

## The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement

John D. Ciorciari

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# The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement

John D. Ciorciari\*

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## Introduction

The legal capacity of the World Bank<sup>1</sup> to consider an applicant's

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\* J.D., Harvard Law School, 1998; A.B., Harvard College, 1995. This article was written while the author was an Associate at the law firm of Davis Polk & Wardwell. The author would like to thank Patricia Armstrong, the Lawyers Committee for Human Rights, and Davis Polk & Wardwell for their support in this endeavor. The views expressed herein are solely those of the author.

1. See THE WORLD BANK, ANNUAL REPORT 1997 x (1997). The "World Bank" consists of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). See *id.* For a helpful synopsis of the dis-  
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human rights record when making its credit decisions has long been the subject of vehement debate in the international community.<sup>2</sup> As a preeminent creditor to developing nations,<sup>3</sup> the World Bank is in a position to exercise considerable leverage over countries.<sup>4</sup> In fiscal year 1999 alone, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) collectively extended capital commitments amounting to US\$29 billion,<sup>5</sup> the overwhelming majority of which went to developing states.<sup>6</sup> Many of those borrowing states have been accused of serious human rights violations in recent years.<sup>7</sup> It is

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tinct roles played by the IBRD and the IDA in the World Bank's affairs, see Mark E. Wadrzyk, *Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?*, 17 WIS. INT'L L.J. 553, 556-57 (1999). In this article, the World Bank is alternatively referred to as the "Bank." "Credit decisions" refer to decisions made by the World Bank to approve or deny an IBRD loan or IDA credit to a potential borrower.

2. See generally Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. INT'L & COMP. L. 173 (1997). Moris provides an overview and discussion of numerous arguments made for and against World Bank involvement in the human rights arena.

The World Bank's involvement in the human rights arena has received substantial attention in the academic literature. Although a number of more recent publications are cited herein, two of the most valuable analyses of the legality of human rights considerations under the IBRD and IDA Articles of Agreement were written approximately two decades ago. See generally Victoria E. Marmorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 J. INT'L L. & ECON. 113 (1978); Robert W. Kneller, *Human Rights, Politics, and the Multilateral Development Banks*, 6 YALE STUD. IN WORLD PUB. ORD. 361 (1980).

3. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS* 61 (2d ed. 1995). The World Bank is the single largest creditor to many of the world's less developed nations. See *id.* Also it is the largest aggregate financial provider for international development, devoting the bulk of its vast resources to that endeavor. See Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 162-63 (1993).

4. See, e.g., Anne Orford, *Locating the International: Military and Monetary Intervention After the Cold War*, 38 HARV. INT'L L.J. 443, 464-71 (1997); John D. Ciorciari, *A Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations*, 22 FORDHAM INT'L L.J. 292, 340-45 (1998) (describing and critiquing the use of conditionality programs to address a wide range of economic, administrative, and arguably social policies).

5. See THE WORLD BANK, ANNUAL REPORT 1999 i (2000). That figure was a slight increase over 1998, when the IBRD and IDA extended \$21.0 billion and \$7.5 billion in capital commitments, respectively. See *id.*; THE WORLD BANK, ANNUAL REPORT 1998 88 (1999) [hereinafter WORLD BANK 1998 REPORT].

6. See generally WORLD BANK 1998 REPORT, *supra* note 5 (providing a full description of the World Bank's recent loans and credits, including a breakdown of commitments by country recipient). With the approval of the Republic of Palau in 1998, the IBRD's membership rose to 181, while the IDA had 160 members as of the same date. See *id.* at 9.

7. See, e.g., Marmorstein, *supra* note 2, at 116. For many years, the World Bank has provided development assistance to nations whose governments have been accused of grave human rights violations. See *id.* Marmorstein noted that, as early as 1977, IBRD loans and IDA credits were extended to at least 16 "generally recognized human rights violators." *Id.*, Table I, at 116.

The Lawyers Committee for Human Rights has also asserted that "[t]he list of countries receiving World Bank loans and/or credits in which the governments consistently and systematically violate fundamental human rights is not short." LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 37; see also Jerome I. Levinson, *Repressive Regimes*

therefore clear that the World Bank's consideration of its borrowers' human rights records when making credit decisions could profoundly affect the Bank's relationship with nations throughout the developing world.<sup>8</sup>

Since the dismantling of the Iron Curtain, the Bretton Woods institutions,<sup>9</sup> collectively the IBRD and the International Monetary Fund (IMF), like other organs of the United Nations system, have realized enhanced freedom of action, no longer encumbered by the bipolar geopolitical framework of the Cold War.<sup>10</sup> That increased freedom has enabled international financial institutions, led by the World Bank, to promote the principles of liberal democracy and free-market economics more vigorously than was previously possible.<sup>11</sup> Cognizant of this change in geopolitical climate, many scholars and international organizations have called upon the World Bank to take a more proactive role in the human rights arena.<sup>12</sup>

Several such proponents have cited the European Bank for Reconstruction and Development (EBRD) as an appropriate model for multilateral

*Shouldn't Get a Loan*, WASH. POST, June 15, 1998, at A23 ("[T]he World Bank and IMF have continued to provide financing to countries that engage in egregious abuses of human rights . . .").

The World Bank's willingness to lend money to nations with poor human rights records has brought the Bank under intense criticism, which has increased in recent years. For an overview of the criticisms leveled at the Bank for its loans to oppressive regimes, see generally Nicole Wendt, *50th Anniversary of the World Bank and the IMF Prompts Criticisms*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 149 (1999).

8. See Moris, *supra* note 2, at 184-97; Cahn, *supra* note 3, at 164. Proponents of active World Bank intervention in the human rights arena and objectors to such involvement agree that the Bank's financial clout places it in a position to exert tremendous influence. See *id.*

9. See Dominique Carreau, *Why Not Merge the International Monetary Fund (IMF) with the International Bank for Reconstruction and Development (World Bank)?*, 62 FORDHAM L. REV. 1989, 1989 (1994). The Bretton Woods institutions were products of the United Nations International Monetary and Financial Conference, held in Bretton Woods, New Hampshire in 1944 [hereinafter the Bretton Woods Conference or Conference]. Both the IBRD and IMF are specialized agencies of the United Nations. For a more extensive description of the World Bank and IMF and how they differ, see generally *id.*

10. See Orford, *supra* note 4, at 443; John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 KAN. L. REV. 605, 638 (1994); John Linarelli, *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 U. PA. J. INT'L BUS. L. 373, 375 (1995).

11. See Orford, *supra* note 4, at 460, 464; John Stremlau & Francisco Sagasti, *Preventing Deadly Conflict: Does the World Bank Have a Role?*, Report for the Carnegie Commission on Preventing Deadly Conflict 8-9 (1998), available at <<http://www.ccpdc.org/pubs/worldbank/world.html>>.

12. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 61-62; House of Commons Canada, *From Bretton Woods to Halifax and Beyond: Towards a 21st Summit for the 21st Century Challenge*, Report of the House of Commons Standing Committee on Foreign Affairs and International Trade on the Issues of International Financial Institutions Reforms for the Agenda of the June 1995 G-7 Halifax Summit, available at <<http://www.library.utoronto.ca/g7/governmental/hc25/>> [hereinafter House of Commons Canada report]. Numerous other advocates of increased World Bank consideration of human rights records are cited in Moris, *supra* note 2.

development banks in the post-Cold War era.<sup>13</sup> The EBRD, created in 1990,<sup>14</sup> has a specific political mandate to champion multiparty democracy, respect for human rights, and free-market economic principles.<sup>15</sup> Some have proposed that the charters of the IBRD<sup>16</sup> and IDA<sup>17</sup> be amended to include a similar mandate.<sup>18</sup> However, in view of the high procedural barriers to amendment,<sup>19</sup> most who support the Bank's consideration of borrowers' human rights records in making credit decisions simply have advocated a broader interpretation of the Bank's powers under its

13. See, e.g., Günther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 A.J.I.L. 642, 645-46 (1998); Linarelli, *supra* note 10, at 440.

14. See Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, 29 INT'L LEGAL MATERIALS 1077, available at <<http://www.austlii.edu.au/au/other/dfat/treaties/1991/15.html>> (entered into force Mar. 28, 1991) [hereinafter Agreement Establishing the EBRD]; see also IBRAHIM F.I. SHIHATA, *THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT: A COMPARATIVE ANALYSIS OF THE CONSTITUENT AGREEMENT 1* (1990); EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, 1994 ANNUAL REPORT (1995).

15. See Agreement Establishing the EBRD, *supra* note 14, at 1083 ("The contracting parties . . . [are] [c]ommitted to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics."). For a broader discussion of the differences between the EBRD and the IBRD, see SHIHATA, *supra* note 14, at 40-49.

16. See Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, as amended Feb. 19, 1989, available at <<http://www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm>> [hereinafter IBRD Articles of Agreement or IBRD Charter] (stating that the IBRD Articles of Agreement constitute its governing organizational charter).

17. See Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249, available at <<http://www.worldbank.org/ida/idaart.htm>> [hereinafter IDA Articles of Agreement or IDA Charter] (stating that the IDA, like the IBRD, is governed by its Articles of Agreement).

The IDA Articles of Agreement conform closely to the IBRD Articles of Agreement for purposes of the present discussion. Therefore, this article will focus primarily on the IBRD Articles of Agreement. See *infra* note 45.

18. See, e.g., Josephine Verspaget, *Report on the Activities of the Bretton Woods Institutions (World Bank and International Monetary Fund)*, Eur. Parl. Ass., Doc. No. 7256, at 2; House of Commons Canada report, *supra* note 12; Jerome Levinson, *Multilateral Financing Institutions: What Form of Accountability?*, 8 AM. U. J. INT'L L. & POL'Y 47, 59 (1992).

19. See IBRD Articles of Agreement, *supra* note 16, art. VIII, § (a). The practical obstacles to amending the IBRD or IDA Articles of Agreement are formidable. With limited exceptions inapplicable to the present discussion, the process for amendment of the IBRD Charter is as follows:

Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendments, the Bank shall certify the fact by formal communication addressed to [all] members.

*Id.* The IDA Articles of Agreement include a similar provision for amendment. See IDA Articles of Agreement, *supra* note 17, art. IX. The requirements that 60% of the Bank's members and 85% of its voting power approve an amendment make any liberalization of the Bank's political mandate highly unlikely because a majority of the Bank's member nations are developing countries apt to oppose any such amendment.

existing Articles of Agreement.<sup>20</sup>

Exhortations that the World Bank weigh its applicants' human rights records in making credit decisions have met with myriad arguments to the contrary.<sup>21</sup> Critics of World Bank intervention in the human rights arena have rejected the EBRD analogy and contend that the Bretton Woods institutions already overstep their proper bounds in dictating legal and political policies to less developed nations.<sup>22</sup> Emerging countries themselves are among the most outspoken objectors to a more aggressive IBRD human rights agenda,<sup>23</sup> holding that human rights criteria in the Bank's lending practice would merely serve as another lever for neocolonial influence via the organs of international finance.<sup>24</sup> Consequently, developing nations have generally advocated a narrow interpretation of the Bank's powers under the IBRD and IDA Articles of Agreement.<sup>25</sup>

#### A. The World Bank's Position

The World Bank has never issued a publicly-available policy statement regarding its power to apply human rights criteria to potential borrowers.<sup>26</sup> Nevertheless, throughout its history, the World Bank has maintained a position that limits its ability to consider a nation's human rights record in making its credit decisions.<sup>27</sup> The Bank's position has been premised

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20. See Daniel Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411, 431 (1995). Bradlow and Grossman have recommended that the Bank reinterpret the IBRD and IDA Articles of Agreement, arguing that "while the [political activity] prohibition has a continuing validity in excluding undue influences, it should not prevent the IFIs and the multilateral development banks from incorporating all matters governed by international law, such as human rights and the environment, into their operations." *Id.*, see also Moris, *supra* note 2, at 192-95; Stremlau & Sagasti, *supra* note 11, ch. 3, ¶ 20; Handl, *supra* note 13, at 647-48.

21. See Moris, *supra* note 2, at 182-92. Moris provides a good synopsis of the arguments levied against IBRD consideration of human rights in credit decisions. The arguments principally focus upon the intrusion into national sovereignty and alleged ineffectiveness of World Bank human rights practices. See *id.* For an insightful critique of Bank practice in the human rights sphere, see also Cahn, *supra* note 3.

22. See Ciorciari, *supra* note 4, at 342-45; Orford, *supra* note 4, at 464-70.

23. See Moris, *supra* note 2, at 183.

24. See *id.* at 184-88. Cahn and Orford also offer arguments supporting this conclusion and challenging the notion that international institutions should actively advance Western democracy and human rights in emerging markets. See generally Cahn, *supra* note 3; Orford, *supra* note 4.

25. See Moris, *supra* note 2, at 182-83.

26. See Daniel D. Bradlow, *Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System*, 6 TRANSNAT'L & CONTEMPORARY PROBS. 47, 51 (1996).

27. See generally Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel*, July 12, 1995 [hereinafter Shihata, 1995 Memorandum]. This memorandum, addressed to the Bank's Executive Directors, sets forth the most authoritative and complete statement of the Bank's recent policy regarding human rights considerations. The 1995 Memorandum elaborated upon and refined some of the arguments and positions set forth in Shihata's 1990 memorandum on issues of "governance," which likewise includes an important statement of the Bank's contemporary position on human rights. See generally Ibrahim F.I. Shihata, *Issues of "Governance" in Borrowing Members: The Extent of Their Relevance Under the Bank's Articles of Agreement*, Legal Memorandum of the General Counsel, Dec.

upon its interpretation of the IBRD and IDA Articles of Agreement, which explicitly prohibit "political" activity<sup>28</sup> by the Bank and limit the Bank to "economic considerations."<sup>29</sup> The most important such provision, entitled "Political Activity Prohibited," is set forth in Article IV, Section 10 of the IBRD Articles of Agreement:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.<sup>30</sup>

A narrower prohibition, restricting the use of IBRD loan proceeds, appears in Section 5(b) of Article III. It is essentially a corollary to the broader political activity provision restated above:

The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.<sup>31</sup>

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21, 1990 [hereinafter Shihata, *Issues of "Governance"*]; see also Ibrahim F.I. Shihata, *The World Bank and "Governance" Issues in its Borrowing Members*, in *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS* 53-96 (summarizing much of *Issues of "Governance"*). The World Bank's policy is discussed in greater detail *infra* Part II.B.2.

28. The IBRD Articles of Agreement actually proscribe several types of "political" activity. The provisions discussed below prohibit the Bank from indulging "political influences or considerations," interfering in the "political affairs" of a member nation, or being influenced by such nation's "political character." For an analysis of how these concepts differ, see *infra* Part II.A-B.

29. A discussion of what constitutes an "economic consideration" under the IBRD Articles of Agreement is provided *infra* Part II.A.2.

30. IBRD Articles of Agreement, *supra* note 16, art. IV, § 10. The IDA Articles of Agreement contain substantially identical provisions, creating the same tension between the concepts of "economic" and "political." They likewise contain a provision entitled "Political Activity Prohibited," nearly identical to its IBRD counterpart:

The Association and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.

IDA Articles of Agreement, *supra* note 17, art. V, § 6.

31. IBRD Articles of Agreement, *supra* note 16, art. III, § 5(b). As another example of the similarity between the IBRD and IDA Articles of Agreement, Article V, Section 1(g) of the IDA Articles of Agreement, entitled "Use of Resources and Conditions of Financing," contains a provision similar to Article III, Section 5(b) of the IBRD Charter:

The Association shall make arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations.

*Id.* art. V, § 1(g).

The Bank has long focused upon the political activity provisions of the IBRD Charter as the determinative objects for interpretation, and the parallel sections of the IDA Charter have been interpreted in accordance with them. See SHIHATA, *supra* note 14, at 42-43.

Although the Bank's policy on human rights intervention has not been static over time, it has always hinged upon an interpretation of the terms "economic" and "political" in the foregoing IBRD Charter provisions.<sup>32</sup> Essentially, the Bank has sought to balance the competing but related concepts of politics and economics by considering human rights violations only when such violations amount to obvious or preponderantly "economic" concerns.<sup>33</sup> Under the Bank's interpretation, consideration of a prospective borrower's human rights record is prohibited only when such abuses do not have a "direct and obvious economic effect," or are preponderantly "political" in nature.<sup>34</sup>

To a large extent, the Bank's interpretation of the IBRD Articles of Agreement has been developed and articulated by its General Counsel,<sup>35</sup> to whom the Bank has historically deferred for matters of charter interpretation.<sup>36</sup> The Bank's previous General Counsel, Ibrahim F.I. Shihata, liberalized the interpretation of the IBRD Charter somewhat, thereby allowing the Bank to entertain a wider range of human rights considerations.<sup>37</sup> Nevertheless, Shihata supported the Bank's traditional distinction between human rights concerns of a preponderantly "economic" and "political"

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The IDA Charter mentions that its activities are intended to supplement those of the IBRD. *Id.*

In addition, regional development banks such as the African Development Bank, Asian Development Bank, and Inter-American Development Bank, whose charters contain similar provisions, have long followed the lead of the IBRD in this and other policy decisions. See Brian B.A. McAllister, *The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the World of the World Bank Among Human Rights, the Environment, and Sustainable Development*, 16 HASTINGS INT'L & COMP. L. REV. 689, 702 (1993). As a result, this article will proceed with an examination of the language of the IBRD Charter, cognizant of the parallel implications upon the charters of the IDA and regional development banks. See *infra* note 45.

32. See, e.g., Shihata, 1995 Memorandum, *supra* note 27, at 28. From the earliest documents issued by the Bank to its most recent policy memoranda, the "political activity" prohibition has always been the linchpin of its view toward human rights considerations. See *id.* For a more detailed discussion of the historical emergence of the Bank's policy with respect to human rights considerations, see *infra* Part II.B.2.

33. See Shihata, 1995 Memorandum, *supra* note 27, at 29-30; Shihata, *Issues of "Governance," supra* note 27, at 55. These memoranda demonstrate that although the Bank's policy has evolved somewhat over time, the essential principle remains that human rights issues should be weighed for their "economic" significance.

34. See Shihata, 1995 Memorandum, *supra* note 27, at 29-30; see also Shihata, *Issues of "Governance," supra* note 27, at 36. A more detailed discussion of the World Bank's contemporary policy position is provided *infra* Part II.B.1.a.

35. See IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD 2* (1991); World Bank, *Ko-Yung Tung is Appointed Vice President and General Counsel of the World Bank*, World Bank Press Release No. 2000/086/S, Nov. 5, 1999 [hereinafter World Bank Press Release]. The General Counsel of the World Bank is responsible for advising the Executive Directors and the Board of Governors of the World Bank on a variety of legal issues, among the most important of which is the interpretation of its constitutive agreements. See *id.*

36. See SHIHATA, *supra* note 35, at 2.

37. See generally Shihata, 1995 Memorandum, *supra* note 27. Shihata's 1995 memorandum clarified and expanded upon the pre-existing Bank policy.



nature.<sup>38</sup> Consequently, the IBRD continues to treat considerations of certain human rights abuses as prohibited by its Articles of Agreement, and some means of promoting international human rights law remain outside the Bank's legal purview.<sup>39</sup>

It is possible that the World Bank's position regarding human rights considerations will be re-examined in the near future. Shihata stepped down as General Counsel on October 15, 1998, and the Bank's Board of Directors appointed Ko-Yung Tung as his successor on November 5, 1999.<sup>40</sup> Tung assumes the incumbent authority of interpreting the Articles of Agreement and therefore will be able to exert considerable influence on the Bank's policy regarding human rights considerations, should he elect to do so.<sup>41</sup>

## B. Purpose of this Article

Ultimately, the World Bank's position regarding its ability to entertain human rights considerations is decisive because both the IBRD and IDA Charters give the Bank the exclusive authority to interpret its Articles of Agreement.<sup>42</sup> That explicit grant of interpretive power would make it quite difficult for any member nation to mount a successful legal challenge to the

38. *See id.*; *see also* Shihata, *Issues of "Governance," supra* note 27 (discussing human rights considerations in the context of the Bank's growing emphasis upon "good governance").

39. *See id.*

40. *See* World Bank Press Release, *supra* note 35. This press release provides a brief biographical sketch of Ko-Yung Tung and a synopsis of the responsibilities he inherited as General Counsel.

41. *See, e.g.,* Shihata, *Issues of "Governance," supra* note 27, at 21. In the past, the World Bank has generally deferred to its Legal Department for interpretation of the Charter. Thus, when the Bank's Executive Directors decide on a future interpretation of the Charter, it is expected that they will "take into account the legal analysis provided by the General Counsel and other relevant considerations." *Id.* Tung's opportunity to reevaluate the World Bank's interpretation of the IBRD and IDA Articles of Agreement is among the principal motives for this article.

42. *See* IBRD Articles of Agreement, *supra* note 16, art. IX, § (a)-(b). Article IX sets forth the guidelines for interpreting the Charter's provisions. There is no provision dealing with interpretation absent a dispute, and historically, the Bank has chosen to rely upon the opinion of its General Counsel. *See id.*

In the event of a dispute among members or between the Bank and any member, Article IX authorizes the Executive Directors of the Bank to interpret its terms. A member dissatisfied with the Directors' interpretation may appeal to the Board of Governors, whose interpretation is final. *See id.* The Executive Directors and the Board of Governors of the Bank thus hold the ultimate power to interpret the IBRD Articles. The relevant provisions of Article IX are as follows:

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4 (h).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

Bank's interpretation.<sup>43</sup> Nevertheless, the Bank's position must be based on a lawful interpretation of the Articles, meaning an interpretation consistent with the principles and methodology of applicable international law.<sup>44</sup> This article identifies and elucidates the proper interpretive methodology; rigorously applies that methodology to the relevant provisions of the Articles;<sup>45</sup> arrives at a legal interpretation of each such provision; and finally, offers a conclusion regarding the scope of human rights considerations that the Bank can lawfully entertain in making its credit decisions.

The analysis begins in Section I with a determination of the precise methodology the Bank must follow in interpreting its constitutive agreements. Section II applies the interpretive methodology to each of the critical terms and provisions of the IBRD Articles of Agreement. Based on that analysis, Section III presents a composite interpretation of the relevant provisions of the IBRD Charter and offers a conclusion regarding the Bank's legal capacity to entertain human rights considerations in making its credit decisions.

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*Id.* The IDA Charter contains an analogous provision. See IDA Articles of Agreement, *supra* note 17, art. X, § (a)-(b).

43. See Yozo Yokota, *The Non-Political Character of the World Bank*, 20 JAPANESE ANN. OF INT'L L. 39, 41 (1976).

44. See Shihata, *Issues of "Governance," supra* note 27, at 21. Shihata acknowledged that "[t]he legal interpretation of treaty provisions such as the Bank's Articles is subject to general rules of international law developed through centuries of state practice, judicial precedents and scholarly works. Such 'customary' rules have been codified in two articles of the 1969 Vienna Convention on the Law of Treaties." *Id.*

The customary rules of international law governing interpretation of the IBRD and IDA Charters are the subject of extensive discussion *infra* Part I. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth the basic elements of the applicable interpretive methodology and are widely considered to have codified preexisting customary international law. See Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 1, 31-32 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

45. The analysis contained herein will focus upon the relevant provisions of the IBRD Articles of Agreement, namely Article IV, Section 10 and Article III, Section 5(b). See IBRD Articles of Agreement, *supra* note 16, art. IV, § 10, art. III, § 5(b). For the relevant text of these provisions, see *supra* notes 30-31. The IDA Articles of Agreement contain a provision substantially identical to Article IV, Section 10 of the IBRD Charter, which has been and should be interpreted in a consistent manner. See IDA Articles of Agreement, *supra* note 17, art. V, § 6. Therefore, this article will proceed with an analysis of Article IV, Section 10 of the IBRD Charter, aware of the parallel implications with respect to Article V, Section 6 of the IDA Articles.

There is no direct counterpart to Article III, Section 5(b) of the IBRD Charter in the IDA Articles of Agreement. See generally IDA Articles of Agreement, *supra* note 17. Therefore, the discussion relating to its provisions technically applies only to the IBRD. Nevertheless, in practice, the IBRD and IDA perform largely integrated functions, and throughout its history, the World Bank has looked to the IBRD Articles as the determinative instrument for interpretation. See Wadrzyk, *supra* note 1, at 558; Shihata, 1995 Memorandum, *supra* note 27, at 5-9; Shihata, *Issues of "Governance," supra* note 27 (exemplifying the Bank's decision to analyze the IBRD Articles as the determinative instrument and interpret the IDA Articles accordingly).

## I. The Interpretive Methodology

As binding agreements among nations, the IBRD and IDA Articles of Agreement constitute treaties under international law.<sup>46</sup> As the IBRD and IDA Charters predate the Vienna Convention, which represents the authoritative modern convention on the law of treaties,<sup>47</sup> the body of law controlling their interpretation is the customary international law that existed at the time they were concluded and entered into force.<sup>48</sup> However, the provisions of the Vienna Convention dealing with treaty interpretation were widely accepted as declaratory of preexisting customary law. Thus, those provisions essentially restate the basic legal principles applicable to an interpretation of the IBRD and IDA Charters.<sup>49</sup> Articles 31 and 32<sup>50</sup> of the Vienna Convention articulate the required methodology for interpretation of a treaty and its constituent terms and provisions.<sup>51</sup>

46. See LOUIS A. HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 416 (3d ed. 1993). A treaty is generically defined as any binding agreement, governed by international law, between or among subjects of international law. See *id.*

47. The Vienna Convention on the Law of Treaties applies only to treaties concluded between states; for which it is the "principal authoritative source of the law." HENKIN ET AL., *supra* note 46, at 416; see Vienna Convention, *supra* note 44, art. 1.

48. See Vienna Convention, *supra* note 44, art. 4. Article 4 of the Vienna Convention declares that the Convention is not retroactive; however, it also states that it is "without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention." *Id.* Thus, customary international law governs the interpretation of treaties concluded prior to the Convention.

Among the most valuable discussions of the preexisting customary law of treaty interpretation was written by the long-time President of the International Court of Justice, Eduardo Jiménez de Aréchaga. De Aréchaga explains the relationship between the Vienna Convention methodology and the preexisting international customary law. His discussion is particularly useful because it elucidates the nuances of treaty interpretation left unclear by a plain reading of Articles 31 and 32 of the Vienna Convention. See Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 *RECUEIL DES COURS* 35-49 (1978). For another discussion of the customary international law of treaty interpretation, see generally James F. Hogg, *The International Court: Rules of Treaty Interpretation*, 43 *MINN. L. REV.* 369 (1959).

49. See MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 121 (5th ed. 1984); HENKIN ET AL., *supra* note 46, at 416-17. The Vienna Convention was the result of a project begun by the International Law Commission in 1949 and largely represents a codification of preexisting norms of customary international law. *Id.* In particular, Articles 31 and 32 of the Vienna Convention, which set forth the relevant law regarding treaty interpretation, were adopted at the Vienna Convention without a dissenting vote and are considered to have been declaratory of preexisting customary law. See de Aréchaga, *supra* note 48, at 39, 42.

50. Note that Article 33 also pertains to treaty interpretation. However, its application is limited to treaties authenticated in two or more languages. Since the IBRD and IDA Articles of Agreement were authenticated only in English, the terms of Article 33 do not apply.

51. See Vienna Convention, *supra* note 44, art. 31; de Aréchaga, *supra* note 48, at 42-49. Article 31 sets forth the general rule:

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

The methodology codified in the Vienna Convention sets forth a relatively clear process and establishes a hierarchy of sources to be used in treaty interpretation. Most importantly, it conveys the primacy of textual analysis over analysis of *travaux préparatoires*.<sup>52</sup> Article 31 requires the interpretation of a treaty to begin with an analysis of the ordinary meaning of its terms<sup>53</sup> in the context of the treaty's remaining provisions, particularly its stated purposes, and any instruments related to the treaty.<sup>54</sup> Arti-

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(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention, *supra* note 44, art. 31. If an interpretation under the methodology of Article 31 proves inadequate, Article 32 permits recourse to supplementary means of interpretation:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

*Id.* art. 32.

52. *See de Aréchaga, supra* note 48, at 43 (citing the proceedings of the International Law Commission). Before and during the Vienna Conference, there was a polarization of two schools of thought regarding treaty interpretation. According to one school, the fundamental objective was "to establish what the text means according to the ordinary or apparent signification of its terms." *Id.* The other school contended that "the prime, indeed, the only legitimate object, is to ascertain and give effect to the intentions or presumed intentions of the parties." *Id.*

As a practical matter, the major difference between the two schools lies in their treatment of the *travaux préparatoires*, or preparatory work of the treaty. Those who would emphasize the intent of the parties treat the *travaux préparatoires* and the text of the treaty as equally important, since each reveals the parties' intentions. Conversely, those who would emphasize the meaning of the text place *travaux préparatoires* in a subordinate role, used only as a secondary or supplemental resource for interpretation. *See id.*

The International Law Commission submitted the determinative proposal for interpretive rules to the Vienna Conference. In comments to its proposal, the Commission wrote: "[The proposal] is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* of the intentions of the parties." *Id.* (citing the proceedings of the International Law Commission).

53. *See* Vienna Convention, *supra* note 44, art. 31(1)-(2). Intrinsic materials include the text of the treaty and any related instruments executed by the parties in connection with or subsequent to the conclusion of the treaty. *See id.*

54. *See id.* De Aréchaga notes that the object and purpose of the treaty are deliberately mentioned to assert that they are part of the textual context within which terms

cle 31 then proceeds to identify further sources of interpretation that indicate express or implied consent among the parties, including subsequent agreements, subsequent practice, and relevant rules of international law.<sup>55</sup> This methodology of interpretation has been described as *encerclement progressif*, by which one departs incrementally from the text to identify appropriate sources for interpretation.<sup>56</sup>

The final provision of Article 31 represents a concession to the theory that the intention of the parties should govern treaty interpretation.<sup>57</sup> It permits a special meaning to be ascribed to a term "if it is established that the parties so intended."<sup>58</sup> The possibility of a special meaning opens the door to consideration of the *travaux préparatoires*.<sup>59</sup> However, the International Court of Justice has held that the standard of proof for such a special meaning is high; any party seeking to establish a special meaning must "demonstrate convincingly the use of the term with that special meaning."<sup>60</sup>

Article 32 designates *travaux préparatoires* as the supplemental means of interpretation to be employed when an interpretation under the process of Article 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."<sup>61</sup> However, Articles 31 and 32 neither establish "two distinct and successive phases in the process of interpretation" nor require that *travaux préparatoires* only be examined after first exhausting all intrinsic sources.<sup>62</sup> Rather, the process of interpretation may proceed with *travaux préparatoires* playing an ongoing and important, though secondary, role in the interpretation of the text.<sup>63</sup>

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must be interpreted. Although they are deemed important in that regard, they are not an autonomous source of interpretation. See de Aréchaga, *supra* note 48, at 44.

55. See Vienna Convention, *supra* note 44, art. 31(3).

56. See de Aréchaga, *supra* note 48, at 44 (attributing the phrase to Max Hüber). The description was coined by Max Hüber and connotes the progressive "circles" of interpretation mandated by customary international law and set forth in the Vienna Convention. Hüber's analogy is an important one because it clarifies the process articulated in Articles 31 and 32.

57. See de Aréchaga, *supra* note 48, at 44-48. The United States government was a principal advocate of placing a treaty's preparatory work on the same level of importance as the "intrinsic" sources of interpretation. Professor McDougal of the American delegation to the Vienna Conference argued that the goal of interpretation was to ascertain "the common intent of the parties." Subordinating preparatory work in the interpretive hierarchy would frustrate that goal. Ultimately, the proposal of the International Law Commission adopted at the Conference reflected something of a compromise between the two competing schools of thought and followed the established practice of the International Court of Justice. See *id.* at 46-47; see also *supra* note 52.

58. Vienna Convention, *supra* note 44, art. 31(4).

59. See de Aréchaga, *supra* note 48, at 46.

60. *Id.* at 44 (citing *Western Sahara Advisory Opinion*, ICJ Reports 1975, p. 53, referring to the *Legal Status of Eastern Greenland* case, ICJ, Series A/B, No. 53, p. 49).

61. Vienna Convention, *supra* note 44, art. 32(a)-(b).

62. See de Aréchaga, *supra* note 48, at 47.

63. See *id.* Sir Humphrey Wadlock commented on the Vienna Convention interpretive process, stating that "all the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation." *Id.*

## II. Applying the Interpretive Methodology

The preceding discussion elucidated the process by which the IBRD and IDA Articles of Agreement must be interpreted. This section undertakes to apply that methodology to arrive at an accurate legal interpretation of the IBRD Charter.<sup>64</sup> Section II(A) contains the first element in that process: an analysis of the ordinary meaning of the relevant terms and provisions in their textual context. Section II(B) then examines secondary sources of interpretation: the subsequent practice of the World Bank members in their application of the treaty and relevant rules of international law. Finally, Section II(C) proceeds to the issue of *travaux préparatoires*, which, absent a clearly intended "special meaning," are properly treated as an important tertiary source for interpretation. Before embarking upon the task of interpretation, it is necessary to identify the terms and provisions of the IBRD Charter relevant to the issue of whether the Bank lawfully may consider a prospective borrower's human rights record.

Two sections of the IBRD Charter are of utmost importance. The broader clause is Article IV, Section 10, which proscribes two distinct types of "political" activity. First, it prohibits the Bank and its officers from interfering in the "political affairs" of any member nation.<sup>65</sup> Second, it prohibits the Bank and its officers from considering a nation's "political character."<sup>66</sup> Article IV, Section 10 thus directs the Bank and its officers to entertain only "economic considerations."<sup>67</sup>

Article III, Section 5(b) of the IBRD Charter sets forth a narrower prohibition, dealing only with the use of loan proceeds. It requires that the Bank "make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations."<sup>68</sup> Analogous to Article IV, Section 10, this narrower provision limits the Bank to economic considerations.<sup>69</sup> However, it also explicitly bars political influences or considerations from affecting the Bank's decisionmaking process, a concept absent in Article IV, Section 10.<sup>70</sup>

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64. Although not addressed in this discussion, an analysis of the IDA Articles of Agreement would proceed in similar fashion. See *supra* notes 30, 45.

65. See IBRD Articles of Agreement, *supra* note 16, art. IV, § 10; see also *supra* note 30 and accompanying text.

66. See *id.*

67. See *id.*

68. IBRD Articles of Agreement, *supra* note 16, art. III, § 5(b). This provision does not have a direct counterpart in the IDA Articles of Agreement, and technically its provisions therefore apply only to the IBRD. However, in a practical sense, they are also relevant to the practices of the IDA, which are largely integrated with those of the IBRD. See *supra* notes 31, 45.

69. See IBRD Articles of Agreement, *supra* note 16, art. III, § 5(b); see also *supra* notes 30-31 and accompanying text.

70. See *id.*

The foregoing discussion highlights four principal clauses governing the matter of human rights considerations. Each contains a critical term or phrase requiring interpretation:

1. the Bank and its officers shall not interfere in the *political affairs* of any member;
2. the Bank and its officers shall not be influenced in their decisions by the *political character* of the member or members concerned;
3. only *economic considerations* shall be relevant to the decisions of the Bank and its officers; and
4. the Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to *political or other non-economic influences or considerations*.<sup>71</sup>

None of the critical terms is defined in the Articles of Agreement,<sup>72</sup> and each must be examined in its respective context to determine its ordinary meaning for purposes of the present interpretation.

#### A. Ordinary Meaning Analysis

The first guideline set out in Article 31 of the Vienna Convention, and the first step in the *encerclement progressif*, requires that a treaty “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.”<sup>73</sup> The ordinary meaning of the provisions is the primary interpretive source under the methodology developed in customary international law and restated in the Vienna Convention.<sup>74</sup> Therefore, a rigorous interpretation of the IBRD Articles of Agreement must begin with a plain reading of the critical terms and provisions in the context of the Charter’s other provisions and its stated purposes.<sup>75</sup>

##### 1. Distinction Between the Terms “Political” and “Economic”

A logical starting point for an ordinary meaning analysis is to differentiate the words “economic” and “political.” However, the difficulty of distinguishing the plain meaning of “political” and “economic” influences, considerations and activities is immediately apparent.<sup>76</sup> Shihata has endeavored to distinguish the two by analysis of the dictionary definitions

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71. These four critical clauses represent the author’s conceptual breakdown of the relevant IBRD Charter provisions. For the actual text of the provisions, see *supra* notes 30-31 and accompanying text.

72. See Bradlow, *supra* note 26, at 54.

73. Vienna Convention, *supra* note 44, art. 31(1).

74. See *supra* notes 53-54 and accompanying text; see also Susan Jeanne Topfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & LAW 83, 99 n.106 (noting that a term’s plain meaning is controlling under the Vienna Convention methodology).

75. See *id.* As no other agreements were formalized in connection with the conclusion of the IBRD and IDA Articles of Agreement, no reference needs to be made to external documents in the course of the ordinary meaning analysis.

76. See Shihata, *Issues of “Governance,” supra* note 27, at 23.

and etymologies of the words.<sup>77</sup> He concludes that in order to draw a distinction "political" factors must involve either: belonging to or favoring a particular political party or partisan faction or following the political principles, convictions, or opinions of a particular party or individual.<sup>78</sup> "Economic" factors, by contrast, must include the management of a nation's money, finances, and resources.<sup>79</sup>

Although Shihata's plain meaning analysis is helpful, it does not answer the critical question of whether the Bank may consider human rights issues that are both "political" and "economic" in some sense.<sup>80</sup> While human rights abuses are often linked to partisan political struggles, they tend to impact adversely a nation's economic and human resources as well.<sup>81</sup> To resolve this matter, it is necessary to look more closely at the language of the IBRD Charter.

Under both Article IV, Section 10 and Article III, Section 5(b), the Bank must base its decisions only upon economic considerations.<sup>82</sup> Consequently, the interpretive problem only arises when the human rights violations in question have some degree of economic importance. In such a case, the ordinary meaning of Article IV, Section 10 is less informative since human rights could simultaneously constitute an "economic consideration" as well as an aspect of a nation's "political affairs" or "political character."

Regrettably, the IBRD Articles of Agreement provide little contextual evidence regarding the meaning of the terms "political affairs" or "political character."<sup>83</sup> Therefore, it is difficult to discern, on the basis of a plain reading of the text, precisely when economically relevant human rights considerations are proscribed by Article IV, Section 10. To resolve that

77. For Shihata's full discussion of the ordinary meanings of "political" and "economic," see *id.* at 22-23.

78. See *id.* at 24.

79. See *id.*

80. See *id.* at 24-30. Shihata does not assert that his plain meaning analysis provides the definitive answer as to when the Bank can entertain human rights considerations. Rather, he acknowledges the need to balance the competing concepts between "economic" and "political" subject-matter under the IBRD Charter. *Id.*

81. For a discussion of the economic impact of human rights abuses, see *infra* Part II.A.3. Shihata acknowledges "economic considerations in their broad sense do extend to the manner in which the state manages its resources, and may thus become difficult to isolate from political considerations, especially in 'policy-based' lending." Shihata, *Issues of "Governance," supra* note 27, at 25.

82. See IBRD Articles of Agreement, *supra* note 16, art. IV, § 10, art. III, § 5(b) (permitting "[o]nly economic considerations"). There is relative consensus in the literature that the plain meaning of the IBRD Charter precludes "non-economic factors" from consideration. See, e.g., Levinson, *supra* note 18, at 56 ("On the face of the Articles, 'noneconomical' factors are prohibited from being taken into account in, for example, determining a lending program in a particular country. Read literally, the IBRD cannot, in conformance with its own Articles of Agreement, assess a country's 'performance' in terms of its human rights record."); Marmorstein, *supra* note 2, at 120-21; see also Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1162, 1218 n.231 (1987).

83. The terms are not defined in the IBRD Charter, and their context provides little succor. See Bradlow, *supra* note 26, at 54.



question, this analysis will be forced to rely upon other sources of interpretation.<sup>84</sup>

The language of the IBRD Charter provides evidence that Article III, Section 5(b) does not prevent the Bank from lawfully considering human rights violations so long as those violations amount to “economic considerations.” Rather, Section 5(b) merely instructs the Bank to direct loan proceeds with “due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”<sup>85</sup> The proscription of “political or other non-economic influences or considerations”<sup>86</sup> is of great import because it implicitly defines “political” influences as one subset of “non-economic” considerations. According to this deduction, “political” considerations are prohibited precisely because they are not “economic” factors, and the IBRD is permitted to contemplate only economic factors in making its decisions. Thus, the Bank may consider human rights violations in the course of its lending decisions if, but only if, they amount to an “economic consideration.”<sup>87</sup>

## 2. Human Rights Violations as “Economic Considerations”

Although the IBRD Charter does not explicitly define “economic considerations,”<sup>88</sup> it does provide some contextual evidence of the term’s meaning. Article III articulates the terms and conditions upon which the Bank may make loans. Section 4(v) instructs the Bank, when making or guaranteeing a loan, to “pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan . . . .”<sup>89</sup>

Article III, Section 4(v) does not necessarily represent an exhaustive definition of “economic considerations” under the IBRD Charter.<sup>90</sup> Instead, the provision merely establishes that a member’s prospective abil-

84. See *infra* Part II.B-C. When the ordinary meaning analysis is unable to resolve an interpretive issue with adequate clarity, the interpretation must be made by reference to the secondary and tertiary shells in Hüber’s *encerclement progressif*. See *supra* notes 55-61 and accompanying text. The following sections will attempt to resolve precisely when the World Bank can consider economically relevant human rights abuses by determining when (if ever) such considerations are proscribed as “political” activities.

85. IBRD Articles of Agreement, *supra* note 16, art. III, § 5(b).

86. *Id.* (emphasis added).

87. Of course, this power is subject to the limitations of Article IV, Section 10. See *id.* art. IV, § 10.

88. See Bradlow, *supra* note 26, at 54.

89. IBRD Articles of Agreement, *supra* note 16, art. III, § 4(v).

90. See *id.* Article III, Section 4(v) does not limit the definition of “economic considerations” to factors which affect a borrower’s ability to repay a loan. However, it is the only provision in the IBRD Charter that identifies a definitive set of such considerations. The only other relevant provision in the IBRD Articles of Agreement is Article III, Section 5(b), which implicitly equates economic considerations with “considerations of economy and efficiency.” See *id.* art. III, § 5(b). Unfortunately, that equation is not very helpful to the present interpretive effort.

Thus, although a plain reading of the IBRD Charter cannot establish the complete universe of “economic considerations” with any certainty, it does establish that a country’s human rights violations amount to an “economic consideration” whenever they affect that nation’s ability to meet its loan obligations to the Bank.

ity to repay its IBRD and IDA loans is a valid economic issue for the Bank to consider. It follows that any factor that impacts a borrower's ability to meet its obligations must be a permissible subject for the Bank's consideration.<sup>91</sup>

Of course, the Bank still must determine, on a case-by-case basis, whether a particular nation's human rights record presents an "economic consideration." The important point is that the World Bank may deem a nation's human rights record an "economic consideration" whenever a reasonable creditor in the Bank's position would consider the record pertinent in assessing the likelihood that the borrower will meet its prospective debt obligations.

There is substantial evidence that a nation's human rights violations frequently rise to the level of "economic considerations," as contemplated by Article III, Section 4(v), by affecting a nation's economic growth, the financial success of its development programs, and its resultant ability to service its debt. Such evidence comes from several sources, including: studies by international economists, which demonstrate that human rights and the rule of law are empirically linked to healthy and sustainable economic growth;<sup>92</sup> the policies and practices of bilateral and private lenders in their dealings with emerging markets;<sup>93</sup> and the World Bank's own field experience, which has shown that a nation's human rights violations can

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91. See Handl, *supra* note 13, at 648-50. Handl asserts that "it is accepted wisdom that noneconomic factors entailing economic consequences that affect international financial project or program activities should be taken into account by MDBs simply as a matter of sound banking practice." *Id.* at 649.

92. See generally Arup Banjeri & Hafez Ghanem, *Does the Type of Political Regime Matter for Trade and Labor Market Practices?*, 11 *WORLD BANK EC. REV.* 171, (1997) (analyzing the impact of human rights and the rule of law upon economic growth and concluding that the protection of basic civil and political liberties is directly related to the development and performance of a productive market economy); Jonathan Isham et al., *Civil Liberties, Democracy and the Performance of Government Projects*, 11 *WORLD BANK EC. REV.* 219 (1997) (describing a similar study focusing on government projects and arriving at similar conclusions); Katarina Tomasevski, *International Law and World Hunger*, 70 *IOWA L. REV.* 1321, 1326 (1985) (asserting, on the basis of "substantial research," that violations of free speech and association are inextricably linked to economic growth).

Addressing the American Society of International Law, John Kneller, an executive from Citicorp explained the economic importance of human rights protections: "Employees whose basic nutritional and medical needs are met will be better and more productive workers . . . . Employees who do not have to live in fear of a battered-in door in the middle of the night, or of speaking freely to one another at appropriate times during the work day, will be more focused on the profitable task at hand." John M. Kneller, *Human Rights, Multinational Business and International Financial Institutions*, 88 *AM. SOC'Y INT'L L. PROC.* 271, 274 (1994).

93. See Marmorstein, *supra* note 2, at 127-30. Marmorstein discusses the country risk and exposure analyses conducted by commercial banks in the course of their lending to developing nations and others accused of significant human rights abuses. Such credit risk analyses include an examination of government practices, such as human rights abuses, apt to destabilize the economy. This practice of considering a nation's legal and political hazards is not new to the private banking industry. See *id.* at 127.

The practice of bilateral donors is also relevant. Many governments take a recipient nation's human rights record into account when determining aid appropriations. To the extent that human rights abuses lead to a decrease in a country's bilateral aid and capi-

profoundly impact the financial success of specific projects.<sup>94</sup>

### 3. Purposes of the Bank's Articles of Agreement

International law requires that the terms of a treaty be interpreted not only in their grammatical context, but also "in the light of [the treaty's] object and purpose."<sup>95</sup> For present purposes, the most relevant of the IBRD Charter's enumerated objectives is set forth in Article I, Section (i): the reconstruction and development of its member nations.<sup>96</sup> The stated purpose in Section (i) with the greatest nexus to human rights considerations is "the encouragement of the development of productive facilities and resources."<sup>97</sup> However, the term "development" is not defined in the IBRD Charter,<sup>98</sup> and the ordinary meanings of the terms "encouragement" and "resources" are open to a wide range of interpretation.

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tal inflow, that country is apt to have more difficulty servicing its IBRD and IDA debt. See *id.* at 129.

94. See McAllister, *supra* note 31, at 702-04 (describing the negative reaction of human rights organizations to the Bank's failure adequately to take into account its borrowers' local human rights abuses); Wendt, *supra* note 7, at 153-55 (same). See *id.*; see also Stremmler & Sagasti, *supra* note 11, ch. 3, ¶ 1; cf. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 395 (1987) (discussing the role a corporation can play in human rights development). One example of such a project was the Volta Dam project in Ghana. See McAllister, *supra* note 31, at 691-92. Patricia Armstrong has also noted a number of recent Bank projects plagued with serious human rights problems. See Patricia Armstrong, *The World Bank and Human Rights: Policies and Prospects*, 11 PACE INT'L L. REV. 239, 245-47 (1999).

These and other projects have contributed to a high rate of financial failure in the Bank's work for the past decade, supporting the conclusion that violations of internationally recognized human rights are inherently matters of "economic" concern. See McAllister, *supra* note 31, at 705 (citing a study concluding that 37.5% of World Bank projects in 1991 achieved unsatisfactory economic results). But see Cahn, *supra* note 3, at 160 (attributing the World Bank's "strong tendency toward systematic failure" to the Bank's activist role as a "governance institution").

Shihata acknowledges that

[Human rights violations] can affect the country's stability, prospective creditworthiness, and ability to carry out Bank-financed projects, and they can impede the Bank's ability to supervise the investments it sponsors. Obviously, these are factors that the Bank must take into account to the extent that they prove relevant in the circumstances of a specific case and not as a factor to politicize its activities.

Ibrahim F.I. Shihata, *Environment, Economic Development and Human Rights: A Triangular Relationship?*, Remarks, Apr. 20-23, 1988, reprinted in 82 AM. SOC'Y INT'L L. PROC. 40, 45 (1988).

95. Vienna Convention, *supra* note 44, art. 31(1).

96. The Bank's first enumerated purpose is

To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

IBRD Articles of Agreement, *supra* note 16, art. I, § (i).

The remaining purposes set forth in Article I provide no additional guidance relevant to the present interpretive inquiry. See *id.* art. I, §§ (ii)-(v).

97. *Id.* art. I, § (i).

98. See Bradlow, *supra* note 26, at 53.

In recent years, the academic literature and international declarations have defined the concept "development" with increasing breadth.<sup>99</sup> Several authors have argued that to fulfill its development mandate, the Bank must be permitted to take human rights considerations into account, regardless of the extent of their "political" nature.<sup>100</sup> Such arguments have relied on the approach to "development" espoused in declarations and statements by officials of the United Nations<sup>101</sup> and its constituent agencies.<sup>102</sup> However, the usage of the term "development" in international declarations and speeches does not definitively establish the meaning of the IBRD Charter's stated purposes. Therefore, while it would be possible to analyze the expansion of the concept of "development" in discussing the Charter's stated purposes, that analysis is more appropriately reserved for the section below addressing the "subsequent practice" of the Bank.<sup>103</sup>

The IBRD Charter does provide a notable exception to its normally binding purposes, articulated in Article III, Section 4(vii). That provision allows the Bank, under "special circumstances," to make or guarantee loans in pursuit of objectives other than reconstruction or development.<sup>104</sup> However, Article III, Section 4(vii) has been employed sparingly in the Bank's work,<sup>105</sup> and the Charter's remaining provisions provide no indica-

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99. See *id.* at 48; Wolfgang H. Reinicke, *Can International Financial Institutions Prevent Internal Violence? The Sources of Ethno-National Conflict in Transitional Societies*, in PREVENTING CONFLICT IN THE POST-COMMUNIST WORLD: MOBILIZING INTERNATIONAL AND REGIONAL ORGANIZATIONS 281, 285 (Abram Chayes & Antonia Handler Chayes eds., 1996).

100. See Bradlow & Grossman, *supra* note 20, at 414. Bradlow and Grossman argue that "IFIs cannot address the problem of poverty or the monetary problems of developing countries without considering the issues of refugees, environmental degradation, the capacity of the state to effectively and equitably manage its resources, population policy, and human rights, including the status of women, indigenous people, and minorities." *Id.*; see also Bradlow, *supra* note 26, at 51; Handl, *supra* note 13, at 645, 649-51 (noting the tension between the Bank's mandate and its goal of achieving "sustainable development").

101. See Louise Fréchette, "The Price of Peace - the Crucial Role of Development in Peacemaking and Peacekeeping," Speech delivered at the International Peace Academy in New York (May 11, 1998), in M2 PRESSWIRE, May 13, 1998 ("Issues of governance and human rights nowadays form an integral part of any strategy for development.").

102. See, e.g., Copenhagen Declaration on Social Development, in Report of the U.N. World Summit for Social Development, U.N. Doc. A/CONF.166/9 (1995) [hereinafter Copenhagen Declaration]. The Copenhagen Declaration states that sustainable development must incorporate, inter alia, democracy, social justice, and observance of human rights. See *id.*

The Declaration on the Right to Development also supports the notion that development encompasses a comprehensive process involving social, cultural, and political, as well as economic, dimensions. See Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

103. See *infra* Part II.B.1.

104. See IBRD Articles of Agreement, *supra* note 16, art. III, § 4(vii) ("Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development.").

105. See Levinson, *supra* note 18, at 49-50. Levinson asserts that the "special circumstances" provision was the legal basis for the emergence of structural adjustment lending by the World Bank. See *id.*

tion of what would constitute "special circumstances."<sup>106</sup> As a result, the scope of this potentially expansive loophole in the Bank's mandate remains too indefinite to contribute meaningfully to the present analysis.<sup>107</sup>

#### 4. Conclusions from the Textual Analysis

The foregoing ordinary meaning analysis provides limited insight regarding when the World Bank can lawfully entertain human rights considerations in the course of its credit decisions. To consider an applicant's human rights record as a factor in its credit decisions, the Bank must first determine when that nation's abuses amount to an "economic consideration." That entails deciding whether a reasonable lender in the Bank's position would deem the abuses relevant to the applicant nation's prospective ability to service its IBRD and IDA debt obligations.<sup>108</sup> If the "economic" criterion is satisfied, the Bank next must determine whether its consideration of the abuses in question will violate the "political activity" prohibitions contained in its Articles of Agreement. Ordinary meaning analysis of the Articles is of limited utility because it has proven unable to answer the latter inquiry, which must be resolved by turning to other sources of interpretation.

#### B. Secondary Intrinsic Sources

As determined above, international law demands an interpretive process aptly described as *encerclement progressif*, whereby textual evidence comprises the innermost evidentiary circle.<sup>109</sup> The second stage in that process involves analyzing circumstances which indicate express or implied agreement among the Bank's members regarding the meaning of the IBRD and IDA Charter provisions: subsequent agreements, subsequent practice and relevant rules of international law.<sup>110</sup> The Bank's members have not executed any formal agreement regarding the interpretation of its Articles of Agreement. Consequently, for purposes of the present analysis,

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106. See *id.* The literature does not provide significant further discussion of the provision.

107. Article III, Section 4(vii) could be interpreted so broadly as to permit almost any conceivable purpose. In practice, the Bank has not explicitly relied upon it to any notable extent. Shihata does not rely upon it in any of his opinions. See, e.g., Shihata, 1995 Memorandum, *supra* note 27; Shihata, *Issues of "Governance," supra* note 27.

108. See *supra* notes 90-94 and accompanying text.

109. For a fuller discussion of the interpretive process developed under customary international law and set forth in the Vienna Convention, see *supra* Part I.

110. See Vienna Convention, *supra* note 44, art. 31(3). Specifically, the Vienna Convention identifies three such factors for consideration:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

the Bank's subsequent practice and the relevant rules of international law constitute the only applicable secondary sources for interpretation.

### 1. Subsequent World Bank Practice in the Human Rights Arena

The Vienna Convention requires analysis of the subsequent practice of the World Bank in the human rights arena because such practice provides evidence of agreement among the Bank's member nations to follow a particular interpretation of the IBRD and IDA Articles of Agreement.<sup>111</sup> Unfortunately, as will be discussed below, the Bank's practice does little to clarify the parties' understanding of the relevant provisions of the IBRD and IDA Charters. Rather, the Bank's practice in the area confirms that its member nations have been unable to reach a consensus regarding the Articles' interpretation.

#### a. Development of a Human Rights Policy

Not surprisingly, the World Bank was not very involved in the area of human rights during its formative years, when international human rights law remained largely inchoate. However, as the principles of international human rights law began to take on a more definite and binding quality,<sup>112</sup> the World Bank was confronted with the dual issues of whether and when consideration of a nation's human rights practices in the context of credit decisions violate the Articles of Agreement.

It was not until the mid-1960s, in a landmark dispute between the IBRD and the United Nations General Assembly, that the World Bank began to clarify its position on human rights considerations.<sup>113</sup> In 1965 and 1966, the United Nations issued a series of resolutions appealing to the Bank to cease lending money to South Africa and Portugal<sup>114</sup> because

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111. The policy and practice of the World Bank are subsumed under the language of Article 31 of the Vienna Convention requiring analysis of "subsequent practice" of the parties. The policy positions taken by the Bank do not rise to the level of agreements between its members, but they are properly treated as a component of IBRD and IDA practice.

112. See HENKIN ET AL., *supra* note 46, at 596-97.

113. For an excellent discussion of the dispute between the U.N. General Assembly and the World Bank, see generally Samuel A. Bleicher, *U.N. v. IBRD: A Dilemma of Functionalism*, 24 INT'L ORGANIZATION 31 (1970).

114. On December 14, 1960, the General Assembly passed the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV). In 1961, the General Assembly passed a second resolution, G.A. Res. 1654(XVI), to implement the Declaration. Although Portugal was among the nations deemed to be in flagrant violation of the Declaration, the World Bank continued to loan money to Portugal, and, in 1965, the General Assembly issued a request for the Bank to desist. That request, part of G.A. Res. 2107(XX), was as follows: "[The General Assembly] *appeals* to all specialized agencies, in particular to the International Bank for Reconstruction and Development and the International Monetary Fund, to refrain from granting Portugal any financial, economic, or technical assistance so long as the Government of Portugal fails to implement General Assembly resolution 1514(XV)." *Id.* A similar appeal was made to the World Bank in paragraph 10 of G.A. Res. 2054(XX), with respect to South Africa, whose apartheid regime was likewise considered a flagrant transgression of international human rights law.

their governments were deemed to be in gross violation of international human rights standards.<sup>115</sup> While the loans were pending, then IBRD President George Woods circulated a statement to the Bank's directors citing Article IV, Section 10 and proposing that the Bank treat the loans to Portugal and South Africa as it would treat any other loans, contemplating human rights abuses only to the extent they represented economic concerns.<sup>116</sup> The World Bank thereafter refused to honor the General Assembly requests,<sup>117</sup> concluding that its Articles of Agreement forbade adherence to the U.N. resolutions.<sup>118</sup>

During the course of the dispute, the IBRD articulated its position in a series of communications to the General Assembly.<sup>119</sup> President Woods' statement encapsulated the twofold rationale for the IBRD's noncompliance. First, the Bank held that adherence to the resolutions would represent an intrusion into the "political affairs" of South Africa and Portugal under Article IV, Section 10.<sup>120</sup> Second, the Bank had not found that the human rights abuses raised sufficient economic concerns to deny the loan applications.<sup>121</sup>

The position articulated by the IBRD in the course of its dispute with the U.N. General Assembly contained a pair of noteworthy principles. First, President Woods acknowledged, by negative implication, that the Bank could consider human rights factors when they had a meaningful

115. See Bleicher, *supra* note 113, at 31. In South Africa, the policy of apartheid was deemed a gross violation of international human rights law, while Portugal was cited for its colonial practices.

116. See Statement of IBRD President Woods to Executive Directors on Mar. 29, 1966, in Statement of IBRD General Counsel to U.N. Fourth Committee, 21 U.N. GAOR, C.4 (1645th mtg.) 317-18 (1966), reprinted in 13 M. WHITEMAN, *DIG. OF INT'L L.* 1005 (1970) [hereinafter Statement of IBRD President Woods]. Mr. Woods' statement included the following precise language:

[T]he Bank's Articles provide that the Bank and its officers shall not interfere in the political affairs of any member and that they shall not be influenced in their decisions by the political character of the member or members concerned. Only economic considerations are to be relevant to their decisions. Therefore, I propose to continue to treat requests for loans from these countries in the same manner as applications from other members. . . . I am aware that the situation in Africa could affect the economic development, foreign trade and finances of Portugal and South Africa. It will therefore be necessary in reviewing the economic condition and prospects of these countries to take account of the situation as it develops.

*Id.*

117. See Bleicher, *supra* note 113, at 33. On June 14, 1966, the World Bank granted loans to Portuguese companies totaling US\$30 million. Shortly afterward, on September 8, 1966, the Bank agreed to loan US\$20 million to the South African Electricity Supply Commission. See *id.*

118. See General Assembly, *Official Records, Fourth Committee* (21st sess.), 1653rd mtg., Dec. 3, 1966, at 382-88 [hereinafter General Assembly Records 1966]. On November 28, 1966, the IBRD General Counsel appeared before a committee of the U.N. General Assembly and argued that Article IV, Section 10 of the Bank's Charter prohibited adherence to the U.N. resolutions.

119. For an account of such communications, see Bleicher, *supra* note 113, at 34-35.

120. See Statement of IBRD President Woods, *supra* note 116.

121. See *id.*

impact upon a nation's economic relationship with the Bank.<sup>122</sup> Second, the Bank's statements conveyed its view that the human rights violations in question were the "political affairs" of Portugal and South Africa and that the Bank therefore could not use them as grounds to deny a loan or credit line absent evidence that the violations were of sufficient economic importance.<sup>123</sup>

The IBRD policy of the 1960s was ambiguous in at least one important sense. It was unclear whether the Bank had asserted that any meaningful "economic consideration" trumps the political activity prohibition or whether a weighing and balancing between "political" and "economic" factors must take place. The episodes involving Portugal and South Africa left this issue entirely unresolved.

Since that time, the World Bank has elaborated upon its position regarding the legality of human rights considerations in making credit decisions.<sup>124</sup> The Bank's previous General Counsel, Ibrahim F.I. Shihata, issued multiple legal opinions and internal memoranda on the subject during his tenure, and he somewhat clarified the Bank's position.<sup>125</sup> However, Shihata's opinions did not entirely resolve the ambiguity in the relationship between economic and political concerns. Under Shihata's interpretation of the IBRD Articles of Agreement, the Bank apparently may consider human rights in two instances: when such rights are of a preponderantly economic (as opposed to political) nature or when such rights have a "direct and obvious" effect on the economic condition of a member nation.<sup>126</sup>

Shihata's modern interpretation, which represents the Bank's current position, leaves at least two things unclear. First, the means for determining whether a human rights consideration is predominantly "political" or "economic" is difficult to decipher. Second, the threshold level of economic impact that a human rights violation must have to satisfy the "direct and obvious" standard, and thus trump the political activity prohibition altogether, is unacceptably vague. As discussed below, the Bank's practice has done little to cure these ambiguities.

#### b. Practice in the Human Rights Arena

Despite the limits imposed by its interpretation of the IBRD Articles of Agreement, the Bank has examined human rights factors in a variety of

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122. See General Assembly Records 1966, *supra* note 118.

123. See *id.*

124. The Bank's policy statements in the context of the dispute surrounding Portugal and South Africa are quite similar to the message one gleans from former General Counsel Ibrahim F.I. Shihata's 1995 memorandum. See Shihata, 1995 *Memorandum*, *supra* note 27.

125. See *id.*; see generally Shihata, *Issues of "Governance," supra* note 27; Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 *DEN. J. INT'L L. & POL'Y* 39 (1988).

126. See Shihata, *Issues of "Governance," supra* note 27, at 38, 55. This formulation was restated and refined in Shihata's 1995 memorandum discussing the political activity prohibition. See Shihata, 1995 *Memorandum*, *supra* note 27, at 29-30.



circumstances.<sup>127</sup> The first explicit recognition of human rights in a World Bank lending decision came in 1972, when the Bank discontinued loans to the Chilean government, citing human rights violations by the Allende government as one of its grounds.<sup>128</sup> Since that time, the Bank has broadened its involvement in the human rights sphere considerably.<sup>129</sup> By 1988, Shihata reported that the World Bank promoted a wide array of human rights,<sup>130</sup> including the "right to development;"<sup>131</sup> the rights to an adequate living standard, education, and nutrition;<sup>132</sup> women's rights; the right to a healthy environment; refugees' rights; and rights related to involuntary resettlement.<sup>133</sup>

To advance its more active involvement in the human rights arena, the World Bank initiated its "good governance" program, which characterized human rights as a vital precursor to sustainable economic development.<sup>134</sup>

127. See Cahn, *supra* note 3, at 163-67. In recent years, the Bank's human rights activities generally have been subsumed beneath the rubric of "good governance," which has become a dominant IBRD theme in the 1990s. See *id.*; Stremlau & Sagasti, *supra* note 11, ch. 3, ¶ 9.

128. See Reports of the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation, 1972 U.N.Y.B. 315-17.

129. See Bradlow, *supra* note 26, at 59. The Bank's operations, either by explicit intent or less direct means, now have a direct effect on many types of human rights, including, *inter alia*, the rights of women, resettled persons, and refugees and the rights to due process, free speech and association, nondiscriminatory treatment, food, health care, shelter, and integrity of the person.

For Shihata's account of the Bank's role in promoting various human rights, see generally Shihata, *supra* note 125, at 48-66. For a summary account of the same activities, see Shihata, *supra* note 94, at 43-44.

130. See Shihata, *supra* note 125, at 48. Shihata has distinguished between human rights of a "civil and political nature" and those which constitute "economic and social rights." See *id.*; see also Shihata, *supra* note 94, at 42-43.

131. See Res. No. 41/128, reprinted in 13 COMMONWEALTH L. BULL. 1013 (1987). The "right to development" emanates from a 1986 Declaration of the U.N. General Assembly. The first paragraph of Article I of the Declaration reads: "The right to development is an unalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized." *Id.* Shihata asserts that the right to development, as set forth in the Declaration, is "one human right which the World Bank has been promoting throughout its history." Shihata, *supra* note 125, at 49.

132. Shihata addresses these rights as coterminous with the broader right to freedom from poverty, which he asserts as a goal of IBRD development programs. *Id.* Such rights emanate from, *inter alia*, the Universal Declaration of Human Rights, the U.N. Declaration on Social Progress and Development and the Universal Declaration on the Eradication of Hunger and Malnutrition and the International Covenant, and the Proclamation of Teheran. *Id.*

133. See Shihata, *supra* note 125, at 54-65. According to Shihata, women's rights emanate from sources including the Declaration of Teheran and the Declaration of Right to Development, while environmental rights are derived from the Declaration on the Human Environment and other sources. See generally *id.* The principal sources of refugees' rights are the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954), and the 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1967). See *id.*

134. See Armstrong, *supra* note 94, at 240-41. Gathii has argued that the Bank's "good governance" policy "serves as the World Bank's short hand for measuring which

By 1989, the Bank published a report which specifically referred to human rights as an essential component of "good governance."<sup>135</sup>

Since the end of the Cold War, the IBRD has pursued a broader "development" strategy, expanding its definition of permissible, "economic" human rights considerations and concomitantly narrowing its definition of prohibited, "political" human rights considerations.<sup>136</sup> The Bank now regularly takes into account the rights of refugees and resettled persons in its loan decisions and program implementation.<sup>137</sup> It has also taken an increasingly active position regarding women's rights, environmental issues, and a cluster of activities related to the rights to development and freedom from poverty.<sup>138</sup>

Two important conclusions may be drawn from the World Bank's practice in the human rights arena. First, it is clear that the Bank now envisions its development mandate as encompassing goals beyond economic advancement.<sup>139</sup> The objectives of social equity and enhanced quality of life are now firmly entrenched in the Bank's conception of "sustainable development."<sup>140</sup> The Bank's broader construction of its mandate significantly influences the interpretation of the IBRD Charter by demonstrating that the Bank's member nations have increasingly agreed certain human rights considerations are sufficiently "economic" and "apolitical" to be lawfully entertained in the Bank's lending decisions.

The second conclusion drawn from IBRD practice is that the precise distinction between "economic" and "political" human rights considerations remains vague.<sup>141</sup> For example, it may be difficult to argue that women's rights are more "economic" and less "political" in nature than the

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parts of the human rights agenda are compatible or consistent with its financial and economic mandate." James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 108 (1999).

135. See THE WORLD BANK GROUP, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH, A LONG-TERM PERSPECTIVE STUDY, 63-88 (1989). The Bank's report stated that the rule of law, necessary for sustainable development, implies scrupulous respect for the law and human rights at every level of governance." *Id.*

136. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 99; Bradlow, *supra* note 26, at 54; see also Bradlow & Grossman, *supra* note 20, at 431.

137. See Shihata, 1995 Memorandum, *supra* note 27, at 26-27.

138. See Bradlow & Grossman, *supra* note 20, at 414-15; Bradlow, *supra* note 26, at 49.

139. See Wadrzyk, *supra* note 1, at 564 (asserting that there has been a "gradual incorporation of some human rights concepts in the Bank's definition of 'development'"); see also Bradlow, *supra* note 26, at 54-57.

140. See Handl, *supra* note 13, at 649-51 (asserting that "in practice MDBs nowadays routinely make investment decisions based, inter alia, on sensitive 'noneconomic' considerations . . . and there is no denying that certain human-rights-related conditionalities have become part and parcel of the MDBs' routine loan requirements").

141. See Shihata, *Issues of "Governance," supra* note 27. The Bank's current test to determine whether a consideration is "economic" or "political" is the "direct and obvious" test. The test has three parts: the economic effect of a considered factor must be (1) clear and unequivocal, (2) preponderant, and (3) if associated with political actions or events, "of such impact and relevance as to make it a Bank concern." *Id.*

freedom of the press.<sup>142</sup> Thus, the Bank's practice cannot be said to provide evidence of an agreement among its member nations regarding the proper interpretation of Article IV, Section 10. It remains unclear precisely when certain human rights considerations breach the protected concepts of a nation's "political affairs" or "political character." For that determination, this analysis turns to an examination of further interpretive sources.

## 2. Relevant Rules of International Law

To interpret the terms and provisions of a treaty, international law, as codified in the Vienna Convention, also requires consideration of "any relevant rules of international law applicable in the relations between the parties."<sup>143</sup> The applicable rules of international law, like the policy and practice of the Bank, comprise part of the second stage in the *encerclement progressif*. Although they are not part of the text of the treaty, they provide evidence of an explicit or implicit agreement among the World Bank's member nations to interpret the Articles of Agreement in a particular fashion.<sup>144</sup>

Applicable rules of international law potentially affect an interpretation of the IBRD and IDA Articles of Agreement in two major ways. First, certain principles of international law provide guidance regarding the meaning of the concept of "political affairs" expressed in Article IV, Section 10. Thus, they help elucidate what the Bank is legally authorized to do. Second, principles of international law dictate certain obligations of the World Bank vis-à-vis the United Nations and other sovereign and international entities. Such authority states what the Bank must do, regardless of the IBRD and IDA Charters.

### a. Defining the Concept of "Political Affairs"

International law provides little guidance regarding the appropriate meaning of "influence[ ] by the political character of the member" found in Article IV, Section 10.<sup>145</sup> It does, however, provide evidence of the proper significance of "interfer[ence] in [a country's] political affairs,"<sup>146</sup> thereby addressing the other major prohibition left obscure by an ordinary meaning textual analysis.

Although no resolute definition of the term "political" exists under international law, both the U.N. Charter and the preexisting Covenant of the League of Nations provide evidence that the narrower concept of a country's "political affairs" is closely tied to traditional notions of sovereign

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142. See Bradlow, *supra* note 26, at 61. Bradlow cites the Bank's determination that female genital mutilation is an "economic" issue as an example of the ambiguity in the Bank's treatment of human rights. See *id.*

143. Vienna Convention, *supra* note 44, art. 31(3)(c).

144. See de Aréchaga, *supra* note 48, at 44.

145. IBRD Articles of Agreement, *supra* note 16, art. IV, § 10.

146. *Id.*

autonomy.<sup>147</sup> Article 2(7) of the U.N. Charter prohibits the United Nations from intervening "in matters which are essentially within the domestic jurisdiction" of any member state.<sup>148</sup> Similarly, Article 15(8) of the Covenant of the League of Nations prohibits the League from interfering in a member State's "domestic jurisdiction."<sup>149</sup> While the IBRD Charter makes no explicit reference to a state's "domestic jurisdiction," it does refer to the "political affairs of any member."<sup>150</sup> This suggests that the affairs contemplated are those of an individual sovereign member, either in its domestic capacity or in its singular relationship with other States, which are not subjects of concern for the international community as a whole.<sup>151</sup>

Evidence that international law defines "political affairs" as acts within a sovereign sphere is of great consequence to the treatment of human rights under the IBRD Charter because it is now well-established that violations of certain human rights fall beyond a State's autonomous jurisdiction.<sup>152</sup> Such rights represent obligations of an individual State to the international community as a whole; they have been deliberately excerpted from the State's sovereign power and consequently cannot be the subject of its "political affairs."<sup>153</sup>

The principle that certain human rights norms constitute obligations to the international community and thus transcend domestic jurisdiction arises from a landmark holding of the International Court of Justice (ICJ). In *Barcelona Traction, Light & Power Co. Ltd.*, the ICJ held that a State bears certain obligations, including the protection of "the basic rights of the human person," to the entire international community; such obligations

147. See Bradlow & Grossman, *supra* note 20, at 415 n.18; Marmorstein, *supra* note 2, at 123-24.

148. U.N. CHARTER art. 2, para. 7.

149. See LEAGUE OF NATIONS COVENANT, art. 15(8).

150. IBRD Articles of Agreement, *supra* note 16, art. IV, § 10 (emphasis added).

151. See Marmorstein, *supra* note 2, at 126.

The transcript of the U.N. response to the IBRD in the dispute surrounding Portugal and South Africa reveals the same basic argument. It paraphrased the response of the U.N. legal counsel as follows:

The first sentence of Section 10 would appear to have as its purpose the prohibition of interference in the internal political affairs of a member state and of discrimination against a State because of the political character of its Government. [The U.N. legal counsel] doubted very much that the sentence was intended to relate to criteria involving the international conduct of a State affecting its fundamental Charter obligations.

21 U.N. GAOR 4-20, U.N. Doc. A/C 4 SR 1653 (prov. ed. 1966), reprinted in 6 INT'L LEGAL MATERIALS 171, 172 (1967).

152. See Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser.B) No.4. The principle that international legal obligations override sovereign jurisdictional interests was set forth in this decision by the Permanent Court of International Justice (PCIJ), the predecessor to the ICJ.

153. See Philip Alston, *Environment, Economic Development and Human Rights: A Triangular Relationship?*, Remarks, Apr. 20-23, 1988, reprinted in 82 AM. SOC'Y INT'L. L. PROC. 40, 54 (1988). Alston has made this contention, asserting that "human rights are not political, they are matters of international law." *Id.*

are *erga omnes*.<sup>154</sup> The Court added that some *erga omnes* obligations arise from "international instruments of a universal or quasi-universal character," while others "have entered into the body of general international law."<sup>155</sup>

Shortly after its decision in *Barcelona Traction*, in an advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*,<sup>156</sup> the ICJ asserted that a violation of "fundamental human rights" constitutes a breach of a State's obligations under the U.N. Charter.<sup>157</sup> In the *Namibia* case, the "fundamental human rights violations" at issue concerned racial discrimination by South Africa during the apartheid regime.<sup>158</sup>

In the years since the *Barcelona Traction* and *Namibia* decisions, the long-debated concept of *jus cogens*, similar to "violations *erga omnes*," has been explicitly recognized in Article 53 of the Vienna Convention, enlarging the window through which international organizations can scrutinize the human rights offenses of sovereign States.<sup>159</sup> More than ever before, violations of fundamental human rights now may confidently be treated as matters that transcend sovereign authority and lie beyond the boundary of a nation's autonomous will.<sup>160</sup> Thus, the IBRD and IDA Articles of Agreement cannot prohibit the Bank's consideration of such fundamental human rights abuses as intrusions upon a nation's protected "political

154. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 33 (Feb. 5). The International Court of Justice held as follows:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.

*Id.*

155. *Id.*

156. 1971 I.C.J. 50 [hereinafter *Namibia*]. The ICJ's advisory opinion was requested by the U.N. Security Council. See HENKIN ET AL., *supra* note 46, at 856.

157. See *Namibia*, *supra* note 156, at 50.

158. See *id.*

159. See Vienna Convention, *supra* note 44, art. 53.

160. See HENKIN ET AL., *supra* note 46, at 599-619; Patricia Armstrong, *Discussion*, 88 AM. SOC'Y INT'L L. PROC. 271, 288 (1994). There is obviously substantial debate regarding what human rights may be regarded as fundamental. However, it is well established at international law that the so-called "International Bill of Rights," comprised of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (together with its Optional Protocol), and the International Covenant on Economic, Social and Cultural Rights, sets forth human rights fairly established as "fundamental" under international law. See *id.*

affairs."<sup>161</sup>

#### b. Rules Binding Upon the IBRD

The second means by which the rules of international law could affect an interpretation of the IBRD Articles of Agreement is by obligating the Bank to consider, or abstain from considering, human rights factors in certain cases. The World Bank has a unique status at international law. It is not a signatory to the U.N. Charter and is technically an independent, specialized agency of the United Nations pursuant to a 1947 agreement between the two organizations.<sup>162</sup> That agreement requires the Bank to consult and cooperate with other international organizations on matters of mutual interest<sup>163</sup> and to conduct its affairs with "due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter."<sup>164</sup> However, it also states that "[t]he United Nations recognizes that the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accor-

161. Whether certain human rights considerations would constitute prohibited influence due to a member's "political character" is not as clear from the relevant rules of international law. That inquiry must be resolved below by reference to the Articles' *travaux préparatoires*. See *infra* Part II.C.

162. See Agreement between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, 16 U.N.T.S. 346, reprinted in 2 INT'L ORGANIZATION 198-201 (1948) [hereinafter Relationship Agreement]. Article I(2) of that agreement states: "The Bank is a specialized agency established by agreement among its member Governments and having wide international responsibilities, as defined in its Articles of Agreement . . ." *Id.* The IDA is also a specialized agency pursuant to a similar agreement. See Agreement between the United Nations and the International Development Association, G.A. Res. 1594, U.N. GAOR, 15th Sess., Supp. No. 16A, at 17. For a brief discussion of the relationship between the World Bank and the United Nations, see Jane Dwasi, *Kenya: A Study in International Labor Standards and Their Effect on Working Women in Developing Countries: The Case for Integration of Enforcement Issues in the World Bank's Policies*, 17 WIS. INT'L L.J. 347, 438 (1999).

163. See Article IV(1)-(3) of the Relationship Agreement, *supra* note 162, which sets forth the general relationship between the Bank and other international organizations:

(1) The United Nations and the Bank shall consult together and exchange views on matters of mutual interest.

(2) Neither organization nor any of their subsidiary bodies will present any formal recommendations to the other without reasonable prior consultation with regard there to. Any formal recommendations made by either organization after such consultation will be considered as soon as possible by the appropriate organ of the other.

(3) The United Nations recognizes that the action to be taken by the Bank of any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognizes therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank. The Bank recognizes that the United Nations and its organs may appropriately make recommendations with respect to the technical aspects of reconstruction or development plans, programs or projects.

*Id.* However, the Relationship Agreement specifically provides that the Bank is required to function as an independent organization relative to the United Nations. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 26 n.68.

164. Relationship Agreement, *supra* note 162, at art. VI(1).

dance with the Bank's Articles of Agreement."<sup>165</sup> It is therefore clear that General Assembly resolutions are not binding on the IBRD,<sup>166</sup> and it appears from the language of the UN-IBRD Relationship Agreement that even Security Council decisions do not create absolute obligations on the World Bank.<sup>167</sup>

Various arguments in the literature have advanced the thesis that international law provides binding norms for the Bank in the human rights arena.<sup>168</sup> Some have argued that, as a specialized agency of the United Nations, the Bank is obligated to foster compliance with international human rights law,<sup>169</sup> an explicit object of the U.N. Charter.<sup>170</sup> Others have countered that consideration of human rights factors amounts to coercion prohibited under the U.N. Charter<sup>171</sup> and violates the principle of sovereignty.<sup>172</sup>

While such arguments may serve valuable rhetorical functions in determining what the Bank *should* do in the human rights arena, neither is an accurate statement of what the Bank is obligated to do. First, it is clear from the Relationship Agreement that the Bank is not bound to promote the principles of the U.N. Charter or the legal principles derived from it.<sup>173</sup> Second, the International Court of Justice has held that economic intervention does not constitute coercion prohibited by customary international law.<sup>174</sup> Finally, the foregoing discussion of *erga omnes* obligations and *ius cogens* norms has shown that certain human rights norms penetrate the

165. *Id.*

166. See Shihata, 1995 Memorandum, *supra* note 27, at 33. The South African and Portugal loan controversies are examples of the non-binding quality of General Assembly resolutions, which are "normally deemed to be recommendations." *Id.*

167. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 27 ("In practice, political reality governs the relationship between the World Bank and the UN in the human rights area.")

168. See Bradlow & Grossman, *supra* note 20, at 427 (citing Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 179 (Apr. 11); IAN BROWN-LIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 679-707 (4th ed. 1990)). Bradlow and Grossman assert that international organizations, such as the World Bank, are subjects of international law bound by its norms. Therefore, they argue that the Bank cannot provide funds to a nation practicing genocide or otherwise violating human rights norms. See *id.*; see also Bradlow, *supra* note 26, at 63. For an additional view on the bindingness of international human rights norms on the IBRD and other multilateral development banks (MDBs), see Handl, *supra* note 13, at 654-55, 662-64 (arguing that the Bank and other MDBs need to recognize an affirmative duty to act in support of "emerging norms of the international law of sustainable development.")

169. See, e.g., Marmorstein, *supra* note 2, at 130-31.

170. See U.N. CHARTER art. 55. Article 55 of the U.N. Charter provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.*

171. See Moris, *supra* note 2, at 183.

172. See *id.* at 184.

173. See *supra* notes 162-65 and accompanying text.

174. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 126 (June 27). In the celebrated *Nicaragua* case, the I.C.J. held that it was "unable to regard such action as is here complained of (cessation of economic aid) as a breach of customary international law." *Id.*

protected sovereign sphere.<sup>175</sup>

It remains probable that Security Council resolutions could create binding obligations upon the World Bank in certain cases.<sup>176</sup> However, no such obligation currently exists, and the literature does not identify any relevant Security Council resolution in the Bank's history. Therefore, the only feasible way to incorporate the resolutions of the Security Council into an interpretation of the IBRD Charter is to acknowledge that, in limited cases, there may be mandates which trump the normal parameters set by the Bank's Articles of Agreement. Those mandates must be assessed on a case-by-case basis and are not sufficiently predictable to influence the present analysis.

### C. Travaux Préparatoires

As described above, the interpretive process set forth in the Vienna Convention requires consideration of both the text of the IBRD Articles of Agreement and the *travaux préparatoires* leading to their formation.<sup>177</sup> An analysis of the preparatory work of the IBRD Charter is critical to understanding the intent of the Bretton Woods parties and, therefore, to an accurate interpretation of the IBRD Charter's provisions. Most importantly, it provides evidence regarding the meaning of a nation's "political character," the major interpretive issue left unresolved by the preceding analyses.

The Bretton Woods institutions were conceived in the midst of the Second World War and were largely negotiated by representatives from two nations: the United States and Great Britain.<sup>178</sup> The geopolitical

175. See *supra* Part II.B.2.a.

176. See Shihata, 1995 Memorandum, *supra* note 27, at 32. Shihata properly asserts that "situations may arise where the Bank becomes legally bound to pay due regard to factors which are basically political in nature. Members of the Bank which are also members of the U.N. are required by the U.N. Charter (Article 48) to carry out Security Council decisions 'directly and through their action in the appropriate international agencies of which they are members.'" *Id.* It remains uncertain when a Security Council resolution would take on binding force.

177. See de Aréchaga, *supra* note 48, at 47-48. De Aréchaga asserts that, in the legal process of treaty interpretation, "the importance of *travaux préparatoires* is not to be underestimated and their relevance is difficult to deny, since the question [of] whether a text can be said to be clear is in some degree subjective." *Id.* at 48. For a discussion of the role of *travaux préparatoires*, see *supra* Part I. See also *supra* notes 61-63 and accompanying text.

178. It is beyond dispute that the United States and Great Britain dominated both the preparation of the Bretton Woods Institutions and the Conference itself. For an in-depth account of the relationship between the United States and United Kingdom throughout the 1940s, see generally RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY* (2d. ed. 1969). Several other books have been written on the subject of Anglo-American relations leading to Bretton Woods. For three of the most valuable sources drawn on for the present analysis, see generally ARMAND VAN DORMAEL, *BRETTON WOODS: BIRTH OF A MONETARY SYSTEM* (1978); EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* (1973); and ROBERT OLIVER, *INTERNATIONAL ECONOMIC CO-OPERATION AND THE WORLD BANK* (1975).

Perhaps surprisingly, the third most important nation in the creation of the Bretton Woods institutions was Canada, which mediated between the U.S. and U.K. delegations at the Conference. See *Introduction to BRETTON WOODS REVISITED: EVALUATIONS OF THE INTERNATIONAL MONETARY FUND AND THE INTERNATIONAL BANK FOR RECONSTRUCTION AND*



destabilization during the war placed the United States and United Kingdom in positions of particular leverage for the planning and construction of a new postwar international order.<sup>179</sup> France, which remained occupied by Germany through 1943 and well into 1944, was not engaged in the planning for Bretton Woods and played only a marginal role in the Conference itself.<sup>180</sup> The Axis Powers - Germany, Italy, and Japan - were excluded altogether for obvious political reasons.<sup>181</sup> For different political reasons, the Soviet Union was likewise uninvolved in the negotiations leading to Bretton Woods.<sup>182</sup> Although a Soviet delegation did attend the latter stages of the Conference, its role was largely observatory, and the Soviet Union ultimately elected not to sign the Bretton Woods agreements.<sup>183</sup> Thus, as a consequence of such geopolitical factors, both the planning for the Bretton Woods institutions and the Conference itself were thoroughly dominated by British and American visions for a postwar economic order.<sup>184</sup>

Great Britain and the United States both envisioned the need for powerful international economic institutions, which would solidify peace by stabilizing currencies, financing certain balance-of-payments deficits, and otherwise averting international monetary and fiscal crises.<sup>185</sup> Nevertheless, the U.S. and U.K. blueprints for international economic bodies were often discordant,<sup>186</sup> and the two allies engaged in substantial negotiation between 1941 and 1945, when the Bretton Woods agreements were signed into force.<sup>187</sup> Those negotiations provide the clearest evidence of the

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DEVELOPMENT (A.L.K. Acheson et al. eds., 1972) [hereinafter BRETTON WOODS REVISITED]; Richard N. Gardner, *The Political Setting*, in BRETTON WOODS REVISITED [hereinafter Gardner, *The Political Setting*], *supra*, at 20.

179. See Gardner, *supra* note 178.

180. See *id.*

181. See *id.*

182. For an excellent account of the proceedings and the roles played by various nations at Bretton Woods, see generally BRETTON WOODS REVISITED, *supra* note 178. The historical literature does not provide a clear account as to why the Soviet Union played so little a role in the negotiations. Nevertheless, it is undisputed in the literature that the Russian delegation took a very minimal role in the proceedings.

183. See Gardner, *supra* note 178, at 20.

184. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 4. The dominance of the United States and Britain in the framing of the IBRD Articles of Agreement is very well documented. See, e.g., MASON & ASHER, *supra* note 178, at 28; Gardner, *supra* note 178, at 26.

185. For detailed discussions of the various motives that impelled the leading parties to create the World Bank and the IMF, see generally VAN DORMAEL, *supra* note 178; GARDNER, *supra* note 178; OLIVER, *supra* note 178. These motivations are relatively undisputed in the literature and formed the stated goals of the Bretton Woods Conference.

186. See, e.g., GARDNER, *supra* note 178; MASON & ASHER, *supra* note 178. Excellent analysis of the broader negotiations between the United States and United Kingdom are set out in a number of sources. An important element of their discord was that the British argued against all political interference with the international financial institutions, while the Americans contended that economic factors could not always trump political considerations. See Introduction to BRETTON WOODS REVISITED, *supra* note 178, at 20.

187. See Yokota, *supra* note 43, at 42-48. Henry Bittermann describes the overall process of negotiation for the World Bank as comprising four phases: "(1) U.S. interdepart-

intent of the drafting parties at Bretton Woods<sup>188</sup> and thus form the subject of the ensuing discussion.

The leaders of the U.K. and U.S. delegations, and the principal architects of the Bretton Woods institutions, were the eminent English economist John Maynard Keynes and Harry Dexter White of the U.S. Treasury Department.<sup>189</sup> In September 1941, Keynes produced a draft for an "international Clearing Union," which became the predecessor to the IMF.<sup>190</sup> By the end of 1941, White had also drafted a plan, comprising a "United and Associated Nations Stabilization Fund" and a "Bank for Reconstruction of the United and Associated Nations,"<sup>191</sup> which would eventually become the World Bank.

Interestingly, in its first iteration, White's plan contained no political activity prohibition;<sup>192</sup> rather, Keynes's Clearing Union plan introduced the concept:

- (a) the Clearing Union should be able to accommodate countries with different principles of government and different economic policies,
- (b) its operations should involve the least possible interference with national policies, and
- (c) its management must be genuinely international without preponderant power of veto or enforcement to any country or group; and the rights and privileges of the smaller countries must be safeguarded.<sup>193</sup>

Conversely, the purposes for the Bank set forth in White's plan include two objectives with an expressly political character, clearly demonstrating that White, at least according to his initial conception, had no intention that the Bank would be non-political:<sup>194</sup>

- 9. To make easier the solution of many of the economic and political problems that will confront the 'peace conference.'

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mental discussion (1941-43); (2) informal intergovernmental discussion of the Treasury's 'Preliminary Draft Outline,' November 24, 1943; (3) the Atlantic City Meeting of the Agenda Committee, June, 1944; and (4) the Bretton Woods Conference, July 1944." Henry Bittermann, *Negotiation of the Articles of Agreement of the International Bank for Reconstruction and Development*, 5 INT'L LAW, 60 (1971). It will become clear in the course of the ensuing discussion that the critical negotiations of the political activity prohibition occurred in the second of Bittermann's four phases. See *infra* Part II.C.

188. See Yokota, *supra* note 43, at 42-48.

189. See Kneller, *supra* note 2, at 395. The dominant roles played by Keynes and White have been chronicled in numerous historical accounts of the negotiations and in biographies of both men. See, e.g., R.F. HARROD, *THE LIFE OF JOHN MAYNARD KEYNES* 575-85 (1951); DAVID REES, *HARRY DEXTER WHITE: A STUDY IN PARADOX* 232-35 (1973).

190. See Keynes' September 1941 Plan for an International Clearing Union, reprinted in *THE NEW ECONOMICS: KEYNES' INFLUENCE ON THEORY AND PUBLIC POLICY* 323-41 (S. Harris ed., 1947).

191. See Bittermann, *supra* note 187, at 62. White's plan was drafted in response to a request by Secretary Morgenthau on December 14, 1941. See *id.*

192. See Yokota, *supra* note 43, at 42.

193. *THE NEW ECONOMICS*, *supra* note 190, at 324-25.

194. See Yokota, *supra* note 43, at 42.

10. To enhance the opportunity throughout the world for a healthy development of democratic institutions.<sup>195</sup>

In comparing the initial drafts of Keynes and White, one finds the first evidence that the notion of political impartiality had its origin with Keynes and the British delegation.

By August 1942, White was familiar with the contents of Keynes's plan for a "Clearing Union."<sup>196</sup> Throughout 1943, informal discussions and negotiations took place between the British government and U.S. authorities.<sup>197</sup> As a result of those negotiations, White's plan for the Bank was amended several times.<sup>198</sup> In November 1943, his revised plan formed the basis for the U.S. Treasury Department's first official proposal for a "Bank for Reconstruction and Development of the United and Associated Nations."<sup>199</sup> During the process of negotiating with the British, the Bank's two political purposes were eliminated and the following predecessor to Article IV, Section 10 was added:

The Bank and its officers shall scrupulously avoid interference in the political affairs of any member country. This provision shall not limit the right of an officer of the Bank to participate in the political life of his own country. The Bank shall not be influenced in its decisions with respect to application for loans by the political character of the government of the country requesting a loan.<sup>200</sup>

Before the delegations convened at Bretton Woods in 1944, language stating that "only economic considerations shall be relevant to the Bank's decisions" was added to the provision, presumably by the British, who substantially rewrote Article IV prior to the conference.<sup>201</sup>

Though not dispositive, the circumstantial evidence that Keynes and the U.K. contingent were the source of the political activity prohibition is certainly strong. However, the British motivations underlying the provi-

195. Harry D. White, *Appendix D: Suggested Plan for a United and Associated Nations Stabilization Fund and a Bank for Reconstruction and Development of the United and Associated Nations*, reprinted in OLIVER, *supra* note 178, at 291.

196. See Kneller, *supra* note 2, at 397.

197. There is no official account of the negotiations that took place between the United States and United Kingdom during the period between August 1942 and November 1943. Therefore, the best evidence of the content of the negotiations is obtained by examining the resulting changes to the drafts of Keynes and White.

During the informal negotiations between the United States and Great Britain, the inchoate plans for the Bank were mentioned incidentally in discussion with China, various Latin American countries, and some European nations, including the Soviet Union. However, the Bank proposal was not given to any of those nations until late in 1943, after the political activity prohibition was added. See Bittermann, *supra* note 187, at 63. Thus, it is quite clear that the political activity prohibition was not included at the direct insistence of any of those nations.

198. See Yokota, *supra* note 43, at 42.

199. See Kneller, *supra* note 2, at 397. The U.S. Treasury draft for the Bank was published and disseminated on November 23, 1943. See Bittermann, *supra* note 187, at 63.

200. U.S. Treasury Dep't, Preliminary Draft Outline of a Proposal for a Bank for Reconstruction and Development of the United and Associated Nations, art. IV, sec. 19 (Nov. 24, 1943).

201. See OLIVER, *supra* note 178, at 174-81.

sion are less evident. Although Congressional hearings and other political fora touched on the subject, neither Keynes nor any member of the British delegation provided any public speech or memorandum definitively explaining the U.K. position.<sup>202</sup> At the Bretton Woods proceedings themselves, there was virtually no mention of Article IV, Section 10,<sup>203</sup> which underwent only moderate amendment in committee and was adopted unanimously by the parties to the treaty.<sup>204</sup>

Although the historical records of the IBRD Charter's *travaux préparatoires* offer little explicit evidence of the drafters' intent of the, three principal rationales have been put forth in the academic literature. First, Mason and Asher assert that Article IV, Section 10 was included "with the Soviet Union principally in mind."<sup>205</sup> It is quite reasonable to believe that the Soviet Union weighed heavily on the minds of the American and British drafters in framing the political activity provision.<sup>206</sup> In 1943, the Soviet Union ranked with the United States and United Kingdom in an Allied triumvirate that stood to divide much of the political world at war's end. Russia would also command important economic power, and securing its participation was undoubtedly an objective of the negotiators at Bretton Woods.<sup>207</sup> The Soviet Union was the nation most apt to oppose an international financial institution which might discriminate against nations on the basis of their "political character."<sup>208</sup> Levinson has argued that the tripolar

202. See Levinson, *supra* note 7, at A23 ("There is no definitive statement as to what the authors [Keynes and White] intended, more than 50 years ago, by their use of the term 'political.' Congressional hearings at the time simply indicated a concern that decisions on particular laws not be influenced by 'political' favoritism.").

203. See generally Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944 (U.S. Government Printing Office, 1948).

204. *Id.*

205. MASON & ASHER, *supra* note 178, at 27. The same assertion has been made by James Paul. See James C.N. Paul, *The World Bank, Human Rights and Development: Some Obligations*, Paper for the Annual Meeting of the Canadian Association of African Studies (1987), at 3-5. The authority and basis for Paul's assertion is likewise unclear.

206. See Bittermann, *supra* note 187, at 79 (asserting that the relevant provisions "were probably intended principally as assurances to the U.S.S.R."). Although the political activity prohibition may have been inserted with the Soviet Union in mind, it is quite clear that its inclusion was not specifically requested by the Russian delegation. Oliver writes that negotiations between the U.S. and Soviet delegations regarding the Bretton Woods proposals did not begin until the spring of 1944, after the relevant language had already been added. See OLIVER, *supra* note 178, at 163-66; see also Yokota, *supra* note 43, at 43.

207. See Untitled Transcript of Harry Dexter White (Nov. 30, 1945), reprinted in GARDNER, *supra* note 178, at 7 [hereinafter White Transcript]; see also Yokota, *supra* note 43, at 43. As Harry White wrote in 1945:

The major task that confronts American diplomacy—and the only task that has any real value in the major problems that confront us—is to devise a means whereby continued peace and friendly relations can be assured between the United States and Russia. Everything else in the field of international diplomacy pales into insignificance beside this major task. It matters little what our political relationships with England become or what happens in the Balkans or the Far East if the problems between the United States and Russia can be solved.

White Transcript, *supra*, at 7.

208. See Yokota, *supra* note 43, at 43.

ideological tension between communist Russia, socialist Britain, and capitalist America likely motivated the parties to include a political activity prohibition.<sup>209</sup>

Despite the appeal of the foregoing rationale, it remains inferential. Mason and Asher provide no authority for their assertion,<sup>210</sup> and the major historical accounts do not emphasize concern for the Soviet Union as a driving force behind the adoption of Article IV, Section 10.<sup>211</sup> Rather, the historical accounts provide evidence that Britain's concern for postwar economic sovereignty was the most influential reason behind the inclusion of the political activity prohibition.<sup>212</sup>

It is well documented that Keynes and other members of the British delegation sought in the course of negotiations to preserve liberal credit for the United Kingdom after the war.<sup>213</sup> Historical accounts provide evidence that the British deemed economic sovereignty vis-à-vis the dominant United States essential to avoid dismantling of the "sterling area," the preferential economic zone of the British Empire.<sup>214</sup> Britain was wary of the American domination of international financial organizations and feared that pressure would be applied to weaken or abolish its preferred trading relationships.<sup>215</sup> Therefore, it appears that Keynes may have added the political activity prohibition as insulation for Britain against American economic dominance or anti-Commonwealth bias.

Kneller offers a third argument, supplementing his contention that Keynes sought primarily to insulate Britain's economic sovereignty. He argues that Keynes added the provision due to his broader concern that political manipulation would detrimentally impact the Bretton Woods institutions.<sup>216</sup> While the American delegation believed that international economics could not be separated completely from politics,<sup>217</sup> Keynes envisioned the most effective financial institutions as highly technical and

209. See Levinson, *supra* note 7, at A23 ("Postwar political competition in individual countries would exist between conservative, liberal and socialist parties. It certainly was reasonable to ensure that the Bretton Woods institutions not take sides in this political competition. And that is what the 'political' sections of the Articles of Agreement should be understood to prohibit.").

210. See MASON & ASHER, *supra* note 178, at 27. Mason and Asher do not cite to any document which supports their assertion.

211. See Bittermann, *supra* note 187; Gardner, *supra* note 178; OLIVER, *supra* note 178. The major accounts of the negotiations, including those of Bittermann, Gardner, and Oliver, provide little suggestion that the Soviet Union was the reason for the political activity prohibition.

212. See Kneller, *supra* note 2, at 395, 398.

213. See Gardner, *supra* note 178, at 26; Kneller, *supra* note 2, at 398.

214. See Gardner, *supra* note 178, at 26.

215. See GARDNER, *supra* note 178, at 18. The British fear of American dominance and the dismantling of the "sterling area" appear to have been well-founded, as the United States advocated anti-discrimination in trading practices, especially "preferential practices in the British Empire." *Id.* Gardner adds that "[s]ome of the most influential post-war planners were deeply suspicious of the United Kingdom." *Id.* at 7.

216. See Kneller, *supra* note 2, at 398; see also C. PAYER, *THE WORLD BANK: A CRITICAL ANALYSIS* 23 (1982). It appears that some American leaders shared this view. See GARDNER, *supra* note 178, at 265.

217. See Kneller, *supra* note 2, at 402.

immune to political influence.<sup>218</sup> Kneller reasons that if Keynes were principally concerned with Britain and economic sovereignty, a political activity prohibition would also appear in the charter of the IMF, which was presumed to exercise greater power over economic policy than the Bank.<sup>219</sup>

Yokota offers another explanation for the inclusion of the political activity prohibition in the IBRD Charter and its removal from the IMF Articles of Agreement. Yokota argues that the United States, as the dominant party to the negotiations, insisted that the provision be removed from the IMF charter.<sup>220</sup> However, in order to warm the British to the idea of the World Bank, which the United Kingdom initially rejected, White elected to accept the provision in the IBRD Articles.<sup>221</sup>

Though the precise intent of the parties remains difficult to ascertain, the drafters of the IBRD Charter were undoubtedly cognizant of all of the foregoing concerns when they negotiated the political activity prohibition. It is therefore likely that some combination of these factors drove the negotiations,<sup>222</sup> and while it is impossible to prove that they represent the complete constellation of motives for Article IV, Section 10, the literature identifies them as the chief probable sources of inspiration. For purposes of the present inquiry, the critical determination is whether the Bank's review of a prospective borrower's human rights record would frustrate any of the three principal motives for the political activity prohibition.

An intent to appease the Soviet Union represents the first likely consideration in the 1943 negotiations between the United States and United Kingdom.<sup>223</sup> To the extent that this assertion is correct and Article IV, Section 10 was included with the Soviet Union principally in mind, the obvious concern addressed was a possible Bank bias against Communism.<sup>224</sup> That concern suggests a relatively narrow intent on the part of the drafters to avoid biases against a member nation based on its political form or ideology – Capitalist, Socialist, or Communist.<sup>225</sup> Given the geopolitical backdrop to the 1943 negotiations, such an intent is highly plausible, as British and American leaders already anticipated the postwar

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218. See *id.* at 398; PAYER, *supra* note 216, at 23.

219. See Kneller, *supra* note 2, at 398-99 n.146.

220. See Yokota, *supra* note 43, at 45.

221. See *id.* at 45-46.

222. While no previous author has made this assertion, a cumulative reading of the historical sources suggests that each of the three factors discussed may have played a role in the ultimate decision to include the political activity prohibition. It is quite clear from the historical analysis that all three factors – the Soviet concern, the British desire to protect spheres of economic influence, and the more functional concerns of John Maynard Keynes – were in the minds of key British and American negotiators at Bretton Woods.

223. See *supra* notes 205-11 and accompanying text (demonstrating that this explanation has been set forth by Bittermann, Mason and Asher, and Paul).

224. See *id.*

225. This argument – that the IBRD Articles of Agreement contemplate “political character” as a nation's form of governance (Communist, Socialist, Capitalist) – was advanced by the U.N. legal counsel in the context of the South Africa and Portugal loan controversies. See 21 UN GAOR 4-20, UN Doc. A/C.4/SR 1653 (prov. ed. 1966), reprinted in 6 INT'L LEGAL MATERIALS 171, 172 (1967).

polarization between Capitalism and Communism, which would give rise to the Cold War.<sup>226</sup>

If the architects of the World Bank simply intended to protect member nations from biases against Communism or Socialism, the scope of a nation's protected "political character" would be narrow. It would allow a country to select a national ideology and form of governance, but it would not permit unbridled flaunting of international legal norms.<sup>227</sup> Violations of international human rights law are not inherently tied to any particular form of governance, and intervention taken to protect such rights would not necessarily have a disproportionate impact upon Communist, Socialist, or Capitalist countries.<sup>228</sup> Therefore, to the extent that concern for the Soviet Union drove the inclusion of the political activity prohibition, the drafters did not intend to protect nations from the adverse consequences of human rights violations.

The second suggested motive for Article IV, Section 10, which resonates with the historical accounts of the negotiations, was Keynes' concern for the protection of Britain's postwar economic sovereignty and Commonwealth ties.<sup>229</sup> This intent, like that to appease the Soviet Union, contemplates a definition of "political" activity that does not preclude human rights considerations.<sup>230</sup> The postwar economic sovereignty sought by the British was related to fiscal and monetary policies and preferential trade relationships.<sup>231</sup> The literature provides evidence that Britain was apprehensive of future restrictions upon its economic freedom.<sup>232</sup> This British concern suggests that the form of "political" insulation contemplated in

226. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 3, at 17; Armstrong, *supra* note 94, at 240; Bittermann, *supra* note 187, at 79. The argument that the political activity prohibition was designed to prevent the World Bank from developing an anti-Communist bias has enjoyed some support in the literature. Inferential support can also be found in the writings of Harry Dexter White. See *supra* note 207.

227. See Address by Henry Morgenthau, U.S. Congress, Senate Committee on Banking and Currency, 1945, cited in GARDNER, *STERLING-DOLLAR DIPLOMACY*, *supra* note 178, at 11. As Morgenthau said in a 1945 address to the Senate Banking and Currency Committee, the object of creating "political Bretton Woods institutions was so that countries could come to a world bank or a world fund without having to sell their political souls." *Id.* It is difficult to argue that forcing a nation to comply with international human rights norms would represent a sale of that nation's "political soul."

228. One could argue that an empirical difference in the human rights standards among Capitalist, Socialist and Communist nations has been evident in the years since the Bretton Woods institutions were created. Even if an empirical study were to support that assertion, there is no obvious inherent disposition in any of such systems to abuse human rights (and thus to suffer disproportionately from sanctions related to human rights abuses).

229. See *Introduction* to GARDNER, *supra* note 178, at xlii. This apprehension was apparently justified. "In the wartime years many American leaders regarded the British Empire as a major obstacle to the achievement of postwar U.S. goals. On the British side, there was a widespread resentment of the rise of American power and of what looked like a misguided and indiscriminate 'anti-colonialism.'" *Id.*

230. Clearly, the desire to protect preferential trade relationships and, more generally, economic sovereignty does not lead to an interpretation which would insulate human rights abuses from the Bank's purview.

231. See Kneller, *supra* note 2, at 398.

232. See Gardner, *supra* note 178, at 25-27.

the IBRD Charter was narrowly focused upon economic policy.<sup>233</sup> Thus, the British desire to preserve economic sovereignty does not imply a desire to protect a sovereign's autonomy regarding human rights considerations.

A final, and relatively undisputed, factor during the 1943 negotiations was Keynes' belief that the Bretton Woods institutions would be most effective if operated by expert economists under conditions of minimal political influence.<sup>234</sup> The rationale for this belief was that decisions would be based on rigorous economic analysis alone. The essential determination would be whether a member nation would be able to pay back its loan. Under Keynes' view, political factors could be considered only when they had direct economic effects upon the transaction or program at hand.<sup>235</sup> His intent was not to construct an artificial separation between "economic" and "political" factors, but to assert that only the *economic aspect* of any consideration be relevant. This intention leaves the door open to human rights considerations whenever they legitimately affect economic performance or ability to repay Bank obligations.

Thus, based upon the available literature, it appears that three major factors drove the inclusion of the political activity prohibition in the IBRD Articles of Agreement. Precisely how much each of those factors influenced the *travaux préparatoires* may never be ascertained, and it is possible that one or two of the three suggested motives was dominant. Fortunately, the weight each of the three factors is immaterial to the present analysis. The important conclusion to be drawn from the *travaux préparatoires* is that none of the three apparent objectives for Article IV, Section 10 leads to an interpretation of a nation's "political character" that would prohibit the Bank from considering a nation's violation of internationally recognized human rights in its lending and credit decisions.<sup>236</sup> Therefore, while the exact history at Bretton Woods remains somewhat shrouded, the available evidence suffices for purposes of the present analysis.

## Conclusions

The preceding analysis has been devoted to a relatively narrow inquiry: precisely when may the World Bank lawfully consider a nation's human rights record in its lending and credit decisions? Although this

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233. See *id.*

234. See GARDNER, *supra* note 178, at 81. Keynes' first draft for an international Clearing Union had proposed that it have a "purely technical and non-political character" or an "anonymous' and 'impersonal' quality." *Id.*

235. See Kneller, *supra* note 2, at 396-99.

236. See, e.g., Levinson, *supra* note 7, at A23. Levinson agrees that none of the possible motives for the political activity prohibition would exclude human rights considerations. He argues that:

In order to accept such an expanded interpretation of the "political" provisions, we have to believe that Keynes and White, at the time the war against Nazi Germany was still going on, intended to provide a cover that would permit the Bretton Woods institutions to provide financing in the future for governments that, like the Nazis if on a lesser scale, were egregious abusers of human rights. Such an interpretation defies reason and common sense.



question ultimately will be answered by the Bank itself,<sup>237</sup> this article has presented arguments to guide that interpretation and steer the Bank towards the proper legal conclusion.<sup>238</sup>

Through application of the interpretive methodology established under customary international law and set forth in the Vienna Convention,<sup>239</sup> the foregoing analysis has yielded a conclusion regarding when the World Bank may lawfully take a nation's human rights record into account in making its credit decisions. First, the bank must determine whether the particular human rights violations it wishes to consider amount to an "economic concern" under the IBRD and IDA Articles of Agreement. That condition is safely met whenever such violations would, in the eyes of a reasonable lender in the Bank's position, adversely affect the prospective borrower's ability to meet its obligations to the Bank under the credit agreement.<sup>240</sup>

Once a nation's human rights policy is established as a valid "economic consideration," the second step commences: determining whether consideration of the policy will breach the "political activity" prohibition of the IBRD or IDA Charter.<sup>241</sup> Reference to relevant rules of international law has shown that the consideration of human rights will not represent an intrusion into a nation's "political affairs" if the abuses relate to "fundamental human rights," which include, *inter alia*, the rights set forth in the International Bill of Rights.<sup>242</sup> Finally, analysis of the Articles' *travaux préparatoires* has demonstrated that the Bank does not indulge in impermissible consideration of a nation's "political character" by evaluating a prospective borrower's violations of fundamental human rights.<sup>243</sup>

This author offers the foregoing conclusions as an alternative to the current Bank position and encourages Ko-Yung Tung and the Executive Directors of the World Bank to consider a revised interpretation of the IBRD and IDA Articles of Agreement. Such interpretation would permit, but not require, the Bank to broaden its existing scope of human rights

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*Id.*

237. See *supra* note 42 and accompanying text. Both the IBRD and IDA Articles of Agreement provide that, in the event of a dispute among member nations, the Executive Directors (and, upon appeal, the Board of Governors) of the World Bank have the final power to interpret the Charter provisions.

238. See *supra* notes 40-41 and accompanying text. Historically, the General Counsel of the World Bank has taken the lead in interpreting the IBRD and IDA Articles of Agreement, and his legal opinions have been the most important factor weighed by the Bank's Executive Directors in arriving at an interpretation. Therefore, the new General Counsel of the World Bank, Mr. Ko-Yung Tung, is the individual to whom the arguments herein are most specifically directed.

239. For a full discussion of the proper interpretive methodology to be applied by the Bank in analyzing its constitutive Articles of Agreement, see *supra* Part I.

240. The rationale for this conclusion is set forth in Section II(A). See *supra* Part II.A.

241. See IBRD Articles of Agreement, *supra* note 16, art. IV, § 10; IDA Articles of Agreement, *supra* note 17, art. V, § 6. Both the IBRD and IDA Articles of Agreement contain political activity prohibitions, which are nearly identical.

242. See *supra* Part II.B.2.

243. See *supra* Part II.C.

considerations.<sup>244</sup> Perhaps more importantly, the interpretation proposed herein would largely abolish the confusing distinction between preponderantly “economic” or “political” human rights, thereby enhancing the Bank’s transparency, accountability, and ultimately its effectiveness and reputation.<sup>245</sup>

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244. See, e.g., Bradlow, *supra* note 26; Cahn, *supra* note 3, 160-61; Handl, *supra* note 13, at 662-65; Moris, *supra* note 2, at 182-200; Orford, *supra* note 4, at 464-71. It is important to emphasize that this article has limited its inquiry to the question of when the World Bank *may* entertain human rights considerations as a matter of law. Only when that question is answered does a separate, but easily confused issue remain: when *should* the Bank exercise that power? The literature has often tangled these distinct questions, frequently drawing upon one to answer the other; however, this article does not attempt to address the latter question.

245. This two-step approach, in which the legal question is answered before the policy question, would enhance the reputation and legitimacy of the World Bank among its members by drawing a clearer line between law and policy. For a compatible argument, see Bradlow, *supra* note 26, at 51 (stating that “the IFIs must develop an explicit human rights policy . . . . A transparent and predictable human rights policy, provided it were well publicized, would also enable all interested parties to understand what they can expect from the IFIs when their activities have an effect on human rights”).

