

# The World Bank Group's Human Rights Obligations

## Under the United Nations Guiding Principles on Business and Human Rights

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### ABSTRACT

The United Nations Human Rights Council unanimously adopted the *Guiding Principles on Business and Human Rights* (the Guiding Principles) on June 16, 2011. The Guiding Principles set forth three general principles: (1) States have a duty to protect against human rights abuses; (2) business enterprises must respect human rights; and (3) both States and business enterprises have an obligation to establish access to effective remedy for those harmed by businesses. Although the Guiding Principles are broad, applying “to all States and to all business enterprises,” the State and business enterprise binary makes it difficult to apply to the World Bank Group, an international financial institution with characteristics of both a State and a business enterprise. As such, the World Bank Group's human rights obligations under the Guiding Principles are unsettled. This paper argues that, despite its State-like features, the World Bank Group should be considered a business enterprise.

Under the Guiding Principles, the World Bank Group is obligated to establish sufficient access to effective non-judicial remedies for those harmed by the projects that it funds. The World Bank Group currently offers two mechanisms—the Inspection Panel, covering the World Bank Group's public sector lending, and the Compliance Advisor Ombudsman (CAO), covering its private sector lending. This paper evaluates both of these mechanisms under the effectiveness criteria established in Guiding Principle 31. It concludes that, although there are significant aspects of the mechanisms that do not meet the standards of Guiding Principle 31, these mechanisms provide access to an

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DOI: <http://dx.doi.org/10.15779/Z38227C>

\* J.D., University of California, Berkeley, School of Law (expected May 2016). Special thanks to Professor Jamie O'Connell and Sarah Singh, Director of Strategic Support at Accountability Counsel, for their encouragement and feedback on this Note.

important, and in some instances the only, remedy to people harmed by one of the world's largest international financial institutions.

TABLE OF CONTENTS

INTRODUCTION .....	491
I. THE WORLD BANK GROUP AND ITS HUMAN RIGHTS IMPACTS .....	492
A. <i>Overview of the World Bank Group</i> .....	492
B. <i>The World Bank Group's Human Rights Impacts</i> .....	493
II. HUMAN RIGHTS RESPONSIBILITIES OF THE WORLD BANK GROUP .....	496
A. <i>The "Protect, Respect, and Remedy" Framework and the Guiding Principles on Business and Human Rights</i> .....	497
B. <i>Important Characteristics of the World Bank Group in Determining Whether It Should Be Considered a State or a Business Enterprise</i> .....	500
1. <i>The World Bank Group is Owned and Controlled by States</i> ..	501
2. <i>The World Bank Group Has Immunity Equal to Sovereign Immunity</i> .....	502
3. <i>The World Bank Group Does Not Have Territorial Sovereignty</i> .....	505
4. <i>The World Bank Group Has a Mandate to Refrain from Engaging in Political Affairs</i> .....	506
5. <i>The World Bank Group is Profit-Seeking</i> .....	508
C. <i>Despite Some State-Like Qualities, the World Bank Group Functions as a Business Enterprise Under the Guiding Principles</i> .....	509
III. DO THE WORLD BANK GROUP'S INDEPENDENT ACCOUNTABILITY MECHANISMS PROVIDE SUFFICIENT ACCESS TO REMEDY? .....	510
A. <i>The World Bank Group's Duty to Provide Access to Effective Remedy</i> .....	510
B. <i>Overview of the Inspection Panel and CAO Processes</i> .....	511
C. <i>Evaluation of the Inspection Panel and CAO under Guiding Principle 31</i> .....	514
1. <i>Legitimacy</i> .....	514
2. <i>Accessibility</i> .....	517
3. <i>Predictability</i> .....	519
4. <i>Equitability</i> .....	521
5. <i>Transparency</i> .....	521

2015] *THE WORLD BANK GROUP’S HUMAN RIGHTS OBLIGATIONS* 491

6. *Rights-Compatibility*..... 522

7. *Source of Continuous Learning* ..... 523

CONCLUSION ..... 524

INTRODUCTION

The United Nations *Guiding Principles on Business and Human Rights* (the Guiding Principles), the leading structure for understanding business-related human rights responsibilities, divides human rights obligations between States and business enterprises. International financial institutions, such as the World Bank Group, are not easily categorized as either a State or a business enterprise. Although categorization is important in identifying the human rights obligations of the World Bank Group, its status is still unsettled. But regardless of whether the World Bank Group is a State or a business enterprise, it has the duty to provide access to an effective remedy under the Guiding Principles. This Note examines whether the World Bank Group should be recognized as a State or a business enterprise and evaluates the effectiveness of its two accountability mechanisms.

Section I provides an overview of the World Bank Group’s mandate and a description of each institution that makes up the World Bank Group. It also includes an analysis of the scope and scale of the potential human rights impacts of projects funded by the World Bank Group.

Section II analyzes whether the World Bank Group should be considered a State or a business enterprise for the purpose of determining its human rights responsibilities under the Guiding Principles. Section II.A details the “Protect, Respect, and Remedy” Framework and the structure of the Guiding Principles. Section II.B details important characteristics of the World Bank Group and concludes that, despite some State-like features, it should be considered a business enterprise. As such, the World Bank Group has a duty to respect human rights and to provide access to non-judicial mechanisms that can effectively remedy human rights abuses caused by the projects it funds.

Section III evaluates whether the World Bank Group’s two independent accountability mechanisms—the Inspection Panel and the Compliance Advisor Ombudsman (CAO)—meet the effectiveness criteria laid out in Guiding Principle 31, which is applicable to both States and business enterprises. This Section finds that these two mechanisms include several features that comply with the effectiveness criteria, and highlights key areas where the mechanisms fail to meet certain criteria. It concludes that, despite many areas that need improvement, the independent accountability mechanisms offer important non-judicial remedies for those harmed by the World Bank Group. These mechanisms are an important, and sometimes the only, means for communities to access any type of remedy for harms caused by World Bank Group-funded projects.

I.

THE WORLD BANK GROUP AND ITS HUMAN RIGHTS IMPACTS

A. *Overview of the World Bank Group*

The World Bank Group is a large international financial institution created to promote international development. It has two goals: (1) to end extreme poverty by decreasing the “percentage of people living on less than \$1.25 per day to no more than [three] percent by 2030,” and (2) to promote shared prosperity by fostering “the welfare and income growth of the bottom [forty] percent of the population in every developing country.”<sup>1</sup> It works to achieve these goals through its five organizations: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).<sup>2</sup>

The World Bank Group lends to States and business enterprises. IBRD and IDA make up the World Bank Group’s public-sector lending arm and are collectively known as the World Bank.<sup>3</sup> IBRD funds development projects in “middle-income countries and creditworthy poorer countries” through loans, guarantees, risk management products, and analytical and advisory services.<sup>4</sup> IDA provides loans and guarantees to the poorest countries “for programs that boost economic growth, reduce inequalities, and improve people’s living conditions.”<sup>5</sup>

The World Bank Group’s private sector lending arm consists of IFC and MIGA. IFC focuses solely on developing countries, lending to companies and financial institutions, and it has five strategic priorities: (1) “[s]trengthening the focus on frontier markets”; (2) “[a]ddressing climate change and environmental and social sustainability”; (3) “[a]ddressing constraints to private sector growth”; (4) “[d]eveloping local financial markets”; and (5) “[b]uilding long-term client relationships in emerging markets.”<sup>6</sup> MIGA aims to promote foreign direct investment into developing countries by offering risk insurance, or

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1. WORLD BANK, THE WORLD BANK GROUP A TO Z xxiii-xxiv (2005), available at <https://openknowledge.worldbank.org/handle/10986/20192>.

2. *About*, WORLD BANK GROUP, <http://www.worldbank.org/en/about> (last visited Apr. 7, 2015).

3. *Id.*

4. WORLD BANK, THE WORLD BANK GROUP A TO Z, *supra* note 1, at 86.

5. *Id.* at 86–87.

6. *Id.* at 87.

guarantees, and credit enhancement for investments in those countries.<sup>7</sup> It covers risks from currency inconvertibility and international transfer restrictions; expropriation losses when governments reduce or remove ownership or control over the investment; and losses resulting from war, terrorism, civil disturbance, breach of contract, and failure of a State or State-owned enterprise to fulfill its financial obligations.<sup>8</sup>

*B. The World Bank Group's Human Rights Impacts*

The World Bank Group states that it pursues its twin goals of poverty alleviation and the promotion of shared prosperity “in an environmentally, socially, and economically sustainable manner to ensure that development gains do not harm the welfare of current and future generations.”<sup>9</sup> But the World Bank Group has frequently been criticized for human rights violations and a lack of accountability.<sup>10</sup>

Business enterprises can impact almost any internationally recognized human right.<sup>11</sup> The business enterprise's particular industry,<sup>12</sup> as well as its “size, sector, operational context, ownership, and structure,”<sup>13</sup> will influence the scope and scale of its potential human rights violations. In terms of size, the World Bank Group is one of the largest international financial institutions in the world—between July 1, 2013, and June 30, 2014, it provided \$65.6 billion in “loans, grants, equity investments, and guarantees to partner countries and private businesses.”<sup>14</sup> It plans to increase its average annual financing capacity to more than \$70 billion over the next ten years.<sup>15</sup> The World Bank Group's sheer size alone demonstrates its potential to cause large human rights impacts, both positive and negative.

7. *Id.* at 107.

8. *Id.* at 108.

9. *Id.* at xxv.

10. Siobhán McInerney-Lankford, *International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW*, DANIEL D. BRADLOW & DAVID B. HUNTER 239, 240 (2010).

11. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Bus. and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Human Rights Council, princ. 18 cmt., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

12. *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

13. *Guiding Principles*, *supra* note 11, at princ. 14.

14. WORLD BANK, ANNUAL REPORT 2014 5 (2014), available at <http://www.worldbank.org/en/about/annual-report>; see also WORLD BANK, THE WORLD BANK GROUP A TO Z, *supra* note 1, at xxvii (reporting that, for fiscal year 2014, IBRD committed over \$18.6 billion; IDA committed over \$22.2 billion; IFC committed over \$17.2 billion; MIGA's gross issuance totaled over \$3.1 million; and Recipient Executed Trust Funds committed over \$4.3 billion).

15. WORLD BANK, ANNUAL REPORT 2014, *supra* note 14, at 13.

The World Bank Group funds projects in a wide variety of sectors: education; agriculture, fishing, and forestry; water, sanitation, and flood protection; transportation; energy and mining; finance; health and other social services; industry and trade; information and communications; and public administration, law, and justice.<sup>16</sup> Many of these sectors, particularly those involving energy and mining projects, require large-scale infrastructure development.<sup>17</sup> Such projects frequently involve environmental harm and long-lasting human rights abuses, such as forced evictions and displacement.<sup>18</sup>

Yet, funding infrastructure development projects “represents the World Bank’s largest business line, which at \$19 billion, comprised forty-seven percent of the total assistance to client countries in fiscal year 2014.”<sup>19</sup> As of February 28, 2014, over half of the World Bank’s active projects—including “high and substantial safeguard risk projects”—lacked assigned technical specialists to create appropriate safeguards.<sup>20</sup> Given the wide breadth of industries that it invests in, its emphasis on infrastructure development projects, and lack of

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16. *Id.* at 32.

17. Amnesty Int’l, *Amnesty International’s Written Statement for the 24<sup>th</sup> Session of the Human Rights Council (9 to 27 September 2013)*, AI index IOR 41/020/2013 (Sept. 16, 2013).

18. *Id.*; see also Press Release, World Bank, World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems, World Bank Press Release 2015/332/ECR (Mar. 4, 2015) (World Bank Group President Jim Yong Kim stating, “We took a hard look at ourselves on [involuntary] resettlement and what we found caused me deep concern.”).

19. This funding amount only accounts for the lending practices of the IBRD and IDA, which collectively make up the World Bank. It does not account for the activities of the IFC or MIGA, the remaining institutions of the World Bank Group. See WORLD BANK, ANNUAL REPORT 2014, *supra* note 14, at 15.

20. INTERNAL AUDITING DEP’T, WORLD BANK GRP., ADVISORY REVIEW OF THE BANK’S SAFEGUARD RISK MANAGEMENT 2, 30 (June 16, 2014) (draft report), available at <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/3/317401425505124162/iad-draft-report-advisory-review-safeguards-risk-management.pdf> (noting that 1,206 out of 2,355 active projects did not have assigned specialists, including 173 agriculture and rural development projects, 135 energy and mining projects, forty-three transport projects, and thirty-five water projects).

safeguard specialists,<sup>21</sup> the World Bank Group has the potential to violate “virtually the entire spectrum of internationally recognized human rights.”<sup>22</sup>

The risk for significant human rights violations in World Bank Group-sponsored projects is heightened by the projects' operational contexts. The World Bank Group often invests in countries and projects that are unable to access private sector capital.<sup>23</sup> In fact, the IFC's Articles of Agreement prevent it from lending to business enterprises that could have reasonably obtained private sector capital.<sup>24</sup> IDA is also prohibited from providing funding where private sector capital is available.<sup>25</sup> Similarly, IBRD's Articles of Agreement encourage it to make loans when private sector capital is not reasonably available.<sup>26</sup> These countries and industries often lack access to private sector capital because “they present political, social, and environmental challenges that exceed the risk tolerance of private-sector financiers.”<sup>27</sup> For instance, corruption is frequently present in these contexts.<sup>28</sup> The World Bank Group must manage

21. Although the World Bank announced an action plan on March 4, 2015, to combat this lack of specialists, among many other issues, members of civil society are highly critical of the plan. See Press Release, Accountability Counsel, World Bank Admits Stunning Failures in Resettlement Policy, Proposed Remedy Insufficient, (Mar. 5, 2015) (Natalie Fields, Executive Director of Accountability Counsel, stated that the World Bank's “proposed solutions are utterly inadequate to make up for the vast harm caused by its cavalier accounting of land and livelihoods lost.”); Ben Hallman, *World Bank Admits It Ignored Its Own Rules Designed to Protect the Poor*, HUFFINGTON POST, Mar. 5, 2015, [http://www.huffingtonpost.com/2015/03/05/world-bank-resettlement\\_n\\_6810208.html](http://www.huffingtonpost.com/2015/03/05/world-bank-resettlement_n_6810208.html) (Ted Downing, the president of the International Network on Displacement and Resettlement, stated that the World Bank's press release and action plan were meant “to distract people” from larger issues.).

22. *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

23. Submission to the U.N. Special Representative to the Sec'y Gen. on Human Rights and Transnat'l Corps. and other Bus. Enters., Bank Information Center, *The Roles and Responsibilities of International Financial Institutions with Respect to Human Rights and Their Relevance to the Private-Sector* 3 (Feb. 2007) (by Steven Herz), available at <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Bank-Information-Ctr-submission-to-Ruggie-Feb-2007.pdf> [hereinafter Herz, *Roles and Responsibilities*].

24. Articles of Agreement of the International Finance Corporation, art. III, § 3(i), May 25, 1955, T.I.A.S. No. 3620,, amended June 27, 2012 [hereinafter IFC Articles of Agreement] (“the Corporation shall not undertake any financing for which in its opinion sufficient private capital could be obtained on reasonable terms”); see also Herz, *Roles and Responsibilities*, *supra* note 23, at 3–4.

25. Articles of Agreement of the International Development Association, art. V, § 1(c), Jan. 26, 1960, 11 U.S.T. 2284 [hereinafter IDA Articles of Agreement] (“The Association shall not provide financing if in its opinion such financing is available from private sources on terms which are reasonable for the recipient or could be provided by a loan of the type made by the Bank.”).

26. Articles of Agreement of the International Bank for Reconstruction and Development, art. I(ii), Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, amended Dec. 16, 1965, T.I.A.S. No. 5929 [hereinafter IBRD Articles of Agreement] (“The purposes of the Bank are: (ii) . . . when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.”).

27. Herz, *Roles and Responsibilities*, *supra* note 23, at 4.

28. DANIEL PERLMAN & ANANYA ROY, *THE PRACTICE OF INTERNATIONAL HEALTH: A CASE-BASED ORIENTATION* 168 (2009).

these risks, “seeking to reconcile its [AAA] bond ratings with the enterprise of making loans to countries ‘where one cannot drink the water.’”<sup>29</sup>

The World Bank Group has “not recognized [its] historical role in promoting corruption by lending large quantities of money to unrepresentative governments that have used the money for personal wealth or to maintain power through war and repression.”<sup>30</sup> The World Bank Group’s “substantial skill in maintaining strict financial policies and performing well in purely financial terms has allowed it to act as an intermediary through which the resources of the world’s most conservative investors can be channeled to developing countries for what, under other circumstances, would be considered distinctly risky ventures.”<sup>31</sup> Thus, the World Bank Group often, if not always, invests in countries and industries that are likely to negatively impact human rights.

In short, the World Bank Group’s institutions are “linchpin financiers and catalysts for ‘high risk-high reward’ development projects, particularly in countries with weak, corrupt, or authoritarian governance.”<sup>32</sup> Because of this high-risk operational context, the large size of the World Bank Group, and the wide variety of industries in which it invests, the World Bank Group’s potential human rights impacts are enormous in both scope and scale.<sup>33</sup>

## II.

### HUMAN RIGHTS RESPONSIBILITIES OF THE WORLD BANK GROUP

The World Bank Group maintains a “quasi-sovereign” character, resulting from a combination of business-like and State-like features.<sup>34</sup> However, John Ruggie’s “Protect, Respect, and Remedy” Framework and the Guiding Principles divide human rights obligations between States and business enterprises.<sup>35</sup> Thus, the determination of whether the World Bank Group is a State or a business enterprise under the Guiding Principles greatly affects its responsibilities toward human rights.

Neither the Framework nor the Guiding Principles explicitly state whether international financial institutions, such as the World Bank Group, are

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29. ANANYA ROY, POVERTY CAPITAL: MICROFINANCE AND THE MAKING OF DEVELOPMENT 55 (2010).

30. PERLMAN & ROY, *supra* note 28, at 168.

31. MICHELLE MILLER-ADAMS, THE WORLD BANK: NEW AGENDAS IN A CHANGING WORLD 25 (1999).

32. Herz, *Roles and Responsibilities*, *supra* note 23, at 4.

33. McInerney-Lankford, *supra* note 10, at 244.

34. See ROY, *supra* note 29, at 55 (using “quasi-sovereign” in the context of capital markets).

35. See *Guiding Principles*, *supra* note 11, at 3.

considered States or business enterprises. Nor are these institutions assigned their own human rights obligations. Consequently, it is necessary to look to the characteristics of the World Bank Group to determine its status under the Guiding Principles. Key characteristics in this determination are the World Bank Group's: (1) ownership and control by States; (2) enjoyment of immunity equal to, or greater than, sovereign immunity; (3) lack of territorial sovereignty; (4) mandate not to engage in political activities; and (5) profit-seeking behavior. Although some of these attributes are State-like, the majority demonstrate that the World Bank Group is more like a business enterprise.

A. *The "Protect, Respect, and Remedy" Framework and the Guiding Principles on Business and Human Rights*

In July 2005, John Ruggie was appointed Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises.<sup>36</sup> In this capacity, he developed the "Protect, Respect, and Remedy" Framework for addressing businesses' impacts on human rights, which the United Nations Human Rights Council adopted on April 7, 2008.<sup>37</sup> The Framework identified "the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences" as the "root cause" of business-related human rights violations.<sup>38</sup>

The "Protect, Respect, and Remedy" Framework sets up three principles. First, "States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction."<sup>39</sup> Second, businesses have a responsibility to "respect human rights," meaning "do no harm."<sup>40</sup> Third, both States and businesses have an obligation to provide access to effective remedy.<sup>41</sup> States must provide both judicial and non-judicial mechanisms under this third prong, while business enterprises must only provide non-judicial mechanisms.<sup>42</sup>

The Framework does not directly address the responsibilities of the World Bank Group, or even international financial institutions in general. However, it recommends that "States, companies, and *the institutions supporting*

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36. See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development—Protect, Respect and Remedy: A Framework for Business and Human Rights*, Human Rights Council, 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *Framework*].

37. *Id.*

38. *Id.* ¶ 3.

39. *Id.* ¶ 18.

40. *Id.* ¶¶ 23–24.

41. *Id.* ¶¶ 26, 82.

42. *Id.* ¶ 82.

*investments*, and those designing arbitration procedures should work towards developing better means to balance investor interest and the needs of host States to discharge their human rights obligations.”<sup>43</sup> This recommendation sets up a role for the World Bank Group, as an institution that supports investments, to address the gap between human rights responsibilities of States and profit-seeking interests of investors. But it does not provide specific ways for the World Bank Group to fulfill this role.

On June 16, 2011, the Human Rights Council unanimously endorsed the Guiding Principles,<sup>44</sup> reaffirming the Framework’s three general principles as: “(a) States’ existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; [and] (c) [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.”<sup>45</sup> The Guiding Principles “apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”<sup>46</sup>

Under the Guiding Principles, States and business enterprises, at a minimum, must respect all of the human rights reflected in the International Bill of Human Rights and in the International Labour Organization’s *Declaration on Fundamental Principles and Rights at Work*.<sup>47</sup> However, under certain operational contexts, there may be a need to respect additional rights, such as “the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them.”<sup>48</sup>

The Guiding Principles do not expressly mention international financial institutions, but they do address international organizations on several occasions.<sup>49</sup> For instance, under Guiding Principle 4, States have an additional

43. *Id.* ¶ 38 (emphasis added).

44. *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights*, UN NEWS CENTRE (June 16, 2011), [http://www.un.org/apps/news/story.asp?NewsID=38742#.VHLUV5PF\\_iI](http://www.un.org/apps/news/story.asp?NewsID=38742#.VHLUV5PF_iI); see also Rpt. of the Working Group on the Issue of Human Rights and Trans’l Corps. and Other Bus. Enters., 3, Human Rights Council, Rep. on its 26th Sess., U.N. Doc. A/HRC/26/25 (May 5, 2014) [hereinafter HRC Working Group Report].

45. *Framework*, *supra* note 36, at 6.

46. *Id.*

47. *Guiding Principles*, *supra* note 11, at princ. 12.

48. *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

49. Peter T. Muchlinski, *International Finance and Investment and Human Rights*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS LAW 263, 274 (Scott Sheeran & Sir Nigel Rodley eds.,

responsibility to protect against human rights abuses caused by “business enterprises that are owned or controlled by the State, or that receive substantial support from State agencies . . . .”<sup>50</sup> The Commentary finds that “agencies” under this principle can be “linked formally or informally to the State,” including development agencies and development finance institutions.<sup>51</sup> Although the World Bank Group itself does not have any responsibilities under this principle, its member States do. But the World Bank Group is controlled by 188 States, not just one. Thus, the policy rationale for imposing additional responsibility on member States for the World Bank Group’s adverse human rights impacts may be weaker than in the case of a regional or national development bank.<sup>52</sup>

In addition, Guiding Principle 10 recognizes the specific duties of member States of business-related multilateral institutions. Member States have an obligation to ensure that these institutions do not prevent States from fulfilling their duty to protect human rights or prohibit business enterprises from respecting human rights.<sup>53</sup> It also requires States to encourage multilateral institutions to (1) promote respect for human rights, and (2) if requested, “help States meet their duty to protect against human rights abuses by business enterprises.”<sup>54</sup> Therefore, the World Bank Group, as a multilateral institution, may have a duty to help protect human rights, but only if requested by a member State.

Despite the few instances where they acknowledge international organizations, the Guiding Principles “[a]ll short of a fuller understanding of the responsibilities of investors and financial institutions.”<sup>55</sup> The Guiding Principles do “not frame the relationship between investors and the companies [or governments] they invest in as one of complicity.”<sup>56</sup> Also, “‘financiers’ responsibilities are not discussed in the same breath with value chain responsibility.”<sup>57</sup>

Although the Guiding Principles do not explicitly provide for responsibilities of international institutions, the United Nations Working Group may provide more insight as to why international financial institutions fall under

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2014).

50. *Guiding Principles*, *supra* note 11, at princ. 4.

51. *Guiding Principles*, *supra* note 11, at princ. 4 cmt.

52. *Id.* (“[T]he closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.”).

53. *Guiding Principles*, *supra* note 11, at princ. 10(a).

54. *Guiding Principles*, *supra* note 11, at princ. 10(b).

55. Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Process*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION* 32 (Radu Mares ed., 2012).

56. *Id.* at 33.

57. *Id.*

the Guiding Principles. The Human Rights Council established the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group) in June 2011 to promote “the dissemination and effective and comprehensive implementation of all three pillars of the Guiding Principles.”<sup>58</sup> In particular, in an April 28, 2014 report addendum, the Working Group communicates the importance of international financial institutions and business working together to ensure sufficient access to non-judicial grievance mechanisms.<sup>59</sup> It highlights that international financial institutions can increase the capacity of borrowers to resolve human rights abuses early on and prevent further harm.<sup>60</sup> The Working Group’s focus on international financial institutions’ role in providing access to effective remedy implies that such institutions do have responsibilities under the Guiding Principles.

Overall, the Guiding Principles can be read as having implied responsibilities for international financial institutions, including the World Bank Group, under both State and business duties. Although international financial institutions are thought to have a role under the Guiding Principles, the human rights obligations of these institutions are unsettled.<sup>61</sup>

*B. Important Characteristics of the World Bank Group in Determining Whether It Should Be Considered a State or a Business Enterprise*

The World Bank Group is not easily characterized as a State or a business enterprise for the purposes of understanding its human rights obligations under the Guiding Principles. It has features of both a State and a business enterprise. Similar to a State, the World Bank Group is owned by States and enjoys immunity equal to (or greater than) that of sovereign immunity. But, like a business enterprise, it does not have territorial sovereignty, it has a mandate to refrain from engaging in political affairs, and it is profit-seeking. In fact, some of the World Bank Group’s business-like qualities make it incapable of fulfilling

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58. HRC Working Group Report, *supra* note 44, at 3, ¶ 3.

59. Rep. of the Working Grp. on the Issue of Human Rights and Transn’l Corps. and Other Bus. Enters., Addendum, Rep. from an Expert Workshop entitled “Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience” Held in Toronto in 2013, ¶ 18, Human Rights Council, 26th Sess., U.N. Doc. A/HRC/26/25/Add.3 (April 28, 2014) [hereinafter HRC Working Group Report Addendum 3] (“For example, international financial institutions are increasing the capacity of borrowers to resolve issues at the project level before they escalate into larger conflicts or cause more harm.”); *id.* ¶ 20(e) (international financial institutions can incentivize “business enterprises to establish or participate in non-judicial grievance mechanisms” by conditioning their borrowers’ access to credit on such participation).

60. *Id.*

61. McInerney-Lankford, *supra* note 10, at 239.

certain duties assigned to States under the Guiding Principles. Thus, the World Bank Group should be viewed as a business enterprise for the purposes of the Guiding Principles.

1. *The World Bank Group is Owned and Controlled by States*

All of the World Bank Group institutions are made up of and governed by States: IBRD has 188 member States, IDA has 172, IFC has 184, MIGA has 179, and ICSID has 150.<sup>62</sup> The member States determine each institution's policies.<sup>63</sup> These States bring to the World Bank Group "their existing external human rights obligations, compliance with which must be retained as they go about their mandated activities."<sup>64</sup> Among these human rights obligations is the duty of member States to protect human rights.<sup>65</sup> As a result, the "[S]tate duty to protect is a key element in the developing debate over the human rights responsibilities of [international financial institutions]," including the World Bank Group.<sup>66</sup>

Because most of the World Bank Group's member States have accepted their duty to protect human rights listed in the International Bill of Human Rights,<sup>67</sup> the World Bank Group is "implicated in the [S]tate's duty to protect human rights and in the oversight of business enterprises in the exercise of their responsibility to respect when they are involved in [World Bank Group] projects and policy delivery."<sup>68</sup> That the World Bank Group is made up of States, each retaining their responsibility to protect, weighs in favor of considering the World Bank Group as a State under the Guiding Principles, with the corresponding duty to protect, respect, and fulfill human rights.

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62. *Member Countries*, WORLD BANK GROUP, <http://www.worldbank.org/en/about/leadership/members> (last viewed Apr. 2, 2015).

63. MARGOT E. SALOMON, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW* 106 (2007).

64. *Id.*

65. See *Guiding Principles*, *supra* note 11, at princ. 10 ("States, when acting as members of multilateral institutions that deal with business-related issues, should: (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising . . .").

66. Muchlinski, *supra* note 49, at 265.

67. The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR). See *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

68. Muchlinski, *supra* note 49, at 265.

2. *The World Bank Group Has Immunity Equal to Sovereign Immunity*

Another State-like quality enjoyed by the World Bank Group is immunity from liability similar to sovereign immunity. This immunity is built into the Articles of Agreement for each of the World Bank Group institutions, as well as the laws of the United States.

Under the Articles of Agreement for IBRD, IDA, and IFC, as well as MIGA's Convention, these institutions have immunities and privileges in the territories of all of their member States.<sup>69</sup> The institutions each have similar provisions stating that, among other privileges and immunities:

- No member State shall be liable for the obligations of IDA or IFC.<sup>70</sup>
- Actions brought against IBRD, IDA, IFC, or MIGA may only be brought in a "court of competent jurisdiction in the territories of a member" in which the Bank, Association, Corporation, or Agency "has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."<sup>71</sup>
- A member State or "a person acting for or deriving claims from members" cannot bring an action against IBRD, IDA, IFC, or MIGA.<sup>72</sup>
- The property and assets of IBRD, IDA, IFC, and MIGA are "immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action."<sup>73</sup>
- The property and assets of IBRD, IDA, IFC, and MIGA "shall be free from restrictions, regulations, controls, and moratoria of any nature."<sup>74</sup>
- "All governors, executive directors, alternates, officers, and employees" of the IBRD, IDA, IFC, and MIGA are "immune from legal process with respect to acts performed by them in their official capacity," except when the institution waives this immunity.<sup>75</sup>

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69. See IBRD Articles of Agreement, *supra* note 26, art. VII; IDA Articles of Agreement, *supra* note 25, art. VIII; IFC Articles of Agreement, *supra* note 24, art. VI; Convention Establishing the Multilateral Investment Guarantee Agency, ch. VII, Oct. 11, 1985, T.I.A.S. No. 12,089 [hereinafter MIGA Convention].

70. See IDA Articles of Agreement, *supra* note 25, art. II, § 3; IFC Articles of Agreement, *supra* note 24, art. II, § 4.

71. IBRD Articles of Agreement, *supra* note 26, art. VII, § 3; IDA Articles of Agreement, *supra* note 25, art. VIII, § 3; see also IFC Articles of Agreement, *supra* note 24, art. VI, § 3; MIGA Convention, *supra* note 69, ch. VII, art. 44.

72. *Id.*

73. IBRD Articles of Agreement, *supra* note 26, art. VII, § 4; IDA Articles of Agreement, *supra* note 25, art. VIII, § 4; see also IFC Articles of Agreement, *supra* note 24, art. VI, § 4; MIGA Convention, *supra* note 69, ch. VII, art. 45(a).

74. IBRD Articles of Agreement, *supra* note 26, art. VII, § 6; IDA Articles of Agreement, *supra* note 25, art. VIII, § 6; see also IFC Articles of Agreement, *supra* note 24, art. VI, § 6; MIGA Convention, *supra* note 69, ch. VII, art. 48(i).

75. IBRD Articles of Agreement, *supra* note 26, art. VII, § 8(i); IDA Articles of Agreement, *supra* note 25, art. VIII, § 8(i); see also IFC Articles of Agreement, *supra* note 24, art. VI, § 8(i); MIGA Convention, *supra* note 69, ch. VII, art. 45(b).

Although States have the primary responsibility to protect human rights under both international law and the Guiding Principles, the Articles of Agreement of the IBRD, IDA, IFC, and MIGA's Convention prevent their member States from bringing an action against the institutions.<sup>76</sup> Further, unless the World Bank Group waives immunity, all of its employees, officers, and directors are immune from any court proceeding in a member State's territory. Consequently, these provisions may inhibit States from fulfilling their duties to protect and remedy human rights violations when the World Bank group is an actor in the violations.

The strong immunities and privileges provided for in the IBRD, IDA, and IFC's Articles of Agreement, and in MIGA's Convention are complemented by the institutions' immunity in U.S. courts. This immunity is derived from the International Organizations Immunities Act of 1945 (IOIA).<sup>77</sup> An "international organization" is defined as an "organization that is created by an international agreement and has a membership consisting entirely or principally of states."<sup>78</sup> The IOIA designates all five World Bank Group institutions as international organizations.<sup>79</sup> As an international organization, the World Bank Group, as well as its property and assets, "shall enjoy the status, immunities, exemptions, and privileges" including "the same immunity from suit and every form of judicial process as enjoyed by foreign governments, except to the extent that [it] may expressly waive [its] immunity."<sup>80</sup>

In 1945, when the IOIA was enacted, foreign governments enjoyed "absolute immunity," meaning that they could not be sued in U.S. courts.<sup>81</sup> Since then, the United States and the international community have identified exceptions to absolute immunity for foreign sovereigns.<sup>82</sup> For instance, the U.S.

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76. When a disagreement develops between the IBRD, IDA, IFC, or MIGA and a country that has ceased to be a member or a member during the permanent suspension of the institution, the disagreement is submitted to arbitration. Thus, under normal circumstances, a member State cannot bring a claim against the World Bank Group. *See* IBRD Articles of Agreement, *supra* note 26, art. IX(c); IDA Articles of Agreement, *supra* note 25, art. X(c); IFC Articles of Agreement, *supra* note 24, art. VIII(c); MIGA Convention, *supra* note 69, ch. IX, arts. 57–58.

77. *See* International Organizations Immunities Act of 1945, 22 U.S.C. §§ 288–288I (2012); *see also* Aaron I. Young, *Deconstructing International Organization Immunity*, 44 *GEO. J. INT'L L.* 311, 313 (2012).

78. Young, *supra* note 77, at 313 n.6 (citing to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 221 (1987)).

79. 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 41.24 exh. 1 (2012) (listing the following as international organizations that have been designated by Executive Order pursuant to treaties or under the IOIA: IBRD in 1946; IFC in 1965; ICSID in 1977; IDA in 1977; and MIGA in 1988).

80. 22 U.S.C. § 288a(b).

81. Young, *supra* note 77, at 314.

82. *Id.*

Foreign Sovereign Immunities Act (FSIA) provides an exception to foreign sovereign immunity for actions in connection with “commercial activities.”<sup>83</sup>

Yet despite the FSIA, U.S. courts usually grant absolute immunity to international organizations covered by the IOIA.<sup>84</sup> For example, in *Atkinson v. Inter-American Development Bank*,<sup>85</sup> the D.C. Circuit interpreted the IOIA to provide international organizations with “virtually absolute” immunity.<sup>86</sup> In *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*, the D.C. Circuit found that “[b]ecause the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the [FSIA].”<sup>87</sup>

But there is a circuit split.<sup>88</sup> In *OSS Nokalva, Inc. v. European Space Agency*, the Third Circuit held that the IOIA incorporates the FSIA’s immunity exceptions.<sup>89</sup> In November 2014, the D.C. Circuit reaffirmed *Atkinson* and expressly declined to adopt the Third Circuit’s *OSS Noklava, Inc.* decision to restrict international organizations’ immunity under the IOIA.<sup>90</sup> Notwithstanding the circuit split, U.S. courts generally recognize that “an international organization is entitled to such immunity from the jurisdiction of a member state as is necessary to fulfill its organizational purposes” and continue to grant absolute immunity.<sup>91</sup> Thus, the World Bank Group’s immunities and privileges “effectively exceed[]” those of foreign governments.<sup>92</sup>

The IOIA further protects the World Bank Group by stating that its property and assets, “wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from

83. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (2012) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”).

84. Young, *supra* note 77, at 314.

85. 156 F.3d 1335 (D.C. Cir. 1998).

86. Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT’L L. REV. 471, 493 (2008) [hereinafter Herz, *International Organizations*].

87. 264 Fed. App’x. 13, 15 (D.C. Cir. 2008).

88. Young, *supra* note 77, at 321.

89. 617 F.3d 756, 765 (3d Cir. 2010).

90. *Nyambal v. Int’l Monetary Fund*, 722 F.3d 277, 281 (D.C. Cir. 2014).

91. Herz, *International Organizations*, *supra* note 86, at 517 (citing to *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983)).

92. Young, *supra* note 77, at 314.

confiscation. The archives of [the World Bank Group] shall be inviolable.”<sup>93</sup> In addition, member States’ representatives and the World Bank Group’s officers and employees have immunity for “acts performed by them in their official capacity and falling within their functions as such representatives, officers or employees.”<sup>94</sup>

The U.S. Congress or President “can reduce the privileges and immunities of the entities that have been designated public international organizations covered by the IOIA.”<sup>95</sup> But even if the World Bank Group were to lack immunity under the IOIA, it still has access to a wide range of U.S. common law defenses: “common-law immunity, *forum non conveniens*, comity, and the Act of State doctrine.”<sup>96</sup> Thus, litigation against the World Bank Group is unlikely to succeed in the United States because of the World Bank Institutions’ Articles of Agreement, immunity under the IOIA, and the practices of most U.S. courts.<sup>97</sup> Consequently, the World Bank Group retains immunity, a State-like quality, which makes it difficult for its member States to hold it accountable for any human rights abuses that it may cause.

### 3. *The World Bank Group Does Not Have Territorial Sovereignty*

Although owned by States, the World Bank does not have all the characteristics of a State. In particular, the World Bank Group “only has territorial jurisdiction over a limited physical area recognized as the ‘headquarters seat’ under its agreement with its host state,” the United States.<sup>98</sup> All of its activities and the projects that it funds take place “either in the territory of the host state or in the territories of other states under an agreement on the purpose, scope, and duration of their operations.”<sup>99</sup> The World Bank Group therefore also lacks general police powers and jurisdiction over any population.

Because the World Bank Group lacks territorial sovereignty, it does not have the ability to meet some of the responsibilities of a State under the Guiding Principles. For instance, under Guiding Principle 2, States should “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>100</sup> Although the member States of the World Bank Group can fulfill this

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93. International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(c) (2012).

94. *Id.* § 288d(b).

95. Young, *supra* note 77, at 351.

96. *Id.*

97. Muchlinski, *supra* note 49, at 275.

98. Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT’L L. 177, 193–94 (2005).

99. *Id.* at 194.

100. *Guiding Principles*, *supra* note 11, at princ. 2.

requirement, the World Bank Group itself cannot do so because it does not have a territory or jurisdiction over an area where business enterprises reside.

Additionally, the World Bank Group's lack of territorial sovereignty makes it incapable of following Guiding Principles 1, 3, 5, 7(d), 25, and 26. All of these Guiding Principles include a need to enact and uphold laws to protect human rights.<sup>101</sup> Without a territory, jurisdiction over a population, or police powers, the World Bank Group has no authority to create legislation to protect human rights from violations by businesses. In addition, the World Bank Group cannot create any judicial mechanisms to enforce its policies. Thus, its lack of sovereign territory makes the World Bank incapable of fulfilling all of a State's human rights duties under the Guiding Principles. This inability weighs in favor of characterizing the World Bank Group as a business enterprise.

#### 4. *The World Bank Group Has a Mandate to Refrain from Engaging in Political Affairs*

The World Bank Group forbids "strictly political activities"<sup>102</sup>—each of its institutions has a mandate prohibiting any political activity, as well.<sup>103</sup>

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101. See *Guiding Principles*, *supra* note 11, at princ. 1 ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."); *id.* at princ. 3 ("In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights . . ."); *id.* at princ. 5 cmt. ("[E]nabling legislation should clarify the State's expectations that these enterprises respect human rights."); *id.* at princ. 7 ("Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: . . . (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses."); *id.* at princ. 25 ("As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."); *id.* at princ. 26 ("States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to denial of access to remedy.").

102. Ana Palacio, *The Way Forward: Human Rights and the World Bank*, THE WORLD BANK (Oct. 27, 2006), <http://go.worldbank.org/RR8FOU4RG0>.

103. See IBRD Articles of Agreement, *supra* note 26, art. IV, § 10; IDA Articles of Agreement, *supra* note 25, art. V, § 6; IFC Articles of Agreement, *supra* note 24, art. III, § 9; MIGA Convention, *supra* note 69, ch. V, art. 34.

Specifically, IBRD, IDA, and IFC's Articles of Agreement contain provisions stating:

The [Bank, Association, or Corporation] and its officers shall not interfere in the political affairs of any member; nor shall it be influenced in its decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to its decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.<sup>104</sup>

MIGA's Convention contains a similar provision, but permits MIGA's staff to "take into account all circumstances surrounding an investment,"<sup>105</sup> rather than only economic considerations.

But protection of and respect for human rights includes "unavoidable political content."<sup>106</sup> As a consequence, Ana Palacio, former Senior Vice President and General Counsel of the World Bank Group, stated:

Political human rights in particular have traditionally been considered to lie beyond the permitted range of considerations under the Articles of Agreement, which bar decisions based on political considerations or political systems, as well as interference in domestic political affairs of its members. The World Bank's role is a facilitative one, in helping our members realize their human rights obligations. In this sense, human rights would not be the basis for an increase in Bank conditionalities, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business.<sup>107</sup>

Despite recognizing the political dimensions of human rights, Palacio went on to conclude that the World Bank Group's consideration of human rights is "permissive," but not mandatory.<sup>108</sup>

Embracing this ability to consider human rights, the IFC created a *Guide to Human Rights Impact Assessment and Management (HRIAM)*. The Guide to HRIAM is designed to enable "companies to identify, understand, and evaluate actual or potential human rights impacts of a project at each stage of development and operations."<sup>109</sup> The Guide to HRIAM considers all the human rights in the International Bill of Human Rights.<sup>110</sup> But unlike the Guiding

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104. See IBRD Articles of Agreement, *supra* note 26, art. IV, § 10; IDA Articles of Agreement, *supra* note 25, art. V, § 6; IFC Articles of Agreement, *supra* note 24, art. III, § 9.

105. See MIGA Convention, *supra* note 69, ch. V, art. 34 ("The Agency, its President and staff shall not interfere in the political affairs of any member. Without prejudice to the right of the Agency to take into account all the circumstances surrounding an investment, they shall not be influenced in their decisions by the political character of the member or members concerned.").

106. Palacio, *supra* note 102.

107. *Id.*

108. *Id.*

109. *Guide to Human Rights Impact Assessment and Management (HRIAM)*, INT'L FIN. CORP., [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/).

110. See *Guide to Human Rights Impact Assessment and Management: What Are Human Rights?* INT'L FIN. CORP., [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/What+are+Human+Rights/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/What+are+Human+Rights/).

Principles, it does not consider the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.<sup>111</sup> In addition to the Guide to HRIAM, the IFC has Performance Standards that state, "[b]usiness should respect human rights."<sup>112</sup> The Performance Standards, however, also stop short of covering all human rights and always require specific human rights due diligence.

Despite the IFC's advances in considering human rights, the other World Bank Group institutions have not expressly acknowledged any human rights responsibilities.<sup>113</sup> No World Bank Group institution has implemented a "comprehensive human rights policy."<sup>114</sup> Instead, the World Bank Group asserts that it is not an "enforcer of human rights" and "its policies, programs, and projects have never been explicitly or deliberately aimed towards the realization of human rights."<sup>115</sup> The World Bank Group interprets its mandate to avoid engagement in political affairs in order to prevent it from having an explicit responsibility for human rights, a duty it considers to be left to States.

##### 5. *The World Bank Group is Profit-Seeking*

Despite its twin goals of poverty alleviation and the promotion of shared prosperity, the World Bank Group may be considered "nearly entirely 'commercial' in nature."<sup>116</sup> Although the World Bank Group claims that it is "not profit maximizing," it acknowledges that "strong financial performance is important" to achieving its development goals.<sup>117</sup> And the World Bank Group "has been overwhelmingly profitable, recording healthy profits every year since 1947 with profits exceeding \$1 billion per year [since 1995], hitting close to \$2 billion in recent years."<sup>118</sup> As with many businesses, bondholders benefit from the interest payout on these high revenues.<sup>119</sup>

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111. See *Guiding Principles*, *supra* note 11, at princ. 12.

112. INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 1, 3 (Jan. 1, 2012), available at [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbff1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbff1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES).

113. See, e.g., *FAQs: Human Rights*, WORLD BANK GROUP (June 2012), <http://go.worldbank.org/72L95K8TN0>.

114. Herz, *Roles and Responsibilities*, *supra* note 23, at 5.

115. *Id.*

116. Young, *supra* note 77, at 339.

117. WORLD BANK TREASURY, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT THE WORLD BANK 2, available at <http://treasury.worldbank.org/cmd/pdf/WorldBankFacts.pdf>.

118. ROY, *supra* note 29, at 55.

119. *Id.*

The World Bank Group's high revenues demonstrate that "the Bank is a bank," and favors acknowledging it as a business enterprise under the Guiding Principles.<sup>120</sup> In 2002, the World Bank Operations Evaluation Department found that "[d]espite the Bank's poverty reduction mission, a country's level of poverty gets relatively minor explicit consideration in budget allocations."<sup>121</sup> Financial performance "trumps all other measures of performance."<sup>122</sup> This is demonstrated through the IFC, IBRD, and IDA's Articles of Agreement, which require the institutions to only take economic considerations into account,<sup>123</sup> combined with these institutions' lack of comprehensive human rights policies.<sup>124</sup> In this way, the World Bank Group "say[s]—loudly, if implicitly—that [human rights] are not as important" as profits.<sup>125</sup> This profit-seeking, if not profit-maximizing, behavior favors a finding that the World Bank Group is a business.

*C. Despite Some State-Like Qualities, the World Bank Group Functions as a Business Enterprise Under the Guiding Principles*

In addition to the Guiding Principles and the characteristics of the World Bank Group, the Working Group on the issue of human rights and transnational corporations and other business enterprises provides additional insight into the responsibilities of international financial institutions.<sup>126</sup> In its May 5, 2014 report, the Working Group lists international financial institutions as a type of institution that can "play a significant role in requiring, or encouraging, States and business enterprises to implement the Guiding Principles."<sup>127</sup> This statement seems to set international financial institutions outside the Guiding Principles' two categories: State or business enterprise. But the addendum to this report recognizes the close link between business enterprises and international financial institutions needed to enforce the third pillar, access to remedy.<sup>128</sup> This addendum increases support for the finding that the World Bank Group is more like a business enterprise than a State.

Because the Guiding Principles do not offer a third category outlining responsibilities for international financial institutions, the World Bank Group's

120. *Id.* at 80.

121. CATHERINE GWIN, WORLD BANK OPERATIONS EVALUATION DEP'T, IDA'S PARTNERSHIP FOR POVERTY REDUCTION: AN INDEPENDENT EVALUATION OF FISCAL YEARS 1994–2000 68 (2002).

122. ROY, *supra* note 29, at 81.

123. *See* IBRD Articles of Agreement, *supra* note 26, art. IV, § 10; IDA Articles of Agreement, *supra* note 25, art. V, § 6; IFC Articles of Agreement, *supra* note 24, art. III, § 9.

124. Herz, *Roles and Responsibilities*, *supra* note 23, at 5.

125. *Id.* at 7.

126. *See generally* HRC Working Group Report, *supra* note 44.

127. *Id.* at 4.

128. HRC Working Group Report Addendum 3, *supra* note 59, at ¶ 18; *see also supra* Part II.A.

characteristics should be used to determine its status. Although it has some State-like qualities, including immunity and control by States, its lack of territorial sovereignty, political affairs prohibition, and emphasis on economics and profits cause the World Bank Group to look more like a business and prevent it from fulfilling several obligations of States. Due to these business-like characteristics, the World Bank Group should be considered a business under the Guiding Principles.

### III.

#### DO THE WORLD BANK GROUP'S INDEPENDENT ACCOUNTABILITY MECHANISMS PROVIDE SUFFICIENT ACCESS TO REMEDY?

Regardless of its designation as a State or business enterprise, the World Bank Group has an obligation to provide access to effective remedy under the Guiding Principles. To address grievances of communities harmed by World Bank Group-financed projects, there are two non-judicial mechanisms: the Inspection Panel and the Compliance Advisor Ombudsman (CAO). Because the World Bank Group enjoys immunity equal to that of a sovereign State, judicial mechanisms provide insufficient access to remedy for individuals or communities harmed by projects that it finances. Consequently, it is important to evaluate the adequacy of the Inspection Panel and the CAO in providing access to remedy.

##### A. *The World Bank Group's Duty to Provide Access to Effective Remedy*

Under the Guiding Principles' third pillar, both States and business enterprises have a responsibility to provide access to effective non-judicial grievance mechanisms. Guiding Principle 29 requires business enterprises to create "effective operational-level grievance mechanism[s] for individuals and communities who may be adversely impacted" by their projects.<sup>129</sup> The operational-level grievance mechanisms must perform two functions. The first is to identify adverse human rights impacts by "providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted."<sup>130</sup> The second function is to create a method to address and remediate identified adverse impacts "early and directly by the business enterprise."<sup>131</sup>

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129. *Guiding Principles*, *supra* note 11, at princ. 29.

130. *Guiding Principles*, *supra* note 11, at princ. 29 cmt.

131. *Id.*

The World Bank Group offers two independent accountability mechanisms (IAMs)—the Inspection Panel, for its public sector lending arm, and the CAO for its private sector lending arm. IAMs are distinct from operational-level grievance mechanisms. Unlike the Inspection Panel and the CAO, administered by the World Bank Group, operational-level grievance mechanisms are administered by the business enterprise implementing a project.<sup>132</sup> Thus, in the context of World Bank Group projects, the borrower implements the project. Although the Inspection Panel and the CAO achieve the first function of an operational-level grievance mechanism, they fail the second function because they only provide remedies directly from the World Bank Group, not the borrower.

Even though the IAMs cannot be categorized as operational-level grievance mechanisms, the World Bank Group must provide them regardless of the presence of any operational-level grievance mechanisms already in place.<sup>133</sup> Additionally, Guiding Principle 31 provides a list of seven effectiveness criteria that are applicable to all non-judicial grievance mechanisms, not just operational-level grievance mechanisms.<sup>134</sup> Thus, it is appropriate to review the Inspection Panel and the CAO under Guiding Principle 31.

#### *B. Overview of the Inspection Panel and CAO Processes*

The Inspection Panel, created by the IBRD and IDA Boards of Executive Directors in 1993, reviews complaints from communities harmed by projects funded by IBRD and IDA.<sup>135</sup> The Inspection Panel has only one function: conducting compliance reviews.<sup>136</sup> The CAO, established in 1999, addresses complaints from individuals or communities harmed by IFC and MIGA projects.<sup>137</sup> The CAO offers three services: dispute resolution, compliance review, and advisory work.<sup>138</sup>

Through their compliance review functions, the Inspection Panel and the CAO can conduct an investigation into the World Bank Group's compliance with its operating policies and procedures.<sup>139</sup> When the Inspection Panel

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132. *Id.*

133. *Id.* (noting that operational-level grievance mechanisms “cannot substitute for” mechanisms with broader stakeholder involvement).

134. *Guiding Principles*, *supra* note 11, at princ. 31.

135. INSPECTION PANEL, THE WORLD BANK, ANNUAL REPORT JULY 1, 2013–JUNE 30, 2014 14 (2014), available at <http://ewebapps.worldbank.org/apps/ip/IPPublications/AnnualReport2013-2014f.pdf?Mobile=1>.

136. *Id.* at 12.

137. COMPLIANCE ADVISOR OMBUDSMAN, CAO 2013 ANNUAL REPORT 8 (2013), available at [http://www.cao-ombudsman.org/publications/documents/CAO\\_AR13\\_ENG\\_high.pdf](http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf).

138. *Id.* at 8, 10.

139. See INSPECTION PANEL, THE WORLD BANK, OPERATING PROCEDURES ¶ 1 (Apr. 2014), available at

receives a complaint from project-affected individuals, it must review the complaint and make a decision whether to register it within fifteen days of its receipt.<sup>140</sup> Once the complaint is registered, the Inspection Panel notifies the complainants, the World Bank Board, the World Bank Group President, and the borrower.<sup>141</sup> World Bank management must respond within twenty-one business days, stating its view on whether the complaint raises issues attributable to World Bank management's actions and providing evidence of its compliance or plans to comply with the World Bank's operational policies and procedures.<sup>142</sup>

The Inspection Panel then has twenty-one business days to submit to the Board a "Report and Recommendation" detailing its independent recommendation on whether to investigate the complaint, typically after a field visit to confirm the complaint's eligibility.<sup>143</sup> To be an eligible complaint, the Inspection Panel requires that: (1) there are at least two individuals who were or likely will be affected by a World Bank-financed project; (2) the harm or potential harm is allegedly caused by a violation of the World Bank's operational policies and procedures; (3) the complainants took steps to notify World Bank management of their concerns and management responded inadequately; (4) the matter is unrelated to procurement; (5) the disbursement of the loan is less than ninety-five percent by the date of the complaint's receipt; and (6) the Inspection Panel has not previously made a recommendation on the matter.<sup>144</sup>

The Board must then authorize a recommended investigation, usually within ten business days.<sup>145</sup> With Board approval, the Inspection Panel will conduct an investigation and issue an "Investigation Report" of its findings to the Board.<sup>146</sup> Within six weeks, World Bank management will submit to the Board its "Management Report and Recommendation in Response to the Inspection Panel Investigation Report" (MRR), typically including proposed

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<http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf> [hereinafter INSPECTION PANEL OPERATING PROCEDURES]; COMPLIANCE ADVISOR OMBUDSMAN, CAO OPERATIONAL GUIDELINES §§ 1.2, 4.3 (2013), available at <http://www.cao-ombudsman.org/howwework/2012OperationalGuidelinesUpdate.htm> [hereinafter CAO OPERATIONAL GUIDELINES].

140. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 22–26.

141. *Id.* ¶ 28.

142. *Id.* ¶¶ 29, 33–34.

143. *Id.* ¶¶ 36–37, 40.

144. *Id.* ¶ 39.

145. *Id.* ¶ 49 n.8.

146. *Id.* ¶¶ 52–53, 63–65.

remedial actions.<sup>147</sup> Finally, the Board considers the Investigation Report and MRR to decide whether to approve World Bank management's proposed action plan.<sup>148</sup>

When the CAO receives a complaint, the CAO will screen it for eligibility within fifteen days of acknowledging its receipt.<sup>149</sup> A complaint is eligible if: (1) it is related to a project that the IFC or MIGA "is participating in, or is actively considering"; (2) it raises issues related to the environmental or social impacts of the project covered by IFC and MIGA operating policies; and (3) the complainant is, or may be, affected by the issues raised in the complaint.<sup>150</sup> If a complaint is eligible, the CAO conducts an assessment within 120 days of the eligibility determination to identify all stakeholders and determine whether the parties want to engage in dispute resolution, compliance review, or both.<sup>151</sup> If the parties do not agree to engage in dispute resolution or dispute resolution is unsuccessful, the complaint goes to compliance review.<sup>152</sup>

The CAO begins its compliance review with an appraisal process to determine whether the projects listed in the complaint "raise substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA."<sup>153</sup> To make this determination, the CAO looks to whether (1) there is evidence of "potentially significant adverse" impacts; (2) there are "indications that a policy or other appraisal criteria" may not have been followed; and (3) there is evidence that an IFC or MIGA provision "failed to provide an adequate level of protection."<sup>154</sup> The CAO then provides its results in an Appraisal Report to the IFC or MIGA, the World Bank Group President, and the Board.<sup>155</sup> If the issues raised meet the appraisal criteria, the CAO will conduct a compliance investigation and issue a draft Investigation Report to IFC or MIGA management.<sup>156</sup> After receiving comments from the IFC or MIGA on the draft, the CAO will finalize the Investigation Report and the IFC or MIGA will submit a response.<sup>157</sup> The President then considers both the Investigation Report and the IFC or MIGA response to determine whether to provide clearance.<sup>158</sup> If the IFC or MIGA is

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147. *Id.* ¶¶ 67–68.

148. *Id.* ¶ 71.

149. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.2; *see generally id.* at 11 fig. 2.

150. *Id.* § 2.2.1.

151. *Id.* § 2.3.

152. *Id.*

153. *Id.* § 4.2.1.

154. *Id.*

155. *Id.* § 4.2.2.

156. *Id.* §§ 4.4.1, 4.4.5.

157. *Id.* § 4.4.5.

158. *Id.*

found to be out of compliance, the CAO will monitor the project until the IFC or MIGA addresses its compliance issues.<sup>159</sup>

In addition to compliance review, the CAO has dispute resolution and advisory roles. It can provide dispute resolution if both the project-affected individuals and the World Bank Group client implementing the project agree to engage in the process.<sup>160</sup> The dispute resolution process can involve the facilitation of information sharing, negotiation of fact-finding approaches that are agreeable to both parties, encouragement of dialogue, and mediation by a neutral third party.<sup>161</sup> Based on its experience through its dispute resolution and compliance processes, the CAO can give advice on IFC and MIGA's environmental and social policies, the CAO's systemic concerns, but not about specific IFC or MIGA projects.<sup>162</sup> The CAO Vice President, World Bank Group President, and IFC or MIGA senior management can initiate the advisory work.<sup>163</sup>

*C. Evaluation of the Inspection Panel and CAO  
under Guiding Principle 31*

To provide sufficient access to remedy, the Inspection Panel and the CAO should meet all seven of the effectiveness criteria listed in Guiding Principle 31: they must be (1) legitimate; (2) accessible; (3) predictable; (4) equitable; (5) transparent; (6) rights-compatible; and (7) a source of continuous learning.<sup>164</sup> Despite containing several characteristics of an effective mechanism, both the Inspection Panel and the CAO fall short of meeting Guiding Principle 31's effectiveness criteria.

*1. Legitimacy*

Guiding Principle 31 defines a legitimate grievance mechanism as one that "enabl[es] trust from the stakeholder groups for whose use they are intended, and [is] accountable for the fair conduct of grievance processes."<sup>165</sup> To achieve

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159. *Id.* § 4.4.6.

160. *Id.* § 3.1.

161. *Id.* § 3.2.1

162. *Id.* § 5.1.2.

163. *Id.* § 5.2.1.

164. Guiding Principle 31(h) lists an eighth effectiveness criterion that only applies to operational-level grievance mechanisms. The Inspection Panel and the CAO are considered independent accountability mechanisms, distinct from operational-level grievance mechanisms, and therefore, the eighth criterion does not apply. See *Guiding Principles*, *supra* note 11, at princ. 31.

165. *Guiding Principles*, *supra* note 11, at princ. 31(a); see also *id.* at princ. 31 cmt.

this trust, the Inspection Panel and the CAO must ensure that the stakeholders “cannot interfere with its fair conduct.”<sup>166</sup>

The Inspection Panel and CAO's stated independence from the World Bank Group helps foster some of this trust. The Inspection Panel's Operating Procedures explain that it is independent from World Bank management and its work is performed impartially.<sup>167</sup> Similarly, the CAO's Operational Guidelines describe the CAO as independent and impartial, recognizing that trust by project-impacted individuals is essential to the operation of the mechanism.<sup>168</sup>

The mechanisms' structures also help foster their independence. The Inspection Panel consists of three members of different nationalities from World Bank member countries.<sup>169</sup> Inspection Panel members are appointed for five-year terms that are non-renewable, after which the person cannot be employed by the World Bank Group.<sup>170</sup> The CAO promotes its independence by ensuring that the CAO Vice President recruits CAO staff; prohibiting certain CAO staff from working for the IFC or MIGA for two years after their work for the CAO; prohibiting the CAO Vice President from World Bank Group employment for life; and limiting direct access to the CAO office to only CAO staff.<sup>171</sup>

However, several external stakeholders believe that the Inspection Panel is not “sufficiently independent.”<sup>172</sup> The Inspection Panel reports directly to the IBRD and IDA Board of Directors.<sup>173</sup> The Board also appoints the Inspection Panel members and has the authority to reject the Inspection Panel's recommendations for a compliance investigation, as well as any proposed action plans.<sup>174</sup> Thus, the Inspection Panel is dependent on the Board of Directors to function effectively.<sup>175</sup>

Additionally, a former Inspection Panel member, Richard Bissell, stated that the “independence of the Panel is only partial at best . . . [T]he Board has not restrained Management from commenting on eligibility [of a complaint] (a matter reserved to the Panel . . . ) and has not prevented recurrent and last-

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166. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

167. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 5(b).

168. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.3.

169. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 7; *see also* Richard E. Bissell & Suresh Nanwani, *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, 6 *MANCHESTER J. INT'L ECON. L.* 2, 11 (2009).

170. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 7.

171. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.3.

172. Suzuki & Nanwani, *supra* note 98, at 207.

173. Bissell & Nanwani, *supra* note 169, at 11.

174. *Id.*; *see also* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 49, 70.

175. Yvonne Wong & Benoit Mayer, *The World Bank's Inspection Panel: A Tool for Accountability?*, in 6 *THE WORLD BANK LEGAL REVIEW: IMPROVING DELIVERY IN DEVELOPMENT: THE ROLE OF VOICE, SOCIAL CONTRACT, AND ACCOUNTABILITY* 495, 510 (Jan Wouters et al. eds., 2015), available at <https://openknowledge.worldbank.org/handle/10986/21553>.

minute introduction of ‘action plans’ that interfere with the Panel’s work.”<sup>176</sup> For example, the Inspection Panel allows IBRD and IDA management to propose “remedial ‘action plans’” before the Inspection Panel has conducted its compliance investigation.<sup>177</sup> This can lead the Inspection Panel to delay its recommendation of an investigation to allow management to implement these plans.<sup>178</sup> This delay is unnecessary because an Inspection Panel investigation does not prohibit management from implementing remedial measures in response to complainants’ concerns.<sup>179</sup>

The Inspection Panel’s independence further decreased after the introduction of the Pilot Program in April 2014.<sup>180</sup> Under this program, IBRD and IDA management can develop measures to address harms alleged in cases “amenable to early resolution.”<sup>181</sup> In these cases, the Inspection Panel must delay its decision on whether to even register the complaint.<sup>182</sup> As a result, those that file an eligible complaint may never have their claim investigated. This reliance on World Bank management to implement remedial measures without an Inspection Panel investigation may break the trust of the mechanism’s stakeholders, particularly communities that hope to use the mechanism and civil society.

Additionally, civil society organizations have raised concerns that the World Bank Group management tends “to refute, deny or otherwise fail to act on critical findings” of the Inspection Panel and the CAO.<sup>183</sup> After the Inspection Panel submits its Investigation Report, IBRD and IDA management are required to submit a “Management Report and Recommendation” (MRR) setting out proposed actions to remedy identified instances of noncompliance.<sup>184</sup> Similarly, after the CAO submits its Investigation Report, IFC or MIGA management submit a response.<sup>185</sup> However, rather than proposing remedies, World Bank Group management frequently uses these responses to contest the

176. Suzuki & Nanwani, *supra* note 98, at 207.

177. *Id.*; see also INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 33–35.

178. Wong & Mayer, *supra* note 175, at 506.

179. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 60.

180. See generally INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, annex I.

181. *Id.* ¶¶ 3–4.

182. *Id.* ¶ 5.

183. Letter from Accountability Counsel et al. to Dr. Jim Yong Kim, President of World Bank Group, Learning from Failure: Management Action Plans Needed in Response to Inspection Panel and CAO Investigations 1 (Nov. 12, 2013), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2014/01/CSO-ltr-learning-from-failure-12-Nov-2013.pdf> [hereinafter Nov. 2013 Civil Society Letter].

184. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 67–68.

185. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 4.4.5.

findings of the Investigation Reports. This undermines the Inspection Panels and CAO's legitimacy.<sup>186</sup>

## 2. *Accessibility*

Under the Guiding Principles, a grievance mechanism must be accessible, meaning that it is “known to all [intended] stakeholder groups . . . and [provides] adequate assistance for those who may face particular barriers to access.”<sup>187</sup> Both the Inspection Panel and the CAO are accessible to many who are impacted by World Bank Group-funded projects because neither requires a harm to occur before a complaint can be brought—a complaint can even be filed at the project proposal stage.<sup>188</sup> This is squarely in line with Guiding Principle 29, which requires that non-judicial grievance mechanisms “specifically aim to identify any legitimate concerns of those who may be adversely impacted” and cannot demand that a complaint first rise to the level of a human rights abuse.<sup>189</sup> The ability to bring a complaint before any harm has occurred also helps the IAMs provide a means for those affected by projects to “raise concerns when they believe they are being or will be adversely impacted.”<sup>190</sup>

However, the Inspection Panel and the CAO have significant barriers to access. Complainants have a limited time to file with both mechanisms. For the Inspection Panel, a complaint must be filed before the IBRD or IDA disburses ninety-five percent of its promised financing.<sup>191</sup> The CAO requires a complaint to pertain to a project that the IFC or MIGA is “participating in, or is actively considering.”<sup>192</sup> But the negative impacts of a World Bank Group-funded project may not be known until after a project has been completed, the IBRD or IDA has disbursed ninety-five percent of its financing, or the IFC loan has been repaid. Thus, individuals and communities harmed by a project after certain financing thresholds have passed are unable to utilize these grievance mechanisms.

In addition, the Inspection Panel requires that, prior to a complaint being filed, complainants raise their issue with World Bank management, and

186. Nov. 2013 Civil Society Letter, *supra* note 183, at 1–2.

187. *Guiding Principles*, *supra* note 11, at princ. 31(b).

188. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 12(b) (noting that a request for inspection should include a “description of how the Bank-financed project or proposed project as far as it may be known to the Requesters, stating how, in their view, the harm suffered or likely to be suffered by them is linked to the project activities . . . .”); CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.2.1 (“CAO will deem the complaint eligible if: . . . (3) The complainant is, or may be, affected by the environmental and/or social impacts raised in the complaint.”).

189. *Guiding Principles*, *supra* note 11, at princ. 29.

190. *Guiding Principles*, *supra* note 11, at princ. 29 cmt.

191. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 11.

192. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.2.1.

management responds unsatisfactorily.<sup>193</sup> However, under Guiding Principle 29, these grievance mechanisms should “not require that those bringing a complaint first access other means of recourse.”<sup>194</sup> The Inspection Panel requirement that complainants first bring their concerns to World Bank management violates this Guiding Principle and can impede accessibility. In contrast, the CAO does not contain any similar requirement and is, therefore, more accessible.<sup>195</sup>

An additional accessibility barrier to the Inspection Panel, but not to the CAO, is its limit on who can file a complaint. The CAO allows “[a]ny individual or group of individuals that believes it is affected or potentially affected, by the environmental and/or social impacts of an IFC/MIGA project [to] lodge a complaint with the CAO.”<sup>196</sup> However, the Inspection Panel requires “two or more people with common interests and concerns who claim that they have been or are likely to be adversely affected by a Bank-financed project to submit a complaint.”<sup>197</sup> Unlike the CAO, the Inspection Panel is not accessible to a single individual claiming harm by a World Bank-financed project.

The implementation of the Inspection Panel’s Pilot Program presents another potential obstacle to accessibility.<sup>198</sup> Proceeding under the Pilot Program is voluntary, and complainants have the right “at any time to indicate that they are not satisfied and would like the Panel to register their Request” for inspection.<sup>199</sup> However, in the Pilot Program’s first case, this right was not respected: two out of the three complainants “expressed their deep dissatisfaction with the Pilot Program and therefore submitted a request for registration,” but the Inspection Panel closed their case, rather than register the complaint.<sup>200</sup>

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193. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 12(d) (“A Request should describe steps taken or efforts made to bring the issue to the attention of Bank staff (if possible, with dates, people contacted, and copies of the correspondence with the Bank), and a statement explaining why, in the Requesters’ view, the Bank’s response was inadequate.”); *id.* ¶ 39 (Criterion (C)) (“The Request asserts that its subject matter has been brought to the attention of Management and that, in the Requesters’ view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank’s policies and procedures.”).

194. *Guiding Principles*, *supra* note 11, at princ. 29.

195. See generally CAO OPERATIONAL GUIDELINES, *supra* note 139.

196. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.1.2.

197. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 10(a).

198. Letter from Natalie Bridgeman Fields et al. to Dr. Jim Yong Kim, President of the World Bank Group, and Eimi Watanabe, Inspection Panel Chair 2 (Aug. 27, 2014), *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2014/08/8.27.14-Letter-to-President-and-Panel-re-Pilot.pdf> [hereinafter Aug. 2014 Civil Society Letter].

199. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, annex I, ¶ 5(b).

200. Aug. 2014 Civil Society Letter, *supra* note 198, at 2.

Lastly, the Inspection Panel and the CAO are underutilized, as neither mechanism is known to all relevant stakeholders.<sup>201</sup> Both civil society actors and individuals affected by World Bank Group-financed projects may not be aware of the available mechanisms.<sup>202</sup> It may not be obvious to those affected that a project has World Bank Group financing because a borrowing State or borrowing business enterprise typically implements the project.<sup>203</sup> Furthermore, impacted individuals may not know enough about the World Bank Group's operational policies and procedures to know when there is noncompliance, and that they may therefore be eligible to bring a complaint.<sup>204</sup> Compounding this problem is the lack of availability of World Bank Group policies and information about the mechanisms in many local languages.<sup>205</sup> Although both the Inspection Panel and the CAO engage in outreach, the mechanisms remain largely unknown.<sup>206</sup>

### 3. *Predictability*

Guiding Principle 31 requires that an effective grievance mechanism be predictable by providing “a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.”<sup>207</sup> It should make information about its procedures publically available, and should respect timeframes for each stage while allowing for flexibility.<sup>208</sup> In alignment with Guiding Principle 31, the Inspection Panel and the CAO state that they aim to be predictable.<sup>209</sup> They also provide timelines for their complaint processes.<sup>210</sup>

201. Wong & Mayer, *supra* note 175, at 507.

202. *Id.*

203. *Id.*

204. Although Inspection Panel complainants do not have to specify what policy or procedure they believe the IBRD or IDA to be violating, for complainants “to make the decision to utilize the Panel at all, they need to have a broad understanding of the Bank’s operational policies and procedures, technical documents that remain relatively unknown outside the specialist community.” *See id.* at 508.

205. The Inspection Panel website is only available in English, but it does provide translations into twelve languages of an eight-page brochure about the Inspection Panel. The CAO website is available in sixteen languages. *See id.* In contrast, the CAO website is available in sixteen languages and its 2013 Operational Guidelines are available in seven. *See generally* COMPLIANCE ADVISOR OMBUDSMAN (CAO), [www.cao-ombudsman.org](http://www.cao-ombudsman.org) (last visited April 2, 2015).

206. *See* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 76–77; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.6.

207. *Guiding Principles*, *supra* note 11, at princ. 31(c).

208. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

209. *See* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, at 4 (stating that the Operating Procedures “aim to make the process user-friendly, transparent, predictable and up-to-date.”); CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.3 (“CAO strives to be an independent, transparent, credible, accessible, and equitable mechanism that provides a predictable process”).

210. The Inspection Panel’s timeline was just added during its most recent update to its

The CAO also monitors the implementation of agreements reached by the parties through its dispute resolution function and publicly discloses the outcomes on its website.<sup>211</sup> This monitoring function provides increased predictability that agreements will be executed. However, the CAO's monitoring function after a compliance investigation does not always make the outcome predictable because the CAO will only monitor the situation "until actions taken by IFC/MIGA assure the CAO that IFC/MIGA is addressing the noncompliance."<sup>212</sup> It does not have to monitor until the noncompliance issue has been fixed. Thus, outcomes from the CAO's compliance mechanism will be less predictable than its dispute resolution function.

The Inspection Panel, on the other hand, has no general monitoring authority. It can, but is not required to, submit a report to the Board on the adequacy of World Bank management's consultations with complainants during the development of action plans.<sup>213</sup> The Inspection Panel also has a quasi-monitoring role when World Bank management includes "a proposal to submit to the Board periodic progress reports on the implementation of the remedial efforts and/or plan of action."<sup>214</sup> If World Bank management does submit progress reports, the Inspection Panel is required to make them available on its website and provide them to the complainants.<sup>215</sup> However, the Inspection Panel never has authority to monitor the implementation of any action plans, making its outcomes less predictable than CAO outcomes.

The Inspection Panel provides no guarantee that all eligible complaints will be investigated, further decreasing predictability. Its operating procedures state that the Inspection Panel "may decide *not* to recommend an investigation even if it confirms that the technical eligibility criteria for an investigation are met,"<sup>216</sup> based on a variety of considerations.<sup>217</sup> As of June 2014, there were twelve

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Operating Procedures in April 2014. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 26, 29, 33, 36, 38, 53(b), 64 & n.8; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.4; see also Letter from Natalie Fields et al. to Eimi Watanabe, Inspection Panel Chair, Civil Society Comments on Inspection Panel Draft Operating Procedures 4 (Jan. 15, 2014), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2014/02/Joint-CSO-letter-on-Inspection-Panel-OPs.pdf> [hereinafter Jan. 2014 Civil Society Letter].

211. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 3.2.3.

212. *Id.* § 4.4.6.

213. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 70.

214. *Id.* ¶ 69.

215. *Id.* ¶ 74.

216. *Id.* ¶ 41 (emphasis added).

217. *Id.* ¶ 43 ("In making its recommendation, the Panel takes into account the following: (a) Whether there is a plausible causal link between the harm alleged in the Request and the Project. (b) Whether the alleged harm and possible non-compliance by the Bank with its operational policies and procedures may be of a serious character. (c) Whether Management, in the Panel's view, has dealt

complaints for which the Inspection Panel acknowledged that all eligibility criteria were met, yet the Inspection Panel did not recommend an investigation.<sup>218</sup> The process requires “the Panel to guess about findings that should only be made through a full investigation,” and the Inspection Panel will likely “not have sufficient evidence to make [these] judgments” before an investigation.<sup>219</sup>

#### 4. *Equitability*

An effective grievance mechanism must also be equitable, meaning that it must “seek[] to ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process on fair, informed, and respectful terms.”<sup>220</sup> Affected individuals often have less information and fewer expert resources than the World Bank Group.<sup>221</sup> Closing this information gap is necessary in order to have an effective mechanism.<sup>222</sup>

Both the Inspection Panel and the CAO contain provisions to ensure that complainants receive copies of the Investigation Reports and responses from World Bank Group management translated into a locally understood language.<sup>223</sup> However, the information imbalance is partially maintained during the Inspection Panel's site visit to determine whether a complaint is technically eligible. During this visit, the Inspection Panel team meets with the complainants and “briefs them orally about relevant information in the Management Response.”<sup>224</sup> The Inspection Panel does not have to provide the complainants with a written version of the Management Response, thus risking the possibility that complainants will not have all needed information.

#### 5. *Transparency*

The Guiding Principles also require that a grievance mechanism be transparent by “keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build

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appropriately with the issues raised in the Request and demonstrated clearly that it has followed the required policies and procedures. (d) Whether Management has provided a statement of specific remedial actions, and whether, in the judgment of the Panel and taking into account the view of the Requesters, the proposed remedial actions may adequately address the matters raised by the Request.”).

218. Wong & Mayer, *supra* note 175, at 505.

219. Jan. 2014 Civil Society Letter, *supra* note 210, at 4.

220. *Guiding Principles*, *supra* note 11, at princ. 31(d).

221. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

222. *Id.*

223. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 72–73; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.6.

224. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 38.

confidence in its effectiveness and meet any public interest at stake.”<sup>225</sup> Both the Inspection Panel and the CAO aim to be transparent. The Inspection Panel “promotes transparency in Bank operations through publication of its reports.”<sup>226</sup> Similarly, the CAO “makes every effort to ensure transparency and maximum disclosure of its reports, findings, and outcomes. This includes reports and findings from its dispute resolution processes, compliance investigations, and advisory work, as well as CAO Annual Reports.”<sup>227</sup>

The Inspection Panel and CAO also implement important limits on transparency in order to protect the interests of complainants. Both mechanisms allow for complaints to be kept confidential when requested by complainants.<sup>228</sup> Thus, the Inspection Panel’s Operating Procedures and the CAO’s Operational Guidelines strike a good balance between ensuring transparency and protecting complainants’ interests.

#### 6. *Rights-Compatibility*

Guiding Principle 31 states that effective grievance mechanisms should also be rights-compatible, meaning that they ensure “that outcomes and remedies accord with internationally recognized human rights.”<sup>229</sup> Even if a mechanism does not frame grievances in terms of human rights, “care should be taken to ensure that they are in line with internationally recognized human rights.”<sup>230</sup>

Neither the Inspection Panel nor the CAO is fully rights-compatible. To file a complaint with either mechanism, the complainants must be experiencing harm, or believe they will be harmed, as a result of the World Bank Group’s violation of its own internal operational policies and procedures.<sup>231</sup> However, while the Guiding Principles recognize human rights as consisting of the International Bill of Human Rights and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work,<sup>232</sup> the World Bank

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225. *Guiding Principles*, *supra* note 11, at princ. 31(e).

226. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 5(g).

227. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.4.

228. *See* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 18; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.4.

229. *Guiding Principles*, *supra* note 11, at princ. 31(f).

230. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

231. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 12(c); *see also* CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.1 (providing a grievance mechanism to redress negative “impacts related to business and human rights in the context of the IFC policy and Performance Standards on Environmental and Social Sustainability.”).

232. *Guiding Principles*, *supra* note 11, at princ. 12.

Group's internal policies and procedures consider fewer rights. Thus, these mechanisms cannot address all human rights violations and are not fully human rights-compatible.

7. *Source of Continuous Learning*

Lastly, an effective grievance mechanism is one that is a source of continuous learning, “drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.”<sup>233</sup> Both the operating procedures and guidelines of both the Inspection Panel and the CAO allow the mechanisms to promote institutional learning in certain circumstances. The Inspection Panel details “systemic issues and reflections discerned from its work to the Board, Management, and the public via its Annual Report and other publications.”<sup>234</sup> But it may only present its observations during meetings with the Board and Management “when requested.”<sup>235</sup> Similarly, the CAO's advisory role can be initiated in three situations: (1) “[a]t the discretion of the CAO Vice President regarding lessons learned from CAO's Dispute Resolution and Compliance roles”; (2) “[a]t the discretion of the CAO Vice President to the World Bank Group President on systemic and critical issues relating to CAO's casework”; and (3) by a “request from the President or IFC/MIGA senior management.”<sup>236</sup>

The Pilot Program denies the Inspection Panel the opportunity to improve World Bank projects through the promotion of lessons learned.<sup>237</sup> During the only two cases handled through the Pilot Program, as of March 31, 2015, the Inspection Panel acknowledged evidence of safeguard violations, but did not launch an investigation.<sup>238</sup> Complainants must voluntarily opt into the Pilot Program, and they retain the right to indicate at any time that they are dissatisfied and would like their complaint to be registered.<sup>239</sup> But within three months of receipt of the complaint through the Pilot Program, the Inspection Panel reviews the case and, based on the complainants' satisfaction at that point, decides whether to register the complaint.<sup>240</sup> As a result, those filing a complaint who become dissatisfied with the progress through the Pilot Program

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233. *Guiding Principles*, *supra* note 11, at princ. 31(g).

234. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 79.

235. *Id.*

236. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 5.2.1.

237. Aug. 2014 Civil Society Letter, *supra* note 198, at 1.

238. *See id.*; Memorandum from the Inspection Panel to the Executive Directors of the International Bank for Reconstruction and Development, Request for Inspection – Paraguay: Sustainable Agriculture and Rural Development Project (P088799), Notice of Non-Registration and Panel's Observations of the Second Pilot to Support Early Solutions (Mar. 11, 2015) (available on World Bank website, IPN Request RQ 14/04).

239. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, annex I, ¶¶ 4, 5(b).

240. *Id.* ¶ 8.

after the three months may never have their claim investigated because the Inspection Panel will have already issued a Notice of Non-Registration. By relying on World Bank management to handle cases through the Pilot Program and deciding not to register a complaint so quickly, the Inspection Panel misses an opportunity to investigate and present to the Board “the cause and extent of the Bank’s policy violations and to learn lessons to improve future projects.”<sup>241</sup>

Overall, based on Guiding Principle 31’s seven effectiveness criteria, both the Inspection Panel and the CAO have several characteristics of an effective mechanism: they are accessible to communities before a harm has occurred, they strike a good balance between promoting transparency and respecting complainants’ confidentiality, and they have the potential to promote institutional learning. The CAO has additional characteristics of an adequate mechanism: it does not require complainants to pursue any other redress mechanisms first, and it allows for complaints by individuals, rather than only communities. But both mechanisms are also lacking in several areas. Neither mechanism is fully rights-compatible or has perfect legitimacy. Both mechanisms may only promote institutional learning in limited circumstances. In addition, the Inspection Panel meets fewer criteria than the CAO, namely predictability, accessibility, and equitability.

Although they do not to meet some of the Guiding Principles’ effectiveness criteria, the Inspection Panel and the CAO still play an important role in ensuring access to remedy. Without these mechanisms, many project-affected communities may have no access to any form of remedy. The existence of the Inspection Panel and the CAO may also pressure World Bank Group management to take steps to ensure that the internal policies and procedures are followed, preventing some future harms.<sup>242</sup> Thus, the Inspection Panel and the CAO are essential mechanisms to provide access to effective remedy for those facing harm from World Bank Group-sponsored projects.

#### CONCLUSION

Under the Guiding Principles, the responsibilities of the World Bank Group are unclear. The World Bank Group maintains State-like qualities, such as ownership by States and immunity equal to that of sovereign immunity. However, it is also characterized by several business-like qualities—including a lack of sovereign territory, a prohibition on engaging in political affairs, and profit-seeking behavior—that prohibit it from fulfilling many of the duties that

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241. *Id.*

242. Wong & Mayer, *supra* note 175, at 516–517.

the Guiding Principles imposes on States. Thus, the World Bank Group should be considered a business enterprise.

Under the Guiding Principles, the World Bank Group has a duty to provide access to effective non-judicial remedies. It offers two accountability mechanisms: (1) the Inspection Panel, covering the IBRD and IDA, and (2) the Compliance Advisor Ombudsman (CAO), covering the IFC and MIGA. Evaluated under the seven characteristics of an effective mechanism in Guiding Principle 31, both mechanisms have several features demonstrating effectiveness. For instance, the Inspection Panel and the CAO are accessible to communities before harm has occurred, they promote transparency while protecting complainants' need for confidentiality in certain cases, and they can foster institutional learning in some circumstances. In addition, the CAO allows an individual to file a complaint, does not require contact with World Bank Group management prior to filing a complaint, and has a strong monitoring function.

But both mechanisms need to improve in a number of areas. In particular, the Inspection Panel and the CAO should establish greater independence from World Bank Group management and ensure equitable access to information for complainants. They should also investigate all eligible complaints and expand timelines for filing complaints. Lastly, they should promote greater stakeholder awareness of the mechanisms. However, despite some failures, the Inspection Panel and the CAO provide a crucial method to hold the World Bank Group accountable for the human rights violations of the projects it funds.