

The World Bank Legal Review

The World Bank Legal Review

Volume 3

**International Financial Institutions
and Global Legal Governance**

Edited by

Hassane Cissé

Daniel D. Bradlow

Benedict Kingsbury



THE WORLD BANK

The World Bank Legal Review

Volume 3

International Financial Institutions and Global Legal Governance

EDITORS

Hassane Cissé

Deputy General Counsel, Knowledge and Research, World Bank

Daniel D. Bradlow

SARCHI Professor of International Development Law and African Economic Relations, University of Pretoria, and Professor of Law, American University Washington College of Law

Benedict Kingsbury

Murry and Ida Becker Professor of Law and Director of the Institute for International Law and Justice at New York University School of Law; Visiting Professor of Law, University of Utah

PRODUCTION EDITOR

Aristeidis Panou

Legal Associate, World Bank

Contents

Foreword	ix
<i>Robert B. Zoellick, World Bank Group President</i>	
Preface	xi
<i>Anne-Marie Leroy, Senior Vice President and Group General Counsel</i>	
Contributors	xii
Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance	3
<i>Benedict Kingsbury</i>	
PART I	
LAW OF INTERNATIONAL ORGANIZATIONS: ISSUES CONFRONTING IFIs	
The Reform of the Governance of the IFIs: A Critical Assessment	37
<i>Daniel D. Bradlow</i>	
Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank	59
<i>Hassane Cissé</i>	
International Financial Institutions and Claims of Private Parties: Immunity Obliges	93
<i>Rutsel Silvestre J. Martha</i>	
Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS	133
<i>William M. Berenson</i>	
Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?	147
<i>Evarist Baimu and Aristeidis Panou</i>	
Partnerships, Emulation, and Coordination: Toward the Emergence of a <i>Droit Commun</i> in the Field of Development Finance	173
<i>Laurence Boisson de Chazournes</i>	
Coordinating the Fight against Fraud and Corruption: Agreement on Cross-Debarment among Multilateral Development Banks	189
<i>Stephen S. Zimmermann and Frank A. Fariello, Jr.</i>	

PART II**LEGAL OBLIGATIONS AND INSTITUTIONS OF DEVELOPING COUNTRIES:
RETHINKING APPROACHES OF IFIs**

The Rule of Law and Development: In Search of the Holy Grail 207
Michael Trebilcock

Rethinking Justice Reform in Fragile and Conflict-Affected States:
The Capacity of Development Agencies and Lessons from Liberia
and Afghanistan 241
Deval Desai, Deborah Isser, and Michael Woolcock

International Norms and Standards Applicable to Situations
of State Fragility and Failure: An Overview 263
Chiara Giorgetti

Legal Obligations and Institutions of Developing Countries:
Rethinking Approaches to Forest Governance 293
Annie Petsonk

PART III**INTERNATIONAL FINANCE AND THE CHALLENGES OF
REGULATORY GOVERNANCE**

Networks In(-)Action? The Transgovernmental Origins of,
and Responses to, the Financial Crisis 323
Chris Brummer

Mitigating the Impact of Financial Crises on the Brazilian
Capital Market 335
Alexandre Pinheiro dos Santos

Developments in Climate Finance from Rio to Cancun 345
Charlotte Streck and Thiago Chagas

Governing a Fragmented Climate Finance Regime 363
Richard B. Stewart, Bryce Rudyk, and Kiri Mattes

INDEX 391

Introduction

Global Administrative Law in the Institutional Practice of Global Regulatory Governance

BENEDICT KINGSBURY*

Introduction

Long-term changes in the nature of global political and social order include the use of increasingly fine-grained regulatory arrangements intended to overcome collective action problems and market failures and to take advantage of global cooperation. Although framing the changes in these politico-economic terms suggests that the key drivers are the maximization by each actor of achievement of its own (self-defined) interests within the constraints of the prevailing constellation of power, any global order model must also address values conflicts and cultural diversity, on the one hand, and the implications of dramatic but shifting inequalities of power, on the other.

Two long-standing state-based models of global order blending these considerations provide the framework for standard approaches to international law: minimal interstate pluralism and more ambitious and moralistic interstate solidarism.¹ Global regulatory governance (GRG) can be framed as a third model of global order, dependent on and layered over the existing models and grappling in distinctive ways with the considerations of power, value conflicts, and inequality. This introduction surveys some specific roles of law in the emerging GRG model, with particular attention to the present and future roles of global administrative law (GAL).

GRG involves the increasingly dense and politically significant exercise of power beyond the state. New understandings of law and its roles are emerging through the practice of GRG. Several features of GRG have distinctive legal implications:

- GRG employs an array of distinctive regulatory techniques, including disclosure and reporting requirements; “reg-neg” negotiations between the regulator and the regulated entity; use of private monitoring and enforcement; peer review; and governance by information. GRG regimes are often designed to create incentives or costs for private actors even when the formal legal regime and regulatory structure are interstate. Some of these techniques seek to shift behavior at the margins, rather than

* This chapter reflects close collaboration with Richard B. Stewart and draws on joint work with Megan Donaldson. Conversations with Danny Bradlow and Hassane Cissé and suggestions from Vikram Raghavan, Aristeidis Panou, Estefania Ponce, and Florencia Lebensohn are gratefully acknowledged.

1 Andrew Hurrell, *On Global Order* (Oxford U. Press 2007).

aiming to change behavior of all regulated entities. Regulation frequently involves cost-benefit calculations, not only in rule making but also in the processes of supervision and in determining consequences of breaches. Regulation depends on an intricate mesh of institutions, market and political forces, social and cultural features, historic experiences, and path dependencies. The relevant institutions and regimes may not be designed or operated in close coordination—indeed, they may have redundancies or run in opposing directions, which can create arbitrage opportunities and problematic externalities, although redundancy and checking structures sometimes can have positive value. Much regulatory design is premised on informational uncertainty, the definition of tolerable and nontolerable levels of risk, management of risk, planning for contingencies, and rapid adaptation. GRG is probabilistic rather than closely determinate. It may be designed to encourage experimentation rather than uniformity of approaches, and to foster and incorporate learning through feedback loops, benchmarking, and revision processes. Regulation, like other governance arrangements, is dynamic and responsive to interactions and to changes in external conditions. These elements of regulation are often not captured in the simple legal binaries of obligation/no obligation, violation/no violation (or breach/no breach), and liability (or responsibility) *vel non*. Nor are they exactly aligned with precepts incorporated into some definitions of rule of law, such as requirements that every comparable case be addressed in the same way.²

- The organizational forms of the international institutions with significant roles in GRG are highly diverse, and they vary greatly in the breadth and publicness of their purposes, membership, reach, and the interests or expertise they embody. They extend far beyond the range of traditional treaty-based intergovernmental institutions to include entities that under traditional analysis are not subjects of international law. Yet many such entities set formal or informal standards that determine practice and expectations in markets, and in some cases are incorporated into other sets of standards or supervisory mechanisms or made binding or cognizable by formal agreements or national law. Some such entities also exercise decisional powers, directly or through their participation in other GRG entities. Many play significant specialist governance roles, for example, in certification or in generation and control of information. Examples of such extrastate institutions in global financial regulation include,³

2 Michael Trebilcock, *The Rule of Law and Development: In Search of the Holy Grail*, in this volume, discusses the model of legal liberalism, according to which rules are made to achieve the purposes of the society as a whole, not of limited groups within it, and the rules are enforced equally for all citizens.

3 See the discussion of these actors in Chris Brummer, *Networks In(-)Action? The Trans-governmental Origins of, and Responses to, the Financial Crisis*, in this volume.

- Formal intergovernmental bodies created by treaties, such as the International Monetary Fund (IMF), the World Bank, and the regional development banks.
- Networks of government or regulatory officials in particular sectors, sometimes with membership that is deliberately restricted by the founding states to like-minded states they select or to the most important states as regards the issues involved.⁴ Participants may directly represent the national political leadership, such as in meetings of the group of 20 (G20) state leaders or governmental ministers, or they may represent national regulatory agencies with varying degrees of independence from the national political leadership, such as the Basel Committee of banking supervisors or regulators, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors. In some cases, such as the Financial Stability Board, representatives of other GRG institutions such as the World Bank and IMF join with national regulators.
- Hybrid bodies involving both public and private actors, such as the International Financial Reporting Standards (IFRS) structure, under which the International Accounting Standards Board, consisting of private individuals with relevant commercial and professional experience (including some former regulators), produces the standards and consults with and reports to a monitoring board comprising public capital market authorities whose decisions may be essential if the IFRS are to be required or accepted from businesses as meeting national regulatory standards for financial reporting.
- Purely private actors, such as the International Swaps and Derivatives Association, which consists of participants in over-the-counter derivatives markets and associated service providers.
- GRG blends formal and informal instruments in highly varying concoctions. This combination creates many challenges for traditional international law analysis. International legal doctrine addresses rules on the conclusion, entry into force, and legal effects of formal interstate treaties. In many countries, national law also sets detailed formal requirements relating to treaties, including approval by the legislature and conditions for application within the national legal system. But informal instruments used in GRG are made through rule-making processes with few established legal controls. Such instruments may have substantial practical effects and sometimes legal effects, for example, when they are incorporated by reference into a legal text or weighed by a body exercising a

4 *Coalitions of the Willing: Avant-Garde or Threat?* (Christian Calliess, Georg Nolte, & Peter-Tobias Stoll ed., Heymann 2007), particularly Eyal Benvenisti, *Coalitions of the Willing and the Evolution of Informal International Law*, 1–24.

law-governed discretion, yet only sparse international or national legal doctrines squarely address these effects.⁵

- Much GRG rule making and decision making takes place within institutions operating under distinctive processes that are largely beyond the reach of national public law or the traditional law of international organizations, which has focused mainly on questions of legal competence or mandate. Even in formal intergovernmental institutions with broad global or regional membership, the controlling governance arrangements may be problematic for many states and nonstate groups. These institutions may have tenuous structures of representation of under-represented states and rules or practices of decision making that date from earlier eras and do not align with current geopolitical or economic distributions of power, let alone with demands for justice or equality.⁶ Efforts to reform IMF and World Bank governance have sought to respond to some such concerns, although many critics do not regard the reforms as sufficient.⁷

The rapid growth of GRG has posed sharp challenges to traditional international law, to standard approaches to the law of international organizations, and to some elements of national legal systems that struggle to grapple with

5 The French Ministry of Foreign Affairs, in its general note on the international engagements of France issued on May 3, 2010, asserts that administrative arrangements concluded between ministers of different national governments are not recognized by international law and ought to be avoided as much as possible because of uncertainty about their effects: "Les arrangements administratifs conclus par un ministre français avec son homologue étranger ne sont pas répertoriés dans la base de données documentaire. En effet, il ne s'agit pas de traités ou d'accords internationaux. Les arrangements administratifs sont conclus par un ministre avec son homologue étranger pour compléter ou préciser un accord existant ou, à la rigueur, pour organiser une coopération administrative de portée limitée dans la stricte limite de ses attributions. Cette catégorie n'est pas reconnue par le droit international. La circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux recommande aux négociateurs français de ne recourir à ce type d'arrangements qu'exceptionnellement et souligne que les effets qu'ils produisent sont incertains." Available at <<http://www.doc.diplomatie.fr/pacte/>>. This statement is somewhat less sanguine than the view taken in the French Prime Minister's circular of May 30, 1997, that such agreements can be made on matters entirely within the purview of a single minister but are in a category unknown to international law. *Circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux*, Journal officiel de la République Française 8415 (May 31, 1997), available at <<http://www.doc.diplomatie.fr/pacte/pdf/circul.pdf>>. The German government takes a more favorable approach to the use of such instruments in its Collective Standing Order for all federal ministries of 2000, §72 Gemeinsame Geschäftsordnung der Bundesministerien of 2000: "Before the planning and the conclusion of international agreements (international treaties, agreements, interministerial or interagency agreements, notes and exchanges of letters) the responsible federal ministry must always inquire whether the conclusion of the international undertaking is indeed required, or whether the same goal may also be attained through other means, especially through understandings which are below the threshold of an international agreement." See Benvenisti, *supra* note 4.

6 Ngaire Woods, *Multilateralism and Building Strong International Institutions*, in *Global Accountabilities: Participation, Pluralism, and Public Ethics* 27 (Alnoor Ebrahim & Edward Weisband ed., Cambridge U. Press 2007).

7 Daniel D. Bradlow, *The Reform of the Governance of the IFIs: A Critical Assessment*, in this volume.

external sources of regulation and regulatory decision making. How does law fit into a GRG model of global order?

The role of law is modest (although not negligible) in the overall configurations of power for GRG, the stocks and flows of resources and capabilities, and the organizational forms these take, which are key variables determining who shapes agendas and who gets what in GRG.⁸ Law contributes appreciably, but generally only in limited ways, alongside political, economic, social, and historical factors in explaining why certain institutions exist in the global administrative space with particular memberships and structures, why these have the mandates and decision rules they do, and why other institutions, mandates, or rules do not exist.

Basic legal concepts and principles of a constitutional or systemic nature play a significant role in instantiating, and to some extent in constituting, interstate pluralist and solidarist order. These basic legal concepts and principles of global order include the juridical conception of the state and its representation and contracting capacity; core principles of imperium such as the entitlements of the state to control its territory and monopolize violence there; fundamental human rights; some emerging principles limiting environmental harm; and rights relating to dominium, including property rights. Public international law and national public law together do this legal work in interstate orders.⁹ In relation to GRG, scholars have proposed that general principles of public law, or international public law, might play a comparable role,¹⁰ but the practical influence of these proposals has not yet been great.

For purposes of GRG, the roles of law are of rapidly growing importance. Some of these roles are explicated in work on GAL. This chapter explores specific issues arising for the legal and governance work of intergovernmental international financial institutions (IFIs). It introduces and draws out themes developed by contributors to this volume of the *World Bank Legal Review*.¹¹

8 See, for example, Miles Kahler & David Lake, *Economic Integration and Global Governance: Why So Little Supranationalism?*, in *The Politics of Global Regulation* 242 (Walter Mattli & Ngaire Woods ed., Princeton U. Press 2009).

9 Several relevant international law principles are surveyed in Chiara Giorgetti, *International Norms and Standards Applicable to Situations of State Fragility and Failure: An Overview*, in this volume.

10 *The Exercise of Public Authority by International Institutions* (Armin von Bogdandy, et al. ed., Springer 2010); Benedict Kingsbury, *International Law as Inter-Public Law*, in *Moral Universalism and Pluralism: NOMOS XLIX* 167 (Henry R. Richardson & Melissa S. Williams ed., N.Y.U. Press 2008); Giacinto della Cananea, *The Genesis and Structure of General Principles of Global Public Law*, in *Global Administrative Law and EU Administrative Law* 89 (Edoardo Chiti & Bernardo Mattarella ed., Springer 2011).

11 This volume is based on papers presented and themes discussed at the 2010 Law, Justice and Development Week, organized by the Legal Vice Presidency of the World Bank and cosponsored by several academic institutions, including the Global Administrative Law Network convened by the Institute for International Law and Justice at New York University Law School. The website of the Global Administrative Law Project, which includes papers and symposia, is <<http://www.iilj.org/GAL>>. Symposia on GAL have been published in 68:(3-4) L. & Contemp. Probs. (2005); 37(4) N.Y.U. J. Intl. L. & Pol. (2005); 17 Eur. J. Intl. L. 1 (2006). See

GAL is based on the insight that much of global regulatory governance can be understood as “administration.” Intergovernmental organizations and other institutions engage in this activity beyond the reach of controls imposed by the public law, democratic apparatus, or other review structures of individual states. The term “administration” in this context encompasses bureaucratic or routine adjudicative decisions on individual situations short of major interstate dispute settlement, general rule making short of treaty making, and other important managerial actions affecting voice and outcomes—all of which bear a resemblance to what is considered administration in domestic legal systems. This administrative component of global governance is undertaken by a wide array of actors.

These actors frequently overlap in their domains of activity, and the regulatory processes in which any particular actor is engaged are often influenced by, and perhaps in tension with, activities of other global (extrastate) institutions and national or subnational institutions.¹² For some purposes, it is distortionary to separate global from national/subnational processes of regulatory administration. Extranational actors and regimes (both global actors and other states) shape domestic administrative practices, and domestic actors play a

also *Global Administrative Law in the Operations of International Organizations* (Laurence Boisson de Chazournes, Lorenzo Casini, & Benedict Kingsbury ed.), 6 *International Organizations L. Rev.* (2009). Books from this project include *El Nuevo Derecho Administrativo Global en América Latina* (Benedict Kingsbury et al. ed., Ediciones Rap 2009); *Global Administrative Law: Development and Innovation* (Hugh Corder ed., Juta 2009); *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (Richard Stewart, Benedict Kingsbury, & Bryce Rudyk ed., N.Y.U. Press 2009). The GAL Project, jointly with leading law schools and research institutes in Africa, Asia, Europe, and Latin America, has convened research and policy conferences with San Andrés University and the University of Buenos Aires, the Centre for Policy Research in New Delhi, the University of Cape Town, FGV Law School in São Paulo, Tsinghua Law School in Beijing, Los Andes University in Bogotá, and the University of Toronto. Together these institutions form the Global Administrative Network, which has completed innovative joint research projects on relations between foreign and local anticorruption activities in Brazil and Argentina; access to essential medicines under TRIPS regimes in Latin America; procedures used by national and supranational competition authorities; and the Regulatory State of the South (a project on models and experience of water, electricity and telecommunications regulations in developing countries, directed by Navroz Dubash and Bronwen Morgan). Publications from these projects are forthcoming; research reports are at <<http://www.iilj.org/GAL>>.

- 12 A modest point on terminology concerns the term “global,” which is frequently used in GAL to refer to all regulatory or other administrative structures that extend beyond a single state. In many cases (for example, a binational mutual recognition regulatory arrangement), this use stretches the ordinary meaning of “global.” However, these regulatory structures typically do not operate in isolation; they may be part of a network of other comparable regulatory arrangements, or they may be nested in or influenced by a regional (for example, Mercosur) or worldwide (such as the WTO GATS) regulatory structure, and the relevant commercial actors and even consumer or public interest groups involved are often transnational. Moreover, many regulatory structures, whether purporting to span the globe or not, are highly exclusionary, and not “global” in the sense of being inclusive. Nonetheless, although it can be important to differentiate truly worldwide structures from more local structures, and to distinguish between more and less inclusive structures, for the purpose of understanding the exercise of governance power beyond the state, a stretched use of “global” is practical.

role in global and foreign regimes. There thus exists an uneven but discernible “global administrative space.”¹³

International institutions have increasingly sought to shore up their legitimacy, and to enhance the effectiveness of their regulatory activities, by applying to (and between) themselves procedural norms (referred to here as “GAL norms”) of transparency, participation, reasoned decision making, and legality, and by establishing mechanisms of review and accountability.¹⁴ These procedural norms and mechanisms resemble, at least in their general orientation, administrative law as applied to regulatory agencies and other executive bodies within some national legal systems. GRG institutions frequently incorporate GAL norms and mechanisms (in varying mixes) when they alter structures for control and conduct of operations as wider forces of change reshape the activities and missions of these institutions. The law bearing on these operational features and dynamics can have considerable significance for on-the-ground outcomes and for normative evaluation of these institutions (for example, in terms of justice or of political acceptability).

Four forms of legal development prompted by the dynamic requirements of GRG and the global administrative space are highlighted in this volume.

- *The operational law of specific intergovernmental institutions.* Stretching and adapting principles of the established law of international organizations, and crafting newer regulatory modalities and mechanisms, are characteristic of efforts to structure and control the operations of IFIs in GRG and to meet the intensifying demands for procedural specification of, and compliance with, the emerging principles of GAL.
- *Interinstitutional governance arrangements.* Effective GRG depends more and more on interinstitutional arrangements and structures. The capacity of intergovernmental institutions to make such arrangements and adapt their policies and culture to work effectively with other institutions is one measure of their quality and success. Increasingly, GAL considerations are significant in the crafting and operation of interinstitutional arrangements.
- *Internationally prescribed national administrative law.* A third strand of GAL, in which IFIs are very involved, comprises the norms and mechanisms that international bodies urge or impose on states as prescriptions for good administration within the state. Some such norms and mechanisms are requirements intended to support the state’s adherence to a specific international legal regime; for example, the World Trade Organization requires states to meet requirements of transparency, notice, and reason

13 Benedict Kingsbury, Nico Krisch, & Richard Stewart, *The Emergence of Global Administrative Law*, 68(3–4) L. & Contemp. Probs. 15 (2005). See also Sabino Cassese, *Lo spazio giuridico globale* (Laterza 2003).

14 Kingsbury, Krisch, & Stewart, *supra* note 13; Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. Intl. L. & Pol. 663 (2005); Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 Eur. J. Intl. L. 23 (2009).

giving when they restrict trade in goods and services with another state. Comparable requirements are set for particular states as part of programmatic obligations of “good governance” or “rule of law” that may be prescribed as conditions for funding from international development agencies. International organizations promote such norms and mechanisms through funding, capacity building, and epistemic influences, including rankings of states based in part on such criteria (for example, the World Bank’s Governance Indicators and Ease of Doing Business Indicators).¹⁵

- *New GRG regimes.* New or deepened GRG regimes are being crafted in vital fields such as financial market supervision, forests, and climate regulation. Typically, these new regimes incorporate different mixes of the three kinds of legal development already mentioned: operations of existing intergovernmental institutions, interinstitutional arrangements, and international standards for coordinated national regulation. But these new regimes are dependent on behavior in markets as well as other forms of private conduct. Private and hybrid governance bodies play major roles, and innovative governance mechanisms and techniques are deployed.

This chapter discusses these four kinds of legal development in the global administrative space, using the topics covered in this volume of the *World Bank Legal Review* as illustrations. Although the relatively new terminology of “global administrative law” is used in only some of the chapters in this volume, all can be read through the lens of GAL.

Danny Bradlow, in a critical assessment of what has been achieved and remains to be achieved in reforms of governance of the World Bank and the IMF, deploys an evaluative structure that integrates these four kinds of legal development into a wider set of political-economy dimensions of GRG. He assesses their governance arrangements in five dimensions: “voice and vote” (decision rules, allocation of voting power, and representation of different groups of states by executive directors); political requirements that the IMF be headed by a European and the World Bank by a U.S. national, with further allocative arrangements for other senior management positions; accountability of member states and affected persons and publics; transparency (particularly disclosure of information publicly); and adequacy of operational policies and of public consultations in making the arrangements.¹⁶ Bradlow proposes a set of normative criteria to use as metrics in evaluating governance arrangements of these IFIs: a holistic understanding of development; flexibility of management arrangements to meet expectations of diverse stakeholders; implementation of relevant international law principles (respect for national sovereignty; non-discrimination, including special attention to participation of low-capacity states; ensuring respect for customary international law human rights and

15 Kevin Davis, Benedict Kingsbury, & Sally Engle Merry, *Indicators as a Technology of Global Governance*, IILJ Working Paper 2010/2 Rev. (Jul. 2011).

16 Bradlow, *supra* note 7. See also the contributions to *International Financial Institutions and International Law* (Daniel Bradlow & David Hunter ed., Kluwer Law International 2010).

rights of foreign legal persons; respect for international environmental law); adequate and meaningful coordination with other relevant institutions; and adherence to GAL principles in operations. These criteria integrate a substantive standard (a holistic approach to development), basic principles of international law, a management standard concerning suppleness and effectiveness, and two criteria to which GAL is directly relevant: GAL within the IFI and interinstitutional arrangements. One might argue the addition of a further criterion concerning relations between IFI governance and approaches the IFI takes and promotes toward governance issues (including GAL issues) within member states. Thus, it might be asked, can the governance arrangements of the World Bank and the IMF contribute to the advancement within states of human rights, environmental standards, and equity and nondiscrimination in development; policies and practices of governmental transparency and anti-corruption; or enumerated features of rule of law, good governance, or democratic national governance?

Each of these issues is either addressed as an objective or deliberately not addressed in poverty reduction strategy papers (PRSPs) negotiated jointly by the World Bank and the IMF with recipient countries.¹⁷ What requirements are set in each PRSP, and what processes of participation and consultation within the country were required in order for the country to be deemed in negotiating the PRSP to have taken “national ownership” of it, may in some measure reflect governance processes within the World Bank and IMF.

Adapting Traditional International Organizations Law to Contemporary Operations of GRG Institutions: The Political Prohibition, Mandate, Immunities, Review, and Responsibility

Adaptation, stretching, and even reconstruction of existing concepts in the traditional law of international organizations have been the dominant strategy of IFI lawyers as they deal with changes generated by GRG and demands for adherence to GAL principles. The long-established concepts of the law of international organizations subject to these processes include the “political prohibition” applicable to some IFIs, more general mandate issues connected with the “principle of speciality,” the law of immunities, and the law of responsibility. Whether these traditional concepts for mobilizing, channeling, limiting, controlling, and legitimizing the power of intergovernmental institutions are sufficient for functional GRG or to meet GAL requirements is questionable. Newer legal strategies include structures of review, principles of accountability (or “soft responsibility”), and the coalescing of substantive and procedural policies into what may become a *droit commun* for specialist institutions or part of a more general law of global governance.

17 For a critical assessment, see Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011).

The Political Prohibition

The powers and mandate conferred on an organization by its constitutive instruments are the basis for its action and for limiting its action, but these can be subject to extension through the legal doctrines of inherent and attributed and implied powers,¹⁸ through creative interpretation of the mandate,¹⁹ and through practice as supported by or acquiesced to by member states or other relevant actors.²⁰

The political prohibition (a categorical term for a highly variegated practice) in the World Bank's Articles of Agreement raises a concern regarding mandates. The articles specify that the Bank "shall not interfere in the political affairs of any member [state]," and that "only economic considerations shall be relevant" to its decisions. These principles are accompanied by other mandate-related restrictions, such as that the Bank finance only expenditures for "productive purposes," and by limits on the substantive mandates of the various organizations of the World Bank Group. The ways in which the political prohibition and the other restrictions have worked are analyzed in Hassane Cissé's account of how lines are drawn and adjusted in specific policy areas.²¹

For example, with its adoption of OP 7.30 (2001), the Bank can consider attitudes of regional organizations in deciding on its financial dealings with a government that came to power through a military coup or other unconstitutional means; this consideration has enabled the Bank to avoid undermining prodemocratic norms such as those of the Inter-American Democratic Charter of 2000 or the African Charter on Democracy, Elections and Governance of 2007,²² without itself articulating a prodemocratic or even an anticoup normative stance. The Bank has pursued the policy articulated in OP 2.30 (1997) of not financing peacemaking, peacekeeping, and humanitarian relief, but it has delicately nuanced its practice in order to support some activities related to peace processes (for example, making presentations to delegates to peace negotiations in Burundi and Sierra Leone in 1999). The Bank continues not to finance military expenditures, but it has assisted with demobilization and landmine clearance projects. Its long-standing refusal to finance criminal justice projects, on the basis that these might involve political activities, is gradually being eased, with ongoing debate as to financing police, prosecutors, and prisons, but the Bank likely will not finance specific actions against ter

18 Jan Klabbers, *An Introduction to International Institutional Law* ch. 4 (2d ed., Cambridge U. Press 2009).

19 Rutsel Martha, *Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)*, 6 *International Organizations L. Rev.* 447 (2009).

20 Jan Klabbers, *Global Governance before the ICJ: Re-reading the WHA Opinion*, 13 *Max Planck Yearbook of United Nations Law* 1 (2009).

21 Hassane Cissé, *Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank*, in this volume.

22 Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge U. Press 2011).

rorism and crimes of state. Its articulated positions on taking account of human rights considerations have become more permissive, but without a major cultural shift or a comprehensive human rights policy.²³ The Bank partners with donors who set political conditions for recipients, such as the inclusion of marginalized groups, but it does not join these partners in threatening to withhold funds for breach of such conditions, and it seeks humanitarian or other exemptions in UN sanctions so as not to face dilemmas about whether to honor such sanctions. The Bank supports anticorruption measures, including recovery of proceeds of corruption from other countries, but it does not finance work on individual cases.

All this line drawing operates as a shield for the Bank and its staff against pressures from borrowing states and their allies, other donors, nongovernmental organizations (NGOs), and national legislatures. It may help retain the confidence of lenders to the Bank, it may improve the effectiveness of the Bank by narrowing its focus, and it may boost the professional self-esteem of Bank staff and their sense of having a mission that is insulated from politics. Yet, the question can be asked whether the evidence for (or against) such results from the political prohibition is conclusive. (The European Bank for Reconstruction and Development may provide informative counterpoint experiences, because its constitutive instruments do not include any political prohibition, but the European regional context makes it a special case.) There is a risk of decoupling when some parts of the Bank's processes, such as the reduction of lending to India and Pakistan after they inducted nuclear weapons into their arsenals in 1998, are readily construed by commentators as the Bank being brought into interstate geopolitics.

Even in more quotidian work, much of what the IFIs do within their own rules can be characterized as highly political and open to denunciation. However, the drawing, nudging, and redrawing of the lines are themselves a significant form of governance. Such actions may empower IFI legal counsels;²⁴ but, from a broader legal standpoint, they constitute a law-based governance with some connection to principles and rules, and require some reason giving and internal review and contestation.

A case for the value of law-based governance is made in the account given by a former IMF lawyer of what he considered improvements in outcomes that resulted from IMF staff adhering to policies. These included the IMF's insistence that if it was to be involved in anti-money-laundering assessments, these assessments must be applied to all countries on the basis of preset standards and methodologies, effectively bringing to an end the Financial Action Task Force strategy of evaluating nonmember states and denouncing some of

23 Galit Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 *Am J. Intl. L.* 647 (2009).

24 Cf. Treasa Dunworth, *The Legal Adviser in International Organizations: Technician or Guardian?*, 46 *Alberta L. Rev.* 869 (2009).

them as “noncooperating countries and territories” who were then potentially subject to sanctions from member states.²⁵

Mandate

The main control mechanisms for the political prohibition, as for other mandate restrictions in most intergovernmental institutions, are the intergovernmental organs such as the institution’s executive board or general assembly, and the legal counsel; these bodies may be prompted to act, or be assertively augmented, by legal arguments or unilateral policies made by governments of particular member states. National courts have addressed mandate issues in cases directly involving intergovernmental institutions, such as in rulings that functional immunity is not available to an organization because it has acted outside its mandate.²⁶ A few international institutions, including regional organizations such as the European Union, have their own courts with powers of judicial review. Mandate issues may arise collaterally in national or international courts, typically in cases to which the institution is not itself a party.²⁷

The International Court of Justice (ICJ, and its predecessor, the Permanent Court of International Justice) has addressed some questions concerning the powers of international organizations in global regulatory governance. Notable was the announcement by the ICJ of a new framing of a principle of speciality, according to which the responsibilities of the World Health Organization (WHO) could not be extended (in the absence of an express textual commitment in its mandate) to peace and security because this would “encroach on the responsibilities of other parts of the United Nations system.”²⁸ The ICJ’s opinion in this case was self-enforcing, as the only immediate legal consequence was that the WHO could not get an opinion from the ICJ on the question it had asked, relating to whether the use of nuclear weapons by a state in armed conflict would be a breach of the state’s obligations under international law. If the ICJ’s principle of speciality were to be amplified into a major principle of the law of GRG, it would have significant consequences, including for IFIs. Its benefits in curbing wasteful duplication and overextension may be difficult to capture without generating other, larger problems.

25 Richard Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. Rev. 502, 577–84, 588 (2010).

26 In *INTERSIDE v. Ministerio de Agricultura y Secretaría Ejecutiva del Convenio Andrés Bello*, Sala de lo Contencioso Administrativo del Consejo de Estado (Mar. 26, 2009), the Colombian Council of State denied functional immunity to the Convenio Andrés Bello (an intergovernmental institution) in a contract case on the basis that the purposes stated in its charter did not even remotely include administering government-financed agricultural subsidies.

27 Such issues have been raised in interstate cases under the ICJ’s contentious jurisdiction, for example in the *Lockerbie* cases (Libya v. UK; Libya v. USA), ICJ Reports 1992 p. 3 and p. 114, with regard to the powers of the UN Security Council.

28 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Op., 1996 I.C.J. Reports, paragraph 26. See generally Klabbers, *supra* note 20.

Overlapping mandates and competences are a feature of the increasingly dense institutionalization of GRG. Although the concept of a functional delineation under which one global organization exists for each field of activity is attractive, GRG is not organized in such a way. Much of the architecture of GRG is pluralist by design; for example, the Cartagena Protocol to the Biodiversity Convention of 1992 purposefully created a second normativity, more accommodating of public anxieties about genetically modified foods, that weakened the exclusivity of WTO Sanitary and Phyto-Sanitary rules on this issue.²⁹ Powerful states encountering obstacles to the pursuit of their objectives (including interests of particular private sector constituencies) on a particular topic within one institution may expand the range and reach of another institution in which the set of members or the decision rules or the culture is more favorable.³⁰ They may create new treaty-based intergovernmental institutions, as is likely to happen in the development of a climate finance regime, although political objections to the cost, cumbersomeness, and potential intractability of new formal intergovernmental institutions have been a brake on the drivers for such institutionalization. States may instead create intergovernmental network institutions, or support hybrid public-private institutions, or leave the terrain to privately constituted institutions of global governance in which states play significant roles.

Immunity and Remedies

The issue of increased judicial review of GRG institutions, particularly formal intergovernmental institutions, arises when considering whether intergovernmental organizations should have immunity before national courts and what legal forums should be available for persons seeking remedies against intergovernmental organizations. The stakes can be high, as in proceedings in Swiss courts seeking to force the Bank for International Settlements, which since the 2000–2001 Argentine financial crisis had come to hold a high proportion (reportedly reaching 99 percent) of Argentina's total foreign reserves, to make available funds to satisfy monetary awards secured by bondholders against Argentina.³¹

Intergovernmental organizations' legal counsel tend to favor sweeping immunities for their organizations and personnel in national courts. Most recognize that a quid pro quo for immunity is that the institution ensures that alternative venues are available in which claims against the organization can be brought and fairly adjudicated and remediated. This formalized bargain—for claims by third parties and staff—is embodied in the 1994 Headquarters

29 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* 189–220 (Oxford U. Press 2010).

30 Eyal Benvenisti & George Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *Stanford L. Rev.* 595 (2007).

31 *NML Capital Ltd, EM Limited v. Bank für Internationalen Zahlungsausgleich (BIZ)*, (Swiss Federal Tribunal, Basel), Jul. 12, 2010, upholding immunity, and subsequent developments.

Agreement between the United States and the Organization of American States (OAS).³² The OAS has absolute immunity from suit and execution in U.S. courts, but must provide arbitration for any claims not within the jurisdiction of its Administrative Tribunal (which deals largely with claims by staff).³³ Even when no explicit agreement has been made, many international organizations have strengthened the due process qualities and remedies powers of staff administrative tribunals, partly under the shadow of national courts that have threatened to deny immunity to international organizations in employment-related cases brought by staff members.³⁴

Most international organizations also provide for arbitration of contractual disputes with private parties. Much weaker, however, are their provisions and policies in relation to third-party claims, that is, noncontract claims by nonstaff.³⁵ Although some such claims are arbitrated by agreement or settled by negotiation, international civil servants face difficulties in committing an organization to binding arbitration or to making financial settlements in the absence of a legal obligation to do so. It can be difficult to persuade interstate organs to entertain such expenditures. A commitment to binding arbitration of all third-party claims could entail exposure to huge financial risks and might have a chilling effect on the activities of the organization, especially in risky settings. Adequate insurance of such risks ensures financial predictability and that recalcitrance or grandstanding by member states will not block payment of liabilities. Prohibitions of punitive damages in the arbitrations, ceilings on awards, and some limits to the range of arbitrable claims can all help cabin such risks.³⁶

32 William M. Berenson, *Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS*, in this volume.

33 The US-OAS agreement may be compared, as Martha suggests, with an agreement between Interpol and France. Rutsel Silvestre J. Martha, *International Financial Institutions and Claims of Private Parties: Immunity Obliges*, in this volume. Interpol, the International Criminal Police Organization, reached a similar arrangement with the French government in 1982 over Interpol's exemption from laws on databases otherwise applicable in France. Interpol established a Commission on the Control of Files (CFF), which receives and potentially acts on petitions by individuals who believe data held about them in Interpol databases is erroneous, or that Interpol should not have issued a "red notice" asking other countries to arrest that person as requested by the police of a member state. Mario Savino, *Global Administrative Law Meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices*, 43 N.Y.U. J. Intl. L. & Pol. 263 (2011); Allan Brewer-Carías, *Global Administrative Law on International Police Cooperation: A Case of Global Administrative Law Procedure*, in *Global Administrative Law: Towards a Lex Administrativa* 341 (Javier Robalino-Orellana & Jaime Rodríguez-Arana Muñoz ed., Cameron 2010); Wui Ling Cheah, *Policing Interpol: The Commission for the Control of Interpol's Files and the Right to a Remedy*, 7 International Organizations L. Rev. 375 (2010). The most controversial disputes concerning red notices, such as those relating to a leader of the Kazakhstan opposition or to prominent Iranian officials accused by Argentine authorities of involvement in bombings in Buenos Aires, have been addressed, not in the CFF, but in the Executive Committee and General Assembly of Interpol (Savino, 301–21).

34 Martha, *supra* note 33, discusses cases in European and Argentine courts, as well as a perplexing decision of a court in Dacca, Bangladesh. Berenson, *supra* note 32, adds discussion of several cases in Brazilian and U.S. courts.

35 Martha, *supra* note 33.

36 Berenson, *supra* note 32.

If sweeping immunities from national jurisdiction and enforcement are as essential to the operation of intergovernmental institutions as their legal counsel suggest, one may wonder how private and hybrid institutions are able to exercise significant powers in global governance without the benefits of such immunity. Some private institutions do have immunity, for example, the International Committee of the Red Cross (ICRC). The Global Fund to Fight TB, HIV/AIDS, and Malaria, although constituted as a private foundation under Swiss law, has immunity in Switzerland, where it is based, and in the United States, where its funds are mainly held, and it has undertaken an energetic campaign to be accorded immunities in other countries. The ICRC and the Global Fund are comparable to major intergovernmental institutions in some functional respects: they engage in activities that might risk liability and operate all over the world, often in dangerous conditions and in countries where judicial or state power might be exercised arbitrarily. Nonetheless, most major private and hybrid operational and standard-setting institutions operate without generalized immunity arrangements. Detailed empirical studies of the consequences of different regimes of immunity and nonimmunity for particular kinds of operations of specific types of institutions may make a valuable contribution to future policy and practice.

Responsibility, Accountability, and Review

The principle that intergovernmental institutions are responsible for breaches of rules of international law applicable to them, along with the related principle that these institutions are liable to victims for harm caused by their breaches of such rules, has achieved considerable prominence with the efforts of the UN International Law Commission (ILC) to codify the legal elements of such responsibility. The ILC draft has been the subject of academic criticism, as well as submissions by international institutions eager to clarify limits to their exposure, as exemplified by the World Bank's request that the ILC clarify limits on responsibility arising from the provision to a state of financial assistance.³⁷ The extensive literature on this form of legal responsibility of intergovernmental institutions is out of proportion to the amount of practice of such responsibility, which remains modest for most institutions other than in employment and contract matters or preset arrangements, such as compensation for death or injury of personnel in UN peacekeeping operations.

The normative demands that have accompanied GRG, including demands framed in terms of GAL principles and procedures, have prompted exploration in the practice of GRG institutions of review mechanisms with distinctive rules and practices concerning participation, transparency, and remedies.

37 ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, at 28, UN Doc. A/CN.4/637 (Feb. 14, 2011). This and other comments and criticisms relating to the ILC draft articles are noted in Evarist Baimu & Aristeidis Panou, *Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?* in this volume.

These are associated with extension of (or sidestepping from) issues of mandate and responsibility to broader concepts of accountability.³⁸

The term "accountability" is used in many different ways in political discourse and academic writing,³⁹ and is often underspecified for any operational purpose. Richard B. Stewart proposes that the term be confined to

institutionalized mechanisms under which an identified account holder has the right to obtain an accounting from an identified accountant for [the accountant's] conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance. . . . Such mechanisms are of two basic types. The first is where the account holder delegates or grants authority or resources to the accountant; it includes electoral, fiscal, hierarchical, and supervisory accountability mechanisms. The second is legal accountability, where the account holder seeks redress for infringement by the accountant of [the account holder's] legally protected interests.⁴⁰

The World Bank Inspection Panel, although clearly a mechanism of review, is not so clearly on its own a mechanism of accountability under Stewart's definition. The Bank's Executive Board must approve a full inspection of a Bank project. The Inspection Panel has powers in relation to management-proposed remedial action plans, but these powers depend on the Board; the Inspection Panel cannot impose remedies or sanctions on the Bank's management other than naming and shaming (although for individual staff, that prospect can operate as a strong and potentially disproportionate sanction). When combined with the Bank's Executive Board, however, the panel can be viewed as a composite accountability mechanism vis-à-vis management. The accountant is the Bank's management. The account holders are those persons or groups who trigger the inspection request and are able to participate in the panel's investigation and in any remedial arrangements made.

What are the parallels and divergences between the Inspection Panel's mandate and practice and the principles of responsibility set forth by the International Law Commission?⁴¹ The panel investigates actions or omissions of the Bank that are inconsistent with Bank policies. Because of the

38 A thoughtful analysis of the genesis, features, and limitations in relation to international organizations of different approaches to responsibility and accountability is provided by Jan Klabbers, *Autonomy, Constitutionalism and Virtue in International Institutional Law*, in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* 120 (Richard Collins & Nigel D. White ed., Routledge 2011).

39 Some of the different usages are reviewed in Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 *West European Politics* 946 (2010).

40 Richard B. Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* 5 (unpublished draft of Jan. 2008, subject to revision). Electoral, fiscal, hierarchical, supervisory, and legal accountability are among the eight categories specified in Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *Am. Pol. Sci. Rev.* 29 (2005).

41 This question is creatively posed and addressed by Baimu & Panou, *supra* note 37. This paragraph summarizes arguments they make.

way Bank policies are written, with Bank staff as addressees, the panel is unlikely to investigate actions or omissions of the Board, or indeed of itself (quite apart from the improbability of such an investigation being proposed or authorized). As Evarist Baimu and Aristeidis Panou point out, the primary rules (here, the Bank's policies) set a narrower limit on the actors whose conduct is actually investigated than do the ILC's rules on attribution, under which the acts or omissions of the Board of Governors and the Executive Board as well as different units of Bank management could all entail responsibility of the Bank. The obligations in relation to which the panel can investigate breaches are the Bank's policies. The panel does not generally have jurisdiction to address any other primary rules of international law that a project may infringe, many of which would be rules applicable to the borrowing state, although some may be rules applicable to the Bank. However, some such rules may be made relevant by the terms of the Bank's policies, and the panel has in some cases found other bases to treat such rules as relevant.⁴² The panel is able to investigate Bank action or inaction in situations where the Bank would not bear responsibility under the ILC draft articles (because, for example, only the borrowing state is responsible). But the panel can only investigate where harm has occurred or will occur,⁴³ and its investigations do not necessarily result in remedies that are the same as what the responsibility regime would theoretically entail.

The creation of mechanisms of investigation and review within intergovernmental institutions in response to the dynamics of GRG may be related not only to responsibility but also to other traditional public international law doctrines, such as immunity. For example, Ibrahim Shihata, while general counsel of the World Bank, emphasized that the reports of the World Bank Inspection Panel, even if highly critical of particular Bank conduct, were unlikely to be used in evidence in cases against the Bank in national courts because of the Bank's immunity.⁴⁴ It seems plausible that investigative mechanisms, especially those that produce detailed and reasoned reports made widely available under a principle of transparency, are more likely to be established or to operate effectively when the IFI creating the mechanism is largely shielded from liability. Thus, immunity may make possible the increased use of investigation, review, transparency, and some other GAL procedures within IFIs.

Operational Policies and Other Normative Instruments for GRG

GAL comprises some "hard law" obligations (including in international treaties and the juridical output of international organizations) and a body of more

42 Baimu & Panou, *supra* note 37, point to the *Chad Petroleum Development and Pipeline Project* case (2002), and the *Honduras—Land Administration Project* case (2007).

43 In theory, the harm must be caused by the Bank's failures to follow its own policies; but the panel has in practice moved away from treating this nexus as a requirement for investigation or remediation.

44 Ibrahim Shihata, *The World Bank Inspection Panel: In Practice* 243–53 (2d ed., Oxford U. Press 2000).

general normative principles, many of which mirror requirements and qualities set by domestic administrative law. The hard international law obligations tend to be most developed in specific areas, particularly trade, investment, and environmental law, and to apply primarily to states and state agencies engaging in functions pursuant to global regimes rather than to international institutions themselves.

More general normative principles emerge reflexively from practice, often prompted by contestation of an institution's authority or legitimacy and borrowing from other institutions or domestic administrative law traditions. The World Bank's 2010 reform of its transparency arrangements is an example of this process. One of the main motivations for reform appears to have been long-standing criticism from NGOs, including the Global Transparency Initiative (GTI), an alliance formed to press for greater transparency in the IFIs, coupled with a sense within the Bank that its own protocols fell short of what it urged on client countries. The Bank issued a draft policy and embarked on consultations, relying on NGO interlocutors to help organize this outreach, and reprinting a "scorecard" prepared by the GTI rating different IFIs as "acceptable," "needs improvement," or "unacceptable" based on principles of access to information. During the policy redrafting, Bank officials declined to articulate transparency as a human right, a position the NGOs urged on them, but in some consultations, officials did say that they understood the Bank as a "public institution" and had drawn on state freedom of information policies in approaching questions of institutional transparency. Once the broad Access to Information Policy was adopted, the Bank promoted it extensively. NGOs proclaimed the World Bank as a "leader" on transparency and inaugurated a campaign to spread these new, more extensive transparency mechanisms to other IFIs. Moreover, the Bank's reformed policy, inspired by domestic freedom of information laws, extends to information that client countries share with the World Bank when doing business with it.

The World Bank and the various regional development banks have adopted broadly similar sets of operational policies and supervisory mechanisms. This cross-institutional normativity might eventually assume qualities of a *droit commun*.⁴⁵ The mechanisms by which policy convergence and insti-

45 Laurence Boisson de Chazournes, *Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance*, in this volume. The evidence for the World Bank as first mover is strong in some cases. For example, the World Bank's Inspection Panel, created in 1993, was the first independent accountability mechanism (IAM); by 2010, all multilateral development banks had IAMs in some form, although with differences in design and powers (Bradlow, *supra* note 7). However, the IMF does not have an IAM; nor do many other international organizations whose operations directly affect vast numbers of identifiable individuals, such as the Office of the United Nations High Commissioner for Refugees. Further research may contribute to mapping and explaining these discontinuities in diffusion patterns even when the demand and the functional case for comparable innovations seem strong. Even among MDBs, more unevenness is evident in practices concerning public consultation before adoption of substantive institutional policies on some topics of particular public interest; and the IMF engages in such consultation much less than the World Bank does.

tutional similarity occur among international institutions have been the subjects of little recent study (whereas diffusion, convergence, and differentiation among states, economies, firms, and nonstate institutions have been extensively investigated across different issue areas). One model suggests that innovations that are diffused are typically those first initiated in the World Bank.⁴⁶ This might be due to the World Bank's large size, meaning it has greater resources for innovation. Subsequent uptake by regional institutions could then be due to learning as the results of the innovation are assessed and the methods for implementing it are refined. Widespread adoption of the innovation makes it more cost-effective for institutions to align to the new norm and more costly to be an outlier, and often these institutions also wish to be regarded as up-to-date. Another driver of uptake could be pressure (or coercion), probably not usually exerted by the World Bank on regional development banks but perhaps exerted by powerful states (that is, lenders, or the biggest borrowers). The size, global mandate, and location of the World Bank may lead to external pressures for reform so that political bargains struck there are in effect also bargains for the regional multilateral development banks (MDBs), in which many of the major lenders are the same countries. Whether the World Bank is always the first mover, as this model implies, may be questioned.

It is to be expected that innovations on some issues will originate in diverse experimentation by regional development banks, with promising experiences then drawn upon by the World Bank, which could learn from these experiences so as not to incur political and resource costs for untried innovations. This seems to have occurred, for example, in policies promoting transparency, where innovations, particularly in the Asian Development Bank, preceded the 2010 World Bank reforms. The incorporation of a problem-solving function into the mandate of MDB independent accountability mechanisms, along with the policy-compliance function, is an innovation developed in several regional MDBs that has not been incorporated into the mandate of the World Bank Inspection Panel. Fine-grained and robust studies of pathways of diffusion and reasons for variation and nonadoption of specific GAL principles and mechanisms among IFIs and among other GRG institutions are needed to understand how and why change occurs in GAL and GRG.

Interinstitutional Relations

GRG has been likened to polysynody,⁴⁷ the system in which a 10-person council took the place of each government minister that was introduced in France by the regent in 1715 and eloquently defended by the Abbé Saint-Pierre.⁴⁸

46 Boisson de Chazournes, *supra* note 45.

47 The parallel is drawn by Cassese, *supra* note 14.

48 Charles-Irénée Castel (Abbé) de Saint-Pierre, *Discours sur la polysynodie* [1718] (Du Villard and Changuion 1719). This work is an argument for constitutional monarchy and against despotism, including excessive powers of the king's ministers. The councils were introduced after the death of King Louis XIV in response to complaints about ministerial power, but

Organizing the relations between collective entities in global governance, or between different legal regimes of which different entities are part, has been tortuous, with much less systematicity and coherence than French polysynody envisaged. Nonetheless, institutions are in increasingly intricate relationships with each other, including in structures of interagency coordination, prioritization (for example, appointment of a lead agency to deal with a specific government receiving humanitarian aid), and representation.

Isomorphism among clusters of institutions with similar missions, taking informal mimetic steps to resemble each other institutionally or to adopt similar operational policies, might provide a foundation for interinstitutional relations. However, similitude is not sufficient—cultural differences and sheer inequality may weigh heavily against interinstitutional arrangements. Staff in some agencies believe that the World Bank, because of its size and culture, is unwilling to adjust its policies or practices to conform to those of other institutions or to easily enable interoperability or greater speed and cost-effectiveness through harmonization in joint activities.

One clear modality for organizing change is through interinstitutional agreements harmonizing policies or linking institutional responses in pre-specified classes of cases. The cross-debarment regime, established in the Agreement for Mutual Enforcement of Debarment Decisions among a group of MDBs in 2010, illustrates this modality.⁴⁹ Each participating institution adopted a harmonized definition of fraud and corruption. An institution investigating such phenomena in a project it has financed follows the IFI Principles and Guidelines for Investigations. Its sanctions decision must be made by a distinct body and conform to requirements of due process, publicity, and proportionality. If a debarment from further contracting is imposed for more than one year, a debarment for the same period is automatically applied by the other participating institutions unless they give written notice (albeit without a requirement to state reasons) that they are opting out due to institutional or legal considerations. This agreement required a considerable amount of harmonization. The step of creating a single unified body to decide on and impose debarment sanctions, while potentially advantageous in unifying the jurisprudence and the length of sanctions imposed, proved impossible to achieve. Partly this was due to a divide between MDBs that consider economic actors to have a right to bid and contract with the MDB, and thus insist on robust due process before interfering in that right, and MDBs that consider it their prerogative to decide on contracts subject only to more modest requirements of nonarbitrariness.

they proved ineffective, partly due to the delinquency of their aristocratic members, and they were dissolved over the period 1718–23.

49 Stephen S. Zimmermann & Frank A. Fariello Jr., *Coordinating the Fight against Fraud and Corruption: Agreement on Cross-Debarment among Multilateral Development Banks*, in this volume. This paragraph summarizes points they make.

The difficulties for IFIs in achieving interinstitutional integration even on fundamentally shared objectives are manifest in relation to an anticorruption strategy operated by the World Bank since 2006.⁵⁰ The Voluntary Disclosure Program (VDP), which was approved by the Board of Executive Directors, aims to encourage disclosure to the Bank of corrupt or fraudulent practices. Any entity or individual involved in contracts or projects financed by the World Bank Group (excluding World Bank Group staff) that is not already under active investigation by the Bank may request entry into the VDP by providing preliminary background details. Once the Bank confirms the entity's eligibility, the entity commits to cease all corrupt and fraudulent practices and to disclose all details of impropriety to the Bank. The requirement that an entity not already be under investigation sets up a clear incentive for wrongdoers to come forward, because there is otherwise a risk that accomplices will come forward first, leaving later disclosers ineligible for the VDP and exposed to the sanctions that would usually follow an investigation (including debarment from bidding for future Bank projects and sanctions imposed by state authorities alerted by the Bank). Once the VDP begins, the participating entity completes an internal investigation (subject to Bank verification), implements a compliance plan, and is subject to external monitoring of adherence to that plan for three years. In exchange, the Bank does not debar the participating entity (as it may do if the corruption or fraud is discovered by the Bank's own investigations) and, although the Bank does not confer immunity of any kind on the participating entity, the Bank has the discretion not to disclose the conduct or the entity's participation in the VDP to third parties (including host countries and other MDBs).⁵¹ To some extent, this nontransparency is necessitated by the logic of the program, including the risk in some countries that transparency about the fact that a participating entity has come forward might compromise the safety of individuals involved with the participating entity.

The Bank's creation of the program reflects a judgment that major drawbacks such as nontransparency are outweighed by the benefits of using this kind of regulatory technique for reducing corruption. It was hoped that the VDP would give the Bank fine-grained information on how corruption operates so that system vulnerabilities could be attenuated and prevention and detection efforts could be focused on specific areas. Bank or state-initiated investigations alone might not produce this information, and major investigations are so expensive (as well as facing other challenges) that they cannot cover nearly as many situations as the VDP. In theory, the Bank can use this information in working with member states and other agencies on forward-looking anticorruption programs. These forward-looking elements, and the

50 This paragraph, and the discussion of the World Bank's Access to Information Policy, draws on joint work with Megan Donaldson.

51 World Bank, Department of Institutional Integrity, VDP Guidelines for Participants (2011), available at <http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf>. Redacted reports of the misconduct, not identifying the participating entity, may be provided to member countries and to other international organizations or civil society.

general deterrence effects of these measures and of the VDP, were given considerable weight in the decision to create the VDP, on top of the possible roles of the VDP in detecting specific corruption and reducing risks of repetition.

At the same time, the VDP may have undesirable consequences.⁵² The VDP puts the Bank's VDP unit in the position of keeping wrongdoing secret from other Bank staff and from other MDBs working with the wrongdoers. Perhaps most problematic, the VDP means the Bank may keep secret from citizens of the host state wrongdoing affecting projects in that state funded by loans that will be repaid from public monies and possibly also wrongdoing by that state's officials.⁵³ The VDP differs from similar programs within states, where the agency to which the wrongdoing is disclosed is itself an arm of the state acting (at least theoretically) in the interests of its citizens. Under the VDP, there is a risk that the Bank may be seen as keeping secrets from the state and the public. Moreover, the VDP process is triggered by the decision of wrongdoers to disclose. This decision is not contingent on any evidence that host state authorities would be unable to investigate or prosecute wrongdoing, or that disclosing the confession to the host country would result in some conceivable risk of retaliation to personnel of the participating entity. Obvious tensions arise with GAL principles of transparency: secrecy can be a necessary part of good administration and can advance accountability and the rule of law.

Attempts to curb corruption in projects funded by IFIs illustrate three points. First, different institutional mechanisms directed toward the same goals may vary significantly in their deployment of specific GAL principles. In regard to transparency, the World Bank's Sanctions Board process accomplishes highly public performative acts against corruption,⁵⁴ the cross-debarment process is public but not so performative, and the VDP is non-public and nontransparent. Second, each specific institutional mechanism is nested in, or connected with, several others. The substantive significance of one mechanism cannot be evaluated without studying the whole regime. Some mechanisms are deliberately designed to mesh together, as in the case of the cross-debarment system meshing with the sanctions board system to impose costs on a wrongdoer and reduce incoherence between different IFIs. Among meshed mechanisms, differences in levels of adherence to GAL principles may result in the displacement of an activity from one mechanism to another. Other

52 For example, by favoring larger (and more likely Western) contractors because it privileges the first party to disclose wrongdoing; larger contractors are likely to be in the best position to understand and make use of the VDP process. It may also be easier for larger contractors to comply with the VDP requirements, although the Bank offers technical assistance to reduce the costs of compliance for smaller contractors; see Sarah B. Rogers, *The World Bank Voluntary Disclosure Program: A Distributive Justice Critique*, 46 Colum. J. Transnatl. L. 709 (2008).

53 However, if the World Bank determines that it has a legal obligation or receives a judicial notice, it can disclose the name of the participating entity after providing notice to it.

54 World Bank Group Sanctions Regime—An Overview (Oct. 8, 2010), available at <<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/Overview-SecM2010-0543.pdf>>.

key parts of the regime may be designed separately and controlled by different actors. Thus, IFI sanctions processes may be influenced by investigatory and sanctions practices of national institutions, which may precipitate an entrant into the VDP or provide material for an IFI sanctions investigation. Across the gamut of meshed and unmeshed mechanisms, regulatory and institutional competition and arbitrage may occur, including over levels of adherence to different GAL principles. Third, differences of culture and values and great disparities in capacity are highly relevant to these GRG processes and their GAL dimensions.

The anticorruption field illustrates some of the difficulties of creating joint institutions. The dense and variegated institutional environment is nonetheless increasingly populated by institutions that were themselves created by existing institutions. Some are subsidiaries of a single existing entity, but many are interinstitutional structures.⁵⁵ Their governing authorities might consist of both state institutions and international institutions,⁵⁶ multiple intergovernmental institutions,⁵⁷ or hybrid and private organizations. These institutions may create further institutions, and they themselves are frequently part of complex interinstitutional and inter-regime arrangements. The substantive nature and importance of these phenomena in global governance has not been fully investigated;⁵⁸ the relevance and potential value of applying GAL principles to this organogenesis and to the operations of these complexes have scarcely been studied.

Prescriptions of International Institutions for Governance within States

Formal and informal international institutions have long been in the business of promoting good governance within states.⁵⁹ Among the myriad prescriptions by different international agencies for governance within states, few have provoked more introspection among lawyers in recent decades than those in

55 Edoardo Chiti & Ramses Wessel, *The Emergence of International Agencies in the Global Administrative Space*, in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* 142 (Richard Collins & Nigel D. White ed., Routledge 2011).

56 Edoardo Chiti, *EU and Global Administrative Organizations*, in *Global Administrative Law and EU Administrative Law* 13 (Edoardo Chiti & Bernardo Mattarella ed., Springer 2011).

57 Boisson de Chazournes, *supra* note 45, discussing the Global Environmental Facility (GEF) and other examples.

58 Many works bear on this vast topic. *See, for example*, Margaret Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* 241–305 (Cambridge U. Press 2011); Robert Keohane & David Victor, *The Regime Complex for Climate Change* (Harvard Project on International Climate Agreements, Discussion Paper 10-33, Jan. 2010), available at <http://belfercenter.ksg.harvard.edu/files/Keohane_Victor_Final_2.pdf>.

59 For critical assessment, *see* Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 *Vill. L. Rev.* 887 (2000); Antony Anghie, *International Financial Institutions*, in *The Politics of International Law* 217 (Christian Reus-Smit ed., Cambridge U. Press 2004).

the field of law and development. Efforts by international institutions and bilateral aid agencies to promote justice sector reform or rule of law within recipient countries are premised on a view of what is good practice in the administration of particular activities by state institutions in these sectors.

Critiques in the early 1970s of such reform efforts focused on societal differences as reasons why ethnocentric Western liberal-legalist interventions aimed at enabling “them” to be like “us” were unlikely to succeed. Third world societies, David Trubek and Mark Galanter wrote, tend to be stratified and divided, with political governance that is authoritarian or totalitarian.⁶⁰ State institutions are less important to social control than tribal or other structures. Legal rules are made not by and for the whole society but by small elites or power groups, and in any case are often not observed, nor are state courts very independent or very important. Efforts to apply a liberal-legalist model in such contexts are thus, these authors suggest, likely to be misguided.

Similar perceptions led some Western scholars and institutions into a reaction akin to Montaigne’s quietist focus on cultivating his own garden. This reticence was overwhelmed by the resurgence of rule-of-law interventionism from the late 1980s onward. This resurgence was a manifestation of several starkly different agendas arising from postconflict state building, conflict prevention, waves of democratic transitions, and a new interest among development economists in law and legal institutions as contributors to prosperity. Some modest convergence may be occurring among these agendas, although they pull in competing directions. Hence, much current work is devoted to the renovation of some central tenets discernible in this convergence. These more recent development interventions have been guilty, it is argued, of excessive state centrism and “skipping straight to Weber” in assuming that rules-based meritocratic politically accountable public agencies can be built and perform well in desperately poor and divided fragile states,⁶¹ where many local people may see these as just another manifestation of the power and interests of a small elite in the capital city.⁶²

Concerns are also raised about persisting tendencies of foreign actors to advocate isomorphic transplantation of institutional models from one setting to another, and about short time horizons driven by budget or election cycles or by career paths of task managers, when in fact 30 or 40 years may be needed for transformations to take root.⁶³ A fundamental issue is the theory of change used by external actors. The rhetoric of rule-of-law interventions

60 David Trubek & Marc Galanter, *Scholars and Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *Wis. L. Rev.* 1062 (1974).

61 Lant Pritchett & Michael Woolcock, *Solutions Where the Solution Is the Problem: Arraying the Disarray in Development*, 32 *World Development* 191 (2004).

62 Deval Desai, Deborah Isser, & Michael Woolcock, *Rethinking Justice Reform in Fragile and Conflict-Affected States: The Capacity of Development Agencies and Lessons from Liberia and Afghanistan*, in this volume.

63 *Id.*

has often assumed that the trajectory of change in a country's institution will be linear (more or less).⁶⁴ Experience demonstrates, however, that change occurs in many other trajectories, including j curves (deterioration followed eventually by improvement), f curves (rapid early gains followed by some deterioration), n curves (short-term improvements but an eventual return to baseline), and punctuated equilibria or step functions (periods of stasis or incremental change, punctuated by moments of major change).

Understanding of circumstances and trajectories under which change occurs, or does not occur, in societies or institutions can be sought through the locally specific perspective and expertise of change-agents or astute observers within the society, or through more detached general models.

Rational-actor models emphasize the weights against change that arise from self-reinforcing mechanisms built into the status quo and from switching costs.⁶⁵ Reforms may thus have better prospects of success when existing ways of doing things can be grandfathered in or allowed a long transition; new constituencies with proreform interests can be empowered on the demand side; extensive education and retraining are provided to enable job holders to work successfully in reformed institutions; and traditional institutions (with adaptations) are accorded significant roles in the reformed system to minimize cultural dissonance.⁶⁶ The embeddedness of any specific national regulatory or justice institution in a wider set of practices and understandings and a matrix of other institutions can make lasting and effective reform of any single institution difficult to achieve. The aggregate of all of this means that reforms must usually be modest in aspiration and carefully sequenced across institutions; critical junctures at which wholesale reform across a whole society might succeed are extremely rare and pass quickly. Reform efforts in ordinary times might thus focus on relatively autonomous, separable, or wholly new institutions, in the hope of demonstrating for other institutions that switching costs are lower and benefits higher than constituencies of resistance expect.⁶⁷ Uneven results have been attained in reforms of courts, police, prisons, independent regulatory agencies for utilities, tax administrations, and competition authorities.⁶⁸

What might GAL contribute to contextualized or generalized understandings of national reform?⁶⁹ A starting point is to study closely the connections between national (or subnational) public or public-private governance in these sectors and extranational sources of norms, practices, ideas, funding, expertise, and assessment. When sufficiently dense and interdependent, these

64 *Id.*

65 Trebilcock, *supra* note 2.

66 *Id.*

67 *Id.*; Mariana Mota Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. Toronto L.J. 341 (2009).

68 Trebilcock, *supra* note 2; Desai, Isser, & Woolcock, *supra* note 63.

69 This discussion draws on work with Megan Donaldson.

connections bring the national and extranational governance together in the loosely unified global administrative space. Local and extralocal programs and sites of specific activities can be integrated through GAL norms and mechanisms.

This integrative process is continuous, iterative, and reflexive. It begins with abstractions from broad normative principles and mechanisms found in national public law systems, which are given abstract or more specific expression in the internal and external practice of international agencies; these abstractions or more specific prescriptions are then invoked in the concretization of practices at national and transnational institutional sites.

For example, an IFI may have a broad program of promoting good governance and rule of law for states.⁷⁰ In dealing with a borrowing state on a specific project, the IFI may urge that state to establish particular national institutions (such as an insurance industry supervisory body or an electricity regulator) that follow principles of transparency, participation, reason giving, review, and accountability in forms distilled as best practices from the same sector in other countries. This advocacy may be represented by the IFI as a vindication of the broad program of good governance and rule of law. Such practices then influence a further round of abstractions as the process continues. Moreover, these abstract norms are likely to find some application and be given weight in the internal practices of the relevant international institutions and in their interinstitutional arrangements, partly to avoid cognitive dissonance. Intrastate and extrastate programs and practices are thus brought into unity through common framings, normativities, mechanisms, and metrics.

Much research is required on the implications and consequences of adoption of particular GAL mechanisms by national or subnational regulators and other agencies. Further work could also be done tracing the way in which GAL mechanisms diffuse within a state. There is often an assumption that GAL mechanisms have positive externalities beyond a specific sector, for example, acting as a beachhead or best practices standard for procedural norms that can then be applied to other sectors and areas of government. Yet, depending on how they operate in practice, GAL mechanisms in one sector could have negative impacts beyond that sector; for example, if the mechanisms do not work or prove unwieldy, the failure might discourage governments from implementing similar measures in other areas. These theories might be tested by more detailed qualitative work tracking the evolution of particular ideas among policy makers.

70 The distinction is between a broad program identified in the discourse of leading decision makers and a more specific practice or technology that, although described by participants as simply a means to advance the program, is in fact likely to be decoupled from it. Peter Miller & Nikolas Rose, *Governing Economic Life*, 19 *Economy and Society* 1 (1990). GAL, at least as it applies to the design and operation of regulatory structures and institutions, can be understood as a technology for the pursuit of, or as congruent with, sweeping programmatic ideas of “good governance” and “rule of law” that are proclaimed and promoted by many global institutions for states and, to some extent, for themselves.

Empirical law and development work on theories of change and differential uptake or success of reforms is likely to provide valuable insights as the questions are addressed in relation to GAL in national or subnational institutions. For example, modes of regulation in authoritarian or centralized regimes may simply not accommodate many GAL mechanisms; conversely, more populist modes of regulation, in which there is a significant measure of public participation or regulation is conducted in a corporatist framework by unions or municipal governments, may accommodate some GAL mechanisms (public participation) but not others (legality). If GAL is dependent on a particular political order—liberal capitalism—then regimes that reject liberalism in favor of some more comprehensive and substantive account of value (religious or otherwise) might be expected to reject GAL as irrelevant, except insofar as it fosters the particular ends to which the regime is committed.

New Forms of Global Regulatory Governance

Three major areas in which some but not all necessary elements of political agreement have come into place for newly crafted GRG arrangements are financial markets supervision, forest governance, and climate finance. In each area, existing or proposed governance arrangements feature significant but varied uptake of GAL principles and mechanisms. Little research has been done, however, on the impacts or consequences of these uses of GAL or on the reasons for and consequences of the variations.

National regulators of capital markets, including in some of the most successful emerging markets, place considerable emphasis on the conformity of regulatory rules and practices with the increasingly dense bodies of standards set by international bodies and on the effectiveness of rules, enforcement, and educational initiatives.⁷¹ These include provisions aimed at ensuring transparency and accountability among market participants. Although some models exist for central bank independence or the design of governmental securities regulatory institutions, and significant arrangements exist for transnational cooperation among counterpart institutions, there appears to be less prescription for the design and procedures of national market regulatory institutions than there is with regard to the standards they ought to apply.

Global bodies in this sector vary considerably with regard to their own institutional design features (such as general or restricted membership) and their norms of process and procedure. To give one example of variation in uptake of GAL norms, the International Accounting Standards Board and associated bodies producing the International Financial Reporting Standards have given a high priority to public transparency and to enabling interested groups to make comments before drafts are finalized. The IFRS Foundation Trustees have a prominent Due Process Oversight Committee devoted to such

71 Alexandre Pinheiro dos Santos, *Mitigating the Impact of Financial Crises on the Brazilian Capital Market*, in this volume.

matters. A contrast is the Committee on Payment and Settlement Systems (CPSS), hosted by the Bank for International Settlements in Basel. The membership of CPSS, initially a very small club, was expanded in 2009 and now comprises representatives of 25 national central banks, with a further program of outreach to other central banks. The committee, which produces principles and recommendations, meets three times per year. Its website informs the public that “No public releases of the meeting agendas or discussions are made. Regular reports on the Committee meetings are made by the Chairman to the Governors of the Global Economy Meeting.”⁷² Why does such great variation exist between the IFRS bodies and the CPSS with regard to GAL principles of transparency and participation?

There may be differences on the demand side, with narrower interest in CPSS work and little pressure to change from a historic model of operating in private. CPSS has as members many of the key public and governmental actors needed to implement its recommendations, whereas the IFRS bodies must persuade government regulators to accept or require the use of IFRS in nationally regulated markets. The IFRS bodies thus need greater nonmember buy-in and face greater risk of challenges to their legitimacy, which is linked to their private or nongovernmental character. This comparison suggests a few of many possible hypotheses to explain differential uptake of GAL norms. Such hypotheses, and hypotheses concerning the effects of application of GAL norms by different bodies, are only now being systematically developed and tested.

From the standpoint of forest preservation, national governmental performance has varied greatly, and existing intergovernmental arrangements for forest governance are not adequate. Institutional solutions have not been able to overcome the fundamental incentives to tropical deforestation that arise from the market price of timber (and in some cases the value of cleared land), producing returns that far outweigh monetary returns from the use of intact forests. Governance initiatives for conservation easements or protected areas, benefit sharing from plant genetic resources, curbing of forest-destructive lending and conditionality by IFIs, partnerships to improve enforcement and curb trade in tropic timber, recognition of indigenous peoples’ land and resource rights, and forest certification by entities such as the Forest Stewardship Council have all produced some positive results,⁷³ and debates about the contributions of GAL norms to effectiveness or legitimacy have been prominent in several of these regimes. In aggregate, however, these initiatives have not provided a solution. Many advocates hope that financial mechanisms aimed at mitigating climate change will provide, through initiatives such as Reducing Emissions from Deforestation and Forest Degradation (REDD+) with associated national reforestation and forest management modalities, sufficient economic incentives to keep forests standing. The administration of forests

72 <<http://www.bis.org/about/factcpss.htm>>.

73 Annie Petsonk, *Legal Obligations and Institutions of Developing Countries: Rethinking Approaches to Forest Governance*, in this volume.

under REDD+ will largely be national, but under conditions of monitoring, reporting, and verification that are likely to entail substantial international prescription of both substantive and process standards. National administration will in many cases be dependent also on international administration of a climate finance regime—GAL procedures will play an essential role in making these different administrative structures transparent to each other and to market actors and in ensuring that they are subject to adequate processes for review and accountability.

The scale of fund flows and of projects envisaged in an effective global climate finance regime, albeit a decentralized regime with numerous different carbon markets and significant powers of initiation and control exercised by national agencies,⁷⁴ will necessitate a sophisticated global administrative apparatus with intricate relations between national and international institutions.⁷⁵ GAL issues have become increasingly central in debates about the clean development mechanism and its reform and viability.⁷⁶ Although they have not featured as much in evaluations of the work of some of the special-purpose climate funds, such as those administered by the World Bank,⁷⁷ GAL issues have loomed larger in relation to the Global Environmental Facility (GEF), especially in response to proposals that the GEF be a significant vehicle for climate finance in the future. GAL issues are likely to feature prominently in the work of the Green Climate Fund and its associated board and implementing agencies, in compliance mechanisms, and perhaps also in the work of the nationally appropriate mitigation action (NAMA) registry.⁷⁸ GAL principles are likely also to play a significant role in the intricate set of interinstitutional governance arrangements that the emerging climate finance regime will entail.

74 For thoughtful advocacy of a bottom-up approach, see Navroz Dubash, *Climate Change and Development: A Bottom-Up Approach to Mitigation for Developing Countries?*, in *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* 172 (Richard B. Stewart, Benedict Kingsbury, & Bruce Rudyk ed., N.Y.U. Press 2009).

75 Charlotte Streck & Thiago Chagas, *Developments in Climate Finance from Rio to Cancun*, in this volume; Arunabha Ghosh, *Harnessing the Power Shift: Governance Options for International Climate Financing* (Oxfam Research Report 2010).

76 See, for example, Charlotte Streck & Julene Lin, *Making Markets Work: A Review of CDM Performance and the Need for Reform*, 19 Eur. J. Intl. L. 409 (2008); Moritz von Unger & Charlotte Streck, *An Appellate Body for the Clean Development Mechanism: A Due Process Requirement*, 3 Carbon & Climate L. Rev. 31 (2009).

77 See, however, the critique of such funds in Sophie Smyth, *Agency and Accountability in Multilateral Development Finance*, 4(1) L. & Dev. Rev. (Article No. 3) (2011); also Ilias Bantekas, *Trust Funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (TMC Asser Press 2009).

78 Richard B. Stewart, Bryce Rudyk, & Kiri Mattes, *Governing a Fragmented Climate Finance Regime*, in this volume.

Conclusion

The stakes involved in GRG regimes are high. Too little is yet known about the differences law makes in such regimes. Enough evidence is now available, however, to suggest that it is unwise to be sanguine about GAL. GAL has winners and losers. GAL can provide substantial net benefits. But in some contexts it can legitimize the highly unjust, and mask or divert substantive critique. Requirements of process can blunt the effectiveness of institutions. Moreover, GAL operates mainly where institutional forms exist or are being created; the lens of GAL may provide little insight into power that is not exercised in such institutional forms, or into ways in which formal institutions can draw gaze and effort away from dynamics or basic structures that ought to be at the center of inquiry and challenge.⁷⁹

GAL can and frequently does serve the interests of powerful actors—a central reason for the rapid uptake of GAL norms, mechanisms, and rhetoric.⁸⁰ One major strand of GAL, oriented to stability and due process for foreign investors and for businesses engaged in trade, includes economic-liberal requirements concerning transparency, participation, review, and (to some extent) reason giving in trade institutions and in investor-state arbitration.⁸¹ These norms align closely with those urged on, or required of, developing countries by international institutions.⁸²

Some GAL norms, although fulfilling such purposes, are oriented more toward enhancing the rights of a wider public. These include the norms prescribed in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 (the Aarhus Convention), developed under the auspices of the United Nations Economic Commission for Europe. This convention requires public authorities to make available environmental information to the public on request and to provide certain types of information on a routine and proactive basis; it also requires structures for public participation in various stages of environmental decision making. These norms have informed and been woven into policies of the World Bank and other IFIs, and the Aarhus Convention Compliance Committee processes have overlapped with World Bank Inspection Panel proceedings in relation to the Vlora power plant in Albania.⁸³

79 David Kennedy, *The Mystery of Global Governance*, 34 Ohio N.U.L. Rev. 827 (2008).

80 This and the following paragraphs draw on work with Megan Donaldson.

81 Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 Eur. J. Intl. L. 121 (2006); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ Working Paper No. 2009/6 (2009).

82 Rene Urueña, *Espejismos constitucionales: La promesa incumplida del constitucionalismo global*, 24 Revista de Derecho Público (Bogotá 2010).

83 World Bank Inspection Panel Investigation Report No. 49504-AL, Albania-Power Sector Generation and Restructuring Project (IDA Credit No. 3872-ALB) (Aug. 7, 2009), available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ALB_Power_Investigation_Report_whole.pdf>. There were 44 states parties to the Aarhus Convention in August 2011.

GAL serves other agendas of IFIs. The World Bank is exemplary of IFIs positioning themselves as “knowledge banks” and sources of expertise.⁸⁴ GAL processes and procedures have been mobilized by the IFIs in this endeavor. Extensive external consultations and reason giving on proposed “safeguards” policies and other normative instruments, requirements that the public and affected groups receive adequate information and have opportunities to comment before a project proposed by a state is approved for financing, mechanisms for review of the institutions’ compliance with their own policies, and Access to Information policies may all facilitate greater public access to, and contestation of, ideas espoused by IFIs. Reporting and inspection or review can bring feedback about on-the-ground experience into the renovation or creation of global regulatory regimes. Some of these mechanisms shape knowledge dissemination and interaction, and they may tip these processes toward being more inclusive and less “top-down” than in the past.

GAL can be state buttressing. In its orientation to a strong if vague sense of “publicness” and public interest,⁸⁵ not only may it influence extrastate public authority, but it may also articulate a distinctive role for the state. In areas such as investment and trade law, GAL may have a potential, only glimpsed so far, to strengthen the sense that states and state authorities have a responsibility to the public that in some situations overrides commercial or other obligations to private actors.

At the same time, GAL may facilitate critique, contestation, resistance, and reform in GRG.⁸⁶ The extent to which GAL norms, processes, and mechanisms have been significant in opening space for disregarded groups and interests or in advancing the realization of different conceptions of substantive justice is unknown. Vignettes and anecdotes suggest, however, that such effects are more than de minimis and may be increasing.

New legal ideas are required in the work of IFIs as in the work of other key institutional actors in global governance. GAL may provide one conceptual resource in this regard. At the same time, innovative work in or relating to GRG institutions and to national practices may inform and shape some aspects of GAL.

84 A nomenclature popular in Bank rhetoric from World Bank, *World Development Report 1998–99: Knowledge for Development* (World Bank 1999). Cf. David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 *Sydney L. Rev.* 5 (2005).

85 Kingsbury, *supra* note 14; Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* 79 (Ulrich Fastenrath et al. ed., Oxford U. Press, 2011).

86 Bhupinder S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 *N.Y.U. J. Intl. L. & Pol.* 799 (2005); Bronwen Morgan, *Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law*, 17 *Eur. J. Intl. L.* 216 (2006); Doreen Lustig & Benedict Kingsbury, *Displacement and Relocation from Protected Areas: International Law Perspectives on Rights, Risks and Resistance*, 4 *Conservation and Society* 404 (2006).