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“THE UNITED STATES AND INTERNATIONAL LAW: LEGAL TRADITIONS AND FUTURE POSSIBILITIES”

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ACCOUNTABILITY IN BRETTON WOODS

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The ILA was founded in Brussels in October 1873. Today, total membership of the ILA is about 4,000. Members are not only lawyers, but include representatives from commercial, industrial, banking and shipping spheres, from Chambers of Commerce, and from arbitration bodies. There are over fifty national branches. The work of the Association is promoted and supervised by the Executive Council which meets twice a year at headquarters in London, United Kingdom. The academic work of the ILA is performed by international committees on particular topics. Their members are appointed by the Executive Council in consultation with the Director of Studies. Each committee has a chairman, one or more rapporteurs, and other members, all of whom are recognized as experts on the subject matter and represent different legal systems and regions. The committees are charged with preparing a fully researched report on a particular topic, which is then presented for discussion, debate and comment by members at the conference. A committee’s report is published in the report of the conference after its adoption. See also http://www.ila.org.

On April 24, 2008, the American Branch of the ILA established the Committee on Multilateralism and Accountability of International Organizations in response to the governance crisis at the Bretton Woods institutions. This Article covers the governance crisis through March 15, 2009. Two of the Committee’s members were on the ILA’s original Committee on Accountability of IOs; five members worked in the World Bank’s Legal Department. Other members practice or teach in the fields of international public law, post-conflict reconstruction, constitutional law, and international investigations. The Committee owes a debt to Mr. Pieter Stek, former Executive Director of the World Bank for the Netherlands constituency, who chaired the Board’s Audit Committee and the Committee on Development Effectiveness. The Committee also wishes to acknowledge the New Haven School of international law. Myers McDougal, Harold Lasswell, Michael Reisman, and other practitioners of the New Haven School drew upon social sciences in their study of international law. The New Haven school included institutional actors and values as legitimate characteristics of international law, distinguishing the New Haven school from international relations realists who viewed international law as the outcome of state power relations and positivists who dismissed international law because it lacked both sovereign commands and a rule of recognition.
I. PURPOSE OF BRETTON WOODS INSTITUTIONS

Under the Marshall Plan after World War II, the United States gave $13 billion to rebuild western Europe. But some historians argue that the United States’ most important legacy was its role in establishing the World Bank and the International Monetary Fund (IMF), named the Bretton Woods institutions, after the site of the conference in 1944 in New Hampshire. At Bretton Woods, forty-four allies agreed to a multilateral institutional framework designed to restore economic growth and monetary stability.

This Article discusses what happened when the United States gradually relinquished its original commitment to multilateralism at Bretton Woods. By the time of the Bush Administration, the United States was abusing its authority at the World Bank as a hegemon. In order to establish this regrettable state of affairs, first the purpose and governance framework of the Bretton Woods institutions, as originally designed, is examined against international precedent, standards, applicable treaties, laws and norms. Then, the transparency of the Bretton Woods institutions is assessed, as well as the impartiality of the institutions tasked with evaluating their performance. The effectiveness of the Bretton Woods institutions’ oversight agencies is also examined, as well as the integrity of the World Bank’s anti-fraud unit. Finally, efforts to improve accountability of the Bretton Woods institutions are discussed with a particular focus on grievance reform and the fate of whistleblowers.
The World Bank and the IMF will be instrumental in overcoming the effects of the international financial meltdown. The IMF is charged with monitoring the role of the official sector in financing United States’ current account deficits. The current financial crisis has simultaneously called the wisdom of American regulatory authorities into question and impaired the stability of U.S. dollar exchange rates. The international dollar standard is at risk. The governance structure of the Bretton Woods institutions matters, not only as this affects the policy and decision framework of these organizations, but also insofar as this orders and reflects changing international financial relationships. The United States cannot expect its allies to respond to the challenges of the global financial crisis unless it is prepared to respect its existing multilateral obligations under Bretton Woods. Moreover, in the face of growing deficits, the United States can ill afford to ignore the call of British Prime Minister, Gordon Brown, and French President, Nicolas Sarkozy, for a new Bretton Woods conference.

The initial purpose of the World Bank was to finance the reconstruction of war-torn Europe. After this was accomplished, the World Bank became the primary financier of development projects in the Third World. The purpose of the IMF was to allocate access to international currency reserves within the system of par values (set values for each member’s currency in terms of gold), convertibility of members’ currencies, and fixed but adjustable exchange rates. After World War II, the U.S. dollar became the main currency for international capital flows outside of Europe.

The delegates to the Bretton Woods Conference considered a draft agreement prepared in April 1942 by Harry D. White of the U.S. Treasury and a draft that was prepared in June 1944 by the United Kingdom, principally by Lord John Maynard Keynes, who chaired the U.K. delegation to the Bretton Woods Conference. Lord Keynes recognized the special role of international lawyers in founding the Bretton Woods institutions:

We, the Delegates of this Conference, Mr. President, have been trying to accomplish something very difficult to accomplish... It has been our task to find a common measure, a common standard, a common rule applicable to each and not irksome to any. We have been operating, moreover, in a field of great intellectual and technical difficulty. We have had to perform at one and the same time the tasks appropriate to the economist, to the financier, to the politician, to the journalist, to the propagandist, to the lawyer, to the statesman—even, I think, to the prophet and to the soothsayer... I am certain that no similar conference within memory has achieved such a bulk of lucid, solid construction. We owe this not least to the indomitable will and energy, always governed by good temper and humor of Harry White. But this has been as far removed as can be imagined from a one-man
or two-man or three-man conference. It has been teamwork, teamwork such as I have seldom experienced. And for my own part, I should like to pay a particular tribute to our lawyers ... I have been known to complain that, to judge from results in this lawyer-ridden land, the Mayflower, when she sailed from Plymouth, must have been entirely filled with lawyers. When I first visited Mr. Morgenthau in Washington some three years ago accompanied only by my secretary, the boys in your Treasury curiously inquired of him—where is your lawyer? When it was explained that I had none—"Who then does your thinking for you?" was the rejoinder. That is not my idea of a lawyer. I want him to tell me how to do what I think sensible, and, above all, to devise means by which it will be lawful for me to go on being sensible in unforeseen conditions some years hence. Too often lawyers busy themselves to make commonsense illegal. Too often lawyers are men who turn poetry into prose and prose into jargon. Not our lawyers here in Bretton Woods. On the contrary they have turned our jargon into prose and our prose into poetry. And only too often they have had to do our thinking for us. We owe a great debt of gratitude to Dean Acheson, Oscar Cox, Luxford, Brenner, Collado, Arnold, Chang, Broches and our own Beckett of the British Delegation.1

Aaron Broches, who was then a young counsellor at the Dutch Embassy, went on to work in the legal department of the World Bank, ultimately as its longest-serving General Counsel from 1959–1978. Aaron Broches considered the most important function of the legal department to be that of ensuring that the Presidency and Board of Executive Directors observed their respective powers laid out in the Articles of Agreement of the World Bank. Mr. Broches' ability to mediate between the presidency and board was severely challenged when Robert McNamara assumed the presidency of the World Bank. After his retirement, Mr. Broches counseled, "When the President of the World Bank comes from the Pentagon, the role of the General Counsel becomes all the more critical in preserving the authority of the Board."2

By the early 1960s, the U.S. dollar's fixed value against gold was considered to be overvalued. Increased domestic spending on President Lyndon Johnson's Great Society programs and military spending on the Vietnam War gradually worsened the overvaluation of the dollar. In 1971 the United States informed the IMF that it would no longer buy and sell gold to settle international transactions. This resulted in the 1973 decision of the


European Community countries and the United States to introduce a joint float of European currencies against the U.S. dollar. Nevertheless, the U.S. dollar maintained its role as "international money." The role of the IMF became less well-defined but in principle turned into one of surveillance and support for currencies in maintaining a stable link with major currencies.

II. WORLD BANK'S ACCOUNTABILITY FOR POVERTY ALLEVIATION

At the turn of the twenty-first century, poverty remains a global problem of huge proportions.\(^3\) Despite continuous attempts to address the issue, the divide between the North and the South, i.e., the "haves" and the "have-nots," remains. The phenomenon of globalization has not overcome the divide. While the two Bretton Woods institutions have influenced developing countries’ policies, by requesting sweeping macro-economic, micro-economic, and governance reforms based on lending conditionalities, these reforms have not enabled the developing countries to catch up. Critics of the Bretton Woods institutions have been justified in questioning the content of the policy reform they promoted.\(^4\)

In light of the Bretton Woods institutions’ increasingly tough governance lending conditionalities, rule of law requirements, and measures for holding those who manage these countries’ economic and social resources accountable for their actions, critics have also turned around and taken a close look at the Bretton Woods institutions’ own internal rule of law record. In connection with inquiries into the Bretton Woods institutions’ rule of law record, light has been

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shed on a crucial defect in the design of international organizations (IOs) in general, and the Bretton Woods institutions in particular, i.e., a lack of accountability of these organizations if measured by modern standards.\(^5\)

IOs, as creatures of traditional international law, come with few accountability features. Beyond a hierarchically organized chain of responsibility of the institutions’ organs (e.g., the IMF Managing Director and the World Bank’s President respond to the Executive Board or the Board of Executive Directors respectively who in turn respond to the Board of Governors or the representatives of all members), few internal, let alone external, accountability mechanisms exist in these institutions.

IOs generally, and Bretton Woods institutions particularly, lack checks and balances or oversight mechanisms that are known cornerstones of democracies. This is a result of the absence of separation of powers known in state context, but unusual in the context of international organizations.\(^6\) On the contrary, the Bretton Woods institutions’ organizational structure features a rudimentary accountability system based on its internal hierarchy. Hence, IMF staff is responsible to the IMF Managing Director and World Bank staff is responsible to its President. The IMF Managing Director/World Bank President report to the IMF Executive Board/World Bank Board of Executive Directors. The IMF Executive Board/World Bank Board of Executive Directors is watched over by the IMF/World Bank Board of Governors.\(^7\) While this organizational scheme of responsibility resembles the internal governance structure of corporations incorporated under domestic law, it differs in the final analysis because it does not include checks and balances guaranteeing mechanisms such as fiduciary duties of directors and officers resulting in personal liability upon breach of their duties.\(^8\)

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6. For details of the absence of checks and balances in Bretton Woods institutions, see Die Rolle der internationalen Finanzinstitutionen, supra note 4, at 197–209.

7. Note that, similar to corporations incorporated under domestic law, Bretton Woods institutions’ members hold shares or quotas representing ownership interest in these organizations and resulting in corresponding capital subscriptions and voting rights.

The Bretton Woods institutions’ governance paradigm is limited to appointment/election of Executive Directors by members (IMF)/shareholders (World Bank), and the appointment of the IMF Managing Director/World Bank President and their removal from office by the Executive Directors. In reality, even the appointment of the IMF Managing Director and the World Bank President is only formally made by the Executive Directors. De facto for over sixty years the IMF and World Bank were subject to a “Gentlemen’s Agreement,” whereby Europeans appointed the Managing Director of the IMF, and the United States appointed the President of the World Bank.

In terms of transparency, the IMF is only required to publish its annual reports and quarterly summary statements of its operations and transactions and its holdings of Special Drawing Rights (SDR), gold and currencies of members. The World Bank must equally publish an annual report and quarterly (or at other intervals) summary statements of its financial position as well as a profit and loss statement. Both the IMF and the World Bank’s annual reports contain audited statements of their accounts.

III. ROLE OF PRESIDENT AND BOARD OF EXECUTIVE DIRECTORS

A. Board of Executive Directors

At the Bretton Woods Conference there was a deliberate attempt to learn from pitfalls in the governance structure of the League of Nations. The Bretton Woods institutions each have a Board of twenty-four Executive Directors.


10. See IMF Articles of Agreement, supra note 9, art. XII(7)(a). The IMF is, in effect, a repository for its members’ currencies and a portion of their foreign exchange reserves. Out of this pool of currencies, the IMF extends short-term credit to members in balance of payments difficulties. The pool of currencies held by the IMF includes the SDR which started as gold-based reserve assets in 1967 and was redefined as a basket of currencies in 1974 upon the demise of the gold standard. Today, the SDR basket of currencies is composed of the US Dollar, the Euro, the Japanese Yen, and the British Pound Sterling.

11. See IBRD Articles of Agreement, supra note 9, art. V(13)(a); IDA Articles of Agreement, supra note 9, art. VI(11)(a).

12. Today, the IMF’s financial statements comply with International Accounting Standards (IAS) with respect to all accounts the IMF manages, i.e., its general resources account, its SDR account, and the accounts of its low-income-countries facilities. The World Bank’s statements apply U.S. GAAP (generally accepted accounting principles) when accounting for the World Bank’s own accounts (IBRD and IDA). However, trust funds other than those administered together with the IMF are not accounted for based on GAAP or IAS.
functioning in continuous session in Washington. The Executive Directors are appointed by the sovereign countries of their constituency, but also serve as officials of the Bretton Woods institutions and are expected to exercise individual judgment in the institutional interests of these organizations.

Public international organizations like the World Bank are governed by a regime based on their respective constitutive treaties rather than on any system of national law. The fact that the Bretton Woods institutions’ Executive Directors work continuously at headquarters, receive a salary, and are expected to serve the interests of all members was taken into account in the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations. When the governance of international organizations is under increasing scrutiny, the Executive Directors serve an important function in ensuring accountability to the constituencies they serve.

B. Presidency

The first World Bank President, Eugene Meyer, had an acrimonious relationship with the Board of Executive Directors and resigned after six months. The second President, John Jay McCloy, insisted on arrangements that

13. IBRD Articles of Agreement, supra note 9, art (V)(4)(e); IMF Articles of Agreement, supra note 9, art. XII(3)(g). Five Executive Directors are appointed by the members with the five largest numbers of shares (currently the United States, Japan, Germany, France and the United Kingdom). Three additional countries with large holdings of shareholder capital are also single country constituencies: China, the Russian Federation, and Saudi Arabia. The remaining Executive Directors are elected by the other members. There were originally twelve Executive Directors.

14. Memorandum from Ibrahim Shihata to Mrs. Eveline Herfkens (May 27, 1994) (with the ILA Committee); see also IBRAHIM SHIHATA, THE WORLD BANK LEGAL PAPERS 656–57 (2000).


Article VI applies to officials of the specialized agencies. It must be noted that the constitutional instruments of the specialized agencies include officers (such as, for example, the Chairman of the Council of [ICAO] or the Executive Directors of the [Bank and Fund]) who serve for continuous periods either not as representatives of any Government at all or, as in the case of the Executive Directors of the Bank and the Fund, partly as representatives of Governments but predominantly as representing the interests of all Members, receiving their salaries from the Organization. It was considered that these officers should be regarded, for the purposes of this convention, rather as officials than as representatives of Members, although they do not come within the cadre of officials of the agency in the strict sense.

Id. For a recount of the historic record, see EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 87–89 (1973).

reduced the power and authority of the Board. Under these arrangements, the Board of Executive Directors agreed that it would refrain from initiating actions and review initiatives introduced by the President. This informal agreement continued to serve as a limit on the powers of the World Bank’s Board of Executive Directors until recent proposals of a working group on internal governance of the Board of Directors.17

In 1980, a Working Group of Executive Directors reviewed the rules and procedures on Executive Directors’ access to information and presented proposals to the President to improve such access, including tours d’horizon by the President to periodically review current problems and major policy issues, and to provide for discussions of sector work. A memorandum prepared by then-General Counsel Ibrahim Shihata on September 28, 1987 for the Ad Hoc Committee on Board Procedures concluded:

As this survey indicates, the role of the Executive Directors has evolved considerably in the course of the Bank’s history under provisions of the Articles of Agreement, which have by their generality allowed such an evolution. The definition of the respective roles of the Executive Directors and Management has changed, and can continue to change, to allow the Bank to be as responsive as it may to the wishes of its members in the attainment of its development objectives.18

C. Small Body of Law Applicable to IOs/Bretton Woods Institutions

While IOs have proliferated over the last century—with over 600 organizations now in existence19—the volume of law that, according to the majority view (expressed by consistent practice by IOs themselves, international jurisprudence, and in the literature), applies to these IOs is quite

Working out the organizational consequences of management’s strategic directions requires a Board that is able to give strategic advice and to oversee the reform of the Bank’s operations, not a Board whose time is dedicated to details and the vetting and approval of the Bank’s many products. My constituency is pleased to learn that the Board’s working group on internal governance has produced a report that sets in motion a reorientation of the relations between management and the Board that will benefit the entire governance and effectiveness of the Bank.

Id. For a recount of the historic record, see EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 87–89 (1973).


small.\textsuperscript{20} In fact, the legal framework by which IOs are bound is rudimentary since it only includes the IOs charters based on which they were created, the law they themselves make, and the commitments they enter into. In other words, international treaties and conventions other than the IOs founding charters, international customary law, \textit{jus cogens}, and general principles of international law, i.e., the bulk of sources of international law, does not apply to IOs following the majority view.\textsuperscript{21} The majority view purporting that IOs are not bound by general international law is based on the following two major arguments: lack of consent on the IOs part\textsuperscript{22} and absence of an explicit

\textsuperscript{20} In terms of IO’s practice, compare, e.g., the Bretton Woods institutions’ official approach to human rights. Most notably, Bretton Woods institutions refer to their charters in this respect but don’t feel bound by human rights conventions etc. For a record to this effect, see Sabine Schlemmer-Schulte, \textit{The World Bank and Human Rights}, 4 \textit{Austrian Rev. of Int’l & Eur. L.} 230, 261–62 (1999). For jurisprudential evidence, see the \textit{European Court of Human Rights}’ (ECHR) judgment of February 18, 1999 in the case of \textit{Matthews v. United Kingdom}, Eur. Ct. H.R. 24833/94, ¶ 32 (1999), and the ECHR’s decision of December 12, 2001 in the case \textit{Banković and others v. Belgium and others}, Eur. Ct. H.R. 52207/99, ¶ 31 (2001), confirming that European Community (EC) and NATO (North Atlantic Treaty Organization) would not be bound by the European Convention on Human Rights. The U.N. themselves do not feel bound by international or regional human rights regimes either. Why would they otherwise conclude special agreements with host countries for U.N. peace-keeping missions introducing certain standards of security and order as well as in terms of human rights. For details on such special agreements, see Michael Bothe, \textit{Peacekeeping, in CHARTER OF THE UNITED NATIONS—A COMMENTARY} 572 (Bruno Simma ed., 1994). Finally, the special U.N. missions in Kosovo and East-Timor which took place below certain human rights standards reveal the fact that the U.N. did not feel particularly bound by international human rights standards laid out in human rights conventions concluded by their member states. For that reason, the U.N. establishes their own terms of reference and standards for such missions and interventions. See Paul C. Szasz, \textit{The United Nations Legislates to Limit Liability}, 25 Revue Égyptienne de Droit Int’l 125 (1969). For a modified view, see F. Morgenstern, \textit{LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS} 4 (1986) (pointing out that a number of rules of international law are not applicable to IOs because they have no territory, confer no nationality and do not exercise jurisdiction in the same sense as states).

\textsuperscript{21} For a list of the sources of international law, in particular, see Statute of the International Court of Justice (ICJ), art. 38(1), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited Mar. 21, 2009), explicitly referring to international conventions, international custom, general principles of law. Article 38(1) of the ICJ Statute also lists, as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists of various nations. \textit{Id.} The list of the ICJ Statute is not exhaustive. Among commonly recognized further sources of international law are unilateral acts and \textit{jus cogens} norms, a special set of norms of superior value. On sources of international law, see generally MALCOLM N. SHAW, \textit{INTERNATIONAL LAW} (4th ed. 1997).

\textsuperscript{22} See ROBERT JENNINGS ET AL., \textit{OPPENHEIM’S INTERNATIONAL LAW}, Vol. I, 14–16 (9th ed. 1992). Thus, IOs in general, or Bretton Woods institutions in particular, are not bound by international human rights conventions which they have not ratified or international customary human rights law to the establishment of which they have not contributed based on their practice and their \textit{opinio juris}. The same argument discards general principles of international law embodying human rights from the list of international law sources applicable to Bretton Woods institutions. The argument even covers \textit{jus cogens}. See \textit{id.; Shaw,
international law rule (e.g., formulated by states establishing IOs) stating that IOs are bound by general international law.

In the absence of the two normally constitutive elements for a finding of an obligation under international law, i.e., the absence of consent by IOs to the effect of being bound and the absence of an international law norm binding IOs to general international law, it is understandable that only a minority opinion in the literature and jurisprudence\textsuperscript{23} argues that IOs are bound by general international law. Proponents of this view suggest that IOs are bound by general international law even without their consent and in the absence of an explicit statement to that effect in their founding charter or elsewhere in order to avoid that states’ members in IOs escape from their international obligations by putting on the institutional hat and acting via the IOs without the need to fear any sanctions for violations of international law that would be used were they

\textsuperscript{23} Cf. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89–90 (Dec. 20) (in connection with the question of an interpretation of the Agreement of March 25, 1951 between the World Health Organization (WHO) and Egypt). In this opinion, the ICJ notes in an obiter dictum that “[i]nternational organizations are subjects of international law and, as such, bound by general rules of international law . . . .” \textit{Id. See also} Henry G. Schermers \& Niels M. Blokker, \textit{International Institutional Law} 982–84 (3rd ed. 2001). Finally, \textit{see} the partial award of the Permanent Court of Arbitration (PCA). Reineccius et al. v. Bank for Int’l Settlements, Hague Ct. Rep. (Hamilton) 1 (Per. Ct. Arb. 2002). The PCA’s award denies the legality of a recall of shares in the Bank for International Settlements (BIS) held by private individuals by applying BIS charter rules as well as general public international law principles on expropriation. It may be noted that such an application of general international law to an IO would not happen in the Bretton Woods institutions context. Bretton Woods institutions interpret their own mandate and are unlikely to even request only an advisory opinion on a question pertaining to their mandate and obligations under it to the ICJ although they have that opportunity under their relationship agreements with the U.N. For further literature in favor of an application of general international law to IOs, \textit{see} Henry G. Schermers, \textit{De binding van internationale organisaties aan regelingen ter bescherming van mensenrechten}, in \textit{Rechten van de Mens in Perspectief} 121–37 (1968); Albert Blokman, \textit{Zur Verbindlichkeit des Allgemeinen Völkerrechts für Internationale Organisationen}, 37 Heidelber. J. Int’l L. 107 (1977).
engaging in the same activities as states. This, however, is a policy argument as opposed to a sound legal argument and hence reflects de lege ferenda ideals.

In conclusion, the Bretton Woods institutions’ view that they are only subject to their founding charter and any further law they agree to be subject to and their firm reluctance to establish outright human rights conditionalities based on human rights provisions in general international law is legally well founded.

IV. JUDICIAL FORUMS TESTING LEGALITY OF IO/BRETTON WOODS INSTITUTIONS’ ACTION

IOs are usually immune from the jurisdiction of domestic courts. Both the IMF’s and the World Bank’s charter explicitly provide for such immunity in connection with their core operational activities, i.e., lending to members in balance of payments difficulties and financing of economic development projects. IOs cannot be sued before the International Court of Justice (ICJ).

24. See Schermers & Blokker, supra note 23, 983–84 (including further references). Another argument refers to IOs as the successors of states into all state members’ international obligations (treaty, customs etc.). However, such a succession into state obligations can conceptually only be accepted in the exceptional case in which the members of an IO have completely transferred their respective powers to the IO, e.g., like the European states did with their external economic policy powers to the European Economic Community (EEC) in the 1950s. While the EEC member states when concluding the GATT in 1948 still owned the competence on foreign economic policy, they turned this competence over to the EEC when the latter was founded. Subsequently, the EEC exercised this competence exclusively. See Case 21-24/72, Int’l Fruit Co. v. Produktionsba, 1972 E.C.R. 1219, 1226. In this case, the European Court of Justice (ECJ) found the European Economic Community (EEC) to be bound by the GATT as a result of it succeeding into the GATT treaty obligations of the EEC state members and the transfers of powers by the EEC member states to the EEC in the area of external trade. Usually, when an IO is created, states do not transfer their powers to the IO in a way that the respective powers are exclusively taken over by the IO. Rather, the new IO receives concurrent powers existing in parallel to similar state powers in the area, or the new IO is endowed with special, new powers that never existed in states. Thus, for example, the IMF and the WB engage in development assistance parallel to bilateral assistance provided by their richer members, or the IMF was authorized to manage the par value system, a power that no member had held before the IMF was created. Moreover, the theory of IO’s succession into member states’ treaty obligations poses practical problems. Taking the example of human rights treaties concluded by the state members of an IO: To which human rights treaties should the IO be subject: to the international, or the regional standards, in human rights treaties, ratified by some but not all IO members, the standards with or without reservations, in other words, the maximum or minimum standard?


26. It may be noted that the World Bank’s charter however explicitly waives this immunity from the jurisdiction of domestic courts in connection with the Bank’s issuance of securities on the private markets for the purposes of raising capital. See IBRD Articles of Agreement, supra note 9, art. VII(3); IDA Articles of Agreement, supra note 9, art. VIII(3). It is only in connection with the Bank’s issuance of securities that domestic law, e.g., the law of the capital market on which securities are offered, applies to the Bank.
The latter decides only disputes among states. IOs may request advisory opinions from the ICJ. In particular, the IMF and the World Bank—although explicitly reminded of the possibility of ICJ advisory opinions by virtue of their Relationship Agreements with the United Nations (U.N.)—have in principle refrained from making use of this tool. While ICJ advisory opinions could have served to answer questions of interpretation of their founding charters such as to what extent these charters subject the organizations to general international law, neither the IMF nor the World Bank have ever requested such an opinion. By contrast, both Washington, D.C.-based Bretton Woods institutions have reverted to their special and unique charter based vehicle for disputes over correct interpretation of their charters. The latter empowers the organs of the two institutions which take the business decisions, i.e., decide on lending and underlying policies, to also interpret their charters.\(^{27}\) In other words, at the IMF and the World Bank, the organs deciding on these institutions’ actions are also the ones deciding on the legality of their previously approved actions. For certain matters, the Bretton Woods institutions are subject to arbitration.\(^{28}\)

In terms of interpretation of their charters, both the IMF and the World Bank accept the notion that while their own organs are the bodies empowered to authoritatively interpret the charters, the methods of interpretation are those laid out by the First Vienna Convention on the Law of Treaties. By contrast, neither the IMF nor the World Bank refers to the Second Vienna Convention on the Law of Treaties concluded between states and IOs and among IOs. When it comes to the lending arrangements, both Bretton Woods institutions enter into these arrangements with their borrowing members, as neither have ratified the Second Vienna Convention.\(^{29}\)

V. BRETTON WOODS INSTITUTIONS’ EFFORTS TO ADDRESS ACCOUNTABILITY ISSUES

In 1946, the IMF established an independent External Audit Committee that oversees the IMF’s internal accountants and its external auditor. In 1988

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27. See IMF Articles of Agreement, supra note 9, art. XXIX; IBRD Articles of Agreement, supra note 9, art. IX(a); IDA Articles of Agreement, supra note 9, art. X(a).

28. In connection with withdrawal by a member from the IMF and regarding liquidation matters, the IMF charter provides for international arbitration to solve the respective dispute. See IMF Articles of Agreement, supra note 9, art. XXIX(c). Equally, the World Bank’s charter provides for international arbitration in cases of disputes arising out of a cessation of membership in the Bank and the termination of Bank operations. See IBRD Articles of Agreement, supra note 9, art. IX(c); IDA Articles of Agreement, supra note 9, art. X(c).

29. Moreover, the IMF does not consider its lending arrangements that allow a member to use IMF general resources to form an international treaty. Such lending arrangements are rather qualified as arrangements \textit{sui generis}.
and 1992 respectively, the World Bank and the IMF established Administrative Tribunals to deal with staff grievances. In 1994, the World Bank established the Inspection Panel, an independent fact finding body assisting the World Bank’s Executive Directors in their oversight of Bank management to make sure that the Bank complies with its own policies and procedures in connection with its lending activities. The World Bank Inspection Panel, while not a judicial body, introduced the possibility for groups of individuals who are supposed to benefit from World Bank financed projects, but with whom the Bank has no contractual relationship, to bring complaints before an independent forum that investigates complaints against the World Bank. In 2000, the IMF established the Independent Evaluation Office, an independent advisory body, assisting the IMF Executive Directors in evaluating its lending policies and possibly redesigning them.

The World Bank’s Operations Evaluation Department (first established in 1973 and renamed the Independent Evaluation Group in 2005), like the IMF’s IEO, assesses policies. The Director General of the IEG does not continue employment with the World Bank after tenure in that position; publications need not be changed at the wish of World Bank management nor the Board.


33. IEG is, however, less independent than the World Bank’s Inspection Panel or the IMF’s IEO. The guarantees of independence for inspectors on the World Bank’s Inspection Panel are missing for IEG. Inspectors cannot be directly hired out of the pool of World Bank staff and management. Two years must
But IEG’s actual objectivity has been called into question when IEG failed to protect a whistleblower who was fired in retaliation for correcting an inaccurate evaluation to the Board. For this reason, the Chair of the World Bank’s Audit Committee recently determined that an external audit of the World Bank’s internal controls was necessary. The World Bank had previously relied upon IEG to certify the World Bank’s internal controls.

In terms of expanded transparency, both the IMF and the World Bank have increasingly made publicly available their lending policies as well as information regarding individual lending arrangements since the 1990s. IMF decisions on interpretation, lending related policies including those on conditionalities, and Public Information Notices (PINs) summarizing the Executive Boards’ decisions regarding individual extension of credit are made publicly available. The full text of IMF stand-by arrangements and related documents reflecting individual credits are not made publicly available, though, as “use of the IMF’s resources.” These arrangements are also not considered to be international treaties which members would need to file with the United Nations Secretary General’s office. Moreover, with the consent of the respective member, countries’ surveillance reports (or summaries of these reports) are published. Documents authored by either the borrowing member or IMF staff in preparation of lending from the PRGF (Poverty Reduction and Growth Facility, the IMF’s major low-income-countries facility) are publicly available in their entirety. IMF assessments of the global economy such as the World Economic Outlook, the Global Financial Stability Reports, and others are also made publicly available.

The World Bank also makes its lending policies and procedures publicly available. The text of individual loans, credits, and guarantees given by the Bank are normally not posted on the World Bank’s webpage. As the World

have elapsed since the end of such service. In practice, the World Bank has interpreted service in the World Bank broadly including even a speaking engagement at a World Bank sponsored conference resulting in the payment of a modest honorarium ($500) by a full-time professor as grounds enough to preclude individuals from appointment to the Inspection Panel. Certainly, full-time World Bank managers and staff as well as consultants may not serve on the Inspection Panel unless two years have passed since they left the World Bank or completed their consultancy. The prohibition of reemployment of inspectors has been in practice interpreted broadly as to prohibit even taking positions with the Global Environment Facility (GEF), a special trust fund administered by the United Nations Environment Programme, United Nations Development Programme, and the World Bank.

34. Meeting held on February 27, 2009 between Mr. Abdulrahman Almofadhi and Drs. Karen Hudes.


36. On rare occasion, however, loan agreements are posted.
Bank's Policy on Disclosure reveals, the World Bank relies on its borrowing members filing these documents with the United Nations Secretary General's (UNSG) office based on the obligation as U.N. members under Article 102, Section 1 of the U.N. Charter. The World Bank's Legal Department in reality files with the UNSG on behalf of the borrowers. Similar to the IMF, the World Bank publishes PINs summarizing projects and programs the financing of which was approved by the Executive Directors. Provided the respective borrower agrees, the World Bank publishes Country Assistance Strategies (CAS) which lay out the World Bank's analysis of a borrowing country's situation and economic program as well as the World Bank's strategy including medium-term lending goals for the country. Documents prepared by either World Bank staff or the borrower in connection with lending to poorer countries (so-called PRSPs or Poverty Reduction Strategy Papers) are made publicly available. The World Bank also publishes annual World Development Reports, and World Economic Prospects and IEG publishes Annual Reviews of Development Effectiveness, and evaluations of some of its operations.

However, the above efforts, while laudable, are far from matching the due process and rule of law standards essential for the protection of vital interests. The International Law Association's (ILA) Committee on the Accountability of International Organizations issued its report to the Berlin Conference in 2004, setting out principles for good governance of international organizations and rules for holding international organizations responsible for their actions. The Report contains detailed Recommended Rules and Practices (RRPs) formulated by the Committee in order to help strengthen IOs' accountability regime. The due process and rule of law standards of the Bretton Woods

37. For example, companies that bid for contracts in connection with Bank-financed projects. Under the Bank's Procurement Guidelines, these companies may be "blacklisted" on the World Bank's webpage if they engage in fraudulent and corrupt practices in connection with their bidding. "Blacklisting" entails the Bank's declaration of these firms' ineligibility for participation in future biddings. The World Bank's decision need not be based on a court's decision finding the bidder actually guilty of fraud or corruption. Hearsay may suffice as a basis for blacklisting. The single remedy available for a bidder wrongfully blacklisted is an appeal before the so-called Sanctions Committee that, unlike the Inspection Panel, is not composed of independent members, but consists of Bank Management members.

institutions do not amount to the desirable degree of protection of equivalent interests as contemplated by the ILA Committee’s RRP.

VI. ILA COMMITTEE RECOMMENDED RULES AND PRACTICES

The ILA RRP formulate detailed recommendations for a comprehensive accountability framework in IOs such as the Bretton Woods institutions. The recommendations concern three levels of accountability, which are interrelated and mutually supportive. The first level concerns the extent to which IOs, in the fulfillment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility. The second level concerns tortious liability for injurious consequences arising out of acts or omissions of the IO not involving a breach of any rule of international and/or institutional law. The third level of responsibility arises out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (for example violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires or violate the law of employment relations).

A. First Level of Accountability

The ILA Committee RRP for the first level of accountability rest on eight principles to guide the institutional and operational activities of IOs and lend internal and external scrutiny to them. These eight principles are referred to as:

1) Good governance;
2) Good faith;
3) Constitutionality and institutional balance;
4) Supervision and control;
5) Stating the reasons for decisions or a particular course of action;
6) Procedural regularity;
7) Objectivity and impartiality; and
8) Due diligence.

The principle of good governance in turn encompasses:

1) Transparency in both the decision-making process and the implementation of institutional and operational decisions;\(^\text{40}\)
2) A participatory decision-making process;\(^\text{41}\)
3) Access to information;\(^\text{42}\)
4) A well functioning international civil service;\(^\text{43}\)
5) Sound financial management;\(^\text{44}\) and

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40. As noted earlier, the IMF and the World Bank have increasingly disclosed policy and summaries of individual lending arrangements with members. The poorer the aid recipient, the broader the disclosure imposed by the Bretton Woods institutions. There remain, however, considerable parts of their operations which are hardly made publicly available (e.g., private sector operations, and policy based lending to middle-income countries).


42. For details on the extent of access to information at the IMF, see Van Houtven, supra note 41, at 58–61. For details on the World Bank, see THE WORLD BANK, supra note 41.

43. Based on explicit charter provisions, both the IMF and the World Bank shall, in appointing staff secure the highest standards of efficiency and of technical competence as well as pay due regard to recruit personnel on as wide a geographical basis. See IMF Articles of Agreement, supra note 9, art. XII(4)(d); IBRD Articles of Agreement, supra note 9, art. V(5)(c); IDA Articles of Agreement, supra note 9, art. V(5)(d). Moreover, IMF and Bank staff owe their duty entirely to the IMF/the Bank and no other authority, in other words, are supposed to be impartial in the performance of their function and loyal to the institutions and the institutional goals. See IMF Articles of Agreement, supra note 9, art. XII(4)(c); IBRD Articles of Agreement, supra note 9, art. V(5)(c); IDA Articles of Agreement, supra note 9, art. V(5)(c). Whether or not the charters are complied with on a daily basis at the IMF and the World Bank is hard to say from the outside perspective because personnel statistics and employment details are not the kind of information made publicly available by the Bretton Woods institutions.

44. As noted earlier, both the IMF and the World Bank publish audited annual reports as well as interim reports including financial statements which comply with International Accounting Standards (IAS) in the case of the IMF and with U.S. GAAP (generally accepted accounting principles) in the case of the World Bank. Unfortunately, the Bank does not use GAAP or IAS in connection with the thousands of trust funds it administers. Regrettably, accounting for these funds is based on simple aggregates. Earmarked trust fund money was illegally used in 2000/2001 to fill a gap in the Bank’s administrative budget. See Stephen Fidler, *Corruption Leads to Freeze on Trust Funds*, FIN. TIMES (London), Feb. 7, 2001, at 14. While both the IMF and the Bank use an internal committee of Executive Directors to oversee management’s accounting, in addition to using an external independent auditor, only the IMF avails itself of a standing committee of outside auditors. The latter appears to be an equivalent of the mandatory audit committee of independent
6) Reporting and evaluation.\(^{45}\)

It is self-evident that the ILA Committee RRP's first and foremost address these principles of communication and cooperation between the IO's organs and its members. However, the beneficiaries of an IO should also benefit from the IO decision-making process as well. In other words, transparency during and participation of third parties in the IO decision-making process mean the inclusion of these parties in the decision-making process. In this respect, the ILA Committee RRP's emphasize that beyond the IO members third parties such as non-governmental organizations (NGOs) or third-party beneficiaries of development projects financed by the Bretton Woods institutions are supposed to be included in the ILA paradigm of good administration of an IO. Proprietary information such as commercial and industrial secrets may easily be protected not by excluding third parties but by preserving confidentiality of respective parts of documents.

The guiding principle of good faith following at the ILA Committee RRP's rests on the prohibition of the abuse of rights, honesty, fairness, and reasonableness in all dealings by the IO. The principle of constitutionality and institutional balance means that the IO is supposed to be acting in accordance with public laws. This means that the decision-making process should be open to the public. As a result, the right to information under the ILA is a fundamental right that the IO must respect. The right to information is a fundamental right that the IO must respect.

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\(^{45}\) Both the IMF and the World Bank established internal reporting and evaluation departments early on. Most of these units have been reporting to senior management within the institutions. See, for example, the Bank's Operations Evaluation Department (OED), renamed Independent Evaluation Group (IEG) in 2005. As noted earlier, while the Director-General heading IEG now reports to the Executive Directors, she is less independent than members of the World Bank's Inspection Panel. Compare comment in n.33, supra. However, after a series of ad hoc investigations into project failures, the IEG established a permanent independent evaluation function, the Independent Evaluation Office (IEO), in 2000 which, based on the IMF Board's request evaluates IMF programs. Similarly, the World Bank's Inspection Panel (IP) investigates allegedly failed projects based on third party complaints or Executive Directors' requests. The IEO and the IP supplement these Bretton Woods institutions' internal reporting and monitoring functions. See THE IMF AND ARGENTINA, supra note 32, at 1991–2001; see also Sovereign Debt, supra note 4; THE WORLD BANK INSPECTION PANEL, supra note 31; Bradlow & Schlemmer-Schulte, supra note 31, at 393; The World Bank's Experience with its Inspection Panel, supra note 31; The World Bank Inspection Panel: A Model for Other International Organizations?, supra note 31; Building an International Grievance System: The World Bank Inspection Panel—Selected Issues, supra note 31.
with its charter, i.e., not ultra vires. Institutional balance, a term of art derived from the European Communities/European Union, denotes the existence of institutional checks and balances. While the latter does not necessarily need to amount to the horizontal checks and balances, as they exist within a state based on the separation of powers (executive, legislative, and judicial) or in the context of corporate governance (vertical checks and balances among shareholders, directors, and officers backed by the possibility to use courts for enforcement purposes in holding directors and officers personally liable for certain forms of mismanagement), some internal control mechanisms that come

46. The concept of separation of powers (including the development of the legislative, the executive, and the judiciary) developed in the eighteenth and nineteenth century in the constitutional law of the Western states as institutional checks and balances and a means to protect the individual against the concentration of uncontrolled state power. The principle of separation of powers in this sense is, however, not incorporated in the charter of any international organization. As an exception in this respect, the ECIJ has introduced the principle of "institutional balance" under the EC-Treaties to govern the relationship between the EU's institutions. See Case C-70/88, European Parliament v. Council of the European Communities, 1990 E.C.R. 2041, ¶ 22. The ECIJ's rationale to speak of "institutional balance" instead of a separation of powers results from the fact that the traditional division of governmental functions into the categories of legislative, executive, and judicial functions does not exist among the EU's institutions. The latter rather share these functions and none of them can be described as the sole legislator or executive. No other international organization has yet developed a principle of institutional balance similar to the EU. However, a separation of functions in the above sense has fortunately evolved in connection with the creation of judicial review mechanisms of international organizations' decisions vis-à-vis staff or in connection with the establishment of inspection functions.

47. The efficient implementation of the charter based hierarchical institutional balance that prevails in the IMF and the World Bank which rests on the principle of Executive Directors' overseeing management may be actually frustrated in the World Bank by the following combination of practices and staff rules. At the World Bank, management reserved itself early in the history of the World Bank the right to initiate business in terms of lending for individual projects as well as drafting of general lending policies. This right to initiate has, in recent years, led to a considerable delay in time in terms of management's reporting on such initiatives to the Directors, in particular regarding private sector operations and extraordinary initiatives. Moreover, the World Bank's Staff Rule on Protections and Procedures for Reporting Misconduct (Whistleblowing) prevents Staff from reporting misconduct to the Board, except for cases involving Board Officials: "4.01...[S]taff members are generally required to report suspected misconduct under this Rule through...line management and/or INT; the President, a Managing Director, the Senior Vice President and Group General Counsel, or the Vice President, Human Resources, where reporting to line management and INT may be inadequate due to risk of retaliation or loss of evidence; and the Ethics Committee of the Board in cases of suspected misconduct involving Board Officials." The World Bank, Staff Manual, External Reporting Rule 4.01, http://siteresources.worldbank.org/NEWS/Resources/8.02Policy.pdf (last visited Apr. 1, 2009). The increased vulnerability of international staff whose G-4 visa status in Washington, D.C. is linked to employment with the Bretton Woods institutions (sixty percent of staff acts as an additional disincentive for reporting mismanagement to the Directors. Upon termination of Bank-sponsored residency, staff members and their families only have a few weeks to leave the United States. Moises Naim, World Bank: Its Role, Governance, and Organizational Culture, CARNEGIE ENDOWMENT FOR INT'L PEACE, Apr. 1994, available at http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=759 (last visited Apr. 1, 2009).
with independence and are not tainted by potential conflict of interests are desirable in IOs.\textsuperscript{48} The principle of supervision and control as explained in the ILA Committee RRP pertains to the exercise of regular monitoring and supervision of organs within IOs based on the existing hierarchy of those organs. The principle of reasoned decisions is self-explanatory in the sense that IOs should avoid making decisions without explaining why they did so; in other words, IOs should state reasons for their actions and avoid the impression of arbitrariness. The principle of procedural regularity means that IOs should not abuse their discretionary powers in making decisions, should avoid errors of fact or law, and should respect due process. The principle of objectivity and impartiality calls for the IOs to avoid arbitrary decisions and decisions that are unfairly discriminatory. The principle of due diligence requires IOs to ensure lawfulness of their actions and decisions, to make an effort to avoid claims against them, and, accordingly, to allow for supervision of the organization by members.

B. Second Level of Accountability

At the second level of accountability of IOs, the ILA Committee RRP explicitly expand the body of law applicable to IOs. In terms of the relations between an IO and its member states, the ILA Committee RRP refer not only to the constituent instruments of the organization, but also to rules of general international law. Equally, in terms of the relations between the IO and its staff members, the ILA Committee RRP not only refer to the respective employment contracts and to internal staff policies, but also list rules of general international law as applicable to these relations. When it comes to relations

\textsuperscript{48} Depending on how the function of General Counsel is exercised within an IO, the latter may de facto reflect the desirable institutional balance which is a difficult issue in Bretton Woods institutions given that, as noted earlier, the organ taking the business decisions also decides on the legality of the course of action. In the history of the World Bank, the late and former General Counsel Ibrahim F.I. Shihata who served from 1983 to 2001 performed the function of general counsel to a large extent as impartial legal advisor to the bank’s President, its Board of Executive Directors, and its shareholders as opposed to a corporate counsel primarily advising management. Colleagues and friends inside and outside the institution have consequently referred to Ibrahim Shihata as the de facto “guardian of the rule of law” within the Bank. See Khalid M. Al-Saad, Homage to Ibrahim Shihata from the Board of Executive Directors, Formal Liber Amicorum Ibrahim F.I. Shihata Presentation Ceremony (Apr. 9, 2002) (unpublished manuscript, on file with author) (in particular emphasizing the general counsel’s ability to say “no” to the President as well as to the Board of Executive Directors); Sven Sandström, A View of Ibrahim Shihata from a Colleague of Senior Management, Formal Liber Amicorum Ibrahim F.I. Shihata Presentation Ceremony (Apr. 9, 2001) (unpublished manuscript, on file with the author) (equally noting the general counsel’s objection to a President backed initiative based on concerns about legality). Sir Joseph Gold, the IMF’s late and former General Counsel, played a similar role in the IMF. See generally JOSEPH GOLD, THE RULE OF LAW IN THE INTERNATIONAL MONETARY FUND (IMF Pamphlet No. 32, 1980); see also Die Rolle der internationalen Finanzinstitutionen, supra note 4, at 204–208.
between an IO and third parties, the ILA Committee RRP's emphasize that, in addition to the contractual terms agreed upon between the organization and third parties, principles of international law that normally govern such types of contracts should apply to contracts of the IO with third parties as well. In the non-contractual sphere, i.e., where acts of IOs cause personal injury to people or damage to property, the law of international responsibility will govern the IO’s actions vis-à-vis state officials and state property, and local tort law will govern the IO’s conduct, vis-à-vis individuals and their property. The ILA Committee RRP's point out that IOs, prior to engaging in operational activities, should assess the potential damage which these activities may cause and take precautionary measures to prevent any of those damages and minimize any risk inherent in their operations. Most importantly, the ILA Committee RRP's emphasize that IOs should comply with "basic human right obligations."  

C. Third Level of Accountability

At the third level of accountability of IOs, the ILA Committee RRP's are a legal responsibility of the IO based on the organization’s breach of international law and an attribution of the action or omission in question to the IO. The identification of acts as those that an IO engages in or those a state does, while not an easy one in the context of debate-oriented IOs, is probably not so difficult to make in connection with Bretton Woods institutions and their actions. In particular, in connection with investigations undertaken by the World Bank Inspection Panel, World Bank activities have been neatly identified and separated from implementation activities under World Bank projects undertaken by borrowing member countries following the project cycle's paradigm.

49. For the IMF and the World Bank, this de lege ferenda obligation would entail a pre-screening of projects and programs to be financed against "basic human rights" standards instead of the current practice which leaves the screening in terms of meeting human rights standards de jure to the borrower. While many IMF and World Bank projects and programs indirectly promote a number of economic and social rights but disregard others in connection with primarily neoliberal adjustment programs, the IMF and the World Bank would have to abandon this selective practice and come up with a list of minimum standards uniformly applicable to all projects and programs they finance. Because the World Bank is required under its Articles of Agreement to be non-political, and the IMF is implicitly non-political in nature, such a change in approach would represent a major shift. Whether or not this move will successfully end the North-South divide is doubtful. Human rights based development approaches may probably not suffice. See Sovereign Debt, supra note 4 (calling for a comprehensive overhaul of the Bretton Woods institutions’ lending policies).

D. Remedies

The ILA Committee RRP s finally discuss appropriate remedies for the different levels of accountability of an IO. As a general principle of law (seemingly international as well as domestic) and basic international human rights standards, the ILA Committee RRP s acknowledge a right to a remedy against IOs by states (members as well as non-members) and non-state parties. Remedies, in the eyes of the ILA committee, should be adequate, effective, and enforceable. Remedial bodies need not necessarily be courts, but they must be effectively in a position to give redress against IOs. While the ILA Committee RRP s leave considerable freedom to IOs in terms of designating respective remedial bodies, the recommendations are specified in terms of procedural aspects of remedial actions against IOs. The extent of procedural aspects to be adhered to varies depending on who is the aggrieved party. Remedial action brought by member states challenging the legality of particular decisions by the IO should rely on the institutional setup of the organization which typically rests on representation of every member state within the organization and the various organs. By contrast, remedial actions brought by staff members should be dealt with outside the outdated diplomatic protection paradigm and should hence rely on an adequate pre-litigation mechanism to deal with employment related disputes between the organization and the staff member concerned and proceedings before an international administrative tribunal. The latter tribunal should function under procedures and conditions that guarantee the tribunal’s independence.\textsuperscript{51} Remedial actions instituted by private claimants other than staff members should be settled by an independent body.\textsuperscript{52} Tort liability of an IO should be dealt with by an arbitration mechanism based on a claims settlement procedure and insurance obtained by the IO in advance. Claims against professionals and experts hired by the international organization should

\textsuperscript{51} As the ILA Committee RRP s add in this context, the burden of proof and evidence is on the IO. Moreover, the proper administration of justice requires the tribunal to request parties in cases before it to disclose information and documents directly held by them. The ILA Committee’s concept in this respect draws from the civil law system’s investigation rights by the court (“Untersuchungsgrundsatze” in administrative court proceedings before German courts in cases brought by civil servants whom the government terminates, whose benefits are cut, or who are not promoted) which may be understood as the civil law equivalent of pre-trial discovery under U.S. rules of civil procedure. In this respect, the Bretton Woods institutions’ administrative tribunals fall short of the ILA Committee’s concept of fair justice. Professor Robert Vaughn reaches a similar conclusion in his Report on the World Bank’s Whistleblower Procedures (Apr. 30, 2005), http://www.whistleblower.org/doc/Vaughn%20Report.pdf (last visited Mar. 30, 2009).

\textsuperscript{52} Clearly, the World Bank’s Sanctions Committee dealing with complaints by firms that have been “blacklisted” by the Bank for allegedly engaging in fraud and corruption in connection with their bidding for the award of a contract under Bank-financed projects does not meet the independence criteria.
be dealt with by adequate mechanisms for the investigation of potential criminal conduct by IOs and experts.

In conclusion, the ILA Committee RRP s emphasize that they are not calling for an elimination of the jurisdictional immunity of IOs before domestic courts nor for an expansion of the jurisdiction of international courts allowing for proceedings against IOs. Rather, the ILA Committee RRPCs argue that alternative remedial protection can be made available to injured parties via independent mechanisms which the IO sets up itself.

VII. END TO THE GENTLEMEN’S AGREEMENT

The Bush Doctrine favoring direct and unilateral action by the United States as a superpower was at odds with the multilateral governance structure of the World Bank and IMF. In 2004, a political science stakeholder analysis predicted an end to the Gentlemen’s Agreement if the United States ignored the multilateral decision framework laid out in the Bretton Woods institutions’ Articles of Agreement by acting unilaterally as a hegemon.53

During the Bush Administration, United States leadership in the World Bank challenged the powers of the Board of Executive Directors under the World Bank’s Articles. Executive Directors did not appreciate when they were removed from the review of the World Bank’s conflict resolution system. Other examples are the unsuccessful efforts to increase accountability by reform of the Human Resources and Institutional Integrity Departments as well as the climate of fear in the World Bank induced by retaliation against whistleblowers. The most blatant example of hegemony was the violation of the diplomatic immunity accorded to Executive Directors by illegal investigations of the Directors’ private bank accounts discussed in Section XI.

As was predicted by the stakeholder analysis, on October 12, 2008 at the Annual Meeting of the World Bank and IMF, the Development Committee announced that the Gentlemen’s Agreement should no longer continue: “There is considerable agreement on the importance of a selection process for the President of the Bank that is merit-based and transparent, with nominations open to all Board members and transparent Board consideration of all

53. Jacek Kugler, Stakeholder Analysis on Rule of Law at the World Bank (2004) (on file with the ILA Committee). The model used in the analysis has analyzed scores of policy issues in over thirty countries, and was determined to have in excess of 90% accuracy in Randolph M. Siverson, A Glass Half-Full? No, but Perhaps a Glass Filling: The Contributions of International Politics Research to Policy, 33 Pol. Sci. & Pol’y 59 (2000). Jacek Kugler is Elisabeth Helm Rosecrans Professor of World Politics at Claremont University, Editor of International Interactions and past President of International Studies Association, and Peace Science Society. He founded the Sentia Group Inc., dedicated to the formal study of decision making, policy analysis and advice.
candidates. The IMF’s Independent Evaluation Office had previously recommended in May 2008, that appointment of the Managing Director by the Europeans should end.

VIII. HUMAN RESOURCES REFORM

In 1997, the World Bank’s shareholders required governance reforms to promote increased transparency and accountability. World Bank management was to be evaluated under clear performance criteria against which progress was measured and for which management was to be held accountable. Dr. Alberto Bazzan, formerly Director of Leadership Development for IBM in Europe, Middle East, and Africa came to the World Bank as its Leadership Development Leader. Dr. Bazzan left the World Bank after two years. The human resources reforms to require objective, transparent processes in selection and promotion of managers that Dr. Bazzan had applied at the World Bank were dismantled and never reintroduced.

Several prominent cases involving retaliation against whistleblowers in recent years have inhibited staff at the Bretton Woods institutions from candid reporting or debate. This resulting climate of fear is inimical to proper controls or necessary evaluation. One whistleblower was fired three months after he assisted the United States Senate Committee on Foreign Relations during

54. WORLD BANK, INT’L MONETARY FUND, DEVELOPMENT COMMITTEE (OCT. 12, 2008), http://siteresources.worldbank.org/DEVCOMMIT/NewsAndEvents/21937474/FinalCommunique101208.pdf (last visited Mar. 21, 2009). The Development Committee, known formally as the Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries, consists of Ministers of Finance or Development of twenty-four countries representing the full membership of the Bank and Fund.


56. 1997 WORLD BANK ANNUAL REP. 10.

57. On March 13, 2007 Senator Lugar asked the U.S. Executive Director, Mr. Whitney Debevoise, the following question for the record during confirmation hearings:

As part of the Strategic Compact in 1997, the Board required reform of the World Bank’s policies for the selection and promotion of managers to promote greater accountability, but these reforms have reportedly not been maintained. Do you think reform of the World Bank’s human resources system is required? If yes, how so? Response: While I do not know the details of the situation, an effective human resources system with quality professional staff is critical to delivering development results. If confirmed, I will look into the status of reform within the Bank’s human resources system.

Questions for the Record, Submitted by Senator Richard Lugar from the U.S. Senate Committee on Foreign Relations for Mr. Eli Whitney Debevoise, II Nomination Hearing, 110th Cong. ¶ 8 (Mar. 13, 2007) [hereinafter Questions for the Record].
confirmation hearings for the US Executive Director. Other whistleblowers included staff who were fired in retaliation for reporting on corruption in World Bank projects, cost over-runs at the World Bank’s headquarters renovation project, poor air quality in the World Bank’s headquarters, sexual harassment, failures in projects combating the AIDS pandemic in Africa, over-charges in interest to World Bank borrowers, improper investigations by the World Bank’s Institutional Integrity Department of the whistleblowers as well as the World Bank’s mediator, improper use of trust funds earmarked by donors to serve special development initiatives, and inaccurate evaluations of the World Bank’s projects.

The whistleblowers provided a feedback loop to improve the Bretton Woods institutions’ governance by meticulously documenting internal control deficiencies to oversight agencies of the Bretton Woods institutions, including interested Executive Directors and relevant Committees of the Board, as well as member and shareholder oversight agencies. Civil society organizations such as the ABILA’s Committee on Multilateralism and Accountability of International Organizations, the Government Accountability Project, and the Open Society Institute joined the effort. With respect to the Bretton Woods institutions’ largest shareholder, the US State and Treasury Departments, and ultimately the US Congress became involved. After the World Bank stone-walled Congress’ inquiries in one whistleblower case, Senators Leahy, Lugar and Bayh requested an investigation by the US Government Accountability Office (GAO) of the World Bank’s efficiency and effectiveness; this investigation was still underway as this Article went to press.

In 2005 the government of the Netherlands requested the World Bank’s Audit Committee to investigate retaliation against one of the whistleblowers. In the fall of 2008, Ambassadors from Australia, France, and Canada also requested that whistleblower to keep their respective Executive Directors apprised. One impetus for this Article is to inform the public at large of other stakeholders’ efforts to introduce accountability into the governance framework of the Bretton Woods’ institutions.

IX. GRIEVANCE SYSTEM REFORM

Legislation introduced by the United States to increase transparency in the multilateral development banks was not implemented at the World Bank. Instead, reforms were introduced under the Bush Administration that obstructed the access of the Board of Executive Directors to information that would enable them to exercise their oversight authority. In 1999, the GAO reviewed the

World Bank’s grievance system reform and requested increased oversight to restore confidence in a system that employees viewed as neither fair nor credible.\footnote{59}

The U.S. Treasury Department assured GAO in 1999 that the process for reform of the grievance system within the World Bank would be closely monitored. However, staff confidence in the World Bank’s conflict resolution system has continued to decline, as evidenced by a reduction in the numbers of cases brought.

In 2003, GAO called for a comprehensive assessment of the World Bank’s internal controls over operations and compliance. GAO requested monitoring to ensure that controls were functioning as intended in compliance with the World Bank’s Articles, policies, and applicable laws of its members and in preventing misuse of funds.\footnote{60} An internal control system within a bank cannot be robust when staff lack confidence that they will be protected from retaliation for reporting misconduct.

Also in 2003, the Senate Appropriations Committee expressed concern about reform of the World Bank’s grievance system:

The Committee continues to follow the World Bank’s efforts to reform its internal grievance procedures. Despite some progress, it remains apparent that as long as the Bank and the other international financial institutions are immune from the court process, they need to do more to ensure that complaints are independently investigated and adjudicated in accordance with due process, and that managers are punished for misconduct, especially retaliation. The Committee is particularly concerned with the professionalism of the Bank’s legal department, and questions its ability to carry out its responsibilities fairly and effectively. Among other things, the Bank’s lawyers have expended resources prolonging cases that should have been resolved quickly, or defended management when it would have been in the interests of the institution to represent the complainants.\footnote{61}

Notwithstanding the Senate’s and GAO’s reservations and concerns, the U.S. Treasury Department informed GAO in 2003 that the World Bank’s internal control system provides adequate assurance that funds are spent as intended.


In 2005, the U.S. Senate Foreign Relations Committee held six hearings on transparency at the multilateral development banks. The 2006 appropriations law, enacted in response, required the World Bank to provide increased whistleblower protections. In March 2007, Mr. Eli Whitney Debevoise informed Senator Lugar during his confirmation hearings as U.S. Executive Director that he intended to work with fellow Executive Directors to address the weaknesses that GAO had identified in the World Bank’s grievance system and adopt best practices for the protection of whistleblowers.\textsuperscript{62}

On April 25, 2007, the World Bank’s Audit and Personnel Committees rejected a proposed whistleblower policy that did not include external arbitration, as required by U.S. legislation. The whistleblower policy as adopted by the Board still provided no recourse to external arbitration, merely leaving staff with the existing grievance system.\textsuperscript{63} Most seriously, the policy removed staff’s right to report misconduct directly to multiple authorities within the World Bank, including to the Board. As mentioned supra, note 34, the Chairman of the Audit Committee has now decided to commission an external audit of the World Bank’s internal controls.

X. INSTITUTIONAL INTEGRITY DEPARTMENT

Under the World Bank’s whistleblower policy, staff “generally should” report suspected misconduct either to their managers or to the Institutional Integrity Department (INT). The World Bank staff lack confidence in INT’s independence. The Staff Association Newsletter reported in a May 2005 article entitled, Staff Want Grievances Handled with Due Process: “INT has been controversial. Outside watchdog groups and staff have accused management of using INT to perform punitive investigations on scanty evidence, or of doing the reverse—calling off a warranted investigation. Victims have included staff who have revealed accounting or project facts embarrassing to managers . . . .”\textsuperscript{64}

When the Audit Committee of the Board of Executive Directors questioned INT’s independence, the President commissioned a report by a panel

\textsuperscript{62} Questions for the Record, supra note 57, ¶ 9.


\textsuperscript{64} World Bank Group Staff Association, Staff Want Grievances Handled with Due Process, STAFF ASS’N NEWSL. (May 2005).
chairied by Paul Volcker. The Volcker Panel left out any investigation into INT’s retaliation against whistleblowers. According to the Volcker Report, “Approximately 37% of INT staff and three of the four top officials are United States Nationals.”

The Government Accountability Project (GAP) (a non-governmental organization that protects whistleblowers) criticized the Volcker Panel’s report because “a pattern emerged of subjective declarations about a general state of affairs, followed by a presentation of facts that in many cases contradicts the previous statement.” GAP found it “inexplicable” when the Volcker Panel failed to mention that INT did not comply with its most recent audit.

The Volcker Panel did not address internal control deficiencies raised by INT’s lamentable record of whistleblower harassment, merely recommending that cases not involving allegations of significant fraud or corruption should be reassigned to the Ethics Office. The Volcker Panel failed to consider the internal control lapses manifested in the Ethics Office as well. The Volcker Panel attempted to address problems with INT’s accountability and independence by establishing an external oversight advisory board. But the terms of reference of the oversight board are not sufficiently robust to restore any confidence in INT. Rather, INT’s accountability and Board oversight have been weakened by requiring INT to report to an operations unit within the World Bank.

Mr. Paul Lachal Roberts, Senior Adviser to the Director General of the European Commission Anti-Fraud Office (OLAF), and a participant on the Volcker Panel, discussed governance issues with European Executive Directors at the World Bank following his report on the Volcker Panel:

My Director General and I met with a number of European Executive Directors of the World Bank a few weeks ago to discuss the Volcker Panel report. At the meeting there was also discussion about governance issues. My impression was that the European Executive Directors are well apprised of all relevant issues at the Bank and no further comment by OLAF is warranted even if it was within our legal competence.

68. E-mail from Paul Lachal-Roberts, Adviser to the Director General OLAF, to Karen Hudes (Mar. 29, 2008, 2:09 p.m.).
Two weeks later, at the Spring Meetings of the World Bank, the European Commission stated: "Furthermore, I call for an open, transparent process, based on merit, in selecting future Presidents for the WB [World Bank] and Managing Directors for the IMF." 69

XI. INVESTIGATIONS OF EXECUTIVE DIRECTORS’ PRIVATE BANK ACCOUNTS

In June 2007, a coalition of World Bank Board members required Paul Wolfowitcz, the former Pentagon second-in-command, to resign as President of the World Bank. Wolfowitcz had arranged a generous raise for his girlfriend and World Bank employee Shaha Riza. Several Board members complained that their private lives were investigated in the hope of uncovering facts that would disqualify them for demanding Wolfowitcz’ resignation. 70

The evaluation of the IMF’s governance revealed weak capacity of members and other stakeholders, including legislatures and civil society, to have their views heard and considered in the institution’s decision-making process. 71 The Board and other IMF authorities feared retaliation. IEO surveys found one-third of authorities and thirty-six percent of Board members believed that they could criticize staff and Management without fear of repercussions “rarely” or “only on some issues.” 72 Fully fifty-six percent of the authorities and sixty-seven percent of Directors from low-income-countries felt they can freely criticize staff “rarely” or “only on some issues.” 73

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70. Ad Melkert, Deputy Director of the United Nations Development Program, and former Dutch Executive Director at the World Bank, confirmed during a fifteen minute interview with Clairy Polak on a Dutch Public Broadcast program that both his and Herman Wijffels’ private lives were subjected to investigation. Attempts to discredit him were especially intense during the period of May through July, 2007. See Buitenhoof, Politiek Bedrijven op het Wereldstadium [Politics on the World Stage], Sept. 30, 2007, http://www.vpro.nl/programma/buitenhoof/afleveringen/35904442/ (last visited Mar. 21, 2009).

"In my case, there was nothing to find, but my colleagues on the Board of the World Bank were dismayed. There were definite attempts at disqualification," said Wijffels. See Wijffels boos over ‘worstest in zijn verleden, DE GELDERLANDER, Sept. 13, 2007, http://www.gelderlander.nl/algemeen/dgbinnenland/1874729/wijffels-boos-over-worstest-in-zijn-verleden.cce (last visited Mar. 21, 2009) (author’s translation).


73. INDEP. EVALUATION OFFICE OF THE IMF, supra note 55, at 8, ¶ 28; INT'L MONETARY FUND INDEP. EVALUATION OFFICE, supra note 72.
XII. PARTNERSHIP WITH ALLIES

In order to preserve its hegemony, the Bush Administration frustrated reforms required by other member countries as well as U.S. Congress for increased transparency and accountability in the Bretton Woods institutions. In one instance, Jean-Marie Le Guen, French National Assembly Vice President, accused the United States of deliberately attempting “to destabilize” Dominique Strauss-Kahn, the IMF’s Managing Director, through revealing a confidential investigation to a journalist at the Wall Street Journal. After Mr. Strauss-Kahn apologized for his lapse of judgment in having an affair with a former staff member at the IMF, he was exonerated from any abuse of his position as Managing Director. This climate of suspicion and hostility among NATO nations and other U.S. allies is detrimental to global stability.

Perhaps Ernest Zedillo, Mexico’s former President, who is chairing the High-Level Commission on World Bank governance, will succeed in restoring the necessary collaboration at the Bretton Woods institutions for resuscitating the international financial system. The paucity of checks and balances and lack of due process for whistleblowers explain the numerous instances of governance failure documented. Because the Bretton Woods institutions are at the center of the international financial system, it is crucial to have proper controls in order to restore confidence. This will require better information flows, including to the American public, as well as access to justice for the World Bank’s whistleblowers. For this to happen, the American public must hold its leaders accountable for upholding the obligations of the United States under the treaties that established the Bretton Woods institutions.

