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THE WORLD BANK: LEGAL ASPECTS

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Legal Vice Presidency
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INTRODUCTION

The International Bank for Reconstruction and Development (Bank or IBRD) is a complex organization. By the treaty that established it (Articles of Agreement), it is an intergovernmental organization. Its mission is the reduction of poverty. From a financial standpoint, the Bank is structured as a corporation. In addition, under its agreement with the United Nations, the Bank is a specialized agency of the United Nations. The molding of a corporate financial structure into an intergovernmental organization with a developmental purpose has made the Bank a legally complex organization that conducts its activities under both public international law and domestic law. At the same time, the Bank's Articles, including the privileges and immunities afforded to the Bank by its members, take precedence over domestic law.

This booklet briefly describes the main legal aspects of the Bank's governing structure and activities. Part I deals with the institutional setting and describes the organizations comprising the World Bank Group, the Bank's governing organs and its relations with outside parties. Part II describes briefly the legal aspects of the Bank's lending operations. Part III deals with the legal aspects of the Bank's financial operations. Part IV reviews the legal aspects of administration and human resources work. Part V deals with the International Centre for the Settlement of Investment Disputes (ICSID). Except for the short description of the World Bank Group in Part I and Part V on ICSID, the booklet deals almost exclusively with the IBRD and the International Development Association.

I. INSTITUTIONAL MATTERS

A. The World Bank Group

The World Bank Group is composed of the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

IBRD was established at the Bretton Woods Conference of July 1944 originally to assist in the reconstruction of economies of its members destroyed by war, and in the development of productive facilities and resources in its less developed member countries. Today, the Bank's overarching objective is to fight poverty. As stated by its Executive Directors:

> [The Bank] has embraced the Millennium Development Goals and has a well-developed strategy for achieving them. This strategy is based on two main pillars: building the climate for investment, jobs, and sustainable growth; and investing in poor people and empowering them to participate in development. The Bank undertakes poverty reduction at both the country and global levels through loans made by IBRD and IDA and through partnerships with other organizations.[1]

IFC was established in 1956 to assist in the economic development of its member countries by promoting the growth of the private sector in their economies. IFC provides loans and makes equity investments without government guarantees.

IDA was established in 1960 to provide financing to further development in the less developed areas of the world included in its membership. Its operations and objectives are similar to the Bank's except that the financing it provides is on highly concessional terms.

MIGA was established in 1988 to provide guarantees against the non-commercial, or political, risk to foreign investors in the developing countries which are members of MIGA. It also offers investment promotion services.

ICSID is the only non-financial member of the World Bank Group. Established in 1966, its purpose is to administer arbitration and conciliation proceedings conducted under the Convention on Settlement of Disputes between States and Nationals of other States (see Part V for details).

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[1] 2002 Annual Report, p. 11.

B. Membership

Membership in the IBRD is open to countries that are members of the International Monetary Fund (IMF). Membership in the other organizations of the Bank Group is open to any Bank member country. In practice, many countries have applied for membership in the IMF, the IBRD and its affiliates at the same time, and the applications have been processed simultaneously.

The Bank has 187 members, as does the IMF. In the course of 1992 and 1993, the number of members increased considerably, as Switzerland, the fifteen former Soviet republics, as well as the Marshall Islands and the Federated States of Micronesia became members. Membership in the Bank is now almost universal. Only a handful of countries are not members, among which are Cuba and the Democratic People's Republic of Korea (North Korea).

The membership process normally starts with an application (usually at the same time as the country applies for membership in the IMF). The applicant's capital subscription is calculated on the basis of its quota in the IMF, and a resolution incorporating the terms and conditions of membership is transmitted to the Board of Governors for approval. In two highly unusual cases, the Executive Directors have decided that States succeeding to another State which ceased to exist as a member could succeed to the membership of the predecessor State in the Bank without having to go through the admission procedures, if certain conditions were met. It is in this manner that in 1993, the Czech Republic and the Slovak Republic succeeded to the membership of the Czech and Slovak Federal Republic and the five successor States to the former Socialist Federal Republic of Yugoslavia succeeded to the membership of that country after 1993.

C. The Board of Governors

1. Appointment

Each member of the Bank appoints a Governor and an Alternate. If the member of the Bank is also a member of IFC and/or IDA, the appointed Governor of the Bank and his Alternate serve *ex-officio* as Governor and Alternate on the IFC and/or IDA Boards of Governors. MIGA Governors and Alternates are appointed separately. For ICSID, the Bank Governor and Alternate also serve as a member and alternate on the Administrative Council of ICSID, in the absence of a contrary designation.

2. Powers

Under the Articles of Agreement, "all the powers of the Bank shall be vested in the Board of Governors." By a provision in the Bank's By-Laws, the Board of Governors has delegated to the Executive Directors all its powers, except those reserved to it under the Articles, or specifically mentioned in the Articles as pertaining to the Board of Governors.

Powers specifically reserved by the Articles for the Governors are those to admit and suspend members, to increase or decrease the authorized capital stock, to determine the distribution of the net income of the Bank, to decide appeals from interpretations of the Articles by the Executive Directors, to make formal comprehensive arrangements to cooperate with other international organizations, and to suspend permanently the operations of the Bank. Other matters specifically mentioned in the Articles as requiring decision by the Board of Governors include increasing the number of elected Executive Directors.

The Board of Governors is also assigned responsibility for approving amendments to the Articles of Agreement of the Bank. After such approval, the amendment must be accepted by three-fifths of the members having 85 percent of the total voting power before it becomes effective. Amendments modifying the right to withdraw from the Bank, preemptive rights or the limit on calls on capital must be accepted by all members. The Bank's Articles were amended in 1965 to permit the Bank to make loans to IFC. A 1989 amendment increased from 80 percent to 85 percent the special majority of the total voting power of members required for acceptance of further amendments of the Articles. The Articles of Agreement of IDA have never been amended.

3. Annual Meetings

The Articles of Agreement of the Bank provide that the Board of Governors shall hold an annual meeting. The time and place of the meetings are normally determined by the Governors, but the By-Laws of the Bank provide that if the Executive Directors, because of special circumstances, deem it necessary to do so, they may change the time and place of the meeting. Annual Meetings for IDA, IFC and ICSID are required to be held in conjunction with those of the Bank. MIGA is required to have an annual meeting, not necessarily in conjunction with the Bank.

The required regular business at the Annual Meeting consists of:

(i) the consideration by the Governors of the annual statement of the Bank's accounts, submitted by the Executive Directors based on an annual audit;

(ii) the presentation to the Governors by the Executive Directors of the Annual Report containing an audited statement of the Bank's accounts and the budget as approved by the Executive Directors; and

(iii) the selection of the Chairman and Vice-Chairmen of the Board of Governors. Other resolutions (such as allocation of net income) may also be adopted at the Annual Meetings.

Other institutions of the Bank Group have similar requirements for their Boards of Governors (or equivalent body) to consider their respective annual reports, annual financial statements and annual budgets at the Annual Meetings and for the selection of Chairman and Vice-Chairmen.

Meetings of two committees of the Board of Governors, the Development Committee and the Joint Procedures Committee, normally take place at the time of the Annual Meetings. Regular elections of the Executive Directors take place every other year, normally in connection with the Annual Meetings.

4. Standing Committees

There are three standing committees of the Board of Governors: (i) the Joint Ministerial Committee of the Boards of Governors of the Bank and the IMF on the Transfer of Real Resources to Developing Countries (known as the Development Committee); (ii) the Joint Procedures Committee; and (iii) the Joint Committee on the Remuneration of Executive Directors and their Alternates. As the names of these Committees indicate, they are joint committees of the Boards of Governors of the Bank and of the IMF.

(a) Development Committee

The Development Committee was established in 1974 by parallel resolutions of the Boards of Governors of the Bank and the IMF.[2] It was established as a ministerial forum representing industrial and developing countries to provide a focal point in the structure of international economic cooperation for formation of a comprehensive overview of diverse international activities in the development area, for efficient and prompt consideration of development issues, and for coordination of international efforts to deal with problems of financing development. The Development Committee is expected to maintain an overview of the development process, advise and report to the Boards of Governors of the Bank and the Fund on all aspects of the broad question of the transfer of real resources to developing countries, and make suggestions for consideration by those concerned regarding the implementation of its conclusions.

In a 1993 legal memorandum, the General Counsel commented on the mandate of the Development Committee as follows:

> The Committee has no decision-making power. This stems from its mandate, as set out above, as well as from the fact that the decision-making organs of the Bank are defined in the Articles of Agreement…. This is also a reflection of the appropriate role of committees of the Board of Governors in general. It may be noted that other provisions of the resolutions confirm the role of the Committee, as a forum for exchange of views and for making recommendations or suggestions. For example, its relationship with the

[2] Resolution No. 294, "Establishment of Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries," adopted on October 2, 1974, as amended by Resolution No. 479, "Amendment of Board of Governors Resolution No. 294," adopted on April 23, 1993.

> Board of Governors is one of advising it and reporting to it. … Consistent with the position that the Committee has no decision-making power, the resolutions also provide that voting will not be used to arrive at substantive decisions. The resolutions specify that in reporting any suggestions or views of the Committee, the Chairman is to seek to establish the sense of the meeting, and in the event of a failure to reach a unanimous view, all views are to be reported, and the members holding such views are to be identified.[3]

The Committee is required to meet at the time of the Annual Meetings of the Bank and the IMF, and traditionally, also meets in the spring of each year. The Development Committee meetings usually take place in conjunction with the meetings of the International Monetary and Financial Committee, which is an IMF Board of Governors committee and not a joint committee.

The reports of the Development Committee's meetings are published to the press as communiqués. Papers considered by the Development Committee are first reviewed by the Executive Directors of the Bank and the Executive Board of the IMF, meeting in the Committees of the Whole, who generally also agree that these papers be made publicly available on the Development Committee website.

(b) Joint Procedures Committee

The Joint Procedures Committee deals with any issues that may arise regarding the conduct of Annual Meetings. Each year, the Boards of Governors of the Bank and the IMF determine the composition of the Joint Procedures Committee for the period from the close of Annual Meetings to the close of the following Annual Meetings. The Committee is available for consultation at the discretion of the Chairman of the Boards of Governors by correspondence or by convening. MIGA has its own separate procedures committee, whose membership is broadly similar to that of the Bank's Joint Procedures Committee.

During the Annual Meetings, the Committee considers the items of business to be reported to the Boards of Governors. The recommendations of the Joint Procedures Committee regarding those items of business are submitted in reports to the Boards of Governors, who then invariably approve those reports without discussion in the plenary session of the Annual Meeting.

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[3] "The Role of the Development Committee—A Legal Analysis," Memorandum of the Vice President and General Counsel dated November 22, 1993. Footnotes Omitted.

(c) Joint Committee on the Remuneration of Executive Directors and their Alternates

Executive Directors and their Alternates are entitled to remuneration in the form of salary and benefits at annual rates to be determined from time to time by the Board of Governors.[4] For that purpose, the Chairmen of the Boards of Governors of the Bank and the IMF appoint a three-person Joint Committee on the Remuneration of Executive Directors and their Alternates (JCR), composed of one of the Chairmen and two former Governors or Alternate Governors. The JCR considers all matters affecting the remuneration and other benefits of the Executive Directors and their Alternates annually. The report of the JCR, together with any recommendations therein, is submitted to the Board of Governors for a vote without meeting.

5. Voting Without Meeting

The By-Laws provide a procedure for obtaining a Board of Governors' vote without a meeting on matters presented to it by the Executive Directors.[5] Many matters, such as the terms of admission of new members and changes in salaries of the Executive Directors and the President, are handled by this procedure.

D. The Executive Directors

1. Appointment and Election

Under the Articles of Agreement of the Bank, five Executive Directors are appointed by the members with the five largest number of shares subscribed, currently the United States, Japan, Germany, France and the United Kingdom. The other Executive Directors are elected by the other members. Increases in the number of elected Executive Directors are conditioned on a decision of the Board of Governors by a majority of 80% of the total voting power. Before November 1, 1992, there were 22 Executive Directors, 17 of whom were elected. In 1992, in view of the large number of new members that had joined the Bank, the number of elected Executive Directors was increased to 19. This increase allowed the establishment of two new seats, one taken up by Russia, and the other by a new constituency including Switzerland and some of the former Soviet states, bringing the total number of Executive Directors to 24. In 2009, the number of elected Executive Directors was increased to 20, bringing the total to 25, in order for the Bank's member countries in Sub-Saharan Africa to be represented by three instead of two Executive Directors.

Executive Directors of the Bank serve *ex-officio* as Executive Directors of IFC and IDA, as long as the country that appoints them, or any one of the countries that have

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[4] IBRD Articles, Article V, Section 2(h); IBRD By-Laws, Section 13(e)(i).

[5] IBRD By-Laws, Section 12.

elected them, is a member of IFC and IDA. All members of the MIGA Board of Directors are elected.

2. Role of Executive Directors

Under the Articles of Agreement of the Bank, "[t]he Executive Directors shall be responsible for the conduct of the general operations of the Bank, and for this purpose, shall exercise all the powers delegated to them by the Board of Governors." The IDA Articles contain a similar provision. One of the most important powers given to the Executive Directors by the Articles of Agreement is the power to interpret the Articles. Interpretations by the Executive Directors, unless overruled by the Board of Governors, are binding on Bank member countries. The Executive Directors frequently made use of this power in the early years of the Bank. Since July 1964, only two interpretations had been made. In October 1986, the Articles were interpreted in respect of the valuation of the Bank's capital. In July 2010, the Articles were interpreted to permit France and the United Kingdom to appoint Executive Directors when, as a result of a shareholding realignment, both members will hold equal number of shares and both will be the fifth largest shareholders in the Bank. This interpretation will allow appointment of six Executive Directors as a temporary measure until the next shareholding review in 2015.

The Executive Directors of IDA have similar powers of interpretation, which they have formally exercised three times. In 1987, they decided, by way of a formal interpretation, on the valuation of initial subscriptions to IDA in the aftermath of the Bank's 1986 decision on the valuation of its capital. Further, in early 2000, they determined by formal interpretation that debt relief through the forgiveness of portions of debt service on credits as they fall due is consistent with the IDA Articles. In March 2006, the Executive Directors formally interpreted IDA's Articles as permitting total debt forgiveness and determined that such an interpretation to permit total debt forgiveness would be consistent with IDA's fundamental features. Otherwise, the Executive Directors of both institutions often agree on the tacit interpretation of the Articles by accepting their application in a certain way or by concurring with the interpretation submitted to them by the General Counsel.

In the discharge of his or her duties, an Executive Director fulfills a dual function, as an official of the Bank and as a representative of the member country or countries which (has) have appointed or elected him or her. An Executive Director owes his or her duty both to the Bank and to his or her "constituency." The Executive Director is not to act simply as an ambassador of the countries of his or her constituency, and is expected to exercise his or her individual judgment in the interest of the Bank and its members as a whole. The Executive Director's relations with a country that has appointed or elected him or her cover all aspects of the Bank's relations with that country. It is a two-way relationship, in which the Executive Director is expected to inform the country or countries he or she represents of the issues before the Board (and provide such views and recommendations as the Executive Director deems appropriate), and to take into account the views of such country or countries in coming to his or her position on issues. In the

course of these exchanges, the Executive Director would normally offer advice to his or her constituency on the full range of matters involving the Bank. One of the areas in which such advice can be given relates to the Bank's lending policies. An Executive Director can play a particularly useful role in explaining the Bank's policies and procedures, especially to countries that have recently become members of the Bank.

The unique position of the Executive Directors is based on the original understanding underlying the provisions of the Articles of Agreement of the Bretton Woods institutions and is supported by consistent practice. On the one hand, the position of Executive Directors is different from that of the President, officers and staff of the Bank who, under Article V, Section 5(c), "owe their duty entirely to the Bank and to no other authority." In contrast, Executive Directors are not exclusively representatives of the countries in their constituencies because they are also officials of the Bank.

Neither the Executive Directors nor their staff actively participate in negotiations of lending agreements between a prospective borrower and the Bank. Such active participation would not be in line with the division of responsibilities between the Management, which prepares loan proposals and submits them to the Executive Directors, and the Executive Directors who, as a Board, have final authority to approve these proposals. Of course, Executive Directors may provide their advice to delegations from the countries of their constituency, taking into account the interests of the borrower concerned and those of the Bank as a whole. On occasion, staff of Executive Directors' offices may be present in negotiations, but, for the reasons noted above, they attend only as observers.

3. Relationship with the President

The relationship between the Executive Directors and the President has evolved over the years. Only very general guidance is given in the Articles of Agreement as to their respective roles. The Articles state that "[t]he Executive Directors shall be responsible for the conduct of the general operations of the Bank."[6] The role of the President is described as follows:

> The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary business of the Bank. Subject to the general control of the Executive Directors, he shall be responsible for the organization, appointment and dismissal of the officers and staff.[7]

The Bank's first President, Eugene Meyer, resigned after six months in office, partly because of difficulties in working with the Executive Directors. His successor, John McCloy, accepted the post only after an understanding was reached with the Executive

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[6] Article V, Section 4(a).

[7] Article V, Section 5(b).

Directors as to their respective roles. The arrangements, which are still observed, established a framework under which "[t]he Executive Directors are responsible for the decision of all matters of policy in connection with the operations of the Bank, including the approval of loans," and "[t]he Management is responsible for developing recommendations on all matters of policy requiring decision by the Executive Directors."

4. Relationship with Staff

On occasion, the question of the proper relationship between Executive Directors and staff has been raised. The Articles of Agreement of both the IBRD and IDA, include the following provision:

> The President, officers and staff of the Bank [the Association], in the discharge of their offices, owe their duty entirely to the Bank [the Association] and to no other authority. Each member of the Bank [the Association] shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.[8]

In a 1990 legal memorandum, the General Counsel commented on this provision as follows:

> The staff should not build their assessment on the possible reaction of any Bank member to their analysis. Interference by Bank members in the staff analysis would form an undue attempt to influence the staff's discharge of their international duty and is explicitly prohibited under the Articles. In particular, the Bank should not take a position for or against lending to a particular member or for a particular project simply because such member or project is likely to be favored or opposed by other members. Each Executive Director is free to vote on loan proposals as he or she may deem fit; he or she is not to interfere, however, with the way the President, officers and staff prepare such proposals for submission to the Board. Consultation with individual Executive Directors on proposed loans or policies should not be taken as an occasion to impose a position on the President or staff as to whether the proposal should be made or on the specific features of such a proposal. The President should be able to decide what position to take in light of the consultation, realizing that it is the Board as a whole which will finally decide on the matter. Attempts by a member or members to impose a certain position before a specific proposal was submitted to the Board in a formal meeting would not, in my view, be

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[8] Article V, Section 5(c) of the IBRD Articles and Article VI, Section 5(c) of IDA's Articles.

consistent with the Articles' requirement of non-intervention in the discharge of the duties of the President and staff. [9]

The Executive Directors, acting as the policy-making organ of the Bank, set out the Bank's policies and provide direction and general control of the Bank's operations and organization. For this reason, Executive Directors are entitled to seek clarification from Management and staff on any matter related to the Bank and may question in the course of Board meetings the positions taken by Management and staff. However, in view of the representative capacity of the Executive Directors, none of them, acting individually or in a group (other than the Board as such) is, in the view of the General Counsel quoted above, authorized under the Articles to influence or attempt to influence the Bank's Management and staff in the discharge of their duties, including the preparation of loan proposals.

5. Procedures and Voting Power

In the Bank, each appointed Executive Director casts the number of votes of the member country that appointed him or her. Each elected Executive Director casts the votes of the country or countries that elected him or her. IDA has a distinct voting power structure, based on a complex formula, which takes into account the contributions members make to its replenishments. Except in a few cases, all decisions of the Board of Executive Directors of the Bank and IDA are taken by a majority of the votes cast. In fact, actual votes are rare, and in most cases, the Chairman announces the decision on the basis of the statements made by the Executive Directors in the course of the discussion.

According to the Executive Directors' Rules of Procedure, the President or, in his absence, one of the Managing Directors, chairs meetings of the Executive Directors. The President has broad discretion in calling meetings, preparing the agenda and conducting the meetings.

Under the Rules of Procedure, an Executive Director may obtain a postponement of not less than two days on action by the Board on any matter, but no further postponement under this provision may be made if requested by other Executive Directors. In practice, the postponed item is usually considered at the next meeting but the President may place it on the agenda of any other future meeting.

In the area of the Bank's operations, it is the practice that Management initiates lending and borrowing proposals, and that the Executive Directors consider each loan proposal individually. The Executive Directors also discuss the broader issue of the Bank's lending strategy towards each of its borrowing member countries, as set out in the Bank's "country assistance strategy." To streamline Board consideration of individual operations

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[9] "Issues of 'Governance' in Borrowing Members: The Extent of their Relevance under the Bank's Articles of Agreement," Memorandum of the Vice President and General Counsel dated December 21, 1990.

and to reserve as much time as possible for projects that require a full discussion, development policy lending and debt reduction operations, operations connected with the country assistance strategy discussions, and other unusual projects, are considered by the Board under normal procedures. All other operations are taken up under streamlined procedures, under which the operations appear on the agenda, but regional management and staff are not requested to attend the meeting. If an Executive Director wishes instead to have a general discussion or raise an issue under regular procedures, notice needs to be given by that Executive Director three working days in advance of the meeting.

6. Standing Committees

Article V, Section 4(i) of the Bank's Articles of Agreement provide that "[t]he Executive Directors may appoint such committees as they deem advisable." The function, structure and terms of reference of the standing committees of the Board were reviewed in depth in 1993-94 by an Ad Hoc Committee of Executive Directors. The Committee's report (the Maehlum Report), which was endorsed by the Board, states that the overall objective of committees of the Executive Directors should be to strengthen the efficiency and effectiveness of the Board in discharging its responsibilities. To meet this overall objective, committees need to carry out work programs that (i) facilitate the process of consensus-building and decision-making in the Board, and (ii) assist the Board in discharging its oversight responsibilities.

In October 2000, an Ad Hoc Committee on Board Policies and Procedures reviewed the functions of the standing committees. The Committee's report (the Toure Report) noted that the committees serve two broad purposes: one is to allow discussion of matters that do not require a Board meeting but are useful in maintaining a continuing dialogue between the Board and management, particularly with respect to monitoring performance, as well as building staff awareness of the contribution the Board makes to institutional objectives and performance. The other purpose is to prepare policy proposals for full Board discussion by vetting issues, highlighting significant points, and offering some guidance for the direction of the subsequent Board discussion.

Board committees have no decision-making power (except with regard to procedural and administrative matters) and committees do not vote on substantive issues. Instead, each committee submits reports and recommendations to the full Board. In case members of committees take different positions, the committee normally reports all views and indicates the degree of support received by each. The Board does not delegate decision-making power to the committees, because the weighted voting system under which Board decisions are taken only works if all Executive Directors may participate in the decision.

The Board currently has five standing committees: Audit, Budget, Committee on Development Effectiveness (CODE), Committee on Governance and Executive Directors' Administrative Matters (COGAM), and Human Resources. In July 2009, the Board

adopted a Resolution which sets forth Committees' Terms of Reference, Rules of Procedure and guidelines for appointment of Committee members.

7. Access to Bank Information

Executive Directors have access to information they require in order to discharge their responsibilities as (i) representatives of the member countries that have appointed or elected them, and (ii) members of the Bank's Board of Executive Directors.

In May 2002, Bank Management issued an "Information Note on Access to Information by the Executive Directors" (the Information Note), which set out (i) information available to individual Executive Directors on countries they represent, (ii) information available to all Executive Directors as members of the Board, (iii) constraints on availability of certain types of information, and (iv) procedures for channeling additional information requests from Executive Directors.[10]

(a) Information Available to Individual Executive Directors on Countries They Represent

Access to information by individual Executive Directors is discussed in BP 17.30, *Communications with Individual Executive Directors,* October 1999. Under BP 17.30, Executive Directors are provided with appropriate, timely information about significant activities and issues concerning the country or countries he or she represents. Examples of such information include: (i) strategy documents which have been formally transmitted to the country authorities, including draft Country Assistance Strategies (CASs) and draft Transitional Support Strategies (TSSs); (ii) framework and administrative agreements and funding proposals approved by the Bank relating to trust funds involving their constituents as donors or as recipients; (iii) notices (on a monthly or quarterly basis) regarding prospective Bank missions or visits to the constituent countries; (iv) notices regarding impending visits to the Bank of key delegations and officials from the constituent countries; (v) copies of documents related to important matters sent to officials of the countries that an Executive Director represents; and (vi) copies of correspondence from or to officials of their countries, as well as the substance of important discussions with country officials. These matters were addressed in a memorandum, dated May 14, 2002, from the President's Office to all Bank staff.[11]

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[10] Information Note on Access to Information by the Executive Directors, dated May 14, 2002, annexed to Official Memorandum from Thomas A. Bernes, Deputy Secretary, to Executive Directors and Alternates dated May 15, 2002 (OM2002-0070).

[11] This memorandum is attached to the Information Note as Attachment 1. The memorandum reminds Bank staff of their responsibilities under BP 17.30 and provides an illustrative list of the most important types of information and documents to be provided to the Executive Directors pursuant to BP 17.30 concerning the countries they represent.

(b) Information Available to All Executive Directors as Members of the Board

Much of the information available to all Executive Directors as members of the Board is contained in periodic reports and in standard documents—such as CASs, Project Appraisal Documents (PADs), program documents, Implementation Completion Reports, sector strategy papers, and so on—which are routinely shared with all Executive Directors (i.e., for Board review, discussion, and approval, or for information). Executive Directors also have access to all information available to staff on the Bank's intranet, subject to certain minimum constraints related to the integrity of the deliberative process within the Bank and Management's decision making processes.[12]

(c) Constraints on Availability of Certain Types of Information

As explained in the Information Note, the effective functioning of the Bank requires that access by Executive Directors and other Bank staff to the following types of information be restricted:

(i) Documents and information obtained by the Bank on the basis of confidentiality (such documents or information cannot be released even within the Bank without the approval of the party that provided them).

(ii) Documents and information owned by another party and held by the Bank (such documents or information cannot be released without the permission of the owner of such information or documents).

(iii) Staff records (except for very limited basic data for employment verification and visa status) or medical records (such records cannot be disclosed inside or outside the Bank without the staff member's consent).

In addition, over the years, the Executive Directors as a group decided not to seek access to certain types of information out of concern that if they were shared with all Executive Directors, they could have a deleterious impact on the Bank's internal decision making process or on the concerned member country. These types of information include: (i) internal documents written by staff to their colleagues; (ii) drafts of various documents such as Economic and Sector Work (ESW), CASs, PADs and program documents; (iii) analyses of country creditworthiness and country risk ratings; (iv) project-specific information on portfolio management; (v) project-specific management information on work programs, budgets and the likes; (vi) project status reports and related ratings; (vii) unpublished and confidential information obtained by staff during the course of project appraisal; and (viii) staff projections not made available in standard documents.

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[12] An illustrative list of the most useful intranet sites for Executive Directors is set out in Attachment 2 to the Information Note.

(d) Procedures for Channeling Additional Information Requests from Executive Directors

Additional requests for information by Executive Directors are directed to the Corporate Secretariat (SEC). In responding to such requests, SEC consults with appropriate Bank units and takes into account such factors as the need to protect confidential information and the Bank's internal decision making process.

8. Disclosure of Bank Information by Executive Directors

Under the Board's Rules of Procedure, the proceedings of the Board are, confidential, unless disclosure is approved by the Board. This is also reflected in the Bank's Policy on Access to Information (AI Policy). Consequently, most papers prepared for discussion or consideration by, or for information of, the Executive Directors or Board committees are normally made available to the public at the end of the Board's deliberative process, unless the papers are classified as "Confidential" or "Strictly Confidential," or unless the Vice President concerned (or the Board) has authorized the exercise of the Bank's prerogative to restrict access because it has been determined that disclosure is likely to cause harm that outweighs the benefits of disclosure. (See Section E.4. below).

In addition to papers that are circulated to the Board, Board proceedings also include statements of the Executive Directors, summaries of Board discussions, and information in documents prepared in the offices of Executive Directors that contain information derived from non-public Board documents and proceedings. Under the AI Policy, the following Board records, which are prepared after July 1, 2010, are made publicly available at the end of the Board's deliberative process: minutes of the Board or Board Committee discussions, the Chairman's Summings-up of Board meetings and Committee of the Whole Meetings, Summaries of Discussions related to Board meetings, Reports to the Board from its Committees (except the deliberative portion), and Annual Reports of Board Committees. Certain Board papers (e.g., project appraisal documents, program documents, country assistance strategy papers, and operational policy and sector strategy papers) may be disclosed before Board discussion in certain circumstances. Other Board papers and records, which are not made publicly available immediately following the end of the Board's deliberative process, may be declassified and disclosed according to the declassification schedule set out in the AI Policy. While the Executive Directors' statements are normally eligible for declassification and disclosure only after a passage of time as set out by the AI Policy, governments of member countries are free to release statements of their respective positions on matters considered by the Board. Such public statements should not contain information that is confidential, or yet public according to the AI Policy.

Executive Directors routinely share non-public Board documents and their contents and confidential information on Board proceedings with government authorities, subject to the requirement that such documents and information have a restricted

distribution and may be used by recipients only in the performance of their official duties. The contents may not otherwise be disclosed without World Bank authorization. Recipient government authorities have an obligation to maintain the confidentiality of restricted Board documents and other confidential information from Bank sources, and to make such documents or information available to others only with the Bank's authorization and subject to the provisions of the Bank's disclosure policy. A member country's release of documents or information that should not be disclosed under the Bank's policy would be inconsistent with its obligations as a member of the Bank.

Executive Directors' offices generate a variety of other materials, including written statements, speeches, office annual reports, constituency newsletters, and reports to ministries. The disclosure of such material—through electronic or other means—is also governed by the Bank's disclosure policy, as described above and further in Section E.4. below.

9. Code of Conduct

In August 2003, the Executive Directors approved a Code of Conduct for Board Officials (Code of Conduct) which set forth principles and ethical standards for the Executive Directors, Executive Director Designates, Executive Director Post-Designates, Alternate Executive Directors, Alternate Executive Director Designates, Alternate Executive Director Post-Designates, Temporary Alternate Executive Directors, and Senior Advisors to Executive Directors (collectively, "Board Officials") in connection with, or having a bearing upon, their status and responsibilities in the organizations of the World Bank Group. The Code of Conduct provides that, as these officials are entrusted with responsibilities as prescribed in the Articles of Agreement, By-Laws, and related documents of the organizations, their personal and professional conduct must comply with the standards and procedures set forth in the Code of Conduct. The Code of Conduct was revised in October 2007.

Pursuant to the Code of Conduct, the Board has established an Ethics Committee to address ethics matters concerning Board Officials in order to ensure sound governance pursuant to the Code of Conduct. The Ethics Committee has the authority to advise Board Officials or the President on matters related to conflict of interests, annual disclosures, or other ethical aspects of conduct in respect of Board Officials or the President, and to investigate alleged misconduct by Board Officials or the President.

E. The Bank's Relationship with Outside Parties

1. The IMF

As the Bank's "sister" Bretton Woods institution, the IMF is the UN specialized agency which is the closest to the Bank. Under the Bank's Articles of Agreement, a country must become a member of the IMF before joining the Bank. Apart from this provision of

the Articles, however, the Bank's relationship with the IMF is not governed by formal agreements. Administrative arrangements between the two organizations cover joint services, such as the Joint Library, the Joint Secretariat of the Annual Meetings and Health Services.

In the area of financial assistance to their developing and transition member countries, the Bank's President and the IMF's Managing Director agreed to broad guidelines for collaboration in April 1989. Additional guidelines were issued in April 1992 with respect to Bank-IMF collaboration in the countries of the former Soviet Union. Taken together, these guidelines recognize certain areas of primary responsibility for each of the institutions: for the IMF—surveillance, exchange rate matters, balance of payments, growth-oriented stabilization policies and their related instruments; and for the Bank—specific projects, sector programs, development strategies and related questions of creditworthiness of its members. However, the guidelines also show that there are large overlapping areas of common concern, such as, for example, fiscal and trade policy. Staff of the institutions are now regularly invited to each other's Board meetings in connection with policy-based loans and credits in the Bank and IDA and stand-by arrangements in the IMF.

In recent years, there has also been an enhanced recognition that close collaboration between IMF and Bank staff on country program design and policy advice is indispensable for effective support to member countries, and an increased emphasis has been placed on the alignment of the work of the two institutions—each with its respective mandate and areas of expertise—while minimizing duplication. In September 1998, the IMF's Managing Director and the Bank's President reaffirmed the principles of earlier accords and agreed on changes in procedures and practices intended at ensuring more effective coordination at an operational level. In September 2000, the heads of the two institutions set out a shared vision for close cooperation. These agreements have built a framework for Bank-Fund cooperation that recognizes the shared principles of commitment to country ownership, the importance of a coherent approach to supporting country priorities based on an efficient division of labor, and the need to focus and streamline conditionality.

In August 2001, the Boards of the Bank and the IMF endorsed the joint paper *Strengthening IMF-World Bank Collaboration on Country Programs and Conditionality*, which applied the strengthened collaboration framework to country issues. Staff of both institutions have since gained a better appreciation of the different structures and processes of the two institutions, and how best they can be aligned in the support of member countries. To operationalize the approach of the strengthened framework, in April 2002 Bank and IMF management issued a guidance note on *Operationalizing Bank-Fund Collaboration in Country Programs and Conditionality* to staff of both institutions. It provides a systematic structure for staff cooperation that stresses division of labor based on the concept of a lead agency, discussions and coordination at an early stage ("upstream engagement"), adequate information sharing, and transparency in presenting information to the Boards. In 2004, the framework for collaboration was further strengthened, following consideration of the Board paper *Strengthening IMF-World Bank Collaboration and*

Country Programs and Conditionality—Progress Report, issued in March 2004. Enhancements included the strengthening of the Joint Implementation Committee (JIC), close collaboration on joint analytical work on thematic issues such as public expenditure and financial management (PEFM) and poverty and social impact analysis (PSIA), and provision of staff guidance to ensure that the Board of each institution remains informed of the engagement and current assessment of the other institution in specific reform areas.

Over the years, the IMF has declared a number of countries ineligible to use the IMF's resources and the Bank's Management has taken the position that such declarations have no automatic effect on Bank lending to the countries involved but should trigger a review by the Bank of the creditworthiness of these countries and of the appropriateness of Bank lending to them.

2. The United Nations

While the Bank is a specialized agency of the United Nations (UN), both the Bank and the IMF have a special position within the UN system and each has entered into an agreement with that organization defining its respective relationship. Under the United Nations Charter, the UN "shall make recommendations for the coordination of the policies and activities of the specialized agencies." The Charter also gives the Economic and Social Council broad powers to make recommendations to the specialized agencies. The Bank's Relationship Agreement is drafted in such a way as to reduce the potential conflict between the Bank and the UN resulting from these provisions of the Charter while laying the foundation for a wide degree of cooperation between the two institutions. It states that: "by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Bank is, and is required to function as, an independent international organization." In addition, the UN recognizes that it should not make recommendations to the Bank with respect to particular loans or with respect to terms of financing by the Bank. The Bank, on the other hand, has agreed to pay due regard to decisions taken by the UN Security Council for the maintenance of international peace and security, which members of the UN must, under the Charter, carry out directly and through their actions in the appropriate international agencies of which they are members.

3. Other International Organizations

The Bank cooperates in many different ways with the United Nations, its specialized agencies, funds and programs, and with other international organizations. It also cooperates with UNDP, as cosponsor (with FAO and IFAD) of the Consultative Group on International Agricultural Research (CGIAR), which the Bank chairs, and as co-sponsor of the Energy Sector Management Assistance Programme (ESMAP). Together with UNEP, the Bank and UNDP cooperate in the Global Environment Facility (GEF), where the Bank acts as the trustee of the GEF funds, as one of the three implementing agencies, and as the provider of administrative services. Areas of cooperation with the other specialized agencies include the follow-up to the Education-for-All Conference, UNAIDS, and the Cooperative Program with FAO. In 1995, the Bank sponsored the establishment of the

Consultative Group to Assist the Poor (CGAP), which includes the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, the International Fund for Agricultural Development and several bilateral donors among its members. The Bank has also entered into an agreement with WTO, under which the Bank and WTO cooperate on matters of mutual interest, including exchange of information and attendance at certain meetings of each organization.

4. Bank Policy on Access to Information

The Bank's policies concerning disclosure of information date back to 1985, and have been premised on the idea that the Bank should be as open as possible, subject to the unavoidable constraints imposed by its character and the nature of its activities. The policy has been revised by the Executive Directors from time to time to expand the types and range of Bank information available to the public.

In November 2009, the Board approved a significant change to the Bank's disclosure paradigm. The new AI Policy, which took effect on July 1, 2010, moved from the Bank from having a policy that lists out specific types of documents that can be made public to having a policy that allows access to any information in the Bank's possession that is not covered by a list of exceptions. The AI Policy also provides that over time the Bank declassifies and makes publicly available certain information covered by some of the exceptions. It also provides requesters, whose requests for information have been denied by the Bank, the right to an appeals process.

The ten exceptions, as defined in the AI Policy, that justify restricting access to information are: (i) Personal Information; (ii) Communications of Executive Directors' Offices; (iii) Ethics Committee Proceedings for Board Officials; (iv) Attorney-Client Privilege; (v) Security and Safety; (vi) Information Restricted Under Separate Disclosure Regimes and Other Investigative Information; (vii) Information Provided by Member Countries or Third Parties in Confidence; (viii) Corporate Administrative Matters; (ix) Deliberative Information; and (x) Financial Information. Additionally, the AI Policy recognizes that, on an exceptional basis, the Bank may exercise the prerogative not to disclose information normally available to the public if the Bank determines that the disclosure is likely to cause harm that would outweigh the benefits of the disclosure**.** The Bank may also exercise the prerogative to disclose certain information restricted under the Corporate Administrative Matters, Deliberative Information, and Financial Information exceptions, if the Bank determines that the benefit resulting from the disclosure would likely outweigh the potential harm to the interests protected by the exceptions.

A party whose request for information has been denied by the Bank can file an appeal alleging that the Bank violated the AI Policy by improperly or unreasonably restricting access to information that it would normally disclose. A requester can also file an appeal asserting a public interest case to override certain AI Policy exceptions. There are two levels of appeal. Appeals filed at the first level are heard by the Access to

Information Committee, an internal Bank body. The decisions of the Access to Information Committee on public interest appeals are final. Appeals alleging a violation of the AI Policy filed at the second level are heard by an Appeals Board, which is made up of three external persons selected by the Bank's President and endorsed by the Executive Directors. The decisions of Appeals Board on appeals alleging a violation of policy are final. The decisions of the Bank's Board are not subject to the appeal process.

5. Legislative Bodies of Member Countries

In general, Bank staff are encouraged to be open and helpful in providing non-confidential and factual information concerning the Bank's work to inquiring legislators or legislative bodies in a timely manner, in order to enhance the Bank's transparency, accountability and responsiveness. Legislatures often have important oversight responsibilities which require knowledge of Bank activities. General informal briefing sessions to disseminate such information in an open and transparent manner are acceptable and appropriate for this purpose. Any such contact with legislatures, however, must be coordinated and cleared in advance with the relevant External Affairs advisor or officer, who will in turn ensure appropriate coordination with the relevant governmental authorities and Executive Director.

Appearances by Bank officials (management and staff) before legislative bodies to provide formal oral or written testimony are not permitted under long-standing Bank policy, except as noted below.

There are several reasons underlying this policy, all based on the Bank's Articles of Agreement. Bank testimony before legislatures and their committees can be seen to involve the Bank directly in the domestic political affairs of a member country, in contravention of the requirement that "[t]he Bank and its officers shall not interfere in the political affairs of any member…."[13] Bank officials, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Furthermore, requests for Bank testimony may conflict with a member country's obligation to respect the international character of this duty. The Bank and its staff thus cannot be directly accountable to member country legislatures, and, moreover, the Bank is required to deal with its members only through their fiscal agencies, such as ministries of finance.[14] In addition, the immunity of Bank officials and documents from legal process could be compromised if such testimony were allowed.[15]

Consequently, requests from any legislative body or committee for Bank officials to provide testimony, whether oral or written, are normally declined.

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[13] Article IV, Section 10.

[14] Article III, Section 2.

[15] Article VII, Section 5.

Nevertheless, where there are exceptional circumstances of institutional significance, testimony may be permitted, provided that the legal limitations are strictly observed by meeting the following criteria:

(i) The appearance must be voluntary, without any form of compulsory process.

(ii) The invitation must come from or be endorsed by the executive branch of the government concerned.

(iii) The testimony should be factual and limited to the Bank's work.

Exceptions, if any, must be justified under these criteria, as determined by appropriate units of the Bank.

Even where an appearance is permitted, the privileges and immunities of the Bank are not waived. Moreover, the individual may not, and may not be required to, disclose information that is not publicly available under the Bank's policy on the disclosure of information.

II. LENDING OPERATIONS

A. The Legal Setting of IBRD and IDA Operations

1. The Articles of Agreement

Many of the Bank's lending policies are firmly rooted in its Articles of Agreement. Early proposals for the establishment of the Bank sought to ensure that its loans were productively employed and repaid, in contrast to a number of unsuccessful pre-World War II international loans. Such was the importance attached to this aspect of the Bank that its Articles contain a number of provisions regulating the Bank's lending operations. The provisions of the IDA Articles of Agreement on operations are drafted in more general terms. In practice, however, IDA applies the same policies as the Bank in selecting, appraising and supervising projects. Through the years, most provisions of the Bank's Articles related to operations have had to be interpreted, as operations have grown in volume, expanded in scope, and new types of lending and new lending techniques and instruments were developed. The more important of these provisions are described below.

(a) Statutory Government Guarantee

The IBRD Articles require that, when the member in whose territories a project is located is not itself the borrower, the member or the central bank or some comparable agency guarantee payments of principal and interest on the loan. Although the Articles give the Bank the option of accepting a guarantee from entities other than the member, it has, as a matter of policy, always required that the guarantee be provided by the member country itself. This ensures that the member will not be able to introduce restrictions on payments to the Bank and that the loan agreement will partake of the international character of the guarantee agreement with the government and will thus be insulated from domestic law.

IDA does not have a similar guarantee requirement, but in practice, with some minor exceptions, IDA has lent only to member governments (the exceptions being credits to international regional organizations).

(b) The Bank as "Lender of Last Resort," Graduation Policy

The Articles of Agreement of the Bank require that before making a loan, the Bank must be satisfied that the borrower would be unable to obtain the loan from other lenders on reasonable conditions. In practice, the judgment as to how much of a country's borrowing needs could be provided by other sources is made with regard to the entire borrowing program and not to individual loans.

The above requirement (often referred to as the principle of the Bank as "lender of last resort") is the legal basis for the Bank's graduation policy under which countries may

become ineligible for further Bank lending. When a borrowing member country reaches a certain level of per capita GNP, a review of the country's situation is made to develop a flexible program to scale down and ultimately end Bank lending. Two important factors considered are access of the country to external capital markets on reasonable terms and the extent of progress in establishing key institutions for economic and social development. The policy was interpreted in 1984 to make clear that attainment of the per capita GNP trigger would not result in an automatic end to Bank lending.

In a few cases, countries that have previously graduated from IBRD lending have subsequently applied for, and obtained new financing. These instances of "graduation reversal" have involved countries whose per capita GNP declined below the graduation trigger level due to subsequent events or exogenous factors.

(c) Prospects that the Borrower and Guarantor Will Be Creditworthy

The Bank's Articles require that it act prudently in the interests of both the member in whose territories a project is located and of the members as a whole and pay due regard to the prospects that borrowers and guarantors will be in a position to meet their obligations under a loan. In practice, staff regularly carry out a general assessment of the creditworthiness of members to service the Bank loans in order to establish each country's eligibility to be a Bank borrower.

(d) Financing to Be Provided, Except in Special Circumstances, for the Purpose of Specific Projects

The Bank's Articles provide that "[l]oans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development."[16] The General Counsel has expressed the view that any loan made for specific productive purposes would be a loan for a specific project under this provision. The Executive Directors decide on the special circumstances that justify each loan not made for specific productive purposes. All loans should, however, aim at facilitating the investment of capital for productive purposes even if they do not constitute such an investment.

In 1980, the Executive Directors approved the introduction of structural adjustment loans under the "special circumstances" provision. At that time, these loans were considered appropriate only when a country's growth prospects were seriously affected by actual or prospective external imbalances and the necessary external resources could not be more conventionally mobilized. Subsequently, in the 1990s, the Executive Directors determined that the rationale for adjustment lending would be a gap in actual or anticipated

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[16] IBRD Article III, Section 4(vii). IDA's Articles of Agreement contain a similar provision.

external financing requirements. This gap could have either balance-of-payments or fiscal origins.

The framework for structural adjustment lending was replaced in 2004 with a new policy on "development policy lending." But the "special circumstances" provision in the Articles remains the underlying basis for development-policy operations. Development-policy loans and credits enable the Bank and IDA to assist borrowers with their actual or anticipated development-financing requirements that could have either domestic or external origins. As under the previous policy, development policy loans are made in support of the borrower's development program, but are not targeted to specific expenditures.

In 1988, the General Counsel also expressed the view that the Bank is not in principle authorized to refinance existing commercial debt or otherwise provide financial support simply to enable a borrower to reduce its obligations vis-à-vis other creditors. In his view, there could be cases, however, where the Bank may, under certain conditions, refinance a Bank-approved and supervised project following its initial funding by a "bridge" commercial loan. The Bank may also provide a loan or guarantee where special circumstances are clearly recognized by the Board as justification for the Bank's use of its lending and guarantee powers in the context of a debt restructuring or conversion scheme. In such cases, the Bank's intervention should support the country's development and investment prospects in a demonstrable way beyond the simple savings resulting from the debt reduction involved (the materiality test). In response to the suggestion of the General Counsel, "materiality criteria" have been developed and approved by the Executive Directors to indicate where the Bank's intervention would reasonably be expected to have such an effect on the recipient country.

(e) Funds to be Made Available to Meet Expenses as They Are Incurred

The Bank is required to make arrangements to ensure that the proceeds of a loan are used for the purpose for which it was granted.[17] In addition, the Articles state that "[t]he borrower shall be permitted by the Bank to draw on [its] account only to meet expenses in connection with the project as they are actually incurred."[18] These provisions form the basis for the Bank's disbursement and supervision practices. The Bank does, however, make advance disbursements to designated accounts to anticipate expenditures, which operate on a revolving basis. The designated accounts may, in some cases, include monies provided by the borrower and/or co-financiers for a given project, in addition to the Bank's monies, which "pool" would thereafter be used to cover project eligible expenditures. Disbursements under development policy loans are made in relation to the program supported by the loan, typically upon evidence of satisfaction of conditions required as a part of carrying out the program, rather than against specific expenditures. There are

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[17] Article III, Section 5(b).

[18] Article III, Section 5(c).

restrictions on the use of the funds for military and luxury goods, among others (known as the negative list).

(f) Limits on Loans to Finance Local Expenditures

The drafters of the Articles of Agreement contemplated that the Bank would normally provide the foreign exchange required to finance projects while the borrowers would provide the local currency required, either from their own resources or through borrowing in the local market. For this reason, the Articles allow Bank financing of local expenditures in "exceptional circumstances."[19] The broad scope of this exception in the Bank's practice was discussed in a 1996 opinion of the General Counsel. Current eligibility conditions are contained in Operational Policy (OP) 6.00 on Bank Financing and its accompanying Bank Procedures (BP). In April 2004, the Executive Directors approved a new policy framework governing expenditures that are eligible for Bank financing, including in relation to local cost financing. At present, local cost financing, in the circumstances described in the OP, has become rather common in Bank practice.

In January 2001, the Executive Directors approved a local currency financial product that gives borrowers the option to either convert or swap disbursed loan amounts of Bank loans into their domestic currency. This option is confined to the local expenditure component of the relevant Bank loan.

Under the new policy (OP 6.00, Bank Financing), the Bank may finance local expenditures when it is satisfied that: (i) financing requirements for the country's development program would exceed the public sector's own resources (e.g., from taxation and other revenues) and expected domestic borrowing; and (ii) the financing of foreign expenditures alone would not enable the Bank to assist in the financing of individual projects. In countries where the criteria for Bank financing of local expenditures are met, Bank loan proceeds could be used to finance local and foreign expenditures in any proportions as needed for individual projects.

(g) Economic, Not Political, Considerations

The Articles provide that only economic considerations are to be relevant to decisions by the Bank and its officers. They are not to interfere in the political affairs of any member, nor are they to be influenced in their decisions by the political character of a member.[20] The Articles also provide that the proceeds of each loan are to be used "with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations."[21] They stipulate that the duty of the

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[19] Article IV, Section 3(b).

[20] Article IV, Section 10.

[21] Article III, Section 5(b).

President and staff shall be entirely to the Bank, that this duty is international in character, and that members of the Bank must respect the international character of this duty.[22]

(h) Extent of Bank's Involvement in Issues of Governance of its Borrowing Members

Experience has shown that certain aspects of governance are relevant to economic development. This was first emphasized in a 1989 major Bank report on the long-term perspective for African countries, which highlighted the need for political reform. Questions of governance were also discussed in connection with the transition process from centrally planned to market economies. The aspects of governance affecting a country's management of its resources are now integrated in the Bank's work, but questions have been raised on the governance-related activities that are within the Bank's mandate and those that are not.

A 1990 legal memorandum from the General Counsel explained the Bank's mandate as stated in its Articles and elaborated on the statutory requirements prohibiting political activities and considerations. In pursuing its authorized purposes, the Bank may take economic considerations into account even when they have political origins or are associated with political factors, as long as the economic effects are clearly established. Apart from the explicit exclusions in the Articles, governance, in the sense of good order or discipline in the management of a country's resources, may be a relevant matter for the Bank's activities. This concept was further defined in the memorandum in terms of the Bank's legitimate concern with the availability of rules and their appropriate application through well functioning institutions in borrowing countries in matters related to the management of resources.

2. Bank Loan and Guarantee Agreements

The Bank's lending instruments contain some financial provisions similar to those which are customary in international commercial practice, although in the Bank's agreements these provisions are not as extensive as in many private transactions. In addition, the agreements contain special provisions adapted to development lending. Most agreements define a development project to be carried out by the borrower and contain a number of obligations of the borrower in connection with the carrying out of the project and concerning the borrower's operations in general which would not normally be included in agreements with private lenders. The agreements also contain obligations with regard to access of Bank staff to the project, the supply of information and the consultation with the borrower and the Bank which reflect the cooperative nature of the institution.

Standard provisions are set out in the General Conditions which are incorporated by reference in individual agreements. Some of these standard provisions are influenced by the

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[22] Article V, Section 5(c).

nature of the Bank as an international institution which lends to its members. For example, Bank does not normally take security from a member government except when a project cofinancier is granted security or when it makes a loan to a non-creditworthy member or to a government entity of such a member. The negative pledge clause, which prohibits the government from giving other lenders a position senior to the Bank through the establishment of collateral or otherwise, is the most common way for the Bank to protect itself as a creditor. Bank lending agreements are governed by international law which means they are insulated from the effect of changes in national law.

The Bank has several ways to ensure compliance with covenants in its agreements. The General Conditions provide that default by the borrower in payment or in the performance of another obligation in the loan agreement will permit the Bank to suspend all or part of the unwithdrawn amount of the loan. Suspension may be followed by cancellation of the suspended amount if it has been suspended for 30 days and/or "cross suspension" of the rest of the loan portfolio that is still disbursing. The General Conditions also give the Bank a right under certain circumstances to require the immediate repayment of the loan in full. The Bank has never used this right of acceleration.

The most effective way to ensure that particular actions are taken by the borrower has been to suspend disbursement under existing loans and not provide new loans until those actions have been completed. A variation on this may be used in development policy lending: the loan amount is divided into tranches or provided in the form of single tranche operations, with each subsequent tranche being contingent on compliance by the borrower with the conditions set out in the loan agreement for its release or agreed triggers, as the case may be. The Bank may also require that the borrower complete certain actions as a condition to the effectiveness of the loan agreement or to the disbursement of specified expenditure categories of the loan proceeds.

3. Disputes between Bank Members as to Boundaries, Water Rights, External Debt, Expropriation and Contracts

The Bank has adopted a number of policies that have important legal aspects. These policies relate to international waterways, boundaries, external debt and expropriation, and can affect the Bank's determination with respect to financing of specific projects and, in certain cases, can involve suspension of a lending program to a member country. The Bank has followed a policy, initially adopted in 1985 and most recently revised in June 2001, of requiring notification of all riparians for projects on international waterways. In projects in disputed areas, the Bank has also followed a policy of encouraging peaceful resolution of disputes and of not prejudicing the position of any countries involved.

For disputes on external debt, expropriation and government contracts, the Bank's policy has been to take these disputes into account in the country's lending program, including under certain circumstances the possibility of suspending new lending, if the

Bank is dissatisfied with the country's position (for example, if the country is not making reasonable efforts to settle the dispute).

In September 1992, the Development Committee issued a set of non-binding guidelines on the legal treatment of foreign direct investment, prepared by the General Counsel of the Bank, IFC and MIGA and endorsed by the Executive Directors after extensive discussion. The Development Committee called these guidelines to the attention of member countries. The guidelines address, *inter alia,* desirable state behavior in matters related to the admission and treatment of foreign investment as well as the expropriation of the property of, and breach of contracts with foreign investors.

Default vis-à-vis other creditors does not have an automatic effect on IBRD lending. Substantial defaults may, however, prompt the Bank to review its assessment of the borrower's creditworthiness for the purpose of borrowing from the Bank. The 1989 understanding between the IMF and the Bank stresses the "solidarity" between the two institutions. This solidarity does not, however, exclude the possibility that in appropriate circumstance, Bank arrears would be cleared before IMF arrears, as was done in the case of Zambia in 1991.

B. Trust Funds and Externally Funded Outputs, Global Programs and Partnerships, Cofinancing, Guarantees, Debt Reduction and Negative Pledge

The Articles of Agreement provide that one of the purposes of the Bank is to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes. Thus, the mobilization of additional financing from other external sources for Bank-assisted projects and programs is an important feature of the Bank's work.

1. Trust Funds, Externally Funded Outputs

Bank-administered trust funds have become a main line of business for the Bank and support a variety of development objectives at the country, regional and global levels. The total stock of funds held in trust exceeded $26 billion at the end of FY09. Trust funds are accounts that contain contributions held by the Bank as a fiduciary under the terms of agreements (usually Administration Agreements) entered into with the contributing donor(s). Activities financed by trust funds can be either (i) Bank-executed (with Bank responsibility for implementation under rules applicable to Bank budget) (this trust fund type is referred to as a BETF), (ii) recipient-executed (with recipient responsibility for implementation under Bank rules and Bank supervision) (this trust fund type is referred to as a RETF), or (iii) through customized arrangements agreed between the Bank and donor(s) (such as limited fiduciary arrangements that feature recipient responsibility for implementation under its own rules without Bank supervision or any other Bank responsibility post-disbursement) (this trust fund type is referred to as a

financial intermediary fund or a FIF). Trust funds may be established with aggregate contributions of $1 million or more. Funds in smaller amounts may also be received by the Bank to produce specific deliverables called externally funded outputs (EFOs), on the understanding that the external funds are commingled with and treated as Bank funds upon receipt.

Administration Agreements for BETFs and RETFS are based on standard forms of agreement. Contribution agreements for FIFs are tailored, often using the standard forms as starting points, but can also become quite complex. Trust funds can also be hybrids of the three categories, in which case the agreements combine the relevant provisions for the applicable categories. EFO agreements are a prescribed format in SAP that is not subject to negotiation and does not receive review or clearance by LEG.

2. Global Programs and Partnerships

Global programs and partnerships (GPPs) are partnership programs with a global, regional, or multi-country focus to which the Bank commits its own resources as part of an enduring or formal relationship. Many GPPs in which the Bank participates are supported through Bank-administered trust funds.

With global and regional issues increasingly influencing the development agenda, including through calls for collaboration and harmonization through the Paris Declaration for Aid Effectiveness and the Accra Action Agenda, GPPs have become increasingly prominent in the Bank's work. In FY09, the Bank was involved in well over 200 GPPs. GPPs increasingly provide the context for Bank-administered trust funds (close to 50% of Bank trust fund disbursements are linked to GPPs), in which case the Bank often additionally provides the secretariat services for the GPP's governing bodies and activity implementation and coordination. The Bank also participates in GPPs that are supported through external secretariats and other funding vehicles. Some of the more significant GPPs supported by the Bank include the Global Environment Facility, the Consultative Group for International Agricultural Research, the Global Fund for AIDS, Tuberculosis and Malaria, the International Financing Facility for Immunization and the Climate Investment Funds.

GPPs are sui generis and vary considerably, reflecting the specific participants, objectives and circumstances in each case. The legal documentation used to establish and implement GPPs accordingly also varies, both as to form and substance.

3. Cofinancing with Commercial Lenders and Guarantees

Cofinancing and guarantee operations have evolved over time. In 1983, the Executive Directors approved a set of cofinancing instruments (the B-loan instruments) designed to accelerate commercial bank lending flows on improved terms (particularly longer maturities) to developing countries. The main feature of the B-loan program was that the Bank, in addition to making its own loan for a project or program (the A-loan),

would participate in a parallel commercial bank loan for the same project (the B-loan) as a co-lender, guarantor or contingent lender. The last B-loan operation was in 1988.

In recognition of the need for the Bank to adapt its commercial cofinancing program to changes in the market, the Executive Directors authorized a program of Expanded Cofinancing Operations (ECO) in July 1989. The ECO program was replaced in September 1994 with a more generalized use of guarantees as a mainstream instrument in IBRD operations for investment projects. This action was taken in view of the increased role of the private sector in borrowing member countries, especially in the provision of infrastructure, and the need for the Bank to expand its role as a catalyst for market finance for private sector projects.

In 1997, the Executive Directors approved the use of partial risk guarantees for private sector projects in IDA countries. In that same year, IBRD guarantees were also approved to be provided for enclave projects (foreign exchange earning projects) in IDA countries. In 1999, the Executive Directors approved the limited provision by the Bank of policy-based guarantees for borrowings associated with the implementation of structural and social reform programs to help borrowers with strong economic and social programs improve their access to private foreign financing.

Like B-loans, the Bank’s guarantees are designed to assist borrowers in attracting private financing for specific projects and programs. Since the guarantee is intended to be a catalytic instrument, the Bank offers only partial guarantees. Although guarantees may be structured in different ways, there are two basic kinds. The guarantee may be for specific risks (the partial risk guarantee) or for part of the financing (the partial credit guarantee). Partial risk guarantees cover debt service defaults on a loan, normally for a private sector project, when such defaults are caused by a government's failure to meet its obligations under project contracts to which it is a party. Partial credit guarantees cover debt service defaults on a specified portion of a loan, normally for a public sector project and are used typically to extend the maturities of sovereign borrowings beyond what creditors would otherwise provide.

Currently, the Bank has four programs of guarantees: IBRD project-based guarantees using both the partial risk and partial credit structures, IBRD policy-based guarantee using the partial credit structure, IBRD enclave guarantees in IDA-only countries using the partial risk structure, and IDA guarantees using the partial risk structure only. Guarantee conditions are contained in Operational Policy (OP) 14.25 Guarantees and its accompanying Bank Procedures (BP) (December 2005).

To date, Executive Directors have approved 35 guarantees (cumulative amount of $4.6 billion) for 35 projects. This includes 23 partial risk guarantees, ten partial credit guarantees and two policy-based guarantees; 23 IBRD and 12 IDA guarantees.

4. Debt Reduction

The Executive Directors have approved programs to support the reduction of member countries' indebtedness to both commercial and multilateral creditors.

Beginning in 1982, the international debt crisis introduced a complex set of new constraints to the flow of commercial bank funds to the highly-indebted middle-income countries (HICs), which limited the opportunities for cofinancing in these countries. With a view to ensuring adequate funding for the adjustment programs of the HICs, the Bank initially played a catalytic role in facilitating both new commercial bank loans and restructuring of old commercial bank loans to the HICs (e.g., Mexico, Chile, Colombia, Uruguay, Argentina, Brazil, Nigeria) through the provision of partial guarantees in three cases and parallel cofinancing arrangements in others.

In May 1989, following the announcement of the Brady Initiative, the Executive Directors formally adopted policies and operational guidelines for Bank financial support for debt and debt service reduction (DDSR) operations in respect of commercial bank debt in the HICs. Under these policies, the Bank provided loans to assist in financing the implementation of DDSR operations (e.g., cash buybacks and debt-for-debt exchanges) in a number of countries (i.e., Argentina, Bulgaria, Ecuador, Mexico, Panama, Peru, Poland, Philippines, Venezuela and Uruguay). Other DDSR operations were carried out in Brazil, Costa Rica, Dominican Republic, Jordan and Nigeria. Although the Bank did not provide financing for those operations, waivers of its negative pledge clause were granted to permit their implementation.

In July 1989, a separate debt reduction facility, initially funded out of an allocation from the Bank's net income for FY89, was set up to provide grants to IDA-only countries for commercial debt reduction operations. Grants have been provided from the IDA Debt Reduction Facility to finance legal and financial advisers to help countries prepare such operations and to finance the cost of their implementation. Most of these operations have been cash buybacks at significant discounts. Such operations have been carried out, for example, for Albania, Bolivia, Côte d'Ivoire, Ethiopia, Guinea, Guyana, Mauritania, Mozambique, Nicaragua, Niger, Sao Tome and Principe, Senegal, Sierra Leone, Togo, Uganda, Vietnam, Yemen and Zambia.

In 1996, the Bank together with the IMF developed a framework of action for addressing the debt problems of a group of heavily indebted poor countries (HIPCs) to ensure that reform efforts of these countries will not be put at risk by continued high external debt burdens. In 1999, enhancements were approved by the Executive Directors in the framework to provide faster and deeper debt relief. Under the HIPC Debt Initiative, creditors, including the Bank and other international financial institutions, will provide debt relief for those IDA-only countries in this group that have demonstrated good policy performance in order to bring their debt service burdens to sustainable levels. As of September 2010, 40 countries (Afghanistan, Benin, Bolivia, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic

Republic of the Congo, Republic of Congo, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Kyrgyz Republic, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nicaragua, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, and Zambia) have been determined to qualify for assistance under the Initiative. The estimated cost to the Bank of providing HIPC relief is estimated to be $15 billion (in end-2009 present value terms).

To augment debt relief to HIPCs, the Executive Directors approved, in March 2006, IDA's participation in the Multilateral Debt Relief Initiative (MDRI). The objective of the MDRI is to provide additional support to HIPCs to reach the Millennium Development Goals while ensuring that the financing capacity of the participating international financial institutions is preserved. The debt relief provided to qualifying HIPCs under the MDRI is in addition to existing debt relief commitments by IDA and other creditors under the HIPC Debt Relief Initiative. The relief is provided through 100 percent cancellation of debts owed to IDA and other international financial institutions by qualifying HIPCs. Implementation of the MDRI commenced on July 1, 2006 and as of September 2010, 30 HIPCs (Afghanistan, Benin, Bolivia, Burkina Faso, Burundi, Cameroon, Central African Republic, Democratic Republic of Congo, Republic of Congo, Ethiopia, Ghana, Guyana, Haiti, The Gambia, Honduras, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nicaragua, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Tanzania, Uganda and Zambia) have qualified for the MDRI. IDA's estimated debt relief costs under the MDRI over its 40-year life span will be about $19.4 billion (in end 2009 net present value terms). In order to maintain IDA's financial integrity and capacity to assist poor countries in the future, donors agreed to dollar-for-dollar compensation that is additional to their existing commitments to IDA. These additional compensatory resources will be paid by donors to IDA over the MDRI's life span. Total debt forgiveness under MDRI required a formal interpretation of IDA's Articles of Agreement by its Executive Directors. This was adopted based on a Memorandum of the General Counsel.

5. Negative Pledge

IBRD's loan and guarantee agreements contain negative pledge clauses which place limits on the creation of security in favor of other creditors over assets of member countries and other entities which have borrowed from, or guaranteed loans made by, the Bank. The clause requires (i) member countries, when liens are established on public assets as collateral for external debt, and (ii) non member country borrowers when they establish liens on their assets as collateral for any debt, to have the Bank's loans equally and ratably secured by the same lien, or when this is not legally possible, to provide the Bank with an equivalent lien on other assets satisfactory to the Bank.

C. Procurement and Consultants Services

The Articles of Agreement require the Bank to ensure that the proceeds of its loans are used "with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations."[23] To meet its Articles' requirements, the Bank has developed detailed rules for procurement of goods and works (the Procurement Guidelines[24]) and selection of consultants (the Consultant Guidelines[25]), which are incorporated in each loan agreement, with appropriate adjustments if required, to be applied by the borrower in the procurement of all goods, works and services financed by the loan. Once incorporated in a loan agreement the Guidelines are binding on the borrower. Furthermore, under each such loan agreement, the responsibility for project execution, and therefore for the procurement of contracts financed by the Bank, rests with the borrower.

The Procurement Guidelines and Consultant Guidelines provide that the borrower is legally responsible for procurement under a Bank loan. It is the borrower that invites bids, receives them, evaluates them and awards the contracts. The contracts are between the borrower and the supplier, contractor or consultant, and the Bank is not a party to them. The Bank's role is limited to the review of the procurement procedures, bidding documents, bid evaluations, award recommendations and contracts, to ensure that the process is carried out in accordance with agreed procedures, as described in the loan agreement. In the case of major contracts, the bidding documents are reviewed by the Bank prior to their issuance. All contracts at or above certain thresholds ($50 million for Works, Turnkey, and Supply and Installation of Plant and Equipment, $30 million for Goods, $20 million for Information Technology and Non-Consulting Services, $15 million for Consultant Services, $5 million for Direct Contracting/Single-Source Contracts with firms, and $1 million for Single-Source Contracts with individuals) are subject to prior review by the Operational Procurement Review Committee (OPRC).

The Guidelines underwent a major revision in May 2004 to reflect (i) recent trends in investment project arrangements such as "pooling" of funds with other multilateral or bilateral agencies; (ii) the longer term objective to substitute client countries' procurement rules for the Bank's rules; and (iii) the need for more flexible procurement arrangements in the loan documentation, including a shift from ex-ante to ex-post reviews. A corrigendum dated October 2006 revised these Guidelines to reflect expanded definitions of fraud and corruption in line with those contained in the Anti-Corruption Guidelines, and a second

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[23] Article III, Section 5(b).

[24] Guidelines: Procurement under IBRD Loans and IDA Credits (May 2004, rev. October 2006 and May 2010); and Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers (January 2011).

[25] Guidelines: Selection and Employment of Consultants by World Bank Borrowers (May 2004, rev. October 2006 and May 2010); and Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits and Grants by World Bank Borrowers (January 2011).

corrigendum dated May 2010 introduced as grounds for ineligibility (i) temporary and early temporary suspension, and (ii) debarment as the result of the new cross-debarment regime under which the Bank will enforce debarment decisions taken by other International Financial Institutions with which the World Bank Group has signed an Agreement for the Mutual Enforcement of Debarment Decisions.

Subsequently, in January 2011, the Board approved another major update to the Guidelines. Without materially altering the Bank's existing overall procurement policy framework, this update makes important revisions reflecting (i) the broad evolution of Bank policies affecting procurement in general, as well as decisions already made by the Board (e.g., in the areas of sanctions reform, rapid response to emergency situations, and the piloting program for use of country systems in procurement); (ii) harmonization with other multilateral development banks (MDBs), taking into account the worldwide evolution of procurement policies and practices; and (iii) issues that have surfaced in the application and interpretation of the Guidelines since May 2004.

The Guidelines provide that if at any time in the procurement process (including after contract award), the Bank concludes that the agreed procurement procedures were not followed in any material respect, the Bank declares misprocurement and cancels the portion of the loan allocated to the goods, works or services that have been misprocured. However, if the violation comes to light after the borrower has already awarded the contract after receiving the Bank's "no objection," the Bank will declare misprocurement only if the "no objection" was issued based on incomplete, inaccurate or misleading information furnished by the borrower.

In addition, remedies may be triggered if the Bank determines that corrupt, fraudulent, collusive, coercive or obstructive practices were engaged in by a borrower's representative in connection with the procurement process or execution of the contract. The Bank may impose sanctions, including debarment, against a bidder found to have engaged in such practices, in accordance with the Procurement Guidelines and the Consultant Guidelines. The Bank may also impose sanctions against any person or entity that either receives loan proceeds for their own use or that takes or influences decisions regarding the use of loan proceeds, in accordance with the Anti-Corruption Guidelines. (See Section D below for details).

Thus, the involvement of the Bank in the procurement process is limited to a review function, and procedures are in place to ensure consistency in the application of the relevant rules and procedures. Bidders have the choice of submitting complaints to the Bank either directly or through their Executive Director. As representatives of the countries that have appointed or elected them, Executive Directors may play a role in pursuing the procurement complaints that the nationals of these countries may have against the Bank or the borrower. Such a role does not include, however, participation in the investigation of the complaint or influencing its outcome. Rather, it includes seeing to it that the complaint is being investigated under the Bank's established procedures and, if so, communicating the result of such investigation to the complainant party or seeing to it that it is directly

communicated. If the Executive Director disagrees with the conclusion of the investigation, he or she may report his or her position to the Office of the President and seek further clarification. As members of the Board, Executive Directors can also play a useful role in conveying to their nationals involved in such complaints the considerations that have shaped the Bank's procurement policies.

In cofinanced projects, the different terms and conditions attaching to funds provided by various cofinanciers affect the choice of procurement arrangements. The rules set forth in the Procurement Guidelines and Consultant Guidelines apply to all contracts financed in whole or in part by the Bank. If a cofinancier accepts to follow the Bank's procurement rules, "joint financing" is possible (i.e., the Bank and the cofinancier may finance agreed percentages of the same contract); if a cofinancier is unable to accept the Bank's rules, "parallel financing" will have to be chosen (i.e., the two institutions, each following its own procurement rules, finance different contracts for the same project). In the case of official cofinancing, the Bank may, at the request of a cofinancier, administer its funds, including handling disbursements and supervising procurement. If, however, the cofinancier's funds are "tied" (i.e., available only for specified kinds of purchases or for purchases only from the country offering the financing or subject to other restrictions on their use), the Bank will not administer them. As a matter of general policy, the Bank only accepts to administer "untied" funds (i.e., funds available for use without restrictions).

Where the Bank guarantees the repayment of a loan made by another lender, the Bank must satisfy itself that procurement is carried out with due attention to economy and efficiency, and that the goods, works or services procured meet certain standards in terms of quality and timeliness.

D. Sanctions Regime

1. Background

The Bank's Articles of Agreement require the institution to make arrangements to ensure that financings provided by the Bank are used for their intended purposes and with due attention to economy and efficiency.[26] This fundamental requirement is often referred to as the "fiduciary duty," which forms the legal and policy basis for much of the Bank's fiduciary framework for its operations, including its project-level anti-corruption efforts.

To this end, the Bank Group has established a set of legal and other tools to help prevent and combat fraud and corruption in Bank Group projects and programs. Collectively known as the "sanctions regime," these tools are both administrative and operational in character.

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[26] *See* IBRD Articles of Agreement, Article III, Section 5 (b), IDA Articles of Agreement, Article V, Section 6.

On the administrative side, the Bank Group has a formal process for sanctioning firms and individuals which have been found to have engaged in fraud and corruption in Bank Group-financed projects, primarily by declaring them ineligible to be awarded Bank Group-financed contracts, a step commonly known as "debarment." Sanctions are intended to advance the fiduciary duty by excluding corrupt actors from access to Bank financing, while serving as a deterrent both for the sanctioned firm and for others. Sanctions can also serve as incentives for rehabilitation.

On the operational side, the Bank Group has developed anti-corruption provisions in its legal agreements with borrowers and other recipients of Bank Group funds, as well as practices and procedures aimed at reducing the risk of, or detecting and addressing, potential fraud and corruption in Bank Group-financed operations.

2. Sanctions Process

The Bank Group maintains a formal process for sanctioning firms and individuals which have been found to have engaged in fraud and corruption in Bank Group financed projects. This process is intended to provide the accused party, known as the "Respondent," with basic due process before deciding whether the Respondent will be sanctioned and, if so, which sanction is appropriate. The core of the sanctions process lies in formal sanctions proceedings, which consist of the following two tiers:

(i) At the first tier, the Bank's Evaluation and Suspension Officer (EO) reviews a Statement of Accusations and Evidence, submitted by INT, for sufficiency of the evidence. If the EO finds that the accusations are supported by sufficient evidence, he/she issues a Notice of Sanctions Proceedings to the Respondent, appending the Statement of Accusations and Evidence and recommending an appropriate sanction and temporarily suspending the Respondent from eligibility for Bank-financed contracts. The Respondent may file an Explanation with the EO seeking either dismissal of the case or a reduction in the recommended sanction. If the Respondent does not contest the EO's final determination, the recommended sanction (if any) is then imposed on the Respondent.

(ii) In cases where the Respondent wishes to contest the EO's final determination, it may trigger a second tier review by filing a Response with the World Bank Group's Sanctions Board, a body composed of three Bank staff and four non-Bank staff, which considers the case *de novo* and takes the final decision on an appropriate sanction, if any. This phase of the proceedings may include hearings if either the Respondent or INT requests them. The name(s) of the sanctioned party(ies) and the sanction(s) imposed are made public.

In appropriate circumstances, sanctions may also be imposed on a Respondent through a negotiated resolution (a.k.a. settlement) of the case. Under this mechanism, sanctions cases may be resolved by negotiations at any stage of the sanctions process up to the issuance of a decision by the Sanctions Board, or during the investigation stage prior to the commencement of sanctions proceedings. Settlements are subject to clearance by the General Counsel and review by the EO for compliance with the Bank's sanctioning guidelines and to ensure that the agreement was voluntary.

The Bank Group has agreed with other multilateral development banks (MDBs) on specific defined forms of fraud and corruption that should be sanctionable.[27] These include corrupt practice, fraudulent practice, collusive practice and coercive practice. In addition, the Bank Group may also sanction a firm or individual for having engaged in "obstructive practice" in connection with an INT investigation. Collectively, these practices are referred to as "sanctionable practices."[28]

Sanctions may take various forms. The "baseline" or default sanction[29] is to impose a minimum period of debarment (i.e., ineligibility to be awarded a Bank Group financed contract or otherwise participate in Bank Group-financed activities) of three years, after which the sanctioned party may be released if it has complied with certain defined conditions.[30] In cases where no appreciable purpose would be served by imposing conditions for release, sanctioned parties may be debarred for a specified period of time, after which they are automatically released from debarment. Sanctions may also take the form of conditional non-debarment, whereby the sanctioned party is not debarred provided the party complies with certain defined conditions within a set time frame. In some cases, for example where an affiliate of the Respondent has been found to have some shared responsibility for the misconduct because of an isolated lapse in supervision, but the affiliate was not in any way complicit in the misconduct, debarment or even conditional non-debarment may be disproportionate to the offense. Finally, in appropriate

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[27] International Financial Institutions Anti-Corruption Task Force, "Uniform Framework for Preventing and Combating Fraud and Corruption" (September 2006).

[28] These definitions may be found in Annex A to the Sanctions Procedures; paragraph 7 of the World Bank Anti-Corruption Guidelines (2006); and Section 1.14 of the Guidelines on Procurement Under IBRD Loans And IDA Credits (May 2004, as revised October 1, 2006 and May 1, 2010); and Section 1.22 of the Guidelines on Selection and Appointment of Consultant by World Bank Borrowers (May 2004, as revised October 1, 2006 and May 1, 2010); s*ee also* "Sanctions Reform: Proposal to Extend the Current Sanctions Regime to Partial Credit Guarantees", R2009-0246; IDA/R2009-0262 (October 5, 2009).

[29] The term "baseline" sanction means the sanction that would normally be imposed for a sanctionable practice before giving effect to any aggravating or mitigating factors.

[30] The conditions normally include the debarred party putting in place, and implementing for an adequate period, an integrity compliance program satisfactory to the World Bank Group.

cases, the sanctioned party may be required to make restitution to the Borrower or to any other party or take actions to remedy the harm done by its misconduct.[31]

3. Operational Aspects of the Sanctions Regime

The Bank also has a number of anti-corruption tools with direct application to its operations, including anti-corruption provisions in its legal agreements with borrowers and other recipients of Bank financing, and certain practices and procedures, particularly in the area of procurement, aimed at reducing the risk of, or detecting and addressing, potential fraud and corruption in Bank-financed operations.

The Procurement and Consultant Guidelines establish as Bank policy the requirement that borrowers and loan beneficiaries, as well as bidders, suppliers, contractors and consultants, maintain the "highest standards of ethics" and, to this end, further provide for Bank sanctions as well as contractual remedies in the event that certain defined forms of fraud and corruption occur in connection with the procurement/selection or execution of Bank financed contracts.[32] The Guidelines also allow the Bank access to bid and contract documentation through the so-called "third party audit clause".[33]

The Bank has remedies under the IBRD and IDA General Conditions that allow the Bank to cancel an amount of the loan equivalent to any Bank-financed contract if it had been tainted by corruption[34] and to suspend disbursements, in whole or in part, in the event that fraud and corruption occurs without timely and appropriate action being taken to address the situation.[35]

The Anti-Corruption Guidelines, like the Procurement and Consultant Guidelines, are incorporated by reference into the Bank's legal agreements.[36] The Anti-Corruption

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[31] Appropriate cases may include those where the damage caused by the misconduct is clear and quantifiable. Restitution has not been imposed to date, largely due to lack of clear criteria to how to calculate the quantum to be restituted and how to determine the appropriate recipient.

[32] The current provisions are found in Section 1.14 of the Procurement Guidelines and Section 1.22 of the Consultant Guidelines. The scope of the policy has been expanded so that the current version of these provisions cover bidders, suppliers, and contractors and their agents (whether declared or not), personnel, subcontractors, subconsultants, service providers or suppliers.

[33] *See* the Procurement Guidelines, Section 1.14 (e); and the Consultant Guidelines, Section 1.22 (e).

[34] IBRD General Conditions for Loans 7.03 (c) (as amended 2006).

[35] Id. at 7.02 (c).

[36] These include IBRD Loan and Project Agreements, and IDA Financing and Project Agreements, as well as Grant Agreements financed by IBRD or IDA administrated Recipient-

Guidelines set out the harmonized definitions of Sanctionable Practices, as well as a set of undertakings by the Borrower and other recipients of Bank funds aimed at preventing and combating fraud and corruption in connection with the use of such funds. The Guidelines also establish the Bank's right to sanction firms and individuals found to have engaged in any fraud and corruption in connection with the use of loan proceeds, not only in connection with procurement.

E. Justice Sector Reform

Though the precise channels of causation are complex and contested, there is broad consensus that an equitable, effective justice system[37] is an important factor in fostering development and reducing poverty.[38] According to President Zoellick, "[t]he most fundamental prerequisite for sustainable development is an effective rule of law."[39]

Like governance, justice concerns and justice reform activity cut across development, and they accordingly cut across the work of the World Bank. Some lending operations take justice sector institutions as their primary focus. This portfolio—which includes at least nineteen closed projects and ten active projects from every region except Africa—has sought among other things to improve court case management systems, as in

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Executed Trust Funds. The application of the sanctions regime to RETFs was confirmed when the new OP/BP 14.40 was adopted in July 2008.

[37] The World Bank has defined "justice system" as comprising "The institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members' behavior; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions." Dory Reiling, Linn Hammergren, and Adrian Di Giovanni, *Justice Sector Assessments: A Handbook,* World Bank Legal Vice Presidency 2007. These institutions include, among others, the courts, the police, prosecutors' offices, administrative law mechanisms, customary law institutions, and anti-corruption commissions.

[38] See, for example, Douglass North, *Institutions, Institutional Change, and Economic Performance,* 1990, p. 54, claiming that the absence of a low-cost means of enforcing contracts is 'the most important source of both historical stagnation and contemporary underdevelopment in the Third World'; Dani Rodrik, Arvind Subramanian, and Francesco Trebbi, "Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development," in 9 *Journal of Economic Growth*, no. 2, 2004, pp. 131–65, which argues that the quality of institutions is a greater determinant of income level than either trade or geography; Rick Messick (WB PREM), "Judicial Reform and Economic Development: A Survey of the Issues," in 14 *World Bank Research Observer*, no. 1, 1999, pp. 124–26, which concludes that, although the specifics of causality are unclear, "history and comparative analysis support the view that a better judicial system fosters economic growth."

[39] Robert Zoellick, "Fragile States: Securing Development," speech to Institute for Strategic Studies, September 12, 2008.

Ecuador, Albania, and Bangladesh; to strengthen training for judges and lawyers, as in Kazakhstan, the Philippines, and the West Bank; to build and rehabilitate judicial infrastructure, as in Armenia and Ecuador; and to pilot model courts, as in Colombia and Argentina.

A larger proportion of operational work on justice reform comprises components of other development projects. A private sector development project in Guinea-Bissau included a component focused on improving access to justice for firms, for example: a Poverty Reduction Support Credit in Benin supported establishment of a Legal and Judicial Information Center; a Governance and Institutional Development Project in Madagascar provided capacity building support to the Ministry of Justice; and a land project in Peru improved the mechanism for resolving land disputes.

In recent years the scope of justice institutions engaged by World Bank operations has widened, to include, for example, criminal justice institutions and customary legal institutions. Taking “stand alone” and component operations together, Bank lending to support the “rule of law” averaged $335 million per year from 2005 to 2010.[40]

These operational activities are complemented by a plethora of grants (instruments include the Institutional Development and Japanese Social Development Funds) and research (instruments include the Bank Netherlands Partnership and the Trust Fund for Environmentally and Socially Sustainable Development) which support and/or study among other things anti corruption agencies, ombudsman offices, rights education, legal pluralism, legal aid and legal empowerment, and data gathering on the protection of basic rights. The Bank’s global Justice for the Poor program focuses on mainstreaming justice concerns throughout the development portfolio. Justice for the Poor has deployed teams in nine countries in East Asia, the Pacific, and Africa that study the dynamics of justice and conflict, and then use that knowledge to pilot justice reform interventions and, ultimately, to strengthen the design and implementation of development operations.

In addition, special initiatives on stolen asset recovery and money laundering seek to improve specific aspects of client governments’ law enforcement capacity.

The Legal Vice Presidency’s Justice Reform Group works with the Public Sector Governance Group and staff throughout the Bank to offer intensive courses on justice reform for Bank staff, and provide support and coordination for the community of practice through a thematic group, presentations and discussions led by justice experts from inside and outside the Bank, a working paper series on Justice and Development, and a series of handbooks and other tools for the justice sector practitioner.

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[40] This mean is derived from figures presented in World Bank Annual Reports for the last five years.

The Justice Reform Group is presently leading a Bank-wide working group to develop a companion piece to the 2011 Governance and Anti Corruption update, which will lay out a strategy for justice reform at the World Bank going forward.

F. Finance, Private Sector and Infrastructure Development

To complement its finance, private sector development and infrastructure work in all regions, the Bank provides specialized legal and related regulatory and institutional advice in each of these fields. The Bank's efforts in these respects complement the broader development agenda to encourage legal, regulatory and institutional modernization to support growth through better integration into the global economy.

Sound legal and regulatory systems play a pivotal role in the operation of financial markets and the efficient intermediation of capital flows and domestic savings. Banks and other financial institutions hold claims on borrowers, the value of which is dependent upon certainty of legal rights and predictability of enforcement. Robust legal and regulatory frameworks are preconditions to the building of well functioning capital markets that facilitate fund raising, foster deep and liquid secondary markets and robust market infrastructures, and promote investor confidence. A competitive business and corporate sector is built on the foundation of strong property rights, ease of company formation, good corporate governance, availability of flexible collateral mechanisms to support the availability of credit, and reliable insolvency systems to minimize lenders' risk and encourage the rehabilitation of viable firms in financial difficulty. Laws and legal institutions also underpin fund raising and securities trading through well-regulated securities markets.

The fundamental aim of these activities is to assist in the alleviation of poverty by: (i) improving financial sector capacity and access to finance; (ii) allowing private sector firms to emerge and expand or, if irretrievably insolvent, to be liquidated efficiently; and (iii) supporting innovations in the provision of infrastructure services and their regulation, including in telecommunications, water and sanitation, electric power, and transportation, so that these services are sustainable financially while safeguarding quality and the public interest.

The World Bank draws on its experiences and those of its development partners in providing advice to developing and transition countries on building a strong legal infrastructure to support efficient financial markets and to foster private sector development and enable equitable access to basic infrastructure services.

1. Finance and Private Sector

Well-functioning financial sectors are essential for private sector-led growth, without which poverty alleviation will not prove possible. They also help prevent or mitigate financial crises which would otherwise burden countries with crippling costs and

increased poverty. The global financial crisis has demonstrated that long-term resilience of the financial system requires reforms—most fundamental is the need for better industry practices, enhanced regulation, improved supervision, credible and robust recovery and resolution regimes, and effectively functioning markets. Thus, the Bank encourages financial sector reforms, and the strengthening of individual financial institutions and markets. The Bank also focuses attention on the critically important cross-cutting issues in the different segments of the financial sector as well as being engaged with client countries in the process by which laws are conceptualized, drafted, enacted, publicized and enforced. In particular, the Bank assists client countries in assessing any gaps and appropriate sequence for the introduction of international best standards in the legal and institutional framework of the financial system, to enhance resilience and minimize vulnerabilities of the financial system.

Although reliable and supportive legal and judicial systems are pre-conditions of financial sector viability and resilience, many Bank client countries continue to lack transparent and robust legal frameworks with well-calibrated market incentives, wide participation and awareness in the law-making process and implications of new laws and regulations, predictability and objectivity in the application of law, equitable and cost-effective legal remedies for consumers, and competent and efficient judicial and other dispute resolution mechanisms. As a result, the Bank's strategic priority is to ensure close synergy with generic legal and judicial as well as public sector reform initiatives.

The Bank, the IMF and other international organizations such as the United Nations Commission on International Trade Law (UNCITRAL), collaborate within the framework of the International Financial Architecture program to help identify effective approaches to legal and regulatory reform in the finance sector. The Bank functions as a "standard setting body" in close coordination with UNCITRAL to develop "best practice" guidance on corporate insolvency and creditors/debtor regimes. In the context of the current global financial crisis, the Bank and UNCITRAL have reconvened the insolvency and creditors rights task force to consider the implications of the crisis on the reform of insolvency regimes. The Bank also contributes towards global discussions on how best to calibrate government interventions, including focused insolvency law reform so as to spur the corporate debt restructuring process.

In order to stimulate open discussion of financial, private sector and related issues and to contribute to knowledge sharing, the Bank has placed relevant materials on its external website, which also allows interaction between discussion groups on the same site. It has also established the Global Insolvency Law Database (GILD) dealing with questions of corporate insolvency and debtor/creditor issues.

2. Infrastructure Sector

Recognizing that inadequate or inefficient infrastructure is a major barrier to growth and poverty reduction, the Bank seeks to improve access to infrastructure services in competitive, well-regulated markets with private sector participation. For infrastructure

sectors such as telecommunications, water, transport and power, rule-based regulatory systems encourage private investment while protecting the public against monopolistic practices.

The Bank assists in the establishment of regulatory frameworks that favor competitive, efficient markets and the entry of small-scale and other non-conventional providers. The Bank also assists in the establishment of legal frameworks and institutions that can foster the preparation and development of public private partnership projects (PPPs). Essential requirements are that: (i) the needs of all communities (including the poorest) are met on a sustainable basis; (ii) consumers enjoy an adequate level of service at a reasonable price; (iii) investors receive a market-based return on the capital invested, with prices reflecting real costs, and with subsidies, if any, being specifically targeted and transparent; and (iv) the public institutions involved in these activities are established with clear mandates and have the capacity to implement and monitor these frameworks and projects. To support this work, the Bank has established the PPP in Infrastructure Resource Center for Contracts, Laws and Regulation (www.worldbank.org/pppiresource) that provides guidance and practical information on the planning, design and legal structuring of infrastructure projects, particularly public-private partnerships.

G. Environmentally and Socially Sustainable Development Work

1. Safeguard Policies

Environmental and social issues arise in many Bank investment projects, particularly those involving agriculture, energy, forestry, industry, privatization and transportation. In addition, such issues may also arise as a result of certain development policy lending activities. Besides projects which impact on social and environmental issues, the Bank has been financing an increasing number of free-standing environment and social projects. To help address some of these issues, the Bank has operational policies including “Safeguard Policies” on Environmental Assessment, Pest Management, Cultural Property, Forests, Indigenous Peoples, Involuntary Resettlement, Natural Habitats, Projects in Disputed Areas, Projects on International Waterways, and Safety of Dams.

2. Land Law

Most developing countries find themselves in the midst of profound transitions in the area of Land Law. Some countries are still working with colonial era statutes, which require reconsideration and updating. These laws were framed almost exclusively with land’s productive function and individual producers in mind, and they often envisaged development scenarios that have not played out as expected. With the growing awareness of environmental problems, there are new conservation values being put forward for factoring into these systems. In other countries, the state appropriated and attempted

direct management of most land. Now, in light of failures in state land management, some of these countries are rethinking the role of private property rights and markets and redefining the roles of the state and local authorities.

Land law issues can arise in the context of a multitude of Bank projects, including natural resource management projects, infrastructure construction projects, urban renewal projects, indigenous peoples development projects, not to mention law and justice system reform projects. The Bank funds both land reform projects and land administration projects, and both types of project often contain sub-components on policy and law reform, and sometimes sub-components on dispute-settlement.

3. Global Environment Facility, Climate Investment Funds and Carbon Finance

In addition to compliance with Bank policies, it is important that project design support compliance with relevant laws and standards, and that appropriate legal safeguards are included in them. Often, the supporting institutional and legal framework is lacking, or needs strengthening. Bank projects often help borrowers address these needs for legal and institutional reform. A series of projects have helped put in place new laws and institutions that support sustainable forest management, protected areas and watershed protection. Part of this action arises out of related Bank strategies: on the environment, on forests and for the rural sector. In addition, some of this work takes place with support from standard Bank investments, as well as from trust funds such as the Global Environment Facility (GEF), Climate Investment Funds (CIF), and Carbon Finance.

GEF. The Bank supports the GEF. The restructured GEF began its operations in July 1994 with a trust fund of approximately $2 billion, which was replenished in August 2006 to a sum of $3.13 billion to fund operations between 2006 and 2010. The GEF serves as the financial mechanism for the Framework Convention on Climate Change, the Convention on Biological Diversity, the Convention to Combat Desertification, and the Convention on Persistent Organic Pollutants, as well as financing projects that address international waters and ozone layer depletion. In 2002, the second GEF Assembly approved certain amendments to the GEF Instrument adding two new focal areas (land degradation and persistent organic pollutants) to the existing ones. These amendments became effective in 2003, having been adopted by the trustee (the Bank) and the three implementing agencies (the Bank, UNEP and UNDP).

In 1997, the GEF Council had introduced simplified procedures for Medium-Sized Projects (MSPs), which are natural resource projects requiring no more than $1 million in GEF financing. Many of these projects are implemented by NGOs, and those requiring $750,000 or less may be approved by the Chief Executive Officer of the GEF.

Full-sized GEF-funded operations follow the same approval procedures as other Bank operations (with the exception of the Statutory Committee approval which is not needed for free-standing GEF projects). Approval by the Bank's Board of GEF projects proposed by Bank management helps ensure that the quality of the Bank's work as implementing agency meets the usual standards of quality, including cost-effectiveness, of Bank operations. In the course of project preparation, Bank-GEF projects are circulated to members of the GEF Council before the Bank's Board considers them. The GEF Council approves the work program. It receives project documents before their final approval by the implementing agency and may discuss their conformity with GEF policies and procedures (at the request of four of the Council members).

The GEF Council has expanded opportunities for other entities—such as the regional development banks and certain UN agencies—to access GEF resources, either through the existing three implementing agencies or directly from the GEF Secretariat. Under this initiative, such projects would be approved by the appropriate boards or other governing bodies of the concerned entities and would not be considered by the Bank's Executive Directors.

CIF. The deliberation under the United Nations Framework Convention on Climate Change on the post-2012 climate change are underway, including discussions on a future financial architecture and funding strategy for climate change. The CIF was created as an interim measure designed to strengthen the global knowledge base for low-emissions and climate-resilient growth solutions while the deliberations are being conducted.

The CIF is a unique pair of financing instruments designed to pilot what can be achieved to initiate transformational change towards low-emissions and climate-resilient development through scaled-up financing channeled through the MDBs.

The CIF is an important new source of funding to fill an immediate financial gap through which the MDBs will provide additional grants, concessional financing as well as guarantees and other financial instruments (that are available to MDBs) to developing countries to address urgent climate change challenges.

The CIF was approved by the Board of Directors of the World Bank on July 1, 2008. It is a partnership with two trust funds: Clean Technology Fund (CTF) and Strategic Climate Fund (SCF). The design of these funds presents a new model for transparency, cooperation, and scaling up climate action. The unique governance structure fosters inclusion and consensus-based decision-making. An equal number of developed and developing countries are represented on the governing bodies of the CTF and SCF, and a broad array of institutional, civil society, private sector, and indigenous stakeholders actively participate as observers.

In two years, the CIF has progressed from the initial design phase to the implementation of 38 pilots in developing countries and transition economies around the

world. As of September 30, 2010, pledges of funds totaled more than $6.4 billion from thirteen countries.

Carbon Finance. The Bank's carbon funds support partnership programs that were created to promote compliance by industrialized countries with the Kyoto Protocol to the United Nations Framework Convention on Climate Change by buying emission reductions resulting from projects that reduce greenhouse gas emissions in developing countries and countries with economies in transition. Since the creation of the first Bank carbon fund, the Prototype Carbon Fund (PCF), by the Executive Directors, in July 1999, carbon finance at the Bank has expanded from a prototype engagement to an increasingly mainstream activity for supporting sustainable development in client countries. The PCF has, in many respects, been the pioneer of the global carbon market, piloting transactions several years before the Kyoto Protocol to the United Nations Framework Convention on Climate Change entered into effect and acting as a role model for other similar funds that have been launched by the Bank, other international financial institutions and the private sector. Today the Bank manages over $2 billion across its twelve existing carbon funds and facilities. Sixteen governments and 66 private companies from various sectors have made financial contributions to the carbon funds. In September 2007, the Executive Directors approved the proposal to establish two new carbon facilities (Forest Carbon Partnership Facility and Carbon Partnership Facility) designed to adopt a larger-scale, longer term approach to greenhouse gas emission reductions, and to test the use of carbon finance in new fields, for example, avoided deforestation. Both facilities represent a unique partnership between buyers and sellers of emission reductions and are designed to purchase far beyond 2012, which will help remove some of the uncertainty currently surrounding the future of the Kyoto Protocol.

H. The Inspection Panel

On September 22, 1993 the Bank's and IDA's Executive Directors adopted a resolution, establishing the World Bank's Inspection Panel. The Panel is an independent body which has authority, within the limits set out in the resolution, to conduct investigations at the request of the Bank's Executive Directors, an Executive Director or a group of people adversely affected by Bank projects. Such complaints must be based on an alleged failure on the part of the Bank to follow its own policies and procedures with respect to the design, appraisal or implementation of projects. The Panel consists of three Inspectors.

The Panel was established to provide to people directly affected by Bank-financed projects an independent forum which can make recommendations to the Executive Directors and to Management to investigate its work on projects it finances, in order to find if the Bank has followed its own policies and procedures. While the Panel is independent, the Executive Directors are closely involved in its work, as the following summary of the Panel's procedures for complaints submitted by an Executive Director or a group of affected people illustrates. After it has received a request for inspection, the Panel promptly

informs the Executive Directors and Management of the request. Within 21 days, Management gives a response to the Panel, with evidence that it has complied with its procedures, or intends to do so. Within 21 days thereafter, the Panel decides whether the requested inspection meets the eligibility criteria and recommends to the Executive Directors whether the inspection should be carried out. If the Executive Directors decide that a request should be investigated, the Panel chairperson makes the arrangements to have the inspection carried out. The Executive Director elected by the country where the project is located is consulted during the inspection. The Panel submits its inspection report to the Executive Directors and the President. Within six weeks of receiving the inspection report, the Management gives to the Executive Directors for their consideration a report indicating its recommendations in response to the findings of the Panel. Within two weeks of the Executive Directors' consideration of the matter, Management must make publicly available the investigation report submitted by the Panel and the Bank's response to it.

The Executive Directors have completed two reviews of the Inspection Panel, one in 1996, and one in 1999. In concluding their reviews, the Executive Directors reaffirmed the resolution, and provided clarifications of the resolution in certain areas where questions had been raised in its application. The Bank's former General Counsel has written a detailed analysis of the evolution of the inspection function, the resolution establishing the Panel, its application in practice, and the Board reviews of the Panel's experience, to which the reader may refer for more information.[41]

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[41] Ibrahim F.I. Shihata, *The World Bank Inspection Panel: In Practice*, Second Edition, New York, Oxford University Press, 2000.

III. FINANCE

A. Financial Policies

The financial operations of the Bank raise a broad range of legal issues. These relate to the formulation and implementation of Bank and IDA financial and accounting policies, preparation of Bank and IDA financial policy papers and the structuring of proposed new financial products. Legal issues are regularly handled in work related to capital subscriptions, the borrowing program, investment and pension plan investment operations, asset-liability and credit risk management, Bank loans to IFC, currency and cash management, prepayments by the Bank's borrowers, loan charges, policies on arrears, provisioning, reserves, the allocation of net income, expanding the available financial terms of Bank loans, the replenishment of IDA resources, and innovative finance initiatives such as the International Finance Facility for Immunisation and Advance Market Commitments.

B. The Capital Stock of the Bank

The Bank's Articles of Agreement contain detailed and complex provisions on the Bank's capital stock. These provisions deal with the price of shares, the amounts which may be required to be paid in at the time of subscription and those which are subject to call, and the voting power attached to shares.

1. The Lending Limit and Capital Increases

The Articles of Agreement contain a limit on the "total amount outstanding" of loans and guarantees made by the Bank.[42] This amount may not be increased if the total would exceed the amount of unimpaired subscribed capital, reserves and surplus of the Bank. In the Bank's practice, loans are counted against this limit to the extent they are disbursed and outstanding, and guarantees are counted from the time they may first become callable. The authorized capital of the Bank may be increased by the Board of Governors by an affirmative vote of 75% of the total voting power. The most recent General Capital Increase was approved in 1988. Since then, special capital increases were approved to provide shares for Switzerland, the former Soviet Republics and other new member countries, as well as Japan. In 1998, a further special increase was approved to provide shares to five countries (Brazil, Denmark, the Republic of Korea, Spain and Turkey) whose share holdings in the Bank were among those that were most out of line with their IMF quotas.

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[42] Article III, Section 3.

In April 2010, the Development Committee endorsed the Bank's first General Capital Increase in more than 20 years and its first Selective Capital Increase in more than a decade, to enhance the voice and participation of developing and transition countries. The proposed General Capital Increase will allow the Bank to increase its support for borrowing countries in the face of continuing financial stress, while the proposed Selective Capital Increase will increase the voting power of developing and transition countries by 3.13%, to 47.19%. On July 21, 2010, resolutions to authorize these capital increases were submitted to the Board of Governors of the Bank. The voting period for these resolutions has been extended to March 31, 2011.

2. "Release" of Local Currency Subscriptions

The paid-in portion of the price of shares was initially set at 20%, and was required to be paid as follows: 2% in U.S. dollars, which at the time had a certain gold content, or in gold, and 18% in the currency of the member (so called "18%" currency or National Currency Paid-In Capital (NCPIC)). This portion has been set at a lower level in the Bank's subsequent capital increases. In the case of the so-called "membership shares," which were created in 1979 to maintain the voting power of small shareholders in the context of the 1979 General Capital Increase, there was no paid-in portion, and the entire price of the shares consisted of callable capital. The most recent General Capital Increase (approved in 1988) includes a portion paid in U.S. dollars (0.3% of the price of each share) and a portion paid in the member's currency (2.7% of the price of each such share). Under the terms of both of the capital increases now under consideration, 6% of the total subscription would be paid in, 0.6% in U.S. dollars and 5.4% in national currency, consistent with the aggregate historical averages.

Under the Articles of Agreement, the Bank is free to use the portion paid in dollars in its operations, but it must obtain the member's consent before lending or converting the portion paid in the member's currency.[43] Most developed member countries, and some developing member countries, have given such consent with regard to past subscriptions and a number of member countries have repurchased their NCPIC with U.S. dollars. In February 2002, the Executive Directors endorsed recommendations made by Management which included continuing (i) to use NCPIC for administrative expenses, (ii) to request member countries to release their NCPIC for lending, and (iii) to encourage member countries to repurchase their NCPIC with U.S. dollars. The recommendations also included the use of new techniques: (i) investment of NCPIC, (ii) swapping out of NCPIC to lend or invest the swapped-in currency, and (iii) providing local currency loans to borrowers or to IFC for IFC to onlend to its clients. However, it was recognized that each of the above approaches needed to take into account the basic position of the Articles, under which it is up to each member to decide whether to give its consent for the use of its local currency subscription in the Bank's operations.

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[43] Article IV, Section 2(a).

The capital increases now under consideration take a different approach. Article II, Section 3(b) provides that "[t]he Bank shall prescribe rules laying down the conditions under which members may subscribe shares of the authorized capital stock of the Bank in addition to their minimum subscriptions." Accordingly, the pending Board of Governors resolutions were crafted to condition each member's subscription on the unrestricted and immediate usability of the NCPIC subscribed. Specifically, subject to certain exceptions, the resolutions provide that the NCPIC must be paid in cash (or, for members with specific legislative constraints, in non-interest-bearing demand notes, which would promptly be encashed by the Bank, and therefore equivalent to cash) and in a freely-convertible currency. In addition, each subscribing member is deemed, under the resolutions, to provide its irrevocable consent to the unrestricted and immediate use of its paid-in capital. As a result of these provisions, the bulk of NCPIC under the proposed capital increases will be immediately usable by the Bank, whether for lending or for operations, without the need to obtain further member consents for the use of NCPIC.

3. Valuation of the Bank's Capital

Under the Articles of Agreement, the value of the capital stock of the Bank is expressed in terms of "United States dollars of the weight and fineness in effect on July 1, 1944" (referred to as "1944 gold dollars").[44] Changes in the international monetary system in the 1970s did away with par values, changed the role of gold, established the SDR as the unit of account of the IMF, and removed the basis for translating 1944 gold dollars into current dollars and other currencies. In light of these events, most members had wanted the Bank to adopt the SDR as the successor to the 1944 gold dollar as the standard of value of the Bank's capital, but this was resisted by the United States which preferred the last par value of the U.S. dollar. Several legal opinions were provided by the Legal Vice Presidency to the Executive Directors on this subject. In October 1986, the Executive Directors adopted a compromise solution proposed by an ad hoc committee of the Directors, under which, by a formal interpretation of the Articles of Agreement, the standard of value of the Bank's capital would be the SDR at the fixed historical value of $1.20635 (the 1974 SDR). In essence, this is basically the last par value of the U.S. dollar with the nominal use of the term SDR. This decision took effect on June 30, 1987.

In the course of the negotiations of the 1988 General Capital Increase, some Executive Directors expressed the view that the question of the valuation of the Bank's capital should be reexamined, and an ad hoc committee of Executive Directors was established for the purpose. The General Counsel, at the request of the Committee, stated his views as to the options available to the Committee. All members of the Committee (and subsequently all Executive Directors) except one (representing the United States) were of the view that the SDR would be the appropriate standard of value for the Bank's capital and for the maintenance of value of the capital. But the conclusion of the Committee, endorsed by the Executive Directors, was that such a change should be the result of

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[44] Article II, Section 2(a).

consensus among the members of the institution. In the context of the 1994 review of capital adequacy, it was concluded that the matter of the valuation of the Bank's capital should be reviewed at such time as a consensus on changing the standard can be reached.

C. IDA Replenishments

Every three years IDA donor countries negotiate a replenishment of IDA's resources. The terms and conditions of IDA replenishments, which in recent years have become increasingly lengthy and comprehensive, are negotiated by the Deputies who are senior officials of the IDA donor countries representing their responsible ministers. They are not officials of IDA and the terms and conditions negotiated by them are submitted for consideration and approval by IDA's governing bodies. The senior governmental positions of IDA Deputies help to ensure that the agreements reached by them will have the necessary political support in the donor countries. During the replenishment negotiations, Deputies and borrower representatives discuss and take account of relevant aspects of IDA's policies and procedures.

The final results of the negotiations and the arrangements for a replenishment are incorporated into a report and resolution adopted by IDA's Board of Governors. In 2006, IDA implemented the Multilateral Debt Relief Initiative (MDRI) which resulted in the cancellation of 100% of eligible debt of countries that reach HIPC completion point. At the same time, IDA approved an additional replenishment to compensate IDA over time for its foregone reflows under the MDRI.

D. IBRD Borrowings, Investments and Credit Risk Management

The IBRD has outstanding borrowings in some 30 currencies and has borrowed from official or private sources in most of its member countries. The vast majority of these borrowings are conducted under IBRD's Global Debt Issuance Facility, an omnibus program that sets virtually all of the standard terms for individual borrowing transactions. On June 30, 2010, outstanding borrowings amounted to the equivalent of about $128.58 billion.

The Articles require that before borrowing funds the Bank obtain the consent of the member in whose markets the funds are raised and the member in whose currency the loan is denominated. The Bank has interpreted this requirement to the effect that it needs the consent of those members whose currency is being borrowed and those members where the banks in the management group of underwriters are located.

In connection with both its borrowing operations and its investments, the Bank also undertakes a wide variety of currency and interest rate swap transactions. A substantial number of legal and documentation issues are associated with these transactions. On

June 30, 2010, the amounts receivable and payable under outstanding swaps totaled $121.63 billion equivalent and $110.42 billion equivalent, respectively.

IBRD's liquidity of $36 billion equivalent on June 30, 2010 is invested in a variety of currencies and instruments. These investment operations raise a multitude of legal questions, from interpretation of the investment authority approved by the Executive Directors to specific issues involving particular types of transactions, such as securities lending, repurchase agreements, futures or options. Assets of the Staff Retirement Plan and Trust and Retired Staff Benefits Plan and Trust, totaling $14.5 billion equivalent on December 31, 2009, are invested in a wider array of currencies and instruments than the Bank's own liquidity and these investments likewise raise a broad range of legal issues.

IV. ADMINISTRATIVE AND HUMAN RESOURCES MATTERS

A. General

Bank administrative and human resources matters involve both legal issues purely internal to the Bank and legal issues relating to the Bank's status as an international organization and its relations with its member countries. Specific legal issues also arise in human resources administration, salary administration, grievance proceedings, acquisition of properties at Headquarters and for field offices, U.S. immigration and tax laws as they affect the Bank and its staff, external legal disputes and pension plan administration. Many of these issues are also faced by other international organizations, especially those headquartered in the United States such as the IMF, the United Nations and the Inter-American Development Bank. The Bank maintains frequent contact with these organizations, to exchange information with them and on occasion take positions jointly, such as approaches to the U.S. government on issues of common concern.

B. Human Resources Matters, Peer Review Services and Administrative Tribunal

The staff members' relationship with the Bank is governed by their terms of employment with the Bank. In 1983, the Bank's Executive Directors approved Principles of Staff Employment setting out the basic rights and obligations of the Bank and staff. To further those principles, the Bank set out Staff Rules in a Staff Manual. This system is similar to the pattern in other international organizations.

Pursuant to terms of reference set forth in the Staff Rules, the Bank has established an internal grievance system to resolve employment related disputes between staff and the administration of the Bank. What follows is a short description of the Bank's Conflict Resolution System (CRS) for dealing with staff grievances.

The Bank has an Ombudsman to facilitate conflict resolution, using informal mediation and conciliation or other appropriate means for the primary objective of settling grievances between a staff member and the Bank's management. This includes the Respectful Workplace Advisors (RWS) program which consists of volunteer peers who serve as an informal avenue of assistance to staff facing harassment, disrespectful or unethical behaviors, or other sources of stress at work. In addition, the Bank has established a Mediation Office that is also devoted to informally resolving disputes before or after they mature into formal grievances. If a dispute cannot be resolved informally, or where the staff member does not wish to engage in mediation, the staff member may seek a formal resolution of the matter. The Bank has established two separate bodies for formally hearing disputes between its staff and the Bank's management. For cases filed prior to

July 1, 2009, the complaints are heard by the Appeals Committee, which recommends a decision to the Vice President, Human Resources, who may accept it, reject it or modify it. For cases filed on or after July 1, 2009, the Peer Review Panel (the Panel), comprising three volunteer staff members (at both managerial and non-managerial level) hears the request. The Peer Review Services process seeks to provide staff with a means to obtain review of disputed employment matters by their peers. The concerned staff member and the designated manager will present evidence regarding the disputed employment matter to a panel of peers. The Panel reviews the evidence presented and considers whether the Bank's actions were consistent with the staff member's contract of employment and/or terms of appointment, including the pertinent Bank rules and policies. Generally, the Panel's recommendations are submitted to the Vice President of the designated manager, who, in consultation with the Vice President, Human Resources, may accept, reject or modify some or all of the corrective measures and relief recommended by the Panel.

The second formal body for hearing staff complaints is the Bank's Administrative Tribunal, which is a judicial body established by the Board of Governors in 1980. The Tribunal, which was patterned after tribunals in existence at almost every other major international organization, consists of seven eminent jurists appointed for five-year terms by the Executive Directors from a list of candidates drawn up by the President after appropriate consultation.

Under its statute, the Tribunal is empowered to hear and decide complaints by staff members or persons claiming through them that a decision or action taken by the Bank has violated the staff member's terms of appointment or contract of employment. With respect to remedies, the Tribunal may order rescission of a contested decision or specific performance of an obligation invoked, while at the same time setting monetary damages in the event the Bank decides to pay compensation in lieu of rescission or specific performance. Judgments of the Tribunal are final.

Generally, the staff must exhaust the Bank's internal grievance mechanisms, i.e., typically mediation, if requested, and the Appeals Committee/Peer Review Services, before proceeding to the Tribunal. Under certain special circumstances a case may proceed directly to the Tribunal. Although the Tribunal will normally have before it documents issued in the course of a case taken through the Bank's internal appeals process, the Tribunal is not an appellate body, but rather hears all cases *de novo*.

Appeals to the Tribunal are made against a range of decisions: e.g., redundancy, reassignment, salary increase, job grading, decisions relating to benefit and pension matters and findings of misconduct and employment discrimination. The Tribunal's decisions place emphasis on the Bank's following a proper process in its treatment of staff.

C. Litigation

The Bank is represented before the Administrative Tribunal by the Legal Vice Presidency. The Legal Vice Presidency is also responsible, usually with the assistance of outside counsel, for all actions brought by or against the Bank in the courts of its member countries. Few cases have been brought against the Bank (e.g., in respect of employment matters). Over the years, some terminated staff members have brought actions in the courts of member countries (at Headquarters and elsewhere) claiming that the Bank has violated domestic labor legislation or civil rights legislation. Similar actions have been brought from time to time against other international organizations. With few exceptions, the organizations have been held to be immune from such suits.

Because the Bank under its Articles does not have absolute immunity from suit, the Bank has defended these employment suits on the basis that national courts lack jurisdiction over Bank employment matters. In fact, the Bank's position is that its immunity applies in all cases except those brought by the Bank's creditors in its borrowing and investment operations, for whom the waiver of immunity was meant from the beginning. In 1983, a U.S. Court of Appeals confirmed the Bank's position in the *Mendaro* case where a staff member had sued the Bank on the grounds of gender discrimination. The U.S. Court of Appeals, citing the fact that the Bank has its own Administrative Tribunal, stated that the broad international and national policy considerations calling for immunity for international organizations from employee lawsuits applied to the Bank notwithstanding the provision in the Bank's Articles of Agreement that actions against the Bank may be brought where the Bank has an office or has issued securities. In 1990, a U.S. District Court decision extended this rule to employees of temporary employment agencies assigned to work at the Bank. (It should be noted that such employees are, technically, *not* Bank staff employees.)

D. Privileges and Immunities

By virtue of specific provisions in the Bank's Articles, as well as treaties such as the Convention on Privileges and Immunities of the Specialized Agencies and various national statutes, the Bank is granted a variety of privileges and immunities which enable it to function internationally without undue interference from governments or individuals. The Bank's immunities include immunity of Bank assets from seizure, inviolability of its archives, immunity of officers and employees from legal process in connection with official acts, immunity of Bank assets and income from all taxation and from all customs duties, and tax immunity for the salaries and emoluments of Bank officials and employees who are not local nationals. Executive Directors and Alternates benefit from these immunities. Most international organizations (including the IMF) have complete immunity from suit in national courts. Because the Bank was to issue and guarantee securities, when its Articles were agreed upon, it was thought necessary that it could be sued by the holders of such securities. However, no action can be brought against the Bank by or on behalf of member countries.

Numerous issues arise which involve these privileges and immunities. These may concern simple attempts to serve process on individual employees of the Bank contrary to the inviolability of the Bank's premises, attempts to attach wages contrary to the immunity of the Bank from attachments, seizure of property in the absence of final judgment against the Bank or even politically motivated attempts to subpoena senior Bank officials to testify before legislative bodies, which would violate the official acts immunity of Bank staff as well as embroil the Bank in the politics of its members. The Bank tries to resolve the underlying dispute in a manner which will not establish an unfavorable precedent. Where more serious questions are raised, such as in individual criminal income tax investigations, the Bank may voluntarily provide documents to a limited extent for the reason that it believes it has a civic responsibility to do so. There are instances, however, where neither a mutually satisfactory resolution nor a waiver is feasible, and the Bank is forced to invoke the immunity in question.

E. The Pension Plan and Tax Allowances

The Bank sponsors the Staff Retirement Plan (the Plan), a defined benefit pension plan, for eligible Bank Group staff. The Executive Directors amended the Plan, effective April 15, 1998, to establish a new "net" pension scheme for participants joining the Plan thereafter. The net scheme includes a traditional pension benefit and a cash balance benefit, both of which are computed based on net salary. Participants who joined the Plan before the 1998 amendment continue their participation in the "gross" scheme, which provides a traditional pension benefit based on a notional gross remuneration. The Plan is maintained as a tax qualified governmental plan under the U.S. Internal Revenue Code (the Code), with the consequence that contributions made by the Bank to the Plan in respect of U.S. nationals are not taxable until retirement or withdrawal from the Plan.

The Bank also sponsors an optional 401(k) plan, effective July 1, 2009, for Headquarters staff. The 401(k) plan enables eligible staff to make contributions to a tax deferred retirement savings plan. The 401(k) plan is maintained as a tax qualified governmental plan under the Code, with the consequence that contributions to the 401(k) plan by U.S. nationals are not taxable until withdrawal or distribution from the 401(k) plan.

Most of the salaries and emoluments paid by the Bank Group during employment are exempt from taxation under the Articles of Agreement, the Convention on the Privileges and Immunities of the Specialized Agencies, or agreements between the Bank and individual member countries. In cases where salaries and emoluments are paid net of taxes and are subject to income tax, a tax allowance is payable by the Bank Group. For taxable pension benefits paid under the net pension scheme of the Staff Retirement Plan, there is a separate tax supplement program. There is also an estate tax protection program, which generally applies to non-U.S. spouses of eligible U.S. based staff who die in service. Tax law issues arise under these various tax programs.

F. Outside Activities

An Outside Interests Committee decides upon requests from staff members to engage in specified outside activities which potentially or apparently involve conflicts of interest with other Bank obligations.

G. Integrity Vice Presidency

The Integrity Vice Presidency (INT) was created in March 2001 to implement the Bank's campaign to prevent fraud and corruption in Bank projects. INT's core functions are to:

(i) Investigate allegations of fraud and corruption in World Bank Group projects.

(ii) Investigate allegations of misconduct by Bank staff.

(iii) Train and educate staff and clients in detecting and reporting fraud and corruption in World Bank Group projects.

INT submits the results of its investigations to Bank management. These results provide management with a basis for deciding whether to take any administrative actions in response to INT's findings. For example, individuals or companies that have been found to have violated the fraud and corruption provisions of the Procurement Guidelines, the Consultants Guidelines, or the recently approved Anti-Corruption Guidelines can be declared ineligible to participate in Bank-financed projects. Bank management can also decide to refer the results of INT's findings to the relevant agencies within member governments of the Bank for possible criminal prosecution.

INT submits the results of its investigations involving allegations of staff misconduct to the Vice President, Human Resources. The Vice President, Human Resources, reviews INT's findings of fact to determine whether misconduct occurred and what disciplinary measures to impose, if any. A staff member dissatisfied with any disciplinary measure imposed may seek redress through the Conflict Resolution System (CRS), described above in Part IV.B.

H. Office of Ethics and Business Conduct

The Bank's Office of Ethics and Business Conduct (EBC) directs and manages the Bank's commitment to its core values of respect, integrity, disclosure and ethical standards. The goal of the EBC is to help all staff achieve the Bank's mission of poverty elimination through conduct that is ethical, legal and responsive to the communities in which the Bank operates around the world. The EBC reports to the Office of the President and is mandated to carry out its responsibilities with independence and

discerning judgment. The EBC is a culture and values-based function, setting standards for appropriate professional conduct and maintaining programs and services that promote excellent employee, consultant, contractor, managerial, executive and leadership behavior.

The EBC provides leadership, management and oversight for the Bank's ethics infrastructure through (i) the Ethics Help Line, (ii) a consolidated conflicts of interest disclosure/resolution system, (iii) an ethical decision making model, and (iv) ongoing training and communication resources. The EBC provides staff support through specialized services, from informal counseling to formal review of concerns.

V. ICSID

The International Centre for Settlement of Investment Disputes (ICSID) was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) which came into force on October 14, 1966 and has been signed to date by 155 States. ICSID is an autonomous international institution within the World Bank Group. All of ICSID's member States are also members of the Bank.

The primary purpose of ICSID is to provide neutral facilities for the conciliation and arbitration of international investment disputes. ICSID has two sets of procedural rules that may govern the initiation and conduct of proceedings under its auspices. These are: (i) the ICSID Convention, Regulations and Rules; and (ii) the ICSID Additional Facility Rules.

The organizational structure of ICSID includes an Administrative Council and a Secretariat. The Administrative Council is the governing body of ICSID. It is comprised of one representative of each of the 144 Contracting States which has signed and also ratified the Convention. Unless a government makes a contrary designation, its Governor for the Bank sits *ex officio* on ICSID's Administrative Council. All representatives have equal voting powers. The President of the Bank is *ex officio* Chairman of the Administrative Council, but has no vote. The Administrative Council convenes annually in conjunction with the joint World Bank/IMF Annual Meetings.

The ICSID Secretariat consists of a Secretary-General, a Deputy Secretary-General and staff. The Secretary-General is the legal representative of ICSID, the registrar of ICSID proceedings and the principal officer of the Centre. The Deputy Secretary-General is responsible for the day-to-day operations of the Secretariat and acts for the Secretary-General in the event of the Secretary-General's absence. ICSID's administrative expenditures are covered by the Bank's contributions, and also by fee income. Expenditures relating to the individual proceedings are borne by the case parties in accordance with the ICSID Administrative and Financial Regulations.

As of October 30, 2010, a total of 327 cases have been registered by ICSID since its inception: 298 under the ICSID Convention and 29 under the Additional Facility Rules. In fiscal year 2010 alone, 31 different legal proceedings were registered including 27 requests for the institution of new arbitration proceedings. The number of the pending proceedings reached 154, keeping ICSID's yearly caseload at a record level.

ICSID does not conciliate or arbitrate disputes; this is the task of independent conciliation commissions and arbitral tribunals constituted in each case to resolve the dispute. Over 350 hundred individuals from 68 countries have served on the conciliation commissions, arbitral tribunals and *ad hoc* committees thus far constituted in the cases. ICSID also maintains Panels of Conciliators and of Arbitrators. Each ICSID Contracting

State may designate up to four persons to each Panel, and the Chairman of the Administrative Council may designate up to 10 people. The Panels are an important component of the ICSID system of dispute settlement since under certain procedural conditions appointees in the cases must be drawn from these Panels. There are currently over 520 members of the ICSID Panels.