LEGAL CHALLENGES AT THE START OF A NEW INTERNATIONAL FINANCIAL INSTITUTION

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I. INTRODUCTION

A. Challenges, Issues, and Personal Reflections

As is clear from the other presentations in this Symposium, international financial institutions (IFIs), and particularly the legal offices within them, present a rich tapestry of challenges and issues. What I wish to do in my presentation is to focus our attention on a certain small but intriguing category of those challenges and issues – the ones facing a *newly-created* international financial institution. In doing so, I shall be drawing on my own experience at the European Bank for Reconstruction and Development (EBRD) in about the first decade of its existence, and I shall concentrate especially on the very first few years after the EBRD's creation.

Why, we might ask, would this be especially interesting or informative? After all, we do not see new IFIs being created every day. In my view, though, a review of how the really basic issues—legal issues, institutional issues, operational issues—were addressed in the context of the world's most recently-established major IFI can in fact offer valuable perspective on how *all* such institutions should be managed today and tomorrow. Change is, after all, a constant factor in our world, especially in the areas of international finance and development. All international organizations, including IFIs in particular, must be nimble; they must be able to recognize new challenges and rise to address those new challenges effectively. Perhaps a review of how the EBRD

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did so, or tried to do so, can be of some value, therefore, to other institutions.

What follows, then, is a set of personal reflections and observations. (They do not, of course, represent official views of the EBRD.) I am pleased to be able to share these thoughts with the participants and audience here at the Symposium, and also with readers of the *Journal* where these proceedings are being published. In that regard, let me offer a special thanks to the *Journal* staff for allowing me to take a very "relaxed" approach in preparing this article. Given its nature—that is, consisting largely of personal reflections, and not written for the purpose of supplying source material for research purpose—I have dispensed with footnotes citing factual and documentary information about the EBRD or related matters that form the background to my observations. Information of that sort is easily available from other sources anyway.[1]

B. The Dramatic Rise of the EBRD

As you probably know, the EBRD was conceived of in 1989-1990 when a senior French economist decided in light of the fall of the Berlin Wall that it would be very advantageous to have a development bank for that part of the world—that is, central and eastern Europe, as well as the Soviet Union. The idea gained momentum among persons who saw special value in creating such an institution and giving it a European perspective. Bear in mind that the World Bank could, and indeed still does, provide development financing throughout those countries that were then emerging from communism; the thrust of this proposed new bank, however, was to come from European governments, and particularly from the French government and President François Mitterrand.

The momentum grew quickly, and the charter of the new institution – the Agreement Establishing the European Bank for Reconstruction and Development – was signed in Paris on May 29, 1990, only a matter of months after the idea of such a bank had first emerged. The bank's doors opened for business on April 15, 1991, in London. And recall what happened within the remainder of that year: the Soviet Union disintegrated into over a dozen new states. Within almost the blink of an eye, the countries in which the EBRD was designed to operate had expanded dramatically. All of these factors contributed to what we might regard as the meteoric rise of the EBRD.

1. *Editor's Note*: For some basic information about the formation of the EBRD, see generally IBRAHIM F.I. SHIHATA, THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (1990). For an account of how that institution represents a "third generation" of IFIs, see JOHN W. HEAD, THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS: AN EVALUATION OF CRITICISMS LEVELED AT THE IMF, THE MULTILATERAL DEVELOPMENT BANKS, AND THE WTO 44-46 (2005); John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, U. KAN. L. REV. 641-44 (1993).

C. Avoiding Near-Collapse: The Significance of Personality

The EBRD nearly experienced just as fast and dramatic a fall. Great tensions emerged from the way in which the first president of the bank operated the organization. This brings me to a first observation, and it simply underscores an important point that Professor Edwards has made in his contribution to this Symposium: personalities play an enormous role in the operations, and the successes or failures, of IFIs. Jacques Attali, who was the first president of the EBRD, was and still is one of the most creative thinkers of our day. He brought his dynamic creativity to the bank. Unfortunately, he did not have certain qualities that the president of a growing international organization needs to have in order to administer that organization in a sound manner and to build the relationships that are necessary with the board of directors and the boards of governors of these organizations. The qualities I refer to are qualities of personality and the qualities inherent in facilitating good personal relations.

I should mention here that my own involvement in the EBRD was in fact the direct result of personal relations, in addition of course to professional background. I was asked to come to the bank, before it was actually operational, as its deputy general counsel. The first general counsel was a very fine American lawyer named André Newberg. I had known André for some years previously because he was a senior partner in the law firm of Cleary, Gottlieb, Steen & Hamilton, where I also had worked as an attorney. André and I had worked together some, and had developed a good professional and personal relationship over the years, long before he ever knew he would be asked to become the general counsel of an IFI—and indeed long before the EBRD was even conceived of in the way I described a few minutes ago.

When I arrived at the EBRD, therefore, the bank was a new, exciting, optimistic, and rather tumultuous and fragile institution—made more tumultuous and fragile by difficulties related to its first president. Fortunately, the bank benefited in those early days from some pretty sound governance on the part of others in the organization. In addition, France proposed another president to step into Jacques Attali's shoes—namely, Jacques de Larosière, who had previously served as managing director of the International Monetary Fund and therefore a very astute and wise individual. If it had not been for the fact that he came into the EBRD about eighteen months after it began, frankly speaking, the bank would have been wound up. There is no question in my mind about that. Think of what that would have been like for those of us involved in the earliest efforts to put the bank on track, to face the prospect then of the institution being wound up just eighteen months or so after it was created!

II. FORMING A NEW IFI LEGAL DEPARTMENT

A. Defining the Scope of Services

With that brief institutional and personal background, I would like to share with you some thoughts on what it is like to form a legal department, or more precisely an Office of the General Counsel, in an international organization. For a moment, put yourself in my shoes: you have been asked to come to a place and form a legal department of an organization that has not yet functioned at all. Where do you start?

One way to start is to ask this threshold question: what legal services would be required by the institution? Drawing from experience gained in other IFIs, the small cluster of us that gathered in London, in one little office, identified four key types of services. Professor Edwards has, in his contribution to the Symposium, identified several others as well, and I agree that all of those he identified are necessary and were indeed "on our agenda" in those early days. But let me focus on four key types of legal services that we gave our most careful attention.

The first main service area is perhaps the most obvious: provide legal support for the institution's banking work. The EBRD is, after all, a bank. Despite its unusual stature as an international institution, with countries as members, the EBRD is engaged in functions that are familiar to banks all over the world. It makes loans; it extends guarantees for loans made by others; it makes equity investments; it underwrites securities. It is not a charitable organization—indeed, none of the IFIs is a charitable organization. Instead, all the IFIs, including the EBRD, must be operated in a way that is prudent, profitable (while not technically having the motive of actually *maximizing* profits), and therefore sustainable.

The work of the lawyers in the EBRD, therefore, involves supporting the institution's banking operations, by assisting in structuring, negotiating, documenting, and monitoring the public and private sector investments of the bank. To conduct that work, we needed a team of lawyers who could actually put together the necessary loan documents, guarantees, and equity investment proposals. Now consider this additional wrinkle to the type of banking-related services that the legal department needed to provide: we were operating in a group of countries that, to be quite frank about it, had extremely little knowledge of any of these financial structures. After all, the countries in which the EBRD was operating had in those early days just emerged from sixty to seventy years of living under a communist regime, with central economic planning and financial structures that were strikingly different from those of the western countries. There was no capital, in the normal sense of the term, flowing around the economic systems in those countries. To be sure, some of the countries had taken international loans, and a few had even issued loans; but for the most part the working environment for our EBRD lawyers consisted of jurisdictions that fell far short in terms of knowing how the

western system of finance works.

A second main area of legal services that our office at EBRD needed to provide related to the bank's treasury work. Like most international banks or institutions, the EBRD funds itself mainly from the international capital markets. It issues bonds. You can go out and buy World Bank bonds; you can buy EBRD bonds. Most of the bonds these institutions issue are purchased by large institutional investors, of course, but individuals can purchase them as well, and they are pretty safe investments, along the same order as U.S. Treasury bonds and sharing the same triple-A rating. (Maybe I should not really say that, given the recent economic troubles involving subprime-mortgage-backed securities, which also had some form of triple-A rating—but I think we can be assured that the triple-A rating on the IFIs is more reliable, thank heaven, than those at work in the subprime mortgage markets!)

Beyond facilitating the issuance of bonds, of course, the treasury-related services that the EBRD's legal department had to start providing in those early days of operation included other aspects. For example, the EBRD, like other IFIs, is not only a lender and a borrower but also an investor: it places cash not currently needed in operations into short-term investments. These operations require legal input. The same applies to a whole range of matters relating to capital subscriptions—that is, the contributions by member countries to the capital structure of the institution.

A third main area of legal services for our EBRD lawyers to provide right from the start was administrative in nature. Operating any institution of this sort involves a vast array of formal relationships, including (i) relationships with shareholders (the countries that own the institution), (ii) relationships between the executive officers (most prominently the president) and the governing boards (which in the EBRD and most IFIs consist of a board of governors, which meets once a year, and a board of directors, which meets several times a week), (iii) relationships between those two governing boards, (iv) relationships with staff members, and (v) relationships with the public at large—all in addition, of course, to the relationships arising from the loan-making function for specific projects in the several countries of operation. These various relationships create, as you can easily imagine, a great many issues that are inherently legal in character or that have legal implications.

Now let me turn to the fourth main area of legal services that our office at the EBRD needed to put high on our list of priorities. This one is unusual, and in fact it did not have close analogies in other IFIs because of certain peculiarities of the EBRD. This fourth main area of services is the provision of technical assistance in economic transformation. The general issue of technical assistance is featured in several of the contributions to this Symposium, and it forms a fascinating topic in the specific context of the EBRD. Recall the peculiar political and economic developments that coincided with, and to some extent caused, the EBRD's creation. Several countries in eastern and central Europe were undergoing an economic and political transformation; and, as I pointed out earlier, the Soviet Union

collapsed just as the EBRD was starting its operations, thereby expanding the scope of that economic and political transformation. The EBRD was injected into the heart of this transformation, and intentionally so: it was given a special mandate in its charter to "foster the transition towards open market-oriented economies" in its countries of operation.[2]

This special mandate required innovative efforts of a legal character. For one thing, as I mentioned earlier, it involved training, in order to bring to these countries in transition an understanding of western economic and financial principles. Let me offer you an example of that: I remember being involved in discussions in which we had to explain to our counterparts – those persons in government and private sector alike—the way in which banks make money from charging of interest. "What is interest?" We were actually asked that question. "What are commissions?" "What is a currency swap?" With questions of this sort being asked of us, it became obvious very quickly that much work was needed to develop skills in these countries to carry out transactions in the context of a western-style economic system.

Exacerbating this challenge, however, was another feature of the EBRD's charter. Unlike the IFIs that came before it, the EBRD is required to direct at least sixty percent of its funding to the private sector.[3] What this meant in practical terms, of course, is that the EBRD's staff, including its lawyers, had to focus their efforts on pushing money into the private sector—not lending to governments, and not lending with government guarantees. Consider the challenges this brings to a lawyer. Once you're in the private sector, you're rolling up your sleeves just as if you were sitting in a law firm in New York, in London, or here in Lawrence. You need to advise your client, in this case the bank, about all the risks that it faces as it operates in the private sector. When things go wrong and you are not able to negotiate some settlement, you'll need to roll up your sleeves further and go into court. Litigation will become an increasing activity for the lawyers in IFIs that operate in the private sector.

In sum, we saw these four key areas of legal services in those earliest days at the EBRD: facilitating the investment operations of the bank, helping manage the treasury-related work of the bank, handling a broad array of

2. *Editor's Note*: The pertinent charter provision reads in full as follows:

> In contributing to economic progress and reconstruction, the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics. AGREEMENT ESTABLISHING THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, May 29, 1990, 29 I.L.J. 1077 (1990) [hereinafter EBRD CHARTER].

3. *Editor's Note*: "Not more than forty (40) per cent of the amount of the Bank's total committed loans, guarantees and equity investments . . . shall be provided to the state sector." *Id.*, art. 11(3)(i). Similar limits apply to the bank's loans, guarantees and equity investments for each recipient country. *Id.* art. 11(3)(ii). Neither limit, however, applies to the bank's financing of a state-owned enterprise that is "implementing a [program] to achieve private ownership and control." *Id.*, art. 11(3)(iii)(b).

institutional and administrative tasks and legal relationships, and this special challenge of helping bring about the radical transformation of national economies, a challenge made even more daunting because of the mandatory private-sector focus of the EBRD. In order to provide these services, we needed to construct an effective and efficient legal department. I turn now to that topic.

B. Building the Right Team of Legal Experts

Let me begin with this old question: What's in a name? In an IFI setting, I would say that there really is a great deal in a name—at least if it is the name of the legal office of the institution. We decided early on that the name of the legal department at the EBRD should be the Office of the General Counsel. For me, that was an obvious choice, because I had been taught long ago, when I was working at the Asian Development Bank, that the term "General Counsel" meant just that—*general* counsel. The individual who held that title, as well as the lawyers who worked in the office that that individual led, could not be content with providing merely *legal* counsel and advice; they all had to provide *general* counsel and advice. Naturally, the lawyers in an IFI cannot be usurping the role of economists or bankers or others. This is a point that Professor Edwards has emphasized, and I agree entirely with it. At the same time, there is a need (perhaps a special need in an IFI, given its unusual nature) for *general* counsel to be provided, in order to answer such questions as these: Is this policy an appropriate policy? Are we going in a direction that generally speaking will manage our risks appropriately? The organization looks to people who have a spread and breadth of experience to be able to give general counsel and advice of this character. And those are the types of people that are needed in the legal department of an IFI.

Allow me to take a short detour to mention how the point I have just made is in fact applicable to students and young lawyers. Young lawyers sometimes come to me and say "If I ever want to get into one of these IFIs, how do I best prepare myself?" My answer to them is to go into one of the best law firms you can get into for the first several years of your career and cut your teeth on as broad a range of legal issues as you possibly can. After all, how can you give *general* counsel unless you have had a grounding of *general* experience?

Having established the name, and therefore the character, of the legal department as the Office of General Counsel, our next challenge was to select the best possible team of lawyers. In this respect, bear in mind again the significance of personal qualities. We needed lawyers who were able to engender trust and confidence based not only on their legal skills but also on their personal skills. The value of their counsel and advice would be quite small if they were unable to instill confidence and therefore have people listen to that counsel and advice.

Moreover, we needed to assemble a team of lawyers from multicultural and multijurisdictional backgrounds—skilled lawyers who not only could

perform as a team to provide the various types of legal services I mentioned earlier but who also could reflect the varying viewpoints of different legal cultures and jurisdictions. Our lawyers needed to come from many different countries; they needed to come from different backgrounds. Invariably, of course, we would expect a lawyer to have a grounding and experience in his or her own country; but we also would expect a lawyer to have a cross-border element to his or her legal skills. After all, the EBRD's countries of operation bridge several legal cultures, including many civil law systems but extending as far east as central Asia and even Mongolia, where the imprint of western legal tradition is very faint indeed. In short, I was looking for members of a legal team that had the breadth of experience to make their counsel and advice applicable to, and understandable in, a range of legal cultures.

C. Specific Challenges, Specific Responses

As should be evident from the observations I have already made, the EBRD is a special place that presents special challenges, particularly from a legal perspective. I have tried to emphasize that the peculiarities of the institution – its multi-cultural setting, its unusual mandate – required us, in launching the Office of the General Counsel, to introduce some innovations and to jump some hurdles. Let me close this section by mentioning one additional innovation and one especially high hurdle.

First, in order to enhance the cross-cultural aspect of the services we could provide, we brought in younger lawyers from the countries where the bank was operating—young people who had demonstrated especially good legal skills right at the beginning of their careers. They were engaged for two-year terms, with the understanding that their work at the bank in that period would not lead to permanent appointments. This gave those young lawyers good experience, which they typically would take back to their own countries, and of course the bank benefited from the special perspectives that they could bring to the work of the institution.

This initiative contributed importantly to another goal that we had in mind, and that any IFI legal department should pursue—a proper balance between specialization and breadth of scope. Naturally, any IFI needs lawyers with specialized skills that pertain to that IFI's operations. In the case of the EBRD, for reasons I alluded to earlier, we placed a high premium on legal skills in the areas of finance and investment, with special emphasis on real-world private-sector expertise. At the same time, however, we did not want lawyers to be so specialized, so concentrated, as to be unable to contribute to the overall "pool" of talent that a good law office should have—especially one that required us to provide advice from different legal perspectives. Hence, we did not bring in specialists and put them in little boxes; instead, we insisted on some degree of skill at taking a generalist approach to legal practice.

Now let me turn to the "especially high hurdle" we faced. It also relates to the unusual cross-cultural setting of the bank. Recall the fourth category of

legal services I mentioned earlier: the provision of technical assistance in economic transformation. After the membership of the EBRD increased so dramatically following the collapse of the Soviet Union, we had thirty-eight countries going through a wrenching process of transition from communism and central economic planning to a market-based economic system. As I explained above, the EBRD was required by its charter to assist in that transition. As you will understand, that requires legal input, because any such economic transition depends importantly on legal reform.

But here is the problem: with legal reform so closely aligned, certainly in the minds of national government officials, with national sovereignty, any involvement—much less pressure—by an IFI in the area of "legal reform" is highly suspect, especially in view of the fact that all of the IFIs created *before* the EBRD included specific "political prohibition provisions"[4] that made such involvement or pressure difficult or impossible. With that as background, let me describe the particular hurdle I faced. I had worked very hard to get budget support for hiring lawyers who could help with this enormous exercise of legal reform. Even after presenting it under the less threatening label of "legal transition", I had been able to secure budget support for only one full time position—one full time position, mind you, for this undertaking stretching across thirty-eight countries, and with a requirement in the bank's charter to assist in the transition in which those countries were engaged.

Then things got worse: that one position was threatened with elimination. At an executive committee meeting, which involved the senior management of the bank—except for the President, who was not present at that particular meeting—a budget proposal was brought up for a vote. The vote went nine-to-nothing against the continuation of the legal transition program. My vote was the only one in favor of continuing the program. Fortunately, the budget is actually determined finally by the bank's Board of Directors, not by this executive committee, so this nine-to-nothing vote was not my last chance; but I was, to say the least, discouraged! In an effort to prevent what I thought would be a disastrous decision to eliminate the legal transition program, I went quietly to the President, Jacques de Larosière, after the executive committee meeting and explained to him that I thought we were going in absolutely the wrong direction to shut down the legal transition program. He looked at me and said, "John, relax. It will be OK." At the next formal meeting of the executive committee, the budget was on the table again. This time, the President was in attendance. When the discussion reached the point of the

4. *Editor's Note*: The pertinent provision in the charter of the International Bank for Reconstruction and Development (part of the World Bank) reads as follows:

> 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 of members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes [of the Bank]. ARTICLES OF AGREEMENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, July 22, 1944, art. IV, §10, T.I.A.S. No. 1507, 2 U.N.T.S. 134.

legal transition program, M. de Larosière looked around the room and said, "But of course we have to have this program." There was absolute silence and we moved on. And so the program, even in its small form, survived. Today, the program is thriving and is a valuable part of EBRD's efforts in its countries of operations, as a glance at the EBRD web site will confirm.[5]

I offer that story in part because it gives further emphasis to a point that Prof. Edwards and I have both made earlier: Personality, and personal strength of influence, means a lot. Jacques de Larosière was very highly respected, and ultimately his view—which I had fortunately been able to influence—prevailed.

III. DEVELOPING A JURISPRUDENCE

I have referred already to certain specific provisions in the EBRD's charter. Now I wish to take a broader view of it and discuss how the entire body of provisions in that charter, together with certain other instruments, constitute the basic framework of rules on which a whole jurisprudence for the institution can be developed. The development of such a jurisprudence is, in a sense, another key type of legal service to be provided by an IFI's legal department, but unlike the other four types of legal services I summarized earlier, this one takes longer to accomplish. Whereas the EBRD lawyers had to start *immediately* providing legal input for the bank's investment operations, its treasury operations, its administrative work, and its technical assistance, our work in developing the bank's jurisprudence could not be accomplished immediately. I want to describe how that process was put on track, and to reflect some on its ultimate purpose.

A. The Skeleton of Institutional Rules

The charter of the EBRD is short. Like a constitution for many countries, most of its provisions are formulated in broad enough terms as to provide the general principles that are to guide the institution, but without so much specificity as to hamper the institution in adjusting to changed circumstances that bear on the accomplishment of the institution's purposes. In short, numerous provisions are vague, at least in the face of specific practical questions that inevitably arise.

It is this fairly brief, fairly general set of provisions – set forth in the treaty that serves as the bank's charter—that forms the basic framework, or "skeleton", of institutional rules for the EBRD. This is true in the case of the other IFIs as well. In the EBRD's case, however, there is an ancillary document that is closely associated with, and intended to explain and elaborate on, the charter. This other document is the Chairman's report,[6] and it was used

5. *Editor's Note*: See the "Legal Transition" page on the EBRD website, http://www.ebrd.com/country/sector/ law/index.htm.

6. *Editor's Note*: *See* CHAIRMAN'S REPORT ON THE AGREEMENT ESTABLISHING THE

quite often in the earliest days of the bank as a source of guidance. Another constitutional document for the EBRD (also as in the case of the other IFIs) is a set of bylaws that were adopted on the same day the bank started its operations. In addition, a few other sets of substantive and procedure rules and regulations were adopted in the early days of the bank.

Even when taken all together, however, these documents—and particularly the charter and Chairman's report—really provide relatively little in the way of detailed instructions as to how the EBRD is to handle issues it confronts. Bear in mind, again, the unusual circumstances in which this institution operates, and was designed to operate. It has an overriding focus on private-sector operations, much more so than the other regional development banks for Asia, Africa, and Latin America. It is newer than any other IFI by about a quarter century (for example, all the other regional development banks were formed in the late 1950s through the mid-1960s). It is operating in countries undergoing drastic economic and political transition. It has been given a mandate to involve itself in, and facilitate, that transition. All in all, it is a different institution in many ways from any institutions that came before it, so it can draw only limited guidance from the experience of those other institutions. For all these reasons, especially in its earliest days, the EBRD had virtually no jurisprudence.

B. Building a Shared Understanding

Why does this matter? Partly because of the intensity and variety of different interests and constituencies at play in the context of the EBRD, or for that matter in any IFI. I referred earlier to some of the relationships at issue in an IFI. They involve its member countries, its management, the governing boards and their individual members, its staff, its borrowers and investment partners, and the public at large—including, of course, those in the financial markets on which the EBRD and most other IFIs depend in raising their financial resources. Indeed, to that list we could add some other entries, such as (i) non-government organizations applying pressure on the IFIs (for many differing and often contradictory causes) and (ii) contractors and suppliers bidding for contracts for the supply of goods and services involved in projects of the sort that all of the IFIs (except the IMF) finance. Without some relatively clear delineation of what the purposes and limits of the organization are, as prescribed in its charter, an IFI will be ill equipped to withstand the wild cross-currents of demands that these various interests and constituencies create.

In my view, therefore, any IFI has a strong need to develop a jurisprudence, and not just as a formal legal matter but in a broader sense as well. I see, and I tried to impress on others at the EBRD, a need to develop the acceptance of a shared understanding, particularly among the shareholder

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT 48, *available* at http://www.ebrd.org/pubs/insti/basics.pdf.

countries, as to the meaning of the IFI's nature, powers, and mission. Moreover, I regard an IFI's legal department, acting to provide the sort of "general counsel" that I referred to earlier, as the principal actor responsible for nurturing this shared understanding.

C. The Value and Art of Interpretations

How can this be accomplished? Let me draw this part of my observations to a close by discussing one method—the use of charter interpretations.

Here again, some specific EBRD charter provisions are pertinent. One set of these provisions prescribes the process for amending the charter. It is a rather complex set of provisions, setting forth detailed procedures, but its overall import is clear: amending the charter requires several formal steps and support from an overwhelming majority of the members—in most cases, three-fourths of the members, representing four-fifths of the total voting power.[7] In contrast to this process for *amending* the charter is another, simpler process for *interpreting* the charter. According to the relevant provision, a question of interpretation can be answered by the Board of Directors, with possible appeal to the Board of Governors.[8] In either case, however, there is no specific procedure prescribed, and the decision can be taken by a much smaller majority—a simple majority of the voting power, so long as a quorum is present.[9]

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7. *Editor's Note*: The first and most general portion of the EBRD charter provision on amendment reads as follows:

> Any proposal to amend this Agreement, whether emanating from a member, a Governor or the Board of Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before that Board. If the proposed amendment is approved by the Board the Bank shall, by any rapid means of communication, ask all members whether they accept the proposed amendment. When not less than three-fourths of the members (including at least two countries from central and eastern Europe listed in Annex A), having not less than four-fifths of the total voting power of the members, have accepted the proposed amendment, the Bank shall certify that fact by formal communication addressed to all members. EBRD CHARTER, *supra* note 2, art. 56(1). Different types of approving majorities apply for specified types of amendments, such as those modifying the right to withdraw from the bank or the purpose and functions of the bank. *Id*., art. 56(2).

8. *Editor's Note*: The pertinent provision reads in pertinent part as follows:

> 1. Any question of interpretation or application of the provisions of this Agreement arising between any member and the Bank, or between any members of the Bank, shall be submitted to the Board of Directors for its decision. . . .
> 2. In any case where the Board of Directors has given a decision under paragraph 1 of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be final. . . . *Id.*, art. 57.

9. *Editor's Note*: According to the charter, all matters before the Board of Directors shall, unless otherwise explicitly specified, be decided by a majority of the voting power of the members voting. *Id.* art. 29(3). The quorum requirement for a Board of Directors meeting is met

A process was developed early in the EBRD's history whereby the President, with advice from the General Counsel, made recommendations to the Board of Directors on policies or courses of action, together with an underlying interpretation for decision by the Board. In this way, an official jurisprudence could be developed. In some cases, proposed interpretations proved controversial, but for the most part this process served as an efficient method for bringing clarity to the meaning that should be ascribed to the charter in uncertain cases, without going through the laborious exercise required for actually amending the charter. This increased clarity, in turn, along with a range of other initiatives, contributed to the process of developing what I referred to above: a shared understanding, particularly among the shareholder countries, as to the meaning of the EBRD's nature, powers, and mission.

IV. CONCLUDING OBSERVATIONS

Those are some of my thoughts about IFI legal departments and about developing a jurisprudence in IFIs. I hope these reflections, drawn largely from my own personal experience at the EBRD, might prove interesting, and perhaps even valuable, to others involved in studying and operating IFIs.

If I had more time, and if you had more patience, we could explore several other topics that bear on the operations and the future of the IFIs. But like most things in life, time and patience are not limitless. In view of that, I wish to complete my contribution to this fine Symposium with this bare-bones enumeration of some additional observations that might provoke further thought:

- In today's world of instant communication and speedy travel, resident Boards of Directors for the IFIs (that is, boards whose members are permanently in residence in the country of the IFI's headquarters) are an expensive and unnecessary anachronism.
- Several existing IFI internal governance and external transparency processes should be examined with fresh eyes, in the light of the very significant developments in corporate governance and reporting processes in the private sector over the past decade.
- The process of graduation – by which countries become ineligible for various types of financial support from IFIs because of those countries' improving economic fortunes – is slower than it should be.
- An IFI's shareholders deserve a return on their capital when the IFI's profits reach exceptionally high levels – the EBRD is a current example.
- High levels of corruption in some of the countries where IFIs operate are a cause for great concern, and the IFIs (including the EBRD) need to find alternative ways in which to address such corruption.

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if a majority of the directors, representing not less than two-thirds of the voting power, is present. *Id.*, art. 28(2).