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Daniel Bradlow

American University Washington College of Law, ddbradlow@gmail.com

David Hunter

American University Washington College of Law, dhunter@wcl.american.edu

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American University Washington College of Law

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INTRODUCTION: INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW

Daniel D. Bradlow
David B. Hunter

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International Financial Institutions and International Law

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**International Financial Institutions
and International Law**

Edited By

Daniel D. Bradlow and David B. Hunter



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About the Authors

Co-editors

Daniel D. Bradlow

Daniel D. Bradlow is the SARCHI professor of International Development Law and African Economic Relations at the University of Pretoria in South Africa and Professor of Law at American University Washington College of Law. He is a member of the Roster of Experts for the Independent Review Mechanism at the African Development Bank. In addition, he is co-rapporteur of the International Law Association's study group on responsibility of international organizations, a member of the board of directors of ILEAP (International Lawyers and Economists against Poverty), and a member of the editorial advisory board of the *Journal of Law, Social Justice, and Global Development*. He served as a member of the International Law Association's Committee on Accountability of International Organizations and as an advisor to the Rethinking Bretton Woods Project. Professor Bradlow holds degrees from the University of Witwatersrand in South Africa, and Northeastern University and Georgetown University in the USA, and is a member of the New York and District of Columbia Bars.

David B. Hunter

David B. Hunter is an associate professor, director of the Program on International and Comparative Environmental Law and the Washington Summer Session on Environmental Law, and acting director of the International Legal Studies Program at American University Washington College of Law. He is the former executive director of the Center for International Environmental Law and was previously an associate with the law firm of Skadden, Arps, Slate, Meagher, and Flom. He currently serves on the boards of directors of the Environmental Law Alliance Worldwide-US, the Project on Government Oversight, the Bank Information Center, and Greenpeace-US. Additionally, Mr Hunter is a member scholar at the Center for Progressive Reform, a member of the Steering Committee of the IUCN Commission on Environmental Law, and a member of the Environmental Law

About the Authors

Expert's Group to the Organization of American States. Professor Hunter holds degrees from the University of Michigan and the Harvard Law School.

Author Contributors

Bhupinder S. Chimni

Dr B.S. Chimni is a professor of International Law and Chairperson of the Centre for International Legal Studies, at the School of International Studies, Jawaharlal Nehru University, New Delhi. He is the former vice chancellor of W.B. National University of Juridical Sciences, Kolkata. He has been a visiting professor at Brown and Tokyo Universities and a visiting scholar/fellow at Harvard, York (Canada), and Cambridge Universities. He has been teaching international economic law for the last twenty-five years and is the author of *International Commodity Agreements: A Legal Study*. He has also published a number of articles on different aspects of international economic law in leading journals. He self identifies as a member of a group of scholars engaged in articulating a critical third-world approach to international law. He is a general editor of the Asian Yearbook of International Law.

Charles E. Di Leva

Mr Di Leva is chief counsel of the Environmental and International Law Unit of the World Bank Legal Department. He has been a director of the IUCN Environmental Law Program. He has also been a trial attorney with the Department of Justice's Environmental Enforcement Section and senior programme officer in the United Nations' Environment Program Environmental Law Unit. He received a B.S. degree from the University of Rhode Island and his J.D. from Vermont Law School.

Steven Herz

Steven Herz is a lawyer and consultant based in Oakland, California. He advises global civil society organizations on international environmental and human rights law, and sustainable development policy. One focus of his work has been increasing public participation and accountability in the environmental decision-making of the World Bank and other international financial institutions. He is the author of a number of articles and reports on these subjects. He currently focuses on climate finance with Greenpeace International. He holds a B.A., M.A., and J.D. from the University of Virginia.

Jerome I. Levinson

Jerome Levinson is Distinguished Lawyer in Residence at American University Washington College of Law. He specializes in the legal aspects of foreign direct

investment. Levinson is well known for his knowledge of international financial issues and workers' rights. He recently published *Who Makes United States Foreign Policy?*

Fergus Mackay

Fergus Mackay is a human rights lawyer and coordinator of the Human Rights and Legal Programme of the UK-based organization, the Forest Peoples Programme. He has worked as an attorney for indigenous people in Alaska and was legal advisor to the World Council of Indigenous Peoples for five years. He has litigated a number of cases before the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, and before the United Nations treaty bodies, including the 2007 *Saramaka People v. Suriname* case, decided by the Inter-American Court. He previously served as an expert advisor to the Organization of American States concerning its proposed American Declaration on the Rights of Indigenous Peoples and as a member of the advisory panel on the World Bank's Extractive Industries Review.

Siobhán McInerney-Lankford

Dr Siobhán McInerney-Lankford is counsel in the Environment and International Law Group of the World Bank LEGVPU. She works on human rights law and safeguard policies, advising on policy issues and coordinating research, analytic work, and consultations relevant to human rights. She leads the World Bank LEGVPU's research project on human rights and climate change, and supports the Nordic Trust Fund on human rights. Additionally, she is the World Bank's representative on the OECD Development Assistance Committee Human Rights Task Team, which she chaired for two years, and she represents the World Bank on the UN High-Level Task Force on the Right to Development. Dr McInerney-Lankford holds an LL.B. from Trinity College, Dublin, a B.C.L. from Oxford University, an LL.M. from Harvard Law School, and D.Phil. in EU human rights law from Oxford University.

August Reinisch

August Reinisch is a professor of international and European law at the University of Vienna and an adjunct professor at the Bologna Center of SAIS/Johns Hopkins University in Bologna, Italy. From 2004 to 2006, he was Dean for International Relations of the Law School of the University of Vienna. He currently serves as arbitrator on the In Rem Restitution Panel according to the Austrian General Settlement Fund Law 2001, dealing with Holocaust-related property claims; as president of an United Nations Commission on International Trade Law (UNCITRAL) investment arbitration tribunal; and as an arbitrator and expert in other investment cases. He has widely published in international law, with a recent focus on investment law and the law of international organizations. Additionally, he has

About the Authors

served as an expert advisor in Austrian and foreign courts and as an international arbitrator. He holds Master's degrees in philosophy and in law as well as a doctorate in law from the University of Vienna and an LL.M. from NYU Law School.

Eisuke Suzuki

Eisuke Suzuki is professor of Policy Studies in the School of Policy Studies at Kwansei Gakuin University, Sanda-Kobe, Japan. In 2003, he was the principal architect of ADB's Accountability Mechanism and has held many leadership positions in the Asian Development Bank, including the Director General, Operations Evaluation, 2003–2005; Special Advisor to the President, 2003; and Deputy General Counsel, 1996–2003. He received his J.S.D. in 1974 from the Yale Law School, where he founded and served as editor-in-chief of *Yale Studies in World Public Order* from 1974 to 1978 (now *Yale Journal of International Law*).

Celine Tan

Celine Tan is a lecturer in Law at the Birmingham Law School at the University of Birmingham. Prior to this, she taught law at Warwick, was a consultant researcher with the Third World Network, and worked at a variety of international and non-governmental organizations relating to social and economic development and human rights. Dr Tan received her LL.B. from the University of London, and LL.M. and PhD from the University of Warwick.

Jakob Wurm

Jakob Wurm is a project assistant at the Department of European, International and Comparative Law at the Law School of the University of Vienna, in Vienna, Austria. He received an LL.M. from the University of Vienna, a European Master in Law and Economics from the Rotterdam Erasmus University, and was a visiting scholar at Boalt Hall, School of Law at the University of California, Berkeley. In addition to his position as an Austrian national reporter for the database, 'International Law in Domestic Courts' (ILDC), he is an ILDC associate editor. His research interests include International Economic Law (WTO dispute settlement), the Law of International Organizations (immunities and privileges of international organizations in Austria), Austrian judicial practice in international law, and European Law.

Introduction

Daniel D. Bradlow and David B. Hunter

Any discussion of the relationship of international law to the operations of international financial institutions (IFIs) must start with the international law applicable to all international organizations. The fundamental international legal issues relating to the status of international organizations, which are inter-governmental organizations created by treaties, are settled. Since the *Reparations* case in 1949, the international community has accepted that international organizations are subjects of international law.¹ It is also acknowledged that the international legal rights and obligations of international organizations are based on their constitutive treaties, any other treaties that the organizations may have signed, and applicable customary international legal principles.²

Beyond these general propositions, the international law pertaining to international organizations is less well established. This lack of clarity is attributable to a number of factors. First, the situation of international organizations as subjects of international law differs in important ways from the position of states. While states have general powers, rights, and responsibilities that they exercise relatively freely within their legally recognized geographical space, international organizations have defined powers and responsibilities determined by the organization's functions and purposes as spelled out in their constitutive treaties and as they are implemented in practice,³ and not by geography. Following the *Reparations* case it is also accepted that, in addition to their explicitly conferred powers,

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1. 'Reparation for Injuries Suffered in the Service of the United Nations', Advisory Opinion, I.C.J. Reports 1949, 174 (hereinafter *Reparations*).
 2. See 'Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt', ICJ Reports 1980, 73, para. 37.
 3. *Reparations*, *supra* n. 1, 180.

international organizations have whatever additional implied powers may be necessary for them to perform their functions.⁴

Second, international organizations are created by states to perform functions that are of interest to their Member States. This means that, although international organizations clearly have a legal existence that is independent from their Member States, their governance, and thus their decision-making, is formally dominated by their Member States, or more accurately their most powerful Member States. This raises some issues relating to the functional independence of international organizations.⁵ For example, the fact that the Member States play a role in the decisions taken by the organizations raises questions about the division of responsibility between the organization and the Member States for the consequences of these decisions.⁶ In particular, it raises concerns about who is responsible for the decisions and actions of international organizations. In principle, there are three possibilities for assigning responsibility: the organizations are independently responsible for their decisions and actions; the organizations and their Member States are jointly responsible; or the international organization has primary responsibility and the Member States can be found to have a secondary responsibility for these decisions, at least in certain circumstances.⁷ The legal independence of international organizations would suggest that the organization alone should be responsible for its own decisions and actions. However, this can be problematic if international organizations make decisions or undertake actions that the states themselves could not do – for example, decisions or actions that are not in compliance with treaties signed by the majority of their Member States but not signed by the organization. There are also issues relating to the legal implications arising from international organizations signing treaties separately from their Member States.⁸ For example, would an international organization signing a treaty bind

4. *Ibid.*, 182.

5. See generally, Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford & Portland, OR: Hart Publishing, 2007); José Alvarez, *International Organizations as Law-Makers* (Oxford & New York: Oxford University Press, 2005); Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, 4th rev. edn (Boston, MA: Martinus Nijhoff Publishers, 2003).

6. See International Law Commission's work on the responsibility of international organizations. The reports of the International Law Commission's Special Rapporteur on Responsibility of International Organizations are available on the International Law Commission's website. International Law Commission, Search Page, <http://untreaty.un.org/ilc/dtSearch/Search_Forms/dtSearch.html> (hereinafter ILC Search Page). The Special Rapporteur issued his seventh report, on 27 Mar. 2009. Giorgio Gaja, ILC Special Rapporteur, 'Seventh Report on Responsibility of International Organizations', A/CN.4/610 (Geneva, 27 Mar. 2009). See also, International Law Association, 'Final Report of the Committee on Accountability of International Organizations' (2004) (hereinafter 'ILA Report').

7. See, e.g., Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of Their Obligations Towards Third Parties', report for Institut de Droit International (1995), in *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, ed. Rosalyn Higgins (Oxford & New York: Oxford University Press, 2009).

8. See Brölmann, *supra* n. 5. This concern with the implications of international organizations signing treaties not signed by all the Member States was one of the factors underlying the ILC's

only the organization, or does it also have international legal implications for their Member States, even if these Member States have not signed the treaties themselves?⁹

Third, the organization's relationship with its members, in principle, is conducted at the level of the state. This means that all interactions between the international organization and non-state actors in its Member States are expected to be indirect and involve the mediation of the state. Only the state has a direct relationship with the organization. This suggests that only the state should be able to hold the organization accountable for its decisions and actions that affect the state and its citizens. This in turn places emphasis on the role of each Member State in the governance of the international organization and on the existing mechanisms for Member States holding the organization accountable. This formal legal relationship is challenged by the functional reality of the active and direct engagement of many international organizations with non-state actors in their Member States, and of their ability to have significant impacts on the lives and activities of these non-state actors. Examples of the direct relationships that can exist between non-state actors and international organizations include, the work of the United Nations in refugee camps, the role that the United Nations played in the governance of Namibia and Timor-Leste during their transitions to independence, and the role of the World Bank and the International Monetary Fund (IMF) in many poor countries during their structural adjustment programmes.¹⁰

These direct non-contractual relations between international organizations and non-state actors raise two sets of important questions. The first relates to the actual ability of an individual Member State to hold the international organization accountable for the impact of its operations on the citizens of that Member State. This can be problematic because the state may be a partner with the organization in an operation that is of interest to the state, and so the state may have little incentive to raise the non-state actors' concerns with the international organization. In addition, the state may occupy a relatively weak position in the governance of the international organization and therefore may experience difficulty in having its concerns actually heard in the organization.

decision to treat treaties involving international organizations in a separate convention from the one dealing with international agreements only between states. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969, entered into force 27 Jan. 1980), *available at* <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 Mar. 1986) (this treaty is not yet in force because it has yet to be ratified by the requisite thirty-five states), *available at* <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>.

9. *See* Brölmann, *supra* n. 5.

10. *See, e.g.*, Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake', *ILSA Journal of International and Comparative Law* 12 (2006): 395 & sources cited therein.

The second deals with the ability of adversely affected non-state actors themselves to hold the international organization accountable.¹¹ This ability can be constrained because to ensure that these international organizations can perform these functions effectively and freely, they are typically granted immunity from legal process in their Member States. This limit on the ability of non-state actors to ensure that the activities of international organizations do not negatively affect their lives has important implications for the organization's accountability for its actions.

In addition to the issues related to the international legal status of international organizations, there are many unresolved issues regarding both the international legal responsibilities of international organizations and the content of the international law applicable to their operations. Evidence of the former can be seen in the attention being paid to this topic by the International Law Commission (ILC) in its work on the responsibility of international organizations,¹² the International Court of Justice's rebuff of the World Health Organization's (WHO) efforts to provide advice on the legality of the use of nuclear weapons in armed conflict,¹³ and the uncertainty surrounding the responsibilities of the United Nations (UN) for misconduct in its refugee camps and peace-keeping operations.¹⁴ Evidence of the latter can be seen, for example, in the lack of clarity surrounding the human rights obligations of international organizations and in deciding exactly which international legal principles are applicable to the operations of the international organizations.¹⁵

The issue of which international legal principles are applicable to the operations of international organizations is further complicated by the number of international organizations, and the diversity in their functions and scope of operations. This suggests that, in addition to the general principles that are applicable to all international organizations, specific principles may apply to particular international organizations or groups of organizations and may lead to special legal outcomes. In this regard, it is important to note that, while legal scholars have written about many different international organizations, the organization that has received the greatest attention is the United Nations, and the subjects that have generated the most interest are its powers to deal with peace and security and its responsibilities in regard to these operations. This focus is understandable,

11. See, e.g., 'ILA Report', *supra* n. 6.

12. ILC Search Page, *supra* n. 6; Gaja, 'Seventh Report on Responsibility of International Organizations', *supra* n. 6.

13. 'Legality of the Use by a State of Nuclear Weapons in Armed Conflict', Advisory Opinion, I.C.J. Reports 1996, 66.

14. See Wilde, *supra* n. 10; Frédéric Mégret & Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Responsibilities', *Human Rights Quarterly* 25 (2003): 314–342, available at <http://muse.jhu.edu/journals/human_rights_quarterly/v025/25.2megret.pdf>; Alvarez, *supra* n. 5.

15. See, e.g., Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford & Portland, OR: Hart Publishing, 2003); Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001).

given that peace-keeping operations have been the most high-profile activities of the United Nations and that these operations are relatively novel and complex.

On the other hand, the developmental work of international organizations has received relatively less attention from international legal scholars. In fact, it is striking how little attention has been paid to the international legal issues relating to the operations of the IMF, the World Bank Group, and the regional development banks (collectively the IFIs).

This gap in the literature is somewhat surprising. The IFIs play important roles in global economic governance and are key actors in shaping the development trajectories in their developing Member States. Their operations can also have profound social and environmental impacts on their Member States, as well as on their economic policies. In addition, these institutions combine their public status as international legal subjects with financial operations that, by their nature, may be indistinguishable from private financial transactions. All of which suggests that the law applicable to their operations could involve both novel and important international legal issues. In addition, it suggests that a better understanding of these legal issues could help both the organizations and their Member States structure their transactions in ways that are more compatible with their developmental objectives and their international responsibilities. Consequently, the issue of what international legal principles are applicable to the operations of the IFIs is an important topic that would benefit from more rigorous study.

The purpose of this book is to address this deficiency in the treatment of international law and IFIs. It hopes to stimulate thought, debate, research and analysis, and action on the topic. It also hopes to contribute to the development of a clearer and better defined legal regime to govern the work of the IFIs. Towards this end it contains a set of contributions that address the various aspects of this topic from diverse perspectives in terms of experience, political viewpoint, and focus. Collectively, the contributions address a broad range of issues that we hope will help define the topic with greater clarity and depth.

The book is divided into two parts. The first part focuses on general issues related to the IFIs and international law. The purpose of this section is to set out the general principles of international law that are applicable to the IFIs and to consider how these are or should be evolving to produce IFIs that are respectful subjects of international law and accountable to all relevant stakeholders for their compliance with international law. The second part focuses on selected aspects of the IFIs' operations that both raise important and challenging international legal issues and that have substantial impacts on both the different stakeholders in the operations of the IFIs, and on the sustainability and success of the operations.

Part I: General Issues

The first chapter in this part provides a general overview of the international law applicable to the operations of the IFIs. In this chapter, the author, Daniel Bradlow, begins his analysis with a brief description of the two key universal IFIs – the IMF and the World Bank Group – and their operations. He then identifies the

international legal principles applicable to IFI operations. His analysis shows that some customary international legal principles are applicable, or at least potentially applicable, to the social and environmental aspects of their operations, and to their contractual relations with their Member States. In the chapter, Bradlow also contends that the IFIs should not only be seen as passive recipients of international legal obligations and rights, but also as key players in the creation of international law through the formulation and implementation of their operational policies, the fact finding work of their independent accountability mechanisms, and their participation in certain international treaty regimes. This, he argues, underscores the importance of defining with more precision the scope of the IFIs' international legal obligations.

The second chapter, by B.S. Chimni, looks at the issue of IFIs and international law from a Third World perspective. He argues that the IFIs are not neutral subjects of international law and that their primary international function is to promote the international capitalist system. This mission is pursued in part by ensuring that IFIs remain subjects of international law that are not bound by international law. The ambiguities in their Articles, Chimni argues, allow them to interpret their mandates in ways that advance their real international function, while evading any obligations that they may have under international human rights law or as participants in the UN system. In addition, Chimni contends, their governance structures, with their weighted voting, restricted Board representation, and limited mechanisms of accountability, serve to constrain the role of the developing Member States and to keep them in a subaltern position. He concludes with a number of reforms that should be pressed by developing Member States and concerned social movements.

Chapter 3, by Eisuke Suzuki, explores the responsibility of the IFIs under international law. In the chapter, he looks at the ongoing work of the ILC's draft articles on the responsibility of international organizations and seeks to apply this work to the case of the IFIs. In particular, he focuses on the internal policies and directives of the IFIs, which he argues implement the mandates of these organizations and are independent of the municipal laws of the Member States. Suzuki argues that the function of the international policies raises a question about the practical and international legal consequences of an IFI's breach of these policies. He maintains that the ILC draft articles are troubling in that no international legal consequences seem to attach to an IFI's non-compliance with these internal policies. In Suzuki's view, the lack of consequences does not mean that they are not responsible for such acts of non-compliance. In fact, the independent accountability mechanisms in the various IFIs are designed, at least in part, to help address the issue of IFI responsibility for these acts of non-compliance. Suzuki ends the chapter with an interesting case study of the functioning of these independent accountability mechanisms and a proposal to extend the scope of the existing IFI administrative tribunals to serve as appellate bodies to review and make binding the decisions of existing accountability mechanisms.

The next two chapters address the accountability of IFIs from the perspective of national courts, particularly given the grant of immunity that accompanies IFIs'

status as international organizations. Chapter 4, by August Reinisch and Jakob Wurm, examines how the IFIs have fared in cases in national courts. Although only a relatively small number of cases involve IFIs, they cover a broad range of issues, including IFI immunity, IFI capacity to sue in national courts, and the ability of various claimants, including creditors, employees, and non-contractual parties to sue IFIs in domestic courts. On the basis of their analysis of the cases, Reinisch and Wurm conclude that in general the IFIs are immune to suit in national courts unless they actually waive their immunity.

Chapter 5, written by Steven Herz, focuses more critically on the issue of IFI immunity. In this chapter, Herz evaluates the law relating to organizational immunity and builds the case for reducing the immunity of the IFIs. He notes the irony that, although initially international organizations were not supposed to have greater immunity than their Member States, over the past fifty years the immunity of states has shrunk while that of international organizations has grown. Particularly in the case of the IFIs, their immunity has expanded together with the widening scope of their activities. It is related, as Herz points out, to the fact that the rationale for international organizational immunity is connected to their need to perform freely the public functions for which they were originally created. In this chapter, Herz cogently argues that the current broad scope of the IFIs' immunity is untenable and needs to be reduced so that they can be held accountable for their actions. He bases his argument on a careful reading of both the functions of the IFIs and of the case law, particularly in the United States, regarding their immunity.

Part II: Selected Topics

The chapters in this section all focus on the international legal implications of specific aspects of IFI operations. The first chapter in this section addresses structural adjustment lending while the remaining chapters address human rights, the environment, and related issues regarding the rights and interests of third parties vis-à-vis the IFIs. While the authors tend to focus their analysis on the IMF and the World Bank Group, their conclusions can easily be extrapolated to other IFIs.

The first chapter in this section (Chapter 6), by Celine Tan, looks at the international law and policy relating to the IFIs' structural adjustment lending. She begins her analysis of this controversial topic with a review of the history and evolution of adjustment lending and the conditionalities attached thereto. She concludes that structural adjustment programmes serve a global economic governance function, particularly in regard to poor and weak states. However, it performs this function without the normal legal or institutional safeguards for states and affected communities that one would expect from well governed entities. Furthermore, Tan contends that through structural adjustment programmes, the IFIs have been able to expand their mandates and their authority over at least some of their Member States without any accompanying increase in their public accountability.

Chapter 7, by David Hunter, focuses on the development of the internal law of the IFIs – particularly the environmental and social policies adopted by the IFIs to

address the rights and interests of third parties affected by IFI financing. He explains how the procedures for adopting policies at the IFIs are part of the emerging global administrative law and how, over time, they have developed into a robust set of procedures for providing non-state actors with access to information and opportunities to participate. These procedural rights in the formulation of policies are rooted in concepts of international human rights and good governance in the field of sustainable development. These procedures are both reflections of the IFIs' (and other international organizations') evolving international legal responsibilities in international policymaking and the IFIs' leading role in establishing new standards for the progressive development of customary law in this area. The chapter faults the IFIs for their ad hoc approach to these procedures and argues that minimum standards need to be codified to ensure no backsliding by the institutions and to meet the growing expectations and responsibilities for ensuring effective participation of non-state actors in international policymaking at the IFIs.

The third chapter in this part (Chapter 8), by Siobhán McNerney-Lankford, deals with the complex issue of the IFIs and international human rights. She begins her analysis by arguing that human rights law requires that the bearer of the human rights obligation be clearly identified, something she contends is only rarely done in regard to human rights in the development context. As a result, operationalizing human rights is difficult in the development context in general, and in regard to the IFIs in particular, especially given that the IFIs are not signatories to the international human rights conventions. She then notes that, pursuant to human rights conventions, the primary human rights obligations rest with states. McNerney-Lankford argues that states' obligations include seeking to protect, promote, and fulfil human rights in their actions in the IFIs. She maintains that the IFIs, as subjects of international law, have a responsibility to support Member States who are signatories to specific human rights conventions in their actions in these countries. In addition, and if appropriate, the IFIs have a responsibility to cooperate with the international bodies formally responsible for monitoring the implementation of human rights obligations.

The ninth chapter, by Fergus MacKay, looks at the impact of the IFIs on indigenous people. He argues that the international law relating to indigenous people has evolved to the point where important international legal documents, in the form of UN Declarations and International Labour Organization (ILO) Conventions, now clarify the international community's, including the IFIs', legal obligations towards indigenous people. In particular, he argues that indigenous people have a right to give their free, prior, and informed consent to IFI operations that affect them. He contends that this should be reflected in the applicable operational policies of the IFIs, and that they should be held accountable for their failure to comply with this obligation.

The tenth chapter, by Jerome Levinson, looks at the way in which the IFIs address the topic of respect for workers' rights, particularly the core workers' rights expressed in the ILO Conventions. The chapter looks at the history of the IFIs' treatment of workers' rights, particularly in the Latin American countries, and how this has evolved over time. He also looks at how the World Trade Organization

(WTO) has addressed this important topic. Levinson concludes that the IFIs have not always met their obligations in the labour context.

The final chapter in this part (Chapter 11), by Charles Di Leva, looks at how the IFIs have dealt with their obligations in regard to international environmental law. In this chapter, he focuses on the World Bank and its environmental activities. The chapter describes these activities in some detail. In addition, Di Leva discusses ways in which the Bank deals with some of the international environmental law issues that arise from these activities. The chapter helps underscore the important role the Bank is playing in regard to environmental affairs at both a global level, and in those developing Member States that use its services.

As the conclusion highlights, the chapters in this book collectively represent a detailed and critical overview of the IFIs and international law. Together, the book demonstrates that the IFIs have important responsibilities under international law and a powerful capacity to influence the development of international law in a number of areas. We hope that the book will both inform readers and stimulate them to undertake further research in this important area of international law. We also hope it will encourage more rigorous engagement between the IFIs and international lawyers on this topic, thereby leading to international law playing a more active role in the work of the IFIs.

