

INTERNATIONAL BANKING AND FINANCE LAW SERIES

International Economic Organizations and Law

The Perspective and Role of the Legal Counsel

Edited by

Asif H. Qureshi

Xuan Gao



Wolters Kluwer

Law & Business

International Economic Organizations and Law

The Perspective and Role of the Legal Counsel

Edited by

Asif H. Qureshi

Xuan Gao



Wolters Kluwer
Law & Business

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3427-1

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

International Economic Organizations and Law

International Banking and Finance Law Series

VOLUME 17

Series Editors

Joseph J. Norton

SMU Dedman School of Law, Dallas

Ross P. Buckley

Professor of Law, University of New South Wales, Sydney

Douglas W. Arner

Asian Institute of International Financial Law, University of Hong Kong

Advisory Board

P. Wood (Chair), *CCLS and Allen & Overy, London*

W. Blair, QC, *CCLS and 3 Verulam Buildings, Gray's Inn, London*

L. Buchheit, *Cleary Gottlieb Steen & Hamilton, New York*

M. Dasse, *McKenna & Cuneo, Brussels*

S. Gannon, *Hong Kong Monetary Authority*

B. Geva, *Osgoode Hall, York University, Toronto*

A. Halkyard, *University of Hong Kong*

N. Horn, *University of Cologne*

A. Itzikowitz, *Edward Nathan Sonnerbergs and University of the Witwatersrand, Johannesburg*

H. Kanda, *University of Tokyo*

R. Lastra, *CCLS, London*

S. Seigel, *NYU Law School, New York*

M. Steinberg, *SMU Dedman School of Law, Dallas*

Z. Zhou, *Shanghai University of Finance and Economics*

Editorial Review Board

Executive Editors

G.A. Walker, *CCLS, London*

C. Hadjiemmanuil, *London School of Economics and Political Science*

J. Winn, *Microsoft Center, University of Washington, Seattle*

B. Hsu, *Asian Institute of International Financial Law, University of Hong Kong*

Associate Editors

C. Olive, *SMU Institute of International Banking & Finance and Bracewell & Guiliani, Dallas*

W. Wang, *Fudan University, Shanghai*

M. Yokoi-Arai, *CCLS, London*

The titles published in this series are listed at the end of this volume.

List of Abbreviations

AfDB	African Development Bank
AfDF	African Development Fund
ADB	Asian Development Bank
ADF	Asian Development Fund
BIRPI	International Bureaux for the Protection of Intellectual Property
BIS	Bank for International Settlements
BIT	Bilateral Investment Treaty
CJEU	Court of Justice of the European Union
DMC	Developing Member Country (Chapter 12); Developed Member Country (Chapter 15)
DSB	Dispute Settlement Body
EBRD	European Bank for Reconstruction and Development
EC	European Communities
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
IAD	International Audit Department
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice

List of Abbreviations

ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IADB	Inter-American Development Bank
IEL	International Economic Law
IEO	International Economic Organization
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
ITLOS	International Tribunal for the Law of the Sea
LDCs	Less Developed Countries
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organization
OECD	Organisation for Economic Co-operation and Development
RTA	Regional Trade Agreement
TEU	Treaty on European Union
TRIPS	Trade-Related Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
WB	World Bank
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Acknowledgements

This publication preceded a conference on the 9 July 2011 at the University of Manchester. It was attended by almost all the contributors in this work. The editors express their gratitude to the contributors who made time from their busy schedules to participate in the conference, and who then contributed final papers, against a similar background with tight deadlines. Thanks are also due to Professor F. Weiss of the University of Vienna, Dr Y. Hodu of the University of Manchester, Dr G. Evans from Queen Mary College, University of London, and Professor E. Avgouleas from the University of Manchester, for their chairmanships of the various panels in the conference. Special thanks to Sir William Blair QC for his after-dinner speech at the conference. Last but not least, thanks are expressed to Janet Adnams from the University of Manchester, for her assistance in the organization of the conference.

The conference was funded from the Melland Schill Fund, held by the University of Manchester, for work in International Law. The idea for the conference was originally conceived under the auspices of the *Manchester Journal of International Economic Law*.

The editors are grateful to all for their respective contributions which have brought this enterprise to fruition, including of course the publisher, Kluwer Law International.

Summary of Contents

List of Abbreviations	xxi
Acknowledgements	xxiii
Part I	
Introduction	1
Introduction and Overview	3
<i>Asif H. Qureshi & Xuan Gao</i>	
Chapter 1	
The Legal Counsel as the ‘Persona of Law’ in an International Economic Organization: A Constitutional Perspective	9
<i>Asif H. Qureshi</i>	
Part II	
Bretton Woods Institutions	27
Chapter 2	
The Role of Law – and Lawyers – in the International Monetary Fund	29
<i>Sean Hagan</i>	
Chapter 3	
The Institutional and Intellectual Role of the General Counsel: Perspectives from the World Bank	47
<i>Anne-Marie Leroy</i>	

Summary of Contents

Chapter 4 ‘Down to Business’: The Role of Law and Lawyers at the World Trade Organization <i>Yves Renouf</i>	65
Part III Specialized Institutions	75
Chapter 5 Taking Account of Human Values in the International Economic Legal Order: Law and the Legal Counsel in the International Labour Organization <i>Janelle M. Diller</i>	77
Chapter 6 The Role and Contribution of the Legal Counsel to Decision-Making and the Development of International Economic Law: The Case of the World Intellectual Property Organization <i>Edward Kwakwa</i>	105
Chapter 7 The Legal Counsel and Law in a sui generis International Organization: Some Personal Views on the Organisation for Economic Co-operation and Development and Its Legal Counsel <i>Nicola Bonucci</i>	115
Part IV Regional Development Banks and Specialized Lending Agencies	131
Chapter 8 The General Counsel as a Transactional Lawyer: Structuring the Commitments to Replenish the Resources of the International Fund for Agricultural Development <i>Rutsel Silvestre J. Martha</i>	133
Chapter 9 The Role of the General Counsel: The African Development Bank Perspective <i>Kalidou Gadio</i>	187
Chapter 10 Assessing Commercial Laws to Foster Reforms: An Insight into the Legal Work of the European Bank for Reconstruction and Development <i>Michel Nussbaumer & Frederique Dahan</i>	217

Chapter 11 Legal Counsel, Legal Analysis, and Legal Limits: The Role of Law and Lawyers in the Asian Development Bank <i>John W. Head</i>	237
Chapter 12 The Replenishments of the Asian Development Fund: Institutional Development in the Asian Development Bank and the Role of the Legal Counsel in Resource Mobilization <i>Gerd Droesse</i>	265
Part V Regional Economic Organizations	315
Chapter 13 A World Wide Web of Law(yers): The Lawyer Function Catalysing and Mediating Change in International Economic Relations – The EU Experience <i>James Flett</i>	317
Chapter 14 The Role of the European Free Trade Association Secretariat and Select Legal Aspects of EFTA Free Trade Agreements <i>Roger Gschwend & Pietro Poretti</i>	351
Part VI The External Perspective: Theory	377
Chapter 15 Multilateral Economic Organizations and Legal Professional Ethics <i>Priscilla Schwartz</i>	379
Chapter 16 The Role of the Legal Counsel and Law in the Proposed United Nations Global Economic Coordination Council: A Reflexive Approach towards Policy Coordination <i>Cecilia J. Flores Elizondo</i>	417
Selected Bibliography	445
Index	467

Table of Contents

List of Abbreviations	xxi
Acknowledgements	xxiii
Part I	
Introduction	1
Introduction and Overview	3
<i>Asif H. Qureshi & Xuan Gao</i>	
Chapter 1	
The Legal Counsel as the ‘Persona of Law’ in an International Economic Organization: A Constitutional Perspective	9
<i>Asif H. Qureshi</i>	
1. Introduction	9
2. A Constitutional Role or a Professional Functionary?	13
2.1. Custodian and Policing Role?	15
2.2. Law and Policy	20
2.3. Interpretation, Representation and Servicing of Dispute Settlement in IEO	21
2.4. Conclusion	22
3. The Code for the Constitutional Role?	22
4. Conclusion	24

Table of Contents

Part II

Bretton Woods Institutions 27

Chapter 2

The Role of Law – and Lawyers – in the International Monetary Fund 29

Sean Hagan

1.	The Powers of the Fund and Its Governance Structure: An Overview	30
1.1.	Regulatory Powers	30
1.1.1.	Surveillance	30
1.1.2.	Exchange Restrictions	31
1.2.	Financial Powers	31
1.3.	Advisory Powers	32
1.4.	The Fund's Governance Structure	33
1.4.1.	Board of Governors and Executive Board	33
1.5.	Managing Director and Staff	34
2.	Advising on the Law of the Fund	34
2.1.	The Role of Fund 'Policies'	35
2.2.	The Limits of Interpretation	37
2.3.	The General Counsel's Independence	38
3.	Legal Reform within the Fund's Membership	40
3.1.	Supporting Financial Sector Stability	40
3.2.	Fund-Supported Programmes	41
3.3.	Money Laundering and Terrorist Financing	42
4.	Dispute Resolution	43
5.	Conclusions	45

Chapter 3

The Institutional and Intellectual Role of the General Counsel: Perspectives from the World Bank 47

Anne-Marie Leroy

1.	Introduction	47
2.	A Multi-Faceted Advisory Role	49
2.1.	Providing Legal Advice to a Variety of Stakeholders	50
2.2.	Providing Legal Advice on a Diverse Range of Subject Matters	51
2.3.	Sources of the General Counsel's Mandate	53
3.	The Institutional Governance Function	55
4.	The Knowledge Contribution	60
5.	Conclusion	63

Chapter 4

'Down to Business': The Role of Law and Lawyers at the World Trade Organization

65

Yves Renouf

1.	'A Regulatory System that Did Not Like Law'	65
2.	The GATT/WTO 'Small Steps' Approach to Law	68
2.1.	Lawyers, Excluded from Any Institutional Role, Entered By the Back Door	68
2.2.	The Legal Affairs Division	69
2.3.	The Appellate Body	70
2.4.	The Legal Counsel to the Administration	71
3.	Looking Ahead: A Discreet yet More Transparent Role	73
4.	Conclusion	74

Part III

Specialized Institutions

75

Chapter 5

Taking Account of Human Values in the International Economic Legal Order: Law and the Legal Counsel in the International Labour Organization

77

Janelle M. Diller

1.	Introduction	77
2.	Background and Context	78
2.1.	The ILO Journey	78
2.2.	Institutional Mandates and Ultimate Objectives	82
2.3.	The Rule of Law and Inter-Institutional Coordination	84
2.4.	ILO Office of the Legal Adviser	85
3.	Impact of Law on the Tripartite Nature and Functioning of the ILO: The Legal Counsel as Guardian	88
4.	Law as a Means for Internal Coherence: Legal Counsel as Innovator	93
4.1.	Conclusion and Ratification of International Labour Conventions	94
4.2.	Strengthening the Effect of ILO's Standards in National Law and Practice	95
5.	Influence of ILO Law and Practice on IEL and Institutions: Legal Counsel as Intermediary	97
6.	Implications for IEL and Institutions	100
6.1.	ILO's Tripartism and Representational Capacity in IEL	100
6.2.	Inter-institutional Relationships Follow Complementary National Action	103
6.3.	The Influence of ILO Soft Law in Relationship with Other Organizations	103

Table of Contents

Chapter 6

The Role and Contribution of the Legal Counsel to Decision-Making and the Development of International Economic Law: The Case of the World Intellectual Property Organization	105
<i>Edward Kwakwa</i>	

1. Introduction	105
2. The WIPO	106
3. General Remarks	107
4. Rule-Making in the Field of Intellectual Property Law	109
4.1. Proposals for Advancing the Development of Intellectual Property Law	109
5. Specific Roles of the WIPO Legal Counsel	111
6. Conclusion	114

Chapter 7

The Legal Counsel and Law in a sui generis International Organization: Some Personal Views on the Organisation for Economic Co-operation and Development and Its Legal Counsel	115
<i>Nicola Bonucci</i>	

1. Introduction	115
1.1. What Is IEL?	116
1.2. What Is an IIER?	117
1.3. Is the OECD an IIER?	117
2. The OECD Directorate for Legal Affairs (LEG) and its Director	118
3. The Legal Counsel and the Law within the OECD	119
3.1. The Continuities	120
3.1.1. The Interaction between Law and Policy	120
3.1.2. The Multiplicity of Clients?	121
3.2. The New Challenges	122
3.2.1. The 'Multiplicity of Clients'	122
3.2.2. The 'Privatization' of the Organization	122
3.2.3. Governance and the Increasing Role of Legal/Procedural Issues Within the Organization	123
3.2.4. Relations with non-members	123
3.2.5. Proliferation of Memorandums of Understanding (MOUs), Arrangements, Partnerships and Others	123
4. The OECD as a Standard-Setter and Its Influence on International Economic Law	123
4.1. Direct Influence	124
4.1.1. Standard-Setting Role through Legally Binding Instruments	124
4.1.2. Standard-Setting Role through Soft Law	124

4.2.	Indirect Influence	125
4.2.1.	By Universalization of the Standard	125
4.2.2.	By Incorporation of the Standard in Other Legal Instruments	126
4.2.3.	By Taking Over of the OECD Standards by Other International Bodies	126
4.3.	The Role of the Legal Counsel and Law	127
5.	Conclusion	127
5.1.	Structural	128
5.2.	Conjunctural	129

Part IV

Regional Development Banks and Specialized Lending Agencies 131

Chapter 8

The General Counsel as a Transactional Lawyer: Structuring the Commitments to Replenish the Resources of the International Fund for Agricultural Development 133

Rutsel Silvestre J. Martha

1.	Introduction	133
2.	Background	135
2.1.	The Office of the IFAD General Counsel	135
2.2.	The Transactional Challenges	136
2.3.	The Proper Law of the Transactions	136
3.	Compulsion and Voluntarism in the Funding of International Organizations	139
3.1.	The Systemic Contradiction	139
3.2.	Power of Non-financial Institutions to Assess Contributions	140
3.3.	Leveraging Capabilities of Multilateral Development Banks	141
3.4.	Donor Dependency of International Development Funds	142
4.	Converting Gratuitous Promises into Binding Commitments	142
4.1.	Preliminary Legal Effects of Pledges of Contributions	144
4.2.	Modes of Creating the Legal Obligation to Contribute	146
4.2.1.	Executed Contributions	147
4.2.2.	Executory Contributions	147
4.2.2.1.	Contribution Promise	148
4.2.2.2.	Contribution Agreement	150
5.	Challenges to the Unrestricted Character of Contributions	152
5.1.	The Principle of Unrestricted Contributions	152
5.2.	Endorsing the Donors' Aid Agenda: Administrative and Operational Deliverables	152
5.3.	Contributions <i>sub condicione suspensiva</i> : Contingent Contributions	153

Table of Contents

5.4.	Obligations Subject to Budgetary Appropriation: Qualified Contributions	155
5.5.	Reserving the Power to Decide on the Use: Complementary Contributions	156
5.6.	Separating Unrestricted Resources from Tied Funds: Supplementary Funds and Co-financing	157
6.	Criteria for Determining the Level of Replenishment	159
6.1.	Financial Obligations <i>ex contractu</i> and <i>ex delicto</i>	160
6.2.	The Place of the Organization in the International Architecture	160
6.3.	Donors' Appetite and Financial Capacity	161
7.	Avoiding Mismatch between Level of Replenishment and Contribution Commitments	162
7.1.	The Need for a Single Unit of Account	163
7.2.	Managing the Freedom of States to Commit in the Currency of Choice	164
7.3.	Currency of Payment and Exchange Rates	167
7.4.	Non-interference with the Operations of the Institution	169
7.4.1.	Exchange Controls and Restrictions	169
7.4.2.	Immunity from Judicial and Administrative Interference	171
7.4.3.	The Unresolved Problem of Domestic Bankruptcy Proceedings	171
8.	Ensuring Timely Availability of Resources for Commitment	173
8.1.	Payment Schedule	173
8.2.	Means of Payment	174
8.3.	Draw Down and Encashment	176
9.	Linking the Commitment Authority to the Achievement of a Critical Mass	177
9.1.	Effectiveness of the Replenishment	177
9.2.	Effectiveness of the Commitment to Contribute	178
9.3.	Disposal over Advance Contributions	179
10.	Remedies and Enforcement of the Commitment to Contribute	179
10.1.	Reporting, ad hoc Consultation and Appeals for Compliance	181
10.2.	Commensurate Modifications of Commitments by Other Contributors	181
10.3.	Denial of Benefits	183
10.3.1.	Exclusion of Eligibility to Office	183
10.3.2.	Exclusion from the Eligibility for Financing	184
10.4.	Increasing the Burden: Moratory Interest	185
11.	Concluding Remarks	186

Chapter 9

The Role of the General Counsel: The African Development Bank Perspective

Kalidou Gadio

187