Human Rights, Politics, and the Multilateral Development Banks

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For more than three years, the United States Congress has considered legislation dictating that the United States take certain actions in the World Bank and other multilateral development banks which, opponents have argued, would be incompatible both with United States obligations as a member of these banks and with the apolitical character and development goals of the banks. These actions include earmarking United States contributions to the banks away from particular countries and projects, requiring members of the banks' boards of directors to oppose all loans for such countries and projects, and requiring these directors to oppose loans to countries with records of human rights violations. Some of these congressional demands have been motivated, at least in part, by genuine concern over violations of human rights in countries receiving assistance from the banks.[1] Other motives, however, include the desire of various members of Congress to increase congressional control over foreign policy and particularly over United States foreign assistance;[2] to reduce United States foreign assistance,[3] especi-

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1. *See* 121 Cong. Rec. H12053 (daily ed. Dec. 9, 1975) (amendment offered by Rep. Harkin); 123 Cong. Rec. H3121-28 (daily ed. Apr. 6, 1977) (amendment offered by Rep. Badillo); *see also* Harkin, *Human Rights and Foreign Aid,* in Human Rights and U.S. Foreign Policy 15, 19-21 (P. Brown & D. MacLean eds. 1979).

2. *See Foreign Assistance and Related Agencies Appropriations for 1979, Part 1: Hearings Before the Subcomm. on Foreign Operations of the House Comm. on Appropriations,* 95th Cong., 2d Sess. 637-38 (1978) (statement by Ralph A. Dungan, U.S. Executive Director, Inter-American Development Bank 1978) [hereinafter cited as *1978 House Hearings*]; Balmer, *The Use of Conditions in Foreign Relations Legislation,* 7 Denver J. Int'l L. & Pol'y 197, 199 (1978) [hereinafter cited as Balmer]; Weisbrodt, *Human Rights Legislation and United States Foreign Policy,* 7 (Supplement) Ga. J. Int'l & Comp. L. 231, 238-40 (1977). *See also* sources cited at note 1 *supra* and note 5 *infra.*

3. Balmer, *supra* note 2, at 207-09.

ally foreign assistance provided through the multilateral development banks;[4] and to eliminate any connection between United States funds and the assistance which banks provide to countries and types of projects opposed by certain members of Congress.[5]

This Article discusses the conflict between demands for such actions and the charters of the multilateral development banks, which declare that the decisions of the banks must be based solely on economic considerations and must be guided by the strictly development-related purposes of the banks. Specifically, the Article will examine the validity of the legislation and government policies generated by congressional demands for human rights criteria for multilateral banks' decisions. It will also examine the banks' charters[6] and the rights and obligations

4. *See* 125 Cong. Rec. H6137-45 (cuts in appropriations for Inter-American Development Bank), H6146-47 (cuts in appropriations for International Bank for Reconstruction and Development), H6148-54 (cuts in appropriations for International Development Association), H6166-67 (cuts in appropriations for Asian Development Bank) (all in daily ed. July 18, 1979). *See also* [1977] Cong. Q. Almanac 286; [1978] Cong. Q. Almanac 123; [1979] Cong. Q. Weekly Rep. 1912, 2340, 2788 (comparison of cuts in bilateral aid appropriations with cuts in multilateral aid appropriations).

5. 125 Cong. Rec. H6157-65 (daily ed. July 18, 1979), H7293-7300, H7301-02 (daily ed. Sept. 5, 1979); 124 Cong. Rec. H2491 (daily ed. Apr. 5, 1978) (remarks by Rep. Young), H8555-58, H8563 (daily ed. Aug. 14, 1978); 123 Cong. Rec. H6346-51 (daily ed. June 22, 1977), H6385-88, H6421-22 (daily ed. June 23, 1977).

6. Articles or Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, multilateral, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, *as amended* Dec. 16, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929 [hereinafter cited as I.B.R.D.].

Articles of Agreement of the International Finance Corporation, May 25, 1955, multilateral, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117, *as amended* Sept. 1, 1961, 12 U.S.T. 2945, T.I.A.S. No. 4894, Aug. 25, 1965, 24 U.S.T. 1760, T.I.A.S. No. 7683 [hereinafter cited as I.F.C.].

Articles of Agreement of the International Development Association, Jan. 26, 1960, multilateral, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249 [hereinafter cited as I.D.A.].

Agreement Establishing the Inter-American Development Bank, Apr. 8, 1959, multilateral, 10 U.S.T. 3029, T.I.A.S. No. 4397, 389 U.N.T.S. 69, *as amended*, Jan. 28, 1964, 21 U.S.T. 1570, T.I.A.S. No. 6920, Mar. 31, 1968, 19 U.S.T. 7381, T.I.A.S. No. 6591, Mar. 23, 1972, 23 U.S.T. 2455, T.I.A.S. No. 7437, June 1, 1976, 27 U.S.T. 3547, T.I.A.S. No. 8383 [hereinafter cited as I.A.D.B.].

Agreement Establishing the Asian Development Bank, Dec. 4, 1965, multilateral, 17 U.S.T. 1418, T.I.A.S. No. 6103, 571 U.N.T.S. 123, *as amended*, Nov. 2, 1967, 18 U.S.T. 2935, T.I.A.S. No. 6387 [hereinafter cited as A.D.B.].

of the United States as a member of several of the multilateral banks. At a more general level, this Article is concerned with the validity of attempts by *any* member of the banks to use its participation in the banks to further its own political goals at the expense of the banks' development goals. Thus, the analysis of the recent congressional demands and the resulting United States actions in the banks is intended to define more clearly the limits to which countries may seek to advance their divergent political objectives through the banks.

This Article will analyze, in the order listed above, the actions demanded by members of Congress. Initially, however, the essay will briefly examine the operations of the multilateral development banks and why, in order to achieve their development objectives, they must function as apolitically as possible.

I. Apolitical Standards for Multilateral Development Banks

Multilateral banks promote development in two principal ways. First, they mobilize private capital for development loans by selling their own securities on international capital markets.[7] The banks loan the proceeds from these sales to finance development projects in developing member countries.[8] Loans of this type are called "hard" loans because the interest rates are determined by the rates at which the banks can borrow on international capital markets.[9] *Capital subscriptions* by the governments

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6. (Continued)

Agreement Establishing the African Development Bank, Aug. 4, 1963, (African states only), 510 U.N.T.S. 3 [hereinafter cited as Af.D.B.].

Agreement Establishing the African Development Fund, Nov. 29, 1972, 28 U.S.T. 4547, T.I.A.S. No. 8605, ____ U.N.T.S. ____ [hereinafter cited as Af.D.F.].

7. The World Bank Group, Policies and Operations 29 (1974) [hereinafter cited as Policies and Operations].

8. The World Bank, Questions and Answers 15 (1976).

9. *See* note 6 *supra*: I.B.R.D., art. III, §4(iv); I.F.C., art. III, §3(v); I.A.D.B., art. III, §7(iv); A.D.B., art. 14, para. (vii); Af.D.B. art. 18, §3(a). For the criteria which the World Bank uses to set interest rates, see Policies and Operations, *supra* note 7, at 50-51. Interest rates on loans made recently by the World Bank have ranged from seven to eight percent. World Bank, 1979 Annual Report 142, 186-90 [hereinafter cited as 1979 Annual Report].

of member countries serve mainly as collateral for the sale of these securities.[10] Second, each of the banks

10. A small portion of capital subscriptions can be included in the funds that are lent as hard loans. This portion is known as the "paid in" portion of capital subscriptions. It constitutes the portion of capital subscriptions that members must actually pay into the banks as they subscribe to capital. Members continue to hold the remaining portion, which serves only as collateral. This portion is known as "callable capital." The total amount of outstanding loans may not exceed total capital subscriptions plus reserves and surplus. So far, none of the banks has ever had to make calls upon callable capital. If large defaults on bank loans ever forced one of the banks to make such a call, its members would be required to contribute pro-rata from their holdings of callable capital. *See* note 6, *supra*: I.B.R.D., art. II, §5, art. III, §3 art. IV, §1(a); I.A.D.B., art. I, §§2(b), 4, art. III, §§4, 5(b); A.D.B., art. 4, para. 2; art. 6, paras. 1,6; art. 11; art. 12, para. 1. *See also 1978 House Hearings, supra* note 2, at 417, 694, 927; *Foreign Assistance and Related Programs Appropriations for 1980, Part 6; Hearings Before the Subcomm. on Foreign Operations of the House Comm. on Appropriations*, 96th Cong., 1st Sess. 54-55, 349 (1979) [hereinafter cited as *1979 House Hearings*].

The paid in portion of capital subscriptions has been steadily decreasing since the founding of the banks. The charters specified the portion of original members' initial capital subscriptions that had to be paid in. In the case of the International Bank for Reconstruction and Development (I.B.R.D.), this amount was twenty percent. The boards of governors of the banks, *see* text accompanying note 58, *infra*, have determined what portion of subsequent increases in the banks' capital stock must be paid in. In 1975, 1976, and 1977 the board of governors of the Inter-American Development Bank (I.A.D.B.), Asian Development Bank (A.D.B.), and I.B.R.D., respectively, approved resolutions calling for capital increases that would sustain the lending activities of these banks until the end of the 1970s. These resolutions called for approximately ten percent of the increase in capital subscriptions to be paid in. In 1978, 1979, and 1980, the boards of governors of these banks passed similar resolutions calling for new capital increases to maintain lending activities into the early 1980s. The A.D.B. resolution again requires ten percent of the new increases in capital subscriptions to be paid in. However, the I.B.R.D. and I.A.D.B. resolutions require that only 7.5 percent of the new increases be paid in. *See 1979 House Hearings* 115 (I.B.R.D. 1977 increase), 240 (A.D.B. 1976 increase), 291-92, 302 (I.A.D.B. 1975 and 1978 increases); statement by Russell Munk, Assistant General Counsel, United States Treasury Department, Dec. 15, 1980 (1980 I.B.R.D. and A.D.B. increases). In 1980, the U.S. Congress authorized U.S. participation in the I.A.D.B. and A.D.B. only at lower levels than those agreed upon by the boards of governors of those institutions. Pub. L.

has a special "soft loan" facility to provide "credits" to finance development projects in the poorest of the developing countries. These credits bear only a low service charge and have long maturity and grace periods.[11] Most of the financing for these credits comes from *direct contributions*, usually referred to as "share subscriptions," to the soft loan facilities by the governments of the member countries.[12] In this Article, contributions to the resources of both hard and soft loan facilities will be referred to as "subscriptions."

The United States is a member of six multilateral development institutions,[13] including the three institutions which comprise the World Bank:

> (1) the International Bank for Reconstruction and Development (I.B.R.D.)--the hard loan facility of the World Bank,
>
> (2) the International Development Association (I.D.A.)--the soft loan facility of the World Bank, and
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> (3) the International Finance Corporation (I.F.C.) --the soft loan facility of the World Bank designed to make equity investments and to provide loans to help private entrepreneurs in developing countries.[14]

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10. (Continued)
No. 96-259 (1980). The authorization request for the latest I.B.R.D. increase had not been presented to Congress by the end of 1980. *See* [1979] Cong. Q. Alumnac 159; [1980] Cong. Q. Weekly Rep. 1397-98, 3452, 3678.

11. *See* note 6 *supra*: I.D.A., art. V, §2(b); I.A.D.B., art. IV, §1; A.D.B., art. 19; Af.D.F., art. 16, para. 2. Credits by the soft loan facility of the World Bank bear an annual service charge of 3/4 of one percent and usually have ten year grace periods and forty year maturity periods. 1979 Annual Report, *supra* note 10, at 191-94. *See also* Policies and Operations, *supra* note 7, at 51.

12. *See* note 6 *supra*: I.D.A., art. II, §2, art. V, §2; I.A.D.B., art. IV, §§3, 4; A.D.B., arts. 19, 20; Af.D.F., arts. 5-9, 14. *See* Policies and Operations, *supra* note 7, at 35-41.

13. For a brief description of these institutions, see *1979 House Hearings*, *supra* note 10, at 114-15, 134-35, 150, 180-81, 239-42, 301-02.

14. Unlike I.B.R.D. loans, I.F.C. loans need not be guaranteed by the governments of the countries in which the projects will be carried out. *See* note 6 *supra: compare* I.B.R.D., art. III, §4(i) *with* I.F.C., art. III.

It is also a member of three regional development institutions, which lend on a regional, rather than world-wide, scale.

(1) the Inter-American Development Bank (I.A.D.B.),

(2) the Asian Development Bank (A.D.B.), and

(3) the African Development Fund (Af.D.F.). The Af.D.F. is the soft loan arm of the African Development Bank (Af.D.B.). Membership in the Af.D.B. itself is currently limited to African countries.15

The charters of the banks declare that their goals are to promote economic development, that their decisions are to be influenced solely by economic considerations, and that they are multilateral institutions in the sense that they are to be independent of the control of any one member and that all members are to have a voice in determining the policies of the banks. Given their goals and structure, it is important that the banks function apolitically. Private investors in the banks' securities need to have confidence that their money is being managed rationally and according to sound business principles.17 A number of relatively small developed countries, including Sweden, Canada, and the Netherlands currently rely on

15. However, negotiations are now under way for membership of the United States and other non-African countries in the Af.D.B. *1979 House Hearings, supra* note 10, at 168 (statement by C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs).

This Article will refer to the World Bank, I.A.D.B., A.D.B., and Af.D.F./F., collectively as "the banks." This term will be used rather loosely. It will sometimes refer to the World Bank and its component institutions as a unit, and it will at other times refer to the I.B.R.D. or those other institutions individually. Also, it will sometimes include the Af.D.B. and at other times only those institutions in which the United States has membership.

16. *See* notes 58-62, 65, 66, 68 *infra*.

17. *See Bretton Woods Agreements Act: Hearings on H.R. 3314 Before the Senate Committee on Banking and Currency*, 79th Cong., 1st Sess. 6-8 (1945) (statement of Henry Morgenthau) [hereinafter cited as *1945 Senate Hearings*].

the banks to manage and coordinate the greater portion of their foreign aid contributions--contributions which each country would otherwise be forced either to manage separately or to transfer to another international body, such as the European Economic Community[18] (E.E.C.). The banks sometimes insist that borrowing countries carry out internal reforms as a condition for receiving development assistance. If the countries which are called upon to carry out these reforms perceive that the banks are acting on the basis of objective economic principles rather than political sentiment, they will be more willing to carry out these reforms. These states would be reluctant to carry out such reforms if they viewed the banks as mere conduits for the demands of particular developed member countries, or if they perceived the banks to be demanding internal reforms purely in order to harmonize their economic policies with the political ideologies of most developed member countries.[19]

The banks will be better able to carry out their work of coordinating aid flows from various countries, of planning development projects, and of executing those projects if they do not become embroiled in political disputes. The banks are involved with member countries having a wide range of ideologies and are themselves managed and staffed by persons from countries of divergent political interests.[20] As long as the goals that inform the banks' decisions are economic ones, a common basis for agreement will exist both between the banks and member countries and within the banks. Once the banks move away from decisions based on solely economic criteria, however, disagreement on appropriate non-economic goals, and on the means of pursuing them, may become a source of conflict threatening the banks' fundamental economic objectives.

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18. E. Mason & R. Asher, The World Bank Since Bretton Woods 493, 506, 509 (1973) [hereinafter cited as E. Mason & R. Asher].

19. R. Oliver, Early Plans for a World Bank 44-45 (1971) [hereinafter cited as R. Oliver, Early Plans]; E. Mason & R. Asher, *supra* note 18, at 431-34.

20. The charters declare that subject to the paramount importance of securing the highest standards of efficiency and competence, due regard is to be paid to the recruitment of personnel on as wide a geographic basis as possible. *See* note 6 *supra*: I.B.R.D., art. V, §5(d); I.F.C., art. IV, §5(d); I.D.A., art. VI, §5(d); I.A.D.B., art. VIII, §5(e); A.D.B., art. 36, para. 6; Af.D.B., art. 37, para. 5; Af.D.F., art. 31, para. 1; *see also* E. Mason & R. Asher, *supra* note 18, at 66-72 (giving the regional composition of the World Bank's staff in the early 1970's).

Not all official development assistance from countries such as the United States must be allocated and managed on an apolitical basis. A large portion of United States official development assistance is *bilateral assistance* which the United States government provides directly to recipient countries through agencies such as the United States Agency for International Development.[21] There is no law prohibiting political criteria for United States decisions concerning bilateral assistance. The United States and other countries are free to allocate their official development assistance between bilateral and multilateral agencies, such as the banks, in any way they see fit.

From the point of view of donor countries, such as the United States, one advantage of bilateral assistance is that the donor can exert greater control over direct aid than over assistance channeled through the multilateral development banks. However, channeling assistance through the banks also has advantages. First, the banks can mobilize and coordinate development funds from many national governments. Second, the mechanism for financing hard loans provides a unique way to mobilize private capital for development purposes. The banks can borrow wherever interests rates are lowest. Moreover, the governments of member countries currently need pay into the I.B.R.D. and the hard loan facilities of the I.A.D.B. and A.D.B. only a fraction of the amount which these institutions can lend as hard loans.[23] Thus, for every dollar of capital stock subscribed by members, these banks can increase by at least a factor of ten the amount of funds available for development loans. Third, unlike much bilateral assistance,[24] loans by the banks are not tied.

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21. In 1975, United States *bilateral* official development assistance was $2,941 million while United States assistance channeled through the banks equaled $1,066 million. S. Rep. No. 159, 95th Cong., 1st Sess. 20, *reprinted in* [1977] U.S. Code Cong. & Ad. News 2686.

22. Policies and Operations, *supra* note 7, at 29-35. The World Bank has recently borrowed exclusively on Western European and Japanese capital markets. *1979 House Hearings, supra* note 10, at 657 (statement by Edward Fried, United States Executive Director to World Bank, that recent borrowing by World Bank has all been on Western European and Japanese capital markets).

23. *See* note 9 *supra*. *See* Table (Appendix), line 8.

24. E. Mason & R. Asher, *supra* note 18, at 209, 505.

In other words, goods and services which are financed by bank loans are to be obtained from the most economical source. The banks are prohibited from requiring that the proceeds of their loans be spent to procure goods or services from any particular country.[25]

Fourth, the banks help to make the allocation and management of development resources a matter of cooperation and consensus between members, rather than a situation in which donor countries dictate terms to recipient states.[26] Finally, the banks are sometimes able to induce recipient countries to undertake necessary internal reforms which would be politically unacceptable if demanded by a donor country offering bilateral assistance.[27]

With the exception of the prohibition against tied loans, these advantages depend to a great extent upon the banks' functioning as apolitical institutions.[28] Thus, the very fact that members may not control multilateral assistance for political purposes gives multilateral assistance several advantages over bilateral assistance. If the apolitical character of the banks is undermined, those advantages will disappear, and the banks will function less effectively as development institutions. Furthermore, to the extent that the banks operate as effective development institutions, there will surely be political benefits for developed members. Insofar as the banks effectively promote economic development, they will raise the standard of living of poor persons in developing countries and thus increase political stability in those countries;[29] foster cooperation between individuals and institutions in developing and developed countries, and thus extend Western influence even in situations where bilateral political cooperation between particular members

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25. *See* note 6 *supra*: I.B.R.D., art. III, §5(a); I.F.C., art. III, §3(iii); I.D.A., art. V, §1(f); I.A.D.B., art. III, §9(a); A.B.D., art. 24, Af.D.B. art. 27; Af.D.F., art. 15, para. 4(a). Note, however, the power of members to restrict the use of their currencies in certain circumstances. *See* notes 76-77 *infra*.

26. J. White, Regional Development Banks 16-17 (1972).

27. *See* note 19 *supra*.

28. *See* text accompanying notes 16-20 *supra*.

29. *See, e.g., 1979 House Hearings, supra* note 10, at 735, 740, 872 (statements by Fred Bergsten); 125 Cong. Rec. H6269-72 (daily ed. July 19, 1979) (statements by Reps. Long, Solarz, and McHugh).

is impossible;[30] and improve the welfare of the poor in developing countries, not only in material ways, but also in ways that implicate notions of social justice and human rights.[31]

II. Earmarking Subscriptions

Numerous charter provisions forbid members to attempt to earmark subscriptions and prohibit the banks from accepting such earmarked subscriptions. In examining those charter provisions, this section will also con-

30. *Id.*; E. Mason & R. Asher, *supra* note 18, at 590, 594. *The Economist* of London vividly states the argument that effective foreign assistance (multilateral or bilateral) by Western countries is an important and too often overlooked means of promoting long-term Western political interests--even in countries whose policies are not always aligned with those of most Western nations:

> Afghanistan was not lost into the Russian military protectorate in its tulip-dotted valleys or in the rough fingers of the Hindu Kush. It was lost by the failing deterrence of America. Nor did it just fall out of the blue while the free world slept off Christmas in the dying days of the 1970s. Afghanistan's slide away from being one of those useful if uneasy bulwarks on Russia's southern border began in the early and mid-1970s. It began when congressional committees and a Vietnam-defensive administration ignored the appeals of American ambassadors in Kabul. It began when no follow-up to America's large aid effort in the Hellmand River project was forthcoming, when the Peace Corps which worked so well around Kandahar and in other regions was allowed to fade out. It began when the de facto division of independent Afghanistan into two spheres of peaceful contest--a northern tier where Russia helped this appallingly badly run country, while America and others helped in the south--was dismantled unilaterally by American abdication from its southern tier and from supplying arms. An ineffectual king was toppled, coup followed coup, corruption deepened, ministries went from lassitude to decay, tribal rebels of centuries' standing (and brigands interested mainly in loot) adopted the modern counter-reformation banner of Islam. Outside "help" became all-Russian and increasingly unpeaceful in intent.

The Economist (London), Jan. 5-11, 1980, at 7.

31. *See* text accompanying notes 170-77 *infra*.

sider the possible bases for *permitting* members to earmark and banks to accept earmarked subscriptions.

A. *Legislative Background*

During each of the past three years, the United States House of Representatives has passed amendments to the annual foreign assistance appropriations bills which would prohibit United States appropriations for the banks from being used to finance loans for certain countries or types of projects. Vietnam and Cuba have consistently been targets of these amendments,[32] despite the fact that Cuba is not a member of any of the banks and is thus not eligible to receive assistance from them. Angola, Mozambique, Uganda, Laos, and Cambodia were also targets in 1977.[33] The stated reasons for imposing these restrictions are as follows:

> (a) Some of these countries are enemies of the United States. In particular, Vietnam was singled out because it has "caused so much grief in thousands and thousands of homes in this land of ours."[34]
>
> (b) Multilateral assistance will be seen as a form of reparations.[35]
>
> (c) United States tax dollars should not be used to aid countries whose policies are opposed to those of the United States.[36]

32. 123 Cong. Rec. H6346-51 (daily ed. June 22, 1977), H6421-22 (daily ed. June 23, 1977); 124 Cong. Rec. H8555-58, H8563 (daily ed. Aug. 14, 1978); 125 Cong. Rec. H6157-65 (daily ed. July 18, 1979), H7293-7300, H7301-02 (daily ed. Sept. 5, 1979).

33. 123 Cong. Rec. H6346-51 (daily ed. June 22, 1977), H6385-88 (daily ed. June 23, 1977).

34. 123 Cong. Rec. H6347 (daily ed. June 22, 1977) (statement by Rep. Ashbrook); 124 Cong. Rec. H8555 (daily ed. Aug. 14, 1978) (statement by Rep. Young).

35. 123 Cong. Rec. H6347 (daily ed. June 22, 1977) (statement by Rep. Gilman).

36. For example, restrictions against Angola and Mozambique were supported on the grounds that the governments of those states involved themselves in the affairs of other nations and sought to impose Mr. Mugabe or Mr. Nkomo on the Rhodesian people. *Id.* at H6385, H6388 (daily ed. June 23, 1977) (statements by Reps. Crane and Bauman).

(d) Laos and Vietnam have been uncooperative in accounting for United States servicemen missing in action.[37]

(e) Preventing the banks from using United States appropriations to assist these countries will be a way to demonstrate United States objections to the policies of these countries.[38]

(f) These countries have bad human rights records. One congressman said that while they were not the only countries with bad human rights records, it would be better to try to cut off multilateral assistance to some human rights violators than to none at all.[39]

(g) Because the United States has cut off direct (bilateral) assistance to these countries, it should, to be consistent, cut off indirect (multilateral) assistance to them as well.[40]

(h) The banks do not permit congressmen to attend their board meetings.[41]

(i) Multilateral assistance allows the President too much discretion vis-à-vis Congress in the field of foreign assistance; in particular, Congress should give specific approval for United States lending through the banks just as it must give specific approval for United States bilateral aid programs.[42]

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37. 123 Cong. Rec. H6347 (daily ed. June 22, 1977) (statement by Rep. Kemp); 124 Cong. Rec. H8557 (daily ed. Aug. 14, 1978) (statement by Rep. Dornan).

38. 123 Cong. Rec. H6347 (daily ed. June 22, 1977) (statement by Rep. Gilman).

39. *Id.* at H6351 (statement by Rep. Harkin); *see generally* notes 32, 33 *supra.*

40. 123 Cong. Rec. H6350 (daily ed. June 22, 1977) (statement by Rep. Badham).

41. *Id.* at H6347 (statement by Rep. Bauman).

42. 123 Cong. Rec. H6385 (daily ed. June 23, 1977) (statement by Rep. Crane).

In addition, in 1977 the House of Representatives passed an amendment to the foreign assistance appropriations bill to prevent United States subscriptions to the banks from being used to encourage "production of sugar, palm oil or citrus crops, if the United States is a producer of the same, similar or competing, agricultural commodity."[43] The avowed purpose of this amendment was to protect United States producers of these products.

B. *Charter Prohibitions Against the Banks Accepting Earmarked Funds and Against Member Countries Attempting to Earmark Funds*

The charters[44] of the banks clearly state member nations rights and obligations. The United States Congress has not enacted the charters as a whole into United States law,[45] nor has the Senate ratified the charters as treaties. However, the charter of each bank contains a provision which requires, as a precondition to membership by any country, that the government of that country accept the charter in accordance with its laws and take all steps necessary to enable it to carry out its obligations under the charter.[46] In the case of each bank, the Congress has passed legislation authorizing the President to accept membership for the United States in that bank as provided by the charter of that bank.[47] Thus, while the charters are not constitutionally laws of the United States, they are statements of rights and obligations which the United States has pledged to uphold and which the Con-

43. *Id.* at H6413-14 (amendment offered by Rep. Moore).

44. *See* note 6 *supra.*

45. The Congress has explicitly incorporated into the law of the United States only those charter provisions that deal with the privileges and immunities of the banks. 22 U.S.C. §§ 282g (I.F.C.), 283g (I.A.D.B.), 284g (I.D.A.), 285g (A.D.B.), 286h (I.B.R.D.), 290g-7 (Af.D.F.) (1976).

46. *See* note 6 *supra*: I.B.R.D., art. XI, §2(a); I.F.C., art. IX, §2(a); I.D.A., art. XI, §2(a); I.A.D.B., art. XV, §1(a); A.D.B., art. 57.

47. 22 U.S.C. §§ 282 (I.F.C.), 283 (I.A.D.B.), 284 (I.D.A.), 285 (A.D.B.), 286 (I.B.R.D.), 290g (Af.D.F.).

gress has confirmed.[48] While there are few judicial decisions dealing with the force of the charters of the banks and the International Monetary Fund (I.M.F.) in United States law, those that do exist acknowledge the binding force of these charters on the United States and on governmental institutions within the United States.[49]

The charter of each bank contains five stipulations which are relevant to the earmarking issue:

(1) All decisions of the banks must relate to their development purposes;[50]

(2) Only economic considerations are relevant to the banks' decisions;[51]

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48. During the Senate Hearings on the Bretton Woods Agreements Act (22 U.S.C. § 286 and 31 U.S.C. § 822(a) (1976)), the act authorizing the President to accept membership for the United States in the I.B.R.D. and the International Monetary Fund (I.M.F.), the Department of State analyzed many previous international agreements that the Congress merely authorized the President to accept but did not formally incorporate into the laws of the United States. That analysis concluded that United States participation in the I.B.R.D. and I.M.F. need not be effected by treaty, but could instead be effected by an act of the Congress authorizing the President to sign the charters of those institutions, and that United States participation would not involve an unlawful delegation of legislative power to those institutions or to foreign countries.

49. *See* International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables & Radio, Inc., 17 F.C.C. 450 (1953), *excerpted in* F. Kirgis, International Organizations in Their Legal Setting 342-44 (1977); Banco do Brasil, S.A. v. A. C. Israel Commodity Co., Inc., 12 N.Y. 2d 371, 190 N.E. 2d 235, 239 N.Y.S. 2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964); and Banco Frances e Brasileiro S.A. v. John Doe no. 1, 36 N.Y. 2d 592, 331 N.E. 2d 502, 370 N.Y.S. 2d 534 (1975), *cert. denied*, 423 U.S. 867 (1975).

For further discussion of the force which United States courts have accorded the Bretton Woods Agreements under United States law, *see generally* J. Gold, The Fund Agreement in the Courts (1962); *see also* J. Gold, Voting and Decisions in the International Monetary Fund 108 n. 21 (1972) [hereinafter cited as J. Gold, Voting and Decisions]. For more recent cases than those cited at *id.*, *see* Menendez v. Saks & Co., 485 F.2d 1355, 1366-67 (2d Cir. 1973); John Sanderson & Co. (Wool) Pty., Ltd. v. Ludlow Jute Co., Ltd., 569 F.2d 696, 699 (1st Cir. 1978).

50. *See* note 55 *infra*.

51. *See* note 57 *infra*.

(3) Authority over the use of the banks' resources rests with their boards of directors;[52]

(4) Members must not attempt to influence the presidents and staffs of the banks in the discharge of their duties;[53]

(5) Members may not restrict the use of their currencies by the banks.[54]

Each stipulation, with its implications for legislative attempts to earmark funds, is discussed below.

1. *All Decisions of the Banks Must Relate to Their Development Purposes.*

The charters of the banks declare that the purposes of the banks all involve encouraging economic development in developing member countries, and require that the banks be guided by these purposes in all their decisions.[55] The charters of the I.A.D.B. and the

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52. *See* notes 61, 62 *infra.*

53. *See* note 73 *infra.*

54. *See* note 74 *infra.*

55. *See* note 6 *supra*: I.B.R.D., art. I; I.F.C., art. I; I.D.A., art. I; A.D.B., arts. 1, 2, 8; *cf.* I.A.D.B., art. I (as amended), art. III, § 1; Af.D.B., arts. 1, 2; Af.D.F., arts. 2, 14 (mentioning contributions to social development). For example, the A.D.B. charter declares:

> The purpose of the Bank shall be to foster economic growth and co-operation in the region of Asia and the Far East (hereinafter referred to as the "region") and to contribute to the acceleration of the process of economic development of the developing member countries in the region, collectively and individually.
>
> . . .
>
> To fulfill its purpose, the Bank shall have the following functions:
>
> (i) to *promote* investment in the region of public and private capital for development purposes;
>
> (ii) to utilize the resources at its disposal for *financing development* of the developing member countries in the region, giving priority to those . . . projects and programs which will contribute most effectively to the harmonious economic growth of the region as a whole, and having special regard to the needs of the smaller or less developed member countries in the region;

A.D.B. make this last obligation even clearer by declaring that the resources and the facilities of these banks shall be used *exclusively* to implement the purposes and functions set forth in the charters.[56]

It is clear from the debates in the House of Representatives that the earmarking amendments directed against particular countries were not intended to serve development purposes. If implemented, their effect would be inimical to the banks' development purposes because they would hinder the operations of the banks and undermine the common basis for agreement both within the banks and between the banks and member countries.

Similarly, there is no development purpose to be served by earmarking in order to preserve the market share of producers of particular agricultural commodities. Channeling assistance away from the production of commodities which are in surplus on world markets may well serve a legitimate development purpose, but this purpose must be distinguished from actions designed to preserve the market share of producers of commodities which are not in surplus.

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55. (continued)

> (iii) [to assist members in the region] in the *coordination of their development policies* and plans with a view to achieving better utilization of their resources, making their economies more complementary, and promoting the orderly expansion of their foreign trade, in particular, intra-regional trade;
>
> (iv) to *provide technical assistance* for the preparation, financing and execution of development projects and programs, . . .
>
> (v) to *co-operate* . . . with the United Nations . . . and with other international institutions, as well as national entities whether public or private, which are concerned with the investment of development funds in the region, . . .
>
> (vi) to undertake such *other activities* and provide such other services as may advance its purpose.

A.D.B., art. 2 (emphasis supplied).

56. *See, e.g.*, note 6 *supra:* I.A.D.B., art. III, §1; A.D.B., art. 8.

2. *Only Economic Considerations are Relevant to the Banks' Decisions.*

All of the charters declare in nearly identical language that:

> The Bank and its Officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned.
>
> Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.[57]

It is clear that many of the congressional proposals for earmarking were motivated by the political character of certain members of the banks. If the banks were to implement the amendments, whether merely symbolically, by segregating United States contributions, or actually by reducing assistance to the target countries, they would discriminate against these countries on the basis of their political character. Moreover, the proposed amendments are not at all based upon economic considerations relevant to the purposes of the banks. Were the banks to implement these amendments on the ground that they were being forced to do so, their action would make a mockery of the letter and spirit of the charters as well as the notion that the decision-making authority of the banks is independent of the will of any particular member country. The banks cannot maintain their integrity as independent institutions if they permit themselves to be forced into actions or policies their charters would not permit them to undertake voluntarily.

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57. *See* note 6 *supra*: I.B.R.D., art. IV, §10. *See also* I.F.C., art. III, §9; I.D.A., art V, §6; Af.D.B., art. 38, para. 2; Af.D.F., art. 21. *See generally* I.A.D.B., art. III, §1(f); A.D.B., art. 36, para. 2.

3. *Authority Over the Use of the Banks' Resources Rests with Their Boards of Directors.*

The powers of each bank are vested in its *board of governors.*[58] Each member country can appoint one governor to the board;[59] members are usually represented by their ministers of finance.[60] Responsibility for the conduct of the bank's general operations rests with the bank's *board of directors*,[61] to which the board of governors may delegate nearly all its powers, with the notable exception of the powers to admit or suspend members and to increase or decrease the capital stock.[62] A member's cumulative subscriptions to a bank determines whether that member will be able to *appoint* a director or whether it must join a coalition of other countries to *elect* a director;[63] in all the banks except the Af.D.F., the United States' subscriptions are sufficient to permit it to appoint its own director.[64]

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58. *See* note 6 *supra*: I.B.R.D., art. V, §2(a); I.F.C., art. IV, §2(a); I.D.A., art. VI, §2(a); I.A.D.B., art. VIII, §2(a); A.D.B., art. 28, para. 1; Af.D.B., art. 29, para. 1; Af.D.F., art. 23, para. 1.

59. *See* note 6 *supra*: I.B.R.D., art. V, §2(a); I.F.C., art. IV, §2(b); I.D.A., art. VI, §2(b); I.A.D.B., art. VIII, §2(a); A.D.B., art. 27, para. 1; Af.D.B., art. 30, para. 1; Af.D.F., art. 24, para. 2.

60. *See, e.g.*, Asian Development Bank, Basic Information 22-30 (1977).

61. *See* note 6 *supra*: I.B.R.D., art. V, §4(a); I.F.C., art. IV, §4(a); I.D.A., art. VI, §4(a); I.A.D.B., art. VIII, §3(a); A.D.B., art. 31; Af.D.B., art. 32; Af.D.F., art. 26.

62. *See* note 6 *supra*: I.B.R.D., art. V, §2(b); I.F.C., art. IV, §2(c); I.A.D.B., art. VII, §2(b); A.D.B., art. 28, para 2; Af.D.B., art. 29, para. 2; Af.D.F., art. 23, para. 2. *Cf.* I.D.A., art. VI, §2(c) (admit or suspend members or "authorize additional subscriptions and determine the terms and conditions relating thereto").

63. Except in the case of the Af.D.F., only subscriptions to each bank's *hard loan* facility determine whether a member may *appoint* a director to that bank. *See* note 6 *supra*: I.B.R.D., art. V, §4(b), Schedule B; I.F.C., art. IV, §4(b); I.D.A., art. VI, §4(b); I.A.D.B., art. VIII, §3(b), Annex C; A.D.B., art. 30, para. 1; Af.D.B., art. 33, para. 1, Annex B; Af.D.F., art. 27, para. 2, Schedule B.

64. S. Rep. No. 159, 95th Cong., 1st Sess. 69, *reprinted in* [1977] U.S. Code Cong. & Ad. News 2670, 2732.

Each director's *voting power* is determined by the voting power of either the country which appointed him or the countries which elected him.[65] A country's voting power increases with its contributions to the general resources of the bank.[66] The United States director in the I.A.D.B. has sufficient voting power to veto managerial decisions, including loan decisions, in the soft loan facility of the I.A.D.B.[67] In no other instance does any member have sufficient voting power to veto general managerial decisions in any bank.[68]

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65. *See* note 6 *supra*: I.B.R.D., art. V, §3; I.F.C., art. IV, §4(c); I.D.A., art. VI, §4(c); I.A.D.B., art. VIII, §4; A.D.B., art. 33, para. 3; Af.D.B., art. 35, para. 3; Af.D.F., art. 29, para. 4.

66. *See* note 6 *supra*: I.B.R.D., art. V, §3; I.F.C., art. IV, §3; I.D.A., art. VI, §3; I.A.D.B., art. IV, §9, art. VIII, §4; A.D.B., art. 33, para. 1; Af.D.B., art. 35, para. 1; Af.D.F., art. 29, para. 3. However, the relationship between total voting power and total contributions to resources is not proportional. In addition to a certain number of votes that are allotted in proportion to each member's contributions, a separate block of votes (which is larger in some institutions than in others) is divided equally among all members. This division gives members with small contributions (which are generally the poorer members) more voting power than they would have under a strictly proportional allocation of voting power. *See* Table (Appendix), lines 5 and 6.

67. *1978 House Hearings, supra* note 2, at 634.

68. *Compare* data on the distribution of voting power in the banks in *1979 House Hearings, supra* note 10, at 128-29, 144-45, 331, 253, 212, *and* in International Finance Corporation, 1978 Annual Report 40 (1978) *with* the charter provisions specifying the number of votes required to approve general managerial decisions. *See* note 6 *supra*: I.B.R.D., art. V, §3; I.F.C., art. IV, §3; I.D.A., art. VI, §3; I.A.D.B., art. IV, §9, art. VIII, §4; A.D.B., art. 33, para. 3; Af.D.B., art. 35, para. 3; Af.D.F., art. 29, para. 7.

Approval of general managerial decisions requires a majority of the represented voting power, except in the Af.D.F., and the soft loan facility of the I.A.D.B. (the Fund for Special Operations) where three-fourths and two-thirds majorities, respectively, are required. As a matter of practice, however, virtually all loans are approved by consensus. The managements of the banks try to accommodate any objections from directors in advance of any formal objection to a particular loan proposal. Formal votes are infrequent, but the secretaries of the banks are sometimes asked to record a member country as dissenting or abstaining when a particular loan is under consideration. E. Mason & R. Asher, *supra* note 18, at 92-93.

The foregoing information is important with regard to earmarking because it demonstrates that, with the exception of a few specifically enumerated powers, all authority of the banks is vested in their boards of directors. One of the central powers of the banks is the capacity to decide how to allocate their resources.[69] Since the exercise of this power lies within the authority of the board of directors, it cannot be subject to unilateral interference from members. The congressional proposals outlined above would, if passed, represent impermissible interference with this authority.

4. *Members Must not Attempt to Influence the Presidents and Staffs of the Banks in the Discharge of Their Duties.*

Each bank has a president who is elected by either the board of governors or the board of directors.[70] The president directs the staff of the bank and conducts, under the guidance of the directors, the ordinary business of the bank.[71] As a practical matter, actual control over the operations of the banks lies with the presidents and the management staffs of the banks, and the directors must rely substantially upon these per-

68. (Continued)

The United States has veto power over decisions to amend the charters of, and to increase the number of directors in, the I.B.R.D., I.F.C., I.D.A., and I.A.D.B. These decisions require four-fifths approval in the case of the I.B.R.D., I.F.C., and I.D.A. and three-fourths approval in the case of the I.A.D.B. *See* note 6 *supra*: I.B.R.D., art. V, §4(b)(ii), art. VIII, §(a); I.F.C., art. IV, §4(b), art. VII, §(a); I.D.A., art. VI, §4(b), art. IX, §(a); I.A.D.B., art. VIII, §3(j), art. XII, §(a).

69. *See* note 61 *supra*, note 76 *infra*.

70. In the World Bank and African Development Bank/Fund, the directors elect the president, while in the I.A.D.B. and A.D.B. the boards of governors elect the president. *See* note 6 *supra*: I.B.R.D., art. V, §5(a); I.D.A., art. VI, §5(a); I.A.D.B., art. VIII, §5(a); A.D.B., art. 34, para. 1; Af.D.B., art. 36; Af.D.F., art. 30, para. 1. *Cf.* I.F.C., art. IV, §5(a) (permitting directors to choose, on the recommendation of World Bank President, a different person to be I.F.C. President).

71. *See* note 6 *supra*: I.B.R.D., art. V, §5(b); I.D.A., art. VI, §5(b); I.A.D.B., art. VIII, §5(a); A.D.B., art. 34, para. 5; Af.D.B., art. 37, para. 2; Af.D.F., art. 22, art. 30, paras. 1, 2. *Cf.* I.F.C., art. IV, §5(a,b) (World Bank directors may choose different President of I.F.C.).

sons for information on policy issues.[72]

The charters of the banks declare in nearly identical language:

> The president, officers and staff of the bank, in the discharge of their offices, owe their duty entirely to the bank and to no other authority. Each member of the bank shall respect the international character of this duty and shall refrain from all attempts to influence them in the discharge of their duties.[73]

Members' legitimate influence must be channeled entirely through the governors and directors.

5. *Members May Not Restrict the Use of Their Currencies by the Banks.*

In general, members of the banks may not place any restrictions on the use of their currencies by the banks.[74] This prohibition directly forecloses the earmarking of subscriptions. There are, however, four exceptions to this general rule. First, and most important with respect to the earmarking issue, is that a member of the I.B.R.D. has the power to veto the use of its currency if that currency constitutes part of that member's paid-in subscription.[75] The drafting history of the I.B.R.D. charter, however, indicates that this power was intended to allow certain members to guard against inflationary demands for their exports in the years immediately following World War II, and not to

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72. *Foreign Assistance and Related Appropriations for 1980: Hearings Before a Subcomm. on Foreign Operations of the House Comm. on Appropriations, Part 2,* 96th Cong., 1st. Sess. 82-83 (1979) [hereinafter cited as *1979 House Investigative Report*].

73. The charter of the I.A.D.B. does not contain this last clause. *See* note 6 *supra*: I.B.R.D., art. V, §5(c); I.F.C., art. IV, §5(c); I.D.A., art. VI, §5(c); A.D.B., art. 36, para. 3; Af.D.B., art. 38, para. 3.

74. *See* note 6 *supra:* I.F.C., art. III, §2; I.D.A., art. IV, §1; A.D.B., art. 24; Af.D.B., art. 27; Af.D.F., art. 11.

75. *See* note 6 *supra:* I.B.R.D., art. IV, §2(a). Currently, ten percent of each member's subscription to the I.B.R.D. must actually be paid into the I.B.R.D. Policies and Operations, *supra* note 7, at 25-26.

allow members to veto loans for political reasons.[76] According to the I.B.R.D., this power has been used only for balance of payments reasons.[77] In any event, the I.B.R.D. has unrestricted use of those currencies raised by borrowings on financial markets and of those currencies purchased on foreign exchange markets.[78]

Second, a member of the I.A.D.B. may restrict up to one-half of its currency subscriptions to the I.A.D.B.'s soft loan facility and one-half of its paid-in subscriptions to the bank's hard loan facility. However, it may restrict such use only to the extent of requiring that its currency be used to purchase goods and services produced in its own territory.[79] The I.A.D.B. charter explicitly prohibits members from requiring that the proceeds of a loan *not* be spent in a particular member country.[80] Thus, in the case of the I.A.D.B., members may restrict the use of their currencies only for balance of payments purposes, and may not target such restrictions for or against any particular countries or projects. The third exception to the general rule against restrictions permits *developing* countries to restrict the use of their currencies by the I.D.A., A.D.B., and Af.D.B. to protect their balance of payments positions and to prevent

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76. The official documents of the Bretton Woods Conference state that the reason for including article IV, §2 in the I.B.R.D. charter was "related to a possible shortage of the goods required in the subscribing countr[ies] concerned, and not to any general desire to control the use of currency subscribed to the Bank." United Nations Monetary and Financial Conference, Bretton Woods: Original Documents and Working Papers, Doc. #336 at 3 (Report of Subcommittees A and B of Committee 2, on the Operations of the Bank, to Commission II, July 12, 1944).

In addition, Robert Oliver writes, "Many Americans feared the potential inflationary repercussions on the American economy of large foreign loans [to finance exports of United States products] in the post-war period." R. Oliver, International Economic Co-operation and the World Bank, 172 n. 22 (1975) [hereinafter cited as R. Oliver]. *See also* Oliver's discussion of I.B.R.D., art. 4, sec. 2, *id.* at 171-72, 197-200.

77. R. Oliver, *supra* note 76, at 197.

78. *See* note 6 *supra*: I.B.R.D., art. IV, §2(d); R. Oliver, *supra* note 76, at 197-98.

79. *See* note 6 *supra*: I.A.D.B., art. V, §1(a).

80. *See* note 6 *supra*: I.A.D.B., art. III, §9(a).

their domestic productive capacities from being overstrained.[81]

Finally, members or non-members may make *special contributions* to the banks to be used for specific purposes.[82] United States contributions to the I.A.D.B. through the Social Progress Trust Fund, established in 1961 by a special agreement between the United States and the I.A.D.B., are one example of such special contributions.[83] The resources of this fund were used to support efforts of Latin American countries to carry out institutional reforms and, in particular, to assist economically the lowest income groups in Latin America.[84] Special subscriptions give the donor country no additional voting power.[85] Moreover, they must be made on terms and conditions which are consistent with the purposes of the banks.[86]

C. *Rejection by the I.A.D.B. of Earmarked Subscriptions*

In 1975, the United States Congress earmarked $50 million of the $235 million United States appropriation to the Fund for Special Operations, the soft loan facility of the I.A.D.B., to cooperatives, to local credit unions, and to savings and loan associations that serve the most economically disadvantaged people in Latin America.[87] In a letter to the United States Secretary of the Treasury, the President of the I.A.D.B. said that the I.A.D.B. could not accept the earmarked funds

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81. *See* note 6 *supra*: I.D.A., art. IV, §1; A.D.B., art. 24 §§1, 2; Af.D.B., art. 27.

82. Some of the charters specifically provide for such contributions. *See* note 6 *supra*: I.D.A., art. 4, §1(c); A.D.B., art. 19, para. 3; Af.D.B., art. 8, art. 28, para. 2(b); Af.D.F., art. 8.

83. Social Progress Trust Fund Agreement, June 19, 1961, United States--Inter-American Development Bank, 12 U.S.T. 632, T.I.A.S. No. 4763. The United States stopped providing resources in 1964, favoring instead contributions to the Fund for Special Operations in order that other countries could bear some of the financial burden involved in trying to achieve the goals of the Social Progress Trust Fund Agreement.

84. *Id.*, art. I, §§ 1.03-1.05.

85. *See* note 6 *supra*.

86. *See* note 6 *supra*: A.D.B., art. 19, para. 3; Af.D.B., art. 8; Af.D.F., art. 8.

87. 22 U.S.C. §§ 283p-283s (89 Stat. 23 (1975)) (repealed by 90 Stat. 592 (1976)).

for several reasons.[88] First, for the I.A.D.B. to accept such funds as part of a general replenishment of its resources would deprive the Board of Governors and the Executive Directors of their authority to determine which areas of lending the I.A.D.B. should pursue. Second, the I.A.D.B. charter forbids pre-commitments of the I.A.D.B.'s general resources.[89] Third, I.A.D.B. acceptance of the earmarked funds "would open the door for all members to similarly lay down terms governing the use of their respective contributions and subscriptions. ... [This] would do irreparable harm to the international cooperative character of this or any similar institution."[90]

The President stressed that the inability to accept the earmarked funds did not stem from opposition to channeling assistance through grass roots self-help institutions in order to benefit the poorest people in society. Indeed, the Bank had itself decided to make available to such institutions loans far in excess of the amounts Congress had earmarked. Rather, the Bank refused the funds to protect its multilateral character and, in particular, to insure that "[a]ny decision to dedicate resources for a particular purpose should be determined in a multilateral manner in accordance with the decisionmaking process provided in the Bank's charter, so that all members contribute with the same understanding."[91]

D. *The Banks Must Reject Earmarked Funds*

Earmarking subscriptions is incompatible with the past practices of the banks and with those provisions of their charters which establish (a) the independent status of the banks,[92] (b) the system of multilateral control over the banks,[93] and (c) the complete authority of the banks over the use of their resources--including contributions and capital subscriptions from member countries.[94] The most significant exception to

88. Letters from Antonio Ortiz Mena to William E. Simon (Apr. 23, 1975, and Feb. 19, 1976) (on file with *Yale Studies in World Public Order*).

89. *See* note 6 *supra*: I.A.D.B., art. III, §7.

90. Letter from Antonio Ortiz Mena to William E. Simon, Apr. 23, 1975 (on file with *Yale Studies in World Public Order*).

91. *Id.*

92. *See* note 73 *supra*.

93. *See* notes 58-69 *supra*.

94. *See* note 74 *supra*.

this statement is the power of members of the I.B.R.D. to veto loans of so much of their currency as constitutes the paid-in portion of their subscriptions. However, the history of the I.B.R.D. charter indicates that members were not intended to use this power to veto loans for political reasons.

This narrow interpretation of the currency-veto power finds strong support in those charter provisions that state that the decisions of the banks shall be based solely on economic considerations, and that the banks' development purposes shall guide all such decisions. These provisions are the strongest affirmation of the apolitical character and strict development orientation of the banks. They clearly prohibit the banks from taking any actions based upon non-economic considerations. To have any effect, these provisions must require members to respect the apolitical character of the banks and refrain from any attempts to use their participation in the banks to further unilateral political goals at the expense of the banks' development objectives. To be consistent with this last requirement, the currency-veto power in the I.B.R.D. should be narrowly construed. Members should not be able to veto the use of their currencies for loans to particular countries or projects simply because they do not like the political character of those countries, or because those projects would hurt the economic interests of special interest groups.

Given this interpretation of the currency-veto power, members have no power in *any* of the banks to earmark funds in the manner in which the House of Representatives has attempted to earmark United States subscriptions. Concomitantly, the banks have no authority to acquiesce in recent congressional earmarking demands. Indeed, the banks' apolitical character, exclusively development-oriented purposes, independent status, and multilateral structure compel them to reject earmarked funds.

III. Requiring Directors to Oppose Loans for Reasons Unrelated to Economic Development

This section will examine, first, the background of the current requirements that United States directors oppose all loans to certain countries and projects, second, the reasons to impute a limited repre-

sentative character to the role of U.S. directors, and third, the reasons to conclude that this representative role is limited by the apolitical character of the banks.

A. *Legislative Background*

Following passage by the House of Representatives of the 1977 earmarking amendments,[95] the President of the World Bank, the general counsels of the World Bank, I.A.D.B., and A.D.B., the Congressional Research Service of the Library of Congress, the District of Columbia Bar Association, the General Counsel of the United States Department of the Treasury, and the American Bar Association all submitted opinions opposing the earmarking amendments and stating that the banks would not or should not accept subscriptions earmarked according to the House amendments.[96] The United States Senate refused to accept the amendments.[97] The House of Repre-

95. *See* notes 32, 33 *supra*.

96. 1978 House Hearings, *supra* note 2, at 490-513 (Letters from Robert McNamara to W. Michael Blumenthal (July 5, 1977), from A. Broches (Vice-President and General Counsel of the World Bank) to Edward Fried (U.S. Executive Director of the World Bank) (Sept. 28, 1977), from Arnold Weiss (General Counsel, I.A.D.B.) to Ralph Dungan (U.S. Executive Director, I.A.D.B.) (Sept. 28, 1977), from Graeme F. Rea (General Counsel, A.D.B.) to Lester Edmond (U.S. Executive Director, A.D.B.) (Oct. 14, 1977), from the Comptroller General of the United States to Clarence D. Long (Chairman of the Subcommittee on Foreign Operations of the House Committee on Appropriations) (Sept. 22, 1977), from the American Law Division of the Congressional Research Service to the House Banking, Finance and Urban Affairs Comm. (Nov. 16, 1977), and from Stephen Ives, Jr. (Chairman, Steering Committee of the International Law and Transactions Division of the District of Columbia Bar) to Senator Inouye (Chairman, Senate Subcomm. on Foreign Operations) (July 22, 1977); United States Department of the Treasury memorandum from Robert Mundheim (General Counsel) to Secretary Blumenthal (Sept. 29, 1977)); resolution of the American Bar Association and accompanying report. The resolution is reprinted in American Bar Association House of Delegates, Summary of Action Taken by the House of Delegates of the American Bar Association 27 (annual meeting, Dallas, Texas, Aug. 14-15, 1979).

97. H.R. Rep. No. 633 (Conference Report), 95th Cong., 1st. Sess. 11, 17 (1977).

sentatives agreed to withdraw its amendments only after President Carter pledged to instruct United States directors in the banks to "oppose and vote against" throughout fiscal year 1978 any loans to the seven countries mentioned in the House earmarking amendments. President Carter made a similar pledge concerning any loans for the production of the three agricultural commodities mentioned in the House amendments, if such production were for export and could injure United States producers.98 Congress nevertheless enacted a provision requiring United States representatives in the banks to "oppose any loan or other financial assistance for establishing or expanding production for export of palm oil, sugar, or citrus crops if such loan or assistance will cause injury to United States producers of the same, similar, or competing agricultural commodity."99

In 1978, House earmarking provisions against Vietnam and Cuba100 were withdrawn in conference committee.101 In 1979, however, House conferees agreed to delete similar provisions only after the President of the World Bank pledged that the Bank would not make any new loans to Vietnam in fiscal year 1980.102

B. *Reasons to Impute a Representative Character to the Role of the Directors*

Since fiscal year 1978, it has remained United States policy, "consistent with the will of the Congress," to oppose all loans by the banks to Vietnam.103

This segment of the Article inquires whether opposition of this type is compatible with the obligations of bank members under the banks' charters. The inquiry will

98. Letter from President Carter to Rep. Clarence Long (Chairman, Subcomm. on Foreign Operations of the House Appropriations Comm.) (Oct. 6, 1977), *reprinted in 1978 House Hearings, supra* note 2, at 472; *see also*, H.R. Rep. No. 701, 95th Cong., 1st Sess. 10-11, 16-17 (1977).

99. 22 U.S.C.A. §262g(a).

100. 124 Cong. Rec. H8555-58, H8563 (daily ed. Aug. 14, 1978).

101. H.R. Rep. No. 1754, 95th Cong., 2d Sess. 17.

102. [1979] Cong. Q. Weekly Rep. 2504 (Nov. 3, 1979).

103. *1979 House Hearings, supra* note 10, at 734 (statement by C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs).

begin with an analysis of the extent to which directors may, in their capacity as representatives, be bound by the wishes of the countries which appointed or elected them. It will then consider the extent to which directors, along with the countries which appointed or elected them, must act in accordance both with the purposes of the banks and prohibitions against the banks basing decisions on political considerations.

1. *The Charters*

The charters of the banks declare that the presidents, officers, and staffs of the banks, in the discharge of their offices, owe their duty entirely to the banks and to no other authorities; and that each member country shall respect the international character of this duty and shall refrain from all attempts to influence any of these persons in the discharge of his or her duties.[104] At least in the case of the World Bank, it is clear that the directors are not "officers" of the Bank for the purposes of this provision. The charters of the World Bank institutions speak about the power of the President of the World Bank,[105] to appoint the officers and staffs of those institutions.[106] In contrast, the directors are either appointed or elected by member countries, not by the presidents of the banks.

There exists, therefore, a negative implication that the directors do not owe their duty exclusively to the banks, and that they are not international civil servants in the same sense as the presidents, officers, and staffs of the banks.[107]

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104. *See* note 75 *supra*.

105. *See* note 6 *supra*: I.B.R.D., art. V, §5(a); I.D.A., art. VI, §5(b). *Cf.* I.F.C., art. IV, §5(b) (more control to board of directors). The I.F.C. charter allows for a different person to serve as President of the I.F.C., but Robert McNamara currently serves as president of all three institutions of the World Bank. International Finance Corporation, 1978 Annual Report 44.

106. *See* note 6 *supra*: I.B.R.D., art. V, §5(d); I.F.C., art. IV, §5(b); I.D.A., art. VI, §5(d); I.A.D.B., art. VIII, §5(e); A.D.B., art. 34, para. 6; Af.D.B., art. 37, para. 2; Af.D.F., art. 32.

107. Bitterman, *Negotiation of the Articles of Agreement of the International Bank for Reconstruction and Development*, 5 Int'l Law. 59, 79 (1971)[hereinafter cited as Bitterman].

2. *The National Advisory Council on International Monetary and Financial Problems/Policies*

The National Advisory Council on International Monetary and Fiscal Problems was established by the United States Congress in the Bretton Woods Agreements Act[108] in order "to coordinate the policies and operations of the representatives of the United States on the Fund and the Bank and of all agencies of the Government which make or participate in making foreign loans or which engage in foreign financial, exchange or monetary transactions, ..."[109] The specifically enumerated functions of the Council were:

(a) to coordinate the actions of the United States representatives to the I.M.F. and the banks with the agencies dealing with foreign loans and financial affairs;

(b) to recommend to the President general policy guidelines for United States representatives to the I.M.F. and the banks;

(c) to consult with the President and the United States representatives on any major administrative problems of the I.M.F. and the banks;

(d) whenever the charters of these institutions required the United States to give its approval before specific action, to decide, under the direction of the President, whether to give that approval;

(e) to transmit annual reports to the President and Congress with respect to the participation of the United States in these institutions; and

(f) to make such reports and recommendations to the President as he should request, or as the Council might consider necessary.

In addition, United States representatives to these institutions were required to keep the Council fully informed of their activities.[110]

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108. 22 U.S.C. §§ 286-290g. For details of the Bretton Woods Act, *see* note 133 *infra*.

109. 22 U.S.C. §§ 282(b), 283(b), 284(b), 285(b), 286(b), 290g-2. The Council consisted of the Secretaries of State, Commerce and Treasury, the Chairman of the Federal Reserve System, and the President of the Export-Import Bank.

110. 22 U.S.C. § 286b(b), (c). In 1965, the Council was abolished, but it was reestablished in 1966 by Executive Order 11269 which also changed its name to the National Advisory Council on .

3. *The Requirement of Senate Confirmation*

Under the terms of the legislation authorizing the President to accept United States membership in the banks, the appointment of U.S. governors and directors to these institutions is subject to Senate confirmation.111

4. *Congressional Interpretation of the Role of United States Directors*

There can be little doubt that the Congress has believed that United States directors in the banks are to represent United States interests in the banks. For instance, a House of Representatives committee report on the Bretton Woods Agreements Act noted with approval that the members of the National Advisory Council on International Monetary and Fiscal Problems "will be in a position to see whether the representatives of the United States on the Fund and the Bank exercise their authority in accordance with the best interests of the United States."112 As another example, in the context of recommending an increase in United States contributions to the Fund for Special Operations of the I.A.D.B., a 1965 House committee report noted: "[S]hould the necessity arise, the United States would be in a position to veto any proposed action [by the Fund for Special Operations] that ran counter to an important U.S. policy interest."113

110. (Continued)
International Monetary and Financial Policies, Exec. Order No. 11269, 3 C.F.R. 534 (1966-70 compilation), *reprinted in* 22 U.S.C.A. §286b at 206 (1979)[hereinafter cited as Exec. Order No. 11269]. The new Council has explicit authority to "review proposed *individual* loan, financial, exchange or monetary transactions," authority which the Bretton Woods Agreements Act did not explicitly confer upon the old Council. In addition, Executive Order 11269 gives the Secretary of the Treasury explicit authority "to instruct the representatives of the United States to the international financial institutions"--authority that was lacking under the Bretton Woods Agreement.

111. 22 U.S.C. §§285a (a), 286a (a). *See also* §§282a, 284(a) (regarding creation of governor, executive director, and alternates).

112. House Comm. on Banking and Currency, Participation of the United States in the International Monetary Fund and the International Bank for Reconstruction and Development, H.R. Rep. No. 629, 79th Cong., 1st. Sess. 66 (1945).

113. H.R. Rep. No. 27, 89th Cong., 1st. Sess. 9, *reprinted in* [1965] U.S. Code Cong. & Ad. News 1426, 1434.

C. *Directors Must Respect the Apolitical Nature of the Banks*

Both the banks' charters and the history of the Bretton Woods conference indicate that the duty to behave apolitically extends to individual directors as well as to the banks as institutions. This individual duty is further supported by analogy to the International Court of Justice (I.C.J.) opinion regarding permissible criteria for admission to the United Nations.

1. *Charter Provisions*

Article IV, section 10 of the I.B.R.D. charter (I.B.R.D. IV.10) and analogous provisions in the charters of the other banks declare that the banks and their officers must not interfere in the political affairs of any member; their decisions must not be influenced by the political character of the member or members concerned; only economic considerations shall be relevant to their decisions; and these considerations shall be weighed impartially in order to achieve the purposes stated in the charters.114 For these provisions to have much practical effect, they must apply to the decisions of the directors of the banks. Except for the residual powers of the boards of governors, the directors are vested with supreme authority in the banks. They are responsible for the "conduct of the general operations" of the banks.115 All loans are subject to their approval. Therefore, their decisions on loan proposals directly determine the decisions of the banks, as institutions, on loan proposals.

Other provisions of the charters also refer to the power of "the Bank" to take particular actions. These provisions would have little practical effect if they did not also apply to the directors and governors who decree what actions "the Bank" will take.116

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114. *See* note 57 *supra*.

115. *See* notes 61, 62 *supra*.

116. For example, I.B.R.D., art. III, §5(a), note 6 *supra*, says, "The Bank shall impose no conditions that the proceeds of a loan shall be spent in the territories of any particular member or members." Since the directors are responsible for loan decisions, this provision would have little force unless it applied to the directors. I.B.R.D., art. VI, §5(b) indicates even more clearly that the decisions of the directors and governors constitute decisions of the bank: "The Bank may suspend permanently its

The General Counsel of the World Bank has himself stated that the term "the Bank," as used in I.B.R.D. IV.10, refers "to the Institution as such and to its organs, the Board of Governors and the Executive Directors."[117]

Given that the boards of directors cannot base their decisions on political considerations, it would make little sense if individual directors could do so. To prohibit a board from deciding on the basis of political considerations, while permitting individual board members to base their decisions on political concerns, would inject indeterminacy into the actions of individual directors. It would make little sense to say that a director who votes on the basis of non-economic considerations violates the charters if his vote prevails, but does not violate the charters if his vote does not prevail.

Undoubtedly, the fact that directors are bound by provisions such as I.B.R.D. IV.10 means they do not have unfettered freedom to represent or advocate the views of the countries that appointed or elected them. However, the charters themselves indicate that the role of the directors is to be distinguished from the role of national representatives.

First, the charters are very careful never to refer to the directors as the "representatives" of countries. The charters even avoid declaring that the directors "cast the votes" of member countries and instead specify that each director casts either "the number or votes allotted ... to the member appointing him" or "the number of votes which counted towards his election."[118] In contrast, some of the charters do refer to the governors as representatives of the mem-

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116. (Continued)
operations in respect of new loans and guarantees *by vote of a majority of the Governors* ..." (emphasis supplied). The same conclusion arises from I.A.D.B., art. IV, §9(a) which says, "All decisions of the Bank concerning the operations of the Fund [for Special Operations] shall be adopted by a two-thirds majority of the total voting power of the member countries."

117. 21 U.N. GAOR, C.4 (1645th mtg.) 14, U.N. Doc. A/C. 4/SR.1645 (1966) (provisional summary record) *reprinted in* 6 Int'l Legal Materials 150, 152 (1967).

118. J. Gold, *supra* note 49, at 99-100, 212. *See generally* note 65 *supra* (texts of relevant charters).

bers that appointed them,[119] and the Charter of the United Nations refers to "representatives" of members in both the General Assembly and the Security Council.[120]

Second, the division of functions between the boards of governors and the directors leaves the boards of governors with responsibility for decisions which are likely to involve political issues. These include decisions which concern the admission of new members, increases or reductions in bank resources, the suspension of members, final interpretations of the charters, and arrangements to cooperate with other international organizations.[121] It has been suggested that this allocation of authority was designed to preserve the non-political role of the directors.[122]

Third, except in the case of the Af.D.F., directors are reimbursed on the basis of full-time service by the banks themselves, and not by member countries.[123]

2. *The Decision of the International Court of Justice in the* United Nations Membership Case

A close analogy exists between bank directors opposing loans for political reasons and the issues addressed by the International Court of Justice in its decision concerning the conditions of admission of a state to membership in the United Nations.[124] In that decision, the Interna-

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119. *See* note 6 *supra*: I.D.A., art. VI, §2(b); A.D.B., art. 27, para. 1, art. 30, para. 1(b).

120. U. N. Charter art. 9, para. 2 & art. 23, para. 3.

121. *See* note 62 *supra*.

122. This suggestion was made by Henry Bitterman, who helped formulate United States proposals for the I.M.F. and I.B.R.D. and who participated in the Bretton Woods Conference. *See* Bitterman, *supra* note 107, at 79.

123. By-laws of the I.B.R.D., §14(e); by-laws of the I.F.C., §12(f) (July 24, 1956); by-laws of the I.D.A., §4(c) (Nov. 8, 1960). *But see* note 6 *supra*: Af.D.F., art. 27, para. 8, (Af.D.F. shall not pay compensation to directors). The *1979 House Investigative Report*, *supra* note 72, at 135-48, discusses and lists the salaries of the directors and other personnel in the World Bank, I.A.D.B., and A.D.B.

124. Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, [1948] I.C.J. 56.

national Court of Justice ruled that a member of the United Nations cannot, in either the Security Council or the General Assembly, make its affirmative vote on the admission of a state to the United Nations subject to conditions not expressly set forth in article 4 of the United Nations Charter.[125] Just as the Court reasoned that article 4 is, by its terms, an exhaustive enumeration of the conditions for admission of states to the United Nations,[126] it is logical to assume that the declarations of purposes and functions which appear in the banks' charters are exhaustive statements of the conditions for supporting proposed loans. This assumption is bolstered by the explicit requirement that the banks be guided in all their decisions by the purposes and functions set forth in their charters.[127] Therefore, by analogy to the I.C.J. decision, a member of the banks could not condition its support for loans upon factors irrelevant to the banks' purposes and functions.

Moreover, the United Nations Charter does not contain any negative commands that United Nations members *must not* condition their support for the admission of other states on particular considerations. The International Court of

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125. *Id.* at 65. U.N. Charter art. 4 says:

> 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations.
>
> 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

The particular condition under consideration in the *United Nations Membership Case* was a requirement that other states be admitted to membership together with the first state to apply at a given time. In 1947, the Soviet Union demanded that the admission of Italy, Finland, Hungary, Romania, and Bulgaria be voted on *en bloc*. When this demand was refused, it vetoed the applications of Italy and Finland, and Bulgaria, Hungary and Romania failed to receive the seven votes necessary to constitute a recommendation for membership by the Security Council. L. Sohn, Cases on United Nations Law 57 (2d ed. 1967).

126. [1948] I.C.J. 62-63.

127. *See* note 55 *supra* (relevant articles of charters).

Justice had to deduce that a United Nations member could not subject an affirmative vote on the admission of one state to the condition that other states also be admitted to membership.[128] In contrast, the charters of the banks specifically forbid decisions based upon non-economic considerations.[129]

Finally, the International Court of Justice, in the *United Nations Membership Case,* did address the question whether action impermissible for a collective body might nevertheless be permissible for individual members of that body. Just as the language of I.B.R.D. IV.10 forbids only the I.B.R.D., and not individual directors, from making decisions based upon non-economic considerations, so article 4, paragraph 2 of the United Nations Charter speaks only of membership decisions "effected by a decision of the General Assembly upon the recommendation of the Security Council."[130] Nevertheless, the International Court of Justice quite logically held that *individual* members of the United Nations could not condition their votes on criteria not specified in article 4, paragraph 1.

3. *The Early History of the Bretton Woods Agreements--the Birth of the I.B.R.D. as an Apolitical Functional Institution*

Henry Bitterman has written that I.B.R.D. IV.10 was "probably intended principally as reassurance to the USSR" to encourage it to participate in the I.B.R.D.[131] However, a more comprehensive analysis suggests that its genesis lies in the interplay between British and United States conceptions of what should be the post-war international economic order.[132]

Harry Dexter White of the United States Treasury Department and British economist John Maynard Keynes were the principal architects of the Bretton Woods institutions,

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128. [1948] I.C.J. 65.

129. *See* note 57 *supra* (prohibitions on political activity).

130. *See* note 125 *supra.*

131. Bitterman, *supra* note 107, at 79; *see also* E. Mason & R. Asher, *supra* note 18, at 11 n. 1, 27.

132. *See* Yokata, *The Non-Political Character of the World Bank,* 20 Japanese Ann. of Int'l L. 39, 42-48 (1977) [hereinafter cited as Yokata].

the I.B.R.D. and I.M.F.[133] By September, 1941, Keynes had drafted a plan for an "international Clearing Union" whose purpose and scope of operations were similar to those of the future I.M.F.[134] By the end of 1941, White had drafted a plan for a "United and Associated Nations Stabilization Fund and a Bank for Reconstruction of the United and Associated Nations."[135] Both White and Keynes believed in the importance of international economic cooperation,[136] and both plans made it clear that the proposed institutions were to be international in outlook.[137] However, White's

133. The Bretton Woods Agreement Act authorized U.S. membership in the I.B.R.D. and I.M.F. The I.M.F. and I.B.R.D. were conceived during World War II as two complementary institutions on which would be based a new post-war monetary and financial world order. The main purpose of the I.M.F. is to help member countries to cope with relatively short-term balance of payments problems, while the purpose of the I.B.R.D. is to attack the structural problems which prevent members from fulfilling their productive potentials. The charters of these institutions are together known as the Bretton Woods agreements--after Bretton Woods, New Hampshire, where the charters were drafted in their final form by an international conference of representatives from forty-four countries. The United States Congress jointly approved the charters in the Bretton Woods Agreements Act of 1945. *See generally* A. van Dormael, Bretton Woods--Birth of a Monetary System (1978) [hereinafter cited as A. van Dormael]; R. Gardner, Sterling-Dollar Diplomacy xvii-xxxiii, 71-95, 106-21, 257-68 (2d ed. 1969) [hereinafter cited as R. Gardner]; R. Oliver, *supra* note 76, at 109-250.

134. A. van Dormael, *supra* note 133, at 29-39. This plan is reprinted in The New Economics--Keynes' Influence on Theory and Public Policy 323-41 (S. Harris ed. 1947) [hereinafter cited as The New Economics].

135. A. van Dormael, *supra* note 133, at 42-47; R. Gardner, *supra* note 133, at 74 n. 1. All portions of one of the drafts of this plan that pertain to the Bank are reprinted in R. Oliver, *supra* note 78, at 279-322. Note that as reprinted, the title of the plan is "Suggested Plan for a United Nations Stabilization Fund and a Bank for Reconstruction *and Development* of the United and Associated Nations" [emphasis supplied], suggesting that there are differing versions of White's "earliest" plan. *See* note 138 *infra*.

136. A. van Dormael, *supra* note 133, at 34, 45; R. Gardner, *supra* note 133, at 74-77, 268; R. Harrod, The Life of John Maynard Keynes 427 *et seq.* (1951) [hereinafter cited as R. Harrod]; The New Economics, *supra* note 134, at 321-22; R. Oliver, *supra* note 76, at 125; R. Oliver, Early Plans, *supra* note 19, at 5, 44-45.

137. *Compare* White's plan, R. Oliver, note 76 *supra*, at 270-84, 320-21, *with* Keynes' plan, The New Economics, *supra* note 134, at 324-25.

original plan apparently contained no analog to present-day I.B.R.D. IV. 10,[138] whereas Keynes' plan declared that:

> (a) the Clearing Union should be able to accommodate countries with different principles of government and different economic policies,
>
> (b) its operations should involve the least possible interference with national policies, and
>
> (c) its management "must be genuinely international without preponderant power of veto or enforcement to any country or group; and the rights and privileges of the smaller countries must be safeguarded."[139]

By August 1942, White knew about Keynes' plan, and after that time he made several revisions of his own plan.[140] In November 1943, the United States Treasury Department issued its first official proposal for a "Bank for Reconstruction and Development of the United and Associated Nations." It was based upon White's revised plan and it was to be the basis for negotiations at the Bretton Woods conference.[141] It contained the following forerunner of I.B.R.D. IV.10:

> The Bank and its officers shall scrupulously avoid interference in the political affairs of any member country. This provision shall not limit the right of an officer of the Bank to participate in the political life of his own country.

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138. This statement is not beyond dispute. R. Gardner, *supra* note 133, at 74, 80, says, with respect to the Fund and Bank proposed in White's earliest draft, "They were to become genuine institutions of international government, serving the needs of their members *without regard to national political considerations*." (emphasis supplied). However, nowhere in the draft reprinted in R. Oliver, *supra* note 76, do any provisions sustaining this statement appear, and Oliver has reprinted all provisions pertaining to the proposed bank. Oliver himself is ambiguous about the origins of I.B.R.D. IV.10, as one can see from *id.* at 142.

139. The New Economics, *supra* note 134, at 324-25.

140. R. Oliver, *supra* note 76, at 136-42, 148-55.

141. *Id.*

> The Bank shall not be influenced in its decisions with respect to application for loans by the political character of the government of the country requesting a loan.[142]

Sometime before the beginning of the Bretton Woods conference, the sentence "Only economic considerations shall be relevant to the Bank's decisions" was added to the end of this provision. The fact that the British substantially rewrote article IV of the I.B.R.D. charter before the conference suggests that this might have been their doing.[143]

Keynes, therefore, may have been the main source of inspiration for I.B.R.D. IV.10. It is true that in his work concerning the Bretton Woods institutions, Keynes was motivated largely by the desire to secure easy credit terms for Britain and to preserve Britain's freedom to pursue expansionary post-war economic policies. He realized that the I.M.F., acting at the behest of the world's main creditor country, the United States, might demand that Britain take corrective measures to reduce its balance of payments deficits, that it maintain stable currency values, and that it rapidly dismantle its foreign exchange restrictions.[144] Yet there was another side to Keynes. Not only did he, by World War II, believe in the necessity of international economic cooperation, but he also believed that the Bretton Woods institutions would suffer if they were manipulated for political reasons.[145]

To the extent that I.B.R.D. IV.10 reflects Keynes' ideas, it probably reflects this last mentioned belief that the I.B.R.D. should be a completely apolitical institution.[146] Certainly, as the following examples indicate,

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142. United States Treasury Department, Preliminary Draft Outline of a Proposal for a Bank for Reconstruction and Development of the United and Associated Nations, art. IV, §19, at 10 (Nov. 24, 1943).

143. R. Oliver, *supra* note 76, at 174-81.

144. R. Gardner, *supra* note 133, at 74-95, 110-21, 264.

145. A. van Dormael, *supra* note 133, at 296, 302; R. Gardner, *supra* note 133, at 80-82, 265-67; R. Harrod, *supra* note 136, at 638.

146. One reason to suppose that the main purpose of I.B.R.D. IV.10 is *not* to prevent the I.B.R.D. from demanding that member countries take corrective (*i.e.*, often deflationary) measures to put their economic houses in order as a pre-condition for receiving assistance is that there is no analog to I.B.R.D. IV.10 in the I.M.F. charter. However, analogously to the I.B.R.D. charter, there is a provision

that was the way in which the U.S. Treasury Department, as well as White and other United States officials who took part in the creation of the I.M.F. and I.B.R.D., viewed I.B.R.D. IV.10 and the Bretton Woods Agreements.

In February 1944, the United States Treasury issued a booklet entitled *Questions and Answers on the Bank for*

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146. (Continued)
which says that the Managing Director, officers, and staff of the I.M.F. owe their duty entirely to the I.M.F., and that members must respect this duty and refrain from attempts to influence them in the conduct of this duty. Articles of Agreement of the International Monetary Fund, art. XIV, §4(c), Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 40, *as amended*, May 31, 1968, 20 U.S.T. 2775, T.I.A.S. No. 6748, *as amended*, Apr. 1, 1978, pursuant to Board of Governors Resolution No. 29010. If I.B.R.D. IV.10 were intended merely to preserve member countries' economic sovereignty, one would expect to find an analogous provision in the I.M.F. charter, since it was generally thought that an institution like the I.M.F. had a greater potential than a development bank for limiting what had traditionally been regarded as sovereign nations' economic freedom of action. Prior to the Bretton Woods conference, Keynes managed to remove most of the provisions from White's plan for a stabilization fund that would have enabled the fund to insist that member countries take corrective measures to reduce their balance of payments problems and would have required members rapidly to dismantle their foreign exchange restrictions. R. Gardner, *supra* note 133, at 121. If Keynes had managed to get this far and if the primary purpose of I.B.R.D. IV.10 were merely to protect economic sovereignty, it would seem he would have gone all the way and included an analog to I.B.R.D. IV.10 in the I.M.F. charter.

On the other hand, if one assumes that the primary purpose of I.B.R.D. IV.10 is to isolate the I.B.R.D. from political considerations, in general, then there is a good reason why it is more important to have such a provision in the charter of the I.B.R.D. than in the charter of the I.M.F. In the I.M.F., each member's drawing rights depend upon its quota, *i.e.*, the amount of its contributions to the Fund. In the I.B.R.D. and the other banks there is no relation between the amount of loans a member might receive and the level of its contributions or capital subscriptions. R. Oliver, *supra* note 76, at 187. Therefore, the managements of the banks have much more discretion in deciding which countries should receive loans than the management of the I.M.F. has over members' drawing rights.

Reconstruction and Development[147] to explain the general principles behind White's November, 1943 draft. In response to the question, "Will it be possible for the Bank to avoid making loans based chiefly on political considerations?,"the booklet answered in part:

> The Bank is designed to be an international economic agency to facilitate productive international investment without regard to political considerations. In deciding on loan applications, the Bank is not to be influenced by the political character of the country requesting the credits. This provision is part of the general requirement that the Bank shall scrupulously avoid interference in the political affairs of member countries.
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> ***
>
> The international character of the Bank is also a protection against loans made for political purposes .... The Bank itself can have no policy outside the purely financial sphere.
>
> ***
>
> This does not imply that international loans for political purposes have no justification. Obviously, there will be instances when loans may properly be made to aid a friendly government. But such loans should not be made with the aid or encouragement of the Bank which is *exclusively concerned with international investment for productive purposes*, nor should such loans be made with funds provided by private investors. Where loans must be made for political purposes, the funds should be provided by the interested government or governments, without requiring either the Bank or private investors to assume the risks inherent in such loans.[148]

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147. United States Treasury Department, Questions and Answers on the Bank for Reconstruction and Development 75-77 (1944) (emphasis supplied) (on file with *Yale Studies in World Public Order*) [hereinafter cited as Questions and Answers].

148. *Id.*

The booklet also said that the Bank would apply no tests to a proposed loan beyond determining whether it would be productive and could be repaid.[149]

In his testimony before the House of Representatives on the Bretton Woods Agreements Act, White noted the basic division of functions between the United Nations and the Bretton Woods institutions. The Dumbarton Oaks proposal, which formed the basis of the United Nations Charter, was to handle chiefly the political aspects of world problems, while the Bretton Woods agreements were to take care of a substantial portion of the economic apsects of world problems. Together, they would "constitute two pillars to support the edifice of world peace and world prosperity."[150]

Secretary of the Treasury Morgenthau, the chairman of the Bretton Woods conference, echoed this apolitical conception of the Bretton Woods institutions when he said before the Senate:

> Rebuilding and restoring the devastated countries, as I see it, is primarily a job for their domestic industries. Certain basic essentials, however, will have to be imported. These include transportation equipment and industrial and agricultural machinery. If private investors abroad will not lend the necessary capital on reasonable terms, countries will be forced to seek help in other ways. Foreign loans might then be arranged on a political basis. This could only mean the rule of power politics in international economic relations.
>
> I repeat, the businessmen of this country do not want to do business that way. The extension of these tactics must mean in the end the domination of international trade and investment by governments. This country has the greatest interest in seeing that international trade and investment are determined by economic and not by political considerations.[151]

In commenting on the Bretton Woods negotiations themselves, Morgenthau said:

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149. R. Oliver, *supra* note 76, at 162.

150. *Bretton Woods Agreements Act: Hearings on H.R. 2211 Before the House Comm. on Banking and Currency*, 79th Cong., 1st Sess. 106 (1945).

151. *1945 Senate Hearings*, *supra* note 17, at 7.

> The thought was that [member countries] could come to a world bank or a world fund and get their financial needs taken care of without having to sell their political souls.... These are to be financial institutions run by financial people, financial experts, and the needs in a financial way of a country are to be taken care of wholly independent of the political connection.[152]

As to the United States view that the directors should play an apolitical role, consider first the following exchange between Secretary Morgenthau and Senator Taft:

> Senator Taft. Do you think when a board [of directors] is set up, composed of the great nations and the small nations of the world, they are not going to be affected by politics about the making of a loan to a nation?
>
> Mr. Morgenthau. I am repeating myself on this, but the institutions will carry out their work as far as it is humanly possible to do it--and it depends on the people running it--on a strictly business basis.[153]

Later, at the inaugural meeting of the I.M.F. and I.B.R.D. in Savannah, White declared:

> [T]he most important thing [is] that the Executive Directors should be devoting their thoughts and time to studying world problems rather than the problems of their individual countries.... They should not consider themselves as representing only their individual governments, and they should not come with instructions from their governments. They should consider themselves as members of an international organization.[154]

While the United States government recognized the practical difficulty of preventing individual directors from making decisions on the basis of political considerations, it nevertheless considered that it would be undesirable for any country to try to exert political influence over the I.B.R.D.'s activities through its director.

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152. *Id.* at 14.
153. *Id.* at 15.
154. A. van Dormael, *supra* note 133, at 297.

> So far as concerns individual member countries, they do undoubtedly have important international political interests. However, it would be quite difficult for any member country to utilize the Bank for the purpose of furthering its political interests. Each member is represented on the Board by one [Director], and no country can cast more than 25 percent of the aggregate votes. ...
>
> It remains true that the possibility always exists that pressure will be exerted to induce the Bank to extend foreign credits because they are politically necessary. So far as possible, the draft proposal is designed to minimize such influences in international lending. We recognize, however, that no set of rules will of itself completely eliminate political considerations and that proper limitation of the Bank's activities depends ultimately on the character of the men responsible for its operations.[155]

It is true that these statements reflect an idealistic vision of the post-war world. However, this fact should not deprive the history of the Bretton Woods agreements of relevance to today's issues. To the extent that the intent of the drafters of the Bretton Woods agreements means anything in interpreting these agreements, this history indicates that the drafters intended the I.M.F. and I.B.R.D. to function as apolitical institutions, and, moreover, intended that members should not use their directors to manipulate these institutions for their own political ends. Furthermore, it appears that these same drafters, especially Keynes and White, believed that, regardless of political climate, these institutions could accomplish their work more effectively, better preserve their integrity, and bring about a greater net benefit for the world, if the persons running them concentrated on economic issues to the exclusion of political ones.[156]

Finally, despite the unforeseen political conflicts that have arisen, the boards of directors have, to a large extent, developed the "world, objective outlook"[157] that

155. Questions and Answers, *supra* note 147, at 76, 77.
156. *See* R. Gardner, *supra* note 133, at xxxviii-xl.
157. R. Gardner, *supra* note 133, at xxix.

Keynes had felt it was so important for them to have. As a former president of the World Bank testified before the United States Senate:

> ... I think what impressed me more than anything else in my experience on the World Bank is the objectivity of the different people there. We had a board of 18 directors, and I think each director certainly felt an obligation to his country but he also felt a very strong obligation to the Bank, and I think that the decisions made were objective decisions and fair decisions.[158]

D. *Congressional Instructions to U.S. Directors Violate Directors' Duty to the Banks*

While the directors of the banks do play a role as representatives of member countries, that role should not entail looking beyond economic and financial concerns. Nothing in the legislation establishing the National Advisory Council on International Monetary and Fiscal Problems contravenes a limitation of this nature. In fact, the legislative history of the Bretton Woods Agreements Act indicates that Congress recognized the existence of just such a restriction.

Admittedly, it is occasionally difficult to distinguish between economic and political considerations. Nevertheless, the charters of the banks and the drafting history of the first of these charters strongly indicate that the actions of the directors must conform to the purposes of the banks and to the apolitical character of the banks. Member countries and their directors must, therefore, respect the banks' limited sphere of activity, and recognize the need to shield the banks from pressures that might interfere with the achievement of their development purposes.

For these reasons, the directors of the banks must deem themselves bound by both the requirement that the banks be guided in all their decisions by the development purposes

158. *Asian Development Bank Act: Hearing on H.R. 12563 Before the Senate Comm. on Foreign Relations*, 89th Cong., 2d Sess. 25 (1966) (testimony of Mr. Black).

set forth in their charters, and by the obligations contained in I.B.R.D. IV.10 and analogous provisions in the other banks' charters. Therefore, the recent requirements that United States directors oppose all loans to certain countries and all loans for the production of certain agricultural commodities violate the charters of the banks, the international obligations of the United States under those charters, and the basic conceptions of the drafters of those charters.

IV. Human Rights

Given that directors cannot base their decisions in the banks on political considerations, can they, nevertheless, refuse to support proposed loans on the ground that the governments of the proposed recipient countries fail to respect the basic human rights of their subjects? Legislation passed in 1977 provides that United States directors in the banks are authorized and instructed to oppose any extension of assistance to any country whose government

> "engage[s] in ... a consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person ... unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country."[159]

There are three possible rationales for permitting the banks to take human rights conditions into account in formulating development plans and in making specific decisions on loans. First, the concept of economic development can be expanded to include the protection of human rights. Second, the growing body of international law relating to human rights places an affirmative obligation on the banks and their members to act to improve human rights conditions, notwithstanding the charters of the banks.[160] Third, to the

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159. 22 U.S.C.A. § 262d(a), (f).

160. This rationale is set forth in Mamorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 J. Int'l L. & Econ. 113 (1978) [hereinafter cited as Mamorstein].

extent that human rights violations create instability or government mismanagement which jeopardizes the success of development projects, such violations have direct economic consequences which the banks should consider. Similarly, if human rights violations in a particular country indicate a serious misappropriation of scarce national resources, such misappropriation should be considered in deciding whether to extend assistance to that country.

This paper will examine each of these rationales in light of the purposes and functions of the banks, the charters of the banks, and other sources of international law.

A. *The First Rationale: The Purposes of the Banks Encompass the Protection of Human Rights*

There are two problems with this first rationale. First, it is hard to read the language of the charters so broadly. In general, the statements of purposes and functions contained in the charters speak only of economic development.[161] Only the charters of the Af.D.B. and Af.D.F. and the amended charter of the I.A.D.B. speak about contributing to the process of "social development."[162] Both the charters of the I.B.R.D. and I.D.A. speak of "raising the standard of living" in member countries, but only in the context of those institutions promoting economic development and increasing productivity in order to raise standards of living.[163] Thus, except perhaps in cases of the I.A.D.B., Af.D.B., and Af.D.F., a literal reading of the banks' charters leaves little room to include the protection of human rights within the stated purposes and functions of the banks--unless one is prepared to argue that the protection of human rights, in and of itself, is one aspect of economic development.

Second, while the banks themselves have broadened their conception of what constitutes economic development, they have stopped short of saying or implying that promoting economic development encompasses the protection of human rights.

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161. *See* note 55 *supra*.

162. *See* note 6 *supra*: I.A.D.B., art. I (*as amended*, 1976); Af.D.B., art. 1; Af.D.F., art. 2.

163. *See* note 6 *supra*: I.B.R.D., art. I, subpara. iii; I.D.A., art. I.

In 1972 and 1973, Robert McNamara, then President of the World Bank, spelled out a new orientation in development policy for the World Bank. In the future, the World Bank would place relatively less emphasis on large scale capital infra-structure projects and relatively more emphasis on projects to benefit the poor[164] directly, to increase the productive potential of the poor, and to try to narrow the gap between rich and poor in developing countries.[165] This change would mean a greater emphasis on projects and programs to increase public services for the poor, to make available to them appropriate technologies, to increase their access to credit, and to increase their levels of employment. It would also encourage and assist governments to carry out institutional reforms to redistribute economic power in favor of the poor, to shift patterns of public expenditures to benefit the poorest segments of developing countries' populations, and to eliminate distortions in the prices of land, labor, and capital, which often make these items more expensive for the poor than for the rich.[166]

These new policies are now being implemented.[167] In 1979, a special congressional investigation of the banks concluded that the banks

> have made an earnest effort to direct an increasingly larger share of their lending towards reaching the poorest people in

164. Considered in most developing countries to be the poorest 40 percent of the population.

165. R. McNamara, *Annual Address* in International Bank for Reconstruction and Development, 1972 Annual Meeting of the Board of Governors: Summary Proceedings 16, 21-28 [hereinafter cited as 1972 Annual Meeting of the Board of Governors, and similarly for all other years]; R. McNamara, *Annual Address* in 1973 Annual Meeting of the Board of Governors 12, 20-33.

166. *Id.*; 1978 Annual Meeting of the Board of Governors, *supra* note 165, at 12, 30-31. The World Bank has advocated internal reforms relating to land, tax, credit, and banking policies.

167. Farnsworth, *World Bank Loans Not Just Money*, N.Y. Times, Aug. 7, 1977, §4, at 4, col. 3; Interview with Robert McNamara, N.Y. Times, Apr. 2, 1978, at E3, col. 1; Nossiter, *World Bank Shifts Focus to Local Projects*, N.Y. Times, Jan. 31, 1980, at D 1, col. 2; Hovey, *World Bank Plan Focuses on Health Care for Poor*, N.Y. Times, Mar. 23, 1980, §1, at 4, col. 1; R. McNamara, *Annual Address* in 1978 Annual Meeting of the Board of Governors, *supra* note 165, at 12, 30-31.

> developing countries and improving their productivity and income levels.[168]

The World Bank, however, has refused to venture into the domain of what it calls "civil rights," in which it includes rights relating to the protection of the human person.[169] The World Bank gives three reasons for this policy: (1) the World Bank was founded to provide economic assistance, and the charters of its component institutions specifically provide that they shall not take account of considerations other than economic considerations; (2) the World Bank is not competent to deal with non-economic issues, since it lacks persons who are skilled in dealing with such issues; and (3) member governments have not agreed upon any standards to apply in this field.[170]

There may, however, be a fourth reason implicit in these statements. The banks have already embarked on a policy which raises issues with potentially sensitive political ramifications.[171] The more the banks emphasize such goals as narrowing the gap between rich and poor and bringing about institutional reforms, the more they will require the cooperation of the countries receiving development assistance. As long as authorities in these countries believe that the banks are acting in the interest of economic development and on the basis of objective economic principles, there exists a common basis for agreement and cooperation between the banks and these countries.[172] However, if authorities in these countries perceive that the banks are going beyond economic considerations in deciding what projects to fund and what conditions to attach to such funding, then the common basis for agreement and cooperation will be undermined. As the banks' operations become more ambitious and the banks assume more responsibility in total international development effort, their[173] actions

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168. *1979 House Investigative Report, supra* note 72, at 164 *et seq.*

169. Transcript of Robert S. McNamara Speaking to a Press Seminar in the World Bank, at 11 (May 10, 1978) (on file with *Yale Studies in World Public Order*). Interview with Robert McNamara, N.Y. Times, Apr. 2, 1978, at E3, col. 1.

170. *Id.*

171. *See* notes 183-86 *supra*; The Economist (London), International Banking: A Survey 21 (Mar. 22, 1980).

172. R. Oliver, Early Plans, *supra* note 19, at 44-45; E. Mason & R. Asher, *supra* note 18, at 431-34.

173. *See* Farnsworth, *World Bank Loans Not Just Money*, N.Y. Times, Aug. 7, 1977, §4, at 4, col. 1 (noting that "the World Bank has become the largest source of technological and financial assistance to

will more frequently have political ramifications. To prevent political disputes from interfering with their development goals, the banks need to try even more scrupulously to preserve this basis of common agreement--both among member countries and the banks and the individual members of the banks' staffs.[174]

The banks have emphasized that among the most basic of human rights is the right to minimal levels of nutrition, health, and education; and that they are more sensitive to these rights and are doing more to advance them than are any other institutions.[175] Both the banks and many *developed* member countries are concerned that if the banks are obligated to pursue human rights as well as development goals, there is great danger that the effectiveness of the banks' present work will be sacrificed in return for doubtful gains in the sphere of human rights.[176]

B. *The Second Rationale: Derogations from Bank Charters Are Permissible*

The second possible rationale for allowing the banks to take human rights conditions into account is that obligations under international human rights law authorize derogations from the charters of the banks.

1. *Jurisdictional Limitations Imposed by the Charters of the Banks and the United Nations Charter*

Article 2, paragraph 7, of the United Nations Charter declares:

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173. (Continued)
the developing nations."); The Economist (London), International Banking: A Survey 22 (Mar. 22, 1980) (noting recent decision by member countries to double World Bank's capital stock to enable it to double its lending).

174. *See 1979 House Hearings, supra* note 10, at 352 (statement by Rep. McHugh noting how difficult it is even in our *bilateral* aid programs to determine which countries should be singled out for cutbacks in aid because of their human rights policies).

175. *See* notes 169, 173 *supra*.

176. *1979 House Investigative Report, supra* note 72, at 184-85; *1979 House Hearings, supra* note 10, at 660-65, 697-701. Ministry of Foreign Affairs of the Kingdom of the Netherlands, Human Rights and Foreign Policy 109.

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[177]

This provision has been the primary obstacle to the United Nations' asserting its competence to protect human rights.[178] However, a number of United Nations resolutions and decisions by the International Court of Justice, in the process of expanding the competence of the United Nations to act to protect human rights, have pushed back the jurisdictional limits imposed by this provision. For example, Resolution 1235 of the United Nations Economic and Social Council (1967)[179] authorizes the United Nations Commission on Human Rights

> in appropriate cases, to make a *thorough study* of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid as practised in the Republic of South Africa and the Territory of South West Africa ... and racial discrimination as practised notably in Southern Rhodesia, *and report, with recommendations* thereon, to the Economic and Social Council.[180]

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177. *See* note 120 *supra*.

178 *See* Ermacora, *Human Rights and Domestic Jurisdiction* (Article 2, §7 of the *Charter*), in 124 Académie de Droit International. Recueil des Cours 371 (1968) [hereinafter cited as Ermacora].

179. E.S.C. Res. 1235, 42 U.N. ESCOR, Supp. (No. 1) 19, U.N. Doc. E/4393 (1967).

180. *Id.* (emphasis supplied). E.S.C. Res. 1503, 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970), sets forth procedures for handling reports of such violations and making studies and recommendations based on such reports. Many Soviet bloc and Third-World members of the Council objected to the procedures as originally proposed on the ground that they "represented interference in the domestic affairs of sovereign states," Commission on Human Rights: Report on the 26th Sess., 48 U.N. ESCOR, Supp. (No. 5) 33-35, U.N. Doc. E/4816, E/CN.4/1039 (1970). Consequently, Resolution 1503, in its final form, specifies that investigations into alleged human rights abuses can be undertaken by an *ad hoc* committee established by the United Nations Commission on Human Rights (a) only with the consent of the state concerned and only so long as it is conducted in constant cooperation with that state and under conditions determined in agreement with it, and (b) only if all available means at the national level have been resorted to and exhausted.

This resolution was the first step towards establishing permanent procedures to investigate all types of serious human rights violations.[181] Moreover, it is probably this resolution which allowed at least one commentator to assert that gross violations or consistent patterns of violations of human rights no longer lie solely within the jurisdiction of individual countries.[182]

Another example of such jurisdictional expansion is provided by dictum in the *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (1970)[183] There the International Court of Justice noted that obligations derived "from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination," are "obligations towards the international community as a whole," and "[b]y their view of the importance of [these] rights," wrote the Court, "all States can be held to have a legal interest in their protection..."[184]

However, the fact that serious human rights violations may now be a matter of international concern does not give the banks the competence to champion human rights. Article 2, paragraph 7, of the United Nations Charter is intended to protect the national sovereignty of members of the United Nations.[185] The principle of national sovereignty and the limitations which it places upon United Nations jurisdiction inform the debates leading up to the passage of Economic and Social Council Resolution 1235 and the *Barcelona Traction* decision.[186] Neither the principle of national sovereignty nor the limited jurisdiction of the United Nations has anything to do with those provisions of the banks' charters that declare that the development purposes of the banks shall guide all their decisions and that such decisions shall be based solely upon economic considerations.[187] These provisions define the limited competence

181. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 Am. J. Int'l L. 337, 344 (1972) [hereinafter cited as Schwelb].

182. Ermacora, *supra* note 178, at 436.

183. Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (New Application: 1962) (Belgium v. Spain) Second Phase [1970] I.C.J. 4.

184. *Id.* at 33.

185. *See* Ermacora, *supra* note 178.

186. *See* notes 179, 180, 183, 184 *supra*.

187. *See* notes 55, 57 *supra*.

of the banks. Thus, the fact that the principle of national sovereignty no longer is a complete shield against international reaction to harsh human rights policies does not overcome these provisions.

Even leaving aside the issue of the competence of the banks to protect human rights, I.B.R.D. IV.10 still prohibits the banks from interfering in the political affairs of members.[188] It makes no distinction between internal and external political affairs. In contrast, United Nations Economic and Social Council Resolution 1235[189] and the quoted passages from *Barcelona Traction*[190] hinge upon the distinction between domestic and non-domestic jurisdiction.

Finally, by agreement between the World Bank and the United Nations, these two institutions have considerable independence from each other.[191] Therefore, decisions which relate to the United Nations Charter and resolutions which concern the competence of United Nations institutions should not be extrapolated facilely to the banks.

2. *International Obligations to Protect Human Rights that May Permit Derogations from the Charters of the Banks*

Even though the banks are not competent to take human rights considerations into account on their own initiative, merely for the sake of promoting human rights, there may exist obligations on the part of the

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188. *See* note 55 *supra*.

189. *See* notes 179-80 *supra*.

190. *See* notes 183-84 *supra*.

191. Agreement Between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, 16 U.N.T.S. 346 [hereinafter cited as United Nations--I.B.R.D. Agreement];

Agreement Between the United Nations and the International Bank for Reconstruction and Development (Acting for and on Behalf of the International Finance Corporation) on Relationship Between the United Nations and the International Finance Corporation, Feb. 20, 1957, 265 U.N.T.S. 314 [hereinafter cited as United Nations--I.F.C. Agreement];

Agreement Between the United Nations and the International Development Association, Mar. 27, 1961, 394 U.N.T.S. 222 [hereinafter cited as United Nations--I.D.A. Agreement]. *See also* text accompanying notes 217-19 *infra*.

international community or among the members of a regional organization such as the Council of Europe or the Organization of American States to respond to violations of human rights in particular countries or territories in a manner which involves consideration of measures to limit economic assistance to those particular countries or territories. The existence of such an obligation should be a necessary but not sufficient condition for the banks' consideration of human rights issues in the course of making loan decisions. Any obligation to consider human rights must be balanced against the banks' conflicting and primary duty to base loan decisions solely on economic considerations. In balancing the two obligations, the banks must consider:

(a) whether the obligation to protect human rights specifically involves the limitation of economic assistance or whether it seeks improvements in human rights conditions by other means (*i.e.*, if the obligation does not concern economic sanctions or other limitations on economic assistance, it probably does not concern the banks at all);

(b) the force of the obligation under international law--in particular, whether it is derived from

> (i) a binding decision of a competent international organ, such as the United Nations Security Council[192] or the Committee of Ministers of the Council of Europe[193] or a decision of a competent international tribunal, such as the International Court of Justice,[194] the European Court of Human Rights[194] or the Inter-American Court of Human Rights;[196]

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192. U.N. Charter art. 25.

193. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 32, 213 U.N.T.S. 221.

194. U.N. Charter art. 94.

195. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 48, 213 U.N.T.S. 221.

196. American Convention on Human Rights, Nov. 22, 1969 (now in force), arts. 62, 63, O.A.S. Treaty Series No. 36, at 1-21 (O.A.S. Official Records, OEA/SER.A/16).

> (ii) a resolution by a competent international organ with only recommendatory authority, such as the United Nations General Assembly[197] or Economic and Social Council[198] or the Inter-American Commission on Human Rights;[199]
>
> (iii) the writings of publicists; or
>
> (iv) the pronouncements of individual governments, but only to the extent that they reflect the sentiments of the international community;[200]

and finally;

> (c) the way in which an obligation to protect human rights, if applied to the banks, would affect the economic progress of needy persons in developing countries, a goal to which both the banks and the United Nations are dedicated.[201]

The most authoritative guide to establishing such an obligation and balancing the various factors mentioned above appears in the International Court of Justice's

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197. U.N. Charter arts. 10-17.

198. U.N. Charter arts. 62-66.

199. American Convention on Human Rights, Nov. 22, 1969, (now in force though United States has not yet ratified it), art. 41, O.A.S. Treaty Series No. 36, at 1-21 (O.A.S. Official Records, OEA/SER.A/16).

200. One possible example of obligations--although they are obligations with questionable international force--is President Carter's March, 1977, address to the United Nations General Assembly, in which he said:

> All the Signatories of the U.N. Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation of freedom occurs in any part of the world.

76 Dep't State Bull. 332 (1977). *See* Oscar Schachter's analysis of President Carter's position in Schachter, *International Law Implications of U.S. Human Rights Policy*, 24 N. Y. L. Sch. L. Rev. 63 (1978) [hereinafter cited as Schachter].

201. U.N. Charter arts. 1, 55, 56, the relevant portions of which are quoted at pp. 416-17 *infra*; *see* note 55 *supra* (with respect to banks).

advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*.[202] In *Namibia* the main issues before the Court were the validity of Resolution 276[203] and what measures were required of South Africa and the rest of the international community as a consequence of this resolution.

The Court found, *sua sponte*, that a policy of apartheid, such as that applied by South Africa in Namibia, constitutes a denial of fundamental human rights and thus a *per se* violation of the purposes and principles of the United Nations Charter.[204] But in establishing the international community's obligation to respond to the situation in Namibia, the Court did not rely on its own assessment of South Africa's policies. Instead, it made that obligation dependent upon the prior Security Council resolution. The Court affirmed the validity of Security Council Resolution 276,[205] and declared that once a competent organ of the United Nations has made a binding determination that a situation is illegal, there exists a duty, especially upon Members of the United Nations, to bring that situation to an end.[206] The Court then declared:

> The precise determination of the acts permitted or allowed--what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should

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202. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] I.C.J. 16.

203. Security Council Resolution 276 (1970) declared that "the continued presence of the South African Authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid," and called "upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with [this declaration of illegality];" 25 U.N. SCOR, Resolutions and Decisions 1, 2, U.N. Doc S/INF/25 (1970).

204. [1971] I.C.J. 16, 57, para. 131.

205. *Id.* at 53, para. 115.

206. *Id.* at 54, para. 117.

> be applied--is a matter which lies *within the competence of the appropriate political organs of the United Nations* acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia.[207]

This passage may leave open the possibility that the General Assembly has some authority to determine what measures *should* be taken in response to human rights violations. It leaves little doubt, however, that the political organs of the United Nations have exclusive competence to determine what measures the international community *should* or *must* take in the way of economic sanctions against a country which violates human rights. In particular, this passage strongly implies that individual countries have no basis under the law of the United Nations to effect such international sanctions *unilaterally*.

The Court qualified the obligation upon countries to "abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory"[208] by saying, "In general, the non-recognition of South Africa's administration of the Territory *should not result in depriving the people of Namibia of any advantages derived from international co-operation*."[209] The Court concluded this section of its opinion with the declaration, "As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that *the injured entity is a people* which must look to the international community for assistance..."[210] This last point finds support in the United Nations Charter, which accords to economic development goals a priority at least equal to that accorded human rights goals.[211]

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207. *Id.* at 55, para. 120 (emphasis supplied).
208. *Id.* at 55-56, paras. 124, 125 (emphasis supplied).
209. *Id.*
210. *Id.* at 56, para. 127 (emphasis supplied).
211. *See* U.N. Charter arts. 1, 55, 56. Article 1 states that one of the purposes of the United Nations is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex language, or religion."

The careful reasoning by which the International Court of Justice arrived at its conclusion that the international community has an obligation to limit economic relations with South Africa suggests a general procedure for establishing similar obligations upon the international community in response to serious violations of human rights. Initially, a competent international organ must find that human rights violations in a particular country or territory are so serious that the international community has an obligation to act to put an end to these violations. A competent international organ must also decide what specific measures are to be taken to try to end these violations. Even more importantly, *Namibia* declares--fully supported by the United Nations Charter--that such measures should not deprive the people of the country or territory concerned of the benefits of international economic cooperation. *Namibia* concerned the policy of apartheid, a category of human rights violations which the international community, by clear consensus, believes to warrant its concern and response.[212] This fact strongly suggests that the limitations which *Namibia* placed on economic sanctions against South Africa apply equally to international obligations to impose economic sanctions in response to other types of human rights violations.

Therefore, given that obligations that involve economic sanctions must be established by competent international organs and that such obligations must not deprive the people of a developing country of the benefits of international development assistance, it appears unlikely that there are any current obligations under international law, with the possible exceptions of obligations to curtail economic relations which help sustain South Africa's apartheid policies and its control over Namibia, that can overcome the obligation upon the banks

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211. (Continued)
Article 55 declares that the U.N. shall promote: "a) higher standards of living, full employment and social progress and development" and "c) universal respect for, and observance of human rights and fundamental freedoms for all . . ." In Article 56, members pledge themselves to take "joint and separate action" to achieve the goals set out in Article 55.

212. Schwelb, *supra* note 181 at 341-46, 348-50; *see also* Ermacora, *supra* note 178, at 427 (U.N. Charter art. 1, para. 3, art 13, para. 1(b); art 55(c), prohibitions on discrimination).

to take only economic considerations into account.[213] In other words, it is unlikely that the banks are now permitted to take into account human rights considerations, *per se*, in making loan decisions.

3. *International Obligations to Protect Human Rights that Can Compel Derogations from the Charters of the Banks.*

Part II, above, showed that directors are governed by the obligation that the banks take only economic considerations into account in making decisions. Therefore, as long as there is no other obligation under international law which can counterbalance this obligation, directors cannot oppose loans solely on the basis of human rights considerations. Once there exists such a countervailing obligation, however, the banks *may* take human rights considerations into account for their own sake, and directors *may* oppose loans directly on the basis of human rights concerns.

The existence of such an obligation does not, however, necessarily mean that it is desirable either for directors to oppose loans for human rights reasons, or that the banks be *compelled* to take human rights considerations into account. The issue hinges on the danger of politicizing the banks[214] and on the danger that limitations on development assistance will do more harm than good.

Whether the banks are compelled to take into account human rights considerations is determined, in large part, by the agreement defining the relationship between the United Nations and the I.B.R.D.[215] This

213. This conclusion assumes that there are no such obligations under current statutory (or customary) international law. In particular, it assumes that instruments such as the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), and the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) (*entered into force* Mar. 23, 1976, though the United States has not yet ratified it) do not create such obligations. *See* Ermacora, *supra* note 178, at 427-30 (Universal Declaration of Human Rights not legally binding).

214. *See* text accompanying notes 16-20 *supra*.

215. United Nations--I.B.R.D. Agreement, *supra* note 191.

agreement, entered into by the United Nations and the I.B.R.D. in 1947 pursuant to articles 51 and 63 and article V, section 8, respectively, of their charters, was later supplemented by agreements between the United Nations and the I.F.C. and the United Nations and the I.D.A.[216] The pertinent article of the United Nations--I.B.R.D. agreement states:

> 1. The United Nations and the Bank shall consult together and exchange views on matters of mutual interest.
>
> 2. Neither organization, nor any of their subsidiary bodies, will present any formal recommendations to the other without reasonable prior consultation with regard thereto. Any formal recommendations made by either organization after such consultation will be considered as soon as possible by the appropriate organ of the other.
>
> 3. The United Nations recognizes that the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognizes, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to terms or conditions of financing by the Bank. The Bank recognizes that the United Nations and its organs may appropriately make recommendations with respect to the technical aspects of reconstruction or development plants [sic], programmes or projects.[217]

Article V, section 8 of the I.B.R.D. charter provides:

> (a) The Bank, within the terms of this Agreement, shall cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields. *Any arrangements for such cooperation which would*

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216. United Nations--I.F.C. Agreement, *supra* note 191; United Nations--I.D.A. Agreement, *supra* note 191.

217. United Nations--I.B.R.D. Agreement, *supra* note 191, art. IV.

> *involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article VII.*
>
> (b) In making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph and participated primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organization.[218]

These two articles, read together, affirm the independence of the I.B.R.D., and emphasize the bank's obligation to make loan decisions solely on the basis of economic considerations.[219] The only provision of the agreement which even alludes to the possibility of derogations from the charter of the I.B.R.D. is article VI, section 1, which states:

> The Bank takes note of the obligations assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter.[220]

In 1967, during discussions in the United Nations General Assembly over I.B.R.D. loans to Portugal and South Africa, the Legal Counsel of the United Nations remarked that "there was nothing in the United Nations Charter which was mandatory for the Bank. Article 48 stated that decisions of the Security Council should be 'carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.'"[221] Thus

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218. I.B.R.D., art. V, § 8 (emphasis supplied).

219. Bleicher, *UN v. IBRD: A Dilemma of Functionalism*, 24 Int'l Organizations 31, 35-42; Yokata, *supra* note 132, at 55-59.

220. United Nations--I.B.R.D. Agreement, *supra* note 191.

221. 21 U.N. GAOR, C. 4 (1653d mtg.) 11, U.N. Doc. A/C.4.SR. 1653 (1966) (testimony of Mr. Stavropoulos).

at least as far as obligations to the United Nations are concerned, members of the banks are compelled to deviate from the bank charters only to comply with United Nations Security Council decisions for the maintenance of international peace and security.

C. *The Third Rationale: In Some Cases, Human Rights Considerations Are Relevant to Economic Considerations*

In making loan and other assistance decisions, the banks may consider human rights factors that legitimately implicate economic decision-making criteria. Banks should take care, however, to limit their reliance on this rationale to situations in which the relation between human rights and economic factors is reasonably clear and direct.

1. *Banks May Consider Human Rights under this Rationale*

Violations of human rights can have economic consequences which the banks may take into account. Human rights abuses can cause, or be symptoms of, governmental instability and arbitrariness, or poor management of economic affairs--all of which can threaten the success of development projects and programs. Human rights abuses, such as discrimination against or intimidation of certain segments of a country's population, may prevent the benefits of development projects and programs from accruing to the very people who most need assistance.[222]

In addition, any cost-benefit analysis in which the main criterion for success is an increase in the well-being of needy persons must contemplate the possible negative effects of development projects and programs. If development assistance merely permits a government to bolster repressive policies, the banks should take this factor into account when making loan decisions. Considerations such as these are legitimate economic ones, since economics, at its most basic, involved the satisfaction of human needs and wants at the lowest possible cost. It is consistent with such a definition of economics to include in any cost-benefit analysis an examination of the broader effects of a proposed project on the welfare of those whom it is intended to benefit.

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222. Schachter, *supra* note 200, at 86.

2. *Limits on the Admissibility of Human Rights Considerations under this Rationale*

It is important to distinguish this third rationale for permitting the banks to take account of human rights conditions from the first rationale. The latter contemplates that the purposes and functions of the banks implicitly include the protection of human rights. By contrast, the third rationale holds that the banks may not regard the protection of human rights, for its own sake, as one of their purposes. Instead, the banks may take human rights considerations into account only to assess the net effect of individual development projects and programs on human welfare. In other words, there must be a *close connection* between those human rights considerations which are taken into account and the particular project or program planned or carried out.

In particular, access to development assistance should not be used as leverage to bring about improvements in human rights conditions, so long as that assistance is likely to bring about a net increase in the welfare of needy persons in developing countries. Such coercive use of development assistance is impermissible and inadvisable. The concept of "economic considerations" would be stretched too far if it included opportunities to increase human welfare via political changes exacted by the banks' assistance policies;[223] considerations of this nature would involve undeniably political elements. Moreover, coercive use of development assistance would certainly be regarded as interference in the political affairs of members of the banks, and therefore prohibited by I.B.R.D. IV.10 and its analogs.[224]

Coercive use of development assistance would introduce a politically charged issue into the banks' cost-benefit calculations, thus politicizing the banks and jeopardizing their effectiveness as development institutions.[225] Even if the banks were willing to take this risk, it would be extremely difficult to calculate whether the potential gains in human rights would exceed the costs of withholding aid from needy persons.

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223. *See* note 57 *supra*.

224. *Id.*

225. *See* note 5 *supra*. *See also* 125 Cong. Rec. H7299 (daily ed. Sept. 5, 1979)(referring to Marmorstein, *supra* note 160, at 135).

3. *Deciding When Human Rights Considerations Have Economic Implications*

Decisions as to when human rights violations raise economic considerations that the banks should take into account must be made by the banks themselves on a case-by-case basis. Political bodies such as national legislatures do not have the expertise or the impartiality to enable them objectively to determine the overall costs and benefits of individual development projects and programs. Furthermore, the charters of the banks declare that authority over the operations of the banks is vested in their boards of governors and directors.[226] Finally, the charter of the I.B.R.D. declares that member countries shall deal with the I.B.R.D. only through their treasuries, central banks, or similar fiscal agencies.[227] Therefore, national legislatures may not insist that human rights violations in particular countries have economic consequences which compel the banks to limit assistance to those countries. Similarly, the provision in the Agreement Between the United Nations and the I.B.R.D. which states, "it would be sound policy [for the United Nations] to refrain from making recommendations to the Bank with respect to particular loans..."[228] implies that similar demands by international political bodies should not be binding on the banks.

E. *The Basic Human Needs Exception in United States Legislation*

As mentioned above,[229] United States legislation requires American directors in the banks to oppose loans and any other assistance to any country whose government engages in a consistent pattern of gross violations of internationally recognized human rights, "*unless* such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country."[230] Does the exception contained in this legislation make the legislation acceptable under the third rationale presented above?

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226. *See* notes 61, 62 *supra*.

227. *See* note 6 *supra*: I.B.R.D., art. III, §2.

228. *See* United Nations--I.B.R.D. Agreement, *supra* note 191, at art. IV, §3.

229. *See* text accompanying note 159 *supra*.

230. Mamorstein, *supra* note 160 (emphasis supplied).

One official of the United States Treasury Department has provided the following description of the manner in which the United States government has implemented the "basic human needs" provision:

> Given the increasing economic diversity which characterizes the developing world; it it clear that the basic needs concept must relate to the various stages of the development process and patterns of income distribution. It must be applied within the context of each recipient country's unique economic, cultural and social circumstances. While it is not feasible to attempt an explicit definition of basic human needs which could be uniformly applied to all developing countries, one result of the application of the basic human needs concept to United States policy in the multilateral development banks is that the United States has tended to oppose loans to countries with serious human rights problems when the loans are for large capital or infrastructure projects.[231]

An economic cost-benefit analysis would probably not distinguish between capital and infrastructure projects on the one hand, and projects directly serving basic human needs on the other, so long as both types of projects result in net increases in the welfare of needy persons in the not-too-distant future. Recently, development planners have emphasized that large capital and infrastructure projects form an essential part of any balanced development program designed to help poor persons in developing countries.[232] It would therefore appear that, even given the basic human needs exception, current legislation will sometimes require United States directors to vote in ways which cannot be justified on the basis of economic considerations.

Overview and Conclusions

The analysis in the latter half of this Article has often focused more on the World Bank than on the other

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231. Statement by Brian Crowe, United States Treasury Department, Apr. 28, 1980 (on file with *Yale Studies in World Public Order*).

232. Nossiter, *World Bank Shifts Focus to Local Projects*, N.Y. Times (late city ed.), Jan. 31, 1980, at D 1, col. 2.

multilateral development banks, largely because of the greater availability of information concerning the World Bank. But since the World Bank is the oldest, largest, and most influential[233] of the banks, and since the charters and operations of all the banks are similar, the conclusions concerning the World Bank are likely to apply to the other banks. The intended focus throughout this Article has been on the multilateral development banks as a group rather than on one particular bank. It is important that the current disputes concerning earmarking, the status of the directors, and human rights not be seen merely as a clash between two institutions--the World Bank and Congress or the World Bank and any other executive or legislative branch of a national government. These disputes implicate the central theme of this Article, the importance of insuring the apolitical character of *all* the multilateral development banks amidst the divergent interests of their member countries.

This concern does not arise from a belief that the banks and multilateral development assistance are important in and of themselves. It arises instead from a recognition that the multilateral banks provide an alternative and, in some respects, more effective means of encouraging desirable development in developing countries; that effective development will redound to the benefit of all the present members of the banks; and that the effectiveness of multilateral development assistance depends to a great extent upon the multilateral banks' functioning as apolitically as possible. The charters of the banks, together with the legislative history of the I.B.R.D. charter, clearly affirm and require all members to recognize the apolitical and strictly development-oriented character of the banks. Members may not, therefore, use their participation in the banks to further their own political objectives in conflict with the banks' development objectives.

The charters of the banks generally prohibit nations from earmarking subscriptions. Members of the I.B.R.D. have the right to veto the use of their currencies which constitute the paid-in portion of their subscriptions to the I.B.R.D. However, a member country's veto of the use of its currency on political grounds would be contrary to the original intentions behind the currency-veto power provision, would be without precedent in the 35-year history of the I.B.R.D., and would

233. *See* Table (Appendix), lines 1-4.

conflict with other provisions of the I.B.R.D. charter. In none of the other institutions do developed member countries have veto power over the use of their currencies.

While directors may represent the interests of the countries which appointed or elected them with respect to economic and financial matters, their actions must conform to the development purposes of the banks and to the requirement that the banks function as apolitical institutions. Members may not instruct their directors to oppose loans to particular countries or projects for political reasons or for reasons which are unrelated to the development purposes of the banks. At the same time, the banks and their directors *may* take into account human rights considerations in making loan decisions. They may do so, however, only to the extent that such considerations have economic implications which are relevant to the banks' purposes and functions. Whether particular violations of human rights have such implications must be decided by the banks themselves on a case-by-case basis.

SOURCES FOR APPENDIX ON PAGE 428

Data on the I.B.R.D. and I.D.A.: WORLD BANK, ANNUAL REPORT 1980 at 3, 8-9, 12-13, 159, 161, 172, 184 (1980). Data on the latest I.B.R.D. capital increases are from the World Bank Department of Information and Public Affairs.

Data on the I.F.C.: INTERNATIONAL FINANCE CORPORATION, ANNUAL REPORT 1980 at 1-3, 28, 47-48 (1980). Some of the data on the latest capital increases are from the I.F.C. Information Office.

Data on the I.A.D.B.: INTER-AMERICAN DEVELOPMENT BANK, ANNUAL REPORT 1979 at 1-3, 5, 8, 15-18, 35, 120 (1980).

Data on the A.D.B.: ASIAN DEVELOPMENT BANK, ANNUAL REPORT 1979 at 6, 20-23 65, 71, 74, 77, 108, 109 (1980). Data on the U.S. share of the latest resource increases are from *1979 House Hearings, supra* note 13, at 224-28.

Data on the Af.D.F.: AFRICAN DEVELOPMENT BANK & AFRICAN DEVELOPMENT FUND, ANNUAL REPORT 1979 at 9, 42, 91, 100, 101, 105 (1980). Data on the U.S. share of the latest resource increase are from *1979 House Hearings, supra* note 13, at 171-72.

APPENDIX

DATA CONCERNING THE MULTILATERAL DEVELOPMENT BANKS IN WHICH THE UNITED STATES HOLDS MEMBERSHIP

	WORLD BANK			I.A.D.B.		A.D.B.		Af.D.F.
	I.B.R.D.	I.D.A.	I.F.C.	hard loan facility	soft loan facility[1]	hard loan facility	soft loan facility[2]	
1. year established[3]	1945	1960	1956	1959	1959	1966	1974	1973
2. no. of members as of end of FY 1979[4]	135	121	113	26 regional 15 nonregional		29 regional 14 nonregional		48 regional 21 nonregional
3. loans approved in FY 1979[4] (millions U.S. $)	7644	3838	681	1249	620	835	416	288
4. *cumulative* loan commitments through FY 1979[4] (millions unadjusted U.S. $)	59341	20570	3105	8307	6427	4687	1963	776
5. cumulative U.S. subscriptions through FY 1979[4] (millions current U.S. $)	9348	6406	102	4059	3640	1054	270	54.6
as percent of total subscriptions	23.4	32.9	33.35	34.9	61.6	11.9	14.0	4.7
6. U.S. voting powers as of end of FY 1979[4] (percent)	21.1	21.5	30.6	34.85		10.0		4.0
7. amount of most recent general capital increase approved by board of governors (millions U.S. $)[5, 6]	44000	12000	540[6]	7968	1750	5446	2150	780
U.S. share (%)	21	27	20.6[6]	34.5	40.0	16.3	20.7	16
date approved by board of governors	1/80	3/80	11/77	12/78		1976	8/78	1978

8. percent of (7) which must be paid-in	7.5	100	100[7]	7.5	100	10	100	100
9. four largest contributors of *convertible* currency to the capital increase referred to in (7) (country, % of total increase)[9]	U.S. 21 U.K. 7.5 Japan 6 W. Ger. 5.5	U.S. 27 Japan 14.6 W. Ger. 12.5 U.K. 10.1	U.S. 20.6 W. Ger. 5.5 France 4.4 U.K. 4.4	U.S. 34.5 Argentina 10.9[8] Brazil 10.9[8] Venezuela 5.0	U.S. 40.0 Japan 4.6 W. Ger. 4.2 France, Italy, Spain, U.K. 4.1	Japan 17.5 U.S. 11.9 Aus. 7.4 Can. 6.7	Japan 47.4 U.S. 14.0 W. Ger. 10.3 U.K. 5.9	Japan 18.7 Can. 14.2 W. Ger. 11.7 Sweden 7.3

NOTES

1. Known as the Fund for Special Operations.
2. Known as the Asian Development Fund.
3. The U.S. is a founding member of all these institutions except the Af.D.F., which it joined in 1976.
4. For the purposes of lines 2-6, "1979" means the calendar year 1979, except in the case of the World Bank, where it means the period from July 1, 1979, to June 30, 1980.
5. These amounts are to be paid to the banks in installments over a three or four year period. *See* note 10 *supra*. In 1980, the U.S. Congress refused to authorize funds for the United States' share of the I.D.A. increase. It did authorize U.S. participation in increases for the I.A.D.B., Af.D.F., and the soft loan facility of the A.D.B. In the case of the I.A.D.B. and A.D.B., however, Congress did not authorize the full amount agreed upon by the Boards of Governors. Pub. L. No. 96-259. The authorization request for the latest I.B.R.D. increase was not presented to Congress before the end of 1980. The authorization request for the I.F.C. and the hard loan facility of the A.D.B. was approved by Congress in 1977. Pub. L. No. 95-118. *See* [1979] CONG. Q. ALMANAC 159; [1980] CONG. Q. WEEKLY REP. 1397-98, 3452, 3678.
6. Some of these capital increases include a certain amount of *unallocated* subscriptions in order that new members of the banks can take part in the increases and that current members can increase their subscriptions if they wish to do so. The amount of unallocated subscriptions is significant in relation to the total capital increase only in the case of the I.F.C., where $71 million of the total $540 million increase was unallocated by the board of governors.
7. Though all capital subscriptions to the I.F.C. must be paid in, the I.F.C. can loan up to four times the amount of its unimpaired subscribed capital and surplus funds.
8. Only two-thirds of this amount is to be made in convertible currencies.
9. Data on individual country allocations are not available for the latest A.D.B. and Af.D.F. resource increases. In the case of the A.D.B. and Af.D.F., the data shown are data for cumulative subscriptions from the time of the founding of each institution up to the end of 1979. By the end of 1979, total cumulative subscriptions to the hard and soft loan facilities of the A.D.B. equaled $8861 million and $1925 million, respectively, and total cumulative subscriptions to the Af.D.F. equaled $1152 million.