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For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks

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SYNOPSIS

This Article enumerates and evaluates key criticisms that are directed at the multilateral development banks ("MDBs")—that is, the World Bank and the four regional development banks. Some of the criticisms are substantive in character, claiming that the MDBs impose inappropriate policies and projects on countries and contribute to environmental degradation and human rights violations; some criticisms are procedural and institutional in character, denouncing the lack of transparency, access, consistency, and competence of the MDBs; and some criticisms are constitutional in character, arguing that these institutions perceive their roles either too narrowly or too broadly, or that they suffer from basic structural flaws because they provide entirely the wrong kinds of assistance and are controlled by the wrong countries.

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Much of this cacophony of criticism stems from the fact that the MDBs have gradually taken on attributes of global regulatory bodies with vastly greater influence now than in earlier years. While this evolution has prompted some calls for dismantling the MDBs, the author dismisses this approach and asserts instead that legal steps should be taken to direct the evolution of MDBs into a “fourth generation” of such institutions. Specifically, the author recommends that the MDBs’ governing bodies make certain fundamental changes, both by adopting new policies and by amending their charters, in order to address those criticisms that are persuasive and important. The author suggests (i) requiring the institutions to give ever more attention to environmental and social concerns by adopting a broader view of “economic development” and by linking MDB membership to the acceptance of key treaty provisions relating to environmental protection and human rights; (ii) taking further steps to permit and facilitate public participation in MDB decision-making; (iii) adopting mechanisms to offset the asymmetry that results from the MDBs’ weighted voting systems and from their use of loan conditionalities; (iv) acting to ensure that the MDB staffs are adequate in their size, their competence, and their access to outside resources to carry out the responsibilities given to them; and (v) providing for external judicial review of MDB operational decisions and charter interpretation through a new tribunal for MDBs. The Article urges that the United States play a lead role in bringing about these changes, recognizing thereby the merits of using multilateral solutions to meet global economic challenges.
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I. INTRODUCTION—THE MDBS IN HISTORICAL AND INSTITUTIONAL CONTEXT

In this introductory Part, I explain why it is necessary, interesting, and timely to undertake a critical survey of the MDBs. Like the other key global economic organizations—the International Monetary Fund ("IMF") and the World Trade Organization (or its predecessor, the General Agreement on Tariffs and Trade)—the MDBs are now attracting much more attention than in earlier decades because they have evolved into such powerful entities. That evolution has brought them to the end of what I refer to as a "third generation" in the development of multilateral economic institutions. They now face a new set of demands that they are ill-suited to meet unless some fundamental legal and institutional retooling takes place. Expressed more bluntly, I believe the MDBs must change or die.
A. **Throwing Eggs at Windows**

In 2002, I wrote an article that focused on the World Trade Organization ("WTO"). The phrase "throwing eggs at windows" was part of the title of the article, because I analogized the apparent collision of globalization and state sovereignty to an egg being thrown against a window. The article identified, and then evaluated, about a dozen key criticisms that have been leveled at the WTO. I dismissed some criticisms, endorsed some criticisms, and offered recommendations. Now I am at the second stage of my assessment of the global economic institutions. I turn to the World Bank and the regional development banks—institutions in which I have a deep interest both professionally and personally, having worked as a lawyer at two of the regional development banks and having dealt extensively with the World Bank on specific projects.

As with the WTO, there are plenty of criticisms to evaluate regarding the MDBs. Many books and articles have appeared in recent years focusing on specific complaints and condemnations—or, occasionally, on specific defenses and accolades—directed at the MDBs. Indeed, I have written some articles myself identifying particular criticisms of these institutions.

My aim in this Article, however, is different from those earlier critiques of the MDBs. Instead of studying only one or two specific points in detail, I wish to take a survey of all the main criticisms leveled at the MDBs and then separate the wheat from the chaff, so as to focus on the most cogent criticisms and see how they should be addressed—just as I attempted in my 2002 article regarding the WTO. A threshold question is whether the valid criticisms of the MDBs are so damning as to require that the MDBs be killed off entirely, as some writers have

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proposed. If that question is answered in the negative (as I shall suggest that it should be), then the more challenging question arises: what kinds of changes—reformulations, restrictions, or re-chartering—should be made to the MDBs in order to address the valid criticisms and enable the institutions to meet the challenges of a new age?

Why is this necessary, interesting, and timely? I see four main reasons. First, there is now a firestorm of protest against all three major global economic organizations—the WTO, the World Bank, and the IMF—and it is conceivable that these institutions might either (i) melt down under the heat of protest if some dramatic changes do not occur or (ii) prove to be as evil as some of the protestors claim, which in either case would bring irreparable harm to global economic relations and to individual nations. Second, some of the protest has now moved beyond the streets and the popular press and has engaged the attention of serious scholars who have sharpened the arguments, so that they are now ripe for evaluating. Third, recent political developments—in particular, the Bush administration’s apparent unilateralist approach to global problems—have struck at the foundations of multilateralism on which the MDBs were built. And fourth, the MDBs themselves have already undergone important changes in the past decade, largely in response to the pressure of earlier public scrutiny and protest. It is timely and important to consider whether those changes show the right amount of adaptability (not too little, not too much) on the part of the MDBs, and what further steps, if any, should be taken now.

B. The MDBs in a Nutshell

I assume that I need not provide here an extensive description of the history, aims, structure, resources, and operations of the MDBs. Good

3. See, e.g., PATRICIA ADAMS, THE WORLD BANK’S FINANCES: AN INTERNATIONAL S&L CRISIS I (Cato Inst., Policy Analysis No. 215, Oct. 3, 1994) (claiming that the World Bank “must be shut down” because “its irresponsible lending exposes Western taxpayers to a possible World Bank bailout on a scale comparable to the U.S. savings-and-loan bailout” of the 1980s), available at http://www.cato.org/pubs/pas/pa-215.html (last visited Nov. 17, 2003); Nicholas Eberstadt & Clifford M. Lewis, Privatize the World Bank, WALL ST. J., June 26, 1995, at A12 (proposing partial elimination of the World Bank and privatization of the remainder). For a demand that all official aid agencies—bilateral as well as multilateral—be shut down, see generally GRAHAM HANCOCK, LORDS OF POVERTY (1989). Hancock concludes his book by claiming that “aid’s main function in the past half-century has been to create and then entrench a powerful new class of rich and privileged people” and that aid “has permitted record-breaking standards to be set in self-serving behaviour, arrogance, paternalism, moral cowardice and mendacity” and “has condoned—and in some cases facilitated—the most consistent and grievous abuses of human rights that have occurred anywhere in the world since the dark ages.” Id. at 192–93.
accounts have been provided elsewhere. I would, however, offer a few highlights and reminders of some specific factual points that need to be borne in mind in order to evaluate various criticisms and recommendations discussed later in this Article. These highlights and reminders relate to (i) some basic similarities in the operations and institutional structures of the MDBs and (ii) their evolutionary character, which has taken the form of three generations and is poised to embark on a fourth.

As a starting point, we should recognize the diversity that exists between the various MDBs. There are, after all, six principal institutions at issue: the International Bank for Reconstruction and Development ("IBRD"), chartered at the Bretton Woods conference in 1944; the International Development Association ("IDA"), chartered in 1960 to reflect the growing needs of less economically developed countries; the three regional development banks that were chartered in the late 1950s and 1960s—the Inter-American Development Bank ("IADB"),

4. For basic descriptions of the various MDBs, see their individual websites. For information on the MDBs provided from outside sources, see THE MULTILATERAL DEVELOPMENT BANKS (The North-South Institute ed., 1996). See also The Bank Information Center Homepage, at http://www.bicusa.org (last updated Nov. 17, 2003) (providing information on the policies and practices of MDBs); Environmental Defense, Regional Multilateral Development Banks (Nov. 1, 2001) (offering a short description of MDBs and suggested reading), at http://www.environmentaldefense.org/article.cfm?ContentID=2469 (last visited Nov. 17, 2003); Overseas Development Institute, Rethinking the Role of Multilateral Development Banks (Nov. 4, 1996) (evaluating MDBs), at http://www.odi.org.uk/publications/briefing/odi_devbank.html (last visited Nov. 17, 2003); Pacific Environment, Bringing Multilateral Development Policy to the Grassroots, at http://www.pacificenvironment.org/finance/intro.htm (last visited Nov. 17, 2003). (offering general observations on MDBs).


African Development Bank ("AfDB"), 8 and the Asian Development Bank ("AsDB"), 9—and the most recent regional development bank to be created, the European Bank for Reconstruction and Development ("EBRD"), which was chartered at the close of the Cold War. 10 The first two of these—the IBRD and the IDA—operate for most purposes as a single institution and are referred to jointly as the World Bank. 11

It is natural that there would be considerable diversity among these six MDBs. They were, after all, established at different times to meet different needs—a point that I shall enlarge on shortly. However, despite their diversity, they all share the same fundamental precepts and structures that are most important for purposes of evaluating the


11. See Head, Throwing Eggs at Windows, supra note 1, at 749 (explaining the relationship between the IBRD and the IDA and noting that the two institutions “are almost completely merged in terms of offices, staff, and policies” and together “are known as the World Bank”). For further information about the relationship between the IBRD and the IDA, see the opening pages of THE WORLD BANK, 1 THE WORLD BANK ANNUAL REPORT 2002 [hereinafter I WORLD BANK ANNUAL REPORT 2002], available at http://www.worldbank.org/annualreport/2002/PrintVersion.htm (last visited Nov. 17, 2003). See also IBRAHIM F.I. SHIHATA, 1 THE WORLD BANK IN A CHANGING WORLD 7–13 (Franziska Tschofen & Antonio R. Parra eds., 1992) [hereinafter SHIHATA II] (explaining the institutional structure of the World Bank and of the “World Bank Group,” which encompasses some other associated entities, including the International Finance Corporation (IFC)). Information about the IFC is available on its website, http://www.ifc.org. For an abbreviated description of the IFC, see I WORLD BANK ANNUAL REPORT 2002, supra, at 9. Despite its importance as a development finance institution, further reference to the IFC has been omitted from the remainder of this Article because certain key differences in its aims and operations—especially its focus on private-sector activities and involvement in equity financing—distinguish it from the other institutions discussed here, all of which have the word “Bank” in their names. I believe some of the criticisms discussed and evaluated in this Article would apply also to the IFC, but I shall not attempt to establish that here.
criticisms currently leveled against them. For example, all of the MDBs have economic development as their motivating aim. To this end, they provide loans (and some grants) to finance economic development projects such as roads, irrigation systems, port facilities, power plants, rural health facilities, teacher training, fertilizer production, agricultural credit, and institutional strengthening. The loans that MDBs provide for such projects are typically made on a reimbursement basis, so that funds are transferred only against expenditures as they are actually incurred, rather than as balance-of-payments loans of the type provided by the IMF. However, most of the MDBs also engage to some degree in "policy-based" lending by which funds are provided to support (and in return for) the adoption by borrowing governments of certain economic and financial policies favored by the MDBs.

Moreover, all of the MDBs share several basic institutional features. They all have states as members and make decisions (about lending and other matters) on the basis of a system of weighted voting under which the states with the largest capital subscriptions control the largest blocks of votes. All of the MDBs operate under charters that take the form of multilateral treaties obligating their member states to pay for certain portions of subscribed capital and to observe certain privileges and immunities of the institutions and their staff members. And all of the MDBs have both borrowing and non-borrowing member states, with non-borrowing member states enjoying some incentives for becoming members, such as eligibility to bid on contracts for equipment and civil works needed in the projects being undertaken with MDB financing.

Given these basic operational and institutional similarities among the MDBs, I shall paint with a broad brush. That is, I shall assume that the

12. With the kind permission of the Kansas Law Review editorial staff, I have dispensed with specific footnote citations to authority for the general descriptive points made in the remainder of this paragraph and the next paragraph and would ask that the reader wanting substantiation or further information refer to the sources cited supra note 4, and to other public sources on these topics, including the websites, charters, and annual reports of the various MDBs. In particular, a review of the information appearing on the MDB websites, at the addresses provided supra notes 5–10, will yield voluminous information on how such matters as project lending, policy-based lending, membership, weighted voting, financial resources, and other points made in this paragraph are dealt with in each of the MDBs.

13. For a description of the procurement policies of the MDBs, see John W. Head, International Contracting Opportunities Under Projects Funded by the World Bank and Related Institutions, INT’L CONTRACT ADVISER, Spring 1995, at 41, 41–53 [hereinafter Head, International Contracting Opportunities]. As noted there, the EBRD is the one MDB that does not require that procurement of goods and services follow eligibility guidelines based on whether or not a country is a member of the institution. Head, Evolution of the Governing Law for Loan Agreements, supra note 2, at 217 n.15.
various criticisms voiced against the MDBs apply in general terms to all of them, although doubtless in greater or lesser degree to one institution or another. In turn, I shall offer my own assessment of those criticisms, and my recommendations for the future, in an across-the-board approach with little discrimination among the MDBs. While this approach obviously overlooks numerous matters of degree and nuance, it permits the sort of wide survey that I believe we need to take.

A second factual point about the MDBs that deserves emphasis is a matter of history. The MDBs may be viewed as being “generational” in character, with three generations now having run their course, or nearly so.14 The first generation is represented by the IBRD, born in the closing days of World War II with the reconstruction of Europe as its main priority. The fact that the U.S. Government soon took over the bulk of that task under the Marshall Plan prompted the IBRD to focus its attention more on the “D” in IBRD—that is, economic development in its non-European member countries.

A second generation began around 1960. With the rapid emergence of many new states following the massive decolonization of the 1940s and 1950s, the IBRD found itself unable to provide as much useful assistance as was needed in those new states because IBRD loans carried market-based interest rates. In 1960, the IDA was established as a companion to the IBRD—yielding the double institution we now call the World Bank—to provide a mechanism for making much cheaper money (“soft loans”) available to the less developed countries (“LDCs”), by relying on contributions from rich member countries to finance projects similar to those that the IBRD had already been funding. At about the same time (between the late 1950s and mid-1960s), the IADB, the AfDB, and the AsDB15 were formed as regional sources of development financing to supplement the resources available through the World Bank. All three of these regional development banks sooner or later developed the same authority to make “soft loans” that the IDA makes.16 Hence

14. For a discussion of this generational character of MDBs, see Head, Supranational Law, supra note 2, at 636, 641–44. The information in the following several paragraphs is drawn from that discussion and from sources cited therein.

15. For details about the early history of the AsDB and the reasons for its establishment, see Head, Asian Development Bank, supra note 9, at 13–17.

16. Head, Supranational Law, supra note 2, at 642. For details about the lending authority of the regional MDBs in this “second generation,” see Inter-American Development Bank, About Us, at http://www.iadb.org/esr/english/ABOUTIDB/about_idb.htm (last visited Nov. 17, 2003); Inter-American Development Bank, OP-903 Fund for Special Operations FSO, at http://www.iadb.org/content/opsf/op-903e.htm (last visited Nov. 17, 2003); The African Development Bank Group, The African Development Fund [ADF], at http://www.afdb.org/knowledge/about/about_adbgroup_ADF.htm (last visited Nov. 17,
these four institutions—the IDA, the IADB, the AfDB, and the AsDB—represent the second generation in the evolution of the MDBs, in which their role and scope were expanded in order to cater better to the needs of LDCs.

The EBRD represents a third generation in the evolution of MDBs.\textsuperscript{17} Formed in 1990, about four decades after the IDA and the earliest of the regional MDBs, the EBRD introduced several novel features into the operations of MDBs. Instead of prohibiting any consideration of political factors, as the charters of the earlier MDBs do,\textsuperscript{18} the charter of the EBRD expressly adopts a political mandate requiring the institution to take concrete steps to assist the countries of its operations—originally a handful of Eastern and Central European states newly released from the Soviet sphere of influence and now a couple of dozen states reaching from Central Europe across to Central Asia\textsuperscript{19}—in making their transition from Communist political control to an embrace of “the principles of multiparty democracy [and] pluralism . . . .”\textsuperscript{20} The EBRD charter also included two other types of mandate absent from the charters of the earlier MDBs. Its economic mandate requires the EBRD “to foster the transition toward open market-oriented economies” in its countries of operation.\textsuperscript{21} Its environmental mandate requires the EBRD to “promote in the full range of its activities environmentally sound and sustainable development.”\textsuperscript{22}

The establishment of the EBRD was a blatant manifestation of a trend that had already begun in the other MDBs. It was a trend toward

\begin{footnotesize}
\begin{enumerate}
\item[17.] For more detailed information about the EBRD, see Head, \textit{Supranational Law}, supra note 2, at 635–49, and other sources cited there.
\item[18.] The EBRD Charter, for example, requires that “[t]he 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.” EBRD Charter, supra note 5, art. IV § 10. Similar language appears in the charters of the regional development banks other than the EBRD. SHIHATA I, supra note 10, at 2 n.2. For example, the “political prohibition” provision in the AsDB charter is almost identical to the one in the EBRD charter: “The Bank, its President, Vice-President(s), officers and staff 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 concerned.” AsDB Charter, supra note 9, at art. 36(2), \textit{reprinted in} Head, \textit{Asian Development Bank}, supra note 9, at 119.
\item[19.] See Head, \textit{Supranational Law}, supra note 2, at 645–46 (explaining that within a few years of its establishment, the EBRD’s countries of operations had expanded from eight to twenty-five, with the breakdown of the Soviet Union and political reformulations in Yugoslavia and nearby states). The EBRD now has 27 countries of operations. The European Bank for Reconstruction and Development, \textit{About the EBRD}, at http://www.ebrd.org/about/main.htm (last visited Nov. 17, 2003).
\item[20.] EBRD Charter, supra note 5, art. 1.
\item[21.] \textit{Id.}
\item[22.] \textit{Id.} art. 2, para. 1 (vii).
\end{enumerate}
\end{footnotesize}
using the MDBs as instruments of global policy guidance or influence—or what I would call global policy regulation. This trend is exemplified by the gradual expansion of MDB operations into the type of policy-based lending explained above; so extensive has this expansion been that today it is common to find these institutions requiring their borrowing member countries to accept and adhere to prescribed policies on environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction.

Indeed, given the breadth and depth of such policy requirements, I believe the MDBs should be regarded as having been transformed from financial institutions into regulatory agencies—that is, into agencies involved in global policy “regulation.” They still carry out development banking functions, of course, but those banking functions have increasingly become instruments for achieving regulatory aims. This fact—that the MDBs have moved beyond merely financial functions—serves as the foundation for one of the most strenuous criticisms directed at these institutions. I shall discuss it more fully below; it is Criticism #12—“Mission Creep”—among my “Fourteen Points” of criticism. However, I have raised the issue here, in the introductory section of this Article, because I believe this evolution of MDBs into instruments of global policy regulation is a principal reason they have attracted so much attention in recent years. Many of the criticisms summarized below in Part II and evaluated in Part III have taken on a high profile in the popular press and public sentiment because

23. For an elaboration on my use of the term “regulation” in this context, see infra note 25.

24. For examples of such policies as promoted by the World Bank, see 1 WORLD BANK ANNUAL REPORT 2002, supra note 11, at 67–69. For similar examples from the AsDB, see the listings of sections in the Operations Manual on the AsDB’s website, at http://www.adb.org/Documents/Manuals/Operations (last visited Nov. 17, 2003).

25. In commenting on a draft of this Article, Bob Hockett of the Yale Law School has questioned my use of the terms “regulation” and “regulatory agency” in this context, pointing out that “regulation” connotes the notion of some entity (a regulator) that is formally authorized to assert jurisdiction over some other entity (a regulatee) and that MDBs do not enjoy the same degree of such authority as regulatory agencies typically do in a national setting. I agree with those points, and I would even add another point that further differentiates MDBs from most national regulatory agencies: in the case of the MDBs, the entities to which the policy guidance applies are themselves members of the MDBs and participate in the formulation of the policies. Despite these points, however, I still believe the MDBs can usefully be regarded as “regulatory agencies,” defined liberally. After all, the aims and effects of the MDBs’ policy guidance are generally the same as the aims and effects of regulations issued by national regulatory agencies: to regularize conduct on a variety of topics so as to conform to formally adopted standards. I believe the fact that the MDBs have increasingly been used in recent years to announce such standards of conduct on a wide variety of topics and to apply those standards (at least vis-à-vis their borrowing member countries) makes it appropriate to regard them as engaging in “regulatory” activities.
the character of MDBs has changed so dramatically. I consider it important that we view the current cacophony of criticism against this historical backdrop.

II. A Menu of Criticisms—Substantive, Procedural, and Constitutional

I distill the various complaints directed against the MDBs into fourteen specific criticisms—a present-day “Fourteen Points.” These Fourteen Points fall into three broad categories: (a) substantive criticisms, (b) procedural and institutional criticisms, and (c) constitutional criticisms. Of course, some of these efforts at line drawing—that is, distilling the complaints into fourteen specific criticisms and placing them in three main categories—are artificial. Many of the anti-MDB attacks as expressed in the streets, in the popular press, and in the more sophisticated literature of law and policy spill across the lines I have drawn. Again, however, I would emphasize my main purpose: to provide a general survey and assessment of the principal criticisms. If I have lumped together (or arbitrarily distinguished between) certain points, I do so with apologies and with this reminder of my main purpose.

I list below, in their barest formulation, the Fourteen Points of criticism.

- Substantive Criticisms:
  
  Criticism #1—The MDBs promote bad economic and financial policies and projects.
  Criticism #2—The MDBs promote environmental degradation.
  Criticism #3—The MDBs disregard human rights.
  Criticism #4—The MDBs trample on national sovereignty.

- Procedural and Institutional Criticisms:
  
  Criticism #5—The MDBs operate with a lack of transparency and access.
  Criticism #6—The MDBs allow an excessive role for corporate interests.
  Criticism #7—The MDBs disregard citizens’ groups and NGOs.
Criticism #8—The MDBs promote a lack of symmetry in international obligations.

Criticism #9—The MDBs create an incoherence in policy prescriptions.

Criticism #10—The MDBs have serious weaknesses in staffing and management.

• Constitutional Criticisms:

Criticism #11—The MDBs are too narrow in their economic focus.

Criticism #12—The MDBs have permitted mission creep to expand their focus unduly.

Criticism #13—The MDBs provide the wrong forms of financial assistance.

Criticism #14—The MDBs suffer from unaccountability and a democracy deficit.

Having provided a list of the Fourteen Points, I now explain each one. In doing so, I express each criticism in what I consider to be its most forceful terms. As discussed in detail below in Part III, I do not agree with several of these criticisms, nor with some of the assumptions and value judgments on which several of these criticisms rest. Therefore, my attempt to state the criticisms persuasively in the following paragraphs should not be taken at this stage as any endorsement of them on my part.

A. Substantive Criticisms

1. Criticism #1—Bad economic and financial policies and projects

In its usual form, this criticism asserts that the MDBs are based on a flawed economic model—laissez-faire, free-market policies—and they

26. For examples in the literature of some criticisms along these lines, see Michael Massing, From Protest to Program, The American Prospect, Summer 2001, at 2–3 (noting that the World Bank, mirroring the interests of its most powerful members, such as the United States, “continues to push on developing nations the same market reforms criticized in its World Development Report [2000/2001]”); Bruce R. Scott, The Great Divide in the Global Village, 80 Foreign Aff. 160, 161 (2001) (noting that “the wealthy nations must . . . acknowledge that the ‘Washington consensus,’ which assumes that free markets will bring about economic convergence, is mistaken [and that those interests need to] abandon the notion that their own particular strategies are the best for all countries”). For a relatively earlier and especially shrill attack of the World Bank, criticizing it for (among other things) its capitalist foundations, see generally CHERYL PAYER, THE WORLD BANK: A CRITICAL ANALYSIS (1982).
force borrowing member countries (sometimes in a "cookie-cutter" manner) to accept that economic model instead of allowing those countries to develop their economies through pragmatic, tailored (even protectionist) policies until those countries can get on their feet economically. The MDBs' insistence on this laissez-faire model reflects the fact that the MDBs conceive of "development" as a narrow process of economic restructuring to stimulate economic growth. In their headlong rush to create such economic growth, the MDBs support bad projects that do not provide long-term economic improvement in the lives of those people who are allegedly the intended beneficiaries of the projects. Indeed, some of the projects—for example, those to expand coffee production—have led to disruption of world markets and economic distress. In addition, some of the projects and policies supported by the MDBs promote privatization in unsophisticated economies that do not yet have an adequate institutional and regulatory framework in place. As a result, the process and results of privatization are terrible; the scoundrels waltz right in to the economy, to everyone's detriment but their own. All in all, this inappropriate and unthinking adoption of, and insistence on, a western rich-country economic model, without due attention to local conditions, has brought further impoverishment to LDCs.

The points described above may be seen as coming from "the left." Sometimes complaints about the MDBs' policies and ideology come also from the other end of the political spectrum. I address those complaints

27. Massing, supra note 26, at 5 (stating that "[o]ne reason there's a glut [in coffee production] is that the World Bank has for years been pushing third-world countries to grow cash crops like coffee to boost their export earnings").

28. See Joint Economic Committee, Report of the International Financial Institution Advisory Commission 9 (Mar. 2000) [hereinafter Meltzer Report] ("Unfortunately, neither the World Bank nor the regional development banks are pursuing the set of activities that could best help the world move more rapidly toward [the objective of eradicating world poverty] or even the lesser, but more fully achievable, goal of raising living standards and the quality of life, particularly for people in the poorest nations of the world."); available at http://www.house.gov/jec/limf/meltzer.pdf (last visited Nov. 17, 2003). The Report of the International Financial Institution Advisory Commission, referred to as the Meltzer Report after its chairman, Allan Meltzer, although worthy of some attention, strikes me as a document riddled with inaccuracies, sweeping generalizations, unsubstantiated suggestions, and not a little ideological hogwash suitable for cute sound bites but of no lasting significance. Dissenting views expressed by four commission members—including most notably Fred Bergsten, whose expert insight has contributed to intelligent assessment of international institutions and relations for several decades—impress me as far more credible and persuasive. Meltzer Report, supra, at 111–18. See also C. Fred Bergsten, The Empire Strikes Back, The Int'l Econ., May 2000, at 10–13, 52 (criticizing the Meltzer Report on grounds that it "unfairly maligns two highly successful international institutions").
more fully later in this Article because they arise most frequently in connection with claims of "Mission Creep" (Criticism #12).

2. Criticism #2—Environmental degradation

This criticism claims that some MDB-financed projects have devastating effects on the environment. For example, the MDBs favor large dams, road-building projects, and a general addiction to fossil fuels. The MDBs permit and promote environmentally destructive projects because the MDBs simply disregard the environmental effects of the projects at both the design and the implementation phase. Why is this the case? Partly because the MDBs are controlled by anti-environment influences, including corporate interests (see Criticism #6), and partly because the MDB staff and management are out of step with modern views of sustainable development (see Criticism #10).

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29. For examples in the literature of some criticisms along these lines, see Mark Hertsgaard, The World Bank and the Global Green Deal, OXFAM EXCHANGE, Winter 2001, at 4 ("Time and time again, [the World Bank] has financed gargantuan, ill-conceived projects whose anti-poverty effects are indirect at best and whose environmental consequences are downright disastrous."); Bank Information Center, Hot Dividends: The World Bank's Investments in Climate Changing Fossil Fuels, Aug. 2000, at 1 ("The World Bank is doling out billions annually in loans and guarantees to fossil fuel projects—the greatest contributor to climate change—in the developing world."); at http://www.bicusa.org/proc/pdf/foe_climate.pdf (last visited Nov. 17, 2003); Forest Peoples Programme, Forests and the World Bank: Concern Over Bank's New Plans to Finance Commercial Logging Operations in all Types of Forests, Sept. 2001, at 2 (stating that civil society organizations "are alarmed that the World Bank is planning to reverse its current forest Policy by lifting its proscription against financing logging in primary tropical moist forests to enable Bank financing of commercial-scale logging operations in all types of forest"), at http://www.bicusa.org/proc/pdf/fpp_forests2001.pdf (last visited Nov. 17, 2003); Kay Treacle, Accountability at the World Bank: What Does It Take? Lessons from the Yacyreta Hydroelectric Project, Argentina/Paraguay (Sept. 1998) (noting that in the World Bank-financed Yacyreta Hydroelectric Project, the environmental assessment was not undertaken until the project was near completion and that, although several specific environmental concerns were to have been addressed before the opening of the dam, they never were), at http://www.bicusa.org/publications/yacyreta.htm (last visited Nov. 17, 2003).
3. Criticism #3—Human rights shortcomings

According to this criticism, the MDBs typically give no regard to human rights of various types, including the right to education and the rights of indigenous people, and they act independently of any accepted human rights norms and institutions. MDB projects and policies often set the pricing of health, education, and water services out of the reach of

30. For examples in the literature of some criticisms along these lines, see John D. Ciocciari, The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement, 33 CORNELL INT’L L.J. 331, 332-35 (2001) (citing the works of several scholars calling on the World Bank to take a more proactive role in the human rights arena); Thomas M. Franck, Are Human Rights Universal?, 80 FOREIGN AFF. 191, 204 (2001) (arguing that the World Bank should be proactively using loan conditionalities to protect human rights against the argument of cultural exceptionalism); Fergus MacKay, Universal Rights or a Universe Unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples, 17 AM. U. INT’L L. REV. 527, 529-30 (2002) (criticizing the World Bank for “openly disregard[ing] a whole range of rights” in a way that “runs counter to mainstream thought about the nature of human rights and attendant international obligations”); Massing, supra note 26, at 7 (noting that the World Bank should use conditionalities to improve socially useful categories like education, but it does not); Treakle, supra note 29, at n.p. (noting that in the Yacyreta Hydroelectric Project, concerns over the resettlement and compensation of displaced indigenous peoples were supposed to be addressed before the opening of the dam, but they never were); Bank Information Center, Problem Project Alert #8: ADB Funded Thailand Samut Prakan Province Wastewater Management Project, at http://www.bicusa.org/asia/samutprakarn/ppa_thai.htm (last updated July 2002) (asserting that concerns expressed by the community to be affected by the AsDB-funded Samut Prakan Wastewater Management Project—over the necessity of the project, the design of the project, the social and environmental ramifications of the project, the allegations of corruption surrounding the project, the lack of transparency and citizen participation in the project, and the violation of Bank policies and Thai laws surrounding the project—were submitted to the AsDB but were largely ignored); Bank Information Center, The ADB-funded Samut Prakan Province Wastewater Management Project in Thailand, at http://www.bicusa.org/asia/samut.htm (last updated July 2, 2003) (same); Globalization Challenge Initiative, Growing Danger of Economic Apartheid: How the World Bank Group’s Private Sector Development (PSD) Strategy Threatens Basic Service Provision (Health, Education and Water), Debt Reduction and PRSP Processes, Sept. 2001, at 1 (“In country after country, efforts [through loan conditionalities] by the World Bank Group to privatize health, education, and water systems are pushing the costs of public services out of the reach of ordinary people.”), at http://www.bicusa.org/ptoc/pdf/gci_privatization01.pdf (last visited Nov. 17, 2003); Results Educational Fund, World Bank Water Policies Undermine Public Health, Sept. 2001, at 2 (noting that the World Bank imposes a policy of increased cost recovery on water services without protecting poor water consumers), at http://www.bicusa.org/ptoc/pdf/rowden_water.pdf (last visited Nov. 17, 2003); Rick Rowden, The World Bank and User Fees, Sept. 2001, at 1 (noting that the World Bank conditions loans upon the willingness of a borrowing country’s government to impose user fees on water, health and education services, effectively locking out the poorest people from accessing them), at http://www.bicusa.org/ptoc/pdf/rowden_userfees.pdf (last visited Nov. 17, 2003). For a careful examination of the relationship between the World Bank and international human rights law, see generally SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001). Questions about that relationship are not new; they have been the subject of debate for many years. For a 1988 symposium on international development agencies, human rights, and environmental considerations, see Symposium, International Development Agencies (IDAs), Human Rights and Environmental Considerations, 17 DENVER J. INT’L L. & POL’Y 29 (1988).
ordinary people. Moreover, MDBs support, at least tacitly, the notion of cultural exceptionalism by which universal human rights norms are ignored by some countries. In addition, the MDBs are ineffective at addressing corruption in government, thus disregarding the human right to effective governance (see Criticisms #5 and #14). Indeed, the MDBs fuel corruption by virtue of the huge financial flows that they control and disburse to government officials.

4. Criticism #4—Trampling of national sovereignty

This criticism claims that in imposing conditions on the rights of member countries to borrow money from MDBs, the MDBs violate the sovereignty of those member countries, and in particular the principle of self-determination. In so doing, the MDBs themselves act inconsistently with settled principles of international law—for example, the principle of state sovereignty enshrined in Article 2(1) of the U.N. Charter and the principle of self-determination of peoples, set forth in (among other places) Article 1 of the International Covenant on Civil and Political Rights. Moreover, to the extent that loan conditionalities imposed by the MDBs require a government to adopt economic and financial policies

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31. A curious irony, kindly pointed out by Bob Hockett in commenting on a draft of this Article, arises between this criticism that the MDBs support exceptionalism in the area of human rights and an element of Criticism #1, described above, that the MDBs reject exceptionalism in the area of economic and financial policies, by insisting on a western rich-country economic model without due attention to local conditions.

32. For a discussion of some criticisms along these lines, see Martin Wolf, Will the Nation-State Survive Globalization?, 80 FOREIGN AFF. 178, 184–85 (2001) (noting that globalization and the global institutions that regulate globalization, such as the World Bank, are “often [seen] as destroying [national] governments’ capacities to do what they want or need to do”). See also Kamal Malhotra, Globalization, Private Capital Flows and the Privatisation of Infrastructure, Presentation at the BOOT: In the Public Interest? conference (Mar. 1998) (“The weakening of the State’s role partly as a result of the economic policy advice of the World Bank and IMF . . . could reduce rather than enhance a government’s ability to enact and enforce effective regulation of the market in the interests of the poor and disadvantaged.”) (transcript at http://www.signposts.uts.edu.au/articles/Generic/Economy/410.html (last updated Jan. 27, 1999)).


that are contrary to those that would be adopted by the people of that country, the MDBs encourage governments to act inconsistently with the principles of participatory governance reflected in Article 25 of the ICCPR.  

B. Procedural and Institutional Criticisms

1. Criticism #5—Lack of transparency and access

According to this criticism, the MDBs are secretive in their operations, in several respects. For one thing, they practice "documentary secretiveness." They typically do not disclose documents that describe their governing policies, their decisions, and their plans—that is, how they do things, what they have done, and what they plan to do.

Moreover, the documents that the MDBs do disclose under their selective disclosure policies are usually self-serving and biased, simply whitewashing over any negative aspects of their operations, and they often result only in the disclosure of documents that are distracting or deceptive in character, intended to keep the public occupied with largely irrelevant information. Furthermore, in some cases the MDBs allow the member countries themselves to determine whether certain documents relating to those countries will be made public, and this represents an abdication of responsibility by the MDBs. In addition to these forms of "documentary secretiveness," the MDBs also practice "operational secretiveness": they conduct business in closed meetings that exclude the public from observing the MDBs in action. Indeed, many key decisions

35. Article 25 of the ICCPR provides that every citizen shall have the right to participate in elections aimed at "guaranteeing the free expression of the will of the electors." Id. art. 25.

are made through informal “insider” meetings that are off-limits both to public scrutiny and to the formalities to which public meetings are usually subject in order to ensure procedural fairness.\textsuperscript{37}

2. Criticism #6—Excessive role of corporations\textsuperscript{38}

This criticism asserts that MDB policies and operations are unduly influenced by corporate interests. The MDB staff members are subjected to lobbying by companies that compete fiercely for billions of dollars worth of procurement contracts—that is, contracts awarded by the MDBs or by their borrowers for the supply of equipment, the building of roads and structures, and the provision of consulting services. The decisions to award such contracts are made in circumstances that invite corruption of government officials and MDB staff members, and no adequate safeguards against such corruption have been put in place. More generally, corporate interests influence the overall selection and design of projects to be financed by the MDBs, as well as the overall policy direction of the MDBs—often overshadowing the interests of the persons and communities whose well-being the projects and policies are supposed to serve.

\textsuperscript{37} See infra Part II.C.4 of this Article for the related complaint (under Criticism #14) that the public has inadequate influence over MDB decisions. Criticism #5 focuses only on the complaint that the public has inadequate access to information about MDB operations.

\textsuperscript{38} For examples in the literature of some criticisms along these lines, see Richard Falk & Andrew Strauss, Toward Global Parliament, 80 FOREIGN AFF. 212, 215 (2001) (stating that “[t]hrough expanding trade and investment, business and banking leaders have . . . exercised extraordinary influence on global policy”); Massing, supra note 26, at 3 (noting that the global regulatory structure, including the World Bank, has failed to regulate and control multinational corporations and their drive to exploit the poorest labor and most unprotected environments in order to maximize profits).
3. Criticism #7—Disregard for citizens’ groups and NGOs

This criticism runs as follows: at the same time that they give undue influence to corporations (see Criticism #6), the MDBs give too little attention to non-government organizations ("NGOs") and citizens’ groups whose aim is to protect the public interest at large—sometimes referred to as "civil society" organizations. The contribution that such groups can make in the development process is ignored, and this in turn prompts some of these groups to take drastic, sometimes violent, actions that pit them against the MDBs as enemies. This needless antagonism represents both (i) a squandering by the MDBs of the opportunity to benefit from the NGOs' enthusiasm and expertise and (ii) a disregard by the MDBs of the recent moves within the United Nations to encourage the involvement of public interest (civil society) organizations.

39. For examples in the literature of some criticisms along these lines, see Falk & Strauss, supra note 38, at 214–15 (suggesting that MDBs incorporate NGOs into their institutions to serve as a "voice of the citizenry" and therefore help legitimize the MDBs); Massing, supra note 26, at 6 (noting that the MDBs should help the NGOs pressure national governments to reign in the multinational corporations through the use of conditionalities); The Development Gap, Civil Society Engages World Bank in Assessment of Structural Adjustment Programs: Hundreds of Organizations to Hold Bank Accountable to Emerging Findings, Sept. 2000, at 1 (noting that although the World Bank has encouraged its critics to participate in evaluating the impacts of its structural adjustment policies through the Structural Adjustment Policy Review Initiative, the World Bank "has yet to demonstrate any willingness to learn from the Initiative's . . . reviews, much less integrate that learning in its policy development, programming and operations"), at http://www.bicusa.org/ptoc/pdf/devgap_strucadj.pdf (last visited Nov. 17, 2003).

4. Criticism #8—Lack of symmetry in obligations\footnote{41}

This criticism emerges from two legal and institutional features of the MDBs and their operations. The first of these is the fact that in their policy-based lending\footnote{42} the MDBs insist, by way of loan conditionality, that borrowing countries implement certain economic and financial policies endorsed by the MDBs. That is, MDB financing is made available only if (and as long as) a borrowing member country accepts certain economic and financial policies prescribed by the MDBs. If the borrower rejects those policies, the financial assistance will not be available; if the borrower accepts the policies at first but then abandons them, the financial assistance will not continue. The second feature from which this criticism emerges is the weighted voting system under which all the MDBs operate.\footnote{43} These two features combined result in an asymmetrical situation: the rich countries are the policy-givers because of the system of weighted voting, and the poor countries, as borrowers, are the policy-takers; and in some cases the rich countries do not follow the very policies that they insist the poor countries should follow. This asymmetry, it is alleged, is fundamentally unfair and perhaps illegal.

\footnote{41. For examples in the literature of some criticisms along these lines, see Alan Beattie, \textit{Raw Deal for Poor Nations Limits Backing for Free Trade: A Report by Oxfam Sounds a Critical Note on Liberalization Gains That are Skewed Towards Rich Countries}, \textit{FIN. TIMES}, Apr. 12, 2002 (noting that “while the [International Monetary] [F]und and [World] [B]ank have the ability via their lending programs to encourage—if not compel—liberalization in poor countries, they lack a similar lever with the Group of Seven leading industrial nations”), available at http://www.financialtimes.com; \textit{An Unequal World: Fair Trade is Needed to Eradicate Poverty}, \textit{GUARDIAN} (London), Apr. 13, 2002 (noting that “[w]hile goods from the developing world are kept out of western markets, poor nations are pressed by the International Monetary Fund and World Bank to open their markets too rapidly”), available at http://www.financialtimes.com and 2002 WL 18762058; \textit{The Great Global Trade Robbery}, \textit{BANGKOK POST}, Apr. 11, 2002 (accusing the G-7 nations of using the World Bank to “force open poor countries’ markets . . . [with policies that] the rich world has itself rejected”), available at http://www.financialtimes.com and 2002 WL 18163944.}

\footnote{42. For a reference to the policy-based lending that the MDBs have undertaken in recent years, see the “nutshell” account of the MDBs that I provided in Part I.B, \textit{supra}.}

\footnote{43. For a reference to the weighted voting system, see the “nutshell” account of the MDBs that I provided in Part I.B, \textit{supra}. For details on how that weighted voting system places control over the MDBs in a handful of countries, see infra notes 54 and 55 and accompanying text.}
5. Criticism #9—Incoherence in policy prescriptions\textsuperscript{44}

This criticism claims that there is inadequate coordination among the MDBs—and also between the MDBs and other international institutions such as the WTO or the IMF—so that some countries might be subject to several conflicting economic and financial policy requirements. This incoherence results from the relative independence of the various global economic institutions, and that independence, in turn, reflects the fact that there is no overall coordinating process or body to bring order and consistency out of all the efforts to facilitate development.

6. Criticism #10—Weaknesses in staffing and management\textsuperscript{45}

According to this criticism, the MDBs are run by persons who have numerous inadequacies, so that even if other deficiencies in the MDBs—substantive, procedural, and constitutional—could be remedied, their operations would still be found wanting. The inadequacies take different forms. For one thing, staff appointments to and promotions within the MDBs are sometimes based on the wrong grounds. Too much emphasis, for instance, is placed on nationality, so that a candidate from an “under-represented” country might be appointed to a staff position (or promoted to a higher one) despite being otherwise poorly qualified for the job, or in any event substantially less qualified overall than another candidate for the position. In terms of promotions, too much emphasis is placed on the volume, rather than the quality, of lending activity generated by the person. In other words, the MDBs have an “approval culture” that gives incentives to lend for lending’s sake. A second form of staff inadequacy

\textsuperscript{44} For examples in the literature of some criticisms along these lines, see MELTZER REPORT, supra note 28, at 9 (noting that coherence and cooperation problems exist between the World Bank and the regional development banks); Lisa Jordan, The Death of Development? The Converging Policy Agendas of the World Bank and the World Trade Organization (Nov. 1999) (suggesting that the World Bank’s alliance with the WTO violates its special responsibility to developing nations), at http://www.bicusa.org/publications/deathdev.htm (last visited Nov. 17, 2003); Rick Rowden, The IMF, World Bank and WTO: Synthesizing Trade Liberalization Goals, Sept. 2001, at 1 (noting that, for example, sometimes “when countries seek to address balance of payment difficulties in accordance with IMF and World Bank programs [these programs] conflict with WTO membership rules”), at http://www.bicusa.org/ptoc/pdf/rowden_trade.pdf (last visited Nov. 17, 2003).

\textsuperscript{45} This criticism emerges mainly from my own experience and discussions with MDB officials. I am not aware of extensive treatment of this criticism in the pertinent literature. The Meltzer Report undertaken in 1999–2000 does, however, touch on one of the points incorporated into the following summary of Criticism #10—the complaint that the MDBs have an “‘approval culture’ aimed at achieving yearly lending targets,” and that this gives “incentives to lend for lending’s sake . . . .” MELTZER REPORT, supra note 28, at 75. For some elaboration on this complaint, and on MDB responses to it, see infra notes 160–61.
is policy anachronism: some staff members who have served in the MDBs for over a decade or two are unable or unwilling to appreciate how the theory and practice of economic development has changed in recent years, and their seniority can give them great influence in formulating and implementing MDB policy. A third form of staff inadequacy stems from a lack of internal accountability because of a division in responsibilities and a regular shifting of staff from one position to another within the organization.

C. Constitutional Criticisms

1. Criticism #11—Narrowness of economic focus

According to this criticism, the MDBs interpret their charter mandates too rigidly by considering only strictly economic factors in assessing the development needs of their member countries and in appraising and designing projects. The MDBs should (but do not) construe their charter provisions—such as the AsDB charter requirement that “[o]nly economic considerations shall be relevant to [its] decisions”—in a flexible manner. They should do so either (i) by recognizing that modern development theory requires that various non-economic factors (for example, politics, biodiversity, and national security) be taken into account or (ii) by construing the term “economic” quite broadly to encompass such things as the efficiency of governance, long-term environmental costs and benefits, and social costs and benefits.

46. For examples in the literature of some criticisms along these lines, see Daniel D. Bradlow & Claudio Grossman, Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF, 17 Hum. RTS. Q. 411, 439 (1995) (asserting that the political prohibition in the MDB charters should not prevent them “from incorporating all matters governed by international law, such as human rights and the environment, into their operations”); Günther Handl, The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development, 92 Am. J. INT’L L. 642, 654 (1998) (noting that “the question still remains to be answered whether...MDBs have an international legal obligation to heed the normative implications of sustainable development generally, notwithstanding the restrictive formal language of their constituent instruments”).

47. AsDB Charter, supra note 9, art. 36(2).
2. Criticism #12—Mission creep

This criticism is the opposite of Criticism #11. Instead of complaining about an excessively narrow focus on economic matters, this criticism claims that the MDBs have become far too broad and scattered in their focus, and hence less effective in their operations, because they have responded to every policy fad that has come along. The result of this looseness has been both a dilution of the MDBs' commitment to true economic development and an expansion of MDB purposes and operations into areas in which they have no authority and no competence. This adventure into ultra vires activity—getting involved, for example, in judicial reform, micro-credit, women's rights, and poverty reduction—has left the MDBs too broad and too shallow. They are gripped by "policy proliferation" or "policy paralysis," so something has to change to get them back on their proper (narrow) track.

3. Criticism #13—Wrong form of financial assistance

According to this criticism, the MDBs should dramatically reduce, or stop entirely, their practice of making loans. MDB lending is anachronistic: the MDBs were established because, at the time, there

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48. For a prime example in the literature of this criticism, see Jessica Einhorn, The World Bank's Mission Creep, 80 Foreign Aff. 22, 22 (2001) ("By now, [the World Bank's] mission has become so complex that it strains credulity to portray the bank as a manageable organization."). Einhorn describes the ways in which the World Bank has gradually widened its focus to take account of environmental sustainability, equitable income distribution, institutional strengthening, debt relief, poverty reduction, financial crisis management, banking regulation, corporate governance, gender disparities, narcotics, crime, and corruption. Id. at 24, 27, 29–32. See also FIFTY YEARS AFTER BRETTON WOODS: THE FUTURE OF THE IMF AND THE WORLD BANK 42 (James M. Boughton & K. Sarwar Lateef eds., 1995) (recording observations by Mannmohan Singh that "the World Bank of the future must return to a more focused set of priorities and activities" on grounds that the proliferation of new objectives and policies "lead[s] to a too diffused pattern of lending, whose impact on development in the recipient countries is far from certain or beneficial"); Ciocirari, supra note 30, at 335 (citing some "critics of World Bank intervention in the human rights arena [who] . . . contend that the Bretton Woods institutions already overstep their proper bounds in dictating legal and political policies to less developed nations").

49. For an example in the literature of this sort of criticism, see MELTZER REPORT, supra note 28, at 6 (implying that development lending is no longer necessary because "[w]ith the development and expansion of global financial markets, capital provided by the private sector now dwarfs the volume of lending the development banks have done or are likely to do in the future"), and at 11 (suggesting that "[g]rant[s] should replace the traditional Bank tools of loans and guarantees"). Another commentator, George Soros, also complains that "the World Bank has only limited funds available for outright grants and technical assistance," which would be more effective forms of World Bank assistance in some areas. GEORGE SOROS, GEORGE SOROS ON GLOBALIZATION 100 (2002).
were no global financial markets and institutions available to provide the financing necessary to facilitate the large public-works projects needed to rebuild Europe (in the case of the IBRD) and (for all the MDBs) to bring economic development to the underdeveloped countries. Now the situation is different. The global financial system is very mature. Hence, MDB loans—and therefore the public borrowings and public contributions on which those MDB loans depend—are no longer necessary. If MDB financing is to continue at all, it should continue (at least predominantly) in the form of grants, so as to assist those countries and those projects that are truly needed and viable from a long-term development perspective but for which commercial financing is unavailable on reasonable terms. Indeed, if the MDBs are justified as a legal matter in their recent shift of emphasis toward poverty reduction (see Criticism #12), then this shift can only be justified as a practical or operational matter if the MDBs provide grant financing to meet that goal. Expressed differently, surely poverty alleviation is better accomplished by giving grants than by making loans.

4. Criticism #14—Unaccountability and democracy deficit

According to this criticism, the MDBs lack legitimacy in today’s world because they lack, as a structural or constitutional matter, any meaningful form of accountability. This criticism takes several forms, of which four are most important. First, the MDBs make no accommodation for citizen involvement. That is, not only do the MDBs operate on the basis of secrecy (see Criticism #5), which prevents individuals or groups from knowing how they operate, what they have done, and what they plan to do; but the MDBs provide no mechanism for

50. As indicated above in the summary of Criticism #1, some complaints from “the right” as to the economic policies promoted by MDBs follow this reasoning. See supra note 28 and accompanying text.

51. For examples in the literature of some criticisms along these lines, see Nathalie Bernasconi-Osterwalder & David Hunter, Democratizing Multilateral Development Banks (noting that recent protests “suggest that international financial institutions will continue to lose legitimacy unless they become more transparent and accountable to both the people affected by their projects and those whose tax money supports them”), in THE “NEW PUBLIC” GLOBALIZATION OF PUBLIC PARTICIPATION 151 (2002), available at http://www.ciel.org/Publications/Democratizing_MDBs_NewPublic.pdf (last visited Nov. 17, 2003); Falk & Strauss, supra note 38, at 212 (“One crucial aspect of the rising disaffection with globalization is the lack of citizen participation in the global institutions that shape people’s daily lives.”). For a thoughtful discussion of the defects in the existing structure of accountability in the two Bretton Woods institutions, see generally Ngaire Woods, Making the IMF and the World Bank More Accountable, 77 INT’L AFF. 83 (2001) (commenting that “[a]ccountability, in particular, has become the catchery of officials, scholars and activists in discussing the reform of the institutions”).
influence by members or representatives of civil society. In a world in which the importance of participatory rights is broadly accepted—for example, in human rights treaties that have been ratified by over three-quarters of all countries\textsuperscript{52}—such unaccountability is anachronistic and unacceptable.

Second, the general unaccountability of the MDBs is exacerbated by the specific form of governance that applies to them: weighted voting. Under the weighted voting system, as noted earlier, a country's voting power is generally proportional to that country's subscription to the MDB's capital. From their inception, the MDBs have had capital structures in which a handful of countries (including most markedly the United States) has controlled the bulk of the subscribed capital. Hence, that handful of countries controls a preponderance of the votes. For example, the G-7 countries\textsuperscript{53}—none of which borrows from the MDBs, of course—control about forty-three percent of the votes in the World Bank\textsuperscript{54} and about forty-one percent of the votes in the AsDB,\textsuperscript{55} and the voting power exceeds fifty percent if (as often happens) the G-7 countries are joined by a few other European countries in decision-making. This is one reason why the lack of symmetry in the making and enforcing of MDB policies (see Criticism \#8) is regarded as so venal: a handful of mainly Western countries can effectively impose economic...

\textsuperscript{52} The ICCPR provides that "[e]very citizen shall have the right and the opportunity ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives." ICCPR, supra note 34, art. 25. As of early 1997, 139 countries had ratified the ICCPR. BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER app. at 1298-99 (3d ed. 1997).

\textsuperscript{53} The Group of 7, or G-7, consists of the United States, Japan, Germany, the United Kingdom, France, Italy, and Canada. John W. Head, Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter, 33 VA. J. INT'L L. 591, 637 n.207 (1993) [hereinafter Head, Suspension of Debtor Countries' Voting Rights]. In recent years, the Russian Federation has been invited to G-7 meetings, and the group is often now referred to as the G-8, as reflected on its website, http://www.g8.fr.

\textsuperscript{54} See THE WORLD BANK, II THE WORLD BANK ANNUAL REPORT 2002, at 47-50 (showing percentages of voting power as of June 2002 to be 2.79% for Canada, 4.31% for France, 2.79% for Italy, 4.49% for Germany, 7.87% for Japan, 4.31% for the United Kingdom, and 16.41% for the United States, for a G-7 total of 42.97%), available at http://www.worldbank.org/annualreport/2002/PrintVersion.htm (last visited Nov. 17, 2003).

\textsuperscript{55} See II THE ASIAN DEVELOPMENT BANK, THE ASIAN DEVELOPMENT BANK ANNUAL REPORT 2001, at 47-50 [hereinafter AsDB ANNUAL REPORT 2001] (showing percentages of voting power as of December 2001 to be 4.600% for Canada, 2.235% for France, 3.863% for Germany, 1.811% for Italy, 13.053% for Japan, 2.003% for the United Kingdom, and 13.053% for the United States, for a G-7 total of 40.618%), available at http://www.adb.org/Documents/Reports/Annual_Report/2001/default.asp (last visited Nov. 17, 2003). For a study of how the actual application of the weighted voting system in the AsDB affects the practical influence that some member countries have in decision-making there, see generally Jonathan R. Strand, State Power in a Multilateral Context: Voting Strength in the Asian Development Bank, 25 INT'L INTERACTIONS 265 (1999).
and financial policies on most of the world's other countries, without having to hew to those policies themselves.

Third, another constitutional peculiarity of the MDBs contributes further to their unaccountability: the MDBs are not subject to any outside judicial review. In particular, the MDB charters vest in the MDBs themselves the sole authority to determine whether they are acting in compliance with their own charters.\textsuperscript{56} Naturally, any such determination is itself made via the weighted voting system. Although steps have been taken recently by some MDBs to establish "inspection panels" to assess whether the institution has followed its own rules,\textsuperscript{57} these steps (so the criticism runs) have been inadequate to overcome this structural deficiency.

Fourth, as if the structural deficiencies were not enough, the MDBs exhibit yet another form or cause of unaccountability: many of their member states' governments, particularly in the poorer countries, are themselves undemocratic in character. Hence, even if a member country with a small capital subscription does succeed in having its voice heard in an MDB's deliberations, there is no guarantee (and often little likelihood) that that voice will reflect the views of that country's people, including the persons most directly affected by the projects or policies at issue.

III. \textsc{Assessing the Criticisms—Which Are Valid and Which Are Not?}

Having summarized the "Fourteen Points" into which I have divided the main criticisms made against the MDBs, I now discuss which ones I find persuasive, which ones I find unpersuasive, and why. I find seven of the fourteen criticisms largely unpersuasive, even though they contain some elements with which I do agree or sympathize. I find the other seven persuasive, even though they contain some weak elements. It is with those seven persuasive criticisms in mind that I then offer, in Part IV, some specific recommendations.

\textsuperscript{56} For references to the pertinent charter provisions, see infra note 66.
\textsuperscript{57} For a description of the inspection panels or functions of some MDBs, see infra note 172.
A. Criticisms I Largely Dismiss

1. Criticism #12—Mission creep

I begin with this criticism because it strikes me as the most important one of all, and because addressing it requires that we examine some elementary principles. In particular, I hope that by discussing this criticism, and ultimately dismissing it, I can identify and explain some of the values and policy choices that underlie my assessment of the MDBs generally and of the criticisms now being voiced against them.

As I mentioned above in Part I, I view the evolution of the MDBs over the past sixty years in terms of three generations.\textsuperscript{58} To summarize:

- First generation. The IBRD was established in 1944 to be, first and foremost, a reconstruction bank—that is, a financial intermediary that would facilitate Europe’s reconstruction following World War II. Its founders gave relatively little focus to the “D” in IBRD (the economic development of the poorer countries), and they prohibited the IBRD from engaging in political influence.

- Second generation. The establishment of the IDA and of the first three regional development banks (all created around 1960), came in response to the rising importance of the LDCs. These institutions provided for lower-cost loans and gave greater regional focus where the LDCs were located. These institutions were still envisioned primarily as banks, however, with no mandate for influencing the overall political or economic policy choices made by their member countries.

- Third generation. The founders of the EBRD extended that institution’s scope well beyond development banking by explicitly adopting three mandates—political, economic, and environmental—that had been absent from the charters of its predecessors. Under these mandates, the EBRD was to engage in the business of broad policy regulation—that is, urging borrowing member countries to take measures, beyond those relating narrowly to development financing, that the EBRD membership as a whole favored.

\textsuperscript{58} See supra text accompanying notes 14–24.
It is important to note that the old dogs learned new tricks. With the emergence of each new generation, the MDBs of the previous generation assumed an increasingly broader role. By the time the IDA was established in 1960, the IBRD had already shifted its focus to the developing world. By the time the EBRD was established in 1990, all of the MDBs that preceded it had already taken on some aspects of policy regulation that were pressing hard against the outer limits of their charters. Indeed, in the same year that the EBRD was making its first loan (1991), the World Bank's General Counsel published a book explaining (and defending) the evolution of the World Bank's work and emphasizing "the ability of the World Bank to adapt its activities to variable and changing circumstances while acting within the original legal framework established by its Articles of Agreement." Now, a dozen years later, all the MDBs have, as noted above, expanded their purview to include a very broad range of policies that the institutions and their borrowing members are to follow—including such issues as environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction.

Is this policy expansion—what former World Bank official Jessica Einhorn calls "mission creep"—appropriate? That question involves two subsidiary issues that must be addressed in order to provide an answer that will allow us to assess the validity or persuasiveness of Criticism #12. Those two subsidiary issues, in a nutshell, are:

- Charter fidelity or ultra vires? This issue revolves around treaty interpretation. Have the MDBs been faithful to their charter provisions—especially those "political prohibitions" that apply to


60. SHIHATA II, supra note 11, at viii. For a review of Shihata's attempt in that book to defend the World Bank against criticisms that it had been either too timid or too aggressive vis-a-vis the limitations of its founding instruments, see John W. Head, *The World Bank in a Changing World: Selected Essays by Ibrahim F.I. Shihata*, 87 AM. J. INT'L L. 351, 351-52 (1993) (book review). The third book in Shihata's three-volume work on the World Bank, written about a decade after the first book, offers an updated discussion regarding the "Evolution of the Scope of the Bank's Mandate." IBRAHIM F.I. SHIHATA, 3 THE WORLD BANK IN A CHANGING WORLD 73 (2000). Shihata notes that the World Bank took a "holistic approach as it realized the inevitable linkage between economic and social development, the necessity of institutional development and the direct effect of the macro-economic framework on the prospects of success or failure" in its lending operations. *Id.* at 77. Taking account of these factors, Shihata asserts, is consistent with the mandate set forth in the IDA and IBRD charters. *Id.* at 77.

61. See supra note 24.

the first and second generation institutions—or have they acted outside their charters (ultra vires) by expanding their purview in the ways described above?

- Development banks or regulatory agencies, or both or neither? This issue is a matter not of legality but rather of ideology and policy. Is it necessary to have development banks at all in today’s world of sophisticated financial markets and services? If so, is it appropriate to allow such banks to engage in global policy regulation?

In considering the first of these two issues (charter fidelity or ultra vires), I draw guidance from the assessment that Bob Hockett has given recently of complaints that the IMF has acted ultra vires in broadening its agenda. Hockett rebuts such “mission creep” claims.63 His defense of the legality of the IMF’s evolution includes several elements, including the point that the IMF’s charter vests in the IMF itself all power to interpret its own charter—a matter that raises “a nearly irrebuttable presumption in favor of formal legality” of IMF action.64 Beyond that, however, is the fact that the IMF’s charter provisions are actually quite broad in their formulation—the result, Hockett explains, of an intentional effort by the persons drafting it “to incorporate a good deal of ‘creative ambiguity’ into the [charter’s] final draft in order to provide for future contingencies and to secure agreement.”65

I believe the same analysis applies in respect of the MDBs. First, I believe it would be difficult to assert, as a legal matter, that the MDBs have acted ultra vires, given the fact that their charters (like the IMF charter) provide for self-interpretation. That is, the charters place with the MDBs’ own governing bodies the complete authority to decide questions of charter interpretation or application.66 In addition, the MDB

63. Robert Hockett, From Macro to Micro to “Mission-Creep”: Defending the IMF’s Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability, 41 Colum. J. Transnat’l L. 153, 177–90 (2002). Hockett, who is fast becoming a recognized expert on legal and theoretical aspects of international financial institutions, also defends the IMF against claims that, as a practical matter (as distinct from a legal matter), it has overstepped its proper bounds, and he concludes that the combination of “pragmatic and legal justifications [that he offers] . . . should put to rest the diffuse, pseudo-ultra vires grumblings heard from some quarters in recent years about the IMF’s ‘mission-creep’ or incremental broadening of agenda.” Id. at 190.
64. Id. at 180.
65. Id. at 178. Hockett illustrates the breadth of IMF charter provisions on surveillance, consultations, and conditionality. Id. at 180–90.
66. For the provisions on charter interpretation, see IBRD Charter, supra note 5, art. IX; IDA Charter, supra note 6, art. X; IADB Charter, supra note 7, art. XIII; AfDB Charter, supra note 8, art. VIII; AsDB Charter, supra note 9, art. 60; EBRD Charter, supra note 10, art. 57. In the context of
charters (again, like the IMF charter) are drafted broadly enough, presumably on purpose, to permit the MDBs to give at least some attention to such issues as those I enumerated above—environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction—because any and all of these can have a bearing on the central objectives prescribed for all of the MDBs in their charters. 67

Given these factors, I dismiss the “mission creep” claim insofar as it is legal in character. Instead, I believe the MDBs have, as Shihata urged us to conclude a dozen years ago with regard to the World Bank, remained largely true to their charter provisions, especially if we are prepared to take a “purposive” or “teleological” approach to charter interpretation.

A possible exception to that conclusion is of very recent vintage: within the last few years some of the MDBs have explicitly, and with much fanfare, announced what amounts to a shift in purpose—from economic development (as prescribed in their charters) 68 to poverty

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67. One of the first provisions in each of the MDB charters is a broad statement of the institution’s purposes. See IBRD Charter, supra note 5, art. I; IDA Charter, supra note 6, art. I; IADB Charter, supra note 7, art. I; AfDB Charter, supra note 8, art. I, II; AsDB Charter, supra note 9, art. I; EBRD Charter, supra note 10, art. I. All of these “statement-of-purpose” provisions are drafted broadly. For example, Article 1 of the AsDB Charter states that the AsDB’s purpose “shall be to foster economic growth and co-operation in the region of Asia and the Far East... and to contribute to the acceleration of the process of economic development of the developing member countries in the region, collectively and individually.” Article 2 of the AsDB Charter, entitled “Functions,” then enumerates five areas of activity—again in broad terms, such as “to promote investment in the region of public and private capital for development purposes”—and ends with an all-encompassing authority “to undertake such other activities and provide such other services as may advance its purpose.”

68. SHIHATA II, supra note 11, at 3, 69 (positing that a “purposive” or “teleological” approach is perfectly justified in the case of the charters of multilateral institutions and is consistent with well-established rules of treaty interpretation). Similar to the notion of “purposive” or “teleological” interpretation is the notion of “evolutive” interpretation, well established in the civil law tradition because of the desire to remain true to the spirit of a written law while being responsive to changing circumstances. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 45–46 (2d ed. 1984) (discussing evolutive interpretation). For a careful examination of the considerations that the MDBs can and should take into account in interpreting their charters, see Ciorciari, supra note 30, at 343–69 (discussing “ordinary meaning analysis,” “secondary intrinsic sources,” and the travaux preparatoires or preparatory works).

69. The MDBs’ charters, in announcing institutional purposes, all focus explicitly on economic development. See, e.g., IBRD Charter, supra note 5, art. I(i) (stating that the IBRD’s purposes are, inter alia, to “assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including... the encouragement of the development of productive facilities and resources in less developed countries”); AsDB Charter, supra note 9, art. I (stating that the AsDB’s purpose is “to foster economic growth and co-operation
reduction. While this purported shift might not elicit the same type of criticism that some other forms of MDB "mission creep" have attracted, the shift could be viewed from a legal perspective as the most egregious departure to date from the MDBs' charters, none of which makes any direct reference to poverty reduction.

At bottom, however, the "mission creep" criticism probably rests less on a concern over legality than on a concern over economic ideology and the power of intergovernmental institutions. Hence the second issue noted above: do we want (at the multilateral level) development banks, regulatory agencies, or both, or neither?

Although critics of the MDBs seldom accompany their criticisms with a clear statement of their underlying ideologies, I believe such

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70. See, e.g., I WORLD BANK ANNUAL REPORT 2002, supra note 11, at 12 (asserting that the World Bank's "mission is to fight global poverty"). For similar references pertaining to the IADB, see The Inter-American Development Bank, Basic Facts About the IDB—Overview, at http://www.iadb.org/expr/pub/bi/bfingles/overview4.htm (last visited Nov. 17, 2003) (noting that one of the "two main objectives of the [IADB]," along with environmentally sustainable growth, is "poverty reduction and social equity"). For similar references pertaining to the AfDB, see The African Development Bank Group, Agreement Establishing the African Development Bank (5th ed., Sept. 30, 1999), at http://www.afdb.org/knowledge/documents/Agreement_Establishing.htm (last visited Nov. 17, 2003) (explaining that the AfDB's mission is to assist its regional member countries to escape "the vicious cycle of poverty in which they are entrapped"). For similar references pertaining to the AsDB, see ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT BANK ANNUAL REPORT 2000 284 (2001) (touting poverty reduction as that institution's "fundamental purpose"). For a commentary on this apparent shift in purpose by the AsDB, see Head, Asian Development Bank, supra note 9, at 24.

71. Viewed from a practical perspective, the shift from economic development to poverty reduction might not seem to amount to much. As a former colleague of mine at the AsDB pointed out in an e-mail message to me, "[m]ost of us in ADB—and probably in other MDBs—would deny there has been any substantive 'shift' from economic development to poverty reduction. If the former does not include the latter, if we've not been pursuing elimination of poverty, what have we in ADB been doing since the start of our operations in 1967?" E-mail from Fred Mesch, Director, Project Coordination & Procurement Division, Asian Development Bank, to John W. Head (Aug. 20, 2003) (on file with author). However, "economic development" could easily be regarded as having a different reach, and encompassing different types of activities, from those of "poverty reduction." For example, "economic development" can include building a society's infrastructure—roads, ports, power plants—so as to boost aggregate economic activity (measured in the society's gross domestic product) without directly addressing the needs of those portions of the society that are mired in poverty. Indeed, a World Bank annual report dating from 1990 reflected this view of "economic development" in noting that the IBRD's charter provisions require that the institution "must lend only for productive purposes and must stimulate economic growth." THE WORLD BANK, THE WORLD BANK ANNUAL REPORT 1990 3 (1990). On the other hand, "poverty reduction" might include some activities—for instance, the provision of fuel subsidies or short-term disaster relief—that would not, under that traditional view, constitute "economic development."

72. None of the MDB charter provisions prescribing the purposes of the institutions, as cited supra note 67, includes the word "poverty." Indeed, my electronic search of the entire texts of those charters likewise indicates that the word "poverty" does not appear anywhere in any of them.
critics could be classified by (i) whether they generally favor or disfavor having the MDBs continue to act in their traditional role as development banks and (ii) by whether they favor or disfavor having MDBs act as international regulatory agencies—that is, as agencies responsible for urging their member countries (or at least the borrowing member countries) to adopt and implement prescribed policies on a wide range of topics. It would be interesting to take a survey of the critics (or, indeed, a survey of all persons knowledgeable enough about international affairs to care) in order to determine how many of them fall into each of the four cells in this grid:

<table>
<thead>
<tr>
<th>Do you favor or disfavor the MDBs acting in their traditional role as development banks?</th>
<th>Disfavor</th>
<th>Favor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you favor or disfavor having the MDBs acting as international regulatory agencies?</td>
<td>Disfavor</td>
<td>Cell A</td>
</tr>
<tr>
<td></td>
<td>Favor</td>
<td>Cell C</td>
</tr>
</tbody>
</table>

Persons whose answers fall in Cell A would probably call for the MDBs to be eliminated, on grounds that such institutions should not continue their operations either as development banks or as purveyors of policy. Public-sector development banks, those persons might say, are (i) anachronistic because worthy projects can now find plenty of financial support from the private sector, given the growing sophistication of the markets in recent decades, (ii) ineffective in creating sustainable economic development (and indeed perhaps do more harm than good), and (iii) incompetent or untrustworthy to hold any authority over the policy decisions that national governments should make. Some persons whose answers fall in Cell A would go further, claiming that the principles of national sovereignty and self-determination should bar any international entity (not just MDBs) from forcing policy decisions on national governments.
Persons whose answers fit into Cell B would generally favor the continued operation of the MDBs in their development banking role—presumably because they think MDBs can provide services that are unavailable from (or better than) the private sector⁷³—but would strip the MDBs of the policy regulatory powers that they have increasingly assumed in recent years. These persons might argue (with some of their colleagues in Cell A) that such policy regulation belongs instead in other international entities that have more experience in the pertinent areas, or that such policy regulation is off limits entirely to international entities and should be left to the province of national governments.

Persons whose answers fit into Cell C might believe (along with those whose answers fit into Cell A) that public-sector development banking is unnecessary or ineffective but would nevertheless see a role for MDBs as international regulatory bodies, using their influence to encourage member countries to adopt and implement policies generally favored by the international community. Of course, disagreements would likely remain over the content of those policies and the process by which such content is determined.

Persons whose answers fit into Cell D would include those who find value in both roles for MDBs—as development finance institutions and as public regulatory bodies.⁷⁴ Such persons might assert that the MDBs provide services not available from the private sector, that MDBs do more good than harm (and can perhaps be improved to do even more good), and that MDBs have (or can develop) the competence to do good work in developing, announcing, prescribing, and enforcing national-level policy choices in areas of interest to the international community as a whole.

My answers to the two questions would place me in Cell D. I am an internationalist, in the sense that I believe international cooperative efforts—through MDBs and other multilateral entities and initiatives—hold the best hope for civilization to survive the current age, and in the long run offer the only hope for humanity itself to survive.⁷⁵ As for

⁷³. A linkage thus exists between Cell B and what I referred to above as the “first generation” (and perhaps also the “second generation”) in the development of MDBs. See supra text accompanying notes 14–24 and 58.

⁷⁴. A linkage thus exists between Cell D and what I referred to above as the “third generation” in the development of MDBs. See supra text accompanying notes 14–24 and 58.

⁷⁵. My views in this respect—which I have referred to above as a matter of “ideology”—reflect my experience in working with several multilateral development institutions. Perhaps that experience makes my views both informed and biased. In another venue I shall try to develop a reasoned and empirical defense of these views, but I shall not do so here. For an expression of these same basic views in another context, see John W. Head, Essay: What Has Not Changed Since
public-supported development financing, I consider it to be just as vital (and yet just as subject to mistake and misuse) at the global level as it is at the national level. And I favor having the MDBs engage in policy regulation—urging their member countries to follow certain policies that the international community arrives at through a collaborative process—because I believe that such regulation is necessary and that the MDBs have both the leverage necessary to make such urging effective and the potential to carry out such operations competently.

I do not, however, believe that the MDBs are properly equipped now, from either a legal or an institutional perspective, to carry these two burdens of development financing and policy regulation. As explained above, I view the evolution of the MDBs as falling into three generations so far, beginning roughly in 1945, in 1960, and in 1990. I believe it is time for a fourth generation to emerge in the evolution of the MDBs, in order (i) to respond to several criticisms that are in fact valid (I discuss these below in Part III.B of this Article) and (ii) to make the MDBs responsive to the changed circumstances of a new century, in which international organizations must adhere to certain institutional and substantive principles (I discuss these below in Part IV.B of this Article). I regard the past performance of the MDBs in a generally favorable light, but I think they must change or die in the coming years.

I have gone into considerable detail about Criticism #12—Mission Creep—in order to describe the overall ideological perspective from which I view the MDBs. My assessment of several other criticisms leveled against the MDBs reflects this perspective. I turn now to the other six of those criticisms that (like Criticism #12) I generally dismiss.

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*September 11—Benefits of Multilateralism,* 12 KAN. J.L. & PUB. POL’Y 1, 10 (2002) [hereinafter Head, Benefits of Multilateralism] (criticizing the unilateralism of the George W. Bush administration in dealing with Iraq and urging that "the United States should do what it takes to stay on the road of multilateralism . . . [which] constitutes our best hope of beating back the darkness that we saw come so vividly and menacingly on September 11"). Many others, of course, have also espoused the values of multilateralism. See, e.g., Richard Stanley, *The Case for Multilateralism,* COURIER, Spring 2003, at 2 (asserting that "[t]he United States can best maintain its influence and power as a global leader and justly avoid accusations of neo-imperialism if it is committed to working multilaterally"); Chris Patten, George C. Marshall Lecture 3 (Oct. 4, 2002) (transcript on file with author) (praising Secretary of State Marshall because "he believed in the absolute indispensability of international co-operation to deal with global problems"); id. at 6 (stating that "[t]he final reason why Marshall’s instinct for international co-operation was and is justified is that the multi-national institutions that [the United States] helped to create are more than ever needed today if we are to enjoy a free and prosperous world," referring specifically to the United Nations, the IMF, the World Bank, and the WTO).
2. Criticism #1—Bad economic and financial policies and projects

For those persons whose answers to the two questions posed above fit into Cell C or Cell D, a third issue then arises: what policies should the MDBs prescribe? As I summarized it above in Part II, Criticism #1 posits (in some of its forms) that the MDBs are based on a flawed economic model—laissez-faire, free-market policies—and the MDBs actually bring more harm than benefit to their borrowing member countries because the MDBs force those countries (sometimes in a "cookie-cutter" manner) to accept that economic model instead of allowing those countries to develop their economies through pragmatic, tailored (even protectionist) policies until those countries can get on their feet economically. I find this criticism unpersuasive for two reasons.

First, it rests on some incorrect factual assumptions about public economics. To the extent that the criticism attacks economic liberalism—that is, a general reliance on effective market mechanisms to provide for efficient allocation of resources, rather than on central planning under which government officials direct the details of economic activity—I think the criticism fails miserably. If we learn anything from the last half-century, we should learn that a liberal, relatively open and effective market system of economic activity works vastly better than a system of central planning.

I would hasten, however, to emphasize a point that is implicit in my reference to an "effective" market system: markets must be regulated, and it is the failure to install adequate regulations (on bank lending, on securities trading, on consumer safety, on corporate governance, etc.) that have created havoc in some countries undertaking the transformation from central planning to market-based economies. Indeed, the dangers of inappropriate deregulation are evident not only in economies in transition but also in economically developed countries such as the United States.\footnote{For an account explaining how the U.S. savings-and-loan crisis of the late 1980s and early 1990s resulted in part from overly relaxed regulation of the financial services industry, see William A. Lovett, Banking and Financial Institutions Law in a Nutshell 273–78, 284 (5th ed. 2001). Former World Bank chief economist Joseph Stiglitz has made a similar point about deregulation more broadly in the 1990s in America: "It is no coincidence that three of the sectors involved in today's economic problems—finance, telecommunications, and electricity trading—were all subject to deregulation." Joseph Stiglitz, The Roaring Nineties, The Atlantic Monthly, Oct. 2002, at 81–82.} However, the market-based model that the MDBs espouse is not itself a flawed economic model, and it is altogether appropriate, in my view, that the MDBs require that governments adopt
that model in order to use the resources of the international community in the course of developing the national economies for which those governments are responsible.

Second, Criticism #1 rests on unprovable factual assumptions about the long-term economic effects of MDB-supported projects. To claim, as some critics do, that the World Bank has brought no improvement to Africa in three or four decades of work there is to engage in preposterous rhetoric, because it is impossible to prove or disprove the claim. There is no “control set”—no Africa without World Bank involvement—against which to compare the results.\(^\text{77}\) It is possible, however, to evaluate how well individual MDB-financed projects have met the goals identified at the time of their planning and approval. While it is doubtless true that some MDB projects have failed to meet their stated goals (the World Bank has said as much and provided documentary support),\(^\text{78}\) those failures have been outweighed by successes.\(^\text{79}\) More importantly, neither

\(^{77}\) A report of the U.S. General Accounting Office on the performance of the World Bank expresses the same point this way: “It is difficult to demonstrate the impact of Bank projects on countries’ overall development. . . . [It is not reasonable to use country macroeconomic indicators alone to judge the effectiveness of the Bank, especially since one can only speculate about the course of a country’s development in the absence of Bank assistance.” General Accounting Office, World Bank: U.S. Interests Supported, but Oversight Needed to Help Ensure Improved Performance, GAO/NSIAD-96-212, at 38 (Sept. 1996), available at http://www.gao.gov/archive/1996/ns96212.pdf (last visited Nov. 17, 2003).


\(^{79}\) Extensive internal assessments of projects financed by the World Bank have found that a high proportion of them qualify as “satisfactory.” See, e.g., I World Bank Annual Report 2002, supra note 11, at 56 (“The percentage of investment projects with satisfactory outcomes rose from 69 percent in fiscal 1999 to 78 percent in fiscal 2001.”). The assessments referred to are carried out by the World Bank’s Operations Evaluation Department, which “is independent of management, reporting directly to the Board of Executive Directors.” Id. at 51. Some other assessments of World Bank projects in general have also been positive. See, e.g., Henry Owen, The World Bank: Is 50 Years Enough?, 73 FOREIGN AFF. 97, 97 (1994) (“[T]he World Bank has made a difference. To take but one example, its aid has been a major factor in making India agriculturally sufficient.”). Positive assessments such as these were reflected in testimony given in September 2002 regarding the proposed replenishment of IDA resources. See Hearing Before the International Economic Policy Subcommittee of the Export and Trade Promotion Subcommittee of the Senate Foreign Relations Committee, Sept. 12, 2002, LEXIS (testimony of James C. Orr, Executive Director, Bretton Woods Committee) (stating on behalf of this group of 700 opinion leaders working to help improve World Bank and IMF effectiveness that “of all the bilateral and multilateral programs in existence, IDA and the World Bank have been the most effective in promoting development over the last 30 or 40 years,” working on “one of the most challenging problems that faces mankind today”); id. (testimony of Rev. David Beckmann, President of Bread for the World) (noting that this NGO supports additional funding for IDA on grounds that “we think the institution has improved”). Other favorable assessments of the World Bank and its sister institution, the International Monetary Fund,
of these assertions (that some projects have failed and some have succeeded) speaks to the long-term overall economic effects of MDB operations, either on the countries in which those operations were conducted or on the global economy more generally.

Moreover, it should be borne in mind that many of the projects financed by the MDBs would (at least in the last couple of decades, after the development of the global financial markets) have been carried out with or without MDB support. That is, had MDB financing not been available, many of the roads, ports, power plants, and other infrastructure projects would still have been undertaken with commercial bank financing. That commercial bank financing, however, would have come at a higher cost to the borrowing countries (because the banks would not have been able to rely on the expertise and the preferred creditor status of the MDBs) and would almost surely not have taken into account environmental and social considerations to the same degree as the MDBs do for such projects. From that perspective, it seems highly likely that MDB involvement has worked to the benefit, not the detriment, of the borrowing member countries and their populations.

Although I largely dismiss Criticism #1, I draw from it two vital points. First, the application of a market-based economic model to societies that lack the experience or legal framework necessary for such a model to succeed is at least a disservice and perhaps a recipe for disaster. For example, requiring a country to force its banks to adhere immediately to the Basle guidelines on capital adequacy\textsuperscript{80} could bring economic meltdown if the country does not have in place effective rules and procedures for handling insolvent banks. Accordingly, the MDBs must (i) gauge carefully the capacity of a borrowing member’s economy to undertake reform, (ii) design conditionality accordingly, and (iii) provide or help arrange for the technical assistance needed to help the

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\textsuperscript{80} The Basle guidelines on capital adequacy requirements were first established by the Basle Committee on Banking Supervision (a committee of banking supervisory authorities) in the late 1980s to assist governments in establishing regulations that would prevent financial institutions from operating in a manner that placed depositors’ assets at undue risk. For an explanation of those capital adequacy guidelines, and related work of the Basle Committee, see ROBERT LEE RAMSEY & JOHN W. HEAD, PREVENTING FINANCIAL CHAOS: AN INTERNATIONAL GUIDE TO LEGAL RULES AND OPERATIONAL PROCEDURES FOR HANDLING INSOLVENT BANKS, at 163–68 (2000); John W. Head, Lessons from the Asian Financial Crisis: The Role of the IMF and the United States, 7 KAN. J.L. & PUB. POL’Y 70, 80, 95 n.83 (1998) [hereinafter Head, Lessons from the Asian Financial Crisis].
country build the legal framework necessary for a market-based economy to prosper.

Second, the fact that some MDB-financed projects have failed to bring the intended benefits, or have brought unintended negative consequences, underscores the importance of careful project appraisal and design. The last fifteen years have seen dramatic changes in the MDBs' use of environmental impact assessment and social impact assessment (a point I shall return to in assessing Criticisms #2 and #3), but these efforts need further attention, especially to ensure that the social and environmental safeguards built into project designs are in fact implemented.

3. Criticism #4—Trampling of national sovereignty

As I summarized it above in Part II, Criticism #4 claims that in imposing conditions on the rights of member countries to borrow money from MDBs, the MDBs violate the sovereignty of those member countries, and in particular the principle of self-determination. In so doing, the MDBs themselves act inconsistently with settled principles of international law, including some specific treaty provisions. I find this criticism unpersuasive for three reasons.

First, states are under no legal obligation to accept the conditions of an MDB loan, for the simple reason that states are under no legal obligation to seek an MDB loan in the first place—or, indeed, to become a member of any MDB. It is no doubt true as a practical matter that a government might find no financial backing for a certain type of project (for example, a project for the construction of a road or a hospital or a school) other than MDB financing, because such a project might be unattractive to any commercial financier. However, it also remains true that if a government is dead-set against adopting the economic and financial policies (or other requirements) that an MDB proposes to include in a loan agreement, that government can decide to do without the project. There is no legal obligation on the government to surrender or diminish its sovereignty.

Second, there is likewise no legal obligation on the MDBs to provide financing for whatever projects their member governments propose. International law contains no generally accepted "right to development assistance" under which a country is legally entitled to receive financial assistance from another country or from an international financial
institution owned by (itself and) other countries. If such a legal entitlement did exist, of course, Criticism #4 might pack some punch; but notwithstanding the efforts of the 1970s to create a new international economic order, preferential economic treatment for LDCs has thus far been confined to particular circumstances specially negotiated, as in the case of (i) the Generalized System of Preferences to provide lower tariffs on goods from LDCs and (ii) special application of new rules adopted in the Uruguay Round of trade negotiations. Indeed, the establishment

81. For discussions of various aspects of the purported “right to development,” see RUMU SARKAR, DEVELOPMENT LAW AND INTERNATIONAL FINANCE 228–34, 246–50 (1999); IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 5–6 (3d ed. 1999); Sumudu Atapattu, The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law, 16 TUL. ENVTL. L.J. 65, 116–25 (2002); Isabella D. Bunn, The Right to Development: Implications for International Economic Law, 15 AM. U. INT’L L. REV. 1425, 1428–52 (2000). As a legal matter, it would appear that the only affirmative international obligation clearly binding on an individual state in this regard is the one stated in Article 56 of the U.N. Charter, in which all U.N. members “pledge themselves to take joint and separate action in cooperation with the [U.N.] Organization for the achievement of the purposes set forth in Article 55”—which in turn asserts that the “United Nations shall promote” such things as higher standards of living and conditions of economic and international cooperation, and solutions of international economic problems. U.N. CHARTER art. 55–56. Given the weakness of the Article 56 obligation, the international law scholar Cassese concludes that it imposes only a “generic duty” to cooperate. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 151 (1986). In particular, he notes that “the kind of co-operation urged by some developing countries—one-way assistance and economic aid...is...precisely [the] kind of co-operation which developed countries...are reluctant to engage in for chiefly economic reasons” and this reluctance “is responsible for the striking weakness of the principle” of cooperation. Id. See also SEIDL-HOHENVELDERN, supra, at 5–6 (asserting that as a general rule “there does not exist any right to development in the legal sense”). Another prominent authority on international law suggests that there might exist “a legal duty...to provide economic aid to underdeveloped countries...” IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 258 (5th ed. 1998). He describes this obligation, however, if it exists, not as an individual duty of a state, but rather as “a collective duty of [U.N.] member states to take responsible action to create reasonable living standards both for their own people and for those of other states.” Id. at 256.


of the IDA, and of "soft-loan" authority for each of the regional MDBs (thereby authorizing those institutions to make long-maturity loans at zero or near-zero interest rates),\textsuperscript{85} represents a massive transfer of resources from developed countries to LDCs—amounting in a recent year, for example, to roughly 12 billion U.S. dollars\textsuperscript{86} in loan commitments—in partial response to the calls for special economic treatment for countries with low per capita income and high per capita debt.

Third, Criticism #4 rests on a legal misperception about the principle of self-determination. Even if the principle of self-determination amounts to something more than just a slogan,\textsuperscript{87} it surely cannot mean that a government can adopt economic and financial policies that are proven failures (or, even more absurdly, that a government can be subsidized through "soft-loan" support in pursuing such policies)—especially if the government itself has not emerged from what has been referred to as "internal" self-determination\textsuperscript{88} involving free and meaningful elections in which the affected population can have a say in the selection of policies and policy-makers.

It is perhaps worth noting that a concern over the alleged trampling of national sovereignty through the operations of the MDBs is surely

\begin{footnotesize}
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\item Typical terms on an IDA loan include a maturity of forty years and a service charge of 0.75%. \textit{The World Bank Group, World Bank Lending Instruments: Resources for Development Impact} 24 (July 2001), available at \url{http://www.siteresources.worldbank.org/PROJECTS/Resources/lendinginstrumentbrochure.pdf} (last visited Nov. 17, 2003). Typical terms on a soft loan from the AsDB, through the Asian Development Fund, include a maturity of thirty-two years (if the loan applies to a project, rather than a quick-disbursing program loan) with an interest charge of 1% for the first few years and 1.5% thereafter. Head, \textit{Asian Development Bank}, supra note 9, at 34.
\item This figure represents the total amount of "soft loans" made by IDA, the IADB, the AfDB, and the AsDB as indicated in their annual reports. \textit{See I World Bank Annual Report 2002, supra} note 11, at 19 (showing fiscal year 2002 lending by the IDA at US$8.1 billion); \textit{IADB Annual Report 2001, supra} note 7, at v (showing "Fund for Special Operations" loans for 2001 totaling US$0.4 billion); \textit{AsDB Annual Report 2001, supra} note 55, at 5 (showing Asian Development Fund "soft loan" operations for 2001 totaling US$1.4 billion); \textit{AfDB Annual Report 2002, supra} note 8, at xxvi (showing AfDF "soft loan" operations for 2002 totaling US$1.3 billion). The EBRD reported no separate figures for "soft loan" operations for 2001. \textit{See EBRD Annual Report 2001, supra} note 10, at 3 (showing a single line for "EBRD financing," without distinguishing ordinary operations from special operations). Some of the MDBs use a fiscal year different from the calendar year.
\item For a brief analysis of the principle of self-determination, and the suggestion that it either amounts to a slogan or to a subsidiary principle that takes back seat to a more fundamental principle of international peace and security, see John W. Head, \textit{Selling Hong Kong to China: What Happened to the Right of Self-Determination?}, 46 U. Kan. L. Rev. 283, 283, 301–04 (1998).
\item \textit{See id. at} 289 (capsulizing the concept of "internal" self-determination as "the right of the 'holders' [of the right of self-determination] to choose freely the form of government under which they shall live").
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mitigated to at least some small degree by the fact that the borrowing countries have representation on the governing boards of the MDBs. Indeed, a borrowing country typically would also enjoy the opportunity to have special representation at MDB board meetings in which loan requests regarding that country are made. 89

4. Criticism #6—Excessive role of corporations

I believe this criticism—which asserts that MDB policies and operations are unduly influenced by corporate interests—generally runs in the wrong direction. As discussed more fully below (see in particular my assessments of Criticisms #5 and #14), I believe the MDBs should be open to influence by a broad range of groups and interests, and that formal mechanisms should in fact be developed to facilitate the bringing of such influence to bear on MDB decision-making. Accordingly, I do not regard the influence that corporate interests have on MDBs (for example, on the overall selection of projects and policies) to be excessive in quantity; instead, that level of influence should be matched by the influence that other groups have. However, the complaints sometimes voiced under Criticism #4 about lobbying by companies and the possibility of corruption do merit close attention because they relate not to the quantity of the influence but rather to the quality or character of such influence.

As for lobbying, MDB staff members should be subject to the same types of standards as those that apply to civil servants in many national governments: contacts with private-sector parties wishing to influence policy or operations should be subject to scrutiny, reporting, and of course restrictions on any gifts. As for corruption, most of the MDBs have recently adopted rules and procedures to prevent corruption of their own staff officials from any quarter, including corporate interests. 90 One

89. See, e.g., By-Laws of the Asian Development Bank, sec. 9, reprinted in Head, Asian Development Bank, supra note 9 (providing that a member country may, if there is not already a Director or Alternate Director of its nationality, "appoint [a] special representative" to express the views of that country at a meeting of the Board of Directors in which a request submitted by that country is being considered).

90. See, e.g., IADB ANNUAL REPORT 2001, supra note 7, at 17 (describing the newly approved initiative for "Strengthening a Systemic Framework Against Corruption" under which IADB staff are to "act in accordance with the highest standards of integrity"). In August 2002, an MDB official made some unusually blunt remarks that underscored the importance of the fight against corruption. The chief World Bank representative in Indonesia asserted that corruption was probably that country's most serious economic problem. Jane Perlez, World Banker Assails Indonesia's Corruption, N.Y. TIMES, Aug. 28, 2002, at W1. For a detailed proposal regarding why and how the
of the more advanced of the MDBs in this regard is the AsDB, which has addressed the question of corruption aggressively by explicitly adopting an anti-corruption policy in 1998 and establishing within the Office of the General Auditor an anticorruption unit authorized to receive evidence of corruption, undertake preliminary inquiries, convene an Oversight Committee when necessary, and conduct investigations. Although efforts such as this require further development, they are unmistakably on the right track and will be spurred on by further transparency and accountability (see my assessments of Criticisms #5 and #14, below).

5. Criticism #7—Disregard for citizens’ groups and NGOs

I doubt there are many NGOs that have made a reasonable effort to convey their opinions to MDBs in the past five years and found it difficult to do so. Some of the MDBs have established liaison offices within their headquarters for the express purpose of welcoming and discussing NGOs’ opinions and involvement in the MDBs’ work.

The AsDB reports that nearly two-thirds of the public-sector projects approved for AsDB financing in 2000 involved NGOs in some significant way—as, for example, by relying on microfinance NGOs to assist flood victims in Bangladesh and by working with NGOs to develop low-cost solutions to sanitation problems in Papua New Guinea. Regular forums, workshops, and other meetings are conducted by MDBs with NGOs, and officials of NGOs regularly work in the


91. See Head, Asian Development Bank, supra note 9, at 19, 87–88. For the current version of the anti-corruption policy, as explained in section C5 of the AsDB Operations Manual, see http://www.adb.org/Documents/Manuals/Operations/OMC05_29oct03.pdf (Oct. 29, 2003). It defines corruption as “behavior on the part of officials in the public and private sectors, in which they improperly enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed.” Id. It then prescribes methods for fighting corruption both within the AsDB and in its member countries. In doing so, however, the policy expressly cites the “political prohibition” in its charter, Article 36(2), and notes that the AsDB’s initiatives on corruption “will be grounded solely upon economic considerations and concerns of sound development management . . . [and] will not involve interference in the political affairs of a member country . . . .” Id.

92. Head, Asian Development Bank, supra note 9, at 88. The General Auditor reports directly to the President. Id.

93. For example, the AsDB has had a formal policy of encouraging such consultation and involvement with NGOs since 1987 and expanded that policy in 1999. Id. at 89. In keeping with that policy, the AsDB has established positions of “NGO Network Coordinator” and “NGO Liaison” and has website links to facilitate communication and cooperation with NGOs. Id.

94. Id.
MDBs under secondment arrangements. In these and other ways, much has been done to involve NGOs and "civil society" in MDB work. Protestors marching outside the World Bank headquarters during a joint annual meeting of the World Bank and the IMF are unlikely to get invited to lunch that day with a World Bank official, but under less confrontational circumstances such meetings can occur. In short, I am not persuaded by complaints that the views and representatives of NGOs are systematically disregarded or excluded now by the MDBs.

However, it is important to recognize the relation between Criticism #7—disregard for citizens’ groups and NGOs—and Criticism #14—unaccountability and the democracy deficit. As explained below, I endorse the latter of these criticisms and suggest that several steps be taken to respond to it. One of those steps would aim to provide still easier and more direct mechanisms for input by all persons or groups interested in the MDBs’ operations.

6. Criticism #9—Incoherence in policy prescriptions

Although I agree with the underlying thesis of this criticism—that it is inappropriate for MDBs to be working at cross-purposes with themselves or with other global economic institutions—I doubt this problem will persist or cause great problems as these institutions mature further. Bob Hackett has explained how IMF and World Bank operations have gradually approached a mid-point in a "macro-micro" spectrum, as the World Bank has increasingly looked to broader "infrastructural" variables in its operations and the IMF has increasingly focused on matters that could be regarded as "micro" in character. Like Hackett, I see no big problem in this convergence, even if it were to result in a slight overlap (what he calls "an overshooting of the mark by one or both institutions"), for I think any inconsistencies or

95. For information about how NGOs can work with the AsDB, and about the AsDB’s NGO Center, see Asian Development Bank, How NGOs Can Work With ADB, at http://www.adb.org/NGOs/contactpoints.asp (last visited Nov. 17, 2003).
96. According to one observer, NGOs have been able “to pressure international financial institutions such as the World Bank ... to be transparent and accountable ...” and have found the World Bank and other international institutions to be "soft targets for civil society. The [World] Bank has involved civil society in more than 700 of its projects since 1973 ...” Gumisai Mutumbe, Development: Civil Society Seeks Greater Role in Global Finance, Inter Press Service, Apr. 8, 2001, LEXIS.
97. Hackett, supra note 63, at 191.
98. Id. at 192.
inefficiencies would be resolved relatively easily, especially if the changes I suggest regarding transparency and accountability (see my assessments of Criticisms #5 and #14, below) are made. Besides, some competition among agencies and their ideas is probably a good thing.  

7. Criticism #13—Wrong form of financial assistance

While it is true that the global financial markets have changed dramatically in the past half-century and that the MDBs no longer fill as large a gap as the one that existed in the 1940s or the 1960s, MDBs still have an important role to play as lenders, in addition to other roles that they should play. For one thing, many of the projects that MDBs help finance still fall into the category of public works projects on which commercial financial institutions typically would not wish to be the lead lender. With an MDB serving as the lead lender, however, commercial lenders will participate. It is no accident that a substantial portion of ADB and World Bank financing, for example, is provided in conjunction with co-financing by commercial lenders.

There are other reasons why loans, not grants, should continue to make up the bulk of financial assistance provided by MDBs. One of the

99. Procedures for facilitating close coordination among aid agencies have been established for many years and have been strengthened recently. For example, in order to improve further the cooperation between the AsDB and the World Bank, those two MDBs signed an agreement in early 2002 that details procedures for coordinating country assistance strategies, harmonizes procedures, and “calls for the implementation of the joint Protocol on Collaboration among Multilateral Development Banks/IMF for preparing poverty reduction strategies . . .” ADB, World Bank Sign Agreement for Closer Cooperation, M2 Presswire, Jan. 22, 2002, LEXIS. Similarly, the AsDB signed a memorandum of understanding with the International Labour Organization in November 2002 “to maximize scarce resources and their development impact.” Social Protection Strategy Off to Good Start, News From NARO (AsDB North American Representative Office), Nov. 2002, at 1–2.

100. For an exploration of this notion—that regulatory competition can be beneficial—see generally REGULATORY COMPETITION AND ECONOMIC INTEGRATION (Daniel C. Esty and Damien Geradin eds., 2001).

101. For example, nearly 20% of AsDB lending in the past five years went to finance “social infrastructure” projects, supporting such things as education, waste management, urban development, water supply, and reproductive health. AsDB ANNUAL REPORT 2001, supra note 55, at 201–03. The corresponding figure for the IADB for 2001 was nearly 40%. See IADB ANNUAL REPORT, supra note 7, at 39 (showing categories of “social” loans committed in 2001, including those dealing with sanitation, urban development, education, social investment, health, and environment).

simple reasons is that the MDBs rely in large part on “reflows”—repayments of loans—for their resources.\(^{103}\) Beyond that, in many of the least economically developed borrowing countries, the experience of government officials in handling national financial affairs is so skimpy that the discipline involved in taking a loan (as opposed to a grant) is better developed by working with an MDB (which typically provides extensive counseling and training in handling such affairs) than by working with a commercial lender. Besides, it is that very category of countries—least economically developed—that will be eligible for the “soft loan” terms provided from the IDA and the regional MDBs.\(^{104}\)

Having said this, I agree wholeheartedly that the level of grant financing made available by the MDBs should be increased,\(^{105}\) along with the MDBs’ “soft loan” resources, through regular replenishment negotiations among the wealthy countries.\(^{106}\) Such grant financing can help member countries in a multitude of ways that contribute to their development. For example, AsDB technical assistance grants pay for training of government officials, development of long-range development plans, preparation of projects, technology upgrades, consulting services for project management, seminars and conferences

\(^{103}\) Illustrating this fact is that there is a rough equality each year between the amounts that these institutions disburse and the amounts that they receive in loan repayments. See, e.g., THE ASIAN DEVELOPMENT BANK, THE ASIAN DEVELOPMENT BANK ANNUAL REPORT 2002, at 132 (noting that “[d]isbursements in 2002 totalled $3.1 billion” and “[p]rincipal repayments for the year were $3.3 billion”), available at http://www.adb.org/Documents/Reports/Annual_Report/2002/financial_statements.pdf (last visited January 6, 2004). One reason the MDBs can rely mainly on such “reflows” (repayments) to fund their operations is that they suffer virtually no defaults or other losses of principal. See, e.g., THE ASIAN DEVELOPMENT BANK, FINANCIAL PROFILE 2002, at 35 (stating that “[i]n its public sector ordinary operations, the A[DB] has not suffered any losses of principal to date and follows a policy of not taking part in debt rescheduling agreements”), available at http://www.adb.org/Documents/Others/Financial_Profile/FinancialProfile2002.pdf (last visited Jan. 6, 2004).

\(^{104}\) For a reference to the typical terms of “soft loans” offered by the IDA and the regional MDBs, see supra note 85.

\(^{105}\) In this one respect, I agree with suggestions made in the (majority) Meltzer Report, and endorsed by George Soros. See supra note 49. However, as Soros noted in his criticism of the Meltzer Report, there is a danger that “the increase in grants would get bogged down in working out the details.” SOROS, supra note 49, at 102.

\(^{106}\) A working group within the American Bar Association’s Section of International Law and Practice concluded in a 1994 report that “[t]he United States should consider increasing its level of financial contributions to the International Development Association (IDA), the entity of the World Bank Group that provides assistance to the poorest countries of the world.” REPORTS & RECOMMENDATIONS OF THE A.B.A. SECTION OF INTERNATIONAL LAW AND PRACTICE, at 1, attachment to letter from Alair Bretz Rief, Staff Director, A.B.A. Section of International Law and Practice, to Members of the U.N. Working Group (Oct. 26, 1995) (on file with author).
on economic and financial issues, improvement of national accounting and auditing standards, research in economics and trade, and so forth.\textsuperscript{107}

\section{B. Criticisms I Generally Endorse}

The seven criticisms I have assessed above—Criticisms \#1, \#4, \#6, \#7, \#9, \#12, and \#13—appear unpersuasive in most respects, although I have identified some elements of those criticisms that I believe do make some sense and should be taken seriously. Just the opposite is true of most of the other seven criticisms among my "Fourteen Points." That is, I find these other seven criticisms generally persuasive, although there are some elements to most of them that do not hold water on closer inspection. As noted below, each of these seven criticisms should evoke certain changes in the policies or constituent documents of the MDBs.

\subsection{1. Criticism \#2—Environmental degradation}

Some of this criticism is out of date. For example, those critics who complain about MDB involvement in big hydroelectric dams apparently do not realize that the MDBs are now largely out of the dam-building business.\textsuperscript{108} Those critics who claim that the MDBs regularly disregard effects of the projects they design either are engaging in intentional misinformation or are ignorant of the enormous change that has taken place over the past two decades in the mindset, the policies, and the structures of the MDBs to incorporate environmental considerations into the operations of those institutions. The World Bank recruited its first environmental advisor in 1969. By 1990, it had a total of fifty-four high-level staff members, assisted by over twenty consultants, working in its Environment Department and regional Environmental Divisions,\textsuperscript{109} and it had adopted an Operational Directive on Environmental Assessment in

\textsuperscript{107} See Head, \textit{Asian Development Bank, supra} note 9, at 42–44 (describing the technical assistance provided by the AsDB, and the legal and operational foundation for such assistance). The AsDB provided over $300 million in technical assistance support to its member countries in the two year period of 1999–2000, financing over 600 specific projects. \textit{Id. See also AsDB ANNUAL REPORT 2001, supra} note 55, at 45 (reporting that in 2001, the AsDB "approved 257 technical assistance grants totaling $146.4 million").

\textsuperscript{108} See The World Bank Group, \textit{Statistics on the World Bank's Dam Portfolio}, at http://www.worldbank.org/html/extdr/pb/dams/factsheet.htm (last visited Nov. 17, 2003) (showing that less than one percent of World Bank lending in recent years has been for new dams, and that such lending has declined substantially from the 1970s and 1980s, so that World Bank funding is involved now in only about one percent of new dam projects worldwide).

order "to ensure that development options are environmentally sound and sustainable and that any environmental consequences are recognized early in the project cycle and taken into account in project design."\textsuperscript{110} As of 1998 it had over five times that many environmental specialists (over three hundred) and had committed close to twelve billion dollars for scores of primarily environmental projects.\textsuperscript{111} Today, the World Bank's commitment to environmental matters is reflected in the fact that it has a vice presidency for Environmentally Sustainable Development, has implemented numerous operational policies on environmental and related issues, and has taken a lead role in creating new funding mechanisms to support sustainable development.\textsuperscript{112} Similar steps have been taken at the AsDB\textsuperscript{113} and at the IADB\textsuperscript{114} and the AfDB.\textsuperscript{115} In the case of the EBRD, as noted above, a specific mandate was included in the charter, requiring that institution "to promote in the full range of its activities environmentally sound and sustainable development."\textsuperscript{116} As a

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\textsuperscript{113} See Head, \textit{Asian Development Bank}, supra note 9, at 78–80 (describing the measures taken at the AsDB in respect of environmental protection). See also \textit{ASDB ANNUAL REPORT 2001, supra} note 55, at 42–43 (reporting on various initiatives taken in 2001 to address issues of environmental sustainability, including the financing of various projects to fight acid rain, reduce air pollution, protect coastal resources, and mitigate emissions of greenhouse gases, as well as the signing of a memorandum of understanding with World Wide Fund for Nature).

\textsuperscript{114} For a description of measures taken at the IADB in respect of environmental protection, see the environment page of its website, at http://www.iadb.org/exter/topics/env.htm (providing an overview of policies and links to specific projects) (last visited Nov. 17, 2003).


\textsuperscript{116} EBRD Charter, supra note 10, art. 2, para. (vii). For information on EBRD environmental protection activities, see the environment partnerships and initiatives page of its website, at http://www.ebrd.org/enviro/init/index.htm (describing EBRD environmental initiatives and providing links to training and partnership pages) (last visited Nov. 17, 2003).
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consequence of these changes, the MDBs all have procedures for conducting environmental impact assessment on any proposed projects that could have any significant effect in this regard, and most of the reports of these assessments are publicly available.\footnote{117}

However, more should be done. A study undertaken for the AsDB about four years ago concluded that although that institution did a relatively good job of incorporating environmental considerations into its design and selection of projects for ADB financing, these efforts often did not get carried through adequately to the project implementation stage.\footnote{118} That is, the best laid plans for avoiding or mitigating environmental damage often went awry in the process of actually building a road or carrying out some other project work. This should be remedied.

More fundamentally, however, I believe that environmental considerations should be placed at the heart of MDB operations as a legal and policy matter. The year 2002 marked the 30th anniversary of the Stockholm Conference on the Human Environment. Just as in 1972, the world remains divided on some key issues of environmental protection, although now the fault lines appear more over the issue of who should pay for environmental protection than over the question of whether a national government has an obligation to protect its environment. Fortunately, an answer to the question of payment appears in the form of the Global Environment Facility and similar regimes by which the costs of using environmentally friendly technology and techniques in development activities can be offset with resources contributed by the richer, more industrially advanced countries.\footnote{119} Such regimes need to be

\footnote{117. For environmental impact assessment reports available online from the World Bank, see the listing of documents and reports by document type, at http://www-wds.worldbank.org/navigation.jsp?cont=browndoc (last visited Nov. 17, 2003) (click “Environmental Assessment” link under “Project Documents” for an updated list of reports).


expanded, as I describe more fully below in Part IV.B. At the same time, the charters of the MDBs should be linked to the key environmental protection treaties—also as described more fully below in Part IV.B.

2. Criticism #3—Human rights shortcomings

Much of what I have written above about environmental protection applies also to human rights protection. Although it is absurd to suggest that the MDBs give no regard to human rights in their operations—they do, after all, require various types of assessments during project design and selection (i) to guard against any interference with the rights of indigenous people, (ii) to enhance the role of women, and (iii) to assess the impact of proposed projects on the social fabric of the communities that the project would directly affect\(^\text{120}\)—the MDBs could and should take further steps in this regard. A linkage between the MDB charters and the key human rights treaties is one such step, as described more fully below in Part IV.B.

Why should the MDBs take on additional responsibility in the area of human rights, as well as in the area of environmental protection? Because (i) these are responsibilities that need to be taken on by some institution or other, and (ii) the MDBs have the resources and the leverage to do so effectively. I assume that the first of these points is fairly well accepted; an international consensus seems to have developed that effective action is needed at the international level to protect human rights and the environment. As for the second of these points, I believe that the prime movers in defining the terms under which economic development (broadly defined) will take place—and indeed in defining a wide range of standards by which national governments will provide services and leadership to their populations—in the coming years are the global economic institutions: the WTO, the IMF, the World Bank, and the regional development banks. Unlike the global and regional regimes established to focus exclusively on human rights protection or on environmental protection, these global economic institutions have the

kind of influence that seems to matter most in today's world: economic influence. This being the case, I believe the response to Criticisms #2 and #3—environmental degradation and human rights shortcomings—should not be (i) to shut down the MDBs so that they cannot cause any more injury to the environment or to human rights, or (ii) to restrict the mission of the MDBs in a way that excludes environmental and human rights considerations, leaving such considerations to other institutions, but instead (iii) to create formal and legal linkages between the MDBs and broadly accepted treaty norms on environmental protections and human rights and the entities specifically responsible for working in those areas. I shall develop this point further below in Part IV.B.

3. Criticism #5—Lack of transparency and access

As with Criticisms #2 and #3, Criticism #5 (at least as I have summarized it in Part II, above) contains some chaff along with the wheat. For example, those who complain that the MDBs operate entirely behind a veil of secrecy are simply wrong. In the past few years, these institutions have adopted and implemented document disclosure policies that make vastly more information available about the MDBs now than even a decade ago. 121 For example, detailed reports issued by the AsDB president to the AsDB Board of Directors regarding loan proposals—enumerating the specific conditionalities accepted by a borrower—would have been almost impossible to obtain a few years ago without inside access to the AsDB. Now they can be ordered from the ADB's website. 122

However, more should be done to facilitate public understanding of how the MDBs operate, what they have done, and what they plan to do. In this respect, the same types of "open meetings" principles adopted in many countries for the conduct of public business should be adopted within the MDBs. Records of meetings of the MDBs' governing boards should, as a general rule, be made publicly available, with exceptions and


safeguards as necessary to guard against disclosure of information that is legitimately confidential. Further details in this regard appear below in Part IV.B.

4. Criticism #8—Lack of symmetry in obligations

As explained above, this criticism emerges from two legal and institutional features of the MDBs and their operations: (i) conditionality in MDB lending and (ii) the weighted voting system. I believe each of these features is completely valid and natural in its own right. After all, why shouldn’t those countries providing the most financial backing for an institution have the most control over its policies; and why shouldn’t a financial institution that depends on repayments of loans in order to stay alive be permitted (indeed, required) to ensure that the borrower takes action likely to enable that borrower to repay the loan?

However, although each of the two features (weighted voting and conditionality) standing alone is legal and desirable, the two of them combined in the context of actual MDB operations—or at least those operations that involve economic and financial policy prescriptions—can be nettlesome. Why? Because they result in blatantly asymmetrical obligations: the countries that control (through the weighted voting system) the MDBs’ policies in imposing conditionality are, with rare exceptions, the very countries that do not borrow from the MDBs and to whom the policies on conditionality do not apply. Thus, the actual operation of conditionality smacks of unfairness and hypocrisy. What is sauce for the goose should, it seems, be sauce for the gander.123

The sense of unfairness and hypocrisy gets stronger when the two countries that have, on average, the largest capital subscriptions in the MDBs—the United States and Japan—regularly engage in behavior that seems inconsistent with the economic and financial policies on which the MDBs typically insist in their policy-based lending. Those economic and financial policies that the MDBs insist on include such things as avoiding large budget deficits, imposing tough supervision of financial institutions to avoid sharp or imprudent practices, closing or restructuring troubled financial institutions, liberalizing trade policies, reducing

123. It is worth noting in passing that asymmetry in obligations is not always inherently unfair. If, for example, the baseline distribution of wealth (and hence influence in the MDBs) among countries were generally regarded as fair, and differential loan conditionalities resulted from genuinely fair bargaining among countries, the asymmetry in applicable conditions would probably attract no criticism. I am indebted to Bob Hockett for illuminating this point.
distorting subsidies, and opening up investment opportunities for foreigners.\footnote{124} Some policies and developments in the United States and Japan in recent years—the U.S. savings-and-loan crisis of the 1980s, lax standards on corporate governance more recently, accounting and auditing scandals, Japan's much-criticized handling of its banking institutions, both countries' frequent budget deficits, and trade protectionism in steel and agriculture\footnote{125}—would almost surely have run afoul of MDB conditionalities had either of those countries sought to borrow from the MDBs.

Adding further fuel to Criticism #8 is that there is no mechanism in the context of the MDBs for officially illuminating and discussing the mismatch between what is expected of the borrowing member countries and what is practiced by the controlling (non-borrowing) member countries. In this respect the MDBs stand in contrast to the IMF, which at least undertakes an annual review of every member's economic and financial policies and performance, in accordance with Article IV of the IMF's charter.\footnote{126}

It is worth pointing out that although the lack of symmetry at issue here is most obvious and unseemly in the context of the MDBs' policy-

\footnote{124. Most of these types of policies appeared in the conditions attached to the "bailout" package of loans made in late 1997 to Korea under the leadership of the IMF. Head, Lessons From the Asian Financial Crisis, supra note 80, at 73–74. The World Bank and AsDB participated in that effort by making loans of US$10 billion and US$4 billion, respectively. Id. at 73. For a description of economic and financial policies that the World Bank reflects in the conditions attaching to its loans, see Axel Dreher, The Development and Implementation of IMF and World Bank Conditionality 10–15, 54–59 (Hamburg Inst. of Int'l Econ., HWWA Discussion Paper 165, 2002), available at http://www.hwwa.de/Publikationen/Discussion_Paper/2002/165.pdf (last visited Nov. 17, 2003).

125. For examples of critical discussions within the IMF of economic and financial policies followed by the United States and Japan, see the reports of IMF Article IV consultations with those countries, available on the IMF website: International Monetary Fund, United States and the IMF, at http://www.imf.org/external/country/USA/index.htm (last modified Nov. 18, 2003) and International Monetary Fund, Japan and the IMF, at http://www.imf.org/external/country/JPN/index.htm (last modified Nov. 18, 2003).

126. See Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, as amended, art. IV, § 3 (directing the IMF to "exercise firm surveillance over the exchange rate policies of members" and requiring each member to provide information to the IMF and to "consult with it on the member's exchange rate policies"), available at http://www.imf.org/external/pubs/ft/aa/aa.pdf (last visited Nov. 17, 2003). The so-called "Article IV consultations" in fact constitute rather wide-ranging reviews of each member country's economic and financial policies, as to which the IMF often offers pointed criticisms. For example, in the most recent Article IV consultation regarding Japan, the IMF's board of directors "stressed that serious and interrelated problems remain [in Japan's economy], and that a sustained and strong economic revival is not yet in prospect," and moreover "agreed that a more comprehensive and integrated policy approach is needed to revitalize the corporate and financial sectors, tackle deflation, and address fiscal imbalances." International Monetary Fund, IMF Concludes 2003 Article IV Consultation with Japan (Sept. 5, 2003), at http://www.imf.org/external/np/sec/pr/2003/pr03112.htm (last visited Nov. 17, 2003).}
based lending (as distinct from their project lending), the "lack of symmetry" criticism in fact packs a punch in the context of all MDB operations. I tried to make this point several years ago in exploring the subject of "environmental conditionality" in MDB operations.\textsuperscript{127} I explained then that although the MDB charters do not vest the MDBs themselves with the sort of authority that Article IV of the IMF charter grants that institution—and therefore no easy vehicle exists in the MDBs for any formal criticism of developed (non-borrowing) member countries that fail to follow the economic and financial policies that the MDBs are pressing their borrowing member countries to follow—there is still much that the MDBs and their developed member countries can do to counteract the effects of the asymmetry in obligations.\textsuperscript{128} In that earlier article, I enumerated some initiatives that I believe the developed countries should take to improve global environmental sustainability, but I noted that "[f]or the present, the role of the [MDBs] in this area is limited by both legal and practical constraints[,]" including certain limitations in the MDBs' charters.\textsuperscript{129}

I believe it is time to cut through those legal and practical constraints and make the burdens and obligations of economic development more symmetrical. In Part IV.B, below, I offer some suggestions in this regard, involving both (i) a mechanism for reporting the national economic performance of non-borrowing member countries and (ii) a linkage between voting power and national economic performance—with "economic performance" construed broadly to encompass social aspects of development.

5. Criticism #10—Weaknesses in staffing and management

I am convinced from my own experience and network of acquaintances in the MDBs that those institutions are staffed by people who are, by and large, deeply dedicated to their work. Many of them have experience and expertise in dealing with extraordinarily complex problems—endemic diseases, institutional weaknesses, cultural incongruities, scarce natural resources, dysfunctional markets, currency fluctuations, mangrove protection, perishable commodities, wind propulsion, coral reef fragility, airport runway design, corrupt government officials, bank insolvencies, cross-default clauses—all in the

\textsuperscript{127} See generally Head, \textit{Environmental Conditionality}, supra note 2.
\textsuperscript{128} \textit{Id.} at 23–24.
\textsuperscript{129} \textit{Id.} at 24.
context of a multicultural and multilingual workplace. Most of them realize the importance of their jobs, the uniqueness of the contribution they can make (or injury they can cause), and the moral duty they have to use their best efforts. I have a deep respect and fond admiration for them as a class of international civil servants, and of course for some of them whom I know personally.  

However, I believe the system of MDB staffing and management suffers from several weaknesses that I described above in summarizing Criticism #10: excessive influence ("overweighting") of nationality as a factor in staff appointments and promotion; inordinate emphasis on loan volume, rather than on loan quality, in promotions and other rewards; "policy anachronism" on the part of some senior staff members who do not give adequate attention to environmental and social dimensions of development; and lack of internal accountability.

Beyond the weaknesses noted above are some others that derive from the points I have made in my assessment of Criticisms #2 and #3 regarding environmental protection and human rights. If, as I suggest, the MDBs are to be given an expanded role in these areas, an expansion of MDB staff resources is essential. Indeed, I regard the staff resources of the World Bank and AsDB—the two MDBs with which I am more familiar—as woefully inadequate now for the tasks that their governing boards have laid on them. Some senior staff members in the AsDB have pointedly criticized the "policy proliferation" that has occurred in that institution (at the initiative of the Board of Directors, following instructions from their national authorities) without an adequate increase in staff resources to handle the increased responsibilities.  

I offer in Part IV.B, below, some recommendations for redressing these various weaknesses. Those recommendations revolve around these key points: an increase in staff resources; policy changes regarding staff appointments and promotions (some of which are already on track in the World Bank); mechanisms for enhanced staff and management accountability (some of which are also underway in the World Bank and

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130. For similar views complimentary to MDB staff, see Owen, supra note 79, at 100 (asserting that the World Bank "is well staffed," that the "caliber of its top management and staff is high[,]" and that one reason for this is the "attractions of international service to humanity").

131. E.g., Strategic Challenges for the Bank (Sept. 16, 1999) (memorandum prepared by AsDB staff for AsDB management) (on file with author). Such criticism is hardly surprising: the list of official AsDB policies to which staff must give attention includes such topics as anti-corruption, benefit monitoring and evaluation, cooperation with NGOs and other aid agencies, environmental protection, gender and development, governance, indigenous peoples, inspection, poverty reduction, rehabilitation assistance, resettlement, and social development. See Asian Development Bank, Operations Manual, at http://www.adb.org/Documents/Manuals/Operations/ (presenting the policies of the AsDB for several topics, including those listed above) (last visited Nov. 17, 2003).
the AsDB); and greatly improved and expanded cooperation with other agencies and NGOs, so that the MDBs serve as clearing-houses and coordinators for a network of subject-matter specialists.

6. Criticism #11—Narrowsness of economic focus

At its core, this criticism is the flip side of Criticism #13—mission creep. I have classified both of them as "constitutional criticisms" because they raise a fundamental constitutional question: should the MDBs give a broad interpretation or a narrow interpretation to the provisions that appear in their charters (except for the EBRD charter) requiring that the MDBs take into account only economic considerations and that they not interfere in the political affairs of their members?

For reasons summarized above in Part III.A, I dismiss the "mission creep" criticism—that the MDBs have acted ultra vires by venturing into areas that typically would not have been regarded part of economic development work a few decades ago, such as environmental protection, social justice, governance, and the like. The gradual realization that such topics can have an important bearing on economic development, and that MDBs therefore must pay some attention to such topics, strikes me as appropriate.

However, I believe the MDBs should have a clearer and broader mandate in this area. The MDBs should be permitted and required to take into account a variety of legal and policy matters relating to the quality of the governance being provided in the member states of the MDBs. Such a permission and requirement should take the form of a new provision appearing in each of the MDBs' charters. A dozen years ago, Ibrahim Shihata defended the World Bank's involvement in governance matters as being consistent with the institution's charter. Shihata, then the World Bank's General Counsel, said that the institution had struck a "delicate balance" by using conditionality to improve the overall policy environment—including in particular those policies that made government more efficient by reducing its size and its control over the economy—while being careful not to assert any mandate to introduce political reform or to question the political form of its borrowing member governments. It is, of course, the political prohibition in the IBRD and

132. SHIHATA II, supra note 11, at 53.
133. Id. at 59, 61. For a detailed description and analysis of the provisions of the IBRD and IDA charters that exclude the World Bank from taking political considerations into account in its operations, see id. at 62–78. Shihata then turns specifically to a consideration of "Aspects of
IDA charters that required the World Bank to strike such a “delicate balance” and prompted Shihata to defend the World Bank in that regard. Shihata drew a contrast between the IBRD and IDA charter provisions and the political mandate given to the EBRD.\textsuperscript{134}

In my view, the three key mandates appearing in the EBRD charter—on political, economic, and environmental matters—should serve as models for charter amendments for the other MDBs.\textsuperscript{135} I explained a few paragraphs earlier, in assessing Criticisms #2 and #3, why I believe the MDBs should be involved in environmental and human rights issues, and I mentioned in particular that there should be a linkage within the charters of the MDBs to major treaties addressing environmental and human rights issues. I would say the same for several other topics into which the MDBs have made only slight forays so far—governance, for example, and perhaps international criminal law.\textsuperscript{136} I explain this suggestion further in Part IV, below.

I should emphasize that I do not propose that existing MDB staff and management be expected to assume the additional responsibilities of dealing with a broader array of issues and policies than they have already been given. As suggested in my assessment of Criticism #10—weaknesses in staffing and management—I believe a substantial expansion and realignment of the staffing of the MDBs is in order. More importantly, I believe a more effective system of cooperation between MDB staff and the staff members of other international organizations, NGOs, and national governments is essential. I agree with Jessica Einhorn’s observation that other organizations are better able to deal with

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\textsuperscript{134} \textit{Id.} at 57–58. The EBRD’s political mandate requires the institution to foster economic change “in the Central and Eastern European countries committed to and applying the principles of multiparty democracy [and] pluralism.” EBRD Charter, \textit{supra} note 10, art. 1.

\textsuperscript{135} I am indebted to Fred Mesch of the AsDB for pressing me on what he calls the “Pandora’s Box issue” of opening up the MDBs’ charters to amendment. I address that issue briefly in footnote 147, \textit{infra}.

\textsuperscript{136} For a discussion of the propriety of MDB involvement in certain aspects of international criminal law, see Daniel Bradlow, \textit{Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?}, 50 U. KAN. L. REV. 695, 697 (2002) (expressing the views that (i) “except in extreme cases, the costs of having the IFIs actively engaged in the enforcement of international humanitarian law outweigh the benefits,” but (ii) “the benefits of having the IFIs involved in the implementation of international humanitarian law exceed the costs”); see also Laurie R. Blank, \textit{The Role of International Financial Institutions in International Humanitarian Law} (report of the International Humanitarian Law Working Group, United States Institute of Peace, Jan. 2002) (discussing the role that IFIs “can and should take” in the implementation of international humanitarian law), \textit{available at} http://www.usip.org/pubs/peaceworks/pwks42.pdf (last visited Nov. 17, 2003).
some issues than MDB staff members are. My suggestion for having the MDBs serve as focal points, at which those issues are translated into policies (and conditionalities, as appropriate), has several benefits—economies of scale, minimizing contradictory messages, and of course financial and institutional leverage—while at the same time using the comparative advantage that other institutions and groups have in various subject-matter areas.

7. Criticism #14—Unaccountability and democracy deficit

In my view, this is one of the most important and persuasive criticisms. As I described it above in Part II of this Article, this criticism has several elements: (i) the MDBs provide little accommodation for citizen involvement in MDB decision-making; (ii) the weighted voting system places control of the MDBs in the hands of a very few countries, leaving most people in borrowing member countries with virtually no influence over the actions taken by the MDBs’ governing boards; (iii) the operations of MDBs are not subject to any outside judicial review; and (iv) the member states’ governments themselves are in many cases undemocratic in character.

Although all four of these points are factually correct, I do not find the second one compelling per se. As I have noted above in my assessment of Criticism #8—lack of symmetry in obligations—it is the combination of the weighted voting system and MDB conditionality, not the weighted voting system on its own, that raises a specter of unfairness. That specter of unfairness prompts me to offer, in Part IV.B, some suggestions in this regard, involving both (i) a mechanism for reporting the national economic performance (including development performance) of non-borrowing members and (ii) a linkage between voting power and national economic performance. I also suggest in Part IV some changes that would increase citizen involvement, impose judicial review on MDBs, and authorize the MDBs to promote government reform in member countries that have not yet embraced the principles of multiparty representative governance.

137. See Einhorn, supra note 48, at 33 (suggesting, for example, that the World Bank pass the job of judicial reform “to an organization staffed by lawyers and judges” and that efforts to protect cultural heritage could likewise be “farmed out to an organization with more corresponding interests”).
IV. CHOOSING A FUTURE FOR THE MDBs—DISMANTLE OR REGULATE?

I have developed in Part II, above, a list of fourteen criticisms of the MDBs. I have assessed these criticisms in Part III, and have concluded that several of them are both persuasive and serious. In Part IV, I address the obvious question: so what? As a practical matter, it would seem that there are three possible futures for the MDBs. First, perhaps they can continue operating as they have, suffering the slings and arrows of dramatically increased public scrutiny and the castigation that has emerged from that scrutiny, maybe with the hope that gradual evolution of their operations will allow them to meet some of the criticisms and to continue contributing to world economic development. Second, perhaps they can be cut up into pieces in response to the complaints that they are too big, too incompetent, and too unaccountable to be allowed to survive (see, for example, Criticisms #10, #12, and #14). Third, perhaps they can be reoriented, through a combination of policy and constitutional reforms, in ways that address the various valid criticisms discussed above.

At this stage in their development, I doubt that the first of these three possible futures—continuing the status quo—is viable or acceptable. As for the second of these three possible futures, which I characterize as “death by slicing,” I am unenthusiastic for several reasons that I explain below in Part IV.A. Instead, I believe it is time to regard the MDBs as having completed a generational period and to make some fundamental changes that will move the MDBs into a new generation—the fourth generation, as explained below in Part IV.B.

A. Death by Slicing

1. The case for dismantling the MDBs

Can there be acceptable MDBs, or are they incorrigible? One line of argument might go like this: power corrupts, and more power corrupts more; the concentration of power that the MDBs represent is just so great as to make it impossible to avoid having MDBs go sour. In order to break the power of the MDBs, the MDBs themselves must be broken up—destroyed through division.

Article 254 of China’s Qing Code, dating from the mid-eighteenth century, imposed a severe punishment for treason: “In the case of plotting rebellion and high treason, when there is joint plotting . . . all
will be put to death by slicing."\textsuperscript{138} Death by slicing has been described as a punishment "not inflicted so much as a torture, but to destroy the future as well as the present life of the offender" because "spirits to appear must assume their corporeal forms, [and the criminal executed by slicing] can only appear as a collection of little bits."\textsuperscript{139}

Perhaps that form of punishment from dynastic China should be imposed on the MDBs, so as to ensure that they can be neutralized and thereby prevented from creating future mischief. Some commentators have made proposals along these lines, suggesting, for example, that the World Bank should be stripped of most of its authority to make loans,\textsuperscript{140} that most of the World Bank's capital resources should be allocated among the regional development banks or returned to the member countries,\textsuperscript{141} that the World Bank also should phase out its work in Asia and Latin America within five years,\textsuperscript{142} and that all of the MDBs should be precluded from financial crisis lending\textsuperscript{143} or any lending to the private sector.\textsuperscript{144}

2. Disadvantages of dismantling the MDBs

I am not in favor of death by slicing. Even if one were to believe that the evils or shortcomings of MDBs far outweighed their positive

\textsuperscript{138} WILLIAM C. JONES, THE GREAT QING CODE 237 (1994).
\textsuperscript{139} DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 93 (1967) (quoting ERNEST ALABASTER, NOTES AND COMMENTARIES ON CHINESE CRIMINAL LAW 57–58 (1899)).
\textsuperscript{140} MELTZER REPORT, supra note 28, at 10–12, 89–90. The proposals made in this regard in the Meltzer Report would (i) phase out lending to those MDB member countries that can borrow on capital markets and (ii) prohibit lending also to the poorest countries, on grounds that grant funding would be more appropriate. George Soros has flatly disagreed: "Contrary to the Meltzer Commission's recommendation, it would be premature to terminate the existing lending operations of the World Bank . . . . The World Bank has an important niche to fill." SOROS, supra note 49, at 102–03.
\textsuperscript{141} MELTZER REPORT, supra note 28, at 12, 89–90. The resources specifically targeted by the Meltzer Report for such slicing are the amounts of "callable capital" promised by member countries. For an explanation (in the context of the AsDB) of callable capital, which forms the largest part of MDB capital resources, see Head, Asian Development Bank, supra note 9, at 65–67. George Soros criticizes the Meltzer Report in this respect, saying that "there is no justification for returning capital to the rich countries." SOROS, supra note 49, at 102.
\textsuperscript{142} MELTZER REPORT, supra note 28, at 89.
\textsuperscript{143} Id. at 12.
\textsuperscript{144} Id. at 90. The IFC would, under the Meltzer Report recommendations, be merged into the World Bank, which would be re-named the World Development Agency to reflect the phasing out of its lending authority. Id. In addition, another part of the World Bank Group, the Multilateral Investment Guarantee Agency (MIGA), would, under the proposals in the Meltzer Report, be eliminated. Id. The report offers three short sentences as justification for this recommendation.
aspects, killing them off would create more problems than it would solve.

For one thing, power (whether it corrupts or not) abhors a vacuum. If the MDBs were dismantled, I believe other structures—probably less savory than the MDBs are—would emerge to assume the economic and political influence that the MDBs currently wield.

In particular, we could expect to see a rise in bilateral lending. Most economically developed countries have bilateral development financing agencies, such as the United States Agency for International Development, the United Kingdom Overseas Development Agency, the Swedish International Development Agency, and the Australian Government Overseas Aid Program.145 These agencies do good work, but they represent a more fragmented, less coordinated, more political, and much less well-funded approach to economic development assistance than the MDBs afford.

We might also see, in the absence of the MDBs, either a decrease or an increase in private-sector lending. As noted above, MDB project lending is often accompanied by commercial co-financing.146 It might be that a dismantling of the MDBs would cause some of that commercial financing to dry up, since a key inducement for such commercial co-financing now is the MDBs’ involvement in the project. LDCs in that case would face greater financial challenges than they do today. On the other hand, it might be that a dismantling of the MDBs would actually encourage more private-sector lending because LDCs would have additional unmet demand for funding. If so, such private-sector lending typically would take only commercial interests into account, with no direct interest in development per se but interest only in the specific projects being financed, regardless of the long-term economic, environmental, or social implications of such projects. I believe this could be disastrous for the populations in the borrowing LDCs.

Two other implications of killing off the MDBs also strike me as unappetizing. First, doing so would represent a substantial blow against multilaterialism—that is, against the trend that has gained momentum in recent decades for addressing multilateral problems with multilateral solutions. I realize that many “anti-globalization” enthusiasts would welcome a reversal of that trend toward multilateral solutions. For me, however, multilaterialism represents one of the best hopes for the survival of mankind. I shall return to this theme in Part V, below.


146. See supra note 102 and accompanying text.
Second, a likely effect of killing off the MDBs—by subjecting them, for example, to death by slicing—would be that some states and regions of the world would be abandoned by financiers. Some states in Africa, for example, would draw little attention from national bilateral development agencies because such agencies would see little direct political or economic return from assisting those states; and many states would fail to attract private-sector financing because of concerns over political risk or credit risk. Given the desperate situation that already exists in many LDCs, a significant reduction in external assistance would, in my view, be a recipe for disaster of regional and global dimensions.

My argument in the preceding few paragraphs addresses the possibility of killing off the MDBs. Could, however, a less drastic approach be taken—not death by slicing but rather regeneration and improved efficiency by slicing? That is, is it conceivable that the various functions now undertaken by the MDBs could be allocated among six or eight or ten smaller, subject-matter-specific institutions, each of which would carry out its limited functions better than the MDBs can because each would be leaner and more focused?

Yes, it is conceivable; but it is highly unlikely, for reasons that should be obvious by now. The international stage already features numerous subject-matter-specific institutions, focusing their efforts on environmental management, human rights protection, labor standards, disease control, bank supervision, accounting practices, and other topics. In my view, the efforts of these institutions need to be coordinated, their strengths need to be harnessed and made more effective, and their operations need to be made subject to certain principles that will help assure the quality of their work. I fear that dividing up the functions of the MDBs and allocating those functions to several subject-matter-specific institutions (either new ones or ones that already exist) would yield the same result I described above in suggesting what would happen if the MDBs were killed off entirely: we would see a more fragmented, less coordinated, more political, and much less well-funded approach to economic development assistance.

In short, although I believe the MDBs are beset with numerous problems—as enumerated in the several valid criticisms explained above—and that they should not continue operating as they are now, I believe that dismantling them or slicing them up would be a grave mistake. Instead, the MDBs should be improved (and reined in, some
would say) by making them subject to a new system of regulation. It is to that subject that I now turn.

B. Regulating the MDBs by Principles and Charter Amendments

MDBs are already regulated, of course, both by their charters and by their members acting through the MDBs' governing bodies. However, I propose a more expansive and formalized regime of regulation aimed at addressing several of the criticisms discussed above. This regime of regulation would consist of both institutional principles and substantive principles to which the MDBs and (in some cases) their member countries would adhere. Some of the principles would be announced in amendments to the MDBs' charters, examples of which I provide in the Appendix to this Article. 147

1. Key institutional principles for MDBs

I propose that five institutional principles be formally adopted by the MDBs: transparency, participation, legality, competence, and accountability. Several of the principles themselves are already supported, at least in general terms, by the MDBs, as is evident from a survey of the MDBs’ websites. 148 However, my proposal goes considerably further than any of the MDBs would (or legally could) go now, as will be evident from the description I give in the following paragraphs of these principles and their implementation.

The principle of transparency involves making publicly available information about what the MDB has done, is doing, and proposes to do. Abiding by the principle of transparency would involve at least five elements. 149 First, the records of discussions and decisions at the

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147. I am fully aware of the “Pandora’s Box issue” regarding charter amendments for international organizations—that is, that any attempt to open up such charters for the purpose of making amendments, however narrowly focused, might unleash a storm of proposals, demands, and rhetoric that would send the organizations into chaos. However, for reasons that I am trying to explain in this Article, I believe the MDBs must change or die, and that some of the necessary changes require amendments to the MDB charters.

148. See, e.g., http://www1.worldbank.org/operations/disclosure/ (referring to transparency and public disclosure in World Bank operations) (last visited Nov. 17, 2003); http://www.sdb.org/Documents/Manuals/Operations/OML03_29oct03.pdf (referring to transparency and openness in all areas of AsDB operations) (last visited Nov. 17, 2003); http://www.ebrd.org/about/strategy/index.htm (stating Public Information Policy to promote transparency and good governance) (last visited Nov. 17, 2003).

149. Several of these elements appear also in the recommendations made in 2002 by the International Law Association’s Committee on Accountability of International Organisations at its New Delhi Conference. See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SEVENTIETH
meetings of MDB governing boards would be accessible to the public. Second, the loan agreements and related legal documents executed by an MDB with borrowers and other entities would be accessible to the public, not only through the deposit of some such agreements with the U.N. Secretary General pursuant to Article 102 of the U.N. Charter but also by immediate availability electronically, prospectively. Third, all recommendations for financial assistance—loans, technical assistance, etc.—presented to the MDB’s board of directors, along with documents relating to environmental and social assessment of such operations—would be accessible to the public through electronic means, both prospectively and retrospectively. Fourth, the MDB’s governing policy and operational documents (such as the MDB’s policy papers and Operations Manual) would be available, in current form, electronically. Fifth, all legal opinions issued by the General Counsel (or an MDB lawyer serving temporarily in the place of the General Counsel) to a governing board of the MDB would be accessible electronically, prospectively. In all these cases, disclosure of and access to information would be subject to appropriate respect for confidentiality where necessary to protect legitimate interests of private parties. Moreover, because of the need for candid and lively debate in the early development of projects and policies, internal staff memoranda would typically not be publicly available.

The principle of participation involves providing for influential input by responsible parties before MDB action is finalized. Abiding by the principle of participation would involve at least four elements. First, the MDBs would provide mechanisms for soliciting and considering...
comments from the public during a reasonable period of time before
decisions are made by a governing board of the MDB on proposed
financing operations or on proposed policy statements or changes. 152
This would facilitate the participation by interested parties directly,
rather than only through the national government authorities of member
countries. Second, the MDBs would provide mechanisms also for
soliciting and considering comments on environmental assessment and
social assessment of specific projects under consideration for MDB
financing. This would facilitate public input into the formulation of
documents evaluating the likely effects of a proposed project on the
physical and human environment, at a stage before such evaluative
documents are finalized and submitted to an MDB's board of directors
for consideration in connection with a proposal for financial assistance.
Third, the MDBs would take further steps to integrate NGOs into the
MDBs' decision-making processes. This might include the
establishment of policies and criteria for certification of NGOs that could
have direct participation in MDB operations, to the extent that this does
not already occur. Fourth, the MDBs would strengthen the capacity of
their field offices to accept comments, complaints, and other views of
local residents about MDB operations, and to convey that information to
the MDBs' headquarters. This could improve the responsiveness of the
MDBs to local populations, whose support is essential for development
assistance to work. 153

The principle of legality, which involves establishing clear rules and
following them, would encompass both (i) legality of the MDBs' activities and (ii) legality of the membership of countries in the MDBs.
The first of these aspects of legality is not new to the MDBs, but
announcing it in charter amendments would provide a foundation for
judicial review of MDB operations, which I explain below under the
topic of accountability.

The second of these two aspects of legality—establishing membership requirements for countries to participate in the MDBs—is largely novel. Some MDBs already have membership requirements:

152. A model for such a mechanism might be found in the American Administrative Procedure Act applicable to administrative agencies in the United States, and particularly in the "notice and comment" procedures for rulemaking. See 5 U.S.C. § 553(c) (requiring that agencies provide for public comment on proposed regulations). For a concise explanation of those "notice and comment" procedures and U.S. experience with them, see Richard E. Levy & Sidney A. Shapiro, Administrative Procedure and the Decline of the Trial, 51 U. Kan. L. Rev. 473, 488–92 (2003).

153. It is perhaps noteworthy that this suggestion, like several others mentioned in this paragraph to broaden public participation in the work of the MDBs, raises a perennial problem: how to balance the two competing values of (i) universality (that is, coherence and harmonization of policies) and (ii) sensitivity to special needs and local conditions.
membership in the World Bank, for example, requires membership in the IMF, and membership in the AsDB requires membership in the U.N. or certain of its agencies. However, I propose that the MDB membership requirements be expanded, in much the same way that participation in the GATT (through membership in the WTO) was made subject to the “single package” approach agreed upon in the Uruguay Round of trade negotiations. Under my proposal, membership in an MDB would require that a country accept certain specified obligations in basic (existing) multilateral treaties relating to environmental protection, human rights, and good governance. Such treaties would include the Convention on International Trade in Endangered Species, the International Covenant on Civil and Political Rights, the OECD anti-bribery convention, and others.

The principle of competence would involve the adoption of specific policies and regulations aimed at improving the competence of MDB staff and management, including the competence of those serving on MDB boards of directors. Specifically, I suggest that each MDB adopt regulations directing the president of the MDB to ensure (i) the competence of incoming staff, (ii) that competence figures more prominently than seniority as a basis for promotions, and (iii) that there is a reduction in the role of nationality in both appointments and promotions. The first of these points, relating to incoming staff, might be facilitated by the establishment of an international civil service examination like that used in dynastic China and in some contemporary national civil service and foreign service systems. The second of these points, relating to the grounds for promotions, should involve objective methods of evaluating the quality of the staff member’s performance—as is used, for example, in the work of the World Bank’s Quality Assurance Group—and should involve a suppression of the “approval culture”

154. IBRD Charter, supra note 5, art. II, para. 1.
155. AsDB Charter, supra note 9, art. 3, para. 1.
156. For a brief description of the “single package” approach, and the score of treaties that were thereby made applicable to countries joining the WTO, see Head, Throwing Eggs at Windows, supra note 1, at 742.
158. ICCPR, supra note 34.
160. For a description of the World Bank’s Quality Assurance Group, see its system for evaluating the quality of projects and the performance of staff members working on those projects, at http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/QAG0/, pagePK:109619–theSitePK:109609,00.html (last visited Nov. 17, 2003). Other MDBs have also placed increasing emphasis on finding
that gives undue emphasis to the volume of lending that staff members generate.\textsuperscript{161} The third point, calling for a reduction in the role of nationality, would require a careful balancing: on the one hand, there is obvious benefit to be gained from wide geographic, national, and cultural diversity in MDB staffing (a benefit reflected, in fact, in some MDB charters);\textsuperscript{162} on the other hand, pressure from national authorities to appoint or promote a person of a particular nationality can severely damage productivity and morale\textsuperscript{163} in a setting in which both need to be high.

In addition to these directives to the MDB president, who is typically responsible for the hiring and management of an MDB’s staff,\textsuperscript{164} regulations also should be adopted regarding the competence of those persons appointed by national authorities to serve on the boards of directors of the MDBs. It must be clear to those national authorities, and to persons serving on those boards of directors, that appointment to such service is to be based on proven professional qualifications and not on political patronage or connections. To this end, I propose that the MDBs prepare and publish detailed terms of reference describing the duties of such directors and the expected qualifications and experience of persons appointed to serve in that capacity, and that rigorous orientation and training programs for those persons, once they take up their positions at the MDBs, be put in place or strengthened. Perhaps most important, especially for those MDBs that already give serious attention to the competence of both staff and members of boards of directors, is the need

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\textsuperscript{161} George Soros makes a similar point: “Performance should not be measured by the amount of loans disbursed.” \textit{Soros, supra} note 49, at 105. This point has not been lost on the MDBs. Introductory comments to the 1994 AsDB book cited earlier note that “an internal task force—the Task Force on Improving Project Quality—. . . recommended a shift away from an ‘approval culture’ to a new corporate culture emphasizing project quality.” \textit{Project Quality Agenda, supra} note 160, at xi. Research that I have carried out at the AsDB since that time indicates that the institution has followed up on this recommendation, in part by pursuing initiatives to enhance the quality of project supervision—for example, by rewarding project administration work in terms of career advancement—and thereby to reverse the so-called "approval culture."

\textsuperscript{162} See, \textit{e.g.}, AsDB Charter, \textit{supra} note 9, art. 34.6 (requiring that the President of the AsDB, in appointing staff members, "shall, subject to the paramount importance of securing the highest standards of efficiency and technical competence, pay due regard to the recruitment of personnel on as wide a geographical basis as possible").

\textsuperscript{163} I draw on my own experience as a staff member of the AsDB: pressure in the mid-1980s from Japanese authorities to hire an unqualified Japanese national seriously undermined the independence and morale of the Office of the General Counsel.

\textsuperscript{164} See, \textit{e.g.}, AsDB Charter, \textit{supra} note 9, art. 34.5 ("The President shall be chief of the staff of the Bank and . . . shall be responsible for the organization, appointment and dismissal of the officers and staff in accordance with regulations adopted by the Board of Directors.").
\end{flushleft}
to formalize and publicize MDB standards and policies in this regard, to help blunt attacks of the sort included in Criticism #10—weaknesses in staffing and management—described earlier in this Article.

The principle of competence would also involve building a more effective network of cooperation between MDB staff and staff members of other international organizations, NGOs, and national governments. I discussed this point above, and proposed that the MDBs would serve as focal points or clearinghouses for expertise that would come from other entities and be brought to bear on the MDBs’ work.

Accountability, in the context of MDBs, should mean at least two things: (i) accountability of the MDBs themselves to a wide range of interests, including the interests of the public at large; and (ii) accountability of all member countries (including non-borrowers) to each other, to the MDBs, and to their own people in managing their national financial and economic affairs. I will address them in reverse order.

In generally endorsing Criticism #8—lack of symmetry in obligations—I pointed out that the IMF Charter requires that IMF members cooperate in Article IV consultations, an annual exercise in which the IMF studies and critiques each member country’s economic and financial policies and performance. The reports issued by the IMF following the Article IV consultation are typically made public. In a similar but more narrowly focused manner, I believe all MDB member countries should be required to report annually (and publicly) on their own policies and performance on economic and financial matters. Specifically, I propose that a standardized set of objective economic and financial criteria, including in particular various indices of sustainable human development, be established by the MDBs, based on the kinds of requirements typically found in loan covenants and conditionalities appearing in loan documents between the MDBs and their borrowers. These criteria, in turn, would be used to evaluate the policies and performance of all MDB member countries—borrowers and non-borrowers alike. These evaluations would then be published.

165. See supra note 137 and accompanying text. For references to existing strands in such a network of cooperation between staff members of MDBs and other international organizations, see also infra note 177.

166. For a comment about the relationship between (i) this aspect of improving MDB staff competence by building a more effective network of cooperation and (ii) my proposal to require that MDB member countries accept certain key obligations in fundamental treaties, see infra note 177.

What would be the use of such evaluations? For one thing, they could help blunt the complaint I described above about the mismatch between what is expected of the borrowing member countries and what is practiced by the controlling (non-borrowing) member countries. Second, such evaluations could be used for a more arresting purpose as well: in egregious cases, where a member country departed substantially and chronically from the economic and financial standards previously agreed to, that member's voting power could be partially suspended until it corrects its behavior.

This remedial function—triggering a partial suspension of voting power for poor performance—has analogs in domestic laws governing corporate entities. At the international plane, it might be seen as analogous to the procedure put in place by the Third Amendment to the IMF Charter. Proposed in 1990 and adopted two years later, that Third Amendment provided for a suspension of voting rights of a member that persisted in a failure to abide by its obligations under the IMF Charter. My proposal would be somewhat different by being more objective, more automatic, and more subtle in its application. The system I think should be adopted would have objective criteria for measuring a country’s economic and financial performance; upon substantial (defined) departure from these criteria, a member’s voting power would be partially suspended; and the amount by which the voting power would be partially suspended would depend on the extent to which the country’s economic and financial performance departed substantially from the established criteria. As a consequence, the weighted voting

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168. For an example of statutory provisions expressly permitting limited liability companies to specify in their constitutional instruments that voting powers may be restricted or reduced in certain specified circumstances, see section 151(a) of the Delaware General Corporation Law (providing that "[a]ny of the voting powers . . . of any . . . class or series of stock may be made dependent upon facts ascertainable outside the certificate of incorporation . . . provided that the manner in which such facts shall operate upon the voting powers . . . is clearly and expressly set forth in the certificate of incorporation"; and "[t]he term ‘facts,’ as used in this subsection, includes . . . a determination or action by any person or body, including the corporation"). 8 DEL. CODE ANN. § 151(a) (2003). For a similar provision, see the Delaware Limited Liability Company Act, title 6, section 18-502(c) of the Delaware Code (providing that "[a] limited liability company agreement may provide that the interest of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for . . . such failure” and that this penalty “may take the form of reducing . . . the defaulting member’s proportionate interest in the company”). 6 DEL. CODE ANN. § 18-502(c) (2003).

169. Third Amendment of the Articles of Agreement of the International Monetary Fund, Nov. 11, 1992, 31 I.L.M. 1307, 1309–10. For a discussion of this development, see generally Head, Suspension of Debtor Countries’ Voting Rights, supra note 53.

170. Head, Suspension of Debtor Countries’ Voting Rights, supra note 53, at 630–32. The IBRD charter has a provision for suspension of membership, which entails a suspension of voting rights, in the event that a member country fails to fulfill its obligations to that institution. IBRD Charter, supra note 5, art. VI, § 2.
system would be modified: a member’s usable voting power would be based on its subscription to capital, as under current rules, unless (and to the extent that) the member’s economic and financial performance triggered a partial suspension in that voting power. Even if such a partial suspension never occurred, the formal system providing for such an action would help address Criticism #8—lack of symmetry in obligations—and would help make all members accountable to each other, to the MDBs, and to their own people for the prudent management of the country’s economic and financial affairs.

I turn now to the second type of accountability: accountability of the MDBs themselves. This should involve two elements. First, MDBs should encourage and facilitate public involvement in decision-making. I have already discussed that point above, in discussing the principle of participation.\textsuperscript{171} Second, MDBs should submit to the jurisdiction of some external entity authorized to review the legitimacy of MDB action. Expressed differently, this means that MDBs should be subject to judicial review. For this purpose, I propose the establishment of an International Tribunal for Multilateral Development Banks. Such a Tribunal would amount to an expansion of the inspection panels that some MDBs have established\textsuperscript{172} in order to determine whether those institutions have acted consistently with the policies that they have announced. Such a tribunal would also have appellate jurisdiction over the governing boards of the MDBs in matters of charter interpretation. Judges for the tribunal could be selected by the MDBs themselves—perhaps two nominated by each participating MDB and two by the President of the International Court of Justice. Providing for such judicial review would introduce some checks and balances of the sort that most national governmental structures have, by adding to the executive and legislative functions (carried out by the MDBs’ management and governing boards, respectively) a judicial function.

\textsuperscript{171} See supra notes 151–153 and accompanying text.

\textsuperscript{172} For descriptions and assessments of the World Bank Inspection Panel, see generally IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL (1994); THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE (Gudmundur Alfreddson & Rolf Ring eds., 2001). The latter of these also includes descriptions of the Inspection Policy of the AsDB, id. at 191–207, and the Independent Inspection Mechanism of the IADB, id. at 209–18. For the AsDB policies on inspection, see ASIAN DEVELOPMENT BANK, ADB’S INSPECTION POLICY: A GUIDEBOOK (1996), at http://www.adb.org/Documents/Guidelines/Inspection/default.asp (last visited Oct. 17, 2003). In June 2002, the AsDB began holding regional meetings to obtain input from NGOs, civil society, and private sector interests regarding the effectiveness and improvement of the AsDB inspection mechanism. ADB Opens Inspection Function to Consultations, ADB REVIEW, Sept.–Oct. 2002, at 21.
responsible for checking the legality of the exercise of the other two functions. The International Tribunal for Multilateral Development Banks would accept complaints from individuals or groups alleging that an MDB had acted inconsistently with its own charter or its own announced policies and principles—including the other institutional principles discussed above and the substantive principles that I discuss below.

2. Key substantive principles for MDBs

In discussing the principle of legality above, I proposed the establishment of membership requirements for countries to participate in the MDBs—including the requirement that member countries accept certain key provisions of fundamental treaties.\textsuperscript{173} To this end, the MDBs’ charters could be amended to incorporate by reference those treaty provisions. A similar approach was taken in the TRIPs Agreement\textsuperscript{174} emerging from the Uruguay Round of trade negotiations: by becoming a party to that Agreement, a country agrees to comply with certain specified provisions of various intellectual property conventions.\textsuperscript{175}

Incorporating by reference certain treaty provisions would not only bear, however, on eligibility for membership. It would also impose a continuing requirement on member countries to adhere to those treaties. The overall aims in imposing this requirement would be (i) to announce definitively that the MDBs themselves, and their members, are committed to the key purposes of the incorporated treaties—regarding, for example, environmental protection, fundamental human rights, and responsible governance\textsuperscript{176}—as well as (ii) to provide a normative basis for imposing requirements on member countries in the form of loan covenants and conditions. Such an initiative might have another, less direct effect: further inducing compliance with the treaties to which MDB member countries had already consented to be bound.\textsuperscript{177}

\textsuperscript{173} See supra text accompanying notes 154–159.

\textsuperscript{174} Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197.

\textsuperscript{175} See, e.g., id. art. 2, (providing that WTO members “shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)” regarding the protection of industrial property).

\textsuperscript{176} Other areas beyond these three could also be given similar attention. For example, I mentioned above the possibility of including international criminal law as an area in which MDBs might have some involvement. See supra note 136 and accompanying text.

\textsuperscript{177} If, as a result of my proposal, treaty regimes were given a shot in the arm, it would be a gain for what has been referred to as “liberal internationalism”—an approach to international cooperation based on multilateral treaties among nation-states. See Kal Rauschala, The Architecture
What substantive principles would be drawn from (existing) treaties? I propose that key substantive provisions of the following environmental, human rights, and governance treaties—all of which have already been ratified by scores of countries—be incorporated by reference in amendments to the MDB charters:

- Vienna Convention for the Protection of the Ozone Layer (1985), and pertinent provisions of the Protocols thereto and of the Amendments to those Protocols
- Convention on Biological Diversity (1992)
- Kyoto Protocol on Global Warming (1998)
- International Covenant on Civil and Political Rights (1967)
- International Convention on the Elimination of All Forms of Racial Discrimination (1966)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984)

In addition, I propose that the MDBs adopt or endorse, through actions of their governing boards, certain other substantive principles, mainly economic or financial in nature, that MDB member countries would be expected to incorporate (in a phased manner if necessary) into

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of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 Va. J. Int’l L. 1, 2–3 (2002) (discussing liberal internationalism). However, another of the proposals I have made above is to build a more effective network of cooperation between MDB staff and staff members of other international organizations, NGOs, and national governments. See supra notes 137, 165 and accompanying text. This would tend to boost what has been referred to as the “transgovernmental network” model. Raustiala, supra, at 4–5. Some commentators fear that this latter model might be a dangerous substitute for traditional multilateralism, but others predict that the two approaches—liberal internationalism and transgovernmentalism—will complement each other. Id. at 5–6. For a “history of transgovernmentalism,” see Anne-Marie Slaughter, The Accountability of Government Networks, 8 Ind. J. Global Legal Stud. 347, 350–55 (2001).

178. For information, current as of January 1997, on the number of states participating in most of these treaties, see Weston et al., supra note 52, at 1270–1336.
their own regulatory and legal frameworks. These principles would be
developed by international entities with subject-matter expertise, and
they could include the following:

- the Basle guidelines on capital adequacy\textsuperscript{179}
- the Basle core principles on banking supervision\textsuperscript{180}
- the OECD guidelines on corporate governance\textsuperscript{181}
- the OECD guidelines for multinational enterprises\textsuperscript{182}
- the guidelines for the treatment of foreign direct investment, 
  adopted by the Development Committee of the World Bank\textsuperscript{183}

3. Specific charter amendments

I have proposed in the preceding paragraphs that MDB charters be
amended to include various new provisions. To reiterate, the main points
to be included in the amendments are:

- definition and adoption of institutional principles—transparency,
  participation, legality, competence, and accountability;
- environmental protection—general obligation and incorporation of
  key treaty provisions;
- human rights and social dimensions of development—general
  obligation and incorporation of key treaty provisions;
- governance—general obligation and incorporation of key treaty
  provisions;
- voting power—modification of weighted voting system in the
  MDBs in case of a member country’s egregious departure from
  established standards of economic and financial policies and
  performance;

\textsuperscript{179} See supra note 80.
\textsuperscript{180} Basle Committee on Banking Supervision, Core Principles for Effective Banking
  Supervision (Sept. 1997), \textit{available at} http://www.bis.org/publ/bcbs30a.pdf (last visited Nov. 17,
  2003); \textit{see also} RAMSEY & HEAD, supra note 80, at 9–10 (summarizing the core principles) and
  158–62 (reprinting the core principles as of September 1997).
\textsuperscript{181} Organisation for Economic Co-operation and Development, OECD Principles of Corporate
  17, 2003).
\textsuperscript{182} Organisation for Economic Co-operation and Development, \textit{The OECD Guidelines for
  Multinational Enterprises}, June 27, 2000, 40 I.L.M. 237. Information about the guidelines and other
\textsuperscript{183} \textit{See} World Bank, Report to the Development Committee and Guidelines on the Treatment
  of Foreign Direct Investment, Sept. 21, 1992, 31 I.L.M. 1363 (reflecting the findings of a working
  group established by the Presidents of the World Bank, the IFC, and MIGA and consisting of the
  General Counsel of those institutions).
• judicial review—cross reference to statute establishing an
   International Tribunal for Multilateral Development Banks.

In the Appendix to this Article I have proposed the actual language
that might be used in effecting the sorts of amendments summarized
above. For that purpose, I have used the AsDB Charter as a model. The
specific format I have proposed in the Appendix is a Draft Protocol to
the AsDB Charter.

V. CONCLUDING OBSERVATIONS

I have covered a great deal of ground in this Article. In these closing
paragraphs I shall (i) offer a quick summation of key points I have tried
to make and (ii) identify several related matters that I have left out of my
analysis in order to avoid exhausting both myself and my reader.
I have tried to establish these points in the preceding pages:

• A cacophony of criticisms. The main criticisms directed toward the
   MDBs—what I have called the Fourteen Points of criticism—may
be conveniently divided into three categories: substantive,
procedural or institutional, and constitutional. Some of the
criticisms, especially the constitutional criticisms, reflect the fact
that the MDBs have gradually taken on attributes of global
regulatory bodies with vastly greater influence now than in earlier
years.

• Wheat and chaff. I find some of the criticisms unpersuasive because
   they rest on misinformation, provinciality, or what I regard as faulty
reasoning. However, I generally endorse several of the criticisms
levelled at the MDBs—namely, the claims that (despite some strides
forward) the MDBs still pay too little attention to environmental
and social concerns, still suffer from a lack of transparency in their
operations, reflect a fundamental asymmetry between rich-country
and poor-country obligations, suffer from weaknesses in staffing
and management, have yet to broaden their focus adequately
beyond narrowly economic matters, and remain too unaccountable
in a political environment that increasingly requires democratic
influence.
• **A fourth generation of MDBs.** Instead of regarding these (valid) criticisms as fatal to the future of the MDBs, I recommend that several legal steps—some of which require formal amendment of the MDBs’ charters—should be taken to manage and direct the evolution of MDBs into a “fourth generation.” Specifically, I suggest (i) requiring the institutions to give ever more attention to environmental and social concerns by adopting a broader view of “economic development” and by linking MDB membership to the acceptance of key treaty provisions relating to environmental protection and human rights; (ii) taking further steps to permit and facilitate public participation in MDB decision-making; (iii) adopting mechanisms to offset the asymmetry that results from the MDBs’ weighted voting systems and from their use of loan conditionalities; (iv) acting to ensure that the MDB staffs are adequate in their size, their competence, and their access to outside resources to carry out the responsibilities given to them; and (v) providing for external judicial review of MDB operational decisions and charter interpretation through a new tribunal for MDBs.

I realize how difficult some of these recommendations might be to implement. However, I see the MDBs at a crossroads, with only two possible futures: change or die.

I also realize that these recommendations, stated as they are in rather abbreviated terms, will trigger numerous related questions. I shall deal summarily with a few of them here.

• **Fear of world government?** Do I worry that my recommendations to expand the authority of the MDBs would raise a danger of what some populists (especially American isolationists) would denounce as world government? Yes, some. However, I worry much more about national governments than about world government. That is, I worry that continuing to permit a mish-mash of national authorities—many of them incompetent, ill-chosen, and unconcerned with the fate of the people they should be serving—will lead to chaos in a world that demands increasingly integrated solutions to global problems. In my view, placing more authority with international financial institutions, but subject to stringent safeguards and principles that protect against abuse, promises more benefit than cost.
• Exporting Western values? Do I worry that my recommendations amount to an endorsement of one set of values—the liberal economic and political values of powerful Western countries that (temporarily) enjoy a position of domination, in part because of past misconduct—and disregard values of other countries and cultures? Yes, some. I am not unmoved by the arguments that some cultures genuinely hold different, non-Western views on such matters as individual human rights, environmental protection, participatory government, and economic ideology. On balance, however, I believe the basic norms that I have suggested the MDBs expressly adopt and apply in their operations represent common ground for most countries. For example, the treaty commitments that I would link to MDB membership (by cross-references in the charters as amended) are ones that most countries in the world have already accepted anyway. My proposal would merely require each such country to put its money where its mouth is. If imposing such a requirement forces a reconsideration of the content of such treaties in order to reach a compromise between Western and other, non-Western sets of values—akin to what some comparative law scholars have called a “rapprochement” between legal traditions—so much the better.

• Role of the United States? Given the traditional reluctance (some would say recalcitrance) that the United States has shown recently in participating in international regimes, what are the chances that a U.S. administration or a U.S. Congress would support my recommended changes? After all, some of the changes—to modify the weighted voting system, for example, or to require all member countries (not just borrowers) to report on economic and financial performance—might be regarded as inconsistent with U.S. interests. I believe that such a view would be short-sighted, and I have formulated some of my recommendations for change in such a way

184. See René David & John E.C. Brierley, Major Legal Systems in the World Today 332 (3d ed. 1985) (observing that in some respects “the Romanist [legal] system of the European continent” might be better prepared than English common law to deal with contemporary problems and that “[a] rapprochement may thus come about between English and continental laws and some see signs of it already”); Merryman, supra note 68, at 158 (referring also to a possible rapprochement between civil law and common law).

185. See Head, Benefits of Multilateralism, supra note 75, at 2–3 (enumerating the “side trips” that the United States has taken away from the road of multilateralism, especially during the Reagan years and the early years of the second Bush presidency).
that the United States should be embarrassed to object to them. I hope that, with more enlightened political leadership than this country currently enjoys, the United States could be a strong and effective advocate for creating a fourth generation of MDBs that would practice and promote values central to American tradition—transparency, participation, legality, competence, and accountability. Over the last six decades, the United States has repeatedly played a central role in the establishment of MDBs and other international financial institutions, demonstrating thereby its commitment to finding multilateral, cooperative solutions to international problems. Now the United States has an opportunity to play a key role in modernizing these institutions for the new century.

• For richer or for poorer? Much earlier in this Article I announced that I am an internationalist, in the sense that I believe international cooperative efforts—through multilateral entities and initiatives—hold the best hope for civilization to survive the current age, and in the long run offer the only hope for humanity itself to survive. I did not, however, expand on this point, nor did I explain why such international cooperative efforts should necessarily be global in character, encompassing the entire international community in all its glorious and frustrating diversity—from the rich industrialized countries to the economically less developed countries to those that are depressingly derelict. I shall leave a discussion of those views for another day, and another article, and simply offer at this stage these broad propositions: I believe that all countries, all peoples, are bound together in a complex intercultural marriage of interests. Our fate—for better or for worse, for richer or for poorer—is a collective one, and divorce is not an option until we find new homes, on other planets. In the meantime, here on our home planet, we must live together cooperatively.

186. See supra text accompanying note 75.
VI. APPENDIX

(Draft) Protocol to the Agreement Establishing the Asian Development Bank

The Parties to this Protocol,

Considering that in order to further achieve the purposes of the Agreement Establishing the Asian Development Bank (hereinafter "the Agreement") and to enhance the contribution that the Asian Development Bank (hereinafter "the Bank") can make in facilitating economic development, broadly defined, in the region (as defined in the Agreement), and

Taking into account the initiatives being taken by other multilateral development banks to make similar modifications to their charters and to cooperate in the establishment of certain common policies and institutional arrangements,

Have agreed as follows:

Article 1. Institutional Principles

The Bank shall be governed by the rules of public international law and by the following institutional principles:

1. Transparency, meaning in this context that the greatest practicable degree of disclosure of documents and other information produced by, within, or for the Bank shall be made to the public, and that the proceedings of the Board of Directors and of the Board of Governors shall to the greatest practicable degree be accessible to the public, subject to (i) the need to encourage vigorous and candid exchange of views among the Bank’s staff and (ii) the need to afford appropriate respect to confidentiality where necessary to protect legitimate interests of private parties.

2. Participation, meaning in this context that the Bank shall invite public participation in its development and implementation of policies pertinent to the Bank’s operations, and to this end shall, inter alia, (i) accept public comment on proposed actions in this regard and (ii) facilitate the participation by, and take into account the views of, nongovernment organizations.
3. Legality and the rule of law, meaning in this context that the Bank (i) shall state its policies clearly and act consistently with them and (ii) shall take into account in its operations and governance the performance of all members of the Bank in honoring their international legal commitments, including the treaty commitments referred to in Articles 5 and 6 of this Protocol.

4. Competence, meaning in this context that the Bank shall (i) place paramount emphasis, in the engagement and advancement of Bank staff, on ensuring their competence as international civil servants in the discharge of their duties and (ii) support efforts by national authorities to ensure that persons appointed as Directors and Governors have suitable professional qualifications necessary to meet their responsibilities.

5. Accountability, meaning in this context that the Bank shall (i) regard itself as accountable to its members and their people, as reflected in part by the establishment of the Tribunal referred to in Article 3 of this Protocol, and (ii) support efforts by national authorities to honor their obligations under the Articles of Agreement of the International Monetary Fund and to adopt and implement the general economic and financial policies prescribed by the Bank in its developing member countries to promote national economic growth and stability.

Article 2. Governance

1. The Bank shall promote through appropriate means, as determined by regulations adopted by the Board of Governors at the recommendation of the Board of Directors, the development in its regional member countries of effective multi-party representative governance.

2. Pursuant to paragraph 1 above, Article 36(2) of the Agreement is hereby amended to read as follows:

   Except in furtherance of the provisions of Article 2, paragraph 1 of the Protocol to the Agreement Establishing the Asian Development Bank, the Bank, its President, Vice-President(s), officers and staff 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 concerned. Only those considerations made applicable by this Agreement and by that Protocol shall be taken into account in their
decisions. Such considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank.

3. The Bank shall take all action necessary and appropriate (i) to ensure that its own operations comport with sound practices of good governance and do not involve corruption or bribery and (ii) to promote within its member countries the adoption of practices and policies to combat corruption or bribery.


1. The Bank shall participate in the work of, and abide by the decisions of, the International Tribunal for Multilateral Development Banks (hereinafter “the Tribunal”), pursuant to the Statute dated \[\text{blank}\] by which that Tribunal is established and governed (hereinafter “the Statute”), and pursuant to any amendments to the Statute to which the Bank may become a party.

2. The Board of Directors shall, subject to any guidelines or regulations that the Board of Governors may wish to establish, appoint judges to the Tribunal, as provided for in the Statute and any amendments thereto to which the Bank may become a party.

3. Article 60(2) of the Agreement is hereby amended to read as follows:

   In any case where the Board of Directors has given a decision under paragraph 1 of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be final unless it is appealed to the International Tribunal for Multilateral Development Banks pursuant to rules governing that Tribunal and applicable to the Bank. Pending the decision of the Board of Governors, the Bank may, so far as it deems necessary, act on the basis of the decision of Board of Directors; and pending the decision of the Tribunal, the Bank may, so far as it deems necessary, act on the basis of the decision of the Board of Governors.
Article 4. Economic and Financial Performance of Members

1. Each member of the Bank shall report annually to the Bank on its own policies and performance on economic and financial matters. The Board of Directors shall, subject to any guidelines or regulations that the Board of Governors may wish to establish, prescribe the criteria, indices, forms, and procedures that members shall apply for this purpose, as well as the standards of economic and financial performance that all members should meet.

2. If the Board of Directors determines, by a vote of the Directors representing not less than a majority of the voting power of the members, that a member of the Bank has departed substantially and chronically from the prescribed standards of economic and financial performance referred to in paragraph 1 above, that member’s voting power shall be partially suspended, in an amount that the Board of Directors determines to be appropriate to reflect the severity of the member’s departure from the prescribed standards; provided, however, that the operation of these provisions shall in no event result in a suspension of more than one-half of a member’s voting power.

3. During the effective period of a partial suspension of a member’s voting power, the number of votes subject to the partial suspension shall not be cast in any organ of the Bank; nor shall they be included in the calculation of the total voting power. Other consequences, if any, of a partial suspension of voting power shall be as prescribed by the Board of Directors at the time that it makes the determination described above in paragraph 2.

4. A partial suspension of a member’s voting power pursuant to paragraph 2 above shall be reversed if the Board of Directors determines, by a vote of the Directors representing not less than a majority of the voting power of the members, that the member has returned to compliance with the prescribed standards for economic and financial performance.

5. Article 33(2) and Article 33(3) of the Agreement are hereby amended by adding in the first sentence of each, after the word “shall,” the phrase, “subject to the provisions of Article 4 of the Protocol to the Agreement Establishing the Asian Development Bank.”

6. The provisions of Article 33 and other Articles of the Agreement referring to voting power and to the casting of votes shall be subject to the provisions of paragraphs 1 through 4 above.
Article 5. Human Rights and Social Dimensions of Development

1. The Bank shall take all action necessary and appropriate to ensure
   (a) that it follows, and sees that any recipient of Bank financial
       assistance follows, adequate procedures to assess in advance
       the social impact of any development projects for which Bank
       financing is used;
   (b) that no person directly affected by any development project for
       which Bank financing is used is worse off than before such
       project was undertaken;
   (c) that it observes and promotes, both in its own operations and in
       its dealings with members, the respect for and protection of
       human rights and fundamental freedoms; and
   (d) that it acts consistently with the rules and principles of
       international law on human rights.

2. Each member of the Bank shall comply with the following treaty
   provisions, subject to (i) any permissible reservation that the member
   has made pertinent to one or more of those provisions upon
   becoming a party to the treaty at issue or (ii) if the member is not a
   party to the treaty in question, any qualifying declaration that the
   member transmits to the Bank on or before the date that the member
   deposits with the Secretary-General of the United Nations its
   instrument of ratification to this Protocol, provided that such
   qualifying declaration would be permissible as a reservation under
   standards used for this purpose by the Secretary-General of the
   United Nations pursuant to Articles 19 through 23 of the 1969
   (a) Articles 1 through 28 of the International Covenant on Civil
       and Political Rights (1967);
   (b) Articles 1 through 7 of the International Convention on the
       Elimination of All Forms of Racial Discrimination (1966);
   (c) Articles 1 through 16 of the Convention on the Elimination of
       All Forms of Discrimination Against Women (1979);
   (d) Articles 1 through 16 of the Convention Against Torture and
       Other Cruel Inhuman or Degrading Treatment or Punishment
       (1984); and
   (e) Articles 1 through 41 of the Convention on the Rights of the
Article 6. Environmental Protection

1. The Bank shall take all action necessary and appropriate to ensure
   (a) that it follows, and sees that any recipient of Bank financial
       assistance follows, adequate procedures to assess in advance
       the environmental impact of any development projects for
       which Bank financing is used;
   (b) that its operations do not create undue harm to the physical,
       human, or cultural environment in the region;
   (c) that it observes and promotes, both in its own operations and in
       its dealings with members, sound principles of environmental
       management and improvement; and
   (d) that it acts consistently with the rules and principles of
       international law on environmental protection and
       management.

2. Each member of the Bank shall comply with the following treaty
   provisions, subject to (i) any permissible reservation that the member
   has made pertinent to one or more of those provisions upon
   becoming a party to the treaty at issue or (ii) if the member is not a
   party to the treaty in question, any qualifying declaration that the
   member transmits to the Bank on or before the date that the member
   deposits with the Secretary-General of the United Nations its
   instrument of ratification to this Protocol, provided that such
   qualifying declaration would be permissible as a reservation under
   standards used for this purpose by the Secretary-General of the
   United Nations pursuant to Articles 19 through 23 of the 1969
   (a) Articles I through XIV of the Convention on International
       Trade in Endangered Species of Wild Fauna and Flora
       (CITES) (1973);
   (b) Articles 1 through 4 of the Vienna Convention for the
       Protection of the Ozone Layer (1985), and pertinent provisions
       of the Protocols thereto and of the Amendments to those
       Protocols;
   (c) Articles 1 through 9 of the Basel Convention on the Control of
       Transboundary Movements of Hazardous Wastes and Their
       Disposal (1989);
   (d) Articles 1 through 20 of the Convention on Biological
       Diversity (1992); and
   (e) Articles 7 through 12 of the Kyoto Protocol on Global
       Warming (1997).