

CORRESPONDENCE

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TO THE CO-EDITORS IN CHIEF:

I wish to congratulate Professor Kenneth J. Vandavelde, for his excellent article, "*The Political Economy of a Bilateral Investment Treaty*" in the *AJIL* October 1998 issue. I was disappointed, however, to see no reference in the article to the 1992 *World Bank Guidelines on the Treatment of Foreign Investment* where he would find most of his suggestions incorporated. (For details, see Ibrahim F. I. Shihata, *Legal Treatment of Foreign Investment—The World Bank Guidelines (1993)*.) As to Professor Vandavelde's suggestions that a BIT should provide equal protection to investors who are nationals of third party states, it is not clear to me how in such a case, as he suggested, "conclusion of a single BIT could alleviate the need for a host state to conclude additional BITs, since all investments would be covered" (p. 639). Can other home states credibly invoke a BIT to which they are not parties as a source of legal rights vis-à-vis the host state? I do not think so and my answer is not confined to the invocation of the dispute resolution mechanism provided for in the BIT.

Professor Günther Handl's article on the "*Legal Mandate of Multilateral Development Banks as Agents for change toward Sustainable Development*," in spite of its precision in many respects, leaves any one familiar with the work of the World Bank and other MDBs unclear about what he means to say. On the one hand, Professor Handl admits that MDBs in general have responded to the emerging international consensus on "sustainable development" and that such response preceded the 1992 Rio Conference (p. 642). On the other hand, he argues that MDBs "have an affirmative duty to incorporate [environmental and social issues] into the mainstream of their development-financing operations" (p. 648). Then, he stresses that the call for "mainstreaming" environmental concerns has been acknowledged by the addressees [the MDBs] (p. 656).

The objective of Professor Handl seems at certain points to request MDBs to take on a political role, mainly in terms of promoting democracy and political rights (p. 644–45). Yet, he admits that "MDBs clearly have no special international mandate to vindicate human rights generally." According to him, they are "subject only to (functionally) limited affirmative obligations regarding the enhancement of human rights" (p. 663). How limited? "MDBs will be required only to take reasonable steps in support of sustainable development" (p. 664). MDBs record in this respect, according to what is described by the author himself, has included more than just "reasonable steps." The prohibition of political activities in the MDBs Charters has never been an obstacle to accepting and mainstreaming environmentally and socially sustainable development. This is not political development but economic development which takes full account of its environmental and social implications and

includes safeguards to assure an outcome that is positive or at least not negative in these respects.

The problem, it seems, lies in Professor Handl's insistence that MDBs should, as a legal obligation, take into account political considerations in their decisions, regardless of explicit provisions in their constituent agreements to the contrary. Fortunately, however, his definition of "political considerations" as meaning "institutional, social and environmental factors" (p. 648) seems to make the issue of no practical consequence. The three types of factors mentioned by Professor Handl (pp. 649–51) have now been incorporated within the MDBs mandates as relevant to the economic development of their member countries. They are, therefore, deemed by MDBs to be part of the "economic considerations" they are called upon by their charters to take into account. (My 1990 legal opinion on governance issues relevant to the World Bank led that direction.)

What is new then? What MDBs have done in terms of new policies responding to new world needs is now described in terms of "international legal obligations." The case for this contention is not clear-cut and cannot be based simply on unbinding declarations and alleged customary law. Since no MDB is questioning the mainstreaming in their operations of environmental, social and apolitical institutional issues, the academic question may be rephrased. What is the true meaning of political considerations in documents which distinguish them from economic considerations and aim to insulate the institutions from the vagaries and double standards of politics?

Professor Handl is entitled of course to his view that some legal obligations have already emerged and are binding on MDBs in spite of the absence of provisions covering them in their constituent instruments. What is objectionable in my view, however, is the call on MDBs to ignore the provisions of their charters prohibiting political activities in favor of other instruments to which the MDBs are not parties. MDBs have done remarkably well in addressing many governance issues without politicizing their work. They have also reconciled this practice with a broad but defensible interpretation of the "prohibition of political activities" provision in their charters. It may not be in anyone's interest to push this beyond credible limits and directly involve MDBs in the political choices of their borrowing members. Intervention in these choices is clearly prohibited by the primary source of the law applicable to MDBs—their respective Articles of Agreement.

The World Bank's broad support of economic liberalization, education for all, women in development, legal, judicial and civil service reform, to name a few fields, contributes indirectly to political reform that develops, as it should, from within the societies involved. This happens without entangling the Bank in a process where intervention by outsiders, even if allowed, is likely to be counterproductive.

Academic writers should realize that the credibility of the MDBs legal counsel is extremely important. Not only internal decisions are based on their advice but external auditors and bonds underwriters rely on their legal opinions. If "the prohibition of political activities" is defined by these counsels as permission of political activities, how much of this credibility would remain? Who would be the beneficiary?

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Professor Handl replies:

I would like to thank Dr. Shihata for his thoughtful observations but beg to differ with regard to his fundamental claim. Essentially he contends that my thesis that MDBs are