LAW AND POLICY IN INTERNATIONAL FINANCIAL INSTITUTIONS: THE CHANGING ROLE OF LAW IN THE IMF AND THE MULTILATERAL DEVELOPMENT BANKS

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I. INTRODUCTION: "WHAT'S LAW GOT TO DO WITH IT?"

In this article I offer a possible framework for our discussions (both written and verbal) in the *Journal*-sponsored Fall 2007 Symposium on "Law and Policy in International Financial Institutions." I am pleased to have been helping to organize the symposium, mainly because the issues at play are both intrinsically interesting and vitally important to the future of global economic relations, and I wish to thank and compliment the *Journal* staff, particularly John Foote, for fine work in organizing the symposium and for publishing the participants' presentations.[1]

I begin with some "stage-setting" points. In the following few paragraphs I shall briefly identify the international financial institutions ("IFIs") under discussion in the symposium as well as some key elements of the historical and legal context in which they now find themselves. I shall also provide a "nutshell" enumeration of the specific issues to be addressed in later sections of this article.

In doing so, and indeed throughout this article, I shall be painting with a

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1. In particular, I greatly appreciate the cooperation and flexibility of the *Journal* staff in terms of formatting matters relating to the symposium contributions, several of which (including this article) appear more in the character of essays than traditional law-journal articles. This approach reflects the main purpose of a symposium: to emphasize the easy exchange of ideas among experts rather than providing extensive citation to authority that non-experts would need. While I am thanking people, I also wish to thank Alexandra Lasley English and Katie Lula for their valuable assistance in the preparation of this article, and to express my appreciation also to Lucia Orth and to my colleagues and fellow participants in the symposium for offering helpful comments and suggestions. As usual, research assistance from the University of Kansas General Research Fund is also gratefully acknowledged.

broad brush. My aim is to identify, based on my engagement in this area for over a quarter of a century, a handful of issues in order to stimulate discussions regarding the role of law in IFIs. I shall not attempt an in-depth analysis of those issues. In view of this approach, and with the kind permission of the *Journal* editors, I shall provide only rather sparse citations to authority but shall instead refer to some of the many books and other sources where such citations may easily be found.

A. IFIs in a Changing World

The IFIs under discussion in this symposium are the International Monetary Fund ("IMF") and the five main multilateral development banks ("MDBs"), of which the World Bank is the most prominent. General information about these IFIs—their creation, their operations, their structures, and so forth—abounds in books, articles, websites, and elsewhere,[2] so I need

2. For a sampling of such information, see generally JAMES M. BOUGHTON & K. SARWAR LATEEF EDS., FIFTY YEARS AFTER BRETTON WOODS: THE FUTURE OF THE IMF AND THE WORLD BANK (1995); THE IMF AND THE WORLD BANK AT SIXTY (ARIEL BUIRA, ED., 2005); Erik Denters, *International Monetary Fund*, *in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS (R. BLANPAIN ED., 1993); ERIK DENTERS, LAW AND POLICY OF IMF CONDITIONALITY (1996); RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION (1985); JOHN W. HEAD, THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS: AN EVALUATION OF CRITICISMS LEVELED AT THE IMF, THE MULTILATERAL DEVELOPMENT BANKS, AND THE WTO (2005) [hereinafter FUTURE OF THE GEOS]; John W. Head, *Asian Development Bank*, *in* INTERNATIONAL ENCYLOPAEDIA OF LAWS (R. BLANPAIN ED., 2002); INTERNATIONAL MONETARY FUND, FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF (IMF Pamphlet Series No. 45, 2d ed. 1991); PETER ISARD, GLOBALIZATION AND THE INTERNATIONAL FINANCIAL SYSTEM (2005); HAROLD JAMES, INTERNATIONAL MONETARY COLLABORATION SINCE BRETTON WOODS (1996); PETER B. KENEN ED., MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS (1995); SIGRIN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001); REFORMING THE IMF FOR THE 21ST CENTURY (EDWIN M. TRUMAN, ED., 2006); DAVID VINES AND CHRISTOPHER L. GILBERT, THE IMF AND ITS CRITICS: REFORM OF GLOBAL FINANCIAL ARCHITECTURE (2004); NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS (2006); John W. Head, *For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241 (2004); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521 (2004); John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605 (1994) [hereinafter *Supranational Law*]; Ross B. Leckow, *The International Monetary Fund and Strengthening the Architecture of the International Monetary System*, 30 LAW & POL'Y INT'L BUS. 117 (1999); Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 GEO. WASH. INT'L L. REV. 71 (2000); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT'L AFF. 83 (2001). Extensive information about the IFIs is also available, of course, on their websites. These are www.imf.org (for the IMF), www.worldbank.org (for the World Bank), www.adb.org (for the Asian Development Bank), www.afdb.org (for the African Development Bank), www.iadb.org (for the Inter-American Development Bank), and www.ebrd.org (for the European Bank for Reconstruction and Development). These institutions are all described in the following few paragraphs.

offer only a brief synopsis here.[3]

• *The International Monetary Fund*. The IMF, formed at the Bretton Woods Conference in 1944, began its existence as the international supervisor of a system of fixed currency exchange rates (the "par value system")—a system whose overall aim would be to facilitate increased international trade by resisting competitive currency devaluations among countries. That fixed-currency-rate system broke down in the 1970s, and since that time the IMF has been most evident as a financing institution for countries facing heavy external debts and facing financial or economic crises. Nearly all countries are IMF members, but the wealthiest members do not borrow from it now. Among those countries that do borrow from the IMF, some are eligible for very low-cost loans. These are sometimes referred to as "soft" loans or "concessional" loans, because of their longer maturities and almost zero interest, and they are made from funds that are contributed by the wealthiest member countries. The other (and significantly larger) category of loans that the IMF makes are "hard" loans, with market-based interest rates; the funds for them come from resources provided by all members in the form of capital subscriptions that reflect each member's "quota," or share, in the IMF. This "quota" system also governs voting power, and the dramatic differences in voting power between the USA—whose "quota" gives it control over about seventeen percent of the total votes—and the dozens of countries that have less than one percent of the total votes makes the "weighted voting system" a subject of frequent criticism.[4]

• *The World Bank*. Nearly all countries in the world also belong to the World Bank, which technically consists of two legally distinct entities: the International Bank for Reconstruction and Development ("IBRD") and the International Development Association ("IDA"). The IBRD was formed alongside the IMF at Bretton Woods in 1944,[5] mainly to finance post-war reconstruction in Europe. A decade and a half later the IDA was established[6] to provide lower-cost financing to economically less developed countries

3. The following synopsis draws heavily from FUTURE OF THE GEOS, *supra* note 2, at 3-4, 22-28, 30-34, 44-46. Citations may be found there to numerous other sources of authority and sources for research into further details.

4. Some of the best and most detailed information on the IMF can be found in the various works written by one of the participants in this symposium, Rich Edwards, whose treatise INTERNATIONAL MONETARY COLLABORATION set the standard for other authors' work in this area. *See generally* Edwards, *supra* note 2; *see also* Denters, *supra* note 2. The IMF's structure and operations are governed by the IMF charter—that is, the treaty under which the IMF was established in 1944—as it has been amended since then. For full citations to, and the current text of, the IMF charter, see FUTURE OF THE GEOS, *supra* note 2, at 19 n.5, 22 n.12, and 253-310, respectively. For a "nutshell" account of the IMF and its operations, see FUTURE OF THE GEOS, *supra* note 2, at 22-30.

5. Like the IMF, the IBRD is governed by its charter as prepared in 1944 and amended since then. For full citations to, and the current text of, the IBRD charter, see FUTURE OF THE GEOS, *supra* note 2, at 19 n.6, 30 n.43, and 311-339, respectively.

6. For further information on the IDA, and citations to and the current text of its charter, see FUTURE OF THE GEOS, *supra* note 2, at 30-46, 31 n.44, and 341-363, respectively.

("LDCs"), which rocketed to prominence with the demise of colonial holdings by European powers. For most practical purposes, the IBRD and the IDA operate as one institution, and they undertake mainly public-sector project lending—that is, lending to national governments (or government agencies) to finance the building of roads, irrigation systems, hospitals, power plants, schools, and the like.[7] In the last quarter-century, however, the World Bank has also engaged in another kind of lending: policy-based lending (sometimes referred to as "structural adjustment" lending) that is not tied to specific projects but instead provides financial support for policy initiatives taken by the government of a country—not unlike the kind of lending the IMF undertakes. Moreover, also like the IMF, the World Bank provides both "hard" loans and "soft" loans. The IBRD makes the "hard" loans, the resources for which come mainly from the proceeds of a vigorous IBRD borrowing program on public financial markets worldwide. The "soft" loans (fewer in number and overall volume) come from the IDA, drawing from resources that are contributed by the wealthiest countries.

• *The regional multilateral development banks*. The IBRD and the IDA are multilateral development banks ("MDBs") in that they muster funds on a multilateral basis to help finance projects designed to aid economic development. Complementing the work of the IBRD and the IDA, and using those institutions as their models, are four main regional development banks. Three were formed in the 1960s: the Inter-American Development Bank ("IADB"), the African Development Bank ("AfDB"), and the Asian Development Bank ("ADB"). A fourth, the European Bank for Reconstruction and Development ("EBRD") was established in 1990.[8] Like the IBRD and the IDA, the regional MDBs engage in both project lending and policy-based lending. Under varying institutional arrangements, most of the regional MDBs also provide both "hard" loans and "soft" loans, with "hard" loans funded through borrowing programs and "soft" loans funded through contributions made by the wealthiest member countries. The most obvious difference between the regional MDBs and the World Bank are the geography-based limitations that apply in the case of the regional MDBs: they carry out their financing operations only in their specific regions. However, membership in the regional MDBs is open not only to countries of their specific regions but

7. Another institution, the International Finance Corporation ("IFC"), was established in the late 1950s to provide financing (both debt and equity) to private-sector borrowers, as opposed to governments and government agencies. The IFC is an affiliate of the World Bank, in that it has close institutional ties to it. So are two other institutions formed in the 1960s and the 1980s, respectively: the International Centre for the Settlement of Investment Disputes ("ICSID") and the Multilateral Investment Guarantee Agency ("MIGA"). These three affiliates of the World Bank, plus the two entities that comprise the World Bank itself (that is, the IBRD and the IDA) are officially referred to collectively as "the World Bank Group." For purposes of this article, and the symposium to which it contributes, the IFC, the ICSID, and the MIGA are of only tangential interest.

8. For further information about these four regional MDBs—along with citations to (and texts of) their charters—see FUTURE OF THE GEOS, *supra* note 2, at 30-46 and 365-510.

also to wealthy countries from outside their regions. The incentives for such wealthy countries to join the regional development banks (and indeed to join the World Bank itself) include these: (i) membership by a country in an MDB makes private-sector contractors and suppliers of that country eligible to bid on construction and supply contracts required for the projects financed by the MDB; and (ii) membership by a country in an MDB gives that country's government some influence in the economic and financial policy decisions made by the MDB.

In earlier writings I have urged that we regard the MDBs—that is, the World Bank and the regional MDBs—as comprising three "generations."[9] As I expressed it recently:

> [The MDBs] were established at different times, reflecting changing needs and influences. In my view, the MDBs should be viewed as "generational" in character, with three generations now having run their course, or nearly so. The first generation is represented by the IBRD, born in the closing days of World War II with the reconstruction of Europe as its main priority [hence the inclusion of the "R" (for "Reconstruction") in the name of the IBRD]. . . . [T]he fact that the U.S. government soon took over the bulk of that task under the Marshall Plan prompted (in part) the IBRD to [abandon that aim of reconstruction and to] focus its attention more on the "D" in IBRD—that is, economic development in its non-European member countries.
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> A second generation began around 1960 to cater better to the needs of LDCs. With the rapid emergence of many new states following the massive decolonization of the 1940s and 1950s, the IBRD found itself unable to provide as much useful assistance as was needed in those new states because IBRD loans carried market-based interest rates. . . . [I]t was against this backdrop that the IDA was established in 1960 as a companion to the IBRD—yielding the two institutions we now call the World Bank—to provide cheaper money through "soft loans" available to LDCs. At about the same time (between the late 1950s and the mid-1960s), the IADB, the AfDB, and the AsDB were formed as regional sources of development financing, and all three of these regional MDBs sooner or later developed the same authority to make "soft loans" that the IDA makes.
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> The EBRD represents a third generation in the evolution of the MDBs. This institution, formed about four decades after the IDA and the earliest of the regional MDBs, introduced several novel features into the operations of the MDBs. Instead of prohibiting any consideration of political factors, as the charters of the earlier MDBs do, the charter of the EBRD expressly adopts a political mandate requiring the institution to take concrete steps to assist the countries

9. *See* FUTURE OF THE GEOS, *supra* note 2, at 44-46. I first discussed this "generational" character of the MDBs about a decade ago. *See* Head, *Supranational Law*, *supra* note 2, at 636, 641-44.

> of its operations—originally a handful of Eastern and Central European states newly released from the Soviet sphere of influence and now a couple of dozen states reaching from Central Europe across to Central Asia—in making their transition from Communist political control to an embrace of "the principles of multiparty democracy [and] pluralism." The EBRD Charter also included two other types of mandate absent from the charters of the earlier MDBs. Its economic mandate requires the EBRD "to foster the transition toward open market-oriented economies" in its countries of operation. Its environmental mandate requires the EBRD to "promote in the full range of its activities environmentally sound and sustainable development."
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> The establishment of the EBRD was a blatant manifestation of a trend that had already begun in the other MDBs. It was a trend toward using the MDBs as instruments of global policy guidance or influence—or what I would call global policy regulation. This trend is exemplified by the gradual expansion of MDB operations into policy-based lending [described above] and by the wide variety of policies and initiatives they have adopted. . . . [These] policies and initiatives address environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, gender issues, and poverty reduction.
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> Given these developments, I believe the MDBs should be regarded as having been transformed from financial institutions into regulatory agencies—that is, into agencies involved in global policy "regulation." They still carry out development banking functions, of course, but those banking functions have increasingly become instruments for achieving regulatory aims.[10]

The above synopsis of the international financial institutions, even with my "three-generations" portrayal of the MDBs in particular,[11] is still too brief to capture fully the tumultuous changes that have buffeted the IFIs in *their* relatively short lives. I find it instructive to picture all the IFIs (metaphorically) as a small fleet of specially-chartered service vessels that have been designed and built to provide a limited set of services to the commercial and fishing boats that operate on a very large lake in a wilderness area. The service vessels, anchored at strategic spots on the lake, provide supplies, navigation assistance, storage facilities, and a few other services for the few private boats that ply the waters of the lake. However, as the years pass, great changes occur: the number of private fishing and commercial boats increases dramatically, the fish stocks in the lake diminish due to overfishing and pollution caused by increased exploitation, other service vessels are launched on the lake to provide additional services to the commercial and fishing boats there, changes in climate patterns surrounding the lake cause heavier winds and rougher waters, and even more remarkable changes—

10. FUTURE OF THE GEOS, *supra* note 2, at 45-46.

11. The IMF could be viewed as being in the first generation, and as having changed over time just as its sister organization, the IBRD, has since they both were created in 1944.

earthquakes and volcanic eruptions—also occur. In the face of these developments, the original specially-chartered service vessels find themselves under considerable stress: they are being asked to provide a wider range of services (even including rescue operations) to a larger number of clients in an increasingly hostile environment—all without any significant overhaul of the vessels themselves or shift in their positions on the lake. The changes in the "world" of specially chartered vessels seems overwhelming.

The IFIs face analogous changes in the world in which they operate. Two earlier observers of IFIs have written books examining some of those tumultuous changes. One of the books, *The IMF in a Changing World*, was written in 1986 by an IMF official.[12] The other book, *The World Bank in a Changing World*, consisted of three volumes published starting in 1991.[13] (It is from those titles that I drew the heading for this subsection: "*The IFIs in a Changing World*.") Since the time those books were written, of course, the world has changed still more. Let me offer some illustrations of the types of political, economic, and legal changes that the IFIs have had to respond to since the first of them (the IMF and the IBRD) were established:

1940s:

- The IMF and the IBRD are established.
- A new organization—the United Nations—is established, with a focus on political and military cooperation.
- The international human rights movement is kicked off with the 1948 adoption of the Universal Declaration of Human Rights and the 1948 Genocide Convention.
- The Cold War begins, freezing most progress toward international cooperation on military issues and poisoning the working atmosphere at the U.N. Security Council.

1950s:

- By this time, the U.S. Marshall Plan has largely displaced the IBRD as a chief financier of the reconstruction of post-war Europe.
- A tidal wave of newly independent countries starts emerging from the termination of (official) European colonialism.

1960s:

- That tidal wave of newly independent countries continues.
- International human rights efforts continue with the adoption of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),

12. *See* MARGARET GARRITSEN DEVRIES, THE IMF IN A CHANGING WORLD, 1945-85 (1986).

13. *See generally* IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD—SELECTED ESSAYS (three volumes) (1991-2000).

and with the adoption and coming into force of the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD").

1970s:

• The oil crises, triggered by effective OPEC oil cartels, bring havoc to the economies of economically developed countries.

• Further progress on human rights is made with the entry into force of the two human rights treaties mentioned above—the ICCPR and the ICESCR.

• The international environmental movement is kicked off with the 1972 Stockholm Conference on Environment and Development.

1980s

• The debt crisis erupts with the announcement by Mexico and Brazil that they are unable to service their debt obligations.

• The Berlin Wall falls, presaging the collapse of the Soviet Union.

1990s

• The Soviet Union collapses, leaving capitalism (market-based economics) as the economic model with nearly-universal acceptance.

• Further steps are taken in the environmental protection movement with the Rio Conference on Environment and Development.

• The World Trade Organization ("WTO") is established following the completion of the Uruguay Round of trade negotiations.

• A string of national and regional economic crises, most notably the Asian financial crisis, rocks the world economy and forces multilateral corrective action.

2000s

• Anti-globalization forces, emboldened by the popular demonstrations against the WTO in Seattle just before the turn of the century (November 1999), gain strength, pressuring all the IFIs for change.

• The Doha Round of trade negotiations, aimed at further liberalization of trade and investment rules, founder on several issues (especially agricultural subsidies) and seem near collapse.

B. Law, Power, and a View of History

But why law? In the words of a take-off on a famous Tina Turner song of the 1980s,[14] *"What's Law Got to Do With It?"*[15] When push comes to shove,

14. According to Wikipedia (a website I would not trust for authentication of more important information than this), the song *What's Love Got to Do With It?* was written by Terry Britten and Graham Lyle and recorded by Tina Turner as part of the album *Private Dancer*, released by Capital Records in 1984. The single went straight to the top of the Billboard Hot 100 in September 1984 and remained there for three weeks. http://en.wikipedia.org/wiki/What's_Love_ Got_to_Do_with_It_(song).

aren't the operations of the IFIs driven by raw political power and the economic strength that gives certain states that power? Doesn't this view best explain, for example, why the government of the United States has such influence in the World Bank, as reflected in the fact that every World Bank president since the creation of the institution has been American?

Perhaps so, but I wish to look beyond the point when push comes to shove. I wish to look instead at the point when a sense of urgency over the risks facing the global economic system triggers a new round of multilateral cooperation.

If you think I am naïve in this respect, then I think you are forgetting history. We must recall that twice in the twentieth century the sense of urgency over the risks facing the world did trigger remarkable new rounds of multilateral cooperation. The first incident followed World War I, the horrors of which prompted the creation of the League of Nations in hopes of avoiding future conflicts of such magnitude. The fact that these hopes were not realized does not detract from the significance of the attempt, just as the fact that a baby's first effort to walk ends in short-term failure does not elicit cries of derision from family and friends.

The second incident followed World War II. Building on the League of Nations model, the allied nations emerging from that second terrible conflict created a cluster of new international institutions—the United Nations to handle matters of international peace and security and the Bretton Woods institutions to address economic matters.[16]

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15. These alternative lyrics (partially reprinted below) have been written by my colleague, Professor Richard E. Levy, and performed by our own KU faculty-led "Moody Bluebooks" rock band for several years in our annual Pub Night bash:

> *What's Law Got to Do With It?*
> *You must understand that a blue book exam makes my pulse react*
> *And it ain't no thrill when you're under the grill, have a heart attack*
> *It's sadistical pathological*
> *And I try to ignore that it means more than this, Oh ...*
> *What's law got to do, got to do with it?*
> *What's law but an optical illusion*
> *What's law got to do, got to do with it*
> *Who needs a class when a class brings confusion*
> *Now you might feel abused when you're hit by the screws of the Socratic game*
> *And your brain cells are dead from the stuff that you've read, it all seems the same*
> *It's hypocritical, it's wholly cynical*
> *But whatever it is it is getting to me, Oh ...*
> *What's law got to do, got to do with it?*
> *What's law but an optical illusion*
> *What's law got to do, got to do with it*
> *Who needs a class when a class brings confusion*

16. The two institutions emerging from the Bretton Woods conference—the IMF and the IBRD—were to be joined by a third institution, the International Trade Organization ("ITO"). However, the ITO was never established and the General Agreement on Tariffs and Trade ("GATT") acted in lieu of the ITO for over forty years until the establishment of the WTO. For

We still live in a warring world, and it is entirely possible that the level of conflict will escalate again to the point at which the international community (or the key players in it) will once more opt for dramatic multilateral efforts to address that conflict. Indeed, I believe the world faces many more threats now than at any previous time in human history simply because there are so many humans now and they are closer to each other, both literally and figuratively. The risk of environmental disasters, the threat of an unprecedented world pandemic, and the possibility of chaos emerging from the combination of crushing poverty and incompetent governance—each of these would be sobering enough in isolation; but our world today faces them all.

Therefore, I see it as altogether plausible that efforts at multilateral solutions—similar to those we have seen in the last century—might be sought in coming years. As in the past, such solutions could take the form of rules and institutions designed to facilitate our efforts to converse, to negotiate, to cooperate, to find common ground, and to survive as a civilized species. This, then, is my answer to the question "what's law got to do with it?": notwithstanding the continuing influence that raw power, with its greed and ambition born of ignorance and arrogance, will naturally exert in global economic relations, law also will continue to have an influence as well. Hence it behooves us to consider legal aspects of the IFIs and their operations.

Before identifying specific issues that I consider noteworthy in that regard, let me offer one further observation about the view of history that colors the account I have given above concerning the importance of law in international economic relations. Mine is admittedly an optimistic view of history and of humanity's future. Unlike a fundamentalist religious view—either that of the fundamentalist Christians or the fundamentalist Muslims (two groups of people whom I regard as equally misguided by anti-intellectual fervor)—my view does not rest on divine intervention or supernatural powers or on some goofy idea of "rapture" transporting us heavenward but instead on the prospect that a growing appreciation of our shared humanity, accompanied by sustained efforts to turn technological advantages to our common benefit, can help us survive and prosper. I believe most people in the world are no worse off , and many are better off, than their ancestors were, and that advancements we have seen in standards of living, especially among females and the poorest classes in LDCs, can be continued (even against the heavy waves of ever-increasing world population) if we try hard enough.

C. A Menu of Issues and Questions

In section II of this Article, I identify and briefly discuss eight specific issues relating to the role of law and lawyers in IFIs. For convenient reference, I have given each one of them a shorthand label. I list them here, and for each one I pose a question that captures some central elements of the issue.

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details on these matters, which are related to the subject of our symposium but lie beyond its scope, *see* FUTURE OF THE GEOS, *supra* note 2, at 46-56.

• Faithfulness to IFI Charter Limitations. *Question*: Are the IFIs acting lawfully within the parameters of their charters, or are they instead engaging in "mission creep"—that is, acting *ultra vires* by engaging in operations not expressly prescribed in their charters? (This issue is addressed in part II.A, below.)

• Legality in IFI Charter Interpretation. *Question*: What limits, if any, apply to an IFI's authority to interpret and apply the provisions of its charter? (This issue is addressed in part II.B, below.)

• IFIs and "Ambient" International Law. *Question*: To what extent, if at all, do general rules of international law—that is, customary international law and treaty law beyond their charters—apply to IFIs? (This issue is addressed in part II.C, below.)

• IFI Conditionality. *Question*: Is IFI conditionality (under which IFIs will lend to countries only if they adopt certain economic and financial policies) really legal, both in principle and in application, or does it violate the national sovereignty of the IFI member countries? (This issue is addressed in part II.D, below.)

• IFI Financial Integrity. *Question*: How does the legal integrity of IFIs—that is, their proper adherence to applicable legal rules and principles—bear on IFIs' financial integrity and strength? (This issue is addressed in part II.E, below.)

• IFIs and Progressive Development of International Law. *Question*: What role, if any, should IFIs play in the progressive development of international law—by promoting, for example, new rules on accountability and good governance? (This issue is addressed in part II.F, below.)

• IFIs and Judicial Review. *Question*: What steps, if any, should be taken to put in place more extensive and objective forms of "judicial review" in the IFI context, to help determine whether those institutions have acted consistently with the policies that they have announced? (This issue is addressed in part II.G, below.)

• The Roles of Lawyers in IFIs. *Question*: What is the proper role of IFI lawyers (that is, their own institutional legal counsel) in IFI operations—for example, should they be "watchdogs" or "lapdogs"—and how far, if at all, should their duty extend outside the walls of the IFI that engages them? (This issue is addressed in part II.H, below.)

II. THE ROLE OF LAW AND THE RULE OF LAW IN IFI OPERATIONS

A. Faithfulness to Charter Limitations

One of the criticisms leveled at IFIs in recent years is that they are engaged in "mission creep"—that is, that they are not acting lawfully within the parameters of their charters. This "mission creep" criticism takes

somewhat different forms depending on whether it is directed at the IMF or at the World Bank and other MDBs, but in all cases the criticism reflects some of the historical points I raised above. In the face of extreme political, economic, and legal changes in the world, the IFIs have not remained static but rather have modified and expanded their operations. For example, the IMF underwent important changes in its course in the 1980s with the emergence of the debt crisis and in the 1990s when the IMF started giving direct attention to "governance" issues and crisis management (most dramatically, with the Asian financial crisis). As a result of these developments, the IMF now, according to many of its critics, has extended its operations into areas in which it has no authority to act.

In order to appreciate fully the "mission creep" criticism, it is important to see the distinction, illuminated by Professor Daniel Bradlow between (1) those critics who argue that "the major problem with the IFIs is the *way* they have gone about expanding their mission rather than the mere fact that they have chosen to expand their mission"[17] and (2) those critics who oppose any mission creep and who "argue that the IFIs' 'mission creep' is tending to politicize the organizations in ways that will ultimately undermine their efficacy."[18] This distinction could be abbreviated as separating those critics who say "not this mission creep" from those who say "not any mission creep."[19]

For example, some critics claim that the World Bank has become far too broad and scattered in its focus, and hence less effective in its operations, because it has responded to every policy fad that has come along.[20] One result of this looseness, it is claimed, has been an expansion of the World Bank's purposes and operations into areas in which it has no authority under its charters.[21] According to its critics, this adventure into ultra vires activity—getting involved, for example, in judicial reform, micro-credit, women's rights,

17. Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 U. KAN. L. REV. 695, 709 (2002) (emphasis added) [hereinafter Bradlow-I].

18. *Id*. at 710.

19. The critics who say "not any mission creep" might be further divided into those who complain that mission creep is wrong as a matter of law (because it constitutes *ultra vires* action) and those who complain that mission creep is wrong as a policy or a practical matter. For purposes of this Article, only the first of those—"legal mission creep"—is of interest.

20. This criticism was made effectively a few years ago by a former World Bank official. *See* Jessica Einhorn, *The World Bank's Mission Creep*, 80 FOREIGN AFF. 22, 22 (Jan.-Feb. 2001) (asserting that "[b]y now, [the World Bank's] mission has become so complex that it strains credulity to portray the bank as a manageable organization").

My wife and I, having moved to the country recently and started gardening again, wonder if a more appropriate term for Ms. Einhorn to have introduced might have been "mission squash"—not to suggest that the World Bank's mission has been squashed at all but rather to reflect the phenomenon that anyone who has ever raised garden squash surely has encountered: a small, slender, attractive fruit emerging from a delicate bloom expands without notice (sometimes overnight) into a gargantuan life form staring up from where it squats in the soil, too heavy to move and utterly impossible to use or (heaven forbid) give away.

21. Technically, the World Bank operates under two charters—the IBRD charter and the IDA charter. *See supra* notes 5 and 6.

and poverty reduction—has left the World Bank and the other MDBs too broad and too shallow. They are gripped, the critics complain, by "policy proliferation" or "policy paralysis," so something has to change to get them back on their proper (narrow) track.[22]

In my view, the "mission creep" criticism fails, at least in the current state of affairs. I believe the IFIs have acted within the limits of their charters, although just barely.

As for the IMF, I believe Professor Bob Hockett—another participant in our symposium—has satisfactorily laid to rest the complaint that that institution has acted *ultra vires* in delving into such areas as "governance" issues and crisis management. Hockett has explained that the pertinent IMF charter provisions are quite broad in their formulation—the result, Hockett explains, of an intentional effort by the persons drafting it "to incorporate a good deal of 'creative ambiguity' into the [charter's] final draft in order to provide for future contingencies and to secure agreement."[23] Moreover, the IMF's charter vests in the IMF itself all power to interpret its own charter—a matter that raises "a nearly irrebuttable presumption in favor of formal legality" of IMF action.[24]

I find Professor Hockett's analysis unassailable; from a legal perspective, the "mission creep" criticism fails when directed against the IMF. Indeed, Hockett's assessment addresses both sides of the distinction Daniel Bradlow draws between those critics who say "not any mission creep" and those who say "not this mission creep."[25] That is, Hockett has explained both (1) why it is appropriate for the IMF to adapt to changing circumstances in general, and (2) why the specific direction that the IMF has taken in expanding the scope of its attention is both legal and necessary.

I believe the same analysis applies in respect of the World Bank and the regional MDBs. As I noted earlier, the MDBs may be regarded as comprising three "generations": the IBRD (emphasizing mainly the reconstruction of Europe after World War II) constituted the first generation; the IDA and the first three of the regional development banks (all created around 1960) constituted a second generation, responding to the rising importance of the LDCs; and the EBRD (created in 1990) constituted the third generation, in which three mandates—economic, political, and environmental—were given to that institution. With the emergence of each new generation, the MDB(s) of the previous generation assumed an increasingly broader role. By the time the IDA was established in 1960, the IBRD had already shifted its focus to the

22. For further detail on the "mission creep" criticism as applied both to the IMF and to the MDBs, *see* FUTURE OF THE GEOS, *supra* note 2, at 166-67, 120. For extensive citations to representative contributions to the literature in this area, *see id*. at 233-234, 246-247.

23. Robert Hockett, *From Macro to Micro to "Mission Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153, 177-78 (2002).

24. *Id*. at 180.

25. *See supra* text accompanying note 17.

developing world. By the time the EBRD was established in 1990, all of the MDBs that preceded it had already taken on some aspects of policy regulation that were pressing hard against the outer limits of their charters. Now all the MDBs have expanded their purview to include a very broad range of policies that the institutions and their borrowing members are to follow—including such issues as environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction.

Is this policy expansion, this "mission creep," legally warranted? I believe it is, for the same reasons that Professor Hockett has offered in rejecting the "mission creep" criticism in respect of the IMF. The MDB charters, like the IMF charter, provide for self-interpretation.[26] I shall argue below in section II.B that this power is not limitless, but it is undoubtedly broad. And, more importantly, the MDB charter provisions themselves are also broad. They are surely broad enough to permit the MDBs to give at least some attention to such issues as those I enumerated above—environmental protection and so forth—because any and all of these can have a bearing on the central objective of economic growth and development prescribed for all of the MDBs in their charters.[27]

In sum, I find the "mission creep" criticism unpersuasive in the case of any of the IFIs, with perhaps one minor exception. Within the last few years some of the MDBs have explicitly, and with much fanfare, announced what amounts to a shift in purpose—from economic development (as expressly prescribed in their charters) to poverty reduction,[28] despite the fact that no such purpose is in fact mentioned (nor does the word "poverty" even appear) in any of the IFI charters.

Aside from that exception, I believe the IFIs have been faithful to their charters, although just barely. Any further significant expansion in the scope of IFI operations would, in my view, require charter amendments. I favor such amendments, for reasons I shall explain below in section II.C.

B. Legality and the Process of Charter Interpretation

Having just asserted in section II.A above that the IFIs are not guilty—so far, at least—of "mission creep" from a legal perspective, I will offer some observations now on a closely related issue: what limits, if any, apply to an IFI's authority to interpret and apply the provisions of its charter? As noted above, each IFI charter includes an interpretation provision that empowers its

26. For citations to the specific charter provisions providing such self-interpretation powers, *see* FUTURE OF THE GEOS, *supra* note 2, at 124 n.49.

27. For citations to the specific charter provisions prescribing overall objectives of the MDBs, *see id*. at 124-25 n.50.

28. For citations to recent pronouncements by the World Bank, the IDB, the AfDB, and the AsDB, as well as references to some commentary on this apparent shift in purpose, *see id*. at 125-26 n.53.

governing board(s) to issue final rulings—not subject to external appeal—on the proper construction of the charter. Article 60 of the ADB charter[29] is typical:

> (1) Any question of interpretation or application of the provisions of this Agreement arising between any member and the Bank, or between two or more members of the Bank, shall be submitted to the Board of Directors for decision. . . .
>
> (2) In any case where the Board of Directors has given a decision under paragraph 1 of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be final. . . .

As Professor Hockett has observed in the context of the IMF, the power of charter self-interpretation raises "a nearly irrebuttable presumption in favor of formal legality" of IFI action.[30] But is this really a carte blanche power?

Let us consider this by examining an example. Article 11 of the ADB charter authorizes the ADB to carry out its operations in several ways, including "by guaranteeing, whether as primary or secondary obligor, in whole or in part, loans for economic development participated in by the Bank." Would it be within the scope of its authority for the ADB's Board of Directors to issue a resolution declaring that Article 11 of the ADB charter permits the bank to issue "stand-alone" guarantees—that is, guarantees for loans in which the ADB does not itself have any financial participation? A case of this sort arose a few years ago in the ADB,[31] with some Board members urging that such "stand-alone" guarantees be authorized, partly on grounds that other MDBs engage in this form of financial assistance. Would it have been appropriate for that position to prevail?

My answer has both a policy element and a legal element. As a policy matter, I believe an IFI should not play fast and loose with its charter interpretation powers, because to do so would, at least in the long run, engender both (i) a culture of undue nonchalance toward the rule of law within the institution and (ii) an institutional image among external evaluators that the IFI is comfortable stretching its powers beyond those expressly granted to it by the states that created it. An external image of this sort could damage the reputation of the institutional on financial grounds—a matter that I address below in section II.E.

As a legal matter, I believe it would not be within the authority of the ADB to declare that Article 11 of its charter permits the bank to issue "stand-alone" guarantees. For one thing, such a declaration would fly in the face of the rules of treaty interpretation prescribed in Article 31 of the 1969 Vienna

29. Citations to the charters of all the MDBs, including the ADB, may be found in FUTURE OF THE GEOS, *supra* note 2, at 30-31. The texts of all the MDB charters may be found in appendices to that book, as well as on the websites of the organizations.

30. *See supra* note 23.

31. Details of the matter are summarized in an internal ADB book titled *Annotated Guide to the ADB Charter* (2001) (on file with author).

Convention on the Law of Treaties.[32] Whatever uncertainty there might be regarding the direct applicability of the 1969 Vienna Convention to the ADB's Board of Directors,[33] it is beyond dispute that Article 31 represents a codification of customary international law. As discussed below in section II.C, I believe the IFIs are, and should regard themselves as being, bound by rules of customary international law.

To this customary international law argument I would add another legal ground for urging that it would not be within the authority of the ADB Board of Directors to declare that Article 11 of its charter permits the bank to issue "stand-alone" guarantees. For many years, questions have arisen over the issue of "implied powers" of international organizations.[34] It could be claimed that an international organization—such as the ADB in the case I have hypothesized above—can take certain actions that are not expressly authorized in the charter that establishes the organization and governs its operations. The main legal impediment to attributing some "implied powers" to an international organization lies in the fact that such an organization is, by its very nature, a creature of delegated powers—delegated to it, that is, by the states that have created it—and that therefore the terms of its charter cannot appropriately be interpreted broadly without interfering with the sovereignty of those states. Put more simply, it cannot be presumed that member states have surrendered to an international organization more of their sovereign powers than they have expressly authorized.[35] Such a presumption would be especially inappropriate if the authority being claimed under an "implied powers" argument is in fact inconsistent with powers expressly granted in the organization's charter.[36] That would be the case in the circumstances I have hypothesized above: for the ADB Board of Directors to declare an implied power to issue "stand-alone" guarantees would be inconsistent with the language of Article 11(iv), which specifically authorizes the bank to issue guarantees for loans in which the bank participates.

32. Vienna Convention on the Law of Treaties, art. 31, ¶1, May 23, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.")

33. The ADB itself, because it is not a state, is not even eligible to be a party to that Vienna Convention, although most ADB members are. The other Vienna Convention on the law of treaties has similar provisions on treaty interpretation. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 31, ¶1, March 21, 1986, 25 I.L.M. 543, 562. However, that 1986 treaty has not come into force yet; and even if it were, its provisions would not apply to a treaty that dates from twenty years earlier, as the ADB charter does. *See id*. art. 4.

34. For a summary on the question of "implied powers" of international organizations, see John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 VA. J. INT'L L. 592, 607-12 (1993).

35. *Id*. at 608.

36. *See id*. at 611 (pointing out that one of the fundamental limitations "inherent in the doctrine of implied powers is that no implied power can be inconsistent with powers expressly granted by the organization's charter").

Let me offer an example drawn from my own personal experience. In the late 1980s, the IMF Legal Department was asked to give its approval to a proposition that it would be within the implied powers of the IMF to suspend the voting rights of a member country that failed to make payments due to the IMF under loans made to that country by the IMF. The Legal Department declined to do that, insisting instead that imposition of such a suspension-of-voting-rights sanction would require formal amendment to the IMF charter. The Legal Department's view prevailed, and the formal machinery of charter amendment was set in motion, resulting ultimately in the Third Amendment to the IMF charter.[37] In my view, this is an example of the lawyers in an IFI bringing their professional training and ethics to bear on an issue in which the integrity of the institution, and its adherence to a rule of law, was at stake.

In sum, I believe that the charter interpretation authority found in the IFIs' charters are limited in several respects. Some of these are found in sound policy, and some are found in law. The fact that the interpretation by an IFI's governing board(s) is to be "final"[38] in the judicial sense of not being subject to the review of some external agency does not mean that there are no ascertainable standards regarding treaty interpretation that should be applied in such cases, or that such cases lie totally within the discretion of the governing board(s) and are somehow exempted from the rule of law.

C. The Applicability of "Ambient" International Law to IFIs

My point in using the term "ambient" international law—a term I have not encountered before—is to identify rules of customary international law, including those that derive from widely accepted treaty provisions, that are part of the environment in which the IFIs operate. Such rules would include rules of treaty interpretation, as referred to above in section II.B. They would also include key norms concerning international human rights, international environmental protection, and international economic law that are binding on states—at least those states that are parties to widely accepted treaties on those topics.

Are the IFIs bound by those "ambient" rules of international law? The simple answer must be "no," but that is too simple an answer. As noted above in section II.B (in considering treaty interpretation rules), international organizations themselves are not eligible to become parties to most treaties, because most treaties anticipate participation only by states. However, most states that are members of IFIs are also parties to the main multilateral treaties on human rights, environmental protection, and international economic law. A representative list of these is given below (with dates of conclusion shown in

37. For an account of this process, *see generally* Head, *Third Amendment*, *supra* note 34.

38. As prescribed in the ADB charter provision cited earlier in this section, a question of charter interpretation may ultimately be sent to the Board of Governors, "whose decision shall be final."

parentheses and approximate numbers of parties shown in brackets).[39]

Treaties relating mainly to international economic relations:

- General Agreement on Tariffs and Trade ["GATT"] (1994) [151[40]]
- Agreement on Agriculture (1994) [151]
- Agreement on the Application of Sanitary and Phytosanitary Measures (1994) [151]
- Agreement on Textiles and Clothing (1994) [151]
- Agreement on Technical Barriers to Trade (1994) [151]
- Agreement on Trade-Related Investment Measures (the TRIMs Agreement) (1994) [151]
- Agreement on Implementation of Article VI of the GATT 1994 (relating to customs valuation) (1994) [151]
- Agreement on Implementation of Article VII of the GATT 1994 (relating to dumping) (1994) [151]
- Agreement on Preshipment Inspection (1994) [151]
- Agreement on Rules of Origin (1994) [151]
- Agreement on Licensing Procedures (1994) [151]
- Agreement on Subsidies and Countervailing Measures (the SCM Agreement) (1994) [151]
- Agreement on Safeguards (1994) [151]
- General Agreement on Trade in Services (1994) [151]
- Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) (1994) [151]
- Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) (1994) [151]
- Trade Policy Review Mechanism (1994) [151]
- Agreement Establishing the World Trade Organization (1994) [151]
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) [36]

Treaties relating mainly to human rights and environmental protection:

- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973) [169]

39. Information shown here for the numbers of states that are parties to treaties is drawn from various websites and other sources. I have made no attempt here to reflect nuances of participation, such as reservations that some states have made in respect of some treaty provisions. The information is supplied for illustrative purposes.

40. This number represents the current number of states that are members of the WTO. In order to be a WTO member, a country must be a party to the GATT, as well as to the several other multilateral treaties emerging from the Uruguay Round of trade negotiations that concluded in late 1993. Most of those treaties are listed here; the same number [151] is shown for each of them for the reason noted above. The last treaty on this list did not emerge from the Uruguay Round.

- Vienna Convention for the Protection of the Ozone Layer (1985), and pertinent provisions of the Protocols thereto and of the Amendments to those Protocols [191]
- Basle Convention on Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) [168]
- Convention on Biological Diversity (1992) [188]
- Climate Change Convention (1992) [189]
- Kyoto Protocol on Global Warming (1998) [164]
- International Covenant on Civil and Political Rights (1967) [152]
- International Convention on the Elimination of All Forms of Racial Discrimination (1966) [169]
- Convention on the Elimination of All Forms of Discrimination Against Women (1979) [177]
- Convention on the Rights of the Child (1989) [192]

Given the broad participation in these treaties[41] by states that also are members of IFIs, what should be the attitude of the IFIs toward the norms set forth in those treaties? I would offer three observations in this regard.

First, the IFIs should not take action that requires states to act inconsistently with their obligations under those treaties. Hence, for example, in its lending operations, an IFI should not impose loan conditions requiring a borrowing member country to impose a ban on the importation of certain manufactured goods so as to protect a local industry within the borrowing country, inasmuch as such behavior would almost surely put the member country in violation of its GATT obligations.

That much is straightforward as to be simplistic, at least in the context of the example I just offered. However, closer cases can arise. Assume, for example, that an IFI requires, as part of the loan conditionality that it applies to a loan, that the borrowing member country reduce subsidies that the government has provided for many years to a large segment of the society. Depending on the circumstances, it might be argued that the required subsidy reduction forces the country to renege on its commitments under Article 11 of the ICESCR to provide an "adequate standard of living." The argument would be even more compelling if the subsidy-reduction requirement would have especially drastic effects on minorities that are to be protected under Article 27 of the ICCPR or under some provisions of the 1967 Racial Discrimination Convention or the 1979 Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). In my view, IFIs should be especially wary of placing member countries in a conflicted position of this

41. In addition to these key treaties, other sets of guidelines have also been developed and gained very broad acceptance by the international community. These include guidelines on banking supervision, corporate governance, regulation of multinational enterprises, treatment of foreign direct investment, and other matters. For details, see FUTURE OF THE GEOS, *supra* note 2, at 105. The observations I make in the following paragraphs about the attitude that IFIs should take toward the treaties I have listed above would also apply to these non-treaty guidelines.

sort. I believe they generally are careful in this regard.

Second, IFIs should, in my view, encourage and facilitate member states' adherence to the commitments they have made under such widely-accepted treaties as those listed above. For example, an IFI should not only refrain from requiring a borrowing member country to impose an import ban that would contravene a country's GATT commitment; the IFI should, where the occasion arises, insist through conditionality that the country remove any import bans it already has in place that would contravene its GATT obligations.

Does that mean that the IFIs should be in the business of enforcing a whole range of treaty obligations that are not directly related to the IFIs' lending program, including not only obligations of an economic nature (such as import bans) but also human rights or environmental-protection obligations? The answer, in my view, depends on the circumstances. I agree with the distinction that Daniel Bradlow has made between enforcement and implementation of international legal obligations.[42] The scope of "implementation," under Bradlow's distinction, involves having international financial institutions "us[e] their technical assistance and information gathering capacity"[43] to collect data and share it with specialized agencies having subject-matter competence.[44] An "enforcement" role, by contrast, would be much broader—involving, for example, loan conditionalities that would result in a suspension of financial assistance if the country acted in breach of its commitments.[45] Using that distinction between implementation and enforcement, I would suggest that the IFIs should have an enforcement role in respect of the core obligations in the treaties listed above on international economic relations and an implementation role in respect of the core obligations in the treaties listed above on human rights and environmental protection.

Third, I would go a step further than Bradlow has anticipated. As I explained in some detail in a recent book, I would recommend amendments to the charters of the IFIs to incorporate by reference key provisions of such treaties as those listed above, with the requirement that member states wishing to continue their membership in the IFIs would need to adhere to those key treaty provisions.[46] This would resemble the approach taken in the TRIPs Agreement[47] emerging from the Uruguay Round of trade negotiations, which incorporates by reference key intellectual property treaties.[48] A principal

42. Bradlow-I, *supra* note 17, at 728.

43. *Id*. at 729.

44. *Id*. at 715-16.

45. *Id*. at 726-27 (discussing the possibility of using loan conditions to enforce international humanitarian law).

46. *See* FUTURE OF THE GEOS, *supra* note 2, at 106-10, 163-66.

47. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

48. *Id*. art. 2.

reason for this charter-amendment approach is that it would help overcome the complaint that the only method by which the IFIs currently apply legal norms from "ambient" international law is through conditionality, which obviously affects only those countries that borrow from the IFIs, and not the rich industrialized countries that are, in Bradlow's terms, "supplier states" rather than "consumer states."[49] We might also refer to these as "norm-makers" and "norm-takers," respectively.

To summarize, I regard the proper relationship between the IFIs and "ambient" rules of international law to have these three elements: (1) IFIs should keep far away from imposing requirements that would force member countries to contravene obligations they have by virtue of their participation in other treaties; (2) IFIs should, in fact, take affirmative steps to facilitate member countries' adherence to such obligations; and (3) in order to have a wider sweep of effectiveness, and particularly to help ensure that their "facilitating" measures will affect the rich developed countries as well as those countries that borrow from the IFIs, the charters of the IFIs should be amended to incorporate by reference the key provisions of several of the main treaties listed earlier in this section—not only those addressing economic and financial matters but also those dealing with human rights and environmental protection.

D. Legal Aspects of IFI Conditionality

Having touched slightly on the issue of conditionality in the preceding section, let us now turn more directly to it. A central question regarding the legal aspects of IFI conditionality is this: Is IFI conditionality legal, both in principle and in application, or does it violate the national sovereignty of the IFI member countries?

The conditionality practiced by the IMF and the MDBs has received intense scrutiny[50] and is surely a familiar topic to all the participants in this symposium and to most readers of the papers emerging from it. Therefore I shall give only an abbreviated description here.

In providing financing to its member countries,[51] the IMF almost always engages in conditionality. Under conditionality, the IMF disburses money to a borrowing country only on a piecemeal basis (rather than in a single lump sum) and only if the country can demonstrate that certain economic and financial policies that the borrowing country's government committed to in advance with the IMF are, in fact, being implemented and having the desired results. The types of policies that IMF conditionality often focuses on include such

49. Daniel D. Bradlow, *Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF*, 94 AM. SOC'Y INT'L L. PROC. 152, 153 (2000) [hereinafter Bradlow-II].

50. *See* FUTURE OF THE GEOS, *supra* note 2, at 228-29, 241 (synopses of, and citations to, several works critical of conditionality as practiced by the IMF and the MDBs).

51. For a survey of the various mechanisms and facilities the IMF uses in providing financing, see *id*. at 24-25.

rather obvious things as (1) a reduction in government spending and foreign borrowing, (2) regulation of the money supply to stop or forestall inflation, and (3) steps to strengthen banking supervision in order to protect depositors from being bilked out of their savings by dishonest or incompetent bank managers.

IMF conditionality also can, depending on the circumstances, reflect policies for liberalizing a country's trade and investment laws, encouraging privatization of government-owned entities or operations, and strengthening tax laws and collection—all with an eye to improving a country's overall economic stability and performance. "Since the late 1990s, 'in growing recognition of the adverse impact of poor governance (and the resulting corruption) on economic efficiency and growth, the IMF has turned its attention to a broader range of institutional reforms and governance issues in the reform programs it supports,'"[52] and therefore has reflected such issues in its use of conditionality. Measures to improve governance include strengthening legal frameworks and applying international standards of accounting and auditing.

IMF conditionality is governed by guidelines adopted most recently in 2002.[53] The main legal foundation for such conditionality is located in Article V, Section 3 of the IMF charter, which directs the IMF to "adopt policies on the use of its general resources, . . . that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund." The "adequate safeguards" phrase appears also in Article I(v), which identifies as one of the IMF's purposes "[t]o give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards."

The conditionality practiced by the MDBs resembles that of the IMF, at least in some respects. It is important, however, to distinguish between the two main types of loans made by the MDBs. The bread-and-butter work for the MDBs has traditionally been to provide financial intermediation for specific development projects, usually for constructing some form of infrastructure or productive operation, such as roads, irrigation systems, rural health clinics, wastewater treatment systems, port facilities, power plants, schools, transmission lines, fertilizer plants, and other physical structures. The loans the MDBs provide for such projects are typically made on a reimbursement basis, so that funds are transferred from the lending MDB to the borrower only against expenditures as they are actually incurred by the borrower or implementing agency, rather than as balance-of-payments loans of the type

52. *Id*. at 25 (citing a 2000 IMF publication on governance and anti-corruption initiatives).

53. *Id*. at 72-73 (explaining the four principles reflected in the new guidelines: (1) the need to enhance the borrowing country's "ownership" of the policy reforms, (2) the need to reduce the number of conditions, (3) the need to tailor the policy programs, and hence the content of the conditionalities, more closely to the borrowing country's circumstances, and (4) the need to improve clarity in the specification of conditions).

provided by the IMF.[54]

However, the MDBs also make another type of loan: "policy-based" loans. In these cases, funds are provided by the MDBs to borrowing countries to support (and in return for) the adoption by those countries' governments of certain economic and financial policies that the MDBs consider appropriate and beneficial. For example, the guidelines on such policy-based lending as carried out by the ADB require that the lending will be based on a "broad-base sector reform and development plan that will enhance sector efficiency and performance, comprising in particular policy changes and institutional development."[55] Consistent with these guidelines, the ADB has made policy-based loans for numerous purposes—for example, financial sector reform in several of its member countries.[56]

In the first of these two types of MDB operations—project lending—the MDBs typically impose numerous conditions relating to the government's commitment of budgetary resources to support the project being financed, the need for environmental protection measures in project implementation, various reporting requirements, and so forth. In the second category—"policy-based" lending—the MDBs impose conditions that operate and sometimes even look like conditions in IMF financing arrangements: they call on the borrower to implement specified economic or financial policies favored by the MDBs in order for the disbursement of loan proceeds to continue.

Are these various forms of IFI conditionality legal, or do they violate the national sovereignty of the IFIs' member countries? In particular, does IFI conditionality violate the principle of self-determination? My answer to both of these questions, as I have explained more fully in another context,[57] is "no." I offer three reasons. First, states are under no legal obligation to accept the conditions of an IFI loan, for the simple reason that states are under no legal obligation to seek an IFI loan in the first place—or, indeed, to become a member of any IFI. Second, there is likewise no legal obligation on the MDBs to provide financing for whatever projects their member governments propose. International law contains no generally accepted "right to development assistance" under which a country is legally entitled to receive financial assistance from another country or from an international financial institution. A large number of initiatives have been taken by which massive transfers of financial resources have in fact been made by rich countries (and by the IFIs)

54. FUTURE OF THE GEOS, *supra* note 2, at 32.

55. Asian Development Bank, Operations Manual: Bank Policies—Program Lending, § D4 (as issued Apr. 16, 1997, renumbered as of October 2003), at ¶ 3, *available at* http://www.adb.org/Documents/Manuals/Operations/OMD04_29oct03.pdf (last visited Apr. 9, 2007).

56. FUTURE OF THE GEOS, *supra* note 2, at 33. One such financial sector reform program supported by a policy-based ADB loan was the one I worked on several times in the 1990s in Mongolia, whose government and central bank were urged by the ADB (and some other IFIs) to undertake sweeping reforms of the country's banking and central banking laws and regulations.

57. *Id.* at 136-38 (discussing in more detail the points summarized below).

to LDCs—the IDA itself is a prime example of this—but these are thus far only the result of special negotiation, not a general requirement of international law. Third, the principle of self-determination is, in my view, much weaker and sketchier than some commentators would suggest. If it amounts to anything more than just a slogan, it surely cannot mean that a government can adopt economic and financial policies that are proven failures (or, even more absurdly, that a government can be subsidized through "soft-loan" support in pursuing such policies)—especially if the government itself has not emerged from what has been referred to as "internal" self-determination involving free and meaningful elections.

E. Legal Integrity and Financial Integrity

The key question I have identified above on this topic is: "How does the legal integrity of IFIs—that is, their proper adherence to applicable legal rules and principles—bear on IFIs' financial integrity and strength?" I raise this legal question because my experience suggests to me that many persons, including even some IFI officials, do not appreciate the close relationship between legal integrity (that is, faithful adherence to written rules or the "rule of law") and the financial strength that the IFIs enjoy.

Let us examine this issue by considering the mechanisms by which the IFIs obtain the resources they use in making loans (and providing other services) to their member countries. In general, there are two such mechanisms. The first, used by all the MDBs in making their "hard" loans (that is, loans carrying market-based interest rates), is to borrow on public financial markets. In this respect they behave much like ordinary private sector businesses or financial intermediaries: the MDBs issue various types of debt instruments (mainly medium-term and longer term bonds) that investors purchase because of the attractive rates and low risk that they present; and the MDBs use the proceeds from those borrowings to make (hard) loans to borrowers in their member countries.

Second, all of the IFIs (that is, the MDBs and the IMF) rely on another mechanism for getting resources: soliciting contributions from member country governments. Such contributions provide the funds for "soft" or "concessional" loans. As noted above, such "soft" loans as offered by MDBs often carry no interest at all (or a tiny amount of interest) and have long maturities. The IMF also engages in "soft" lending through its Poverty Reduction and Growth Facility ("PRGF").[58]

Both of these two mechanisms for obtaining resources—borrowing on financial markets and securing contributions from member country governments—make the IFIs' adherence to written rules important. Take the first mechanism: the successful marketing of MDB debt securities on financial markets requires strong ratings from such rating agencies as Moody's or

58. For a summary of the PRGF, see *id*. at 24.

Standard & Poor's. In order to obtain such strong ratings for its debt instruments, an MDB needs to show financial integrity and prudence as evidenced by good policies and practices relating to borrowing limits, lending limitations, accounting standards, investment of funds, and so forth.[59] If an MDB were to act in breach of any of its stated financial policies—such as the ADB charter requirement that the ADB's total amount of its outstanding "loans, equity investments and guarantees . . . should not at any time exceed the total amount of its unimpaired subscribed capital, resources and surplus included in its ordinary capital resources"[60]—this could (and should) serve as a red flag to the rating agencies and trigger a drop in the ratings provided by those agencies; and this in turn would increase that MDB's borrowing costs because its securities would need to carry higher interest rates (or other more favorable terms) in order to attract purchasers of the securities.

A similar logic applies to the other mechanism for obtaining resources. In general, member governments will be reluctant to provide contributions for "soft" lending operations by the MDBs or by the IMF if those institutions appear to be playing fast and loose with their charter provisions or to give little attention to accepted rules and policies applicable to the organizations.

In sum, financial strength is influenced importantly by legal integrity. In order to best serve the intended beneficiaries of IFI operations, the IFIs themselves must consistently follow, and be seen to be following, the terms of pertinent charter provisions and pertinent policies adopted by the IFIs. What charter provisions and policies are "pertinent" for these purposes? I would suggest that practically all charter provisions and policies are "pertinent," because any ultra vires action—that is, any departure by an IFI from the written rules that govern it—could trigger concern on the part of rating agencies and member governments that the IFI is taking a relaxed attitude toward the rule of law. For example, if the IMF Executive Board were to impose on an IMF member country a sanction not provided for in Article XXVI of the IMF charter, or if the ADB Board of Directors were to declare that Article 11 of the ADB does in fact permit that organization to provide "stand-alone" guarantees— to use two illustrations offered above—rating agencies and member countries asked to contribute to "soft" loan resources might well question whether the IMF or the ADB can be trusted to adhere to other rules and procedures binding on them.

Let me emphasize how this point about "legal integrity and financial integrity" is related to the earlier discussion of "mission creep." As explained above in section II.A, I believe the IFIs have not engaged in "mission creep," at least as a legal matter, so far (unless we consider the recent rhetorical claims by IFIs that poverty reduction is a "purpose" despite the fact that no such

59. For examples of several such policies—specifically, lending criteria and limitations, borrowing limits, and investment guidelines—as practiced in the ADB, see Head, *Asian Development Bank*, *supra* note 2, at ¶ ¶105, 184, 189.

60. ADB Charter, art. 12.1.

purpose is in fact mentioned in any of the IFI charters[61]). It is vitally important, however, that the IFIs be alert to the dangers of "mission creep." The discussion in this section, showing how legal integrity bears on financial strength, underscores why IFIs must play by the rules—that is, that they carefully avoid taking action that is beyond the scope of their authority as set forth in their charters and other official policies. It is partly for this reason that I have proposed charter amendments that will formally modify the powers and responsibilities of the IFIs and thereby overcome any current concerns regarding "mission creep."[62]

F. Judicial Review of IFI Operations

All of the IFIs are self-contained in the sense that they do not report to or fall under the authority of any other entity, either national or international. Their governing boards have authority to interpret their charters, as noted above. This self-contained nature of the IFIs has led to the criticism that they are unaccountable because they are not subject to any outside judicial review.[63]

In recent years, however, several of the IFIs have taken initiatives to permit some form of review of their actions. In the case of the World Bank, for example, such review function is carried out by the World Bank Inspection Panel, established in September 1993. The World Bank Inspection Panel, comprising three individuals acting with substantial independence from the World Bank's management, has as its primary purpose "to address the concerns of people who might be affected by [World Bank] projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of such projects."[64]

Steps have also been taken in this same direction by other IFIs. For example, the ADB has had an Inspection Policy for over a decade,[65] and that policy has recently been reviewed and expanded[66]; the IADB has an

61. *See supra* text accompanying note 24.

62. *See supra* text accompanying note 43.

63. For further details in this regard, and related criticisms, see FUTURE OF THE GEOS, *supra* note 2, at 119.

64. THE WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON 3 (2003). Information about the World Bank Inspection Panel is also available at http://www.inspection.panel.org.

65. *See* ASIAN DEVELOPMENT BANK, ADB'S INSPECTION POLICY: A GUIDEBOOK (1996), *available at* http://www.adb.org/Documents/Guidelines/Inspection/default.asp.

66. In June 2002, the ADB began holding regional meetings to obtain input from NGOs, civil society, and private sector interests regarding the effectiveness and improvement of the ADB inspection mechanism. FUTURE OF THE GEOS, *supra* note 2, at 163 n.152. In May 2003, the ADB replaced its inspection mechanism with a new accountability mechanism, which consists of a consultation phase and a compliance review phase. *See* ASIAN DEVELOPMENT BANK, REVIEW OF THE INSPECTION FUNCTION: ESTABLISHMENT OF A NEW ADB ACCOUNTABILITY MECHANISM (2003), http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf.

Independent Inspection Mechanism[67]; and the AfDB now (as of recently) has an Independent Review Mechanism.[68] The corollary to these in the IMF is the Independent Evaluation Office ("IEO") established in July 2001 in order "to conduct objective and independent assessments of issues of relevance to the mandate of the IMF."[69] The structures vary, of course, among these various "inspection," "accountability," "review," and "evaluation" mechanisms.

In my view, the development in recent years of these various mechanisms is praiseworthy but inadequate. I would prefer to see more extensive and objective forms of "judicial review" in the IFI context—that is, review by a more independent, more judicial, and therefore more externally trustworthy system. In particular, for the World Bank and the other MDBs, I propose the establishment of an International Tribunal for Multilateral Development Banks. Such a Tribunal would amount to an expansion of the inspection panels that the MDBs have established in order to determine whether those institutions have acted consistently with the policies that they have announced. Such a tribunal would also have appellate jurisdiction over the governing boards of the MDBs in matters of charter interpretation. Judges for the tribunal could be selected mainly by the MDBs themselves. Providing for such judicial review would introduce some checks and balances of the sort that most national governmental structures have, by adding to the executive and legislative functions (carried out by the MDBs' management and governing boards, respectively) a judicial function responsible for checking the legality of the exercise of the other two functions. The International Tribunal for Multilateral Development Banks would accept complaints from individuals or groups alleging that an MDB had acted inconsistently with its own charter or its own announced policies and principles.

As for the IMF, I suggest a revision in the structure of the IEO to make it more genuinely independent of the IMF Executive Board. Such revisions might include (i) providing for appointment of one or more IEO panel members by some entity (or entities) other than the IMF Executive Board, (ii) providing procedures by which cases alleging IMF misconduct could be

67. In 1994, the IADB established the Independent Investigation Mechanism to investigate formal complaints on whether the IADB fails to follow its policies in the design, analysis, or implementation of IADB-financed operations. For more information on the IADB inspection mechanism, see http://www.iadb.org/aboutus/iii/independent_invest/independent_invest.cfm?language=english (last visited Apr. 9, 2007).

68. In June 2004, the AfDB established its Independent Review Mechanism (IRM) to ensure that the AfDB complies with its own policies and procedures. For public sector projects, the IRM reviews compliance with all AfDB operational policies and procedures. However, for private sector projects, the IRM reviews compliance only for social and environment policies. For more information on the AfDB IRM, see http://www.afdb.org/portal/page?_pageid=473,5848220 &_dad=portal&_schema=PORTAL (last visited Apr. 9, 2007). Professor Daniel Bradlow has been involved in assisting the AfDB in this regard. *See* Daniel Bradlow, *Study on an Inspection Function for the African Development Bank Group* (Nov. 2003, on file with author).

69. INTERNATIONAL MONETARY FUND, ANNUAL REPORT 2003 60 (2003), *available at* http://www.imf.org/external/pubs/ft/ar/2003/eng/index.htm.

brought more directly before the IEO without review of the IEO's work program by the IMF Executive Board, (iii) creating a position of "ombudsman" to assist with the process, (iv) providing for open hearings, and (v) requiring that the IMF's management or Executive Board issue a public response to IEO recommendations.[70]

G. IFIs and the Progressive Development of International Law

Another key question that I identified above is this: What role, if any, should IFIs play in the progressive development of international law—by promoting, for example, new rules on accountability, transparency, good governance, or special treatment for less developed countries?

I use the term "progressive development of international law" in the sense in which that term is used in Article 13(1)(a) of the United Nations Charter, which authorizes the U.N. General Assembly to make recommendations for the purpose of "encouraging the progressive development of international law." The same term is used in Article 15 of the Statute of the International Law Commission, which identifies the "progressive development of international law" as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states."[71]

Should the IFIs be involved in any activities of this sort? In my view, the answer is "yes." To some extent, of course, the IFIs are already involved through the promotion of rules and standards on a variety of subjects, including corporate governance, money laundering, environmental protection, accounting standards, and treatment of foreign direct investment.[72] There

70. For further details regarding some of these proposals, see FUTURE OF THE GEOS, *supra* note 2, at 98. As indicated there, some of these proposals draw on the work of other observers. *See, e.g.*, Carol Welch, *The IMF and Good Governance*, *in* 3 INTERHEMIPSHERIC RESOURCE CENTER & THE INSTITUTE FOR POLICY STUDIES, Foreign Policy in Focus *3* (Tom Barry & Martha Honey eds.,1998), *available at* http://www.hartford-hwp.com/archives/25/054.html; *see also* Bradlow-II, *supra* note 48, at 158.

71. Statute of the International Law Commission, U.N. Doc. A/ CN.4/4/Rev.1 (1962), *at* http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf (last visited Apr. 9, 2007).

72. For some examples of how the World Bank or other MDBs promote rules and standards in these areas, *see, e.g.*, The World Bank News & Broadcast, *World Bank Releases Largest Available Governance Data Source*, Press Release No. 2009/63/WBI, Sept. 15, 2006, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21050333~menuPK:34465~pagePK:34370~piPK:34424~theSitePK:4607,00.html (World Bank initiatives on public governance standards); The World Bank News & Broadcast, *World Bank Continues Leadership In Fight Against Corruption, Report Shows*, Press Release No. 2007/213/INT, Feb. 6, 2007, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21205078~menuPK:34465~pagePK:34370~piPK:34424~theSitePK:4607,00.html (World Bank initiatives against fraud and corruption); The World Bank News & Broadcast, *World Bank Advances on Governance and Anti-Corruption Work Plan*, Press Release No. 2007/138/WB, Nov. 10, 2006, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21124299~menuPK:34465~pagePK:34370~piPK:34424~theSitePK:4607,00.html (World Bank initiatives on governance and anti-corruption standards); The World Bank News & Broadcast, *European Investment Bank and*

would seem to be little question that such activities fit easily within the purposes of the IFIs as prescribed in their charters,[73] even taking into account the "political prohibition" provision that appears in most of the IFI charters.[74] The more important issue is whether it is appropriate as a policy matter for the IFIs to participate actively in the "progressive development of international law."

I believe it is appropriate. We find ourselves in an age in which economic law and policy have taken center stage, and the IFIs provide the institutional leverage needed to bring about more effective regulation and coordination of that economic law and policy at the global level. Given the obvious and increasing need for rules that facilitate the effective management of economic issues at the national level (where more economic regulation will continue to take place for the foreseeable future), and given the influence that IFIs can exert through their lending operations, it strikes me as altogether fitting that the IFIs take a lead role in the progressive development of international law, at least in areas that relate to economic management and regulation.

I have argued elsewhere in favor of expanding the IFIs'authority[75] in

World Bank Join Forces to Tackle Climate Change, Press Release No. 2007/280/SDN, Mar. 20, 2007, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21264121~menuPK:34465~pagePK:34370~piPK:34424~theSitePK:4607,00.html (European Investment Bank and World Bank initiatives to finance environmental protection); The World Bank News & Broadcast, *MDBs, Business and Governments: Financing Clean Energy*, Press Release No. 2007/270/SDN, Mar. 13, 2007, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21256600~menuPK:34465~pagePK:34370~piPK:34424~theSitePK:4607,00.html (MDBs' initiatives to finance environmental protection). One of my close friends, Herbert Morais, has written widely on the role of IFIs in establishing and applying standards. One of his articles on this topic was presented at a symposium here at Kansas University several years ago. *See* Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KAN. L. REV. 779 (2002). For some of his work on IFIs and human rights, *see generally* Morais, *supra* note 2.

73. For example, Article I(iii) of the IBRD charter states as one of the IBRD's purposes "[t]o promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments." Likewise, Article 1, § 1 of the IADB charter provides that that institution's purpose "shall be to contribute to the acceleration of the process of economic and social development of the regional developing member countries [of the IADB]." The IMF charter provisions on that organizations purposes, found in Article 1 of that charter, are similarly broad, using such phrases as "[t]o promote international monetary cooperation" and "[t]o facilitate the expansion and balanced growth of international trade."

74. The "political prohibition" provision in the IBRD charter appears in Article IV, § 10: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions . . . ." Similar provisions appear in the IDA charter at Article V, § 6; the IADB charter at Article VIII, § 5(f); the AfDB charter at Article V, § 38(2); and the ADB charter at Article 36.2. A similar but narrower provision appears in Article IV, § 3(b) of the IMF charter, which states that in its surveillance activities the IMF should "respect the domestic social and political policies of its members."

75. *See* FUTURE OF THE GEOS, *supra* note 2, at 155-66 (suggesting reforms to the MDBs' operations under which those institutions would insist on the adoption of certain rules and principles by their member countries); *see also id.* at 96-108 (suggesting reforms to the IMF's operations under which that institution would insist on the adherence by all countries to certain

order to take advantage of the strength those institutions have. Such expansion of authority would require amendments to the IFIs' charters that would both (i) vest new powers in them and (ii) impose more safeguards and checks on their operations. One consequence of these changes should be that the IFIs' influence would extend not just to borrowing member countries but also to those member countries that do not borrow from the IFIs and that thus have heretofore been, as a practical matter, largely exempt from the influence that the IFIs exert through conditionality.[76] For example, I have proposed amendments to the IFI charters that would link some portion of each member country's voting power to its economic and financial policies and performance,[77] and that would make a country's continuing membership in the IFIs conditional on that country's acceptance of various treaties and guidelines on a range of other issues, including human rights and environmental protection.[78]

In all these ways, the IFIs could contribute to the "progressive development of international law." The reforms necessary to authorize the IFIs to undertake some of these activities would raise troubling issues for some observers, and indeed I see many such reforms as impossible in today's political climate, particularly in the United States. I believe, however, that the day will come fairly soon when circumstances in the world economic and political climate will make dramatic changes both necessary (even in the eyes of currently skeptical observers) and feasible. I would prefer that we have considered in advance what those changes should be.

H. The Status and Roles of Lawyers in IFIs

My list of key topics relating to the role of law in IFIs comes to a close with some observations regarding the lawyers and legal departments that serve those institutions. This is a topic that will resonate loudly with several of the participants in our symposium, because they bring to our proceedings many decades of aggregate experience as practicing lawyers serving as legal counsel to IFIs: Ross Leckow is currently the Deputy General Counsel at the IMF; John Taylor was General Counsel of the EBRD; John Boyd combines many years of experience in the ADB Office of General Counsel with many years of experience in other offices of that institution; and two others of our participants also have some experience practicing law within the IFIs.

Beyond doubt, IFI lawyers have played valuable roles in the establishment and operation of these institutions. In my view, the future of the

minimal standards in several areas, including quality of governance).

76. For a description of this "symmetry in obligations" problem, under which borrowing member countries are subject, through conditionality, to requirements that the non-borrowing member countries can largely ignore, *see id*. at 67-68 (IMF) and 120-21 (MDBs).

77. *See id.* at 100-01 (in the context of the IMF) and 161-62 (in the context of the MDBs).

78. *See id.* at 105-07 (in the context of the IMF) and 158, 164-66 (in the context of the MDBs).

IFIs will turn in important measure on the independence, integrity, and ingenuity of such lawyers in coming years.

1. Watchdogs or Lapdogs?

I surmise that we would get a wide range of answers if we were to pose this general question to top executives in various IFIs: "What is the proper role and status of lawyers within this institution?" The status of lawyers varies in numerous ways among legal systems and cultures. For example, a Japanese view would likely differ from an American or European view. From my experience at the ADB—which has strong Japanese influence for several reasons (including the tradition by which all ADB presidents have been Japanese nationals)—I have concluded that the Japanese view typically sees lawyers as facilitators whose main function (shared with other officials, of course) is to assist the executive in accomplishing the executive's goals. While this function is by no means foreign to an American lawyer, the typical American lawyer would regard his or her role to be larger than that, encompassing a "watchdog" (or "guardian") function reflecting loyalty not predominantly to the executive but to the entity as a whole—whether that entity is a private company or a public institution. For that reason, I believe the typical American lawyer would be most comfortable reporting to the highest level of authority within the entity and less comfortable reporting to a non-legal intermediary (for example, a vice president or a director of administration), who might filter the lawyer's views or balance them against other factors in a way that the American lawyer would find entirely inappropriate.

In my view, several of the IFIs have organizational structures that do not adequately value and validate the role of lawyers in the institutions' operations. In the ADB, for example, the General Counsel reports not to the President or to the Board of Directors but instead to one of the four Vice-Presidents, as do six other officials (budget director, secretary, treasurer, etc.).[79] Likewise, the IADB structure places the General Counsel relatively far down in status, reporting to a Vice-President rather than to more highly-placed officials—Executive Vice President, President, and Board of Executive Directors.[80] In the World Bank, the General Counsel has a higher organizational status, serving also as a Senior Vice President.[81]

I acknowledge the fact that I reflect my own biases in recommending that the American approach (as I have summarized it above) be followed in all the

79. For information on the ADB organizational structure, *see* http://www.adb.org/About/ ADB_Organization_Chart.pdf.

80. For information on the IADB organizational structure, *see* http://www.iadb.org/ aboutus/iv /organizational.cfm?language=english.

81. For information on the World Bank's organizational structure, *see* http://site resources. worldbank.org/EXTABOUTUS/Resources/bank.pdf. For information on the organizational structure in the IMF (showing the Legal Department reporting directly to the Managing Director and Deputy Managing Directors), *see* http://www.imf.org/external/np/ obp/orgcht.htm.

IFIs, so that IFI lawyers be regarded as watchdogs and not as lapdogs.[82] However, my bias comes not so much from the fact that my own legal training comes from England and the United States as from the answer I suggested at the beginning of this article to the question, "What's Law Got to Do With It?" I believe law—and in particular a constant and evident faithfulness to the rule of law—has a great deal to do with the future and success of the IFIs.

2. Transparency and IFI Legal Opinions

In the context of the IFIs, "transparency" involves making available to the public a very broad range of information about what the IFIs have done, are doing, and propose to do. I have outlined elsewhere the various elements of transparency that I believe IFI operations in general should involve.[83] In what specific ways, though, does the move toward greater transparency bear on the work of IFI lawyers? I shall suggest one here.

In my view, all legal opinions issued by the General Counsel (or an IFI lawyer serving temporarily in the place of the General Counsel) to a governing board of the IFI should be accessible electronically to the public. Beginning in the early 1990s, the World Bank general counsel, Ibrahim Shihata, began making publicly available the content of many legal opinions he had issued—not in their original form but in the three-volume set of books I referred to earlier in this article. Those books, under the general title of The World Bank in a Changing World, set forth numerous legal views and explanations drawn in part from internally-generated legal opinions.[84] In keeping with the dramatic moves taken recently toward greater transparency in all the IFIs, it should not be necessary to have some special "external" (and perhaps sanitized) publication of such legal opinions. Instead, given the significance of the IFIs to the world's economic management, such official views by an IFI's head lawyer on the legal aspects of the IFIs' operations should, in my view, automatically be made public upon issuance.

I would go even further in this respect, to suggest that all the charter-based legal opinions prepared within the legal departments of IFI should be made public. In 2001 I prepared for the ADB two books—they are titled Guide to the ADB Charter and Annotated Guide to the ADB Charter—to provide a legal history (in both an abbreviated version and a comprehensive version) of the ADB as it evolved through the written interpretation and

82. According to Wikipedia (whose authenticity is probably adequate for this purpose), the word "lapdog" can refer not only to a dog small enough to sit conveniently on a person's lap but also to "a person who is very easily controlled, such as a 'yes' man."

83. *See* FUTURE OF THE GEOS, *supra* note 2, at 156 (referring to the MDBs, and focusing on such things as making accessible to the public the records of discussions and decisions at meetings of governing boards); *id*. at 97 (referring to the IMF, and focusing on such things as establishing and publishing an Operations Manual and formal statements regarding the IMF's mandate and its respect for domestic social and political policies of member countries).

84. *See* SHIHATA, *supra* note 13, at vol. 1, p. 53 (explaining that the contents of the book's chapter on "governance" issues was drawn from a legal memorandum by the author as World Bank general counsel).

application of the provisions of the ADB charter by lawyers in the ADB's Office of General Counsel. Such lawyers are public servants; they are part of the international civil service. Therefore, in my view, their official functions should be open to some extent to public scrutiny. Publishing their legal opinions—not every memorandum they write, but just that small proportion of their memoranda that offer considered opinions on the application of the fundamental constituent document(s) of the institution—would reflect their status as international civil servants. It would also serve an educative purpose by informing an interested public how the terms of public documents (IFI charters) are to be construed and used. So far, however, the two books I mentioned above, explaining and detailing the ADB charter, have not been made public.

3. Building Legal Capacity

I began this section by asserting that "the future of the IFIs will turn in important measure on the independence, integrity, and ingenuity of [IFI] lawyers in coming years." I wish to turn to the third of these aspects: ingenuity. One of my long-term colleagues in the area of international economic law and development is John Boyd. He is also one of the participants in this symposium. One of Mr. Boyd's observations in surveying the many profound needs of the developing world is that one of the most important tasks of development is *legal* development. Many countries face the rigors of globalization with dismally weak legal systems, whether gauged in terms of the quality of legal education, the honoring of legal rights, the enforcement of legal judgments, the expertise of legal personnel (advocates, notaries, judges, legislators), the dissemination of legal rules and information, or the general acceptance of the rule of law in government and society. These weaknesses stand squarely in the way of durable progress toward economic improvement.

How, and by whom, can these legal deficiencies be addressed and overcome? Only, I believe, through dramatically increased funding for projects aimed directly at building legal capacity in those countries where the legal deficiencies are deepest; and only by persons who themselves are lawyers with an appreciation for the critical role that a modern and stable legal system, reflective of the traditions of a society, can play in facilitating economic development in that society. Without going into detail here, I would propose that lawyers in IFI are best positioned to help design and manage those legal-capacity-building projects. Such lawyers already have, by virtue of the environment in which they work and the cross-cultural legal training that this environment has given them, a deep reservoir of expertise and experience from which to draw. The other main ingredient they will need is ingenuity, in order to see how best to persuade their IFI colleagues and managers of the value of legal capacity-building projects. Considerable work in this area has already been done.[85] More is needed.

85. For some examples drawn from the ADB, *see* information appearing at

III. CONCLUDING OBSERVATIONS

Earlier in this article I focused briefly on multilateralism. In particular, I said that I see it as altogether plausible that new efforts at multilateral solutions, similar to the efforts made immediately following World War II, might be sought in the coming years; and on that basis I suggested that a public discourse over legal aspects of the IFIs and their operations is timely and important.[86]

In concluding this article, I wish to return briefly to the topic of multilateralism, and to sound a cautionary note. Despite my view that we might see new efforts at multilateral solutions-and that we should prepare ourselves for them by discussing how to improve the IFIs-I do not consider it a sure thing that multilateralism will in fact be the path ultimately taken for dealing with increasing global tensions. Indeed, I see in some of the occurrences of recent years a growing ideological conflict over how such global tensions should be handled. Multilateralism is under attack. This ideological conflict has many dimensions, but the dimension that concerns me the most, and that bears most directly on the IFIs as well as the WTO, relates to global economic development. As I have characterized it elsewhere,[87] I fear that a Global Development War has now erupted, a war whose outcome will have wide implications—especially institutional, environmental, and economic implications—for our world.

What do I mean by referring to a "Global Development War"? To put it in its starkest form, it may be seen as a war over the developmental ideology that is to be adopted and followed in the coming years, and particularly whether to accept or reject an ideology of liberal, intelligent, participatory, multilateral, and sustainable human development.

I shall not try here to explain precisely what I mean by that high-sounding phrase—"an ideology of liberal, intelligent, participatory, multilateral, and sustainable human development." Suffice it to say that such an ideology was at work in the establishment of the global economic organizations over the years starting in the 1940s, as well as in many of the initiatives taken in recent years to update and reform those institutions in hopes of keeping pace with changing economic and political conditions in the world. As should be clear from several of my comments in this article, I believe those initiatives for update and reform have been too few and too modest in several important

http://www.adb.org/Documents/TARs/VAN/R65-01.pdf (referring to technical assistance dating from 2000 for legal capacity building in Vanuatu); http://www.adb.org/Documents/TACRs/VIE/34055-VIE-TACR.pdf (referring to a legal-capacity-building technical assistance project in Vietnam that was completed in January 2006); http://www.adb.org/Governance/gov_ publications .asp#legal_justice (referring to the ADB's legal reform efforts more generally).

86. *See supra* note 16 and accompanying text (especially two paragraphs before and two paragraphs after that note).

87. *See generally* JOHN W. HEAD, LOSING THE GLOBAL DEVELOPMENT WAR: A CONTEMPORARY CRITIQUE OF THE IMF, THE WORLD BANK, AND THE WTO (forthcoming 2008).

respects; and yet I see considerable promise in the IFIs (as well as in the WTO) if further efforts are made.

No such efforts will be made, however, if the underlying ideological support for the global economic organizations, and the goals they seek to achieve, crumbles. I see signs of such a crumbling, and this is what makes me concerned that we—that is, the world's societies collectively, and especially those of us in the rich, "developed" world—might currently be losing that Global Development War.

Let me sketch out how this might be happening. There are three ways. First, we seem in some respects to be failing to expand and improve on the multilateralism of the past. Just as a bicycle rider will typically wobble and then fall over unless the bicycle is moving forward at some reasonable speed, so the process of multilateralism must be moving forward at some reasonable pace in order to stay on track. Recent developments reveal that instead of moving forward briskly with the process of multilateralism—for example, by expanding and improving on the Uruguay Round trade liberalization exercise with far-reaching initiatives—we are permitting a serious slowdown in the pace of multilateralization, as reflected recently in the breakdown of the Doha Round of trade negotiations.

A second way in which I fear we might be losing the Global Development War is closely related to the first. In some respects there is an actual unraveling of the multilateralism that emerged after World War II. That is, in certain ways the bicycle rider seems to have stopped pedaling entirely, dismounted from the bicycle, and started walking backwards. Why? Because of doubts both about her destination (which direction she is going) and about the bicycle as a means of transport (that is, about how she is getting there). A great crescendo of criticism has cast doubt on the global economic organizations, claiming not only (i) that the ideological foundation on which they rest (like the bicycle's destination) is misconceived but also (ii) that deep institutional failings require that those global economic organizations be abandoned (shut down), at least in their present form, on grounds that they are unworkable vehicles for getting to any desired destination.

What is wrong with this picture? What is wrong is that many of the criticisms of the global economic organizations are simply off-base because they rely on outdated information or fundamental misunderstandings of what those organizations are, why they were created, how they are structured, and how they operate. Like Gresham's Law, under which bad money runs out the good,[88] the invalid criticisms threaten to run out the very legitimate ones. In

88. Gresham's Law, named after Sir Thomas Gresham (1519-1579), is stated simply as "bad money drives good money out of circulation." Despite its attribution to Gresham, the "law" actually has earlier origins, as both ancient and medieval references were made to the tendency of lightened, debased, or worn coins to have assigned to them the same official value as coins containing greater quantities of precious metal. This tendency would lead to "bad" coins (those possessing a relatively low precious-metal content) being offered in routine payments, while "good" coins were withdrawn into hoards, exported, or reduced through clipping or "sweating" to

other words, one way in which we are losing the Global Development War is by allowing invalid assertions—some of which I have discussed briefly in earlier portions of this article—to influence our policy-makers (and ourselves) in determining whether, and how, to stick with the multilateral approaches established sixty years ago to manage international economic relations.

A third way in which I fear we might be losing the Global Development War comes as a direct consequence of the two trends I have identified above. Because there is a slowdown in the process of multilateralization, and even a reversal in some respects, ideological and institutional alternatives are starting to gain influence. Just as nature abhors a vacuum, likewise any drop in commitment to improving and expanding upon the multilateral ideology and institutions that were so strong following World War II will naturally attract competitors. One such competitor is the sort of bilateral assistance that China has started to engage in recently, lending money to governments in Africa and elsewhere on terms that are devoid of such conditions as economic policy reform, participatory project design, good governance, or other issues that the World Bank in particular has increasingly paid attention to in recent years.[89]

Why does any of this matter? My view in a nutshell is this: The ideological and institutional developments I have identified above—our failure to move forward briskly with an improved and expanded multilateral approach in the context of the global economic organizations, plus the supplanting of that approach with an inferior one—all lead toward the largest problem of all: we are losing ground in the effort to meet the great challenge of our time. That challenge, on which our collective future depends, is to bridge the dangerous and desperate gap in living conditions of human beings around the world.

I close by directing my thanks again to the *Journal* for sponsoring this Symposium, and to my fellow participants for making it a success. We have, I think, made a useful contribution to a much-needed thoughtful public discourse over the role and future of the IFIs.

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an intrinsic value no greater than that possessed by their "bad" counterparts. For further information, see http://eh.net/encyclopedia/article/selgin.gresham.law.

89. Several reports during 2007 drew attention to China's expanding practice of bilateral assistance. *See, e.g.*, *Can We Help You? How China is Wooing a Poor Neighbour*, ECONOMIST, Mar. 29, 2007, at 14 (reporting on an April 2006 announcement by China's prime minister that China would provide Cambodia with US$600 million, equivalent to almost the entire international aid budget for that country, for roads, dams, and other projects, all apparently with no strings attached); *see also* Moisés Naím, *Help Not Wanted*, N.Y. TIMES, Feb. 15, 2007, p. A10 (reporting on China's offer to rebuild Nigeria's entire rail network, a project amounting to about US$9 billion, with "no bids, no conditions and no need to reform"); *see also* William Wallis, *China's Pledge of $20bn for Africa Will Eclipse Other Donors*, FIN. TIMES, May 18, 2007, at 1 (noting that making such loans without conditions will provide no particular incentive to make policy changes to help assure the ability of the borrower to meet its repayment obligations). Other observers emphasize another potential danger to such loans: some of them represent "tied aid" of the sort referred to earlier, under which the funds can be used only for purchase of Chinese goods and services. *See, e.g.*, Jamil Anderlini, *China Ties $5bn Aid to Africa*, FIN. TIMES, June 26, 2007, at 1.