

THE ROLE OF THE GENERAL COUNSEL OF AN INTERNATIONAL FINANCIAL INSTITUTION

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This paper examines the role of the general counsel and director of the legal service of an international financial institution (IFI), whether a regional development bank or a global regulatory organization like the International Monetary Fund. John Head, in his paper for this Symposium, identifies a number of issues concerning the role of the General Counsel in an IFI.¹ This paper responds to a number of Professor Head's questions and identifies some additional issues. Although the thoughts expressed in this paper are intended to apply to a wide range of international financial institutions, many examples are drawn from the International Monetary Fund because the author is most familiar with that organization.

Professor Percy E. Corbett made the following comment regarding the work of legal advisors to national foreign ministers:

Theirs is the first chance to perceive those convergences of law and policies that can be made the stepping stones towards an effective law of nations. . . . Not a few of them bring to their work a conviction of mission to speed the coming of a universal legal community. If with this conviction they combine courage and a shrewd sense of the possible, they can exert steady pressure in that direction upon their governments.²

H.C.L. Merillat, the first Executive Director of the American Society of

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1. See John W. Head, *Law and Public Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J. L. & PUB. POL'Y 194, 223-26 (2008) [hereinafter Head, *Law in IFIs*].

2. H. C. L. Merillat, *Preface* of LEGAL ADVISERS AND FOREIGN AFFAIRS, at v (H. C. L. Merillat ed.; Oceana Publ'ns 1964) (citing PERCY E. CORBETT, *LAW IN DIPLOMACY* 34 (Princeton Univ. Press 1959)).

International Law (ASIL), recognized the important roles of the legal advisors to foreign ministries and to international organizations in the application and development of international law. Under his guidance, the ASIL organized two pioneering small off-the-record conferences. One was held in 1963 at Princeton University and included legal advisers to national foreign ministries, the World Bank, the United Nations and scholars.³ The other conference was held in 1965 at the Rockefeller Foundation's Villa Serbelloni in Bellagio, Italy, and included only legal advisers to international organizations and a few scholars.⁴ The author, as a young lawyer on the Society's staff, attended those conferences. At the 1965 conference he met Joseph Gold, then General Counsel of the International Monetary Fund, and began a friendship that lasted to the end of Mr. Gold's life.

RESPONSIBILITIES OF THE LEGAL DEPARTMENT

The responsibilities of the legal department of an international financial institution are outlined below.⁵ These tasks overlap and are not intended to be separated.

(A) Review and draft loan agreements and all varieties of documents to:

(1) Assure consistency with that organization's practice and constitutional instrument;

(2) Anticipate future problems, with appropriate precision/ambiguity regarding the duties and responsibilities of the organization and the country involved; and assure consistency with that organization's practice and constitutional instruments; and

(3) Use elegance of language appropriate to the circumstances.

(B) Advise on the formal interpretation of the constitutional instrument of the IFI and other documents. (In a number of IFIs, the Board of Governors and the Executive Board are authorized to make interpretations binding on the membership with no effective appeal provided.)

(C) Advise on the work of the IFI including:

(1) Advise on legal aspects of relations of the organization with member and non-member states and with other inter-

3. A summary report of the 1963 conference and the texts of papers for the conference, as revised, appear in *LEGAL ADVISERS AND FOREIGN AFFAIRS*, *id.*

4. A summary report of the 1965 conference and the texts of many of the papers for the conference, as revised, appear in *LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS* (H.C.L. Merillat ed.; Oceana Publ'ns 1966).

5. This list of responsibilities was inspired by a list made by Alexander J. Elkin. Alexander Elkin, *The Legal Service of an International Economic Organization* 3 (Aug. 1965) (unpublished paper prepared for Conference of Legal Advisers and International Organizations, organized by the American Society of International Law, Bellagio, Italy, Aug. 30-Sept. 3, 1965, in possession of the author). Cf. discussion of scope of services of an IFI legal department in John L. Taylor, *Legal Challenges at the Start of a New International Financial Institution*, 17 *KAN. J. L. & PUB. POL'Y* 349, 352-55 (2008).

- governmental organizations and non-governmental organizations;
- (2) Advise on legal aspects of authority of officers and staff members of the IFI;
- (3) Advise on legal aspects of personnel matters, staff reorganization, assignments, and termination; and
- (4) Advise on legal aspects of application of procurement regulations.
- (D)** Assure integrity of the organization and assume a leading role in anti-bribery and anti-corruption actions.
- (E)** Provide technical assistance related to the work of the IFI (e.g., assistance in drafting legislation relating to central banks, in the IMF, or advice on practices to detect and prevent money-laundering in support of crime and terrorism, also in the IMF).
- (F)** Assess the consistency of laws and regulations of member states in relation to the IFI's constitutional instrument and decisions.
- (G)** Advise on the scope of the IFI's jurisdiction over member states in areas of special concern (e.g., jurisdiction of the IMF over exchange rate arrangements and currency restrictions).
- (H)** Arrange for legal representation of the organization, and supervise that representation, in legal or arbitral proceedings in which the IFI is an interested party.
- (I)** Respond to outside inquiries from national authorities, inter-governmental organizations, and non-governmental organizations regarding the IFI's laws and practices.
- (J)** Cultivate relationships with professional organizations and individuals potentially interested in legal aspects of the IFI's work.

SIZE AND ORGANIZATION OF THE LEGAL DEPARTMENT

In 1965, the Legal Department of the IMF consisted of the General Counsel, two Deputy General Counsel, ten other lawyers, plus a supporting staff.⁶ The department was small enough so that all lawyers had easy access to the General Counsel. During this period, seven lawyers devoted most of their time to issues concerning use of the Fund's financial resources, exchange rate arrangements, and exchange restrictions of individual members. One lawyer devoted almost all of his time to technical assistance concerning central bank legislation. The remaining lawyers dealt with human resources, procurement by the IMF itself, and other issues that were presented from time to time.

As of Fall 2007, the Legal Department of the IMF consisted of 44 lawyers plus a cadre of bank supervisors focused on anti-money laundering and combating the financing of terrorism, as well as a large supporting staff. While the top layer of the Legal Department consists of only the General Counsel and two Deputy General Counsel, the organization of the office is more

6. Joseph Gold, *International Monetary Fund*, in LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS, *supra* note 4, at 96, 97-98.

hierarchical than in 1965. Eighteen lawyers now focus on the use of Fund resources, exchange rate arrangements, exchange restrictions, and debt problems of individual member countries. Technical assistance needs of member countries receive, proportionately, much more attention than they did forty years ago. The Legal Department now carries a lead role in efforts to identify and counter money-laundering activities and the financing of terrorism, with about nine lawyers and twelve non-lawyer bank supervisors concentrating their attention on these matters, matters that were hardly considered in 1965. Now, six lawyers deal primarily with internal personnel issues, procurement by the Fund, and other related internal matters.⁷

In 1965, Aron Broches, General Counsel of the World Bank⁸ and one of the six members of the “President’s Council,” reported that the Legal Department had a professional staff of twenty.⁹ At that time it was the Department’s policy to associate its lawyers with all aspects of the Department’s activities and to avoid specialization either as to geographical areas or types of work except where, say, linguistic ability might influence assignments.¹⁰

In order to function effectively, the general counsel and members of the legal department must keep themselves informed about developments and work of the institution. The lawyers should keep themselves up to date by, for example, attending periodic briefings in geographical departments so they are aware of the important activities of their counterparts and can inject legal advice before actions mature into uncomfortable precedents. However, most legal departments are small in relation to the size of the total staff and should not be expected to participate actively at the lower levels of the IFI.

EXAMPLES OF CRITICAL ROLES THAT LAWYERS HAVE PLAYED

While the aforementioned list of legal department responsibilities may adequately describe the work of an IFI legal service, it does not adequately communicate the special roles that lawyers can and have played within IFIs. The author wishes to examine four of those roles:

1. Role of the lawyer as innovator and institution-builder.
2. Role of the lawyer when presented with a *fait accompli*.
3. Role of the lawyer in pointing out potential “uncomfortable

7. E-mail messages from Ross B. Leckow, Deputy General Counsel, IMF, to the author Sept. 4-6, 2007 (on file with *Kansas Journal of Law and Public Policy*).

8. For the purposes of this article, “World Bank” refers to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The term “World Bank Group” refers to the preceding two institutions plus the International Finance Corporation (IFC), the Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), and the Multilateral Investment Guarantee Agency (MIGA).

9. Aron Broches, *International Bank for Reconstruction and Development*, in *LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS*, *supra* note 4, at 83, 85.

10. *Id.* at 83.

precedents.”

4. Role of the lawyer in the interpretation of the IFI’s constitution.

Finally, this paper will address the relationships of lawyers and economists and how a member of legal service of an IFI must avoid acting as an economist.

ROLE OF THE LAWYER AS INNOVATOR AND INSTITUTION-BUILDER

The legal service of an international financial organization is sometimes the innovator, and often the principal draftsman, when a new institution within the organization is created. Here, we shall look at three cases: the creation of the International Centre for the Settlement of Investment Disputes (ICSID) as an affiliate of the World Bank, the creation of Special Drawing Rights (now simply called SDRs) within the International Monetary Fund, and the creation of the Inspection Panel of the World Bank.

World Bank – ICSID

In the early 1960s, when there was agitation in the United States Congress to prohibit foreign assistance to countries that had expropriated property of U.S. private corporations,¹¹ the World Bank had already gained experience in the settlement of investment disputes. In a number of cases, developing countries had approached the President of the World Bank with the request that he use his good offices to try to settle an investment dispute that had arisen between the particular country and private investors.¹² To resolve the matter, the President often had to deal with the private investing company, the state of nationality of that company—or its shareholders, and the country where the investment was made. In some cases the President mediated settlement or issued what amounted to an arbitration award. Not infrequently, the World Bank President designated arbitrators, umpires, or experts to settle the dispute.¹³

The exercise of the President’s good offices in dealing with private investment disputes became such a large part of the President’s work (and in turn the work of the Legal Department of the World Bank) that Aron Broches, then General Counsel of the IBRD, persuaded his senior non-lawyer colleagues and the President of the Bank, that a new institution should be created.¹⁴ This

11. See generally S. REP. NO. 87-1535, at 36 and App. A (1962). (Appendix A contained a list of expropriations.)

12. See Remarks by Aron Broches in Panel, *Arbitration between Governments and Foreign Private Firms*, 55 PROC. AM. SOC. INT’L L. 69, 72-73 (1961). See also 2 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 7 (Oceana Publ’ns 1968) [hereinafter ICSID PREPARATORY DOCUMENTS].

13. ICSID PREPARATORY DOCUMENTS, *supra* note 12, vol. 2, at 7

14. Eugene R. Black, President of the World Bank, Address before the Annual Meeting of

body was intended to resolve disputes between host countries and private investors and to exclude the nation-state of the investor's nationality from participation (at least at the outset).

The Legal Department played the key role in organizing regional meetings of legal experts to discuss issues and review drafts regarding the new dispute settlement institution.¹⁵ A decision was made that the investment dispute settlement regime should take the form of a treaty. The Executive Board, with the approval of the Board of Governors, developed the text and submitted it to governments. The Convention on the Settlement of Disputes between States and Nationals of Other States entered into force on the fall of 1966.¹⁶

IMF – Special Drawing Rights (SDRs)

The Special Drawing Right (now simply SDR)¹⁷ is a monetary reserve asset created and sustained through multilateral collaboration with the IMF. The user of the SDR has the right to obtain an equivalent amount of a “freely usable” national currency in exchange for each SDR. Only member countries of the IMF, the IMF itself, and other countries and official institutions designated by the IMF can hold SDRs. “Private individuals, firms, and commercial banks are not permitted to hold SDRs, but may hold and use instruments valued in terms of the SDR.”¹⁸

The basic idea of a monetary reserve asset that was neither gold nor a national currency and would be created and sustained by multilateral cooperation within an international organization was conceived by John Maynard Keynes before the IMF was created.¹⁹ In the early and mid 1960s, a number of economists proposed the creation of monetary reserve assets that would supplement holdings of gold and the U.S. dollar (the principal monetary reserve assets at the time).²⁰

the Board of Governors (Sept. 19, 1961), *id.*, vol. 2, at 3. *See also id.* at 1-3.

15. Aron Broches, *Development of International Law by the International Bank for Reconstruction and Development*, 59 PROC. AM. SOC. INT'L L. 33, 34-38 (1965), reprinted in ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 79, 80-84 (Martinus Nijhoff 1995) [hereinafter BROCHES, ESSAYS].

16. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Aug. 27, 1965, *entered in force* Oct. 14, 1966; 17 U.S.T. 1270, 575 U.N.T.S. 159. *See also* Aron Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263 (1966), reprinted in BROCHES, ESSAYS, *supra* note 15, at 164.

17. *See* International Monetary Fund, By-laws, Rules and Regulations, Rule B-6 (60th Issue 2006).

18. *See generally* RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION 167-221 (Transnational Publishers 1985) [hereinafter EDWARDS, COLLABORATION].

19. *Id.* at 6-8.

20. *See* 1 MARGARET GARRITSEN DE VRIES, THE INTERNATIONAL MONETARY FUND,

It was not enough to simply describe and name this new monetary instrument. Detailed rules had to be worked out on its allocation and use. Negotiations proceeded in two forums: the deputy finance ministers of the Group of Ten and the IMF's Executive Board. This caused considerable awkwardness, for example, when Joseph Gold (General Counsel) and Jacques J. Polak (Economic Counsellor), who attended G-10 meetings as the personal representatives of the Managing Director, briefed the members of the IMF's Executive Board who had not been permitted to attend. Mr. Gold played a key role in defining the features of the new monetary instrument, the legal attributes it would have, and the rules regarding its allocation and use. Words were chosen carefully in all of these matters so as not to prejudice agreement on rules regarding allocation and use that became the heart of the system. The role of lawyers in identifying issues and in negotiating their resolution cannot be overstated. The result was the First Amendment to the Articles of Agreement that entered into force on July 28, 1969.²¹ Further changes in the SDR system were made in the Second Amendment that entered into force April 1, 1978.²²

World Bank – Inspection Panel

By the early 1990s there was a significant professional literature, as well as popular literature, on the adverse environmental and social effects of some large infrastructure projects financed by the World Bank.²³ This culminated in public outcry by non-governmental environmental organizations about the Narmada River projects in India. The projects, supported by financing from the IBRD and IDA, included the Sardar Sarovar Dam and Power Project and a water delivery and drainage project that would provide water for irrigation. The projects would have major environmental impacts and require resettlement of over 120,000 persons. Construction had begun in 1987, but all of the IBRD's contribution had not yet been disbursed. Faced with intense criticism, the Bank in 1991 commissioned an independent outside review. Environmental organizations were critical of the Bank's tepid response to the outside review report when received in 1992 and threatened to work politically

1966-1971, chs. 1-2 (Int'l Monetary Fund 1976); and Joseph Gold, *Legal Technique in Creation of a New International Reserve Asset: SDRs and Amendment of the Fund's Articles*, 1 CASE W. RES. J. INT'L L. 105 (1969) reprinted in 1 JOSEPH GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 128 (Int'l Monetary Fund 1979) [hereinafter GOLD, ESSAYS]. See also ROBERT SOLOMON, THE INTERNATIONAL MONETARY SYSTEM, 1945-1981, ch. 4 (Harper & Row 1982).

21. 20 U.S.T. 2775, 726 U.N.T.S. 266. See also EDWARDS, COLLABORATION, *supra* note 18, at 8-9 (n. 15).

22. *Id.* at 8-11. See generally *id.* at 167-221.

23. See Dana Clark & David Hunter, *The World Bank Inspection Panel – Amplifying Citizen Voices for Sustainable Development*, in THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE 167, 167-169 (Gudmundur Alfredsson & Rolf Ring ed.; Martinus Nijhoff 2001). See also Ibrahim F.I. Shihata, *The World Bank and Non-Governmental Organizations*, 25 CORNELL INT'L L. J. 623 (1992).

to cut off of funding for IDA, which depended on periodic “replenishments” from governments.²⁴

Following the Narmada River projects experience, the Executive Board in 1993 considered a number of proposals for improved monitoring of the work of the World Bank and establishment of a procedure for non-governmental organizations and groups adversely affected by a Bank-financed project to express their concerns. It fell to Ibrahim Shihata, the General Counsel of the Bank, and the Legal Department to flesh out the proposals.²⁵ Mr. Shihata became the principal architect of this new institution. On September 22, 1993, the Executive Board of the World Bank adopted two virtually identical resolutions establishing the Inspection Panel.²⁶

The World Bank Inspection Panel was a unique body when established.²⁷ It is an independent body within the structure of World Bank that reports directly to the Executive Board.²⁸ It receives and investigates complaints received directly from organizations and groups that were not part of the Bank’s previous “constituencies.”²⁹ However, the Inspection Panel’s role is a limited one circumscribed by the Executive Board.³⁰

24. See IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* 1-8 and 20 (2d ed.; Oxford Univ. Press 2000) [hereinafter SHIHATA, *INSPECTION PANEL* 2d].

25. See *id.* at 16-27.

26. Res. No. IBRD 93-10, Res. No. IDA 93-6, reprinted in SHIHATA, *INSPECTION PANEL* 2d, *id.* at 271-277.

27. The Asian Development Bank and the Inter-American Development Bank established inspection panels modeled on the World Bank Inspection Panel. See comparison table in SHIHATA, *INSPECTION PANEL* 2d, *supra* note 24, at 491-500. The inspection mechanism of the Asian Development Bank has now been replaced by an “accountability mechanism.” See generally Head, *Law in IFIs*, *supra* note 1, at 219 nn. 64-66.

28. The independence of the Inspection Panel from the World Bank’s management and staff is protected by procedures for appointment and tenure of panelists and the requirement that it report directly to the Executive Board and not to the management. The panel has its own staff which it controls. It has access to information and enjoys a status within the Bank that would not be available to an outside agency.

29. The “inspection panel” differs in concept from operations evaluation departments which have been established in IFIs (including the IMF and World Bank). These departments are internal to the organizations, they do not provide a vehicle for outside groups to impact the work of the organizations, and they report to management.

30. Cases are divided into two phases: an admissibility phase and a merits phase. In the first phase the Inspection Panel considers whether the “eligibility” requirements set forth in the guiding resolution establishing the Panel have been met and makes a recommendation to the Executive Board on that matter. A critical requirement for eligibility is that at least five percent of funds remain to be disbursed under the IBRD loan or IDA credit for the project. See 1995 legal opinion reprinted in SHIHATA, *INSPECTION PANEL* 2d, *supra* note 24, at 329-337. Another requirement is that the complaining organization or group be in the borrower’s territory and allege adverse impact on the group from the project. See 1997 legal opinion, *id.* at 338-344. The Board makes a determination on eligibility and instructs the Panel whether to proceed to examine the merits of the complaint.

One or more members of the panel will visit the country during the merits phase. The Panel’s report focuses on compliance by the World Bank with its policies and procedures and makes recommendations based on its findings of compliance or non-compliance. The Panel also does

The Inspection Panel system of the World Bank can be contrasted with the IFI review body proposed by John Head.³¹ John Head has proposed that the review body be completely independent from any particular IFI, have attributes of a court to which appeals can be made, and decisions of the review body would be binding rather than recommendatory.³² It is not clear whether the review body would be a substitute for an inspection panel or a body from which appeals could be made from decisions of the Executive Board.

ROLE OF THE LAWYER WHEN PRESENTED WITH A *FAIT ACCOMPLI*

On occasion, hopefully rare, the legal service of an IFI may be presented with a decision or document in which it did not participate in drafting and with which it recognizes unwise language. Often, if the matter is not truly important, the legal advisor will do little more than express his or her displeasure in mild terms. However, if the decision or document has significant legal implications, the general counsel may try to reopen the matter. Here, diplomacy, personality, and the overall respect enjoyed by the legal advisor are very important. A classic example is the involvement of Joseph Gold, when General Counsel of the IMF, in the final drafting of what is now Article IV of the Articles of Agreement of the International Monetary Fund.

The Document Presented to the IMF General Counsel

Article IV of the original Articles of Agreement of the IMF enshrined a par-value system of exchange rates based upon the centrality of the U.S. dollar and its convertibility into gold at a fixed rate. Following the collapse of the Bretton Woods system in 1973, there was widespread understanding that a new Article IV must be the centerpiece of any amendment to the IMF's Articles of Agreement. The IMF's Committee of Twenty was unable to reach agreement on a new Article IV. The Interim Committee of the Board of Governors was also unable to negotiate the terms of a new Article IV. The United States and France were the two protagonists. The United States wanted to be able to float the dollar in the exchange markets and for its actions to be formally legitimized. France wanted the floating of the dollar to be temporary and subject to legal constraints. It wanted a system of fixed but adjustable exchange rates to be at the center of any new Article IV.³³

When the negotiation of a new Article IV broke apart in June 1975, the attitude of most countries was that the negotiation of the terms of a new Article IV should be left to senior finance officials of the U.S. and French governments, and it was informally understood that whatever they agreed upon

not report on or make recommendations regarding the host-country's or borrowing entity's compliance with Bank policies and procedures.

31. Head, *Law in IFIs*, *supra* note 1, at 219-20.

32. *Id.*

33. See generally EDWARDS, COLLABORATION, *supra* note 18, at 491-505.

would be acceptable to other countries.³⁴ Following intense negotiations, the French and U.S. authorities announced agreement. The agreed text of the new Article IV was presented to the Fund on, essentially, a “take it” basis.³⁵

Reaction and Involvement of the General Counsel

When Joseph Gold, General Counsel of the IMF, first saw the full text of a draft of Article IV in early December 1975, he was shocked. Provisions that should have been part of the “purposes clause” in Article I, were stated as a “whereas” clause in Article IV. Section 2 of the draft authorized the Fund by an 85% vote of the total voting power to adopt general exchange arrangements binding on all members without stating with any precision what those arrangements might be. This was not a concern to the United States which had the voting power to block any vote requiring 85% of the total weighted voting power, but should have been of deep concern to other countries that might be in the minority. In the past the Fund Agreement had spelled out the legal obligations associated with future decisions contemplated by the Articles.³⁶ Rather than draw up a “bill of particulars” stating his concerns about the U.S.-French draft, he worked over the weekend on an entirely new draft of Article IV using the U.S.-French draft used as the starting point. This would not be an ideal text, but a “tolerable” one.³⁷

When U.S. and French representatives reconvened with Mr. Gold and George Nicoletopoulos (Deputy General Counsel of the IMF) on Monday, December 15, 1975, the U.S. and French representatives asked about the concerns of Mr. Gold hoping they would be simple and limited in number. Mr. Gold in response said they he would prefer that the group just look at his draft. He then left the room. For the next hour, the U.S. and French representatives discussed whether to work with Mr. Gold’s draft or their original agreed draft. They knew that the changes made by Mr. Gold were primarily legal, but still were suspicious of anyone reworking their agreed draft. The U.S. and French officials ultimately agreed to use Mr. Gold’s draft as the basis for further negotiation, and Mr. Gold returned to the room. Before the end of the week, Mr. Gold and the U.S. and French officials worked out the refinement of Article IV.³⁸

End of Episode

The author recalls that when the final agreed text of Article IV was

34. See 2 MARGARET GARRITSEN DE VRIES, *THE INTERNATIONAL MONETARY FUND, 1972-1978*, at 739-743 (Int’l Monetary Fund 1985) [hereinafter *IMF HISTORY, 1972-1978*].

35. *Id.* at 743-749.

36. *Id.* at 748. See also Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 *AM. J. INT’L L.* 443 (1983) [hereinafter *Strengthening*], reprinted in GOLD, *ESSAYS*, *supra* note 20, vol. 2 (1984) at 515.

37. See *IMF HISTORY, 1972-1978*.

38. *Id.*

released, he was very unhappy with its drafting and wrote Mr. Gold expressing his unhappiness. Article IV, even after it's re-drafting with the help of Mr. Gold, read more like a press communiqué than a statement of legal obligations. Mr. Gold in reply wrote a short response:

I think it was the Grand Cham, Samuel Johnson himself, who once said of a particular activity [a woman preaching; a dog walking on its hind legs] that the wonder was not that it was performed well but that it was performed at all. The same remark may be made about the draft of Article IV.³⁹

The final text of Article IV, as revised, was incorporated into the Second Amendment to the Articles of Agreement of the IMF.⁴⁰ The author wrote an article that attempted to interpret Article IV and to show how the legal commitments embodied in it might be applied and thus strengthened.⁴¹ Mr. Gold later wrote an article that had the same purpose.⁴² This is an example of a lawyer with an IFI doing his best when faced with a *fait accompli*.

ROLE OF THE LAWYER IN POINTING OUT POTENTIAL "UNCOMFORTABLE PRECEDENTS"

Alexander Elkin, who had served as the Legal Adviser to the Organisation for European Economic Co-operation (predecessor to the O.E.C.D.), wrote a discussion paper for the Bellagio conference in 1965 in which he commented:

[The General Counsel's or member of the legal department's] most valuable contribution will often lie, not in answering the question what the law *is*, but in the application of legal techniques to a discussion of policies. Once the relevant facts are sifted and the existing law ascertained, he will examine:

—whether the proposed rule or decision, though not contrary to the law as such and however much it may satisfy some immediate interest, may not form “an uncomfortable precedent for the future” or, in case of retrospective analysis later on, give rise to criticism . . . ;
and

—how the proposed rule or decision can best be adapted to the legal and institutional system of IEO [the international economic organization], particularly in the light of precedents established by other international organizations

39. Letter of Joseph Gold to the author dated February 6, 1976. The reference is to 1 BOSWELL'S LIFE OF JOHNSON 463 (George Birkbeck Hill, ed., revised by Lawrence Fitzroy Powell; Oxford Univ. Press 1934).

40. *Entered into force*, Apr. 1, 1978, 29 U.S.T. 2203, 17 I.L.M. 1312.

41. Richard W. Edwards, Jr., *The Currency Exchange Rate Provisions of the Proposed Amended Articles of Agreement of the International Monetary Fund*, 70 AM. J. INT'L L. 722 (1976). See also EDWARDS, COLLABORATION, *supra* note 18, at 507-568; and Richard W. Edwards, Jr., *An "Interesting" Provision Concerning Exchange Rate Arrangements*, 23 INT'L LAWYER 827 (1989), reprinted in Festschrift in Honor of Sir Joseph Gold 101 (Werner F. Ebke & Joseph J. Norton eds.; Verlag Recht und Wirtschaft 1990).

42. Gold, *Strengthening*, *supra* note 36.

in comparable circumstances

In his examination, or in suggesting alternative solutions, he [the legal advisor] will be aware that, once adopted, rules and decisions harden into precedents, and precedents harden into sustained lines of action⁴³

A good example of where lawyers have prevailed by pointing out potential uncomfortable precedents relates to the statement of long-term economic policies by debtor countries. Joseph Gold, when General Counsel of the International Monetary Fund, wanted it to be legally unnecessary for debtor countries to submit IMF stand-by arrangements for national parliamentary approval because of the delay and uncertainty that would entail. He also desired that a country's failure to implement a stated economic policy not be treated as a treaty breach. He was insistent that a stand-by arrangement (under which the Fund would guarantee a member country access to a set level of financial assistance over a set period of time) be seen and characterized as a unilateral statement of economic policies by the country and a unilateral decision by the Fund to guarantee funds in support of those policies, and not be seen as an international agreement or treaty.⁴⁴

International lending institutions, like the World Bank, have also been careful to avoid stating long-term economic policy commitments in legally binding terms.⁴⁵ However, rate clauses in loans for utilities may be treated differently.⁴⁶

ROLE OF THE LAWYER IN THE INTERPRETATION OF THE IFI'S CONSTITUTION

Lawyers with international financial institutions are often called upon to interpret documents, the most important of which is the constitution of the IFI itself. The constitution may go by various names, such as "articles of agreement," "constitution," "convention," "charter," or another name; but the reference here is to the same kind of over-arching document.

In the case of many international financial institutions, the IMF and the World Bank being examples, formal final interpretation binding on the member states is vested in the executive board with appeal to the board of

43. LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS, *supra* note 4, at 2 (quoting Elkin, *supra* note 5, at 5-6).

44. JOSEPH GOLD, THE STAND-BY ARRANGEMENTS OF THE INTERNATIONAL MONETARY FUND 44-51 (Int'l Monetary Fund 1970). In the cited pages, Gold discussed Paragraph 7 of the Conclusions of Executive Board Decision No. 2603-(68/132), adopted Sept. 20, 1968, which provided in part: "[L]anguage having a contractual flavor will be avoided in the stand-by documents." While Decision No. 2603 has been superseded, the quoted language has been retained with minor changes in currently-applicable decisions. See also EDWARDS, COLLABORATION, *supra* note 18, at 267-270.

45. See FOREIGN DEVELOPMENT LENDING – LEGAL ASPECTS 210-215 (Seymour J. Rubin ed.; A.W. Sijthoff & Oceana Publ'ns 1971).

46. *Id.*

governors.⁴⁷ Interpretation by third parties, such as the International Court of Justice, may be severely limited.⁴⁸ Ibrahim Shihata, former General Counsel of the World Bank, has written:

[T]he framers of the Articles wanted disputes related to their provisions to be settled through a process internal to the Bank which involves its policy-making organs. In interpreting the Articles, the Executive Directors should thus have adequate latitude to enable them to achieve the Bank's objectives in the changing conditions in which the Bank operates. They are not expected to act strictly as a court of law and they should weigh carefully both the strict requirements of legal interpretation as well as the policy requirements dictated by the Bank's objectives and its changing environment. They should not, however, amend existing provisions under the guise of interpreting them.⁴⁹

John Head has questioned the wisdom of policy-makers making final interpretations of constitutional documents. He has proposed that an independent judicial institution serving all IFIs (except the IMF) should be established that would have appellate jurisdiction in matters of charter interpretation.⁵⁰ The author believes the present system set forth in the articles of the Bank and Fund has served both organizations well and should be continued, notwithstanding external criticism of the organizations for democratic deficits.

In the history of both the Fund and Bank, only a small number of the many executive board interpretations have been explicitly characterized as formal interpretations of the articles of the organizations. One concern is that formal binding decisions should be extremely well thought out for the long term, and should not be adopted unless absolutely necessary. While decisions that are not formally characterized as binding interpretations can be modified, they often become precedents for later decisions. Thus, a distinction between formally binding interpretations and other interpretations by the executive board is not a sharp one in practice, as both are taken seriously.

Even though policy organs in the IMF and the World Bank have the last word on interpretation, as noted above, interpretation in both organizations has, nevertheless, been approached as a distinctly legal task. Memoranda prepared by the legal departments are given "great weight" (usually conclusive weight) in the interpretative process.⁵¹

47. IBRD Articles of Agreement, Art. IX; IMF Articles of Agreement, Art. XXIX.

48. See EDWARDS, COLLABORATION, *supra* note 18, at 38-39 (discussing IMF-United Nations relationship agreement and limited role of International Court of Justice); and IBRAHIM F.I. SHIHATA, THE WORLD BANK LEGAL PAPERS lxii (Martinus Nijhoff 2000) [hereinafter SHIHATA, PAPERS] (discussing IBRD-United Nations relationship agreement and limited role of I.C.J.).

49. SHIHATA, PAPERS, *supra* note 48, at xlvi.

50. Head, *Law in IFIs*, *supra* note 1, at 219-20.

51. SHIHATA, PAPERS, *supra* note 48, at lviii-lix; and JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 581-583 (Int'l Monetary Fund 1996) [hereinafter GOLD, INTERPRETATION].

In interpreting the constitutions of IFIs, lawyers with the organizations place great weight on purpose clauses when the specific powers of the organizations are stated in terms that are vague or ambiguous. In an early draft of his book, *International Monetary Collaboration*, the author (quite accurately in his own mind) paraphrased the purposes of the IMF stated in Article I of the Fund's Articles of Agreement. John V. Surr, who then served as Senior Counsellor in the Legal Department, recommended that the purposes be quoted in full and in their exact language. He commented that he had been told, and that he had learned from experience, that "each word is pregnant."⁵²

Purpose-oriented interpretations are specifically contemplated by the charters of IFIs. Article I of the IMF's Articles of Agreement concludes: "The Fund shall be guided in *all* its policies and decisions by the purposes set forth in this Article."⁵³ A purpose-oriented approach to interpretation does not mean that the text is disregarded. Ibrahim Shihata, former General Counsel of the World Bank, commented that quite often the purpose-oriented approach to interpretation reaches the same result that a textual approach would have reached.⁵⁴

Joseph Gold has argued in addition to taking a purpose-oriented approach and having a deep understanding of the text, proper interpretation of the charter of an IFI requires the interpreting lawyer to have a conception of the organization created by its constitution.⁵⁵ This means a conception of the organization's structure, powers, resources, and jurisdiction, as well as its purposes. John Taylor, former General Counsel of the European Bank for Reconstruction and Development, has pointed out the importance of the general counsel of an IFI nurturing a shared understanding of the IFI's nature, powers, and mission among its stakeholders.⁵⁶

Another principle of interpretation of IFI charters, especially of organizations like the IMF that have regulatory jurisdiction, is that obligations and burdens are not placed on member states that do not flow naturally from the language of the organizations' charters. The reader may recall the concern of Joseph Gold that new IMF Article IV being drafted in late 1975 not place obligations on IMF members to later adopt (without their consent) exchange arrangements that were not specified in the revised article or an annex to it.⁵⁷

52. EDWARDS, COLLABORATION, *supra* note 18, at 11.

53. Art. I of the IBRD Articles of Agreement contains similar language in its last sentence: "The Bank shall be guided in all its decisions by the purposes set forth in this article."

54. SHIHATA, PAPERS, *supra* note 48, at lx.

55. GOLD, INTERPRETATION, *supra* note 51, at 557-567. An example of where a conception of the organization was critical to an interpretation relates to the Inter-American Development Bank. The words "and other available resources" in Art. I, Sec. 2(a)(ii), of the Articles of the IDB were interpreted to authorize the IDB to accept funds from non-member states where the funds' use was limited to particular applications. Elting Arnold, *The Inter-American Development Bank*, in FOREIGN DEVELOPMENT LENDING, *supra* note 45, at 48, 48-52.

56. Taylor, *supra* note 5, at 359.

57. See *supra* notes 33-42 and accompanying text (concerns of Joseph Gold with U.S.-French draft of Article IV).

Another example relates to voting rights in the IMF. While some persons might have argued that loss of voting rights is less of a sanction than a declaration of “ineligibility” to draw on the IMF’s resources or “compulsory withdrawal” from the organization (both of which were explicitly mentioned in the IMF’s Articles of Agreement⁵⁸) and, therefore, voting rights could be suspended when the member’s conduct satisfied the requirements for a formal declaration of ineligibility, the Legal Department (including John Head who worked on the issue when he served in the Fund’s Legal Department) reached the conclusion that the Articles of Agreement as they then stood could not fairly be interpreted to authorize that sanction.⁵⁹ The result was that the Third Amendment to the IMF’s Articles of Agreement was later adopted.⁶⁰

SOME FURTHER THOUGHTS

Relations of Lawyers and Economists

The role of the General Counsel is not that of an economist even if he or she has had training in that discipline. The lawyer must be careful not to take sides in economic disputes unless the economic theory is indelibly embedded in the articles of agreement of the international economic organization. This is important because able economists tend to dominate international economic organization staffs and they often do not agree. The lawyer should avoid being drawn into areas where economic theories conflict and the choices have economic but not legal consequences. The lawyer should, of course, point out when the application of a particular economic policy would lead to a result that is inconsistent with the constitutional instrument of the IFI. The lawyer should also point out the *legal* consequences of conflicting theories. However, the lawyer should normally avoid taking a position on the *economic* policy to be preferred which may change over time in the light of experience.

The paragraph above generated considerable discussion and the expression of different views at the symposium in Lawrence, Kansas, on October 26, 2007. The author concedes that the *general* counsel should give broad, as well as specific, advice.⁶¹ However, the author strongly believes that the general counsel should not be drawn into taking sides in disputes among economists about economic theories. This may be difficult for a lawyer in an IFI, particularly one who has been professionally trained in economics, but the lawyer should observe role limitations in order to maximize his or her effectiveness as the senior lawyer. The lawyer should, of course, understand

58. IMF Articles of Agreement, Art. XXVI prior to Third Amendment.

59. Head, *Law in IFIs*, *supra* note 1, at 209-10. See also John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 VA. J. INT'L L. 592 (1993).

60. IMF Articles of Agreement, Third Amendment, *entered into force* Nov. 11, 1992, T.I.A.S. No. 11,898, *reprinted in* 31 INT'L LEGAL MAT. 1307 (1992).

61. See Taylor, *supra* note 5, at 355.

economic arguments and the legal and policy implications of those arguments, which itself may be quite demanding.

Conflict of Interests

In most international financial institutions, the legal department gives legal advice to the president (Managing Director in the IMF), to the staff, and also the executive board to which the president or managing director reports, and which sets the policy of the institution subject to the ultimate authority of a board of governors (or equivalent).

A word about loyalty may be appropriate before moving on. The loyalty of a general counsel, as director of the legal department, is not solely to the administrative head (managing director or president) of the international economic organization. In the most international financial institutions, the general counsel also advises the executive board. The executive board, while often chaired by the managing director or president, is independent from him or her. In those areas of potential conflict, the loyalty of the general counsel should be understood to run to the organization itself and to the law applicable to international organizations. Because of international organization immunities, in the author's view lawyers employed full time by an IFI are not subject to enforcement of the disciplinary rules of the nation state that licensed him or her to practice law.⁶² However, he or she should normally comply with those rules, at least when compatible with his or her organizational responsibilities.⁶³

In personnel matters, the individual employee or employee association should not depend on the legal department of the international organization but should be advised to get legal advice from another source.

In non-personnel matters where there is an actual or an apparent emerging difference between the executive board and the president, the general counsel may need to advise the executive board and the president that the legal department cannot provide legal advice and counsel to both entities. In those conflicts, the legal department should probably continue to provide legal advice to the president and staff while the executive board should be advised to

62. In the absence of a waiver by the IFI, state bar disciplinary authorities in the United States lack jurisdiction over an American lawyer with respect to official conduct within the International Financial Institution. 22 U.S.C. § 288d(b) provides:

"[O]fficers and employees of such organizations [international organizations listed as enjoying immunities under 22 U.S.C. § 288] shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such . . . officers . . . or employees except insofar as such immunity may be waived by the . . . international organization concerned.

Further, the author is not aware of any cases where a state bar disciplinary authority in the United States pursued disciplinary proceedings against an American lawyer for conduct within an international organization listed under 22 U.S.C. § 288.

63. See, e.g., Rule 1.13 (entitled "Organization as Client") of the Amer. Bar Ass'n's Model Rules of Professional Conduct (2004).

seek legal advice and counsel from outside the institution. However, the department's legal advice to the president should be given with attention to the interests of the institution as a whole, and should not simply facilitate what the president may wish to do.

Qualifications, Title, and Reporting

The person selected to be general counsel should be a lawyer by profession. In the author's judgment, he or she should be licensed to practice law before the highest courts of a member state of the IFI. Ideally, in the author's judgment, the person should be professionally trained as a lawyer in more than one legal system or at least be familiar with more than one system, as the membership of IFIs typically spans several legal systems and parochialism should be avoided.

To whom the general counsel reports may evidence how law is perceived within the IFI. Professor John Head notes in his paper that the legal adviser of the Asian Development Bank is called "General Counsel" but does not report to the President of the Bank but instead to one of the four Vice Presidents.⁶⁴ The General Counsel of the Inter-American Development Bank reports to a Vice President, rather than to the President or Executive Vice President.⁶⁵ When the head of the legal department does not report directly to the president of the IFI (Managing Director in the case of the IMF), there is a risk that the non-lawyer receiving the advice will "filter" it or weigh it against other factors before passing the advice to his/her superior.⁶⁶

The title of the head of the legal service may also indicate the status of the legal service within the organization. When Joseph Gold retired as General Counsel and Director of the Legal Department of the International Monetary Fund in 1979, George Nicoletopoulos was appointed to succeed him as Director of the Legal Department. However, Mr. Nicoletopoulos was not named "General Counsel" (no one was). This was especially odd because Mr. Nicoletopoulos had been "Associate General Counsel" in the latter years of Mr. Gold's tenure.⁶⁷

Sir Joseph Gold once told the author that he believed the decision not to name Mr. Nicoletopoulos "General Counsel" was a personal rebuke of him (Mr. Gold) and reflected a denigration of law within the IMF. Mr. Gold and the Fund's Economic Counsellor, Jacques J. Polak, had held formal rank above the other department directors, were close advisers to the Managing Director, and represented the Managing Director at meetings of the Group of Ten at the Deputy Finance Minister level. Sir Joseph told the author that directors of some of the other departments and some members of the Executive Board were jealous of the "privileged" position that Mr. Gold had held. They also believed

64. Head, *Law in IFIs*, *supra* note 1, at 224.

65. *Id.*

66. *Id.*

67. See IMF HISTORY, 1972-1978, *supra* note 34, vol. 2, at 1019-1020, 1026.

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that, during the years Mr. Gold was General Counsel, legal considerations had played a more significant role in Fund decision-making than they should. They saw law, in Sir Joseph's view, as essentially instrumental and malleable.⁶⁸

In any event, Mr. Nicoletopoulos was never named General Counsel. When he retired in 1985, Professor François Gianviti, a French scholar and well-known author of books and articles on international monetary law, was appointed to succeed him and was initially given only the title Director of the Legal Department.⁶⁹ However, in 1987 Professor Gianviti was given the added title of General Counsel.⁷⁰ At the end of 2004 when Professor Gianviti retired, his successor, Sean Hagan, was given the title General Counsel and Director of the Legal Department with what appears to be little fanfare.⁷¹ Thus, the effort to formally restrict the role of the senior lawyer in the IMF ended. However, the lament that Sir Joseph expressed earlier that no General Counsel of the IMF since his retirement has been a "senior counsellor" (or even just "counsellor") to the Managing Director remained true when this article went to press.⁷²

CONCLUDING COMMENT

It would not be proper to conclude this article without recognition of the importance of personal attributes in the effectiveness of a general counsel to an international financial institution. Joseph Gold, as General Counsel of the International Monetary Fund from 1960 to 1979, played a role in the development of the law of that organization that was truly remarkable. In the author's mind, he is a model of what the general counsel of an international financial institution should be.

Joseph Gold always kept in mind what was possible and what was ideal. He pushed as hard as he could toward his vision of the latter, while keeping his eye on what was possible. This article has discussed his role in the re-drafting of Article IV of the IMF's Articles of Agreement at a time when others viewed the text as final. This is only one example of his appreciation of the "possible."⁷³ Mr. Gold's role in the creation of Special Drawing Rights (now simply "SDRs") and the First Amendment of the Fund's Articles to create them has also been told above.⁷⁴ He was a mentor to the author and many others.

68. Conversations between Sir Joseph Gold and the author in Washington, D.C., in 1985 and later.

69. 15 IMF SURVEY 20 (1986).

70. Memorandum of the Managing Director of the IMF to the Executive Board, Sept. 16, 1987.

71. IMF Press Release No. 04/234 (Nov. 3, 2004).

72. GOLD, INTERPRETATION, *supra* note 51, at 595.

73. See *supra* notes 33-42 and accompanying text.

74. See *supra* notes 17-22 and accompanying text.

At the end of the day, the general counsel of an international financial institution must possess more than the technical competence and skills discussed in this paper. He or she must deserve and enjoy respect for sound judgment and wisdom and possess the personal qualities of friendship and trustworthiness that are essential in all important endeavors. Finally, the general counsel must be a person of integrity.⁷⁵

⁷⁵. See generally Taylor, *supra* note 5, where the importance of personal qualities is evident throughout.