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International Law or International Politics? The Guaidó v. Maduro Conundrum at the Inter-American Development Bank

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International law or international politics? The Guaidó v. Maduro conundrum at the Inter-American Development Bank

Félix A. Quintero Vollmer¹

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1. INTRODUCTION

On March 15, 2019, the Inter-American Development Bank's (the "IDB") website displayed a press release titled "IDB Group approves nomination of new Governor for Venezuela."² It stated that the Board of Governors of the IDB "approved a resolution recognizing the appointment by Mr. Juan Guaidó of Ricardo Hausmann as IDB Governor for Venezuela"³ and confirmed that the appointment was effective immediately.⁴ The press release further mentioned that the Board of Governors of the Inter-American Investment Corporation (the "IDB Invest"),⁵ another public international organization associated with the IDB, had also approved Dr. Hausmann's appointment.⁶

These institutional decisions were adopted in response to a letter issued on February 28, 2019, by Mr. Guaidó and addressed to Mr. Nicolás Dujovne, in his capacity as Minister of Finance of the Republic of Argentina and President of the IDB's Board of Governors.⁷ The letter, which identified Mr. Guaidó as Venezuela's National Assembly President and interim President of the Republic, conveyed Mr. Guaidó's decision to appoint Dr. Hausmann as Governor of Venezuela before the IDB and the IDB Invest, as well as

² Press Release, *IDB Group Approves Nomination of new Governor for Venezuela* (Mar. 15, 2019), <https://www.iadb.org/en/news/idb-group-approves-nomination-new-governor-venezuela>.

³ *Id.*

⁴ *Id.*

⁵ See IDB INVEST, <https://www.idbinvest.org/en> (last visited Sep. 2, 2019).

⁶ *IDB Group Approves Nomination of new Governor for Venezuela*, *supra* note 2.

⁷ Carlos Vecchio, appointed by Mr. Guaidó as Ambassador before the United States of America, shared a picture of the letter via Twitter. Carlos Vecchio (@carlovecchio), TWITTER (Mar. 4, 2019, 2:00 PM), <https://twitter.com/carlovecchio/status/1102690187975495684>.

his interest in Ms. Gina Montiel's "designation" as a Director in both organizations.⁸ It ended by making clear that previous appointments were effectively revoked.⁹ Mr. Nicolás Maduro, however, insisted that his appointment as of March 1, 2018, of Mr. Oswaldo Javier Pérez Cuevas as Governor and Mr. Santiago Armando Lazo Ortega as Alternate Governor remained in force.¹⁰ The competing claims of legitimate government in Venezuela between Mr. Juan Guaidó and Mr. Nicolás Maduro, therefore, triggered the question of whether the Washington, DC-based organizations should abide by the letter's terms.

This article explores the challenges faced by the IDB's in-house counsel in assessing, from a legal standpoint, Mr. Guaidó's letter and will mainly focus on the appointment of the Venezuelan Governor before the IDB's Board of Governors. It further considers whether IDB's in-house counsel needed to frame this legally contentious event within a broader political and historical perspective. Finally, the article includes remarks for in-house counsel, especially in intergovernmental organizations (the "IGOs"), to consider when dealing with issues that overlap between international law and international politics.

2. THE CHALLENGES: WHICH REPRESENTATIVE, WHO DECIDES AND ON WHAT GROUNDS?

The Agreement Establishing the Inter-American Development Bank (the "Agreement") became Effective December 30, 1959,¹¹ and it was ratified by the Venezuelan Congress on February 12, 1960.¹² It became law in and thereby binding for Venezuela upon the publication of the Law Approving the Agreement Establishing the Inter-American Development Bank on the Extraordinary Offi-

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Agreement Establishing the Inter-American Bank, December 30, 1959, 389 U.N.T.S. 69.

¹² INTER-AMERICAN DEVELOPMENT BANK, *Historical Milestones 1959-1968*, <https://www.iadb.org/en/about-us/historical-milestones-1959-1968%2C3617.html>.

cial Gazette No. 608 on February 19, 1960.¹³ Consequently, Venezuela has been an IDB member country, subject to the obligations and entitled to the rights provided under the Agreement, ever since.¹⁴

Mr. Guaidó and Mr. Maduro were both keen on continuing to engage with the IDB through their respective representative, just like any other member country. Therefore, the matter at hand was one of *representation*, rather than *membership*. Alison Duxbury, a professor at Melbourne Law School, sheds light on the matter by making clear the distinction between the two concepts:

Membership questions are concerned with the admission or exclusion of a state from an organisation. Representation presupposes membership and deals with the question of which persons or entities are permitted to represent a particular state. Issues concerning representation often arise where there are two rival authorities claiming to represent the legitimate government of a member. Representation is usually effected through a process whereby a particular delegate's credentials are accepted by the organisation. The decision to withhold such credentials may indicate the attitude of the organisation's members toward that government, although technically the state remains a member of the organisation unless it is excluded by another means.¹⁵

The IDB member countries' views towards the Venezuelan government varied greatly. Many member countries had publicly recognized Mr. Guaidó as Venezuela's legitimate (interim) President. Such was the case of several borrowing member countries, including Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Panama, Paraguay, and Peru.¹⁶ Non-

¹³ Law No. 608, Febrero 19, 1960, GACETA OFICIAL DE LA REPUBLIC DE VENEZUELA.

¹⁴ *Id.*

¹⁵ ALISON DUXBURY, THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS 1, 20 (2011).

¹⁶ Andres R. Martinez, *Here Are the Countries Recognizing Guaidó as Venezuela's New President*, BLOOMBERG (Jan. 23, 2019, 2:59 PM),

borrowing member countries like Canada¹⁷ and the United States¹⁸ had also issued official statements backing Mr. Guaidó. In fact, Mr. Guaidó also received support from Israel¹⁹ as well as European non-borrowing member countries.²⁰ Even the IDB's President expressed "the IDB's interest in working with Venezuela's interim President, Juan Guaidó . . . to ensure our continuous support for the development of the Venezuelan people."²¹ However, not all IDB member countries endorsed Mr. Guaidó's interim Presidency. Borrowing member countries like Bolivia, Mexico and Uruguay, and non-borrowing member countries like China and Norway, either openly recognized Mr. Maduro as President or cautiously advocated for new presidential elections without recognizing either camp.²²

Given the competing claims of government in Venezuela and the IDB member countries' differing views on the matter, the IDB's receipt of the letter triggered the question of whether Dr. Hausmann should be recognized as the Venezuelan Governor by the IDB. It also raised the issue of who was duly authorized to make such a determination and on what grounds. In order to address these questions, the IDB's in-house counsel needed to refer to the most relevant sources of law, namely, the applicable legal

<https://www.bloomberg.com/news/articles/2019-01-23/brazil-canada-join-trump-backing-guaido-as-venezuela-president>.

¹⁷ *Canada Recognizes the Interim President of Venezuela*, GLOBAL AFFAIRS CANADA, (Jan. 23, 2019), <https://www.canada.ca/en/global-affairs/news/2019/01/canada-recognizes-the-interim-president-of-venezuela.html>.

¹⁸ *Statement from President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaidó as the Interim President of Venezuela*, THE WHITE HOUSE (Jan. 23, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/>.

¹⁹ Raphael Ahren & Toi Staff, *Israel Recognizes Opposition Leader's new Government in Venezuela*, TIMES ISR. (Jan. 27, 2019), <https://www.timesofisrael.com/israel-recognizes-opposition-leaders-new-government-in-venezuela/>.

²⁰ Amy Mackinnon, *Maduro vs. Guaidó: A Global Scorecard*, FOREIGN POLICY (Feb. 6, 2019), <https://foreignpolicy.com/2019/02/06/maduro-vs-guaido-a-global-scorecard-map-infographic/>.

²¹ Luis Alberto Moreno (@MorenoBID), TWITTER (Jan. 23, 2019, 3:27 PM), <https://twitter.com/MorenoBID/status/1088216692944224256>.

²² Mackinnon, *supra* note 20.

framework, the organization's practices, and the comparators' decisions and practices.

3. THE LEGAL FRAMEWORK

This section will refer to some of the legal documents that govern the IDB's basic governance, including the Agreement Establishing the Inter-American Development Bank (the "Agreement"), the By-Laws of the Inter-American Development Bank (the "By-Laws") and the Regulations of the Board of Governors (the "Regulations") (collectively, the "Basic Documents").²³

The Agreement is the IDB's constituent document and establishes its governance structure. Pursuant to its Article VIII on Organization and Management, Section 1, the IDB's structure includes "a Board of Governors, a Board of Executive Directors, a President, an Executive Vice President . . . and such other officers and staff as may be considered necessary."²⁴ The Article also includes the duties as well as the appointment procedures for both Governors and Directors.²⁵

While the Agreement makes clear that the Board of Governors is the IDB's highest decision-making organ,²⁶ it also states that the Board of Directors, subject to the Board of Governors' delegation of authority, is responsible for the conduct of the IDB's operations.²⁷ The Agreement establishes, however, that the Board of Governors retains "full power to exercise authority over any matter delegated to the Board of Executive Directors"²⁸ The By-Laws further develop, under Section 4 "Delegation of Powers," the

²³ IDB's Basic Documents can be accessed via the IDB website. *See Document Collections*, IDB, <https://www.iadb.org/en/legal-resource-center/document-collections> (last visited Sep. 2, 2019).

²⁴ Agreement Establishing the Inter-American Development Bank, art. VIII, § 1, December 30, 1959, 389 U.N.T.S. 69.

²⁵ *See id.* at art. VIII, §§ 2, 3.

²⁶ *Id.* at art. VIII, § 2(a) ("All the powers of the Bank shall be vested in the Board of Governors.").

²⁷ *Id.* at art. VIII, § 3(a) ("The Board of Executive Directors shall be responsible for the conduct of the operations of the Bank, and for this purpose may exercise all the powers delegated to it by the Board of Governors.").

²⁸ *Id.* at art. VIII, § 2(c).

scope of delegations and ratify the hierarchy between decisions issued by the Board of Governors and the Board of Directors:

The Board of Executive Directors is authorized by the Board of Governors to exercise all the powers of the Bank with the exception here of those reserved to the Board of Governors in . . . the Agreement. The Board of Executive Directors shall adopt no measure, by virtue of the powers delegated to them by the Board of Governors, that is inconsistent with any measure adopted by the Board of Governors.²⁹

3.1. *Appointment of Governors*

The Agreement provides in relevant part under Article VIII, Section 2(a) on the “Board of Governors” as follows: “Each member shall appoint one governor and one alternate, who shall serve for five years, subject to termination of appointment at any time, or to reappointment, at the pleasure of the appointing member.”³⁰

Likewise, Section 3 of the Regulations on “Representation of member countries” stipulates: “At each meeting of the Board of Governors, the President of the Bank shall submit a list of the Governors, Alternates, or Temporary Alternates of the member countries whose appointment has been officially communicated to the Bank”³¹

These provisions make clear that appointment of Governors is a unilateral decision by each member country; they do not state, or even suggest, that the IDB has the duty nor the right to assess each appointment. However, the provisions are drafted on the assumption that the IDB engages with each member country’s government without disruptions (*e.g.*, competing claims of legitimate government). The Agreement further stipulates that an appointment is

²⁹ Inter-American Development Bank [IADB], *By-Laws of the Inter-American Bank*, § 4, (February 5, 1960).

³⁰ Agreement Establishing the Inter-American Development Bank, art. VIII, § 2(a), December 30, 1959, 389 U.N.T.S. 69.

³¹ Inter-American Development Bank [IADB], *Regulations of the Board of Governors of the Inter-American Bank*, art. §3, (February 5, 1960).

terminated (i) upon a new appointment and (ii) at the member country's discretion.³²

3.2. *Appointment of Directors*

The Agreement provides under Article VIII, Section 3(a) on the "Board of Executive Directors" as follows:

One executive director shall be appointed by the member country having the largest number of shares in the Bank, not less than three executive directors shall be elected by the governors of the non-regional member countries, and not less than ten others shall be elected by the governors of the remaining member countries. The number of executive directors to be elected in these categories, and the procedure for the election of all the elective directors shall be determined by regulations adopted by the Board of Governors by a three-fourths majority of the total voting power of the member countries, including, with respect to provisions relating exclusively to the election of directors by nonregional member countries, a two-thirds majority of the governors of the nonregional members, and, with respect to provisions relating exclusively to the number and election of directors by the remaining member countries, by a two-thirds majority of the governors of regional members. Any change in the aforementioned regulations shall require the same majority of votes for its approval.³³

The provision establishes that the appointment and election procedures for directors vary depending on the type of member country. Whereas the United States, the IDB's largest shareholder,³⁴ has the right to directly appoint a director, regional member

³² Agreement Establishing the Inter-American Development Bank, art. VIII, § 2(a), December 30, 1959, 389 U.N.T.S. 69.

³³ Agreement Establishing the Inter-American Development Bank, art. VIII, § 3(a), December 30, 1959, 389 U.N.T.S. 69.

³⁴ *Capital Stock and Voting Power*, IDB, <https://www.iadb.org/en/about-us/capital-stock-and-voting-power%2C1352.html> (last visited Sep. 2, 2019).

countries like Venezuela need to comply with the applicable election procedures, as adopted by the Board of Governors. Therefore, the election of the Venezuelan director is contingent on (amongst other factors) a previous appointment of a Venezuelan governor. Hence, Mr. Guaidó's interest in the "designation" of Ms. Gina Montiel as director, rather than her appointment.

3.3. *Representation*

The IDB's legal framework, including the Basic Documents, is silent when it comes to representation,³⁵ as defined by Duxbury. That is, it does not anticipate a situation in which the IDB's decision-making bodies need to address and decide upon the question of which persons are to be recognized as entitled to represent a member country at the IDB.³⁶ This is not a unique feature of the IDB, however, as each IGO follows a distinct approach. Scholars have documented, for example, that the question of representation is not generally dealt with in IGOs' constituent documents³⁷ and that sometimes it is "one for the rules of procedure in each organ of each organization."³⁸

3.4. *Membership: admission, suspension and withdrawal*

The Agreement provides under Article VIII, Section 2(b) a list of powers that the Board of Governors may not delegate to the Board of Directors, including the powers to (i) admit new members; (ii) determine the conditions of admission; and (iii) suspend members.³⁹ Pursuant to Section 11 of the By-Laws on "Applications for Membership of the Bank," the Board of Directors needs to consult with the applying country and issue a recommendation

³⁵ There are several references to representation but they have a different connotation. For example, Article VIII, Section 5(a) of the Agreement provides that the President is the IDB's legal representative.

³⁶ C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS, 125-26 (1996).

³⁷ *Id.* at 127.

³⁸ *Id.*

³⁹ Agreement Establishing the Inter-American Development Bank, art. VII, § 2(b), December 30, 1959, 389 U.N.T.S. 69.

to the Board of Governors.⁴⁰ As stated earlier, Venezuela has been an IDB member country as of February 19, 1960.⁴¹

Suspension of a member country is regulated under Article IX, Section 2 of the Agreement and under Section 12 of the By-Laws.⁴² These documents provide that suspension is conditioned upon (i) a member country's failure to fulfill any of its obligations to the IDB; (ii) a review of the matter by and a recommendation from the Board of Directors to the Board of Governors; (iii) notice, reasonable time to prepare a defense and an opportunity for the member country to present its case before the Board of Governors; (iv) a vote of the Board of Governors; and (v) a final decision by the Board of Governors.⁴³ Article IX further states that, unless the Board of Governors decides otherwise "by the same majority", suspension is effective one year *after* the date of suspension.⁴⁴ This drafting could potentially allow for the member country to fulfill its obligations, and for the parties to reassess and perhaps reach a different agreement, prior to the effective date. Regardless of whether Venezuela had failed to comply with certain obligations to the IDB (*e.g.*, arrears), the organization did not pursue suspension proceedings in connection with Mr. Guaidó's letter or otherwise.

The Agreement's wording under Article IX, Section 1 indicates that each member country has the right to withdraw from the Bank at its discretion, subject to certain notice requirements and to the member country remaining liable "for all direct and contingent obligations to the Bank to which it was subject at the date of delivery of the withdrawal notice."⁴⁵ As stated earlier, however, neither

⁴⁰ Inter-American Development Bank [IADB], *By-Laws of the Inter-American Bank*, § 11, (February 5, 1960).

⁴¹ Law No. 608, Febrero 19, 1960, GACETA OFICIAL DE LA REPUBLIC DE VENEZUELA.

⁴² Agreement Establishing the Inter-American Development Bank art. IX, § 2, December 30, 1959, 389 U.N.T.S. 69; Inter-American Development Bank [IADB], *By-Laws of the Inter-American Bank*, § 12, (February 5, 1960).

⁴³ The vote requires: (i) 3/4 majority of the total voting power of the member countries; and (ii) 2/3 majority of the total number of governors (including a 2/3 majority of the governors of regional members). *Id.*

⁴⁴ Agreement Establishing the Inter-American Development Bank art. IX., December 30, 1959, 389 U.N.T.S. 69.

⁴⁵ *Id.* at art. IX, § 1.

Mr. Guaidó nor Mr. Maduro submitted a withdrawal notice to the IDB.

3.5. *IDB and member countries' political affairs*

The Agreement provides under Article VIII, Section 5(f) on the “President, Executive Vice President, and Staff” as follows:

The [IDB], its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the [IDB's] purpose and function.⁴⁶

This provision is further supported by another section under the same Article that, according to former World Bank Group⁴⁷ General Counsel Ibrahim Shihata when referring to a similar wording embedded in the constituent documents of the International Bank for Reconstruction and Development (the “IBRD”) and International Development Association (IDA), serves to “protect the President and staff from political pressure”⁴⁸: (d) The President, officers, and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and shall recognize no other authority. Each member of the Bank shall respect the international character of this duty.⁴⁹

Shihata argued that the scope of the prohibition of political activities under the IBRD and IDA constituent documents included, amongst others, the obligation (i) not to interfere in a member

⁴⁶ Agreement Establishing the Inter-American Development Bank, art. VIII, § 5(f), December 30, 1959, 389 U.N.T.S. 69.

⁴⁷ The World Bank Group consists of 5 organizations: The International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). See WORLD BANK, <https://www.worldbank.org/en/about> (last visited on Sep. 2, 2019).

⁴⁸ IBRAHIM F.I. SHIHATA, THE WORLD BANK LEGAL PAPERS 227-28 (2000).

⁴⁹ Agreement Establishing the Inter-American Development Bank, art. VIII, § 5, December 30, 1959, 389 U.N.T.S. 69.

country's domestic or foreign partisan politics; (ii) not to favor political parties or competing political candidates; and (iii) to deal with the government in charge.⁵⁰ He also recognized, however, that the World Bank Group "is often called upon to address issues that may, by their very nature, have political undertones and implications"⁵¹ and that "certain political circumstances were recognized as clearly relevant to the [World] Bank's work and could not therefore be ignored by it."⁵² Further, regarding the "exclusive duty to the Bank" requirement, Shihata noted that (i) "officers" should be construed as "more senior staff"⁵³; and (ii) governors and directors need not comply with it because "while required to act for the benefit of the institution and its members as a whole, [they] are also appointed or elected by members and may be expected to express the views of such members."⁵⁴

While the Agreement differs slightly in wording from the IBRD and IDA constituent documents, the rationale behind the inclusion of the provisions on a member country's political affairs and exclusive duty to the respective organization (with their subtle variations) remains the same. Shihata's assessments, therefore, provide guidance on how to interpret all three constituent documents.

3.6. *Interpretation*

The Agreement provides under Article XIII, Section 1 on "Interpretation" as follows:

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the [IDB] or between any members of the [IDB] shall be submitted to the Board of Executive Directors for decision . . .

(b) In any case where the Board of Executive Directors has given a decision under (a) above, any member may require that the question be submitted

⁵⁰ See SHIHATA, *supra* note 48, at 271 (2000).

⁵¹ *Id.* at 220.

⁵² *Id.* at 228.

⁵³ *Id.* at 258.

⁵⁴ *Id.* at 258-59.

to the Board of Governors, whose decision shall be final. Pending the decision of the Board of Governors, the [IDB] may, so far as it deems it necessary, act on the basis of the decision of the Board of Executive Directors.⁵⁵

This provision is complemented by Article VIII, Section (2)(vi), which reserves to the Board of Governors the power to “hear and decide any appeals from interpretations of this Agreement given by the Board of Executive Directors.”⁵⁶ In terms of *how* to interpret the Agreement, the Vienna Convention on the Law of Treaties,⁵⁷ concluded on May 23, 1969, establishes the “General Rule of Interpretation” under Section 3, Article 31, which reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

⁵⁵ Agreement Establishing the Inter-American Development Bank, art. XIII, § 1, December 30, 1959, 389 U.N.T.S. 69.

⁵⁶ *Id.* at art. VIII, § 2(vi).

⁵⁷ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.⁵⁸

According to José Alvarez, a former President of the American Society of International Law and currently Herbert and Rose Rubin Professor of International Law at New York University, the most important rule of treaty interpretation in Article 31 of the Vienna Convention is that of “ordinary meaning” of the text.⁵⁹ C.F. Amerasinghe,⁶⁰ however, points out that the process of interpreting IGOs’ constituent documents is not without challenges:

[W]hen it comes to the choice of rules or principles to be applied in a particular set of circumstances, that choice is dependent on so many variables and imponderables that there can be serious disagreement and the answer to a problem of interpretation may appear subjective. Not only, for example, is there very often disagreement on whether the meaning of a text is clear or ambiguous, whether a particular meaning is the natural or plain meaning, what is the object and purpose of a document or what was the intention of the framers underlying the terms used, but interpreters may differ also, inter

⁵⁸ *Id.* at art. XXXI, § 3.

⁵⁹ JOSÉ ÁLVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 76 (2005).

⁶⁰ Chittharanjan Felix Amerasinghe, a Sri Lankan international legal advisor and PhD in International Law from Cambridge University, worked as counsel at the World Bank’s Legal Department and then as a judge at the United Nations Administrative Tribunal.

alia, on whether a textual interpretation should be adopted, whether a meaning should be given in the light of the object or purpose of a text to the exclusion of the plain and natural meaning or whether the intention of the parties to or framers of the instrument should be recognized at the expense of what may be regarded as the natural or plain meaning. Thus, much may be left to the preferences of the interpreter in terms of the goals sought to be achieved. More so than in other areas of the law, the end may determine the means adopted and the principle of interpretation chosen and its implementation may depend on the choice of the policy goal to be achieved.⁶¹

While the relevant Agreement provisions, the Vienna Convention's Article 31, and Shihata's assessments provide a framework as to who should interpret the Agreement and how to interpret it, it is also clear that an IGO's interpretation of its constituent document may depend on voting majorities and available policy goals.⁶²

4. APPLICABLE PRACTICE?

While the Basic Documents, and especially the Agreement as the IDB's constituent document, lay out the organization's governing legal framework, its practices offer another source of law worth considering when assessing Mr. Guaidó's letter. Amerasinghe explains the complementarity between the different sources of law as follows:

In general, the law relating to a particular organization will flow basically from conventional law, namely the constitution of that organization. The practice of organizations based on legal opinions of the legal advisers of the organizations and decisions taken by their organs will especially fill out or even expand constitutional texts, while customary inter-

⁶¹ AMERASINGHE, *supra* note 36, at 32.

⁶² *See id.* at 38.

national law and even general principles of law may be relevant to the interpretation of texts.⁶³

While it is the practice for IDB member countries to appoint Governors through the issuance of rather straightforward communications, as per the Agreement's Article VIII, Section 2(a),⁶⁴ there is no established practice at the IDB on how to address Governor appointments when there are competing claims of legitimate government in the appointing member country. However, other practices could still be relevant in assessing whether to recognize Dr. Hausmann's appointment, who should make that determination and on what grounds. Such is the case of membership practices and those related to politically contentious events in member countries.

In terms of IGOs' membership practices, Duxbury sheds light on the matter by assessing whether they are driven by legal or political criteria:

In focusing on the provisions in constituent instruments of international organisations, the impression may have been given that although the formation of such organisations is the result of political processes, the analysis of constitutional instruments and practice is essentially a legal procedure. However, the resolution of membership issues is a result of both political and legal factors. While the founding document of an international organization may define the legal criteria to be fulfilled by applicant states, political factors, including ideology and the recognition policies of existing members, have a role to play in determining states' voting behavior in membership decisions. As membership decisions are rarely, if ever, subject to judicial review, there is little jurisprudence on the interpretation of membership provisions and the interplay between legal and political factors.⁶⁵

⁶³ *Id.* at 19-20.

⁶⁴ *See* Agreement Establishing the Inter-American Development Bank, art. VIII, §2(a), December 30, 1959, 389 U.N.T.S. 69.

⁶⁵ DUXBURY, *supra* note 15, at 23-24.

As for politically contentious events, the Honduran President Manuel Zelaya's⁶⁶ ouster from office in 2009 by that country's armed forces⁶⁷ offers an example of the IDB's favored approach. It opted to temporarily withhold any new loans to Honduras⁶⁸ and to monitor the situation from afar. Notably, other IGO organs unanimously condemned the events in Honduras, including the General Assembly of the Organization of American States⁶⁹ (the "OAS")—who shares almost the same regional membership with the IDB—and the General Assembly of the United Nations⁷⁰ (the "UN").

This approach reveals the IDB's interest in distancing itself from politically contentious events until they have been sorted at the national level, ideally with the unanimous endorsement of its member countries and of other IGOs (including those with political mandates). However—and unlike with the Venezuela case—the IDB did not need to assess the appointment of a Honduran Governor at the time. Further, in Venezuela's case, the IDB had already suspended new loans—prior to receiving Mr. Guaidó's letter—due to the member country's failure to meet its financial obligations.⁷¹ Therefore, the Venezuelan case warranted a different approach.

Given the vacuum in IDB's practices with regard to representation-related matters, the legal and political factors potentially asso-

⁶⁶ Maren Goldberg, *Manuel Zelaya*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Manuel-Zelaya> (last visited Sep. 2, 2019).

⁶⁷ Elisabeth Malkin, *Honduran President Is Ousted in Coup*, N.Y. TIMES (Jun 28, 2009), <https://www.nytimes.com/2009/06/29/world/americas/29honduras.html>.

⁶⁸ Manuel Farias, *IADB says Pausing Loans to Honduras over Coup*, REUTERS (July 1, 2009 4:34 PM), <https://www.reuters.com/article/honduras-iadb/iadb-says-pausing-loans-to-honduras-over-coup-idUSN0151377620090701>.

⁶⁹ Press Release, Organization of American States, OAS Suspends Membership of Honduras (July 5, 2009).

⁷⁰ G.A. RES. 63/301 (June 30, 2009), <https://undocs.org/en/A/RES/63/301>. *General Assembly, Acting Unanimously, Condemns Coup d'État in Honduras, Demands Immediate, Unconditional Restoration of President* (June 30, 2009), <https://www.un.org/press/en/2009/ga10842.doc.htm>.

⁷¹ *Regional Lender IDB Halts new Loans to Venezuela on Payment Delays*, REUTERS (May 22, 2018, 7:15 PM), <https://www.reuters.com/article/venezuela-idb/regional-lender-idb-halts-new-loans-to-venezuela-on-payment-delays-idUSL2N1ST2DF>.

ciated with membership-related matters in IGOs, the *ad hoc* nature of the Guaidó versus Maduro conundrum, and the official statements issued by some IDB member countries, revisiting other IGOs' practices and decisions on the matter is another valuable exercise.

5. COMPARATORS

This section will provide an overview of the approaches that some IGOs have adopted when assessing the representation queries triggered by the Guaidó versus Maduro conundrum. Unless otherwise agreed to by a binding legal agreement, however, decisions and practices of IGOs are usually not enforceable against one another. For example, the Agreement provides that the Secretary General of the OAS could have a role in IDB arbitration proceedings⁷² and the relationship between the UN and the World Bank is governed by an agreement entered into between the two organizations in 1947.⁷³ Nevertheless, IGOs frequently engage with one another to share lessons learned and best practices to avoid pitfalls and work in a somewhat coordinated fashion.

5.1. *Organization of American States*

The OAS General Assembly, through Resolution AG/RES. 2929 (XLVIII-O/18) of June 5, 2018, declared that the electoral process that took place in Venezuela on May 20, 2018, through which Mr. Maduro was allegedly elected for a second term as of January 10, 2019, lacked legitimacy.⁷⁴ The organ argued that the electoral process did not include the participation of all Venezuelan political actors, failed to comply with international standards, and was carried out without the necessary guarantees for a free, fair, transparent, and democratic process.⁷⁵ The General Assembly went as far as urging the thirty-five OAS member countries (twenty-eight of which are also IDB member countries): “[T]o adopt, in accordance with international law and their national legislation,

⁷² Agreement Establishing the Inter-American Development Bank, art. XIII, § 2, December 30, 1959, 389 U.N.T.S. 69.

⁷³ SHIHATA, *supra* note 48, at 799.

⁷⁴ G.A. Res. 2929 (XLVIII-O/18), at 207 (June 5, 2018).

⁷⁵ *Id.*

diplomatic, political, economic and financial measures that they consider appropriate, to contribute to the prompt restoration of the democratic order of Venezuela.”⁷⁶

On January 10, 2019, the OAS Permanent Council issued Resolution CP/RES. 1117 through which it echoed the General Assembly’s previous statements and decided “not to recognize the legitimacy of Nicolas Maduro’s new term as of the 10th of January of 2019.”⁷⁷ Four months later, on April 9, 2019, the Permanent Council issued Resolution CP/RES. 1124 through which it opted to “accept the appointment of Mr. Gustavo Tarre as the [Venezuelan] National Assembly’s designated Permanent Representative, pending new elections and the appointment of a democratically elected government.”⁷⁸ The General Assembly ratified this decision during the OAS’s annual meeting on June 28, 2019, at Medellin, Colombia.⁷⁹

5.2. *International Bank for Reconstruction and Development and International Development Association*

The IDB, IBRD and IDA constituent documents have similar (though not exact) provisions in terms of (i) Governors’ powers and appointment procedures; (ii) admission, suspension and political affairs of member countries; and (iii) treaty interpretation. Moreover, they are all silent on representation-related matters.

David Malpass, elected as World Bank Group President on April 5, 2019,⁸⁰ has reportedly stated that it is up to the organization’s “shareholders,” rather than the organization itself, to make a determination with regard to the competing claims of government

⁷⁶ Press Release, Organization of American States, OAS AS Permanent Council Agrees “to not recognize the legitimacy of Nicolás Maduro’s new term” (January 10, 2019).

⁷⁷ P.C. Res. 1117 (2200/19) (January 10, 2019).

⁷⁸ Press Release, Organization of American States, Permanent Council Accepts Appointment of Designated Permanent Representative of Venezuela’s National Assembly to the OAS (April 9, 2019).

⁷⁹ GIDEON LONG, *Guaidó Representative Recognised at Fractious OAS*, FINANCIAL TIMES, June 28, 2019, <https://www.ft.com/content/1fcaa700-99f3-11e9-9573-ee5cbb98ed36>.

⁸⁰ Press Release, World Bank, World Bank’s Executive Directors Select David Malpass 13th President of World Bank Group (Apr. 5, 2019).

in Venezuela: “As far as the political side, we will be guided by the international community and the views of our shareholders.”⁸¹

5.3. *International Monetary Fund*

While the International Monetary Fund’s (the “IMF”) constituent document also provides for member countries’ discretion as regard to the appointment of Governors and for the Board of Governors to be the organization’s final decision-maker, it does not include an express restriction of interference with member countries’ political affairs like the constituent documents of IDB, IBRD and IDA.

IMF Managing Director Christine Lagarde, nevertheless, echoed Mr. Malpass’s words in a press conference at the start of the 2019 IMF and World Bank spring meetings in Washington, DC when she stated: “It is for our members to indicate which authority they are recognizing diplomatically so we can then follow through.”⁸²

5.4. *United Nations*

Pursuant to Rule 28 of the Rules of Procedure of the General Assembly,⁸³ a Credentials Committee of nine UN member countries examines the credentials of each representative. If a member objects to the admission of a specific representative, Rule 29 thereof provides that the General Assembly decides by a vote. In Venezuela’s case, the Credentials Committee has continued to recognize Mr. Maduro’s representatives.⁸⁴

⁸¹ *World Bank: Shareholders to Decide on Recognizing Venezuela*, FRANCE24 (Apr. 11, 2019, 3:49 PM), <https://www.france24.com/en/20190411-world-bank-shareholders-decide-recognizing-venezuela>.

⁸² Rodrigo Campos & David Lawder, *Venezuela Leadership Issue Still Blocking IMF, World Bank Aid*, REUTERS (Apr. 11, 2019, 9:39 AM), <https://www.reuters.com/article/us-imf-worldbank-venezuela/venezuela-leadership-issue-still-blocking-imf-world-bank-aid-idUSKCN1RN1TH>.

⁸³ Rules of Procedure of the General Assembly of the United Nations, A/520/Rev.17, at 8 (2008), <https://www.un.org/Depts/DGACM/Uploaded%20docs/rules%20of%20procedure%20of%20ga.pdf>.

⁸⁴ Federica Paddeu & Alonso Gurmendi, *Recognition of Governments: Legitimacy and Control Six Months After Guaidó*, OPINIOJURIS (July 18, 2019), <https://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/>.

One instance when the Credentials Committee recognized Mr. Maduro's representative occurred during the Second High-level United Nations Conference on South-South Cooperation,⁸⁵ celebrated on March 2019 at Buenos Aires, Argentina.⁸⁶ Another example of the UN recognizing Mr. Maduro as Venezuela's president (and, therefore, his capacity to appoint representatives) is reflected in the report issued by Dr. Michele Bachelet, in her capacity of United Nations High Commissioner for Human Rights, with the results of her visit to Venezuela on June 2019:⁸⁷

The High Commissioner visited Venezuela from [nineteen] to [twenty-one] June 2019. She met with many stakeholders, including President Nicolás Maduro, the Vice-president, the Minister of Foreign Affairs, high-level officials from seventeen ministries, the President of the National Assembly, and opposition parliamentarians. She also met with the President of the National Constituent Assembly, the Attorney-General, the President of the Supreme Court of Justice and the Ombudsperson. She held meetings with representatives of the Catholic Church, the business sector, universities, students, trade unions, and human rights organizations, approximately 200 victims, the diplomatic community and the United Nations Country Team.⁸⁸

Notwithstanding Dr. Bachelet's report, her predecessor, Prince Zeid Ra'ad Al Hussein, had declared before the Human Rights Council on March 7, 2018, that the human rights context in Vene-

⁸⁵ See *Second High-level UN Conference on South-South Cooperation*, ISSD (Mar. 20-22, 2019), <https://sdg.iisd.org/events/second-high-level-un-conference-on-south-south-cooperation/>.

⁸⁶ Paddeu & Gurmendi, *supra* note 84.

⁸⁷ OHCHR recognizes Mr. Juan Guaidó as President of the Venezuelan National Assembly but not as interim President of Venezuela.

⁸⁸ Office of the U.N High Comm'r for Human Rights, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Bolivarian Republic of Venezuela, A/HRC/41/18, at 2 (July 5, 2019), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18.docx.

zuela did not in any way fulfill minimal conditions for “free and credible elections.”⁸⁹

This section makes clear that while each IGO is subject to its own constituent document, policies and decisions, a pattern emerges when it comes to assessing representation-related matters, in the sense that decisions at IGOs may ultimately be subject to member countries’ votes in the applicable IGO’s organs.⁹⁰ However, argues Amerasinghe, while voting in favor of a representative may signal a member country’s interest in recognizing the appointing government, an IGO’s granting of representation “does not necessarily bind the member States of the organization to recognition of the government concerned”⁹¹

6. CONCLUSIONS

The Guaidó versus Maduro conundrum illustrates the legal and political factors that in-house counsel in IGOs need to identify when addressing representation-related matters resulting from competing claims of legitimate government in a member country. It also demonstrates that there can be overlaps between these factors. After all, as Duxbury highlighted, the decision of whether to accept a member country’s representative may indicate “the attitude of the organization’s members” toward that member country’s government.

In the IDB’s case, receipt of Mr. Guaidó’s letter appointing a representative triggered the institutional need to decide whether to take note of its content –and act accordingly– or disregard it altogether. It also raised the question of who was authorized to make that determination and on which grounds.

The Basic Documents are silent when it comes to representation-related matters and there is no specific IDB practice in that regard. Notwithstanding, the decision to recognize Mr. Guaidó’s representative resulting from the Board of Governors’ votes, fur-

⁸⁹ Office of the U.N High Comm’r for Human Rights, Human Rights Violations in the Bolivarian Republic of Venezuela: A Downward Spiral with no end in Sight, at 5 n.24 (June 2018), https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018_EN.pdf.

⁹⁰ See Paddeu & Gurmendi, *supra* note 84.

⁹¹ AMERASINGHE, *supra* note 36, at 126-27.

ther supported by a prior endorsement from the Board of Directors, satisfies the Agreement to the extent that it is grounded on the Board of Governors being the IDB's final decision-maker, including as regard to membership-related matters.

In-house counsel for IGOs should be aware that, while institutional decisions regarding membership and representation should be framed within the applicable legal framework and applicable practices, they are also likely to be driven by political interests. Further, and regardless of potential tensions between the legal framework and political interests, in-house counsel at IGOs have a duty to provide legal support and assist the respective organs in navigating complex challenges. Such support should minimize both legal and reputation risks while avoiding disruptions to the IGOs' day to day operations.

However, in-house counsel should not provide, and should not be expected to provide, political advice. Staying abreast of political events and agendas, both within the IGO and in the respective member countries, is therefore essential for in-house counsel to identify and differentiate legal from political factors.