International Law as Insulation – The Case of the World Bank in the Decolonization Era

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Abstract

This paper maps out how (international) legal concepts and norms were employed during the inter-institutional struggle between the United Nations (UN) and the World Bank (Bank) in the era of decolonization. The first contribution of the paper is historiographical. Drawing on material from the Bank’s (oral) archives, the paper gives an original account of the ways in which the organization bypassed the ‘universalist’ aspirations that were gaining a foothold in the UN’s democratic bodies. Secondly, the paper retraces how the event gave rise to a clash between opposing imaginaries of international legal order, where the ‘universalist’ aspirations voiced by states from the Global South were ultimately frustrated by a functionalist understanding of international (institutional) law, which justified the Bank’s institutional insulation. Finally, the paper seeks to provide a modest contribution to the study of international institutional law (IIL) on a methodological level. As a doctrinal discipline that is primarily grounded in formalist comparative inquiry, IIL has traditionally paid little attention to the sociological dimensions of legal interventions. The paper points to some merits in extending the archive of IIL and altering its methodological apparatus: drawing on Kratochwil’s notion that the meaning of norms only emerges through concrete instances of norm-use, this analysis operates on the level of praxis and seeks to retrieve the meaning and potency of legal acts in a non-essentialist fashion.
Introduction

This paper maps out how (international) legal concepts and norms were employed during the inter-institutional struggle between the United Nations (UN) and the World Bank (Bank) in the era of decolonization. It focuses on a conflict between both international organizations (IOs) regarding the Bank’s lending to the apartheid regime of South Africa and the colonial regime of Portugal. The first contribution of the paper is historiographical. Drawing on material from the Bank’s (oral) archives, the paper gives an original account of the ways in which the organization bypassed the ‘universalist’ aspirations that were gaining a foothold in the UN’s democratic bodies.\(^1\) This is a narrative on how international (development) finance was able to extract itself from the political demands voiced in the UN System and how certain hegemonic constellations of international order were able to withstand external pressure.\(^2\)

Secondly, the paper retraces the particular performativity of international law during this episode. One vision of the international legal order (put forward by the states from the Global South as well as by the USSR) articulated a ‘universal’ understanding of international law based on both axiological and institutional grounds (both on fundamental values and the supremacy of the UN System). This was not (merely) a conceptual or jurisprudential ideal, but an attempt by the Global South to amplify its political influence over the already fragmented and splintered landscape of global governance. Yet, I demonstrate, this recourse to international law as an emancipatory instrument was successfully countered by a second vision (formulated by the General Counsel of the World Bank) that employed international legal arguments to assert the institutional sovereignty of the Bank.\(^3\) The contractual and functionalist coding of international organizations law, I show, provided the Bank with a normative language of justification to disregard the demands voiced in the UN. In this sense, international law provided an essential technology for the Bank’s institutional insulation, and (as recent controversies highlight)\(^4\) continues to do so.

Thirdly, and finally, the paper seeks to provide a contribution to the study of IO law on the level of methodology. As a doctrinal discipline that is primarily grounded in formalist comparative inquiry,\(^5\) international institutional law (IIL) has traditionally paid little attention to the sociological dimensions of legal work in IOs. In this paper, I therefore suggest a change in the methodological apparatus and an extension of the archive of IIL: beyond formal legal norms, principles and doctrines, to a qualitative analysis of ‘competent performances’ by identifiable actors driven by concrete motives,

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\(^1\) I am referring in particular to the UN’s *Declaration on the Granting of Independence to Colonial Countries and Peoples.*


\(^4\) See Letter from Olivier De Schutter (Special Rapporteur on the right to food) and Cephas Lumina (Independent Expert on the effects of foreign debt and other related financial obligations of states) to Jim Yong Kim, 10 August 2012.

moving in delineated spaces, drawing on particular discursive strategies and inscribed in contingent institutional roles. Drawing on Kratochwil’s notion (himself inspired by Wittgenstein) that the meaning of norms only emerges through concrete instances of norm-use, I want to focus my analysis on the level of praxis and, doing so, try to retrieve the meaning and potency of legal interventions in a non-essentialist fashion.

**Decolonization, Functional Specialization and the Politics of International Law**

The 1947 Relationship Agreement between the UN and the IBRD (concluded in the context of Article 57 of the UN Charter) was concluded after a series of contentious negotiations and eventually hailed within the Bank as a ‘declaration of independence’. After the agreement was accepted by the UN General Assembly with ‘a certain amount of bad grace’, the two institutions split paths, and speaking in 1961, Demuth (who was responsible for coordinating the Bank’s relationships with the UN and one of the few people who was ‘not afraid to be seen walking out of the United Nations building’) noted that ‘I don’t think anybody’s ever looked at it since’. The importance of law faded to the background, although it did leave a trace: ‘ECOSOC has been so cowed’ by the negotiations, Demuth later observed, that they ended up saying ‘you just go on your way and we’ll go on our way’.

This mutual disregard ended when dozens of ‘developing’ countries – having recently obtained their independence – joined the UN and placed the anti-colonial struggle at the centre of the General Assembly’s agenda, while at the same time claiming a bigger role for the UN in the sphere of development. In this context, the General Assembly approved a number of increasingly exigent resolutions, which first ‘invited’ and later ‘requested’, ‘appealed to’ and ‘appealed once again to’ the Bank ‘to refrain from granting … any financial, economic or technical assistance’ to either South-Africa or Portugal, as long as they failed to implement General Assembly Resolution 1514 (XV) containing the Declaration on the Granting of Independence to Colonial Countries and Peoples. General Assembly Resolution 2105 (XX) on the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples deplored the ‘negative attitude of certain colonial powers, and in particular the unacceptable attitude of the Governments of Portugal and South Africa, which refuse to recognize the right of colonial peoples to independence’, and requested ‘all states and international institutions, including the specialized agencies of the United Nations, to withhold assistance of any kind to the Governments of Portugal and South Africa until they renounce their

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6 I elaborate on this elsewhere, but it suffices to say that the contentious issue during these negotiations was whether the Bank would become subordinated to the UN System or have an autonomous legal status. While several countries within the UN (most vocally, the USSR and Norway), urged for the former option, the eventual agreement encoded the latter.

7 Interview by R. Oliver with A. Broches, World Bank Oral History Program, 1985, 15 (referred to as ‘Broches 1985’).

8 Interview by R. Oliver with R. Demuth, Oral History Research Office, Columbia University, 1961, 18 (‘Demuth 1961’).

9 Ibid. 20. As noted before, I have elaborated on these prior events extensively elsewhere. For the purpose of this paper, this merely serves as a set of introductory notes.


policy of colonial domination and racial discrimination’. In a resolution adopted one day later, regarding the Question of Territories under Portuguese Administration, the General Assembly appealed specifically to ‘all the specialized agencies, in particular to the International Bank for Reconstruction and Development and the International Monetary Fund’ to seize all financial, economic or technical assistance to Portugal.

While it is not my intention here to delve into the political economy of this inter-institutional conflict, it is useful to underline that the anti-colonial and anti-apartheid agenda of the General Assembly intertwined with broader critical perspectives on the role of multinational corporations, international finance and foreign investment that animated a range of institutional discussions in the UN during this period. Signifying this dimension, in 1965 the UN Special Committee on the implementation of the 1960 Declaration of the Granting of Independence to Colonial Countries and Peoples adopted a report stating that the ‘presence of foreign economic and other interests was impeding the progress of the territories towards independence’, which was described by the U.S. representative, Ambassador Eugenie Anderson, as an ‘oversimplified, outworn and doctrinaire Marxist point of view’.

The Bank found itself at the centre of this debate; confronted with strong operational demands to align its practice and policy with exogenous political rationalities and institutional perspectives. The irony, of course, is that beyond the institutional veil of both the UN and the Bank, the same actors could be found: the states that debated and adopted the anti-colonial resolutions in the UN General Assembly were largely the same as those that were – directly or indirectly – involved in planning and approving the loans subject to criticism. Both institutions, however, not only assigned institutional power in radically different ways, they also converged around different functional objectives and enabled different modes of action and expertise. The unique performativity of legal interventions in the Bank – as this section and chapter seek to demonstrate – lied not in producing or codifying these internal institutional episteme and politics, but in safeguarding a space of institutional autonomy or insulation by deferring substantive contestation to the formal techniques of legal interpretation and

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14 G.A. Res. 2107 (XX), Question of Territories under Portuguese Administration, Dec. 21, 1965, para. 9 (emph. added).
15 Sundhya’s Pahuja recent work provides new insights into the world-making institutional struggles between 1955 and 1974 to define the proper relationship between international law, the state and the corporation-which-travels. Her analysis focuses specifically on the attempt in 1974, by the ‘Group of 77’ developing states, to assert international legal control over trans- or multi-national corporations through the establishment of the Commission on Transnational Corporations. See S. Pahuja, “Rival Worlds and the Place of the Corporation in International Law”, in P. Dann and J. Von Bernstorff, Decolonisation and the Battle for International Law, OUP, 2018. See also S. Pahuja, The Changing Place of the Corporation in International Law, Hersch Lauterpacht Memorial Lecture 2018, Cambridge, 2018.
18 With the major exception of the USSR, of course, which was not a member of the Bretton Woods Institutions.
19 With voting power in the Bank being linked to the amount of shares held by states (generating de facto control by the United States and its allies over the Bank’s operations), in contrast to the institutionalization of formal sovereign equality in the UN General Assembly. This difference in voting power, in combination with the absence of the USSR from the Bretton Woods Institutions, placed the Bank and the UN at opposing ends of major political debates in the context of the Cold War and the anti-colonial struggle.
20 This echoes the observations by Koskenniemi, who defines these ‘regimes of truth’ as ‘autonomous social and epistemic wholes’ that ‘are internally validated by their embedded hierarchies of preference’. See M. Koskenniemi, “Hegemonic Regimes”, in M. Young (ed.), Regime Interaction in International Law, CUP, 2012, 317.
analysis. In other words, I argue that if we want to fully understand law’s ‘mode of existence’ in the Bank, it is useful and necessary to look beyond the concrete controversies through which it passes (controversies of value, politics or truth) and to ask of it, in Latour’s terms, ‘to transport only itself’ – its own effects and techniques; its own maps of meaning and modes of world-making in a concrete institutional context. While legality performed a pivotal role in this controversy, it was not because the ‘state of the law’ favoured a narrow ideal of development or ‘mandated’ the Bank to disregard the UN’s anti-colonial politics. We should resist the temptation of overburdening law’s form and substance with excessive causal attributes; of conflating legal interventions with the claims, politics and actors that it assembles and engages. What did law do that only law could do?

A Financial Lawyer in the United Nations – Law as Deference, Translation and Diffusion

As Aron Broches (the Bank’s General Counsel at the time) recalls, the Bank has originally handled the early General Assembly resolutions with the same attitude that had defined its position during the 1947 negotiations: polite but resolute disregard. This situation, however, was considered untenable by George Woods, the Bank’s president from 1963 to 1968, who had instructed Broches that ‘now we have to come closer to the U.N.’. Philippe de Seynes, the UN’s very highly regarded Under-Secretary for Economic and Social Affairs from 1955 to 1968 and Under-Secretary-General for Economic and Social Affairs from 1968 to 1975, soon started referring to Woods as John XXIII: the liberal pope who’s most cited ambition was too ‘throw open the windows of the church so that we can see out and the people can see in’. In light of Woods’ agenda to develop a ‘policy of cooperation’ with the UN, the timing of the General Assembly resolutions was most unfortunate. By the mid-1960s, the Bank had de facto stopped lending to both South Africa and Portugal for a variety of reasons: Portugal was going through a recession as a result of its accumulation of foreign-exchange reserves in anticipation of colonial warfare, and South Africa was considered ready for ‘graduation’ from the Bank’s financial support. Both countries kept asking for financing, however, which was made conditional by the Bank’s senior management upon specific conditions: South Africa – as part of its graduation – would receive one last loan if it borrowed an equivalent amount on the German or

21 This aligns with the more general argument that ‘[m]odern international law is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on’. See M. Koskenniemi, “The Politics of International Law”, EJIL, Vol. 1:1, 1990, 28.
26 The U.N. General Assembly for years had adopted resolutions calling on the Fund and the Bank not to deal with South Africa and Portugal. We acknowledged receipt of the resolutions and said that we would send them to our members, who, of course, had already received them, but we took no further action’. See Broches 1985, 10.
28 Ibid.
American capital market, and Portugal was urged to change its economic policy and revamp its domestic agricultural industry. Shortly after the UN had adopted its very strong resolutions (2105 and 2107), Broches recalls, ‘South Africa borrowed in Frankfurt or New York, so we were bound to make them a loan. Then Portugal adopted an agricultural reconstruction program that we had been pushing them to accept, so there also the condition was fulfilled’.\(^\text{29}\) In balancing the urgent calls by the UN General Assembly with its existing contractual commitments, the Bank’s senior management chose to honour the latter. Consequently, in a period of several months after the UN had called upon the Bank to align with its anti-colonial and anti-apartheid policies, loans were made to both Portugal and South Africa. The result was ‘great indignation in the U.N.’, with the USSR, supported by a large number of countries from the Global South, accusing the Bank for ‘showing the greatest contempt’.\(^\text{30}\)

While the Bank could easily have left it at that (as the IMF did), move on and continue the state of disregard that had defined its relationship with the UN for the past two decades, its leadership was bothered by the controversy, which jeopardized its aims for enhanced cooperation. ‘George Woods then had a bright idea’, Broches recalled: ‘[h]e was going to show that the Bank had no contempt for the UN. He would fight them to his last General Counsel! He informed the [UN] Secretariat that I would appear’.\(^\text{31}\) It is important to pause at this decision and the strategy behind it. Rather than continuing the state of solipsism, Woods chose to respond to the call by the UN General Assembly and the Secretary-General. He did so not to engage in an inter-institutional discussion on the links between post-colonial politics and development, but to show the respect that was necessary to safeguard his cooperative policy objectives. Rather than appearing himself, as the UN had requested, however, the chosen response was of a legal nature, and the representative his senior lawyer. The strategy, as we will continue to see throughout this paper, was to assert legitimacy through legality.

Aron Broches, who had been Secretary of the Netherlands’ delegation in Bretton Woods and part of the Bank’s legal department from the very start, was far from a legal formalist. During his time as Senior and General Counsel, he had provided legal justifications for the Bank’s expansion into a wide range of new operational fields, employing what Sinclair described as an ‘ultra-liberal’ perspective on the Articles.\(^\text{32}\) In a publication following his course at the Hague Academy of International Law, Broches had noted that the Bank’s Directors were ‘free to interpret the provisions of the Articles according to their own discretion’ and that this ‘power of interpretation [had] both judicial and legislative elements’.\(^\text{33}\) Regarding the Bank’s mandate, he had noted that its powers did not need to be ‘necessarily or even reasonably implicit’ in the Articles, but merely needed to stand in some presumed relationship with its broad purposes.\(^\text{34}\) From the Bank’s expanding practices of technical assistance or conflict mediation to the very creation of new IOs – the IDA and ICSID – Broches had not seen the Bank’s Articles, which provide no legal basis for any these activities, as an impediment.

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29 Broches 1985, 11.
30 Ibid; Broches 1984, 22.
31 Broches 1984, 22 (emphasis added).
34 Ibid. 336.
On the stage of the UN General Assembly’s Fourth Committee, however, Broches responded to the Guinean representative by stating that, regretfully, the Bank faced formal ‘constitutional limitations on the extent to which [it] could meet particular wishes expressed by the United Nations’. When Mr. Appiah, the Ghanaian representative, asked ‘whether the Bank considered itself absolved from any responsibility to heed world public opinion and help to put an end to acts of genocide which were being committed by Portugal and South Africa?’, Broches responded, again regretfully, that ‘the Bank had to live within the limits imposed by its [Articles] and that [those] clearly made it impossible for the Bank to heed world public opinion in the instance mentioned’. ‘Short of amendments to the [Articles] to remove such obstacles’, Broches lamented, ‘the Bank could do nothing’.

The legal argument had two pillars. On the one hand, Broches relied on the 1947 relationship agreement, arguing that the Bank, with reference to Article I, ‘was an independent international organization and required to function as such,’ and stipulating that ‘Article IV (2) of the Agreement stated that neither organization … would present any formal recommendations to the other without prior consultation’. The Bank did not regard resolutions 2105 and 2107 as formal recommendations, Broches stated, since there had been no prior consultation. When pushed by Mr. Mendelevich, the USSR representative, on why the Bank differed from the ITU, WHO and UNESCO in disregarding the UN; why it had not called a special session to discuss the UN resolutions and why it has not invited any UN representative to its Board meetings, Broches repetitively stated that the Bank ‘had not thought that the United Nations had addressed a formal recommendation to it’ in the meaning of Article IV (2) of the relationship agreement. The second pillar was the Bank’s own constituent charter, specifically the political prohibition clause. The Bank, Broches argued, ‘was instructed in clear terms by its charter to be guided by economic considerations alone’. Not only was not Bank not bound to comply with the resolutions, Broches concluded, it was constitutionally prohibited from doing so (a conclusion he himself, interestingly, recalled as ‘not unassailable’).

During the discussion, members of the Fourth Committee consistently tried to reanimate the political nature and stakes of the discussion: the axiological core of the UN System and Charter – the ‘general goals of the United Nations’, ‘world public opinion’, and, specifically, the ‘respect for human rights and fundamental freedoms’ as codified in Article 55 – were mobilized against the ‘actions by the Bank which were of benefit to the Portuguese colonialists who were waging a war against the

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36 Ibid. 160 (emphasis added).
37 Ibid.
38 Ibid. 157.
39 Ibid. 163ff. Upon further questions by the Ghanaian and Tanzanian representatives if the Bank could simply disregard General Assembly resolutions, Broches merely repeated that ‘The Bank had not regarded the resolutions in question as formal recommendations within the meaning of Article IV, paragraph 2, of the Agreement between the Bank and the United Nations’. Ibid. 166.
40 Ibid. 154.
41 Broches 1984, 23.
42 Reference to these goals was made by the representative of Ceylon. See ibid. 153.
43 This axiological recourse to ‘world public opinion’ was made by the Ghanaian representative. Ibid.
44 Respect for these rights and freedoms had to be safeguarded in all loans, according to Iran’s representative. Ibid. 168.
African people’.45 Surely, Mr. Appiah argued, ‘the Bank’s Executive Directors and officials could not claim to live in isolation’ and would be obliged to ‘help to put an end to acts of genocide which were being committed by Portugal and South Africa’.46 While the Fourth Committee provided a forum for anti-colonial47 and Cold War48 politics, Broches consistently argued that the Bank’s practices were not a matter of substantive choice, but of formal legal necessity. The ‘criticism’ against the Bank, he argued, merely stemmed from an inadequate understanding of the provisions of the Bank’s Articles of Agreement … which have been signed by the vast majority of the members of the United Nations’.49 In acting as it did, he stated, the ‘Bank has done no more than pay heed to the constitutional provisions by which it is governed’.50 Referring eight times to the ‘constitutional limitations’ of the Bank, he argued that the organization was simply ‘not free to pursue the aims of the United Nations’ and that ‘it could not act on the resolutions because of its Articles of Agreement and for reasons connected with the relationship Agreement’.51

It was an uncomfortable encounter (Broches later recalled having ‘not particularly’ enjoyed it), staged for the particular purpose of shaming and blaming: while the Bank had a reserved seat ‘in the back of the hall where nobody can see you’, Broches was asked ‘with some trepidation’ to speak from a seat below the table of the president, ‘facing the delegates because, it was explained to me, then the delegates could see you and know whether you were honest or not’.52 Before he took the stage, he recalls, the ‘Council had just finished hearing witnesses who were testifying about maltreatment, I think, in Angola’.53 Broches, an institutional lawyer specialized in advising on financial transactions, was alien to these plenary spaces of global politics and inept to engage with the passionate register of fear, violence and injustice that marked the discussions and allegations against the Bank. The value of legality, however, was displayed precisely in the ensuing conversion of the emotions, passion, values and politics of the anti-colonial struggle into matters of legal interest with their own ontological tenor and tone: form, procedure and interpretation.54 Once seen from a legal perspective, the Bank’s actions were a matter of formal necessity. Consequently, it was only a small step to assert that the ‘inadequate understanding’ of the Bank’s legal framework on the part of the UN members, according to Broches, had created ‘the false impression that there was a conflict between the Bank and the United Nations’.55 By recasting the issue in legal terms, Broches had now depleted the debate from elements of political choice, agency or conflict. While the Fourth Committee had requested the

45 This statement was made by the USSR’s representative. Ibid. 165.
46 Ibid. 159 (emphasis added).
47 Responding to the Portuguese representative, Mr. Appiah said that ‘said that the voice he had just heard was a lone cry in the wilderness, representing a piece of the Iberian peninsula which believed that it was still the fifteenth century. That country should wake up to the realities of the twentieth century. It was indeed practising genocide in Africa’. Ibid. 169. Both Portugal and South Africa denied these allegations.
48 Mr. Mendelevisch used the occasion to state that ‘the Soviet delegation had been motivated by a principle – that of support for peoples fighting against colonialism. The Soviet Union gave such peoples its moral and material support both inside and outside the United Nations’. Ibid. 186.
49 Ibid. 151-152 (emphasis added).
50 Ibid. 153.
51 Ibid. 157 and 169 (emphasis added).
52 Broches 1984, 22.
53 Ibid.
54 Koskenniemi 1990, supra n. 22, 28.
55 Ibid. 169 (emphasis added).
Bank to politically justify its financial support for colonial powers, Broches had shifted the debate to questions regarding what counts as a valid ‘consultation’ under the 1947 relationship agreement or as a prohibited ‘political’ affair in the Articles. Unsurprisingly, on the second day of the meeting, the presence of Mr. Stavropoulos, the UN legal counsel, was requested: as the participants understood, the conflict had become legal matter in which passionate political pleas were categorically misplaced. The conversion remained problematic, however: until the meeting’s conclusion, its participants revolted against how these tiny – superficial, formal, seemingly irrelevant – threads of legality could have obtained such an astonishing force and silenced their political demands. The most salient performative effect of Broches’ intervention, in other words, was law’s creation of its own field of application: selectively bringing itself into existence through the gradual qualification of contentious political positions into matters of legal form and interpretation, until the point that the very notion of normative conflict could merely be a ‘false impression’. This performativity is described by some legal sociologists, such as Christodoulidis – who builds on Teubner’s notion of juridification as the ‘expropriation of conflict’ – as intrinsic to legal form, which ‘appropriates and depletes politics by legally differentiating out the area of what is significant as political’.

The legal controversy continued after the meeting in an exchange between the legal counsel of the United Nations and Aron Broches. The former argued that ‘a more reasonable interpretation’ of both the 1947 relationship agreement and the Bank’s Articles was possible, which would ‘permit the Bank to have regard for and comply with the relevant General Assembly resolutions’. This perspective was grounded in a broader image of the UN System as a ‘family of institutions … intended to work in harmony’ and unified by a common set of normative principles. In his response, Broches stressed the ‘non-political, technical and functional nature of the Bank’ and underlined that the relationship agreement ‘did not and could not modify its character as a technical and financial organizations which was specifically enjoined by its member Governments from playing any political role’. In his final response, the UN legal counsel noted that the level of legal independence claimed by the Bank was ‘difficult to reconcile with the common dedication of members of the United Nations system to the fulfilment of the purpose of the United Nations Charter’.

Throughout the controversy, these two opposing imaginaries on the law of IOs were present: one seeing IOs as part of a holistic ‘international community’ unified by the key norms and principles of international law, while the other defined IOs

56 Representatives from Ghana, India, Bulgaria, USSR, Tanzania and Yugoslavia contended the idea that the Bank could place itself outside the UN Charter because – presumably, but disputably – no ‘consultations’ had taken place.
57 Broches: ‘short of amendments to the Articles of Agreement to remove such obstacles, the Bank could do nothing’. Ibid. 160. Latour, AIME, 364: ‘the passage of law gradually modifies the relation between the quantity of facts, emotions, passions, as it were, and the quantity of principles and texts on which it will be possible to rule. This proportion of relative quantities is known by the admirable term “legal qualification”’.
61 Ibid, Annex II (Extract from a letter from the General Counsel of the IBRD to the UN Secretariat, 5 May 1967), 7, 19.
as independent ‘islands in the sea of globality’,\textsuperscript{63} shaped by their internal functional objectives and grounded in international treaties with purported ‘constitutional’ status.

**The Performativity of Legal Form – Insulation and Constitutionalization**

On the basis of this analysis, it would clearly be a mistake to place Broches’ legal performance in a causal relationship with the operational decisions or dominant economic paradigms in the Bank, as is recurrent in literature.\textsuperscript{64} It was not because of its legal coding that the Bank thought or acted in specific ways: after the Bank had legally insulated itself from the UN, it altered its lending policy. As Broches later noted: ‘after we said that we couldn’t respond, we did in fact respond. We made no more loans. … So, in the case of Portugal, there was a response, and what it proves to me, is the importance of international public opinion’.\textsuperscript{65} Neither the Bank’s original decision to continue lending (which was shaped by internal managerial concerns and economic calculus), nor its decision to refrain from doing so in the future (shaped by international public opinion) was caused by legal reasoning. As Broches himself noted, throughout the dispute, the ‘legal issue was not controlling’.\textsuperscript{66}

The performativity and salience of law – the ‘mode of existence’ I am interested in here – was of an entirely different nature and manifested itself on two different levels. One the one hand, Broches’ legal interventions, as elaborated above, translated and reduced the deeply political issue into a conflict on legal formalities. In line with his policy to generate a more amicable relationship with the UN, Woods could now close the controversy by bracketing the dispute as a purely legal matter. In a letter to the UN Secretary-General, Woods praised the UN’s ‘carefully reasoned legal argument’, but – since the law provided no resolve – expressed his desire to ‘leave legal argumentation aside’ and provided the assurance that ‘the World Bank is keenly aware and proud of being part of the United Nations family’ and that it would ‘avoid any action that might run counter to the fulfilment of the great purposes of the United Nations’.\textsuperscript{67} UN Secretary-General Thant responded by embracing the Bank in the ‘United Nations family’, bound by its ‘great purposes’.\textsuperscript{68} Eventually, Broches noted, ‘this incident ended in a declaration of cooperation in good spirits’, with both Woods and Thant ‘saying in substance: “Well, the lawyers can’t agree, but let’s just say that we want to cooperate”’. \textsuperscript{69}

Law did not determine the conflict’s outcome but deferred and diffused it; altering the register through which it was enacted. To see how this specific performativity of the Bank’s Articles – and the political prohibition clause in particular – prevails until today, it suffices to look at the Vision

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\item \textsuperscript{63} G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, OUP, 2012, 52
\item \textsuperscript{64} For example, Darrow 2003, supra n. 25; D. D. Bradlow, “The World Bank, the IMF and Human Rights”, *Transnational Law and Contemporary Problems*, Vol. 6:47, 1996, 55ff; Rosaria Mauro 2015, supra n. 24, 254.
\item \textsuperscript{65} Broches 1984, 24 (emphasis added). This is a wonderful affirmation of the argument presented in K. Daugirdas, “Reputation and the Responsibility of International Organizations”, EJIL, Vol. 25:4, 2015, 991-1018.
\item \textsuperscript{66} Ibid.
\item \textsuperscript{68} Ibid, Annex V (Letter from the Secretary-General of the UN to the President of the IBRD, 23 August 1967).
\item \textsuperscript{69} Broches 1984, 24 (emphasis added) and 1985, 13.
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Statement in the recently adopted Environmental and Social Framework (ESF), which states that the Bank’s activities ‘support the realization of human rights … in a manner consistent with its Articles of Agreement’. If we want to understand law’s performativity in the encounter between the Bank and the ‘outside world’, in other words, we need to appreciate its potency in channeling inter-regime disputes through this gradual translation of political conflict into manageable legal form.

The second dimension relates to law’s internal constitutional function (in the ‘constitutive’ and not the deontic sense): its usefulness as an ‘inscription device’ for the durable establishment of political associations. As Broches noted, “[y]ou talk of American, or French or Dutch positions, and there is no such thing. There are the Dutch who know about the Bank, then the Dutch who know about the UN, etcetera’. As noted above, this distinctness was a key point of debate during the Bretton Woods negotiations, and deliberately cultivated inside the Bank’s Board. This disaggregation of the state across multiple regimes – often with overlapping and potentially conflicting functional or political objectives – was central to the dispute in the Fourth Committee. When asked by the Ghanaian representative ‘whether the Legal Counsel agreed that the Bank should conform to the objectives of the United Nations Charter’, Mr. Stavropoulos opined that ‘the United Nations and the Bank had almost the same membership and should have the same objectives’. In the same vein, Mr. Esfandiar, the Iranian representative, argued that ‘under Article 103, in the event of a conflict between the obligations of Members under the Charter and their obligations under any other international agreement, their obligations under the Charter prevailed’. ‘In a sense, therefore’, he concluded, ‘Article 55 [UN Charter] superseded the [1947] Agreement between the United Nations and the Bank’. This position – echoing ‘the strains of a (constitutionally) systemic and hierarchical

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70 World Bank, Environmental and Social Framework, Washington D.C., World Bank, 2017 (Vision Statement, 1-2). In a footnote, the ESF refers specifically to the ‘political prohibition’ clause.

71 See Koskenniemi 2012, supra n. 21.

72 Hereby I refer to Teubner’s argument that law is essential for the self-foundation and delineation of discrete social systems (now perhaps more commonly described as ‘regimes’). The ‘constitutive’ dimension points to what Teubner describes as ‘the self-identification of a social system with the assistance of the law’. See Teubner 2012, supra n. 64.

73 The concept ‘inscription device’ is borrowed from Latour, who defines ‘inscriptions’ as ‘durable representations of knowledge’ produced through the alignment between organization and technology. See B. Latour, Science in Action: How to Follow Scientists and Engineers through Society, Cambridge (Ma.), Harvard University Press, 1987, 65-68. In drawing on the concept, I want to point to the capacity of law in establishing a ‘durable bond of political association’; a signpost for appropriate intra-institutional though and action.

74 Broches 1984, 22. Demuth equally observed that ‘[i]t’s extraordinary how differently the governments react in [political] discussions, at the [Bank’s] Annual Meetings, for example, where the finance ministers are representatives, and at the Economic and Social Council where the representatives come from foreign offices, and are more politically motivated’. See Demuth 1961, 19.

75 According to Luxford, one of the ‘biggest fights at Bretton Woods’ was to ensure that the Bank’s directors would be reasonably independent, so that they could ‘talk intelligently to their own countries and point out the facts of life … and get away from voting … purely as political matters’. See Interview with Luxford, World Bank Oral Archives, 1961, 17.

76 Fourth Committee 1966, 176.


78 Fourth Committee 1966, 169.
conception of the international legal order—still animates much of the international legal critique on the Bank (and other IFIs or IOs more broadly), and is metaphorically captured in De Zayas’ spatial representation of the Bank as a ‘legal black hole’ in the cosmos of international order. The argument, in short, is that the structure of inter-, or postnational governance might be institutionally splintered, but remains axiologically unified. This universalist perspective, however, inevitably entails its own particular political, normative and epistemic preferences and hierarchies—\textit{in casu} the institutional inferiority of the Bank \textit{vis-à-vis} ECOSOC. It is precisely in providing space for alternative political projects that IIL—\textit{in casu} the Bank’s Articles—expresses its ‘constitutionally’ generative dimension: in addressing the Bank’s Board, Woods had indicated that ‘\textit{by virtue of the Articles of Agreement}’, disregarding resolutions 2105 and 2107 ‘was the only course open’ to the Bank’s member countries, when acting inside the organization’s limited functional sphere. The Board, representing roughly the same countries as those present in the UN General Assembly, ‘although with some exceptions and some dissents … accepted the Bank’s counsel’s legal opinion’, and asserted its institutional independence with reference to both the constituent Articles and Article I of the 1947 relationship agreement, which thereby regained its momentary salience. Broches put his finger on this politically generative role of the Articles in recalling that ‘[t]he Trusteeship Council and the Bank Board are two different \textit{bodies}, and the representative to each may think in good faith … that they \textit{act in accordance with the charters governing them}’. In this sense, the Articles—occasionally obtaining meaning and momentum in the legal performances and opinions of the Bank’s General Counsel—continuously re-enroll its participants in a delineated political project. This both enables the latter’s durability and serve to illuminate its normative fault lines, \textit{i.e.} the confines of the collective project—the ‘first-person plural’—on which the emergence of legal order is conditional. This does \textit{not} imply, however—and this point should be stressed, since it is here that most analyses derail—that law determines the substantive direction of these collective projects. The Bank’s Articles are no blueprint for its trajectory, but a mode of stabilizing and enabling a concrete collective project by carrying promises

80 De Zayas 2017, supra n. 78.
81 See Tilburg Principles, supra n. 78, para. 6: ‘[a]ccording to the Relationship Agreements the organisations are, and are required to function as, independent international organisations. It provides an organisational independence from the UN, not from international law’.
83 Fourth Committee 1966, 152.
84 Broches 1984, 24 (emphasis added).
85 \textit{Ibid.} (emphasis added).
86 Lindahl develops a very sophisticated line of reasoning in arguing that ‘legal orders are necessarily limited’, and that ‘joint action by a legal collective presupposes a closure that is spatial, temporal, subjective and material’. These collectives—the ‘first-person plural’—are grounded in ‘mutual normative expectations … about who ought to do what, where and when … articulated and actualized in joint action under law’. The character of a legal collective ‘manifests itself to its members—and to others—in how it draws the boundaries that establish the who, what, where, and when of behaviour falling within the scope of its normative point’. Absent these concrete ‘ought-places’ and their inevitable boundaries of purpose and meaning (at this point Lindahl aligns with the system theorists), law cannot ‘assign[] the appropriate places and times for the appropriate subjects to do the appropriate things’. See H. Lindahl, \textit{Fault Lines of Globalization: Legal Orders and the Politics of A-Legality}, OUP, 2013, 25, 74, 84 and 165. This view on how legality is implicated in the communicative foundation of the ‘collective self’ is echoed by Teubner 2012, supra n. 64, 68ff.
on ‘who ought to do what, where and when’ across shifting times and spaces.\textsuperscript{87} The instruction to ‘act in accordance with the Articles’ despite the pressure of alternative normative registers, displays law’s importance in ‘ensur[ing] the continuity in time and space of courses of action that would otherwise always scatter’ in ephemeral and \textit{ad hoc} projects and alliances.\textsuperscript{88} ‘While in fact there is neither real continuity of courses of action nor stability of subjects’, Latour argues, ‘law brings off the miracle of proceeding as though, by particular linkages, we were held to what we say and what we do’.\textsuperscript{89}

Following this analysis, law’s performativity in the encounter between the Bank and the outside world is put in sharper focus. The Bank’s disregard for the edicts of the UN (and the moral exigencies of international law more broadly) does not represent an anomalous state were the proper functioning of law has been suspended, but exemplifies the laborious construction of the Bank as an autonomous ‘international legal person’.\textsuperscript{90} Building on Koskenniemi and d’Aspremont, who argue in similar terms that the ‘regime-world’ reproduces the well-known problem of ‘solipsistic and imperialistic’ sovereignties striving for ‘privacy and self-preservation’,\textsuperscript{91} this section has elaborated on how these sovereignties are legitimated, consolidated and insulated through legal praxis. The conclusion urges us to reconsider the orthodox binary between domestic and international law as exclusive spaces of legal authority: as this episode illustrates, the alignment between political- and legal order is a self-referential process in which different sources – \textit{in casu} the UN Charter or the Bank’s Articles – can be produced as sources of ultimate authority in certain institutional settings.\textsuperscript{92} In this process, I have argued, law serves both to diffuse and defer political conflict, and to enroll a variety of actors in a durable collective project. Law does not shape or define the ever-changing \textit{telos} to which these projects are directed,\textsuperscript{93} but passes through these institutional practices and conflicts in an almost disinterested way, stabilizing the fragile assemblage of the Bank’s autonomous institutional sphere in a volatile environment. As ‘mode of existence’, law then does not provide justice or truth, but merely seeks to safeguard that ‘we are all still here’.

\textsuperscript{87} Ibid.
\textsuperscript{88} Latour 2013, supra n. 23, 369-370.
\textsuperscript{89} Ibid. 370.
\textsuperscript{90} In her book on non-legality, Fleur Johns wonderfully traces how many of international law’s ‘voids’ or ‘empty spaces’ are constituted and shaped trough legal work. F. Johns, Non-Legality in International Law: Unruly Law, CUP, 2013. d’Aspremont in this sense argues that IOs – as proper legal orders – are endowed with institutional independence, defined as ‘the impermeability of the organization to external institutional interferences’ and constituting a ‘legal order distinct from the general international legal’. D’Aspremont 2011, supra n. 80, 63-64.
\textsuperscript{91} Koskenniemi 2012, supra n. 21, 317-318. D’Aspremont 2011, supra n. 80, 79.
\textsuperscript{92} In this light, D’Aspremont is right to argue that the ‘mechanism of Article 103 of the UN Charter … does not impinge on that conclusion [of institutional independence] as it simply addresses such a conflict from the vantage point of the UN Charter’. D’Aspremont 2011, supra n. 80, 75.
\textsuperscript{93} As Latour notes, ‘If there is one thing that law does not know how to replace, it is the gradual composition of sovereignty that is achieved by politics – a very specific form of enunciation, with its own particular vehicles and labours’. See Latour 2009, supra n. 26. This obseveration aligns with Teubner’s argument that law does not play a primary role in the self-foundation of social systems. Law, for Teubner, solidifies the autonomy of these social systems – in a process he defines as ‘double reflexivity’ – by neutralizing the inevitable paradox of self-referentiality involved in any constitutional claim. In sum, law closes the circle of constitutional self-foundation by providing a stable normative reference point. Or in Teubner’s own words: ‘[t]he ‘self’ of the social system is defined heteronomously by legal norms and it can then define itself autonomously thereby. While the unity of a social system develops through the concatenation of its own operations, its identity is created in its own constitutions through the re-entry of external legal descriptions into its own self-description”. See Teubner 2012, supra n. 64, 107ff. See also N. Luhmann, \textit{Law as a Social System}, OUP, 2004, 147.
This analysis points to a recurrent problem in legal literature: by causally linking the Bank’s ‘refusal to comply with the General Assembly resolutions’ with an ‘expansive interpretation of the ‘political’ prohibition’, or by describing Broches’ position as an assertion of the Bank’s ‘narrow economic perspective’ on what constitutes ‘development’, we end up with a flawed image on law’s potency and performativity that pushes our thinking and activism in the wrong direction. If, indeed, we see the Bank’s Articles – and political prohibition in particular – as a set of norms causing action, we are tempted to think on how these norms have altered over time and sparked different modes of politics and economic thinking. We are equally tempted to contest perverted modes of praxis or reflection by attacking their purported legal coding – urging an ‘amendment’ or radical ‘reinterpretation’ of the Articles. We draw maps on the evolving causal relations between law and the institutional and operational world it generates; a cartography for political possibility through law. On the basis of the above analysis, however, I want to argue that law’s potency cannot be grasped by placing the Articles in a causal relationship with different modes of institutional behaviour (after all, Broches noted, ‘the legal issue was not controlling’). Law neither shaped the Bank’s decision to award certain loans, nor did it make the Bank refrain from such loans in the future. It did not communicate or codify the Bank’s ‘contempt’ for the UN (on the contrary, I showed), nor did it reflect the Bank’s conservative perspective on ‘development’ or its relationship with the ongoing struggle against colonial rule. The unique function of law was to provide an apparatus for institutional enrolment, endurance and insulation, not a substantive political program. Looking through this lens, we notice that many of the narratives on the ‘evolution of legal thinking’ in the Bank describe gradual – and often merely rhetorical – evolutions in the Bank’s development policies, and thereby pass by the more structural performativity of legal interventions in positioning the Bank vis-à-vis the outside world. The image of international law as an instrument of insulation and self-foundation (and thereby its implication in the way that institutional power is divided and entrenched) contradicts the narrative that the Bank is a political space where the normal operation of international law has been suspended (the metaphor of the ‘legal void’ or the notion that the organization is situated ‘outside’ the law). On the contrary, it seems, the conceptual apparatus of international law has played an essential role (and continues to do so) in formalizing the relationship between the Bank and the ‘outside world’ – not as a universalist project of integration, but as a technology of consolidating its quasi-sovereignty.

94 Darrow 2003, supra n. 25, 152.
95 Rosaria Mauro 2015, supra n. 24; Bradlow 1996, supra n. 65, 55 (fn. 35).
96 See de Zayas 2017, supra n. 78; Tilburg Principles 2003, supra n. 78.
97 Darrow 2003, supra n. 25; P. Alston, Report of the Special Rapporteur on extreme poverty and human rights, A/70/274, 2015, 2: ‘[t]he biggest single obstacle to moving towards an appropriate approach is the anachronistic and inconsistent interpretation of the “political prohibition” contained in its Articles of Agreement’.
98 See Rosaria Mauro 2015, supra n. 24, 254.
100 On the salience and flaws of this imaginary, see Johns 2013, supra n. 91.