

**DOCTORAL DEGREE BY VIRTUE OF  
PUBLICATIONS: INTERNATIONAL  
DEVELOPMENT LAW**

BY

**DANIEL DAVID BRADLOW**

Thesis submitted in partial fulfilment of the requirements for the degree of  
Doctor of Laws (LLD) at the University of Pretoria

Prepared at the Centre of Human Rights, Faculty of Law,  
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## **LLD Application Statement by Daniel Bradlow**

I am hereby applying for the doctoral degree by virtue of publications. I am submitting the following publications in support of this application. (Copies are attached of all publications indicated in bold). I also hereby confirm that these publications are my own works or those of myself and my co-authors, have not previously been submitted to any other institution for a doctoral degree and that due attention has been paid to all applicable copyright considerations.

The publications, which have been divided into five categories, are:

### I. International Development Law

**“Differing Conceptions of Development and the Content of International Development Law”** 21:1 *South African Journal of Human Rights* (2005) reprinted in Development and Economic Resources, from *Encyclopedia of Life Support Systems (EOLSS)*, Developed under the Auspices of the UNESCO, Eolss Publishers, Oxford, UK, [<http://www.eolss.net>] Also available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=788070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=788070)

This publication is based on my work with the World Commission on Dams, on the International Financial Institutions and human rights, and with the World Bank on dam safety regulation. It is an attempt to explain the conflicting views that have developed about development, particularly around infrastructure projects and extractive industry projects, and the implications this has for international development law. At the time the article, of which there are in fact 2 versions (the second version was published in the Boston University Journal of International and Comparative Law), was written, it was innovative and attracted considerable interest.. For example, on the SSRN network<sup>1</sup>, the two versions of the article have been viewed a total of 1716 times and the papers downloaded a total 311 times.

The following is an abstract of the article published in the SAJHR :

International development law is the branch of international law that deals with the rights and duties of states and other actors in the development process. Its original content was premised on a particular generally accepted understanding of development. Under the pressure of the problems of development that arose during the 1970s and 1980s, this general agreement on the key issues in development disintegrated. As a consequence, the consensus on the content of international development law also began to break down.

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<sup>1</sup> Social Science Research Network (SSRN) is devoted to the rapid worldwide dissemination of social science research and is composed of a number of specialized research networks in each of the social sciences, including law.

Today, there are competing idealized views of development that shape the current debate about both development, and the content of international development law. The first view, which can be termed the traditional view, maintains that development is about economic growth. It argues that the challenges of economic development can be distinguished from other social, cultural, environmental and political issues in society, including human rights. The second view, which can be termed the modern view has a holistic understanding of development. It argues that development should be viewed as an integrated process of change that involves economic, social, cultural, political and environmental dimensions. Each of these views leads to a different understanding of the contents of international development law. The traditional and modern views of international development law differ in their understanding of the substantive content of development law, the importance they attach to the principle of sovereignty and in their view of the relationship between national and international law in the law applicable to the development process.

I have also written two other articles that are relevant to this topic. They are:

**“Are We Being Propelled Towards a People: Centered Transnational Legal Order?”** *9Am. U. J. Int’l. L. and Pol’y* 1-25 (co-authored with Claudio Grossman) (1993) (Also available at: <http://ssrn.com/abstract=1365252>).

“Debt, Development and Human Rights: Lessons from South Africa,” *12 Michigan Journal of International Law* 647 (1991).

## II. Articles on the Governance of the IMF

**“Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF,”** *3 Journal of International Banking Regulation* 9-36 (2001). An updated version of this article was prepared for the G24 Secretariat and published as **“The Governance of the IMF: The Need for Comprehensive Reform,”** (prepared for G24 Technical Committee) available at [www.g24.org/brad0906.pdf](http://www.g24.org/brad0906.pdf) (2006) (also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=92846](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=92846)

This publication was based on my work on enhancing accountability of international financial institutions and on reform of the international financial architecture. The articles are unusual in that they analyze, from an international legal and policy perspective, the problems in the structure, function and governance of the IMF and propose a set of short, medium and long term solutions to these problems. My work in this area has attracted considerable attention. I was asked to speak about the paper to a number of different audiences and was invited to publish shorter versions of it in the *South African Yearbook of International Affairs* and the *Indian Journal of International Law*. On the SSRN network the two versions carried of this article have been viewed 940 times and the papers downloaded 214 times.

The following is the abstract of the article written for the G24 Secretariat:

This article argues that IMF's current governance arrangements suffer from being non responsive to key stakeholders, lack of accountability, non-representative decision making, lack of transparency, and poorly defined relations with other international organizations. These deficiencies have arisen because the IMF has failed to adapt its decision-making structure and procedures to its changing functions and role in the global economy. They have caused distortions in the IMF's relations with its member states, with non-state actors, and with other international organizations and problems with some of the IMF's interpretations of its articles. The article argues that the IMF cannot perform effectively until it corrects these problems in its governance and these distortions in its relations with its key stakeholders. It also includes a set of short, medium and long term reform proposals that, if adopted by the IMF, would make its decision-making procedures more compatible with its current functions and changed relations with its member states. They will also ensure that the IMF's own governance and decision making arrangements conform to the principle of good governance-transparency, predictability, participation, reasoned decision making, and accountability - that are applicable to all public institutions at both the national and international level.

I have written a related paper on this topic, entitled, “**Operational Policies and Procedures and an Ombudsman**” that was published in a book, *Accountability of the International Monetary Fund*, B. Carin, A. Wood, eds., IDRC/Ashgate, 2005. ( also available at : <http://ssrn.com/abstract=805805>). I was invited to present this paper to meetings at the IMF and at the Brookings Institution in Washington DC. It has been viewed 466 times on SSRN and downloaded 73 times.

The following is an abstract of the article:

This paper is about the problems with the administrative practices and procedures in the IMF. It argues that currently the IMF lacks administrative practices and procedures that are consistent with the requirements of good governance. There are 2 requirements for such administrative practices and procedures. The first is clearly articulated and publicly available standards that guide IMF staff in their work and that other stakeholders can utilize in measuring the performance of IMF staff. These standards should set out both the substantive and procedural requirements applicable to the operations of the IMF. The second is a mechanism through which IMF staff and management can be held accountable for their failure to comply with the applicable procedures. The paper concludes with recommendations on designing a formal and comprehensive set of operational policies and procedures for the IMG and a call for the IMF to establish and ombudsman to oversee compliance with these operational policies and procedures.

### III. Articles on Accountability in International Financial Institutions

**“International Organizations and Private Complainants: The Case of the World Bank Inspection Panel,”** 34 *Virginia Journal of International Law* 553 (1994).

This article was based on my work creating the Inspection Panel at the World Bank. It discusses the problems at the World Bank that arose due to its lack of accountability, the suggestions that were made to address this problem, the campaign to get the World Bank to adopt an accountability mechanism, and the significance of the Inspection Panel. I wrote this article because the Inspection Mechanism is based substantially on my proposal that the World Bank create an ombudsman empowered to receive complaints from people and communities that were harmed or threatened with harm by World Bank funded projects and because I was actively involved in the campaign to get the Bank to create the Inspection Panel. It is important to note that the World Bank was the first major international organization to create a mechanism that allowed non-state actors to hold an international organization directly accountable for its actions.

**“Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions”,** 36 *Georgetown J. Int’l. L* 403 (2005). (also available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=713502](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=713502))

This article was based on a study that I did for the African Development Bank on inspection mechanisms in international financial institutions and international organizations. The study ended with a proposal for the design of an inspection mechanism for the AFDB. The AFDB adopted my proposal and created the Independent Review Mechanism (IRM), based on my proposal. I was subsequently appointed as a member of the first 3-person Roster of Experts in the IRM. I was also the chair of the panel created in response to the first request for inspection received by the IRM. This study attracted some interest outside the Bank and so I converted the study into a publishable article. The article has been viewed 512 times on SSRN and has been downloaded 157 times.

The abstract for the article is:

This paper is a comparative study of the independent inspection mechanisms in international financial institutions. These mechanisms, which are an important development in the accountability of international organizations, allow private complainants who believe that they have been harmed or threatened with harm by the failure of these institutions to act in accordance with their own operational rules and procedures to have their complaints investigated by an independent body.

The paper is divided into three parts. In the first part I discuss the structure, functions and procedures of the World Bank's Inspection Panel, the International

Finance Corporation's Compliance Advisor Ombudsman, the Inter-American Development Banks' Independent Inspection Mechanism, the Asian Development Bank's Accountability Mechanism, the European Bank for Reconstruction and Development's Independent Recourse Mechanism, and the African Development Bank's Independent Review Mechanism. I also briefly discuss analogous mechanisms in the International Monetary Fund, the European Union, the United Nations, and Export Development Canada.

The second part of the paper is a comparative analysis of these mechanisms. It compares their structures, functions and procedures and draws some conclusions of general applicability about independent inspection mechanisms.

The third part of the paper argues that all international organizations with operational responsibilities need independent inspection mechanisms. It then discusses the principles that should guide the structure, function and procedures of such mechanisms and considers various models that can be adopted for such mechanisms. It ends with a recommendation on the optimal structure for such a mechanism.

I have written a number of other articles about the World Bank Inspection Panel. They include:

“Precedent Setting NGO Campaign Saves World Bank Inspection Panel,” 6 *Human Rights Brief*, No. 3, p. 74, May 1999.

“A Test Case for the World Bank,” *Am.U. J. Int'l. L. and Pol'y* 247 (1996).

“The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order,” 54 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 392 (Max-Planck Institute) (co-authored with S. Schlemmer-Schulte) (1994).

#### IV. International Financial Institutions and Human Rights

“**The World Bank, the International Monetary Fund and Human Rights,**” 6 *Journal of Transnational Law and Contemporary Problems* 68 (1996).

This article was an attempt to explore the World Bank and the IMF’s responsibilities in regard to human rights. My concern in this article was to explore their human rights obligations in regard to both their operations and their relations with member states that are systematic human rights violators. Prior to my article, most articles that had been written about human rights and these institutions had only focused on the latter issue. The article built on my research for my article on debt, development and human rights in South Africa and on my work on the World Bank Inspection Panel. It also contributed to my interest in dams and my work on differing conceptions of development and international development law.

V. Socially Responsible Investing

**“An Experiment in Creative Financing to Promote Reconciliation and Development In South Africa”** in *Africa’s Finances: The Contribution of Remittances*, R. Bardouille, M. Ndulo and M. Grieco (eds., 2008) ( also available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=987506](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987506))

This article is a summary of a project that I undertook to launch a Reconciliation and Development Bond in South Africa. The project was inspired by the Report of the Truth and Reconciliation Commission. Its goal was to design a retail bond that could be sold to the public and which could be used to fund small scale development projects in poor and disadvantaged South African communities. The article describes the work I did to design the bond and some of the lessons that I learned from the project. While the project has not yet resulted in the bond being issued, it has had a practical result. In the course of the project, I was awarded a grant by the Wallace Global Fund, which I used to hire consultants to conduct a study of organizations with the capacity to invest the money raised through the bond in small scale development projects. It turned out that the study that I commissioned was probably the first such study done in South Africa. It not only is a careful study of the institutional capacity for such projects in South Africa but it includes an innovative methodology for identifying and evaluating them. The consultants and I have continued to work together. We are in the process of turning our work into an annual report that will promote understanding of small scale social impact investing and will facilitate investment in small scale development projects. The article has been viewed 240 times and downloaded 79 times on SSRN.

The following is the abstract for the article:

This paper discusses a project designed to address 3 seemingly unconnected problems:

- 1) How to promote private reconciliation in South Africa, that is reconciliation between black and white South Africans that is independent of the effort to promote reconciliation between the state and those who suffered under apartheid
- 2) How to involve the South African expatriate community in the process of reconciliation and development in South Africa, and
- 3) How to mobilize and deliver funding for projects that are both too rich for grant funding because they generate a stream of revenue that can be used to service debts and other financial obligations and too poor for commercial funding either because of the scale of the project or the risk and return profile of the project.

The paper describes the innovative funding structure that has been developed to

simultaneously address all three of these issues and some of the interesting financial, legal and policy issues that it raises.

## VI. Dam Safety Regulation

### **Regulatory Frameworks for Dam Safety: A Comparative Study (2002)**,

published by World Bank as part of Law, Justice and Development Series (co-authored with Alessanro Palmieri and Salman Salman).

This book is a comparative study of dam safety regulation in 22 countries. The study is divided into 3 parts. The first part is a description of the dam safety regulatory framework in 22 countries: Argentina, Australia, Austria, Brazil, Canada, China, Finland, France, India, Ireland, Latvia, Mexico, New Zealand, Norway, Portugal, Romania, the Russian Federation, South Africa, Spain, Switzerland, the United Kingdom, and the United States of America. The second part is a comparative analysis of these regulatory frameworks, highlighting the similarities and differences in the approaches adopted by these 22 countries. The third part offers recommendations on what a regulatory framework for dam safety should include. It lists essential elements, desirable elements and identifies a number of emerging trends in dam safety. The third part of the study is designed to be a tool kit that can be used by countries interested in updating or developing a regulatory framework for dam safety. The book has been translated into Chinese, French and Russian.

My role in this publication consisted of the following: I was hired as a consultant to undertake this study. Consequently, I was responsible for doing the research on the 22 countries, writing the first draft of the publication, editing the text of the publication after it was reviewed in a peer-review workshop. My co-authors were my contact people at the World Bank. They reviewed all drafts of the text and were available to meet with me to discuss the project and the book drafts. They also played a role in the editing of the text.

## VII. Additional Information

I have selected the above for submission for consideration for the doctoral degree by virtue of publications because I believe they give a clear picture of my research interests and of my writings over the course of my academic career. However, they do not constitute a comprehensive list of all my publications. Consequently, I am attaching as an addendum to this application, a complete list of all my publications.



ADDENDUM 1:  
COMPLETE LIST OF PUBLICATIONS  
BY  
DANIEL BRADLOW

**AUTHOR**

**BOOKS**

“Regulatory Frameworks for Water Resource Management: A Comparative Study” (Co-author with Salman Salman) (The World Bank, Law, Justice and Development Series, 2006)

“Regulatory Frameworks for Dam Safety: A Comparative Study” (Co-author with Alessandro Palmieri and Salman Salman) (The World Bank, Law Justice and Development Series, 2002)  
(book has been translated into Chinese, French and Russian)

**JOURNALS**

“Developing Countries Debt Crises, International Financial Institutions, and International Law: Some Preliminary Thoughts”, 2008 *German Yearbook of International Law* (forthcoming)

“Private Finance, Social Responsibility and Transitional Justice: The Case for South African Reconciliation and Development Bonds”, 15:1 *Human Rights Brief* 7 (2007)

“Training Law Students to be International Transactional Lawyers – Using An Extended Simulation To Educate Law Students About Business Transactions” (Co-authored with Jay Finkelstein) 1 *Pepperdine Journal of Business, Entrepreneurship and the Law* 67 (2007).

“The Changing Role of the IMF in the Governance of the Global Economy and Its Consequences” 2007 *South African Yearbook of International Affairs* (2007)

“Differing Conceptions of Development and the Content of International Development Law” 21:1 *South African Journal of Human Rights* (2005) reprinted in Development and Economic Resources, from *Encyclopedia of Life Support Systems (EOLSS)*, Developed under the Auspices of the UNESCO, Eolss Publishers, Oxford ,UK, [<http://www.eolss.net>]

“Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions”, 36 *Georgetown J. Int'l. L* 403 (2005).

- “Development Decision Making and the Content of International Development Law”,  
*27 B.C. Intl. & Comp. L. Rev.* 195 (2004)
- “The Governance of the International Financial Institutions: The Need for Reform”, 43  
*Indian Journal of International Law*,” 533 (2003).
- “Should The International Financial Institutions Play a Role in The Implementation and  
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- “The Changing Dynamics of International Financial Negotiations,” *MEFMI Forum*  
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- “Lessons From the NGO Campaign Against The Second Review of the World Bank  
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- “The Times They Are A „Changin“: Differing Conceptions of Development and the  
Reform of the WTO,” *33 George Washington International Law Review* 503  
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- “Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF,” *3 Journal of  
International Banking Regulation* 9 (2001).
- “The World Commission on Dams and Its Contribution to the Broader Debate on  
Development Decision-Making,” *16 American University International Law  
Review* 1531 (2001) (reprinted as “Mediating the Traumas of Techno-  
Economic Change: A Case Study in Popular Input” in *The Future of Peace*, N.  
Kittrie, H. Carazo and J. Mancham (eds) (2003).
- “Precedent Setting NGO Campaign Saves World Bank Inspection Panel,” *6 Human  
Rights Brief*, No. 3, p. 74, May 1999.
- “A Legal Perspective on the Asian Crisis and Lessons for Africa,” *1 Banking &  
Financial Law Journal of Ghana* 110 (1999).
- “The World Bank, the International Monetary Fund and Human Rights,” *6 Journal of  
Transnational Law and Contemporary Problems* 68 (1996).
- “A Test Case for the World Bank,” *Am.U. J. Int'l. L. and Pol'y* 247 (1996).
- “Limited Mandates and Intertwined Problems: A New Challenge for the World Bank  
and the IMF,” *17 Human Rights Quarterly* 411 (co-authored with Claudio  
Grossman) (1995).
- “International Organizations and Private Complainants: The Case of the World Bank  
Inspection Panel,” *34 Virginia Journal of International Law* 553 (1994).

“The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order,” 54 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 392 (Max-Planck Institute) (co-authored with S. Schlemmer-Schulte) (1994).

“Are We Being Propelled Towards a People: Centered Transnational Legal Order?” 9 *Am. U. J. Int'l. L. and Pol'y* 1 (co-authored with Claudio Grossman) (1993).

“South African Worker and Community Groups and the Operations of the World Bank: A Program of Action” 1 *East African Journal of Peace and Human Rights* 224 (1993). (Reprinted in MULBERRY, *Mostly Unread Literature Bearing Extraordinarily Rich and Relevant Yields*, Series No. 4 (96), (Olive (ODST) Subscription Service, Durban, South Africa) (1996).

“Human Rights, Public Finance and the Development Process: A Critical Introduction,” 8 *Am.U.J. Int'l. L. and Pol'y* 1 (1992).

“Regional Developments in Africa,” 25 *The International Lawyer* 1053 (1991).

“Debt, Development and Human Rights: Lessons from South Africa,” 12 *Michigan Journal of International Law* 647 (1991).

#### **BOOK CHAPTERS, MONOGRAPHS**

“An Experiment in Creative Financing to Promote Reconciliation and Development In South Africa” in *Africa's Finances: The Contribution of Remittances*, R. Bardouille, M. Ndulo and M. Grieco (eds., 2008) ( also available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=987506](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987506))

Entry on “The World Bank Group” in Robertson, Roland, and Jan Aart Scholte, eds. *Encyclopedia of Globalization*. (New York: Routledge, 2006)

“At the Mercy of Vultures: Sovereign Creditors in the Courts”, in *Ad Honorem Ion Dogaru: Studii Juridice Alese*, (Rumania, 2005), (with Ruxandra Burdescu)

“Operational Policies and Procedures and an Ombudsman”, in *Accountability of the International Monetary Fund*, B. Carin and A. Wood (eds., 2005)

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- “Some Lessons About the Negotiating Dynamics in International Debt Transactions” (UNITAR Discussion Document No. 9) (2000).
- “The Review of the IMF’s Enhanced Structural Adjustment Facility” (UNITAR Discussion Documents No. 7) (2000).
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- “Legal Aspects of Foreign Investment in South Africa,” *Legal Aspects of Foreign Direct Investment*, D. Bradlow and A. Escher (eds.) (Kluwer Press) (1999).
- “Introduction,” *Legal Aspects of Foreign Direct Investment*, D. Bradlow and A. Escher (eds.) (Kluwer Press) (1999).
- “The Changing Operations of the World Bank and the International Monetary Fund, and Its Implications for Southern Africa,” *Democracy, Human Rights and Economic Development in Southern Africa*, N. Steytler (ed.) (Lex Patria Publishers, South Africa) (1997).
- “Adjusting the Bretton Woods Institutions to Contemporary Realities” (co-authored with Claudio Grossman), *Rethinking Bretton Woods*, J.M. Griesgraber and B.G. Gunter (eds.) (Pluto Press with the Center of Concern) (1996).
- “Negotiation Theory and Practice: Case Study: Negotiating With Commercial Banks” (UNITAR) (1996).
- “Negotiation Theory and Practice: Module on Negotiating With Bilateral Aid Agencies” (UNITAR) (1996).
- “Sources of International Funds,” *Debt and Financial Management: Legal Aspects*, (UNITAR) (1993).
- “International Financing Techniques,” *Debt and Financial Management: Legal Aspects*, (UNITAR) (1993).
- “The International Monetary Fund, The World Bank, and Debt Management,” *Debt and Financial Management: Legal Aspects*, (UNITAR) (1993).
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- “The Structure and Function of the International Monetary Fund,” *International Borrowing: Negotiating and Structuring International Debt Transactions*, Daniel D. Bradlow (editor) (International Law Institute) (1st edition 1984, 2nd edition 1986).

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#### **NEWSPAPER AND MAGAZINE ARTICLES**

“Add Your Voice To The Global Economic Anthem”, *The Exporter, Business Day* April 6, 2009

“Fixing the IMF”, on Foreign Policy in Focus on March 30, 2009, available at: <http://fpif.org/fpif.txt/6002>>

“The G20 and Sustainable IMF Reform” on VOXEU on March 18, 2009, available at: <http://www.voxeu.com/index.php?q=node/3285>>

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- “South Africa Must Promote Democratic Development Now,” *Daily Mail*, August 22, 1990.
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#### **CONFERENCE PROCEEDINGS**

- “The Changing International Business Context and the Challenge it Poses for the Education of International Business Lawyers”, Proceedings of the Conference on “The Law of International Business Transactions: A Global Perspective” International Association of Law Schools, Hamburg, Germany, (April, 2008)
- “The Governance of International Financial Institutions: The Need for Reform”, Proceedings of the 2003 Hague Joint Conference on Contemporary Issues of International Law, The Hague, Netherlands, (July 2003) (TMC Asser Press)
- “ The Role of the World Bank in Post-Conflict Situations,” Proceedings of the 95<sup>th</sup> Annual Meeting of the American Society of International Law, Washington, DC (April 2001).
- “Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF,” Proceedings of the 94<sup>th</sup> Annual Meeting of the American Society of International Law, Washington, DC (April 2000).

“A Legal Perspective on the Asian Crisis and Lessons for Africa” Proceedings of the Tenth Annual Conference, The African Society of International and Comparative Law, Addis Ababa, Ethiopia (August 1998).

“Roundtable on The Accountability of International Organizations to Non-State Actors” Proceedings of the 92<sup>nd</sup> Annual Meeting of the American Society of International Law, pp. 359-360 (April 1998).

“Greater Public Accountability Will Improve The Efficacy of the Multilateral Development Banks,” The Proceedings of the 5<sup>th</sup> Annual Conference of the African Society of International and Comparative Law, Accra, Ghana (1993).

### ***COMPACT DISCS***

“Guidance Document on Debt and Financial Management: Preparing a National Profile to Assess the National Infrastructure for Sound Financial Management” (UNITAR) (1998-99).

### ***SUBMISSIONS TO OFFICIAL BODIES***

“The Governance of the IMF: The Need for Comprehensive Reform,” (prepared for G24 Technical Committee) available at [www.g24.org/brad0906.pdf](http://www.g24.org/brad0906.pdf) (2006) (also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=92846](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=92846)

“Study on An Inspection Function for the African Development Bank Group” (prepared for African Development Bank Group) (November 2003).

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### **EDITOR**

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## **PART 1**

### INTERNATIONAL DEVELOPMENT LAW

Differing Conceptions of Development and the Content of International Development Law

Are we being propelled towards a people: Centered Transnational Legal Order?

Differing Conceptions of Development and the Content of International  
Development Law<sup>1</sup>  
Daniel D. Bradlow<sup>2</sup>

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I. Introduction

International Development Law (IDL) is the branch of international law that deals with the rights and duties of states and other actors in the development process. This suggests that the content of IDL depends on one's conception of development. Currently there is no general consensus on how the economic, social, political, cultural, spiritual and environmental aspects of human existence should be integrated into a coherent theory of development. Consequently, it is difficult to reach agreement on the content of IDL. This essay will demonstrate that one's understanding of the content of IDL depends to a large extent on one's view on the relationship between economic growth and the social (including human rights), environmental, political, and cultural aspects of the development process.

This uncertainty about the content of International Development Law suggests a useful structure for the paper. It will begin with a description of the history of IDL. Thereafter it will discuss the two general categories into which different views of development can be classified and the different views of IDL that arise from each of these perceptions. The final section will consider likely future developments in our understanding of the content of IDL.

II. A Brief History of IDL

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<sup>1</sup> DO NOT QUOTE WITHOUT PERMISSION OF AUTHOR.

<sup>2</sup> Professor of Law and Director, International Legal Studies Program, American University, Washington College of Law, Washington D.C. [bradlow@wcl.american.edu](mailto:bradlow@wcl.american.edu) The author wishes to thank Maki Tanaka and Miki Kamijyo for their research assistance.

IDL began to emerge as a distinct body of law after the Second World War. It was inspired by the Latin American development theorists who argued that despite more than a century of political independence, the development of Latin American countries was hampered by its dependent economic relations with Europe and North America.<sup>3</sup> It gained further support in the era of decolonization from the experience of the newly independent countries of Africa and Asia. These countries discovered that while they had won their political independence, they did not have economic independence. They were locked into unequal and unfavorable economic relations with their former colonial masters that constrained their ability to develop.<sup>4</sup> Examples of economic relationships that adversely affected the economic independence of developing countries were:

- 1) concession agreements that gave foreign investors long term relatively unrestricted access to the resources of these countries at low cost;<sup>5</sup> and
- 2) unfavorable trade arrangements that gave the former colonial powers relatively easy access to their former colonies' market but denied comparable access to products, other than raw materials, from these countries.<sup>6</sup>

The international legal implications of these types of economic transactions were governed by the principles of international law, particularly those relating to state responsibility for the treatment of aliens and their property. These principles were primarily the creation of the countries of Europe and North America and were not particularly sensitive to the concerns of the developing countries in Africa, Asia and Latin America. Their primary focus in this regard was on protecting the sanctity of contractual arrangements, ensuring that foreign investors were treated according to certain minimum standards, and that foreign owners of nationalized property were promptly adequately and effectively compensated.<sup>7</sup>

<sup>3</sup> See generally TC Lewellen *Dependency and Development: An Introduction to the Third World* (1995) 60 (in the 1940s, economists from United Nations' Economic Commission for Latin America first proposed dependency theory, which seeks to explain underdevelopment as being caused by unequal exchange in international capitalism).

<sup>4</sup> See e.g., SKB Asante, 'The Concept of Stability in Contractual Relations, in the Transnational Investment Process' in K Hossain (ed) *Legal Aspects of the New International Economic Order* (1980) 234, 244 (newly independent countries could not repudiate unfavorable agreements immediately upon political independence because of traditional doctrines, such as *pacta sunt servanda*, sanctity of contract, acquired rights, and state succession).

<sup>5</sup> See e.g., *Aminioil v Kuwait* (1982)21 ILM 976, 1020-21 (unilateral termination of the oil concession despite the stability clause in the concession agreement); *Saudi Arabia v Aramco* (1958)27 IL Rep 117, 118 (interpreting the scope of the company's rights granted by the concession agreement that stipulated "exclusive concession for sixty years in the eastern part of Saudi Arabia"); N Schrijver, *Sovereignty Over National Resources: Balancing Rights and Duties* (1997) 175 (discussing international concessions involving natural resources with examples of concession agreements between the British-owned Anglo-Persian Oil Company and Iran and between the Sheikh of Abu Dubai and the Petroleum Development Company Ltd.). Concession agreements are also used in mineral mining sectors. See M. Sornarajah, *The International Law on Foreign Investment* (1994) 31 (giving examples of mining agreements regarding gold fields in Ghana, which gave a concession for one hundred year, and similar concessions regarding ruby mines in Burma).

<sup>6</sup> In the colonial era, charter companies, such as the Dutch East Indies and West Indies Companies and the British East India Company, gained advantageous trading and jurisdictional treatment through agreements with local rulers. See Schrijver (note 5 above) 174. The former colonial powers continued to secure favorable trade relations after World War II by using tariff and non-tariff barriers to control imports from developing countries. See A Mukerji, 'Developing Countries and the WTO: Issues of Implementation' (2000) 34 *J of World Trade* 33, 36.

<sup>7</sup> See e.g., *Chorzow Factory Case (FRG v Pol)*, 1928 PCIJ ser. A3 No. 17, 47 (1928) (restitution to the foreign investor as remedy for nationalizing State's breach of its contractual obligations); Asante (note 4 above) 237-39 (theoretical basis of stability of transnational investment agreements originates from

The newly independent countries and sympathetic legal commentators realized that the international legal order, like the existing economic order, worked to their disadvantage. They began to fashion legal arguments to justify alterations in their economic relations and to gain greater control over their economic destinies. For example, they began to argue that the doctrine that all contracts should be fully honored according to their terms — *pacta sunt servanda*—was not the only international legal principle applicable to international economic transactions. They proposed that its application should be modified by the well accepted public international law principle—clausula rebus sic stantibus— which provides that changed circumstances can justify changing the terms of international agreements.<sup>8</sup> This was particularly useful for those countries which found themselves locked into long term unfavorable concession agreements. These sorts of arguments which were based on existing international legal doctrine fashioned the initial principles of IDL.

Thus, IDL began as an attempt to develop a more equitable legal approach to the core international economic issues of interest to developing countries, namely international trade relations and a state's responsibilities towards its foreign investors and their home state. Its initial objective was to develop legal principles and arguments that would help developing countries gain control over their economic destinies. IDL was successful in elaborating justifications for the unilateral modification of unfavorable economic agreements. It provided developing countries with a principled basis on which to terminate or renegotiate these agreements and to gain at least formal economic independence. These efforts received international legal recognition in such documents as the United Nations Declaration on Permanent Sovereignty over Natural Resources,<sup>9</sup> the arbitral awards made in the cases arising from the nationalizations of the oil companies in the Middle East;<sup>10</sup> and in the negotiated compensation agreements that followed the nationalization of key natural resources and other corporate enterprises in the developing countries.<sup>11</sup>

During this period the special needs of developing countries were recognized in other ways. For example, Part IV of the General Agreement on Tariffs and Trade (GATT),

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traditional Anglo-American doctrines based on freedom of contract). See generally FV Garcia-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (1990) 126-29 (law and practice of compensation to foreign owners of nationalized property before World War II).

<sup>8</sup>See Asante (note 4 above) 242 (stating that the application of the doctrine of *pacta sunt servanda* to transnational investment agreements should be effectively limited by the doctrine of *clausula rebus sic stantibus* under public international law). See also Sornarajah (note 5 above) 348-49 (although foreign investor attempted to 'internationalize' transnational investment agreements so that the doctrine of pacta sunt servanda would be applicable, they could not override other basic principles of international law).

<sup>9</sup> Declaration on the Permanent Sovereignty over Natural Resources, GA Res 1803, UN GAOR, 17th Sess, Supp No 17, at 15, UN Doc A/5217 (1962). See also, Garcia-Amador (note 7 above) 132-40 (evolution of the doctrine of permanent sovereignty from claims to the right to economic development and self-determination).

<sup>10</sup> See, e.g., *Aminioil* note 5 above, 1023 (the stability clauses did not absolutely prohibit nationalization and that a State may nationalize foreign owned property provided it pays the requisite compensation); *Aramco* note 5 above Rep, 171-172 (the concession agreements under Saudi Arabian law and using public international law to fill the gaps in the Saudi Arabian law); See generally Sornarajah (note 5 above) 339-40 (the host countries' law is generally regarded as applicable to the concession agreements in oil concession arbitrations).

<sup>11</sup> See AA Akinsanya *The Expropriation of Multinational Property in the Third World* (1980) 78.

which allows developing countries to receive non-reciprocal trade benefits from their richer trading partners, was adopted in 1965.<sup>12</sup> They also received some support for more generous capital flows. In 1960 the member states of the World Bank Group established the International Development Association to lend to the poorest developing countries on highly concessional terms.<sup>13</sup> In the same year, the rich countries supported a UN General Assembly resolution imposing an obligation on them to provide financial assistance to developing countries.<sup>14</sup>

These legal successes, however, resulted in only limited economic success. By the 1970s, many developing countries still faced substantial barriers to development. Unfortunately, there was no longer any clear consensus about what these barriers were. As a result, there were also disagreements about the appropriate legal responses to them. Some saw the problems as being imbedded in the structure of the international economic order and called for a new international economic order (NIEO).<sup>15</sup> Others, while not denying that there were problems with the international order, argued that the problem was primarily caused by the economic and political policy choices of the developing countries themselves and rejected these calls.<sup>16</sup> During most of the 1970s and early 1980s many IDL theorists and practitioners were focused on this debate over the need for a new international economic order and its implications for development and IDL.

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<sup>12</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, Protocol Amending the General Agreement to Introduce Part IV on Trade and Development and to Amend Annex I, Feb. 8, 1965, 17 UST 1977, 572 UNTS 320 (Article XXXVI that deals with non-reciprocal trade benefits to developing countries).

<sup>13</sup> Articles of Agreement for International Development Association, Jan. 26, 1960, 11 UST 2284, 439 UNTS 249 (entered into force Sep 24, 1960).

<sup>14</sup> In 1960, the United Nations General Assembly formally adopted a target for financial flows to developing countries, pursuant to which developed countries were supposed to allocate one percent of their national income to international assistance including public loans and private investment. See Accelerated Flow of Capital and Technical Assistance to the Developing Countries, GA Res 1522, UN GAOR 948th plen mtg, at 1 (1960). The Pearson Report, while adopting the principal that rich countries should provide a certain level of development assistance to poorer countries, proposed a reduced level of official development assistance (“ODA”). It recommended donor countries offer at least 0.7 percent of GNP preferably by 1979 and no later than 1980. See LB Pearson et al., *Partners in Development* (1970) 148-149 [hereinafter Pearson Report]. See also note 47 above (discussing subsequent reaffirmation of this target and the unsatisfactory response of donor countries).

<sup>15</sup> See, e.g. Declaration on the Establishment of a New International Economic Order, GA Res. 3201, UN GAOR, 6th Spec. Sess, Supp No 1, at 3, UN Doc. A/9559 (1974) [hereinafter UN Declaration on NIEO] (stating that States ‘shall correct inequalities and redress existing injustices’ and ‘make it possible to eliminate the widening gap between the developed and developing countries’); Charter of Economic Rights and Duties of States, GA Res 3281, UN GAOR., 29th Sess Supp No 31, pmbl., UN Doc. A/9631 (1975) [hereinafter U.N. Economic Charter] (calling for the establishment of a new international economic order designed to remove major hurdles to economic development in developed countries); Resolution on an International Development Strategy for the Third U.N. Development Decade GA Res. 35/56, UN GAOR., 35th Sess. Supp No, pmbl. § 2, UN Doc A35/56 (1981) [hereinafter International Development Strategy] (recognizing imbalances and inequities between developed and developing countries in the present system of international economic relations and seeking to restructure the existing international economic order). See also, Kamal Hossain (ed) *Legal Aspects of the New International Economic Order* (1980) 1, 2.

<sup>16</sup> See e.g. *World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth* 23-30 (various aspects of “deteriorating government” as factors behind the African economic decline); R Gulhati, *The Political Economy of Reform in Sub-Saharan Africa: Report of the Workshops on the Political Economy of Structural Adjustment and the Sustainability of Reform* (1989) 3-4 (‘policy and institutional distortions’ as one of the crucial factors of the African economic crisis).

The demands for an NIEO were eventually overwhelmed by the debt crisis of the 1980s. Thereafter the attention of the international community shifted to the internal barriers to, and requirements for development in individual countries. Until recently relatively less attention was paid to the structure of the international order. This change in focus has generated an ongoing intense debate about the nature of the development process and the barriers to development. IDL has been and continues to be affected by this broader debate about development. The result is that today one's understanding of the content of IDL tends to depend on one's position in this broader development debate.

Most positions in this broader debate can be classified into one of two competing idealized views of development. It is to these two competing views of development and their legal implications that we now turn.

### III. Competing Views of Development

There was a time when there was a general consensus that development was about economic growth<sup>17</sup> and that, at least analytically, it could be treated as a separate problem from other social, cultural and political issues in society. Today, however, that consensus has broken down. Now many people argue that development must be seen holistically, as an integrated process of change that involves economic, social, cultural, political and environmental dimensions.<sup>18</sup> The debate between these two positions has not been resolved and today the various competing views can be categorized into two contending approaches to development. We can term these two approaches 'the traditional view' and the 'modern view'. Each of these idealized views of development leads to a different understanding of the contents of IDL.

The differences between these views of development revolve around a few key issues. They relate to the role that the state should play in development, whether development is purely an economic process or should be viewed more holistically so that issues such as human rights are seen as an integral part of the development process, and to the relationship between international and national regulation.<sup>19</sup> More precisely they differ

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<sup>17</sup> In conventional neoclassical models, human welfare is measured by increases in consumption of goods and services. See J Weaver & K Jameson, *Economic Development: Competing Paradigms* (1981) 10-11. Accordingly, the conventional development economics literature focuses on removing barriers to economic growth. See PR Agénor & PJ Montiel, *Development Macroeconomics* (1996) 3. This was reflected in international discourses regarding development. In 1961, the United Nations General Assembly adopted an economic growth rate of five percent in national income as a target for developing countries. See Resolution on United Nations Development Decade: A Programme for International Economic Co-operation (I), UN Res. 1710, UN GAOR, 2d. Comm. 16th. Sess. , 1084th plen. mtg. at 1 (1961). The Pearson Report proposed as a target an annual growth rate of GNP 6%. See Pearson Report, note 14 above, 28.

<sup>18</sup> See generally Declaration on the Right to Development, GA Res 41/128, UN GAOR, 41st Sess, Supp No. 53, at 186, UN Doc A/41/128 (1987) (dealing with development as a "comprehensive economic, social, cultural and political process"); World Bank, *Comprehensive Development Framework* (balanced approach development policy-making by considering interdependence of economic and non-economic factors), <<http://www.worldbank.org/cdf/>>; World Bank, *World Development Report 2000/2001: Attacking Poverty* (2000) (multi-dimensional indicators of well-being, such as education, health, and security, as well as levels of income and consumption and arguing that it is possible to reduce all dimensions of poverty). See also *United Nations Development Programme, Human Development Report* (2000) 139-268.

<sup>19</sup> Many observers would consider that another key issue for developing countries is the existing arrangements for the governance of the international economic order. Since, this issue relates primarily to

over whether the state should have the primary role in decision-making relating to development policy and projects. They also differ about the scope and nature of the responsibilities of the various actors involved in the planning, construction and operation of development projects and in the design and implementation of development policy. This means that a key area of disagreement is the definition of the appropriate legal and other relationships between the following four groups of actors in development policy making and projects:

- the state, which approves development projects and makes and implements development policy;
- project sponsors, who may be the private sector, the public sector or the state itself;
- project contractors, which includes those public and private sector institutions which provide the financing, goods and services for the design, construction and operation of development projects and for the implementation of development policies; and
- individuals and communities that are directly or indirectly affected, in both positive and negative ways by particular policies and projects and their representatives.

The two views of development and the relationships they posit between these different groups of actors and the implications of each of these views for IDL are discussed below. As will be seen one's conception of development influences one's understanding of the content of IDL in four ways. First, it shapes one's view of the substantive content of IDL. Second, it helps define one's view of the relationship between the sovereign and the other actors in the development process. Third it influences the degree to which one views IDL as 'international' as opposed to 'transnational' law. Fourth, it determines one's view of the role that international human rights law plays in IDL. Each of these aspects of IDL will be considered separately.

### *III. 1 The Traditional View of Development*

The traditional view is advocated by elements of the business community, governments, and international organizations.

The traditional view is that development is primarily an economic process that consists of discrete projects (for example: building a dam, a road, a school, a factory, a mine or a telecommunications system) and specific economic policies. It recognizes that

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the structure and functions of the international economic organizations, it can be viewed more as a problem of international organizations than of IDL. Therefore, is it treated as outside the scope of this essay. For more information on this issue, see, e.g. DD Bradlow, 'Critical Issues Facing the Bretton Woods System: The World Bank, the IMF, and Human Rights' (1996) 6 *Transnat'l L & Contemp Probs* 47 ; DD Bradlow 'Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?' (2002) 50 *U Kan LR* 695 ; DD Bradlow 'Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF' (2001) 3 *J of Int Banking Reg* 9; DD Bradlow "'The Times They Are A-Changin'": Some Preliminary Thoughts on Developing Countries, NGOs and the Reform of the WTO' (2001) 33 *Geo Wash Int LR* 503; C Grossman & DD Bradlow 'Are We Being Propelled Towards a People-Centered Transnational Legal Order?' (1993) 9 *Am U J Int L & Pol'y* 1.

development has social, environmental, and political implications but argues that these can be dealt with separately from the economic aspects.

The proponents of this view divide decision-making about these projects and policies into two parts. First, there are broad policy issues in which decisions are made through the political process by the government and society in which the policy or project will be implemented. Examples of broad policy issues include: (1) whether the budget should allocate additional resources to health and education or to energy and national defense; (2) whether to build a system of highways or public transport; and (3) whether to promote export oriented or locally-focused industries.

The second category involves specific project or policy decisions. Examples of these types of decisions include: (1) how should a dam be constructed, or (2) what exactly should be done to promote local industries

According to this view, the first responsibility of the project sponsors and contractors is to evaluate each project in terms of its technical, financial and economic feasibility. As long as all technical problems can be resolved, the economic and financial benefits exceed the costs and it is expected to produce the desired rate of return, a project is justified and is treated as developmentally beneficial.<sup>20</sup> The project sponsor's and contractors' remaining duty is to execute their contractual obligations in regard to the project faithfully and efficiently.

The traditional view allows the project sponsors and contractors to treat all other issues, that is broad policy issues, including social and environmental issues, as externalities. These issues are perceived as the prerogative of the society or government in which the project is being built.<sup>21</sup> This means that the project sponsors' and contractors' operating assumption is that the society or government in which the project is located will decide how it wishes to manage its own environment and to share the costs and benefits of the project among the various stakeholders in these projects. The project contractors and sponsors can treat these decisions as background facts during the project negotiations and as fixed variables in their own planning.

To the extent the various project stakeholders, other than project sponsors and contractors, wish to be involved in the project's decision-making process, they will need to consult with the government because it has control over the broad social, political, environmental, and cultural implications of the project. These other stakeholders will

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<sup>20</sup> See generally WC Baum & SM Tolbert *Investing in Development: Lessons of World Bank Experience* (1985) 418-68 (cost-benefit analysis, cost recovery, and financial performance in project analysis).

<sup>21</sup> This view is reflected in a number of official documents. See, e.g., Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, art IV, § 10, 60 Stat 1440 [hereinafter World Bank Articles of Agreement] ('The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.')

<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049557~menuPK:63000601~pagePK:34542~piPK:36600~theSitePK:29708,00.htm>>; Organization for Economic Development (OECD), *The OECD Guidelines for Multinational Enterprises* art. II (June 27, 2000), <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> (advising multinational enterprises to '[a]bstain from any improper involvement in local political activities').



only need to consult with the project sponsor or contractors on specific technical issues related to the design, construction or operation of the project.

Decision-making under the traditional view is likely to be ‘top-down’. There are several reasons for this. First, most project contractors are private companies in which the managers of these companies have been hired by the owners to run the companies for their benefit. This means that they are expected to make all project related decisions with this objective in mind.<sup>22</sup> Public sector project sponsors and contractors similarly have to account to their owner – the state (or states in the case of multilateral institutions) – for how they use their assets. This suggests that they are also likely to have a top-down decision-making structure.

Second, while the managers may feel the need to consult with others before making any particular project decision, the range of people with whom they need to consult is limited. Since the project sponsors and contractors are only responsible for technical and financial issues, their senior management only needs to consult with experts on these issues before making their decisions. To the extent that the project requires a broader consultative process, it is in regard to the social and environmental externalities that are the responsibility of the government and not the sponsors or contractors.

The traditional view makes it easy to identify to whom the different participants in the project are accountable. Project sponsors and contractors are only accountable to three groups. First, they are accountable to government regulators for their compliance with the applicable regulations. Second, they are accountable to those who hired them for the performance of their contractual obligations. Third, they are accountable to their owners or shareholders for their management of the enterprise.

The project sponsors and contractors will only be accountable to the project’s intended beneficiaries and to those adversely affected by the project in two situations. The first is when they have a direct contractual relationship with these other stakeholders and have failed to perform their contractual obligations. The second is when the sponsors or contractors have committed a tort against these other stakeholders and there is a forum that is willing to entertain the victims claim. This forum could be either a national court or an international body.

The state, as the party with decision-making responsibility for the broader social and environmental aspects of the project, is accountable to the beneficiaries and those harmed by the project. Accountability is imposed on the state through the political system. In other words, the proponents of the traditional view are relying on the two primary mechanisms of accountability in democratic governance to hold governments responsible for their decisions and actions relating to specific policies or projects. The first mechanism is the periodic elections for a new government. Thus, interested persons can hold the government, which has sponsored or approved the project, accountable for its actions by voting against it in the next elections. This is not a particularly effective

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<sup>22</sup> Shareholders maintain control over the board of directors through shareholder election or removal of directors and shareholder resolutions and approvals. See HG Henn & JR Alexander *Laws of Corporations* 3 ed (1983) 511-17. Moreover, the board of directors owes various duties primarily to the corporation and a fiduciary duty to shareholders and other beneficiaries as well as to the corporation. See *id.* 611-61.

means of accountability for specific project related decisions. It is unlikely that the electorate as a whole will base its decision on the government's conduct in one project that may only affect a portion, possibly a very small portion, of the electorate. The second mechanism is whatever administrative or judicial procedures the state might have established through which interested private actors can challenge governmental decisions.

It should be noted that the top down nature of decision-making and the limited range of accountabilities described above both suggest that the traditional view contemplates a very limited role for non governmental organizations ("NGOs") in development. Unless these groups can act as project sponsors or contractors, their role is limited to assisting project victims hold project decision-makers accountable for their decisions and actions in the project. Their efficacy in doing so will depend, in the first instance, on how much access they have to judicial and administrative tribunals and to the media. They may also be able to hold decision makers accountable through international forums and through developing international campaigns in conjunction with international NGOs.<sup>23</sup>

A third implication that follows from the traditional view is that it places some constraints on the topics that are open for negotiation in any development transaction. Since the broad social, political and environmental decisions are the prerogative of the state, they are outside the scope of the negotiations between the project sponsor and the government or the project sponsor and the project contractors. In both sets of negotiations, the broad social, environmental and political parameters of the project are treated as fixed and the parties must negotiate the terms of their transaction within these parameters. This is consistent with the legal rule that a foreign project sponsor's or contractor's obligation is to obey the law of the host state and to refrain from interfering in the affairs of the host state.<sup>24</sup>

A fourth implication is that the traditional view of development is consistent with traditional notions of sovereignty. The traditional view by treating social, political and environmental factors as project externalities is implicitly defining the scope of the state's sovereignty in regard to the other actors in development. It is making clear that decisions relating to the social, political and environmental consequences of development should be taken by the sovereign and its decisions should be respected by the other actors in development.

### *III.2. The Traditional View of Development and IDL*

#### *III.2.A. The Substantive Content of IDL*

Based on the traditional views of development, the traditional view of IDL focuses on economic law issues and specifically international economic law issues. IDL deals with those international legal aspects of international trade, finance and investment that relate to the challenges facing developing countries. In other words, the traditional view of development conceives of IDL as being a specialized branch of international economic

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<sup>23</sup> See, notes 71-73 below and the accompanying text for a discussion of these international forums and the growing ability of stakeholders to internationalize their concerns.

<sup>24</sup> See generally Sornarajah (note 5 above) 151-162 (the territoriality principle provides the basis for the host state's jurisdiction over foreign investors).

law. It is that branch of international economic law that deals with the specific problems of developing countries.<sup>25</sup>

This means in the trade area IDL focuses on these aspects of international trade law of most interest to developing countries. This would include, for example, issues related to special and differential treatment for developing countries through such programs as the Generalized System of Preferences (GSP);<sup>26</sup> and the impact of the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreements) on developing countries.<sup>27</sup> In addition, IDL would include efforts to make trade in commodities more predictable,<sup>28</sup> and to develop legal arguments that support changes designed to make the international trading system more equitable.<sup>29</sup> Similarly, in the investment area, traditional IDL focuses on such issues as nationalization and compensation,<sup>30</sup> the treatment and responsibilities of investors<sup>31</sup> and host state regulation of and incentives for investors.<sup>32</sup> It also deals with questions of political risk and the resolution of disputes between investors and their host

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<sup>25</sup> See FV Garcia-Amador (note 7 above,) 35-36 (two basic elements of IDL as the States' duties and responsibilities to cooperate for development and rights to development including preferential treatments in trade and development assistance); AH Qureshi, *International Economic Law* (1999) 338 (noting that IDL deals with an area of international economic law that can be a matter of controversy between developing and developed countries).

<sup>26</sup> The UNCTAD originally laid out the principles of the GSP. See Preferential or Free Entry of Exports of Manufactures and Semimanufactures of Developing Countries to the Developed Countries, UNCTAD, 2d Sess, Vol. I, Annex, Agenda Item 11, at 38, UN Doc. TD/97/Annexes (1968). See also EJ de Hann 'Integrating Environmental Concerns into Trade Relations' in *International Economic Law with a Human Face* (1998) 307, 309-310 (characteristics of the UNCTAD General System of Preferences). The principle gained a legal basis in the GATT as the 'Enabling Clause' agreed in the Tokyo Round in 1979 in accordance with Part IV. See Differential and More Favorable Treatment: Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, L/4903, GATT B.I.S.D. (26th Supp.) (1980) 203; Hann, *supra* at 311.

<sup>27</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol 31(1994) 33 ILM 81.

<sup>28</sup> See UN Economic Charter, note 15 above, art. 6 ("All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable..."); QURESHI, note 25 above, 337 (referring to commodity agreements as providing a cooperative or facilitative framework for development).

<sup>29</sup> See, e.g., M Bulajić, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order* 2 ed (1993) 287-98 (discussing the principle of preferential and non-reciprocal treatment for developing countries as a tool to change substantive inequity between developed and developing countries).

<sup>30</sup> See Garcia-Amador, note 7 above, 126-31 (explaining principles concerning nationalization and compensation in traditional international law); SORNARAJAH, *supra* note 5, at 253-260 (describing the controversies over the standard formulation of compensation for nationalized foreign owned property).

<sup>31</sup> See Bulajić, note 30 above, 170 (outlining international efforts to create principles regarding the regulation and treatment of transnational economic relations); Garcia-Amador, note 7 above, 159-71 (dealing with the treatment of foreign investment and the law governing State contracts with foreign investors); Sornarajah, note 5 above, 121-33 (discussing controversies in host State's responsibility for injuries to foreign investors).

<sup>32</sup> See Sornarajah (note 5 above) 83-143 (examining host State's control over foreign investment, including regulation of entry and other public policy requirements); Qureshi (note 25 above) 337 (regarding the regulation and protection of foreign investment as elements in the traditional normative framework of development); JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' 33 *Int Law* 875, 879, 885-86 (in discussing dominant development models noting that until 1980's focus was on regulation of foreign investment but since then it has been on the promotion of foreign investment).

countries.<sup>33</sup> Finally, in the international financial area, IDL has focused on such issues as access to capital,<sup>34</sup> debt renegotiation,<sup>35</sup> the operations of the Bretton Woods Institutions,<sup>36</sup> and foreign aid.<sup>37</sup>

While there may be general agreement among all proponents of the traditional view of development about the types of issues addressed by IDL, there is not agreement about the actual doctrines that form the content of IDL. Originally, the debates about these doctrines reflected the differing perceptions about international economic transactions held by the capital exporting and the capital importing countries. Today, while the lines of disagreement still largely coincide with these two general categories, it is more accurate to state that the divisions reflect the different perceptions of the proponents and the opponents of the New International Economic Order (NIEO) that was proposed by developing countries in the 1970s.

The NIEO included an attempt by developing countries to develop a new legal framework for the global economy that was more equitable than the then existing legal framework.<sup>38</sup> It had a number of objectives. First, the NIEO sought to ensure that each state could control economic activity within its own borders. For example, the NIEO would have required foreign entities to respect national sovereignty over natural resources. It also obliged states to provide national treatment to foreign investors.

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<sup>33</sup> See Bulajić (note 30 above,) 230(identifying “peaceful settlement of economic disputes” as one of the traditional principles incorporated in IDL); Garcia-Amador (note 7 above) 174-187 (examining law concerning settlement of disputes between foreign investors and States in relation to developing countries’ claim of permanent sovereignty); Sornarajah (note 5 above) 55-65, 375-99 (political and other risks involved in foreign investment and the resolution of investment disputes through international tribunals and national courts). For the role of the World Bank Group in international investment disputes, see IFI Shihata, ‘The Settlement of Disputes Regarding Foreign Investments: The Role of World Bank Group’ in F Tschofen & AR Parra (eds) *The World Bank in a Changing World* (1991) 287-308; IFI Shihata ‘Towards a Greater, Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ in F Tschofen & AR Parra (eds) *The World Bank in a Changing World* (1991) 309-42.

<sup>34</sup> See, e.g., Bulajić (note 30 above) 168 (attempts to create the Multilateral Investment Guarantee Agency (“MIGA”) to stimulate the capital flow particularly to developing countries). For details in the function of the MIGA, see Shihata, (note 33 above) 271-86.

<sup>35</sup> See Bulajić (note 30 above) 14-20 (considering the indebtedness of developing countries as being the responsibility of not only developing countries but also international financial institutions and the lender countries).

<sup>36</sup> See Qureshi (note 25 above) 337 (mechanisms to encourage developing countries to participate in international economic organizations).

<sup>37</sup> See Qureshi (note 25 above) 337 (development assistance in the corporative or facilitative framework for development). See also Garcia-Amador (note 7 above) 83- 95 (discussing developing countries’ claim to development assistance based on the right to development).

<sup>38</sup> Developing countries had articulated grievances with the prevailing economic order and attempted to shape a new economic order since the 1950s. See K Hossain, ‘Introduction: General Principles, the Character of Economic Rights and Duties of States and the NIEO’ in K Hossain (ed) *Legal Aspects of the New International Economic Order* (1980) 1, 2. The developing world perceived disadvantages generally in international economic relations and particularly in international trade. See *id.* The first attempt to introduce a new economic order was made in 1952, when Chile raised this issue in terms of permanent sovereignty over natural resources in discussions relating to the Draft International Covenant on Human Rights. See Milan Bulajić, ‘Legal Aspects of New International Order’ in K Hossain (ed) *Legal Aspects of the New International Economic Order* (1980) 45, 46. Developing countries formally called for ‘a new international economic order’ at the Non-Aligned Summit in 1973. See Hossain (note 15 above) 1.

Second, it sought to ensure that economic relations between states were designed to provide developing countries with more stable incomes for their primary commodity exports and greater assured access to technology and international finance and investment. In order to achieve these objectives, the proponents of the NIEO called for the UN to adopt Codes of Conduct on Transnational Corporations,<sup>39</sup> Restrictive Business Practices<sup>40</sup> and Transfer of Technology.<sup>41</sup> These codes were intended to regulate the rights and responsibilities of the state and foreign entities in international transactions in such a way as to ensure that these transactions did not perpetuate the unequal economic relations that characterized the colonial era.

Third, the NIEO sought to enhance the role of developing countries in the governance of the international economy by promoting the United Nations as the forum for discussion of issues of interest to developing countries. It was seen as preferable to the Bretton Woods institutions because in the United Nations General Assembly each country has an equal vote. The Bretton Woods institutions, on the other hand, use a weighted voting system which favors the richer countries.<sup>42</sup>

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<sup>39</sup> In 1976, the U.N. Commission on Transnational Corporations created an Intergovernmental Working Group. This group proposed a draft text for the Code of Conduct on Transnational Corporations in its final report in 1982. See Bulajić (note 30 above) 169-70. For the full text of the Draft Code, see UN Commission on Transnational Corporation, Draft United Nations Code of Conduct on Transnational Corporations, UN Doc E/c.10/1984/S/5, (1984), reprinted in (1984) 23 ILM 626 [hereinafter Draft Code on Transnational Corporations]. Despite Commission's subsequent attempts to finalize the draft, some controversial issues remained unresolved. See UN Commission on Transnational Corporation, Report of the Secretariat: Compilation of the Formulation of the United Nations Code of Conduct on Transnational Corporations, UN Doc E/c.10/1984/S/5 (1984), reprinted in (1984) 23 ILM 602 [hereinafter UNCTC Report] (outstanding issues of the Draft Code on Transnational Corporations). See Bulajić (note 30 above) 170-74 (examining attempts by coalitions of developing countries to create United Nations Code of Conduct on Transnational Corporations and the problems that frustrated their attempts); E Kelly, "National Treatment" and the formulation of a Code of Conduct for Transnational Corporations' in K Hossain (ed) *Legal Aspects of the New International Economic Order* (1980) 137, 153-155 (developing countries' demands concerning national treatment in the Draft Code of Conduct on Transnational Corporations).

<sup>40</sup> In 1968, the UNCTAD II decided to initiate research on restrictive business practices. This research was reduced to a set of principle and rules in subsequent sessions of an ad hoc working group within the UNCTAD. See Bulajić (note 30 above) 55. Parties agreed a set of principles and rules to govern restrictive business conduct in 1980. See The Set of Principle and Rules on Restrictive Business Practices, GA Res 35/63, UN GAOR, 35th Sess, Agenda Item 61, U.N. Doc. A/Res/35/63 (1980). See also Bulajić (note 30 above) 55-57.

<sup>41</sup> The first session of UN Conference on an International Code of Conduct on the Transfer of Technology was held in 1978 and the substantive part of the code was created in the first three sessions of the Conference. See Bulajić (note 30 above) 174-75. However, the subsequent sessions of the Conference was unsuccessful in establishing the International Code of Conduct for the Transfer of Technology as an essential component of the NIEO. See Bulajić (note 30 above) 175-77. For the text of the draft code, see Draft International Code of Conduct for the Transfer of Technology, UN Conference on Trade and Development, UN DOC TD/TOT/47, 1 (1985).

<sup>42</sup> World Bank Articles of Agreement, note 20 above, art. V § 3; Articles of Agreement of International Monetary Fund, July 22, 1944, art. XII § 3, 60 Stat. 1401. See generally UN Inst for Training and Research, *International Financial Institutions*, Module 5, at 12-13, 31 (the weighted allocation of voting power in the IMF and in the World Bank that takes account of differences in member states' contributions and shares). See also, DD Bradlow 'Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF' (2001) 3 *J of Int Banking Reg*; A Burria 'The Governance of the IMF in a Global Economy' in A Burria (ed) *Challenges to the World Bank and the IMF: Developing Country Perspectives* (2003) (both articles discuss, inter alia, the problems with and reform of the weighted voting system in the IMF)

The proponents of the NIEO persuaded the General Assembly to adopt The Charter on the Economic Rights and Duties of States,<sup>43</sup> and to create a Center on Transnational Corporations.<sup>44</sup> They also pushed for the United Nations to develop and adopt the Codes of Conduct referred to above.<sup>45</sup> While the issues covered by these various documents are complex and a detailed analysis of their contents is beyond the scope of this paper, they all share an interest in enhancing the bargaining power of the developing countries in relation to multinational corporations and their home country governments and giving developing countries more control over their own economic futures.

The proponents of the NIEO also attempted to impose new obligations on the capital exporting countries. These obligations, while not necessarily legally enforceable, were intended to encourage the rich countries to act in solidarity with the countries of the South and to respect the sovereignty decisions of the developing countries. For example, the industrialized countries were encouraged to accept an obligation to commit 0.7% of their national income to financial aid for developing countries.<sup>46</sup> Pursuant to Part IV of the GATT, the rich Northern countries agreed to grant developing countries non-reciprocal trade benefits that were more generous than those offered to other GATT contracting parties.<sup>47</sup> This commitment resulted in the Generalized System of Preferences under which many rich countries allow duty free access or impose lower tariffs, on specific products from qualifying developing countries than they offer to other GATT

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<sup>43</sup> U.N. Economic Charter, note 15 above. See generally Bulajić (note 30 above) 111 (examining proposals, negotiations, and adoption of the Charter of Economic Rights and Duties of States).

<sup>44</sup> The United Nations Center on Transnational Corporation was created in 1974 by a resolution adopted in the ECOSOC. See ESC Res 1903, UN ESCOR, 57th Sess, Supp. No. 1, at 13, UN Doc E/5570 (1974). It has subsequently been reduced to a program on foreign direct investment in the division on investment, technology and enterprise development of UNCTAD, see <[www.unctad.org](http://www.unctad.org)>.

<sup>45</sup> See note 40-42 above and accompanying text (dealing with efforts to establish United Nations Code of Conduct on Transnational Corporations and attempts to draft the Set of Principles and Rules on Restrictive Business Practices and International Code of Conduct for the Transfer of Technology).

<sup>46</sup> The 0.7 percent target proposed by the Pearson Report has been reaffirmed in subsequent international discourses on development. See, e.g., International Monetary Fund (IMF), Group of Twenty-Four Report on Changes in the Monetary System, 14 IMF Survey 154, reprinted in (1985) 24 ILM 1699, 1714 (developed countries agreed to spend 0.7 percent of GNP for ODA at United Nations Conference on Trade and Development VI in 1984). See also note 14 above (discussing the 0.7 percent target in the Pearson Report). Developing countries have demanded developed countries fulfill their internationally agreed obligation. See, e.g. id. (urging developed countries to accelerate their efforts to reach the target). Moreover, the target was reaffirmed in the United Nations Conference on Environment and Development (UNCED). See Agenda 21, UN GAOR, 47th Sess, Annex 2, 33.15, UN Doc A/CONF.151/4 (1992) ('Developed countries reaffirm their commitments to reach the accepted United Nations target of 0.7 per cent of the GNP for ODA and, to the extent that they have not yet achieved that target, agree to augment their aid programmes in order to reach that target as soon as possible...'). See also Statement of Johannesburg summit on Rio plus 10 (2002) <<http://www.un.org/esa/sustdev/index.html>> and Monterrey Consensus (financing for development meeting 2002/2003) <<http://www.un.org/esa/ffd/aconf198-3.pdf>> (both of these statements reaffirm this commitment)

However, as of 2002, the average actual ODA contributions of the member states of the OECD Development Assistance Committee is 0.4 percent. See *World Bank, Global Development Finance 2004, Vol. 1, Analysis and Summary Tables* 4.3 (2004)

<[http://siteresources.worldbank.org/GDFINT2004/Home/20177154/GDF\\_2004%20pdf.pdf](http://siteresources.worldbank.org/GDFINT2004/Home/20177154/GDF_2004%20pdf.pdf)>. Only Belgium, Denmark, Ireland, Norway, Luxembourg, the Netherlands, and Sweden have reached the target. See id.

<sup>47</sup> See note 12 above (referring to Part IV of the GATT, which includes non-reciprocal benefits to developing countries).

contracting parties.<sup>48</sup> This commitment has been carried over into the World Trade Organization, the successor to the GATT.

The legal advocates of the NIEO also sought to expand the ability of developing countries to control economic activity in their own territory. For example, they argued that the treatment of foreign investors should be governed by the Calvo Clause, according to which all foreign investors must respect and are subject to the laws and exclusive jurisdiction of their host state.<sup>49</sup> This means that all disputes arising out of the foreign investment and all issues relating to the treatment of the foreign investor by the host country should be resolved by the courts or legal authorities in the host state and according to the law of the host state.<sup>50</sup> The foreign investor, in other words, must agree that it will submit in all matters relating to the investment to the jurisdiction of its host state and that it will forego whatever assistance may be available to it as a citizen of its home state.

Similarly, the proponents of the NIEO sought to increase developing country access to new technologies on equitable terms. This was specified in UN resolutions and was the premise underlying the unsuccessful effort to draft a code of conduct on transfers of technology.<sup>51</sup> This Code sought to create a more equal balance of power between the owners of technology and those who need access to the new technology. This can be seen in the Code's support for compulsory licensing and for efforts to regulate transfers of technology.

The opponents of the NIEO argued that IDL should not create special rights for some states and special responsibilities for other states. They maintain that, at least from a legal

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<sup>48</sup> The UNCTAD originally laid out the principles of the GSP. See 'Preferential or Free Entry of Exports of Manufactures and Semimanufactures of Developing Countries to the Developed Countries' UNCTAD, 2d Sess., Vol. I, Annex, Agenda Item 11, at 38, UN Doc TD/97/Annexes (1968). See also EJ de Hann, 'Integrating Environmental Concerns into Trade Relations' in *International Economic Law with a Human Face* (1998) 307, 309-310, 311 (characteristics of the UNCTAD General System of Preferences). The principle gained a legal basis in the GATT as the 'Enabling Clause' agreed in the Tokyo Round in 1979 in accordance with Part IV. See 'Differential and More Favorable Treatment: Reciprocity and Fuller Participation of Developing Countries', Nov. 28, 1979, L/4903, GATT BISD (26th Supp.) (1980) 203.

<sup>49</sup> This position is reflected in the Draft UN Code of Conduct on Transnational Corporations and the UN Charter on Economic Rights and Duties of States. U.N. Economic Charter, note 15 above, art. 2.2 (States have sovereign right to control foreign investment within their jurisdictions and that foreign investors shall not intervene in internal affairs of their host State); Draft Code on Transnational Corporations, note 40 above, art. 55 ('Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate'). See also SR Chowdhury, 'Legal Status of the Charter of Economic Rights and Duties of States' in Kamal Hossain (ed) *Legal Aspects of the New International Economic Order* 79, 88 (1980) (noting that Article 2 of the Charter is regarded as "a classic restatement" of the Calvo Clause, which rejects the use of independent international tribunals to resolve investment disputes).

<sup>50</sup> See UN Economic Charter, note 15 above, art. 2.2 ('Each state has the right: (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities'); Kelly, (note 40 above) 143 (the Charter and the Declaration is intended to ensure State's sovereign economic right, including the right to freely formulate the policy regime applicable to foreign investors).

<sup>51</sup> See UN Economic Charter, note 15 above, art. 13.2 ('all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology, and the creation of indigenous technology for the benefit of the developing countries.'). See also note 42 above (referring to proponent's attempts to create the International Code of Conduct for the Transfer of Technology).

perspective, all states are equal and their rights and duties do not vary according to their level of development. These NIEO opponents add that this legal equality does not preclude states from voluntarily agreeing to assume different obligations depending on their level of development. These opponents also argue that while individual states may wish to grant developing countries preferential treatment, there is no legal obligation for them to do so.<sup>52</sup> This, they argue, is the situation in regard to aid.

In the case of foreign investment these opponents suggest there are no such voluntary agreements. Consequently, all states must treat each other and their citizens according to standards that are universally applicable and internationally enforceable. They contend that international law requires all states to observe certain minimum international standards in their treatment of foreign investors, regardless of how they treat their own citizens.<sup>53</sup> These standards require host states to grant foreign investors non-discriminatory treatment, to respect their contractual and property rights and, if they interfere with these rights, to promptly pay the injured party adequate and effective compensation.<sup>54</sup> In addition, the opponents of the NIEO maintain that these standards should be enforceable either through international forums or through the efforts of the injured party's home state.<sup>55</sup>

It is interesting to note that the position of the opponents effectively means that IDL should be seen as merely a subset of international economic law. The latter is concerned with all international economic relations and therefore, includes the economic relations of developing countries.

### *III. 2.B Sovereignty and IDL*

The proponents and opponents of the NIEO both agree that the state is the key subject of IDL. Both are concerned with the rights and duties of states and attach great importance to the concept of state sovereignty. This is not surprising given that its proponents are primarily motivated by their interest in achieving economic independence or self-

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<sup>52</sup> NIEO opponents find confusion between 'legal obligations' and 'political objectives' in the proponents' arguments for the NIEO and attempt to distinguish the former from the latter. *See* Bulajić (note 30 above) 229. From this perspective, States agree to give development assistance or to establish a new international investment regime as a 'political objective', but not as a "legal obligation." *See id.*

<sup>53</sup> *See* Bulajić (note 30 above) 230-31 (developed countries oppose the NIEO as disregarding recognized legal principles including international minimum standards to protect foreign private property and investment rights).

<sup>54</sup> *See* UNCTC Report, note 40 above, 35 (some States insisted on including "the payment of prompt, adequate and effective compensation" in accordance with international law in the Code of Conduct on TNC's); Bulajić (note 30 above) 231 (the idea behind opponents' legal arguments as the following four traditional principles of international law: (1) freedom of contract, (2) *pacta sunt servanda*, (3) protection of foreign investor's property, and (4) peaceful settlement of economic disputes); Kelley (note 40 above) 144-47 (discussing developed countries' strong concern about discrimination against transnational corporations in creating the Code of Conduct on Transnational Corporations).

<sup>55</sup> *See* UNCTC Report, note 40 above, 36 (some States opted for dispute settlement in other countries than the host State and demanded to include specific reference to international arbitrations); OECD Guideline, *supra* note 21, art. 19 ('The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.');

Chowdhury (note 50 above) 87-88 (opponents' attempts to amend Article 2 of the Economic Charter to authorize appeals on investment disputes to international forums after parties exhausted domestic remedies in the host State).



determination for developing countries, or more specifically for the state in these countries. Similarly its opponents base their position on classical principles of international law, in which the state is the key subject.<sup>56</sup> Consequently, they share their opponent's interest in upholding the principle of state sovereignty. One example of their shared concern with state sovereignty is that both acknowledge the significance of the principles of a state's permanent sovereignty over its natural resources and self-determination.<sup>57</sup>

The importance both sides attach to state sovereignty is consistent with their adherence to the traditional view of development with its clear division between the economic and non-economic aspects of development. Under the traditional view of development, the sovereign retains final decision-making authority over the non-economic aspects of development. While both sides recognize that the sovereign should also have substantial influence over the economic aspects of development, they disagree about the extent of that influence. The proponents of the NIEO argue that under international law the sovereign has almost plenary powers<sup>58</sup> while the opponents contend that international law imposes certain constraints on the state's economic power.<sup>59</sup> These constraints arise whenever the sovereign chooses to allow foreign investors to operate within its territory.

While the two sides agree on the importance of state sovereignty, they differ on the relative weight they assign to it in their relationships with private economic actors. The proponents of IDL believe that state sovereignty is the most important legal protection that economically and politically weak developing countries have against undue interference by the richer Northern countries. They believe that the rights of foreign property owners must take second place to the needs of their host states to protect their sovereignty and to promote the development of their citizens. Thus these proponents insist on the state's ability to submit all economic activity within its borders to its exclusive jurisdiction. They also argue that they can compel these private property owners to surrender some of their property rights for the greater good. This can be seen, for example, in their advocacy of compulsory licenses, and in their view that compensation for nationalized property need only be appropriate under the circumstances and should be determined by the domestic law in the courts and other available forums of the host state.<sup>60</sup>

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<sup>56</sup> See, e.g., I Brownlie, *Principles of Public International Law* 4 ed (1990) (the principles of the sovereignty and equality of states as the fundamental doctrine of the law of nations).

<sup>57</sup> See Bulajić (note 30 above) 262-63 (the right to economic self-determination and permanent sovereignty over natural resources is regarded as fundamental in international law and that the principle of sovereign equality in States' economic relations emanates from and is applied to the right to self-determination without controversy). See also note 9 above (the Declaration on the Permanent Sovereignty over Natural Resources and its evolution from the principle of self-determination).

<sup>58</sup> See UNCTC report, note 40 above, 17 (proponents considered the principle of permanent sovereignty over natural resources and economic activities well-recognized in international law and U.N. resolutions); Kelly (note 40 above) 148-52 (examining developing countries' attempt to ensure States' power over transnational corporations including "full exercise by the home country of its permanent sovereignty over all its wealth, natural resources and economic activities").

<sup>59</sup> See, e.g., UNCTC Report, note 40 above, 17 (some States insisted on including reference to international law in Article 6 of Draft Code on Transnational Corporations to qualify the States' sovereign power over foreign investors).

<sup>60</sup> See also Chowdhury (note 50 above) 88 (developing countries' rejections of independent international tribunals to resolve investment disputes); Kelly (note 40 above) 143-44 (from the perspective of developing countries, Article 2.2 of the UN Economic Charter is regarded as a principle of appropriate compensation

The opponents of the NIEO, on the other hand, believe that while state sovereignty is important as the basis for the international legal order, it does not empower the state to freely override the rights of private property owners. They argue that there are certain international legal standards that constrain the state's ability to treat foreign property owners in any way that it wishes.<sup>61</sup> Moreover, they deny that sovereignty can shield the state from all outside intervention in its internal economic affairs. Whenever the state treats foreign investors in ways which are incompatible with international legal standards, other states can demand compensation for the injury to their nationals and can seek to hold the state accountable for its actions.<sup>62</sup>

The opponents also disagree with the proponents of the NIEO over the validity of taking the level of a state's development into account when deciding on its rights and responsibilities. The opponents argue that all states are equal and should be treated equally. They argue that the level of a state's development is not relevant to its status as a sovereign state under international law. Furthermore, they contend, justice requires that all states be treated equally and this means that the same rules should apply in the same way to all states. This position is consistent with the basic international legal principle that all states are, formally, co-equal sovereign states.<sup>63</sup>

The proponents, on the other hand, argue that, in fact, all states are not equal, and that the pre-NIEO international legal standards do not result in equal treatment. Consequently, the application of the same law to two countries at different levels of development will produce very different results. For example, because of the legacy of colonialism, the application, in unmodified form, of principles like non-discriminatory trade treatment, or minimum standards for foreign investors, to the developing countries can lock them into their historically unequal economic relations. Consequently, they argue that the only way in which to achieve justice is to explicitly account for the differences in situations of countries, which inevitably leads to developing countries obtaining more favorable treatment.<sup>64</sup>

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under the domestic law of the expropriating State).

<sup>61</sup> The opponents' position is reflected, for example, in the following provisions of the OECD Guidelines. 'Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law.' OECD Guidelines, note 20 above, art I., 7.

'Governments adhering to the Guidelines set them forth with the understanding that they will fulfil [sic] their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations' *Id.* art. I, 8. *See also* note 54 above and the accompanying text (opponents' adherence to certain minimum international standard in treating foreign investors and their properties).

<sup>62</sup> *See*, note 55 above (dealing with opponents' adherence to international legal principles includes *pacta sunt servanda*, and prompt, effective, and adequate compensation); *supra* note 61 and the accompanying text (opponents' arguments for resolution of investment disputes in international tribunals).

<sup>63</sup> *See* Brownlie (note 57 above). *See also*, OECD 'Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on International Investment and Multinational Enterprises' 21 June 1976 in *International Investment* (Rev ed 27 June 2000) II.1 (Member States should give another Member country or its nationals 'national treatment,' which is "consistent with international law and no less favorable than that accorded in like situations to domestic enterprises"). The Declaration further states "[t]hat Member countries will consider applying "national treatment" in respect of countries other than Member countries," *id.*, at II.2.,

<[http://www.oecd.org/document/53/0,2340,en\\_2649\\_34887\\_1933109\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/53/0,2340,en_2649_34887_1933109_1_1_1_1,00.html)>.

<sup>64</sup> *See* Hossain (note 15 above) 5-6 (in NIEO instruments, developing countries attempt to seek legal protection from coercive forces and affirmative action to remedy disadvantageous conditions); Kelly, note

Finally, the proponents of the NIEO, at least in principle, see a great role for the state as the engine of development. It decides on the regulatory framework within which economic transactions take place, and it makes most important policy decisions, including what role private and foreign investors will play in the economic development of the country. The opponents of the NIEO, on the other hand, tend to assign a smaller role to the state and a larger role to private actors, particularly the owners of capital, in economic development.

### *III. 2.C. The Relationship Between National and International Law*

The significance of state sovereignty to the adherents of Traditional IDL implies that they see a sharp distinction between national and international law. This is the case even though these adherents differ over the relationship between the two in the regulation of domestic economic affairs. The supporters of the NIEO, see IDL as protecting the state's freedom of action in the domestic economic realm. The opponents of the NIEO see international law as imposing some constraints on the state's treatment under domestic law of foreigners involved in the domestic economy.

### *III.2.D. The Role of International Human Rights Law in IDL*

The proponents of Traditional IDL do not view International Human Rights Law as playing an important role in IDL. The reason is that they see IDL as being about economic matters. As discussed above, they treat the legal issues related to the social, environmental, cultural and political aspects of development as external to their economic concerns. Consequently, they regard International Human Rights Law as dealing with issues that, while important, are external to the economic concerns of IDL.

### *III.3. The Modern View of Development*

The modern view of development tends to be held by nongovernmental organizations, civic organizations, and progressive elements in governments, corporations, and international organizations.

The proponents of the modern view of development argue that the economic aspects of development cannot be separated from its social, political, environmental and cultural aspects and that, in fact, development should be seen as one economically, politically, socially, culturally and environmentally integrated process.<sup>65</sup> From this perspective, development projects and policies should be treated not so much as discrete economic events but as episodes of social, economic and environmental transformation that are part of an ongoing process of change. This means that to fully assess the desirability of a particular project or policy proposal it is necessary to account for all the ways in the project will affect the social and physical environment in which it is to be located and

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40 above, 150 (from developing countries' standpoint, States may give preferential treatment to their nationals in seeking to achieve certain national economic and developmental goals).

<sup>65</sup> See, note 18 above and the accompanying text (discussing multidimensionality of development in the modern view)

how these impacts will evolve over the life cycle of the project or policy. Without all this information the decision-makers cannot be confident that they understand the economic, financial, environmental, social, cultural and political consequences of their decisions. They also cannot accurately assess all the costs and benefits of any proposed project or policy thereby increasing the risk that they will approve projects or policies which will produce fewer benefits than anticipated and will cause more harm than expected.

The modern view of development is, in part, a response to the mounting empirical evidence that in too many cases governments and project sponsors have so underestimated project and policy costs and overestimated their benefits that they have mistakenly followed policies and constructed (and continue to construct) developmentally harmful projects.<sup>66</sup> It is also, in part, a consequence of two other factors in human affairs.<sup>67</sup>

The first is our growing recognition of the limits on the ability of the environment to maintain the human societies that we have created.<sup>68</sup> This has led to increasing importance being attached to the assessment of all the environmental impacts associated with human activity. It has also resulted in more careful attention being paid to identifying the party best able to assume the burden for assessing the environmental consequences of the proposed activity. The modern view seeks to place the responsibility for assessing environmental impacts on the party who is undertaking the action that will cause the likely impacts. As a result, many project stakeholders are demanding that project sponsors or policy advocates account for all the human and physical environmental costs and benefits of their proposed projects or policy before the project or policy is approved. This is a significant change from the traditional view which assigned this responsibility to the sovereign and allowed all other actors to defer to the sovereign's decision in this regard.

The operational expression of this demand is the importance attached to impact assessments in planning and to the growing acceptance of the precautionary principle.<sup>69</sup>

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<sup>66</sup> See generally RF Mikesell & L Williams *International Banks and the Environment* (1992) (several case studies in which poor assessments of projects costs have resulted in excessive environmental costs); B Rich *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development* (1994) (the World Bank's often destructive environmental and political impact on millions of people); B Morse & TR Berger *Sardar Sarovar: The Report of the Independent Review* (1992) (describing how Sardar Sarovar projects, which faced resistance from tribal peoples living in the project area, have adversely effected these peoples).

<sup>67</sup> A third important factor is improvements in information and communication technology. This technology enable business, investors, and NGOs around the World to quickly learn about and react to developments around the world. See C Grossman & DD Bradlow (note 19 above) 11. This factor receives less attention in this paper because, to date, it has had less direct impact on IDL than the other two.

<sup>68</sup> See D HUNTER ET AL., 'Introduction' in D Hunter, J Salzman & D Zaelke (eds) *International Environmental Law and Policy* v-vi (1998) ('human economic activity threatens to surpass the ecological limits of the biosphere (if it has not already done so in certain instance').

<sup>69</sup> See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 ILM 802 [hereinafter Espoo Convention] (not yet in force as of Nov. 25, 1999) ('Mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impacts in general and more specifically in a transboundary context'); Hunter et al., (note 69 above) 360. See also *id.*, 366 (environmental impact assessment as the 'process for examining, analyzing and assessing proposed activities, policies or programs to integrate environmental issues into development planning and maximize the potential for environmentally sound and sustainable

The precautionary principle was developed in response to the fact that scientific certainty often comes too late to design effective legal and policy responses for preventing potential environmental threats. It shifts the burden of scientific proof necessary for triggering policy responses from those who would prohibit a harmful activity to those who want to initiate or continue the activity.

The second development is the increasing influence of international human rights law and forums around the world. The development of international human rights law has educated governments and international organizations about their responsibilities towards those who are affected by their actions; raised awareness among people about their rights; and increased their willingness to take steps to oppose development projects and policies that they believe will harm them. The existence of new international mechanisms for raising human rights claims means that it is now possible for many of those who are adversely affected by development projects to challenge these projects in an international forum where they can obtain an ‘on the record’ hearing. It is also becoming possible for the adversely affected people to seek to hold accountable those who actually did or helped the perpetrators take the action that caused the harm. For example, people who feel that they have suffered material harm because the World Bank has not followed its own operating rules and procedures can file a Request for Inspection with the World Bank’s Inspection Panel.<sup>70</sup> Similarly, groups who feel that development projects are violating their human rights may be able to file claims before such bodies as the African or Inter-American Human Rights Commissions.<sup>71</sup> In addition in some cases, domestic courts in the project sponsor’s or contractor’s home state have been willing to consider these cases.<sup>72</sup> Regardless of the outcome of the proceedings in these forums, the mere fact that the cases have been filed can impose reputational and financial costs on the project sponsor, contractors and the government which approved the project. The increased costs can be sufficient to change the calculus of the project’s costs and benefits.

The result is that, in addition to public interest groups, some in the corporate sector are calling for all the key actors in the project to take more account of human rights considerations in their project planning.<sup>73</sup> In addition, a number of corporations have been willing to work with the United Nations to develop norms of conduct for multinational corporations.<sup>74</sup>

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development’).

<sup>70</sup> See DD Bradlow ‘International Organizations and Private Complaints: The Case of the World Bank Inspection Panel’ (1994) 34 *Va J Int L* 553, 553-54 (function of the Inspection Panel as a forum in which nongovernmental parties can hold an international organization directly responsible for the harm resulted from the violation of its own rules and procedures). See generally, IFI Shihata *The World Bank Inspection Panel: In Practice* (2000). (the objectives and mechanism of the Inspection Panel and its operation); *Accountability at the World Bank: The Inspection Panel 10 Years On*, The Inspection Panel (2003).

<sup>71</sup> For the details of the function of these human rights commissions, see generally H Hannum (ed) *Guide to International Human Rights* 3 ed (1999) 11-14 (methods by which international human rights obligations can be enforced). See also, LA Malone & S Pasternack, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (2004).

<sup>72</sup> See, e.g., *Jota v Texaco, Inc.* 157 F.3d 153 (2d Cir. 1998) (consolidated appeals of two class actions brought by residents of Ecuador and Peru against Texaco in New York for environmental and personal injuries allegedly caused by Texaco’s exploitation of oil fields in a river basin in Ecuador).

<sup>73</sup> This can be seen for example in the adoption of corporate codes of conduct and in the increasing attention being paid to the issue of corporate social responsibility.

<sup>74</sup> See The Global Compact <<http://www.unglobalcompact.org>>.

There are a number of consequences that follow from this view of development, which can be seen most clearly in the case of development projects. The first is that project sponsors and contractors have greater and more complex responsibilities than those assigned to them by proponents of the traditional view of development. According to the traditional view of development, project sponsors and contractors are only responsible for the performance of their specific project related functions. Under the modern view they are seen as being responsible for both the performance of their specific project functions and for the impact of these functions on the other stakeholders in the project and on the project's physical and human environment. This means that it is no longer seen as acceptable for project sponsors or contractors to treat social and environmental costs as externalities. They are now expected to internalize these costs and account for them in their project planning. In other words, it is no longer seen as prudent, in an economic or risk management sense, for project contractors to rely on government decisions relating to environmental and social matters.

The second consequence, which follows from the first, is that proponents of this view of development attach great importance to consultations between project decision-makers and all those who will be affected by the proposed project. The reason is that the project decision-makers can only be confident that they have accurately assessed the costs and benefits of the project if they understand how those who will be affected by the project will react to the project and the resulting changes in their social and physical environment. This information can only be uncovered through consultation with all those parties who will be affected by the project or who have the ability to influence how these affected parties will respond to the project.

The emphasis on consultations has two important implications. The first is that the consultation process can only give project sponsors and contractors the desired result if the project decision-makers provide the affected people with adequate information about the project. Unless these people have sufficient information on the project to understand its potential impacts, they cannot know with any confidence how they will respond to the project. The need for consultation, therefore, necessarily leads to a requirement for disclosure of information.<sup>75</sup>

The need for consultations also has the effect of partially localizing the focus of the project.<sup>76</sup> Under the traditional view of development, project sponsors and contractors only need to consult the relevant regulatory authorities, usually national authorities, in the course of making project-related decisions. Now however, they must pay greater attention to local concerns and impacts, even if the project's ultimate rationale is to provide national or even transnational benefits. This necessarily has the effect of empowering local stakeholders and their representatives in their consultations with the project sponsors. In this regard, it is important to note that the modern view highlights the importance of consulting groups traditionally excluded from power, such as women and indigenous people. Since both these groups have the ability to influence the future

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<sup>75</sup> See generally JB Battle et al. *Environmental Decisionmaking and NEPA* 2d ed (1994).

<sup>76</sup> Note this is taking place at the same time as the regulatory framework for projects is being globalized. See, e.g., World Bank and IFC Safeguard Policies, available at World Bank website, <[www.worldbank.org](http://www.worldbank.org)>, and at IFC website, <[www.ifc.org](http://www.ifc.org)>.

impacts of the project and its likely success, they cannot be ignored in the project consultation process.

This consequence of the modern view has legal implications. It suggests that for sustainable development to occur attention will need to be paid to removing legal barriers that might impede the ability of these groups to participate in the consultation process. These barriers could include both overtly discriminatory laws<sup>77</sup> and legal measures that have the effect of inhibiting these groups from participating in the consultations.<sup>78</sup>

Another implication is that consultations necessarily politicize the project because both the disclosure of information and the actual consultations become part of the project sponsor's efforts to secure the affected stakeholders' support for the project. If the affected people do not support the project, the project decision-makers cannot be confident that they will act in the best long run interests of the project and that the project will be sufficiently sustainable to actually produce the expected developments or that it will have the predicted impacts. Consequently, the consultations become an important arena of contest between those who support and those who oppose the project, in which each group seeks to use the consultations to advance their particular position.

Projects can also be politicized in another way. This occurs in cases where there are differences of opinions between the local stakeholders and the national government or project sponsor over the desirability of the project. In this case the project sponsor and contractors will need to make a choice as to how to respond to these differences in opinions. This clearly places the sponsor and contractors in the position of having to take a position on a domestic political issue.

The modern view of development requires a more participatory form of decision-making than the traditional view of development. The reason is that without people feeling that they are able to influence the decision-making process, they are unlikely to have confidence in and be willing to take part in the consultation process. This in turn means that project decision-makers, who insist on a top-down form of decision-making, are unlikely to obtain all the information they need to anticipate and assess all project impacts.<sup>79</sup>

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<sup>77</sup> Examples of such measures would be laws that deny women the right to participate in meetings and laws that do not recognize the property rights of indigenous people or women.

<sup>78</sup> Examples of such measures could include laws that require all documents to be submitted in one official language, rather than in the languages of indigenous peoples, laws that deprive people of their internationally recognized rights to free speech and association, the protection of the integrity of their person and the failure of some governments to effectively enforce their laws against certain social groups who take action to limit participation in development by other groups.

<sup>79</sup> See, e.g., World Bank, *The World Bank Participation Sourcebook* (1996) 3-4 (project planning with the conventional "external expert stance" in which sponsor and designers collect information by using experts but, may fail to listen to the voices of local stakeholders or disadvantaged people) <<http://www.worldbank.org/wbi/sourcebook/sbhome.htm>>. The Bank currently advocates stakeholder participation that involves all parties concerned, such as the poor and socially disadvantaged, NGOs, private sector organizations, local and national government officials, and Bank staff. See *id.*, 6-7. For examples of participatory development, see *id.*, 17-120 (reviewing development projects with participatory approaches in sixteen countries).

A third consequence of the modern view of is that it has begun to blur the boundaries of the scope of the project sponsor's or contractor's responsibility. Under the traditional view, the scope of their responsibilities is relatively well-defined. Geographically they are limited to the discrete location of the project and, more specifically, to those aspects of the project for which they had direct responsibility. Furthermore, their responsibilities have relatively clear temporal boundaries. The project sponsor's and contractors are responsible for events that happen during the time they are working on the project site and for problems that develop directly out of their work for a defined period thereafter.<sup>80</sup> Their responsibilities will only be ongoing if they continue to be involved in the operation and maintenance of the project after construction is completed.

The modern view requires all project sponsors and contractors to take into account the impact of the project and how these impacts will evolve over the life cycle of the project. Since all aspects of the project are seen as inter-connected, the sponsors and contractors cannot easily divide responsibility amongst themselves. This makes it harder to identify the limits of their responsibility. In addition, the modern perception of a project requires project sponsors and the contractors to account for all impacts over the entire life cycle of the project. This means that, their responsibility will also extend over the entire life cycle of the project and for the period thereafter in which the project's impacts are still socially or environmentally significant. In fact, under the modern vision of development, any attempt to draw boundaries around the project sponsor's and contractors' responsibilities is a question of judgement and, therefore, requires debate and consultation.

The significance of the difference in perceptions of responsibility between the two views can be seen in the case of a dam. Under the traditional view of development, the scope of the sponsors' and contractors' responsibility is limited to their direct contributions to the dam itself and its immediately surrounding areas. The duration of their responsibilities is limited to the time of their involvement in the dam project and for a defined period thereafter. On the other hand, the modern view holds the dam's sponsor and contractors responsible for the dam's social, economic, cultural, political and environmental impacts on the whole river basin; its impact on all who depend on the river basin and for how these impacts will evolve over the period of the dam's construction, operation and decommissioning. Their responsibility may also continue during the period in which the environment and the affected people adapt to the decommissioning of the dam.

The changing view of sponsor and contractor responsibility is relevant to the issue of the treatment and the responsibilities of foreign investors. It used to be the case, that foreign businesses could feel relatively confident that they had met all their legal obligations if they acted in conformity with the national law of their host countries. However, the changing scope of their responsibilities begins to call this into question. First, as the example of the dam project suggests, the project may have impacts outside the borders of the state in which the project is located which the project sponsor must incorporate into its planning. This means that it will need to pay attention to the international and national law that may be applicable to these 'extra-territorial' effects.

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<sup>80</sup> The time period for which the project sponsors and contractors remain liable for damage may be set by contractual warranties, by statute or may depend on their ongoing relationship with the project.



In addition, it may not be sufficient for businesses to be complacent if the host state law does not adequately deal with particular issues. The reasons are the existence of international forums in which people adversely affected by projects can bring claims and developments in communications. These create the possibility for the affected people to claim, either in a legal forum or in the “court” of public opinion, that the project sponsor or contractor is liable for their suffering because it did not follow the best standards of regulation in the industry/world. The latter, while it will not be a winning legal argument, can be a powerful moral argument that can cause significant reputational harm to the project sponsor or contractor and can result in a real financial cost to the sponsor or contractor. Consequently, proponents of the modern view of IDL need to consider these forums and these soft law standards in their consideration of IDL’s treatment of the rights and responsibilities of foreign investors.

Another consequence of relevance to IDL is that the modern view does not show the same respect to the concept of sovereignty as the traditional view. Under the traditional view, the sovereign has the final decision over the social, political, cultural, and environmental “externalities” in development projects and policies. Under the modern view, these “externalities” have been ‘internalized’ and are now part of the responsibility of each of the actors in the development project. Responsible project sponsors, contractors and other project stakeholders are expected to make their own decisions about these “externalities” even if it places them in conflict with the sovereign. According to the modern concept of development, the sovereign is only one actor in the development drama, and there is no clear justification for international organizations, foreign corporations, financial institutions, and NGOs to give its opinions greater weight than those of other actors in the drama. In fact, the case for deferring to the sovereign’s opinions is particularly weak when these opinions conflict with the expressed interests of those who will be most directly affected by the project.

### *III. 4. The Modern View of Development and IDL*

It should be clear from the above description, that the proponents of the modern view of development have a different view of IDL from that held by the supporters of the traditional view of development. The former’s holistic view of development results in a “modern” view of IDL that differs from the traditional view in its understanding of the substantive content of IDL, sovereignty, of the relationship between national and international law and in the role that International Human Rights Law should play in IDL. Each of these differences is discussed in more detail below.

#### *III. 4.A. The Substantive Content of IDL*

The modern view of the substantive content of IDL differs in two important ways from the traditional view. The first is that the “modern” IDL is as concerned with the legal rules and procedures that will lead to development policies and projects that are economically, environmentally, socially and legally sustainable as it is with the rights and responsibilities of the developing and industrialized states towards each other and to other actors in the international economy. The significance of this difference is that the modern IDL views the state as only one of many actors in the development process, while the traditional view treats the state as the primary actor in this process. This can be seen, for

example, in the Declaration on the Right to Development (DRD) which is an important document for modern IDL.<sup>81</sup> The DRD stipulates that each individual and each group of people has a right to development.<sup>82</sup> It also makes clear that the state has obligations towards the individual and the group to help him/her/them develop.<sup>83</sup> This differs from the traditional view of IDL, where the focus is on the rights and responsibilities of the state in developing countries in relation to industrialized states and those foreign economic actors who are active in or with the developing country.

The second difference is that unlike the traditional view of IDL, the scope of the modern view is not limited to economic issues. Thus, in addition to international economic law, the modern vision of IDL incorporates those international environmental and human rights law principles and documents that are relevant to its holistic view of the development process. They include the Universal Declaration on Human Rights,<sup>84</sup> the major United Nations Human Rights Conventions,<sup>85</sup> the DRD<sup>86</sup>, the Stockholm Declaration,<sup>87</sup> Rio Declaration on Environment and Development (the Rio Declaration),<sup>88</sup> and such key multilateral environmental agreements as the climate change, and biodiversity conventions.<sup>89</sup> It is important to note that some of these documents are important to modern IDL even though they may not create legally enforceable obligations.

These documents expand the content of traditional IDL in a number of important ways. The Rio Declaration, for example, seeks to establish principles that promote economic activity that is environmentally and socially sustainable. It stipulates that such important

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<sup>81</sup> Declaration on the Right to Development, note 18 above, art. 2.2 ('All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community...')

<sup>82</sup> *Id.* art. 1.1 ('The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.')

<sup>83</sup> *Id.*, 2.3. ('States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.')

<sup>84</sup> Universal Declaration on Human Rights, GA Res 217A, UN GAOR, 3d Sess., pt. I, 71, UN Doc A/810 (1948).

<sup>85</sup> International Convention on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3; Convention on the Rights of the Child, Nov. 20, 1989, (1989) 28 ILM 1456 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, (1980) 19 ILM 33 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195. *See also*, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24, pt. I, 20 (1993), reprinted in (1993) 32 I.L.M. 1661.

<sup>86</sup> Declaration on the Right to Development, note 18 above.

<sup>87</sup> Declaration of the U.N. Conference on the Human Environment, June 16, 1972 UN Doc A/Conf. 48/14/Rev.1, reprinted in (1972) 11 ILM 1416.

<sup>88</sup> Rio Declaration on Environment and Development, UN Doc. A/CONF.151/Rev. 1 (1992), reprinted in (1992) 31 ILM 874 [hereinafter Rio Declaration]. Johannesburg Declaration on Environment and Sustainable Development, [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm).

<sup>89</sup> United Nations Framework Convention on Climate Change, May 29, 1992, 31 I.L.M. 849 (1992) [hereinafter Climate Change Convention]; Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) [hereinafter Biodiversity Convention].

environmental principles as common but differentiated responsibilities, impact assessment, and the precautionary principle are applicable to all these actors.<sup>90</sup> The principle of common but differentiated responsibilities recognizes that the obligations of states may differ according to their level of development and their specific circumstances. The Rio Declaration refers to the fact that while all states may be bound by the same international obligations, they may not all have the same capacity to act or may not all be affected in the same way by specific problems and so cannot all make the same contribution to its resolution.<sup>91</sup> Impact assessments refer to the requirement for all actors to carefully assess the impact of their proposed action before they act and to take actions to avoid or mitigate the expected adverse environmental and social consequences of their actions.<sup>92</sup> The precautionary principle, as explained above justifies states and other actors in taking preventive action to avoid potentially serious and irreversible harm even in the absence of scientific certainty.<sup>93</sup> The Rio Declaration also makes clear that all actors – states, private enterprises, individuals and groups, international organizations – have a responsibility to protect the environment and to promote development.<sup>94</sup>

The modern view's expansion of the scope of IDL should not be interpreted as implying any diminution in the importance of the international economic law issues that are the core content of the traditional view of IDL. The legal issues raised by practitioners of traditional IDL are still of great interest and relevance to the practitioners of modern IDL. Instead this expansion should be seen as shifting the emphasis placed on some of the international economic law issues of relevance to IDL. For example, under the traditional view of IDL, the primary obligation of a foreign investor is to always act in conformity with the law of the host state. Under the modern view, the foreign investor's obligation may be broader than this in that it may be required to act in conformity with the "best international practices" in the industry even if these standards exceed those stipulated in the law of the host state. Furthermore, the foreign investor, who fails to act in conformity with the applicable standards, may, in fact, be accountable to any individual or group who believes that it suffered or may suffer as a result of the investor's failure to act in conformity with the best international practice.

Interestingly, the forums in which these parties can bring their challenge against a foreign investor may include such bodies as the courts of the investor's home state, the

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<sup>90</sup> See Rio Declaration, note 86 above, principle 27 ('States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration...').

<sup>91</sup> See Rio Declaration, note 86 above, principles 6-7 (putting priority on 't]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable' while highlighting developed countries' responsibility in consideration of the burdens they impose on the global environment). The five-year review of UNCED conducted in 1997 highlighted the principle of common but differentiated responsibilities in formulation and implementation of national strategies for sustainable development while calling for commitments of all parties concerned in both developed and developing countries. See Programme for the Further Implementation of Agenda 21, GA Res S19-2, UN GAOR, 19th Special Sess 11th plenary mtg at 22, 24, 26 UN Doc A/S19-2 (1997) [hereinafter Programme on Agenda 21].

<sup>92</sup> See generally note 70 above (definition of environmental impact assessment and its application in the transboundary context in Espoo Convention).

<sup>93</sup> See Rio Declaration, note 86 above, principle 15 ('Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.').

<sup>94</sup> See Rio Declaration, note 86 above, principle 27 ('States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration...').

International Finance Corporation's Compliance Advisor/Ombudsman,<sup>95</sup> the inspection mechanisms at the multilateral development banks<sup>96</sup> and the various regional and universal human rights courts or commissions. These are in addition to any claims they may have under the host state's domestic law or that the home state may bring on their behalf in an international forum.

### *III. 4.B Sovereignty and IDL*

The modern approach to IDL, like the traditional approach, recognizes that states are the pre-eminent actors in the international legal arena and that the state is sovereign within its domestic jurisdiction. However, the modern approach has a much narrower interpretation of "sovereignty" than does the traditional approach. In fact, the modern approach, with its holistic view of development, views very few issues as being exclusively within the sovereign's "domestic jurisdiction".

This narrow interpretation of the sovereign's exclusive area of jurisdiction is derived from the modern approach to IDL's concern with human rights and environmental issues. It, therefore, tends to perceive the international community as having a legitimate interest in protecting the interests of groups who claim that they are being mistreated as a result of the development process in a state.<sup>97</sup> For example, under this rights based approach to IDL, the international community can intervene to protect indigenous people, women, and child workers.<sup>98</sup> Countries that are signatories to international human rights agreements have obligations that the international community may be able to enforce

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<sup>95</sup> For details, see Int'l Fin. Corp., Operational Guidelines for the Office of the IFC/MIGA Compliance Advisor/Ombudsman, <[http://www.cao-ombudsman.org/pdfs/FINAL%20CAO%20GUIDELINES%20%20IN%20ENGLISH%20\(09-20-00\).doc](http://www.cao-ombudsman.org/pdfs/FINAL%20CAO%20GUIDELINES%20%20IN%20ENGLISH%20(09-20-00).doc)>

<sup>96</sup> In addition to the World Bank, the African, Asian and Inter-American Development Banks, and the European Bank for Reconstruction and Development also have inspection mechanisms. Information on these mechanisms are available at their websites: African Development Bank, [www.afdb.org](http://www.afdb.org); Asian Development Bank, [www.adb.org](http://www.adb.org); European Bank for Reconstruction and Development, [www.ebrd.org](http://www.ebrd.org); Inter-American Development Bank, [www.iadb.org](http://www.iadb.org). For a comparative analysis of these mechanisms see, DD Bradlow 'Private Complainants and International Organizations: A Comparative Study of Independent Inspection Mechanisms in International Financial Institutions' (2005) 36 *Georgetown J Int L* (forthcoming)

<sup>97</sup> See Declaration on the Right to Development, note 18 above, art. 6.1 ('All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights...'). See also Grossman & Bradlow (note 68 above) 3 (United Nations recognition of protection of human rights as an international obligation, provides the basis of international organizational supervision over human rights).

<sup>98</sup> See Declaration on the Right to Development, note 18 above, art. 6.1 (States' duty to cooperate in promoting universal human rights 'without any distinction as to race, sex, language or religion'). There are specific UN conventions that covers human rights of women. See CEDAW, note 85 above and children, see CRC, note 85 above. The UN Commission on Human Rights has also proposed a Draft United Nations Declaration on The Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994) 34 ILM 541, 546, <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G94/125/10/PDF/G9412510.pdf?OpenElement>>. For child labor, see International Labor Organization Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor (June 17, 1999) 38 ILM 1207. In addition to these formal efforts, international civil society has reacted to business practices that fail to incorporate human rights considerations. See also P Malanczuk 'Globalization and the Future Role of Sovereign States' in International Economic Law with a Human Face, note 49 above, 45, 58-59 (examples of international protests against Shell for disregard of human rights of minority rights activists in Nigeria and against Nike for unfair labor practices including use of child labor in developing countries).

against them in cases of non-compliance. These agreements, in effect, may also impose non-binding moral obligations on non-signator states and other actors in development that may be *de facto* enforceable. The practical effect of this aspect of IDL can be seen, for example, in the efforts of the international community to deny financing to projects, such as the Sardar Sarovar dam in India<sup>99</sup> and the Ilisu dam in Turkey,<sup>100</sup> that are seen as impairing the human rights of those adversely affected by these projects. It can also be discerned in the approach of the Bretton Woods Institutions to such projects as the Chad-Cameroon pipeline<sup>101</sup> and to good governance and in the debates in the WTO over labor rights.<sup>102</sup>

The emphasis that modern IDL places on environmental issues also tends to reduce the scope of the state's sovereign jurisdiction. Many environmental issues, such as those affecting international waterways, and those dealing with air pollution, do not respect political borders. They can only be addressed within the scope of the boundaries imposed by the affected ecosystem. In many cases this means that they can only be resolved through inter-state agreement and with the cooperation of all those public and private stakeholders whose actions can either help resolve or exacerbate the environmental problem. This means that all the affected states and stakeholders perceive themselves as having an interest in the way in which other states and stakeholders behave in regard to the applicable environmental issues. Since the state is only one of the relevant actors in this regard, the other stakeholders and practitioners of modern IDL tend to attach less significance to state sovereignty than the proponents of traditional IDL and see it as less

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<sup>99</sup> In 1992, in reaction to strong international criticism against the Sardar Sarovar project, the World Bank conducted a review and imposed conditionality on the remaining loan to ensure adequate resettlement and economic rehabilitation of the affected people and environmental protection. In 1993, the Bank formally canceled the remaining loan. See *World Bank Operations Evaluation Dep't, World Bank, Learning from Narmada*, Precis No.88 (1995) <<http://wbln0018.worldbank.org/oed/oeddoclib.nsf/e90210f184a4481b85256885007b1724/12a795722ea20f6e852567f5005d8933>>. For a detailed review of Sardar Sarovar Dam project, see Morse & Berger, note 67 above.

<sup>100</sup> The export credit agencies of developed countries refused to give export credit support unless Turkey satisfied four conditions designed to address international concerns about the project's adverse impacts on human rights and the environment. See JM Adams 'Environmental and Human Rights Objections Stall Turkey's Proposed Ilisu Dam' (2000) 11 *Colo. J Int Envtl L & Pol'y* 173, 175-76. The conditions include creation of internationally acceptable resettlement plan, establishment of upstream water treatment plant, maintenance of downstream water flow, and protection of archeological sites. See *id.* 176.

<sup>101</sup> See Report of the World Bank Inspection Panel, 'CAMEROON: Petroleum Development and Pipeline Project (Loan No. 7020-CM); and Petroleum Environment Capacity Enhancement (CAPECE) Project' (Credit No. 3372-CM) ( July 24 ,2003 ) <<http://wbln0018.worldbank.org/IPN/ipnweb.nsf/WReport/081ABED76D5636B485256C93005F152A>>.

<sup>102</sup> See *Policy Dep't & Review Dep't, IMF, Review of the Funds Experience in Governance Issues*(2001) 8-9 (IMF regards good governance as an important condition to effectively attain the objectives of IMF-supported projects and promotes it through prior consultations with States seeking assistance) <<http://www.imf.org/external/np/gov/2001/eng/gov.pdf>>. The IMF highlights importance of cooperation with other multinational institutions including the World Bank and the OECD to facilitate good governance in the borrowing country. See *id.*, 20-21. For details of World Bank's strategies regarding good governance through development assistance, see *World Bank, Reforming Public Institutions and Strengthening Governance* (2000) <<http://www1.worldbank.org/publicsector/civilservice/Reforming.pdf>>. See also 'Recognized Labour Standards and Trade' in *International Economic Law with a Human Face*, note 49 above, 79, 80-81 (the use of trade sanction against States that fails to protect labor rights as a key issue in debates on international trade and labor standards).

of a barrier to them interfering in the internal affairs of another state.<sup>103</sup> The influence of this can be seen in the Rio Declaration<sup>104</sup> and in such international environmental agreements as the Global Climate Change<sup>105</sup> and Biodiversity Conventions.<sup>106</sup> It is also implicated in the Shrimp-Turtle and Tuna-Dolphin cases that were heard by the WTO and GATT dispute settlement bodies.<sup>107</sup>

It is important to recognize that while the source of the modern IDL's narrow approach to sovereignty is derived from human rights and environmental law, it also applies to the international economic aspects of IDL. This necessarily follows from its holistic view of development which means that IDL sees the environmental, human rights and economic aspects of international transactions as being too intertwined to be treated separately.<sup>108</sup> Thus, modern IDL does not see any subset of the issues relating to regulation of foreign investors as being exclusively within the jurisdiction of the host state. In this regard it shares the view of these proponents of traditional IDL who contend that international law requires certain minimum standards in the treatment and behavior of foreign investors. However, the holders of the modern view of IDL differ from the traditionalists in their view of the contents of these standards. They argue that these standards address a broader range of issues than the state's treatment of foreign investors. The standards also

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<sup>103</sup> See O Schachter, 'The Erosion of State Authority and Its Implications for Equitable Development' in *International Economic Law with a Human Face*, note 49 above, 31, 36-38 (active roles played by transnational civil society, including private business, NGOs, and scientific and technical experts, in promoting international development).

<sup>104</sup> Rio Declaration, note 86 above, principle 10 ('Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'). Rio Declaration emphasizes participation of women, the youth, and indigenous people and local communities in achieving sustainable development. See *id.* principles 20-22.

<sup>105</sup> Climate Change Convention, note 87 above, art 4.1(i), (States shall '[p]romote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations').

<sup>106</sup> Biodiversity Convention, note 87 above, pmb. ('Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components'). The Convention also stresses women's vital role in maintaining and promoting sustainable use of biological diversity and recognizes the need for women's participation in policy-making and implementation to protect biological diversity. See *id.*

<sup>107</sup> WTO Report of the Appellate Body on United States—Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimp-Turtle case] (United States import ban on shrimp products based on its domestic environmental regulation aiming at protection of sea turtles), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 ILM 839 (1994); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 ILM 1594 (1991) (dealing with United States import ban on tuna products from Mexico, which did not introduce dolphin-friendly fishing practices required under United States environmental law). In Shrimp-Turtle case, several NGOs submitted amicus curiae briefs to support the United States environmental regulation while the appellees (India, Pakistan, Thailand, and Malaysia) argued against the NGOs' submission of amicus briefs. See Shrimp-Turtle case, above, 12-13, 18, 28.

<sup>108</sup> See Rio Declaration, note 86 above, principle 4 ('In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'). Programme on Agenda 21, note 89 above, ¶ 23 ('Economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development.').

include the investor's responsibility to the host state and citizen and the state's responsibility to the other stakeholders in the investment or business transaction.

The issue of standards is also relevant to the changing ability of the state to regulate activity inside its own boundaries. Regulation used to be a national function in which states would pass laws, and regulations to govern particular forms of conduct in their jurisdictions. Now, however, (because economies are becoming globalized) regulation is being internationalized. Today, the effective regulatory framework for a particular sector will, *de facto*, be derived from a variety of different sources. The first, and still the most important, is the laws and regulations of the country in which the project is located. These will be supplemented by the international treaties to which that state is a signatory. In addition, project sponsors and contractors will need to refer to various sources that, while not binding or even directly applicable to the sponsor or contractor, give guidance on what constitutes best practice for the particular activity being undertaken by the sponsor or contractor. These sources include international organizations like the World Bank,<sup>109</sup> and the International Finance Corporation (IFC);<sup>110</sup> the ten principles underlying the United Nations' Global Compact with business;<sup>111</sup> industry associations like the International Organization for Standardization (ISO);<sup>112</sup> and individual corporate codes of conduct.<sup>113</sup> The sum of all these different sources can be considered the effective regulatory framework for a particular project because actors who fail to act in conformity with the best practices established by this collection of laws, regulations, guidelines, and examples of good conduct risk incurring reputational and moral damages, if not legal

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<sup>109</sup> See G Loibl, 'The World Bank Group and Sustainable Development' in *International Economic Law with a Human Face*, note 48 above, 513, 520-25 (Bank's operational policies and procedures relevant to environmental protection and sustainable development). For a comprehensive list of Bank's operational manuals, see World Bank, *Operational Manual: Table of Contents* <<http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf>>.

<sup>110</sup> For a list of relevant guidelines, see Env't Div, IFC, *Environmental, Health and Safety Guidelines* <<http://www.ifc.org/enviro/enviro/pollution/guidelines.htm>> n.100. Projects supported by IFC are also subject to relevant parts of the Bank's Operational Manuals. See IFC, *Safeguard Policies* (listing relevant operational manuals) <<http://www.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies>>.

<sup>111</sup> See The Ten Principles of the Global Compact. <[http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal\\_user/aboutTheGC/nf/nf/theNinePrinciples](http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples)>. The ten principles include 2 principles dealing with human rights, 4 dealing with labour rights, 3 dealing with environment and 1 dealing with corruption.

<sup>112</sup> ISO introduced a series of quality management standards (ISO 9000) See ISO, *ISO 9000 and ISO 14000 in Plain Language* <<http://www.iso.org/iso/en/iso9000-14000/index.html>>. ISO created a series of environmental management standards (ISO 14000) to address the following issues: environmental management systems, environmental auditing and related investigations, environmental labels and declarations, environmental performance evaluation, and life cycle assessment. See Tech. Comm. 207, ISO, *What is ISO 14000?* <<http://www.tc207.org/faq.asp?Question=2>>.

<sup>113</sup> See, e.g., Levi Strauss & Co, *Social Responsibility/Global Sourcing and Operating Guidelines* (corporate guidelines taking into account of environment, labor, and human rights issues in business partners and the host country), <<http://www.levistrauss.com/responsibility/conduct/guidelines.htm>>; Nike Inc., *Labor Code of Conduct* ('zero tolerance for under-age labor') <<http://www.nike.com/nikebiz/gc/mp/pdf/English.pdf>>; Shell Oil Co., *Our Policy and Principles*, (information on Shell's corporate policy regarding business principles, health and environment, and sustainable development) <<http://www.countonshell.com>>.

liability.<sup>114</sup> In this sense they form an effective regulatory framework that informs the modern view of IDL's position on the rights and responsibilities of foreign investors.

### *III. 4.C. The Relationship Between National and International Law*

As we saw above, the traditional view of IDL is based on a strict delineation between national and international law. The modern approach to IDL, on the other hand, tends to soften the distinction between national and international law. In fact, the modern approach to IDL is premised on a form of transnational law in which the boundary between national and international legal issues is blurred and there is a dynamic interaction between these two bodies of law. This can be seen for example in the ways in which some issues such as climate change need to be addressed at both the international and national levels. It can also be seen in the expansion of the effective regulatory framework for foreign investors. This shift to transnational law is consistent with the general trend, in this era of globalization, towards a reduction in the de facto significance of national boundaries.

### *III.4.D. The Role of International Human Rights Law in IDL*

International Human Rights Law plays an important role in modern IDL, because of modern IDL's interest in providing the legal support for a holistic vision of development. Thus IDL is striving to develop doctrines and principles that integrate the doctrines and principles of International Human Rights Law with those of International Environmental Law and of International Economic Law.

IDL's interest in human rights manifests itself in a number of ways. First, it means that the DRD is a document of particular importance to IDL. The DRD's emphasis on the human person, individually and collectively, as the subject of development<sup>115</sup> helps structure the normative framework for IDL. In addition, its emphasis on both the responsibilities of states to create conditions favorable for the realization of the right to development<sup>116</sup> and of all human beings for development<sup>117</sup> provides a principled basis for modern IDL's concern with the rights and responsibilities of all actors in the development process. Finally, the DRD's admonition that States should encourage '...popular participation in all spheres as an important factor in development...' <sup>118</sup> provides legal support for the modern view of development's insistence on the importance of participation to the development process.

Second, because modern IDL seeks to establish the legal principles on which to base a holistic approach to development, it has an interest in attempts to operationalize human

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<sup>114</sup> Good examples of sectors where the regulatory framework has been effectively globalized are the hydro sector and the mining sector. In both these sectors, the conflict generated around major projects resulted in sector-wide reviews that attempted to establish general principles to guide conduct in the sector. See,

<sup>115</sup> Declaration on the Right to Development, note 18 above, art 1.1

<sup>116</sup> Declaration on the Right to Development, note 18 above, arts 3.1, 6.3, and 8.1

<sup>117</sup> Declaration on the Right to Development, note 18 above, art 2.2

<sup>118</sup> Declaration on the Right to Development, note 18 above, art 8.2



rights. For this reason, IDL views the reports of the World Commission of Dams as an important document that has the potential to influence the future evolution of IDL.<sup>119</sup>

#### IV. Some Thoughts on The Future Evolution of IDL

There is a certain irony in the way in which IDL has evolved. Its early proponents were interested in helping the developing countries overcome the economic legacy of colonialism and strengthen their control over their economic futures. In this sense their primary goal was to strengthen the economic sovereignty of the developing countries by enhancing the state's ability to manage its economy. Consequently, they were interested in developing rules that required foreign investors and other economic actors to respect the law, rules and procedures of their host states; providing legal support for the unilateral modification of unfair economic agreements; and in encouraging the industrialized countries to provide financial and other economic support to the developing countries. These objectives also informed the work of the advocates of the NIEO.

The proponents of the modern approach to IDL in some ways are working to undo the gains made by the traditional approach. While they recognize the importance of state sovereignty in a world of economically and politically unequal states and of enhancing the ability of developing countries to shape their own destinies,<sup>120</sup> they are also seeking to enhance the power of non-state actors in the development process. This follows from their incorporation of human rights and environmental issues into IDL and their attempts to use human rights and environmental law to constrain the state's ability to impose development policies and projects on its subjects without their participation. Similarly they are seeking to require all stakeholders, including the state and foreign economic actors, to respect the rights of all other stakeholders in each society's development process.

In one important respect, the seeming incompatibility between these two approaches is more apparent than real. They both share an interest in empowering the poorer and weaker actors in the international economic order. In addition, they are both interested in creating incentives for the richer and stronger actors in this order to be more responsive to the needs of weaker stakeholders and to surrender some of their control over the international economic order. They differ however, on who should be the beneficiaries of this effort and at whom it should be targeted. The traditional approach sees the problem primarily in terms of states as beneficiaries and targets. The modern approach prefers to focus on individuals and communities as the beneficiaries and relatively powerful states, corporations and international organizations as the targets.

The current global climate suggests that the future will favor the modern approach to development and IDL. There are several reasons for this. First, the phenomenon of

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<sup>119</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision Making* (Earthscan 2000).

<sup>120</sup> See Schachter, (note 100 above) 43-44 (the present state-based structure still constitutes the general framework of governance in international relations, although noting increasing influence of non-state actors). See also Rio Declaration, note 86 above, principle 2 ('States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources'); Climate Change Convention, note 87 above, pmb. ('Reaffirming the principle of sovereignty of States in international cooperation to address climate change').

globalization is weakening the *de facto* control that all states have over the economic and political affairs of their countries. It is also creating conditions that at least in relative terms empower private non-state actors, regardless of whether they are commercial enterprises or non-governmental organizations representing civil society, at the expense of the state. This suggests that IDL principles that rely too heavily on exclusively state-based approaches to resolving development issues risk being overtaken by events.

Second, there is growing concern around the world about environmental issues and about the sustainability of our current approach to economic development. This suggests that approaches to IDL that do not take into account the need to promote environmental responsibility and sustainable development are likely to be viewed as out of step with the needs of our time. In this regard, it is important to note that an often overlooked part of environmental law is its attempt to promote more responsible consumption habits, particularly in the richer countries.<sup>121</sup>

Third, the dramatic developments in telecommunications make it increasingly difficult for key decision makers to control the flow of information about their activities and, therefore, the responses to these activities. This means that both states and large corporations cannot maintain exclusive control over those activities for which they are presumably responsible. This breakdown in control is challenging legal thinkers to design new approaches to regulation and to holding actors accountable for the consequences of their actions.<sup>122</sup> This means that an approach to IDL that is focused too much on the state and its powers and responsibilities risks being found wanting in its proposed solutions to developmental problems.

This means that increasingly even its proponents are finding the traditional approach to IDL inadequate. They are learning that its insistence on an economic focus does not help states, businesses, communities and individuals understand their *de facto* rights and responsibilities in regard to development activity and exposes them to unacceptable risks of harm or liability, as the case may be. For example, it leads foreign investors to think that it is sufficient to comply with their host states' domestic legal requirements regarding their environmental and social responsibilities regardless of these requirements compliance with international "best practices" as embodied in such soft law as World Bank Operational Policies and industry standards. The result is that these investors may misconstrue their *de facto* responsibilities and may underestimate their exposure to reputation risk and to financial liability. Similarly, it leads them to underestimate the importance of public participation and in their project-related decision making, which can also lead them to incorrectly assess the risks to their ventures.

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<sup>121</sup> See Rio Declaration, note 86 above, principle 8 ('To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption...'); Programme on Agenda 21 note 84 above, 28 (stating that unsustainable patterns of consumption in developed countries continue exacerbating environmental degradation and that developed countries should make efforts to change the unsustainable consumption patterns).

<sup>122</sup> See Grossman & Bradlow (note 68 above) 12-14 (advances in information technology have enabled nongovernmental actors to share information and spread activities across border and thus undermines States' authority to regulate and sanction their activities).

As a consequence of these acknowledged inadequacies, many proponents of traditional IDL are beginning to look for ways to add environmental and social issues onto their traditional economic concerns. However, many of them are doing so in a manner that treats environmental, social, political, cultural and economic matters as discrete areas of activity. They do not seek to integrate them into one holistic vision of development. The result, as can be seen in some of the contentious projects funded by the World Bank and in some attempts at expanding corporate social responsibility practices, is that environmental and social, including human rights issues, are often seen as ‘costs’ of doing business rather than as an integral part of the development process.

The growing rejection of the traditional view of IDL does not necessarily mean there is a growing acceptance of the modern view of IDL with its holistic view of development. One reason for the reluctance of some to adopt the modern view of IDL is that, while it has successfully articulated a new vision of development and the content of IDL, it has not yet been able to develop an operationally useable set of principles and legal doctrines.

The combined result of the clear inadequacy of traditional view of IDL and the failure of modern IDL to develop operationally useful principles and doctrines is that the content of IDL remains a topic of vigorous debate. This debate incorporates a number of different issues. At the international level, the issues debated include the appropriate role of international organizations like the Bretton Woods Institutions and the WTO in the development process and the appropriate role of specific domestic and foreign stakeholders in major projects, such as mining projects, within one country. Another important issue in this debate is the appropriate role for the state and its relations with the other actors in the development process.

While the precise outcome of this debate is not easy to predict, it is clear that the future evolution of IDL will be in the direction of the modern view of IDL; although its final destination may not be the modern view. This means that the future scope of IDL’s content will include economic, environmental and human rights law. However, the exact way in which these different bodies of law will interact to form the future doctrines of is not yet discernible. This suggests that IDL will provide many interesting and important challenges for lawyers specializing in IDL for many years to come.

# ARE WE BEING PROPELLED TOWARDS A PEOPLE-CENTERED TRANSNATIONAL LEGAL ORDER?

Claudio Grossman<sup>\*</sup>  
Daniel D. Bradlow<sup>\*\*</sup>

## INTRODUCTION

Sovereignty is the fundamental concept around which international law is presently organized. This principle holds that “[e]xcept as limited by international law or treaty, each state is master of its own territory.”<sup>1</sup> Consistent with this conception of absolute sovereignty, international law has traditionally been concerned with the relations between co-equal sovereign states. Each sovereign state can only be legally bound by those commitments it willingly makes to other sovereign states, and by those few principles which are viewed as binding on all states. Those issues that arise from the relationship between the state and its citizens, and between those citizens *inter se*, are viewed as part of the domestic affairs of each sovereign state and thus outside the scope of international law.

This theory of international law, founded upon a clear division between domestic and international issues, was reasonable, as long as most

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\* Acting Dean and Professor of Law, Washington College of Law, The American University; Raymond I. Geraldson Scholar in International and Humanitarian Law; member of the Inter-American Commission on Human Rights.

\*\* Associate Professor of Law, Washington College of Law, The American University. The authors wish to thank Sabine Schlemmer-Schulte for her research assistance; and Leslie Deak, Olivia Goldman, Kimberly Khrounek and Richard Weiss, 1992 Ford Fellows, for their assistance in organizing the conference on “Changing Notions of Sovereignty and the Role of Private Actors in International Law,” held at the Washington College of Law, The American University, March 25-26, 1993.

1. Louis Henkin, *How Nations Behave*, quoted in Barry Carter & Phillip Trimble, *INTERNATIONAL LAW* 17 (1991). For additional conceptions of sovereignty, see Clive Parry, *The Function of Law in the International Community*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 1, 8-14 (Max Sørensen ed., 1968); Bengt Broms, *States*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 41, 44 (Mohammed Bedjaoui ed., 1991).

human activity took place within clearly defined geographic boundaries; that is, within nation-states.<sup>2</sup> It became less satisfactory as technological and socio-economic developments expanded the range of activities whose causes or effects transcended national boundaries and increased national interdependence.

The international community responded to these changes by creating international organizations mandated to coordinate specific areas of international relations. Examples of these organizations include the League of Nations and the International Labour Organisation.<sup>3</sup> These organizations, however, did not alter the basic orientation of international law because they were organized around the fundamental principle of sovereignty. In addition, the organizations lacked the effective powers needed to compel sovereign states to abide by their rules and decisions.<sup>4</sup>

The Second World War provided members of the international community with a powerful and tragic lesson in the dangers inherent in an international legal order based upon a notion of absolute sovereignty. The contemporary international order severely limited the ability of the international community to intervene in the internal affairs of sovereign states. This lesson provided the impetus for the creation of new international organizations. The new organizations were still organized around the principle of sovereignty, but they were given some ability to compel member states to comply with their rules and decisions.<sup>5</sup>

2. Classical international law, in the sense of the law between the states, has been criticized in recent years by governments of developing nations as the product of Western interests often discordant with the interests of developing nations. *See, e.g.,* Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1, 1 (1979) (Adamantia Pollis & Peter Schwab eds., 1979) (asserting that the United Nations Charter is founded upon Western political philosophy); Clive Parry, *The Function of Law in the International Community*, in MANUAL OF INTERNATIONAL LAW 1, 38-42 (Max Sørensen ed., 1968).

3. *The Covenant of the League of Nations*, June 28, 1919, 2 Bevans 48; CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION, 62 Stat. 3490.

4. *See* CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION, 62 Stat. 3490, arts. 19-20 (describing the procedures for adoption of conventions); *id.* at arts. 24-25 (delineating the procedures to be followed in cases of non-observance of conventions by workers or employers); *id.* at arts. 26-34 (describing the complaints of member non-observance by other member states).

5. *See* U.N. CHARTER, art. 25, June 26, 1945, 59 Stat. 1031, 1041, U.N.T.S. No. 993 [hereinafter U.N. CHARTER] (requiring that members act in accordance with decisions of the Security Council); *see also* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. V, sec. 5, 60 Stat. 1401, 1406, T.I.A.S. No.

These new organizations included the United Nations, the International Monetary Fund, and the International Bank for Reconstruction and Development.<sup>6</sup> The United Nations was charged with the maintenance of peace and security. Its charter recognized, without further definition, the existence of human rights that imposed international obligations on all member states.<sup>7</sup> This initial recognition was sufficient to initiate the development of human rights law and the process of international organizational supervision of those rights.<sup>8</sup> The International Monetary Fund (IMF) was mandated to regulate an international monetary order based on the member states' commitment to freely convertible currencies and stable but 'flexible exchange rates.<sup>9</sup> The International Bank for Reconstruction and Development (World Bank or IBRD) was established to fund the reconstruction of war-torn Europe, and to develop the poorer

1501, 2 U.N.T.S. 39, 52 [hereinafter IMF] (providing that the IMF can restrict a member's use of the IMF's general resources if the funds are used in a manner inconsistent with the IMF's purposes).

6. U.N. CHARTER, *supra* note 5; IMF, *supra* note 5; Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 [hereinafter World Bank].

7. See U.N. CHARTER, *supra* note 5, art. 1, para. 3 (proclaiming that one purpose of the United Nations (U.N.) is to promote the respect for human rights); see also U.N. CHARTER, *supra*, note 5, art. 55(c) (stating that the U.N. promotes respect for human rights).

8. For supervisory mechanisms in the area of human rights, see Shigeru Oda, *The Individual in International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 496, 498-503 (Max Sørensen ed., 1968); Frank Newman & David Weissbrodt, *International Human Rights: Law, Policy and Process* 2-17 (1990). For supervisory mechanisms in the IMF, see R. Barents, *Supervision Within the IMF*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS* 351 (P. van Dijk ed., 1984); G.J.H. van Hoof & K. de VeyMestdagh, *Mechanisms of International Supervision*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS* 1 (P. van Dijk ed., 1984).

9. See RICHARD W. EDWARDS, JR., *INTERNATIONAL MONETARY COLLABORATION* 491 (1985) (noting that the original Articles of Agreement required each IMF member to proclaim a par value of its currency in terms of gold or the United States dollar and that these par values could be altered only under limited circumstances). However, the Second Amendment to the Articles changed this mandate by giving legal sanction to a system of floating exchange rates. See Margaret Garritsen de Vries, 1 *The International Monetary Fund 1972-1978* 3-4 (1985) (stating that the international monetary agreements based on floating exchange rates prevalent after the 1971 United States decision to suspend convertibility of the dollar was given legal recognition by the Second Amendment); see also EDWARDS, *supra* at 521 (noting that the Second Amendment allows members to choose any exchange arrangements for their currency except one based on gold).

countries of the world. The mandate of the World Bank was to complement private capital and to facilitate the growth of both the borrower's and the world's economy.<sup>10</sup>

The international community's support for international organizations and willingness to place restrictions on state sovereignty was not unlimited. The international community ultimately failed to ratify the creation of a fourth international organization, the International Trade Organization (ITO).<sup>11</sup> The ITO would have regulated most non-monetary aspects of the international economy. The only surviving remnant of the ITO is the General Agreement on Tariffs and Trade (GATT).<sup>12</sup> This intergovernmental agreement establishes the framework for international trade in goods between the contracting parties.<sup>13</sup>

Even though the organizations were originally founded upon the principle of sovereignty, the establishment of the United Nations and the Bretton Woods Institutions constituted a movement away from an international legal order based solely upon absolute sovereignty. Both the United Nations and the IMF created a super-structure which operates above the level of the individual member states, and to which each member state agreed to surrender some aspect of its sovereignty in return for the political, economic or social benefits to be derived from membership in the organization. For example, by joining the United Nations, member states agreed to limit their ability to use force and to submit decisions relating to international peace and security to the U.N.

10. World Bank, *supra* note 6, art. I. See EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 150 (1973) (remarking that initially the World Bank was not a major supplier of capital for development).

11. THE HAVANA CHARTER FOR THE INTERNATIONAL TRADE ORGANIZATION, Mar. 24, 1948, *reprinted in* CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 231-327 (1947) [hereinafter HAVANA CHARTER].

12. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

13. The international community's failure to establish the ITO has come back to haunt GATT negotiations. The present Uruguay Round of the GATT is seeking to expand the international trade negotiation framework to include trade in services, intellectual property, agriculture, and foreign investment. *Remarks at the Annual Meeting of the Boards of Governors of the IMF and World Bank*, 22 WEEKLY COMP. PRES. DOC. 1309 (Sept. 30, 1986). Some of these sectors would have fallen within the ITO's jurisdiction. See HAVANA CHARTER, *supra* note 11, art. 12 (extending ITO coverage to foreign investment); see also *id.* art. 53 (extending ITO regulation to trade in services). In addition, the GATT negotiators are proposing to establish a Multilateral Trade Organization. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 550 (1993).

Security Council.<sup>14</sup> They also granted the General Assembly broad authority to discuss publicly issues of international concern.<sup>15</sup>

Similarly, by joining the IMF, member states agreed to surrender some of their control over their exchange rate and their monetary policy. Further, member states agreed to abide by the international monetary rules formulated at the Bretton Woods Conference.<sup>16</sup> The IMF was mandated to monitor compliance with these rules through regular consultations with all member states.<sup>17</sup> The benefits to be derived from compliance include an efficient international payments mechanism, IMF financial support if the country experienced difficulty in meeting its international monetary obligations; and membership in the World Bank, where the country could obtain financing for development projects.<sup>18</sup> World Bank loans, whose covenants restricted the borrower's future conduct or imposed certain reporting requirements on the borrower, also contributed to the erosion of absolute sovereignty.<sup>19</sup>

14. See U.N. CHARTER, *supra* note 5, art. 33 (requiring that member states exhaust peaceful means of conflict resolution before turning to the use of military force). See *id.*, art. 24 (granting the U.N. Security Council primary responsibility for the maintenance of international peace and security). Furthermore, U.N. Security Council decisions are binding on all U.N. members. *Id.* art. 25. See also *id.* art. 37 (giving the U.N. Security Council the final competence to resolve armed conflicts through decisions and actions binding on all members).

15. U.N. CHARTER, *supra* note 5, arts. 10-11. The development of an International Bill of Rights, having as its point of departure the United Nations Charter, is a good example of the impact that the General Assembly can have on the behavior of member states. See 1 PACE Y.B. INT'L L. 21 (discussing International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Bill of Rights).

16. See International Monetary Fund, *supra* note 5, art. IV (limiting member's exchange rate policies); see also *id.* art. VIII (prohibiting restrictions on current payments and discriminatory currency practices and requiring freely convertible currencies); *id.* art. V (limiting the use of the IMF's general resources).

17. Enforcement of these rules would depend on how the member's deviation from the rules manifested itself. In cases of members whose monetary policies produced balance of payments problems that required IMF financial assistance, the IMF would use its conditionality policies to enforce its rules. In all other cases the IMF would use peer pressure to try to "encourage" members to abide by the rules of the international monetary order. Joseph Gold, *Strengthening the Soft International Law Exchange Arrangements*, in 2 JOSEPH GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 515, 527-30 (1984); RICHARD W. EDWARDS, INTERNATIONAL MONETARY COLLABORATION 638-42 (1985).

18. World Bank, *supra* note 6, art. II, sec. 1(a).

19. The World Bank's articles stipulate that the member states must either be the guarantor or the borrower on all IBRD loan agreements. *Id.* art. III, sec. 4. See DAN-



During the first few decades after World War II, the movement away from sovereignty often was not perceptible. Indeed, in the wake of decolonization, the role of sovereignty in international law appeared to be strengthened by the growing number of nation-states in the world and by their aggressive assertion of the rights of sovereign states.<sup>20</sup> These developments, however, masked a slow but steady diminution in the realities of sovereign power and a growing gap between the legal principle of sovereignty and the factual reality of a world of limited sovereign states.

This gap between theory and reality has manifested itself in two ways. First, there has been a steady increase in the number of activities whose effects spill over national boundaries and in activities which states are unable to regulate independently. Examples of these issues include global environmental issues; nuclear proliferation; financial flows; refugees; transfers of technology; the trade, labor, consumer, and tax consequences of globalized production patterns; and such criminal law problems as drug trafficking and gun control. Since effective resolution of the legal issues that arise from these activities can only occur at the international level, there is a growing body of international law that seeks to either regulate the activities or to coordinate national regulation efforts.<sup>21</sup>

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IEL D. BRADLOW (ED.), INTERNATIONAL BORROWING 47-87 (1986) (providing a sample loan agreement and general conditions applicable to development credit agreements).

20. See CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, *reprinted in* CHANGING PRIORITIES ON THE INTERNATIONAL AGENDA: THE NEW INTERNATIONAL ECONOMIC ORDER 206 (Karl P. Sauvant ed., 1971), art. 1, para. 1 (proclaiming that states shall have full authority over the natural resources and economic activity within their boundaries); *see also* Declaration on the Establishment of a New International Economic Order, *reprinted in* Sauvant, *supra* at 171 (proclaiming the sovereign equality of states, states' rights to determine their own development strategies, and full state sovereignty over natural resources).

21. *Vienna Convention for the Protection of the Ozone Layer*, 26 I.L.M. 1516 (1987); *Montreal Protocol on Substances that Deplete the Ozone Layer Including Chlorofluorocarbons*, 26 I.L.M. 1541 (1987); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*, 28 I.L.M. 649 (1989); *Vienna Convention on the Physical Protection of Nuclear Material*, 18 I.L.M. 1419 (1979). The *Agenda 21* is a complex document setting forth actions that need to be taken in relevant sectors. *Rio Declaration on Environment and Development, in Agenda 21*, 31 I.L.M. 874 (1992), *Convention on the Climate Change, in Agenda 21*, 31 I.L.M. 849 (1992), *Convention on Biological Diversity, in Agenda 21*, 31 I.L.M. 818 (1992), *Statement of Principles for a Global Consensus of the Management, Conservation and Sustainable Development of All Types of Forests, in Agenda 21*, 31 I.L.M. 881

The internationalization of these issues has also affected the traditional separation of powers between the executive and legislative branches of government.<sup>22</sup> In a reality based on the internationalization of an increasing range of issues coupled with the resulting erosion of the distinction between domestic and international issues, the power of the executive, based on its authority in the realm of international affairs, has expanded at the expense of the legislature.

Given that the legislative branch is the branch of government that most directly represents the sentiments of civil society and in which most of the battles for democratization of social life have been fought, this expansion of executive power has assumed an undemocratic character. It creates a substantial obstacle to the participation by the members of civil society in the affairs that most directly affect them. The expansion of executive power is also forcing private actors to adopt a broader definition of their interests and a more cosmopolitan perception of their political allies.

The second manifestation of the gap between theory and reality, therefore, has been an increase in the number of actors on the international stage. In addition to states, these actors now include national liberation movements; business, consumer, environmental, human rights and other non-governmental organizations (NGOs); political parties; and trade unions. These new actors have recognized that without internationalizing their operations their impact will be limited. They have, thus, begun to develop transnational affiliations and the capacity to operate internationally so that they can make their voices heard in a meaningful way.

The most significant example of this phenomenon is the Transnational Corporation (TNC). While TNCs have existed for centuries, their ability to plan and operate on a global basis grew dramatically as the post-World War II era unfolded.<sup>23</sup> Stimulated by new investment opportuni-

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(1992). *See also* Basel Committee of International Bank Supervisors, *Consultive Paper on the International Convergence of Capital Measurement and Capital Standards of 1988*, 30 I.L.M. 967 (1991) (providing another international cooperative work on national bank standards).

22. *See generally* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION 67-149* (1990) (asserting that in the United States, the President almost always prevails in disputes over foreign affairs authority because of a pattern of executive initiative, congressional acquiescence, and judicial tolerance).

23. There is extensive literature on TNCs. *See generally* RAYMOND VERNON, *SOVEREIGNTY AT BAY* (1971); RICHARD J. BARNET & RONALD E. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974); JEAN JACQUES SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE* (1968); Robert R. Reich, *Who is*

ties and technological developments, TNCs have developed the ability to produce their goods and services in multiple interconnected locations. This development has encouraged global distribution patterns and transnational strategic planning.

One important effect of these developments is that TNCs have become "de-nationalized" in the sense that they view the world, rather than their home or host states, as their base of operations. The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world. Having multiple production facilities also means that those private actors such as trade unions, consumer groups, and environmental organizations, that traditionally interact with TNCs on a country-by-country basis, are being forced to transnationalize so that they can interact with the TNCs in a meaningful way.<sup>24</sup>

This growth in corporate power raises a significant problem for traditional international law. First, it means that whatever the international legal status of states may be, the sovereign has less power, measured in terms of control over human, natural, financial and other resources, than those corporations that it is supposedly regulating.<sup>25</sup> This suggests that

*Us?*, HARV. BUS. REV., Jan.-Feb. 1990 at 53.

24. See Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U.L. REV. 923, 931-32 (1981) (testing successfully the Organization for Economic Cooperation and Development (OECD) guidelines for the conduct of multinational corporations in the *Badger* case); see also Timothy W. Stanley, *International Codes of Conduct for MNCs: A Skeptical View of the Process*, 30 AM. U.L. REV. 973, 1002 (1981) (discussing organized labor's use of existing codes for TNCs as tactical tools to limit TNC independence); THE COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS, available in LEXIS, Europe Library, EURSCP File (addressing among other issues the problem of runaway plants in the Internal Market in Europe with differing standards of labor law and work security in different member states). The charter was adopted by the Heads of State and Government of the Member States of the European Community at the European Council meeting in Strasbourg on Dec. 9, 1989. This charter has a non-binding character, but the commission adopted the Social Charter Action Programme, COM/89/568, thereupon. The latter will lead to further legislative measures that take workers' rights into account in the area of company law, takeovers regulation, and health standards, among other areas.

25. The power of private corporations is evident from a comparison of their financial resources relative to the gross domestic product of five of the richest countries. See *Rank by Sales Volume*, DUN'S BUSINESS RANKINGS, sec. VII, (Dun & Bradstreet eds., 1993) (citing the sales volume for 1992 of General Motors (\$123,056,000,000), Exxon (\$115,068,000,000), Ford Motors (\$88,286,300,000), IBM

in fact the sovereign is no longer "master of its own territory."

The growing power of the TNCs also poses a challenge to the notion that the primary focus of international law should be relations between states. Such a narrow view of international law allows TNCs to evade accountability for their actions at the domestic level by shifting production between different sites. The absence of clear international standards means that they can also avoid regulation at the international level. Thus, TNCs are able to operate in an unregulated manner. This regulatory situation is not beneficial for the TNCs and the multitude of stakeholders in their operations. The absence of an effective regulator complicates the efforts of TNCs to establish universally recognized standards of conduct for the host state-foreign investor relationship.<sup>25</sup>

### I. THE CHALLENGE TO INTERNATIONAL LAW

Such recent developments as the end of the Cold War; enhanced efforts at regional integration in North America, Europe, Latin America, and Africa; and the increasing integration of national economies into a global economy have dramatically increased the pressure on international

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(\$64,523,000,000), and AT&T (\$63,089,000,000). See also THE CORPORATE FINANCE BLUEBOOK, sec. 8 (National Register Publishing ed., 1993) (providing figures on the assets of various companies including: General Motors (\$184,325,500,000); Exxon (\$87,560,000,000); Ford (\$174,429,400,000); IBM (\$92,473,000,000); and AT&T (\$53,355,000,000)); ANNUAL REPORT TO SHAREHOLDERS: FORTUNE 500 (Washington Disclosure, Inc., ed., 1993) (expanding upon these basic figures). See generally WORLD TABLES 257, 269, 349, 625, 629 (Johns Hopkins Univ. Press ed., 1993) (published for the World Bank) (providing figures on the 1990 gross domestic product of the following countries: France (Franc 6,484,109,000,000 = US\$1,162,026,000,000); Germany (DM 2,404,540,000,000 = US\$1,448,518,000,000); Japan (Yen 425,735,000,000 = US\$2,799,100,000); United Kingdom (Pound Sterling £549,181,000,000 = US\$315,621,000,000); United States (US\$5,392,200,000,000)). The conversion of foreign currencies into U.S. dollars was made upon the trading rate on the New York Stock Exchange on June 30, 1990.

26. *United Nation Draft International Code of Conduct on Transnational Corporations*, 23 I.L.M. 626 (1984); see generally Hans Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 4 (Norbert Horn ed., 1980) (discussing generally codes of conduct for TNCs); Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U. L. REV. 923 (1981); Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between Legal Cooperation and Economic Development*, 30 AM. U. L. REV. 903 (1981); Samuel Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401 (1979).

law to respond to the expansion of international legal issues and actors. These developments challenge international law to either adapt its key principles, such as sovereignty, to these new realities, or to develop new principles that more adequately reflect the world in which international law must operate.

With the objective of exploring the issues raised by these developments and their effects on the various actors on the international stage, the Washington College of Law organized a conference on "Changing Notions of Sovereignty and the Role of Private Actors in International Law." The conference sought to explore the changing role private actors play in peace and democratization, human rights, international economic organizations, the transnational economy, and the regulation of the international environment. Conference panelists were asked to present case studies of the role of private actors in specific organizations or areas of activity. In some cases, the speakers highlighted the important role that private actors have played in international fora and suggested ways in which the benefits to be derived from their participation could be strengthened. In other cases, the speakers discussed the problems that can result when international decision makers fail to take proper account of the interests of private actors in the formulation of international agreements or in the regulation of international conduct.

Collectively, the conference presentations highlighted four historical forces which are inexorably undermining sovereignty and the special status that states occupy in traditional international law. These four forces are: (1) the technological changes that are facilitating the creation of a global economy and global society; (2) the growing concern about the environment; (3) the expanding role of international organizations in the world; and (4) the changing perceptions of peace and security. Each of these developments and their implications for international law are discussed in more detail in the following section.

These four forces are also accelerating the collapse of the distinction between domestic and international issues. It is becoming less tenable to classify issues as "international" and therefore as inside the boundaries of international law or as "domestic" and therefore within the jurisdiction of each sovereign state. All issues now have both international and domestic features, in the sense that they influence or are influenced by developments in both the domestic and international arenas. This collapsing distinction between the domestic and the international calls for a reconceptualization of international law so that these issues can be addressed in their totality and free of the constraints that are created by the artificial distinction between domestic and international issues. This

conclusion is explored in more detail in the last section of this paper.

## II. THE FORCES FOR CHANGE

### A. TECHNOLOGICAL CHANGES

In the past fifteen to twenty years, developments in information technologies and telecommunications have revolutionized the world economy and the way in which human beings conduct their day to day affairs.<sup>27</sup> These developments are "globalizing" the international economy and creating transnational linkages between private actors.

Investors can use computer programs to plan their investment strategies and electronic funds transfers to move instantaneously their funds around the world in search of better returns.<sup>28</sup> Engineers working for the same company but in different countries can use computer technologies to work simultaneously on the same design project. Researchers and scholars located around the world can conduct an ongoing international dialogue over electronic mail or E-Mail networks.<sup>29</sup> Human rights and other social activists can use facsimiles and E-mail to inform the world of developments in their countries. The global media can then spread this information instantaneously around the world.<sup>30</sup>

27. It should also be noted that developments in biotechnologies and material sciences are also having important effects on national and international affairs. For example, the invention of the abortion pill RU486 has begun to influence the debate over abortion in the United States. Also, developments in material sciences are beginning to weaken the international economic position of those states that depend on the export of natural resources for their foreign exchange earnings. See Edouard Sakiz, *Five Years to Introduce RU486*, CHEMICAL BUS. NEWS BASE, July 10, 1993, available in LEXIS, Nexis Library, ALLNWS File (discussing the introduction of abortion pill in the United States); *Hoechst Wants to Give Schering Abortion Pill*, DIE WELT, Oct. 4, 1993, available in LEXIS, Nexis Library, ALLNWS File (noting the reaction to the abortion pill in Germany).

28. See JOEL KURTZMAN, *THE DEATH OF MONEY* 17 (1993) (noting that more than \$1.9 trillion is exchanged daily in New York at nearly the speed of light).

29. ROBERT B. REICH, *THE WORK OF NATIONS* 111 (1991).

30. See *Island of Oppression - The Funeral Massacre in East Timor*, TIMES (London), Nov. 22, 1991, available in LEXIS, Nexis Library, ALLNWS File (reflecting the instantaneous spread of international news); *Who Pulled the Trigger on Aquino*, N.Y. TIMES, Aug. 25, 1983, available in LEXIS, Nexis Library, ALLNWS File (discussing dissemination of worldwide news instantly); Donatella Lorch, *Burundi After Mutiny: Horror Stories Everywhere*, N.Y. TIMES, Nov. 21, 1993, at 3 (discussing use of cellular phones and radio to mobilize opposition to coup).

While these technological developments open up exciting possibilities for human development, they also significantly diminish state control over such activities. All the activities described above can occur at speeds that make it difficult for state regulators to detect the activity. Even if they can detect the action, regulators experience difficulty in sanctioning the actor. The speed of the transaction impedes the state's ability to trace the action and identify the actor. In addition, the public's relatively easy access to the computer and telecommunication networks that constitute the infrastructure for these new technologies makes it difficult for states to regulate their use. In fact, those states that have sought to limit the public's access to these new technologies or their ability to use these technologies have found that the price in terms of their ability to participate in the international economy is higher than they can afford.<sup>31</sup>

The result of these developments is that private actors can use these technologies not only to neutralize the regulatory efforts of their sovereign states, but also to undermine the legitimacy and authority of the current government. Moreover, these technologies enable individuals and groups to develop connections with others outside their sovereign states that may be stronger than the connections felt towards their compatriots. Accordingly, there is a resulting weakening of national consciousness and the inchoate beginnings of a global consciousness.<sup>32</sup>

In such an environment, the relevance and efficacy of an international legal order based on sovereign states is open to debate. This international legal order affords no formal recognition to the corporations, industry associations, NGOs and other private actors who, by virtue of their access to these new technologies, play an increasingly active role in

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31. See ROBERT B. REICH, *supra* note 29, at 212 (explaining that costs include those born by persons who do not have the skills to use the new technologies nor the resources to acquire the necessary hardware); see also Jeffrey S. Palmer, *The New European Order: Restructuring the Security Regime Under the Conference on Security and Cooperation in Europe*, 5 TEMP. INT'L & COMP. L.J. 51 (1991) (discussing the effect of the United States and the Coordinating Committee on Multilateral Controls' denial of technological exports to the Soviet Union).

32. See Guido de Bruin, *North-South: Environmental Bid Could Herald New Conflict*, 1993 INTER PRESS SERV., June 4, 1993, available in LEXIS, Nexis Library, CURRNT File (commenting that non-governmental organizations play a significant role in the efficacy of UNCED's efforts); see also Colm Bolland, *NGOs' Demand Role in Drafting of Declaration*, IRISH TIMES, June 17, 1993, available in LEXIS, Nexis Library, CURRNT File (noting that NGOs must be included in the Drafting Committee of the Human Rights Declaration so as to preserve the universality principle in human rights).

international affairs. In addition, the legal order does not reflect the fact that the new technologies have so enhanced the power of private actors relative to the state that, in many cases, it is not feasible to establish sustainable international standards of conduct without the participation of these private actors or without creating an international body that exercises greater power over its member states than states appear to be willing to surrender.

A good example of an area where the desirability of an international regulatory body is clear is the banking industry.<sup>33</sup> As banks now have the ability and the client-driven need to move instantaneously funds around the world, it is no longer possible for each individual nation state to regulate effectively its banks.<sup>34</sup> In the absence of a central bank that has global jurisdiction, the only sustainable regulatory framework is one that has the support of all the participating banks and financial actors. If not, banks can easily avoid the effects of any regulatory framework that they oppose by moving their money and activities to a non-regulated jurisdiction. Essentially, the banks will exercise this option as long there is one non-participating jurisdiction.

In short, these technological developments have so undermined the concept of sovereignty that, on some issues, effective rule making and enforcement cannot take place, either at the domestic or the international level, without the full participation of interested private actors. Moreover, the globalized nature of these issues suggests the need for a coherent set of rules that will be applicable at both the domestic and the international level.

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33. See Allan Murray-Jones & Andrew Gamble, *Managing Capital Adequacy: A Handbook of International Regulations* (1991) (discussing international regulations for capital adequacy in the banking industry); Joseph J. Norton, *Capital Adequacy Standards: A Legitimate Regulatory Concern for Prudential Supervision of Banking Activities*, 49 OHIO ST. L.J. 1299 (1989) (noting concern for banking regulation and supervision of capital adequacy standards).

34. See Daniel M. Laifer, *Putting the Super Back Into the Supervision of International Banking, Post-BCCI*, 60 FORDHAM L. REV. 467 (1992) (pointing out that while banking has become international, supervision has not). See also Giusti, *Banking Crises of the Early 1970s Demonstrated a Need for Coordinated Supervision of International Finance*, AM. BANKER, Dec. 16, 1983, at 26; A. MULLINEUX, *INTERNATIONAL MONEY AND BANKING: THE CREATION OF A NEW ORDER* (1987); D. KHAMBATA, *THE PRACTICE OF MULTINATIONAL BANKING* 35 (1986) (noting that banks by their worldwide operation are often able to circumvent national regulations).



## B. ENVIRONMENT

There is growing recognition that the global environment, because it cannot absorb all the waste that the international economy generates, imposes a fixed constraint on economic growth. This realization has profound implications for both domestic and international affairs, resulting in a paradigmatic shift in human thinking.<sup>35</sup> Until recently, social scientists and policy makers analyzed human activity in terms of how people arranged themselves for the production and distribution of the goods and services needed for individual and social well-being. The recognition of the environmental constraints forces them to factor in to the equations both the process of production as well as that of consumption. All costs must be internalized in the production and consumption process, including not only the costs of direct production and consumption but also the costs of the indirect effects caused by these activities. These costs include not only the treatment of waste and traditionally externalized costs but also "consumption opportunity costs," *i.e.*, the cost of foregoing alternative consumption opportunities. To determine the latter category of costs, social scientists must now consider the sustainability of human activities and the impact of these activities on intra- and intergenerational equity.

The new environmental awareness affects international law in two ways. First, international law must address the increased number of transnational environmental issues. Environmental problems such as the depletion of the ozone layer, the protection of tropical forests, biodiversity, and global warming, are problems that can only be solved at the global level with the participation of all the stakeholders in these issues.<sup>36</sup> This international collaboration necessarily involves the surren-

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35. *See, e.g.*, HERMAN E. DALY & JOHN B. COBB, JR., FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARDS COMMUNITY, THE ENVIRONMENT AND A SUSTAINABLE FUTURE 2 (1989) (discussing the intersection of the economy and sustainable growth); ROBERT REPETTO, ET AL., WASTING RESOURCES AND NATURAL RESOURCES IN THE NATIONAL INCOME ACCOUNTS 6 (1989) (discussing the need to incorporate environment developments in the national income accounts); EDITH B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 45-46 (1989) (explaining that there is a planetary obligation to ensure that each generation inherits an environment of relatively similar conditions which may be attained by balancing the application of the preservationist and opulent models of planetary behavior regarding the environment).

36. Many of the most severe environmental problems are still "domestic" problems. For example, in many developing countries, the most prevalent and lethal environmental problems are the air pollution, caused by charcoal and wood burning

der of certain national prerogatives and the willingness of each nation-state to surrender part of its sovereignty to the rule of the international community.

The shift to an environmental paradigm is also beginning to affect the jurisdictional boundaries between different international and domestic issues. For example, environmental and consumer advocates have pointed out that it is not tenable to limit international trade negotiations to the treatment of products. Equal attention must be paid to the process of production. This means that many traditionally domestic issues, such as health and safety, consumer protection, and internalization or socialization of the full costs of production, are becoming legitimate trade issues. Conversely, traditional trade issues such as non-tariff barriers and subsidies are becoming important consumer, labor, and environmental issues.<sup>37</sup>

The blurring of the distinctions between domestic and international issues also increases the number of parties who wish to participate in the formulation and implementation of these international arrangements. Those organizations and individuals who participate, at the domestic level, in the formulation of health and safety or consumer protection standards wish to participate in the international fora in which these issues are or could be discussed. Moreover, because of the opportunities created by the new technologies, they have the knowledge, power, and

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stoves, found inside people's houses, and the problems caused by lack of access to safe, potable water. See *Development and the Environment: World Development Report 6* (World Bank ed., 1992) (stating that between 400 to 700 million people are affected by inhaling smoky indoor air and that two million deaths are attributable to water pollution each year). This suggests that the high priority attached to these global environmental issues is as much a reflection of the priorities of the rich countries and of the lack of democratic processes in international law as of the severity of the problems.

37. Three areas of traditional consumer, environmental, and labor issues have presented themselves as contentious trade issues. See, e.g., *Chilean Crabs Latest Threat to U.S. Wildlife Laws, Says Defenders of Wildlife; Chilean Minister to Discuss Dolphin Kills, NAFTA Impact*, 1991 U.S. NEWSWIRE, Oct. 13, 1993, available in LEXIS, Nexis Library, CURRNT File (commenting that Chile's practice of tuna fishing creates a trade against the environment); *Regulation of Environmental Standards by International Trade Agreements*, Int'l Env't Daily (BNA) (Sept. 15, 1993), available in LEXIS, Nexis Library, CURRNT File (noting that certain countries use of hormones in livestock and cattle breeding have become trade issues in the international arena); *Jobs at Center of NAFTA Debate*, 1993 DLR 199, Oct. 18, 1993 (commenting that the North American Free Trade Agreement has stirred labor issues and debate in the United States).

international connections to make their presence felt in trade negotiation fora.

The failure of international fora to incorporate these private actors deprives the international negotiators of an important source of expertise and information. Furthermore, this failure creates the impression that international law is sanctioning the use of international procedures to undermine the standards set by the democratic processes of the participating sovereign states.<sup>38</sup> The environment is therefore posing an important challenge to international law and the concept of sovereignty. This challenge comes not only from the evolving environmental paradigm, but also from the growing interest private actors have in international negotiations. Faced with this challenge, international law needs to conceptualize environmental issues in ways that incorporate both their domestic and international dimensions and to establish rules that define the international rights and responsibilities of private actors.

### C. THE ROLE OF INTERNATIONAL ORGANIZATIONS

The role of international organizations has undergone substantial evolution in the wake of the process of decolonization, the growing recognition of poverty and environmental issues as fundamental international

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38. Interested private actors are being deprived of an important part of their democratic rights if they cannot meaningfully participate in the formulation of the regulatory frameworks applicable to their areas of interest. The debates in European countries over the ratification of the Maastricht Treaty and in the United States over NAFTA both demonstrate the significance of this issue. The approval of the Maastricht treaty in some member states required a referendum, and in others only a parliamentary ratification. In the United Kingdom, people pleaded in vain for a referendum to decide on Maastricht. Miles Kington, *A Referendum? Much too Democratic for Britain*, INDEPENDENT (London), May 19, 1993, at editorial page. Sarah Womack, *Lib-Dems Call for People Power Ministers*, PRESS ASSOC. NEWSFILE, July 28, 1993, available in LEXIS, Nexis Library, ALLNWS File. People were not asked to vote on Maastricht in Germany either. Their dissatisfaction with the way Maastricht was adopted was one of the reasons why the Green Party brought the Maastricht Treaty before the German Constitutional Court to examine its constitutionality. *Bonn Goes on Trial Over Maastricht*, DAILY TELEGRAPH (London), July 1, 1993, at 13. Moreover, the narrow result of the Danish Referendum shows that the Maastricht Treaty did not have the people's broad support. *Denmark: 56.8% of Danes Accept the Treaty of Maastricht*, AGENCE EUROPE, May 20, 1993 available in LEXIS, Nexis Library, ALLNWS File. NAFTA was disputed in a similar way. Kelly McParland, *NAFTA - The Battle Heats Up: Elite Backing Goes For Naught as Popular U.S. Revolt Swells*, FIN. POST, Sept. 25, 1993, at S14; Victor Olson, *NAFTA is So Sweeping that We Should Vote on It*, TORONTO STAR, Jan. 21, 1993, at A25.

problems, and the increasing globalization of the world economy. The United Nations has become a universal forum in which any issue of interest to any member of the international community can be raised and debated. In addition to its peacekeeping functions, the United Nations is now interested in and involved with a wide range of social, economic, and political development programs.

A good example of this fundamental evolution is the United Nations' growing involvement in the promotion and protection of human rights. This involvement has resulted in the recognition of the universality of human rights<sup>39</sup> as well as the development of instruments to supervise the protection of human rights. The present system of supervision provides individuals with opportunities to hold their governments accountable in myriad arenas.<sup>40</sup> While this system does not yet assure redress to all victims of human rights abuses, it has succeeded in making human rights performance an essential attribute for political legitimacy and respectability at the international level.<sup>41</sup> The system promotes and is stimulated by an international movement of private actors that reflect the emerging international civil society.<sup>42</sup>

39. See *Vienna Declaration and Program of Action*, WORLD CONFERENCE ON HUMAN RIGHTS, U.N. Doc. A/Conf. 157122, June 14-25, 1993 (demonstrating the importance of human rights issues in the global arena).

40. GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum ed., 1984) (edited for the International Human Rights Law Group) (providing a guide for gaining access to various international organizations and procedures for redress of human rights violations). See Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT'L & COMP. L. REV. 363 (1992) (discussing the origin of the Inter-American system and the need for direct legal representation).

41. Progress has been greater at the regional than at the global level, particularly in Europe and the Western Hemisphere. See Thomas M. Frank, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); *Final Act of the Conference on Security and Cooperation in Europe, Helsinki 1975*, 14 I.L.M. 1292-1325 (1975); Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155 (1981) (comparing and contrasting approaches to the preservation of human rights).

42. More than 1,500 NGOs from all regions of the world participated in the World Conference in Vienna, Summer 1993. THE REPORT OF THE NGO FORUM, U.N. Doc. A/Conf. 15717. There were more than 3,000 participants representing the NGOs who influenced the conference agenda on an unprecedented level. *Id.* Delineated by region, Vienna welcomed 202 NGOs from Africa; 178 from North America; 236 from South America; 270 from Asia; 38 from Australia; 426 from Western Europe; and 179 from Eastern Europe. *Id.* The NGOs influence within the United Nations can only continue to increase. The NGO forum in Vienna created a new NGO Liaison

The IMF, over time, has assumed more responsibility for dealing with the payments to and the structural problems of developing countries.<sup>43</sup> The IMF has expanded the period of time that it uses in its analyses and over which it makes financial assistance available to its member states. As a result, the IMF has been able to incorporate more supply side responses into the design of its adjustment programs. Consequently, the IMF pays relatively more attention to the structural causes of balance of payments problems and is relatively more sensitive to the difficulties involved in changing the structural features of national economies.<sup>44</sup> This shift in emphasis, in turn, means that the IMF has been forced to address many of the developmental, in addition to the monetary, problems that confront its member countries.

The functions of the IBRD have undergone an even more dramatic transformation than those experienced by the United Nations and the International Monetary Fund. Confronted by the developmental problems of borrowing countries and the inability of many World Bank funded projects to perform as expected in deficient macroeconomic environments, the World Bank has broadened its focus from an exclusive concern with discrete development projects to include a concern with the general policy environment within which the project must function. The World Bank has thus begun to fund both general and sector-specific adjustment programs. The loans for these programs provide borrowers with general balance of payments support conditioned upon the borrower adopting certain policy reforms. Since the borrower's acceptance of these conditions results in contractually binding obligations, the conditions relate to the adoption of certain institutional or legislative measures

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Committee (NLC), which will coordinate the work of the NGO community with the United Nations and its conferences. *Id.* Seats on the NLC were allocated according to the following regional and thematic constituencies: Africa (3); Asia (3); Pacific (1); Western Europe (3); Latin America and Caribbean (3); Central and Eastern Europe (1); Women (3); Indigenous People (3); International NGOs (3); Children (1); Unrepresented Peoples and Nations (2); Youth (1); Refugees and the Displaced (1); and the Disabled (3). *Id.*

43. See DANIEL D. BRADLOW, *The International Monetary Fund, The World Bank Group and Debt Management*, in LEGAL ASPECTS OF DEBT MANAGEMENT (UNITAR forthcoming) (discussing the IMF's increasing responsibilities towards developing countries).

44. See *The IMF and Stabilization: Developing Country Experiences* (T. Killick ed., 1984) (noting that the IMF has been criticized for failure to pay adequate attention to the social impact of its policies); CORNIA ET AL., *ADJUSTMENT WITH A HUMAN FACE: PROTECTING THE VULNERABLE AND PROMOTING GROWTH* (1987) (noting the need to incorporate concern for human welfare into IMF adjustment programs).

that are designed to “adjust” the structures within which economic activity or development policy is made.<sup>45</sup>

This shift in the focus of World Bank lending operations has forced the institution to address explicitly the institutional constraints that influence the ability of the borrower to implement and sustain the policy reforms. In doing so, the World Bank has been forced to consider all aspects of a country’s governance that can influence its policymaking capacity.<sup>46</sup> By converting these concerns into the conditions attached to its loans, the World Bank influences the form and substance of the borrower’s policymaking processes. The reason for this emphasis is that the efficiency and the efficacy of the country’s governance will influence the borrower’s ability to repay the loan and its ability to use successfully the funds to achieve the desired structural changes. As a result, the World Bank has become an active participant in the policymaking process of its borrower countries.<sup>47</sup>

The fact that these international organizations have been compelled by the evolution in their mandates to involve themselves in the internal affairs of their member countries has necessarily undermined the sovereignty of its member states. This involvement has also forced these international organizations to become more receptive to the calls by private actors for increased public participation in their affairs.<sup>48</sup> These

45. See JOAN M. NELSON, INTRODUCTION: THE POLITICS OF ECONOMIC ADJUSTMENT IN DEVELOPING NATIONS, 3-4 (Joan M. Nelson ed., 1990) (discussing stabilization of debt procedures as well as structural changes that stimulate economic growth); Paul Mosley et al., *Aid and Power: The World Bank and Policy-Based Lending*, Vol. 1, 65-67 (1991) (discussing the World Bank’s use of conditionality in its lending operations and the policy dialogue between the World Bank and its member countries); IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS (1991) (focusing on the evolving role of the IBRD in a world which demands more of the World Bank than it has in the past).

46. SHIHATA, *supra* note 45, at 53-96. The World Bank does seek to limit the issues it considers in examining a country’s governance. *Id.* at 85-93.

47. See Mosley, *supra* note 45, at 51 (noting that borrowing countries’ policy makers occasionally encounter the problem of successfully complying with the World Bank’s conditions, confusing these conditions with those of the IMF); see also Jonathon Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 171-80 (providing a description of the objective, the scope, and the implementation of the concept of policy-based lending); Sigurm I. Skogly, *Structural Adjustment and Development: Human Rights - An Agenda for Change*, 15 HUM. RTS. Q. 751 (1993) (commenting on the interplay between human rights and development).

48. The most significant example of this is the World Bank’s adoption of a new information disclosure policy and establishment of an Independent Review Panel in

developments suggest a need to reformulate the operating procedures and responsibilities of international organizations in such a way that they incorporate both the domestic and international consequences of their activities.

#### D. PEACE AND SECURITY

As the world is becoming more integrated, the range of factors that influence both national and international peace and security has expanded. Threats to national and international well-being can arise from environmental, social, economic and human rights problems, as well as from traditional military sources.<sup>49</sup> For example, social conflict in one area of the world can interrupt the supply of goods and services to countries across the globe, as well as cause human migrations that overtax the resources of other countries and internationalize local conflicts.

In addition, global integration has enhanced the general awareness of the interconnectedness of human beings. On occasion this awareness has stimulated a sense of solidarity in the international community. As a result, the international community has taken a growing interest in local conflicts that directly affect only the internal peace of sovereign states.<sup>50</sup>

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1993. The panel investigates complaints from directly affected private parties regarding the World Bank's failure to follow its own operating rules and procedures. See *IBRD Resolution on the Inspection Panel No. 93-10 and IDA 93-6; IBRD Resolution on Disclosures of Operational Information*, in *IBRD OPERATION MANUAL - BANK PROCEDURES*, BP17.50 (World Bank ed., 1993). See generally Daniel D. Bradlow, *Why World Bank Needs an Ombudsman*, *FIN. TIMES*, July 14, 1993, at 13 (commenting on the World Bank's need for an independent monitor of its actions); Daniel Bradlow, *A Proposal for a World Bank Ombudsman* (May 1993) (presenting testimony submitted to the International Subcommittee of House Banking Committee).

49. See Michael Prieur, *Protection of the Environment*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 1017, 1019 (Mohammed Bedjaoui ed., 1990) (discussing the range of factors which may threaten the environment); Barbara Stark, *Conceptions of International Peace and Environmental Rights: The Remains of the Day*, 59 *TENN. L. REV.* 651 (1992) (reviewing the global environment and its possible maintenance).

50. The global effort to assist famine victims in Africa in the 1980s is a good example of this sense of solidarity which was stimulated by private actors and facilitated by the ease of global communications. See Frances Westley, *Bob Geldof and Live Aid: The Effective Side of Global Social Innovation*, 44 *HUM. REL.* 1011-36 (1991) (discussing the massive fundraising projects undertaken to assist African famine victims); David Fricke, *Bob Geldof: Rock and Roll's World Diplomat*, *ROLLING STONE* 18 (July/Aug. 1985) (noting the rock-and-roll singer's role in the aid to African fam-

These developments, fueled by the end of the Cold War, have enabled the international community to recognize its interest in playing a more active role in the promotion of peace and security among nation-states. The international community has also begun to acknowledge that peacekeeping involves resolving the causes of conflict as well as the manifestations of that conflict. As a result, the international peacekeeping forces organized by the United Nations and regional organizations have been given mandates that extend beyond peacekeeping to include peacemaking. The most significant examples of this development include the cases of Namibia and Cambodia. In each of these cases, the peacekeeping operation assumed many of the traditional attributes of national sovereignty such as the maintenance of law and order, the organization of elections, and the provision of key governmental functions during the period of transition from conflict to peace.

The problematic examples of international involvement in conflicts such as those in Angola, Haiti and Bosnia suggest that the international community has not yet defined the scope of its obligation to intervene to protect human life and the domestic peace and security of its member countries; nor has it been able to establish a uniformly applicable set of rules for intervention in the internal affairs of other states and social groups. These examples further demonstrate that the international community is not yet ready to accept the political and financial consequences of peacemaking. Nevertheless, these examples also demonstrate that there are powerful forces pushing the international community towards acceptance of this new reality.

Those cases in which the international community has been willing to undertake complex peacemaking operations, involving the assumption of certain governmental functions, raise important considerations of responsibility and accountability. The peacekeepers relate to the general population within the country in much the same way that governmental actors relate to the population within a country. This suggests that the international community, in defining the mandate and in the execution of these operations, needs to ensure that the international peacekeepers perform their responsibilities to these private actors to the same extent and in a comparable manner to what would be expected of a national government.

These developments also pose an important challenge to international law: to balance the ability to intervene so as to maintain peace and

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ine victims); Paul McGrath, *Delivering Live Aid*, 98 MACLEAN'S 12 (1985) (commenting on the social effort to deliver relief to African famine victims).



security with concerns about undue interference by the most powerful members in the international community. As a result, the international legal process needs to redefine the respective rights and obligations of the different actors in the international community in a way that promotes both effective peacekeeping and the ability of all actors to determine and implement peacefully their own social, political, cultural, and economic policies.

#### E. RECONCEPTUALIZING INTERNATIONAL LEGAL ISSUES

The deficiencies of the present international legal order based on the *de jure* sovereignty of the nation-state and a relatively clear distinction between international and domestic legal issues are obvious. The nation-state is no longer functionally "the master of its own territory." Some private actors and international organizations have at least as much power as the sovereign state. They are able to use their power to influence the decisions and policies of the individual nation-state in the domestic realm and of the community of states in the international arena. This shift in power is beginning to produce an international civil society, based on shared interests and new loyalties, the members of which are beginning to demand the right to be full participants in the formulation of international rules and decisions.<sup>51</sup>

These developments pose two challenges for international law. First, it needs to recognize and incorporate into its jurisdiction all international actors. The states, international organizations, and private actors such as transnational corporations; trade unions; consumer, environmental, development and human rights NGOs; and private individuals,<sup>52</sup> are now all engaged in the ongoing process of formulating and implementing international legal standards. An international legal process that fails to allow non-state actors to participate fully in the process cannot develop legal norms that are fully responsive to the needs of the international community.

Second, international law must adapt to the reality that the instantaneous transmittal of information around the globe ensures that the im-

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51. See JOHN CLARK, *DEMOCRATIZING DEVELOPMENT* 125-30 (1990) (noting not only NGOs' international advocacy powers, but also their ability to effect change in their respective governments); DAVID C. KORTEN, *GETTING TO THE 21ST CENTURY* 95-100 (1990) (discussing the development and objectives of voluntary organizations as well as their role in facilitating political participation in a democracy).

52. Grossman, *supra* note 40.

fact of all significant social, economic, cultural, and political issues transcend national boundaries. This development transforms all of these issues into either domesticated international issues or internationalized domestic issues in the sense that they simultaneously affect all societies and are influenced by the national debates in each of these societies. Furthermore, this concept reveals that the belief in a clear distinction between domestic and international legal issues is fundamentally flawed.

International lawyers cannot meet these challenges by merely redefining international legal issues. Any redefinition that retains the standard distinction between domestic and international issues will be inadequate because it will not incorporate both the domestic and the international dimensions of each issue. Instead we need to develop new legal norms that consider both the domestic and international dimensions of the issues to which they are applicable, as well as new institutional arrangements that accommodate all the participants in the international legal process. This undertaking requires a fundamental reconceptualization of the norms and institutions of international law. While the new norms and institutional arrangements will ultimately evolve out of the world being shaped by the four forces described above, two of the principles that should shape the new legal process can be identified.

The first of these principles is that of participation. Essentially, all parties that will be directly affected by the decisions and actions taken, regarding any particular issue, should be able to participate in the formulation of those decisions.<sup>53</sup> While the form of participation may vary according to the nature of the issue involved, all affected parties should be assured of meaningful participation in the fora in which decisions are made. A corollary to this principle is that all affected parties should have appropriate access to the information needed to ensure that their participation is meaningful.<sup>54</sup>

The second principle is that all affected parties should be able to hold

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53. THE AFRICAN CHARTER FOR POPULAR PARTICIPATION IN DEVELOPMENT, U.N. Doc. E/ECA/CM.116/11; see also Daniel D. Bradlow, *Regional Developments: Africa*, 25 INT'L L. 1053 (1991) (commenting on the African Charter); Agenda 21, *supra* note 21 (compiling the latest four UNCED documents); Edith B. Weiss, *Introductory Note on UNCED Meeting*, 31 LL.M. 814 (1992) (commenting on the latest four documents of the UNCED). See *supra* note 39 and accompanying text (discussing the 1993 Vienna Human Rights Conference).

54. The World Bank has acknowledged this principle in its new information disclosure policy. According to this policy, the World Bank will be establishing Public Information Centers and will be expanding the range of documents it makes available to the public. IBRD Resolution on Disclosure of Information, *supra* note 48.

those who make and implement policies that affect them accountable for their actions. The form of the accountability may vary, but generally a sustainable legal order must provide all those affected by a particular decision with the ability to hold those who make and implement the decision responsible for the consequences of their actions.

Neither of these principles is linked to sovereignty or to the international or domestic nature of an issue.<sup>55</sup> The sole criterion used to identify the parties who should be able to participate in decision making is the nature and the impact of the decision to be taken. Similarly, the criterion used to identify who should be given the ability to hold decision makers accountable is who is actually affected by the decisions that have been taken and the consequences thereof. The identity of those to be held accountable depends only on who actually has the power to make and implement decisions.

The fact that sovereignty is irrelevant to these two principles means that they will help shape an international legal order that is people-centered, rather than state-centered. This focus creates the possibility for a much more cooperative and rights based legal order than exists under the present state-centered international order. However, a people-centered legal order provides no obstacle to stronger states or social groups interested in making an unjustified intervention in the internal affairs of weaker states or social groups. This in turn creates the risk that a people-centered legal order could result in the centralization of power in the international community.

The new international legal order, therefore, needs a means to distinguish between legitimate international action in solidarity with other members of the global community and the unjustified use of power. The two basic principles offer a good starting point for finding a solution to this problem. Participation establishes the duty of every state or group, that seeks to intervene in the affairs of any other state or group, to obtain authorization for its actions through a decision-making mechanism in which all interested parties will have the right to participate. Account-

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55. It may also be noted that these two principles are essential characteristics of any democratic society. In this sense they merely represent the extension of the principles of democracy from the domestic to the international realm. See C. Hides, *On the Citizen and the Legal Person: Toward the Common Ground of Jurisprudence, Social Theory and Comparative Law as the Premise of a Future Community, and the Role of the Self Therein*, 59 U. CIN. L. REV. 789 (1991) (discussing the issues of democracy and responsibility on the international plane); Jochen Frowein, *The European Community and the Requirement of a Republican Form of Government*, 82 MICH. L. REV. 1311 (1984) (pondering democracy within the European Community).

ability establishes the right of the target state or group to hold the intervenors responsible for the consequences of their actions.

These principles obviously need further development and need to be tested in the crucible of the international order which is evolving under the influence of the four historical forces discussed above. The discussions at the conference were designed to spark debate on the challenge posed to international law by these four historical forces. Our purpose in publishing the papers in this symposium issue is to further stimulate discussion of the role of private actors in the new international legal order and on the movement towards a people-centered transnational legal order.

## **PART II**

### ARTICLES ON THE GOVERNANCE OF THE IMF

Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF

The Governance of the IMF: The need for comprehensive reform

Operational Policies and Procedures and an Ombudsman



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## Papers

# Stuffing new wine into old bottles: The troubling case of the IMF

**Daniel D. Bradlow**

International Legal Studies Program, American University, Washington College of Law, 4801  
Massachusetts Avenue, Washington DC 20016-8084  
tel: +1 (202) 274 4205; fax: +1 (202) 274 4116; e-mail: bradlow@wcl.american.edu

*Daniel D. Bradlow is Professor of Law and Director of the International Legal Studies Program at the Washington College of Law, American University, Washington, DC. His current scholarship focuses on the Bretton Woods institutions, the international legal aspects of sustainable and equitable development, and the legal aspects of debt and financial management.*

### ABSTRACT

*This paper argues that IMF is failing because its decision-making structure and procedures have not adapted to its changing functions and role in the global economy. This results in poor policy decisions and causes distortions in the IMF's relations with its member states, non-state actors, and other international organisations, and problems with some of the IMF's interpretations of its articles. This paper also proposes a set of short-, medium- and long-term reforms that, if adopted by the IMF, would make its decision-making procedures more compatible with its current functions and changed relations with its member states.*

### INTRODUCTION

Since the collapse of the Bretton Woods system in the mid-1970s the International Monetary Fund (IMF) and the World Bank have helped the world avoid the horrors of a systemic collapse. However, when

looking at the volatility in financial markets, however, the growing income inequality both within and between countries, and the fact that nearly half the world's population lives on less than \$2 per day, about 22 per cent live on less than \$1 per day, and hundreds of millions of people live without safe sources of running water, shelter, education or health care, it is clear that they are failing in their mandate to reduce poverty, promote and maintain high levels of employment, real income and a stable international monetary system, and shorten the duration and lessen the degree of payments disequilibria.<sup>1</sup>

Unfortunately, they are failing at a time when the world badly needs them to be functioning effectively. The increasingly integrated global financial system, with its apparently endemic volatility and uncertainties and unbalanced allocation of resources, desperately needs some form of effective global governance.

In this paper the reasons for the IMF's failure to adequately carry out its mandate explored. It is argued that, while the suitability of the IMF's policies and the appropriate scope of its activities are certainly open to debate, an important and often underemphasised cause of its unsatisfactory performance is its failure to adapt its structure and operating practices to its changing



functions. In fact, without correcting this latter set of problems it will never be able to fulfil its responsibilities effectively.

The thesis of this paper is that since the collapse of the Bretton Woods system of relatively fixed exchange rates, the IMF has lost influence over its richest member states, particularly the G7 countries, and has steadily gained influence over its developing country member states. This process has resulted in the IMF slowly mutating from a monetary organisation into a macroeconomically oriented development financing institution. These developments have important implications for the IMF's relations with its member states, the citizens of those member states and other international organisations. Unfortunately the IMF has not yet adequately acknowledged these implications. Consequently, the IMF is experiencing serious problems that are caused by the distortions that arise from it trying to squeeze its new functions and relations into its old structures. These problems are undermining its ability to function effectively. They are leading many in the developing world and in international civil society to view the IMF as an uncaring bully that is more responsive to the concerns of its richest member countries than to the real problems of the citizens of the countries in which it operates.<sup>2</sup>

The paper also proposes a reform programme for the IMF that is designed to adapt its existing structures to its new functions. The reforms will also make it more accountable, democratic and responsive to the challenges that its developing country member states face. Without these changes, the IMF will fail in its responsibility to ensure that the global financial system is able to contribute to the resolution of the serious problems of poverty and inequality that exist in the world today.

While this paper will focus on the IMF, the lessons drawn from this case study are applicable to other international economic

organisations, like the World Bank, in which industrialised countries are perceived to have a disproportionate share of the power and developing countries, which are directly affected by the policies and actions of the organisation, have very limited influence. It also has relevance for those international organisations, primarily the UN's specialised agencies, which, because they are perceived by the richest countries as being too responsive to the concerns of developing countries, have lost power to the IMF and the World Bank over the past 20 years.

In order to establish this thesis, the paper is divided into a number of sections. The following section of this paper gives an overview of the IMF's structure and functions and will briefly describe the evolution in its operations since its creation. The third section describes five distortions that have arisen from the combination of the evolution in the IMF's functions and the inflexibility of its decision-making structures. The next section briefly reviews the problems that have resulted from these five distortions, and the final section considers the possible responses to the current problematic situation of the IMF and concludes that the most desirable option is a substantial programme of structural reform. It also contains a set of short-, medium- and long-term proposals for reforming the IMF.

## THE EVOLUTION OF THE IMF'S OPERATIONS

At the Bretton Woods Conference in 1944, the 44 participating countries agreed to surrender some of their monetary sovereignty to the IMF in exchange for the benefits of a rules-based monetary system.<sup>3</sup> The states agreed that the post-war international monetary system would be based on a fixed link between gold and the US dollar. Every other participating country would set the value of its currency, known as its 'par value', in terms of the US dollar. The participants created the IMF to oversee the



system. Its primary function was to ensure that members were following economic policies that were consistent with maintenance of the par value they had established for their currency. The countries also agreed that they would not let the value of their currency change more than a specified amount without the permission of the IMF. To encourage the participating countries to comply with these obligations and as part of the benefits of membership in the IMF, it was empowered to provide financial support to any member state that was experiencing balance of payments problems.<sup>4</sup>

In order to perform its oversight functions, the IMF was required, pursuant to Article IV of its Articles of Agreement, to conduct an annual consultation with each of its member states. During these annual consultations, sometimes referred to as surveillance missions, the IMF focused its attention on those macroeconomic variables that influenced the ability of the country to maintain the par value of its currency. Thus, the primary focus of the IMF was on such macroeconomic variables as exchange rates, interest rates, inflation rates, the balance of payments, and growth in money supply and credit.<sup>5</sup> Given the nature of its interest, it made sense for the member states to stipulate in the IMF's Articles of Agreement that the IMF should limit its interactions with its member states to the state's central bank and ministry of finance.<sup>6</sup> These were the two agencies in the member country that had jurisdiction over the variables of interest to the IMF.

The IMF's specialised international monetary mission also placed limits on the conditions it would attach to the financing it offered its member countries. These conditions were limited to such issues as the size of the currency devaluation, the required cut in the budget deficit, and the expected limits on the growth in money supply and credit. The fact that the conditions were focused on macroeconomic

issues meant that the recipient state was free to choose the precise policy measures for meeting these conditions. During the period of the par value system many countries, including the USA, made use of the IMF's services.<sup>7</sup>

Since the IMF was designed to be a monetary and not a development institution, it operated on the basis of uniform treatment for all member states. The justification for this was that all states were participants in the same monetary system and that the ability of each state to maintain its par value was influenced by the same variables and they were all vulnerable to the same types of balance of payments problems. The IMF thus offered each member state access to its financing facilities on the same terms and conditions. Similarly, the IMF's annual consultations with each member state covered essentially the same ground. The IMF concretised this uniformity of treatment by adopting a principle of uniformity as one of its key operating principles.<sup>8</sup>

The IMF's original governance structure was designed on the assumption that in an international monetary system based on par values all countries could potentially run into balance of payments problems and need to make use of the IMF's financing facilities. Thus, even though the IMF's system of weighted voting meant that some countries had more influence in the IMF than others, they all had an interest in developing policies that were acceptable to states that actually used the IMF's services. Since even the most powerful states could one day need the IMF's support, they were unlikely to advocate policies that were unduly burdensome for member states.<sup>9</sup> They understood that the policies they supported in the IMF could one day directly affect their own citizens and they could be held accountable for them.

The governance structure was also built around the expectation that the IMF's



board of executive directors would exercise firm control over the IMF's management and staff. The board would thus hold the staff and management accountable for their actions and decisions. During the period of the par value system, this expectation was realistic because the number of IMF programmes was relatively small and the scope of the programmes was limited to the key macroeconomic variables relevant to the par value system.

After the collapse of the par value system, which was formalised with the adoption of the Second Amendment to the IMF's Articles of Agreement in 1978, the IMF lost its well-defined monetary mission.<sup>10</sup> The Second Amendment gave each member state the right to choose its own exchange rate policy. This created a problem for the IMF. If the member state was not expected to maintain any particular value for its currency and could choose its own exchange rate policy, then what was the IMF supposed to be monitoring in its annual consultations with the country?

The amended Article IV provides only limited guidance. It requires each member state to 'endeavour to direct its economic and financial policies toward ... fostering orderly economic growth ...' and to 'seek to promote stability by fostering orderly underlying economic and financial conditions' and to 'follow exchange rate policies compatible with the undertakings' of Article IV.<sup>11</sup> The lack of specificity of this language suggests, as in fact has become the case, that the IMF needs to look at any aspect of the member state's economic and financial policies that could affect its 'orderly economic growth', its external balance of payments and the value of its currency. In other words, the Second Amendment resulted in the IMF dramatically expanding the scope of its Article IV consultations.<sup>12</sup>

It has also resulted in an expansion in the range of conditions that the IMF attaches

to the financing it provides to member states. In fact, in some cases IMF financing arrangements have contained over 100 conditions covering such issues as privatisation, reform of tax administration, adoption of new laws such as bankruptcy codes, and budgetary allocations for health and education, in addition to the more 'traditional' macroeconomic conditions.<sup>13</sup>

The Second Amendment had disparate impacts on different groups of IMF member states. The IMF lost its significance in the case of those countries, all of which were industrialised, that knew that they would not need to use or had no intention of using the IMF's services in the foreseeable future. On the other hand, if the country knew that it needed or may need the IMF's financial support, it necessarily had to pay careful attention to the views of the IMF and the advice it offered during the annual Article IV consultations. These views would inform the conditions that the IMF would attach to the financing it would offer the member state. Thus, an unintended effect of the Second Amendment was to create a *de facto* distinction between those countries that used or intended using IMF financing and those that did not.

In fact, since the Second Amendment, IMF member states can be classified into two groups. The first group, which can be called 'IMF supplier states', consists of those countries that, because of their wealth, their access to alternate sources of funds and for political reasons, have no intention of using the IMF's services in the foreseeable future.<sup>14</sup> These countries do not need to pay particular attention to the views of the IMF.<sup>15</sup> For these countries, the most important of which are the G7 countries, the Second Amendment meant that they regained their monetary sovereignty from the IMF and escaped from its control. These countries, in fact, do not seem to pay much attention to the IMF's



advice. For example, during the 1980s the IMF consistently and ineffectively called for the USA to reduce its budget and trade deficits.<sup>16</sup> Similarly, its advice on such issues as interest rates and exchange rates in the G7 countries do not appear to have had any real influence over the policies these countries adopt. Instead, these countries rely on their own judgments and the discussions that take place among themselves in making policies on these issues.

The second group, which consists of those member states that need or know they may need IMF financing in the foreseeable future, can be called the 'IMF consumer' countries. These states must pay careful attention to the views of the IMF because they will influence the conditions that the IMF will attach to the funds it provides the state. The IMF can also influence these countries' access to other sources of funds.

#### **INSTITUTIONAL IMPLICATIONS OF THE CHANGING ROLE OF THE IMF: THE FIVE DISTORTIONS**

The IMF has attempted to fulfil its current expanded range of activities without making any significant changes in its decision-making structures or governance arrangements. It has also allowed its new role to develop without any serious public debate over the institutional and legal implications of this development. The result is that the IMF has 'forced' its new broader functions into its existing decision-making structures and governance arrangements and its existing interpretation of its mandate. This has resulted in five distortions that are undermining the effectiveness of its operations and are increasing hostility to the IMF around the world.

These five distortions are:

- three legal issues;
- the IMF's relations with the industrialised countries, in particular the G7;

- the IMF's relations with developing countries that utilise or expect to utilise its financial services;
- the IMF's relations with the citizens of its member countries; and
- the IMF's relations with other international organisations.

Each of these problem areas is discussed in more detail below.

#### **Three legal issues**

According to its Articles of Agreement, some of the IMF's primary purposes are:<sup>17</sup>

- to 'promote international monetary cooperation';
- to 'facilitate the expansion and balanced growth of trade and to contribute thereby to the promotion and maintenance of high levels of employment and real income and the development of the productive resources of all members';
- to 'assist in the establishment of a multilateral system of payments in respect of current transactions'; and
- to provide financial resources to member countries experiencing balance of payments difficulties so that they can overcome these difficulties without resorting to measures that are destructive of international or national prosperity.

As was explained above, the IMF, in implementing this mandate, developed the principle of uniformity. This principle results in the IMF granting all states equal access to its financing and other services without drawing any distinctions between its member states based on their wealth, size, level of development, or importance in the international monetary system. Thus, unlike the World Bank, the World Trade Organization (WTO) or the United Nations, the IMF does not divide its mem-

bership into different categories based on their wealth or level of economic development. The uniformity principle has had the effect of protecting the richest countries from having to grant special treatment to developing countries in the use of the IMF's general resources. It has also offered developing countries some protection against being discriminated against by the richer member states.<sup>18</sup>

The Articles of Agreement also require the IMF, when conducting its annual consultations with its member states and when designing the conditions it attaches to its funding, to pay due regard to social and political conditions in the country.<sup>19</sup> The IMF has historically interpreted this requirement as prohibiting it from being influenced by political (that is non-economic) considerations in its dealings with its member states.<sup>20</sup>

These two interpretations of its legal mandate pose a number of problems for the IMF. First, the principle of uniformity made sense when the IMF functioned purely as a monetary institution and all its member states, in fact, were utilising its services. It does not make sense, however, when its services are only being utilised by its developing country member states. An example of the problems that this creates is the Enhanced Structural Adjustment Facility (ESAF), now renamed the Poverty Reduction and Growth Facility (PRGF). When the IMF decided that it needed to create a special facility exclusively for the poorest of its member states, it could not do so with its general resources but had to create a special fund for this purpose. Since this requires contributions from all member states, the PRGF has inevitably become politicised, subject to multiple demands and, as indicated by the external review of the ESAF, impaired in its functioning.<sup>21</sup> This suggests that the IMF would be better off if it could treat different categories of its member states differ-

ently in regard to all its services and resources. For example, it would enable the IMF more easily to design facilities that are only suitable for certain member states. It would also allow it to consider whether or not it needs to restructure some of its decision-making procedures to make them more responsive to the needs of its poorer and weaker member states.

Similarly, the IMF's interpretation of the requirement that it pay due regard to social and political conditions in its member countries may have made sense when the IMF's operations were limited to monetary issues. It is, however, neither prudent nor principled for an organisation that attaches conditions to its funding that relate to governance, corruption, budgetary allocations and privatisation to pretend that it should not be influenced by social and political considerations. The only function that the current interpretation serves is to obscure what political considerations the IMF does view as relevant to its operations, what principles it applies in making these judgments and what process it follows in reaching these decisions. The lack of clarity on this issue also leaves undefined the outer limits of the IMF's specialised economic mandate.<sup>22</sup>

A good example of the problems that can arise in this regard are human rights issues. There are occasions when the IMF will take human rights into account, for example in Indonesia in 1997. But there are also occasions in which it does not do so, for example in Mexico in 1994 or in Turkey in 2000. In all three of these cases the country was experiencing serious human rights problems. Furthermore, it is not clear that in Indonesia the human rights problems themselves were worse than in the other two cases or that they were causing more serious economic problems than in the other cases. There are no clear principles, however, that stipulate how the IMF should incorporate 'political'

issues like human rights into its calculations. Without such principles, the decisions of the IMF appear arbitrary or determined by the interests of its richer and more powerful member states. This inevitably undermines confidence in the fairness of the IMF.

A third legal problem for the IMF arises from the IMF's characterisation of the legal nature of the standby arrangement through which it provides much of its financing to its member states. The standard documentation used in these transactions is a letter of intent, usually written by the government of the member state to the IMF, followed by the decision of the IMF's executive board. For many years the IMF has argued that this arrangement is *sui generis* and is not a legal contract.<sup>23</sup> Consequently, the IMF does not treat the arrangement as an international agreement. This means that a member state that does not meet the performance criteria or other requirements of the standby arrangement will not incur any legal liability. Until recently, the IMF also relied, in part, on this characterisation to avoid publicising the member state's letter of intent.<sup>24</sup>

The IMF's formalistic interpretation of the nature of this transaction had a certain utilitarian value when the IMF functioned as the manager of the par value system, and the conditions attached to the financing included a change in the par value of a currency. It is not clear, however, that the same considerations apply to its current development functions. In fact, the IMF seems to have recognised as much. In recent years, as part of its efforts to promote transparency, it has encouraged its member states to publish their letter of intent to the IMF.<sup>25</sup> Nevertheless, the IMF has not yet reviewed its decision regarding the nature of the transaction. The result is that the transactions are still not viewed by the IMF as contractual and, therefore, are still not considered as international agree-

ments. This is problematic for two reasons. First, if the arrangements, like World Bank contracts, were classified as international agreements they would be registered with the United Nations and would become public documents.<sup>26</sup> Consequently, the IMF could require, rather than encourage, member states to publish these letters of intent. This would more effectively advance the IMF's goal of promoting transparency than the current arrangements.

Secondly, as IMF transactions become more complex and the IMF increases the number of conditions it attaches to its standby arrangements there is a greater need for these agreements to be subjected to predictable principles of interpretation. The reason is that, when dealing with conditionalities related to governance, for example, it is possible for disagreements to arise about what constitutes sufficient compliance with the conditions of the standby to justify allowing the country to obtain the next tranche of the funds. If these transactions were viewed as international agreements, they would be subject to public international law rules for interpreting international agreements.<sup>27</sup> Under the current IMF view that the transactions are *sui generis*, there are no obviously applicable rules of interpretation. Consequently, the transactions are amenable to *ad hoc* and arbitrary interpretation. This reduces our ability to hold either the member state or the IMF accountable for the execution and interpretation of these arrangements.

#### **Relations between the IMF and the industrial countries**

Since the adoption of the Second Amendment to the IMF Articles of Agreement in 1978, the industrial countries have relied on their own resources and the private financial markets to meet their financial needs. They have in effect concluded that the IMF is not a politically or economically feasible



source of funds for them. The embarrassment of having to accept the conditions attached to IMF financing is viewed as politically unacceptable to these countries and financially too costly in terms of its impact on their future access to private financial markets.

The fact that these countries do not intend using the IMF's financing facilities has freed them from any need to defer to any advice the IMF may offer them in their annual consultations. This means that they are free to choose their own exchange rate system and manage (or mismanage) it as they choose. In other words, they have regained from the IMF the sovereignty that they surrendered to the IMF at the Bretton Woods Conference in 1944.

This does not, however, mean that they have regained full monetary sovereignty. The world's economy has become too integrated for that. Instead, these countries, particularly the G7, have in effect agreed to resolve all monetary and financial issues that may arise between them in an alternate set of international fora. These issues are now resolved through the G7, the Organization for Economic Cooperation and Development (OECD), the Bank for International Settlement (BIS) and the Committee of Bank Regulators associated with it and the International Organization of Securities Commissions (IOSCO).

When these are not deemed adequate, the G7 have been willing to create additional fora. For example, after the Asian financial crisis and the near bankruptcy of Long Term Capital Management, the G7 became concerned about the regulatory framework for the international financial markets. These countries decided that they needed a mechanism through which they could coordinate national regulation of financial markets and financial institutions. Consequently, they created the Financial Stability Forum<sup>28</sup> in which the regulators of the banking, securities and insurance

industries of major industrial countries and financial centres meet together with representatives of the IMF, the World Bank and the BIS to discuss regulatory issues of mutual concern. They also created the G20,<sup>29</sup> which consists of the G7 plus some other key industrial and emerging market countries. The purpose of this group is to ensure that the regulatory frameworks existing in all countries that participate in the international financial markets are consistent with the demands of the increasingly integrated international financial market.

Since the industrialised countries that participate in these fora have no need for the IMF's services, it is reasonable to question the purpose of having the IMF participate in the meetings of these fora. It would seem that the IMF's function is to ensure that those countries not invited to participate in these fora undertake the necessary economic and regulatory adjustments to enable them to participate in the international financial system being shaped by the richest and most powerful countries.

Similarly, the G7 have continued to support the IMF because they find its influence over poor countries and middle-income countries undergoing transformations or experiencing serious debt problems useful. In particular, they appreciate its ability to compel these countries to adopt stabilisation and adjustment policies that the G7 deem acceptable. They also support its role as the crisis manager in countries experiencing debt problems. In short, they value having an international organisation that can focus on the problematic areas of the global financial system while they are free to shape that system to suit their own needs.

The wealth and independence of the industrialised countries, particularly the USA, Japan, Germany, the UK and France, also ensures that they are the dominant force within the decision-making structures of the IMF. Their dominance is

significantly enhanced by two developments that have occurred in the IMF since its formation in 1944. The first relates to the composition of the voting rights of each member state. Each state's vote consists of 250 basic votes plus one vote for each special drawing right (SDR) 100,000 it contributes to the IMF's general resources. The basic vote is intended to reflect the general principle of the sovereign equality of states. The remaining portion of the vote is intended to reflect the size of the country and its importance in the world economy. Since the establishment of the IMF in 1946, the number of total votes in the IMF has been increased to accommodate the IMF membership growing from 39 in 1946 to 182 in 2000 and the need to expand the total resources of the IMF. There has been no change, however, in the basic vote. The result is that today the basic votes form a significantly smaller portion of the total vote than was the case in 1946. In 1946 the basic votes accounted for 11.3 per cent of the total vote. By 1982 they only accounted for 5.6 per cent. In 2000 the basic vote accounted for only 2.2 per cent of the total vote. This means that the portion of the IMF's voting system that offered the smaller and weaker states some counterweight to the dominance of the richest and biggest countries in the IMF has been reduced in importance and the dominance of these richer and bigger countries has been enhanced.<sup>30</sup>

The second development is that the number of IMF executive directors has grown more slowly than the number of IMF member states. The original 39 member states were represented by a 12-member board of directors. Today, the 182 members are represented by a board of 24 members. Originally, only the five biggest shareholders had their own executive directors and the remaining 34 member states were represented by the other seven directors. This meant that each of these

seven directors represented on average slightly less than five states. Today, of the 24-member board, in addition to the five executive directors representing the five largest shareholders another three directors represent single countries. Thus, today, 16 directors represent the remaining 174 member states. This means that each of these directors represents on average slightly less than 11 states. In fact, some executive directors — for example, the two directors representing sub-Saharan Africa — represent considerably more than 11 states.<sup>31</sup>

This change in the average size of the constituencies represented by the executive directors has an important impact on the power relations in the IMF's decision-making process. It means that those states that have permanent representation on the board have a distinct advantage in having their views heard in the board and also in developing expertise in how to function effectively in the IMF. It is unlikely that a director who represents 10–11 states can advocate for the views of each of those states as effectively as a director who only represents one state. It is also unlikely that such a director can play the same active role in policy issues in the IMF as an executive director who represents only one state can play.

The influence of the industrialised countries on the IMF executive board is further enhanced by the fact that in all six cases in which an executive director represents both developing and industrialised countries, the executive director is always from an industrialised country.<sup>32</sup> The result is that of the 24 directors, 11 are from industrialised countries. Each of the 7 countries always has a national of their country on the executive board, despite the fact that only five of the seven countries have appointed executive directors. The net effect of this development is that on balance, the G7 countries and the other indus-



trialised countries have an even larger influence over the institution than their voting domination alone would suggest.

The numerical advantage of the industrialised countries on the executive board and the permanency of the G7's representation is significant even though the board always operates by consensus. The reason is that these countries, because of their permanent presence on the board, are able to develop institutional memories and expertise in how to function in the IMF. This enhances their ability to negotiate effectively and to shape the issues and the decisions around which the consensus must form.<sup>33</sup>

The result is that, *de facto*, the G7 countries control the policy agenda in the IMF; however, because these countries are effectively independent of the IMF, they never have to live with the consequence of the policies that they make for the IMF's operations. This means that they can make policy that is only of limited interest to their own citizens. The policy is, of course, of immense interest to people in developing countries who have no ability to hold them accountable for their decisions or actions. This situation of decision makers having power with accountability to people who do not have to live with the consequences of their decisions but without accountability to those most affected by their decisions is a situation ripe with potential for abuse.

#### **Relations between the IMF and its consumer member states**

Since 1978 all the states that have utilised the financial services of the IMF are developing countries or the so-called 'transition countries'. For present purposes these countries can be divided into two groups. The first group consists of those countries that are classified as emerging markets and, under normal circumstances, have access to private financial markets. Many countries

in this group need the IMF's support to satisfy private investors that they have adopted and are implementing good macroeconomic policies and that they are 'suitable' for private investment. Thus, even though this group of countries only needs IMF funding when they are unable to raise sufficient funds from private sources because of a debt or some other financial crisis, they are dependent on the IMF giving their economic policy performance a favourable review. This in turn is influenced by how they respond to the advice the IMF gives them in their annual consultations. Mexico, Argentina, Turkey and Thailand are examples of this group of countries.

The second group consists of those countries that, because of their poverty or unstable political conditions, are dependent on official sources of funds. This group, in addition to needing the IMF's financial support, depends on the IMF's approval of their policies because their other official funders tend to rely on the IMF's advice in making their funding decisions. Uganda, Malawi, Haiti and Laos are good examples of countries in the second group.

In addition to being a source of funds for all the consumer member states, the IMF has effectively become a gatekeeper which regulates access to other possible sources of external financing for these countries.

While there are significant differences both within and between the countries in these two groups of IMF consumer states, they all share a common characteristic. Although the challenges that these countries face have a macroeconomic dimension, the primary cause of their social and economic, including macroeconomic, problems lies in the governance of their societies. In particular their problems are caused by weaknesses in their institutional arrangements and technical capacities which limit their ability to make and



implement policy effectively.<sup>34</sup> Although these structural issues are outside the scope of the IMF's specialised area of competence, it has attempted to address them.<sup>35</sup> This means that increasingly in both its policy advice and the conditions that it attaches to its financing, the IMF is addressing non-monetary and non-macroeconomic issues like bankruptcy laws, legal and judicial reform, allocations of public budgets, privatisation, environmental issues, social safety nets, and banking reform. The specificity and micro nature of these requirements highlight the evolution of the IMF from a monetary institution to a development financing organisation.

The broadening range of its interests and the increasing specificity of IMF advice during its annual surveillance missions and in the conditions it attaches to the funding it provides to these developing countries is changing the nature of the relationship between the IMF and these countries.<sup>36</sup> It is turning the IMF into an important actor in the policy-making process of its member countries. In the days of the par value system, the IMF limited its influence over national policy making by concentrating its advice and the conditions attached to its finance to specific macroeconomic variables. This imposed a restraint on the IMF's involvement in domestic policy making because it left the member state's government free to decide on the actual measures needed to achieve these macroeconomic targets. The increased range of issues the IMF considers and the specificity with which it addresses these issues means that the restraint has now been removed. The result is that the IMF has now become an active part of the policy-making process of its developing country member states. Given the important influence it has over these countries' access to external financing, the IMF is often the decisive voice in these countries' policy-making processes.

The combination of the IMF's gate-

keeping functions and its *de facto* role in national policy making further tips the balance of bargaining power in favour of the IMF in both the annual consultations and the negotiations over the policy conditions to be attached to IMF financing. Moreover, given the dominance of the G7 and the other industrialised countries in the IMF, there is a significant risk (that has often in fact been realised<sup>37</sup>) that these countries will use the IMF to impose their views of good political and economic policies on the developing countries. In fact, many people in developing countries already see the IMF more as a political organisation that is biased in favour of the rich countries and their interests than as the technically specialised and politically neutral organisation that it was intended to be.

The IMF's expanded role in its developing country member states has also changed the range of actors with whom it must directly interact in these states. Prior to 1978, the IMF could reasonably limit its direct interactions to the makers of monetary and macroeconomic policy in the member states, namely to the central banks and the ministries of finance.<sup>38</sup> Today, however, the IMF's operations directly affect many, if not all, government ministries and the lives of all those people who will be governed by the policies that the IMF helps to make. This means that it is no longer feasible for the IMF to limit its interactions to the Central Bank or the Ministry of Finance. In fact, without directly interacting with a broader range of both governmental and non-governmental actors in the member states, the IMF is unlikely to obtain all the information it needs to play an effective policy-making role. For example, it needs to consult with government ministries whose budgets and policies will be affected by the IMF's funding conditionalities. It also needs to consult with the legislators who must pass the laws that the IMF policies require. To be an



effective and credible policy maker, the IMF should also hear the views of all those stakeholders who will be affected by the specific policy decisions it is influencing. These stakeholders have the ability to influence the success or failure of those policy decisions. To date, the IMF, utilising informal procedures, has consulted with some of these actors. However, it has not yet developed formal procedures for ensuring that all relevant stakeholders are consulted.

The principles of good governance that the IMF advocates require that all players in the policy-making process should be held accountable for their actions and decisions. To date, the IMF has not established any mechanism through which the citizens of these member countries or the governments of these countries can hold the IMF accountable for its actions in the policy-making process. In other words, the changes in the IMF's functions have resulted in the IMF acquiring great power over, but being effectively unaccountable to, its developing country member states or their citizens.

#### **IMF relations with the citizens of its member states**

The creators of the IMF, like the creators of most international organisations, believed that it was not necessary for the IMF to have any direct interaction with non-state actors. This belief was premised on the sovereignty of its member states. It was also based on the belief that for the IMF to perform its specialised monetary responsibilities effectively it only needed to interact with each member state's central bank and ministry of finance. Restricting the IMF's interactions with its member states to these two institutions had the added benefit of reinforcing the limits on the extent to which the IMF could impinge on the sovereignty of its member states.

The creators of the IMF also assumed that they had built sufficient accountability

into the IMF by making sure that it would be accountable to its member states' governments through their representatives on the board of governors and the executive board. The creators also assumed that these representatives could be held accountable by their governments and, through elections, by their citizens. This indirect form of IMF accountability to non-state actors was deemed to be sufficient.

These beliefs about the relationship of the IMF to non-state actors are no longer valid. Given, as was shown above, that the IMF is now an active participant in the policy-making processes of those member states that utilise its resources, it is no longer adequate for the IMF to limit its interactions to their central banks and the ministries of finance. For the IMF to be an effective actor in the policy-making process it must consult with both other governmental agencies and non-governmental actors. This means that the IMF is now effectively entering into direct interactions with non-state actors and the policies it is helping to make are directly affecting these non-state actors.

If nothing else, the basic principles of good governance which the IMF advocates so eloquently to the governments of its member states should determine its conduct towards those directly affected by its policy-making activities. After all, there is no obvious reason why the IMF, when it 'descends' into the national policy-making process, should be less accountable to those people directly affected by its decisions than other actors in this process. This means that the IMF needs to offer the citizens of its developing countries a formal means for holding the IMF accountable for its actions in the national policy-making process. It is no longer sufficient for the IMF to assume that it can rely on indirect forms of accountability to these non-state actors. To be sure there may be practical difficulties in designing an accountability



mechanism that is suitable for an international organisation and respectful of the member state's sovereignty. These problems have been dealt with in the case of the World Bank, however, and there is no reason why they could not be overcome in the case of the IMF.<sup>39</sup>

The IMF's lack of accountability is exacerbated by the fact that the IMF executive board does not provide much guidance on how the management should conduct itself in the national policy-making process. Unlike the World Bank, the IMF does not have a publicly available operations manual that contains its operating rules and procedures. Such a manual would inform interested persons about how the IMF conducts its business and could be used by them to hold the IMF management accountable for its actions and decisions. The effect of the lack of such a document is to grant the IMF management and staff great discretion in its operations.

The developing countries and their citizens are unable to limit the staff and management's discretion effectively. While the executive board is the most appropriate body for controlling the management, as we have seen above the consumer states are imperfectly represented on this body. Furthermore, it is unrealistic to assume the citizens of the consumer states can hold the IMF accountable through their representatives on the board of governors. There are two reasons for this. The first is that this is not the appropriate body in which to challenge individual operational management decisions and the way in which these decisions were made or their effects. Second, even if this were possible, it is not realistic to assume that the state's IMF governor will be willing to raise its complaints or those of its citizens in this way. This is particularly relevant in the case of IMF consumer states because of their governance problems. Almost by definition, this means that the mechanisms through which people

can communicate their views to their own government, can participate in their own government's policy making, and can hold their own government accountable for individual decisions are imperfect. It also means that often they will not have access to the information necessary to persuade the government to act on their behalf.

It is also unrealistic for the IMF to assume that the citizens of all its developing country member states can hold their governments accountable for the conduct of the state's relations with the IMF. As was discussed above, the primary problem in most developing countries is governance. This means, *inter alia*, that the mechanisms through which the people can communicate their views to the government are unlikely to function effectively and the people are unlikely to have access to the information needed to make an informed opinion about the government's conduct of its relation with the IMF. This means that, in fact, the ability of the people to hold their governments accountable for their dealings with the IMF is likely to be impaired or non-existent. It is also not realistic to assume that the electorate will always make its voting decision based only on the way in which the government managed its relations with the IMF.

There are other problems that arise because the IMF has no formal channels through which it can communicate with non-state actors in its member states. Under the current operating principles, the IMF, out of respect for the sovereignty of its member states, only communicates with non-state actors in a member state if it obtains the consent of the government to do so. In some cases governments do not agree to the IMF having unrestricted access to non-state actors. This means that in many cases the IMF does not actually meet with the full range of non-state actors in its member states. Consequently, it is at high risk of making policy decisions for the

country on the basis of inadequate information about the likely reception that the policies will receive in the country and their chances of success.

The IMF's current approach to communications with non-state actors may have made sense before it assumed such an active role in the policy-making process of its member states. It does not make sense, however, given the expanded role that the IMF is playing in its developing country. This new role requires direct communication with non-state actors. The IMF's failure to establish formal communications mechanisms which are independent of the government has an adverse impact on the IMF's policies and its relations with the citizenry of these countries. They come to see the IMF as unapproachable and as an elitist, ideological institution that is uninterested in learning about the views of those who will be most affected by its policies.

Another dimension to the IMF's changing relationship with the citizens of its member countries is the impact of its changed activities on its relations with the citizens of its industrialised member countries. The citizens of these countries are not directly affected by the actions of the IMF. Many of them, however, acting usually through NGOs, see themselves as being indirectly affected by the IMF's operations. They argue that it is their taxes that support the IMF and that, currently, these taxes are being spent to support policies and operating principles, which they oppose. Consequently, these citizens have begun demanding changes in the operations of the IMF and have lobbied their governments to push for these changes in the IMF. The industrialised country NGOs have also used their access to their own governments and to the media in the industrial world to raise the concerns of their partners in the developing countries. These NGOs have had some success in

influencing the IMF. For example, the involvement of the IMF in the environment and its activities in regard to corruption, military expenditure, debt relief and poverty are all attributable, at least in part, to the campaigns of non-state actors in industrialised countries. Ironically, the influence of these NGOs in the IMF is attributable in part to the disproportionate influence and power of the industrialised countries in the IMF.

It can therefore be seen that the IMF's increasing role in the policy-making process in its developing country member states and its lack of accountability to those affected by this role is causing it to have tense relations with non-state actors in both its developing and developed member states. The failure of the IMF to address the causes of these tensions is leading many non-state actors to question the fairness of the IMF. The failure of the IMF to address this perception adequately is leading some of these non-state actors even to begin questioning the legitimacy of the IMF. The significance of these developments can be gauged from the impact non-state actors have had on the ability of the IMF to obtain funding from key member states, such as the USA,<sup>40</sup> and from the demonstrations against the IMF at its 2000 spring meeting in Washington and its annual meeting in Prague in autumn 2000.

#### **The IMF's relations with other international organisations**

The original conception of the creators of the specialised agencies of the United Nations (UN) system was that each agency would exercise its authority within the limited scope of its specialisation and that the UN Economic and Social Council would be the forum in which their activities would be coordinated. Each specialised agency, in part to facilitate coordination, entered into a relationship agreement with the UN. This relationship agreement



ostensibly clarified the fact that the specialised agency was subordinate to the UN and clarified how it would relate to the UN. The relationship agreement between the IMF and the UN,<sup>41</sup> however, amounts in effect to a declaration of independence. While it acknowledges that the IMF is a specialised agency of the UN, it relieves the IMF of any significant responsibilities to the UN and denies the UN any meaningful role in the affairs of the IMF.

The effective independence of the IMF from the UN has become a problem as the scope of the IMF's operations has expanded beyond its original monetary function. Now that the IMF is involved in such issues as law reform, poverty alleviation, labour issues, social welfare, environment and trade liberalisation, its operations are encroaching into the jurisdiction of other specialised international organisations like the World Bank, the WTO, the International Labour Organization (ILO), the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF).

#### **PROBLEMS CREATED BY THE FIVE DISTORTIONS**

The five distortions mentioned above are creating a number of problems for the IMF. The most significant of these problems are discussed below.

##### **The disconnect between power and responsibility**

As was discussed above, the industrialised countries, particularly the G7, have accumulated great power in the IMF even though they are not interested in the services of the IMF for themselves. This enables them to make policy for the IMF without having to live with the consequences of the IMF's policies and actions. Consequently, most of their own constituents have little interest in the IMF or its policies and limited incentive to support

their government's financial contributions to the IMF. The governments of these countries, therefore, are free to develop their policies for the IMF without paying appropriate attention to the concerns of the developing countries or to the situations in which these policies must be implemented. The most prominent example of this reality is the debates in the US Congress about the IMF. In addition, this situation amplifies the voices of those NGOs who have an interest in the IMF and other international development issues. While many NGOs have utilised this situation to achieve a great deal of good, the reality is that they, like their governments, can influence the policy of the IMF without having to live with the consequences of their proposals.

One result of this situation is that proposals that impose substantial burdens on already overloaded developing country governments or that make unrealistic assumptions about the access of these countries to private financing are able to receive serious consideration. For example, the US government and Congress seem to believe that developing countries in financial difficulty, even though a major cause of their problems is deficiencies in their governance arrangements, can implement complex adjustment programmes in relatively short periods of time.<sup>42</sup>

##### **The IMF's lack of accountability**

The IMF still operates on the erroneous assumption that its existing channels of accountability are sufficient. The IMF structure provides for two channels of accountability: the IMF's board of executive directors, and the board of governors. The board of executive directors is not an adequate channel of accountability to those member states most affected by the IMF's actions for three reasons. The first is that, as we have seen, most consumer member states are only indirectly represented on it.



In fact, the link between each consumer member state and the executive director who represents it on the executive board has weakened as the number of countries each executive director represents has grown. Secondly, the executive directors from the key supplier member states dominate the board.

The third reason is that IMF programmes have become too numerous and complex for the executive directors to be able to exercise firm oversight over the staff. The executive directors representing the consumer states do not have sufficient staff or time in the day to understand adequately all the programmes in which the IMF is involved. Nor do they have the capacity to play an active role in making operational policy for the IMF and in dealing with the numerous organisational issues that the board of any organisation as complex as the IMF must address. The result is that IMF staff and management are making decisions about IMF programmes and are interpreting IMF policies without any substantive accountability to IMF consumer member states. For example, it is the management and staff who design the conditions attached to IMF financing for a country and who make the decision that the country has sufficiently complied with the multiple conditions attached to IMF financing to warrant asking the board to release the next tranche of IMF funding.

The board of governors is also not a sufficient channel of operational accountability even though each member state is represented on it. The board, which only meets once a year, is the highest body in the organisation and is not the appropriate body to deal with the operational issues that may arise in the relationship between the IMF and a consumer member state. Furthermore, even if the governor from a consumer member state were willing to raise an operational issue in the board of governors, it is unlikely that he or she

would have adequate knowledge of the impact of the IMF's policies and programmes in his or her country on its citizens. The reason for this is that these countries suffer from governance problems which mean that they are unlikely to have adequate channels of information about these impacts.

The problems in the existing channels of accountability have three important operational implications for the IMF. The first is that the IMF staff and management are effectively operating without any accountability. If the IMF staff are making policy in the member states, however, there is no obvious reason why they should be less accountable to those affected by the policies than the other participants in the policy-making process. In fact, it undermines the IMF staff and management's credibility when they advocate accountability as an aspect of good governance in member states but do not apply the principle to themselves.

The second is that the IMF does not provide much guidance to the staff on how they should perform their responsibilities when they act in this policy-making capacity. For example, it does not clarify to whom they owe their primary responsibility, what obligations they owe to those affected by the policies, what factors they should consider in making decisions in this process, etc. The lack of such guidance results in each staff member or mission team exercising great discretion in their policy-making activities in each member country. It also makes it hard to hold the staff accountable. In this regard it is important to note that, unlike the World Bank, the IMF does not have an operational manual that contains the detailed operational policies and procedures which its staff should follow in the conduct of their duties.

Thirdly, the IMF is performing its policy-making functions without establish-

ing any formal mechanisms through which those non-state actors most affected by its actions can communicate directly with the IMF. In fact, the IMF is not unaware of this problem and it often engages in informal communications with these affected parties.<sup>43</sup> This means, however, that the IMF, in consultation with the government of the member state, is choosing which non-state actors it communicates with, and is setting the terms for this communication. A more formal procedure for communication with these non-state actors — such as a requirement that all IMF missions hold a public hearing in the country they are visiting or an explicitly recognised right to make written submissions — would ensure that many more interested non-state actors have a meaningful opportunity to communicate with the IMF. The IMF's failure to establish such procedures contradicts the principles of participation and the need for transparent governance procedures that it advocates to its member states. It also suggests that the IMF is often making policy without having access to all the relevant information.

Another aspect of the IMF's lack of accountability is its continued adherence to the principle of uniformity.<sup>44</sup> While it is important that international organisations treat all similarly situated member states equally, it is also important that it treat all member states fairly. Given the difference in the nature of the IMF's relations with the industrialised and developing countries it is no longer adequate to contend that since all states participate in the same international monetary system they all should receive uniform treatment. In reality, as discussed above, some IMF consumer states do not have access to the financial markets that the G7 utilise. Furthermore, very few, if any, of the IMF consumer states are able to have any substantial input into the workings of the international monetary and financial systems or influence in their

governance arrangements and institutions. This suggests that the uniformity principle has become a means of justifying unfair treatment for the developing countries. For example, it precludes the IMF from offering certain groups of member states disproportionately favourable access to its general resources or special considerations in its decision-making procedures.

### **The IMF and other international organisations**

The expansion of the IMF's scope of operations has resulted in the IMF encroaching into the areas of responsibility of other specialised agencies. For example, the IMF is beginning to deal with budgetary allocations for health and education<sup>45</sup> but without involving the WHO or UNESCO in these activities. While in some cases the IMF may attempt to have communications with these organisations, there is no formal agreement designed to ensure regular communications at the staff level. The only specialised agency with which the IMF has a formal arrangement is the World Bank.<sup>46</sup> The result of this situation is that the IMF is making policies and taking action in these new areas without necessarily having the technical expertise to do so and without adequate consultation with the appropriate specialised agency.<sup>47</sup> It may hire consultants to work on these issues, but it does not have the in-house expertise to evaluate the work of the consultants. This situation will continue until it either hires people with the necessary technical skills or establishes some sort of cooperative arrangement with the relevant specialised agencies. This creates a significant risk that the IMF will have inadequate policies in these areas or that it will assign a lower priority to these issues than may be appropriate in particular situations.

The UN specialised agencies' implicit acquiescence in the IMF usurping parts of their responsibilities also has adverse conse-

quences for the functioning of the UN system as a whole. It is resulting in a concentration of power in organisations like the IMF and the World Bank. This exacerbates the IMF's tendency to maintain that it has the 'correct' answer for the major development challenges that its member states face. The inability of other specialised agencies to challenge the IMF's position effectively increases the risk of the IMF giving wrong policy advice. Furthermore, the developing countries, because of the IMF's gate-keeping functions, have no real choice but to follow the advice of the IMF.

#### **Interpretation of Articles of Agreement**

The IMF has not fully recognised the expanding scope of its activities is calling into question its interpretation of its own Articles of Agreement. In particular, it raises questions about the limits on its permissible scope of activities and about the IMF's claim to be a 'non-political' body. The IMF has failed to define the limits of its mandate or to stipulate a principled basis on which it determines what issues it is willing to address and which issues are outside its mandate because of their inherently political or non-economic nature. This failure makes it hard for outsiders to understand why the IMF is willing to address certain issues, for example human rights in Indonesia, but not other issues, such as human rights in Mexico in 1994 or Turkey. It also subjects the IMF to the charge that it is acting in an arbitrary and capricious fashion in interpreting its articles.

#### **A PROPOSED SOLUTION TO THE PROBLEMS CAUSED BY THE FIVE DISTORTIONS**

There are three basic approaches that could be taken to resolving the problems with the IMF. The first is to conclude that the IMF is irredeemably flawed and should be abolished. The second is to conclude that

the IMF is a necessary organisation in today's integrated global economy but that the policies that it advocates are flawed and must be changed. Implicit in this view is the belief that if the IMF changed its policies the distortions identified in this paper would lose their significance. The third approach builds on the second approach and argues that changes in the IMF's policies alone, while necessary, are not sufficient to ensure that the IMF will effectively fulfil its responsibilities in the world. It argues that policy reform is unlikely to be sustainable unless the IMF first undergoes substantial structural reform.

#### **Approach 1: The IMF should be abolished**

There are two different groups who advocate this approach. The first argues that the market is the most efficient and best means for allocating resources and that all state interventions into the market merely impair its functions.<sup>48</sup> Consequently, they oppose all state-sponsored interventions in the functioning of the market. From their perspective the operations of the IMF are merely a form of state intervention and are *per se* suspect. This group further argues that their only effect is to create a moral hazard problem. The IMF is accused of doing so by leading both investors and governments to believe that they can engage in excessively risky economic activities because the IMF will bail them out if they fail.

The second group comprises the opponents of the current power relations in the world. They contend that international organisations are merely a reflection of these power relations and that they will always be used by the rich and powerful nations to keep poorer and weaker developing countries in 'their place'. These groups also argue that developing countries would be better off if they followed more independent policies that did not rely so





heavily on international organisations that are controlled by the G7.<sup>49</sup>

While the political perspectives of these two groups are clearly very different, they both believe that the IMF as currently constituted is irredeemably flawed. Consequently, they agree that the IMF should be abolished. These groups can draw support for their position from the mutation of the IMF from a monetary organisation into a development financing one. They can argue that the IMF's record as a development financing organisation is not impressive, citing the controversial record of the IMF's involvement in Russia and in the countries that have used the IMF's Enhanced Structural Adjustment Facility as evidence.<sup>50</sup>

These groups can also contend that if the IMF has no monetary role left to perform, why do we need two international organisations offering development financing services? They can cite the fact that the World Bank exists to fund development and that there is already a great degree of overlap between the functions of the two organisations. Consequently, it would be more efficient either to merge the two organisations or shut down the IMF and let the Bank assume those development financing activities that only the IMF currently performs.<sup>51</sup>

These critics can also point out that the industrialised countries, who as we saw above control the IMF, do not have any intention of allowing the IMF to become an effective manager of the international monetary system. In support of this position, they can offer the fact that when serious financial or monetary issues arise in the global economy, the rich countries have not turned to the IMF. Instead they have turned to the G7, the BIS or the OECD. In addition, they have been willing to create new fora, such as the Financial Stability Forum and the G20, whenever they see a missing element in their ability

to control the international monetary and financial system. The only role they assign the IMF in these arrangements is essentially the developmental one of ensuring that the developing countries will be 'structurally adjusted' to fit into the financial system that the industrialised countries are shaping.

While these arguments raise important issues and have persuasive power, they are ultimately unrealistic. The increasingly integrated global financial system needs international organisations which have the specialised mandate to help those countries that are either *de facto* not full participants in the global financial system because of their extreme poverty or that are experiencing difficulties in becoming a full participant in the global system. Even if the sovereignty of many of these states in fact is illusory, it is not politically or economically feasible for the richest and most powerful states to control them directly or to force all of them directly to adjust to their economic and political requirements. The industrialised states have also conclusively demonstrated that they are not willing and may not have the capacity to help these countries address the complex development challenges that they face. Furthermore, it is unrealistic to expect that private financial markets will be willing to fund important primary health and education projects in very poor or unstable countries on financially feasible terms. It is also unrealistic (and even of questionable desirability) to count on private investors to provide sufficient balance of payments support to governments facing serious monetary or debt crises. Consequently, there is an absolute need for international organisations that can fund development in the poorest countries, and work with emerging markets to help them gain secure and adequate access to the financial resources available from the international capital markets. There is

also a need for international financial organisations that can provide a forum where the developed and the developing countries can communicate about issues of mutual concern relating to the global financial system.

This means that while it may be possible to abolish the IMF, it is not possible to eliminate the need for an organisation like the IMF. It is therefore irresponsible to suggest abolishing the IMF unless one can be confident that it is politically possible to create an alternative organisation that will effectively and equitably perform its legitimate monetary and macroeconomic functions. It is clear that the political conditions for creating new international organisations do not exist and are unlikely to exist in the near future. Consequently, the only option is to reform the ones that currently exist.

#### **Alternative 2: Change the policies of the IMF**

Those supporting this position accept that conditions have changed and that the IMF must change to fit the new conditions. They believe, however, that what must change is the substance of the IMF's policies and its *modus operandi*. Those who advocate for this position can be divided into two sub-groups. The first sub-group's argument with the IMF is over the expanding range of its operations. They contend that the IMF was established as a specialised organisation with a mandate to focus on macroeconomic issues and that the IMF should not let its scope of operations expand beyond this set of issues.<sup>52</sup> In their eyes any conditions relating to issues such as governance, legal reform or regulatory issues that the IMF attaches to its financing are illegitimate. These issues either fall within the mandate of the World Bank or within the sovereign prerogatives of the member state. This group therefore argues for a reduction in the

scope of the IMF's operations and a return to its original focus on macroeconomic issues.

The second sub-group's fight with the IMF is not so much over the scope of its operations but over the content of its policies. This sub-group argues that the IMF is insensitive to the impact of its policies on the poor, the environment and human rights. Consequently, this group advocates for the IMF to adopt new policies that are more pro-poor, pro-environment and pro-human rights.<sup>53</sup>

Those who criticise the IMF's policies for being insensitive to the poor and the environment share a problem with the IMF. They can also be criticised for not recognising any clear limits on the permissible scope of IMF operations. The logical endpoint of their suggestions, and of the current IMF expansion, is that it will be the pre-eminent international organisation with *de facto* authority over all issues related to economic and social policy and with great influence over such issues as human rights, environment and political process. As was suggested above, this great accumulation of power without any obvious checks or balances on its power is troubling and contrary to the principles of good governance.

Some members of this sub-group focus more on the economic content of the IMF's policies and the conditions that it attaches to its financial support than on its social and environmental impacts. For example, they argue that the IMF offers bad policy advice on such issues as exchange rate policies, including exchange controls, capital controls and budget deficits. Consequently, they call on the IMF to change the assumptions and economic model it uses in developing its policies towards its developing country member states and challenge the specific policy measures contained in individual agreements between the IMF and its member states.<sup>54</sup>



This second approach is more realistic than the 'abolish the IMF' approach. Its call for more critical assessment of IMF policies and the scope of IMF operations is important and needs to be heeded if the IMF's performance is to begin improving. In fact, any coherent approach to reforming and improving the IMF must include this as at least one element of the reform agenda. This 'reform the policies' approach is, however, ultimately inadequate. It is addressing the symptom rather than the real cause. The policies of the IMF arise from the power relations within the organisation and from its policy and decision-making structure. Without changing these structural features, the IMF will always adopt policies that are heavily biased towards the interests of its supplier member states and that are insufficiently responsive to the needs of its consumer member states. Thus, policy changes that leave the basic structural features of the IMF intact will ultimately fail to achieve their intended results.

### **Alternative 3: Reform the IMF<sup>55</sup>**

The third approach argues for a comprehensive reform programme for the IMF which has as its primary focus correcting the structural problems with the IMF. This approach accepts the necessity for an intergovernmental financial institution like the IMF but contends that it must be structured and must function according to the same principles of good governance — transparency, participation and accountability — that the IMF advocates should apply at the national and sub-national level. This means that the IMF must be reformed so that its basic structures and operating policies and principles are transparent. In addition, those who are most directly affected by its policies and actions must be able to participate in the IMF's policy-making processes and must be able to hold its decision makers accountable for

their decisions and the actions based on those decision. It also means that there should be appropriate checks and balances on the power of the IMF. The proponents of this approach argue that if the structural problems with the IMF are corrected, the organisation will be more responsive to the needs of its consumer member states and their citizens. This in turn should result in the IMF adopting more acceptable policies.

The appeal of this reform option is further strengthened by the reality of international power relations and the inherent difficulties of making changes at the international level. This reality leads to the conclusion that before we reject the existing international organisations we need to be confident that we have exhausted all feasible possibilities for reforming them. In the case of the IMF, very little effort has been made to reform it. Consequently it is relatively easy to identify a programme of reform that has the potential to correct the problems identified in this paper.

Given the complexity of the nature of the relations between international organisations and their member states and the current hostility to international organisations in such key countries as the USA, it is likely that carrying out the structural reforms being advocated in this paper will be a long-term project. It is possible, however, to divide this reform programme into short-, medium- and long-term proposals. The distinction between these categories is not only based on how possible it is to achieve these proposals but also on the basis of who must act to implement the reform proposal. Thus, short-term items are those which only require action by the IMF staff and the executive board acting on their own authority. Medium-term items are those that are more politically difficult and will require the participation of the governors of the IMF. The third



category are those items that will require amendment to the Articles of Agreement or at least will require the agreement of each of the member states, including the agreement of their legislatures. It should be noted that the IMF has begun to implement at least some aspects of the proposed reform agenda.

*Short-term reform agenda: Those actions that the managing director and board of directors acting on their own authority can take*

These actions can be divided into the following five categories:

- (1) Actions to make the IMF more responsive to its developing country member states.
  - (a) Allow the member state's governor to the IMF or his/her representative to participate in any discussion in the executive board on the member state. This would include discussions about the staff report following the annual IMF surveillance mission to the country and about any proposed IMF programme and financing for the country.<sup>56</sup> It should be noted that this reform is roughly analogous to the situation in the United Nations Security Council.<sup>57</sup> In this case, states that are not members of the council but that have a direct interest in the matter being considered by the council can ask for permission to address the council and participate in the Security Council discussions, but not its vote. For many countries the issues being discussed about the country in the IMF executive board can be as momentous as those that can arise in the UN Security Council.
  - (b) Give more resources to the executive directors representing IMF

consumer countries so that they can more effectively represent their constituents.<sup>58</sup>

- (c) Establish formal procedures for how the IMF will consult with non-state actors during its Article IV consultations with its member countries and when developing a programme for any member state that wishes to use its financing facilities. This procedure should create a meaningful opportunity for non-state actors to submit information and express their views to the IMF.
- (d) Establish a formal mechanism through which non-state actors as well as civil servants who feel that they cannot safely or freely participate in any meetings that the IMF might hold with non-state actors can communicate with the IMF. This mechanism should enable such actors to make written submissions to the IMF. It would also provide a mechanism for communication with non-state actors in those states in which the government will not allow the IMF to meet with non-state actors.
- (e) Establish an IMF-NGO liaison committee in which a group of NGO representatives, elected on a regional basis, can meet on a regular basis with senior IMF staff to discuss issues of concern to NGOs and other non-state actors around the world.<sup>59</sup>
- (f) The IMF should adopt a policy of publicly releasing drafts of all official reports and policies, redacted to remove all market-sensitive information, and submitting them to public comment before the final reports or policies are adopted. The IMF has improved its information disclosure policy but it



- usually only releases final reports and policies.<sup>60</sup>
- (g) An external review panel should evaluate the policies of the IMF to assess their impacts on poverty and the environment. This panel should also be charged with making recommendations on how the IMF, acting consistently with its mandate (see below), could improve its policies so that their potential to have a positive effect on poverty and the environment is maximised. The soon-to-be-established IMF Evaluation Office should perform this role.<sup>61</sup>
- (2) Actions to make the IMF more accountable.
- (a) Establish a permanent and independent evaluation unit in the IMF. The IMF is in fact in the process of establishing such a unit.<sup>62</sup>
- (b) Establish an ombudsman at the IMF who has the power to receive and investigate complaints from any person, organisation or state that feels that the IMF has not been acting in conformity with its mandate. This official should have the power to publish an annual report that discusses the investigations he/she has conducted and to make recommendations to the board of directors on how to reform the functioning of the IMF.<sup>63</sup>
- (3) Actions to coordinate the IMF's activities better with other international organisations.
- (a) Establish an expert panel to review the IMF's relations with other international organisations and to make recommendations on how the IMF, acting in conformity with its limited mandate (see below), can most effectively coordinate its activities with these organisations.
- (4) Actions to match IMF skills better to the tasks it performs.
- (a) Change the skill mix in the IMF to make it more suitable to the functions the IMF defines as within its mandate (see below). This will mean hiring more people with expertise in social sciences other than economics. This action will be less necessary if the IMF has better coordinated relations with other international organisations.
- (5) Legal actions.
- (a) The board of directors, after a notice and comment period, should issue a decision defining the scope of the IMF's mandate.
- (b) The board of directors should abandon the principle of uniformity and should explicitly categorise countries according to their wealth and level of economic development.
- (c) The board of directors should acknowledge the contractual nature of stand-by arrangements.
- Medium-term actions: Those actions that require the approval of the board of governors*
- (1) Actions to make the IMF more responsive to its developing country member states.
- (a) The IMF should increase the number of alternate directors that can assist each director in more effectively representing the members of his/her constituency. Since this will lead to a more unwieldy board, the IMF may need to give thought to delegating more responsibility to board committees.
- (b) The IMF should consider moving from its current practice of making decisions on the basis of consensus to making decisions on a basis that

better reveals the preferences of those who will be most affected by the decisions. One possibility would be for the IMF to require the board of directors to make decisions on the basis of formal votes, rather than consensus. The results of these votes could be made public.

(2) Actions to make the IMF more accountable.

(a) The IMF should develop detailed operating principles and procedures. These policies and procedures should be made public. This publication would be analogous to the World Bank's operating manual.<sup>64</sup> This publication would detail the responsibilities of the IMF staff and the procedures that they should follow in each situation. The publication of this information would enable those people affected by the IMF's actions to understand how IMF policy is made and whether the IMF has acted in conformity with its own rules and procedures in all cases. It would also facilitate efforts by these people to hold the IMF staff accountable for their actions.

(3) Actions to improve the IMF's relations with other international organisations.

(a) Establish formal and more extensive links between the IMF and other relevant international organisations (eg WTO, World Bank, UNICEF, WHO, ILO, etc) at both the senior management and staff levels. These links should include regular meetings, staff exchanges, regular exchanges of information and reports and other publications, participation in joint missions to countries and formal agreements on the division of labour and responsibility between these organisations. It should also include a

means for resolving any disputes that may arise between the parties.

(b) The IMF should renegotiate its relationship agreement with the UN. The objective of this exercise would be to clarify the IMF's responsibilities to the UN and to enhance the ability of the UN to ensure the IMF fully respects the jurisdiction of other specialised agencies.

(c) The IMF should establish an independent review commission, with members drawn from the institutions, the member states and non-state actors, to consider the optimal division of responsibilities between the IMF and the World Bank. One option that the commission should consider is defining their responsibilities not according to function but according to the level of wealth of the country and the type of financing sources on which it relies. Under this proposal the IMF would deal only with the problems of emerging markets that have access to private markets. The World Bank would deal exclusively with countries that are dependent on official sources of funds. The issues of primary concern to industrialised countries would be addressed in other fora. The IMF and World Bank would only participate in these fora to the extent necessary to understand how the issues being discussed would affect their areas of responsibility.

*Long-term actions: Those actions that require ratification by the member states*

(1) Actions to make the IMF more responsive to its developing country member states.

(a) Amend the Articles of Agreement



to increase the basic votes to at least their original proportion in the total votes at the IMF.

- (b) Amend the Articles of Agreement to introduce a qualified voting procedure that ensures that in votes on policy issues, those countries that use the resources of the IMF vote separately from the industrial countries and the policy measure must obtain the support of a majority of both groups.
- (2) Actions to alter the structure and functions of the IMF to recognise the changing responsibility of the IMF.
  - (a) Implement the findings of the independent review commission that investigated the division of responsibilities between the IMF and the World Bank.

## CONCLUSION

The IMF is suffering from serious structural distortions that have slowly developed since the Second Amendment to the Articles of Agreement. These problems create a substantial barrier to the effective functioning of the IMF. They can only be corrected through a broad-ranging reform programme that will overhaul the structure and operating principles of the IMF. Without undertaking this reform programme, it is unclear if the IMF will ever be able effectively to make any useful contributions to solving the complex problems of poverty, inequality and inadequate governance which plague developing countries today.

Unfortunately the problems that exist in the IMF are only the most extreme version of a problem that exists in all international organisations. All those organisations that have great economic power in the developing world — the World Bank, the regional development banks and the WTO — share, although it may be in less extreme forms, the same problems. Those UN specialised agencies that lack adequate resources, influ-

ence and power — such as UNESCO, FAO, UNICEF, WHO — often suffer from the reverse problem. They lack influence and power because they are deemed to be too sensitive to developing countries. The result is that industrialised countries lose interest in them. If international organisations are to perform the global governance functions that were envisaged for them and if they are to play an effective role in dealing with the complex problems that exist in the developing countries and the extreme inequalities of power and wealth that exist between developing and developed countries, they will need to undergo their own reform programmes, that will be complementary to the one this paper proposes for the IMF.

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- (7) See Gold, J. (1984) *Legal and Institutional Aspects of the International Monetary System: Selected Essays II*, IMF, Washington, pp. 647-650; Bradlow, ref. 5.
- (8) See Gold, J. (1979) *Legal and Institutional Aspects of the International Monetary System: Selected Essays I*, IMF, Washington, DC, pp. 469-519.
- (9) A good example of this point is that the IMF originally adopted the view that the standby arrangement is not a contract under the influence of the industrialised countries. These countries, which at the time were still using the financing facilities of the IMF, did not wish to be seen by their citizens or other countries as entering into a binding contract with the IMF. They also did not wish to be seen as breaching their obligations if they failed to effect the policies set out in the letter of intent that formed part of their standby arrangement with the IMF. See Gold, J. (1996) *Interpretation: The IMF and International Law*, p. 371 n.125.
- (10) See IMF (1978) Articles of Agreement, amendment I, at <http://www.imf.org/external/pubs/ft/aa/index.htm>; Gold, ref. 7, at pp. 108-113.
- (11) See IMF Articles, ref. 4, at Art. IV, s. 1 (adopted 22nd July, 1944, entered into force 1945, amended effective 1st April, 1978).
- (12) See Gold, ref. 8, at pp. 573-574.
- (13) The IMF's financial arrangements with Russia and Indonesia contained over 100 conditions each. These conditions dealt with most of the issues cited in the text. In the case of the heavily indebted poor countries (HIPC), the IMF requires them to follow participatory processes in developing their poverty reduction strategy papers and to allocate certain portions of their savings from debt reduction to primary health and education budgets. For more information see the IMF website: [www.imf.org](http://www.imf.org).
- (14) None of these countries has used the financial resources of the IMF since 1978. See de Vries, ref. 3, at p. 119 (noting that during 1972 to 1978, the IMF approved standby arrangements for Italy and the UK).
- (15) Despite this the IMF continues to devote a considerable amount of resources to its surveillance of these countries. See *Evaluation of Surveillance*, ref. 2.
- (16) See eg IMF, *World Economic Outlook*, from 1982 to 1986.
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- (25) For the text of IMF agreements, see <http://www.imf.org>
- (26) See UN Charter, Art. 102 (1945).
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- (28) For information on the Financial Stability Forum, see <http://www.fsforum.org>: 'The Financial Stability Forum (FSF) was convened in April 1999 to promote international financial stability through information exchange and international co-operation in financial supervision and surveillance. The *Forum* brings together ... national authorities responsible for financial stability in significant international financial centres, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts.' The members of the FSF are Australia, Canada, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Singapore, the UK and the USA.
- (29) For information on the G20, see <http://www.g20.org/indexe.html> (describing the G20 as an informal mechanism for dialogue among systemically important countries within the framework of the Bretton Woods institutional system). 'The G-20 promotes discussion, and studies and reviews policy issues among industrialized countries and emerging markets with a view to promoting international financial stability.' The members of the G20 are Argentina, Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the UK and the USA.
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- (36) See Bradlow, ref. 5, at pp. 66–72; Kapur and Webb, ref. 35.
- (37) See Kapur (1998), ref. 35, at p. 98 (quoting a supporter of the IMF in the US Congress: the IMF 'is in fact one of the best possible deals we could ever imagine: Its programs cost us nothing yet it provides enormous benefits for our economy and our foreign policy').
- (38) See IMF Articles, ref. 4, at Art. V, s. 1.
- (39) The World Bank has established the inspection panel partly for this purpose. See generally Bradlow, D. D. (1994) 'International organizations and private complaints: The case of the World Bank inspection panel', *Virginia Journal of International Law*, Vol. 34, p. 553; Shihata, I. F. I. (2000) *The World Bank Inspection Panel: In Practice*, 2nd edn., Oxford University Press, New York.
- (40) See eg the complex range of conditions that were attached to the US legislation authorising the USA to participate in the most recent IMF quota increase. The legislation was only passed after intense debate and a great deal of lobbying. See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, ss. 597(b), 602, 610–612, 112 Stat. 2681.
- (41) See the Agreement between the United Nations and the International Monetary Fund, entered into force 15th November, 1947, 109 UNTS 340.
- (42) See eg Omnibus Consolidated and Emer-



- agency Supplemental Appropriations Act, ref. 40.
- (43) See eg *Evaluation of Surveillance*, ref. 2; *External Evaluation of ESAF*, ref. 2.
- (44) See Gold, ref. 8.
- (45) See IMF, 'Progress Report on the Heavily Indebted Poor Countries (HIPC) Initiative and Poverty Reduction Strategy Papers (PSRP) Program and Work Priorities in 2001', at <http://www.imf.org/external/np/hipc/2001/020601.htm>.
- (46) See Polak, J. (1997) 'The World Bank and the IMF: A changing relationship', in Kapur, D., Lewis, J. P. and Webb, R. (eds) *The World Bank: Its First Half Century*, Vol. II, Brookings Institution, Washington, DC, p. 473.
- (47) See generally Bradlow, D. D. and Grossman, C. (1995) 'Limited mandates and intertwined problems: A new challenge for the World Bank and the IMF', *Human Rights Quarterly*, Vol. 17, p. 411.
- (48) See eg Meltzer Commission, ref. 2; Schultz, G., Simon, W. E. and Winston, W. B. (1998) 'Who needs the IMF?', *Wall Street Journal*, p. A22, 3rd February.
- (49) See eg Danaher, ref. 2.
- (50) See *Evaluation of Surveillance*, ref. 2; *External Evaluations on ESAF*, ref. 2; Kapur, ref. 35; Woods (2000), ref. 33; 'The IMF: Doctor, savior — Or wastrel?', *Business Week*, 28th December, 1998, p. 12 (criticising the IMF for 'throw[ing] \$22 billion at an economic basket case like Russia ... after billions had disappeared in that black hole before'). The article also discusses the IMF's involvement in Mexico in 1995.
- (51) This position has been advocated by people other than those who are implacable foes of the IMF. See eg Mikesell, R. (1995) *Proposals for Changing the Functions of the International Monetary Fund*, Jerome Levy Economics Institute, Bard College, Working Paper No. 150.
- (52) See eg Feldstein, ref. 2; Browne, R. S. (1996) 'Rethinking the IMF on its fiftieth anniversary', in Griesgraber and Gunter, ref. 2, p. 1.
- (53) See eg Danaher, ref. 2; Blecker, ref. 5; Omnibus Consolidated and Emergency Supplemental Appropriations Act, s. 610(a); Friends of the Earth (2000) 'The IMF: Selling the Environment Short', at <http://www.foe.org/imf/index.html>
- (54) See Blecker, ref. 5 at pp. 39–53.
- (55) For an interesting overview of reform initiatives in the IMF, see Wood, A. (2001) 'Structural Adjustment for the IMF', at [www.brettonwoodsproject.org](http://www.brettonwoodsproject.org).
- (56) See ref 19, By-laws of the IMF and De Gregorio, J., Eichengreen, B., Ito, T. and Wyplose, C. (1999) *An Independent and Accountable IMF: Geneva Reports on the World Economy, Vol. I*, International Center for Monetary and Banking Studies, Geneva.
- (57) See eg Kirgis, F. L. Jr (1993) *International Organizations in their Legal Setting*, 2nd edn, West Publishing, St Paul.
- (58) The IMF has begun to provide some more resources to the African executive directors.
- (59) The World Bank has had such a committee for a number of years.
- (60) For the IMF information disclosure policy, see <http://www.imf.org>. The IMF set an important precedent for releasing drafts of policies and procedures when it published its draft decision on establishing an independent evaluation office before the decision was taken by the board to do so. Ultimately the board decided to establish such an office and it is in the process of doing so.
- (61) See IMF (2000) 'Making the IMF's Independent Evaluation Office Operational' (August), at <http://www.imf.org/external/np/eval/evo/2000/Eng/evo.htm>.
- (62) *Ibid*.
- (63) See Bradlow, D. (1999) 'An Ombudsman for the IMF', Letter to the *Washington Post*, 24th September.
- (64) See [www.worldbank.org](http://www.worldbank.org).

# **The Governance of the IMF: The Need for Comprehensive Reform\***

Daniel D. Bradlow\*\*

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\* Paper prepared for the Meeting of the G24 Technical Committee, Singapore, September 2006

\*\* Professor of Law and Director, International Legal Studies Program, American University, Washington College of Law, Washington D.C. and Research Associate, Centre for Human Rights, Faculty of Law, University of Pretoria, Tel: (202)274-4205, email: [bradlow@wcl.american.edu](mailto:bradlow@wcl.american.edu)

# The Governance of the IMF: The Need for Comprehensive Reform<sup>1</sup>

Daniel D. Bradlow<sup>2</sup>

## I. Introduction

This paper focuses on the governance of the International Monetary Fund (IMF)<sup>3</sup>. It argues that the IMF's current governance arrangements are characterized by non-responsiveness to the concerns of key stakeholders in the IMF, lack of accountability, non-representative decision-making, lack of transparency, and poorly defined relations with other international organizations.

It further contends that the basic cause of the IMF's current problems is its failure to adequately adapt its decision-making arrangements and operating practices to the changes that have occurred in the nature and scope of its operations over the past 30 years as it has slowly mutated from a monetary organization into a macro-economically oriented development

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<sup>2</sup> Professor of Law and Director, International Legal Studies Program, American University, Washington College of Law, Washington D.C. and Research Associate, Centre for Human Rights, Faculty of Law, University of Pretoria, Tel: (202)274-4205, email: [bradlow@wcl.american.edu](mailto:bradlow@wcl.american.edu) .

<sup>3</sup> There is an extensive literature, from many different political perspectives on the many policy and program problems with the IMF. *See, for example, See generally* Joseph E. Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (W.W. Norton & Company, 2002); Paul Blustein, THE CHASTENING: INSIDE THE CRISIS THAT ROCKED THE GLOBAL FINANCIAL SYSTEM AND HUMBLING THE IMF (PublicAffairs, 2001) (exploring the Asian financial crisis of 1997 and the IMF's role in that crisis); Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT) (PublicAffairs, 2005) (looking at the interconnectedness and causal relationships among Wall Street, the IMF, and Argentina's bankruptcy in 2001). INTERNATIONAL MONETARY FUND, EXTERNAL EVALUATION OF IMF SURVEILLANCE (1999), at <http://www.imf.org/external/pubs/ft/extev/surv/eval.pdf> [hereinafter EVALUATION OF SURVEILLANCE]; EXTERNAL EVALUATION OF THE ESAF, Report by a Group of Independent Experts (June 1998), at <http://www.imf.org/external/pubs/ft/extev/index.htm> [hereinafter EXTERNAL EVALUATION ON ESAF]; Jeffrey D. Sachs, *The IMF and the Asian Flu*, THE AMERICAN PROSPECT, Mar.-Apr. 1998, at 16-21; Anna J. Schwartz, *Time to Terminate the ESF and the IMF*, FOREIGN POLICY Briefing No. 48, Washington, D.C.: Cato Institute (Aug. 26, 1998); Martin Feldstein, *Refocusing the IMF*, FOREIGN AFFAIRS 77(2), at 20-33 (1998); MELTZER COMMISSION, REPORT OF THE INTERNATIONAL FINANCIAL INSTITUTION ADVISORY COMMISSION (2000); J.M. Griesgraber and B. Gunther, THE WORLD'S MONETARY SYSTEM (1996); FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND, (Kevin Danaher, ed., 1994).

financing institution. Its attempt to squeeze its new functions and relations into its old structures has resulted in distortions in the IMF's relations with its member states and their citizens and with other international organizations, and in its internal governance arrangements.

The problems caused by these distortions are now coming to a head. The reason is that, while the ability of the IMF to provide satisfactory services to its developing country member states has been widely challenged for at least 2 decades, its ability to effectively manage the international monetary system, to respond to the interests of the rising new economic powers, and to deal with the financial and monetary issues of most interest to the rich countries is now also being questioned by leading officials in its most powerful member states.<sup>4</sup>

It follows from this analysis that the current governance reform proposals of the IMF Managing Director<sup>5</sup>—to increase the votes of certain particularly under-represented member states, and to significantly increase the basic votes for all member states—are an inadequate response to the IMF's problems. Even if implemented, they will only address one dimension of the problem.

In order to establish this thesis, the paper is divided into a number of sections. The next

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<sup>4</sup> See, for example, Timothy D. Adams, "The IMF: Back to Basics", in REFORMING THE IMF FOR THE 21<sup>ST</sup> CENTURY, Edwin M. Truman (ed) (2006); King, Mervyn, Reform of the International Monetary Fund, at 2 (speech given at the Indian Council for Research on International Economic Relations in New Delhi, India) (Feb. 20, 2006) (warning that the IMF could slip into obscurity); Dodge, David, The Evolving Monetary Order and the Need for an Evolving IMF, Lecture to the Woodrow Wilson School of Public Affairs, Princeton, March 30, 2006, available at [www.bankofcanada.ca/en/speeches/2006/sp06-6.html](http://www.bankofcanada.ca/en/speeches/2006/sp06-6.html) (arguing for reforms in the IMF's functions and governance so that it can more effectively fulfill its role in the global economy) see also Interview with Lorenzo Bini Smaghi, "Eurozone 'Needs Bigger IMF Role'", Financial Times (London), March 29, 2006 (stating that the IMF "risks becoming a 'mere secretariat' for international policymakers"). (Timothy Adams is the Under-Secretary for International Affairs in the U.S. Treasury, Mervyn King is the governor of the Bank of England, David Dodge is the Governor of the Bank of Canada and Lorenzo Bini Smaghi is a European Central Bank executive board member).

<sup>5</sup> IMF, The Managing Director's Report on the Fund's Medium-Term Strategy (September 15, 2006), at <http://www.imf.org/external/np/omd/2005/eng/091505.pdf>; IMF, The Managing Director's Report on Implementing the Fund's Medium Term Strategy (April 5, 2006), at <http://www.imf.org/external/np/pp/eng/2006/040506.pdf>. Rodrigo De Rato, Progress in Implementing the Fund's Medium-Term Strategy (speech given at the Foreign Correspondent's Club in Tokyo, Japan) (August 3, 2006), available at <http://www.imf.org/external/np/speeches/2006/080306.htm>.

section briefly discusses some key points of the IMF's original governance arrangements and of the impact of the evolution in its operations over the past three decades on its institutional arrangements. Section III describes 5 distortions that have arisen from the combination of the evolution in the IMF's functions and the inflexibility of its decision making structures. Section IV briefly reviews the key governance problems that have resulted from these five distortions. Section V contains a detailed proposal for a comprehensive governance reform program for the IMF.

## II. The IMF's Original Governance Arrangements and the Evolution in Its Operations

At the Bretton Woods Conference in 1944, the 44 participating countries, agreed to surrender some of their monetary sovereignty to the IMF in exchange for the benefits of a rules-based monetary system<sup>6</sup>. The participants created the IMF to oversee the system. Its primary function was to ensure that members were following policies that were consistent with the maintenance of the par value they had established for their currency. To encourage compliance with these obligations and as part of the benefits of membership, the IMF provided financial support to any member state experiencing serious balance of payments difficulties<sup>7</sup>.

The operating practices and governance arrangements for the IMF were designed to support these original regulatory and financing functions. Some of their features deserve mention because of their relevance to the IMF's current governance problems.

First, the annual surveillance missions that the IMF conducted in each member state, pursuant to Article IV of its Articles of Agreement, focused on those macroeconomic variables that influenced the ability of the country to maintain the par value of its currency.<sup>8</sup> Given the

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<sup>6</sup> See Margaret Garritsen de Vries, *THE IMF IN A CHANGING WORLD 1945-1985* 14-20 (1986).

<sup>7</sup> See, International Monetary Fund, *Articles of Agreement art. I (1944)* (stating purposes of IMF) [hereinafter *IMF Articles*].

<sup>8</sup> See Garritsen, *supra* note 5; ROBERT A. BLECKER, *TAMING GLOBAL FINANCE* 1-7 (1999); Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 47, 68-69 (1996).

nature of its interest, it made sense for the member states to stipulate in the Articles of Agreement, that the IMF should limit its interactions with the member state to its Central Bank and Ministry of Finance<sup>9</sup>.

Second, maintenance of the par value system also placed limits on the conditions the IMF would attach to the financing it offered its member countries. These conditions focused on those macro-economic and monetary issues that were relevant to the restoration of a sustainable balance of payments and par value for the currency. The nature of these conditions placed some limits on the IMF's intrusion into the policy-making process of its member states because it left the recipient state free to choose the specific policy measures for meeting these conditions.

It should be noted that the sensitivity of a change in the par value of a currency led the IMF to seek to keep the substance of the standby arrangements, particularly the Letter of Intent, confidential. Consequently, it developed a formalistic interpretation of the legal nature of a standby arrangement, which denied that the relationship was contractual. This avoided both the obligation to treat the arrangements, as an international agreement that, pursuant to the United Nations Charter, must be made public<sup>10</sup> and the vexing issue of potential liability that could result from states failing to comply with the terms of the standby arrangement<sup>11</sup>.

Third, since the IMF was designed to be a monetary and not a development institution, it did not formally distinguish between its member states on the basis of their wealth or level of development. Its justifications for this approach were that since all states were participants in the same monetary system, that the ability of each state to maintain its par value was influenced by the same variables, and that they were all vulnerable to the same types of balance of payments problems, they should all be treated in a "uniform" manner. This approach resulted in the IMF offering all member states access to its financing facilities on the same terms and conditions. Similarly, the IMF's annual consultations with each member state covered essentially the same

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<sup>9</sup> See IMF ARTICLES, *supra* note 6, at art. V, § 1.

<sup>10</sup> See U.N. CHARTER art. 102 (1945).

<sup>11</sup> See Joseph Gold, The legal character of the Fund's stand-by arrangements and why it matters, IMF (1980).

issues. The IMF concretized this approach by adopting a principle of uniformity as one of its key operating principles<sup>12</sup>. The principle made sense during the period of the par value system when many of the rich countries, including the United States, in fact, did make use of the IMF's financing services<sup>13</sup>.

Fourth, the IMF's original governance structure contained some checks on the power of the richest member states, even though the IMF's system of weighted voting gave these countries the greatest influence in the IMF. Since the richest and most powerful states could anticipate having to use the financing services of the IMF, they were unlikely to advocate policies that were unduly burdensome for those states that did use the IMF's services<sup>14</sup>. They understood that the policies they supported in the IMF could one day directly affect their own citizens and they could be held accountable for them.

Fifth, the governance structure was also build around the expectation that the IMF's Board of Executive Directors, acting on behalf of the membership, would exercise firm control over the IMF's management and staff.<sup>15</sup> During the period of the par value system, this expectation was realistic because the number of IMF programs was relatively small, the scope of the programs was limited, and the Board was reasonably representative of the IMF membership—the original 39 member states were represented by 12 Executive Directors.

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<sup>12</sup> See Joseph Gold, *Legal and Institutional Aspects of the Int'l Monetary System: Selected Essays I*, at 469-519 (1979) [hereinafter Gold I].

<sup>13</sup> See Joseph Gold, *Legal and Institutional Aspects of the Int'l Monetary System: Selected Essays II*, at 647-650 (1984) [hereinafter Gold II]; Bradlow, *supra* note 8.

<sup>14</sup> A good example of this point is that the IMF originally adopted the view that the standby arrangement is not a contract under the influence of the industrialized countries. These countries, who at the time were still using the financing facilities of the IMF, did not wish to have their policy making options constrained by a publicly available agreement with the IMF. They also did not wish to be seen as breaching their obligations if they failed to affect the policies set out in the Letter of Intent that would form part of their standby arrangement with the IMF. See JOSEPH GOLD, *INTERPRETATION: THE IMF AND INTERNATIONAL LAW* 371 n.125 (1996).

<sup>15</sup> When the IMF was established, John Maynard Keynes had argued for a part-time Board that was less actively involved in the day-to-day affairs of the IMF. However, he lost this argument and the Board became a full time Board that plays an active role in the operations of the IMF. Skidelsky, Robert. *JOHN MAYNARD KEYNES: FIGHTING FOR FREEDOM 1937-1946*. Vol. 3. (Viking, 2000). This suggestion has recently been revived by the Governor of the Bank of England. See King, *supra* note 5.



After the collapse of the par value system, which was formalized with the adoption of the Second Amendment to the IMF's Articles of Agreement in 1978, the IMF lost its well-defined monetary mission<sup>16</sup>. If a member state was not expected to maintain any particular value for its currency and could choose its own exchange rate policy, then what was the IMF supposed to be monitoring in its annual consultations with the country?

The amended Article IV provides only limited guidance. It requires each member state to “endeavour to direct its economic and financial policies toward...fostering orderly economic growth...”; to “seek to promote stability by fostering orderly underlying economic and financial conditions”; and to “follow exchange rate policies compatible with the undertakings” of Article IV.<sup>17</sup> The lack of specificity of this language suggests, as in fact has become the case, that the IMF needs to look at any aspect of the member state's economic and financial policies and policy making arrangements that could affect its “orderly economic growth”, its external balance of payments and the value of its currency.<sup>18</sup> In other words, the Second Amendment has resulted in the IMF dramatically expanding the scope of its Article IV consultations.<sup>19</sup> It has also led to an expansion in the range of conditions that the IMF attaches to its financing.<sup>20</sup>

The Second Amendment had disparate impacts on different groups of IMF member states. In fact, for most of the period since the Second Amendment, IMF member states could be

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<sup>16</sup> See IMF ARTICLES OF AGREEMENT, amend. I (1978), at <http://www.imf.org/external/pubs/ft/aa/index.htm>; GOLD II, *supra* note 9, at 108-113.

<sup>17</sup> See IMF ARTICLES, *supra* note 6, at art. IV, § 1 (adopted July 22, 1944, entered into force 1945, amended effective April 1, 1978).

<sup>18</sup> In recent years, as the process of globalization has intensified, the IMF has been forced to expand its surveillance beyond a national focus to include regional and even global considerations. See de Rato, Rodrigo. “The IMF's Medium-Term Strategy: New Priorities, New Directions,” pp. 1, 3. Feb. 9, 2006; de Rato, Rodrigo. “New Priorities for an Era of Globalisation,” p. 3. Jan. 2, 2006; IMF. “The Managing Director's Report on the Fund's Medium-Term Strategy,” pp. 4-6. Sept. 15, 2005.

<sup>19</sup> See Gold I, *supra* note 10, at 573-4.

<sup>20</sup> The IMF's financial arrangements with Russia and Indonesia contained over 100 conditions each. These conditions dealt with most of the issues cited in the text. In the case of the HIPC countries, the IMF requires them to follow participatory processes in developing their Poverty Reduction Strategy Papers and to allocate certain portions of their savings from debt reduction to primary health and education budgets. For more information see IMF website <[www.imf.org](http://www.imf.org)>.

classified into two groups. The first group, which can be called “IMF supplier states”, consists of those countries which, because of their wealth, their access to alternate sources of funds and for political reasons, have no intention of using the IMF’s services in the foreseeable future<sup>21</sup>. These countries do not need to pay particular attention to the views of the IMF<sup>22</sup>. For these countries, the most important of which are the G-7 countries, the Second Amendment meant that they regained their monetary sovereignty from the IMF and escaped from its control.

The second group, which consists of those member states that need or know they may need IMF financing in the foreseeable future can be called the “IMF consumer” countries. These states must pay careful attention to the views of the IMF because they will influence the conditions that the IMF will attach to the funds it provides the state. The IMF can also influence these countries’ access to other sources of funds.

In recent years, a third group of states has emerged. This group consists of those countries that have good access to private financial markets and have accumulated sufficiently large reserves that they can effectively “self-insure” against the risk of payments and capital account crises.<sup>23</sup> The states in this group, like the IMF supplier states, appear to be in the process of “buying” their independence from the IMF. In fact, it can be argued that a key motivation for the Managing Director’s current governance reform proposal is to give this emerging third group

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<sup>21</sup> None of these countries have used the financial resources of the Fund since 1978. *See* DE VRIES, *supra* note 6, at 119 (noting that during 1972 to 1978, the IMF approved stand-by arrangements for Italy and the United Kingdom).

<sup>22</sup> Despite this, the IMF continues to devote considerable amount of resources to its surveillance of these countries. *See* EVALUATION OF SURVEILLANCE, *supra* note 4.

<sup>23</sup> For example, China’s gross official reserves were projected at \$829 billion for 2005, India’s reserves were projected at \$139.5 billion for 2005/2006, and Korea’s reserves are projected by IMF staff to be at \$3.9 billion for 2005. *See* IMF Executive Board Article IV Consultation Reports for data on each country, available at <http://www.imf.org>. Andrew Ball and Richard McGregor. *G20 Calls for Reform of IMF and World Bank*. FINANCIAL TIMES, Oct. 16, 2005; G20, *The G20 Statement on Reforming the Bretton Woods Institutions* (calling for improvement in governance, strategy, and operations of both the IMF and the World Bank). For an interesting discussion of the significance of the size of the reserves, *see* Lawrence H. Summers, *Reflections on Global Account Imbalances and Emerging Market Reserve Accumulation*, L.K.Jha Memorial Lecture, Reserve Bank of India, March 24, 2006, available at [www.president.harvard.edu/speeches/2006/0324\\_rbi.html](http://www.president.harvard.edu/speeches/2006/0324_rbi.html) (showing that reserves of emerging market Asian and oil exporting countries exceed short term debt due within one year by about \$2 trillion and growing each year by several hundred million dollars)

of states an incentive to remain actively engaged with the IMF.<sup>24</sup>

### III. Institutional Implications of the Changing Role of the IMF: The Five Distortions

Since the adoption of the Second Amendment in 1978, the IMF has attempted to implement its expanding range of activities without making any significant changes in its governance arrangements. This means that the IMF has “forced” its new broader functions into its existing decision-making structures and governance arrangements and its existing interpretation of its mandate. This has resulted in five distortions that are undermining the effectiveness of its operations, are increasing hostility to the IMF around the world, and are raising questions about its relevance.

These five distortions are:

- a) The IMF’s relations with the industrialized countries, in particular the G-7;
- b) The IMF’s relations with developing countries that utilize or expect to utilize its financial services;
- c) The IMF’s relations with the citizens of its member countries;
- d) The IMF’s relations with other international organizations; and
- e) Three legal issues.

Each of these problem areas is discussed in more detail below.

#### A. Relations Between the IMF and The Industrial Countries

Since the adoption of the Second Amendment, the industrial countries, in fact, have relied on their own resources and the private financial markets to meet their financial needs. They have not made use of the resources of the IMF. They have in effect concluded that the IMF is not a politically or economically feasible source of funds for them.

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<sup>24</sup> See, *supra* notes 4 and 5. See also Peter Costello, *The Global Monetary Fund Needs to Reform Its Quotas*, FINANCIAL TIMES, Aug. 21, 2006 at 9.

The fact that these countries do not intend using the IMF's financing facilities has freed them from any need to defer to any advice the IMF may offer them in their annual consultations. In other words, they have regained the sovereignty that they surrendered to the IMF at the Bretton Woods Conference in 1944.

This does not, however, mean that they have regained full monetary sovereignty. The world's economy has become too integrated for that. Instead these countries, particularly the G-7 have used an alternate set of international fora to resolve all monetary and financial issues that may arise between them. These fora include the G-7, the Organization of Economic Cooperation and Development (OECD), the Basel Committee of Bank Regulators, and the International Organization of Securities Commissions (IOSCO).

When these are not deemed adequate, the G-7 have been willing to create additional fora. For example, after the Asian financial crisis and the near bankruptcy of Long Term Capital Management in 1998, the G-7 became concerned about the regulatory framework for the international financial markets. These countries decided that they needed a mechanism through which they could coordinate national regulation of financial markets and financial institutions. Consequently, they created the Financial Stability Forum<sup>25</sup> in which the regulators of the banking, securities and insurance industries of major industrial countries and financial centers meet together with representatives of the IMF, the World Bank and the BIS to discuss regulatory issues of mutual concern. They also created the G-20<sup>26</sup>, which consists of the G-7 plus some

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<sup>25</sup> For information on the Financial Stability Forum, see <http://www.fsforum.org> ("The Financial Stability Forum (FSF) was convened in April 1999 to promote international financial stability through information exchange and international co-operation in financial supervision and surveillance. The *Forum* brings together . . . national authorities responsible for financial stability in significant international financial centers, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts."). The members of the FSF are: Australia, Canada, France, Germany, Hong Kong, Italy, Japan, Netherlands, Singapore, United Kingdom, and the United States.

<sup>26</sup> For information on the G-20, see <http://www.g20.org/indexe.html> (describing the G-20 as an informal mechanism for dialogue among systemically important countries within the framework of the Bretton Woods institutional system). "The G-20 promotes discussion, and studies and reviews policy issues

other key industrial and emerging market countries.

Since the industrialized countries have no intention of using the IMF, it is reasonable to question why the G-7 have continued to support the IMF. The reason is that they find its influence over poor and middle income countries undergoing transformations or experiencing serious macro-economic and monetary problems useful. In particular, they appreciate its ability to compel these countries to adopt stabilization and adjustment policies that they deem acceptable. They also support its role as the crisis manager in countries experiencing debt problems. In short, they value having an organization that can focus on the problematic areas of the global financial system, leaving them free to shape that system to suit their own needs.

The wealth and independence of the industrialized countries, particularly the United States, Japan, Germany, Great Britain and France, also ensures that they are the dominant force within the decision making structures of the IMF. Their dominance is significantly enhanced by two developments that have occurred in the IMF since its formation in 1944. First, the number of IMF Executive Directors has grown more slowly than the number of IMF member states. The original 39 member states were represented by a 12 member board of directors. Today the 184 members are represented by a board of 24 members. Originally, only the 5 biggest shareholders had their own executive directors and the remaining 34 member states were represented by the other 7 directors. This meant that each of these 7 directors represented on average slightly less than 5 states. Today, of the 24 member Board, in addition to the 5 executive directors representing the five largest shareholders another 3 directors represent single countries. Thus, today 16 directors represent the remaining 176 member states. This means that each of these directors represents on average slightly less than 11 states. In fact, some executive directors, for example the two directors representing sub-Saharan Africa represent considerably more than 11 states<sup>27</sup>.

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among industrialized countries and emerging markets with a view to promoting international financial stability.” The members of the G-20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, and the United States. *Id.*

<sup>27</sup> See, IMF SURVEY, Special Supplement, September 2005 (for list of Executive Directors and their

This change in the average size of the constituencies represented by the executive directors has an important impact on the power relations in the IMF's decision making process. It means that those states that have permanent representation on the Board have a distinct advantage in having their views heard in the Board. It is unlikely that a director who represents 10-11 states can advocate for the views of each of those states as effectively as a director who only represents one state. It is also unlikely that such a director can play the same active role in policy issues in the IMF as an executive director who represents only one state.

In this regard, it is important to note that each of the G-7 countries always has a national of their country on the Executive Board, despite the fact that only 5 of the 7 countries have appointed Executive Directors. In addition, the Eurozone member states hold 6-8 of the 24 seats on the Executive Board. Furthermore, in 5 out of 6 cases in which an Executive Director represents both developing and industrialized countries, the Executive Director is from an industrialized country, and the in the other 1, the Executive Director is usually from an OECD member state<sup>28</sup>. The result is that of the 24 directors, 11 are currently from OECD countries and 9 are from industrialized countries.

The numerical advantage of the industrialized countries' representation on the Executive Board is significant even though the Board tends to operate by consensus. The reason is that these countries, because of their permanent presence on the Board, are able to develop institutional memories and expertise in how to function in the IMF. This enhances their ability to negotiate effectively and to shape the issues and the decisions around which the consensus must form<sup>29</sup>.

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constituencies); Ngaire Woods, "Governance in International Organizations: The Case for Reform in the Bretton Woods Institutions" in INTERNATIONAL FINANCIAL AND MONETARY ISSUES (UNDP, 1988); Rustomjee, Cyrus, IMPROVING SOUTHERN VOICE ON THE IMF BOARD: QUO VADIS SHAREHOLDERS? IN ACCOUNTABILITY OF THE INTERNATIONAL MONETARY FUND, at 23-25 (Cairn & Wood, eds.) (Ashgate Publishing, 2005).

<sup>28</sup> See, IMF SURVEY, *supra*, note 27.

<sup>29</sup> See Ngaire Woods, *Governance in International Organizations: The Case for Reform in the Bretton Woods Institutions*, Woods, Globalization and International Institutions, in THE POLITICAL ECONOMY OF

The result has been to enhance the G-7's control over the policy agenda in the IMF. However, because these countries are effectively independent of the IMF, they never have to live with the consequence of the policies that they make for the IMF's operations. This means that they can make policy that is only of limited interest to their own citizens but that is of immense interest to people in developing countries who have no ability to hold them accountable for their decisions or actions. This situation of decision makers having power with accountability to people who do not have to live with the consequences of their decisions but without accountability to those most affected by their decisions is a situation ripe with potential for abuse.

The second development relates to the composition of the voting rights of each member state. Each state's vote consists of 250 basic votes plus 1 vote for each SDR 100,000 it contributes to the IMF's general resources. The basic vote is intended to reflect the general principle of the sovereign equality of states. The remaining portion of the vote is intended to reflect the size of the country and its importance in the world economy. Since the establishment of the IMF in 1946, the number of total votes in the IMF has been increased due to the IMF membership growing from 39 in 1946 to 184 today and the need to expand the total resources of the IMF. However, there has been no change in the basic vote. The result is that today the basic votes form a significantly smaller portion of the total vote than was the case in 1946. In 1946 the basic votes accounted for 11.3% of the total vote. Today the basic vote accounts for only 2.1%. This means that the portion of the IMF's voting system that offered the smaller and weaker states some counterweight to the dominance of the richest and biggest countries in the IMF has been reduced in importance<sup>30</sup>.

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GLOBALIZATION, at 208-209. Carlo Cottarelli, *Efficiency and Legitimacy: Trade-offs in IMF Governance*, IMF Working Paper WP/05/107, 21-24 (2005) (discussing the overall scarcity of human resources at the IMF). Kahler, Miles, *Internal Governance and IMF Performance* 1-6 (prepared for Institute of International Economics' Conference on IMF Reform, 2005) available at <http://irpshome.ucsd.edu/faculty/mkahler/>; Rustomjee, *supra* note 27.

<sup>30</sup> This information has been derived from IMF Annual Reports. Also see GOLD I, *supra* note 9, at 292-294; Baira, Ariel, *The Governance of the IMF in a Global Economy*, in CHALLENGES TO THE WORLD BANK AND IMF 13, 14-15. Anthem Press, 2003; Carin, Barry and Angela Wood. ACCOUNTABILITY OF

## B. Relations Between the IMF and Its Consumer Member States

Since 1978 all the states which have utilized the financial services of the IMF are low or middle-income developing countries or the so-called transitional countries. For present purposes these consumer states can be divided into two groups. The first group consists of those countries that are classified as emerging markets and, under normal circumstances, have access to private financial markets. Many countries in this group need the IMF's support to satisfy private investors that they have adopted and are implementing good macroeconomic policies and that they are "suitable" for private investment. Thus even though this group of countries only needs IMF funding when they are unable to raise sufficient funds from private sources because of a debt or some other financial crisis, they are dependent on the IMF giving their economic policy performance a favorable review. This in turn is influenced by how they respond to the advice the IMF gives them in their annual consultations.

It is interesting to note that a number of these countries have recently pre-paid their obligations to the IMF so that they can try and escape from its oversight<sup>31</sup>. In addition, a number of the Asian countries have attempted to escape the constraints that the IMF may impose on them by building up sufficient reserves to withstand any future payments crisis that they may face<sup>32</sup>.

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THE INTERNATIONAL MONETARY FUND at 10-13. Ashgate Publishing, 2005; Rapkin, David P. and Jonathan R. Strand, *Reforming the IMF's Weighted Voting System*, 13-14 (Blackwell Publishing 2006); Truman, Edwin M., *A Strategy for IMF Reform* (Institute for International Economics, 2006).

<sup>31</sup> See, for example, IMF Press Release No. 05/19, Russian Federation Completes Early Repayment of Entire Outstanding Obligations to the IMF (Feb. 2, 2005); IMF Press Release No. 05/278, Argentina Announces Its Intention to Complete Early Repayment of Its Entire Outstanding Obligations to IMF (Dec. 15, 2005); IMF Press Release No. 05/275, Brazil Announces Intention to Complete Early Repayment of Entire Outstanding Obligations to IMF (Dec. 13, 2005); Chris Giles and Andrew Balls, Call for IMF Reform Draws Muted Echo, *FINANCIAL TIMES*, Feb. 24, 2006, at 3.

<sup>32</sup> For example, China's gross official reserves were projected at \$829 billion for 2005, India's reserves were projected at \$139.5 billion for 2005/2006, and Korea's reserves are projected by IMF staff to be at \$3.9 billion for 2005. See IMF Executive Board Article IV Consultation Reports for each country, available at <http://www.imf.org>. For an interesting discussion of the significance of the size of the reserves, see Lawrence H. Summers, *Reflections on Global Account Imbalances and Emerging Market Reserve Accumulation*, L.K.Jha Memorial Lecture, Reserve Bank of India, March 24, 2006, available at [www.president.harvard.edu/speeches/2006/0324\\_rbi.html](http://www.president.harvard.edu/speeches/2006/0324_rbi.html) (showing that reserves of emerging market



These efforts have been interpreted as a vote of no-confidence in the IMF and are posing an important financial challenge to the IMF<sup>33</sup>. Furthermore, to the extent that these countries succeed in their efforts to assert monetary independence, they will become a third group of member states that can relate to the IMF in ways that are more similar to those of an IMF supplier country than to those of consumer countries. To a significant extent, the current interest in governance reform at the IMF is attributable to the institution's and its more powerful member states' interest in keeping this emerging third group of countries engaged in the IMF.

The second group consists of those countries which because of their poverty or unstable political conditions are substantially dependent on official sources of funds. This group, in addition to needing the IMF's financial support, require its approval of their policies because their other official funders tend to rely on the IMF's advice in making their funding decisions.

While there are significant differences between the countries in the second group of IMF consumer states, they all share a common characteristic. Although the challenges that these countries face have a macroeconomic dimension, the primary cause of their social and economic, including macroeconomic, problems lies in the governance of their societies. In particular their problems are caused by weaknesses in their institutional arrangements and technical capacities which limit their ability to effectively make and implement policy.<sup>34</sup> Although these structural issues are outside the scope of the IMF's specialized area of competence it has attempted to address them<sup>35</sup>. This means that increasingly, in both its policy advice and in the conditions that it attaches to its financing, the IMF is addressing issues like bankruptcy laws, legal and judicial reform, allocations of public budgets, privatization, environmental issues, social safety nets, and banking reform that are not monetary or macro-economic issues. The specificity and micro

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Asian and oil exporting countries exceed short term debt due within one year by about \$2 trillion and growing each year by several hundred million dollars)

<sup>33</sup> Andrew Balls and Richard McGregor, *G20 Calls for Reform of IMF and World Bank*, FINANCIAL TIMES, Oct. 16, 2005.

<sup>34</sup> See, for example, The World Bank, *Can Africa Claim the 21st Century?* (2000); The World Bank, *World Development Report: The State in a Changing World* (1997).

<sup>35</sup> See Devesh Kapur, *The IMF: A Cure or a Curse?*, FOREIGN POL'Y (June 1998) (hereinafter *The IMF*); Devesh Kapur and Richard Webb, *Governance Related Conditionalities of the International Financial Institutions*, G-24 Discussion Paper Series No.6 (2000); THE POLITICAL ECONOMY OF GLOBALIZATION.

nature of these requirements highlight the evolution of the IMF from a monetary institution to a development financing organization.

The broadening range of issues addressed in its annual surveillance missions and in the conditions it attaches to its funding is changing the nature of the relationship between the IMF and these countries<sup>36</sup>. In the days of the par value system, the IMF limited its influence over national policy making by concentrating its advice and the conditions attached to its finance to discrete macroeconomic variables. This imposed a restraint on the IMF's involvement in domestic policy making because it left the member state's government free to decide on the actual measures it would adopt to achieve these macroeconomic targets. The increased range of issues the IMF considers and the specificity with which it addresses these issues means that this restraint has now been removed. The result is that the IMF has become an active participant in the policy making process of this group of member states. In fact, because of its influence over their access to external financing, the IMF is often the decisive voice in this processes.

The combination of the IMF's gate keeping functions and its *de facto* role in national policy-making further tips the balance of bargaining power in favor of the IMF in both the annual consultations and in the negotiations with the consumer states over the policy conditions to be attached to IMF financing. Moreover, given the dominance of the G-7 and the other industrialized countries in the IMF, there is a significant risk (that has often in fact been realized<sup>37</sup>) that these countries will use the IMF to impose their views of good political and economic policies on the developing countries. In fact, many people in developing countries already see the IMF more as a political organization that is biased in favor of the rich countries and their interests than as the technically specialized and politically neutral organization that it was intended to be.

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<sup>36</sup> *Id.*

<sup>37</sup> See Kapur, *The IMF*, *supra note 47*, at 98 (quoting a supporter of the IMF in the U.S. Congress: the IMF "is in fact one of the best possible deals we could ever imagine: Its programs cost us nothing yet it provides enormous benefits for our economy and our foreign policy"); Paul Blustein, *The Chastening: Inside the Crisis That Rocked The Global Financial System and Humbled the IMF* (PublicAffairs, 2001) (exploring the Asian financial crisis of 1997 and the IMF's role in that crisis).

This problem is exacerbated because the consumer countries are unable to effectively use the Board of Executive Directors or the Board of Governors to limit the staff and management's discretion in the IMF's operations. As we have seen above, the consumer states are imperfectly represented on the Board of Executive Directors. Furthermore, it is unrealistic to assume that the consumer states can hold the IMF accountable through their representative on the Board of Governors. There are two reasons for this. The first is that this is not the appropriate body in which to challenge individual operational management decisions. Second, it is not realistic to assume that a member state's IMF Governor will be willing to raise specific operational issues during the infrequent meetings of the IMF Governors.

The IMF's expanded role in its developing country member states has also changed the range of actors with whom it must directly interact in these states. Prior to 1978, the IMF could reasonably limit its direct interactions to the Central Banks and the Ministries of Finance<sup>38</sup>. Today, however, the IMF's operations directly affect many, if not all, government ministries and the lives of all those people who will be governed by the policies that it helps make. This means that it is no longer feasible for the IMF to limit its interactions to the Central Bank or the Ministry of Finance. In fact, without directly interacting with a broader range of both governmental and non-governmental actors in the member states, the IMF is unlikely to obtain all the information it needs to play an effective policy making role. For example, it needs to consult with government ministries whose budgets and policies will be affected by the IMF's funding conditionalities. It also needs to consult with the legislators who must pass the laws that the IMF policies require. To be an effective and credible policy maker, the IMF also should hear the views of all those stakeholders who have the ability to influence the success or failure of those policy decisions and will be directly affected by them. To date, the IMF, utilizing informal procedures has consulted with some of these actors. However, it has not yet developed either formal procedures for ensuring that all relevant stakeholders are consulted or through which the government or citizens of these member countries can hold the IMF accountable for its actions in the policy making process.

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<sup>38</sup> See IMF ARTICLES, *supra* note 7, at art. V, § 1.

The IMF has recognized that its programs have become unduly intrusive. In 2002, it issued new guidelines on conditionality that are intended to make the conditions more focused on its core areas of competence and to reduce the number of conditions to those that are essential to the achievement of the program's objectives. These new guidelines, however are drafted in relatively non-specific terms and it is not clear how effective they will be in reducing the IMF's intrusion into its members domestic affairs, although they do appear to have resulted in some reduction in the average number of conditions attached to IMF financial programs.<sup>39</sup>

It is important to note, however, that a reduction in quantity of conditions does not necessarily translate into a reduction in intrusiveness, particularly given that the new guidelines allow the IMF to continue engaging in institutional and governance reform in the monetary and financial area. In addition, the previous IMF guidelines on conditionality also attempted to impose limits on the scope of conditionality but these were largely ignored in practice.<sup>40</sup>

### C. IMF Relations with the Citizens of its Member States

The creators of the IMF, like the creators of most international organizations, believed that it was not necessary for the IMF to have any direct interaction with non-state actors. They assumed that it would be sufficient for the IMF to interact with its member states through their representatives on the Board of Governors and the Executive Board and, in its specific operations, through the Ministry of Finance and the Central Bank. The creators also assumed that

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<sup>39</sup> See IMF, *Guidelines on Conditionality* (2002), available at <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>; Buirra, Ariel, ed. *Challenges to the World Bank and IMF: Developing Country Perspectives*, pp. 55-90. Anthem Press, 2003; Eggers, Andrew et. al., *Democratizing the IF* in ACCOUNTABILITY OF THE INTERNATIONAL MONETARY FUND, at 40 (Barry Cairn & Angela Wood, eds.) (Ashgate Publishing, 2005); Eldar, Ofer. "Reform of IMF Conditionality: A Proposal for Self-Imposed Conditionality." 8 JOURNAL OF INT'L ECON. LAW 509 (2005).

<sup>40</sup> See *Guidelines*, IMF, *Guidelines on Conditionality* (2002), available at <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>; Buirra, Ariel. *An Analysis of IMF Conditionality*, in CHALLENGES TO THE WORLD BANK AND IMF: DEVELOPING COUNTRY PERSPECTIVES, at 67-69 (Anthem Press 2003). Eggers, Andrew et al. *Democratizing the IMF*, in ACCOUNTABILITY OF THE INTERNATIONAL MONETARY FUND, *supra* note 19 at 39-40

this arrangement would provide sufficient accountability to all stakeholders because these representatives would be responsible to their governments, who in turn would be held accountable, through elections and administrative procedures, by their citizens.

These beliefs about the relationship of the IMF to non-state actors are no longer valid. Given, that the IMF now actively participates in the policy making processes of those member states that utilize its resources, it is no longer adequate for the IMF to limit its interactions to their Central Banks and Ministries of Finance. For the IMF to be an effective actor in the policy making process it must consult with both other governmental agencies and non-governmental actors. This means that the IMF is now interacting with non-state actors and the policies it is helping to make are directly affecting these non-state actors.

The basic principles of good governance which the IMF advocates so eloquently to the governments of its member states should guide its own conduct towards those directly affected by its policy-making activities<sup>41</sup>. After all, there is no obvious reason why the IMF, when it “descends”<sup>42</sup> into the national policy-making process should be less accountable to those people directly affected by its decisions than other actors in this process. This means that the IMF needs to establish a formal and direct means through which those directly affected by its actions in the national policy making process can hold the IMF accountable. It is no longer sufficient for the IMF to assume that it can rely on indirect forms of accountability to these non-state actors.

To be sure there may be practical difficulties in designing an accountability mechanism

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<sup>41</sup> For discussion of developments in and requirements for international organizational accountability, see Int'l Law Assoc. (ILA), *Accountability of International Organisations- Berlin Conference Final Report* (2004) (the author was a member of the ILA committee that drafted this report); Int'l Law Comm. (ILC), *First Report on Responsibility of International Organizations*, UN Doc. No. A/CN.4/532 (2003); ILC, *Second Report on Responsibility of International Organizations*, UN Doc. No. A/CN.4/541 (2004); ILC, *Third Report on Responsibility of International Organizations*, UN Doc. No. A/CN.4/553 (2005).

<sup>42</sup> The analogy is to the law of sovereign immunity, according to which, a sovereign will lose its immunity to being sued when it “descends” into the market place and engages in activity that by its nature is commercial. See, for example, *Alfred Dunhill v. Republic of Cuba*, 45 U.S. 682, 96, S.Ct 1854 (1974) at 1862 (quoting *Bank of the United States v. Planter's Bank of Georgia*, 22 U.S. 904, (1824) . Also see Foreign Sovereign Immunities Act Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611 (1976).

that is both suitable for an international organization and respectful of the member state's sovereignty. However, these problems have been dealt by the multilateral development banks and there is no reason why they cannot be overcome by the IMF<sup>43</sup>.

There are other problems that arise because the IMF has no formal channels through which it can communicate with non-state actors in its member states. Under the current operating principles, the IMF, out of respect for the sovereignty of its member states, only communicates with non-state actors in a member state if it obtains the consent of the government, which can result in the IMF meeting with an inadequate range of non-state actors in its member states. Consequently, it is at high risk of making policy decisions for the country on the basis of insufficient information about the likely reception that the policies will receive and their chances of success. Furthermore, the failure to establish formal mechanisms through which it communicates with non-state actors and which are independent of the government has an adverse impact on the IMF's policies and its relations with the citizenry of these countries. They come to see the IMF as unapproachable and as an elitist, ideological institution that is uninterested in learning about the views of those who will be most affected by its policies.<sup>44</sup>

Another dimension to the IMF's relationship with non-state actors is the impact of its evolving operations on its relations with the citizens of its supplier states. Although these actors are not directly affected by the actions of the IMF, many of them see themselves as being indirectly affected by the IMF's operations. They argue that it is their taxes that support the IMF and that, currently, these taxes are being spent to support policies and operating principles that they oppose. Consequently, these citizens have begun demanding changes in the operations of

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<sup>43</sup> The World Bank has established the Inspection Panel partly for this purpose. *See generally* Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994); IBRAHIM F. I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* (2nd ed., 2000); Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 411-420 (2005).

<sup>44</sup> The IMF has made some efforts to address this problem. In October 2003 it issued guidelines for IMF staff on interacting with civil society organizations. See IMF, *Guide for IMF Staff Relations with Civil Society Organizations*, October 10, 2003, *available at* <http://www.imf.org/external/np/cso/eng/2003/101003.htm>.

the IMF. The NGOs that represent them have used their access to their own governments and to the media in the industrial world to raise these concerns. These NGOs have had some success in influencing the IMF. Ironically, the influence of these NGOs in the IMF is derived in part from the disproportionate influence and power of the industrialized countries in the IMF.

#### *D. The IMF's Relations with Other International Organizations*

The original conception of the creators of the United Nations system was that each specialized agency, of which the IMF is one, would exercise its authority within the limited scope of its specialization and that the U.N. Economic and Social Council would be the forum in which their activities would be coordinated<sup>45</sup>. Each specialized agency, in part to facilitate this coordination, entered into a relationship agreement with the United Nations. This relationship agreement was ostensibly based on the fact that the specialized agency was subordinate to the United Nations. The relationship agreement between the IMF and the UN<sup>46</sup> however amounts to a declaration of independence. While it acknowledges that the IMF is a specialized agency of the UN, it relieves the IMF of any significant responsibilities to the UN and denies the UN any meaningful role in the affairs of the IMF.

The effective independence of the IMF from the UN has become a problem as the scope of the IMF's operations has expanded beyond its original monetary function. Now that the IMF is involved in such issues as law reform, poverty alleviation, labor issues, social welfare, budgetary allocations for health and education, environment, and trade liberalization, its operations are encroaching into the jurisdiction of other specialized international organizations like the World Bank, the ILO, WHO, UNICEF, UNEP and the WTO.

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<sup>45</sup> See UN CHARTER, art. 61-72 (establishing EcoSoc and setting out its purposes and functions).

<sup>46</sup> See Agreement between the United Nations and the International Monetary Fund, entered into force 15 November 1947, 109 U.N.T.S. 340.

### E. Three Legal Issues

The three legal issues are uniformity, the treatment of political considerations by the IMF and the legal nature of the standby arrangement. It is important to note that each of these issues arises from the way in which the IMF has interpreted its mandate and are not explicit requirements of the Articles of Agreements. They are each discussed below.

As was explained above, the IMF, in implementing its mandate, developed the principle of uniformity. This principle results in the IMF granting all states equal access to its financing and other services without drawing any distinctions between its member states based on their wealth, size, level of development, or importance in the international monetary system. It has had the effect of protecting the richest countries from having to grant special treatment to developing countries in the use of the IMF's general resources. It has also offered developing countries some protection against being discriminated against by the richer member states<sup>47</sup>.

The Articles of Agreement also require the IMF, when conducting its annual consultations with its member states and when designing the conditions it attaches to its funding, to pay due regard to social and political conditions in the country.<sup>48</sup> The IMF has historically interpreted this requirement as prohibiting it from being influenced by political (that is non-economic) considerations in its dealings with its member states.<sup>49</sup>

These two interpretations of its legal mandate pose a number of problems for the IMF. First, the principle of uniformity made sense when the IMF functioned purely as a monetary institution and all its member states, in fact, were utilizing its services. However, it does not

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<sup>47</sup> A good example of how the uniformity principle worked in favor of developing countries is the original decision to allocate SDRs among all member states according to their quotas rather than to limit it to the richest countries. See GOLD I, *supra* note 10, at 469-470; Mohammed, Aziz Ali, *Who Pays for the IMF?* in CHALLENGES TO THE WORLD BANK AND IMF 37 (Ariel Buira, ed.) (Anthem Press, 2003); Ferguson, Tyrone, *The SDR and Related Questions: The Origins of the Quest for Participation in Decision Making in The Third World and Decision Making in the International Monetary Fund: The Quest for Full and Effective Participation* 119-147 (Pinter Publishers 1988).

<sup>48</sup> See IMF ARTICLES, *supra* note 6, at art. IV, § 3.

<sup>49</sup> See Gold. See also IMF ARTICLES, *supra* note 6, at art. XII, § 4(c).



make sense when its services are only being utilized by its developing country member states. For example, uniformity precludes the IMF from creating mechanisms that protected the poorest and weakest states from the undue exercise of power by the richest and most powerful states in the decision-making bodies of the IMF. Another example of the problems that uniformity creates is the Poverty Reduction and Growth Facility (PRGF). When the IMF decided that it needed to create a special facility exclusively for the poorest of its member states, it could not do so with its general resources but had to create a special fund for this purpose. Since this requires specific contributions from member states, the PRGF has inevitably become politicized. Both examples serve to demonstrate that the performance of the IMF could be improved if it could distinguish between different categories of member states both in regard to its services and resources and in its governance arrangements.

Similarly, the IMF's interpretation of the requirement that it pay due regard to social and political conditions in its member countries made sense when the IMF's operations were limited to monetary issues. However, it is neither prudent nor principled for an organization that attaches conditions to its funding that relate to governance, corruption, budgetary allocations and privatization to pretend that it does not consider political and social factors in its operations. The only function that the current interpretation serves is to obscure what political considerations the IMF does view as relevant to its operations, what principles it applies in making its decisions, and what process it follows in reaching them. The lack of clarity on this issue also leaves undefined the outer limits of the IMF's specialized economic mandate<sup>50</sup>. This results in IMF decisions appearing arbitrary or influenced by the interests of its richer and more powerful member states, thereby undermining confidence in the fairness and objectivity of the IMF.

A third legal problem for the IMF arises from the IMF's characterization of the legal nature of the standby arrangement through which it provides much of its financing to its member states. The standard documentation used in these transactions are a letter of intent, usually written by the government of the member state to the IMF, and the decision of the IMF's Executive Board. For many years the IMF has argued that this arrangement is *sui generis* and is

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<sup>50</sup> See Bradlow, *supra* note 8, at 66-70.

not a legal contract<sup>51</sup>. Until a few years, the IMF relied, in part, on this characterization to avoid publicizing the member state's Letter of Intent<sup>52</sup>. It also justifies this characterization by arguing that it protects a member state that does not meet the performance criteria or other requirements of its standby arrangement from incurring any legal liability.

The IMF's formalistic interpretation of the nature of this transaction had a certain utilitarian value when the IMF functioned as the manager of the par value system, and the conditions attached to the financing included a change in the par value of a currency. It is not, however, clear that the same considerations apply to its current development functions. In fact, the IMF seems to have recognized as much. In recent years, as part of its efforts to promote transparency, it has encouraged its member states to publish its Letter of Intent.<sup>53</sup> Nevertheless, the IMF has not changed its view of the legal nature of the standby arrangement. This is problematic for two reasons. First, if the stand by arrangements, like World Bank contracts, were classified as international agreements they would be registered with the United Nations and would become public documents<sup>54</sup>. Consequently, the IMF could require, rather than encourage, member states to publish these letters of intent. This would more effectively advance the IMF's goal of promoting transparency than the current arrangements.

Second, as IMF transactions become more complex and the IMF increases the number of conditions it attaches to its standby arrangements there is a greater need for these agreements to be subjected to predictable principles of interpretation. The reason is that, when dealing with conditionalities like benchmarks or those related to governance, for example, it is possible for disagreements to arise about what constitutes sufficient compliance with the terms of the standby to justify disbursing the next tranche of the funds. If these transactions were viewed as international agreements, they would be subject to predictable public international law rules for

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<sup>51</sup> See GOLD I, *supra* note 10, at 52, 464-66.

<sup>52</sup> See *id.*

<sup>53</sup> For the text of IMF agreements, see <http://www.imf.org>. See also IMF, *The Fund's Transparency Policy* (Statement by Horst Kohler) (2002); IMF, Public Information Notice No. 02111 (2002); IMF, ANNUAL REPORT, Chapters 7-8 (April 2005) (providing details on the IMF's attempts at increased transparency for the benefit of stakeholders and other nonofficial groups).

<sup>54</sup> See U.N. CHARTER art. 102 (1945).

interpreting international agreements<sup>55</sup>. Under the current IMF treatment of standby arrangements there are no obviously applicable rules of interpretation. In addition, if they were seen as international agreements, the standby arrangements would include dispute settlement clauses that would establish clear procedures for resolving disputes between the IMF and the member state over the interpretation and implementation of the standby arrangement<sup>56</sup>.

#### IV. Problems Created by the Five Distortions

The five distortions discussed above are creating a number of problems for the IMF. The most significant of these are discussed below.

##### A. The Disconnect Between Power and Responsibility<sup>57</sup>

As was discussed above, the industrialized countries, particularly the G-7, have accumulated great power in the IMF even though they are not interested in the services of the IMF for themselves. This enables them to make policy for the IMF without having to live with the consequences of the IMF's policies and actions. Consequently, most of their own constituents have little interest in the IMF or its policies and limited incentive to support their government's financial contributions to the IMF. The governments of these countries, therefore, are free to develop their policies for the IMF without paying appropriate attention to the concerns of the developing countries or to the situations in which these policies must be implemented. In addition, this situation amplifies the voices of those Northern NGOs who have an interest in the

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<sup>55</sup> These rules would include the Vienna Convention on the Law of Treaties (U.N. Doc. A/CONF. 39/27, May 23, 1969) and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (U.N. Doc. A/CONF. 129-15) (this treaty has not yet entered into force). *Also See* Gold I, *supra* note 10, at 446-447.

<sup>56</sup> One Model that the IMF could follow in drafting dispute settlement provisions is the arbitration clause contained in the general conditions incorporated in all IBRD loan agreements and all IDA credits. *See* IBRD, *General Conditions for Loans*, July 1, 2005, Article VIII, available at [http://siteresources.worldbank.org/INTTOPGENCON/Resources/IBRD\\_GC\\_05.pdf](http://siteresources.worldbank.org/INTTOPGENCON/Resources/IBRD_GC_05.pdf); IDA, *General Conditions for Credits and Grants*, July 1, 2005, Article VII, available at [http://siteresources.worldbank.org/INTTOPGENCON/Resources/IDA\\_GC\\_05.pdf](http://siteresources.worldbank.org/INTTOPGENCON/Resources/IDA_GC_05.pdf)

<sup>57</sup> *See generally* ILA, *supra* note 52, at Part 1, § 1.

IMF and other international development issues. While many of these NGOs have utilized this situation to achieve a great deal of good, the reality is that they, like their governments, can influence the policy of the IMF without having to live with the consequences of their proposals.

One result of this situation is that proposals that impose substantial burdens on already overloaded developing country governments or that make unrealistic assumptions about the access of these countries to private financing are able to receive serious consideration<sup>58</sup>.

*B. The IMF Management and Staff's Lack of Accountability*<sup>59</sup>

As was discussed above, the IMF's existing channels of accountability are insufficient. The problems in the existing channels of accountability have three important operational implications for the IMF. The first is that the IMF staff and management are effectively operating without any accountability. However, if the IMF staff are making policy in the member states, there is no obvious reason why they should be less accountable to those affected by the policies than the other participants in the policy-making process. In fact, it undermines the IMF staff and management's credibility when they advocate accountability as an aspect of good governance in its member states but do not apply the principle to themselves.

The second is that the IMF does not provide much guidance to the staff on how they should perform their responsibilities when they act in this policy-making capacity. For example, it does not give them formal guidance on such issues as what obligations they owe to those affected by the policies, what factors they should consider in making decisions in this process, and to whom they owe their primary responsibility. The lack of such guidance makes it possible for each staff member or mission team to exercise great discretion in its operations. It also makes it hard to hold the staff accountable. In this regard it is important to note that, unlike the World Bank, the IMF does not have a publicly available operational manual that contains the

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<sup>58</sup> See, for example, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. Law No. 105-277 (1998); Meltzer Commission, Report of the International Financial Institution Advisory Commission (2000).

<sup>59</sup> See generally ILA, *supra* note 52, at Part 1, § 1.

operational policies and procedures that its staff should follow in the conduct of their duties<sup>60</sup>.

Third, the IMF is performing its policy-making functions without establishing any formal mechanisms through which those non-state actors most affected by its actions can communicate directly with the IMF. In fact, the IMF is not unaware of this problem and it often engages in informal communications with these affected parties<sup>61</sup>. However, this means that the IMF, in consultation with the government of the member state, is choosing with which non state actors it communicates and is setting the terms for this communication. A more formal procedure for communication with these non-state actors -- such as an explicit requirement that all IMF missions hold a public hearing in the country they are visiting or an explicitly recognized right to make written submissions -- would ensure that many more interested non-state actors have a meaningful opportunity to communicate with the IMF. The IMF's failure to establish such procedures contradicts the principles of participation and the need for transparent governance procedures that it advocates to its member states. It also suggests that the IMF is often making policy without having access to all the relevant information.

### C. The IMF and Other International Organizations

The expansion of the IMF's scope of operations has resulted in the IMF encroaching into the areas of responsibility of other specialized agencies. While in some cases the IMF may attempt to have communications with these organizations, there is no formal agreement designed to ensure regular communications at the staff level. The only international organizations with which the IMF appears to have formal arrangements are the World Bank<sup>62</sup> and the World Trade Organization. The result of this situation is that the IMF is making policies and taking action in

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<sup>60</sup> Daniel D. Bradlow, *supra* note 54.

<sup>61</sup> See for example, EVALUATION OF SURVEILLANCE, *supra* note 4; External Evaluation of ESAF, *supra* note 4.

<sup>62</sup> For a history of this relationship, see Jacques Polak, *The World Bank and the IMF: A Changing Relationship*, in THE WORLD BANK: ITS FIRST HALF CENTURY II 473 (1997). For recent developments in it see, IMF Press Release No. 06/65, *IMF Managing Director Rodrigo de Rato and World Bank President Paul Wolfowitz Initiate Deeper Measures to Review and Enhance IMF-World Bank Cooperation* (March 29, 2006).

these new areas without necessarily having the technical expertise to do so and without adequate consultation with the appropriate specialized agency<sup>63</sup>. It may hire consultants to work on these issues, but it does not have the in-house expertise to fully evaluate the work of the consultants. This situation will continue until the IMF either hires people with the necessary technical skills or establishes some sort of cooperative arrangement with the relevant specialized agencies. This creates a significant risk that the IMF will have inadequate policies in these areas or that it will assign a lower priority to these issues than may be appropriate in particular situations.

The UN specialized agencies' implicit acquiescence in the IMF usurping parts of their responsibilities also has adverse consequences for the functioning of the UN system as a whole. It is resulting in a concentration of power in organizations like the IMF and the World Bank to the detriment of the other specialized agencies. This exacerbates the IMF's tendency to maintain that it has the "correct" answer for the major development challenges that its member states face. The inability of other specialized agencies to effectively challenge the IMF's position increases the risk of the IMF giving wrong policy advice. Furthermore, the developing countries, because the IMF has the money, have no real choice but to follow the advice of the IMF.

#### D. Interpretation of Articles of Agreement

The IMF has not fully recognized that the expanding scope of its activities is calling into question its interpretation of its own Articles of Agreement. In particular, it raises questions about the limits on its permissible scope of activities and about the IMF's claim to be a "non-political" body. The IMF has failed to define the limits of its mandate or to stipulate a principled basis on which it determines what issues it is willing to address and which issues are outside its mandate because of their inherently political or non-economic nature. This failure subjects the IMF to the charge that it is acting in an arbitrary and capricious fashion in interpreting its articles.

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<sup>63</sup> See generally Daniel D. Bradlow & Claudio Grossman, Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF, 17 HUM. RTS. Q. 411 (1995).

## V. A Proposed Solution to the Problems Caused By the Five Distortions<sup>64</sup>

The solution proposed in this section is based on three assumptions:

1. Good governance of the international financial and economic system requires an organization like the IMF;
2. Given the current global context it is not politically possible to create a new “ideal” IMF and that therefore we need to focus on reforming the current IMF. Thus, the comprehensive reform program proposed in this section of the paper is designed to create the best IMF possible in the current global context and its likely evolution over the next few years. This means an IMF that:
  - i) has a limited but realistic mandate;
  - ii) makes a positive and coherent contribution to global economic governance; and
  - iii) that wins the confidence and support of all its member states.
3. The IMF, like all international organizations, should conform to the principles of good administrative governance that are applicable to all national and international public institutions. These principles are<sup>65</sup>:
  - a. *transparency*, which means that there should be reasonable access to information for all interested parties and that all stakeholders should be able to see and understand the decision-making process in the institution,
  - b. *predictability*, which means that the decisions and actions taken by the institution should be based on understandable principles and processes that are applied in a consistent manner,
  - c. *participation*, which means that all interested stakeholders should be able to have some input into the decision making process of the institution,

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<sup>64</sup> For an interesting overview of reform initiatives in the IMF, see Angela Wood, *Structural Adjustment for the IMF* (2001), at [www.brettonwoodsproject.org](http://www.brettonwoodsproject.org). See also generally Carin, Barry and Angela Wood, ACCOUNTABILITY OF THE INTERNATIONAL MONETARY FUND (Ashgate Publishing, 2005); Truman, Edwin M., A STRATEGY FOR IMF REFORM (Institute for International Economics, 2006).

<sup>65</sup> Benedict Kingsbury et. al., *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer-Autumn 2005, at 37.

- d. *reasoned decision-making*, which means that the institution should provide a rationale for its decisions, and
- e. *accountability*, which means that those affected by the decisions and actions of the institution, its staff, and management should be able to hold these actors responsible for their decisions and actions.

Given the complexity of the nature of the relations between international organizations and their member states, it is likely that carrying out all the proposed reforms will be a long term project. However, it is possible to divide this reform program into short-, medium- and long-term components. The distinction between these categories is based on who must act to implement the reform proposal. Thus, short-term items are those which only require action by the IMF staff and Executive Board acting on their own authority. Medium term items are those that are more politically difficult and will require the participation of the Governors of the IMF. The third category includes those items that will require an amendment to the Articles of Agreement or at least will require the agreement of each of the member states, including the agreement of their legislatures. It should be noted that the IMF has begun to implement at least some aspects of the proposed reform agenda.

*A. Short-Term Reform Agenda: Those Actions That the Managing Director and Board of Directors Acting on Their Own Authority Can Take*

These actions can be divided into the following 6 categories:

**1) Actions to Make the IMF More Responsive to Its Developing Country Member States:**

- a) Allow the member state's governor to the IMF or his/her representative to participate in any discussion in the Executive Board on the member state. This would include discussions about the staff report following the annual IMF surveillance mission to the country and about any



proposed IMF program and financing for the country<sup>66</sup>. This reform is roughly analogous to the situation in the United Nations Security Council<sup>67</sup>. In this case, states who are not members of the Council but have a direct interest in the matter being considered by the Council can ask for permission to address the Council and participate in the Security Council discussions but not its vote. For many countries the issues being discussed about the country in the IMF Executive Board can be as momentous as those that can arise in the U.N. Security Council. It should be noted that currently it can happen that a representative of a member state attends Executive Board meetings on that country. However, the proposal is to formalize this process so that it is included in the Board's bylaws and/or operating procedures. Such an action will have two beneficial effects. First, it will encourage member states to engage more actively in Board discussions on the country. Second, it will enhance the channels of communications between the IMF and its consumer member states, particularly those that do not have direct representation on its Board.

- b) Give more resources to the Executive Directors representing IMF consumer countries so that they can more effectively represent their constituents<sup>68</sup>. This includes both more staff and more financial resources.
- c) Establish formal procedures for how the IMF will consult with non-state actors during its Article IV consultations with its member countries and when developing a program for any member state that wishes to use its financing facilities. This procedure should create a meaningful opportunity for non-state actors to submit information and express their views to the IMF.
- d) Establish a formal mechanism through which non-state actors as well as civil servants who feel that they cannot safely or freely participate in any meetings that the IMF might hold with non-state actors can communicate with the IMF. This mechanism should enable such actors to make written submissions to the IMF. It would also provide a mechanism for communication with non-state actors in those states in which the government will not allow

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<sup>66</sup> See Jose De Gregorio et al., *An Independent and Accountable IMF: Geneva Reports on the World Economy* (1999).

<sup>67</sup> See, eg., Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* (2nd ed. 1993).

<sup>68</sup> The IMF has begun to provide some more resources to the African Executive Directors. See Buira, Ariel, *The Governance of the IMF in a Global Economy*, *supra* note 78, at 24-26.

the IMF to meet with non-state actors.

- e) Establish an IMF-NGO Liaison Committee in which a group of NGO representatives, elected on a regional basis, can meet on a regular basis with senior IMF staff to discuss issues of concern to NGOs and other non-state actors around the world<sup>69</sup>.
- f) The IMF should formalize its participation in the World Bank-Parliamentary Network or create its own network.<sup>70</sup>
- g) Increase the number of staff, particularly senior staff hired from consumer states.

## 2) Actions to Make the IMF More Transparent

- a) The IMF should adopt a policy of publicly releasing drafts of all official reports and policies, redacted to remove all market sensitive information, and submitting them to public comment before the final reports or policies are adopted. The IMF has improved its information disclosure policy but it usually only releases final reports and policies<sup>71</sup>.
- b) The IMF should adopt a policy of releasing the transcripts of its Board Meetings in a timely manner.<sup>72</sup>
- c) The process for selecting the Managing Director and senior IMF staff should be opened to citizens of all member states and there should be a selection process, including interviews, that is understandable to the public.<sup>73</sup>
- d) The IMF needs to develop and make publicly available a manual of all its operating policies

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<sup>69</sup> The World Bank has had such a committee for a number of years. See World Bank and Civil Society, available at <http://www.worldbank.org/civilsociety>.

<sup>70</sup> See IMF, *Report of the Working Group of IMF Executive Directors on Enhancing Communication with National Legislators* (Jan. 15, 2004), available at <http://www.imf.org/external/np/ed/2004/ecnl/index.htm>.

<sup>71</sup> For the IMF information disclosure policy, see <http://www.imf.org>. The IMF set an important precedent for releasing drafts of policies and procedures when it published its draft decision on establishing an independent evaluation office before the decision was taken by the Board to do so. Ultimately, the Board decided to establish such an office and did so in 2002. See <http://www.imf.org/external/np/ieo>. Another important precedent was the IMF's use of notice and comment period following the announcement of the new conditionality guidelines. Bradlow, *supra* note 54.

<sup>72</sup> See, for example, "A Guide to Meetings of the Board of Governors of the Federal Reserve System, available at <http://www.federalreserve.gov/boarddocs/meetins/sunshine.htm> ;

<sup>73</sup> **SUCH A SELECTION PROCESS WAS USED IN FINDING THE NEW DIRECTOR OF UNDP. SEE**

and procedures.<sup>74</sup> This publication would be analogous to the World Bank's operating manual<sup>75</sup>. While such a manual may not have been necessary when the IMF was operating under the par value system, the increased complexity of its operations makes such a manual a requirement. This publication would detail the responsibilities of the IMF staff and the procedures that they should follow in each situation. The publication of this information would enable those people affected by the IMF's actions to understand how IMF policy is made and whether the IMF has acted in conformity with its own rules and procedures in all cases.

### 3) Actions to Make the IMF More Accountable:

- a) The IMF Managing Director and the Deputy Managing Directors should be subject to a process of periodic evaluation during their term of office. In this regard, it would be useful for the IMF to consider adopting the example of the New Zealand government, which negotiates a contract with the Governor of its Reserve Bank that establishes performance standards against which the Governor's performance can be evaluated.<sup>76</sup>
- b) The publication of a manual of all the IMF's operating policies and procedures would enable those people affected by the IMF's actions to determine whether the IMF staff and management have acted in conformity with the IMF's operating rules and procedures in all cases and to hold them accountable for non-conforming actions.
- c) Establish an ombudsman at the IMF who has the power to receive and investigate complaints from any person, organization, or state, that feels that the IMF has not been acting in conformity with its mandate. This official should have the power to publish an annual report that discusses the investigations he/she has conducted and to make recommendations to the Board of Directors on how to improve the functioning of the IMF<sup>77</sup>.
- d) An independent review panel should evaluate the policies of the IMF to assess their impacts

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<sup>74</sup> Bradlow, *supra* note 54.

<sup>75</sup> See, <http://www.worldbank.org>.

<sup>76</sup> See Reserve Bank of New Zealand, *Policy Targets Agreement 2002* (agreement between the Minister of Finance and the Governor of the Reserve Bank of New Zealand), <http://www.rbnz.govt.nz/monpol/pta/>.

<sup>77</sup> See, Bradlow, *supra* note 54.

on poverty and the environment. This panel should also be charged with making recommendations on how the IMF, acting consistently with its mandate (see below) could improve its policies so that their potential to have a positive effect on poverty and the environment is maximized. The IMF Evaluation Office may be the appropriate office to perform this role<sup>78</sup>.

#### **4) Actions to Better Coordinate the IMF's Activities with Other International Organizations**

- a) Establish an independent expert panel to review the IMF's relations with other international organizations and to make recommendations on how the IMF, acting in conformity with its specialized mandate can most effectively coordinate its activities with these organizations. The IMF is beginning this process by reviewing its relationship with the World Bank<sup>79</sup>. However, it also needs to undertake similar reviews of its relations with the G-20, Financial Stability Forum, and other inter-governmental and international organizations, particularly the other specialized UN agencies.

The commission reviewing the relationship between the World Bank and the IMF should consider such options as merging the two institutions and revising the division of labor between them. For example, one option that it should consider is defining their responsibilities not according to function but according to the level of wealth of the country and the type of financing sources on which it relies. For example, the IMF would deal only with the problems of emerging markets that have access to private markets. The World Bank would have deal exclusively with countries that are dependent on official sources of funds. The issues of primary concern to industrialized countries would be addressed in other fora. The IMF and World Bank would only participate in these fora to the extent necessary to

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<sup>78</sup> See INTERNATIONAL MONETARY FUND, *Making the IMF's Independent Evaluation Office Operational* (Aug. 2000), at <http://www.imf.org/external/np/eval/evo/2000/Eng/evo.htm>.

<sup>79</sup> See IMF, IMF Managing Director Rodrigo de Rato and World Bank President Paul Wolfowitz Initiate Deeper Measures to Review and Enhance IMF-World Bank Cooperation, Press release March 29, 2006, <http://www.imf.org/external/np/sec/pr/2006/pr0665.htm>.

understand how the issues being discussed would affect their areas of responsibility.<sup>80</sup>

**5) Actions to Better Match IMF Skills to the Tasks it Performs:**

- a) Change the skill mix in the IMF to make it more suitable to the functions the IMF defines as within its mandate. This will mean hiring more people with diverse social science expertise. This action will be less necessary if the IMF has better coordinated relations with other international organizations.

**6) Legal Actions:**

- a) The Board of Directors, after a notice and comment period, should issue a decision defining the scope of the IMF's specialized mandate<sup>81</sup>. This decision, which would be part of the operational manual referred to above and would also help define the meaning of the restrictions on the IMF taking political considerations into account in its operations<sup>82</sup>. It would also help distinguish the IMF from other international organizations. The resulting clarity about the IMF's mission will enhance both the transparency and accountability of the IMF.
- b) The Board of Directors should abandon the principle of uniformity and should explicitly categorize countries according to their wealth and level of economic development.
- c) The IMF needs to clarify the legal nature of the standby arrangements.

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<sup>80</sup> For a discussion of the problems with the IMF being involved in poverty alleviation and PRGF, *see* Stiglitz, *supra* note 4; Eldar, *supra* note 19, at 515-16, 515 n. 31.

<sup>81</sup> It is not unprecedented for the IMF to use a notice and comment period before finalizing its operational policies. This was done in the case of the 2002 Guidelines on Conditionality. *See* Bradlow, *supra* note 62; *infra* note 85.

<sup>82</sup> *See* IMF ARTICLES, *supra* note 6, at art. IV, § 3.

B. Medium Term Actions: Those Actions That Require the Approval of the Board Of Governors

**1) Actions to Make the IMF More Responsive to its Developing Country Member States:**

- a) Begin the process of restructuring the Board so that it includes more developing country representatives. The steps that should be taken in the short term are:
  - i. all Board constituencies that include both consumer and supplier countries should commit to only choosing representatives from consumer countries as its Executive Directors; and
  - ii. the member states of the Euro-zone should publicly state their intention to consolidate their representation on the IMF's Board of Directors over time.<sup>83</sup>
- b) Make some adjustments in the votes of those member states whose quotas result in them being underrepresented in the deliberations of the IMF. This means there should be both an increase in the votes allocated to those member states whose quotas are not an accurate reflection. It should be noted that this is similar to the Managing Director's current proposal to increase quotas. However, it is unlikely that a change in quotas alone will lead to any significant changes in the operations of or decision making in the IMF<sup>84</sup>.
- c) Change the formula for calculating quotas so that it is based on purchasing power parity exchange rates rather than the current basis. This will have the effect of increasing the voting power of some of the emerging market countries, particularly in Asia.<sup>85</sup>

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<sup>83</sup> Edwin M. Truman, *Rearranging IMF Chairs and Shares: The Sine Qua Non of IMF Reform*, IIE Conference on IMF Reform (Sept. 23, 2005); Truman, Edwin M., *A STRATEGY FOR IMF REFORM* (Institute for International Economics, 2006).

<sup>84</sup> The IMF Managing Director acknowledged this in response to a question. See, Rodrigo de Rato, "Transcript of an Address to the Foreign Correspondent's Club of Japan", Tokyo, August 3, 2006 available at <http://www.imf.org/external/np/tr/2006/tr06083.htm> (in response to a question on the likely impact of the change in quotas and votes on IMF policy, he said "...I do not think that the institution will change its views") Also see, IMF, *The Managing Director's Report on the Funds Medium-Term Strategy* (September 15, 2006), at <http://www.imf.org/external/np/omd/2005/eng/091505.pdf>; IMF,

<sup>85</sup> Buira, Ariel, *The Governance of the IMF in a Global Economy*, in *Challenges to the IMF and World Bank: Developing Country Perspectives* 13, 19-21 (Anthem Press, 2003); Rustomjee, *supra* note 40. It is

- d) The IMF should increase the number of alternate directors that can assist each director in more effectively representing the members of his/her constituency.<sup>86</sup> In this regard, it should be noted that Trevor Manuel, the South African Minister of Finance, has proposed that there should be one Alternate Executive Director for each 8 countries in a constituency<sup>87</sup>. Since this will lead to a more unwieldy board, the IMF may need to give thought to delegating more responsibility to Board committees.
- e) The Board of Governors can approve the restructuring of Board constituencies so that the Eurozone countries are granted one seat on the Board with the combined voting power of all the Eurozone countries. This will have the effect of freeing up at least 2 seats on the Board which can then be allocate to new constituencies that are constructed to enhance developing country representation at the Board level, for example by reducing the size of the African constituencies.<sup>88</sup> While reviewing the composition of Board constituencies, it should re-evaluate, within the constraints of its Articles, the desirability of having 3 single country constituency seats on the Board<sup>89</sup>.
- f) The IMF should consider moving from its current practice of making decisions on the basis of consensus to making decisions on a basis that better reveals the preferences of those who will be most affected by the decisions.<sup>90</sup> One possibility would be for the IMF to require separate votes by those Executive Directors who represent developing countries and those who represent industrialized countries. Any decision would only be adopted if it commanded a majority of both groups.<sup>91</sup> This would improve the responsiveness of the IMF to the

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interesting to note that recently there have been suggestions that the US has been calling for the use of purchasing power parity in calculating UN contributions. *See also* Mark Turner, *China and Russia Bridle at Paying UN More*, FINANCIAL TIMES (LONDON), March 25, 2006.

<sup>86</sup> *See* IMF, *By-Laws, Rules, and Regulations*, § 14 (d). *See* art. XII. § 3.

<sup>87</sup> Wray, Quentin, *IMF revolution still a long way off, says Manuel*, BUSINESS REPORT, August 4, 2006 at 1.

<sup>88</sup> *See* Truman, *supra* note 78; Rustomjee, *supra* note 40.

<sup>89</sup> Article XII Section 3(c), for example, imposes some limits on the ability of the IMF to eliminate these seats on the Board.

<sup>90</sup> The IMF Articles of Agreement appear to offer some flexibility in voting because they only stipulate that decisions must be made “by a majority of the votes case” without defining how this “majority” is defined. *See* Articles XII Section 5(c).

<sup>91</sup> Other organizations have also adopted this strategy. *For example*, Global Environmental Facility (GEF), *Rules of Procedure for the GEF Council*, § 12, available at [http://www.gefweb.org/participants/Council/Council\\_Rules/English\\_Council\\_Rules.pdf](http://www.gefweb.org/participants/Council/Council_Rules/English_Council_Rules.pdf).

interests of both its supplier and consumer member states.

## **2) Actions to Improve the IMF's Relations with other International Organizations:**

- a) Establish formal and more extensive links between the IMF and other relevant international organizations (eg. United Nations, WTO, World Bank, UNICEF, WHO, ILO, etc.) at both the senior management and staff levels. These links should include regular meetings, staff exchanges, regular exchanges of information and reports and other publications, participation in joint missions to countries and formal agreements on the division of labor and responsibility between these organizations. It should also include a means for resolving any disputes that may arise between the parties.
- b) The IMF should renegotiate its Relationship Agreement with the UN. The objective of this exercise would be to clarify the IMF's responsibilities to the UN and to enhance the ability of the UN to ensure the IMF fully respects the jurisdiction of other specialized agencies.

### *C. Long Term Actions: Those Actions That Require Ratification By the Member States*

#### **1) Actions to Make the IMF More Responsive to Its Developing Country Member States:**

- a) The IMF should amend the Articles of Agreement to increase the basic votes to at least its original proportion in the total votes at the IMF and to facilitate future increases in both basic votes and in the quota formula.<sup>92</sup> It should be noted that the MD has proposed an increase in the basic votes as part of his governance reform proposals.
- b) Amend the Articles of Agreement to introduce a qualified voting procedure that requires that any decision can only be adopted if it is supported by both a majority of the votes cast and a majority of the member states.<sup>93</sup>
- c) Amend Article V Section 1 to require the IMF to consult more broadly with all affected

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<sup>92</sup> See Buria, *supra* note 19.

<sup>93</sup> Woods, Ngaire and Lombardi, Domenico, Uneven patterns of Governance: How Developing Countries Are Represented in the IMF, 13 REV. INT'L POL. ECON. 480, 495. (2006).



parties in its member states and not to limit its dealings with the member states to their Central Banks and Ministries of Finance.

## **2) Actions to Alter the Structure and Functions of the IMF to Recognize the Changing Responsibility of the IMF:**

- a) Implement the findings of the independent review commission that investigated the division of responsibilities between the IMF and the World Bank.

## VII. Conclusion

The IMF is suffering from serious structural distortions that have slowly developed since the Second Amendment to the Articles of Agreement. These problems create a substantial barrier to the effective functioning of the IMF. They can only be corrected through a broad ranging reform program that will overhaul the structure and operating principles of the IMF. Without undertaking this reform program, it is unclear if the IMF will ever be able to effectively make any useful contributions to solving the complex problems of poverty, inequality and inadequate governance which plague developing countries today.

**Chapter 5: Operational Policies and Procedures and an Ombudsman**  
**Prepared for**  
**Center for Global Studies, University of Victoria**  
**Study on IMF Accountability**<sup>1</sup>  
Professor Daniel D. Bradlow<sup>2</sup>

I. Introduction

This paper is about the administrative practices of a public institution, the International Monetary Fund (IMF). The principles of good governance require that the IMF's administrative practices should promote both efficient and effective IMF operations and the accountability of IMF staff and management<sup>3</sup>. The administrative practices can only promote accountability if they satisfy two conditions. First, the institution's stakeholders and the staff and management themselves must be able to determine if the staff and management's conduct conforms to the appropriate standards for measuring their performance. These standards can be divided into two categories. The first, which can be termed operational policies, establish the substantive requirements that the staff and management must meet in implementing the institution's policies. Examples of operational policies are the World Bank's environmental assessment requirements<sup>4</sup> and the International Monetary Fund's (IMF) guidelines on conditionality<sup>5</sup>. The second, which can be called operational procedures, explain how the staff and management of the institution should go about making decisions and conducting its operations. Examples of operational procedures are the steps that World Bank staff must take in conducting environmental assessments<sup>6</sup> and the IMF's guidance note on the guidelines on conditionality<sup>7</sup>. This second category is comparable to administrative procedures in national legal systems.

The second condition is that the institution must have some mechanism for dealing with cases of staff or management non-compliance with the applicable operational policies and procedures and the consequences thereof. Examples of mechanisms established for this purpose include ombudsmen, administrative tribunals and inspection mechanisms, like the World Bank Inspection Panel.

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<sup>1</sup> DO NOT QUOTE OR PUBLISH WITHOUT PERMISSION OF AUTHOR OR CENTRE FOR GLOBAL STUDIES.

<sup>2</sup> Professor of Law and Director, International Legal Studies Program, American University Washington College of Law, Washington D.C. Email: bradlow@american.edu

<sup>3</sup> For a general overview of IMF governance, see, L. van Houtven, *Governance of the IMF: Decision Making, Institutional Oversight, Transparency and Accountability* (IMF Pamphlet Series #53, 2002)

<sup>4</sup> World Bank, Operational Manual, Volume II, Safeguard Policies, *Operational Policy (OP) 4.01: Environmental Assessment*, 1999, available at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/9367A2A9D9DAEED38525672C007D0972?OpenDocument>.

<sup>5</sup> International Monetary Fund, *Guidelines on Conditionality*, 2002, available at <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>.

<sup>6</sup> World Bank, Operational Manual, Volume II, Safeguard Policies, *Bank Procedure (BP) 4.01: Environmental Assessment*, 1999, available at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/ea5916efc9250d10852565af0054d273/c4241d657823fd818525672c007d096e?OpenDocument>

<sup>7</sup> International Monetary Fund, *Operational Guidance on the New Conditionality Guidelines*, available at <http://www.imf.org/External/np/pdr/cond/2003/eng/050803.htm>.

This paper examines how well the IMF's administrative practices conform to this principle of good governance. It is divided into four sections. The first section is a review of the existing operational policies and procedures in the IMF and a comparison with the situation in the multilateral development banks (MDBs). The second section evaluates the feasibility of the IMF establishing a comprehensive set of operational procedures. The third section considers the case for establish a mechanism for holding the IMF staff and management accountable for their compliance with a comprehensive set of operational policies and procedures. The final section contains recommendations, based on the lessons learned in the previous sections of the paper. It recommends that the IMF develop a comprehensive set of formal operational policies and procedures and that it establish an ombudsman to deal with the problems created by staff and management non-compliance with these policies and procedures.

## II. The Current Situation in the IMF and Comparison with the MDBs

### A. *Current Situation in the IMF*

Operational policies and procedures are part of the “internal law” of an international organization. For current purposes, “internal law” refers to the combination of the constitutive documents of the organization and the rules and regulations that it develops to govern the way in which it implements its mandate.

The IMF's internal law consists of the following:

1. *Articles of Agreement*<sup>8</sup>: This is the international agreement, signed and ratified by all IMF member states, that establishes the powers and mandate of the IMF. The issues addressed in the Articles include the purposes of the IMF; its powers to conduct surveillance, to provide financing to its member states and to issue SDRs; its governance structure; and the rights and obligations of IMF member states.
2. *By-Laws*<sup>9</sup>: The Board of Governors adopts these By-laws pursuant to its authority under the Articles of Agreement. They are intended to complement the Articles. They deal with such matters as the conduct of the meetings of the Executive Board and the Board of Governors, the appointment of Executive Directors, voting, the ability of members not entitled to appoint an Executive Director to be represented at meetings of the Executive Board, budgets, audits and membership issues.
3. *Rules and Regulations*<sup>10</sup>: These “provide such operating rules and procedures, regulations, and interpretations as are necessary and desirable to carry out the purposes and powers contained in the Articles, as supplemented by the By-Laws.”<sup>11</sup> The IMF has 20 rules and regulations, each of which is identified by letter. They cover such issues as the meetings of the Executive Board, the mechanical aspects of transactions with the

<sup>8</sup> International Monetary Fund, *Articles of Agreement of the International Monetary Fund*, adopted July 22, 1944, available at <http://www.imf.org/external/pubs/ft/aa/aa.pdf>

<sup>9</sup> International Monetary Fund, *By-Laws of the International Monetary Fund*, adopted March 16, 1946, available at <http://www.imf.org/external/pubs/ft/bl/blcon.htm>.

<sup>10</sup> International Monetary Fund, *Rules and Regulations of the International Monetary Fund*, adopted Sept. 25, 1946, available at <http://www.imf.org/external/pubs/ft/bl/blcon.htm>

<sup>11</sup> International Monetary Fund, *Rules and Regulations of the International Monetary Fund*, Rule A-1, Scope of Rules and Regulations, adopted Sept. 25, 1946, amended April 1, 1978, available at <http://www.imf.org/external/pubs/ft/bl/rr01.htm>.

- IMF, accounting and reporting in the IMF, relations with non-member states, staff regulations and the operation of the SDR account. The rule dealing with staff is designated Rule-N. It covers such issues as appointment of staff, the fact that staff owe their loyalty “entirely” to the IMF, individual staff involvement in political affairs, publications by staff, the affirmation that staff make upon their appointment, staff grievances, and staff travel.
4. *Decisions of the Board*<sup>12</sup>: These are formal decisions of the Executive Board that establish clear policies for the IMF. They deal with such issues as the content of conditionality, Article IV consultations and the role of the IMF in governance.
  5. *General Administrative Orders*<sup>13</sup>: These are orders issued by management. They usually deal with personnel issues as opposed to operational issues.
  6. *Codes of Conduct*<sup>14</sup>: The IMF has a code of conduct for its staff and management and a separate code for Executive Directors, Alternate Executive Directors and their Advisors. Both codes deal with ethical issues related to the problem of corruption.
  7. *Guidance Documents*: These are policy papers and guidance notes that set out the IMF’s policies on specific issues. Most of these documents are operational policy documents that are intended to provide guidance on the substance of IMF policy in regard to specific activities of the IMF or to specific issues relevant to IMF operations. An example of such a document is the IMF Guidelines on Conditionality<sup>15</sup>. Recently, the IMF issued a guidance note to help staff implement the conditionality guidelines<sup>16</sup>. This is a rare example of a formal and publicly available IMF operational procedure. Most IMF operational procedures are informal and not publicly available. It is important to note it is unclear if these guidance documents establish binding standards and procedures for IMF staff or are merely precatory in intent. .

The internal law addresses four administrative issues with differing degrees of detail. The most detailed relates to the personnel policies of the IMF, including the rights and responsibilities of IMF employees. One indication of the importance that the IMF attaches to this issue is the number of mechanisms that it has established to “enforce” these personnel policies. This infrastructure, in addition, to less formal grievance procedures<sup>17</sup>, consists of the following elements:

1. *Ombudsman*<sup>18</sup>: The office of the Ombudsman deals with staff grievances. It seeks to investigate and then help resolve problems that arise between staff and management.
2. *Staff Association Committee*<sup>19</sup>: This is a committee of the Staff Association and one of its functions is to advise staff on their rights and responsibilities and to assist in the resolution of cases of staff grievance with IMF management.

<sup>12</sup> International Monetary Fund, *Selected Decisions and Selected Documents of the IMF Twenty-Seventh Issue*, December 31, 2002, available at <http://www.imf.org/external/pubs/ft/sd/index.asp>

<sup>13</sup> International Monetary Fund, Report of the External Panel, *Review of the International Monetary Fund’s Dispute Resolution System*, Nov. 27, 2001, available at <http://www.imf.org/external/hrd/dr/112701.pdf>.

<sup>14</sup> International Monetary Fund, *Code of Conduct for Staff*, July 31, 1998, available at <http://www.imf.org/external/hrd/code.htm>; International Monetary Fund, *Code of Conduct for Members of the Executive Board of the International Monetary Fund*, July 14, 2000, available at <http://www.imf.org/external/hrd/edscode.htm> .

<sup>15</sup> *Guidelines on Conditionality*, *supra*, note 4.

<sup>16</sup> *Operational Guidance on the New Conditionality Guidelines*, *supra* note 6.

<sup>17</sup> *Review of the International Monetary Fund’s Dispute Resolution System*, *supra* note 12.

<sup>18</sup> International Monetary Fund, *Ombudsperson’s Terms of Reference*, June 30, 1999, available at <http://www.imf.org/external/hrd/ombuds.htm>

<sup>19</sup> *Review of the International Monetary Fund’s Dispute Resolution System*, *supra* note 12.

3. *Administrative Tribunal*<sup>20</sup>: This is an independent tribunal on which legal experts who are not employees of the IMF serve on a part-time basis. The tribunal's function is to hear formal complaints and grievances of employees of the IMF relating to their treatment by their managers and the IMF as an institution. The Tribunal has the power to overrule management and to provide complainants with compensation for the harm they have suffered and to order their re-instatement.
4. *Ethics Officer*<sup>21</sup>: The IMF has appointed an Ethics Officer to advise all IMF officials on issues arising from the applicable code of conduct.

These mechanisms support the internal law in three ways. First, they help educate staff about what their rights are and the standards with which they can expect their managers to conform. Second, they allow employment problems to be resolved in a way which is effective, impartial and based on the merits of the case. Third, their case records help the IMF learn lessons about the nature of the employment relationship in the institution and how to improve it.

It is important to note that the IMF has established an infrastructure for implementing its personnel law that meets almost all the requirements for accountability mentioned at the beginning of this paper. It has clear policies and procedures, with the possible exception of a rule making process, and a mechanism for monitoring and enforcing compliance with these policies and procedures. Interestingly, this is the only part of the IMF internal law for which this observation is accurate.

The second administrative issue is the rules and practices applicable to the governance of the IMF. These rules and practices deal with such issues as the election of Executive Directors, the conduct of Board of Governors' and Executive Board meetings, and the accounting practices of the organization.

The third issue addressed by the internal law is operational policies. The content of these policies is less detailed than the content of the law in regard to personnel matters. The mechanisms for "enforcing" this law are also less well developed. Examples of IMF operational policies are the new conditionality guidelines<sup>22</sup>, and the policy documents on surveillance<sup>23</sup>, governance<sup>24</sup> and poverty reduction strategy papers (PRSPs)<sup>25</sup>. Until recently the only IMF mechanism for monitoring compliance with these operational policies was the Policy Development and Review Department (PDR) of the IMF. It is interesting to note that PDR, whose staff are regular IMF employees, is responsible for both the development and the review of IMF policies and their

<sup>20</sup> International Monetary Fund, *Administrative Tribunal (IMFAT)*, available at <http://www.imf.org/external/imfat/index.htm>

<sup>21</sup> International Monetary Fund, *Ethics Officer - Terms of Reference*, Feb. 28, 2000, available at <http://www.imf.org/external/hrd/eo.htm>

<sup>22</sup> *Guidelines on Conditionality*, *supra* note 3.

<sup>23</sup> International Monetary Fund, Public Information Notice (PIN) No. 03/50, April 10, 2003, Enhancing the Effectiveness of Surveillance: Operational Responses, the Agenda Ahead, and Next Steps, available at <http://www.imf.org/external/np/sec/pn/2003/pn0350.htm>; International Monetary Fund, *Surveillance: A Factsheet, April 2003*, available at <http://www.imf.org/external/np/exr/facts/surv.htm>.

<sup>24</sup> International Monetary Fund, *The Role of the IMF in Governance Issues: Guidance Note*, available at <http://www.imf.org/external/np/sec/nb/1997/nb9715.htm#I2>, International Monetary Fund, *Good Governance: The IMF's Role*, 1997, available at <http://www.imf.org/external/pubs/ft/exrp/govern/govern.pdf>.

<sup>25</sup> International Monetary Fund, *Poverty Reduction Strategy Papers (PRSP)*, last updated June 16, 2003, available at <http://www.imf.org/external/np/prsp/prsp.asp>

implementation. There is an obvious conflict of interest between the policy development and policy review aspects of PDR's work which has tended to undermine public confidence in the objectivity of PDR reviews of IMF operational policies. Recently, the IMF, in part to address this problem, established an Independent Evaluation Office<sup>26</sup>, which is independent of IMF management and reports directly to the Executive Board, to evaluate selected aspects of IMF operations. Consequently, to some extent it functions as a monitor of staff and management compliance with the applicable operational policies.

The fourth and least developed area of the IMF's internal law is its formal operational procedures. Two preliminary points must be made about this area of the internal law. First, IMF "operational procedures" can be understood as referring to the way in which the staff and management execute their responsibilities in IMF surveillance, financing, analytical, and technical assistance activities. Second, the focus of this paper is on the establishment of **formal** operational procedures, which means that they have entered into force after a drafting and approval process that results in a Board level decision, and that they are publicly available.

With one exception, the IMF does not have formal operational procedures. This exception is the operational guidance note that the IMF has adopted to assist staff in implementing the conditionality guidelines<sup>27</sup>. The IMF does have informal procedures in the form of memoranda and notes from management to the staff that provide guidance on how they should conduct IMF operations. These existing procedures are informal in the sense that they have not been presented for Board approval and are not contained in a publicly available document. One example of such an informal operational procedure, identified through references in published materials, is an operational guidance note on surveillance<sup>28</sup>.

The lack of formal operational policies means, for example, that there are no publicly available documents that external stakeholders can consult to learn how the IMF decides with whom it should consult during surveillance operations or in designing its financing arrangements or its technical assistance programs or in its general analytical and policy work, how it organizes these consultations, or what factors the staff should consider in making specific types of decisions. In addition, there are no mechanisms that stakeholders can use to hold the IMF accountable for the way in which it implements the existing informal operational policies or the one formal policy. Thus, the internal law in regard to operational procedures fails to conform to either of the two standards for good administrative practices identified at the beginning of this paper.

The IMF's failure to develop comprehensive formal operational procedures can be explained. When the IMF was responsible for managing a system of relatively fixed exchange rates, it could limit its interactions in its member states to the financial and monetary authorities. This meant that there was a limited range of officials involved in these interactions. In addition, the IMF

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<sup>26</sup> International Monetary Fund, *Independent Evaluation Office (IEO) of the IMF*, available at <http://www.imf.org/external/np/ieo/index.htm>.

<sup>27</sup> *Operational Guidance on the New Conditionality Guidelines*, *supra* note 6. The IMF has undertaken a participatory process regarding its relations with civil society and it is possible that this process will result in a second formal operational procedure.

<sup>28</sup> Footnote 28 in *Enhancing the Effectiveness of Surveillance: Operational Responses, the Agenda Ahead and Next Steps*, prepared by the Policy Development and Review Department in consultation with Other Departments (March 13, 2003) refers to an *Operational Guidance Note for Staff Following the 2002 Biennial Surveillance Review, September 2002*. However, this note is not publicly available.

staff would be sent on mission with detailed and carefully crafted instructions and would be required to refer matters back to headquarters before agreeing to any deviations from what was proposed in these instructions<sup>29</sup>. The result was that both from the IMF and the member state perspective there was limited need for formal operational procedures. Everyone involved in the discussions between the IMF and the member state knew and understood the *de facto* operational procedures.

However, following the collapse of the par value system and the expansion in the scope of IMF operations that occurred in the course of the 1980s and 1990s the nature of IMF interactions with its member states has changed<sup>30</sup>. There are at least three changes that are relevant for current purposes:

1. *The political context with which the IMF must operate has changed.* Non-state actors – corporations, NGOs, civic organizations – have begun to play a greater role in international affairs generally and in the work of the IMF in particular. This can be seen, for example, in the consultation requirements in the PRSP process, the efforts the IMF makes to meet with civil society in its missions to its member states, and in its growing informal interactions with civil society over particular policy papers of the IMF. This evolving relationship has increased the pressure on the IMF to disclose more information and was an important factor in the establishment of the Independent Evaluation Office. NGOs and civic organizations, however, continue to criticize the IMF for the lack of transparency in its operating procedures. They argue that they do not fully understand how the IMF makes operational decisions and that it appears that its decision making process is subject to undue influence from the IMF's most powerful member states.
2. *The nature of the IMF's relations with its member states has changed.* Originally the IMF was perceived as and operated like a credit union in which all participants were both contributors to the fund and users of its services. Thus, all member states understood that IMF policy and operational decisions could become directly applicable to them. However, this is no longer the case. Today, the rich countries contribute most of the IMF's funds but never use its financial or technical services while the developing countries contribute a relatively small portion of its resources but use all its services. In addition, the rich countries, both because of the weighted voting structure in the IMF and the structure of its Executive Board, are able to control the institution and make operational policy for it, even though these policies will never be applicable to them or their citizens. The developing countries, who are dependent on the services of the IMF, on the other hand find it much more difficult to participate in policy and decision making of the IMF. The result of these changes is that a power imbalance has developed in the IMF<sup>31</sup>. In this situation, the lack of formal comprehensive operational policies and procedures becomes a problem that affects the perceived fairness of IMF operations and decision making.
3. *The scope of IMF operations has expanded dramatically.* The IMF, in addition to its involvement in monetary, fiscal and exchange rate policy, is now also involved in

<sup>29</sup> R.H.R. Harper, *Inside the IMF: An Ethnography of Documents, Technology and Organizational Action* (1998) at 175-230 for a description of an IMF mission.

<sup>30</sup> See James M. Boughton, *Silent Revolution: The International Monetary Fund 1979-1989* (2001) for a history of the International Monetary Fund during much of this period.

<sup>31</sup> See Daniel D. Bradlow, *Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF*, 3 J. OF INT'L BANKING REG. 9 (2001).

advising countries and in supporting their efforts to promote better governance, and to adopt policies that are geared towards poverty reduction as well as towards macro-economic stability. The result is that a member state's Central Bank and Ministry of Finance do not have all the necessary information about the issues of interest to the IMF. Thus, the IMF needs to interact with a much broader array of governmental and non-governmental sources if it is to obtain the necessary information, and effectively design and implement its operations. All these sources can influence the success of its proposed activities. For these additional actors, the lack of clear and predictable IMF operating procedures becomes a problem because they do not know the most effective ways to engage with the IMF and cannot understand its operational needs.

The combined effect of these three changes is that the need for formal and comprehensive IMF operational procedures has become more urgent. The lack of such procedures is undermining the efficacy of the IMF and even threatening its legitimacy.

#### B. *Situation in The World Bank*<sup>32</sup>

The World Bank, unlike the IMF, has formal operational policies and procedures to guide its staff in the conduct of their responsibilities. Both of these are contained in the Bank's Operational Manual<sup>33</sup> which is available at the Bank's website. It addresses such issues as the types of products the Bank offers, the procedures Bank staff should follow in developing their country assistance strategies and other analytical work, the procedures they should follow and the factors they should consider in their project and loan preparatory work, the environmental and social safeguard policies of the Bank, the procedures applicable to loan disbursements and repayments and the staff's responsibilities in monitoring Bank-funded projects.

The Bank's operational policies and procedures consist of a number of different documents. They are<sup>34</sup>:

1. *Operational Policies (OPs)*: These are short, focused statements that are drawn from the Bank's Articles of Agreement, the general conditions, and policies approved by the Board. They establish the parameters within which Bank operations must be conducted and describe the circumstances under which exceptions to these policies are admissible and who can authorize such exceptions. In the terminology of this paper, the OPs are the Bank's operational policies.
2. *Bank Procedures (BPs)*: These are statements explaining how Bank staff should implement the policies set out in the OPs. They spell out the procedures and documentation that the staff is required to obtain. One of their purposes is ensure Bankwide consistency and quality in the implementation of the OPs. In the terminology of this paper, the BPs are the Bank's operational procedures.

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<sup>32</sup> The "World Bank" refers to the members of the World Bank Group. The members of this group are the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes.

<sup>33</sup> The Operations Manual can be viewed at [www.worldbank.org/institutional/manuals/opmanual.nsf](http://www.worldbank.org/institutional/manuals/opmanual.nsf). This manual is only applicable to the IBRD and IDA. However, many of its policies and procedures have been incorporated into the operational policies and procedures of IFC and MIGA. [See websites: [www.ifc.org](http://www.ifc.org); [www.miga.org](http://www.miga.org)

<sup>34</sup> These descriptions are drawn from the definitions of these documents contained in the Operations Manual, *id.*



3. *Good Practices (GPs)*: They contain advice and guidance for staff on implementing the OPs. The GPs contain information on such matters as the history of the issue being addressed in the OP, the sectoral context within which the OP is being implemented, the analytical framework that has informed the substance of the OP, and they provide some best practice examples.
4. *Operational Directives (ODs)*: The ODs contain a mixture of policies, procedures and guidelines. They are gradually being replaced by OPs, BPs and GPs..
5. *Operational Memoranda (Op. Memos)*: These are interim instructions designed to elaborate on issues raised in OPs/BPs or ODs. Once the instructions in Op. Memos are incorporated into revisions of the pertinent OPs/BPs, the Op. Memos are retired.

OPs, BPs and ODs, which are contained in the Operational Manual, are mandatory and staff are expected to comply with their terms in all their operational activity. GPs and Op. Memos are not mandatory and may not be in the Operational Manual.

The Bank has established a number of independent mechanisms for monitoring and ensuring staff compliance with these operational policies and procedures<sup>35</sup>. They are:

1. *Operations Evaluation Department(OED)*<sup>36</sup>: The OED is responsible for evaluating completed Bank projects and for offering the management insights into the strengths and weaknesses in Bank operations. Its activities may lead it to recommend changes in Bank operating policies and procedures.
2. *Inspection Panel(Panel)*<sup>37</sup>: The Panel, whose jurisdiction is limited to IBRD and IDA operations, is authorized to receive requests from any groups of two or more persons who claim that they have been or are threatened with harm by the Bank's failure to act in compliance with its operational policies and procedures. The Panel is authorized to investigate these complaints and make recommendations to the Bank's Executive Board on how to correct the problems caused by Bank non-compliance with these policies and procedures.
3. *The Compliance Advisor Ombudsman (CAO)*<sup>38</sup>: The CAO's jurisdiction is limited to the social and environmental aspects of IFC and MIGA operations. It is authorized to deal with complaints received from persons who claim they have been or are threatened with harm caused by IFC or MIGA funded operations, to monitor compliance with IFC and MIGA social and environmental standards and operational procedures and to give the management of these institutions advice on the social and environmental aspect of its operations.

The Bank's personnel policies and procedures have a similar structure to the IMF. It has a staff manual that informs staff about their rights and responsibilities. In addition, the Bank, like the IMF, has an Administrative Tribunal, an Ombudsman, and an Ethics Officer. Their powers and procedures are similar to those of the corresponding bodies in the IMF.

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<sup>35</sup> In the case of the IBRD and IDA these independent mechanisms are in addition to the Operations Policy and Country Services Vice Presidency, which is responsible for strengthening management systems for monitoring compliance. See World Bank, *Quality Assurance Group*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/QAG/0,,pagePK:109619~theSitePK:109609,00.html>.

<sup>36</sup> World Bank, *Operations Evaluation Department*, available at <http://www.worldbank.org/oed/>.

<sup>37</sup> World Bank, *The Inspection Panel*, available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf>.

<sup>38</sup> *Compliance Advisor Ombudsman*, available at <http://www.cao-ombudsman.org/ev.php>

### C. *Situation in Regional Development Banks*<sup>39</sup>

The African, Asian and Inter-American Development Banks and the European Bank for Reconstruction and Development follow similar approaches to the World Bank. This means that they each have operational policies and procedures to guide their staff in the conduct of their operations. All four have an evaluation department that helps monitor the implementation of these operational policies and procedures. In addition, the Asian, and Inter-American Development Banks and the European Bank for Reconstruction and Development have inspection mechanisms to monitor compliance with these policies and procedures and to deal with the harm that they cause<sup>40</sup>. Finally, each of the regional development banks has personnel policies and mechanisms for dealing with grievances that may arise under them.

#### III. Designing a Formal and Comprehensive Set of Operational Policies and Procedures for the IMF

The previous section makes clear that the IMF is an unusual international financial institution (IFI) because it does not have a set of formal and comprehensive operational policies and procedures. There are two possible explanations for this difference. The first is that the IMF's lack of such procedures is attributable to the significant operational differences that follow from the macroeconomic focus of the IMF's responsibilities and the MDBs' emphasis on project lending. However, this is not an adequate justification for the IMF's lack of a formal set of operational procedures. The scope of the IMF's interactions in those member state's that use its services tends to be no less diverse or complex than the interactions of the MDBs in these societies. In addition, the impact of an IMF operation on a particular state tends to be stronger than the impact of most MDB operations on the same state. Consequently, it has the same need for transparent and predictable procedures to guide the conduct of staff and management as the MDBs.

The second possible explanation is that the costs to the IMF of having formal operational procedures are too high. In order to adequately assess this explanation, it is necessary to determine both the costs and benefits that such procedures would create for the IMF.

#### A. *The Benefits*

There are five significant benefits that would accrue to the IMF from having a set of formal operational procedures. They are:

1. *Effective Guidance for Staff*: Formal operational procedures would provide staff and management with a clearer understanding of what is expected from them during IMF

<sup>39</sup> For information on the operational policies and procedures of these banks, see <http://www.iadb.org/exr/english/POLICIES/policies.htm> for the Inter-American Development Bank; see <http://www.adb.org/Development/policies.asp> and <http://www.adb.org/Documents/Manuals/Operations/default.asp?p=policies> for the Asian Development Bank; see [http://www.afdb.org/projects/policies\\_and\\_procedures.htm?n1=3&n2=1&n3=0](http://www.afdb.org/projects/policies_and_procedures.htm?n1=3&n2=1&n3=0) for the African Development Bank; see <http://www.ebrd.org/about/index.htm> for the European Bank for Reconstruction and Development.

<sup>40</sup> Asian Development Bank, *Inspection Function*, available at <http://www.adb.org/Inspection/default.asp>; European Bank for Reconstruction and Development, *Independent Recourse Mechanism*, available at <http://www.ebrd.org/about/policies/irm/irm.pdf> The Inter-American Development Bank does not mention its Investigation Review Mechanism on its website.

- operations. This should facilitate staff accountability and provide a basis for improving staff performance. It should educate those with whom they interact on the limits of staff's decision-making authority. This, in turn, could help promote member state "ownership" of IMF-funded programs. Finally, these procedures may positively affect staff willingness to be innovative by giving them clear guidance on where there is scope for innovation.
2. *Predictability in the Conduct of IMF Operations*: Formal operational procedures would provide greater predictability to IMF operations than informal procedures which can relatively easily be changed. This will enhance both stakeholder confidence in dealing with the IMF and IMF staff confidence in their interactions with outside stakeholders.
  3. *Transparency in IMF Decision-making and Action*: Formal procedures would make it easier for outsiders to understand how the IMF does its work and the factors that it considers in making its decisions. This should help clarify the scope of IMF responsibilities and differentiate them from the responsibilities of member governments in their dealings with the IMF. Increased transparency may also reduce suspicion that the IMF management is unaccountable and has too much discretion. It may also clarify the ways in which the IMF is susceptible to pressure from powerful member states.
  4. *Accountability*: Formal operational procedures will promote accountability in two ways. First, they will give outside stakeholders—member states and non-state actors—a principled basis on which to hold IMF staff and management accountable. This should help depoliticize the issue of IMF operational accountability for specific operations and decisions. Second, formal procedures will help the Board members to hold IMF staff and management accountable.
  5. *Lessons Learned*: Formal operational procedures will also make it easier for the IMF to learn about the actual impact of its operational practices and the strengths and weaknesses of its operational policies and procedures and to improve them over time.

## B. *The Costs*

The IMF would incur the following costs from having formal operational procedures:

1. *Increased Bureaucratization*: Formal operational procedures can result in IMF staff developing a cautious approach to their work in which they seek to do everything "by the book". There is also a danger that the rules result in an increase in reporting and paperwork requirements that reduce staff productivity.
2. *Loss of Flexibility*: It is impossible for the drafters of the procedures to anticipate all the situations in which they need to be applied. Thus, the procedures can result in a certain loss of operational flexibility because they cannot be easily adapted to specific conditions in which they actually must function. This in turn may cause the IMF, once again, to be seen as imposing a "one size fits all" approach on its member states.
3. *Disincentives for Innovation*: Formal procedures can increase the risk that staff and management will be sanctioned for being innovative in ways that do not strictly comply with strict interpretations of the procedures. Since the issues with which the IMF deals do not have clear answers and their resolution requires creativity, any disincentive to innovation is a potentially significant cost for the IMF. The cost however is mitigated by the fact that it is not in the IMF's interest for the staff and management to have too much scope for uncontrolled innovation and the procedures can establish the limits on their scope for permissible ingenuity.

### C. *Balancing Costs and Benefits*

There are four reasons why the benefits of having formal operational policies and procedures outweigh the costs for the IMF. First, such procedures help outside stakeholders particularly those in developing countries, engage more effectively with the IMF. This is particularly relevant useful given that the IMF advocates increased participation in the PRSP process, increased country ownership of IMF supported programs and transparency, participation and accountability as key elements in good governance for its member states. Second, transparent and predictable operational procedures will increase public understanding of the IMF's operations, including of the costs associated with more transparent operating procedures. In fact, it is the stakeholders in those member states that are most directly affected by the operations of the IMF who currently have the least ability to learn about and understand the operating policies and procedures of the IMF and who would benefit most from having formal operational policies and procedures. Third, the procedures will promote IMF accountability. Fourth, the policies and procedures will improve internal IMF governance at a time when IMF operations are growing more complex. All these benefits would be earned in areas where the IMF is particularly weak: public confidence and trust in the IMF and the efficacy of its operations is declining and there is a growing mismatch between the IMF's rhetoric on good governance and its own governance practices.

Given these significant gains, the question of whether or not the IMF should adopt a set of formal operational rules and procedures seems to boil down to two questions:

1. Can the IMF draft operational policies and procedures that maximize the benefits while minimizing the costs associated with such policies and procedures?
2. What should the scope of the policies and procedures be?

Each of these questions is answered below.

#### *C.1: Drafting Operational Policies and Procedures*

The primary drafting challenge is to strike the appropriate balance between the rigidity needed to provide stakeholders with the desired predictability and transparency in IMF operations and the flexibility needed for management and staff to adapt the policies and procedures to the variety of situations in which they must operate. There is no theoretical reason that this cannot be done. In fact, it is the type of drafting challenge that government draftspeople confront all the time.

In the IMF's case the goal is to draft operational policies that are sufficiently detailed that they provide all stakeholders with enough predictability and information to understand the policies of the IMF and their operational goals when they implement the policies. Thus, the operational procedures must identify the categories of information staff need to gather in order to perform their operational responsibilities; the factors they should consider, the people they should consult and the steps they should follow in making operational decisions. In addition, the procedures should clearly explain how staff can seek exceptions to the policies and procedures. There are two good models that the IMF could use in this drafting exercise. The first is the IMF's own New Conditionality Guidelines and its Operational Guidance on the New Conditionality Guidelines<sup>41</sup>.

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<sup>41</sup> *Guidelines on Conditionality*, *supra* note 4, *Operational Guidance on the New Conditionality Guidelines*, [supra](#) note 6.

The second is the Bank's three related operational documents --OPs, BPs and GPs. These examples clearly demonstrate that it is possible for the IMF to develop operational policies and procedures that combine predictability and transparency in IMF operations with operational flexibility.

### *C.2: The Scope of the Operational Rules and Procedures*

There are two aspects to this issue. First, the operational policies and procedures should address how the IMF conducts its operations and makes decisions relating to all aspects of its work. This means that they should cover all aspects of IMF surveillance, the design, negotiation and implementation of IMF financial programs, IMF technical assistance, policy and analytical work and its relations with other organizations.

Second, the IMF needs to establish a transparent and predictable rule-making procedure that will govern how the IMF develops all its operational policies and procedures. The extensive consultations that preceded the adoption of the current guidelines on conditionality and of the work plan of the Independent Evaluation Office are important precedents in this regard. However, in both cases this impressive process was "revealed" to all interested parties, thereby leaving interested parties uncertain as to whether these were harbingers of new operating procedures or exceptions to the normal procedures granted at the IMF management's discretion. The IMF could enhance confidence in its own governance by establishing a predictable rule-making procedure that it will always follow when developing new operational policies and procedures.

## IV. The Need for an Ombudsman in the IMF

In order for operational policies and procedures to be effective they need to be supported by a mechanism capable of monitoring and promoting compliance with them. One indication of the importance of such mechanisms is that the MDBs either have or are considering establishing an inspection mechanism that is empowered to investigate charges of non-compliance with their operational policies and procedures<sup>42</sup>.

There are a number of benefits that such mechanisms offer to IFIs. First, the mechanisms can help raise the profile of the operational policies and procedures within the institution. In this regard the experience of the World Bank's Inspection Panel, is instructive. The risk that Bank projects may become the object of Panel investigations has increased staff sensitivity to the Bank's operational policies and procedures and their interest in acting in complying with them. In fact, it has led to a phenomenon known as "Panel-proofing" a project, which means making sure that the project is sufficiently in compliance with the policies and procedures that it will survive any challenge in the Inspection Panel.

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<sup>42</sup> See World Bank, *The Inspection Panel*, available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf>; International Finance Corporation (IFC) / Multilateral Investment Guarantee Agency (MIGA), *Office of Compliance Advisor/Ombudsman*, available at <http://www.cao-ombudsman.org/ev.php>; Asian Development Bank, *Inspection Function*, available at <http://www.adb.org/Inspection/default.asp>; European Bank for Reconstruction and Development, *Independent Recourse Mechanism*, available at <http://www.ebrd.org/about/policies/irm/irm.pdf>; Inter-American Development Bank, *Independent Investigation Mechanism*, available at <http://www.iadb.org/cont/poli/mecanism.pdf>; The African Development Bank is expected to establish such a mechanism.

Second, the mechanism can become a vehicle for solving problems that have arisen in IFI operations. Such problem-solving capability offers obvious advantages in terms of the quality of the operations of the institution and in term of public relations. The IFC and MIGA's Compliance Advisor Ombudsman (CAO) offers the best example of an effective problem-solving mechanism.

Third, the mechanism offers the institution an opportunity for learning lessons about the actual impact of its operations. Since these mechanisms are triggered by complaints from those who have been most directly affected by the operation, they have a unique perspective on the operations of the institution. Consequently, its findings and the expertise it develops over time can offer the institution some important insights into the strengths and weaknesses of its operations and into what feasible improvements can be made to both the policies with which its operations must comply and the procedures that it should follow in designing and implementing these operations.

Fourth, the mechanism is helpful in differentiating the responsibilities of the international financial institution from those of other actors in its operations. This is a particularly useful benefit for an institution like the IMF which has to be careful to avoid unduly interfering with the sovereignty of its member states. The mechanism, whose mandate is limited to monitoring issues arising under the institution's operational policies and procedures, can focus just on the operations of the institution without having to investigate the activities and decisions of its member states. The evolution in the functioning of the World Bank's Inspection Panel shows both the sensitivity and importance of this issue and the ability of such mechanisms to enhance institutional accountability without unduly interfering with the sovereignty of its member states<sup>43</sup>.

The above suggests that the efficacy of the IMF's operational policies and procedures would be enhanced if it established a mechanism that was empowered to monitor their implementation. There are a number of forms such a mechanism could take. For example, the IMF could follow the examples of the IBRD and IDA, and the regional development banks and establish an inspection mechanism<sup>44</sup>. Alternatively, it could follow the example of the IFC and MIGA and establish a compliance advisor and ombudsman arrangement. A third possibility is to follow the example of many national governments and the European Union and appoint an ombudsman<sup>45</sup>.

Based on the experience of all these examples, it is possible to deduce certain general principles that should be observed by any IFI interested in establishing a mechanism to monitor the implementation of its operational policies and procedures. Any mechanism that fails to incorporate these principles is likely to be viewed as deficient by at least one of the IFI's stakeholders – member states; the Executive Directors, management

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<sup>43</sup> See Ibrahim F.I. Shihata, *The World Bank Inspection Panel: In Practice* (2d ed. 2000); Daniel D. Bradlow, *Lessons From the NGO Campaign Against the Second Review of the World Bank Inspection Panel: A Participant's Perspective*, 7 ILSA J. INT'L & COMP. L. 247 (2001).

<sup>44</sup> See, *supra*, note 40. The United Nations also has an inspection mechanism, although this is not triggered by outside complaints. See, United Nations, *Joint Inspection Unit (JIU)*, available at <http://www.unsystem.org/jiu/>.

<sup>45</sup> European Ombudsman, available at <http://www.euro-ombudsman.eu.int/home/en/default.htm>.

and staff of the IFI; and non-state actors directly affected by the operations of the IFI and their representatives.

These principles are:

1. *Role of Non-State Actors*: It is absolutely essential that the mechanism be triggered directly by non-state actors who claim that they have been harmed or threatened with harm by the failure of the IMF to comply with its operational rules and procedures.
2. *Clarity of Purpose*: The mechanism can be designed to serve one or more of three different functions. These functions are:
  - a. **Compliance Review**: This involves determining if the IFI staff and management are satisfying the requirements of all the applicable operating policies and procedures in a particular IFI operation. The World Bank's Inspection is a good example of an inspection mechanism whose primary focus is compliance review.
  - b. **Problem Solving**: This involves resolving problems that arise in the course of an IFI operation and that have been identified by affected people as causing them or threatening them with harm. The IFC and MIGA's CAO is a good example of a problem solving mechanism.
  - c. **Lessons Learned**: This refers to the ability of the mechanism to contribute to the lessons that the IFI can learn about the efficacy of its operational rules and procedures. Given its unique perspective, the mechanism is in a position to identify trends within the implementation of operational policies and procedures that are unlikely to be obvious to other IFI actors. This function is not well developed in most of the mechanisms in the MDBs. The European Union's ombudsman is an example of a mechanism that performs a "lessons learned" role.

These three purposes are not necessarily mutually exclusive and it is possible for one inspection mechanism to perform more than one of these functions. In the case of the IMF, the two most relevant functions will be the compliance review and lessons learned function. It is more difficult for the mechanism to perform a problem solving function because of the complexities and multi-faceted nature of IMF operations. However, this does not mean that it should not be given the ability to solve problems when it can appropriately do so.
3. *Limited Jurisdiction*: The mechanism's jurisdiction must be limited to any case arising out of an allegation of non-compliance by the IFI staff and management with the IFI's operational policies and procedures. This helps ensure that the mechanism does not encroach onto the sovereignty of the institution's member states.
4. *User Friendliness*: Since the mechanism is intended to be available to those who have been adversely affected by the operations of the IFI, its procedures for receiving and handling complaints should be as easy for the affected people to understand and utilize as possible. One way to make the mechanism user

friendly is to limit the number of requirements that a complaint must satisfy before the mechanism begins to address the substance of the matters raised in the complaint. The Ombudsman part of the CAO is a good example of a user friendly mechanism. An example of a mechanism that is not particularly user friendly is the World Bank Inspection Panel<sup>46</sup>. One consequence of its formal procedures is that the management of the World Bank has been able to use the Panel procedures to challenge the eligibility of complainants and the suitability of complaints for investigation. This has forced affected people to rely on relatively sophisticated advisors in preparing their complaints. In some cases, it has also contributed to an unnecessary politicization of the complaint.

5. *Independence*: The mechanism should be independent of the management of the IFI and should report directly to its Executive Board. In addition, the terms and conditions of employment of the mechanism's personnel should be designed to promote and protect its independence. Finally, the budget of the mechanism should support its independence.
6. *Powers of Investigation*: The mechanism must have access to all the persons, documents, records, and locations that it deems necessary to conduct a complete investigation.
7. *Impartiality and Competence*: This means that the mechanism's recommendations, findings, and conclusions must be supported by facts and, well reasoned arguments. In addition, the mechanism's investigations should be sufficiently comprehensive to demonstrate that it has gathered all the relevant information and has used this information in its reports.
8. *Efficiency and Cost Effectiveness*: This means the mechanism should be able to deal with complaints relatively quickly and at a cost that does not impose an undue burden on the IFI.
9. *Effective Management of Issues Presented*: This means that the mechanism must be able to demonstrate to all stakeholders that its findings and recommendations are taken seriously by the IFI and that the IFI will either implement the mechanism's recommendations or explain its failure to do so. One important consequence of this principle is that the mechanism should be given the power to monitor the implementation of the results of an inspection process.
10. *Transparency*: This means that the mechanism must publish the results of its investigations and must publish an annual report.

#### *Application of the Principles to the IMF*

Given the complexity of the IMF's operations, it needs a mechanism that is flexible, efficient, effective and easy to use. It also needs a mechanism that can both monitor staff and management compliance with its operational policies and procedures and can provide the IMF with a lessons learned capability. The mechanism should also, where appropriate, be able to help those directly

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<sup>46</sup> See, *supra*, note 41.



affected by the IMF's decisions and operations either resolve their problems with the staff and management, or explain to them why a resolution is not possible.

The model that is most suited to the IMF's needs is an ombudsman. Historically an ombudsman was created for the purpose of receiving complaints from people who believed that they had been harmed by the failure of an institution to comply with its own policies and procedures<sup>47</sup>. It was also expected to report to higher authorities on how well the institution was performing its responsibilities and complying with its policies and procedures. An ombudsman was designed to be flexible and relatively informal in its approach to the issues brought to it. This means that it can perform its function with minimal procedural requirements. The ombudsman is also well suited to help educate the institution and the authorities to which it reports on the problems that are arising in its operations and on identifying ways in which it can improve its operations.

The following are the essential characteristics that should be exhibited by an IMF ombudsman charged with monitoring its operational policies and procedures:

1. The ombudsman must be appointed by and report directly to the IMF's Executive Board. He/she should have the status of a senior official of the IMF.
2. The ombudsman must be given all the indicia of independence. This means he/she should not have to report to IMF management or to receive any authorization from management regarding its budget or personnel decisions, He/she must be appointed to a single non-renewable term of office from which he/she can only be removed by the Executive Board for cause. The ombudsman should also have full control over all staff appointments in the ombudsman's office, and assured budgetary support.
3. The ombudsman must be able to receive any complaint relating to the IMF's operations from any person who believes they have been or are threatened with harm caused by the failure of IMF staff or management to comply with the IMF's operational policies and procedures.
4. The ombudsman must have the exclusive power to review the complaint and to decide whether to investigate the complaint or to reject it.
5. If the ombudsman decides to accept the complaint for investigation, he/she must have complete powers of investigation, which includes access to all the IMF staff and records that he/she deems relevant to the investigation.
6. The ombudsman must be required to make a report, which is publicly available, to the Executive Board for each case for which he/she conducts a full investigation.
7. The ombudsman must publish an annual report in which he/she must report on all the complaints he/she received and on how they were handled. In addition, the ombudsman, in the annual report, must comment on the lessons he/she believes can be learned about the IMF's operational policies and procedures from the cases he/she has received and, if appropriate, make suggestions on how to improve these rules and procedures.
8. The ombudsman must have the authority to monitor the implementation of the outcome of any investigations he/she conducts.

### *Example of Operation of IMF Ombudsman*

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<sup>47</sup> For information on ombudsmen generally, see Ibrahim al-Wahab, *The Swedish Institution of Ombudsman* (1979); World Bank, PREM Notes, No. 19, April 1999, *Using an Ombudsman to Oversee Public Officials*, available at <http://www1.worldbank.org/prem/PREMNotes/premnote19.pdf>.

The following example may help clarify the benefits that an ombudsman could provide to the IMF: Assume that the IMF has proposed that a country seeking its financial support cut its budget deficit as a condition for this support. Under the current situation, groups opposing the government's proposed cuts to government expenditures or proposed increased taxes could not easily establish whether the government alone shares responsibility for this action or if the IMF staff share some of the responsibility because, for example, they failed to consult all relevant parties or failed to take certain pertinent information into account in establishing the challenged condition. This is because these groups could not easily determine if the IMF staff have complied with IMF operational policies and procedures in establishing this condition (which would set out with whom the staff should consult and the variables that the IMF should consider in making its conditions) and would have no formal channels through which to address their concerns about the IMF staff. The result may be that the groups will either politicize their concerns so as to get the attention of the IMF Board of Director or that they will work to undermine the government's policy, thereby, also undermining the potential success of the IMF's operation.

If there were formal IMF operational policies and procedures and an IMF ombudsman, the affected groups could determine whether or not the IMF staff had complied with the applicable policies and procedures and could bring their concerns to the ombudsman. This person could then review the record to determine if the IMF complied with its operational policies and procedures. If he/she determined that there was compliance, he/she could provide the complainant and the IMF Board and management with a reasoned explanation for his/her finding. Alternatively, if the ombudsman found there was non-compliance, he/she would provide the IMF Board, the management and the complainants with a reasoned explanation for this finding. This would allow the Board, based on a well reasoned record and finding and the management's response to this record, to decide, based on the merits of the case, how they wish to address the situation. In either case, the findings of the ombudsman would assure the complainants that their concerns had been addressed on their merits at a high level in the IMF. While this may not bring them their desired outcome, it should satisfy them that their concerns have been taken seriously and that they have been treated fairly by the IMF.

This example highlights a number of important points. First, the ombudsman's mandate is limited to reviewing the IMF staff and management's compliance with the IMF's formal operating policies and procedures. He/she cannot comment on the actions of the government concerned. Second, the ombudsman's authority rests only on his/her persuasive powers, as he/she has no independent powers of enforcement. Thus, the efficacy of the ombudsman depends on maintaining the confidence of all relevant stakeholders—both those inside and outside the IMF. It is for this reason that the independence of the ombudsman from all stakeholders is of such critical importance. Third, the ombudsman's findings and decisions will help provide all interested persons with empirical data on the actual implementation of its operational policies and procedures. These lessons can help contribute to both their improvement over time and to better understanding among all interested parties about the challenges the IMF faces in its operations. Fourth, there is no part of the current IMF structure that can readily play the role of the ombudsman, even though there are two existing units that play a role in policy review and evaluation. The Policy Development and Review Department, both because it reports to management and because of its role in developing policies is not a credible independent monitor of the implementation of the policies it develops and helps review. The Independent Evaluation Office, under its current mandate has the requisite independence but is limited to reviewing

completed operations. Consequently, without an expansion of its mandate, it cannot deal with cases arising from ongoing operations, which would be the normal source of cases for an IMF ombudsman.

## V. Conclusion

The complexity and range of IMF operations has grown to the point where it is no longer feasible for it to limit its interactions in its member states to officials in the Central Bank and the Ministry of Finance in those countries. It now regularly consults with a broad range of government officials, legislatures and actors in civil society in those member states that utilize its services. This means that the number and range of actors with which the IMF is engaged as grown beyond the point where its operating practices can be kept informal and known only to a relatively small number of experts. Consequently, it needs to develop a set of operational policies and procedures to guide its interactions with all these actors and to guide its decision making. The lack of a comprehensive set of such policies and procedures renders IMF operations unduly opaque and undermines stakeholder confidence in its fairness and impartiality.

While the creation of such operational policies and procedures do impose some costs on the IMF, they can be minimized through the policy and procedures design and drafting process. In addition, these costs are more than compensated for by the benefits that they will bring to the institution.

It is not sufficient for the IMF to merely promulgate such policies and procedures. It must support the implementation of these operational policies and procedures by establishing an independent ombudsman with the authority to investigate complaints from directly affected people and groups about staff and management non-compliance with the policies and procedures.

Both of these steps are required if the IMF is to demonstrate that it practices what it preaches about good governance.

## **PART III**

### **ARTICLES ON ACCOUNTABILITY IN INTERNATIONAL FINANCIAL INSTITUTIONS**

International organizations and Private complainants: The case of the World Bank Inspection Panel

Private complainants and International organizations: A comparative study of the Independent Inspection Mechanisms in International Financial Institutions

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ARTICLE: International Organizations and Private Complaints: The Case of the **World Bank Inspection Panel**

**NAME:** Daniel D. **Bradlow** \*

**BIO:**

\* Associate Professor, Washington College of Law, The American University. The author wishes to thank Professors Tom Farer, Robert Goldman, Claudio Grossman, Diane Orentlicher, Thomas Sargentich, and Herman Schwartz for their observations and suggestions on this Article and on the author's proposal for a **World Bank** Ombudsman; Marcos Arruda, Marcia Burdette, John Clark, Joe Eldridge, David Gillies, Jo Marie Griesgraber, David Hunter, Ted van Hees, and Lori Udall for their help in promoting the author's proposal for a **World Bank** Ombudsman; and Monica Vallada and Sabine Schlemmer-Schulte for their research assistance. The author also pays tribute to all the people around the world, including **World Bank** officials, who campaigned for the creation of this **Inspection Panel**.

**LEXISNEXIS SUMMARY:**

... The three-member **Panel**, which will be independent of Bank staff, will be appointed by, and report directly to, the Executive Directors. ... Moreover, critics contend that the Bank's staff has used these procedures, which are not well understood by outsiders, along with the Bank's great respect for the borrower state's sovereignty to avoid being held accountable by either the Executive Directors or those individuals most directly affected by Bank operations. ... The primary benefit of this proposal was that it would have enhanced the Directors' oversight of the Bank's staff. ... (d) The **Panel** is required, before making its recommendation, to consult with the Bank's legal department regarding rights of the Bank that might be implicated by the request for an **inspection**, and with the borrower and the Executive Director representing the borrower. ... The Resolution also leaves unresolved the issue of which party, either the **Panel** or the Bank's staff, has the power to determine which records are "pertinent" to a particular investigation. ... Those private actors who contended that they had been harmed by the actions of the international organization were expected to have the member state, of which they were a citizen, bring a complaint to the international organization on their behalf. ...

**TEXT:**  
**[\*553]**

I. Introduction

On September 22, 1993, the Executive Directors of the **World Bank** decided to establish an independent **Inspection Panel (the Panel)**. <sup>1</sup> The three-member **Panel**, which will be independent of Bank staff, will be appointed by, and report directly to, the Executive Directors. <sup>2</sup> It will have the power to investigate complaints received from any group of private complainants who allege that they have been directly and adversely affected by the failure of the International Bank for Reconstruction and Development or the International Development Association (known, collectively, as the Bank) to comply with its operational policies and procedures. <sup>3</sup> In addition, the **Panel** will advise the Bank's Executive Directors on which complaints to investigate. The Bank will make publicly available the complaints that the **Panel** receives, the **Panel's** findings and recommendations, and the subsequent decisions of the Executive Directors. <sup>4</sup> The Bank will also publish the **Panel's** annual report to the President and Executive Directors of the Bank. <sup>5</sup>

The creation of the **Panel** is an important legal development. It is the first forum in which private actors can hold an international organization directly accountable for the consequences of its failure to follow its own rules and procedures. <sup>6</sup> The Executive Directors' decision, therefore, constitutes the first formal acknowledgement that international organizations have a legally significant non-contractual relationship with private parties that is independent of either the organization's or the private actor's relationship with a member state.

The Executive Directors, in their decision to create an independent **inspection panel**, have carefully defined the scope and nature of the relationship between the Bank and private actors. There are three aspects to this relationship. First, the Executive Directors have decided that the Bank's legally significant relationship is limited to those private actors who can demonstrate that their rights or interests have been, or are likely to be, directly affected by Bank operations. <sup>7</sup> Second, the Executive Directors have determined that private actors can hold the Bank publicly accountable for its conduct in this relationship. Pursuant to this determination, they have provided private actors with a forum for raising qualified **[\*555]** complaints about the Bank's conduct. <sup>8</sup> Third, the Executive Directors have defined the legally significant aspect of this relationship to be the manner in which the Bank implements its mandatory operating policies and practices. <sup>9</sup> These rules and procedures cover all aspects of the Bank's operations, including such issues as participation by non-governmental actors in Bank operations, <sup>10</sup> the treatment of involuntarily resettled communities, <sup>11</sup> the Bank's treatment of indigenous peoples, <sup>12</sup> and the procedures to be followed in undertaking environmental impact assessments. <sup>13</sup>

Due to the broad scope of the Bank's operating rules and procedures, the **Panel's** findings and recommendations have the potential to influence substantive areas of international law. For example, the **Panel's** findings on the adequacy of the Bank's actions in implementing its policies and procedures for dealing with indigenous peoples, involuntarily resettled communities, and other non-governmental actors directly affected by Bank operations could influence the development of international human rights law. Similarly, the **Panel's** findings regarding the Bank's rules for conducting environmental impact assessments will be of interest to international environmental lawyers.

The work of the **Panel** should also influence the development of international administrative law. Currently, this branch of law is primarily concerned with the internal rules of international organizations and the adjudication of disputes between these organizations and their respective employees. <sup>14</sup> The Bank's creation of the **Panel** could expand the scope of international administrative law to include the adjudication of disputes between international organizations and private parties regarding an international organization's compliance with its own internal operating rules and procedures. **[\*556]**

In the course of this newly created complaint process, the complainant, the **Panel**, and the Bank will each need to advance an interpretation of the operational rule or procedure that governs the contested Bank action. Because the Resolution provides that, at a minimum, both the complainant and the **Panel's** interpretations will become public, the work of the **Panel** should stimulate public debate over Bank rules and practices. In addition, the **Panel's** work should spark debate over the process the Bank follows in formulating its rules and procedures. Consequently, over time, the **Panel's** influence can be expected to extend beyond the adjudicatory aspects of international administrative law to include the Bank's own rule-making procedures.

The work of the **Panel** should also have a positive influence over the overall efficiency and governance of the Bank. By providing Bank management with timely, independent, and objective information about the actual and potential effects of its operations, the **Panel** should improve management's ability to identify and correct, or at least mitigate, problems caused by on-going operations. It will also enhance the ability of those private actors most directly affected by Bank operations to communicate with decision-makers within the Bank. This may ultimately encourage the Bank and its staff to be more responsive to the needs and concerns of those touched by Bank operations. In short, by increasing the transparency of Bank operations and the accountability of the Bank's staff, the **Panel** should improve the Bank's ability to alleviate poverty and promote sustainable development. <sup>15</sup>

This Article will first describe the developments that resulted in the Bank's adoption of this resolution. It will then describe and analyze the **Panel's** powers and procedures. This discussion includes several proposals for strengthening the **Panel's** procedures and some suggestions for making effective use of the **Panel**. The final section will discuss the legal and operational significance of the **Panel** in greater detail. [\*557]

## II. Developments Leading to the **Panel**

The general mandate of the Bank is to promote "development." <sup>16</sup> Each succeeding generation of Bank leaders, in seeking to define this mandate in light of the perceived needs of the times, has expanded the scope of the Bank's operations. <sup>17</sup> The result is that the operations of the Bank now include the financing of both discrete investment projects and of programs and projects that include such broad objectives as capacity building, poverty alleviation, popular participation in development, and environmentally sustainable development. In addition, the Bank makes adjustment loans by which the Bank extends credits in exchange for the borrower's commitment to adopt certain policy measures that are designed to produce structural changes in the borrower's economy. <sup>18</sup> These measures may address such issues as trade and investment liberalization, public sector management, the transparency and accountability of government administration, the administration of justice, and the creation of social safety nets to [\*558] protect vulnerable population groups from the effects of adjustment. <sup>19</sup>

Each new expansion has complicated the Bank's decision-making processes. In particular, the division between the borrower's and the Bank's respective responsibilities for Bank-funded operations has become blurred. When Bank operations were limited to funding the construction of discrete development projects, the Bank's lending decisions were based on technical and financial considerations relevant to each individual Project's feasibility. These decisions were based on the Bank staff's analysis of a given project. <sup>20</sup> The Bank treated the trade-offs between different policy objectives and the interests of different social groups in a country as the sovereign prerogative of borrower states. As such, the Bank formally viewed these issues as external to its own decisions regarding a

project's feasibility and, ultimately, to the Executive Directors' decision to fund the project. <sup>21</sup>

The evolution of the Bank's operations has made it increasingly difficult for the Bank to maintain such formal distinctions. For example, it is not possible to evaluate a project designed to meet the needs of the rural poor without making some judgments about the acceptability of the project's associated trade-offs between the interests of urban and rural communities, between rich and poor rural population groups, and possibly between men and women. The Bank also needs to make some assessment of the priorities that should be attached to the borrower state's various development objectives. **[\*559]**

Structural adjustment and systemic transformation operations require further analysis. Such lending decisions must include a judgment about the appropriate sequence of adjustment measures, the appropriate time-frame within which these measures must operate, and the social and political acceptability of proposed adjustment measures. In addition, the Bank cannot realistically condition its loans on the adoption of certain policy measures without passing judgment on the ability of borrower governments, and specific government officials, to actually implement and sustain these policy measures. <sup>22</sup>

The expansion of the Bank's operations has therefore forced it into a broad-ranging policy dialogue with its member countries that encompasses many aspects of the governance of these societies. <sup>23</sup> Because the Bank translates the conclusions drawn from these discussions into the binding conditions attached to future loan transactions, these developments have turned the Bank into an actor in the formulation and implementation of policy in its borrower countries.

In the course of expanding its operations, the Bank has sought to respect the sovereignty of its member countries by ensuring that all substantive decisions are formally made by the borrower. <sup>24</sup> Consequently, under the terms of all Bank loan agreements, the borrower remains legally responsible for the implementation of Bank-**[\*560]** funded projects or adjustment programs. <sup>25</sup> This legal formalism does not alter the fact that the decisions the Bank makes in the course of structuring and negotiating loan transactions, approving loan agreements, and disbursing loan proceeds directly affect the lives of millions of people. Such decisions influence who will benefit from the transaction and who will suffer injury, either because of the transaction itself or as a result of the Bank's decision to allocate resources to a particular operation rather than to other projects.

Given the potential consequences of its actions, the way in which the Bank makes its operational decisions is of significance to all those affected by Bank operations. Its decision-making rules and procedures influence which voices are heard in the Bank's deliberations and, as a result, which interests are likely to be served by Bank operations. In addition, they determine how the Bank allocates its resources and, thus, whether the Bank makes effective use of the public resources with which it has been entrusted. <sup>26</sup>

Unfortunately, the Bank's decision-making procedures appear to have been overwhelmed by the expansion of the Bank's functions and by the increasing complexity of its operations. According to existing procedures, all **World Bank** loans must be approved by the Bank's 24-member Board of Directors. <sup>27</sup> In fiscal year 1993, these Executive Directors and their small staff, in addition to overseeing the Bank's general operations, were required to understand, assess, and approve a total of 245 IBRD loans and IDA credits; <sup>28</sup> review 277 completion reports and seven studies submitted by the Operations and Evaluations Department (OED); <sup>29</sup> and develop and refine the policies of the Bank.

The Directors are heavily dependent on the services of the Bank's staff to adequately perform their present responsibilities. **[\*561]** The Bank's staff, which numbered 6,197



at the end of fiscal year 1993, <sup>30</sup> is responsible for gathering relevant information, negotiating project design and implementation strategy with the borrower, and making accurate and objective appraisals of loan proposals. In most cases, the Bank's Directors do not see the project documentation until a loan proposal is formally presented for Board approval. At that time, the Directors only have a few weeks to review the proposal and decide whether to approve or reject the loan request. <sup>31</sup>

This operating procedure gives the Bank's staff enormous power. First, staff members determine which loan requests develop into negotiable loan proposals. In addition, by deciding who to consult and how much weight to attach to the information available to them, the staff influences both the issues and the range of opinions that are incorporated into the loan appraisal reports presented to the Directors. In essence, the Bank's staff influences the form and substance of the information that Board members ultimately receive about each loan proposal. The staff also can influence the Executive Directors' decisions on loan proposals through the timing of their loan presentations to the Board.

The ability of the staff to objectively make all of these decisions must be questioned. Bank staff from the country department for each borrower state are involved in policy dialogues with that country, as well as in the design, negotiation, and implementation of all Bank-funded projects in that country. The officials who make many of the Bank's decisions on a project have often had a direct, personal involvement in the project under consideration or have colleagues and superiors who were involved in the project's design, appraisal, and negotiation. This makes it difficult for Bank officials to be objective about projects or programs that they themselves or their colleagues and supervisors have helped design and negotiate.

Prior to the creation of the **Panel**, the power of the Bank's staff was further enhanced by the lack of formal and independent channels through which the Directors could receive information directly from private actors affected by proposed or on-going bank operations. <sup>32</sup> The lack of such a formal channel deprived the Directors of an independent and knowledgeable source of information on specific Bank operations. It also meant that private actors were only able to communicate their concerns to the Directors through sympathetic staff or through those non-governmental actors with the resources and influence to gain access to the Directors. Consequently, even indirect communications between the Bank and private actors took place in a highly politicized atmosphere, significantly complicating any dialogue between the two parties.

Until recently, the result of this loan approval process was that, except in those unusual cases where the Board as a whole, or an individual Director, took a special interest in a loan proposal, the Board was reduced to acting as little more than a rubber stamp of staff decisions. The result is that, in effect, the Bank's staff has operated without effective accountability.

The power of the Bank's staff continues after the Board decides to approve a loan. Staff members determine whether a borrower has complied with loan provisions and, as a result, whether the borrower is entitled to have loan proceeds disbursed. <sup>33</sup> Staff members also decide whether to excuse a borrower's failure to comply with the terms of the loan agreement. <sup>34</sup>

Many observers and critics of the Bank have expressed concern about this modus operandi. <sup>35</sup> They argue that these operating procedures have created an institution that is insufficiently responsive to the concerns of those most directly affected by Bank operations, as well as one that often funds projects and programs of questionable quality. <sup>36</sup> Moreover, critics contend that the Bank's staff has used these procedures, which are not well understood by outsiders, along with the Bank's great respect for the borrower state's sovereignty to avoid being held accountable by either

the Executive Directors or those individuals most directly affected by Bank operations.

The critics' arguments have gained substantial support from two recent developments. The first is the case of the Bank's participation in the Sardar Sarovar Water Project in India. The construction of this dam project, which, if completed, will be one of the largest water projects in human history, involves the forced removal of approximately 250,000 people and the expropriation of approximately 117,000 hectares of land. <sup>37</sup> In 1984, despite widespread opposition to the dam, the Bank agreed to lend U.S. \$ 450 million to the project. Following continued opposition and a concerted international campaign against the project, the Bank finally appointed an independent commission in 1991 to study the Bank's role in the project.

The commission, whose report was released in July 1992, <sup>38</sup> found that the Bank had violated its own rules and procedures both in its decision to lend money to the Sardar Sarovar project and, following the Board's approval, in actually disbursing funds for the project. It found, for example, that the Bank had failed to complete, or require the borrower to complete, the environmental impact studies required by Bank procedures. <sup>39</sup> The commission also determined that the Bank's staff had failed to enforce loan provisions requiring the Indian government to make adequate arrangements for compensation payments before the government began forcibly relocating residents from the project site. <sup>40</sup> In fact, the commission found the quality of the technical and environmental studies completed for this project to be so inadequate that it could **[\*564]** not make recommendations on how to correct problems with the project. <sup>41</sup> In addition, the commission expressed concern that the project might actually cause worse public health problems than those it was intended to solve. <sup>42</sup>

The second development was an internal review of the Bank's management of its loan portfolio. <sup>43</sup> This review found that nearly one-third of all Bank-supported projects failed to perform as well as expected and that the quality of the Bank's loan portfolio has steadily deteriorated over the past ten years. <sup>44</sup> According to the report, the share of problem projects increased from 11% in fiscal year 1981, to 13% in fiscal year 1989, to 20% in fiscal year 1991. <sup>45</sup> Worldwide, the report determined that 39% of all borrower countries were experiencing problems with more than 25% of their Bank-funded projects. <sup>46</sup>

The report made clear that, while there were many causes for the deterioration in the Bank's loan portfolio, the Bank's administrative procedures were an important contributing factor. <sup>47</sup> In particular, the report suggested that "the Bank's pervasive preoccupation with new lending" <sup>48</sup> and its emphasis on loan approval rather than on loan implementation had encouraged both staff and borrowers to view loan appraisal as a promotional rather than a prudential process, whose major purpose was to convince the Executive Directors to support the loan proposal. <sup>49</sup> The report indicated that this problem was exacerbated by inadequate monitoring of project implementation and by "startlingly low" compliance with covenants in Bank loan agreements. <sup>50</sup> Citing another recent **World Bank** study, the report estimated that borrowers were complying with only 22% of the financial covenants in loan/credit agreements. <sup>51</sup> This, the task force concluded, had adversely **[\*565]** affected the credibility of the binding nature of the Bank's loan agreements. <sup>52</sup>

The findings of these recent reports suggest that outsiders cannot be confident that loan agreements, which are the most important public documents describing specific Bank operations, accurately describe the plan of action the Bank and the borrower will follow in implementing Bank-funded operations. <sup>53</sup> They also indicate a reduction in the transparency of Bank operations which adversely affects the ability of those directly affected by these operations to comprehend the Bank's activities and to hold the Bank accountable for its actions.

The reports also demonstrate that the Bank's lending process was fundamentally flawed and that Executive Directors were basing their lending decisions on information whose objectivity and adequacy was questionable. The information available to the Executive Directors was often compromised by the perception, on the part of both borrower states and the Bank's own staff, that project documents were marketing tools rather than documents to be used in forming objective decisions on project proposals. Moreover, because neither the Bank nor borrower governments appeared to treat loan agreements as binding and enforceable, non-Bank stakeholders in Bank operations could not be confident that they knew the real terms of the Bank's loan transactions.

These developments encouraged both Bank officials and non-Bank commentators to begin thinking of ways to improve the monitoring of Bank operations. Three types of solutions were proposed. <sup>54</sup> The first set of proposals called for an independent commission that would constitute a permanent version of the ad hoc review **panel** established in the Sardar Sarovar case. <sup>55</sup> These **[\*566]** proposals generally called for a permanent review **panel**, independent of the Bank's staff and substantially independent of the Bank's Executive Directors. The **panel**, as it was envisioned in these proposals, would hear complaints from private actors regarding nearly any aspect of a proposed or on-going Bank operation. <sup>56</sup> Private parties, therefore, would have been able to complain to the **panel** about the Bank's own conduct and about possible developmental, environmental, or human rights issues raised during the design and implementation of Bank-funded operations. Furthermore, these proposals would have granted the **panel** binding decision-making powers. <sup>57</sup>

The creation of such a **panel** would undoubtedly have increased the confidence of many private actors in Bank operations. It would also have had a profound impact on the responsiveness of the Bank's staff to the needs of the intended beneficiaries of Bank operations. Nonetheless, these proposals had several flaws.

The most important problem with these proposals was that they failed to distinguish between those complaints that relate exclusively to the Bank's own responsibilities and those that pertain to either the Bank's shared responsibilities or to the exclusive respon **[\*567]** sibilities of other participants in the project, including member states in whose territory operations were taking place. This failing meant that the **panel** would find it difficult to act effectively within the confines of the Bank's mandate, which requires the Bank to refrain from interfering in the internal affairs of its member countries. <sup>58</sup> It would also have created problems relating to the Bank's respect for the sovereignty of member states and to the relationship between the Bank and its members.

For example, in cases where the actions of a borrower or member state were directly implicated, the **panel** would have been unable to conduct its investigations or to enforce its decisions without either the member state agreeing to the **panel's** review of the Bank's operations, or the Bank agreeing to ignore its mandate and support the **panel's** interference in the sovereign affairs of the borrower country. Similarly, in cases where actions by project participants other than member states were directly implicated, the **panel** would not have been able to fully resolve the complaints unless those actors agreed to participate in the **panel** proceedings, or the Bank was willing to assume exclusive responsibility for issues in which it shared responsibility with the other participants.

These proposals would also have raised questions relating to the legal limits of the Bank's ability to intervene in issues involving the political affairs of member states. For example, complaints that implicated the borrower state's treatment of its own citizens, even where this treatment did not involve violations of their human rights, would require the **panel** to sit in judgment of the political decisions of a borrower state. This could result in the **panel** forcing the Bank to substantially alter the meaning of its Articles of

Agreement. <sup>59</sup> Although the Bank should become more sensitive to human rights concerns, it is not clear that such a fundamental reinterpretation of the Bank's Articles of Agreement should occur in such a manner, without the direct participation of the Bank's various stakeholders.

A second type of recommendation was to create an independent evaluation unit within the Bank. <sup>60</sup> This unit would have been **[\*568]** independent of the Bank's staff and would have reported directly to the Bank's Executive Directors. Its mandate would have allowed it to investigate on-going Bank operations at the request of the Executive Directors or the borrowers, and to make non-binding recommendations to the Directors and the Bank's management on how to correct problems in the operations. The unit would also have been empowered to initiate its own evaluation of specific on-going Bank operations.

The primary benefit of this proposal was that it would have enhanced the Directors' oversight of the Bank's staff. It would also have provided them with independent and timely advice on how to respond to perceived problems in Bank operations.

The major problem with this proposal was that the evaluation unit would not have had the explicit authority to receive complaints from directly affected private actors. Consequently, it would not have significantly improved the transparency of Bank operations. In addition, lack of public access to the unit would have undermined the public's confidence in its work. Furthermore, the proposal would not have addressed the issue of direct Bank responsibility to private actors adversely affected by the Bank's operations.

A third proposal, made by the author, was to establish a Bank ombudsman with a mandate to investigate complaints from the public about the Bank's implementation of its own operating rules and procedures. <sup>61</sup> This official, who would have enjoyed security of tenure and independence from Bank staff, would have made recommendations to the Executive Directors on which complaints to investigate and on how to respond to the findings of any investigations. The ombudsman would also have published these findings **[\*569]** and recommendations, as well as an annual report discussing the ombudsman's operations.

The primary benefit of this proposal was that it defined the zone of exclusive Bank responsibility as being the manner in which the Bank implements its operational rules and policies, and sought to limit the activities of the ombudsman to that area. This would have provided the Bank and the public with a number of advantages. First, this proposal would have enhanced public faith in Bank operations by providing private parties with a transparent procedure for raising qualifying complaints. They could do so with the confidence that petitioners would receive a fair hearing based on the merits of a complaint and not on the basis of the identity or political influence of the complainants. Second, it would have opened up to public scrutiny the administrative practices of the Bank. This would have stimulated public debate on these practices and, over time, could have led to a more open process for designing, implementing, and interpreting the Bank's administrative practices. Finally, this proposal would have provided the Directors with timely, independent, and impartial information and advice on problems in Bank operations and on the actual impact of the Bank's operating rules and procedures. Ultimately, such transparency would likely have had a beneficial effect on the overall quality of Bank operations.

Like most ombudsmen, however, the Bank ombudsman would only have had advisory powers. <sup>62</sup> Nevertheless, this limitation would have been mitigated by the fact that all of the findings and recommendations of the ombudsman would have been public. In addition, the ombudsman could have used the annual report to signal dissatisfaction with the Bank's response to the ombudsman's findings and recommendations.

To its credit, the Bank responded constructively to these reports and proposals. The Executive Directors have authorized three important actions. First, the Bank has adopted a program of action that, when fully implemented, is expected to result in the staff's placing greater emphasis on the monitoring of loan implementation and project maintenance rather than focusing on the quantity [**\*570**] of money being loaned. <sup>63</sup> This program should also shift portfolio management from the project to the country level. <sup>64</sup>

The Bank expects its new loan management program to provide borrowers and the Bank with greater flexibility in the use of Bank funds. It hopes that this flexibility will foster Bank-funded operations that are more responsive to the needs of the borrower country. <sup>65</sup> It should also improve the Bank's ability to manage its loan portfolio.

Second, the Board adopted a new information policy that should result in a substantial improvement in the public's access to Bank information. <sup>66</sup> Pursuant to this new policy, the Bank has expanded the categories of documents that it will make publicly available. It has also created a new document, known as the Public Information Document (the "PID"), which is designed to provide the public with more detailed and timely information on Bank operations. <sup>67</sup> This development should enhance the public's ability to influence the final design and implementation strategy for specific Bank operations. In addition, the Bank has opened a Public Information Center that, while based in Washington D.C., has the capacity to make documents available anywhere in the world through Bank field offices or through the Internet. <sup>68</sup>

The third measure adopted by the Board was the September 1993 resolution establishing the **Inspection Panel**. <sup>69</sup> The resolution is substantially influenced by the ombudsman proposal, adopting its proposed scope of jurisdiction and operating procedures. Fur [**\*571**] thermore, the resolution adopts the other two proposals' suggestion that the entity reviewing complaints have several members, rather than a single ombudsman, and adopts the inspectorate's suggestion that Executive Directors retain all final decision-making power.

In addition to its other benefits, the **Panel** will provide the public with a means to enforce the Bank's other two reform measures: the new loan management program and the information disclosure policy. In principle, the Bank's failure to enforce either of these reforms could become the subject of a complaint to the **Panel**. This possibility will be discussed in greater detail following a discussion of the **Panel** and its procedures.

### III. The Procedures of the **World Bank Inspection Panel**

#### A. Introduction

The Resolution provides considerable information on the powers of the **Panel** and the procedural rules that will govern its work. Although the Resolution fails to resolve a number of critical issues, it provides sufficient detail to establish the basic operating principles of the **Panel**. These principles are:

- (a) **Panel** members should have strong incentives to provide the Executive Directors with independent, impartial advice that is based only on the merits of the complaints that they receive and on the findings of their investigations;
- (b) The Bank's staff should be given adequate opportunity to handle problems before they become the subject of an investigation;
- (c) The **Panel** should take care to consult with the Bank's staff and the borrower country when they review a request for an investigation or conduct an investigation; and
- (d) The Board and the staff of the Bank should be given adequate opportunity to respond to the recommendations and findings of the **Panel** before they are made public.

Although these operating principles are not inherently contradictory, they are not necessarily compatible with each other. The independence of the **Panel's** advice to the Executive Directors can be undermined by the other three principles' strong bias in favor of avoiding investigations. The Executive Directors appear to have **[\*572]** had three reasons for creating this tension in the **Panel's** operating principles. Two of these reasons are a concern with ensuring that Bank officials have adequate flexibility and autonomy to perform their responsibilities and a desire to maintain intra-organizational accountability. The third is respect for the sovereignty of the borrower state. Although these are important considerations, it is to be hoped that neither the Bank nor the **Panel** will allow them to undermine the independence of the **Panel** or unduly limit the public's ability to hold the Bank's staff accountable for its actions.

The following sections discuss the procedural requirements established by the Resolution and indicate the issues that have not yet been resolved by the Bank. The sections also include some proposals for resolving these difficulties.

## B. **Panel** Membership

The members of the **Panel** shall be selected by the Executive Directors from nominations submitted by the President of the Bank "after consultation with the Executive Directors." <sup>20</sup> The Board has assured the geographic diversity of the **Panel** by requiring that each member of the **Panel** have a different nationality. <sup>21</sup>

The Resolution does not require that the **Panel** include both men and women, nor does it require that **Panel** members possess diverse substantive expertise. The Board's lack of attention to the gender balance of the **Panel** is lamentable. It undermines the impression that the **Panel** will provide access to those private actors, such as women, who have traditionally lacked the power to effectively convey their concerns about the Bank's operations to Bank officials.

Failure to specify that Panelists should have a diversity of substantive expertise is also problematic in that it raises doubts about the ability of the **Panel** to competently and independently assess and investigate certain types of complaints. This could be a particularly relevant consideration in those cases that raise complex human rights and environmental issues. For example, the **Panel** may need a specialist with environmental, human rights, legal, or anthropological expertise if it is to fairly resolve a complaint

brought by a group of people forcibly removed in the course of a Bank-funded dam project. The President of the Bank and the **[\*573]** Executive Directors should be more sensitive to these considerations when selecting Panelists than they were when they adopted the Resolution. [72](#)

Despite their lack of attention to the diversity of expertise among Panelists, the Executive Directors have stipulated minimum qualifications required of all **Panel** members. Although these qualifications are broad and grant the President a great deal of discretion, they are sufficient to produce a **Panel** that is capable of gaining the confidence and respect of both Bank and non-Bank actors. The Executive Directors have established the following requirements that pertain to the expertise of the Panelists:

- (a) They must be able to deal "thoroughly and fairly" with requests for **inspection**; [73](#)
- (b) They must have integrity and be independent of the Bank's management; [74](#)
- (c) They must have "exposure to developmental issues and to living conditions in developing countries;" [75](#) and
- (d) It would be "desirable" for them to have knowledge and experience of Bank operations. [76](#)

The Board has also established the following requirements which are designed to assure the independence of the Panelists:

- (a) Panelists must not have served as an Executive Director, Alternate Executive Director, advisor to an Executive Director, or a member of the Bank's Staff within the past two years. For these purposes, the Bank's Staff has been defined to include Bank consultants; [77](#)
- (b) Panelists serve a non-renewable five-year term of office [78](#) and members of the **Panel** will be ineligible for **[\*574]** employment with the Bank once their term of office expires; [79](#) and
- (c) Panelists may only be removed from office for cause by a decision of the Executive Directors. [80](#)

These requirements should maximize the Panelists' interest in reaching decisions that are universally viewed as being fair and competent. [81](#) For example, the fact that Panelists cannot be reappointed and are not eligible for any other position within the Bank suggests that the Panelists' own best interests will be served by producing findings and recommendations that are universally respected by both Bank and non-Bank actors. This will only occur if the Panelists possess the expertise and independence to base their decisions on the merits of a complaint, rather than on the identity of the complainant or the interests of the Bank or specific member states.

The **Panel's** independence is counterbalanced by the fact that it only has advisory

powers. This combination poses a challenge to both the **Panel** and the Bank. The Bank's staff may attempt to marginalize the **Panel** and undermine its efficacy if it views the **Panel** as being too responsive to the interests of the complainants and insufficiently sensitive to the constraints under which the Bank's staff operates. On the other hand, the **Panel** will suffer a loss of public confidence if it is too sensitive to the concerns of the Bank and develops a reputation for being unwilling to make recommendations that are contrary to the Bank's interests.

These risks can be minimized in two ways. First, Panelists must issue reasoned opinions that justify their findings and recommendations. The Bank is required to publish the full record of the **Panel's** findings and recommendations, including the Board's responses to these findings. <sup>82</sup> Outside observers will be able to use these reports and opinions to hold the **Panel** accountable for its [\*575] work and the Bank accountable for its responses to the work of the **Panel**. <sup>83</sup> Second, the **Panel** should adopt procedures that are as transparent and participatory as possible. This will reduce the number of opportunities for the Bank's staff to engage in efforts that could undermine the efficacy of the **Panel**, such as ex parte communications with the **Panel** or the Executive Directors. <sup>84</sup>

### C. Powers of the **Panel**

**The Panel** shall have the following powers:

(a) INVESTIGATORY: The **Panel** shall have the power to investigate complaints involving the Bank's failure, through act or omission, to follow its operational policies and procedures. <sup>85</sup> The **Panel** shall then make findings about the Bank's compliance with the relevant operational policies and procedures on the basis of this investigation. <sup>86</sup> The **Panel** will submit its report on the investigation to the Bank's Executive Directors and the Bank's President. <sup>87</sup>

(b) ADVISORY: The **Panel** shall review all complaints and make recommendations to the Executive Directors about which complaints to investigate. <sup>88</sup>

(c) RULE-MAKING: The **Panel** shall make decisions on all procedural matters relating to the work of the **Panel**. <sup>89</sup> This means that the **Panel** has the power to formulate the procedural rules applicable to the complaints process and to resolve issues that were not clarified in the Resolution. <sup>90</sup>

#### [\*576]

Paragraph twelve of the Resolution defines operational policies and procedures to include the Bank's operational policies, Bank procedures, and operational directives. <sup>91</sup> The Resolution expressly excludes guidelines and "Best Practices" from this definition. <sup>92</sup> An analysis of these different categories of Bank rules and procedures suggests that the **Panel's** jurisdiction is limited to those Bank policies and procedures that impose binding obligations on the Bank's staff. This is consistent with the notion that the **Panel** should not deprive the Bank of the flexibility and autonomy that staff members need in order to perform their responsibilities. <sup>93</sup>

The Bank's mandatory policies and procedures include Bank procedures relating to the treatment of involuntarily resettled communities, the Bank's relations with indigenous peoples, public participation in Bank operations, information disclosure, environmental



impact assessments, and rules applicable to loan disbursements and contract management. <sup>94</sup> Thus, the work of the **Panel** could affect the Bank's relations with most of the non-governmental stakeholders in its operations.

## 1. An Example

The following example is designed to demonstrate the types of complaints that could be brought under the Bank's operational policies and procedures. Operational Directive 4.30 deals with the Bank's policy on involuntary resettlement. <sup>95</sup> The Directive states that displaced people should receive benefits from the projects that **[\*577]** displace them. <sup>96</sup> In addition, it stipulates that, at least in large-scale displacements, "a detailed resettlement plan, timetable, and budget are required." <sup>97</sup> The Directive specifies the factors that a borrower's resettlement plan should address and the obligations of the Bank's Task Managers in projects involving large-scale resettlements. <sup>98</sup> The Directive also requires Bank Task Managers to inform borrowers of the Bank's policies regarding large-scale relocations. <sup>99</sup> Finally, the Directive notes that the "responsibility for resettlement rests with the borrower." <sup>100</sup>

Complaints that could arise under this Directive can be divided into three categories. The first of these categories, involving complaints that relate to the staff's non-compliance with the obligations imposed on them by Directive 4.30, clearly falls within the scope of the **Inspection Panel's** jurisdiction. For example, the Directive specifies that the Task Manager should inform the borrower of the Bank's resettlement policy and must "ensure that involuntary resettlement is avoided or minimized." <sup>101</sup> The Directive also states that the Task Manager should consult legal, social, and technical experts and that specialists should visit possible resettlement locations. <sup>102</sup> The staff's failure, therefore, to inform the borrower of the Bank's resettlement policy, to consult with the requisite experts, or to visit resettlement sites could serve as the basis for a complaint against the Bank by inadequately resettled individuals.

The second category consists of complaints arising under Operational Directive 4.30, which are clearly outside the scope of the **Panel's** jurisdiction. These include complaints relating to actions that are not the exclusive responsibility of the Bank. For example, the Operational Directive makes clear that the borrower is responsible for the resettlement plan. <sup>103</sup> This means that the **Panel** lacks **[\*578]** the authority to sit in judgment of the borrower's implementation of these resettlement plans. Consequently, any involuntarily resettled group that feels that the borrower has treated it unfairly or inadequately compensated it cannot complain to the **Panel**. Instead, the group must take its complaint to the borrower government or, if appropriate, to another international forum. <sup>104</sup>

The third category consists of those complaints that arguably arise from the Bank's mandatory responsibilities under the Operational Directive. The success of these complaints will depend on the way in which groups characterize their complaints and on the willingness of the **Panel** to creatively and aggressively use its powers. <sup>105</sup>

For example, complaints in this category might arise from the fact that Directive 4.30 stipulates the issues that should be considered in a borrower's resettlement plan. According to the Bank's Directive, resettlement plans must include: an analysis of the legal framework for resettlement, an assessment of alternate resettlement sites, consideration of management capabilities, a valuation of compensation, environmental assessments, and a discussion of the services that should be provided to ensure that resettled individuals are restored to a socially and economically viable position. <sup>106</sup>

Because resettlement is the borrower's responsibility, the borrower retains responsibility for designing a plan that addresses each of these issues. In a case where the resettlement plan does not include an adequate response to each of the factors listed in the Directive, it may be possible to draft a complaint alleging that, given the deficiencies of the resettlement plan, the Bank, in its assessment of the plan, could not have adequately considered each of the factors specified in the Operational Directive.

[107](#) [**\*579**]

In this type of complaint, the complainant would argue that what the **Panel** is being asked to consider is the adequacy of Bank staff compliance with the Operational Directives, and not the adequacy of the borrower's plan itself. Because such a claim is clearly a challenge to the actions of the Bank's staff in light of relevant Operational Directives, the complaint would fall within the **Panel's** jurisdiction and the **Panel** should be willing to investigate.

This type of complaint is likely to be rejected by a timid or insecure **Panel** on the grounds that its role is limited to determining whether the Bank formally complied with the Operational Directives; not the adequacy of its compliance with the Directives. The fact that the **Panel** would be required to publicize the complaint, its review of the complaint, and the decision of the Board means that the public will be able to hold the **Panel** accountable for such a narrow decision. This could generate pressure for the **Panel** to expand the scope of its review in future complaints.

## 2. Disclosure of the **Panel's** Work

The adequacy of the **Panel's** advisory and investigatory powers must be evaluated in light of the Resolution's requirements regarding publication of the work of the **Panel**. According to the Resolution, the Bank will make the complaints it receives, the recommendations and findings of the **Panel**, and the decisions of the Executive Directors in response to the **Panel's** findings and recommendations "publicly available." [108](#) This means that there will be a public record of the **Panel's** work that can be used to hold the Bank's Directors and staff accountable for their actions in response to the **Panel**. It can also be used to hold the **Panel** accountable for the quality of its work.

The **Panel** will also influence Bank operations through its impact on the interpretation of the rules and procedures the Bank follows. Complainants, in seeking to demonstrate that the Bank failed to follow its operating rules and procedures, will necessarily base their claims on their own interpretation of these operating rules and procedures. Because the complaint, the **Panel's** recommendation, and the Executive Director's response to the complaint will all form part of the public record, the complainant's interpretation will encourage the Bank's staff to advance its own interpretations of Bank policies and procedures in response to the complaint. Eventually, both the **Panel** and the Executive Directors will need [**\*580**] to resolve any conflicts between these interpretations in the course of their deliberations. The publication of these various interpretations should stimulate public debate on the best interpretation of these policies and procedures. [109](#) This debate, in turn, should encourage public discussion of the adequacy of the Bank's procedures. It could also lead to public proposals for improving specific policies or procedures within the Bank. These discussions and proposals could ultimately influence the content of the Bank's operating rules and procedures. [110](#)

In the course of its review of some complaints and its investigations, the **Panel** will need to judge the actions of specific Bank officials. The **Panel's** complaint process thus should result in individual Bank officials being held publicly accountable for their actions. While

highlighting shortcomings in the performance of some officials, the **Panel's** work should also vindicate Bank officials who are properly implementing controversial Bank operating policies and procedures. These findings should educate both the Bank's staff and private actors about the "best practices" for implementing Bank policies and procedures. Thus, the ultimate effect of holding individual Bank officials publicly accountable for their actions is likely to be an improvement in staff performance, measured both in terms of the efficacy of their work and in terms of their sensitivity to the interests and concerns of those borrowers and private actors whose interests they are supposed to be serving.

Nevertheless, the fact that the **Panel** has only advisory powers does pose an important challenge to the members of the **Panel** and the Bank. If the recommendations and findings of the **Panel** are not respected or generally adopted by the Board, the **Panel** runs the risk of being viewed as irrelevant by non-Bank actors. On the other hand, if all the **Panel's** recommendations are accepted by the Board without debate, the **Panel** runs the risk of being viewed as too subservient to the Bank. The publication of the **Panel's** findings and reports will help non-Bank actors evaluate how seriously the Executive Directors take the **Panel's** advice and how independent this advice actually is. **[\*581]**

## D. The Complaint Process

### 1. The Complaint

The following requirements for a successful request for **inspection** can be deduced from the Resolution establishing the **Inspection Panel**:

(a) **Inspections** can be initiated in three ways. First, a request for **inspection** can be brought by any "affected party in the territory of the borrower" that is not a single individual or by that party's local representative. <sup>111</sup> The Representative needs to present the **Panel** with written evidence demonstrating that "he is acting as agent of the party on behalf of which the request is made." <sup>112</sup> Second, the Executive Directors, acting in their individual capacities, may request an investigation of serious violations of Bank policies and procedures. <sup>113</sup> In addition, the Executive Directors "acting as a Board" can instruct the **Panel** to conduct investigations. <sup>114</sup>

(b) In "exceptional cases," a non-local representative can bring a complaint on behalf of an affected party. <sup>115</sup> In these cases, the complainant, presumably through the representative, needs to show that no appropriate local representative is available and the Executive Directors must agree to the non-local representation. <sup>116</sup>

(c) Complaints must:  
[sp'(c)'+n](1) be in writing and state all relevant facts, including harm suffered or threatened as a result of the Bank's failure to follow its operational rules and procedures; <sup>117</sup>

(2) allege that the rights or interests of the affected party "have been or are likely to be directly affected by an action or omission of the Bank" that is inconsis **[\*582]** tent with

the Bank's "operational policies and procedures"; [118](#)

(3) allege that the Bank's failure to follow its operational policies and procedures relates to "the design, appraisal and/or implementation" of a Bank-funded project. [119](#) The challenged Bank action can include a failure to "follow-up" on the borrower's obligations under the loan agreement, provided that the obligation relates to operational policies and procedures; [120](#)

(4) allege that the Bank's failure to follow its operational policies and procedures has had or threatens to have a "material adverse effect" on the affected party; [121](#)

(5) specify the steps that the requesting party has taken to communicate with the management of the Bank about the request and the response that it has received from the Bank's management; [122](#) and

(6) limited to the acts of the Bank. It cannot relate to actions which are the responsibility of the borrower, guarantor, or any other party besides the Bank. [123](#) In addition, the complaint cannot relate to procurement issues, and cannot be filed after the closing date of the loan or after the loan has been "substantially disbursed." [124](#)

A number of conclusions can be deduced from the above list of requirements. First, the jurisdiction of the **Panel** is limited to proposed and on-going Bank operations. Thus, the **Panel** is empowered to hear complaints related to the design, appraisal, and implementation phases of Bank projects and programs. Its authority ends once the Bank operations are "substantially" completed. [125](#)

This delineation of the **Panel's** jurisdiction means that the **Panel's** authority ends when the Operations Evaluation Department's (OED) authority begins. [126](#) This division of authority protects the independence and objectivity of both the **Panel** and the OED and ensures that both are capable of rendering independent judgments within the spheres of their operations. [127](#)

Second, the Board, by allowing any "affected party" except a single individual to bring a complaint, has indicated that it recognizes the need for a complaint process that is accessible to as many affected people as possible. [128](#) This suggests both a serious intent to improve public access to the Bank and an interest in obtaining accurate and timely information on problems related to on-going or proposed Bank operations.

The Resolution does not define "affected party." [129](#) Consequently, it is not clear if juridical persons have standing to bring complaints. The Bank's apparent interest in opening the process to as many complainants as possible would suggest, however, that the term should be read to include both natural and juridical persons.

Third, the Board's decision to allow affected people to rely on representatives to bring their complaints is analogous to the granting of the right to counsel in legal proceedings. It should be noted that while the Resolution expressly states that the complainant cannot be a single individual, it imposes no such limitation on the representative. It therefore can be presumed that the representative may be a single individual. **[\*584]**

The decision to allow representatives to bring complaints is most welcome. The ability to use representatives should help relieve the financial and technical constraints that may impair the ability of affected people, particularly the weakest and most vulnerable, to bring complaints. In addition, in some cases the use of representatives may help reduce the risk of reprisals against complainants from either the borrower or those who stand to benefit from the proposed Bank-funded operation.

This risk of reprisals would also be significantly reduced if the **Panel** established a procedure enabling complainants to request the **Panel** to protect their anonymity, especially in any communications with other parties, including Bank officials, interested in the complaint. <sup>130</sup> This procedure would diminish the inhibiting effect such threats could have on affected people's willingness to use the **Panel**. <sup>131</sup> In this regard, it is to be hoped that the **Panel** and the Board will interpret the right of complainants to make use of "non-local" representatives generously. <sup>132</sup> Such an interpretation would enable the largest possible number of affected people to make use of the **Panel**. It would also advance the Bank's objective of creating a forum in which issues are decided on the merits of the complaints, rather than on the identity and political influence of the complainants. Finally, it would help ensure that Bank decision-makers receive comprehensive information on all projects.

Although the Resolution is a major step forward, there are a number of important issues that the Resolution fails to address. Most significantly, the Resolution fails to explicitly establish the complainant's right to receive and respond to communications [\*585] between the **Panel** and other interested parties, particularly Bank staff. <sup>133</sup> There are three reasons that complainants should be granted this right, subject to reasonable safeguards for confidential Bank information. <sup>134</sup> Perhaps most importantly, considerations of due process suggest that both the Bank and the complainant should be given an opportunity to respond to each other's arguments. In particular, those who may suffer irreversible harm in a Bank operation should be given a full and fair opportunity to make their case. This will only be possible if they are informed of the Bank's reasons for undertaking the challenged action.

Second, many Bank-funded operations produce profound and often irreversible changes in the lives of affected people. Consequently, if the Bank is genuinely interested in producing sustainable projects that maximize benefits and minimize the harm to affected individuals, it should ensure that all efforts are made to base Bank decisions on comprehensive and objective information. In addition, if the Bank is interested in promoting transparent and accountable governance to its member countries, it should set a good example in its own operations. This will not occur if the Bank does not make every effort to understand the arguments and concerns of those opposed to its actions, including their response to specific issues raised by the Bank's staff.

Third, the **Panel's** review of the complaint provides an opportunity to educate the complainant and other interested parties about the Bank's interpretation of its operating rules and procedures. This opportunity will be lost if the complainants are not given access to communications between the Bank's staff and the **Panel**.

Another important concern is that the Resolution does not stipulate what information a complainant should include in a successful request for an **inspection**. <sup>135</sup> Complainants should use the opportunity created by this lack of specificity to make their complaints as [\*586] comprehensive as possible. Because the complaint will ultimately become part of the public record, it may be the complainant's best opportunity to make its case to both the **Panel** and the public. In this regard, it should also be noted that the Resolution does not explicitly grant complainants the right to participate in the **Panel's** proceedings at any point after the initial filing of the complaint. <sup>136</sup>

Complainants, therefore, should consider including information in their complaint from non-directly affected parties inside the complainant's home country, as well as from local and foreign technical experts. In addition, if it is appropriate, they should include information about other countries and other projects which might indicate that the complaint is raising a generalized problem with Bank operating rules and procedures. In fact, if the basis for the complaint is an allegedly flawed operational rule or procedure, complainants should consider filing transnational complaints, incorporating related claims

from a number of different countries. Furthermore, until the role that complainants will play in the investigatory work of the **Panel** is clarified, complainants should expressly request that they be allowed to participate in the investigation and to supplement their complaints with additional information after the complaint is filed.

The Resolution's lack of specificity may also create a number of practical problems for complainants. The first is whether the complaint can only be filed with the **Panel** in Washington, D.C. An alternative, which would be particularly beneficial to poorer complainants, would allow affected parties to file the complaint with the Bank's resident representatives in member states. <sup>137</sup> If the **Panel** does allow complaints to be submitted outside of Washington, D.C., the **Panel** will need to establish clear rules to guide resident representatives in their treatment of complaints. These rules should provide that Bank representatives have an obligation to forward complaints to the **Panel** in an expeditious manner, with full **[\*587]** protection for the integrity and confidentiality of the complaint. Resident representatives should be subject to severe sanction for breach of such rules.

Another unresolved practical consideration regards the permissible languages in which complaints may be drafted and the identity of the party that should bear the costs of translation. <sup>138</sup> These issues are important because they will affect the ability of poor complainants to file complaints. A restrictive decision on this issue could be counterbalanced by an expansive interpretation of the circumstances justifying reliance on non-local representatives.

Based on these observations, it would seem advisable, where possible, for complainants to include the following information in their written requests for investigations:

(a) Information on the Complainant: This should include the name and address of the complainant and proof that the complainant is not a single individual. It should also contain sufficient information to establish that the complainant is directly affected by the on-going or proposed Bank-funded project.

(b) Information on the Representative: If the complaint is being brought by a representative, the complaint should include proof that the representative has the authority to represent the affected party, and the name and address of the representative. If the representative is "non-local," the complaint should contain an explanation of the need for such "non-local" representation. <sup>139</sup>

(c) The Operational Policy: The complaint should refer to the specific operational policy or procedure that the Bank has failed to follow. The complaint should identify which parts of the policy or procedure the Bank has not followed and should explain why the Bank's actions are inconsistent with the policy. This part of the complaint will therefore provide the complainant with an opportunity **[\*588]** to get its interpretation of the Bank's policy or procedure into the public record. <sup>140</sup>

(d) Information on Injury: The complaint should describe the harm that the complainant has suffered, is suffering, or will suffer if the challenged Bank activity is not corrected.

(e) Information on Causation: The complaint should contain information on the link between the harm being suffered and the Bank's failure to follow the cited operational policies and procedures.

(f) Information on Contacts with the **World Bank**: The complaint should describe all communications between the complainant or its representative and the staff of the **World Bank** relating to the substance of the complaint. Ideally this information should

include the dates of all communications, the names of the people spoken to, copies of any letters sent or received, statements of people who undertook these efforts, and an explanation of why the Bank's response was inadequate.

(g) Request for Relief: The complaint should conclude with a request for the types of actions the complainant would like the **Panel** to take. These requests should include the obvious request for an investigation, but should also relate to the **Panel's** review of the complaint and to the procedures to be followed during the investigation. The complainant should consider requesting that:

(1) the **Panel** inform the complainant of all communications between the **Panel** and the Bank's staff and between both the **Panel** and the Board of Directors, and, where possible, provide it with copies of all written communications;

(2) the complainant be given an opportunity to respond to these communications;

(3) the complainant, acting through the **Panel**, be given an opportunity to request information from the Bank because in many cases the Bank will be the **[\*589]** only source of information on pertinent aspects of the complaint; [141](#) and

(4) the **Panel's** investigation include any investigatory procedures the complainant deems desirable. These could include a public hearing, an on-site investigation, the opportunity to present additional evidence, such as expert testimony, and evidence about similar problems in other Bank-funded operations.

Finally, potential complainants should recognize that the resolution establishing the **Inspection Panel** states that the Board will review its decision in two years. [142](#) Thus, the Board has the authority to modify the **Panel's** powers if it finds the work of the **Panel** to be too burdensome or if it finds the **Panel's** impact too trivial to justify the expense. This means that the **Panel** may feel compelled to be prudent and deliberate in its actions. Non-governmental actors will also need to carefully select the complaints they bring to the **Panel**. These complaints need to demonstrate both the need for an independent **inspection panel** and the contribution that the **Panel** can make to improving the operations of the Bank.

## 2. Complaint Review Procedures

The purpose of the **Panel's** review of a complaint is to enable it to make a recommendation to the Executive Directors on whether to authorize an investigation. In making this determination, the **Panel** must assess the adequacy of the complaint and determine whether the Bank has taken or intends to take adequate measures to address

the concerns of the complainant. The complaint review procedures are designed to conform to the general principle that the Bank should be given every opportunity to avoid investigations.

The Resolution stipulates the following complaint review procedures: **[\*590]**

- (a) The Chair of the **Panel** must inform the President and the Executive Directors "promptly" of any requests for **inspection** received by the **Panel**. <sup>143</sup>
- (b) The Bank Management has twenty-one days after this notification to provide the **Panel** with evidence that it has complied with or "intends to comply" with the relevant policies and procedures. <sup>144</sup>
- (c) The **Panel** must decide whether the request meets the requisite standards for acceptance for investigation <sup>145</sup> and whether the **Panel** will recommend an investigation to the Executive Directors within twenty-one days of receiving the Management's response. <sup>146</sup> It is important to note that the Resolution does not stipulate that the **Panel** is required to recommend an investigation for all complaints that meet the standards of acceptance for investigation.
- (d) The **Panel** is required, before making its recommendation, to consult with the Bank's legal department regarding rights of the Bank that might be implicated by the request for an **inspection**, <sup>147</sup> and with the borrower and the Executive Director representing the borrower. <sup>148</sup>
- (e) The **Panel's** recommendation shall be circulated to all Executive Directors "within the normal distribution period" <sup>149</sup> and the Executive Directors will then decide whether to investigate. <sup>150</sup>
- (f) The affected party, if it initiated the request, shall be informed of the Executive Director's decision within two weeks of the decision. <sup>151</sup>
- (g) The decision of the Executive Director, the recommendation of the **Panel**, and the request for investigation shall be made publicly available. <sup>152</sup> Presumably this will happen no sooner than two weeks after the Executive Directors' decisions. <sup>153</sup> **[\*591]**

These procedures leave a number of critical issues unresolved. They can be expected to remain unresolved until the **Panel** uses its powers to formulate a complete set of procedural rules. <sup>154</sup> These issues, however, are sufficiently serious that the adequacy of the **Panel's** work depends, to a significant extent, on how the **Panel** resolves them.

The first issue of concern is that the procedures provide too many opportunities for ex parte communications between the **Panel** and the Bank's staff, the borrower, and the Executive Director representing the borrower state. This makes it difficult for complainants to have unqualified confidence in the impartiality and fairness of the complaint review process. The **Panel** could rectify this deficiency by granting complainants the right to be informed of all communications between the **Panel** and the Bank's staff, the Executive Directors, and the borrower. Complainants also need an opportunity to respond to such communications. If necessary, the **Panel** could review the information in these communications in light of the Bank's information disclosure policy and "sanitize" them to protect confidential information. <sup>155</sup>



The second issue that needs clarification is the nature of the information the **Panel** can consider in making its recommendations. The Resolution does not explicitly state that the **Panel** is required to base its decisions exclusively on information contained in either a complaint or the Bank staff's response to a complaint. Thus, it is at least theoretically possible that the **Panel** could request additional information from the complainant, the Bank, the borrower, and the general public. <sup>156</sup>

This possibility raises the issue of the **Panel's** obligation to publicize the fact that it has received a specific complaint. The Resolution states that the **Panel** will make the complaint publicly available at the time its own recommendation and the determination of the Board are made public. However, if the **Panel** decides [**\*592**] to seek or accept information from additional sources, it must make the existence of the complaint publicly known at an earlier stage. Its failure to do so could result in some parties being denied a fair opportunity to present information to the **Panel**. This would compromise the integrity of the **Panel's** review of a complaint.

If, in the course of its deliberations, the **Panel** does decide to accept such information, it should be required to provide the complainant and the Bank with a meaningful opportunity to respond to the additional information. The **Panel's** failure to provide such an opportunity would raise concerns similar to those associated with ex parte communications with the **Panel**.

Another important issue in this regard involves the information that the Board of Directors can use in its deliberations. The Resolution does not state whether the Board is limited to making its decision based on information provided by the **Panel** or whether it can seek additional information. In the latter case, clear rules would need to be established to guide the Directors in their request for additional information and in their treatment of such information. These rules should also identify the sources the Board may approach for additional information. For example, the Board could consider allowing other interested parties to file amicus curiae briefs and to seek joinder of related complaints. The **Panel** and the Board, however, would need to clarify the rights of both the complainant and the Bank to receive and respond to such additional information.

A third unresolved issue involves the time period within which the Executive Directors must act on the **Panel's** recommendations. Paragraph nineteen of the Resolution states that the **Panel's** recommendation "shall be circulated to the Executive Directors for decision within the normal distribution period." <sup>157</sup> The Resolution, however, fails to specify what the "normal distribution period" is, nor does it indicate whether the Board is obliged to make a final determination within a specific time period after distribution. <sup>158</sup>

This lack of clarity would seem to make it possible for the Board to delay action on the complaint and the **Panel's** recommendation for an undue period of time. Such a possibility would be particularly troubling if the **Panel** had not publicized its receipt of the complaint. In addition, it should be noted that in controversial [**\*593**] cases the complainant may also have chosen, for prudential reasons, not to publicize the complaint.

A fourth unresolved issue relates to the nature of the report that the Bank will make publicly available after the Board's decision. Paragraph twenty-five of the Resolution states that the Bank shall make public the complaint, the recommendation of the **Panel**, and the decision of the Executive Directors. <sup>159</sup> However, the Resolution does not specify that the full, unedited text of each of these documents must be made public. In fact, the Resolution does not provide any guidance as to how much detail the Bank must make public. <sup>160</sup> Consequently, the possibility exists that the Bank could decide to publish edited summaries of the **Panel's** proceedings.

The **Panel** would best serve the interests of both the complainants and the Bank if it publishes the full texts of the complaint, the **Panel's** reasoned recommendation (including any report prepared by a dissenting panelist), [161](#) and the reasoned decision of the Board. The publication of edited versions of these documents would only raise questions about what the Bank decided not to publish.

### 3. Standards for Review of the Complaint

The **Panel** will only recommend that the Executive Directors authorize an investigation if it can make an affirmative finding on all four of the following issues:

- (a) The request for **inspection** states sufficient grounds to recommend an investigation. It would appear from paragraph twelve of the Resolution that "sufficient grounds" exist if the complaint is made by a party alleging that its "rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures" and that this failure "has had, or threat **[\*594]** ens to have, a material adverse effect" on the complainant. [162](#)
- (b) The Bank's staff has failed to adequately respond to the complaint. [163](#)
- (c) The violation of the Bank's policies and procedures is of a "serious character." [164](#) This term is not defined in the Resolution. [165](#)
- (d) The request has not already been the subject of **Panel** review, unless new facts or evidence justify a second review. [166](#)

In the course of reviewing the complaint, the **Panel** must also "seek the advice of the Bank's legal department on matters related to the Bank's rights and obligations with respect to the request under consideration." [167](#) The Resolution provides no guidance as to the scope of these consultations nor to the weight the **Panel** must attach to the views of the legal department. The Resolution also fails to establish who should initiate the consultations. Thus, it is not clear how the **Panel** is obliged to respond to requests for consultation from the legal department, which may have been informed by other Bank departments that the **Panel** was in the process of considering a specific complaint.

The precise nature of the relationship between the **Panel** and the legal department is an important consideration in assessing this consultation requirement. If, in paragraph fifteen, the Executive Directors intended "seek the advice" to mean that the legal department should act as the legal advisor to the **Panel**, the need for the complainant to be informed of communications between the **Panel** and the legal department would appear to be diminished. However, such an interpretation would create a conflict between the legal department's role as counsel to the Bank and its role as advisor to the independent **Panel** reviewing the actions of the legal department's client - the Bank. **[\*595]**

On the other hand, if the Board intended the **Panel** to consult with the legal department so that it would better understand the position of the Bank, then the legal department would be acting as the Bank's advocate before the **Panel**. In this case, the complainant's need to be informed of such communications and to have an opportunity to respond is

more acute.

Because all complaints are likely to implicate the rights and obligations of the Bank, consultations with the legal department could become an essential element of all **Panel** reviews. In light of this, the issue of the complainant's right to be informed of and to respond to all communications between the Bank and the **Panel** takes on added significance. In many cases, the complainant's interpretation of Bank rules and procedures will form the basis of the request for an **inspection**. Complainants, therefore, cannot be confident that they will receive fair treatment if they do not have an opportunity to respond to the legal department's interpretation of both the Bank's and their rights and obligations in the matter under consideration.

The standards the **Panel** will use in evaluating the Bank's response to pre-complaint communications between Bank staff and complainants also require clarification. If the **Panel** is given unrestricted discretion in evaluating the adequacy of the Bank's response, the complainant will find it difficult to predict the sufficiency of a potential complaint. The **Panel** can also use this discretion to avoid reviewing difficult or controversial, but nevertheless meritorious, complaints.

This suggests the need for some rules to guide the **Panel** in evaluating the Bank's response. The Bank should not be able to avoid an investigation merely by showing that it responded in some way to a complainant's communication. Instead, the **Panel's** review should focus on the adequacy of the Bank's response to the communication. Additionally, in cases alleging that the Bank failed to take appropriate action in a particular situation, the **Panel** should be required to review the adequacy of the Bank's explanation for its failure to act.

#### 4. The Investigation

The purpose of the investigation is for the **Panel** to make a finding, based on "all relevant facts," indicating "whether the Bank has [\*596] complied with all relevant Bank policies and procedures." <sup>168</sup> The Resolution establishes general guidelines that the **Panel** must follow when conducting an investigation. These guidelines, however, are so vague that the potential reach of the **Panel's** investigatory powers will not be fully determined until the **Panel** finalizes its own procedural rules governing investigations. <sup>169</sup>

Nonetheless, the Resolution does establish the following procedures for investigations:

(a) The Chairperson shall designate one or more of the three Panelists as having primary responsibility to conduct the investigation. <sup>170</sup> This person(s) shall report his or her findings to the **Panel** within a period of time to be determined by the **Panel**. <sup>171</sup>

(b) The investigator shall have access to all Bank staff who may have information, as well as to all pertinent Bank records. <sup>172</sup>

(c) The investigator, if necessary, "shall consult as needed" with the Director General of the Operations Evaluation Department (OED) and the Internal Auditor. <sup>173</sup> In addition, he or she must consult with the borrower and the Executive Director representing the borrower/guarantor. <sup>174</sup>

(d) The **Panel** can conduct an on-site investigation with the prior consent of the

borrower country. [175](#)

(e) The **Panel** shall either make its finding and recommendations by consensus or include both majority and minority recommendations and findings in its report. [176](#)

(f) The **Panel** shall submit its report to the Executive Directors and to the President. The report must include all relevant facts and the **Panel's** findings on whether the **[\*597]** Bank has complied with the relevant policies and procedures. [177](#)

(g) The management, within six weeks of receiving the **Panel's** findings, must submit a report to the Executive Directors indicating its recommendations in light of the findings. [178](#) In the case of projects in preparation, the findings of the **Panel** and the actions taken in response thereto must be discussed in the Staff Appraisal Report when the project is ultimately submitted to the Executive Directors for approval. [179](#)

(h) The affected party must be informed of the findings of the investigation and any actions taken by the Bank in response to the findings, within two weeks of the Executive Directors' decision. [180](#)

(i) The report of the **Panel** and the Bank's response thereto shall be made publicly available within two weeks of the Executive Directors' decision. [181](#)

There are again a number of issues that the Resolution leaves unresolved. Some of these issues, such as the problems of ex parte communications or the ability of the **Panel** and the Board to collect information on their own initiative, are similar to those discussed in regard to the **Panel's** review of the complaint. [182](#) Other issues are more specific to the procedures used in the investigation phase of the complaint process. Only the latter will be discussed in this section.

The first of these issues involves the **Panel's** access to Bank personnel. Paragraph twenty-one of the Resolution states that the **Panel** "shall have access to all staff who may contribute information." [183](#) This wording suggests both that the **Panel** has broad access to the Bank's staff and that it lacks the power to compel staff members to cooperate with its investigations. This formulation, therefore, appears to give Bank staff the option of declining to contribute information, creating a risk that staff members could effectively hinder **Panel** investigations by exercising this option. **[\*598]**

This problem is compounded by the failure of the drafters to define the term "access" as it is used in the Resolution. Thus, it remains unclear whether the **Panel's** access includes the right to orally question staff members or if it is limited to merely seeking written responses to questions submitted in writing to staff members.

This is not to suggest that the Bank's staff will act in bad faith towards the **Panel**. In fact, it is reasonable to assume that in most cases the staff will cooperate with the **Panel**. However, it is also realistic to assume that many staff members, feeling that investigations could undermine or challenge their work, either individually or institutionally, would have an incentive to be uncooperative. Consequently, the **Panel's** ability to conduct adequate investigations of complex and controversial complaints may depend on the adoption of clear rules establishing the staff's duty to cooperate. Such rules would also need to specify the sanctions staff members would face if they failed to cooperate with the **Panel**. Problems relating to the staff's failure to cooperate with the **Panel** could be particularly significant if the complainant is not given the opportunity to receive and to respond to all communications between the Bank and the **Panel**.

Similar issues arise in regard to the **Panel's** access to Bank records. Paragraph twenty-one of the Resolution states that the **Panel** "shall have access to ... all pertinent Bank records." <sup>184</sup> However, it fails to define the terms "access" or "pertinent." Thus, it is not clear whether "access" actually means unrestricted access to the raw data in the files of the Bank. It is conceivable that the requirement could be satisfied by the staff providing the **Panel** with summaries of the Bank's data. The Resolution also leaves unresolved the issue of which party, either the **Panel** or the Bank's staff, has the power to determine which records are "pertinent" to a particular investigation.

These two issues are of significance because they strike at the heart of the independence and transparency of the **Panel's** investigations. The **Panel** will not retain the confidence of the public if it lacks the power to determine what information is relevant to its investigations, the ability to gain unrestricted access to this information, and the authority to compel Bank staff to cooperate with its investigations. The only potential counterbalance to such a situation would be for the **Panel** to use its reports to signal to the general public that its findings are based on limited access to the Bank's staff and records.

A second unresolved issue concerns the form of **Panel** investigations. The fact that the Resolution does not provide clear guidance on this issue suggests that the Executive Directors intended to grant the **Panel** discretion in this regard. Although there is much to recommend this approach, the resulting lack of certainty may be problematic. For instance, the Resolution does not expressly grant the complainant the right to participate in the investigation. It cannot be taken for granted that the **Panel** will deem the complainant's participation to be a necessary or even a desirable element of every investigation. Similarly, there is no assurance that other interested parties will be permitted to present evidence to the **Panel**. <sup>185</sup>

Another important issue left unresolved relates to the substantive content of the **Panel** reports which will be made publicly available. Paragraph twenty-two merely states that the report "shall consider all relevant facts, and shall conclude with the **Panel's** findings." <sup>186</sup> Once again, the Resolution fails to define "relevant facts." Consequently, it would be consistent with the letter of the Resolution for the Bank to publish an edited summary of the evidence presented to the **Panel** as well as a condensed version of the **Panel's** findings. The problem is compounded by the fact that the Resolution does not stipulate whether it is the **Panel** or the Board which has the power to determine which facts are "relevant" and therefore need to be included in the published report. The Bank, however, should realize that the publication of an edited report will undermine the credibility of both the **Panel** and the Bank. <sup>187</sup>

A final issue that requires clarification pertains to the amount of time the Executive Directors are permitted in responding to the findings of the **Panel** and the report of the Bank's management. To **[\*600]** begin with, the Resolution provides no guidance on when the **Panel's** findings or the Bank management's response to the finding should be distributed to the Executive Directors. <sup>188</sup> In addition, it is silent as to the time period within which the Board must act. Consequently there is a substantial risk that, in difficult or controversial cases, the Board could indefinitely delay action on the **Panel's** findings. This would also delay publication of the **Panel's** findings. Some guidance on this point is needed if the public is to have confidence in the efficacy and transparency of the **inspection** process.

Paragraph twenty-six states that the **Panel** is required to submit an annual report of its activities to the Bank's President and Executive Directors. <sup>189</sup> The Resolution also requires the Bank to publish the **Panel's** annual report. <sup>190</sup>

This requirement is one of the most positive aspects of the **inspection** process. The report will enable the public to assess the independence and competence of the **Panel** and the Bank's response to the recommendations of the **Panel**. Moreover, the public can use this information to hold the Bank accountable for its responses to the findings and recommendations of the **Panel**. The report also provides the public with an opportunity to evaluate the work of the **Panel** and to hold it accountable for shortcomings in its own operations. This includes an opportunity for the public to assess the quality and utility of the annual report itself. In addition, the **Panel** can use the annual report to stimulate public debate relating to problems in the Bank's operating rules and procedures. Interested parties can then use the report to argue for changes in the rules and procedures. Finally, the annual report offers the Panelists an opportunity to make observations about the types of complaints it receives and about its relationship with the Bank. **[\*601]**

#### IV. The Significance of the **Panel**

There are two bases for testing the **Panel's** significance. The first focuses on the nature of the legal precedent being set by the establishment of the **Panel**. The second evaluates the **Panel's** impact on the operations of the Bank. The latter will obviously depend on how potential complainants choose to use the **Panel's** complaint process and on the quality of the **Panel's** work. Nevertheless, it is possible to make some preliminary observations about the effect that the **Panel** could have on the Bank.

##### A. Legal Significance

The **Panel** is the first international forum with the mandate to use complaints from private actors to supervise the activities of an international organization. Its establishment sets a precedent that has the potential to influence three areas of international law: the law of international organizations, substantive areas of international law such as international human rights and environmental law, and international administrative law. After a brief discussion of the **Panel** as a supervisory mechanism, the impact of the **Panel** on each of these areas will be discussed below.

##### 1. The **Panel** as a Supervisory Mechanism

The concept of supervision refers to the methods that both national and international societies use to ensure that the actions of all participating members conform to society's rules of conduct. The supervisory mechanisms that the international community uses can be classified into three categories: judicial supervision, quasi-judicial supervision, and non-judicial supervision. <sup>191</sup>

Judicial supervision is exercised by an independent and impartial body that is competent to give legally binding judgments based on the facts as determined by due process. <sup>192</sup> Non-judicial supervision, on the other hand, is exercised by a politically dependent body that reaches either a binding decision or a non-binding recommendation by way of an ill-defined, but often politicized, procedure. This supervisory mechanism generally includes a technical **[\*602]** phase in which experts, who may or may not be independent of the politicized decision-makers, perform a fact-finding function. <sup>193</sup>

Quasi-judicial supervision includes elements of both judicial and non-judicial supervision. It usually involves a relatively independent body that reaches either binding or non-binding decisions by applying law to facts. The essential elements of quasi-judicial supervision include procedures that are both transparent and fair and the ability to make a final decision. <sup>194</sup>

The **World Bank Inspection Panel** can be classified as a quasi-judicial supervisory body. The Resolution establishes procedures that provide groups with the ability to present complaints and have them reviewed on the merits by a relatively independent body. Furthermore, the Resolution provides that complainants will be presented with a final decision in which the facts will be applied to the Bank's operational policies and procedures.

Based on the wording of the Resolution, the **Panel** may be viewed as a weak, quasi-judicial supervisory body lying closer to the non-judicial end of the supervisory spectrum than to the judicial end. <sup>195</sup> This is because the **Panel's** procedures leave final decisions to the relatively more politicized Board of Executive Directors <sup>196</sup> and because the Bank's staff is allowed to play a role in its own supervision. <sup>197</sup> However, if the **Panel** uses its powers to issue reasoned opinions and to broadly interpret its jurisdiction to review complaints, it has the potential to strengthen its position as a quasi-judicial supervisory body. **[\*603]**

Supervision in international organizations should perform three functions. First, it should encompass a review function that tests the conduct of the supervised entity against the standards established in the applicable rules. <sup>198</sup> Second, it should have a corrective function that entails enforcing the law and ensuring that the supervised entity corrects any infringements of the applicable rules. <sup>199</sup> Finally, it should have the creative function of contributing to the development of the rules and laws applicable to the supervised international organization. <sup>200</sup> The **Panel** can perform all three functions. It performs the review and corrective functions by reviewing complaints and by making findings and recommendations to the Board. It will perform the creative function by using its advisory and investigatory powers to both clarify and further delineate the standards of conduct and obligations established under the Bank's operational rules and procedures.

## 2. Law of International Organizations

The creation of the **Panel** promises to alter the legal relationships between the Bank, its member states, and the citizens of the member states. Prior to the establishment of the **Panel**, international organizations were viewed as being directly accountable only to their member states. <sup>201</sup> Private parties were expected to relate to these organizations through member states. Those private actors who contended that they had been harmed by the actions of the international organization were expected to have the member state, of which they were a citizen, bring a complaint to the international organization on their behalf. Private actors, therefore, were forced to rely on domestic opportunities to

encourage their sovereign to adequately protect their interests in dealings with international organizations. [202](#)

One major exception to this general rule relates to those international organizations where member states, in establishing or joining the organization, have expressly agreed to allow private actors to **[\*604]** participate in the affairs of the international organization. [203](#) In these cases the private actors' involvement is limited to participating in the formulation and enforcement of standards of conduct for member states. They are not involved in formulating and enforcing the standards of conduct applicable to the international organization's operations. [204](#)

The **World Bank**, by establishing the **Inspection Panel**, has challenged this set of legal relationships. It has acknowledged that it has a legally significant relationship with private parties that is distinct from either its relationship with its member states or a state's relationships with its own citizens. Moreover, it has recognized that it can be held accountable for its conduct within the scope of this distinct relationship.

The source of the Bank's distinct relationship with private actors is its operations in its member countries. In the course of its operations, the Bank must decide which of the borrower country's development projects or programs to fund and what conditions to attach to the use of those funds. As demonstrated above, these decisions can have a direct and often irreversible effect on the lives of the citizens in member countries. Traditionally, responsibility for these effects rested solely with the sovereign state of which the affected person was a citizen. **[\*605]**

The Bank, in its decision to establish the **Panel**, has implicitly divided the responsibility for these effects into two categories. In the first category, which is limited to the substance of lending decisions, the traditional relationships between international organizations, member states, and citizens apply. Thus, even though decisions within this category are reached jointly by the Bank and the borrower country, the borrower state assumes legal responsibility for the decision. This principle is implemented through various covenants and conditions in Bank loan agreements that explicitly make the borrower and/or guarantor responsible for the implementation of these decisions. [205](#) Consequently, private actors must look to member states for redress for any harm caused by these decisions.

The second category, which consists of the manner in which the Bank makes and implements its decisions about which projects and programs to support, is the sole responsibility of the Bank. The Bank determines for itself how to collect and analyze the information upon which these decisions are made and whom it allows to participate in these decisions. The borrower state's involvement in these issues is limited and non-essential. [206](#)

With the adoption of this resolution, the Executive Directors have decided that directly affected private parties can hold the Bank accountable for these actions. The borrower state is not a necessary party to these proceedings. This means that the Executive Directors have defined a legal relationship between the Bank and private actors that is distinct from the relationship the Bank has with its member states.

The Executive Directors have also determined that private actors should be able to initiate the complaint process. They, therefore, have granted individuals the opportunity to use the preparation and submission of complaints to influence the evolution of the **Panel's** interpretation of its own jurisdiction and the **[\*606]** Bank's operational rules. This represents a potentially significant improvement in the ability of private actors to influence the work of the Bank and the legal environment within which the Bank functions.



Furthermore, because the **World Bank** is not the only international organization to have this type of independent relationship with the citizens of its member countries, the **Panel** establishes an important precedent. All international organizations with a mandate to use public resources to promote economic, social, and cultural development within their member states have similar relationships with the private actors in their member countries. Consequently, the example set by the **World Bank** is directly applicable to all such international organizations. [207](#)

The Resolution establishing the **Panel** also defines the scope of the Bank's responsibility within this Bank-private actor relationship. There are two elements to the Bank's definition of its responsibilities. The first is the identity of the parties to whom the Bank is accountable. The Resolution stipulates that the Bank is only accountable to private actors who are directly and materially affected by acts or omissions by the Bank that are inconsistent with its operating rules and procedures. [208](#)

This suggests that, as a general rule, the Bank's responsibility will be limited to citizens in its borrower countries. It also suggests that the Bank does not recognize any direct accountability to private actors simply because their governments allow the Bank to use their tax dollars to fund Bank operations. [209](#) These private parties can only seek to hold the Bank accountable through the member state of which they are citizens.

The Executive Directors' decision does not affect the Bank's responsibility to member states for the way in which it uses their **[\*607]** contributions. Furthermore, taxpayers in creditor countries may have access to either political or legal means to influence their governments' decisions regarding the Bank. For example, public interest groups have persuaded the U.S. Congress to pass legislation influencing the manner in which U.S. administrations use their voice and vote within the Bank. [210](#)

One possible exception to this general rule would arise where citizens of wealthier countries can show that they are included in the class of intended beneficiaries of a particular operational rule or procedure. An example of such an exception would be a complaint dealing with the Bank's implementation of its new information disclosure policy. This policy, embodied in a Bank procedure, seeks to open Bank information to all interested parties, including those in non-borrower member states. [211](#) Because Bank procedures fall squarely within the **Panel's** jurisdiction, the information disclosure policy could form the basis for a complaint brought by citizens of both borrower and non-borrower states who have been directly and adversely affected by the Bank's failure to comply with these procedures.

The second element of the Bank's responsibility relates to its identification of the actions for which it can be held accountable. In the Resolution, the Bank has limited its responsibility to the implementation of its operating rules and procedures. These rules and procedures pertain to how the Bank makes and implements decisions, rather than to the actual content of the decisions. As discussed above, the Bank alone controls that process. [212](#) **[\*608]**

The Bank's definition of its unique area of responsibility helps to clarify the respective responsibilities of borrowers, member states, and all other participants in Bank-funded operations. This should facilitate the efforts of groups adversely affected by Bank projects to identify those responsible for special aspects of their problems and to hold them accountable for their actions. Thus, the **Panel's** work in defining and elaborating the contours of the Bank-private actor relationship may also affect the relationship between the Bank and its member states. In addition, it may affect the relationship between member states and private complainants who are citizens of that state.

### 3. Substantive Areas of International Law

Because the Bank's operational rules and procedures cover the full range of Bank activities, the **Panel's** findings and recommendations have the potential to influence the development of substantive areas of law applicable to the Bank's operations. For example, the **Panel's** findings and recommendations pertaining to complaints involving the rights of indigenous peoples and groups involuntarily resettled in the course of Bank-funded operations could influence the development of international human rights law. Similarly, **Panel** decisions on complaints pertaining to environmental rules may affect the evolution of international environmental law.

The potential for the **Panel** to influence substantive human rights law can be gauged by examining a potential complaint arising under Operational Directive 4.30. <sup>213</sup> Consider a complaint alleging that the Bank failed to adequately review a borrower's resettlement policy and that, as a result, the Bank approved a project which would lead to the forced resettlement of people in a manner that is inconsistent with the policies spelled out in Directive 4.30. Regardless of whether the **Panel** accepts or rejects such a complaint, its response could influence laws governing the rights of resettled people. First, the **Panel's** reasoned recommendation to investigate or not investigate will clarify the Bank's responsibilities under Directive 4.30 and should make more specific the factors the Bank should consider in assessing a borrower's proposed resettlement plan. Second, if the **Panel** chose to investigate the adequacy [**\*609**] of the Bank's review of the borrower's resettlement plan, it would have to begin by defining the nature of the Bank's obligations toward resettled populations and the rights of resettled groups to hold the Bank accountable for its failure to comply with these obligations.

Third, the complainants, in drafting their complaint, would need to rely on applicable general principles of international law to interpret the requirements of the Operational Directive and to build its case regarding the adequacy of the Bank's assessment of the resettlement plan. The **Panel** would also need to engage in a similar exercise in its review of the complaint. Thus, the complaint process can lead to the further incorporation of general principles of international law into the regulation of Bank operations. The manner in which the **Panel** interprets and applies relevant international legal principles should also influence the interpretation of these principles in other international fora.

### 4. International Administrative Law

The Bank's identification of the implementation of its operating rules and procedures as the substance of its unique relationship to qualifying private actors should have an impact on the administrative law of international organizations. Prior to the establishment of the **Panel**, this area of administrative law was limited to issues pertaining to the internal arrangements of international organizations. <sup>214</sup> The Bank's creation of the **Panel**, however, should expand the scope of this area of law to include the conduct of international organizations in their dealings with those private parties most directly affected by their actions.

Initially, the effects of the **Panel's** decisions will be limited to the resolution of qualifying disputes between the Bank and the public. However, over time complainants may be able to use the **Panel** to influence the Bank's rule-making procedures. The reason is that in order to successfully bring a complaint before the **Panel**, complainants will need to

propose their own interpretations of the Bank's operating rules and procedures. The **Panel**, in reviewing the complaint, will need to evaluate these interpretations and provide its own interpretation in response thereto. Publication of these various interpretations should stimulate public debate about the Bank's rules and procedures and the process the Bank follows in **[\*610]** drafting them. This, in turn, should encourage the Bank to make public its own interpretation of its rules and procedures to justify why its interpretation is "superior" to those of the **Panel** or the complainant.

Hopefully, this exchange will encourage the Bank to consider establishing a more open and participatory rule-making procedure. Such a procedure could include formal opportunities for interested parties to submit comments on proposed rules. It could also include a requirement that the Bank publish a response to these comments together with the text of, and the rationale for, all new rules and procedures.

In addition, these developments should be of interest to other international organizations that have been entrusted with the management of public resources. All such organizations have rules and procedures that have a substantial and direct impact on communities around the world. Consequently, they have as much need as the **World Bank** for an **inspection panel** to investigate public complaints concerning their failure to follow their own operating rules and procedures. The creation of such **panels** would have a profound and salutary effect on the administrative practices of all international organizations.

## B. Effect on Bank Operations

The work of the **Panel** should enhance the accountability and efficacy of Bank operations. Each of these issues is discussed below.

### 1. Accountability

The **Panel** will improve the Bank's public accountability by providing a forum in which qualifying private actors can initiate investigations into the manner in which the Bank implements its operating rules and procedures. The **Panel's** independence and the qualification of its members should give complainants confidence that their claims will receive a fair hearing based on the merits of each complaint.

The possibility that Bank staff could be held personally accountable for the manner in which they make and implement decisions should also encourage the staff to be more responsive to and respectful of those who are affected by their decisions. In this sense, the **Panel** should encourage the Bank's staff to incorporate more of the principles of good governance - principles they advocate **[\*611]** - into their own operations. <sup>215</sup> Thus, the **Panel** can help make the Bank's staff a more open and accountable civil service.

### 2. Efficacy

The complaint process will improve the efficacy of the Bank in a number of ways. First, qualifying complainants can use this forum to ensure that they have some say in the issues receiving **World Bank** attention. This should improve the Bank's understanding of the needs and concerns of the intended beneficiaries of its operations. It should also enhance the Bank's ability to serve the poor and powerless and achieve its objective of alleviating poverty.

Second, the complaint process and the work of the **Panel** should also provide the Bank with a timely and independent appraisal of claimed deficiencies in Bank operations. The Bank can use this information to correct deficiencies in the design or implementation of its on-going operations and mitigate the effects of hardships caused by such operations.

Third, the fact that the **Panel's** findings and its recommendations to the Executive Directors will be published means that the complaint process will create a public record documenting the actual effects of on-going Bank operations. This record can be used by non-governmental actors to help affected people better understand how to make the Bank more responsive to their needs. In addition, non-governmental organizations can use the empirical data included in the record to stimulate a more informed and focused discussion with the Bank on its policies and procedures. This knowledge, and the discussions it generates, should eventually result in Bank operations that more precisely meet the needs of their intended beneficiaries.

Fourth, the findings of the **Panel** will provide the Bank's Directors with independent information on the staff's compliance with their rules and procedures. The Board can use this information to identify the "best practice" to follow in implementing these rules and procedures and the type of circumstances that may justify deviations from these practices.

The **Panel** may also protect Bank staff and Directors from having to deal with complaints that fall outside of the Bank's area of exclusive responsibility or that lack merit. However, the work of **[\*612]** the **Panel** should also make it harder for the Bank to avoid accepting responsibility for those complaints that arise from aspects of its operations that are subject to its exclusive dominion.

Finally, it should be recognized that the operational impact of the **Panel** will be influenced by the size of its budget, which will be determined by the Bank's Executive Directors. If the **Panel's** budget proves to be inadequate or too tightly controlled by the Executive Directors, the independence of the **Panel's** decision-making will be called into question. Furthermore, a fear of financial repercussions could cause the **Panel** to make decisions on the basis of budgetary considerations. It is to be hoped that the Bank will be sensitive to these potential problems and ensure that the **Panel** has adequate resources to avoid them. [216](#)

## V. Conclusion

The **Inspection Panel** is an important forum for people affected by **World Bank** operations. Their ability to effectively and successfully exploit this opportunity depends on the careful selection and preparation of complaints, the **Panel's** adoption of fair and transparent procedures, and the quality of the **Panel's** findings and published reports.

The creation of the **Panel** is also an important development in international law. The **Panel** will be the first forum in which private actors can hold an international

organization directly accountable for its actions. If presented with well-prepared complaints, the **Panel** has the potential to affect the legal relationships between international organizations, their member states, and private actors. It can also influence the development of the administrative law of international organizations. In addition, it provides private actors with the opportunity to influence the evolution of international human rights and environmental law.

By defining the exclusive responsibilities of the **World Bank**, the decisions of the Executive Directors will help clarify the responsibilities of both the Bank and its member states toward private actors. Over time this should also enhance the ability of private **[\*613]** actors to hold both the Bank and its member states more accountable for their actions.

The **Panel** will also make a positive contribution to the governance of the Bank and the efficacy of its operations. Its findings and recommendations will provide the Executive Directors with timely information on problems in Bank operations. This information can be used to improve the quality of the Bank's services. In addition, the example set by the **World Bank** in establishing the **Panel** may compel other international organizations to create their own **inspection panels**.

The complaint process will also generate empirical data on the actual effect of Bank policies and procedures. This data can be used both to improve Bank operations and policies and to educate both the Bank's staff and the public about the "best practices" to follow in designing and implementing Bank-funded operations.

Finally, lawyers and other advocates who work with communities directly affected by the Bank's operations should exploit the opportunities created by the establishment of the **Panel** for the benefit of their clients. The success of this historic development depends on their doing so.

### Legal Topics:

For related research and practice materials, see the following legal topics:

[Administrative Law](#) > [Agency Rulemaking](#) > [Rule Application & Interpretation](#) > [General Overview](#) 

[Banking Law](#) > [Directors & Officers](#) > [General Overview](#) 

[Environmental Law](#) > [National Environmental Policy Act](#) > [General Overview](#) 

### FOOTNOTES:

<sup>n1</sup>. The **World Bank Inspection Panel**, Res. 93-10, International Bank for Reconstruction and Development, Res. 93-6, International Development Association, Sept. 22, 1993 [hereinafter Resolution].

<sup>n2</sup>. Id. 1-2.

<sup>n3</sup>. Id. 12.

<sup>n4</sup>. Id. 25.

<sup>n5</sup>. Id. 26.

¶n6. The treaties establishing the institutions of the European Union do allow private actors to sue the institutions of the Community in the European Court of Justice on non-contract claims. See, e.g., Treaty Establishing the European Economic Community [EEC Treaty] arts. 173, 215; Treaty Establishing the European Atomic Energy Community [Euratom Treaty] arts. 136, 188; Treaty Establishing the European Coal and Steel Community [ECSC Treaty] arts. 31, 33, 40. However, these supranational communities have a different purpose and focus from international organizations like the **World Bank**. Their objective is to create an integrated community. The purpose of international organizations, such as the **World Bank**, is to promote international cooperation while respecting the sovereignty of each member state. Interestingly, the European Union does not allow citizens of non-EU countries to sue the institutions of the European Union in the European Court of Justice. In addition, the European Investment Bank does not allow private actors directly affected by the Bank's actions who do not have a contractual relationship with the Bank to seek legal redress through the European Court. See J. Steiner, Textbook on EEC Law (3d ed. 1992).

¶n7. Resolution, supra note 1, 12; see also infra notes 129-132 and accompanying text.

¶n8. The **Panel** has the power to investigate qualifying complaints and to make findings regarding the Bank's compliance with its rules and procedures. Resolution, supra note 1, 12, 20-22; see discussion infra part III.C.

¶n9. Resolution, supra note 1, 12; see discussion infra part III.D.

¶n10. See The **World Bank** Operational Manual, Operational Directive 14.70: Involving Nongovernmental Organizations in Bank-Supported Activities (Aug. 1989).

¶n11. See The **World Bank** Operational Manual, Operational Directive 4.30: Involuntary Resettlement (June 1990).

¶n12. See The **World Bank** Operational Manual, Operational Directive 4.20: Indigenous Peoples (Sept. 1991).

¶n13. See The **World Bank** Operational Manual, Operational Directive 4.01: Environmental Assessment (Oct. 1991); The **World Bank** Operational Manual, Operational Directive 4.00 Annex A: Environmental Assessment (Oct. 1989).

¶n14. See, e.g., C.F. Amerasinghe, The Law of the International Civil Service 3-25 (1988).

¶n15. The **World Bank** has stated that it views alleviating poverty as its most important task. See The **World Bank**, Implementing the **World Bank's** Strategy to Reduce Poverty: Progress and Challenges (1993).

¶n16. Article I(i) of the Articles of Agreement of the International Bank for Reconstruction and Development states that one of its purposes is "to assist in the ... development of territories of members by facilitating the investment of capital for productive purposes, including ... the encouragement of the development of productive facilities and resources in less developed countries." Article I(iii) states that the Bank should use its resources in such a way that it will assist in raising the "productivity, the standard of living and conditions of labor" in member states. Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature, Dec. 27, 1945, [60 Stat. 1440](#), 2 U.N.T.S. 134.

Article I of the Articles of Agreement of the International Development Association states that its purpose is "to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world . . . thereby furthering

the developmental objectives of the International Bank for Reconstruction and Development." Articles of Agreement of the International Development Association, Sept. 24, 1960, [11 U.S.T. 2284, 2285-86](#), 439 U.N.T.S. 249, 252.

<sup>n17</sup>. There is an extensive literature discussing the Bank's activities. See, e.g., Robert L. Ayers, *Banking on the Poor* (1983) (discussing the expansion of Bank operations during the 1970s); Jonathan Cahn, *Challenging the New Imperial Authority: The **World Bank** and the Democratization of Development*, [6 Harv. Hum. Rts. J. 159 \(1993\)](#) (discussing the Bank's growing role in the governance of its member countries); Edward S. Mason & Robert E. Asher, *The **World Bank** Since Bretton Woods* (1973) (analyzing the Bank's development during its first quarter century); Paul Mosley et al., *Aid and Power* (1991) (discussing the development of structural adjustment lending and the evolution of policy dialogues between the Bank and its borrower countries); Cheryl Payer, *The **World Bank**: A Critical Analysis* 344-356 (1982); Bruce Rich, *The Emperor's New Clothes: The **World Bank** and Environmental Reform*, 7 *World Pol'y J.* 305 (1990); Bruce Rich, *Mortgaging the Earth: The **World Bank**, Environmental Impoverishment, and the Crisis of Development* (1994); Ibrahim F.I. Shihata, *The Bank in a Changing World* (1991).

<sup>n18</sup>. See Cahn, *supra* note 17, at 161; Mosley, *supra* note 17, at xiii.

<sup>n19</sup>. See William A. McCleary, *The Design and Implementation of Conditionality in Restructuring Economies in Distress* 197, 197-215 (Vinod Thomas et al. eds., 1991); Mosley, *supra* note 17, at 134-78 (discussing the implementation of various conditional lending requirements). See generally Shihata, *supra* note 17.

<sup>n20</sup>. See Warren C. Baum, *The Project Cycle* 11-17 (1982). See generally Warren C. Baum & Stokes M. Tolbert, *Investing in Development: Lessons of **World Bank** Experience* 393-568 (1985).

<sup>n21</sup>. This does not mean that these issues were not considered informally within the Bank. However, based on its interpretation of the political prohibitions in its own Articles, the Bank generally contended that it was legally required to treat these issues as part of the sovereign prerogatives of its borrower countries. See Aron Broches, *International Legal Aspects of the Operations of the **World Bank***, 98 *Recueil des Cours* 297, 385-408 (1959) (discussing legal implications of loan agreements between sovereign states and the Bank); Shihata, *supra* note 17; *The **World Bank**, Governance and Development* 50-52 (1992); Lawyers Committee for Human Rights, *The **World Bank**: Governance and Human Rights* 16-19 (1993). See generally Baum, *The Project Cycle*, *supra* note 20, at 11-17 (discussing project analysis).

<sup>n22</sup>. These issues are relevant to project loans as well. However, they become more pertinent in the case of structural adjustment loans because the success of the loan depends on the government's ability to design and implement policy. See McCleary, *supra* note 19; Shihata, *supra* note 17; Mosley, *supra* note 17, at 81, 145-61.

<sup>n23</sup>. For a discussion of **World Bank** policies on governance, see Shihata, *supra* note 17, at 53-96; *The **World Bank**, Governance and Development*, *supra* note 21; Lawyers Committee for Human Rights, *supra* note 21, at 43-60.

<sup>n24</sup>. This is mandated by the Articles of the Bank which require the Bank to refrain from taking the political character of a borrower state into consideration. In addition, the Articles require the Bank to base all of its lending decisions on economic considerations. See Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 16, art. III, 5(b), art. V, 5(c); Articles of Agreement of the International Development Association, *supra* note 16, art. V, 1(g), 6, art. VI, 5(c). But see Bartram S. Brown, *The United States and the Politicization of the **World Bank***

(1992) (discussing the legal and practical implications of the politicization which occurs when the United States uses its voting power in the **World Bank** to serve political purposes). The Bank's practice is based on traditional international legal concepts of sovereignty. See generally Broches, *supra* note 21, at 385-408 (discussing international legal aspects of loan agreements and state sovereignty). These notions are, however, under challenge. See Claudio Grossman & Daniel D. **Bradlow**, Are We Being Propelled Towards a People-Centered Transnational Legal Order?, 9 Am. U. J. Int'l L. & P. 1, 6 (1993) (addressing changing notions of sovereignty and the role of private actors in international law).

¶n25. See sample IBRD loan agreement in Daniel D. **Bradlow**, *International Borrowing* (3d ed. Int'l Law Inst., 1994).

¶n26. The International Bank for Reconstruction and Development (IBRD) funds its operations either from the capital provided by its shareholder member states or from private investors who rely on the commitment member states have made to contribute additional capital to the Bank when called upon to do so. International Development Association (IDA) funds are contributed by member states and are periodically replenished. In the final analysis, this means that the Bank is utilizing the availability of public funds to finance its operations. See Shihata, *supra* note 17.

¶n27. See Baum, *The Project Cycle*, *supra* note 20, at 18. The number of Executive Directors was increased from 22 to 24 on November 1, 1992. See *The World Bank*, 1993 Annual Report 17 (1994).

¶n28. *The World Bank*, 1993 Annual Report, *supra* note 27, at 166-67.

¶n29. *Id.* at 85-86.

¶n30. *Id.* at 99.

¶n31. But see, [22 U.S.C. 262m-7](#) (requiring the United States Executive Director not to vote in favor of any project that would have a "significant effect on human environment" unless the project reports are made available to the Executive Director at least 120 days before the vote).

¶n32. In recent years, the Bank has taken a number of steps to improve its interactions with non-governmental organizations and actors (NGOs). See Operational Directive 14.70, *supra* note 10, at 8, 10, 18. Bank staff are now encouraged to consult with NGOs about Bank-funded operations, and the Bank makes more of an effort to solicit the views of NGOs on a broader range of issues. The Bank has also established an NGO-**World Bank** Committee, which consists of equal numbers of Bank officials and representatives of NGOs. This committee meets to discuss issues of mutual concern to the Bank and the NGOs. However, the Executive Directors are not formally required to participate in these consultations and their knowledge of the consultations is often filtered through the Bank's staff. See Ibrahim F.I. Shihata, *The World Bank and Non-Governmental Organizations*, 25 Cornell Int'l L.J. 623 (1992); Marcos Arruda, *NGOs and the World Bank: Possibilities and Limits of Cooperation* (1992); Paul and Israel, *Nongovernmental Organizations and the World Bank: Cooperation for Development* (1991).

¶n33. See Baum, *The Project Cycle*, *supra* note 20, at 19-21.

¶n34. *Id.* The Bank staff's influence over the disbursement of funds will not be altered by the **Inspection Panel. However, the Panel** will have the ability to investigate the exercise of this power.

¶n35. See, e.g., Bettina S. Hurni, *The Lending Policies of the World Bank in the 1970s:*



Analysis and Evaluation 83-90 (1980) (discussing the staff's strong influence in the lending process); Payer, *supra* note 17; Rich, *Mortgaging the Earth*, *supra* note 17, at 194, 307; The Sierra Club, *Bankrolling Disasters: International Development Banks and the Global Environment* 4, 13 (1986).

<sup>36</sup> See sources cited *supra* note 35; see also Raymond Mikesell and Larry Williams, *The International Banks and the Environment: From Growth to Sustainability: An Unfinished Agenda* 13-16 (1991) (arguing that the Bank's operational procedures do not adequately take environmental objectives into consideration).

<sup>37</sup> B. Morse & T. Berger, *Sardar Sarovar: The Report of the Independent Review* (1992).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> The **World Bank**, *Effective Implementation: Key to Development Impact*, Report of the Portfolio Management Task Force (1992).

<sup>44</sup> *Id.* at ii-iii, 3-4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at ii, 3.

<sup>47</sup> *Id.* at iii.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at iii, 12.

<sup>50</sup> *Id.* at ii; see also *id.* at 7-8.

<sup>51</sup> *Id.* at 8.

<sup>52</sup> *Id.* at ii.

<sup>53</sup> **World Bank** project reports, which provide more detail than loan agreements, are available through the U.S. Department of Commerce. They are not, however, easily accessible to people in borrower countries. The amount of publicly available information on Bank projects should increase as the Bank begins issuing its new Public Information Documents. These documents are available through the Bank's new Public Information Center in Washington, D.C. See The **World Bank** Operational Manual, Bank Procedure 17.50: Disclosure of Operational Information (Sept. 1993); The **World Bank, The World Bank** Policy on Disclosure of Information (1994); see also *infra* notes 66-68 and accompanying text.

<sup>54</sup> See Ibrahim F.I. Shihata, *The World Bank Inspection Panel* 1-28 (forthcoming 1994) (manuscript on file with the Virginia Journal of International Law) (discussing the evolution of an independent **inspection** function at the Bank).

¶n55. See Eric Christensen, Natural Resources Defense Council, Green Appeal: A Proposal for an Environmental Commission of Inquiry at the **World Bank** (1990); Memorandum from Lori Udall, Environmental Defense Fund, & David Hunter, CIEL, to interested Parties (Apr. 6, 1993) (on file with the Virginia Journal of International Law) (proposing draft provisions for an independent appeals commission to monitor the **World Bank**). There are several differences between these two proposals. Nonetheless, the proposals are substantially similar in respect to the issues under discussion. See also Cahn, *supra* note 17, at 190 (proposing the establishment of an institutionally independent "watchdog agency" to monitor Bank operations); David A. Wirth, Legitimacy, Accountability and Partnership: A Model for Advocacy on Third World Environmental Issues, [100 Yale L.J. 2645, 2664](#) (calling for a neutral adjudicatory mechanism and a "private attorney general" model of citizen enforcement of Bank and borrower state compliance with applicable standards). These proposals are similar to the proposals for a permanent review **panel** in that they seek to establish a body with the authority to review almost all aspects of Bank operation. See also C. Wald and D. Zaelke, Establishing an Independent Review Board at the European Bank for Reconstruction and Development: A Model for Improving Decisionmaking, 2 *Duke Env'tl. L. & Pol'y F.* 59 (1992).

¶n56. See Christensen, *supra* note 55, at 5 (arguing that an environmental commission of inquiry at the **World Bank** should "be empowered to determine whether a particular project meets the Bank's Articles of Agreement, by-laws, operational directives, and other internal guidelines, as well as whether specific conditions contained in the loan agreement for the project have been fulfilled"); Udall, *supra* note 55, at 1-2 (arguing that an **inspection panel** should be competent "to investigate and pass judgment on complaints regarding violations of all **World Bank** policies, procedures, loan and credit agreements, the **World Bank's** articles of agreement, by-laws and violations of international human rights and environmental law").

¶n57. See Christensen, *supra* note 55, at 5; Udall, *supra* note 55, at 3. This proposal, however, would have granted the Executive Directors the ability to overturn decisions of the **panel** based on a two-thirds vote for reversal.

¶n58. Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 16, art. IV, 10 (prohibiting the Bank from interfering in the political affairs of member countries and from taking political issues into consideration); see also *id.* arts. III 5(b), V 5(c).

¶n59. See *supra* note 58 and accompanying text.

¶n60. This proposal was advanced by a number of the Bank's Directors and was discussed in internal Bank memoranda. Although details on various versions of this proposal have been made available to some outside parties, the Bank has not published the text of this proposal. The discussion here based on an internal memorandum provided informally to author. (unpublished memorandum is on file with the author). For a further discussion of this proposal, see Shihata, *supra* note 54, at 22-23.

¶n61. See Daniel **Bradlow**, Opening Statement of Professor Daniel **Bradlow** to the Sub-Committee on International Financial Institutions of the Standing Committee on Finance, House of Commons, Canada (Feb. 18, 1993) (unpublished transcript on file with the Virginia Journal of International Law); Daniel **Bradlow**, The Case for a **World Bank** Ombudsman, Submitted to the Sub-Committee on International Development, Finance, Trade, and Monetary Policy of the Banking, Finance, and Urban Affairs Committee, U.S. House of Representatives (May, 1993) (unpublished manuscript on file with the Virginia Journal of International Law); Daniel **Bradlow**, **Why the World Bank** Needs an Ombudsman, *Fin. Times*, July 14, 1993, at 13.

<sup>62</sup>. See W. Gelhorn, *Ombudsmen and Others* (1966); I. al-Wabab, *The Swedish Institution of Ombudsmen* (1979).

<sup>63</sup>. See The **World Bank**, *Getting Results: The World Bank's Agenda for Improving Development Effectiveness* 7 (1993).

<sup>64</sup>. *Id.* at 8.

<sup>65</sup>. See *id.* at 7.

<sup>66</sup>. See The **World Bank** Operational Manual, Bank Procedure 17.50: Disclosure of Operational Information, *supra* note 53; The **World Bank, The World Bank** Policy on Disclosure of Information, *supra* note 53, at 2-3.

<sup>67</sup>. See The **World Bank** Operational Manual, Bank Procedure 17.50: Disclosure of Operational Information, *supra* note 53, at 1; The **World Bank, The World Bank** Policy on Disclosure of Information, *supra* note 53, at 5.

<sup>68</sup>. The **World Bank** Operational Manual, Bank Procedure 17.50 Annex B: The Public Information Center (Sept. 1993); The **World Bank, The World Bank** Policy on Disclosure of Information, *supra* note 53, at 4.

<sup>69</sup>. See Shihata, *supra* note 54, at 30-36 (describing the Executive Board's discussions of this Resolution). The **Inspection Panel** officially opened its offices in Washington, D.C. on September 7, 1994. New Independent **Inspection Panel** Office Opens, **Inspection Panel** News Release No. 1 (The **Inspection Panel**, Sept. 7, 1994). The first complaint was filed on October 26, 1994 by the Arun Concerned Group, which represents the residents of the Sankhuwa-Sava District in Nepal. It concerns the proposed Arun III Hydroelectric Project, which will be built in this district.

<sup>70</sup>. Resolution, *supra* note 1, 2.

<sup>71</sup>. *Id.* This consideration also suggests that two of the members of the **Panel** should be citizens of borrower countries.

<sup>72</sup>. The Bank does not appear to have taken these factors into consideration when selecting the first members of the **Inspection Panel** in April 1994. The Chairperson of the **Panel** is Ernst Gunther-Broder, a former President of the European Investment Bank and Governor of the European Bank for Reconstruction and Development. Alvero Umana Quesada, the former Minister of Natural Resources for Costa Rica, and Richard E. Bissell, a former official of the United States Agency for International Development, were also selected to serve on the **Panel**. See Independent **World Bank Inspection Panel** Appointed, **World Bank** News Release, No. 94553 (Apr. 22, 1994).

<sup>73</sup>. Resolution, *supra* note 1, 4.

<sup>74</sup>. *Id.*

<sup>75</sup>. *Id.*

<sup>76</sup>. *Id.*

<sup>77</sup>. *Id.* 5.

<sup>78</sup>. *Id.* 3. The first members of the **Panel** shall be selected as follows: one for three years, one for four years, and one for five years. *Id.* The Panelist selected for five years

shall serve a one-year term as the Chair of the **Panel**. Thereafter, the members of the **Panel** shall select a Chairperson who shall serve a one-year term. Id. 7. Only the Chairperson shall work on a full-time basis. Other panelists will work full-time only if this is justified by the **Panel's** workload. Id. 9. Ernst Gunther-Broder was selected to serve the five-year term, Alvero Umana Quesada the four-year term, and Richard Bissell the three-year term. See supra note 72 and accompanying text.

<sup>n</sup>79. Resolution, supra note 1, 10.

<sup>n</sup>80. Id. 8.

<sup>n</sup>81. The Resolution further emphasizes the importance of the Panelists' independence by stipulating that Panelists cannot participate in hearings or investigations in which they have a personal interest or involvement. Id. 6.

<sup>n</sup>82. Id. 25.

<sup>n</sup>83. See infra note 161 and accompanying text.

<sup>n</sup>84. See discussion infra part III.D.2 (discussing ex parte communications); parts III.D.2, .D.4 (discussing the staff's ability to control information flows to the **Panel** and the potential for the staff to inhibit the **Panel's** efforts to review and investigate complaints).

<sup>n</sup>85. See Resolution, supra note 1, 20-22; id. 12 (defining operational policies and procedures).

<sup>n</sup>86. Id. 22.

<sup>n</sup>87. Id.

<sup>n</sup>88. Id. 19.

<sup>n</sup>89. Id. 24.

<sup>n</sup>90. On August 19, 1994, the **Inspection Panel** adopted provisional operating procedures, which it will review within the next 12 months. The **Inspection Panel**, Operating Procedures 4 (Aug. 1994) [hereinafter Operating Procedures]. Although it is too early to assess the adequacy of these procedures, they appear to provide useful guidance on filing complaints and creating a process that is reasonably sensitive to the needs of potential complainants. However, they also appear to impose an additional requirement on the complainant, which has the potential to undermine the transparency of the complaints process. The procedures empower the Chairperson of the **Panel**, acting in his or her own capacity, to refuse to register any request for investigation which he or she finds to be "manifestly outside the scope of the **Panel's** mandate" on the grounds, inter alia, that the request is "manifestly frivolous, absurd or anonymous." Id. 22. The **Panel** will note the number of complaints handled in this manner in its annual report, but it is not required to publish either the text of the complaint or the Chairperson's rationale for rejecting the complaint as this is "manifestly outside the **Panel's** mandate." Id. 23. The Chairperson, however, is required to provide the complainant with his or her reasons for refusing to register the complaint. Id. 22. Copies of the Operating Procedures can be obtained from the **Inspection Panel's** office in Washington, D.C.

<sup>n</sup>91. Id. 12.

<sup>n</sup>92. Id.

¶n93. See supra part III.A (discussing the operating principles of the **Panel**).

¶n94. There are at least two binders of Operational Directives, Operational Policies, and Bank Procedures. These are made available to all Bank employees, but are not readily available to the public. It is to be hoped that this situation will change under the Bank's new information disclosure policy. See supra notes 66-68 and accompanying text (discussing the Bank's new policy on disclosure of information).

¶n95. The **World Bank** Operational Manual, Operational Directive 4.30: Involuntary Resettlement, supra note 11.

¶n96. Id. 3.

¶n97. Id. 4. The Operational Directive notes that large-scale relocations involve more than 200 individuals. See id. at 2 n.8.

¶n98. Task Managers "should assess government policies, experiences, institutions, and the legal framework covering resettlement." Id. 24. In addition, the Task Manager "needs to ensure ... that laws and regulations concerning displaced people provide compensation sufficient to replace all lost assets, and that displaced persons are assisted to improve, or at least restore, their former living standards, income earning capacity, and production levels." Id.

¶n99. Id.

¶n100. Id. 6.

¶n101. Id. 24.

¶n102. Id. 25.

¶n103. Id. 6.

¶n104. If they have been unfairly treated, the injured parties may be able to argue that the borrower state has violated their human rights in contravention of the state's international treaty obligations. For a discussion of the procedures for bringing complaints before international human rights fora, see generally Guide to International Human Rights Practice (Hurst Hannum ed., 1984).

¶n105. This suggests that these types of complaints are not likely to succeed until the **Panel** has clearly established its basic operating procedures and has gained confidence in its powers.

¶n106. The **World Bank** Operational Manual, Operational Directive 4.30: Involuntary Resettlement, supra note 11, 5.

¶n107. Similar complaints might address the adequacy of site visits by Bank specialists or of a compensation law which is so clearly deficient that the Bank's staff could not possibly have reviewed the law with the level of care and attention required by the Directive. See id. 14, 24, 25 (establishing standards for determining fair compensation rates, reviewing compensation laws, and conducting site visits).

¶n108. Resolution, supra note 1, 25.

¶n109. If the **Panel** cannot reach a decision by consensus, it is required to include both majority and minority views in its reports. Id. 24. The publication of both views should

also help stimulate public debate.

<sup>n110</sup>. At present, the Bank does informally engage some outside parties in discussion about the content of proposed operational policies and procedures. However, it selects which private actors to consult and when to consult them. See supra note 32 (discussing the **World Bank's** relations with non-governmental actors).

<sup>n111</sup>. Resolution, supra note 1, 12.

<sup>n112</sup>. Id.

<sup>n113</sup>. Id.

<sup>n114</sup>. Id.

<sup>n115</sup>. Id.

<sup>n116</sup>. Id. (stating that non-local representatives may present requests for **inspection** in "exceptional cases where the party submitting the request contends that appropriate representation is not legally available and the Executive Directors so agree at the time they consider the request for **inspection**").

<sup>n117</sup>. Id.

<sup>n118</sup>. Id.

<sup>n119</sup>. Id.

<sup>n120</sup>. Id.

<sup>n121</sup>. Id.

<sup>n122</sup>. Id. 16.

<sup>n123</sup>. Id. 14.

<sup>n124</sup>. Id.

<sup>n125</sup>. A footnote to the Resolution defines the term "substantially disbursed" to mean that at least 95% of the loan proceeds have been disbursed. Id. 14 n.1.

<sup>n126</sup>. The OED provides the Bank with an objective evaluation of completed operations and a mechanism for determining how to improve the design, appraisal, and implementation of future projects. The objectivity and credibility of OED reports depends on the fact that the OED has no interest or operational involvement in the projects it evaluates.

<sup>n127</sup>. The **Panel** offers the Bank an independent mechanism for receiving timely information on problems in on-going operations, a means for monitoring the efficacy and adequacy of the Bank's operating rules and procedures, and a formal mechanism for handling complaints from the public. The credibility and efficacy of the **Panel** depends on its independence, which dictates that the **Panel** must not have a stake in the Bank's evaluation of its own performance in completed operations. Confidence in the **Panel** would be weakened if it had an institutional affiliation to the OED, which conducts ex post evaluations of Bank operations, or if the two had overlapping jurisdictions. Such an affiliation with the OED would be especially problematic if the **Panel**, in investigating specific complaints, were required either to evaluate the extent to which the Bank had

implemented the findings of its OED-affiliate or to take the OED's findings and recommendations into account in a particular decision. In either case, confidence in the objectivity of the **Panel** would be severely diminished.

¶n128. See Resolution, *supra* note 1, 12.

¶n129. Usually in Bank parlance, "affected party" refers to those persons who, in their daily lives, feel the direct impact of a Bank operation.

¶n130. The provisional Operating Procedures offer complainants some protection in that documents and portions of documents will not be released without the express written consent of the party concerned. Operating Procedures, *supra* note 90, 63. It is not clear, however, whether the protection provided by this provision is limited to the release of documents to the public or if it also includes the anonymity of the complainant in communications between the **Panel** and Bank officials, including the Executive Directors.

¶n131. Procedures protecting a complainant's anonymity would be consistent with procedures in other international fora in which private complainants are allowed to bring complaints against official actors. See Guide to International Human Rights Practice, *supra* note 104, at 59-162 (explaining the procedures for making human rights complaints in the United Nations, the ILO, UNESCO, the Inter-American Center for the Protection of Human Rights, and the African Commission on Human and Peoples' Rights).

¶n132. The Bank's rationale for limiting the role non-local representatives can play in the complaints process is unclear. However, the Bank may have been motivated by an interest in limiting the role global non-governmental organizations, such as Washington-based environmental groups, can play in the work of the **Panel**. See Shihata, *supra* note 54, at 57-58. This is unfortunate because potential complainants may need to draw on the human and financial resources of these organizations in preparing their complaints.

¶n133. This issue is not adequately addressed in the provisional Operating Procedures of the **Panel**. The Procedures merely provide that the **Panel** "may" notify the Requestor of any "new material facts" provided to it by officials of the Bank or the borrower. See Operating Procedures, *supra* note 90, 48.

¶n134. For further discussion of the confidentiality issue, see the Bank's new information disclosure policy, *supra* note 53 and accompanying text.

¶n135. The provisional Operating Procedures of the **Panel** do provide some general guidance in this regard, including, in an annex to the procedures, a model form for requesting an **inspection**. Operating Procedures, *supra* note 90, Annex 2. This annex suggests that the **Panel** will require detailed information about the complainant. However, it will only be possible to determine the minimum standards for an adequate complaint once the **Panel** has had the opportunity to review some complaints.

¶n136. The provisional Operating Procedures provide that the complainant "may" provide the **Panel** with supplemental information, but does not grant the complainant a formal right to participate in the **Panel's** proceeding. See *id.* 47-49.

¶n137. The provisional Operating Procedures provide that a complaint can be filed with the Bank's Resident Representative in the country where the project is located. The Resident Representative is expected to forward the complaint to the **Panel** in the next pouch. *Id.* 14. The provisional procedures do not, however, explicitly impose an obligation to protect the confidentiality of the complaint on the Resident Representative. In addition, they do not allow complainants, who may fear reprisals in their own countries or who come from countries that may not have a Resident Representative, to file complaints with any Resident Representative.

¶n138. The provisional Operating Procedures allow complainants to submit requests for **inspection** in their local languages but do not discuss the cost of translation. Id. 8.

¶n139. An example of reasons that might justify the use of a "non-local representative" would include cases where bringing the complaint would place the complainant at risk of reprisals from the borrower state.

¶n140. This suggests that the more successful complainants will require the services of a lawyer. As this imposes an undue burden on poor complainants, the **Panel** should assume some of the burden of linking a complaint to the applicable operational policy.

¶n141. The Resolution does not contain any rules of discovery.

¶n142. Resolution, supra note 1, 27. One issue the Bank might consider in this review is an extension of the **Panel's** jurisdiction to include other members of the **World Bank** Group, besides the IBRD and IDA. The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) both have operating rules and procedures that directly affect people's lives. Consequently, there do not appear to be any good reasons for excluding them from the jurisdiction of the **Panel**. There may be a need for some special procedural rules, however, because their operations do differ in some significant respects from those of the IBRD and IDA.

¶n143. Id. 17.

¶n144. Id. 18.

¶n145. See discussion of these standards infra part III.D.3.

¶n146. Resolution, supra note 1, 19.

¶n147. Id. 15.

¶n148. Id. 21.

¶n149. Id. 19.

¶n150. Id. 20.

¶n151. Id. 19.

¶n152. Id. 25.

¶n153. Id.

¶n154. The **Panel** released provisional Operating Procedures in early September 1994. See supra note 90. These provisional rules do not address the issue of ex parte communications, but they do appear to offer the complainant and interested third parties an opportunity to submit information to the **Panel** during the course of **Panel** investigations. Operating Procedures, supra note 90, 47-51; see also supra note 137.

¶n155. For further discussion of the ability of complainants to comment on ex parte communications, see supra part III.D.1. For a discussion of the ability of complainants to respond to advice the **Panel** receives from the Bank's legal department, see infra part III.D.3.

¶n156. The provisional Operating Procedures provide for this possibility. Operating



Procedures, supra note 90, 47-51.

¶n157. Resolution, supra note 1, 19.

¶n158. The General Counsel of the Bank estimates the normal distribution period to be about three weeks. See Shihata, supra note 54, at 73 n.75.

¶n159. Resolution, supra note 1, 25.

¶n160. The provisional Operating Procedures provide that the **Panel** shall make its recommendation to the Board public, but leave unclear whether this includes the attachments to the recommendation, which, according to the procedures, could include relevant information provided by the requestor, the text of the Management's responses to the **Panel**, and the text of any advice received from the Legal Department of the Bank. Operating Procedures, supra note 90, 37, 41.

¶n161. Pursuant to paragraph 24 of the Resolution, any panelist who disagrees with the finding of the majority can be expected to prepare a report explaining the grounds for his or her dissent. Resolution, supra note 1, 24 (noting that "in the absence of a consensus, the majority and minority views shall be stated").

¶n162. Id. 12.

¶n163. Id. 16.

¶n164. Id. 13.

¶n165. One possibility is to construe this expression in light of the language of paragraph 12. Thus the term may reinforce the notion that the Bank's actions must have had a "material adverse effect" on the rights or interests of the complainant. Another possibility is that the term stipulates that the **Panel** should focus on the severity of the violation, rather than on the injury to the complainant.

¶n166. Resolution, supra note 1, 14(d).

¶n167. Id. 15.

¶n168. Id. 22.

¶n169. The provisional Operating Procedures provide the **Panel** with broad discretion in determining the form of any investigation. See Operating Procedures, supra note 90, 42-45.

¶n170. Resolution, supra note 1, 20.

¶n171. Id.

¶n172. Id. 21.

¶n173. Id.

¶n174. Id.

¶n175. Id. The Bank could consider obtaining permission for such investigations as a term of its loan agreements.

¶n176. Id. 24.

<sup>n</sup>177. Id. 22.

<sup>n</sup>178. Id. 23.

<sup>n</sup>179. Id.

<sup>n</sup>180. Id.

<sup>n</sup>181. Id. 25.

<sup>n</sup>182. For a detailed discussion of these issues, see supra part III.D.2.

<sup>n</sup>183. Resolution, supra note 1, 21.

<sup>n</sup>184. Id.

<sup>n</sup>185. Complainants can seek to mitigate the effects of these issues by including an express request that the investigation be conducted according to procedures stipulated in the complaint. The eventual publication of such a request would force the **Panel** to explain any refusal to follow requested procedures. See discussion supra part III.D.1. The provisional Operating Procedures do allow third parties to provide the **Panel** with supplemental information relating to the Request for Investigation. Operating Procedures, supra note 90, 50-51.

<sup>n</sup>186. Resolution, supra note 1, 22.

<sup>n</sup>187. The provisional Operating Procedures state that the **Panel's** report will include a "summary discussion of the relevant facts," the **Panel's** findings, and a list of supporting documents available on request from the Office of the **Inspection Panel**. Operating Procedures, supra note 90, 52.

<sup>n</sup>188. This is different from the procedure established for the **Panel's** recommendation on whether to investigate a complaint. In that case, the **Panel's** recommendation shall be circulated "within the normal distribution period." Id. 19. See supra part III.D.2. for an analysis of this requirement.

<sup>n</sup>189. Resolution, supra note 1, 26.

<sup>n</sup>190. Id.

<sup>n</sup>191. See G.J.H. van Hoof & K. de Vey Mestdagh, Mechanisms of International Supervision, in Supervisory Mechanisms in International Economic Organisations 1, 15-20 (P. van Dijk ed., 1984) (describing the characteristics of judicial, quasi-judicial, and non-judicial supervision).

<sup>n</sup>192. Id. at 15. The International Court of Justice is an example of a body engaged in judicial supervision.

<sup>n</sup>193. Id. at 18. The Security Council of the United Nations is a non-judicial supervisory body.

<sup>n</sup>194. Id. at 18 (noting that "essential to ... quasi-judicial supervision is the notion of due process and the finality of the decision"). The European and Inter-American Commissions of Human Rights are examples of quasi-judicial supervisory bodies.

<sup>n</sup>195. But see Shihata, supra note 54, at 98-100 (characterizing the **Inspection Panel**

as a non-adjudicatory process).

<sup>196</sup>The Board, however, should not be viewed as a political body. The Executive Directors, as officers of the Bank, are required to comply with the clauses in the Bank's Articles of Agreement that preclude the Bank and its officers from relying on political considerations in their decision-making. In addition, the Bank's member states are required to respect the international character of the duty of all officers of the Bank and to refrain from attempting to influence them in the discharge of their duty. See Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 16, art. IV, 10, art. V, 5 (c); Shihata, *supra* note 17, at 105-107; see also *supra* note 24.

<sup>197</sup>See *supra* part III, discussing pre-complaint communications, *ex parte* communications in **Panel** proceedings, and the staff's lack of any direct obligation to provide information to the **Panel** during investigations.

<sup>198</sup>See van Hoof & de Vey Mestdagh, *supra* note 191, at 11.

<sup>199</sup>*Id.*

<sup>200</sup>*Id.* at 11-14.

<sup>201</sup>See 2 Henry G. Schermers, *International Institutional Law* 574 (1980). But see discussion of European Union, *supra* note 6.

<sup>202</sup>See Ian Brownlie, *Principles of Public International Law* 590-91 (3d ed. 1979); Schermers, *supra* note 201, at 311.

<sup>203</sup>The International Labor Organization is an example of such an organization. See Schermers, *supra* note 201, at 89; van Hoof & de Vey Mestdagh, *supra* note 191, at 22-23. But see Brownlie, *supra* note 202, at 591 (noting that these recent exceptions have not significantly affected the general rule).

There are two other exceptions to this general rule. The first is that international organizations can be directly liable for breaches of their contractual arrangements with private actors. For example, the Bank can be held liable by investors who purchase **World Bank** bonds. See Broches, *supra* note 21, at 308-12.

The second exception arises from those international treaties in which the signatory states have explicitly provided that an international organization can be held responsible for the injuries caused by its conduct. In all such cases, the international organization is undertaking the same action as a sovereign state. Consequently, the treaty signatories are expecting the organization to waive immunity to the same extent they do. See Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 139, U.N. Doc. A/CONF.62/122 (1982); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature Dec. 18, 1979, arts. 14, 16, U.N. GAOR, 34th Sess., Supp. 46, at 77, U.N. Doc. A/34/46; Convention on International Liability for Damage Caused by Space Objects, opened for signature Mar. 29, 1972, art. XXII, [24 U.S.T. 2389](#), 961 U.N.T.S. 187; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, arts. VI, VII, 18 U.S.T.S. 2410, 961 U.N.T.S. 187.

<sup>204</sup>See, e.g., Frederick J. Kirgis, Jr., *International Organizations in their Legal Settings* 274-80 (1993) (discussing the case of the ILO).

<sup>205</sup>See generally Broches, *supra* note 21; Baum, *The Project Cycle*, *supra* note 20,

at 19. For a sample loan agreement, see **Bradlow**, supra note 25.

¶n206. See Baum and Tolbert, Investing in Development, supra note 20, at 353; Report of the Portfolio Management Task Force, supra note 43, at 12. It should be noted that the Bank is required to deal with its borrowers through their Ministries of Finance or their Central Bank. This requirement may complicate the Bank's interactions with private actors in the borrower country. It does not, however, preclude such interactions. See Articles of Agreement of the International Bank for Reconstruction and Development, supra note 16, art. III, 2; Articles of Agreement of the International Development Agency, supra note 16, art. VI, 10 (stating that each member state "shall designate an appropriate authority" for communication with the IDA).

¶n207. On August 10, 1994, the Executive Directors of the Inter-American Development Bank decided to establish an independent investigative **panel** that will investigate complaints from affected groups alleging that the Bank had "failed to follow its own policies and norms" and that such failures had produced "adverse effects in its borrowing member countries." See IDB to Have Independent Investigative **Panels**, Press Release NR/135-94 (Inter-American Development Bank, Aug. 10, 1994). The Asian Development Bank has also stated that it is considering creating an independent **inspection** unit. See John Chalmers, Asian Aid Bank Comes Under Fire at Annual Meeting, Reuters, May 2, 1994.

¶n208. Resolution, supra note 1, 12.

¶n209. Nonetheless, the Bank remains contractually liable to investors who purchase its bonds. This liability arises out of the contractual relationship established between the Bank as borrower and its investors and is outside the scope of the **Panel's** purview. See Broches, supra note 21, at 308-12.

¶n210. See, e.g., U.S. International Financial Institutions Act, [22 U.S.C. 262d](#)(f) (1988) (instructing U.S. Executive Directors of the **World Bank** "to oppose any loan, any extension of financial assistance, or any technical assistance to any country" whose government is engaged in a pattern of gross violations of internationally recognized human rights unless the assistance "is directed specifically to programs which serve the basic human needs of the citizens of such country").

¶n211. See supra notes 66-68 and accompanying text for a description of the Bank's new disclosure policy.

¶n212. In fact, the Bank's staff has the authority to formulate its own operational rules and policies. Normally, the Executive Directors do not review the operational rules before they become effective. This means, in effect, that the member states do not play a role in the way in which the Bank makes and implements its operational decisions. See Ibrahim F.I. Shihata, The **World Bank** and the Environment: A Legal Perspective, 16 Md. J. Int'l L. & Trade 1, 9 (1992) (explaining that Annex A to Operational Directive 4.0 and Operational Directive 4.01 on Environmental Assessment were discussed in the draft by the Executive Directors prior to finalization and this was an unusual step because operational directives fall "clearly within the prerogative of Bank management in the implementation of policies determined by the Board"). The Bank's staff is presently engaged in an extensive review of its operational directives. Revised directives are being issued as Operational Policies. It is not yet clear how this review process will affect the **Panel's** jurisdiction.

¶n213. See supra notes 95-107 and accompanying text for a discussion of Operational Directive 4.30 and the categories of permissible and impermissible complaints that could arise thereunder.

n214. See generally Amerasinghe, supra note 14 (discussing dispute resolution between employees of international organizations and their employers).

n215. For a more detailed discussion of the Bank's view of governance, see supra note 23.

n216. Although an inadequate budget would be undesirable, it would, nonetheless, present an opportunity for interested non-governmental actors to provide the **Panel** with information and investigatory assistance. The experiences of human rights groups are particularly relevant in this regard. See generally Guide to International Human Rights Practice, supra note 104, at 81 (analyzing the International Labor Organization's investigatory procedures).

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# PRIVATE COMPLAINANTS AND INTERNATIONAL ORGANIZATIONS: A COMPARATIVE STUDY OF THE INDEPENDENT INSPECTION MECHANISMS IN INTERNATIONAL FINANCIAL INSTITUTIONS

DANIEL D. BRADLOW\*

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\* Professor of Law & Director, International Legal Studies Program, American University, Washington College of Law, Washington, D.C. The author wishes to thank the many officials at the international financial institutions who, although they will remain unidentified, generously shared their time and knowledge on the inspection mechanisms at their institutions with him. Without their assistance, this Paper would not have been possible. The author would also like to thank Miki Kamijyo for her research assistance. This Study is based on research the author did on inspection mechanisms while working as a consultant to the African Development Bank.

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I. INTRODUCTION

It is a general principle that those with power must be accountable for the way in which they exercise it.<sup>1</sup> The form of the accountability can vary, depending on the circumstances. The holders of power can be held accountable through legal, political, administrative or financial means.

Applying this general principle to international organizations is complicated because international organizations are the creations of their member states and have organizational immunity.<sup>2</sup> As a result, international organizations are usually viewed as being accountable to only a limited range of actors. They are directly accountable to their member states for the way in which they implement the mandates that

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1. See, e.g., 2004 Final Report of the Committee on the Accountability of International Organizations to the Berlin Conference 5 (2004) [hereinafter *Final Report*].

2. KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 120 (2002); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §§1610-1612 (3d ed. 1999); *Final Report*, *supra* note 1, at 50-51.



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the member states have given them.<sup>3</sup> Member states can hold international organizations accountable through the various governance structures that exist in the organization and through whatever dispute settlement forums might be available to the member states and the organization. In addition, such organizations are directly accountable to those states and international organizations with whom they have concluded treaties or other international agreements and to those private legal and natural persons with whom they enter into contractual relations (usually only after they have waived their immunity).<sup>4</sup> These actors can hold the organizations accountable through the dispute settlement mechanisms established in the agreements. International organizations also have some international legal responsibility to non-member states that are harmed by their actions and decisions. Such non-member states may be able to hold the organizations accountable through either formal or informal means.<sup>5</sup>

The one group that historically has not been able to hold international organizations accountable is non-state actors who are adversely affected by the actions of an international organization but who have no contractual relationships with it.<sup>6</sup> In principle, there are four possible means through which these actors can try and hold the international organization accountable.<sup>7</sup> First, the non-state actors can seek to persuade their home state to exercise its diplomatic protection and to hold the organization accountable on their behalf. Second, they can try and persuade the international organization to waive its immunity and agree to submit to suit in one of its member states. Third, they can try and persuade a court that the international organization has acted *ultra vires* or with such gross negligence or willful recklessness that it should set aside the organization's immunity and hear their case. Fourth, they can seek to persuade a domestic or international court to "pierce the veil" of the international organization and hold the member states responsible for the acts of the international organization.

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3. WELLENS, *supra* note 2, at 29-33; SCHERMERS & BLOKKER, *supra* note 2, §1885.

4. Final Report, *supra* note 1, at 23-25; SCHERMERS & BLOKKER, *supra* note 2, §1612(a).

5. SCHERMERS & BLOKKER, *supra* note 2, §1687.

6. Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 554 (1994) [hereinafter Bradlow, *Inspection Panel*]; Daniel Bradlow & Sabine Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT (THE HEIDELBERG J. INT'L L.) 353, 395 (1994).

7. See WELLENS, *supra* note 2, at 114-32. See generally AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000) (analyzing whether international organizations should be immune to national jurisdictions).

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None of these options are likely to be successful, except in the most unusual of circumstances. The result, therefore, has been that, in fact, non-state actors have not been able to hold international organizations accountable.

This gap in international organizational accountability was not perceived to be significant until the last quarter of the twentieth century when two parallel developments began to change this view. The first development was that the scope of the activities of international organizations broadened. The impact of this change is seen most clearly in the case of the international financial institutions (IFIs), particularly the World Bank Group (World Bank) and the International Monetary Fund (IMF). The World Bank began to expand its range of operations beyond financing physical infrastructure projects to include such matters as providing both financing and advisory services related to the structural adjustment of its member states' economies and to improving the governance of their societies.<sup>8</sup> Similarly, the IMF began to get involved in poverty alleviation and the governance of its member states.<sup>9</sup> This "mission creep," combined with changes in the international financial system, altered the nature of the IFIs' relations with their developing country member states, shifting the balance of bargaining power between international financial institutions and their client states in favor of the IFIs.<sup>10</sup> This meant that the developing countries had limited scope to negotiate over the conditions that the IFIs attached to their financing and could not ignore the policy advice from the IFIs. The net effect was that, de facto, the IFIs became important participants in the policy-making process of their member states. However, because of the organizations' immunity and their member states' lack of interest in holding them accountable, the international organizations, unlike most actors in the policy-making process, were not directly accountable to those most affected by their decisions and actions.<sup>11</sup>

The second development was that perceptions began changing

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8. Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 48, 49 (1996) [hereinafter Bradlow, *Human Rights*]; Bradlow, *Inspection Panel*, *supra* note 6, at 557-58 and sources cited therein.

9. Daniel D. Bradlow, *Stuffing New Wine into Old Bottles: The Troubling Case of the IMF*, 3 *J. INT'L BANKING REG.* 9, 9 (2001) [hereinafter Bradlow, *IMF*].

10. *Id.* (citing to D. Kapur & R. Webb, *Governance Related Conditionalities of the International Financial Institutions* (G24 Discussion Paper Series No. 6, 2000)); see Bradlow, *Human Rights*, *supra* note 8, at 66-72.

11. Bradlow, *Inspection Panel*, *supra* note 6, at 567; Bradlow, *IMF*, *supra* note 9, at 24-25.

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about the responsibilities of decision-makers in large-scale projects and development programs. The change was happening because of developments in human rights law and changing views about the environmental and social responsibilities of key decision-makers and actors.<sup>12</sup> The result was that those who were adversely affected by the projects began to advocate more vigorously that all decision-makers, including funding sources, be held accountable for their decisions relating to these projects. Since the World Bank and the regional development banks were often key lenders and providers of technical assistance for projects, they were the first targets of these calls for greater accountability.

The ability of the multilateral development banks (MDBs) to escape liability was particularly upsetting to non-state actors because MDBs, despite their formal role as lenders rather than sponsors of development projects or programs, were perceived to be directly and exclusively responsible for at least part of the harm caused by their operations.<sup>13</sup> Non-state actors further argued that the MDBs' ability to escape accountability was incompatible with the principles of good governance being advocated by the institutions themselves.<sup>14</sup>

It is important to note that these developments in the relationships between international organizations, their member states and non-state actors are not limited to the IFIs. Other international organizations or entities in organizations, such as the United Nations Children's Fund (UNICEF), United Nations Development Programme (UNDP), World Food Programme (WFP) and United Nations High Commission for Refugees (UNHCR), engage in activities in their member states that bring them into direct interaction with the citizens of their member states and for which they could be held exclusively accountable.<sup>15</sup> In

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12. Daniel D. Bradlow, *The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making*, 16 AM. U. INT'L L. REV. 1531, 1541-45 (2001) and sources cited therein.

13. Bradlow, *Inspection Panel*, *supra* note 6, at 560.

14. Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY 2, 6 (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003); Kunibert Raffer, *Good Governance, Accountability, and Official Development Co-operation: Analyzing OECD-Demands at The Example of the IBRD*, in SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 343-59 (Konrad Gintler et al. eds., 1995) (describing the increasing demand for good management by public institutions including sensible economic and social policies and financial accountability); *see also* WORLD BANK, 2003 ANNUAL REPORT 6-7 (2003) (calling for openness, transparency and accountability in the Bank).

15. UNICEF, 2002 ANNUAL REPORT 38 (2003) (noting that UNICEF worked in 162 countries and territories in 2002), *available at* <http://www.unicef.org> (last visited June 28, 2004); About UNDP, *available at* <http://www.undp.org> (last visited June 28, 2004); UNDP, 2003 HUMAN DEVELOPMENT REPORT (displaying the UNDP's programs to eradicate poverty, reduce gender

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addition, the United Nations itself has undertaken operations in places like Cambodia,<sup>16</sup> East Timor<sup>17</sup> and Namibia,<sup>18</sup> that, because of their broad scope, have a direct impact on citizens in these countries.

The World Bank became the first international organization to respond to these demands for accountability. In 1993 the World Bank created the Inspection Panel,<sup>19</sup> the first mechanism in which qualifying non-state actors could hold an international organization directly accountable for its actions. The Inspection Panel allows these non-state actors to hold the Bank accountable for actions that cause or threaten to cause serious harm to the complaining non-state actors and are inconsistent with the Bank's own operational policies and procedures. Since that time, a number of other international financial institutions have established their own inspection mechanisms. They are the Asian Development Bank, the Inter-American Development Bank, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the European Bank for Reconstruction and Development. The African Development Bank has approved and is in the process of setting up an independent inspection mechanism for the Bank. In addition, two national development financing organizations, the Japanese Bank for International Cooperation and Export Development Canada, have created similar mechanisms.<sup>20</sup>

These inspection mechanisms have both practical and legal significance. At a practical level, they have resulted in thousands of people receiving compensation for the adverse consequences of projects being funded by these institutions, in the cancellation of at least one project, in instructions from the Board to the management to make changes in projects in order to provide people with the intended benefits or to mitigate the harm caused by the project and in much greater sensitivity

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inequality and reduce child mortality and other social programs); WFP (showing that WFP has emergency and development projects in 81 countries), *available at* <http://www.wfp.org> (last visited June 28, 2004); UN High Commission for Refugees (estimating that as of January 1, 2004, there are 17,093,400 asylum seekers, refugees, and others of concern to the UNHCR), *available at* <http://www.unhcr.ch> (last visited June 28, 2004).

16. Frederic Megret & Florian Hoffmann, *The UN as a Human Rights Violator?: Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 327 (2003).

17. *Id.* at 327.

18. *Id.* at 333.

19. See International Bank for Reconstruction and Development (IBRD), *Resolution 93-10* (1993); International Development Association (IDA), *Resolution 93-6* (1993). The two Resolutions are identical and are reprinted in WORLD BANK, WORLD BANK OPERATIONAL MANUAL: BANK PROCEDURES 17.55, Annex A (1997) [hereinafter *Resolutions*].

20. See discussion *infra* Section II.C.2.

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in the institutions to their own operational policies and procedures.<sup>21</sup> Legally, these mechanisms have turned out to be effective forums in which adversely affected persons can raise claims that relate to their rights as indigenous people or as involuntarily resettled people and in which they can challenge the interpretation and implementation of the internal policies and procedures of the MDBs. Consequently, inspection mechanisms are slowly beginning to provide data and precedents that can influence the evolution of international human rights law, international environmental law and international administrative law.<sup>22</sup> The inspection mechanisms may also ultimately influence the development of international financial law, as they investigate cases in which they are trying to determine the obligations of creditors towards those harmed by the projects they finance.

Given the legal and practical significance of these inspection mechanisms, they deserve more systematic examination. This Paper is intended to provide such examination. This Paper is a comparative study of the inspection mechanisms at the MDBs and comparable mechanisms at other international institutions. The goal of the study is to see what lessons can be learned about the structuring of inspection mechanisms at international organizations. Thus, the Paper is an analysis of the institutional arrangements that have been developed to promote international organizational accountability to non-state actors. It is not a study of their “jurisprudence” or, more accurately, the lessons that can be learned from the reports of their inspections and recommendations.

For the purposes of this study, an “inspection function” refers to an independent mechanism that investigates complaints from affected people who allege either one or both of the following: that they have been harmed or will be harmed by an operation of an international organization, and that the harm has been caused by the failure of the organization to follow its own operating rules and procedures in the operation. The “independence” of the mechanism references that the mechanism is independent from the organization’s management and

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21. See WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON (2003) [hereinafter WORLD BANK, INSPECTION PANEL] (discussing cases received and investigated in which non-state actors registered complaints to the Inspection Panel). *But see* Jonathan Fox & Kay Treakle, *Concluding Propositions*, in DEMANDING ACCOUNTABILITY, *supra* note 14, at 283-86 (criticizing the Inspection Panel as lacking powers of enforcement and of restitution and noting that the number of Panel claims only represents a fraction of potentially controversial projects).

22. Bradlow, *Inspection Panel*, *supra* note 6, at 601, 608-10; WORLD BANK, INSPECTION PANEL, *supra* note 21.

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reports directly to the relevant decision-making body representing its member states. “Affected people” refers to non-state actors who have no contractual relationship with the organization but whose living conditions are directly or indirectly affected by the bank-financed operation or operationally related decision. “Operation” refers to any project, program or other activity of the international organization that brings it into direct interaction with non-state actors in those member states in which it is active.

The structure of the Paper is as follows. Section II discusses the inspection mechanisms at the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the World Bank Group, in the order in which they were established. In addition, the Section contains some information on inspection mechanisms in other national and international organizations that have similar functions to the inspection mechanisms at the international development banks. Section III follows with a comparative analysis of the mechanisms discussed in the previous Section and a discussion of the general principles that should guide the structuring of an inspection function. Section IV contains a description of the options that are available to any international organization interested in creating an inspection mechanism. The final Section draws some lessons about inspection mechanisms and contains a recommendation as to which option is the best for international organizations that need to create inspection mechanisms.

## II. DESCRIPTIONS OF EXISTING INSPECTION MECHANISMS

### A. *Mechanisms at Multilateral Development Banks*

These mechanisms are discussed in the order in which they were first established.

#### 1. World Bank Inspection Panel

The World Bank Inspection Panel (Panel), which has three members, was established by a resolution of the World Bank’s Board of Executive Directors in 1993 (Resolution).<sup>23</sup> Its structure and procedures are described in more detail below, followed by a brief description of the experience of the Panel.

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23. See *Resolutions*, *supra* note 19.

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a. *Structure*

The three members of the Panel are appointed to non-renewable 5-year terms by, and are responsible to, the Board of Executive Directors of the World Bank.<sup>24</sup> The Directors make their appointments based on nominations from the President of the Bank. The President makes these nominations after consultation with the Executive Directors<sup>25</sup> and other stakeholders. The Panel members are selected on the bases of their ability to deal “thoroughly and fairly” with the requests brought to them, their integrity, independence from Bank management and exposure to development issues and living conditions in developing countries.<sup>26</sup>

The Resolution establishes a number of requirements designed to protect the independence of the members of the Panel. First, the Resolution stipulates that members cannot have worked in any capacity for the Bank for the two years prior to their appointment.<sup>27</sup> Second, the members of the Panel can only be removed from office “for cause” and by a decision of the Executive Directors.<sup>28</sup> Third, a Panel member is barred from participating in any hearing or investigation relating to any matter in which the Panel member has a personal interest or a significant involvement.<sup>29</sup> Fourth, Panel members are not eligible to work for the Bank in any capacity following the end of their term on the Panel.<sup>30</sup>

The Panel members select their own chair.<sup>31</sup> The chair is expected to work full-time for the Panel, while the other Panel members work part-time with their work-load, depending on the demand for their services.<sup>32</sup> The Resolution provides that the Panel will be assisted in its work by an Executive Secretary,<sup>33</sup> who is a staff member of the Bank and is assigned to the Panel by the President of the Bank after consultations with the Executive Directors. The current Executive Secretary of the Panel previously worked in the legal department of the Bank. His staff consists of two assistant executive secretaries, who

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24. *See id.* ¶¶ 2-3

25. *See id.* ¶ 2.

26. *Id.* ¶ 4.

27. *See id.* ¶ 5.

28. *See id.* ¶ 8.

29. *See id.* ¶ 6.

30. *See id.* ¶ 10.

31. *See id.* ¶ 7.

32. *See id.* ¶ 9.

33. *See id.* ¶ 11.

### INDEPENDENT INSPECTION MECHANISMS

originally worked in the legal department, and two support staff. In addition, for the past few years, the Panel has employed two long-term consultants who are both lawyers.

The annual budget of the Panel in both 2001 and 2002 was slightly over \$2 million. In 2000, the budget was \$2.23 million. Interestingly, in 2000 actual Panel expenses were \$2.20 million, and in 2001 actual expenses were \$1.8 million. It is more difficult to obtain information on the cost to the Bank of the staff time and resources used in responding to cases before the Panel. However, in the China Western Poverty Reduction Project (Credit No. 3255-CHA and 450-CHA), which was probably the Panel's most difficult case, the World Bank consumed about \$1.5 million in staff time and resources.<sup>34</sup>

#### b. *Procedures*

The Panel process is initiated by a request for inspection. These requests can be submitted by:<sup>35</sup>

- (i) "an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals);"<sup>36</sup>
- (ii) the local representatives of such an affected party;
- (iii) another representative of the affected party in exceptional circumstances. This can occur when the party submitting the request asserts that appropriate representation is not locally available and the Executive Directors agree at the time they consider the request;
- (iv) an Executive Director in "special cases of serious alleged violations"<sup>37</sup> of operational policies and procedures; and
- (v) the Executive Directors acting as a Board.

In practice, most requests for inspection have been submitted by affected parties or their local representatives. In one case the request

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34. This information was obtained from the second draft of the report to the Asian Development Bank reviewing its inspection function, dated 31 July 2002. The report is available at the Asian Development Bank (ADB) website, <http://www.adb.org>. It should be noted that some have questioned the accuracy of this figure, contending that it over-estimates the cost of local consultants.

35. *See Resolutions, supra* note 19, ¶ 12.

36. *Id.*

37. *Id.*



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was filed by a non-local representative of the affected party.<sup>38</sup>

In the request for inspection, the affected party:

[M]ust demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal, and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.<sup>39</sup>

The Resolution defines “operational policies and procedures” as including all “the Bank’s Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started, and does not include Guidelines and Best Practices and similar documents or statements.”<sup>40</sup>

Once the Panel receives the request, it must satisfy itself that the subject matter of the request has been dealt with by the Bank management, but that the Bank management failed to follow or take adequate steps in conformity with the Bank’s policies and procedures to deal with the issues raised in the request. In addition, the Panel should satisfy itself that the alleged violations of the Bank’s policies and procedures are of a serious character.<sup>41</sup> The Panel should also determine if the matter is “without doubt manifestly outside the Panel’s mandate.”<sup>42</sup>

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38. See WORLD BANK INSPECTION PANEL, INVESTIGATION REPORT: THE QINGHAI PROJECT, A COMPONENT OF THE CHINA WESTERN POVERTY REDUCTION PROJECT (Credit No. 3255-CHA and Loan No. 4501-CHA) ¶ 4 (2000).

39. *Resolutions*, *supra* note 19, ¶ 12.

40. *Id.*

41. *See id.* ¶ 13.

42. WORLD BANK INSPECTION PANEL, OPERATING PROCEDURES ¶ 22 (1994) [hereinafter OPERATING PROCEDURES].

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There are certain matters that the Panel is not authorized to entertain. They are:

- (i) requests dealing with actions that are the responsibility of other parties and which do not involve an action or omission of the Bank;
- (ii) requests dealing with procurement decisions;
- (iii) requests filed after the closing date of the loan financing the project with respect to which the request for inspection was filed;
- (iv) requests filed after the loan is substantially disbursed, which is deemed to mean that the proceeds of the loan are ninety-five percent disbursed; and
- (v) requests relating to matters over which the Panel has already made a recommendation based on a prior request for inspection, unless there is new evidence or circumstances that were not known at the time of the prior request.<sup>43</sup>

In addition, the Panel only has jurisdiction to deal with requests for inspection relating to International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) operations.

If the request contains the required information and is not manifestly outside the Panel's mandate, the chair of the Panel promptly registers it and notifies the requester, the Executive Directors and the Bank President that the request has been registered.<sup>44</sup> Within twenty-one days of being notified of the request, management must submit a response to the Panel.<sup>45</sup>

The Panel must make a recommendation to the Executive Directors on whether or not they should grant the request for an inspection within twenty-one days of receiving the management response.<sup>46</sup> The Panel may visit the country in which the project or operation is based during this time in order to verify information and help determine the eligibility of the request.<sup>47</sup> In making this recommendation, the Panel should consider whether the request meets all the eligibility requirements set out in the Resolution.<sup>48</sup> In this regard, it should be noted that in addition to the requirements discussed above, a successful requester

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43. See *Resolutions*, *supra* note 19, ¶ 14 & n.1.

44. See OPERATING PROCEDURES, *supra* note 42, ¶ 17.

45. See *id.* ¶ 30; *Resolutions*, *supra* note 19, ¶ 18.

46. See OPERATING PROCEDURES, *supra* note 42, ¶ 30.

47. See *id.* ¶ 36.

48. See *Resolutions*, *supra* note 19, ¶ 19.

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must show that its “rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures.”<sup>49</sup> Pursuant to paragraph 15 of the Resolution, the Panel is required to seek the advice of the Legal Department in matters related to the Bank’s rights and obligations with respect to the request under consideration.

After receiving the Panel’s report, the Board of Executive Directors meets to consider the Panel’s recommendation and decide whether or not to grant the request for an inspection. Following the second review of the Resolution establishing the Panel, conducted in 1999,<sup>50</sup> the Board has limited discretion in deciding whether or not to adopt the Panel’s recommendation. Pursuant to this clarification, the Board can only challenge the Panel’s recommendation on clearly stipulated “technical” grounds.<sup>51</sup> In fact, the Board usually decides this issue on a “no objection” basis.<sup>52</sup>

The Resolution does not specify a time period within which the Board must reach this decision. It does, however, require that the requester be informed of the Executive Directors’ decision within two weeks of the date of the decision.<sup>53</sup> The decision, together with the request and the Panel’s recommendation, must also be made public within this time period.<sup>54</sup> Pursuant to the first clarification of the Resolution, the management’s response is also made public.<sup>55</sup>

If the Board of Executive Directors decides to authorize an investigation, the investigation is conducted by the Panel, or more specifically the Panelist or Panelists selected by the chair of the Panel to lead the investigation.<sup>56</sup> In conducting the investigation, the responsible Panel-

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49. *Id.* ¶ 12.

50. See WORLD BANK, CONCLUSIONS OF THE BOARD’S SECOND REVIEW OF THE INSPECTION PANEL ¶ 9 (1999), available at <http://www.worldbank.org/html/extdr/ipwg/secondreview.htm> (last visited Apr. 28, 2005).

51. These technical grounds are derived from the requirements established in the Resolution and relate to factual matters. All matters that require judgment are treated as “non-technical” matters and cannot be challenged by the Board. See *id.*

52. See WORLD BANK INSPECTION PANEL, PANEL REGISTER, available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WRegister?openview&count=500000> (last visited July 16, 2004).

53. See *Resolutions*, *supra* note 19, ¶ 19.

54. See *id.* ¶¶ 19, 25.

55. See WORLD BANK, WORLD BANK OPERATIONAL MANUAL: BANK PROCEDURES 17.55, ¶ 10 (1999).

56. See *Resolutions*, *supra* note 19, ¶ 20.

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ist(s) have access to all staff, who may contribute information, and to all pertinent Bank records. With the prior consent of the involved borrower or guaranteeing member state, the Panel may visit the country in which the project or operation is located. The Panel may also consult with the Director General of the Operations Evaluation Department and the Internal Auditor of the Bank.<sup>57</sup>

Once the investigation is complete, the Panel submits its report to the Executive Directors and the President of the Bank. The report should contain all relevant facts and conclude with the Panel's findings on whether the Bank has complied with all relevant operational policies and procedures.<sup>58</sup>

Within six weeks of receiving the Panel's report, the Bank's management must submit a report to the Board of Executive Directors indicating its recommendations in response to the Panel's findings.<sup>59</sup> The Board of Executive Directors makes the final decision on whether to adopt the management's recommendations and on how to respond to the Panel's findings.

The Panel's report containing its findings and the management's response thereto shall be made public within two weeks of the Board's decision on these reports.<sup>60</sup> The Panel is required to submit an annual report to the President and Executive Directors concerning its activities.<sup>61</sup>

### c. *Experience*

As of December 2004, the Panel had received a total of thirty requests for inspection. Eight of these requests have been from Africa, nine from South Asia, ten from Latin America and three from East Asia and the Pacific.<sup>62</sup> The majority of these requests have raised issues relating to the Bank's safeguard policies, particularly its policies related to environmental assessment, indigenous people and involuntary resettlement. Other policies that have been commonly cited relate to information disclosure, economic evaluation of projects, consultation and project supervision. The Panel has recommended an investigation in fifteen of the cases it received, and the Executive Directors approved

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57. *See id.* ¶ 21.

58. *See id.* ¶ 22.

59. *See id.* ¶ 23.

60. *See id.* ¶ 25.

61. *See id.* ¶ 26.

62. For a list of formal requests and investigations, see WORLD BANK INSPECTION PANEL, *supra* note 52.

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ten of these recommendations.

The Resolution establishing the Panel required the Board to conduct a review of the Panel two years after its establishment. This review was conducted in 1996. The review reconfirmed the importance of the Panel and addressed issues that had arisen in the course of the first years of the Panel's operations. The main issues dealt with were:

- (i) the scope of the preliminary assessment of the request for inspection conducted by the Panel before it decides whether or not to recommend an inspection;
- (ii) the definition of key terms, "affected party" and "project," in the Resolution; and
- (iii) public disclosure of the management's response to the Panel's recommendation to the Board and of the General Counsel's opinions on Panel issues.

In addition, this review reaffirmed the Board's role as the interpreter of the Resolution establishing the Panel.

In 1997, the Board decided to initiate a second review of the Panel to deal with problems that had arisen in the Panel process, particularly relating to the preliminary phase. The most significant of these problems were the bitter disputes at the Board level regarding the Panel's recommendations of an investigation and the efforts of Bank management to enter into "extra-procedural"<sup>63</sup> communications with the Board that appeared designed to undermine the Panel's recommendation of an inspection. These disputes tended to divide Board members according to whether or not they represented borrower countries on the Board. In addition, the disputes were frustrating affected communities and their NGO representatives, creating a serious public relations challenge for the Bank.

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63. This means that the management was seeking to communicate with the Board in ways that were not explicitly provided for in the procedures established by the Resolution or the Panel's own operating procedures. These procedures only provide for the management to communicate its views on the issues raised in the request through its formal submissions to the Panel. They do not contemplate any direct communications between the Board and management regarding the Inspection Panel case in advance of the Board's receipt of and discussion of the Panel's recommendation. In a number of cases, however, the Bank management directly informed the Board that it had developed with the borrower, but without any consultations with the affected party, an action plan for resolving the problems with the project and that therefore an investigation was not necessary. Since the Board learned this information before it had had a chance to consider the Panel's recommendation and before the Panel had a chance to comment on the management's proposed plan of action to correct the problem, the management's extra-procedural communications tended to undermine the Panel's relations with the Board and to complicate Board discussions about the Panel's recommendation.

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The second review concluded in 1999 with a “conclusion” that resulted in some streamlining of the Panel process.<sup>64</sup> The Board decided to narrow the scope of the assessments conducted by the Panel in the preliminary phase of the process and to make the adoption of its recommendation at the end of this phase more certain by limiting Board discretion to reject the recommendation to objective technical grounds. In addition, the Board provided an interpretation for the term “material adverse harm” within the meaning of the Resolution. The clarification also placed limits on the communications that can take place between management and the Board during the course of a Panel proceeding on matters relating to the substance of the request under consideration by the Panel. Since the “conclusion” of the second review, the Panel process appears to be working more smoothly. In fact, the Board has approved all investigations recommended by the Panel on a “non-objection” basis.

The Panel and outside commentators have both identified one important problem with the working of the Panel. As noted above, the Panel does not play any role in monitoring implementation of the Board’s final decision regarding the Panel’s report on its investigation and the management’s recommendations in response thereto. The Resolution does not explicitly state whether or not the Panel should play any role regarding the Panel’s findings and the management’s recommendations. After some uncertainty, the Board decided that the Panel should not play any role in monitoring implementation of its final decision.<sup>65</sup> This has caused problems because it means that there is no entity in the World Bank that can give the Board an independent assessment of whether its final decision is actually being implemented as intended. According to some observers, in a number of cases the Board’s decisions have not been implemented and the original complainants have not seen the improvements in their conditions promised by the Board’s decision.<sup>66</sup>

In this regard, it is interesting to note that the Panel received a

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64. See WORLD BANK, *supra* note 50; Daniel D. Bradlow, *Lessons from the NGO Campaign Against the Second Review of the World Bank Inspection Panel: A Participant’s Perspective*, 7 ILSA J. INT’L & COMP. L. 247 (2001) (discussing the campaign waged around the second review).

65. This issue was resolved in the second clarification of the Resolution.

66. This information is based on conversations with staff of the Panel and the editors of a recently released book on the experience of the Panel, DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (D. Clark, J. Fox & K. Treakle eds., 2003).

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second request regarding the Yacyreta Dam Project in Argentina.<sup>67</sup> The World Bank Board of Directors' final decision in the first case authorized some actions to correct the problems identified in the case. The second request alleges that the World Bank has failed to implement these actions. The continuing problems with this project indicate the importance of monitoring implementation of the final decisions in the inspection function.

2. Inter-American Development Bank's Independent Investigation Mechanism<sup>68</sup>

The Inter-American Development Bank established an Independent Investigation Mechanism in 1994. This Mechanism was reviewed in 2001 and some amendments were made. The following discussion describes the current situation.

a. *Structure*

This Mechanism consists of a permanent Coordinator and a Roster of Investigators. The rules provide for fifteen individuals to be appointed to the Roster.<sup>69</sup> They must come from at least ten different Bank-member countries, must represent a broad range of technical expertise and skills, cannot have worked in any capacity for the Inter-American Development Bank for two years prior to their appointment to the Roster and must be recognized as individuals of integrity and recognized competence in areas related to development and to Latin America and the Caribbean.<sup>70</sup> The members of this Roster are appointed by the Executive Directors based on nominations by the

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67. For a description of the Yacyreta Dam Project, see generally David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 4 CHIL. J. INT'L L. 201 (2003); Richard E. Bissell, *Current Development: Recent Practice of the Inspection Panel of the World Bank*, 91 AM. J. INT'L L. 741 (1997).

68. The Inter-American Development Bank is currently reviewing its inspection function and is considering options for restructuring the mechanism. Since the review is still being conducted, it is not possible to provide information on what changes, if any, the Bank will decide to make to the mechanism. See INDEPENDENT INVESTIGATION MECHANISM, 2003 ANNUAL REPORT, available at <http://www.iadb.org>.

69. It is my understanding, based on conversations with the mechanism's coordinator, that, in fact, the Bank has experienced problems in finding fifteen qualified people to serve on the Roster and that currently there are less than fifteen serving members of the Roster.

70. INTER-AMERICAN DEVELOPMENT BANK (IDB), THE IDB INDEPENDENT INVESTIGATION MECHANISM ¶ 2.2 (2000), available at <http://www.iadb.org/cont/poli/mecanism.pdf> (last visited Apr. 28, 2005).

## INDEPENDENT INSPECTION MECHANISMS

President after consultation with the Executive Directors.<sup>71</sup> The members of the Roster are appointed for a non-renewable five-year term.<sup>72</sup> They do not work full-time for the Bank. Instead, they represent a pool of people whose services can be tapped when needed.<sup>73</sup>

In order to protect the independence of the members of the Roster, the members can only be removed for cause by a decision of the Board of Executive Directors.<sup>74</sup> In addition, a member of the Roster cannot be employed by the Bank for a period of two years following the termination of his or her appointment to the Roster.<sup>75</sup>

The Coordinator is a staff position. The Coordinator's responsibility is to receive complaints, make an initial determination on eligibility in conjunction with the Legal Department and advise the President on whether or not to appoint an individual from the Roster to review the request. The Coordinator also acts as a coordinating center during the investigation process.

### b. *Procedures*

The Mechanism is mandated to receive complaints from affected parties that allege that:

[T]he Bank has failed in the design, analysis or implementation of proposed or ongoing operations to follow its own established operational policies, or norms formally adopted for the execution of those policies (including enforcement of compliance with borrower's obligations required by such policies and/or norms), when material adverse effects have or might reasonably be expected to occur as a result of such failure by the Bank.<sup>76</sup>

Requests for investigation can also be filed by a representative of the affected party. Usually, this will be a local representative. However, in exceptional cases when no local representative is available and the Executive Directors agree, another representative can act for the affected party.<sup>77</sup>

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71. *See id.* ¶ 2.3.

72. *See id.* ¶ 2.5.

73. *See id.*; IDB, INDEPENDENT INVESTIGATION MECHANISM: ROSTER (2000), available at <http://www.iadb.org/cont/poli/investing/roster.htm>.

74. *See id.* ¶ 2.6.

75. *See id.* ¶ 2.8.

76. *Id.* ¶ 1.1.

77. *See id.* ¶ 3.3.



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For the purposes of this Mechanism:

- (i) “affected party” is defined to mean “a community of persons such as an organization, association, society or other groupings of individuals;”<sup>78</sup> and
- (ii) “operational policies or norms” consist of those “which apply to the design, appraisal, and/or implementation of Bank operations, funded in whole or part by loans or grants from Bank funds or funds administered by the Bank.”<sup>79</sup>

The requests for investigation must be filed with the Coordinator for the Mechanism. The Coordinator, in conjunction with the Legal Department, makes a preliminary determination on eligibility and advises the President on whether or not to appoint an individual from the Roster as a consultant to review the request.<sup>80</sup> It is important to note that the regulations contain no deadlines for any of these actions.

If the consulting member of the Roster concludes that the request is not frivolous and is substantive, the Coordinator forwards the request to the Board of Executive Directors, the President and, through the President, to the management for a response.<sup>81</sup> In this regard, it should be noted that a successful requester must show that its “rights or interests have been or are likely to be directly and materially affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and norms.”<sup>82</sup>

Management is required to give its response to the Coordinator within thirty days of receipt of the request.<sup>83</sup> The Coordinator forwards the management response to the consulting member of the Roster, who is required to prepare a recommendation to the Board on whether or not to authorize an investigation.<sup>84</sup> This recommendation is submitted to the Board through the Coordinator. There are no deadlines for when the consulting member must submit the recommendation to the Coordinator, nor for when the Coordinator must submit the recommendation to the Board.<sup>85</sup> Similarly, there is no stipulated time period within which the Board must act on the recommendation.<sup>86</sup> The only

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78. *Id.* ¶ 3.2.

79. *Id.* ¶ 1.2.

80. *See id.* ¶¶ 4.3(a)-(b).

81. *See id.* ¶ 4.3(c).

82. *Id.* ¶ 3.2.

83. *See id.* ¶ 4.4.

84. *See id.* ¶¶ 4.4-4.5.

85. *See id.* ¶ 4.8.

86. *See id.* ¶ 5.1.

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deadline is that the Coordinator is required to inform the requester of the Board's decision on whether to proceed with the investigation within fifteen days of the decision.<sup>87</sup>

If the Board does decide to authorize an investigation, it must name a Panel consisting of no less than three individuals from the Roster.<sup>88</sup> The members of this Panel should have different nationalities. The Board, in consultation with the President, selects the chair of the Panel.<sup>89</sup>

The Panel, in conducting the investigation, shall establish its own procedures,<sup>90</sup> but it will have access to all staff and to all relevant records.<sup>91</sup> The Panel may only visit the territory of the member state in whose country the Bank operation is located with the prior consent of the member state.<sup>92</sup> The Office of the Secretary of the Bank acts as the Secretariat of the Panel.<sup>93</sup> Further, the Panel may seek the advice of the Legal Department of the Bank on matters related to the Bank's rights and obligations with respect to the request and to other questions concerning the Mechanism policy.<sup>94</sup>

At the end of the investigation, the Panel submits its findings and recommendations<sup>95</sup> in a written report to the Board of Executive Directors and to the President.<sup>96</sup> The Bank's management has thirty days from receipt of the report to respond to the Executive Directors.<sup>97</sup> Based on the Panel report and the management's response, the Board shall decide on what action, if any, should be taken.<sup>98</sup> There is no time period within which the Board must make this determination. Once the Board makes its determination, the management must implement the decision and must report to the Board on its implementation of the decision.<sup>99</sup> Neither the Panel nor the Coordinator is assigned any explicit role in monitoring implementation of the Board's decision.

The Bank is required to publicly disclose the investigation report and

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87. *See id.* ¶ 4.8.

88. *See id.* ¶¶ 5.1-5.2.

89. *See id.* ¶ 5.2.

90. *See id.* ¶ 5.3.

91. *See id.* ¶ 5.5.

92. *See id.* ¶ 5.9.

93. *See id.* ¶ 5.4.

94. *See id.* ¶ 5.11.

95. *See id.* ¶ 6.1.

96. *See id.* ¶ 6.2.

97. *See id.* ¶ 6.3.

98. *See id.* ¶ 7.1.

99. *See id.* ¶ 7.2.

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the management response thereto within ninety days of the Board's receipt of these two documents.<sup>100</sup> Similarly, the management's reports on the implementation of the Board's decision must be disclosed within fifteen days of the Board's approval of this report.<sup>101</sup> Finally, the Coordinator is required to issue an annual report discussing any requests received and the investigations undertaken and their results to the President and the Board of Executive Directors.<sup>102</sup> The annual report will also be made publicly available.

*c. Experience*

As of December 2004, the Mechanism had received four requests involving three different projects.<sup>103</sup> The first resulted in a full investigation. However, the project that formed the basis for this first request also involved World Bank financing. Consequently, a request for inspection was also filed with the World Bank's Inspection Panel. The report of the World Bank Inspection Panel's investigation of this request was publicly released, and after considerable delay, the Inter-American Development Bank released the report of its investigation. This same project is now the subject of the fourth request received by the Mechanism.<sup>104</sup>

It appears that the 2001 operating budget for the Mechanism was \$236,500. Total expenditures made in 2002 reached \$258,828, not including the salaries and overhead related to the Coordinator and other Bank staff working with the Mechanism or the time devoted by the Bank staff to the Mechanism.<sup>105</sup> The Bank, however, has made clear that it will provide any additional reserves that the Mechanism may need to adequately perform. However, this has not been necessary. In 2001, the Mechanism only spent \$44,959,<sup>106</sup> which was a reflection of the small workload of the Mechanism. In 2003, the workload had increased, the budget was \$247,263 and total expenditures were

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100. *See id.* ¶ 8.1.

101. *See id.* ¶ 8.2.

102. *See id.* ¶ 8.3.

103. IADB website, <http://www.iadb.org/cont/poli/investig/notices.htm>.

104. The report for this fourth investigation was released in July 2004. *See* Press Release, International Rivers Network, Inter-American Development Bank Investigation Confirms Chronic Problems at Yacyreta Dam, July 12, 2004, *available at* <http://www.irn.org/programs/hidrovia/index.asp?id=040716.yacyreta.html> (last visited July 20, 2004).

105. INDEPENDENT INVESTIGATION MECHANISM, 2002 ANNUAL REPORT, *available at* <http://www.iadb.org/cont/poli/investig/iimar02eng.pdf>.

106. Information supplied by Mr. Rene Rios, Coordinator, IADB Inspection Mechanism.

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\$278,229.52.<sup>107</sup>

### 3. Asian Development Bank's Accountability Mechanism

On May 29, 2003, the Board of the Asian Development Bank (ADB) voted to establish a new Accountability Mechanism (AM) to replace the Bank's prior Inspection Function, which became operational in December 1995.<sup>108</sup> The ADB's decision followed an extensive review of its existing inspection function that was precipitated by the ADB's unsatisfying experience with the prior mechanism.<sup>109</sup> The new Accountability Mechanism became effective on December 12, 2003.<sup>110</sup>

The new mechanism has two complimentary functions: a consultation phase and a compliance review phase.<sup>111</sup> Each of these has a separate structure.

#### a. Consultation Phase

The purpose of this phase of the Accountability Mechanism is to help project-affected people address the specific problems caused by ADB-supported projects with the consent and participation of all parties concerned. It is important to note that the purpose of this phase is to solve problems and not to identify and allocate blame.<sup>112</sup> The scope of this phase is broader than that of the compliance review phase.

A Special Project Facilitator (SPF) is fully responsible for managing the consultation phase of the Accountability Mechanism.<sup>113</sup> The SPF is appointed by and reports to the President of the ADB. The SPF, who

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107. INDEPENDENT INVESTIGATION MECHANISM, 2003 ANNUAL REPORT, available at <http://www.iadb.org/iim/iim2003.pdf>

108. Asian Development Bank (ADB), Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism [hereinafter Review of the Inspection Function], available at [http://www.adb.org/Documents/Policies/ADB\\_Accountability\\_Mechanism/default.asp](http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp) (last visited Apr. 28, 2005). In June 2003, the ADB issued a new Bank Policy that describes how the Accountability Mechanism functions. ADB, Operations Manual Banking Policies, OM Section 49/BP, issued on 13 June 2003, available at <http://www.adb.org/Documents/Manuals/Operations/OM49.pdf> (last visited Apr. 28, 2004).

109. The existing mechanism proved unable to effectively handle a case involving a project in Thailand. For a description of this case, see ADB, FIRST DRAFT OF WORKING PAPER: REVIEW OF THE INSPECTION FUNCTION (2002), available at <http://www.adb.org/Inspection/draft.pdf> (last visited Apr. 28, 2005).

110. See ADB Accountability Mechanism, May 4, 2004, available at [http://www.adb.org/Documents/Policies/ADB\\_Accountability\\_Mechanism/default.asp](http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp) (last visited June 16, 2004).

111. See Review of the Inspection Function, *supra* note 108.

112. See *id.* ¶ 71.

113. See *id.* ¶ 62.

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has a rank equivalent to director general, is independent of the Bank's operational departments. The staff of the SPF consists of one professional and two administrative officers. The SPF was responsible for preparing the operational procedures for the consultation phase.

The activities of the SPF include:<sup>114</sup>

1. collecting information on problem-solving experiences in the ADB and elsewhere that can be fed back into the design and implementation of ADB operations;
2. providing "generic support and advice" to operational departments in their problem-solving activities;
3. reviewing and assessing complaints;
4. facilitating consultative dialogues, facilitating mediation and other forms of problem-solving techniques;
5. informing the Board of the ADB about the results of specific consultation activities; and
6. reporting annually to the President, with a copy to the Board, on its activities which will be integrated into an annual report with the report of the Compliance Review Panel.<sup>115</sup>

The SPF is authorized to receive any complaint from "any group of two or more people (such as an organization, association, society, or other grouping of individuals) in a borrowing country," a local representative of the affected group or, in exceptional cases, a non-local representative.<sup>116</sup> The complaint must be in writing and must be specifically addressed to the SPF.<sup>117</sup> The complaint must include the following:

1. an allegation that the complainant is or is likely to be directly affected "materially and adversely" by the ADB-supported project, "irrespective of any allegation of noncompliance by ABD of its operational policies and procedures";
2. a statement that the complainant claims that the "direct and material harm" is or will be the result of an act or omission of the ADB in the course of the design and implementation of the ADB-supported project;
3. a description of the "direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected" by the project;

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114. *See id.* ¶ 66.

115. For information on the Compliance Review Panel, see discussion of compliance review phase *infra* Section II.A.3.b.

116. Review of the Inspection Function, *supra* note 108, ¶ 68.

117. *See id.* ¶ 69.

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4. the identity of the complainant and any representatives;
5. a description of the project;
6. a statement of the desired outcome or remedies sought by the complainant; and
7. a description of the “good faith” efforts that the complainant has made to address the issue with the Bank’s operational department.<sup>118</sup>

The SPF will not accept any complaint that deals with, inter alia, procurement issues, allegations of fraud or corruption or the adequacy or suitability of the ADB’s existing policies and procedures.<sup>119</sup>

The consultation process managed by the SPF is expected to take about three months from the date on which the complaint is filed. At certain stages during the process, the complainant is free to refer the matter to the compliance review phase.<sup>120</sup> The consultation process involves the following nine steps:

1. Complainant files a written complaint with the SPF.
2. The SPF registers the complaint and sends an acknowledgement to the complainant. If the SPF “immediately” determines that the complaint cannot be accepted because it is not within the scope of ADB’s mandate or he/she cannot help the problem, he/she must notify the complainant with a copy to management.
3. The SPF determines if the complaint meets all the requirements for eligibility. If the SPF determines that the complaint is ineligible, he/she informs the complainant. In this case, the SPF must also inform the complainant that it can file a request for a compliance review with the Compliance Review Panel, who will make an independent determination of eligibility.
4. The SPF undertakes a review to determine how best to address the issues raised in the complaint. After the review is completed, the SPF makes an assessment of how he/she can most effectively help to solve the problems. The SPF reports this finding to the President of the Bank and the Vice-President concerned with the operation at issue and refers the findings to the complainant and the applicable operations department. The SPF must also inform the complainant that it can either

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118. *See id.* ¶ 70.

119. *See id.* ¶ 72.

120. *See id.* ¶ 74.

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- continue with the consultation process or file a request for a compliance review with the Compliance Review Panel.
5. The complainant informs the SPF if it wishes to proceed with consultations or to file a request for compliance review.
  6. The SPF receives comments from the complainant and the applicable operations department about the findings and, after reviewing the comments, makes recommendations on how to proceed. This recommendation must be approved by the President before anything can be implemented. If the complainant is not happy with the recommendation, it can file a request for compliance review.
  7. The SPF implements the problem-solving course of action with the participation of all interested parties.
  8. Termination of the consultation process: this can occur at the instigation of any of the parties to the consultation.
  9. The SPF monitors the implementation of any agreement reached during the consultation process. He/She must report at least annually to the President, with a copy to the Board on the state of implementation of the agreement.<sup>121</sup>

b. *Compliance Review Phase*

The ADB has established a Compliance Review Panel (CRP) consisting of three members.<sup>122</sup> The chair of the CRP works full-time and the two other members work part-time. The CRP is supported by a staff of two professionals and three administrative officers.<sup>123</sup> The members of the CRP are appointed by the Board on the recommendation of the President.<sup>124</sup> They report directly to the Board on all their activities.<sup>125</sup> The Board has appointed a Board Compliance Review Committee (BCRC) which exercises oversight over some aspects of the CRP's work.<sup>126</sup> The BCRC replaces the Board Inspection Committee, which oversaw the previous inspection function.

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121. *See id.* ¶¶ 75-89.

122. *See id.* ¶ 95.

123. *Id.*

124. *See id.* ¶ 96.

125. *See id.* ¶ 98.

126. For details on the functions of the BCRC, see discussion of CRP process *infra* p. 430.

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The activities of the CRP include:

1. receiving and determining the eligibility of requests for compliance reviews;
2. conducting compliance reviews;
3. issuing reports that include its findings and recommendations on policy compliance;
4. monitoring the implementation of decisions made by the Board; and
5. issuing annual reports that contain descriptions of the requests it has received, a summary of its activities and advice on the lessons learned from its cases.<sup>127</sup>

The CRP investigates alleged violations by the ADB of its operational policies and procedures that “directly, materially, and adversely affect [ ] local people in the course of the formulation, processing, or implementation of the [ADB]-assisted project.”<sup>128</sup> The purpose of the investigation is to determine only whether or not the ADB has complied with CRP operational policies and procedures. The purpose is not to investigate the borrowing country, the executing agency for the project or the private partner in the project. Their conduct will only be investigated to the extent “directly relevant” to an assessment of the ADB’s compliance with its operational policies and procedures.<sup>129</sup>

Requests for compliance reviews can be filed by:

1. any group of two or more people (such as an organization, association, society or other grouping of individuals) in a borrowing country where an ADB-assisted project is located or in an adjacent ADB member country;
2. the local representative of the affected group;
3. a non-local representative of the affected group if the CRP agrees; and
4. one or more members of the Board of Directors.<sup>130</sup>

The request must be in writing and must be addressed to the secretary of the CRP.<sup>131</sup> Requests can be submitted in any of the official or national languages of the ADB’s developing member countries, but

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127. *See id.* ¶ 100.

128. *Id.* ¶ 99.

129. *Id.*

130. *See id.* ¶ 103.

131. *See id.* ¶ 106.



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the working language of the CRP, like that of the SPF, is English.<sup>132</sup> The request must include, inter alia, the following:<sup>133</sup>

1. the assertion that the requester is or is likely to be “directly affected materially and adversely” by the ADB-assisted project;
2. the assertion that the “direct and material harm” from which the requester is suffering or is likely to suffer is or will be the result of the ADB’s alleged failure to follow its operational policies and procedures in the course of the design and implementation of the ADB-assisted project;
3. a description of the harm;
4. a description of the ADB-assisted project;
5. a statement of the outcome or remedy that the requesters believe the Bank should provide; and
6. an explanation of the requester’s efforts to address the matter with the SPF.

The CRP can only deal with requests relating to the ADB’s “operational policies and procedures.”<sup>134</sup> In addition to the limitations on the scope of activities of the SPF described above, the CRP cannot deal, inter alia, with requests that relate to matters that are not the responsibility of the Bank or that have not first been filed with the SPF.<sup>135</sup>

The CRP process involves the following ten steps:

1. The request for compliance review is filed with the Office of the CRP (OOCR).
2. The OOCR registers the request and sends an acknowledgement to the requester.
3. The CRP determines the eligibility of the request. This must be done within fourteen days from registration, unless the SPF has already determined that the complaint is ineligible. In the latter case, the determination must be made within twenty-one days from registration. The CRP informs the Board of its decision.
4. The Board decides whether to authorize a compliance review.
5. The CRP conducts the compliance review.
6. The CRP prepares a draft report which it submits to Bank management and the requesters for comment.
7. The Bank management and the requesters submit their re-

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132. *Id.*

133. *See id.* ¶ 107.

134. *See id.* ¶ 110.

135. *See id.* ¶ 113.

## INDEPENDENT INSPECTION MECHANISMS

- sponses to the draft report to the CRP within thirty days from receipt of the draft report.
8. The CRP issues its final report to the Board within fourteen days after receiving the comments of the management and the requester.
  9. Within twenty-one days, the Board considers the report and makes the final decision regarding any recommendations that the CRP has made on how to bring the project into compliance with the ADB's operational policies and procedures or to mitigate any harm caused by the project.
  10. The CRP monitors implementation of the remedial actions approved by the Board and reports at least annually to the Board on the implementation.

### c. *Experience*

Prior to December 2004 the Mechanism received one request involving the Chashma Right Bank Irrigation Project in Pakistan. In April 2003, the ADB Board approved the Inspection Committee's recommendation to authorize an inspection.<sup>136</sup>

The old ADB inspection function received seven requests for inspection. Most of these were found to be ineligible for investigation. The most important case involved the Samut Prakarn Wastewater Management Project in Thailand (Samut Prakarn).<sup>137</sup> This case proved to be controversial, and its handling exposed such serious problems with the mechanism that the case precipitated a review of the inspection function that ultimately resulted in the establishment of the current Mechanism.

Samut Prakarn involved a request for an inspection from a group of villagers who alleged that the Asian Development Bank's decision to change the proposed location for this project was made without an assessment of the environmental and social impacts of the proposed change on the local communities. The Board of Directors authorized an investigation and appointed a Panel to conduct this investigation. The Panel, however, did not receive clearance from the Government of

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136. ADB, ANNUAL REPORT OF THE INSPECTION COMMITTEE OF THE BOARD, 2003-2004, *available at* <http://www.adb.org/Documents/Reports/Inspection/ar2003-2004.pdf> (last visited Dec. 10, 2004).

137. For details of the project, see ADB, SAMUT PRAKARN WASTEWATER MANAGEMENT PROJECT (2002), *available at* <http://www.adb.org/Inspection/Projects/samutprakarn.asp> (last visited Apr. 28, 2005).

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Thailand to visit the project site, ultimately causing the Panel to suspend its inspection of the project. Despite this fact, the Panel did issue a report, based on a review of the project documents and the documentation submitted by the requesters and by management. The Panel found that the Asian Development Bank had failed to comply with all applicable operational policies and that there was direct and material harm to the rights and interests of the requesters. Management objected to the Panel's findings. The Board of Directors' final decision in this case imposed some additional monitoring requirements on management.

The difficulties involved in the Samut Prakan case, which followed from the decision of the Government of Thailand, made it an extremely expensive case for the Asian Development Bank. It is estimated to have cost the Bank \$1.7 million in staff time and resources, in addition to the \$200,000 incurred by the Panel. The typical case appears to cost the Bank about \$160,000 in staff time and resources.<sup>138</sup> However, according to the 2003-2004 Annual Report, the budgetary allocation for the Chashma Project investigation is \$515,000 of which \$463,000 had been dispensed by June 30, 2004.<sup>139</sup>

The budget for the first year of operations of the Accountability Mechanism is about \$1.25 million. About \$400,000 is for the SPF and about \$850,000 is for the CRP.<sup>140</sup>

#### 4. IFC/MIGA's Compliance Advisor/Ombudsman

In 1999, International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) established the office of the Compliance Advisor/Ombudsman (CAO). Its mandate is to assist the two organizations in dealing with complaints from people affected by the projects they support in a way that is "fair, objective and constructive."<sup>141</sup> Specifically, the office has three functions:

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138. See Second Draft of the Report to Asian Development Bank, Review of Inspection Function (July 31, 2002) ¶ 120. Also see annex 1 of this report for a discussion of Samut Prakan.

139. ANNUAL REPORT OF THE INSPECTION COMMITTEE OF THE BOARD, *supra* note 136.

140. ADB, Proposal for a New ADB Accountability Mechanism: A Two-Step Approach of Consultation and Compliance Review: Resource Implications, available at [http://www.adb.org/Documents/Policies/ADB\\_Accountability\\_Mechanism/acent307.asp](http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/acent307.asp) (last visited Jan. 29, 2005).

141. COMPLIANCE ADVISOR/OMBUDSMAN (CAO), OPERATIONAL GUIDELINES FOR THE OFFICE OF THE IFC/MIGA 4 (2000), available at [http://www.cao-ombudsman.org/pdfs/FINAL\\_CAO\\_GUIDELINES\\_IN\\_ENGLISH\\_\(09-20-00\).doc](http://www.cao-ombudsman.org/pdfs/FINAL_CAO_GUIDELINES_IN_ENGLISH_(09-20-00).doc) (last visited Apr. 28, 2005).

### INDEPENDENT INSPECTION MECHANISMS

- (i) to respond to complaints by persons who are affected by IFC- and MIGA-supported projects through attempting to resolve the issues raised using a flexible problem-solving approach (the Ombudsman Role);
- (ii) to provide independent advice to the President and senior management of IFC and MIGA (the Advisory Role); and
- (iii) to oversee audits of IFC's and MIGA's social and environmental performance, both on systemic issues and issues related to specific projects (the Compliance Role).<sup>142</sup>

The CAO is appointed by and reports directly to the President of the World Bank Group and is not part of the line management structure of either the IFC or MIGA. The CAO has the authority to appoint all the members of the staff of the CAO and any consultants that it uses.<sup>143</sup> According to the CAO's 2002-2003 Annual Report, the staff of the CAO consists of the CAO, three specialists and four support staff. The office has also made use of the services of consultants.

#### a. *Ombudsman Function*

The CAO Ombudsman's primary function is to help resolve issues related to the social and environmental impacts of IFC- and MIGA-supported projects. The Ombudsman's aim is to work with all relevant parties to "identify problems, recommend practical remedial action and address systemic issues that have contributed to the problems, rather than to find fault."<sup>144</sup> In keeping with best practices for Ombudsman, the CAO gives priority to confidentiality of process but not of product. In fact, it exercises a presumption in favor of disclosure of its reports.

The CAO's guidelines establish a six-step process for its Ombudsman's function. These steps, which are initiated by the filing of a complaint by affected persons, are:<sup>145</sup>

- (i) *Acknowledgement of Receipt*: The CAO sends an acknowledgement that it has received the complaint within five days of receipt of the complaint.
- (ii) *Appraisal and Acceptance (or Otherwise)*: In deciding whether or not to accept the complaint the CAO considers whether:

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142. *See id.*

143. *See id.* at 7.

144. *Id.* at 10.

145. *See id.* at 10-18.

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- the complainant has been affected or is likely to be affected by the actual or potential social and/or environmental impacts of the project on the ground;
- the complaint relates to the planning, implementation or impact of an IFC or MIGA project;
- there are “sufficient and specific grounds” for the complaint; and
- the complaint is genuine (i.e., not malicious, trivial or designed to gain competitive advantage).

If the complaint is accepted it will be registered and the complainant sent a notice of acceptance. If rejected, the CAO will close the file and so inform the complainant.

- (iii) *Assessment*: The CAO undertakes a preliminary investigation in order to assess the complaint and determine how it should be handled. This phase concludes with a decision on whether or not to proceed and an outline of the proposed course of action to be followed. This phase should be completed within thirty working days of the decision to accept the complaint. During this step, the CAO will seek information and comment from IFC or MIGA management, who must respond within twenty days of the inquiry. Similar requests will be sent to the project sponsor and other relevant parties. At the end of the assessment, the CAO has three options:
- First, the CAO might decide that it would not be useful to continue with the investigation, in which case it will so inform the complainant and other relevant parties.
  - Second, the CAO may decide that while there is no benefit to be derived from further action by the Ombudsman, there are issues which could usefully form the basis for a compliance audit. In such a case, the CAO will inform the complainant and other relevant parties and at its own discretion may decide to initiate a compliance review.
  - Third, the CAO can decide to continue with its problem-solving activities. This option leads to the fourth stage of the process.
- (iv) *Action in Response to a Complaint: Facilitation, Mediation and Investigation*: The course of action adopted by the CAO will depend on the nature, complexity and urgency of the matter. The action taken by the CAO is designed to solve problems and to this end can involve:

### INDEPENDENT INSPECTION MECHANISMS

- promoting dialogue between the complainant, IFC/MIGA and the project sponsor in order to stimulate a self-generated solution among the parties;
  - conciliation or mediation facilitated by the CAO or a third party at the request of the CAO;
  - investigation by the CAO; or
  - interim recommendations for action.
- (v) *Conclusion and Closure.* The CAO may conclude and close a case at any time when a satisfactory solution has been reached or when the CAO concludes that further action is not likely to be useful or productive. When the CAO closes a case, it will report to the President and will advise the complainant of the CAO's decision and the reasons therefore. If the case has not been successfully concluded the CAO's report to the President may contain recommendations on future actions that IFC/MIGA could take to address the issues raised in the complaint. The CAO's report is made public. Once the case is closed, the CAO has the discretion to undertake a compliance audit to look at issues of non-compliance that have arisen in the course of the Ombudsman's investigation.
- (vi) *Monitoring and Follow-Up.* The CAO will seek to ensure that agreements between parties make provisions for review and monitoring. The report to the President should also contain a program of implementation so that monitoring of compliance with the agreements can be incorporated into normal project management and monitoring. The CAO will also, "to the extent that this is practicable,"<sup>146</sup> monitor implementation of its recommendations.

#### b. *Compliance Audit Function*

Compliance audits can be triggered, as indicated above, by the Ombudsman's investigations, although the compliance audit will be delayed until after the conclusion of the Ombudsman process. Alternatively, compliance audits can be undertaken at the request of IFC or MIGA management or on the CAO's own initiative.<sup>147</sup>

The purpose of a compliance audit is to determine whether IFC and MIGA staff, and in some cases project sponsors, have complied with

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146. *Id.* at 18.

147. *See id.* at 20-21; *see also* CAO, CAO COMPLIANCE AUDIT ROLE: GUIDANCE ON COMPLIANCE AUDITING AND ENHANCING OUTCOMES (2002).

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IFC's and MIGA's social and environmental policies, guidelines and procedures. It is important to note that the CAO's operational guidelines stipulate that:

A compliance audit would not normally seek to set aside an otherwise reasonable interpretation or judgment. However, it will nevertheless be important to draw attention to situations where reasonable interpretations have led to undesirable outcomes and make recommendations about them.<sup>148</sup>

The findings of the compliance audit are presented to the President of the World Bank Group in a report that can contain recommendations on corrective action as well as policy and procedural matters. The CAO will monitor implementation of its endorsed recommendations. The CAO will also inform the Board of the findings of its audits after these findings and recommendations have been discussed with the President.

*c. Advisory Role*

The CAO's advisory role can be performed at the request of the President or IFC and MIGA management or on the CAO's own initiative. It is usually performed in an informal way through regular information exchange between IFC and MIGA staff and the CAO. The CAO is able to provide advice at all stages of project preparation and implementation, but it does not act as a clearinghouse for new projects and its advice should not be interpreted as an endorsement of any project. The advice usually takes the form of summaries and periodic memoranda to the President. The CAO decides whether these documents should be publicly disclosed.<sup>149</sup>

*d. Annual Report*

The CAO provides an annual report to the IFC and MIGA Boards. The purpose of this report is to provide the Boards with an overview of CAO activities and information on its monitoring of the implementation of the CAO recommendations that the Board has endorsed.<sup>150</sup> The Boards can request that the CAO supplement this annual report

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148. *Id.*

149. *See id.* at 22.

150. *See id.* at 23.

## INDEPENDENT INSPECTION MECHANISMS

with a briefing. The Boards can also request briefings at other times, for example, after being informed of the results of compliance audits or the handling of a specific complaint.<sup>151</sup>

### e. *Experience*

Most of the CAO's experience has been in its role as Ombudsman. According to its 2003-2004 Annual Report, the CAO, in its role as Ombudsman, has received twenty-eight formal complaints, of which ten were assessed, seven were investigated and recommendations made, five were rejected, two resulted in large scale mediations and four were closed.<sup>152</sup> Common issues arising from these complaints are affected communities' "right to know and to be consulted about projects with a potential impact on the environment or the social fabric of the community."<sup>153</sup> The 2001-2002 Annual Report stated that, in addition to the formal complaints, the office had received sixty-five letters of inquiry.<sup>154</sup>

The CAO has also provided informal advice to IFC and MIGA in approximately ten or eleven cases. For example, the CAO has advised IFC on incorporating ideas on sustainability into its investment decisions so that these decisions are designed to produce positive outcomes as opposed to merely avoiding harm. The CAO has provided advice to the World Bank Group in its extractive industries review and in regard to how the IFC and MIGA can use the World Commission on Dams report to further their own dam management and oversight responsibilities.<sup>155</sup> The CAO has also provided advice, based on a CAO investigation, to shareholders in an IFC project that resulted in a mercury spill that led to 300 cases of mercury poisoning.<sup>156</sup> Finally, in 2002 the CAO undertook a review of the IFC's safeguard policies, which is publicly available through the CAO's website.<sup>157</sup>

Following a clarification of the situation, the CAO provides formal advice to IFC and MIGA in cases arising from complaints to the Ombudsman and from compliance audits. In these cases, the formal

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151. *See id.*

152. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2003-04 ANNUAL REPORT 3 (2004).

153. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2000-01 ANNUAL REPORT 7 (2001), available at <http://www.cao-ombudsman.org/pdfs/AnnReportCAOarEng.pdf> (last visited Apr. 28, 2005).

154. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2001-02 ANNUAL REPORT 7 (2002), available at [http://www.cao-ombudsman.org/pdfs/CAOar\\_02\\_Eng.pdf](http://www.cao-ombudsman.org/pdfs/CAOar_02_Eng.pdf) (last visited Apr. 28, 2005).

155. *See id.* at 10-11.

156. *See id.* at 11.

157. *See id.*



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advice addresses policy and process issues in a broader context than that of the individual project from which the complaint or audit arose.<sup>158</sup>

The compliance function is the least developed of the CAO's roles. The CAO only developed its compliance audit operating guidelines in 2002. The CAO has undertaken a compliance audit of at least one project, a MIGA project.<sup>159</sup> In January 2002, the CAO received a complaint regarding the Bulyanhulu mine in Tanzania. Following an assessment of the complaint, the CAO found that the mine was performing in accordance with environmental and social standards and did not merit a compliance audit.<sup>160</sup>

The 2004 operational budget of the CAO was \$1,900,864.<sup>161</sup> In addition, the CAO has a contingency fund of \$1 million and the IFC Board has promised to provide additional funds if necessary.<sup>162</sup> It has developed a procedure to try and encourage the parties involved in a complaint to its Ombudsman (presumably excluding the complainant) to contribute to the cost of the CAO's activities in regard to the complaint.<sup>163</sup> This is important because the cost of the CAO's involvement in a project can be substantial. In one case the total cost of a mediation organized by the CAO, excluding the costs of the CAO staff, was approximately \$1.7 million, of which about \$1 million was paid by the company.<sup>164</sup>

##### 5. European Bank for Reconstruction and Development's Independent Recourse Mechanism

On April 29, 2003, the EBRD's Board of Directors approved the establishment of an Independent Recourse Mechanism (IRM).<sup>165</sup> The decision was made after significant public and internal consultations.

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158. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2002-03 ANNUAL REPORT 11 (2003).

159. *See id.* at 14-15; *see also* CAO, PRELIMINARY AUDIT REVIEW OF MIGA IN RELATION TO COMPANIA MINERA ANTAMINA S.A. (2001), *available at* <http://www.cao-ombudsman.org> (last visited Apr. 28, 2005).

160. MIGA, 2003 ANNUAL REPORT (2003), *available at* <http://www.miga.org> (last visited June 16, 2004).

161. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2003-04 ANNUAL REPORT 19 (2004).

162. *Id.* It does not appear that, to date, the CAO has had to draw on this contingency fund.

163. *See id.* at 17.

164. The project related to the mercury spill at the Yanococha mine in Peru. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2002-03 ANNUAL REPORT 19 (2003).

165. *See* EBRD, INDEPENDENT RECOURSE MECHANISM: AS APPROVED BY THE BOARD OF DIRECTORS ON 29 APRIL 2003, *available at* <http://www.ebrd.org/about/policies/irm/main.htm>.

### INDEPENDENT INSPECTION MECHANISMS

The consultations included a four-month period for public comments on a proposal approved by the Board's Financial and Operational Policies Committee.<sup>166</sup>

The IRM consists of a "system of processes and procedures designed to provide a venue for an independent review of complaints or grievances from groups that are, or are likely to be directly and adversely affected by a Bank-financed project."<sup>167</sup> It is designed as both a compliance review and problem-solving mechanism for both public and private sector projects but with a focus on compliance review. This means that when the IRM receives eligible complaints it can undertake a compliance review. However, it may also engage in problem-solving in order to "facilitate the early resolution of the issues that have arisen in connection with the design, appraisal or implementation of a project."<sup>168</sup> The IRM's compliance reviews are limited to the following specified EBRD policies: the Environmental Policy and provisions of the Public Information Policy which relate to project-specific issues and, in the future, any new policies that the Board decides should be within the compliance review function.<sup>169</sup> It should be noted that the Environmental Policy addresses such social issues as "compliance with specified internationally recognised labour standards, protection of workers' health and safety and safeguards relating to cultural property, indigenous peoples and involuntary resettlement."<sup>170</sup> The IRM can also consider relevant Bank procedures and any other Bank policies that may be related to possible violations of these two policies.<sup>171</sup>

The IRM is authorized to receive both complaints relating to the design, assessment and implementation of projects and complaints filed within twelve months following the date of physical completion of the project, or where physical completion is not an appropriate indicator, within twelve months after the date of the final disbursement of the loan.<sup>172</sup>

The IRM consists of the following officers and bodies:<sup>173</sup>

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166. *See id.* § I. The IRM Report contains a summary of the public comments received by the EBRD and the staff responses to these comments.

167. *Id.* Annex 1 ¶ 2.

168. *Id.* § II.1.

169. *Id.* Annex 1 ¶ 3.

170. *Id.*

171. *Id.*

172. *Id.* Annex 1 ¶ 12.

173. *Id.* Annex 1 ¶ 6.

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- The Board of Directors, which has decision-making authority in the case of complaints relating to projects that have received Board approval;
- The President of the EBRD, who has decision-making authority in the case of complaints relating to projects that have not yet received Board approval and any problem-solving initiative;
- A Roster of three to ten experts who are appointed by the Board of Directors on the recommendation of the President. The members of this Roster should have similar qualifications and should function in a similar way to the IDB's Roster of Experts. Unlike the IDB's experts, the members of the EBRD Roster are paid a retainer for which they are required to spend five days each year at the EBRD learning about the policies and procedures of the Bank; and
- The Chief Compliance Officer (CCO), who has assumed additional duties as the coordinator of the IRM.<sup>174</sup> The CCO reports directly to the President and is independent of all the EBRD's operational departments. The CCO's current responsibilities include ensuring that the Bank's processes comply with the highest standards of integrity, conducting investigations of alleged misconduct by Bank personnel and handling allegations of fraud and corruption in the EBRD and EBRD-financed projects.<sup>175</sup>

a. *Procedures*

On April 4, 2004, the Board of Directors approved the IRM Rules of Procedure.<sup>176</sup> These detailed rules govern how complaints may be filed with the IRM and how such complaints are to be assessed and, if found eligible, processed by the IRM through compliance reviews, problem-solving initiatives or a combination of the two. The rules also set out requirements relating to deadlines, reports, disclosure of and access to information and other issues.<sup>177</sup>

Any two or more individuals with a common interest who claim that they are or are likely to be "directly and adversely" affected by a

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174. The CCO is currently responsible for investigating cases of misconduct among the EBRD's staff. However, the CCO is not responsible for investigating cases of fraud and corruption in EBRD operations that do not involve misconduct by EBRD staff.

175. For more information on the CCO's role in regard to fraud and corruption, see the EBRD's website, <http://www.ebrd.org/about/index.htm>.

176. See EBRD, INDEPENDENT RECOURSE MECHANISM RULES OF PROCEDURE: AS APPROVED BY THE BOARD OF DIRECTORS ON 6 APRIL 2004 [hereinafter IRM RULES OF PROCEDURE], available at <http://www.ebrd.com/about/policies/irm/procedur.pdf> (last visited June 16, 2004).

177. See *id.*

### *INDEPENDENT INSPECTION MECHANISMS*

Bank-financed project or the agent for such individuals can file a complaint with the IRM.<sup>178</sup> The complainants can request that their identity be kept confidential, but the IRM will not accept anonymous complaints.<sup>179</sup>

There is no special form that the complaint must follow other than it must be in writing.<sup>180</sup> The complaint can be in any language. However, the complaint must identify the project and the harm that it is causing or is expected to cause. In addition, the complaint must indicate the actions that the complainant has taken to resolve the matter with the EBRD and what actions the complainant would like the Bank to take. The complaint should be sent to the CCO.<sup>181</sup>

The CCO must determine whether or not the complaint is “manifestly ineligible” within five business days of the receipt.<sup>182</sup> If the CCO finds the complaint to be “manifestly ineligible,” he/she shall send the complainant a written response within those same five days.

If the complaint is not “manifestly ineligible,” the CCO will register and acknowledge the complaint. Upon registration, the CCO will appoint an independent expert from the Roster, the Eligibility Assessment Expert, to assist in assessing its eligibility.<sup>183</sup> The Eligibility Assessors, comprised of the CCO and the Eligibility Assessment Expert, must make an Eligibility Assessment of the registered complaint within thirty business days of the receipt of the complaint. If the Eligibility Assessors recommend that the complaint is ineligible, notice shall be given within fifteen business days of the receipt of the complaint.<sup>184</sup> If the complaint is found ineligible, the Assessors must make a reasoned recommendation to dismiss the complaint. This recommendation will be sent to the complainant, the project sponsor and the relevant Bank department. The complainant will be entitled to comment on this recommendation.<sup>185</sup>

A complaint is eligible if, *inter alia*:<sup>186</sup>

- The complainant is from a group of two or more individuals with “a common interest;”

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178. *Id.* Annex 1 ¶ 7.

179. *Id.*

180. *Id.* Annex 1 ¶ 8.

181. *Id.* Annex 1 ¶ 9.

182. *Id.* at 8.

183. *Id.* Annex 1 ¶ 11.

184. *Id.* Annex 1 ¶ 12.

185. *Id.* Annex 1 ¶ 14.

186. *Id.* Annex 1 ¶ 12.

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- The complainant is, or is likely to be, directly and adversely affected by a Bank-financed project and there is “prima facie evidence of such direct and adverse effects;”
- The complainant has made a good faith effort to resolve the issue with the Bank staff;
- The complaint relates to the design, assessment or implementation of the project or to a project where the EBRD maintains a financial interest, which means that the complaint was filed within twelve months of physical completion of the project or, where this is not applicable, within twelve months of the final disbursement;
- The complaint, inter alia, is not frivolous or malicious; does not involve matters of procurement, fraud or corruption; does not relate to the adequacy or suitability of EBRD policies;<sup>187</sup> or does not relate to the responsibilities of other parties besides the EBRD or to the laws, policies and regulations of the borrowing country;<sup>188</sup> and
- The CCO and the expert decide there is a possibility that the EBRD has acted “contrary to, or failed to act when required in accordance with, the mandatory provisions of an EBRD policy which is within the purview of the compliance review function of the IRM.”<sup>189</sup> As was discussed above, the policies that currently fall within the purview of the IRM’s compliance review function are the Environment Policy and the project-specific provisions of the Public Information Policy.<sup>190</sup>

When the CCO and the expert are making the eligibility and compliance review assessment of the complaint, the CCO should also consider, as part of a separate process, whether there is any potential for utilizing problem-solving techniques (fact-finding, mediation, conciliation, dialogue facilitation, investigation and reporting) to deal with the issues raised in the complaint.<sup>191</sup> The CCO, whose decision should be based on stipulated criteria,<sup>192</sup> can recommend the use of these techniques regardless of the recommendation regarding eligibility and compliance review. The CCO’s recommendation on problem-solving is made to the President in a separate report, which should also identify a

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187. *Id.* Annex I ¶ 13.

188. *Id.* Annex I ¶ 18.

189. *Id.* Annex I ¶ 16.

190. *Id.* Annex I ¶ 17.

191. *Id.* Annex I ¶ 27.

192. *Id.* Annex I ¶ 28. The stipulated criteria relate to the likelihood of the problem-solving efforts achieving a positive outcome.

### INDEPENDENT INSPECTION MECHANISMS

problem-solver and the terms of reference for this expert. The President decides whether or not to undertake a problem-solving activity.<sup>193</sup> The actual problem-solving efforts will then be undertaken by an expert selected by the President.

After they complete their review, the CCO and the independent expert submit a report and recommendation to either end the complaint process or to conduct a compliance review. The report is submitted either to the President (in the case of projects that have not yet received Board approval) or to the Board of Directors (if the project has received Board approval).<sup>194</sup> If the appropriate decision-maker is the President, the report will also be transmitted to the Board for informational purposes.<sup>195</sup>

The appropriate decision-maker (i.e., the Board or the President) then decides whether or not to accept the recommendation. If the recommendation is to dismiss the complaint, the appropriate decision-maker may accept the recommendation or may remit it back to the CCO for further investigation or for reconsideration by a new expert.<sup>196</sup> If the recommendation is to conduct a compliance review, an expert will be appointed as soon as the appropriate decision-maker approves the recommendation.<sup>197</sup> It should be noted that if the CCO or the expert is of the opinion that “serious, irreparable harm” will be caused by the continued processing or implementation of the project, they can recommend that the President suspend work on the project or disbursement of the loan.<sup>198</sup>

Once the expert has completed his/her investigation, he/she submits a report with his/her findings and recommendations to the President, who, if not the appropriate decision-maker, transmits the report to the Board.<sup>199</sup> The findings of the expert must be limited to determining whether or not there has been a material policy violation.<sup>200</sup> The expert, however, may recommend systematic internal changes within the EBRD to ensure future compliance with EBRD’s policies as well as changes in the scope or implementation of the

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193. *Id.* Annex 1 ¶ 27.

194. *Id.* Annex 1 ¶ 19.

195. *Id.*

196. *Id.* Annex 1 ¶ 20.

197. *Id.* Annex 1 ¶ 21.

198. *Id.* Annex 1 ¶ 22.

199. *Id.* Annex 1 ¶ 24.

200. *Id.*

project.<sup>201</sup>

The appropriate decision-maker can decide whether or not to accept the recommendations and findings of the expert.<sup>202</sup> Once the appropriate decision-maker has considered the report, the complainant and other involved parties will be made aware of the report and any resulting decisions, and the report will be made public, subject to “maintaining confidentiality of any commercially sensitive information.”<sup>203</sup> The CCO, unless the appropriate decision-maker decides that the expert should do so, is authorized to monitor the implementation of the decision of the President or Board.<sup>204</sup>

The CCO will submit an annual report to the President and Executive Committee for transmission to the Board of Directors.<sup>205</sup> The report will also be published on the EBRD website.

#### 6. African Development Bank’s Independent Review Mechanism<sup>206</sup>

In late June 2004, the Boards of Directors of the African Development Bank Group (AFDB)<sup>207</sup> voted to establish an Independent Review Mechanism (the Mechanism) for the AFDB. This Mechanism consists of a Compliance Review and Mediation Unit (CRMU) and a Roster of Experts. The CRMU is the organizational unit that supports the Mechanism and is headed by a Director who will be appointed by the President of the Bank in consultation with the Boards of Directors of the AFDB. The Director of the CRMU (the Director) will work full-time for the AFDB and report administratively directly to the President of the Bank, but functionally will report to both the President and the Boards of Directors of the AFDB.

The Roster of Experts will consist of three individuals who are each appointed for one non-renewable five-year term by the Boards of Directors on the recommendations of the President of the Bank. The Chairperson of the Roster of Experts will be appointed by the Boards

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201. *Id.*

202. *Id.* Annex 1 ¶ 25.

203. *Id.*

204. *Id.* Annex 1 ¶ 26.

205. *Id.* Annex 1 ¶ 39.

206. The author worked as a consultant to the African Development Bank on inspection functions, and the information in this Section is based on his communications with the relevant staff at the Bank and the formal resolutions establishing the Bank’s Independent Review Mechanism.

207. The African Development Bank Group consists of the African Development Bank, the African Development Fund and the Nigerian Trust Fund.

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from among the three members of the Roster. The members of the Roster of Experts are expected to be independent of the Bank management. Thus, they cannot have worked in any capacity for the Bank for at least two years prior to their appointment to the Roster and cannot work for the Bank for two years after the completion of their term as an expert. The members of the Roster of Experts will be paid a retainer by the Bank and shall only be expected to work full-time for the Bank when they are appointed to serve on a compliance review Panel. Finally, the experts can only be dismissed from their position by the Boards of the Bank for cause.

The Mechanism is empowered to receive requests for action from any two or more persons or their representatives. The requesters must allege that they have been adversely affected by a project financed by the AFDB in which the Bank failed to comply with its operational policies and procedures. For public sector projects, the allegations can relate to any of the Bank's operational policies and procedures. However, in the case of private sector projects, the allegations must relate to the Bank's environmental and social safeguard policies, which include its policies dealing with agriculture, education, health, gender, good governance and environment.

In order for requests, which must be in writing, to be eligible for treatment by the Mechanism, the management of the Bank must have had an opportunity to deal with the matter. In addition, the requests must fall within the scope of the Mechanism's mandate. This means, inter alia, that the request cannot involve matters that are the responsibility of parties other than the AFDB, is not a complaint against procurement decisions, is not a complaint dealing with fraud and corruption or with matters before other tribunals or review bodies and is not frivolous or malicious.

Once the Director receives the request he/she conducts a preliminary review of the request to determine its eligibility. At the conclusion of this review, the Director informs the Board of the Bank and the President if the request is eligible for either a compliance review or a problem-solving exercise. The management of the Bank is given an opportunity to respond to the request before the matter proceeds to either a problem-solving exercise or a compliance review.

If the Director decides that the request should be handled through a problem-solving exercise, he/she takes responsibility for organizing the exercise and invites all relevant parties to participate. The Director can use whatever problem-solving techniques he/she deems most appropriate in the exercise. At the end of the problem-solving exercise, the Director will make a report on the exercise. This report is submit-



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ted to the Boards of the AFDB, to the President and to the participants in the problem-solving exercise. If the exercise results in a positive outcome, the Director may help monitor the implementation of the agreed resolution of the problem-solving exercise. If the exercise does not result in an outcome that is satisfactory to all relevant parties within a reasonable period of time, the Director can make his/her own recommendations for remedial action to the Boards of the AFDB or to the President, if the project has not yet been approved by the Board. The Director's recommendations can include undertaking a compliance review. Such a recommendation is likely in any case in which the Director concludes that there is prima facie evidence that the affected parties have been harmed or threatened with harm as a result of the Bank's failure to follow the relevant AFDB policies and procedures.

If the requester has asked for a compliance review and the Director has not undertaken a problem-solving exercise, the Director will determine if the request is eligible for a compliance review. If the Director determines the request is eligible for a compliance review, the Director shall make a recommendation to the Boards of Directors or to the President, in the case of projects that have not yet been approved by the Boards. If the Director recommends in favor of conducting a compliance review, the recommendation shall include draft terms of reference for the compliance review and shall identify two experts, from the Roster of Experts, to work with the Director on the compliance review. Thus, the Compliance Review Panel (Panel) will consist of the two experts plus the Director. The Boards of Directors or the President may approve the recommendation on a "non-objection" basis or remit the request to the Director or to one of the members of the Roster of Experts to reassess the recommendation regarding the composition of the Panel or the terms of reference of the compliance review.

Once the recommendation in favor of the compliance review is approved and the Panel appointed, the Panel will conduct the compliance review consistently with the terms of reference. At the end of the review, the Panel will prepare a report containing its findings and recommendations to the Boards or the President, if the project has not yet been approved by the Boards. The Boards or the President, as the case may be, shall decide whether or not to accept the findings and recommendations of the Panel.

If the Director, after reviewing the request for a compliance review, determines that it is not eligible for such review, he/she shall refer the request to the Chairperson of the Roster of Experts. The Chairperson shall then make a determination of the eligibility of the request and so inform the Boards of Directors. If the Chairperson decides that the

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request is not eligible, he/she shall inform the Boards, or in the case of projects that have not been approved by the Boards, the President, of the ineligibility. If the Chairperson finds the request to be eligible, he/she shall recommend that the Boards or the President, as the case may be, authorize a compliance review and submit, together with the recommendation, draft terms of reference for the review and a recommendation on which two experts from the Roster of Experts to appoint to the Panel.

All the reports of the Director arising from problem-solving exercises or from requests for compliance review, the reports of the Panel arising from compliance reviews and the decisions of the Boards and President shall be made publicly available subject to the provisions of the Bank's information disclosure policy.

The Director, in consultation with the members of the Roster of Experts, is required to prepare an annual report for the Boards of the AFDB and its Board of Governors. This report, which will be published by the Bank, will contain information on the activities of the CRMU during the preceding year, including discussion of any identifiable trends that may have emerged from the mechanism's problem-solving and compliance review activities and the lessons that the CRMU has learned about the impacts and challenges of implementing the AFDB's operating policies and procedures.

The Mechanism will become operational once the Director of the CRMU is appointed and takes up the position; this is expected to be before December 31, 2005.

### B. *The Situation in Other International Organizations*

#### 1. International Monetary Fund

The International Monetary Fund (IMF) does not have an inspection mechanism. However, it recently created an Independent Evaluation Office that conducts selective evaluations of the IMF's operations. The mechanism, which is closer to an operations evaluation mechanism than an inspection mechanism, does offer outside parties some scope for submitting suggestions for evaluations to the Office. Over time, it is conceivable that this could develop into a vehicle for submitting complaints about IMF operations.<sup>208</sup>

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208. For more information, see INTERNATIONAL MONETARY FUND, INDEPENDENT EVALUATION OFFICE (IEO) OF IMF, available at <http://www.imf.org/external/np/ieo/index.htm> (last visited June 16, 2004).

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2. United Nations

The United Nations has two mechanisms which play a role in inspection and compliance matters.

a. *Joint Inspection Unit*

The Joint Inspection Unit (JIU) was established by the United Nations General Assembly in 1966.<sup>209</sup> The JIU has broad powers of investigation in relation to the specialized agencies and other international organizations within the United Nations system that have accepted its statute. The JIU consists of eleven Inspectors appointed by the General Assembly on the basis of their special experience in national or international administrative and financial matters, including management questions. Inspectors serve five-year terms that are renewable once.<sup>210</sup>

The JIU has the mandate to investigate all matters “having a bearing on the efficiency of the services and the proper use of funds”<sup>211</sup> in the organizations subject to the JIU’s jurisdiction. In exercising these powers, the JIU can make on the spot investigations and inquiries. It must satisfy itself that the activities undertaken by the organizations under its jurisdiction are carried out in the “most economical manner and that the optimum use is made of resources available for carrying out these activities.”<sup>212</sup> The JIU’s investigations tend to cover both financial matters and general management and programmatic issues. The JIU reports on its investigations to the executive heads of the relevant institutions. It also provides an annual report to the General Assembly and the appropriate legislative bodies of the other organizations subject to its review. It has the authority to monitor the implementation of its recommendations.

It is important to note that the JIU does not deal with complaints or undertake investigations on request from non-state actors who allege that they have been harmed or are threatened with harm from the actions or decisions of the specialized agencies and other international organizations within the United Nations system over which it has jurisdiction.

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209. See U.N. GAOR, 21st Sess., U.N. Doc. A/2150 (1966).

210. See U.N. GAOR, 56th Sess., Supp. No. 34, at 1, U.N. Doc. A/56/34 (2001).

211. U.N. JOINT INSPECTION UNIT, ABOUT JIU: JOINT INSPECTION UNIT OF THE UNITED NATIONS SYSTEM, available at <http://www.unsystem.org/jiu/new/about.htm> (last visited June 16, 2004).

212. *Id.*

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### b. *Office of Internal Oversight Services*

The Office of Internal Oversight Services was established in 1994. It is headed by an Under-Secretary-General, who is appointed by the Secretary-General with the approval of the General Assembly for a fixed non-renewable term of five years. The Office has operational independence and submits reports on its activities and an annual report to the Secretary-General for submission to the General Assembly.<sup>213</sup> The Office can conduct audits, program evaluations and program inspections and investigations.<sup>214</sup> It is supposed to act as an “agent for change”<sup>215</sup> within the United Nations system, to promote accountability for the stewardship of resources, efficiency and productivity, cost effective controls to ensure compliance with authority, minimization of waste and deterrence of fraud and dishonesty.<sup>216</sup>

It is important to note this office does not deal with complaints, conduct audits or undertake investigations on request from non-state actors.

### C. *Other Models of Inspection Mechanisms*

#### 1. European Ombudsman

The European Ombudsman has been included in this Section even though it differs from the other inspection mechanisms discussed in this Paper in that it does not operate in the context of a development institution. There are two reasons for including it in this Paper. First, it is a mechanism in a supra-national organization that is designed to address complaints from affected non-state actors who feel that they have been harmed or threatened with harm by the operations of the supra-national organization. Second, the Ombudsman offers an example of a model that combines problem-solving with some compliance review in a manner that is relatively flexible and informal. Consequently, it is a potential model for an inspection function in an international organization. In this regard it should be noted that many states have established ombudsmen and are more familiar with this mechanism than with the other inspection mechanisms discussed in

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213. See U.N. OFFICE OF INTERNAL OVERSIGHT SERVICES, OFFICE OF INTERNAL OVERSIGHT SERVICES: GENESIS, MISSION, METHODS, IMPACT 3 (2000), available at [http://www.un.org/Depts/oios/oios\\_03.pdf](http://www.un.org/Depts/oios/oios_03.pdf) (last visited June 16, 2004).

214. See *id.* at 4.

215. *Id.* at 1.

216. See *id.* at 5.

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this Paper.

The European Parliament established the European Ombudsman (the Ombudsman) in 1994.<sup>217</sup> The mandate of the Ombudsman is to deal with complaints from citizens of the European Union or any natural or legal person residing in the Union alleging “maladministration in the activities of Community institutions or bodies.”<sup>218</sup> According to the European Ombudsman website, “maladministration” means “poor or failed administration” and occurs when the institution fails to do something that it should have done, does something that it should not have done or does something in a wrong way.<sup>219</sup> The website cites “administrative irregularities, unfairness, . . . abuse of power, [and] refusal of information” as examples of maladministration.<sup>220</sup>

The procedures established for the European Ombudsman are relatively simple.<sup>221</sup> The complainant writes to the Ombudsman within two years of learning of the facts on which the complaint is based. The complainant need not be individually affected by the maladministration. However, the complainant must have contacted the institution or body concerned before it contacts the Ombudsman.<sup>222</sup> The Ombudsman registers the complaint and sends the complainant an acknowledgment of receipt of the complaint.<sup>223</sup> The receipt also contains the registration number for the complaint and the name of the officer who is dealing with the case.<sup>224</sup> The Ombudsman then reviews the complaint to determine if it falls within the Ombudsman’s mandate and is admissible.<sup>225</sup> In addition, the Ombudsman decides if there are sufficient grounds to justify making an inquiry into an admissible com-

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217. Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman’s Duties, 1994 O.J. (L113) 15 [hereinafter European Ombudsman Statute], available at <http://www.euro-ombudsman.eu.int/lbasis/en/statute.htm> (last visited Apr. 28, 2005); Decision of the European Ombudsman Adopting Implementing Provisions [hereinafter European Provisions], available at <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm> (last visited Apr. 28, 2005).

218. European Ombudsman Statute, *supra* note 217, art. 2.2.

219. EUROPEAN OMBUDSMAN, EUROPEAN OMBUDSMAN: HOW TO COMPLAIN, available at <http://www.euro-ombudsman.eu.int/media/en/default.htm> (last visited Apr. 28, 2005).

220. *Id.*

221. For a detailed description of the procedures, see European Provisions, *supra* note 217. The European Ombudsman recently released a leaflet for citizens titled “At a Glance” which briefly describes the Ombudsman’s role and gives answers to frequently asked questions, available at <http://www.euro-ombudsman.eu.int/glance/en/default.htm> (last visited June 16, 2004).

222. See EUROPEAN OMBUDSMAN, *supra* note 219.

223. See European Provisions, *supra* note 217, art. 2.1.

224. See *id.* art. 2.2.

225. See *id.* art. 3.1

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plaint.<sup>226</sup>

If an inquiry is warranted, the Ombudsman informs the complainant and the institution involved and invites the institution to submit an opinion within a stipulated period of time, which normally will not exceed three months.<sup>227</sup> The Ombudsman normally sends this opinion to the complainant and invites the complainant to send observations on the institution's opinion.<sup>228</sup>

After reviewing both the institution's opinion and the complainant's observations, the Ombudsman may decide to either close the case or continue the inquiry. This decision is conveyed to the two parties.<sup>229</sup>

The Ombudsman can request the relevant European institutions and the member states to provide it with information and documents for the purpose of its inquiries.<sup>230</sup> In addition, the Ombudsman can request European institutions to make arrangements for it to conduct on the spot investigations.<sup>231</sup> In addition to powers of investigation, the Ombudsman has the authority to explore friendly solutions with the complainant and the relevant European institutions.<sup>232</sup>

The Ombudsman's investigations and/or efforts at a friendly-solution result in a report which, if the Ombudsman thinks it appropriate, can include draft recommendations.<sup>233</sup> This report is submitted to the complainant and the institution.<sup>234</sup> The institution is required to respond to the report within three months of receiving it. The response may be to accept the Ombudsman's decision and it may contain a description of the measures the institution has taken to implement the recommendations.<sup>235</sup> If the Ombudsman does not consider the institution's report to be satisfactory, it issues another report addressing the issues of maladministration and includes recommendations.<sup>236</sup> This second report takes the form of a special report to the European Parliament. Copies of the report are also sent to the complainant and the relevant European institution.<sup>237</sup> The second report, therefore,

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226. *See id.* art. 4.1.

227. *See id.* art. 4.3.

228. *See id.* art. 4.4.

229. *See id.* art. 4.5.

230. *See id.* art. 5.1.

231. *See id.* art. 5.3.

232. *See id.* art. 6.

233. *See id.* art. 8.1.

234. *See id.* art. 8.2.

235. *See id.* art. 8.3.

236. *See id.* art. 8.4.

237. *See id.* art. 8.5.

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allows the Ombudsman to engage in some monitoring of the implementation of the conclusions of its investigations or friendly solution.

If the Ombudsman decides that it is no longer possible for the European institution to eliminate the case of maladministration and that the instance of maladministration has no general implications, it closes the case with a “critical remark” rather than a report.<sup>238</sup> The complainant and the institution are informed of this decision.<sup>239</sup>

It should be noted that the Ombudsman has the power to undertake inquiries on its own initiative.<sup>240</sup>

The Ombudsman is required to submit an annual report to the European Parliament in addition to the special reports referred to above.<sup>241</sup> The annual report may “contain such recommendations as [the Ombudsman] thinks appropriate to fulfill his responsibilities under the Treaties and the Statute.”<sup>242</sup> This report, therefore, offers the Ombudsman an opportunity to make some comments on how effectively its recommendations and the conclusions of the investigations are being implemented by the relevant institution.

In general, the documents of the Ombudsman are available to the public. There are, however, occasions where the law or a decision of the Ombudsman may result in a document being kept confidential.<sup>243</sup>

*Experience*

In 2003, the Ombudsman received 2,436 complaints.<sup>244</sup> This was a 10% increase over the previous year, due in part to a concerted effort to inform citizens of their rights.<sup>245</sup> A total of 253 inquiries were opened and 180 cases were closed following inquiries.

## 2. Export Development Canada

In 2002, Export Development Canada (EDC), the Canadian export

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238. *Id.* art. 7.1.

239. *See id.* art. 7.2.

240. *See id.* art. 9.

241. *See id.* arts. 11.1-11.2.

242. *Id.* art. 11.3.

243. *See id.* art. 13.

244. THE EUROPEAN OMBUDSMAN EXECUTIVE SUMMARY AND STATISTICS FROM THE ANNUAL REPORT 2003, available at [http://www.euro-ombudsman.eu.int/report03/pdf/en/short03\\_en.pdf](http://www.euro-ombudsman.eu.int/report03/pdf/en/short03_en.pdf).

245. *Id.*

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credit agency, appointed a Compliance Officer.<sup>246</sup> This official's mandate is to "enhance existing transparency and accountability practices in areas such as public disclosure of information, environmental reviews, human rights and business ethics."<sup>247</sup> The Compliance Officer is authorized to encourage dialogue between EDC and the complainant so as to try and resolve disputes; to provide EDC with advice on ethical business practices; and to oversee and monitor compliance audits that are conducted by internal or external professionals but that are triggered by complaints filed with the Compliance Officer.<sup>248</sup> Thus, this official performs a function similar to that performed by the CAO in IFC and MIGA.<sup>249</sup>

The first Compliance Officer was appointed in January 2002.<sup>250</sup> In 2003, the Compliance Officer received five complaints/allegations of non-compliance.<sup>251</sup> Of the five received, one fell within the Program's mandate and was reviewed following the Program's procedural guidelines.<sup>252</sup>

### III. COMPARATIVE ANALYSIS OF INSPECTION MECHANISMS AND GENERAL PRINCIPLES THAT SHOULD GUIDE INSPECTION MECHANISMS

#### A. Comparative Analysis

The purpose of this comparative analysis is to see what lessons can be learned about the structuring of inspection mechanisms in international organizations. Eight of the twelve mechanisms described above are designed to receive complaints from affected parties.<sup>253</sup> They are: the World Bank's Inspection Panel (IP); IFC/MIGA's Compliance

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246. See EXPORT DEVELOPMENT CANADA (EDC), THE COMPLIANCE OFFICER: LISTENING STAKEHOLDERS, available at [http://www.edc.ca/corpinfo/csr/compliance\\_officer/index\\_e.htm](http://www.edc.ca/corpinfo/csr/compliance_officer/index_e.htm) (last visited Apr. 28, 2005).

247. *Id.*

248. See EDC, THE COMPLIANCE OFFICER'S ROLE, available at [http://www.edc.ca/corpinfo/csr/compliance\\_officer/role\\_e.htm](http://www.edc.ca/corpinfo/csr/compliance_officer/role_e.htm) (last visited Apr. 28, 2005).

249. See EDC, *supra* note 246.

250. See EDC, WHO IS THE COMPLIANCE OFFICER, available at [http://www.edc.ca/corpinfo/csr/compliance\\_officer/who\\_e.htm](http://www.edc.ca/corpinfo/csr/compliance_officer/who_e.htm) (last visited May 23, 2002).

251. EDC, ANNUAL COMPLIANCE PROGRAM REPORT 2003, available at [http://www.edc.ca/corpinfo/csr/compliance\\_officer/2003\\_actreport\\_e.pdf](http://www.edc.ca/corpinfo/csr/compliance_officer/2003_actreport_e.pdf).

252. *Id.*

253. In addition to these eight mechanisms, the IMF's Independent Evaluation Office also creates a possibility for outsiders to propose studies to the office and to comment on the terms of reference of these studies. However, since the primary focus of this office is on post hoc evaluations and not complaints by third parties, it has been excluded from this comparative analysis.



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Advisor Ombudsman (CAO); the Inter-American Development Bank's Independent Inspection Mechanism (IIM); the Asian Development Bank's Accountability Mechanism (AM); the African Development Bank's Compliance Review and Mediation Unit (CRMU); Export Development Canada's Compliance Officer (EDC); the European Bank for Reconstruction and Development's Independent Recourse Mechanism (IRM); and the European Ombudsman (EO). The following comparative analysis focuses on these eight mechanisms. A table comparing all the mechanisms discussed in Section II is attached as an Appendix to this Paper.

1. The Composition of the Mechanisms

The IP, CAO, AM and CRMU all have at least some of the persons who will actually do the problem-solving or compliance review activities of the mechanism working full-time for the institution. In the case of the IP, only the chair of the Panel works full-time for the Panel. In addition, the Panel has a staff of full-time professionals and a support staff. The remaining two members of the IP only work on an "as needed" basis. In the case of the CAO, the CAO and the specialist advisors all work full-time. The CAO also has a support staff. The AM's Special Project Facilitator and the chair of its Compliance Review Panel work full-time. The remaining two members of the Compliance Review Panel only work when needed. In addition, the AM, like the IP, has a full-time professional and support staff.

The Director of the CRMU at the AFDB is a full-time employee of the Bank. This person is responsible for undertaking the problem-solving activities of the mechanism and for making recommendations to the Boards of the AFDB and to its President regarding compliance reviews. The Director will also serve as a member of the Compliance Review Panel, together with two others who are selected from the three-member Roster of Experts. The members of this Roster are paid a retainer in order to ensure their availability to undertake compliance reviews. They are, however, free to pursue other activities, but they cannot work in any capacity for the AFDB for the duration of their term on the Roster.

The IIM and IRM have "virtual" Panels in the sense that there are no full-time Panelists. The IIM has a Roster of ten to fifteen potential Panelists from which a Panel can be constituted on an "as needed" basis, and the IRM has a Roster of three to ten independent experts. The members of these Rosters are free to pursue other activities but they cannot work in any capacity for the institution to whose Roster they have been appointed for the duration of their term on the Roster.

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However, the IRM's Roster of Experts will be paid a retainer to try and ensure their availability. In return for the retainer they will be required to spend five days a year at the EBRD learning about the Bank and its operational policies and procedures. The IIM's Roster is serviced by a secretariat that consists of one professional staff member and support staff. This secretariat will receive all complaints and steer them to the appropriate entity responsible for advising the Board on whether or not to authorize an investigation. In the case of the IRM, the EBRD's Chief Compliance Officer provides secretariat support to the Roster of Experts.

In the cases of the IP, IIM, AM, IRM and CRMU the Board of the institution appoints the members of the Panel or the Roster from nominations or recommendations from the Bank President. The appointments to the IP and the Rosters of Experts of the IIM, AM and CRMU are for a fixed term and are non-renewable. The members of the Panel or Roster are expected to be independent of Bank management. Thus, they report to the Board and cannot be removed except by the Board and for cause. In addition, they cannot have worked in any capacity for the institution for a specific period of time—usually two years—before their appointment and for a stipulated period after the expiration of their appointment.

In the case of the CAO, the appointment is made by the President of the World Bank Group, who is not the chief executive officer of IFC or MIGA. The CAO reports directly to the President and not to the CEOs of these institutions.

### 2. The Scope of the Mechanisms' "Jurisdiction"

The IP, IIM, AM and CRMU can accept and investigate complaints relating to any ongoing Bank operation. This means that they can accept complaints relating to operations that are in the design, appraisal or implementation phase of their life-cycle. These mechanisms each have a means for determining when the mechanism's "jurisdiction" ends. In some cases, this is when the loan is at least ninety-five percent disbursed, while in others it is twelve months after physical completion of the project or the date of the last disbursement. In addition, these mechanisms are precluded from dealing with any cases relating to procurement matters or with fraud and corruption cases. Finally, the mechanisms cannot accept any case which has already been the subject of an inspection unless there is new evidence or circumstances which were not known at the time of the original investigation.

The CAO is limited to cases involving the social and environmental impact of IFC and MIGA operations. This means that it can only deal

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with matters relating to the institutions' safeguard policies. EDC deals with any case involving issues of transparency or accountability relating to environmental reviews, human rights, business ethics and information disclosure. Finally, the EO can accept any case relating to "maladministration" in any institution of the European Union.

The IRM is limited to cases involving specified policies of the EBRD relating to environment and public disclosure of information. The IRM cannot accept cases involving procurement or fraud and corruption. The IRM can also not accept any complaint that is currently before another judicial or review body where the results of the review could have a bearing on any actions or decisions that the IRM may take.

The CRMU can accept cases involving both public and private sector projects. In the case of public sector projects, the scope of its jurisdiction extends to cases pertaining to any of the AFDB's operating policies and procedures. However, in private sector projects, the mechanism is limited to the Bank's policies dealing with agriculture, education, health, gender, good governance and environment.

The types of cases that the mechanisms receive are influenced by the nature of their institutions' work. For example, the IP's, IIM's and the AM's predecessor's experience is primarily with public sector projects. On the other hand, the CAO only deals with private sector projects. It should be noted that, because of the nature of the work of the AFDB, ADB and EBRD, the AM, CRMU and IRM can accept complaints dealing with both public and private sector projects.

### 3. Eligibility to File Complaint

In five of the seven mechanisms (IP, IIM, AM, IRM, CRMU), the complaint must be filed by groups that consist of at least two affected people who have a common interest in the substance of the complaint. All these mechanisms allow any affected person to qualify as one of the members of the complaining group. Thus, in principle, it is possible for both natural and legal persons to qualify as an affected person for this purpose.<sup>254</sup> All five mechanisms also allow a representative of the affected people to file a complaint on their behalf, but this does not alter the requirement that the complaint involve at least two affected people.

The first mechanism with this requirement was the IP. The other

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254. The IP has received complaints from legal persons. *See, e.g.*, Bangladesh Jute Sector Adjustment Credit (Cr. 2567-DB), Tanzania: Power VI Project (Cr. 2489-TA) and Papua New Guinea Governance Promotion Adjustment Loan Project (Cr. 7021-PNG).

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mechanisms followed the IP's example. The rationale for restricting eligibility to groups of two or more people appears to have been a sense of caution. When the IP was established, it was an unprecedented experiment and the World Bank had no idea how many affected people would actually file complaints with the IP. Given the large number of people affected by World Bank projects, there was a concern that the mechanism would be overwhelmed with complaints. In particular, some thought that if individuals were allowed to file complaints, the inspection mechanisms would be flooded with complaints that were trivial, frivolous or in some way unrepresentative of the group of people affected by a particular Bank-funded operation. In fact, the numbers of complaints filed with each of these mechanisms has been relatively small—thirty since 1994 in the case of the IP, four since 1994 in the case of the IIM, one complaint to the AM since it began operations and seven complaints to its predecessor.

It is important to note that the one exception to the IP rule prohibiting individuals from filing complaints is that individual Executive Directors can request the IP to undertake investigations.

In the remaining three mechanisms (CAO, EDC, EO), individuals are allowed to file complaints. This may result in a greater number of cases than in the three mechanisms discussed above. For example, the CAO in its first three years of operation received thirteen complaints. However, it has a greater capacity to handle a larger number of complaints than the IP or IIM because of the relative informality of its Ombudsman procedures.

The CAO and EO both allow representatives to file complaints on behalf of the affected people.

All eight mechanisms allow the complainants to request that their identities be kept confidential. This requirement is necessary to protect the complainants from any potential threats to their safety. Experience indicates that these threats to their safety can emanate from both governmental and non-governmental opponents of the complainants. For example, in one of the IP's cases the complainants requested anonymity because they feared reprisals from other NGOs who supported the project and opposed their complaint.<sup>255</sup>

#### 4. Requirement of a Pre-Complaint Approach to Management

The IP, IIM, AM, IRM, CRMU and EO, with varying degrees of formality, all require that the complainant raise the matter with the

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255. This information was provided in an interview with a member of the IP.

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institution's management before it files its complaint. The logic of this requirement appears to be that management should have an opportunity to explain its apparent non-compliance or to correct the alleged non-compliance before the inspection function is invoked.

The CAO and EDC do not formally require a pre-complaint approach to management. However, one of the first steps in their investigation of a complaint is likely to be an effort to find out if management has had an opportunity to deal with the complaint and, if so, how they handled the complaint.

### 5. Formal Requirements for an Acceptable Complaint

The IP, IIM, IRM, CRMU and the compliance review function of the AM all require that the complaint must specifically allege that the complainants have been harmed or threatened with harm as a result of the failure of the institution to comply with its operational rules and procedures in the design, appraisal and/or implementation of a Bank-financed operation. This requirement is consistent with the compliance focus of the mechanisms.

It should be noted that this requirement implies that successful complainants need to be reasonably knowledgeable about the institution and its operational rules and procedures. This increases the chances that complaints will be brought by, or at least supported by, relatively sophisticated groups or organizations.

The CAO, EDC, the problem-solving functions of the AM and IRM, and the EO do not impose many formal requirements on the complaints that they accept. All that is required is an allegation that the complainant has been harmed by an operation of the institution. These mechanisms place the burden for determining the complaint's suitability for investigation or resolution on the inspection mechanism itself. This appears to reduce the need for the complainants to have the support of sophisticated organizations and to increase the ability of affected people to utilize the mechanism. It is also consistent with the problem-solving focus of these mechanisms. The experience of the CAO suggests that a lack of formal requirements does not result in a significant number of trivial complaints being submitted to the inspection mechanism.

### 6. The Existence of Formal Procedures for Deciding to Conduct an Investigation and for the Conduct of the Investigation

The IP, IIM and the compliance review functions of the AM, IRM and CRMU all have relatively formal procedures for their operations.

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The relative formality of these procedures is a consequence of the mechanisms' focus on issues of non-compliance. Because mechanisms may make a finding that management's failure to comply with the applicable policies and procedures caused harm, management is concerned that unless they are given certain procedural protections, they could be found "at fault" without some form of due process. It is partly in response to these concerns that the procedures tend to spell out clearly that management has a right to respond to the complaint and to the report on the investigation.<sup>256</sup>

These five mechanisms all have procedures that govern the making of the decision to authorize an investigation. These procedures require management to provide a formal response to the complainant within a specified period of time. In addition, they require that an identified entity make a recommendation to the institution's Board of Directors on whether or not to authorize an investigation. In three cases, the final decision to authorize an inspection is made by the Board of Directors. In the cases of the IRM and CRMU, the decision will be made either by the Boards of Directors or the President of the institution, depending on whether or not the project at issue has previously been approved by the Board.

These mechanisms all have relatively flexible rules governing the actual conduct of an investigation. They all grant the panel conducting the investigation full access to the staff and records of the institution. In addition, the mechanisms all provide that the panel can design its own procedures for conducting the investigation and can use whatever methods of investigation it deems appropriate, including a visit to the site of the operation from which the complaint arises. In all cases, the member state in which the operation is located must consent to the visit.

In three of these cases, the procedures provide that the Board of Directors makes the final decision on how to respond to the report on the investigation. In the cases of the IRM and CRMU, the decision is made by either the Boards of Directors or the President of the applicable banks, depending on whether or not the Board has previously approved the project.

The remaining mechanisms—CAO, EO, the problem-solving functions of the AM and IRM and the EDC—have very simple procedures that, in fact, amount to a description of how they will handle the complaint. This simplicity is a direct consequence of the fact that they

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<sup>256</sup>. Practical considerations are also a factor in this regard.

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all have a relatively strong focus on problem-solving, which requires a relatively flexible and informal approach. The CRMU has a somewhat more formal problem-solving procedure because it is more closely tied into the compliance review functions of the mechanism.

### 7. Decision to Authorize an Inspection

The IP, IIM, IRM, CRMU and AM all leave the final decision as to whether to authorize an investigation up to the Board of Directors. The only partial exceptions to this are the IRM and CRMU, which give the President of the Bank decision-making authority only in the case of projects that have not yet been approved by the Board. The panel or the experts who conduct the preliminary phase of the investigation are limited to making a recommendation on whether or not the Board should authorize an investigation.<sup>257</sup> In the case of the CAO, EDC and EO, the mechanism itself makes the decision on how to proceed.

The IP and the AM's predecessor have not had a happy experience with giving the Board full discretion in regard to authorizing an inspection. In the first few years of the IP, there was intense conflict on the Board surrounding each decision related to authorizing an inspection. Since the Board's discretion at this stage was reduced by the second review of the Resolution, the process seems to be working more smoothly. In all post-second review cases, the World Bank Board has adopted the recommendation of the IP without acrimonious debate. The ADB has also experienced difficult Board discussions relating to the decision on authorizing an inspection. In fact, the difficulty of these discussions was a contributing factor in deciding to initiate the extensive review that resulted in the decision to establish the AM. As a result of these experiences, the current trend is for the mechanism to limit the discretion of the Board in making its decision. In fact, the Board usually decides on a "non-objection" basis.

### 8. Outcomes of Inspections

The IP and IIM can only include findings of fact in their reports on their investigations. The responsibility to develop solutions to any problems that the investigation may have uncovered lies with management, who will need to describe their proposed solution in their response to the report. The AM, IRM and CRMU do allow the inspec-

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<sup>257</sup>. In the case of the Asian Development Bank, the Board's inspection sub-committee makes the recommendation to the full Board, which makes the final decision.

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tors to make recommendations.

The CAO in the reports of its Ombudsman cases may make both findings of fact and recommendations. The report is likely to include a solution to the problem presented by the complaint when the parties have agreed on a solution. If the Ombudsman fails to resolve a case, its reports may include observations on why a resolution was not possible. The CAO can also state in this report that a compliance review is warranted. Similarly, the EO can make recommendations in its reports to the relevant European institution. It is not clear if the EDC can make recommendations, but it is likely that its reports can include both findings of fact and recommendations.

### 9. Follow-Up to the Report

Only four of the inspection mechanisms have the authority to monitor the implementation of any remedial actions that grow out of their investigations. They are the AM, IRM, CRMU and the CAO, which in its capacity as Ombudsman can build a monitoring role for itself into the solution to the problem that it helps the parties fashion and adopt. In addition, the EO and EDC have some capacity to play a monitoring role. The absence of such authority in other mechanisms is problematic because it means that the Board has no easy way of knowing if the management and staff are actually implementing the remedial action that management proposed and the Board authorized.

### 10. Publication of the Report

Seven of the eight mechanisms—IP, IIM, AM, IRM, CAO, CRMU and EO—provide for publication of the full reports of the mechanisms. The EDC only requires publication of a summary of the report.

In the case of the IP, IIM, IRM, AM and CRMU, publication usually takes place after each Board decision. At that time, or more accurately, within a specified period of time thereafter, all the relevant documents (the complaint, the mechanism's report, the Board decision and the response of the management) will be made public. In the case of the CAO, the reports will be publicly released when the matter is deemed closed.

There are two exceptions to this effort to publish all information in the cases handled by the inspection mechanisms. First, on request, the identity of the complainants will be kept confidential. In fact, this information, after it has been verified by the mechanism, will also not be divulged to the Board or management. Second, where applicable, commercially sensitive information will be kept confidential.



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11. Lessons Learned

The IP and IIM are not authorized to make substantial contributions to the learning process in their respective institutions. Consequently, neither in the reports on their investigations nor in their annual reports to the Board are they expected to discuss the lessons they learned about the institutions' operations from their work. This means that the institutions are currently being deprived of their inspection mechanism's unique knowledge about the impact of their operations on affected communities and about the implementation of their operational policies and procedures. The AM and IRM are authorized to include "lessons learned" in their reports but are not required to include this information in their annual reports. The CAO has more opportunity to capture and convey some of this information in the recommendations it makes in its case reports and in its annual reports. The EO can also include information on the lessons that it has learned in its case reports and in its annual report.

The CRMU has the most extensive lessons learned requirements. It is required to include information both on the trends relating to the activities of the AFDB that emerge from its problem-solving exercises and compliance reviews and on the lessons that it has learned about the impacts of and the challenges arising from the implementation of the Bank's operating policies and procedures.

IV. THE NEED FOR AN INSPECTION FUNCTION AND OPTIONS FOR ANY  
INTERNATIONAL ORGANIZATION

A. *The Need for an Inspection Function*

The need for an inspection mechanism for international organizations that engage in operations in their member countries that can adversely affect non-state actors is based, in the first instance, on the general principle that those who exercise power should be accountable to those who are affected by their use of their power. In addition, as a practical matter, international organizations need inspection mechanisms as part of their drive for good governance for themselves and their member states. Without such mechanisms, the institutions may be allowing the flawed aspect of operations and actions to continue unchanged or may be failing to correct certain unplanned negative consequences of their operations.

Some organizations may seek to refute the practical argument for an inspection Panel by arguing that the fact that they do not receive many

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complaints from non-state actors indicates that they have little need for an inspection function. However, the number of complaints actually received by an organization is a misleading indicator of the need for an inspection function. There are two reasons for this.

First, the absence of an inspection mechanism means that affected people who would like to complain to the organization cannot do so. Thus, the small number of complaints may be more a reflection of lack of opportunity than of the fact that affected people do not have complaints about operations of the particular organization.

Second, the number of cases received by an inspection function is not necessarily an accurate reflection of the benefits it offers an institution. The existence of the inspection function creates an incentive for staff and management to pay closer attention to the international organization's policies and procedures and to ensure that their activities are in compliance with these policies and procedures. This has led to the phenomenon of "Panel proofing" projects in the World Bank. "Panel proofing" refers to enhanced efforts by Bank staff to ensure that their activities are in compliance with the World Bank's operational policies and procedures. The value of this preventive function to the work of a development bank is hard to measure but is not inconsiderable.

### *B. General Principles*

Based on the above description and analysis of existing inspection mechanisms, it is possible to identify a number of principles that should be observed in designing an inspection mechanism for an international organization. Any mechanism that fails to incorporate these principles is likely to be viewed as deficient by at least one of the stakeholders in the mechanism. These stakeholders include affected people, members of the organization's governing bodies, management and staff, non-state actors (both legal and natural persons) and member states.

In order to ensure that all these stakeholders have confidence in the inspection mechanism and view its establishment as a positive development for the international organization, it is advisable for the organization to offer all these stakeholders an opportunity to comment on the inspection mechanism that it eventually proposes to adopt before it actually takes the formal decision to establish the mechanism. Such a step is also consistent with the evolving practice in the international financial institutions of allowing for a notice and comment period

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before adopting significant policies or procedures.<sup>258</sup>

The principles that should guide the design of an international organization's inspection mechanism are:

1. Clarity of Purpose

Inspection mechanisms in international organizations can be designed to serve one or more of three different functions. These functions are compliance review, problem-solving and lessons learned. Compliance review refers to investigations that are designed to determine if the bank's staff and management met the requirements of all the applicable operating rules and procedures in the particular operation that is the subject of the review. Thus, in performing a compliance review, an inspection mechanism's primary focus is on the acts and omissions of the bank's staff and management as opposed to the harm suffered by the affected people. The IP is a good example of an inspection mechanism whose primary focus is compliance review.

The problem-solving function deals with troubling issues that have arisen in the course of an operation of the institution and that have been identified by affected people as causing or threatening them with harm. In performing the problem-solving function, the inspection mechanism's primary concern is the harm suffered by the affected people, as opposed to the acts and omissions of the bank's staff and management. Its objective is to identify ways to correct the problems identified in the complaint. The Ombudsman function of the CAO is a good example of a problem-solving mechanism.

The lessons learned function refers to the ability of the inspection function to contribute to the lessons that the institution learns about the design and implementation of its operations. The inspection function, because its operations are triggered by the complaints of affected persons rather than by the staff or management of the institution, has a unique perspective on the organization's operations. It is in a position to identify trends within the implementation of the institution's policies and procedures that are unlikely to be obvious to other actors in the organization. An inspection mechanism that is concerned with lessons learned will seek to convey the information that it gathers in a manner and form that can be used by the institution to improve its future operations.

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258. For example, this practice has been used by the MDBs in establishing their inspection mechanisms and by the World Bank and the International Monetary Fund in developing some of their more controversial operational policies.

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These three purposes are not mutually exclusive, and it is possible for one inspection mechanism to perform more than one of these functions. Thus, for example, while the IP is primarily a compliance mechanism it does perform some problem-solving activities. This follows from the fact that its mandate is not only to investigate World Bank compliance with its operating policies and procedures but also the harm caused to the requesters to the IP. Similarly, when the CAO is engaged in problem-solving it may identify issues that are suitable for compliance reviews.

The AM and IRM both perform both problem-solving and compliance review functions. They may also play a lessons learned role. The newly created CRMU at the African Development Bank has the potential to play the most active lessons learned function. It is the only mechanism that is explicitly required to include information on both the trends relating to the activities of the AFDB that it identifies in its problem-solving and compliance review exercises and the lessons it learns about the impacts of and the challenges arising from the implementation of the Bank's policies and procedures in its annual report.

### 2. User Friendliness

All inspection functions at development banks are intended as mechanisms through which affected people can complain about the effects of bank-funded operations. This suggests that the procedures that the inspection mechanism adopts for receiving and handling these complaints should be as easy as possible for the affected people to understand and utilize. This is particularly important given that many of the affected people are unlikely to have either the knowledge about the organization or the resources needed to access a complex mechanism.

A user-friendly mechanism is one that has simple and flexible procedures and limits the number of requirements that a complainant must satisfy before the mechanism begins to address the substance of the matters raised in the complaint. The Ombudsman part of the CAO is a good example of a user-friendly mechanism. It merely requires the complainant to identify the project that is the source of its complaint and to explain the problems that it is facing. The CAO will then conduct its own investigations to determine if further action is warranted.

An example of a mechanism that is not particularly user-friendly is the World Bank Inspection Panel. The management of the World Bank has been able to use the Panel procedures to challenge the eligibility of

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complainants and the suitability of complaints for investigation. The result has been to force affected people to rely on relatively sophisticated advisors in preparing their complaints. In addition, at least prior to the second review of the Resolution establishing the Panel, management was able to utilize weaknesses in the procedures to complicate the deliberations of the Board on the Inspection Panel's recommendations of whether or not to authorize an investigation.

### 3. Independence

The mechanism should be independent from the management of the organization and should report directly to its Board of Directors. In addition, the terms and conditions of employment of the Panel members should be designed to promote and protect their independence. There are a number of measures that should be adopted to achieve this outcome. First, the members should not have worked for the institution in any capacity for a stipulated period before their appointment. Second, they should be appointed for one non-renewable term of office. Third, the Board of Directors should only be able to terminate their appointment for cause. Fourth, the budget of the mechanism should be designed to promote its independence. Fifth, the members should be ineligible for any bank employment for a stipulated period after the termination of their appointment. Some of the mechanisms studied bar the Panel members from ever again working for the organization after their term of office ends. This seems to be excessive. The term of the prohibition against employment by the institution need only be long enough to avoid creating an incentive for the individuals to favor the organization while working for the inspection mechanism.

### 4. Powers of Investigation

The mechanism must have access to all the persons, documents, records and locations that it deems necessary to conduct a complete investigation. The mechanism must also have the authority to make both findings and recommendations in its report at the end of the investigation.

### 5. Impartiality, Competence and Fairness

The investigating mechanism must be, and must be seen to be, impartial, fair and technically competent. This means that its recommendations, findings and conclusions must be supported by facts and well-

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reasoned arguments and must be consistent with prior decisions and actions of the investigating mechanism. In addition, the mechanism's investigations should be sufficiently comprehensive to demonstrate that it has gathered all the relevant information and has used this information in its reports.

### 6. Efficiency and Cost Effectiveness

The inspection mechanism must operate efficiently and must be cost effective. This means it should be able to deal with complaints relatively quickly and at a cost that does not impose an undue burden on the organization.

### 7. Effective Management of Issues Presented

The inspection mechanism should deal and be seen to deal effectively with the issues that fall within its mandate. One important consequence of this principle is that the inspection mechanism should be given the power to monitor the implementation of the results of an inspection process. The AM, IRM, CRMU and CAO have this power, while the lack of this monitoring power is generally recognized to be the greatest weakness in the IP.<sup>259</sup>

Another aspect of the efficacy of the mechanism is the staff and management's level of knowledge about and understanding of the mechanism. The reason is that if the staff view the mechanism in a negative light, they may work to undermine it. On the other hand, if the staff see the mechanism as a useful means for solving problems in the institution's operations, they are more likely to support the mechanism and thereby enhance its effectiveness. In addition, educating staff about the mechanism may encourage them to take actions which prevent their projects becoming the subject of complaints to the mechanism. This, in itself, may have a beneficial effect on the quality of the organization's operations.

#### *C. Options for an Inspection Function at Any International Organization*

Based on the general principles discussed above, it is feasible to identify a number of possible structures for an inspection mechanism

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259. This conclusion is based on discussions with members of the World Bank Inspection Panel, its staff and experts who either have been participants in cases before the Inspection Panel or are keen observers of the Inspection Panel. *See DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL* (D. Clark, J. Fox & K. Treakle eds., 2003).

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in an international organization. These possible structures, all of which conform to the general principles discussed above, are described in this section.

Before discussing these options, however, it is necessary to briefly discuss two issues that any organization must consider in deciding which of the possible structures to adopt. The first issue is the weight the organization wants to give to compliance review in its inspection mechanism. This issue is important because if the organization plans to give primary importance to compliance it will need procedures that are relatively more formal so that the various stakeholders—complainants, staff and management, member states, etc.—know their rights and responsibilities in the process and how they will be affected by the findings and recommendations of the mechanism. If the most significant objective is problem-solving, then the mechanism can have relatively more flexible and informal procedures because each stakeholder in the problem-solving process will be able to determine for itself how to deal with any findings or recommendations of the inspection mechanism.

The second issue arises in those cases where the organization is contemplating giving its inspection mechanism some compliance review responsibilities. In these cases, the organization needs to determine if its operational policies and procedures are sufficiently well developed that they can meaningfully serve as the basis for compliance reviews. If the operational policies and procedures are not sufficiently detailed and do not clearly establish the obligations for the organization's staff and management or the standards with which they must comply, it is very difficult for the inspection mechanism to conduct a credible compliance review. In this sense, the establishment of inspection mechanisms can have a salutary effect on the development of operational policies and procedures at the organization, thereby helping to promote a more effective rule-based culture in what are ultimately organizations designed to serve the public interest.

1. Option 1: An Inspection Mechanism

In this option, the organization would establish an independent mechanism with the mandate to investigate complaints from affected persons who allege that they have been harmed or threatened with harm caused by the failure of the organization's staff to comply with all its operational policies and procedures in the relevant operation. The focus of this mechanism would be on compliance review. However, it is possible to incorporate into the mechanism both an ability to engage in some problem-solving activities and the responsibility to provide some

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lessons learned in its reports and publications.

There are three different versions of an inspection mechanism that an international organization could adopt. The advantages and disadvantages of each of these versions are discussed below.

### a. *Version 1: Inspection Committee, Inspection Unit and Roster of Experts*

This version is similar to the inspection mechanisms previously used by the Asian and the Inter-American Development Banks. It envisages an inspection function that consists of an Inspection Committee that is a sub-committee of the Board of Directors, an Inspection Unit and a Roster of Experts. The Inspection Committee will make recommendations to the Board on whether or not to authorize an investigation and on how to respond to the findings of the investigating Panel and the management response thereto.

The Roster of Experts will consist of ten to fifteen members and will assist the Inspection Committee. The Board of Directors will appoint the members of this Roster to one non-renewable fixed term on the Roster. In order to be eligible for appointment to the Roster, a person may not have worked for the organization for a stipulated period prior to his/her appointment. In addition, the expert may not work for the organization in any other capacity during the time of his/her appointment and for a set period after the term of his/her appointment ends. Given the size of the Roster and the requirement that no member be selected to work on a case in his/her own country, no member of the Roster can be assured that he/she will be appointed to a Panel during the time of his/her appointment.

In this version, the Inspection Committee, upon receipt of a complaint, would appoint an expert from the Roster of Experts to conduct a preliminary review and make a recommendation on whether an inspection is warranted. Based on this report, the Inspection Committee will decide whether or not to recommend to the full Board of Directors to adopt, reject or modify the recommendation of the expert. If the Board of Directors, following the Committee's recommendation, decides to authorize an investigation, the Inspection Committee will appoint an inspection Panel to conduct the investigation. This Panel will consist of three experts selected from the Roster. This Panel will present its report, which may include both findings of fact and recommendations for corrective action, to the Inspection Committee. After the Inspection Committee reviews this report and the management response thereto, it will present this information and its own recommendations for corrective action to the Board of Directors. The Board will make the final decision on how to deal with the issues raised in the



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investigation. The Inspection Committee will be responsible for monitoring implementation of the Board's final decision.

An Inspection Unit, whose staff will be drawn from the staff of the organization, will support the Inspection Committee. This Unit, which may only consist of one professional and support staff, will act as the secretariat for the Committee. The Unit will be the "address" to which affected people will send their complaints, and it will determine if they meet the basic requirements for eligibility before submitting the complaint to the Inspection Committee. In addition, the Unit will act as the secretariat for the three-member Panel that will conduct the investigation.

*Advantages and Disadvantages of Version 1*

This version has two advantages. First it is relatively cheap. The cost of the staff for the Inspection Unit is the only fixed cost in this version. All other costs will be variable costs that depend directly on the number of complaints the inspection function receives and the number of investigations the Board chooses to authorize. One indication of how much the fixed costs of this option would be is that the 2001 operating budget for the IADB Mechanism, whose Inspection Unit has a staff of one professional and support staff, was \$236,500.

Second, the mechanism is clearly independent of the organization's management. The Board of Directors or its Inspection Committee makes all decisions and all appointments related to a particular investigation. In addition, the staff of the Inspection Unit is directly accountable to the Inspection Committee.

In considering the disadvantages of this version, it is useful to note that the Asian Development Bank and the Inter-American Development Bank have both experienced difficulties with their inspection mechanisms. The Asian Development Bank experienced so many problems with its inspection mechanism that it undertook an extensive and expensive review of its mechanism.<sup>260</sup> This review, which included consultations with interested parties in ten different cities around the world, was a consequence of the political and public relations problems that it experienced in the Samut Prakarn case. In this case, the Asian Development Bank was forced to deal with an investigation that was blocked by a non-cooperating borrower government and the political tensions that this caused in the Bank Inspection Committee, its equiva-

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260. See discussion of Asian Development Bank's inspection function *infra* Section II.A.3.

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lent of the Inspection Committee.

The Inter-American Development Bank model has also faced difficulties.<sup>261</sup> Potential users found its initial structure to be very user-unfriendly because the complaints had to be sent to the Office of the President. Despite changes that have corrected this problem, there is still substantial doubt about the independence and efficacy of the mechanism. This is based partly on the fact that the final report in the mechanism's first case was not publicly released and the outcome of the investigation was not clear. In addition, a second case has moved more slowly than the procedures would lead one to expect. The small number of cases received by the IADB inspection mechanism is at least in part attributable to this lack of public confidence in the mechanism.

The first problem with this version is that the key decision about whether to authorize an inspection is made by a Board committee and then ratified by the full Board while the factual record in the case is undeveloped. This means that the Board is making its decision based on the relatively unsubstantiated allegations in the complaint and the response of management, who have extensive knowledge of the project or operation and who, in all likelihood, are challenging the complainant's allegations. The result is that the Board is being asked to authorize an investigation when the information available to it indicates that a project or operation funded by the organization has caused harm and the organization's management denies that the harm was caused by their failure to comply with Bank operating policies or procedures. This creates the implication that the harm was caused by some other participant in the operation, such as the member state. Experience at both the World Bank and the Asian Development Bank suggests that Board decisions on inspection matters when the Board has such limited information become very contentious and politicized.

It was the bitterness caused by these debates that caused the World Bank Board of Directors to authorize the second review of the World Bank's Inspection Panel. These bitter disputes have been avoided following the second review and the resulting decision to strictly limit the Board's discretion in accepting or rejecting the Panel's recommendation on whether or not to authorize an investigation. The experience of the Asian Development Bank suggests that the problem is unlikely to be solved by delegating the decision to a Board sub-committee.

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261. See discussion of Inter-American Development Bank inspection function *infra* Section II.A.2.

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The second potential problem with this model is that the organization is likely to experience difficulty in finding qualified people to serve on the Roster of Experts. The reason is that the experts who know the organization well may be reluctant to serve on the Panel when they realize that it will preclude them from working in any other capacity for the organization during their term of service on the Roster, without any compensating assurance of work as an expert for the inspection function.

A third problem arises from the fact that the members of the Panel of Experts do not necessarily know each other and do not necessarily know the inspection function very well. This means that each time a Panel is appointed for a specific case, the Panel will need to get to know each other and learn to function effectively as a group and will have to learn about the inspection mechanism's procedures for conducting investigations. The Panel's steep learning curve will need to be repeated in each case, which will slow down the process and increase the costs of an investigation if the Panel is expected to do highly professional work.

Fourth, there is likely to be some concern about the independence of the Inspection Unit. Since the personnel of this Unit will be drawn from the international organization's staff, they will not appear to outsiders to be truly independent unless they are precluded from returning to employment with the organization after working for the Inspection Unit. However, the possibility that the number of cases received by the organization's inspection function may be small (based on the experience of the IADB it could be about one to two cases per year) and the limited role that the Unit will play in the inspection function suggest that this position will not necessarily be an attractive one. The absence of a relatively senior person in this position may undermine public confidence in the inspection mechanism and faith in the organization's commitment to having an effective inspection function.

Fifth, this version cannot easily be adapted to incorporate greater problem-solving responsibilities. The Executive Directors on the Inspection Committee cannot be expected to engage in problem-solving, and it is unlikely that the affected people would be willing to accept the staff of the Inspection Unit as problem-solvers, if the staff is not seen as having sufficient stature in the Bank. To overcome this difficulty, the Inspection Committee would have to appoint an expert from the Roster of Experts for this purpose. Such ad hoc appointments, particularly if made without sufficient consultation with the affected persons

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and other interested parties, have a higher risk of failure than would be the case if the identity of the problem-solver were known to all interested parties before the complaint was filed.

The mechanism can also not easily be adapted to playing a greater lessons learned function. Neither the members of the Inspection Committee nor the staff of the Inspection Unit are in a position to perform this task without questions being raised about their suitability for the task. It is also unlikely that an expert would be able to effectively perform this function if he/she has not been involved in all the cases received by the mechanism. The nature of a roster system makes it unlikely that there would be one expert with such extensive involvement in the work of the mechanism.

### *b. Version 2: Full-Time Inspection Panel*

This version is modeled on the World Bank's Inspection Panel. In this version, the organization Board of Directors would appoint a three-member Panel, each of whom would serve a fixed non-renewable term in office. Only the chair of the Panel, who would be appointed to a one-year term by the members of the Panel, would work full-time for the inspection function. The other two Panel members would commit to be available to work on the Panel as and when needed. The Panel would be supported by a small permanent staff that would be drawn from the staff of the organization.

The scope of jurisdiction and the operating procedures of this version would be similar to those of the World Bank's Inspection Panel. The one difference would be that the Panel would have the authority to decide for itself whether or not to conduct an investigation. The Board would retain the power to make the final decision on how to respond to the Panel's findings from its investigation and the management response thereto.

This change in the procedures from the World Bank Panel procedures should streamline the process without adversely affecting any party's position in the process. The Board would still retain the power to make the most important decision in the process and to hold the Panel accountable for its actions. Management would still be able to raise its concerns about the eligibility of the complainants and the suitability of the complaint for investigation. The only difference is that management would now do this informally to the Panel during the investigation or formally to the Board in their response to the Panel report. Finally, the simpler procedures would work to the benefit of potential complainants.

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*Advantages and Disadvantages of Version 2*

The primary advantage of this version is that there is a permanent Panel that operates and is seen to operate in all respects independent of management. It is very effective in promoting confidence in the independence of the inspection function.

A second advantage is the fact that the chair of the Panel works full-time at the organization. This creates the possibility that, at least in principle, he/she gets to know the organization and its staff and management. This should help the Panel to overcome the initial suspicion that an inspection function at the organization will face.

Third, the fact that the three Panelists know that they will be working together on all Panel-related matters should increase their incentive to develop their knowledge about the procedures and practices of the inspection mechanism. This should positively affect the efficiency and efficacy of the Panel and its investigations.

Finally, the benefit of having a full-time Panel member is that this person can handle all complaints and all requests for information that the Panel receives. This creates a buffer between the international institution and the inspection function that enhances outsider confidence in the inspection function and helps depoliticize the treatment of complaints in the institution.

The primary disadvantage of version 2 is that it is very expensive. Its direct costs are a full-time secretariat and a full-time Panel chair that is paid at a senior executive's level. One indication of the cost of this mechanism is that the annual budget of the World Bank Inspection Panel is now about \$2 million.<sup>262</sup> In fact, it is most likely that the cost of this mechanism makes this option unsuitable for most organizations.

Another disadvantage is that the mechanism, because of its focus on compliance review, tends to have formal procedures that are not particularly user-friendly. This has two adverse effects. First, the fact that the procedures are not user-friendly effectively limits access to the Panel to those groups who have sophisticated knowledge of the Bank and its operating policies and procedures or who are able to retain the services of people or organizations that have such knowledge. Second, the formal procedures tend to encourage both the complainant and the institution's staff and management to view the proceedings as roughly analogous to litigation, which tends to foster an adversarial relationship between the complainant and the organization's staff and

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<sup>262</sup>. See discussion of World Bank Inspection Panel *infra* Section II.A.1.

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management. An adversarial relationship, in turn, may increase the total costs of the investigation.

#### *c. Version 3: The “Virtual” Inspection Panel*

This version is a mix of versions 1 and 2. It seeks to overcome the problems of the roster system associated with version 1 and the high costs associated with version 2.

In this version, instead of a Panel that consists of a full-time chair and two part-time Panelists, this version would have a “virtual” Panel of three members who would only be convoked when a complaint is submitted. The three members of this Panel, who would only work on an as needed basis, would be paid a small retainer to assure their availability when cases arise. In addition to the retainer, the Panelists would also be paid for participating in each particular Panel investigation. One of these Panelists would be appointed as chair of the Panel. This person would agree to be available to conduct preliminary reviews of any complaints received by the Panel. The Panel would be supported by a small secretariat that consists of possibly one professional and one support staff.

It should be noted that the EBRD and the AFDB have adopted a version of this “virtual” Panel. Their mechanisms have a Roster of Experts, who are or will be paid a small retainer. In return for this retainer, EBRD’s experts are required to spend five days a year at the EBRD learning about the Bank and its operating policies and procedures. This will have the salutary effect of enhancing the efficacy of the experts in the event they are actually required to conduct an investigation. To date, it is unclear exactly what responsibilities the AFDB’s experts will have.

The Panel would be assisted by a small secretariat, whose function would merely be to provide administrative support to the Panel. This secretariat may need to be expanded to provide adequate support when the Panel is involved in an investigation.

The scope of jurisdiction and the operating procedures of this model could be identical to those of the World Bank Inspection Panel or they could be designed to be more flexible to allow for the Panel to undertake problem-solving activities. In the latter case, the chair of the Panel could be authorized, when a complaint is received, to engage in some preliminary problem-solving. This could involve the chair engaging in discussions with all interested parties and seeing if it is possible to fashion a solution that satisfies all interested parties. If this in fact did happen, then the chair would recommend against an investigation to the Board and in the report to the Board would explain the solution

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that was reached. If it is not possible to solve the problem, then the chair would consult with the other Panel members and they would decide whether or not to recommend an investigation. The Panel would base its decision on the same criteria that would have been applicable if the chair had not engaged in problem-solving activities.

This model could also be given a lessons learned responsibility. The virtual Panel could present an annual report to the Board, management and Board of Governors of the Bank that includes a section on the lessons it has learned from its activities. This report, if applicable, could include recommendations on what steps the Bank can take to enhance compliance with its operating policies and procedures and to improve these policies and procedures.

In this version of the option, the Panel would be given the authority to monitor the implementation of the decisions reached by the Board at the end of the investigation.

*Advantages and Disadvantages of Version 3*

This version has one advantage over each of the other versions of Option 1. First, unlike in version 1, the identity of the Panelists in any particular case will be known in advance. This should enhance confidence in the mechanism. It also creates incentives for Panel members to develop their expertise in inspection matters. This should reduce their learning curve in any particular case, thereby improving the efficiency and efficacy of the mechanism. It should also make it easier than is the case in version 1 for the virtual Panel to play both a problem-solving and lessons learned role, in addition to its primary compliance review function.

Second, the costs of this mechanism would be lower than the costs of version 2. The reason is that none of the Panel members work full-time for the inspection mechanism, and the permanent staff of the mechanism is no bigger than the staff of the Inspection Unit in version 1. Moreover the fixed costs of this mechanism will only exceed the fixed costs of version 1 by the amount of the retainers paid to the three Panel members.

The primary disadvantage of this mechanism follows from its “virtual” nature. The lack of a full-time presence of a Panelist at the organization means that the Panel will have less opportunity to get to know its personnel. This could adversely affect the Panel’s standing within the organization thereby impairing the efficacy of the inspection mechanism.

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### 2. Option 2: The Ombudsman<sup>263</sup>

In this option, the organization would appoint an Ombudsman. This office would consist of one full-time or part-time professional, who would be a highly respected expert recruited from outside the organization, and a support staff.

The Ombudsman differs from the previous option in that its primary focus is on problem-solving. Thus the Ombudsman would establish much less stringent requirements for accepting complaints and much less formal operating procedures than those utilized in the first option. In fact, the Ombudsman would accept any complaint that appeared to identify a bona fide problem arising from an operation of the organization that has caused or threatened to cause harm to affected people. It would be incumbent on the Ombudsman to investigate the complaint to see if it is suitable for problem-solving activities. If this is not the case, the Ombudsman would so inform the complainant and explain why the Ombudsman was unable to help the complainant. In all other cases, the Ombudsman would attempt to solve the problems raised in the complaint. In the event that it was successful in solving the problem, the Ombudsman would prepare a report to the Board, the complainant and to the organization's management describing the solution and the history of the complaint. If the Ombudsman is not successful, he/she would prepare a report explaining the history of the complaint, the efforts undertaken to resolve the problem and, if appropriate, observations on the cause of the problem and the steps that the organization could take to avoid such problems in the future. The Ombudsman would therefore play a potentially useful and creative lessons learned role in the organization. This role could be enhanced by having the Ombudsman discuss some of the lessons he/she has learned from the complaints he/she has received in his/her annual report to the Board.

The Ombudsman would also be responsible for monitoring the implementation of the solutions that he/she helps devise for the

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263. Prior to the establishment of the World Bank Inspection Panel, the author had proposed that the World Bank establish an ombudsman to receive complaints from non-state actors. See Daniel D. Bradlow, *Why the World Bank Needs an Ombudsman*, FIN. TIMES, July 14, 1993, at 13; see also Daniel D. Bradlow, *Opening Statement to the Sub-Committee on International Financial Institutions of the Standing Committee on Finance*, House of Commons, Canada (Feb. 18, 1993). The author had the opportunity to discuss his proposal both at an informal seminar for the Bank's Board of Directors and with the Bank's General Counsel. The proposal was influential in the design of the Inspection Panel. See I.F.I. Shihata, *THE WORLD BANK INSPECTION PANEL IN PRACTICE* 18-19 (2d ed. 2000).



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problems raised in the complaints he/she receives.

The Ombudsman can only perform limited compliance review functions because if he/she is to be a credible problem-solver, all parties must have confidence in his/her impartiality. If the Ombudsman is responsible for compliance review as well as problem-solving, it will adversely affect the willingness of the organization's management and staff to engage in problem-solving with the Ombudsman. The reason is that they will be concerned that the Ombudsman may use the information he/she learns in the course of problem-solving in compliance reviews and that his/her findings in regard to compliance matters may influence his/her problem-solving efforts and vice versa. Consequently, the Ombudsman's contribution to compliance review should be limited to comments on compliance issues in the case and in the annual reports of the Ombudsman to the Board.

*Advantages and Disadvantages of Option 2*

The first advantage of this mechanism is that it has the potential to solve the problems faced by affected persons.

The second advantage is that it is user-friendly, having operating procedures that are informal and flexible. This means that the mechanism should be relatively easy for affected people to access without too much outside assistance. It should also be possible for the Ombudsman to be creative in designing solutions to the problems with which he/she is presented.

Third, the mechanism functions with great independence. In fact, it is not necessary for the Board of Directors to be involved in the Ombudsman's handling of any particular case. However, the Ombudsman is accountable to the Board. Consequently, he/she will report to the Board on his/her handling of the cases that he/she receives and on the overall conduct of his/her operations. If the Board would like to play a more active role in the process, it could limit the Ombudsman to making his/her reports in the form of recommendations, which do not become binding on the parties until adopted by the Board.

The major disadvantage of this mechanism is that it plays a minimal role in compliance. Its clear focus is on problem-solving and lessons learned. However, in assessing this cost, it is important to carefully evaluate whether the organization's operating policies and procedures have the detail and broad coverage that make them suitable for compliance reviews by an inspection mechanism. In order for compliance reviews to be meaningful for affected people, it is necessary that

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the organization have policies and procedures that establish clear standards and guidelines for its staff.

An important qualification on this mechanism is its novelty. The CAO, because its authority is limited to reviewing IFC and MIGA operations, only has experience with problem-solving with private sector operations. It is not clear that its success in this area can be easily transferred to operations that involve the public sector, particularly if the sovereign itself is a necessary party to the problem-solving process. It should be noted that the new mechanisms at the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development have clear problem-solving mandates involving both public and private sector projects. However, they are too new to be able to assess their efficacy and problem-solving success in public sector projects.

#### 3. Option 3: Combined Compliance Review and Problem-Solving Mechanism

This option, which combines a compliance function and a problem-solving function into one mechanism, consists of a Director of the Compliance Review and Problem-Solving Mechanism (the Director) and a Roster of Experts. The newly created Independent Review Mechanism at the African Development Bank is the closest in form and function to this option.

The organization would appoint the Director, who would have the status of a senior member of the organization's staff, to a fixed term that was non-renewable. The Director would work exclusively on compliance review and problem-solving matters. In order to protect the independence of the Director, this official could not have worked for the organization in any capacity for at least two years before his/her appointment as Director and could only be removed from his/her position for cause, and he/she would not be allowed to work for the organization for a stipulated period after his/her term of office ends.

The Roster of Experts would consist only of three members who would be appointed by the Board of the organization on the recommendation of the head of the organization. The members of the Roster would be appointed for a fixed non-renewable term. In order to protect the independence of the experts, they could not have worked for the organization in any capacity for at least two years before their appointment to the Roster, could only be removed from the Roster for cause and would not be allowed to work for the organization for a stipulated period after their term of office ends. During their term of office they would work for the institution on an "as needed" basis and

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would be ineligible to work for it in any capacity that is not connected to the Compliance Review and Problem-Solving Mechanism. The members of the Roster would be paid a small retainer to ensure their availability when needed. In return they would be expected to spend a stipulated number of days at the organization learning about the Bank and its operating policies and procedures.<sup>264</sup> They would also be compensated for the work that they actually do for the Compliance Review and Problem-Solving Mechanism.

If the organization does not want to pay the members of the Roster a retainer, it would need to appoint a larger Roster of Experts—probably ten experts—to ensure that at least some experts are available when the Mechanism needs them. To protect the independence of the experts, they would be precluded from performing any other functions for the organization during their service on the Roster but would only be paid for the services they perform for the compliance review mechanism. Based on the experience of the Inter-American and Asian Development Banks with this approach to a Roster, there are reasons for doubting that some organizations would be able to assemble a ten- to fifteen-member Roster of qualified people. The primary reason for this is that the experts are being asked to forego any possibility of working for the organization both during and for a stipulated period after their term on the Roster without being given any assurance that they will ever be used by the Compliance Review and Problem-Solving Mechanism. This is likely to decrease the attractiveness of the position for many qualified experts.

The Director would receive all complaints from affected people alleging that they have been harmed by an operation of the organization. Complainants could state whether they are seeking problem-solving or compliance review functions or both in regard to their complaint.

Upon receipt of the complaint, the Director would conduct a preliminary review to determine if the complaint contains a bona fide allegation of harm arising from a Bank-funded operation. Once this was established, the official would decide whether to accede to the request of the complainant or to make his/her own decision on whether the case was more appropriate for problem-solving efforts or a compliance review. The Director would inform the President, the Board and the complainant of his/her decision and the reasons for the decision.

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264. The EBRD requires the members of its Roster of Experts to spend five days per year at the Bank learning about the Bank and its operating policies and procedures.

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If the Director decides that the case is suitable for problem-solving, the Director will invite all relevant parties to participate in a problem-solving exercise that he/she would conduct. If the problem-solving exercise succeeds in resolving the issue, the Director will prepare a report describing the case and the solution. This report will be provided to all participants in the problem-solving exercise and to the Board and the President of the organization. One element of the solution should be that the Director will be involved in monitoring implementation of the solution. In the case of projects that have not yet been submitted for Board approval, the Director would submit a report to the Board on the implementation of the solution when the project was presented for Board approval.

If the problem-solving efforts are not successful, either within a stipulated period of time or by common consent of the parties, the Director could declare the problem-solving exercise a failure and submit a report discussing the efforts and the reasons for their failure and making recommendations of steps the organization could take to deal with the unresolved issue. This report should be submitted to the participants in the problem-solving exercise, the Board and the President. The President, in cases that have not yet been submitted to the Board, and the Board, in cases of projects that it has already approved, would then decide to accept or reject the expert's recommendations for remedial action. If the President or Board decides to reject the recommendation, he/she/it should inform all participants of his/her/its reasons for doing so.

The Director can include a recommendation that the project undergo a compliance review in his/her report. Such a recommendation would be appropriate if the Director determines that the complainant has been harmed or threatened with harm by the organization's operation and that the harm or threat was caused by the failure of its staff and management to comply with any of the organization's policies and procedures. The Director's recommendation would be submitted to the Board for ratification.

This means that compliance reviews can be initiated in one of three ways: by request of the complainant, on the recommendation of the Director either upon receipt of the complaint or after the problem-solving exercise. In all cases, the Board would decide whether or not to adopt the recommendation. It should be noted, however, that if the complainant requests both a problem-solving exercise and a compliance review, the request for compliance review will not be addressed until the Director rejects the request, the problem-solving exercise is successfully completed or the Director has declared the exercise a

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failure.

The compliance review would be conducted by a compliance review Panel that consists of two experts from the Roster of Experts and the Director. Consequently, the recommendation to have a compliance review should include advice on which two members of the Roster of Experts to appoint to the Panel that will conduct the compliance review. The Board will make the final decision regarding the appointment of the experts to the Panel and of the chair of the Panel.

The two experts, with one acting as chair of the Panel, would be responsible for conducting the compliance review. The Director would participate in the review and in the discussions on the report about the investigation but would only have a vote in the case of a deadlock on the Panel.

After completing its investigation, the Panel would present its findings of fact and recommendations for corrective action to the Board of Directors. The Board, based on this report and management's response thereto, would decide whether to accept, modify or reject the recommendations of the Panel.

The Director, working with the Roster of Experts, should be required to prepare an annual report on the activities of the Compliance Review and Problem-Solving Mechanism. The report, which would be submitted to the Board and should be made publicly available, should discuss, in addition to the year's activities, some of the trends that have emerged from the year's problem-solving exercises and compliance reviews and any lessons it has learned about the Bank's operating policies and procedures during the course of the year. Thus, the annual report of the Director would serve a lessons learned function.

This option is most similar to the AFDB's Compliance Review and Mediation Unit. It is also similar to the EBRD's Independent Recourse Mechanism. However, there are two important differences from the latter. The first is that, unlike the CCO at the EBRD, the proposed Director would only work on matters relating to the Compliance Review and Problem-Solving Mechanism. This is important for four reasons. First, it should ensure that the Mechanism is receiving all the attention it needs. Second, the fact that a senior official works exclusively on these issues should raise the credibility and prestige of the Mechanism. Third, it would avoid the risks of any conflicts between the different roles that the CCO plays. Fourth, the fact that the Director, unlike the CCO, is appointed to this post from outside the organization and for a non-renewable term should enhance stakeholder confidence in his/her independence.

The second important difference is that the mandate of the Mecha-

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nism will allow it to accept complaints arising from any of the organization's operational policies and procedures. In the case of the EBRD, currently only the Environmental Policy and Public Information Policy are subject to the Independent Recourse Mechanism. The broader scope of the proposed Mechanism should enable it to avoid unnecessary fights about whether certain complaints fall within the scope of its mandate. In addition, it will avoid the risk of future operational policies and procedures being politicized as the Board debates whether or not a particular new policy or procedure should be submitted to the inspection mechanism's "jurisdiction." It should also be noted that the inspection mechanisms at the World Bank and the Inter-American and Asian Development Banks allow claims involving all their operational policies and procedures to be investigated. It is only the EBRD, the CAO at the IFC and MIGA and complaints regarding private sector projects to the CRMU at the AFDB that are limited to dealing with environmental and social issues.

#### *Advantages and Disadvantages of Option 3*

The first advantage of this option is that it establishes a mechanism that has both compliance and problem-solving components. In this sense it combines the best of all the above options. In addition, the annual report, with its discussion of the trends that have emerged from the cases handled by the mechanism, lessons it has learned about the organization's operating policies and procedures and recommendations on how to resolve the issues it has identified in the report, should serve a useful lessons learned function for the organization.

The second advantage is cost. The direct cost of this mechanism need not be any higher than the cost of the cheapest of the other options. Like the Inspection Unit (see Version 1 of Option 1) and the Ombudsman, the fixed cost of this mechanism would only consist of the cost of the Director and a support staff. In addition, if the three-member Panel option is chosen, there will be the cost of the small retainer paid to the members of this Panel. All other costs will be directly related to the cases that it receives.

The primary disadvantage of this mechanism is that, by leaving open the possibility that a failed problem-solving effort could result in a compliance review, it may reduce the incentives for the parties to engage as actively as possible in problem-solving activities. However, this tendency would be reduced if experience indicates that the parties do not necessarily gain more from a compliance review than from a well-organized problem-solving exercise.

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V. CONCLUSION AND RECOMMENDATION

A. *Concluding Observations*

Based on the above analysis it is possible to draw a number of conclusions. First, over time there have been changes in the structure of the inspection mechanisms used by the MDBs. In fact, it is possible to identify three “generations” of inspection mechanisms. The first generation consists of the World Bank’s and the Inter-American Development Bank’s inspection mechanisms and the original mechanism created at the Asian Development Bank. The second generation is the Compliance Advisor Ombudsman at IFC and MIGA. The third generation is only now beginning to emerge and consists of the new mechanisms at the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development.

The first generation mechanisms were designed to be compliance review mechanisms. They were not given any problem-solving authority, although they found, in fact, that the requesters expected them to play a problem-solving role. The second generation was given both a problem-solving and compliance review function. Its structure sought to combine both the problem-solving and the compliance review in one office. The independence of this office was protected by taking the office outside of the normal lines of authority at IFC and MIGA and having the head of the office report to the President of the World Bank Group rather than to the executives in charge of daily operations at IFC and MIGA. In addition, its mandate, because of the nature of IFC and MIGA’s work, is limited to private sector projects. The third generation mechanisms tend to divide authority relating to the compliance review and the problem-solving functions so that they have a staff member who is responsible for problem-solving and an independent compliance review mechanism that reports to the Board of the Bank. In these mechanisms the staff member in charge of problem-solving reports through the normal lines of authority in the organization while the compliance review personnel report directly to the Board of the institution. The third generation mechanisms apply the problem-solving function to both public sector and private sector projects.

This “generational” progression in the functioning of the inspection mechanisms is not surprising. In reality, non-state actors are more interested in having the problems caused by the organization’s operations solved than they are in ensuring that the staff and management comply with the applicable operational policies and procedures, which may not be well known by them. On the other hand, the senior management of the organization does have a significant interest in

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compliance review. Consequently, the inspection mechanism cannot satisfy both groups of stakeholders if it does not perform both of these functions. In fact, the World Bank's Inspection Panel has sought to overcome this gap by informally playing a problem-solving role whenever it sees an opportunity to do so.

The second lesson is that, in order for inspection mechanisms to be effective compliance review mechanisms, international organizations need detailed operational policies and procedures. Without such detailed policies and procedures it is difficult for the staff and management of these international organizations to know the standards they are expected to uphold in their work. In addition, it is hard for non-state actors to know what to expect from the staff and management of the international organizations which directly affect their lives. In the absence of such clear policies and procedures, the creation of an inspection mechanism can merely result in a messy politicized process in which non-state actors are trying to impose responsibility on staff and organizations, and the staff and management are trying to avoid responsibility post hoc.

In this regard, in order for detailed policies and procedures to be viewed as legitimate, they need to be developed through a rule-making procedure that has the confidence of all relevant stakeholders. This means that the establishment of inspection mechanisms generates an impetus towards establishing more transparent and participatory rule-making procedures. This development can already be seen in the member organizations of the World Bank Group, where a number of important operational policies and procedures have only been adopted after a public notice and comment period.<sup>265</sup> In this sense, the creation of inspection mechanisms appears to be having a positive effect on the development of international administrative law.

The third lesson is that for an inspection mechanism to maximize its value to the organization it needs to have a clear lessons learned function. There are two reasons for this. First, the unique perspective of the inspection mechanism, based on the fact that all its activities are

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265. It should be noted, however, that the impact of the inspection mechanisms on the operational policies and procedures of the World Bank is more complicated than this positive development would suggest. The World Bank, for example, in recent years has been changing the format of its operational policies, seeking to split the details contained in its old operational policies into three documents, only two of which establish mandatory rules for Bank staff. The impact of this change on the Inspection Panel is not yet clear, although a number of observers are pessimistic about its likely impact. See Kay Treacle, Jonathan Fox & Dana Clark, *Lessons Learned, in DEMANDING ACCOUNTABILITY*, *supra* note 14, at 247-75. A full exploration of the implications of this shift for the evolution of administrative procedures in the Bank is beyond the scope of this Paper.



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initiated by non-state actors who have been directly and adversely affected by the international organization's operations, means that it is likely to have information on the actual impact of the organization's operations and its policies and procedures that are not available to any other part of the organization. Consequently, the mechanism has the potential to help the organization by informing it about the lessons it is learning from this information. Second, the lessons learned function helps the inspection mechanism build credibility with all stakeholders in the international organization. It is a way to demonstrate to the organization's staff and management and to its member states that the purpose of the mechanism is not "finger pointing" but improvement in the operations of the organization. The lessons learned function also demonstrates to non-state actors that the organization is interested in improving its operations and in avoiding the identified problems in the future. Based on these observations, it is clear that any international organization interested in creating an inspection mechanism or rethinking the structure of its current mechanism will need to create a mechanism that is capable of performing problem-solving, compliance review and lessons learned functions.

*B. Recommendation*

Of the various options identified above, the one best qualified to satisfy all the elements required for effective inspection mechanisms is the Compliance Review and Problem-Solving Mechanism described in the third option. While the mechanism has multiple functions, it is still consistent with the clarity of purpose requirement because the mechanism always makes explicit what function it is performing at any given time. The mechanism, because it has simple procedures for initiating problem-solving exercises and compliance reviews, offers potential complainants a user-friendly mechanism for having their concerns about the organization's operations addressed in a way that is efficient, effective and inexpensive. The structure of the mechanism ensures that all of its different actors are able to make independent decisions and are relatively independent of the organization's management. They also will have all the necessary investigatory powers.

*C. Possible Terms of Reference*

The following is a set of possible terms of reference for a Compliance Review and Problem-Solving Mechanism (CRPSM) that should be applicable to any international organization interested in creating an inspection mechanism:

## *INDEPENDENT INSPECTION MECHANISMS*

### *Structure of the CRPSM*

- 1) The CRPSM shall consist of a Director, who shall work full-time for the organization, and a three-member Roster of Experts, who shall work only when needed by the organization.
- 2) The Director shall be appointed for a five-year term that is renewable only once and shall not be eligible to work for the organization for a two-year period after his/her tenure as Director ends. The Director, who shall hold the rank of a senior official, shall not have worked for the organization in any capacity for at least two years prior to his/her appointment to the position.
- 3) The members of the Roster of Experts shall be selected by the representatives of the member states of the organization, working through the appropriate body in the structure of the international organization on the basis of a recommendation from the chief official of the organization. They shall not have worked for the organization in any capacity for two years before their appointment to the Roster. They shall be selected on the basis of their knowledge of the operating conditions of the international organization, expertise, experience, integrity and ability to act independently. In addition, in making these appointments, the relevant decision-makers shall pay due regard to maintaining a reasonable degree of diversity of expertise, experience, nationality and gender among the members of the Roster.
- 4) The members of the Roster of Experts will be paid a retainer for serving on the Roster in order to ensure their availability to work for the CRPSM. They will also be required to spend five days per year at the organization learning about the operations and operating policy and procedures of the organization and consulting with the Director about the CRPSM's annual report.
- 5) The members of the Roster of Experts can only serve one five-year term on the Roster of Experts and, during their term on the Roster, can only be removed by a decision of the relevant body representing the member states of the organization upon a showing of good cause. They will not be eligible to work for the international organization for a two-year period after the end of their term.

### *Problem-Solving Function*

- 1) The Director of the CRPSM is authorized to receive requests to undertake a problem-solving exercise from any person or group of two or more persons who contend that they have been harmed or are threatened with harm by an operation, which is

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- not yet complete, and which is either funded by the international organization or in which the international organization plays a key role, depending on the nature of the organization.
- 2) The Director of the CRPSM is authorized to receive requests for a problem-solving exercise from any individual or organization who can demonstrate that he/she/it represents any person or group of people who have been harmed or are threatened with harm by an organization-funded operation.
  - 3) The request for a problem-solving exercise must be in writing but does not have to conform to any specified format. It must identify the operation which is alleged to be the cause of the harm, and it must explicitly state that the requester has been harmed or is threatened with harm by the identified operation. The request should also indicate what efforts, if any, the requester has made to communicate his/her/its concerns to the organization's staff and management.
  - 4) The Director of the CRPSM has the exclusive authority to decide whether or not to accede to the request for a problem-solving exercise. However, if the Director decides to reject the request, he/she shall provide the requester and the relevant decision-making body that represents the member states of the organization with a written explanation of his/her decision.
  - 5) The Director of the CRPSM, in undertaking a problem-solving exercise, has the authority to undertake all actions he/she deems useful in bringing the requested problem-solving exercise to a successful conclusion and has access to all organization staff and records that he/she considers relevant to the problem-solving exercise. In regard to information supplied by the organization's staff, the Director shall comply with all the requirements of the organization's information disclosure policy.
  - 6) The Director of the CRPSM has the authority unilaterally or in consultation with all the participants in the problem-solving exercise to terminate the exercise at any time whether or not it has been successful.
  - 7) Within a stipulated period after the conclusion of the problem-solving exercise, the Director of the CRPSM shall prepare a report describing the problem-solving exercise, the reasons for terminating the exercise and any recommendations that he/she deems appropriate for resolving the problems identified in the exercise. This report shall be submitted to the chief executive officer and the relevant body representing the member states of the organization, the complainant and all other par-

### *INDEPENDENT INSPECTION MECHANISMS*

ties who have participated in the problem-solving exercise. The report shall also be made public except for those portions that include information given by the parties to the Director of the CRPSM in confidence or whose disclosure would violate the information disclosure policies of the organization.

- 8) In the event that the problem-solving exercise has been successful, the Director of the CRPSM shall include in his/her report a program for monitoring the implementation of the results of the problem-solving exercise.
- 9) In his/her report at the end of the problem-solving exercise, the Director of the CRPSM can recommend that the matter be submitted to a compliance review, regardless of whether or not the requester had originally requested a compliance review.

#### *Compliance Review Function*

- a. The CRPSM is authorized to accept requests for a compliance review from any person or group of two or more persons who alleges that they have been harmed or are threatened with harm by an operation funded by the organization and that the harm has been caused by the failure of the organization and its staff and management to comply with its own operating policies and procedures.
- b. The CRPSM is authorized to receive requests for a compliance review from any organization which can demonstrate that it represents any group of two or more people who have been harmed or are threatened with harm by an operation funded by the organization and that the harm has been caused by the failure of the organization and its staff and management to comply with its own operating policies and procedures.
- c. The requests for a compliance review, which must be in writing, do not have to conform to any specified format but must identify the operation of the international organization which is alleged to be the cause of the harm, explicitly state that the complainant has been harmed or is threatened with harm by the identified operation and explicitly state that the cause of the actual or threatened harm is believed to be the failure of the organization's management and staff to comply with its operating policies and procedures. If possible, the complaint should also indicate with which operating policies and procedures it believes the organization and its staff and management have failed to comply. The complaint should also indicate what efforts, if any, the requester has made to commu-

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- nicate his/her/its concerns to the organization's staff and management. In the event that the complaint is from an organization representing a person or group of people, it must also include evidence of the organization's authorization to represent the person or group of people.
- d. The CRPSM is authorized to accept requests for compliance reviews which ask the CRPSM to keep the identity of the complainant confidential. However, it cannot accept anonymous complaints.
  - e. Compliance reviews can also be initiated pursuant to a recommendation of the Director of the CRPSM contained in the Director's report at the end of a problem-solving exercise or after reviewing a request from a complainant for both a problem-solving exercise and a compliance review and deciding to accede only to the request for a compliance review.
  - f. The Director of the CRPSM is authorized to make a recommendation to the relevant decision-making body representing the member states of the organization on whether or not to grant the request for a compliance review.
  - g. The relevant decision-making body representing the member states of the organization can accept or reject the recommendation of the CRPSM on a "non-objection" basis. If it decides to accept the recommendation, this decision-making body shall appoint two persons from the Roster of Experts to conduct the compliance review.
  - h. The recommendation of the CRPSM, the relevant decision-making body's decision and the terms of reference for the experts who will conduct the review will be conveyed to the requesters and made public.
  - i. The two experts, with the support of the Director of the CRPSM, shall conduct the compliance review. The Director shall participate in all meetings of the experts to discuss the compliance review but shall only have a vote in the event of a disagreement between the experts.
  - j. The experts shall have free access to all relevant information, documents and staff in conducting the compliance review. They are also authorized to utilize whatever investigatory techniques, including but not limited to site visits, interviews with stakeholders and document reviews, they deem necessary to conducting the compliance review. The experts are also authorized to consult with the requesters regarding any corrective actions that either the requesters or the experts may wish to recommend.

### *INDEPENDENT INSPECTION MECHANISMS*

- k. At the end of the compliance review, the experts shall prepare a report to the relevant decision-making body representing the member states of the organization detailing their findings of fact and recommendations for corrective action.
- l. The relevant decision-making body representing the member states of the organization, based on the experts' report and the management response thereto, shall decide whether to accept or reject the recommendations of the experts. They may also adopt a modified version of the recommendations.
- m. After the relevant decision-making body representing the member states of the organization has made its decision, the report of the experts, the management response and the decision of this decision-making body shall be provided to the requester and shall be made public.
- n. The Director of the CRPSM and an expert appointed each year from the Roster of Experts by the relevant decision-making body representing the member states of the organization on the recommendation of the Director shall be required to monitor the implementation of the corrective actions authorized by the Board. For as long as necessary, the Director and the expert shall submit a report at the end of each year to this decision-making body discussing the implementation of the authorized corrective actions. This report shall also be submitted to the original requesters and shall be made public.

#### *Annual Report*

- 1) Each year the Director of the CRPSM, in consultation with all members of the Roster of Experts, shall prepare an annual report to the chief executive officer and the relevant decision-making body representing the member states of the organization. The report shall be made public.
- 2) The report shall describe the work of the CRPSM during the previous year and shall include a discussion of any identifiable trends relating to the work of the organization that have emerged from the CRPSM's problem-solving exercises and compliance reviews and a discussion of the lessons that the CRPSM has learned about the impact of and challenges in implementing the organization's operating policies and procedures. The report may also contain recommendations on changes that should be made to the organization's operating policies and procedures.

APPENDIX: COMPARATIVE ANALYSIS OF INSPECTION MECHANISMS

	World Bank Inspection Panel	IFC/MIGA CAO	IADB Indep. Investigation Mechanism	ADB Accountability Mechanism	EBRD Indep. Recourse Mechanism	AFDB Indep. Review Mechanism	Export Dev Canada	UN's JIU	UN's Office of Internal Oversight	European Ombudsman	U.S. Inspector General
Structure	- 3-member Panel; chair full time; permanent staff - fixed term	- CAO; permanent staff - fixed term	- Permanent Coordinator and Roster 10-15 members - fixed term	Board Committee; Compliance Review Panel and Special Project Facilitator and secretariat from bank staff, fixed term	Chief Compliance Officer and Roster of Experts	Director of CRMU and 3-member Roster of Experts	1 permanent officer	11 full time inspectors fixed term	Under-Sec. Gen. heads office, operational independence	Full time Ombudsman - fixed term	Full time fixed term
Appointment	Panel appointed by Board on recommendation of Pres. and Committee	CAO by President of WBG	Roster - appointed by Board on nomination by Pres.	Panel appointed by Board; Project Facilitator appointed by President	Roster appointed by Board on recommendation of President; CCO is current position	- Director appointed by President in consultation with Board - Roster appointed by Board on recommendation of President		Inspection by UNGA		By European Parliament	By President and confirmed by U.S. Senate
Scope	Public sector operations only	- Social and env matters only - Private sector projects	Public and private sector	Public and private sector	Public and private sector and only Environmental Policy and Public Information Policy	- Public sector- all policies - Private sector- only env. and social safeguard policies	- Transparency - Accountability re: env. review, HR, business ethics and info disclosure	All matters relating to efficiency of services and proper use of funds		Maladministration	Audit investigation promote efficiency fraud and corruption maladministration
Exclusion	- procurement substantially disbursed loan (>95%) - fraud and corruption	Social and env. matters only	Similar to WB	Similar to WB	- procurement - fraud or corruption - complaints before other judicial or review bodies	- procurement - fraud and corruption - complaints before other bodies					

APPENDIX: CONTINUED

	World Bank Inspection Panel	IFC/MIGA CAO	IADB Indep. Investigation Mechanism	ADB Accountability Mechanism	EBRD Indep. Recourse Mechanism	AFDB Indep. Review Mechanism	Export Dev Canada	UN's JIU	UN's Office of Internal Oversight	European Ombudsman	U.S. Inspector General
Accepts Complaints from Affected People	Yes (2 or more people)	Yes - Ombudsman Compliance can arise from complaint	Yes (community)	Yes	Yes (2 or more people)	Yes (2 or more people)	Yes	No	No	Yes	No
Complaint Must Allege Violation of Operating Rules and Procedures	Yes	No Ombudsman CAO decides in compliance	Yes	Yes – only for Compliance Review Panel	No – only for compliance review	Yes	No	No	No	No	No
Representative Can File Request on Behalf of Affected People	1) Local Rep. 2) Foreign Rep. in exceptional circumstances ED or Board	Yes - Ombudsman	Local Rep. can file; Foreign Rep. exception	Local Rep.	Yes	Yes	Unclear	No	No	No	No
Requirement of Prior Approach to Management	Yes	No - Ombudsman checks with Management	No - Coordinator checks	Yes	Yes	Yes	No	No	No	No	No
Formal Procedures Established that Include Deadlines	Yes	Ombudsman - Minimal (Limited Rules on Closing Case)	Yes	Yes	Yes	Yes	No	No	Minimal	Minimal	No
Decision to Authorize Investigation	Panel recommends Board decides but limited discretion	CAO	Roster member recommends - Board decides	Panel recommends to Board Committee which recommends, Board decides	CCO recommends Board/President decides – depending on stage of project	Director of CRMU recommends to Board but if recommends against review then refers to chair of Roster to review and recommend to Board	N/A	JIU	OIOS	Ombudsman	Inspector General



APPENDIX: CONTINUED

	World Bank Inspection Panel	IFC/MIGA CAO	IADB Indep. Investigation Mechanism	ADB Accountability Mechanism	EBRD Indep. Recourse Mechanism	AFDB Indep. Review Mechanism	Export Dev Canada	UN's JIU	UN's Office of Internal Oversight	European Ombudsman	U.S. Inspector General
Powers to Investigate	Yes - documents and staff	Yes - documents and staff	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Operates as Instrument of Board Oversight or Management Tool	Board oversight	Reports to Pres ⇒ Partial management tool but independent	Board oversight	Board oversight	Board oversight except for projects not yet approved by Board	Board oversight except for projects not yet approved by Board	—	Management tool	Management tool	Oversight	Management tool
Investigation Result in Fact Finding and/or Recommendation	Fact Finding	Fact Finding and Recommendation	Fact Finding	Fact Finding and Recommendation	Fact Finding and Recommendation	Fact Finding and Recommendation	—	Fact Finding and Recommendation	Fact Finding and Recommendation	Fact Finding, Conclusion and Recommendation	Fact Finding and Recommendation
Follow-up to Report	None	Ombudsman - Yes	Yes	No	None	Yes	Yes	Report to UNGA	Yes	Yes	Yes
Lessons Learned	Limited Annual Report	Limited Annual Report but has Advisory Role	Annual Report	Annual Report	Annual Report	Annual Report-trends and lessons learned	—		Annual Report	Annual Report	Yes
Publication of Reports and Decision	Yes	Yes	Yes	Yes	Unclear from Proposal	Yes	Yes	Unclear	Yes	Yes	Yes
Primary Focus on Compliance/ Problem-Solving	- Primarily Compliance - Problem-Solving left to Management	Ombudsman - Problem-Solving but also has Compliance Role	Compliance and Problem-Solving	Compliance	Compliance and Problem-Solving	Compliance and Problem-Solving	Problem-Solving	Audit	Audit	Problem-Solving	Compliance

## **PART IV**

### INTERNATIONAL FINANCIAL INSTITUTIONS AND HUMAN RIGHTS

The World Bank, the International Monetary Fund and Human Rights

## The World Bank, the IMF, and Human Rights

*Daniel D. Bradlow\**

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\* Professor of Law and Director of the International Legal Studies Program, at the Washington College of Law, American University, Washington, D.C. The author wishes to thank Lisa Trojnar for her research assistance.

## I. INTRODUCTION

At the end of the World Summit for Social Development, the participating States issued the “Copenhagen Declaration on Social Development and Programme of Action.”<sup>1</sup> In this Declaration, they stated that sustainable and equitable development must incorporate democracy; social justice; economic development; environmental protection; transparent and accountable governance; and universal respect for, and observance of, all human rights.<sup>2</sup> Thus, the participating States reaffirmed the view that development is a multifaceted process in which, *inter alia*, economic development and human rights are so intertwined that sustainable development cannot occur without both economic growth and the promotion of human rights.<sup>3</sup>

The participating States also called on other members of the international community, including specialized agencies of the United Nations, to support developing countries in their efforts to achieve sustainable development.<sup>4</sup> The call to promote sustainable development could not have been a surprise to the World Bank Group (World Bank)<sup>5</sup> and

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1. Copenhagen Declaration on Social Development in Report of the U.N. World Summit for Social Development, U.N. Doc. A/CONF.166/9 (1995) [hereinafter Copenhagen Declaration]; Programme of Action of the World Summit for Social Development, in Report of the U.N. World Summit for Social Development, *supra* [hereinafter Programme of Action].

2. Copenhagen Declaration, *supra* note 1, para. 26. This perception is consistent with the Declaration on the Right to Development, which also conceives of development as a comprehensive process involving economic, social, cultural, political, and environmental dimensions. G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986). World Bank officials share this view. *See, e.g.*, Ibrahim F.I. Shihata, Democracy and Development (Oct. 3, 1996) (unpublished manuscript, on file with author) [hereinafter Shihata, Democracy and Development]; Ibrahim F.I. Shihata, *Human Rights, Development and International Financial Institutions*, 8 AM. U. J. INT'L L. & POL'Y 27 (1992); Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT'L L. & POL'Y 39 (1988); James D. Wolfensohn, Speech at the Annual Meeting of the World Bank (Oct. 1, 1995) (transcript available at <<http://www.worldbank.org>>).

3. It should be noted that all aspects of sustainable and equitable development are intertwined. However, in this Article the author has chosen to highlight the intertwining of human rights and economic development in the work of the World Bank Group and the IMF. *See* Daniel D. Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411, 413-16 (1995) [hereinafter *Limited Mandates*]; Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1 (1993) [hereinafter *A People-Centered Legal Order*].

4. Copenhagen Declaration, *supra* note 1, Commitment 2, paras. (g), (h).

5. The World Bank Group consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). For a more detailed description of the institutions in the World Bank Group, see 2 IBRAHIM F.I. SHIHATA, *THE*

the International Monetary Fund (IMF).<sup>6</sup> Over the fifty years of their existence, both institutions have dramatically expanded their understanding of the concept of development. Both institutions, in fact, now address social and human rights issues in their discussions with their Member States and, in the case of the World Bank, in their operations in these States.

For example, World Bank-funded operations<sup>7</sup> now promote such economic, social, and cultural rights as health, education, social welfare, jobs, and property. In addition, the World Bank, through its financing and advisory activities, influences the status of women, children, indigenous peoples,<sup>8</sup> and other vulnerable groups<sup>9</sup> in those Member States that borrow from it.<sup>10</sup> The World Bank's governance operations, which address such issues as the rule of law in society, reform of the civil service, and the management of the public sector, have an impact on civil and political rights in Borrower States. Furthermore, the World Bank's new practice of requiring participation by primary stakeholders in the design and

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WORLD BANK IN A CHANGING WORLD, SELECTED ESSAYS (1995); DANIEL D. BRADLOW, UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH, THE INTERNATIONAL MONETARY FUND, THE WORLD BANK GROUP, AND DEBT MANAGEMENT (1993). In this Article, the author shall focus on the IBRD and IDA, which collectively shall be referred to as "the World Bank."

6. The IMF, the IBRD, and the IDA are specialized agencies of the United Nations. See Agreement Between the United Nations and the International Monetary Fund, art. IV(2), 16 U.N.T.S. 328, 332 (1948) [hereinafter U.N.-IMF Relationship Agreement]; Agreement Between the United Nations and the International Bank for Reconstruction and Development, art. IV(2), 16 U.N.T.S. 346, 348 (1948) [hereinafter U.N.-IBRD Relationship Agreement]; Agreement Between the United Nations and the International Development Association, G.A. Res. 1594, U.N. GAOR, 15th Sess., Supp. No. 16A, at 17, republished U.N. GAOR, 15th Sess., Annex 2, Agenda item 91 (1960) [hereinafter U.N.-IDA Relationship Agreement].

7. See *infra* Part II.C-D. for a more detailed discussion of the types of activities funded by the World Bank.

8. WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, Operational Directive 4.20: Indigenous Peoples (Sept. 1991) (discussing World Bank policy on indigenous people) [hereinafter OPERATIONAL MANUAL].

9. OPERATIONAL MANUAL, *supra* note 8, Operational Directive 4.30: Involuntary Resettlement (June 1990) (stating that World Bank policy on involuntary resettlement is designed to ensure that those forced to relocate as a result of a Bank-funded project should still share the benefits of the project). *But see* WORLD BANK, RESETTLEMENT AND DEVELOPMENT: THE BANKWIDE REVIEW OF PROJECTS INVOLVING INVOLUNTARY RESETTLEMENT 1986-1993 (1994) (revealing Bank problems in implementing this policy).

10. Not all Member States are eligible to borrow from the World Bank. Those States that have a per capita income of less than US\$5,295 (in 1995 dollars) can borrow from the IBRD and less than US\$1,465 (in 1995 dollars) can borrow from IDA. In practice, however, only countries with annual per capita incomes of less than US\$905 receive IDA credits. In this Article, Member States that are eligible for IBRD or IDA loans shall be referred to as "Borrower States" or "Member States." The focus of this section of the Article is on the operation of the IBRD and IDA in these States.



implementation of its projects<sup>11</sup> is, in effect, a statement about the importance of political rights in the development process.

The scope of the IMF's Article IV consultations<sup>12</sup> suggests that the IMF is also capable of influencing the human rights situation in its Member States.<sup>13</sup> This can be deduced from the fact that during Article IV consultations, the IMF has been known to engage the Member State in discussions of its policies relating to health care, environment, welfare, housing, unemployment, labor markets, military expenditures, and certain aspects of the management of the State's public sector.<sup>14</sup>

The degree of the IMF's influence varies depending on the Member State's need for financial support. Since the advice given by the IMF in the Article IV consultations may be converted into the conditionalities attached to IMF financing, the IMF is able to exert greater influence over those Member States who need or expect to need its financial assistance.<sup>15</sup>

Given that human rights and the economic functions of the World Bank and the IMF (collectively the International Financial Institutions, or the IFIs) are inherently intertwined, the increasing involvement of the IFIs in

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11. See WORLD BANK, THE WORLD BANK PARTICIPATION SOURCEBOOK (1996) [hereinafter PARTICIPATION SOURCEBOOK].

12. Pursuant to Article IV of its Articles of Agreement, the IMF is required to engage in regular consultations with its Member States about their exchange rate policies. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. IV, sec. 3, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, 51, amended, July 28, 1969, 20 U.S.T. 2775, amended, Apr. 1, 1978, 29 U.S.T. 2203 [hereinafter IMF Articles]. For a description of Article IV consultations, see, e.g., RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION 22, 558-68, 571-80 (1985).

13. While it is mandatory for IMF Member States to hold regular consultations with the IMF, they are not required to follow the advice the IMF offers them in the course of these consultations. However, the IMF's report on the State will be discussed by the IMF's Board of Directors and form part of the data used by the IMF in compiling its semi-annual report, "World Economic Outlook." Consequently, the IMF's opinions may influence how other States and financial actors perceive the Member State. See Executive Board Decision No. 6026-79/13 (Jan. 22, 1979), as amended by 10273-93/15 and 10364-93/67, in SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE IMF 13 (19th ed. 1994) (dealing with Article IV consultations). For general description of the IMF and its operations, see ANAND G. CHANDAVANKAR, THE INTERNATIONAL MONETARY FUND: ITS FINANCIAL ORGANIZATION AND ACTIVITIES (IMF Pamphlet Series No. 42, 1984); A. W. HOOKE, THE INTERNATIONAL MONETARY FUND: ITS EVOLUTION, ORGANIZATION AND ACTIVITIES (IMF Pamphlet Series No. 3, 3rd ed. 1983); TREASURER'S DEPARTMENT OF THE INTERNATIONAL MONETARY FUND, FINANCIAL ORGANIZATION AND OPERATIONS OF THE IMF (IMF Pamphlet Series No. 45, 2d ed. 1991) (discussing functions of IMF) [hereinafter TREASURER'S DEPARTMENT]; BRADLOW, *supra* note 5; see also IMFSURVEY, SUPPLEMENT ON THE IMF (Sept. 1996).

14. See *infra* Part III.C. for a more detailed discussion of this issue.

15. IMF influence is likely to be greatest in Member States that are eligible for Extended Structural Adjustment Facility (ESAF) support. For these countries, IMF policies may be included in the Policy Framework Paper which will ultimately influence both IMF and World Bank support for the State. See OPERATIONAL MANUAL, *supra* note 8 (discussing Policy Framework Papers); TREASURER'S DEPARTMENT, *supra* note 13, at 80-83 (discussing ESAF).

the social and human rights affairs of their Member States is not surprising.<sup>16</sup> However, this involvement raises two important human rights issues.

The first issue, which can be called the operational human rights issue, pertains to the human rights impact of the IFIs' operations in their Member States. It focuses on the IFIs' responsibilities for ensuring that the design and implementation of their projects, programs, policies, and in-country activities are consistent with internationally recognized human rights standards.

There are two dimensions to this operational issue. The first is the *promotion* of human rights, which concerns the obligations of the IFIs to actively seek to improve the human rights situation in their Member States.<sup>17</sup> The second dimension is the *protection* of human rights, which concerns the obligations of the IFIs to help stop human rights abuses perpetrated by their Member States.<sup>18</sup>

The second issue, which can be called the institutional issue, pertains to the internal rules and procedures of the IFIs. It focuses on the responsibilities of the IFIs to ensure that their own internal operating rules and procedures are consistent with internationally recognized human rights standards. This issue highlights the transparency, accountability, and accessibility of the IFIs' internal operating rules and procedures.<sup>19</sup>

Despite the importance of these two human rights issues to the overall efficacy of their operations, the IFIs do not have well-developed, publicly available human rights policies. Those policies that they do have tend to be *ad hoc*<sup>20</sup> and ambiguous.<sup>21</sup>

The lack of a coherent human rights policy has created problems both for the IFI staff and for the other stakeholders in the IFIs' operations.<sup>22</sup> It deprives their staff of clear guidance on the scope of their human rights responsibilities. In addition, it tends, by default, to delegate to the IFI staff the authority to make their own policy decisions when these issues arise in the course of their duties. The resulting decisions often appear to stakeholders in the IFIs' operations to be arbitrary and difficult to

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16. See generally, *Limited Mandates*, *supra* note 3.

17. See *infra* Parts II.D-E., III.C-D. for a more detailed discussion of this issue.

18. See *infra* Parts II.F., III.D. for a more detailed discussion of this issue.

19. See *infra* Part IV. for a more detailed discussion of this issue.

20. See *infra* Parts II.C., III.C. for a more detailed discussion of the evolution of the Bank and IMF's involvement in the human rights policies of their Member States.

21. See *infra* Part II.E.1. for discussion of the "direct and obvious" test and its ambiguities.

22. The stakeholders in IFI operations include those portions of the Member State's population that are directly affected by the IFIs' financing operations (this will be the entire population in the case of IMF and World Bank structural adjustment loans), the Member State itself, the IFI, the suppliers that stand to benefit from the financing operation, and other indirectly affected persons in the States that are members of the IFIs.

understand. This adversely affects the transparency and accountability of the IFIs' operations, and makes it hard for outsiders to predict how the IFIs will deal with future human rights situations.<sup>23</sup>

In this paper I will argue that the IFIs must develop an explicit human rights policy in order to resolve the human rights problems they face. This policy should instruct staff and policymakers on how to appropriately incorporate human rights considerations into all IFI operations. A transparent and predictable human rights policy, provided it were well publicized, would also enable all interested parties to understand what they can expect from the IFIs when their activities have an effect on human rights, and thus, to hold the IFIs accountable for their performance in this regard.

In order to make this case, I shall first describe the evolution of the World Bank's and the IMF's operations over the past fifty years. In these sections I shall also discuss the human rights dimensions of the IFIs' work and the nature of the legal constraints on their ability to consider human rights issues in their operations.<sup>24</sup> Thereafter, I shall discuss the institutional implications for the IFIs of this evolution in their operations. Finally, I shall make some proposals regarding possible human rights policies for the IFIs.

## II. THE WORLD BANK

### A. Introduction

This section of the Article begins with an analysis of the political prohibition in the World Bank's Articles of Agreement. It is followed by a description of the evolution of the Bank's operations and an explanation of how this has influenced the interpretation of the political prohibition. The final part of this section discusses the human rights impact of the Bank's

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23. See *infra* Part IV for further discussion of this issue.

24. The World Bank's Articles explicitly require the Bank to base its decisions only on economic consultations and to not take political factors into account in its decisions. Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, amended, Dec. 17, 1965, 16 U.S.T. 1942 [hereinafter IBRD Articles]; Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249 [hereinafter IDA Articles]. See *infra* Parts II.B., III.B. for a more detailed discussion of this issue. The IMF's Articles do not explicitly prohibit it from considering political issues; however, the IMF has interpreted the Articles as imposing such a prohibition. JOSEPH GOLD, THE RULE OF LAW IN THE IMF, (IMF Pamphlet Series, No. 32, 1980); Francois P. Gianviti, *Members' Rights and Obligations Under the IMF's Articles of Agreement*, in 3 CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS 1, 10 (Robert C. Effros ed., 1995). For further discussion of this issue, see *infra* Part III.B.



operations and focuses on both the promotional and protective dimensions of the operational human rights issue.<sup>25</sup>

For present purposes it is important to note that the International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) will only lend funds to nonmember borrowers if a Member State either guarantees or approves the loan.<sup>26</sup> This means that the Member State is always a participant in an IDA or IBRD financing arrangement. As a result, in principle the IBRD and IDA are always in a position to influence their Borrower States' human rights situations.<sup>27</sup>

### *B. The Bank's Mandate*

The mandate of both the IBRD and IDA (hereinafter referred to collectively as the "Bank") is to assist development efforts in their Member States. The IBRD's Articles of Agreement state that the purposes of the IBRD include "assist[ing] in the reconstruction and development of territories of members," and "promot[ing] the long range balanced growth of international trade and the maintenance of equilibrium in balance of payments . . . thereby assisting in raising productivity, the standard of living and conditions of labor in [members'] territories."<sup>28</sup>

The purposes of the IDA, according to its Articles of Agreement, are to "promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world . . . thereby furthering the developmental objectives of the International Bank for Reconstruction and Development."<sup>29</sup>

Interestingly, neither institution's Articles define the term "development." The Bank does not disagree with the international community's conception of development as a comprehensive process

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25. A full discussion of the institutional issue is deferred until later in this Article. *See infra* Part IV.

26. The IBRD Articles state that if the Member State is not the borrower, "the member or the central bank or some comparable agency" must fully guarantee the loan. IBRD Articles, *supra* note 24, art. III(4)(i). The IDA's Articles of Agreement state that the IDA cannot provide financing for any project "if the member in whose territory the project is located objects to such financing." IDA Articles, *supra* note 24, art. V, sec. 1(e).

27. International human rights law deals with the State's relationship to its citizens. *See, e.g.*, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (4th ed. 1990) (describing the scope of international human rights law).

28. IBRD Articles, *supra* note 24, art. I. The other purposes of the IBRD are "to promote private foreign capital by means of guarantees or participation in loans and other investments made by private investors, . . . to arrange the loans made or guaranteed by [the IBRD, and] . . . to conduct its operations with due regard to the effect of international investment on business conditions in the territories of members." *Id.*, art. I, (ii), (iv), (v).

29. IDA Articles, *supra* note 24, art. I.

incorporating economic, social, cultural, political, and spiritual dimensions.<sup>30</sup> Nevertheless, the IBRD and IDA contend that as specialized economic organizations<sup>31</sup> they have a limited mandate. This restricts their permissible activities to the economic aspects of the development process.<sup>32</sup> The other aspects of the development process fall outside the scope of the Bank's permissible range of activities.

In support of its position, the Bank points out that the Articles of Agreement of both the IDA and the IBRD place limits on what factors they can consider in their decisions. For example, the IBRD's Articles require it to ensure that its funds are "used only for the purposes for which the loan was granted with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations."<sup>33</sup> Lest there be any doubt about their economic focus, the Articles of both the IBRD and IDA state that:

The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.<sup>34</sup>

Despite the strong emphasis the Articles place on ensuring that IBRD and IDA decisions are based only on "economic considerations," neither institution's Articles define "economic considerations." Similarly, neither institution's Articles define "political affairs" or "political character."<sup>35</sup>

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30. See *supra* note 2. The international community endorsed this conception of development at the World Summit for Social Development. See Copenhagen Declaration, *supra* note 1, para. 26.

31. The IBRD and IDA are specialized agencies of the United Nations. See *supra* note 6.

32. Ibrahim F.I. Shihata, Issues of Governance In Borrowing Members and the Extent of Their Relevance Under the Bank's Articles of Agreement (Dec. 21, 1991) (unpublished memorandum of the Vice President and General Counsel of the World Bank) (on file with author); see also SHIHATA, *supra* note 5, at 553-78 (discussing governance and human rights in Bank Member States); Shihata, Democracy and Development, *supra* note 2.

33. IBRD Articles, *supra* note 24, art. III, sec. 5(b). The IDA operates under an identical restraint. IDA Articles, *supra* note 24, art V, sec. 1(g).

34. IBRD Articles, *supra* note 24, art. IV, sec. 10; IDA Articles, *supra* note 24, art. V, sec. 6. The Articles of Agreement of these two organizations also stipulate that the Member States shall respect the international character of these organizations and refrain from seeking to influence the officials of these organizations who owe their primary duty of loyalty to the organization. IBRD Articles, *supra*, art. V, sec. 5(c); IDA Articles, *supra*, art. VI, sec. 5(c).

35. It appears from statements made at the Bretton Woods Conference by Harry Dexter White, Lord Keynes, and by the U.S. Treasury that the purpose of the political prohibition was to

This enables both institutions to interpret for themselves the term “economic considerations” in order to determine what issues and activities fall within their permissible scope of operations. They are also free to decide what issues to treat as “political” and thus outside their jurisdiction.

### *C. The Evolution in the Bank's Operations*

Over the past fifty years, the Bank has steadily expanded its understanding of what factors qualify as economic considerations within the meaning of its Articles. In its early years, when the Bank's position was that development referred to economic growth, it interpreted economic considerations as including only those issues that were directly relevant to the financial and technical feasibility of the projects it was funding and to the project's impact on the economic growth potential of the Member State.<sup>36</sup> In this regard it should be noted that the Articles of the IBRD require it to ascertain whether the borrower or the guarantor “will be in a position to meet [their] obligations under the loan.”<sup>37</sup>

One of the benefits of the Bank's original interpretation of economic considerations was that it respected the Borrowing State's sovereignty. It appeared to leave to the Borrowing State all the difficult political judgments, such as which potential projects should be given the highest priority, who should benefit from the project, and how the costs associated with the project should be shared among the citizens of the Borrowing State.

The Bank's initial perception of development did not prove to be sustainable. Beginning in the 1960s, the Bank, faced with the failure of

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ensure that the Bank acted impartially. See United Nations: Statements of U.N. Legal Counsel and IBRD General Counsel on Relations of U.N. and IBRD and Effect of U.N. Resolutions, 6 I.L.M. 150 (1967) (regarding World Bank loans to South Africa and Portugal) [hereinafter Broches Statement].

In 1966, the Bank's Legal Counsel transmitted a memorandum to the United Nations in which he attempted to explain why the IBRD's Articles prohibited it from complying with General Assembly Resolutions requesting the Bank to refrain from extending credit to South Africa and Portugal. The General Counsel argued that the prohibition had two purposes. The first was to prevent the possibility of using Bank financing as leverage against any Bank member to advance the political aims of any other member or group of members. The second reason was to assist the Bank in raising capital from investors who may be concerned that the Bank was basing its lending decisions on political considerations. See *id.*; see also Ibrahim F.I. Shihata, Legal Opinion on Governance (unpublished memorandum, on file with author) [hereinafter Shihata, Opinion on Governance]; BARTRAM S. BROWN, *THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY* (1992).

36. Broches Statement, *supra* note 35; see also Shihata, Opinion on Governance, *supra* note 35 (explaining that the aim of Bank was to base decisions on impartial and technical criteria).

37. IBRD Articles, *supra* note 24, art. III, sec. 4(v). The IDA Articles do not have this provision. However, they do require the IDA, in its lending decisions, to have regard for the “economic position” of the area in which it lends and for the “nature and requirements of the project.” IDA Articles, *supra* note 24, art. V, sec. 2(b).

economic growth to adequately address the problems of the poor, began broadening its understanding of which activities were included within the scope of its mandate by focusing more directly on poverty alleviation and basic human needs.<sup>38</sup> Thus, in addition to physical infrastructure projects, the Bank began to fund development activities related to health, education, agriculture, and housing. Later the Bank, again responding to its evolving understanding of the developmental problems of its Member States, added policy-based lending, environmental concerns, and gender issues to its list of permissible operations.<sup>39</sup> More recently, faced with the continuing developmental problems of many of its Member States, the Bank has added governance, economic transformation, and private sector development to its repertoire of appropriate operations.<sup>40</sup> It is now also attempting to incorporate public participation into most of its operations.<sup>41</sup>

#### *D. The Human Rights Implications of the Bank's Operations*

Each step in the expansion of the Bank's range of activities has forced it to confront operational issues that require it to make policy judgments. For example, it is not possible for the Bank to fund projects designed to alleviate poverty without making some judgment about who the poor are and who the relative winners and losers in these projects should be.<sup>42</sup> The Bank's failure to adequately consider all aspects of these issues may result in projects that either do not achieve their intended results or that perpetuate discriminatory treatment of certain vulnerable population groups.<sup>43</sup>

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38. EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* (1973). For a critical perspective, see CHERYL PAYER, *THE WORLD BANK: A CRITICAL ANALYSIS* (1982).

39. See, e.g., 1 PAUL MOSLEY ET AL., *AID AND POWER: THE WORLD BANK AND POLICY BASED LENDING* (1991); BRUCE RICH, *MORTGAGING THE EARTH* (1994).

40. SHIHATA, *supra* note 5.

41. PARTICIPATION SOURCEBOOK, *supra* note 11.

42. It should be noted that defining who should be the beneficiaries of a poverty alleviation project is not a simple task. For example, a project aimed at helping subsistence farmers might help those who own land but not those who work on other people's land. The latter group may be more numerous and poorer than the subsistence farmers. The same project may also benefit poor men at the expense of poor women. See generally, LAUREN MCGLYNN, *THE WORLD BANK AND THE REALIZATION OF THE RIGHTS OF WOMEN IN AGRICULTURE AND RURAL DEVELOPMENT PROJECTS IN SUB-SAHARAN AFRICA* 15 (1991) (discussing the situation of women in development); JOSETTE MURPHY, *GENDER ISSUES ON WORLD BANK LENDING* (1995); KATRINA A. SAITO & DAPHNE SPURLING, *DEVELOPING AGRICULTURAL EXTENSION FOR WOMEN FARMERS* (World Bank Discussion Paper No. 156, 1992); WORLD BANK, *ADVANCING GENDER EQUALITY: FROM CONCEPT TO ACTION* (1995); WORLD BANK, *POVERTY REDUCTION HANDBOOK* (1993).

43. There are many examples of problems that can arise when the Bank fails to adequately consider all aspects of these issues. See, e.g., BRADFORD MORSE & T. BERGER, *SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW* (1992) [hereinafter *SARDAR*

Similarly, the Bank cannot fund adjustment programs without also, at least implicitly, making judgments about the capacity of governments, and even of individual government officials, to implement and sustain the adjustment program.<sup>44</sup>

The complexity and the sensitivity of the issues that the Bank must consider have grown exponentially with the evolution of the Bank's adjustment-related work. As the focus in the adjustment programs has shifted from macroeconomic policymaking to the formulation and implementation of policy at a sector and even sub-sector level, the Bank has become ever more deeply involved in the affairs of some of its Member States.

For example, the Bank's initial concern with macroeconomic policymaking led it to focus on, *inter alia*, problems in the Member State's financial sector. Faced with these problems, the Bank began to fund financial sector adjustment loans that were designed initially to produce market-oriented policy changes in the Borrower State's financial sector. However, the focus on these policy changes highlighted other problems in the financial sector. In response, the Bank broadened its operations to include reform of supervisory and regulatory arrangements in the financial sector. This, in turn, helped raise the issue of the efficacy of the implementation of government regulation in the financial sector. These issues caused the Bank to further expand its scope of activities to include promoting the transparency and enforceability of the legal and regulatory structure in the Borrower State. This focus on legal reform highlighted the problems faced by the judiciary in some Bank Member States and has now led the Bank to fund several judicial reform projects.<sup>45</sup>

This evolution in Bank adjustment lending, together with the Bank's stated concern with poverty alleviation and the development of human resources, has expanded the range of activities now funded by the Bank (in addition to its traditional infrastructure projects) to include: reform of the civil service; reform of the management of public sector enterprises; legal and judicial reform; family planning; improving the quality of education and the equity of access to primary education; reform of universities; development of the private sector; land titling and registration reform; and programs to ensure that vulnerable groups such as women, children, indigenous people, and other minorities get access to health, education, and

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SAROVAR]; RAYMOND F. MIKESELL & LARRY W. WILLIAMS, *INTERNATIONAL BANKS AND THE ENVIRONMENT* (1992); PAYER, *supra* note 38; SIERRA CLUB, *BANKROLLING DISASTERS* (1986).

44. MOSLEY ET AL., *supra* note 39.

45. This progression in Bank lending can be discerned from the description of Bank loans contained in the Bank's annual reports. Similar evolutions in Bank operations have been occurring in all sectors in which the Bank funds the operations in the Borrower State. For further discussion of this issue see *infra* notes 47-48 and accompanying text.



other Bank-funded programs. In addition, during the past two years the Bank has actively promoted public participation in its operations.<sup>46</sup>

A comparison of the IBRD's and IDA's operations in 1990 and 1995 demonstrates the dramatic change in the Bank's operations.<sup>47</sup> In 1990, only one of the 234 loans made by the two institutions explicitly incorporated participation as an element of the project design. By 1995, participation was an element in ninety-two of the 243 projects funded by the Bank. In 1990, the two institutions made no loans for judicial reform. By 1995, they had made five loans designed, at least in part, to promote such reform. In 1990 the Bank funded no projects designed to strengthen property rights or to promote land reform. By 1995, the Bank was funding such projects in countries as diverse as Indonesia, Nicaragua, Bolivia, Thailand, and Russia.<sup>48</sup> In 1990, the Bank's governance operations were focused on improving the efficiency of the management of the public sector and on liberalizing policies in specific spheres of activity. By 1995, the scope of its governance activities had expanded to include strengthening local governments and devolving power from central to local governments; restoring or creating basic governmental functions in the Occupied Territories, Burundi, Rwanda, and Haiti; and restoring public confidence in the integrity and competence of the public sectors in Guatemala.<sup>49</sup> Since 1990, the IBRD and IDA have also funded projects to reform or develop university education; to improve the equity of access to, and the quality of, education; to improve educational opportunities for young girls; to promote health care for women; to provide assistance to indigenous peoples and other minorities; to assist countries in developing legal training programs; and to assist Uganda in laying a foundation for decreasing historic regional inequalities within the country.<sup>50</sup>

This brief description of the Bank's operations illustrates the wide range of human rights issues that can arise from the Bank's activities. For example, the Bank influences the rights of individuals to be free from discrimination and their rights to education and health when it finances projects that promote equity in access to health or education. Similarly, the Bank influences the ability of people to exercise their rights in their interactions with their governments when it finances reforms of the civil service. Also, the Bank raises questions about freedom of expression and association when it finances projects incorporating public participation into their design and implementation. In addition, by financing changes

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46. This information is drawn from various project summaries contained in the World Bank's annual reports. See WORLD BANK, WORLD BANK ANNUAL REPORT 1990, at 137-81; 1991, at 161-78; 1992, at 157-95; 1993, at 145-88; 1994, at 122-43; 1995, at 104-23 [hereinafter ANNUAL REPORTS].

47. See ANNUAL REPORTS, *supra* note 46, 1990 and 1995 project summaries.

48. *Id.* \*

49. See ANNUAL REPORTS, *supra* note 46, 1994 and 1995 project summaries.

50. *Id.*

in the management of universities and in the quality of education, the bank influences academic freedom. Finally, when the Bank finances a program of judicial reform, even if the program is only intended to improve specific aspects of the judiciary's operations,<sup>51</sup> it affects the way in which that judicial system will work for all those who seek its assistance. On a broader level, it also influences every person's access to the judicial system.

In short, it seems reasonable to conclude on the basis of the Bank's present range of activities that its operations have a direct effect on the following human rights in its Borrower States: the right to due process; the right to free association and expression; the right to participate in the government and the cultural life of the community; the right to work; the right to health care, education, food, and housing; and the rights of women, children, and indigenous peoples to nondiscriminatory treatment.<sup>52</sup> In addition, depending on the Borrower State's response to its citizens who take advantage of opportunities created by Bank-funded projects, the Bank can have an impact on human rights associated with the integrity of the person.<sup>53</sup> This will occur if the State or its agents take reprisals against citizens who use the opportunity created by the Bank's invitation to participate in its operations to oppose the projects sponsored by the State.<sup>54</sup>

### *E. The Human Rights Issues Raised by the Bank's Operations*

While there are a number of well-known cases where Bank-funded projects have resulted in human rights abuses,<sup>55</sup> the standard Bank

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51. The Bank has attempted to limit its governance and legal reform efforts to those issues that have a "direct and obvious" economic effect. Consequently its judicial reform projects have tended to focus on judicial administration and the judiciary's ability to deal with economic and commercial issues. See Shihata, *Opinion on Governance*, *supra* note 35; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS* (1993) [hereinafter *GOVERNANCE*]; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *UPDATE ON GOVERNANCE* (1995) [hereinafter *UPDATE ON GOVERNANCE*]. For a critical analysis of judicial reform, see LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *HALFWAY TO REFORM, THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM* (1996).

52. These rights are drawn from the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 U.N. Doc. A/34/46 (Dec. 18, 1979), *reprinted in* 19 I.L.M. 33 (1980); Convention on the Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989), U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989); and the U.N. CHARTER.

53. These rights include the right against torture, the right to a fair trial, and the right not to be detained without trial.

54. For a discussion of the Bank's responsibilities in these situations, see *infra* Part V.B.3.

55. See *e.g.*, SARDAR SAROVAR, *supra* note 43; LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE INSTITUTE FOR POLICY RESEARCH AND ADVOCACY, *IN THE NAME OF DEVELOPMENT: HUMAN RIGHTS AND THE WORLD BANK IN INDONESIA* (1995); JUSTICE

operation gives rise to less dramatic—but no less important—human rights concerns. The following sections discuss these latter concerns in more detail.

### 1. *The Political Prohibition in the Bank's Articles*

The first human rights issue raised by the Bank's standard operations pertains to how the Bank interprets the political prohibition in its Articles.<sup>56</sup> To date, the distinction the Bank draws between "economic" and "political" factors has been based on the impact the particular factor has on considerations of efficiency and economy.<sup>57</sup> On this basis, the Bank has defined an economic factor, within the meaning of the Bank's Articles of Agreement, as any factor that has a "direct and obvious' economic effect relevant to the [Bank's] work."<sup>58</sup> The Bank uses a three-part test to determine if the economic effect of a particular factor in a Bank operation is "direct and obvious." The economic effect must be (1) clear and unequivocal; (2) preponderant; and (3) when the issue is associated with political actions or flows from political events, the economic effect "must be of such impact and relevance as to make [it] a Bank concern."<sup>59</sup>

The Bank's General Counsel has also attempted to define the term political. He has suggested that the term political relates to "the art and practice of running a country or governing."<sup>60</sup> It includes those factors that would require the Bank to take a side in the political system of its Borrower States, such as favoring one political party or faction over another. It also includes considerations that might result in Bank decisions being influenced by the principles, opinions, or beliefs of the people or parties holding power in its Member States.<sup>61</sup> The General Counsel would exclude from the term "such typical economic and technical issues as the

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DENIED!: HUMAN RIGHTS AND THE INTERNATIONAL FINANCIAL INSTITUTIONS (1994); Request for Inspection-Nepal: Arun III Hydroelectric Project, Nov. 3, 1994, IPN Request RQ 94/1 (available at <<http://www.worldbank.org/ins-panel.html>>); Request for Inspection-Rodonia Natural Resources management Project, IPN Request RQ 95/3 (available at <<http://www.worldbank.org/ins-panel.html>>).

56. IBRD Articles, *supra* note 24.

57. Shihata, Opinion on Governance, *supra* note 35.

58. *Id.*; SHIHATA, *supra* note 5, at 53-97.

59. See Shihata, Opinion on Governance, *supra* note 35. It should be noted that the Bank has always recognized that political developments inside a country can be so important that they affect that country's future stability. In such situations, the Bank is required to consider these political developments because they will influence the project's success and the borrower's ability to perform its obligations under the loan agreement. See Broches Statement, *supra* note 35.

60. See Shihata, Opinion on Governance, *supra* note 35.

61. *Id.*



'management of money or the finances' or more generally the *efficient* management of the country's resources."<sup>62</sup>

The governance issues that the Bank considers inside its mandate demonstrate how the Bank applies these definitions. The Bank considers issues that relate to the degree and quality of the Borrower State's intervention in its economy as falling within the Bank's economic mandate because they have a direct effect on investment prospects in the country. Based on this rationale the Bank supports the Borrower State's efforts to reform its civil service, improve those aspects of its legal system that directly affect the conduct of commerce, increase the degree of accountability for public funds, and foster discipline in the budgeting process.<sup>63</sup>

The ambiguity in the Bank's interpretation of its mandate can be seen in its decision that female genital mutilation is an economic issue. The Bank has justified this decision by pointing to the economic costs associated with female genital mutilation.<sup>64</sup> In contrast, the Bank has not been willing to treat freedom of the press as an economic issue, despite the obvious economic costs associated with the lack of a free press.<sup>65</sup>

These examples suggest that the Bank's interpretation of its direct and obvious test is not based on easily identifiable criteria. The apparent arbitrariness of the direct and obvious test is not surprising. The test is easy to state but very difficult to apply. A key problem is that the test does not stipulate the time period over which the directness and the obviousness of the economic impact of the particular factor should be determined. If the time period for analysis is short, then relatively few nonobvious economic issues will have a direct and obvious effect.

Many Bank projects and programs, however, are implemented over a relatively long period of time and are designed to produce benefits over an even longer period. Consequently, it does not seem unreasonable to measure the direct and obvious effects of certain aspects of these operations over a period of time that roughly coincides with the project time frame. However, given that political and economic factors are inherently

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62. *Id.*

63. *Id.* See also WORLD BANK, GOVERNANCE: THE WORLD BANK EXPERIENCE (1994); WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992).

64. See George Graham, *Pledge over Female Mutilation: World Bank and IMF Win Commitment by Burkina Faso*, FIN. TIMES, Apr. 22, 1994, at A6.

65. JEAN DREZE & ARMATYA SEN, HUNGER AND PUBLIC ACTION 263-64 (1989). Professor Sen has stated that "[t]here has never been a famine in any country that's been a democracy with a relatively free press. . . . I know of no exception. It applies to very poor countries with democratic systems as well as to rich ones." Sylvia Nasar, *It's Never Fair to Just Blame the Weather*, N.Y. TIMES, Jan. 17, 1993, at A1. Another benefit of a free press is information disclosure. This enables investors to identify business opportunities and risks, and allows citizens to hold their government more accountable.



intertwined,<sup>66</sup> it is likely that within such a time frame almost all political, social, and cultural issues will have a direct and obvious economic effect on the Bank-funded project or program and on the Borrower State's ability to perform its loan obligations. Consequently, on the basis of the direct and obvious test, the Bank should treat almost all issues as economic issues.

To cite an example, consider a Bank Member State that decides on human rights grounds to grant all criminal defendants the right to counsel and a fair trial. *Prima facie*, this decision would appear to be a political decision that is not relevant to Bank decisionmaking. However, this decision, over time, can have significant and potentially contradictory economic effects. On the one hand, the resulting improvement in the Member State's human rights situation could lead to an improvement in business confidence, which could result in increased investment, increased employment, and reduced social tensions. On the other hand, the decision could lead to a reallocation of resources towards the criminal justice system, which could result in a reduction of resources available to the civil justice system. The need for police officers to spend more time in court testifying in criminal trials could lead to a reduction in the number of police officers available to prevent crime. In addition, the decision could lead to a budgeting reallocation to the criminal justice system with adverse consequences for other areas of the budget. These developments could adversely affect business confidence leading to a reduction in investment, a rise in unemployment and social tensions, and a decline in the Borrower State's ability to perform its loan obligations.<sup>67</sup> In either case, it is clear that the decision will have direct economic consequences.

The potential effects of this ostensible human rights decision therefore indicate that the Bank should treat the decision to grant criminal defendants the right to counsel as an economic issue. This creates a problem, however, in that it suggests that all issues are economic and that, as a result, there is no issue that is excluded from the scope of the Bank's jurisdiction. The Bank's adoption of such an approach would undermine its role as a specialized international organization and would substantially alter the balance in the Bank-Member State relationship. Nevertheless, it must be recognized that failure of the direct and obvious test to incorporate a temporal dimension either leads to the adoption of this all-encompassing approach or results in decisions that appear arbitrary.<sup>68</sup>

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66. *Limited Mandates*, *supra* note 3, at 413-16.

67. REGINALD H. GREEN, PARTICIPATORY PLURALISM AND PERVERSIVE POVERTY: SOME REFLECTIONS 21 (1989) (discussing the consequences of criminal justice reforms that are inspired by external pressure).

68. This issue will be addressed again in Part V. of this Article, in which the author discusses the contents of a possible IFI human rights policy.

## 2. *The Bank and the International Human Rights Conventions*

The second human rights issue raised by the Bank's operations focuses on the international human rights conventions. The fact that the Bank is not a signatory to any of the major human rights conventions means that the Bank is not required to specifically apply internationally recognized human rights standards in its operations. Similarly, it is not required to follow the decisions or recommendations of any of the specialized human rights agencies.<sup>69</sup> In theory, therefore, the Bank can develop its own human rights standards.

There are, however, limits on the Bank's ability to develop human rights guidelines that do not conform to internationally accepted human rights standards. First, the Bank is a specialized agency of the United Nations and consequently is required to act in conformity with the U.N. Charter.<sup>70</sup> Second, the Bank, as an international organization, is a subject of international law and therefore can not violate customary international law.<sup>71</sup> Thus, for example, it can neither directly nor indirectly fund States that practice genocide or racially discriminatory conduct. Also, the Bank's operations should not undermine the ability of its Member States to live up to their international legal obligations. This suggests that, at least in those countries that are signatories to human rights conventions, the Bank may have an obligation to ensure that its operations do not undermine the country's efforts to abide by these conventions.<sup>72</sup> This would include ensuring that the projects it funds do not distribute their costs and benefits in such a way as to undermine the Borrower State's efforts to meet its international legal obligations.

## 3. *The Bank-Borrower State Relationship*

The third human rights issue raised by the Bank's operations is the amount of influence it has over the development policies, including the human rights policies, of its Member States. The Bank is able to exert influence through its lending operations, policy dialogue, technical assistance, and research programs. The degree of influence will depend on the relative bargaining position of the Bank and the Member State. This

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69. There is no agreement requiring the Bank to abide by the recommendations of the United Nations or its specialized agencies. See U.N.-IBRD Relationship Agreement, *supra* note 6; U.N.-IDA Relationship Agreement, *supra* note 6.

70. DEREK W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* (4th ed. 1982); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* (3d ed. 1995).

71. BOWETT, *supra* note 70; SCHERMERS & BLOKKER, *supra* note 70.

72. Applying this standard will not be easy given the differing interpretations States may have about how to implement their human rights obligations. *Limited Mandates*, *supra* note 3. A satisfactory outcome to this problem would be facilitated by an explicit Bank human rights policy. For more detailed discussion of this issue, see *infra* Part V.A.

will be affected by such factors as the strength of the Bank's views on the Borrower State's needs, the relationship between the relevant Bank officials and the Borrower State, the quality of the State's own development planning, the clarity of the State's own perspective on the services it needs from the Bank, and the State's access to alternative sources of funds.

The Bank is able to use the lack of transparency in its interpretation of the political prohibition in its Articles to enhance its bargaining power. The lack of clear guidelines about what human rights and other political issues fall within its jurisdiction allow Bank officials great discretion in deciding which issues can and which can not be considered in the design and implementation of Bank-funded operations. This may work to the detriment of the Borrower State, which may be seeking to develop policies that are consistent with its international human rights obligations but which may not conform to the relevant Bank official's view of the appropriate policies for the State. It may also harm other stakeholders in the Bank-borrower relationship who may be seeking external assistance in encouraging a State to live up to its international legal obligations.

On the other hand, the lack of clear guidelines can present an opportunity for well-prepared Borrower States. These States, as well as nongovernmental stakeholders in Bank operations, can use their superior knowledge of local conditions and local needs, and their own development planning process to enhance their bargaining position with the Bank. In addition, if they can convince Bank officials to treat their human rights concerns as "economic" issues, they can also harness the services of the Bank to promote their own human rights agenda.

### *F. Protection of Human Rights*

The discussion so far has focused on the Bank's obligations to promote human rights. The Bank, however, also has some obligation to protect victims of human rights abuses from the perpetrators of those abuses. The Bank's obligations in this regard arise primarily when a potential Borrower State is guilty of serious human rights abuses. These abuses could be either directly related to or completely unconnected with the specific Bank operation. An example of abuses related to Bank activities would be where citizens suffer reprisals after accepting the Bank's offer to participate in the Bank-funded operation. An example of unconnected abuses would be where the Borrower State is guilty of widespread arbitrary arrests and detentions without trial, and in which the detainees are held for activities unconnected to the potential Bank-funded operation.

For a number of reasons, the protection of human rights is a much more difficult issue for the Bank than the promotion of human rights. The first reason is that no country in the world has a perfect human rights record. Consequently, if the Bank were to set too high a human rights standard it would not be able to lend to any country. On the other hand, if the Bank does

not set any such standards, it runs the risk of supporting governments that are engaging in gross human rights violations, and thus, which are incapable of promoting sustainable development.<sup>73</sup>

Second, the Bank's efforts to identify human rights situations that require it to take protective action are complicated by the fact that human rights law treats all human rights as being of equal value. Consequently, different States may choose to emphasize different human rights at different stages in their development process. It is not easy for the Bank or any other observer to balance respect for these choices with an assessment of when the State's human rights situation has reached such a serious state that it requires a specific Bank response.<sup>74</sup>

Third, the Bank's ability to protect human rights is limited by the fact that it is a specialized economic organization. Thus, the Bank is unlikely to have the in-house expertise needed to identify those human rights situations that are sufficiently serious to merit a Bank response or to determine what the appropriate response should be. There is, however, a solution to this problem. The Bank should work with specialized human rights organizations and other expert groups to formulate a policy for identifying countries where the human rights situation requires a response by the Bank.<sup>75</sup>

A fourth reason is that even after the Bank determines that the human rights situation is sufficiently serious to warrant protective action, it is not clear what the Bank's response should be. It is possible that any one of the following three mutually contradictory responses could be the most productive: (1) the Bank should cease making any loan commitments or disbursements to the State, (2) the Bank should continue lending on the assumption that the development projects it is funding will ultimately help produce a change in the State's human rights situation, or (3) the Bank should continue lending but only to projects which help empower the victims to defend their human rights.

Historically the Bank has responded by treating the issue of unconnected human rights violations as a political issue that is outside its jurisdiction. However, the Bank's efforts to promote good governance in Borrowing States undermines this position. There are two reasons for this. First, governance operations force the Bank to address issues relating to how the State manages its resources, including its human resources.<sup>76</sup> The management of human resources necessarily implicates human rights considerations. Second, it is difficult for the Bank to argue that

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73. Sustainable Development is a comprehensive process involving economic, social, cultural, political, and environmental aspects. See *supra* note 2 and accompanying text.

74. *Limited Mandates*, *supra* note 3.

75. Some proposals for this policy will be discussed in Part V. of this Article.

76. See WORLD BANK, GOVERNANCE AND DEVELOPMENT, *supra* note 63; WORLD BANK, GOVERNANCE, *supra* note 63.

governments guilty of widespread human rights violations are practicing sustainable good governance.

The question of how to deal with the protection of human rights victims has also acquired greater relevance now that the Bank is promoting participation as part of its standard operating procedure. In this regard the Bank needs to develop guidelines for determining when people have had an adequate opportunity to participate in Bank-funded projects. It also needs to formulate a policy for dealing with situations of inadequate participation and situations in which some person or group, invited to participate in a Bank-funded project, suffers reprisals as a result of their participation in the project design and implementation process.<sup>77</sup>

### G. *The Institutional Human Rights Issue*

The final issue that human rights raise for the Bank relates to its own internal operating procedures. The Bank, as a subject of international law, should ensure that its operations are conducted in a way that is consistent with the internationally recognized rights of the citizens of its Member States. This suggests that the Bank's operating rules and procedures should incorporate such elements of due process as transparent procedures, open communications, and accountability.<sup>78</sup>

## III. THE INTERNATIONAL MONETARY FUND

### A. *Introduction*

In this section I argue that over the past 50 years the IMF has been transformed from a monetary institution with a clearly defined scope of operations into an institution whose activities often appear to focus more on developmental than monetary matters.<sup>79</sup> While the causes of this

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77. See *Limited Mandates*, *supra* note 3; Shihata, *Democracy and Development*, *supra* note 2, at 7.

78. It should be pointed out that these rights coincide with the elements of good governance that the Bank suggests its Borrower States incorporate into their own operating practices. Consequently, it is hard to see what objection there can be to the Bank practicing what it itself preaches. Daniel D. Bradlow, *International Organizations and Private Complainants: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994). The institutional challenges that this creates for the Bank will be discussed in a later part of this Article. See *infra* Part IV.

79. For reviews of the IFI's first 50 years of operation, see, e.g., Robert S. Browne, *Rethinking the IMF on its Fiftieth Anniversary*, in *THE WORLD BANK'S MONETARY SYSTEM* (Jo Marie Griesgraber & Bernhard G. Gunther eds., 1996); Barry Eichengreen & Peter B. Kenen, *Managing the World Economy Under the Bretton Woods System*, in *MANAGING THE WORLD ECONOMY 3* (Peter B. Kenen ed., 1994); *BRETTON WOODS COMMISSION, BRETTON WOODS: LOOKING TO THE FUTURE* (1994); *FIFTY YEARS AFTER BRETTON WOODS: THE FUTURE OF*

expansion in the IMF's operations differs from those of the Bank, the result has been similar. Today, the IMF, like the Bank, exerts some influence over the human rights situation in its Member States.<sup>80</sup> Moreover, the IMF is exerting this influence with an even less developed human rights policy than the Bank.

In order to make this case, I shall begin with a discussion of the IMF's Articles of Agreement and the evolution in its operations. This discussion will be followed by an analysis of the IMF's present involvement in the human rights situation in its Member States.

### *B. The IMF's Mandate*

The IMF, like the Bank, is a specialized agency of the United Nations.<sup>81</sup> It was established to help regulate the international monetary system and to provide financial support to Member States that were experiencing balance of payments problems. According to its Articles of Agreement, the purposes of the IMF, *inter alia*, are to promote monetary cooperation, to promote orderly and stable exchange rates, to assist in the establishment of a multilateral system of payments for current transactions, and to give confidence to Member States by helping them correct balance of payments problems in a manner that is not destructive of either international or domestic prosperity.<sup>82</sup>

Until the collapse of the par value system,<sup>83</sup> the IMF's job was relatively simple. It monitored its Member States' international monetary policies to ensure that they were consistent with the maintenance of their currencies'

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THE IMF AND THE WORLD BANK (James M. Boughton & K. Sarwar Lateef eds., 1995) [hereinafter FIFTY YEARS AFTER].

80. Margaret Conklin & Daphne Davidson, *The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985*, 8 HUMAN RIGHTS QUARTERLY 227 (1986); Michael Lucas, *The International Monetary Fund's Conditionality and the International Covenant on Economic, Social and Cultural Rights: An Attempt to Define the Relation*, 25 R. BEL. D. INT'L 104 (1992); Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. INT'L. L.J. 81 (1993).

81. U.N.-IMF Relationship Agreement, *supra* note 6.

82. IMF Articles, *supra* note 12, art. I.

83. According to the original Articles of the IMF, each Member State was required to establish a fixed value for its currency. Each State had to ensure that its currency did not fluctuate in value by more than 1% above or below this par value. (This was later changed to 2.5%.) IMF Member States, therefore, had a legal obligation to take corrective action any time the value of their currency began to deviate from the par value by more than the prescribed amount. Only in cases of "fundamental disequilibrium" could States change the par value of their currency by either devaluing or revaluing it. IMF Articles, *supra* note 12, art. IV (Articles prior to amendments); EDWARDS, *supra* note 12; JOSEPH GOLD, LEGAL EFFECTS OF FLUCTUATING EXCHANGE RATES 3 (1990).

par value. The IMF was also expected to provide its members with short-term financing when they experienced balance of payments difficulties.<sup>84</sup>

The IMF's primary mechanism for monitoring its Member States' exchange rates and balance of payments policies was (and still is) the regular consultations it conducted with these States pursuant to Article IV of its Articles of Agreement. The par value system tended to place some limits on the scope of these Article IV consultations. Since the purpose of these periodic consultations was to determine the State's ability to maintain its par value, the consultations could be limited to those macroeconomic variables that directly affected the external value of the State's currency during the period under consideration (usually one year). Thus, the focus of the consultations tended to be on such issues as interest rates, money supply, government debt, inflation, and the current account of the balance of payments. The scope of these discussions were also somewhat constrained by Article IV which requires that the IMF "respect the domestic social and political policies of members, and in applying these principles . . . pay due regard to the circumstances of members."<sup>85</sup> The IMF has interpreted this provision as a prohibition against considering political factors in its operations.<sup>86</sup>

The par value system also operated to limit the range of conditions that the IMF would attach to the financial support it offered to its Member States.<sup>87</sup> Under a par value system, the exchange rate is the primary anchor for the economy. This meant that, except in exceptional circumstances,<sup>88</sup> the burden of adjustment fell on the domestic economy of countries with balance of payments disequilibria.<sup>89</sup> Consequently, the IMF conditions could be limited to those macroeconomic variables—government debt,

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84. EDWARDS, *supra* note 12.

85. IMF Articles, *supra* note 12, art. IV, sec. 3(b).

86. Joseph Gold, *Political Considerations Are Prohibited by Articles of Agreement When the Fund Considers Requests for Use of Resources*, IMF SURVEY, May 23, 1983, at 146; see also Gianviti, *supra* note 24. It should be noted that the language of the IMF's Article IV is less restrictive than the political prohibition in the Bank's Articles. This suggests that the IMF's Articles provide broader scope for developing a human rights policy than the Bank's.

87. Pursuant to Article V, the IMF must ensure that its Member States use its funds in accordance with the IMF's purposes and that the Member State will be able to resell the funds to the IMF within a relatively short period of time. IMF Articles, *supra* note 12, art. V, sec. 2. In order to execute these requirements the IMF attaches specific performance-related conditions to the use of its financing facilities. These conditions form the basis of IMF conditionality. For a discussion of IMF Conditionality, see, e.g., JOSEPH GOLD, CONDITIONALITY (IMF Pamphlet Series No. 31, 1979); MANUEL GUITIAN, FUND CONDITIONALITY: EVOLUTION OF PRINCIPLES AND PRACTICES (IMF Pamphlet Series No. 38, 1981). For case studies on conditionality, see, e.g., IMF CONDITIONALITY (John Williamson ed., 1983); CHERYL PAYER, THE DEBT TRAP: THE INTERNATIONAL MONETARY FUND AND THE THIRD WORLD (1974).

88. See *supra* note 83. See, e.g., EDWARDS, *supra* note 12.

89. See JEFFREY D. SACHS & FELIPE LARRAIN B., MACROECONOMICS IN THE GLOBAL ECONOMY (1993).





money supply, inflation, budget deficits—that were directly relevant to the attainment of a sustainable balance of payments position, based on a currency with a relatively fixed value. The scope of the issues discussed in each Member State's letter of intent could also be limited to these macroeconomic issues.<sup>90</sup>

In this regard, it should be recognized that the IMF was concerned primarily with the actual attainment of these macroeconomic goals. It only had a secondary interest in how the Member State reached these targets. Consequently, the precise methods used to reach these goals could be left to the discretion of the Member State. This tended to impose some constraint on the IMF's ability to intervene in the policymaking processes of its Member States.<sup>91</sup>

### *C. The Evolution in the IMF's Operations*

#### *1. The End of the Par Value System*

The collapse of the par value system in 1971 changed this relatively simple picture.<sup>92</sup> The par value system was replaced with a market-oriented exchange rate system which allows participating States to let their currencies fluctuate in value.<sup>93</sup> In such a floating exchange rate system, the exchange rate becomes only one of the many economic variables that can influence the country's balance of payments. Floating exchange rates allow a country to correct a balance of payments problem by making adjustments either in the value of its currency or in its domestic economy.<sup>94</sup>

This change expanded the range of issues that the IMF needed to address in its Article IV consultations with its Member States. For example, because such issues as labor, health, and agricultural policies can directly

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90. In order to utilize the resources of the IMF, a Member State must submit a letter, known as letter of intent, to the Managing Director of the Fund. This letter contains a description of the policies the Member State intends to follow to correct its balance of payments problems. For examples of letters of intent, see *THE IMF AND GHANA: THE CONFIDENTIAL RECORD* 61 (Eboe Hutchful ed., 1987) (letter from Ghana); EDWARDS, *supra* note 12 (letter from India); KATHLEEN BURK & ALEC CAIRNCROSS, 'GOODBYE GREAT BRITAIN': *THE 1976 IMF CRISIS* 229 (1992) (letter from United Kingdom).

91. The efficacy of these constraints is open to debate. See, e.g., PAYER, *supra* note 87; BURK & CAIRNCROSS, *supra* note 90; *THE IMF AND GHANA: THE CONFIDENTIAL RECORD*, *supra* note 90.

92. See MARGARET GARRITSEN DE VRIES, *THE IMF IN A CHANGING WORLD 1945-1985* (1986).

93. The market-oriented exchange rate system was enacted by the Second Amendment to the IMF Articles in April, 1978. The Second Amendment also prohibited a Member State from basing its exchange rate on gold. See JOSEPH GOLD, *USE, CONVERSION, AND EXCHANGE OF CURRENCY UNDER THE SECOND AMENDMENT OF THE FUND'S ARTICLES* (1978); see also GOLD, *supra* note 83.

94. SACHS & LARRAIN, *supra* note 89.

affect the value of a country's currency and its ability to adjust to changes in its balance of payments, the IMF needs to consider all these issues in its surveillance of its Member States' monetary policies. In fact, over time the IMF has found it necessary to expand the range of issues included in its consultations. The result is that today, during Article IV consultations, the IMF may discuss such issues as the level of military expenditures, environmental issues, governance issues, and social safety nets (which amount to welfare, housing, and unemployment policies).<sup>95</sup>

The broad scope of the Article IV consultations suggests that the IMF can exert influence over the human rights situation in Member States. Discussions between the IMF and the Member State about such issues as labor policies, health care, and social security can influence economic and social rights in the State. Similarly, when the senior staff of the IMF talks both publicly and privately about the importance of the rule of law and good governance to development, they can influence the state of civil and political rights in Member States.<sup>96</sup>

The extent of the IMF's influence will vary depending on the identity of the Member State. If the State has a healthy economy or is rich enough that it is unlikely to need the resources of the IMF, it is free to accept or reject the IMF's views. On the other hand, poor States or those States that are using or expect to use the IMF's financing facilities can not treat the IMF's advice so dispassionately. Only at a theoretical level do these States have the same capacity as the rich Member States to accept or reject the IMF's advice. Consequently, the IMF tends to have much greater influence over the policies of poorer States than over richer States.

## 2. *The Economic Crises of the 1970s and 1980s*

The oil and debt crises of the second half of the 1970s and the 1980s also caused changes in the operations of the IMF. These crises resulted in a shift in the identity of the countries that make the most extensive use of the services and facilities of the IMF. Prior to these crises, the primary users of the IMF's financing services were industrialized countries. Since the

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95. See, e.g., SOCIAL DIMENSIONS OF THE IMF'S POLICY DIALOGUE, (IMF Pamphlet Series No. 47), excerpted in IMF SURVEY, Apr. 3, 1995, at 97; Robert Brauning, *Summit Sets Standard for Social Policies*, IMF SURVEY, Apr. 3, 1995, at 101 (quoting speech of IMF Managing Director Michel Camdessus at Social Summit); *Gender Issues in Economic Adjustment Discussed at U.N. Conference on Women*, IMF SURVEY, Sept. 25, 1995, at 286 (speech of IMF representative K. Burke Dillon at the Beijing Conference on Women) [hereinafter Dillon Speech].

While the range of issues discussed in the IMF's standby decisions has expanded, the IMF has not explicitly incorporated the full range of social and human-rights-related issues into the conditionalities attached to its financing facilities.

96. See *supra* note 80; see also *Limited Mandates*, *supra* note 3, for citations to other IMF statements on these issues.



advent of these crises the primary users of its services have been developing countries.<sup>97</sup>

The change in the IMF's clientele necessarily produced changes in its operations because the causes of (and the solutions to) the balance of payments problems of developing countries are not identical to those of industrialized countries. The balance of payments problems of developing countries, in part, are attributable to their level of development. Consequently, their balance of payments problems have structural dimensions which cannot easily be resolved within the parameters of the IMF's standard short-term standby arrangement. The IMF responded by developing longer-term financing facilities, such as the Extended Fund Facility and the Enhanced Structural Adjustment Facility (ESAF).<sup>98</sup>

The longer-term facilities lengthened the time period within which the IMF expected its adjustment policies to work. As a result, the IMF was able to change its assumptions about which factors should be treated as fixed and which as variable in the design of its stabilization and adjustment programs. Most significantly, the IMF relaxed its assumptions about the fixed nature of the supply side of a country's economy.<sup>99</sup> This has enabled the IMF to begin including in its conditionality policies some measures designed to produce changes in the Member State's production profile.<sup>100</sup>

A necessary consequence of this change is that the IMF, when deciding how to incorporate supply-side issues into its policies and programs, has begun to pay close attention to the speed at which, and the extent to which people in the country can actually make changes in the production side of the economy. This requires some analysis of the economic, social, and cultural impediments in the Member State.

As the discussion above illustrates, the change in the IMF's clientele has forced the IMF to address the social, cultural, and governance features of its Member State's political economy.<sup>101</sup> The result of these developments is that today almost all IMF standby and ESAF arrangements include

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97. See DE VRIES, *supra* note 92; MANAGING THE WORLD ECONOMY, *supra* note 79; BRETTON WOODS COMMISSION, *supra* note 79.

98. For IMF publications that discuss the ESAF and EFF, see TREASURER'S DEPARTMENT, *supra* note 13. For a discussion of the history of the IMF, see DE VRIES, *supra* note 92, and HOOKE, *supra* note 13.

99. In its standard twelve- to eighteen-month standby arrangements, the IMF tends to assume that the country has very limited ability to increase the amount or the range of goods and services it produces. Consequently, its conditionalities tend to require the country to correct its balance of payments position by decreasing the level of demand in the domestic economy. See GOLD, *supra* note 87; GUITIAN, *supra* note 87.

100. See GOLD, *supra* note 87; IMF CONDITIONALITY, *supra* note 87; GUITIAN, *supra* note 87.

101. See, e.g., SOCIAL DIMENSIONS OF THE IMF'S POLICY DIALOGUE, *supra* note 95; Brauning, *supra* note 95; Dillon Speech, *supra* note 95; see also *Limited Mandates*, *supra* note 3; Robert S. Browne, *Alternatives to the International Monetary Fund*, in *BEYOND BRETTON WOODS 57* (John Cavanagh et al. eds., 1994).

discussions of social safety nets and market-oriented reforms.<sup>102</sup> In addition, IMF officials talk about the importance of transparent and accountable governance and of the rule of law to economic development.<sup>103</sup>

#### *D. The Human Rights Implications of the IMF's Operations*

##### *1. Limits on the IMF's Influence*

The extent of the IMF's influence over human rights is more limited than the Bank's. There are several reasons for this. The first is that the IMF is a monetary, not a development institution. Even though its operations focus on developing countries and their problems, its primary focus still remains on macroeconomic, and in particular, monetary issues. It is less involved than the Bank at the micro-level of the economy, which is the level that the policies and operations of the IFIs most directly affect the human rights situation of the citizens of their Member States.

The second reason for the IMF's more limited human rights influence is that the IMF tends to operate with a much shorter time horizon than the Bank. This is particularly pertinent for human rights issues, which tend to require longer periods for change than do the issues usually focused on by the IMF. Consequently, there is a temptation for the IMF to treat human rights issues as fixed during the period in which the IMF program will be implemented.<sup>104</sup>

Even though the IMF has less influence than the Bank, the IMF still exerts some influence over its Member States' human rights situations through its Article IV consultation process and through its use of conditionalities attached to its financing facilities. Thus, like the Bank, it needs a human rights policy that can inform all the stakeholders in its operations about what they can expect from the IMF in this regard.<sup>105</sup>

#### *E. The Protection of Human Rights*

The third issue relating to the IMF's human rights responsibilities in its operations is that the IMF, as a subject of international law, has some responsibility to help protect the citizens in its Member States from human rights abuses. It cannot be indifferent to situations in which human rights

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102. This can be deduced from a review of the press releases that announce the IMF Board of Executive Directors' standby decisions. These press releases are published in the IMF Survey.

103. See, e.g., Brauning, *supra* note 95.

104. Even in longer-term facilities, the precise performance criteria on which IMF financing is conditioned are only established approximately on a twelve-month basis. See TREASURER'S DEPARTMENT, *supra* note 13, at 83-86 (describing Extended Fund Facilities and ESAFs)

105. See *infra* Part V. for further discussion of this issue.



abuses have become so serious as to cause monetary consequences. For example, during the 1980s, the IMF was forced to recognize that the systematic abuses caused by South Africa's apartheid policy had adverse effects on its ability to meet its obligations as a Member of the IMF. As a result the IMF was forced to limit South Africa's access to the resources and services of the IMF.<sup>106</sup>

It should be noted that the IMF faces a more difficult situation in this regard than the Bank. There are three reasons for this. First, as the manager of the international monetary system, the IMF must balance its responsibilities to the citizens of the violating State against its responsibilities to the other stakeholders in the international monetary system. Consequently, it cannot easily impose sanctions on a State that violates human rights if this would have a substantial adverse effect on the international monetary system.

Second, the IMF has fewer options than the Bank for dealing with human rights abuses. Because the IMF provides financing for general balance of payments support rather than for specific projects,<sup>107</sup> it cannot easily direct the flow of the financing. Consequently its only option when faced with a serious human rights problem is to either deal with the State purely on the basis of its monetary situation or to impose sanctions on the State.

Third, the Articles of Agreement constrain the IMF's ability to use sanctions. The Articles require the IMF to make its financing facilities available to any Member State in good standing who is suffering the type of balance of payments problem that the facility was established to help correct.<sup>108</sup> A member is in "good standing" if it is performing all the obligations of membership in the IMF.<sup>109</sup> These obligations, as stipulated in the Articles of Agreement, do not include human rights performance.<sup>110</sup>

It should be noted that the Articles do not, however, preclude the IMF from raising serious human rights issue in its Article IV consultations with its Member States.<sup>111</sup> It can justify doing so on the grounds that poor human rights performance can have an adverse effect on the State's

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106. See Jim Morell, *A Billion Dollars for South Africa*, INT'L POL'Y REP., Apr. 1983, at 1; Morell, *A Victory over Apartheid*, INT'L POL'Y REP., Apr. 1984, at 1. [hereinafter both Morell articles referred to as International Policy Papers]; see also Daniel D. Bradlow, *Debt, Development and Democracy: Lessons from South Africa*, 12 MICH. J. INT'L L. 647 (1991).

107. See EDWARDS, *supra* note 12, at 12; GOLD, *supra* note 87.

108. See Joseph Gold, *Uniformity as a Legal Principle of the International Monetary Fund*, 7 LAW. & POL'Y INT'L BUS. 765 (1975).

109. *Id.*

110. See IMF Articles, *supra* note 12.

111. See *supra* notes 85-86 and accompanying text (discussing interpretation of Article IV).

balance of payments position.<sup>112</sup> This follows from the fact that a poor human rights situation has economic costs that affect the allocation and utilization of resources, including human resources.

The final human rights issue that the IMF must address is the issue of its human rights responsibilities in regard to its own internal operating policies and procedures. The IMF's institutional human rights obligations will be discussed with those of the Bank in the next section of this Article.

#### IV. INSTITUTIONAL ISSUES

##### *A. Description of the Issues*

As subjects of international law, the IFIs are required to ensure that their operating rules and procedures conform to the standards of international law and do not undermine the efforts of their Member States to satisfy their own international legal obligations. This suggests that the IFIs' operating rules and procedures should be transparent, should provide affected parties with a meaningful opportunity to participate in the design and implementation of their operations, and should hold IFI staff accountable for their actions and decisions.

In recent years, both the Bank and the IMF have experienced problems with their operating rules and procedures.<sup>113</sup> An internal investigation into the Bank's management of its loan portfolio found problems that were attributable, at least in part, to deficiencies in the operational procedures of

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112. The U.S. Congress used this logic in deciding to order the U.S. Executive Director at the IMF to vote against IMF Financing for South Africa during the 1980s. See 22 U.S.C. § 286aa (1988); see also Bradlow, *supra* note 106 (discussing U.S. policy towards IMF financing for South Africa); International Policy Papers, *supra* note 106.

113. See Moises Naim, *The World Bank: Its Role, Governance and Organizational Culture*, in BRETTON WOODS COMMISSION, *supra* note 79, at C-273; Bradlow, *supra* note 78; Lori Udall, *The World Bank's Revised Information Policy and New Inspection Panel: Public Accountability or Public Relations*, in BEYOND BRETTON WOODS, *supra* note 101, at 145; Bruce Rich, *The World Bank: Institutional Problems and Possible Reforms*, Memorandum from Bruce Rich to Interested NGOs, IGC Conferences, Researchers, Bank Watchers, etc. (March 1995) (on file with author) [hereinafter Rich Memorandum]; Report of the Portfolio Management Task Force, *Effective Implementation: Key to Development Impact* [hereinafter Wapenhans Report]; SARDAR SAROVAR, *supra* note 43; Jeffrey Sachs, *Will the Banks Block Debt Relief?*, N.Y. TIMES, Mar. 21, 1989, at A25; *Oversight of the IMF and World Bank, Meeting of a Multinational Group of Parliamentarians Involved in Oversight of the IMF and World Bank Before the Subcomm. on International Development, Finance, and Monetary Policy Trade of the House Comm. on Banking, Finance and Urban Affairs*, 103rd Cong., 2nd Sess., 26-28, 47-48 (1994) (statement of Jeffrey Sachs, Professor of Economics) [hereinafter Inter-Parliamentary Meeting]; *Testimony to Subcomm. on Development, Finance, Trade, and Monetary Policy of the Comm. on Banking, Finance, and Urban Affairs*, 104th Cong., 1st Sess., 8-12, 51-52 (1996) (Statement of Jeffrey Sachs, Professor of Economics); Jeffrey Sachs, *Towards Glasnost in the IMF*, CHALLENGE, May-June 1994, at 4.

the Bank.<sup>114</sup> The IMF has also been criticized for its handling of such situations as the 1994 currency crisis in Mexico and the complex problems resulting from the breakup of the former Soviet Union.<sup>115</sup> The IMF's problems are also attributable in part to deficiencies in its operating practices.<sup>116</sup>

The reasons the IFIs have experienced these problems are not hard to find. Historically, both institutions have not been easily accessible to the public; both have been reluctant to make adequate amounts of information publicly available in a timely manner; and both have been insufficiently accountable to those who are most directly affected by their actions. In addition, staff incentives in both institutions are more responsive to their prior narrower range of activities and the technical issues that arose from them than to the broad ranging and complex policy choices that the institutions now have to make.<sup>117</sup>

In the case of the Bank, this created what the Wapenhans report called a "loan approval" culture which encouraged Bank staff to lend money. This was accompanied by an institutional bias in favor of large, complex projects rather than smaller, simpler projects which, while more labor and resource intensive, are also more amenable to public participation and tend to be more directly responsive to the needs of their intended beneficiaries.

Similarly, the IMF rewards staff for their technical proficiency rather than for taking the time to engage in the wide-ranging consultations and exchanges of information necessary to ensure that the IMF's operations are transparent and sensitive to the interests of those who will be affected by them. In this regard, the IMF tends to limit its discussions to a small number of government ministries. The Articles require the IMF to establish either the Central Bank or the Ministry of Finance as its contact point with the government.<sup>118</sup> There is no obligation on the IMF to broaden its contacts beyond these two governmental actors.

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114. Wapenhans Report, *supra* note 113.

115. Sachs, Inter-Parliamentary Meeting, *supra* note 113; BRETTON WOODS COMMISSION, *supra* note 79; FIFTY YEARS AFTER, *supra* note 79; MANAGING THE WORLD ECONOMY, *supra* note 79.

116. Inter-Parliamentary Meeting, *supra* note 113 (stating, *inter-alia*, that it is harder to get information from the IMF than from the CIA).

117. See Wapenhans Report, *supra* note 113; Rich, *supra* note 113; BRETTON WOODS COMMISSION, *supra* note 79; FIFTY YEARS AFTER, *supra* note 79; MANAGING THE WORLD ECONOMY, *supra* note 79. See generally PROMOTING DEVELOPMENT: EFFECTIVE INSTITUTIONS FOR THE TWENTY-FIRST CENTURY (Jo Marie Griesgraber & Bernard Gunther eds., 1995); RETHINKING BRETTON WOODS: TOWARDS EQUITABLE, SUSTAINABLE AND PARTICIPATORY DEVELOPMENT (Jo Marie Griesgraber & Bernard Gunther eds., 1994) [hereinafter RETHINKING BRETTON WOODS]; THE WORLD BANK: LENDING ON A GLOBAL SCALE (Jo Marie Griesgraber & Bernard Gunther eds., 1996); THE WORLD'S MONETARY SYSTEM: TOWARD STABILITY AND SUSTAINABILITY IN THE TWENTY-FIRST CENTURY (Jo Marie Griesgraber & Bernard Gunther eds., 1996).

118. IMF Articles, *supra* note 12, art. V, sec. 1.

### B. *The Response of the Bank*

The Bank has begun to address these problems. First, it has undertaken an extensive participation learning exercise and is now determining how to incorporate public participation into all phases of its project cycle.<sup>119</sup> Second, it has adopted a new information disclosure policy that increases the amount of public information available about Bank projects.<sup>120</sup> Third, the Bank has substantially expanded and formalized its relations with NGOs.<sup>121</sup> As a result, the Bank President requires all Bank Resident Representatives to hold regular meetings with the NGOs in their respective countries. Fourth, the Bank has established an Inspection Panel that provides private actors harmed by the Bank's failure to abide by its own rules and procedures with a mechanism for holding the Bank publicly accountable.<sup>122</sup> Finally, the Bank has taken steps to incorporate more extensive social assessments into its operations.<sup>123</sup>

The Bank is also addressing the staff incentive problem by changing its operating practices to emphasize the quality rather than the quantity of Bank-funded projects. In addition, the Bank is encouraging its staff to ensure that borrowers and other stakeholders feel a sense of "ownership" in Bank-funded projects. The Bank hopes that these changes will make projects more responsive to the interests of those who are the project's

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119. PARTICIPATION SOURCEBOOK, *supra* note 11; BHUVAN BHATNAGAR & AUBREY C. WILLIAMS, PARTICIPATORY DEVELOPMENT AND THE WORLD BANK (World Bank Discussion Papers No. 183, 1992); *see also* Robert Picciotto & Rachel Weaving, *A New Project Cycle for the World Bank?*, FIN. & DEV., Dec. 1994, at 42.

120. *See* WORLD BANK, THE WORLD BANK POLICY ON DISCLOSURE OF INFORMATION (1994). The Bank has created a Project Information Document which is issued for each project now under consideration at the Bank. This document is available from the Public Information Center. *See* OPERATIONAL MANUAL, *supra* note 8, B.P. 17.50, for a complete listing of the documents that the Bank now makes publicly available through the Public Information Center.

121. Ibrahim F.I. Shihata, *The World Bank and Non-Governmental Organizations*, in SHIHATA, *supra* note 5.

122. World Bank Inspection Panel, Res. 93-10, International Bank for Reconstruction and Development, Res. 93-6, International Development Association, Sept. 22, 1993; IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL (1994); DAVID HUNTER & JAY UDALL, THE WORLD BANK'S NEW INSPECTION PANEL: WILL IT INCREASE THE BANK'S ACCOUNTABILITY? (Center for International Environmental Law, Brief No. 1, April 1994); Bradlow, *supra* note 78; Daniel D. Bradlow & Sabine Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 ZEITSCHRIFT FÜR AUSLÄDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG JOURNAL OF INTERNATIONAL LAW] 392, 554 (1994).

123. *See* World Bank, Guidelines for Incorporating Social Assessment and Participation into Bank Projects (Draft Memorandum, Feb. 14, 1996) (on file with author) [hereinafter World Bank Guidelines on Social Assessment]; Peter Montague, *World Bank Loan for Pakistan*, FIN. TIMES, Dec. 21, 1995, at 3 (Bank has approved loan for dam project in Pakistan that is first project in which an independent panel of social scientists have helped guide project preparation.)





intended beneficiaries. It expects these changes to enhance the sustainability of the projects.<sup>124</sup> The Bank has also begun to broaden the focus of its operations from the project to the country level. This should make it easier for the Bank and the country to shift funds from problem projects to the country's most effective development projects and programs.

Each of these changes is subject to criticism. For example, the information disclosure policy has been criticized for not providing the public with adequate information at a meaningful time in the project cycle. In addition, while information is publicly available in Washington, it is not easily available to people in the Bank's Borrower States, who are, after all, those most directly affected by the Bank's actions. Consequently, some critics argue, the new policy has not materially helped those most vulnerable to, and most directly affected by, the Bank's operations. These vulnerable groups still find it difficult to protect their interests and promote a sustainable and equitable development process.<sup>125</sup>

While these criticisms raise important issues, they should not undermine the potential advances created by the Bank's actions. The changes in the Bank's operating procedures have created opportunities for stakeholders who have the requisite resources to take advantage of them. These stakeholders can use the Bank's information disclosure policies, participation requirements, and Inspection Panel to engage the Bank in a dialogue about human rights and other relevant issues. In addition, they can use these changes in the Bank's operating procedures to increase the likelihood that the Bank's operations will be designed and implemented in a way that is sensitive to the human rights issues that may arise in the course of Bank-funded projects and programs.

### *C. The Situation of the IMF*

The IMF has moved more slowly than the Bank to address the challenges posed by its expanded scope of operations. It has begun to make some efforts to communicate with NGOs; however, it has not yet formalized a process for such communication. In fact, the IMF does not appear to have any explicit staff requirements relating to consultations with NGOs. As a result, the IMF is able to engage in substantial and wide-ranging policymaking consultations with its Member States without engaging in meaningful consultations with interested nongovernmental actors.<sup>126</sup>

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124. WORLD BANK, *GETTING RESULTS: THE WORLD BANK'S AGENDA FOR IMPROVING DEVELOPMENT EFFECTIVENESS* (1993).

125. Udall, *supra* note 113, at 145. For criticism of the other changes in Bank operations, see Bradlow, *supra* note 78, at 563; Naim, *supra* note 113; Udall, *supra* note 113; Udall & Hunter, *supra* note 122; Rich Memorandum, *supra* note 113.

126. Since it tends to focus its attention on the Finance Ministries and the Central Banks in its Member States, the IMF is also able to make policies without necessarily consulting all interested line ministries in the country's government.

The IMF has also made minimal efforts to publicly disclose information about its activities. To date, its most significant attempt to develop better information flows was to suggest that its Member States publicly release the reports prepared at the end of the Article IV consultations.<sup>127</sup> Nevertheless, the IMF remains such a closed institution that one commentator was moved to note that it is often harder to get information from the IMF than from the CIA.<sup>128</sup>

In addition, stakeholders in the IMF's operations have no real means for holding the IMF directly accountable for its actions. Unlike the Bank, the IMF does not have a *post hoc* independent audit department that can provide the directors and governors of the IMF with an independent review of the efficacy of its operations.<sup>129</sup> In addition, it has no formal mechanism, like the Bank's Inspection Panel, for handling complaints from non-state actors who allege that they have suffered or are threatened with material harm caused by a failure in the IMF's operating procedures.

#### D. Conclusion

The above description of the institutional responses of the IFIs suggests that they are failing to live up to the same standards of good governance that they themselves advocate to their Member States.<sup>130</sup>

### V. SOME THOUGHTS ON THE CONTENTS OF AN IFI HUMAN RIGHTS POLICY

#### A. *The Need for a Human Rights Policy*

The Bank and the IMF both lack adequate policies for dealing with the human rights implications of their operations. While the Bank has taken measures to address both the operational and the institutional dimensions of the human rights impact of its operations, it has not yet developed a coherent and publicly available human rights policy. Its present human rights policies must be deduced from the writings and statements of its

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127. Switzerland established the precedent of releasing these reports. It should be noted that the IMF originally did not support the Swiss initiative.

128. Sachs, Inter-Parliamentary Hearings, *supra* note 113.

129. The Bank's Operations Evaluation Department conducts *post hoc* reviews of Bank operations. It is independent in the sense that it reports directly to the Bank's Board of Directors and not to the Bank's Management.

130. It should be noted that all these criticisms are the subject of ongoing international NGO campaigns. See, e.g., RETHINKING BRETTON WOODS, *supra* note 117; FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994).



management and staff, and from its actions.<sup>131</sup> These statements and actions, however, do not provide adequate clarity. They tend to acknowledge that human rights are important to development and, therefore, to the work of the Bank; however, by emphasizing the constraints on the Bank's ability to deal with human rights issues, these statements suggest that many human rights issues are outside the Bank's mandate.<sup>132</sup> Thus, even when the Bank appears to base its decisions on human rights grounds—for example denying funding to countries such as Kenya or Malawi under former President Banda—it tends to emphasize the economic rationale for its decision, thereby implying that human rights are outside its mandate.<sup>133</sup>

The IMF's policy on human rights is even harder to detect. The primary evidence of an IMF position on human rights is found in the writings and statements of its representatives. Like the Bank, the IMF sends contradictory signals in these statements. For example, in his public speeches, the Managing Director has recognized the importance of human rights to the development process. At the same time, he and other authorities on the IMF have also suggested that the IMF can not play a role in promoting human rights.<sup>134</sup> However, they do not explain why, if human rights are so important, the IMF can ignore them in its operations and policies.

The result is that to outside observers the decisions the IFIs make when confronted with human rights issues appear to be *ad hoc* and somewhat arbitrary. In fact, the IFIs seem to use the constraints imposed by their Articles to justify extending the scope of their operations to areas they want to deal with and as an excuse to avoid those human rights problems they do not wish to address.<sup>135</sup> This situation makes it difficult for the various

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131. See SHIHATA, *supra* note 5; Wolfensohn, *supra* note 2; GOVERNANCE, *supra* note 51; UPDATE ON GOVERNANCE, *supra* note 51 (discussing lending decisions regarding China after Tienamin Square, and Malawi and Kenya in the late 1980s and early 1990s). For earlier evidence, see Broches Statement, *supra* note 35 (discussing lending decisions regarding South Africa and Portugal in 1966); Victoria E. Marmorstein, *World Bank Power to Consider Human Rights*, 13 J. INT'L L. & ECON. 113 (1978). It should be noted that the Bank's Board of Executive Directors has not made all the Bank's General Counsel's legal opinions relevant to this issue publically available.

132. For the most recent example of this, see Shihata, *Democracy and Development*, *supra* note 2.

133. GOVERNANCE, *supra* note 51; UPDATE ON GOVERNANCE, *supra* note 51.

134. See Brauning, *supra* note 95, at 101; Dillon speech, *supra* note 95, at 287; *Excerpts from closing address by Managing Director Michel Camdessus at 1994 Annual Meeting of the IMF*, IMF SURVEY, Oct. 17, 1994, at 328; *Excerpts from closing address by Managing Director Michel Camdessus at 1995 Annual Meeting of the IMF*, IMF SURVEY, Oct. 23, 1995, at 334-35. Joseph Gold states: "The swimmer who goes out too far may seem to be waving but he is drowning. The Fund that swims out too far even, in a moral cause, will risk drowning. It will have lost the full confidence of its members. It will be less able to promote universal prosperity. That task is the Fund's moral cause." Gold, *supra* note 86, at 148.

135. For example, the Bank has not allowed its political prohibitions to preclude it from considering such issues as gender equality and special treatment for indigenous people and



stakeholders to know what they can expect from the IFIs in terms of promoting and protecting human rights. It also makes it difficult for the IFI staff to know how they are expected to handle the human rights issues that arise in the course of their duties. Finally, the lack of a human rights policy complicates the international community's efforts to hold the IFIs accountable for their human-rights-related decisions. In order to avoid these problems, therefore, the IFIs each need to develop a principled and transparent human rights policy.

### *B. The Content of an IFI Human Rights Policy*

An IFI human rights policy should address both the operational and institutional human rights issues raised in the course of the IFIs operations. These two dimensions to the human rights challenges facing the IFIs can be further divided into the following four issues: (1) the interpretation of the constraints imposed by their Articles of Agreement, (2) the IFIs' responsibility to promote human rights, (3) the IFIs' responsibility to protect the planned beneficiaries of their operations against human rights abuses, and (4) the IFIs' responsibilities in regard to their internal operating policies and procedures. Each of these issues will be discussed separately.

#### *1. The Constraints Imposed by the Articles of Agreement*

Obviously, each IFIs' human rights policy must be consistent with its Articles of Agreement. This means that the Bank should develop a human rights policy that is consistent with the political prohibition in its Articles which state that the Bank should not be influenced by the "political character" of its Member States.<sup>136</sup> To date, the Bank has not formally defined the term political character or explained the political considerations that are outside its mandate.<sup>137</sup> Instead the Bank has stated

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other minorities, but it has refused to explicitly consider human rights issues when extending credit to countries with well-documented human rights problems like China, Indonesia or Mexico. GOVERNANCE, *supra* note 51, UPDATE ON GOVERNANCE, *supra* note 51. Similarly, in the early 1980s, the IMF refused to explicitly consider the human rights implications of apartheid when making financing available to South Africa. It did, however, later stop assisting apartheid South Africa. Bradlow, *supra* note 106, at 656; International Policy Papers, *supra* note 106.

136. IBRD Articles, *supra* note 24, art. IV, sec. 10; *see also, id.* art. III, sec. 5 (b).

137. The Bank's General Counsel in his legal opinion on governance has provided a general definition of "politics," but not "political character," the term used in Article IV, section 10. His definition ("politics" relates to the art and practice of running a country or governing) is too general to be operationally useful in defining the outer limits of the Bank's jurisdiction. Many factors that the Bank treats as "economic" are encompassed within this definition of "politics" (for example, reform of the public sector enhances the environment for the private sector). *See* Shihata, Opinion on Governance, *supra* note 35, at 26.

that it can take political considerations or the political character of the Borrower State into account in its decisions when these considerations have a "direct and obvious" economic effect.<sup>138</sup>

The Bank's General Council has identified four political considerations that the Bank can treat as falling within the scope of its mandate. These are (1) the binding decisions of the U.N. Security Council relating to peace and security; (2) international sanctions affecting the economic prospects of a potential borrowing country; (3) an escalation of armed conflict that affects the viability of Bank projects and the safety of Bank personnel; and (4) where it can be unequivocally shown that political phenomena have demonstrably adverse economic consequences.<sup>139</sup>

As discussed above, all human rights can be shown to have direct and obvious economic effects.<sup>140</sup> Consequently, the political prohibition should not be interpreted so broadly as to preclude the Bank's involvement with internationally recognized human rights. Rather it should be construed narrowly to only preclude the Bank from interfering in domestic partisan political affairs. The Bank should abstain from considering issues such as which political party or faction should hold political power, who should win specific political debates, or which official should be appointed to which post.<sup>141</sup> In addition, any purely domestic affairs that have no relation to the international responsibilities of the Bank should be excluded from the scope of the Bank's mandate.

The IMF faces a weaker political constraint than the Bank. The IMF's Articles only require it to "pay due regard" to domestic, social, and political affairs in its Article IV consultations.<sup>142</sup> This provision has been interpreted to preclude the IMF from basing its operations on political considerations.<sup>143</sup> A literal reading of this provision, however, does not preclude the IMF from having its own opinion on these issues and from acting on the basis of its own perception of the member's political situation. The provision merely requires the IMF to treat the Member State's perception of these issues seriously. Thus, the Articles provide the IMF with the flexibility it needs to take human rights considerations into account in its operations. The IMF could therefore facilitate the development of a human rights policy by explicitly adopting an interpretation of its Articles that allows it to take internationally recognized human rights standards into account in its Article IV consultations.

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138. See *supra* Part II.E.1. for more detailed discussion of this issue.

139. See Shihata, Opinion on Governance, *supra* note 35.

140. See *supra* Part II.E.1.

141. This interpretation would be consistent with a liberal reading of the General Counsel's Legal Opinion on Governance. Shihata, Opinion on Governance, *supra* note 35.

142. See IMF Articles, *supra* note 12, art. IV.

143. See GOLD, *supra* note 24; Gianviti, *supra* note 24.

A final point to note in regard to interpreting the political constraints on the IFIs is that they are institutions subject to international law.<sup>144</sup> This means they have an obligation to act in conformity with international law and to ensure that their operations do not undermine the ability of other subjects of international law to act in conformity with their own legal obligations. In this sense, the IFIs should see the consideration of human rights in the course of their operations as a requirement and not as a possible political consideration that is outside their mandates.

## 2. Promotion of Human Rights

The IFIs' responsibility in regard to the promotion of human rights is to ensure that the design of all their operations enhances the human rights situation of those affected by their operations. While this principle is easy to state, it is extremely difficult to apply. Nevertheless, it is possible to identify three indicators that can help determine if an IFI operation will promote human rights.<sup>145</sup> These are (1) the level of public participation in the operation, (2) the expected impact of the operation on human rights, and (3) the degree of public accountability of the decisionmakers in the specific operation.

### *a. Participation is the First Human Rights Indicator*

The first indicator of a human-rights-promoting operation is significant stakeholder participation. Achieving this participation requires identifying all the stakeholders in the operation. The stakeholders are those groups affected both directly and indirectly by the proposed operation. Their role in the design and implementation of an operation is a critical factor in determining whether or not the project promotes human rights. Consequently, the IFIs should ensure that each group of stakeholders is able to participate in the design and implementation of the IFIs' operation. The extent of their participation should be related to how directly and substantially the operation affects them.

Stakeholders can adequately participate in the operation only if they possess sufficient freedom of association and expression, and have access to sufficient information to make informed decisions about the operation. Consequently, this first indicator relates to freedom of expression, freedom of association, and access to information pertaining to the operation.

The IFIs, when evaluating performance on this criteria, must consider more than the existing legal regime in the Borrower State. They must also

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144. See BOWETT, *supra* note 70; FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING (2d ed. 1993); SCHERMERS & BLOKKER, *supra* note 70.

145. This discussion is based in part on the World Bank's guidelines on social impact assessments and the work of Tomashevski on human rights impact assessments. See KATARINA TOMASHEVSKI, DEVELOPMENT AID AND HUMAN RIGHTS REVISITED (1993); World Bank Guidelines on Social Assessment, *supra* note 123.

consider whether stakeholders, in fact, feel able to exercise their rights. Stakeholders, even though they have the legal right to do so, may feel unable to freely express their opinions for a number of reasons. These include a governmentally created climate that chills free speech and freedom of association, the *de facto* inability of stakeholders to obtain adequate information on the proposed IFI operations, and the lack of capacity to participate. This lack of capacity can be caused by cultural barriers such as gender relations and the status of minority groups in the society.

This means that the Bank should only decide a project meets satisfactory human rights standards if it is confident that the stakeholders in the project in fact are able to freely express their opinions about the project and to organize themselves to advocate for their interests. In addition, the Bank needs to be sure that the stakeholders have access to sufficient information to make an informed decision about the project.

Similarly, the IMF should only find that a standby arrangement promotes human rights if it is satisfied that the citizens<sup>146</sup> of the particular State have an adequate opportunity to express their views on the policies that the standby arrangement will support. An IMF finding that citizens are provided with an adequate opportunity to express their opinions should be based on their ability to organize, the level of freedom of speech in the country, and the ability of citizens to obtain information on the proposed policies.

In cases where they find problems that affect the ability of stakeholders to actually participate in the project, the IFIs should consider what steps they can take to facilitate participation by all stakeholders. For example, the IFIs could create a mechanism through which stakeholders or their authorized representatives could communicate their views directly to the IFIs.<sup>147</sup>

#### *b. The Expected Human Rights Impact is the Second Indicator*

The second indicator of a human-rights-promoting operation is that the expected impact of the operation should be to improve the human rights conditions of all stakeholders. This implies that the design of such operations should include an assessment of the expected change in the human rights condition of the stakeholders over the duration of the operation.

It is clearly easier to conceptualize and describe this indicator than to operationalize it. This difficulty can be overcome, however, if it is remembered that the primary function of the indicator is to ensure that the

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146. IMF standby (or other financing) arrangements are macroeconomic in focus and, therefore, affect all the citizens in the particular State.

147. See *Limited Mandates*, *supra* note 3, at 429, for further discussion of this point.

human rights effects of an operation receive adequate attention from the IFIs.

This indicator therefore requires the IFIs to explicitly identify in their planning documents which human rights are likely to be affected and to describe how they will be affected by the operation. For example, in a Bank-funded health project, the Bank will need to identify the impact the project will have on the health of all stakeholders. In addition, the Bank will have to identify what other impacts the health project will have on each group of stakeholders. This means that the IFIs will need to identify who will receive the other social, political, and economic benefits associated with the project. These benefits may include jobs, income, and access to political authorities. In addition, the Bank staff should attempt to assess how the project might affect the relations between different groups of stakeholders, such as men and women.

The IMF in its operational planning should also engage in this human rights impact analysis. It should consider both the short- and long-term impact of its operations on different social groups and on the relations between these different groups. While this human rights impact analysis may be qualitative and not very accurate, it should enable the IMF and other stakeholders in the operation to assess the likely effects of the proposed policies. In this sense, the indicator will contribute to IMF operations that promote human rights in that they are sensitive to the needs of all stakeholders in the operation, enhance transparency in IMF operations, and enhance IMF accountability.

In developing a human rights impact analysis the IFIs must deal with the reality that not all sustainable and equitable operations produce only positive human rights results. The project may result, for example, in involuntary resettlement or loss of income for some stakeholders. The analysis must therefore incorporate some methodology that IFI staff can utilize to decide when to proceed with an operation that will produce some adverse human rights consequences. In this regard, the staff can look at the following criteria: the existence of less harmful alternatives, the duration of the negative human rights impacts, the adequacy of the opportunity for the stakeholders who will suffer the negative human rights impacts to participate in the design and implementation of the project, the availability of a means for the stakeholders to petition the operation's decisionmakers for redress of the grievances which arise during the course of the operation, and the nature and quantity of compensation available to those who suffer losses as a result of the operation.

There is no doubt that the proposed human rights impact analysis will complicate the work of the IFIs. Not only is the analysis itself difficult and time consuming, but its speculative nature is likely to generate controversy. While these costs are real, they do not outweigh the benefits provided by undertaking this analysis during the design phase of an operation. The analysis, which necessarily will require public



participation, should stimulate public debate and promote public knowledge about the proposed operation. Thus, while this analysis may complicate the design phase of the operation, it should facilitate implementation of the operation. It should also help ensure that IFI operations are responsive to the needs of the stakeholders and the constraints of the context within which they will take place.

It should be noted that a modified version of this approach may be required in situations of crisis, where time is of the essence and decisionmakers need to act with discretion to avoid market actions that would undermine their IFI-supported stabilization strategies. In these cases more emphasis will need to be placed on *post hoc* mechanisms, such as appeals processes, to ensure that all stakeholders are treated fairly. In addition, a more human rights-sensitive proposal can be applied once the acute phase of the crisis is over.

### *c. Accountability is the Third Human Rights Indicator*

The third indicator relates to the accountability of the decision makers in the specific operation. This indicator focuses on both the ability of the stakeholders to identify the decisionmakers in the operation and on the stakeholders' access to a mechanism for holding these decisionmakers accountable. It will be noticed that since the decisionmakers in IFI-funded operations include IFI staff, this indicator requires the IFIs to assess both their own accountability to these stakeholders and that of the decisionmakers in the Borrower State.

The latter point raises the issue of the acceptable level of IFI involvement in the affairs of the Member State. In this regard it is useful to recall that specialized human rights organizations do evaluate the accountability of decisionmakers in Member States in the course of reviewing the reports of signatories to the various international human rights conventions.<sup>148</sup> The IFIs could capitalize on the expertise of these organizations by either utilizing the information gathered by these organizations or by working with them to conduct their evaluations.<sup>149</sup>

Another aspect of this issue is determining what the IFIs should do when the Borrower State's methods of accountability are found to be deficient. In such cases the IFIs could work with the relevant international organizations and with other interested parties to determine how serious the deficiencies are and whether the project can achieve its objectives despite these deficiencies.

In order to ensure adequate accountability, the IFIs also need to incorporate some *post hoc* evaluation mechanism into their operations. The purposes of this mechanism would be to determine if the operations actually

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148. See GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum ed., 1984).

149. See *Limited Mandates*, *supra* note 3, for a more detailed discussion of this issue.

produced the expected benefits, and to learn more about what makes for successful human-rights-promoting operations. The Operation Evaluations Department performs this function for the World Bank.

#### *d. The Problem of Non-Ideal Projects*

The three indicators discussed above are designed to help the IFIs identify and produce an ideal human-rights-promoting operation. However, no operation is likely to achieve a perfect rating on all indicators. Consequently, the IFIs' human rights policies will need to include some means for determining what constitutes acceptable derogations from the ideal situation. Acceptable derogations may be so case specific that it will be extremely difficult for the IFIs to develop general principles in this regard. However, in order for their operations to be confidently viewed as human rights promoting, they will need to publicly and explicitly justify each operation that derogates in any significant way from the ideal situation.

### *4. Protection of Human Rights*

#### *a. Defining the IFIs' Responsibilities*

The IFIs can not be expected to play the leading international role in protecting the victims of human rights abuses from the state actors perpetrating these abuses. This responsibility lies with the specialized international human rights organizations, and with other state and non-state actors in the international community. The IFIs, however, do have a responsibility to ensure that their operations do not exacerbate problematic human rights situations.<sup>150</sup>

While the IMF has not publicly addressed this issue, the Bank has made some relevant statements. The Bank's General Counsel has advised that the Bank would not be able to undertake operations in countries that are the target of binding U.N. Security Council decisions relating to peace and security, in which international sanctions are affecting the economic prospects of the target country, in which armed conflict threatens the viability of Bank projects and the safety of Bank personnel, or in which it can be unequivocally demonstrated that political phenomena have adverse economic effects.<sup>151</sup> While none of these criteria specifically mention human rights, they can be interpreted as including situations with serious human rights problems. In fact, the Bank's General Counsel has stated that

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150. See, e.g., Marmorstein, *supra* note 131; *The Impact of Financial Institutions on the Realization of Human Rights: Case Study of the International Monetary Fund in Chile*, 6 B. C. THIRD WORLD L.J. 143 (1986); David Gillies, *Human Rights, Democracy and 'Good Governance': Stretching the World Bank's Policy Frontiers*, in THE WORLD BANK: LENDING ON A GLOBAL SCALE, *supra* note 117.

151. See SHIHATA, *supra* note 5, at 560-61.

an extensive violation of human rights, to the extent that it has a direct and obvious economic effect, could become a factor in Bank decisions.<sup>152</sup>

The General Counsel's opinion represents an important advance in the Bank's acceptance of its obligation to protect human rights. Nevertheless, it does not go far enough. It does not acknowledge that the Bank has a responsibility to protect people from human rights abuses that occur as a direct result of participating in a Bank-funded operation. The Bank needs to develop a policy for dealing with this situation. It is irresponsible for the Bank to invite people to participate in its activities and then fail to protect them when its interventions result in reprisals from the Borrower State or its agents.

The General Counsel's opinion also fails to give clear guidance on how the Bank should treat the recommendations and opinions of international organizations other than the Security Council. For example, it does not indicate how the Bank should respond to the findings of the United Nations Human Rights Commission or the regional human rights commissions that a certain country is experiencing serious human rights problems or is refusing to respect a ruling of a regional human rights court.

While these recommendations and opinions may not be legally binding on the Bank, they cannot be ignored.<sup>153</sup> There are two reasons for this. First, the Bank as a subject of international law has an obligation to ensure that it does not enhance the ability of other subjects of international law to ignore binding international norms. Extending financial support to States that, for example, ignore the rulings of international tribunals, could facilitate the State's continued efforts to ignore such rulings. Second, a State that fails to respect the ruling or findings of a human rights tribunal that it is legally bound to respect may also ignore its other legal obligations, including those contained in its agreements with the Bank. As a matter of prudence, therefore, the Bank should refrain from lending to the offending State.

The IMF's responsibilities to protect human rights are similar to the Bank's. The IMF, however, has not made any public statements addressing this issue. In practice, it has been able to avoid some of these issues because it has made no effort to make its operations participatory. This does not mean that the IMF has any less obligation than the Bank to become more participatory or to become more respectful of the recommendations and opinions of specialized international human rights organizations. It merely means that the IMF has been less willing than the Bank to take steps that are designed to meet its obligations to protect human rights.

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152. Shihata, *Opinion on Governance*, *supra* note 35.

153. This is a complex issue and a full exploration of it is outside the scope of this Article. See *Limited Mandates*, *supra* note 3, for a more detailed discussion of the issue.

*b. The IFI Response to Human Rights Abuses*

The next aspect in developing the IFIs' policy to protect human rights is to define the type of action the IFIs should take to protect people who are suffering human rights violations. It should be noted that the IFIs' responses to these situations may be constrained by the political prohibition in their Articles of Agreement. However, as was discussed above, these prohibitions should limit their ability to intervene in purely domestic political issues but not their ability to deal with situations with international implications, which include cases of significant human rights abuses.<sup>154</sup>

One possibility is for the IFI to work with the offending government and, where appropriate, international human rights organizations to stop the abuse. For example, the IMF could raise the human rights issue with the violating State during the Article IV consultations and make recommendations on how to deal with the situation. Similarly, the Bank could make recommendations during the Bank's ongoing policy dialogue with the Member State.

An alternative, although more controversial approach, would be for the IFIs to condition any assistance on the correction of human rights abuses.<sup>155</sup> The sanction attached to this condition could take a number of forms. For example, the IFIs could deny future requests for financing. Alternatively, they could suspend existing funding commitments. The feasibility of the latter approach would depend on the terms of the existing arrangements between the particular IFI and the Member State.

The Bank does have another option in dealing with human rights problems. It can limit its operations in the offending State to those activities which it is satisfied will not facilitate the government's continued human rights abuses and which will enhance the victims' ability to protect themselves against the perpetrators of such abuses.

Given the severity of most of these sanctions, they would only be appropriate for serious human rights abuses. In addition, the Bank should only impose the harsher sanctions when it is convinced that there is no possibility to undertake any constructive development activity in the country. The IMF should contemplate these sanctions when it is convinced that the State, because its human rights abuses are so extensive, cannot reasonably be expected to live up to its monetary obligations. Both IFIs should consult with specialized human rights organizations in reaching these decisions.

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154. See *supra* Part V.B.1.

155. This is the approach adopted by a number of bilateral aid donors. It is, however, a more complex approach for the IFIs to adopt because it may lead to charges that the IFIs are promoting the political agenda of a specific group of countries. See Gillies, *supra* note 150.

#### 4. *The Institutional Human Rights Issue*

The final aspect of the IFIs' human rights policy is ensuring that their own operating procedures are consistent with international human rights law. There are four aspects to the IFIs' responsibilities in this regard. First, the IFIs need to ensure that their own operating practices and procedures conform to the principles of good governance they advocate to their own borrowers. Thus their operating rules and procedures should be transparent and easily understandable to all interested parties. Moreover, all the operating rules and procedures should be publicly available.<sup>156</sup>

Second, the IFIs need to provide interested parties with the opportunity for meaningful communication with the IFIs about their operations. For these purposes, the term "meaningful communications" means communications at a time that will enable the interested parties to adequately protect their interests in the project. It also means that the IFIs need to make information about their planned operations publicly available in a timely fashion.

Third, the IFIs need to provide stakeholders with the means to hold both institutions accountable for their actions. This requires the IFIs to improve public access to their internal evaluation reports. It also will require the IFIs to develop mechanisms, like the Bank's Inspection Panel, that allow private actors to hold them and their staff accountable for their actions and decisions.

The fourth aspect to the IFIs' institutional obligations is that they need to educate their staff about human rights. Such education would sensitize the staff to the human rights dimensions of the IFIs' operations. This will assist them in responding to the many difficult human rights issues that can arise in the course of their work in the IFIs' Member States. These educational activities should be undertaken in conjunction with the specialized international human rights organizations and the relevant nongovernmental organizations.<sup>157</sup>

## VI. CONCLUSION

The operations of the IFIs, in fact, have a significant impact on the human rights situation in those Member States that choose to utilize their services. In order to ensure that they have a positive impact on these human rights situations, the IFIs need to develop an explicit human rights policy. This policy should include both a standard for determining when human rights issues have a sufficient economic impact to be considered part of the

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156. Many, but not all, of the Bank's operating rules are available through the Bank's Public Information Center. The Bank needs to ensure that all the rules are available not only through the PIC but also from each of its Resident Missions.

157. See *Limited Mandates*, *supra* note 3, for a more detailed discussion of this issue.

IFIs' mandate, and a definition of the term "political" so that all stakeholders can identify what issues are outside the IFIs' mandate. Such a policy would help the IFI staff perform their duties in a manner that conforms to the IFIs' responsibilities to promote and protect human rights. It would also help other stakeholders in these operations understand what they can expect from the IFIs in this regard and hold the IFIs accountable for their human rights performance. Finally, this policy would help ensure that the IFIs' own operating policies and procedures follow the same principles of good governance—transparency, accessibility, and accountability—that they advocate for their Member States.

## **PART V**

### **SOCIALLY RESPONSIBLE INVESTING**

An experiment in creative financing to promote reconciliation and development in South Africa



## American University Washington College of Law

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### AN EXPERIMENT IN CREATIVE FINANCING TO PROMOTE SOUTH AFRICAN RECONCILIATION AND DEVELOPMENT

Daniel Bradlow

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An Experiment in Creative Financing to Promote South African Reconciliation and Development<sup>1,2</sup>  
Daniel D. Bradlow<sup>3</sup>

The Reconciliation and Development Project (R&D Bonds) was originally conceived as an attempt to involve the South African expatriate community in the process of national reconciliation that began with the end of apartheid. It has evolved into a broader effort to create a financial instrument capable of raising financing from both expatriates and the domestic market for small scale revenue generating development projects that will produce jobs, services, and opportunities for poor and historically disadvantaged South Africans. Through this evolution, it has become clear that the project, which if implemented will be unprecedented, has the potential to teach some interesting and generally applicable lessons on the roles that private financial markets can play in attracting both domestic and international funding for sub-commercial development projects and in promoting reconciliation in post-conflict societies.

The paper is divided into three sections. The first section will describe the genesis of the R&D Bonds Project. The second will discuss the design of the R&D Bonds. The final section will highlight some of the interesting development financing issues that arise from the project.

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<sup>1</sup> DO NOT QUOTE OR DISTRIBUTE WITHOUT PERMISSION OF THE AUTHOR.

<sup>2</sup> This paper was prepared for a conference in November 2006 on “Engaging the African Diaspora to Finance Africa’s Development”, sponsored by the Institute for African Development, Cornell University, Ithaca, NY.

<sup>3</sup> The author is Professor of Law and Director, International Legal Studies Program., American University Washington College of Law and a Research Associate, Centre for Human Rights, University of Pretoria. His work on the Reconciliation and Development Bonds Project has been supported grants from the Skoll Foundation and the Wallace Global Fund. He thanks Celine Bressart for her research assistance with this paper. He welcomes comments and questions on this paper and can be contacted at <bradlow@wcl.american.edu>

## Section 1: Genesis of the R&D Bonds Project

The R&D Bond Project grew out of the author's interest in the work of the South African Truth and Reconciliation Commission (TRC or Commission). This historic Commission effectively documented the tragic history of apartheid and promoted accountability for its perpetrators. However, its attempts at redressing the injuries caused by apartheid were less comprehensive. They were limited to an acknowledgement by the state of the wrongs that apartheid had produced and to the payment of compensation to those identified as victims of state violence, inter-group violence or "liberatory" violence in the TRC's report<sup>4</sup>. Thus, the reconciliation work of the Commission was ultimately focused on repairing the important relationship between the South African state and black South African citizens.

The TRC did not directly seek to promote reconciliation between ordinary black and white South African citizens—although the Commission, of course, hoped that its report would contribute to this process. This meant that the TRC itself did not establish any mechanism through which individual white South Africans could acknowledge that they had been beneficiaries of the apartheid system and could make a gesture of reconciliation. It also did not address the issue of how the South African "diaspora", that is those people who grew up in South Africa and benefited from its wealth and opportunities but who no longer live in the country, should and could contribute to reconciliation and development in South Africa.

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<sup>4</sup> Section 2, §11 Truth and Reconciliation Commission of South Africa Report (2003)

The R&D Bond Project began as an attempt to address this unresolved issue of reconciliation between private citizens. It was premised on the idea that reconciliation between the different social groups who benefited from and those who suffered under apartheid requires some meaningful gesture of support from the former to the latter group.

In principle, there are many forms that this gesture can take. Nevertheless, the history of the most successful example of reconciliation—the reconciliation of Germany and Jews following the end of World War II—demonstrates that one key component of effective reconciliation is providing those who suffered under the old order with the means to establish a life that is materially more comfortable and that offers them and their children better opportunities and more dignity than what they had under the old order<sup>5</sup>. This is important because, as their circumstances improve, the sufferers are better able to bear the psychic cost that must be paid if they are to move beyond their pain and anger and reconcile with those who previously oppressed or harmed them.

The initial goal of the Project was to design an appropriate vehicle through which private citizens could make meaningful and explicit contributions to the process of reconciliation in South Africa. Given the poverty of many black South Africans and their lack of access to jobs, services and opportunities, the project's objective was to structure a mechanism through which interested white South Africans, both those living in the country and

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<sup>5</sup> The lesson from the case of German reparations has been confirmed in a study of reparations in the Czech Republic. See Roman David & Susanne Choi Yuk-ping, *Victims on Transnational Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic*, 27 *Human Rights Quarterly*, 393 (2005)

expatriates, could make financial contributions to support projects that would create jobs, services and opportunities for poor black South Africans. It came to focus on using debt instruments for the purpose of promoting reconciliation through development through a process of elimination.

Its starting point was that the most obvious means of raising money for reconciliation and development was to establish a charitable entity to which those who wish to make gestures of reconciliation can make donations. This entity could then make grants to development projects that are designed to create jobs, services and opportunities for poor black South Africans.

The success of such a charity's contribution to South African reconciliation and development depends on its ability to satisfy three "reconciliation-financing" criteria. First, it requires that sufficient numbers of white South Africans contribute to the entity so that it has enough money to make a meaningful difference to the situation of poor black South Africans. Second, the contributions must come from a large enough number of people to demonstrate a serious community-wide interest in reconciliation. Third, the charity must be able to use the money effectively enough to satisfy both those who contribute funding and those who benefit from it that the charity can make a noticeable impact on solving the problems caused by apartheid.

Using charitable donations to promote reconciliation in South Africa, in fact, was tried and it failed<sup>6</sup>. Based on the relatively small number of people who contributed to the charitable entity, it could be argued that it failed because there are not enough white South Africans of goodwill who are willing to work for the reconciliation and development of the country. However, this does not seem to be an adequate explanation. There is evidence demonstrating that most South Africans, including most white South Africans, in fact do make charitable contributions.<sup>7</sup>

This would suggest that there are other reasons for the failure to attract donations to promote reconciliation. One important contributing factor seems to be that many South Africans are skeptical about the ability of the existing charitable organizations to effectively address the problems of poverty. In other words, this effort to use charitable giving to promote reconciliation was unable to satisfy the third reconciliation-financing criterion.

If charities cannot succeed in funding reconciliation, the alternative is to offer people an opportunity to invest in reconciliation and development in a way that allows them to earn a financial and social return on their investment. This approach would enable people interested in reconciliation and development to monitor the stream of financial and social returns generated by their investments and to use these returns as indicators of the

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<sup>6</sup> Following the release of the TRC report, a group of South Africans established the “Home to All Campaign”. This Campaign included a variety of efforts to promote reconciliation, including the establishment of a Development and Reconciliation Trust that would accept donations from the public and would make grants to projects to promote literacy and other poverty-fighting efforts in South Africa. The Trust has collected some funds and has awarded some grants but the amounts were relatively small. The author has worked with the Campaign and the Trust in developing the R&D Bonds Project.

<sup>7</sup> David Everatt & Geetesh Solanki, *A nation of Givers, : Social Giving among South Africans*, The State of Social Giving in South Africa Report Series, Research Report # 1

developmental and poverty alleviating impact of their investments. Such investments therefore should satisfy the three reconciliation-financing criteria identified above. First, because they will yield a real market-based financial return, they have the potential to attract sufficient numbers of investors to both demonstrate an interest in promoting reconciliation and to fund enough development projects to have a meaningful impact on poverty, inequality and unemployment in South Africa. Second, if the investments are required to meet certain financial and social standards, they should be able to demonstrate that they are in fact contributing to the building of a better future for all South Africans.

There are two ways in which such investment vehicles can be structured. The first is to establish an investment fund that makes equity investments in projects, such as small and micro-businesses and low income housing projects, which are designed to help those who historically were denied access to jobs, services and opportunities. An equity fund is attractive as a development financing mechanism because of its risk sharing features. Thus, the investors do not earn a return on their investment until the projects are generating a profit. However, equity investments are problematic vehicles for promoting reconciliation. They can be perceived as a way for the beneficiaries under the old order (whites in South Africa) to both profit from the hard work of those who suffered under that order and to control (through the voting rights associated with equity) the efforts of those they previously oppressed.

The second way to structure such investments is to use debt to finance projects that provide jobs, services and opportunities to poor black South Africans. Debt has a number

of attractive features for the purposes of promoting both development and reconciliation. Since debt is a fixed term contractual relationship between the debtor and the creditor, it leaves the debtor, after it has fully performed its contractual obligations, both independent of the creditor and in a materially better condition than before the debt transaction. Second, the debtor, through its reliable servicing of the debt, can establish a credit history which should enhance its prospects for accessing future financing. Third, if it is possible for the debt arrangement to be structured so that the borrower receives the funding on better terms than are available from any other available funding source<sup>8</sup>, the transaction can facilitate better relations between debtor and creditor, thereby serving the goal of promoting reconciliation. The extent to which this approach promotes development and reconciliation depends, to a significant extent, on this last point because if the terms of the debt are perceived by the borrower to be too harsh, the debt transaction can undermine rather than promote these objectives.

The above analysis underscores the potential for debt financing to promote both development and reconciliation. In order for it to satisfy the first two reconciliation-financing criteria, the funds should be raised through a retail bond that is designed to appeal to as broad a group of individuals as possible. Such a bond, even though it is issued on the South African domestic market, should also be attractive to those expatriate South Africans living around the world who still have strong emotional, family and

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<sup>8</sup> It should be noted that the small scale revenue generating projects that will be funded through the R&D Bond Project find it difficult to obtain grant financing precisely because they generate a return. Consequently, the funding options available to them are likely to require some form of repayment commitment.

economic ties to South Africa and therefore have an interest in promoting reconciliation and development in the country.

Complying with the third reconciliation-financing criterion is more difficult, because it requires the proceeds raised by the bond to be used to effectively support those types of projects that will both produce meaningful developmental opportunities for those without access to jobs, services and opportunities and an adequate return to service the bonds.

This means that the bonds will need to support those projects that are the hardest to fund anywhere in the world – those projects that are both “too rich” for grant funding because they generate a return that can be used to service a certain level of debt and “too poor” for commercial funding either because of the size of the project or because its rate of return is too low to be attractive to a commercial lender. Examples of these types of projects are new small and micro-enterprises and projects related to low income housing.

Given the realities of distributing and servicing retail bonds, any attempt to use them for reconciliation and development purposes must satisfy a fourth reconciliation-financing criterion—it must be attractive to financial institutions. The reason is that these institutions are needed to help promote and distribute the bonds. Their participation is helpful in convincing potential investors that this is a serious financial transaction in which they can earn both a reasonable financial return and produce noticeable social benefits for South Africa and its poor people. They can also provide the distribution network through which the bonds are sold.



The R&D Bond Project thus has become an effort at creating and issuing a bond that is capable of meeting all four reconciliation-financing criteria. Its proposed structure is described in the next section.

## Section 2: The Structure of the R&D Bond Project

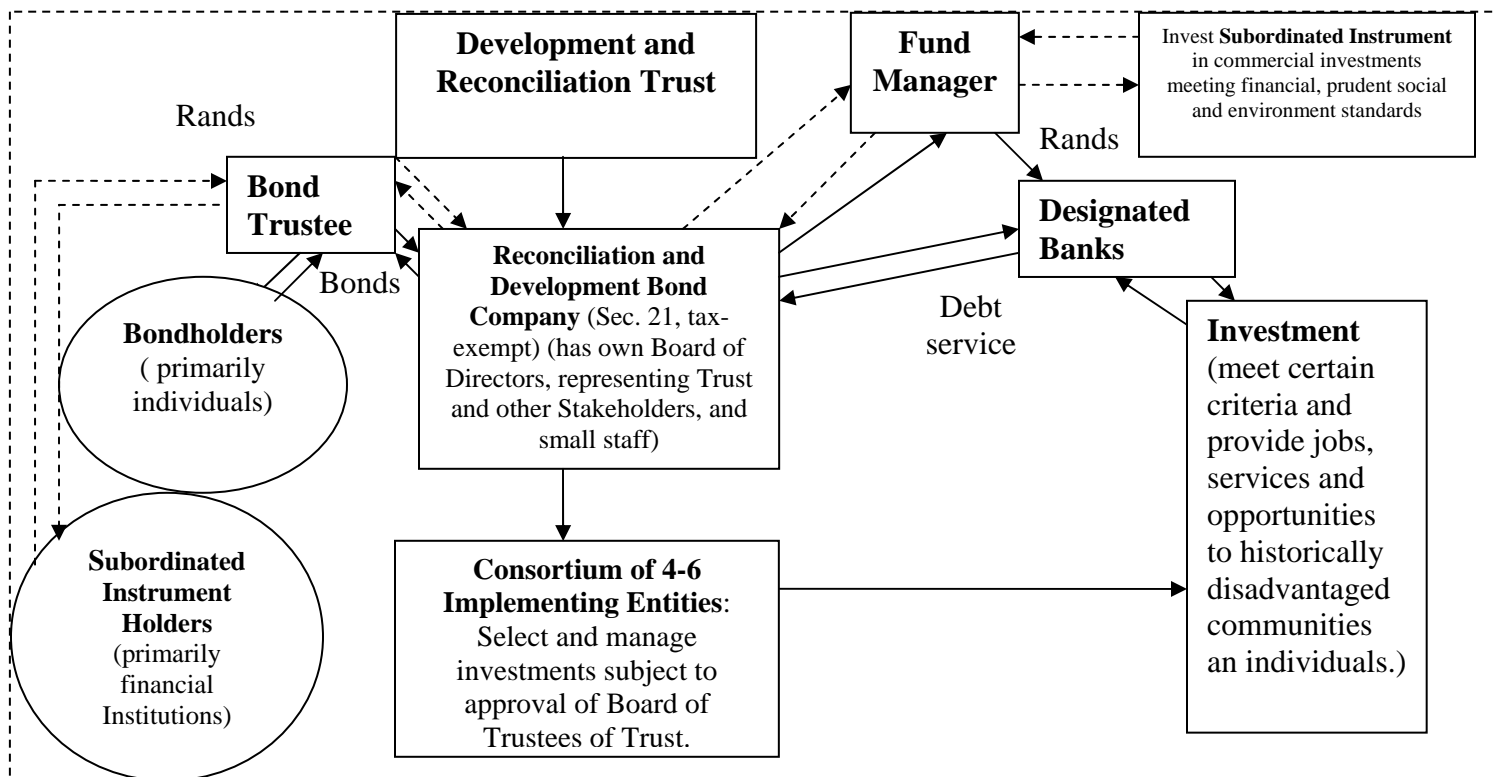
In designing the R&D Bond, the author consulted with a broad range of financial, developmental, reconciliation and legal experts working in financial institutions, law firms, development organizations, government, trade unions, universities, church groups, reconciliation groups, and other civil society organizations. The bond described in this section, therefore, has been tested and has proven able to address all the conceptual concerns expressed by these experts.

The structure, which is illustrated in Diagram 1, is designed to raise R1 billion<sup>9</sup> to fund a range of development projects through 2 instruments—a Subordinated Instrument (SI) and the retail R&D Bond. Both instruments will seek to raise R500 million for a term of 10 years.

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<sup>9</sup> The exchange rate between the South African Rand and the US Dollar fluctuates between about SAR 6-7.5 to USD 1. Thus R1 billion is equal to about USD143 million.

Diagram 1: Reconciliation and Development Bond Project



**Key =**

----- = flow of Subordinated Instrument Funds

\_\_\_\_\_ = flow of R&D Bond Funds

*The Project Issuer*

Both the SI and the R&D Bond will be issued by a special purpose entity that will be created for this purpose. This entity (“the Project Issuer” or PI) will be a non-profit, tax exempt company that has a board of directors that includes representatives of the financial institutions that are the primary investors in the SI and experts from civil society who are well respected in South Africa for their integrity, financial and development expertise and who have credibility with all sectors of the South African society. The Project Entity will have a small staff whose job will be to manage its relations with the other actors in the project and to ensure that the PI meets all its obligations to its investors in a timely manner.

#### *The Subordinated Instrument (SI)*

The SI will raise R500 million for 10 years from financial institutions, corporations, and foundations. The funds raised through the SI will be managed on behalf of the PI by a small group of well respected and experienced fund managers who are already in the business of fund management. Each fund manager will be allocated a portion of the SI funds and will be contractually obliged to invest the proceeds in commercial projects that satisfy a set of agreed prudential, financial, social, and environmental criteria. They will be expected to produce a target rate of return that is based on commercial and market considerations. The income generated by these managers will be used to pay all operating costs for the issuing entity and to help service the R&D Bonds, at least in the early years of the project.

The SI will offer investors the following benefits:

1. On maturity, the purchasers of this instrument will receive a lump sum payment equal to their original investment plus a stipulated pro rata share of the surplus remaining after all other Project related obligations have been satisfied.
2. The project's investments should entitle qualifying SI holders to score points towards their transformational charter obligations.<sup>10</sup> In addition, purchase of the Subordinated Debt Instruments should count towards any Government requirement that South African businesses invest a stipulated portion of their assets in socially responsible investments.
3. Based on preliminary conversations with tax experts it is likely that SI holders will qualify for a tax benefit<sup>11</sup>. Financial institutions that invest in the SI can claim this benefit by arguing that the purchase of the SI is an expenditure laid out or extended for the purpose of trade within the meaning of Section 11(a) of the Income Tax Act 58 of 1962. Based on this provision they can argue that because they are in the business of investing in financial instruments and are making a below market purchase of a debt instrument, they are entitled to a tax deduction in year 1 equal to the difference between the face value of the instrument and the net

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<sup>10</sup> Under the Broad Based Economic Empowerment Act (53) 2003, all sectors of the South African economy are required to develop charters that establish standards, dealing with equity ownership, management, procurement and investment, for transforming that sector so that it is more open to and representative of the whole South African population. Companies that fail to comply with these standards may be precluded from doing business with the government and may become less attractive to other private companies with whom they do business (because of the implications for the latter group of companies' own procurement requirements). The most relevant charter for the R&D Bonds project is the Financial Services Charter, which, *inter alia*, requires financial institutions to make significant investments in low income housing; small medium and micro-enterprises, and certain infrastructure projects that are designed to help develop previously underserved communities, See Financial Sector Charter (2003), available at <http://www.treasury.gov.za/press/other/2003101701.pdf>.

<sup>11</sup> A definitive determination of the tax consequences of this transaction will require a formal decision from the South African Revenue Service, SARS. At this stage, no effort has been made to obtain such a decision from SARS.

present value of the future stream of payments that it generates, in this case the lump sum payment that they will receive at the end of 10 years. Under this rationale, the government will be able to claw back the tax deduction in subsequent years as the net present value of the repayment increases. However, with appropriate tax planning, investors should be able to avoid this tax obligation. This interpretation of the tax law is supported by the decision in Warner Lambert SA (Pty) Ltd v. Commissioner for South African Revenue Service 2003, 65SATC346.

4. The banks that are holders of the SI will benefit from the banking business generated by the Bond project. Each actor in the transaction will need a bank account for funds related to the Project. They will be required to maintain this account with a bank chosen from the list of banks that have invested in the Subordinated Debt Instrument.
5. The project structure will enable interested SI holders to form linkages with the Implementing Agencies (IAs) that will be responsible for investing R&D Bond proceeds in revenue generating projects that create jobs, services and opportunities for poor and historically disadvantaged individuals and communities. These linkages will give them an opportunity to identify other business opportunities with the IAs and to learn about the risks and rewards of doing business in the markets in which the IAs operate. In this regard it is important to note that the Project will allow the investors, particularly the financial institutions, to see if investing in this segment of the market is a business they would like to become directly involved in or if it is one which they would

- like to enter indirectly by funding a set of intermediary entities that are expert in this type of business. Their interactions with the IAs may also help them identify intermediary entities in which they could invest.
6. The holders will profit from the goodwill created by their participation in the Project. In this regard, it should be noted that the Project may also create additional business opportunities for the SI investors. This will occur as the projects supported by the R&D Bonds and their beneficiaries succeed so that they become “bankable” more quickly than might otherwise have occurred, thereby creating new business opportunities for the SI investors.
  7. All SI investors will receive an annual report describing the projects being funded by the R&D Bonds and detailing the social benefits that have or are expected to accrue from these projects.

### *The Retail R&D Bonds*

The R&D Bonds, which will raise R500 million for 10 years, will be issued as a non-tradable debenture with a periodic interest payment. It will be sold, for R500 per bond. It is expected that the bond will be bought by those South Africans with some disposable income, expatriate South Africans and friends of South Africa.

Bondholders will be able to purchase either a tangible or intangible version of the bond. Each bond will have identical terms except that the intangible form of the R&D Bond will offer a higher interest rate. The intangible form of the R&D Bonds will offer a fixed

market-related interest rate that is payable once a year. The rate will be equal to the rate offered by the Government of South Africa on its 5-year Government Retail Bond<sup>12</sup>. The tangible form of the R&D Bond will offer an interest rate that is 150 basis points below this rate. In return for accepting the lower interest rate, the tangible bondholder will receive a bond certificate that is an attractive poster, with the interest coupons included in the design of the poster<sup>13</sup>. Consequently, if the tangible bondholder wants to receive the interest payments, he/she will need to tear the coupon off the poster, thereby destroying its aesthetic appeal. In addition, all bondholders will receive an annual report describing the projects being funded by the Bonds and detailing the social benefits that have or are expected to accrue from these projects.

Even though the interest on the bond is paid annually, the R&D Bond principal will be repaid in a single payment at the end of the 10 year term of the R&D Bond.

All the proceeds raised through the R&D Bond will be invested in projects that meet the goals of the R&D Bond Project. This means that they will be invested in projects that are both “too rich” for grant financing because they are revenue generating projects and, because of their size or rate of return, are “too poor” for commercial financing.

Moreover, the projects to be funded by the Bonds will all be designed to produce jobs, services and opportunities for those people who suffered under apartheid.

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<sup>12</sup> See [www.rsaretailbonds.gov.za](http://www.rsaretailbonds.gov.za)

<sup>13</sup> The idea of the collectible bond has been used in Germany approximately 17 times. The experience of three of these transactions indicates that between 25-75% of the bondholders keep the poster and do not actually collect either the interest or the principle payments due to them. These transactions raise complex legal and planning issues relating to the obligations of the issuer. However, it should be possible to structure the terms of the bonds so as to reduce the complexities of these issues and to make the planning of the bonds more certain.

The Project Issuer will be responsible for arranging for the investment of these funds. In order to ensure that this responsibility neither requires a large organization nor seeks to duplicate the efforts of other organizations working in these areas, the PI itself will not directly invest in projects. Instead it will enter into contractual arrangements with 4-6 “Implementing Agencies” (IAs). These IAs will be organizations that either have 8-10 year track records of doing business in the types of projects that the Bonds are designed to support or the key people in these organizations will have 8-10 years experience in this type of development work. These IAs will be responsible for identifying the projects to be supported by the Bonds and for providing them with the support that they need in order to be able to repay their debts to the IAs. It is important to note that ultimately it is the IAs that bear the responsibility to repay the funds to the Project Issuer.

It should be clear from the above description that the contract between the IAs and the Project Issuer needs to be carefully drafted to include adequate safeguards designed to make sure that the Bond proceeds are only used to fund qualifying projects. The contracts will include 3 sets of provisions intended to achieve this objective. First, the contract will stipulate that the funds can only be used to finance projects that meet a set of agreed criteria. These criteria will both establish a principled basis for holding the IAs accountable for their use of the money and a predictable basis on which the Project Issuer can reject non-conforming project proposals.



Second, the contract will provide that the IA is committed to investing a stipulated amount of money over a number of years and will grant the IA the right to access up to a specified portion of this amount each year. However, it will also state that the IA cannot access the funds until it provides the Project Issuer with a proposal for a project that the Project Issuer deems to conform with the terms of its contract with the IA. Until this point, the R&D Bond proceeds will be parked with and invested by a fund manager in projects and investments that meet stipulated financial, prudential and social responsibility criteria. Once the Project Issuer approves the project, it will authorize the fund manager to transfer the applicable amount to a dedicated bank account to be controlled by the IA and the Project Issuer. The funds will only be disbursed from this account upon showing of proof that they will be used for approved project related expenditures.

It is important to note that this arrangement will result in there being, in the early years of the project, a pool of R&D Bond funds that are committed to be invested over time in appropriate development projects but that will not be needed until a reasonably predictable future date. Consequently, these funds can be invested by the fund manager for a predictable period. The income earned on these investments will be used to service the R&D Bond's debt obligations, thereby helping to subsidize the interest rates charged to the IAs and the projects that they fund. The result will be that the projects will obtain funding on terms that include relatively long grace periods and interest rates that are substantially below market rates.

Third, the contract will make clear that the IA is responsible for repaying, together with the stipulated interest rate, the funds advanced by the Project Issuer. Thus, in the R&D Bond transaction it is the IAs that bear the risk of non-payment. One consequence of this arrangement is that it places a premium on identifying and contracting with the most effective and efficient development organizations possible to be IAs.

In addition to these 3 devices, the Project Issuer will seek to diversify its risks by pacing the funds with 4-6 IAs. There are 2 reasons for selecting this number of IAs. First, it allows for some variety in the skills, experience and scope of operations of the IAs, thereby creating both some variation in the IA operations supported by the Bonds and for some diversification of risk. Second, the relationships between the Project Issuer and this number of IAs can be managed by a small staff. This avoids the risk of the IA needing a large staff that “eats” a significant portion of the funds raised by the Bonds.

#### *Current Status of R&D Bond Project*

At the time of writing (February 2007), the R&D Bond Project is a fully conceptualized project that is waiting to be implemented. The author is now involved in discussions with a few financial institutions and financial experts regarding the potential for implementing the project. In addition, the author is in the process of hiring a consultant to do a study of development organizations that will be used to identify the 10 best potential IAs in South Africa.<sup>14</sup>

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<sup>14</sup> This study is being funded by a grant from the Wallace Global Fund.

### Section 3: Issues Arising From the R&D Bond Project

The R&D Bond Project raises a number of interesting issues that merit further investigation. Unfortunately, until the project is actually implemented and begins to produce empirical data, it is only possible to describe these issues. Their resolution will have to wait until the project is implemented.

First, the Project suggests that it is possible, at least in countries with sufficiently developed financial markets, for private actors to use domestic bond instruments to raise funds for small scale development projects. The purchasers of these bonds will be people living both inside and outside the country who have some level of disposable income. These instruments can attract investors from outside the country, even though they are only marketed in the country, because the expatriate community has sufficiently strong connections to their home country to learn about these bonds and to arrange to invest in them. Consequently, the bonds can become a useful way for a country to simultaneously raise funding from its local middle and upper classes and its diaspora without having to incur the considerable costs involved in issuing bonds on international markets.

It should also be noted that it is possible that the country's friends in the international community—in the case of South Africa, this means those people around the world who were supporters of the anti-apartheid struggle—will invest in the bonds as well. This group of people, like the diaspora community, has the kinds of connections to South

Africa that will enable them to learn about the bonds and the motivation and interest to invest in a rand denominated and domestically issued bond.

Second, the Project raises an interesting question about the nature of the investment approaches used by most financial institutions. One of the reasons that the projects that the R&D Bonds Project is designed to support find it difficult to raise funding is that they do not meet either of the two sets of criteria that financial institutions use in making their lending decisions. These two sets are those used for commercial lending and those used in making socially responsible investments. As explained above, either because of their scale or rate of return, the projects to be funded by the R&D Bonds do not meet the criteria financial institutions use in extending credit on commercial terms. In addition, because they generate a stream of income, these projects are not viewed as attractive candidates for funding from the “social responsibility window” of the financial institution. The reason is that financial institutions tend to see this window as being a grant making facility and so are not inclined to use it to fund revenue generating projects, no matter how socially beneficial they may be. In addition, there may be a concern that if this social responsibility window funds projects which earn a return that it will undermine the public relations benefit the institution hopes to gain from this window—it wants to be seen as acting in a “purely” generous fashion and without any expectation of a financial return.

The fact that a substantial number of revenue generating projects that create jobs, services and opportunities for poor people cannot fit into this binary analytical framework

suggests that financial institutions, particularly those in poor countries, need to rethink their approach to doing business and social responsibility. Instead of seeing all their investment activities as falling into either one of these two categories, they should see these categories as being the end points of a spectrum of activities that range from profit maximizing activities at the one end to “goodwill generating” activities at the other. The R&D Bond Project offers these institutions an opportunity to experiment and to learn more about how to identify other points along this spectrum.

Conversely, the R&D Bond Project will offer foundations and other grant makers the opportunity to learn lessons about how they can support sub-commercial revenue generating projects that produce jobs, services and opportunities for poor people. It should provide them with useful data on how they can adapt their grant making expertise to investing in new categories of development work.

Third, the Project raises an interesting question about how to identify appropriate projects for this type of debt financing. The Project’s approach to this issue is to rely on the expertise of the IAs. Provided the Project can demonstrate that the IAs have the requisite expertise and experience and that they will be guided by mutually agreed social and economic standards, this should be adequate for the purposes of the Bonds. However, the data collected by the IAs and the Bond issuer can be used to study this issue more systematically. Consequently, the information generated by the Project should help interested persons develop a methodology for doing social and credit assessments of sub-commercial revenue generating projects. This methodology should be applicable in other

sorts of development financing transactions. The development of an effective methodology will make it easier to scale up and replicate the R&D Bond Project.

A fourth issue, which is related to the third issue, is that the Project challenges us to think about how to evaluate the social returns generated by the projects being supported by the Bonds. A detailed annual report on the investments being made by the IAs should satisfy R&D Bond Project that their contributions are generating satisfactory social gains for the Project's intended beneficiaries. It should also be an adequate means for holding the IAs and Project Issuer accountable for their decisions and actions in regard to using the Bond proceeds. However, the empirical data generated by the Project can be used by interested parties to test methodologies for measuring social returns on investments. Such methodologies are necessary if this project or future ones like it are to be able to unequivocally demonstrate that they are meeting the third reconciliation-financing criterion, namely that the funds are being used in a way that has a meaningful impact on poverty alleviation and development. They are also necessary to enable potential investors to comparatively evaluate different socially attractive investment options.

Fifth, the Project raises some interesting contractual issues. In particular, it will challenge the Project Issuer to draft covenants that effectively and enforceably require the IAs to invest in projects that meet adequate financial and social criteria. In addition, the PI will have to work with the IAs on crafting similar covenants to be included in the IAs agreements with the projects that they fund with their allocation of R&D Bond monies.

Some guidance in this regard can be gained from the contracts that have been developed in the context of micro-lending<sup>15</sup>.

Sixth, the Project will need to consider what additional credit enhancements it can use to give particularly the SI investors additional confidence that they will get their money back. There are a number of ways in which this could be done. First, the Project Issuer could require that the IAs obtain alternative forms of collateral from the projects in which they invest<sup>16</sup>. Second, the PI could obtain credit enhancements to support the agreements between the Project Issuer and the IAs. Based on preliminary discussions it would seem that such credit enhancements may be available from some official agencies and some foundations.

Seventh, the Project raises an interesting question about future truth and reconciliation efforts in post-conflict societies. The project suggests that it is possible to use innovative applications of traditional financial instruments to promote reconciliation. This is particularly important given the evidence that financial compensation is one of the most effective ways to promote reconciliation.

## Conclusion

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<sup>15</sup> See *Commercial Loan Agreements: A Technical Guide for Microfinance Institutions*, (Consultative Group to Assist the Poor, The World Bank, 2006)

<sup>16</sup> For an interesting discussion of this point see R. Dyal-Chand, “Human Value as Collateral”, available at <http://www.aals.org/am2007/schoDyal-Chand.pdf> or [http://www.ssrn.com/sol3/papers.cfm?abstract\\_id=939587](http://www.ssrn.com/sol3/papers.cfm?abstract_id=939587)

The R&D Bond Project was originally intended as a vehicle for promoting reconciliation but it has evolved into an innovative development financing project. The reason for this transition is that it turns out that private efforts at reconciliation cannot be based on mechanisms for making grant financing available to development projects. Instead they must adapt traditional financial instruments to new purposes. In order to do this, the reconciliation project needs to offer potential investors both a reasonable financial and social return. The conceptualization of a retail bond for this purpose turns out to be an effective means for addressing to a number of difficult development financing issues. Interestingly, the R&D Bond Project, if successfully implemented, has the potential to be replicated in a number of different countries and regions, including Africa.



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A Comparative **Study**

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# Regulatory Frameworks for Dam Safety

## A Comparative Study

### **Daniel D. Bradlow**

Professor of Law and Director  
*International Legal Studies Program*  
*Washington College of Law*  
*American University*

### **Alessandro Palmieri**

Lead Dam Specialist  
*Quality Assurance and Compliance Unit*  
*Environmentally and Socially Sustainable Development Network*  
*The World Bank*

### **Salman M. A. Salman**

Lead Counsel  
*Environmentally and Socially Sustainable Development and*  
*International Law Group*  
*Legal Vice Presidency*  
*The World Bank*



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1818 H Street, NW  
Washington, DC 20433  
Telephone 202-473-1000  
Internet [www.worldbank.org](http://www.worldbank.org)  
E-mail [feedback@worldbank.org](mailto:feedback@worldbank.org)

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## Foreword

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*Regulatory Frameworks for Dam Safety* was conceived and prepared in response to growing concern over the safety of dams. Given the large number of dams around the world, the safe operation of dams has significant social, economic, and environmental relevance. A dam failure can result in extremely adverse impacts, including a large-scale loss of human life. For countries with large stocks of dams, the issue of dam safety is critical.

The World Bank has long recognized the importance and relevance of this issue. As early as 1977, it issued Operational Manual Statement (OMS) 3.80, "Safety of Dams." The OMS made it clear that failure of a dam as a result of natural phenomena or of inadequate design can have disastrous consequences and underscored the importance of dam safety. This OMS has been revised and reissued twice since 1977 to reflect the evolving thinking on dam safety issues. The current version of the Bank's policy was issued in October 2001 (Operational Policy [OP] 4.37, together with Bank Procedure [BP] 4.37). Its application now goes beyond water storage dams and extends to tailings, slimes, and ash impoundment dams.

*The Report of the World Commission on Dams*, which was released in November 2000, highlighted, among other things, the importance of the safety of dams. The standards already set by the Bank for the safety of dams under its operational policy and procedure are no less stringent than those recommended by the World Commission on Dams.

OP 4.37, on safety of dams, is one of the 10 World Bank "safeguard policies." These policies require that potentially adverse environmental and selected social impacts of Bank-financed projects be identified, and avoided, minimized, to the extent feasible, or mitigated and monitored. As such, the principal objective of the safeguard policies is that of "doing no harm." At the same time, application of, and scrupulous compliance with, the safeguard

policies has demonstrated that their use can achieve much more than just avoiding harm. Going beyond compliance, and making development objectives the goal of the safeguard policies, is the Bank's current endeavor.

In this context, OP 4.37 recommends, where appropriate, as part of the policy dialogue with the borrowing countries, that Bank staff discuss any measures necessary to strengthen the institutional, legislative, and regulatory frameworks for dam safety programs in those countries.

*Regulatory Frameworks for Dam Safety* helps to achieve this overriding goal by providing a better understanding of dam safety, thus working to ensure compliance with the World Bank's safeguard policies and, by extension, to promote sustainable, equitable, and environmentally sound development. The present study examines the dam safety regulatory frameworks of 22 countries. It draws comparisons and highlights similarities among the various systems. Most important, it makes recommendations on how to improve dam safety, thereby improving the quality of life for people throughout the world.

The Legal Vice Presidency and the Environmentally and Socially Sustainable Development Network of the World Bank are pleased to offer this publication and hope it will serve as a useful guide for policymakers and technical experts, as well as civil society organizations—indeed all those working toward increased dam safety.

Ko-Yung Tung  
Vice President and General Counsel  
Legal Vice Presidency  
The World Bank

Ian Johnson  
Vice President  
Environmentally and Socially  
Sustainable Development Network  
The World Bank

## Abstract

---

This study is a comparative assessment of the regulatory frameworks applicable to dam safety in 22 countries. It is divided into three parts. The first part is a description of the dam safety regulatory framework in each of the 22 countries. The countries were selected based on the availability of information about their dam safety regulatory frameworks. The second part of the study is a comparative analysis of these regulatory frameworks. The analysis attempts to highlight the main similarities and differences in the approaches adopted by the countries discussed in the first part of the study. The third part offers recommendations on what a regulatory framework for dam safety should contain. It lists essential elements that should be included in all dam safety regulatory frameworks, as well as elements that would be desirable to include in such regulatory frameworks. This part also identifies and discusses a number of emerging trends in dam safety. In this connection, this part of the study can be seen as providing a tool kit that can be used in formulating a regulatory framework for dam safety.

The study has seven appendices. Appendix IV contains a dam safety statute; appendix V is a dam safety regulation; and appendix VI is a sample operations, maintenance, and surveillance manual. These appendices are provided as examples of dam safety regulations and management. There are many other examples, and the inclusion of these particular samples in this study should not be interpreted as an endorsement of these models over other models.

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Last, we would like to acknowledge the assistance of, and funding from, the Bank-Netherlands Water Partnership Program for the preparation of this study, and to thank the colleagues who facilitated such assistance and funding.

## Acronyms and Abbreviations

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AAR	alkali aggregate reaction
ANA	National Water Agency ( <i>in Brazil</i> )
ANCOLD	Australian National Committee on Large Dams
ANEEL	Energy Regulatory Agency ( <i>in Brazil</i> )
ASDSO	Summary of State Dam Safety Officials ( <i>in the United States</i> )
BP	Bank Procedure
CDA	Canadian Dam Association
CE	chief executive
CSD	Commission for Safety of Dams ( <i>in Portugal</i> )
CWC	Central Water Commission ( <i>in India</i> )
DSA	Dam Safety Act ( <i>in Finland, India</i> )
DSC	Dam Safety Committee
DSCP	Dam Safety Code of Practice ( <i>in Finland</i> )
DSD	Dam Safety Decree
DSO	Dam Safety Organization
DUC	dam under construction
DWAF	Department of Water Affairs and Forestry ( <i>in South Africa</i> )
EDSC	External Dam Safety Committee ( <i>in Ireland</i> )
EPP	Emergency Preparedness Plan
ESB	Electricity Supply Board ( <i>in Ireland</i> )
FDSS	Federal Dam Supervisory Section ( <i>in Austria</i> )
FEMA	Federal Emergency Management Agency ( <i>in the United States</i> )
FERC	Federal Energy Regulatory Commission ( <i>in the United States</i> )
FMAF	Federal Ministry of Agriculture and Forestry ( <i>in Austria</i> )
GACG	Governmental Action Command Group ( <i>in Norway</i> )
ICOLD	International Commission on Large Dams
IDA	International Development Association

IDF	inflow design flood
LDSSC	Large Dam Safety Supervision Center ( <i>in China</i> )
MPW	Ministry of Public Works
MWAF	Minister of Water Affairs and Forestry ( <i>in South Africa</i> )
NDCD	National Department of Civil Defense ( <i>in Portugal</i> )
NDSC	National Dam Safety Committee
NDSPA	National Dam Safety Program Act
NIW	National Institute of Water ( <i>in Portugal</i> )
NLEC	National Laboratory of Civil Engineering ( <i>in Portugal</i> )
NVE	Norwegian Water Resources and Energy Directorate
NWC	National Water Commission ( <i>in Mexico</i> )
NZSOLD	New Zealand Society of Large Dams
OMS	Operational Manual Statement
OMS Manual	Operations, Maintenance, and Surveillance Manual
OP	Operational Policy
ORSEP	Organismo Regulador de Seguridad de Presas ( <i>in Argentina</i> )
PAR	population at risk
PCA	Pollution Control Act ( <i>in Norway</i> )
PREPA	Puerto Rico Electric Power Authority
RA	Reservoirs Act ( <i>in the United Kingdom</i> )
REC	Regional Environmental Center ( <i>in Finland</i> )
RMA	Resource Management Act ( <i>in New Zealand</i> )
SERCON	Chef des Services du Control ( <i>in France</i> )
TOR	terms of reference
TR	Technical Regulation
TT	task team
TVA	Tennessee Valley Authority ( <i>in the United States</i> )

## INTRODUCTION

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This study is a comparative assessment of the regulatory frameworks applicable to dam safety in 22 countries.<sup>1</sup> The purpose of the study is to provide information to policymakers and technical experts in countries that are planning to develop new or to modify existing regulatory frameworks for dam safety. The study should also be of interest to two other groups. The first is policymakers and technical experts who are interested in learning more about current approaches to the regulation of dam safety around the world. The second is that group of people who are trying to decide whether it is a worthwhile exercise for their countries to design a regulatory framework for dam safety.

The International Commission on Large Dams (ICOLD) estimated that by the end of the last century there were over 45,000 large dams.<sup>2</sup> More than half of those dams are located in developing countries, and a number of those countries are currently engaged in extensive dam-building programs. Thus, the subject of dam safety becomes an important one for a number of reasons. First and most obviously, it is essential that each dam owner be able to ensure that its dams are safe and do not pose an unacceptable risk to life, human health, property, or the environment. Second, dam safety directly influences the sustainability of dam projects and the extent of their potential environmental and social impacts. Consequently, dam safety is an important consideration at all stages of the dam's life cycle. Third, dam safety is relevant

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1. Those 22 countries are: Argentina, Australia, Austria, Brazil, Canada, China, Finland, France, India, Ireland, Latvia, Mexico, New Zealand, Norway, Portugal, Romania, the Russian Federation, South Africa, Spain, Switzerland, the United Kingdom, and the United States.

2. See International Commission on Large Dams, *World Register of Dams* (ICOLD 1998) (computer database). ICOLD defines a large dam as a dam (i) with a height of 15 meters or more from the foundation, or (ii) with a height between 5 and 15 meters, with a reservoir volume of more than three million cubic meters.

to a state's ability to comply with its international obligations. A failure to pay adequate attention to dam safety can cause a country to violate its obligations under existing international treaties and conventions, such as those relating to transboundary watercourses and the environment. It can also have an adverse impact on the state's ability to perform its international financial obligations, thereby undermining its overall development strategy.

Another reason that dam safety is a matter of such importance is that in many countries, there is now a substantial stock of dams whose failure could have significantly adverse social, economic, and environmental consequences. In these countries, the safety of existing dams is a matter of great concern. In fact, it may be the most important issue related to dams in these countries because they are no longer building many new dams or because the state of the existing dams poses a safety problem.

For the purposes of this study, "dams" refers to water storage dams used in hydropower, water supply, irrigation, flood control, or multipurpose projects.<sup>3</sup> Many of the points made in this study will be relevant to other dams, such as tailings and slime dams for mine projects and ash impoundment dams used with thermal power plants. However, in some countries different regulatory regimes may be applicable to these other types of dams, and this study did not focus on these different regimes. Consequently, the conclusions of this study may not be directly applicable to these other types of dams.

"Dam safety," as used in this study, can be understood as referring to the factors that influence the safe operation of the structure of the dam and the appurtenant structures, and the dam's potential to adversely affect human life, human health, property, and the environment surrounding it. This means that dam safety is also concerned with the adequacy of the operations and maintenance of the dam, as well as its plans for dealing with emergencies and with limiting the adverse impact of existing dams on human life, human health, property, and the environment.

This study is divided into three parts. The first part is a description of the dam safety regulatory framework in each of 22 countries. The second part of

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3. This definition is based on the definition used in World Bank, *Operational Policies and Bank Procedures: Safety of Dams (OP and BP 4.37, Oct. 2001)* in *The World Bank Operational Manual* <<http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf>>. See appendices I, II, and III of this study. It should be noted, however, that OP and BP 4.37 apply to tailings, slime, and ash impoundment dams. The scope of this study is confined to water storage dams.



the study is a comparative analysis of these regulatory frameworks. The third part contains the recommendations of the study on what a regulatory framework for dam safety could contain. These include the essential elements that should be included in all dam safety regulatory frameworks, as well as elements that would be desirable to include in such a regulatory framework. This part also describes and analyzes some emerging trends in the regulation of dam safety.

## **PART ONE**

### **Country Study of Regulatory Frameworks for Dam Safety**

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This part of the study describes and analyzes the regulatory frameworks for safety of dams in 22 countries. It specifies the law, decree, or regulation that deals with the matter and discusses the institutional arrangements for implementing such a framework, as well as the enforcement procedures and mechanisms.

#### **Argentina**

The regulatory framework for dam safety in Argentina consists of an administrative decree, which creates the Organismo Regulador de Seguridad de Presas (ORSEP), or dam safety regulatory body. The ORSEP is an independent regulatory agency within the Secretariat for Water Resources. It replaces the ORSEP Comahue, which was established in 1993, and three transitional commissions on dam safety. The function of the ORSEP is to oversee dam safety issues in the design, construction, maintenance, and operation of privatized hydroelectric projects.

The ORSEP has police powers to deal with dam safety issues. This means that the ORSEP has the power to develop norms and technical directives relating to dam safety, to compile statistics on dams, to provide assistance to government bodies that request its assistance, and to collaborate with other bodies working on dam safety. It has the power to enforce the law relating to dam safety and to intervene in legal and judicial proceedings relating to dam safety. The ORSEP provides certificates of approval for works within its jurisdiction and is responsible for evaluating the performance of dam licensees and concessionaires. It is also responsible for evaluating the performance of dam licensees and concessionaires. The ORSEP finances its activities through fees and monthly charges paid by the entities that it regulates.

Dam licensees' contracts include obligations relating to dam safety. These include developing and maintaining environmental assessment plans, regular

monitoring and evaluating of dam performance, and periodic inspections by independent consultants. In addition, the owners of dams are required to maintain a current emergency action plan. This plan must be approved by the ORSEP. The owner must keep a copy of the plan.

The highest authority in the ORSEP is the Technical Council. This body consists of the heads of the four regional offices of the ORSEP and a chair. The president of Argentina appointed the first members of this council. However, it is expected that in the future the members of the council will be chosen in a competitive election. There are four regional offices under this council. These offices have independent technical and institutional responsibilities. Each is headed by a regional director, and there is a director for each province subject to the jurisdiction of the regional office (there can be more than one province per regional office). The ORSEP is required to provide an annual report to the government on the structural and operational condition of the 32 privatized dams in Argentina.

It is important to note that there are an additional 70 nonprivatized dams in Argentina. These dams belong to the provinces and are not subject to any national or federal dam safety regulatory framework.

### **Australia**

In Australia, dam safety is a state matter. This means that the relevant regulation can be found at the state level. Currently, there are three states that have dam safety regulations. These are New South Wales, Queensland, and Victoria. The information on Australia is drawn from the laws in these three states and the 1994 Australian National Committee on Large Dams (ANCOLD) Guidelines on Dam Safety Management.

#### *New South Wales*

The Dams Safety Act (DSA) in New South Wales creates a Dams Safety Committee (DSC) that functions under the direction and control of the minister responsible for administering the act. The DSC consists of eight part-time members, seven of whom are experienced in dam engineering. Pursuant to section 8 of the DSA, they are selected in the following manner: four are nominated by statutory bodies dealing with water and power; one is nominated by the minister responsible for administering the Public Works Act; one by the minister administering the Mining Act; and two persons are

nominated by the Australian Institution of Engineers. The minister appoints the chair of the DSC.

The functions of this committee are to maintain surveillance over “prescribed dams” to ensure their safety; to investigate the location, design, construction, reconstruction, extension, modification, operation, and maintenance of prescribed dams; to obtain information and keep records relating to dam safety matters; to formulate measures to ensure safety; to make reports to the minister on the safety of prescribed dams; and to make recommendations on adding new dams to the list of prescribed dams. It should be noted that the “prescribed dams” are all those dams listed in schedule 1 of the DSA. This schedule lists the names and locations of all prescribed dams; it does not establish any criteria for determining whether a dam is prescribed.

The DSC also regulates mining activities under or in the near vicinity of dams and their reservoirs in order to ensure that such mining does not jeopardize the safety of the dam or the security of the reservoir. In accordance with the provisions of the Mining Act, the DSC enforces this regulation by advising the minister responsible for administering the Mining Act on conditions to be attached to the mining leases granted for mining under and around dams and reservoirs.

The DSC has the power, by written notice, to require the owners of a prescribed dam to make observations, take measurements, and keep records regarding the operation and maintenance of prescribed dams and their environment, and to provide this information and these records to the DSC. The DSC has the power to undertake these activities itself if the owner fails to do so. It can then recover the costs of its activities from the dam owner. Another power of the DSC is to authorize inspections of prescribed dams. The person undertaking these inspections is authorized to enter the land where the dam is located after giving reasonable notice to the dam owner. The owner must be compensated for any damage caused in the course of the inspection. If the DSC thinks a prescribed dam is unsafe or is in danger of becoming unsafe, it may, by written notice, require the dam owner to take specific actions, or to refrain from acting, so as to ensure the safety of the dam. In addition to those inspections initiated by the DSC, the minister can direct the DSC to conduct inquiries into any matter relating to the safety of a prescribed dam. In conducting this inquiry, the committee, subcommittee, or person appointed to conduct the inquiry can request all information, evidence, and records, and can order people to attend the inquiry and produce information.

The DSA also has provisions dealing with emergencies. These provide that if there is a dam failure or the minister believes that a prescribed dam could fail, the minister, whether or not on the DSC's recommendation, can declare a state of emergency in respect of the prescribed dam. This state of emergency allows the DSC, acting with the approval of the minister, to take control of the dam, release water from the dam, carry out works on the dam, or demolish and remove the dam. The DSC can recover the costs of these activities from the dam owner. According to sections 25 and 28, the DSC is empowered to appoint other public authorities or single members of the DSC to act as its agents and carry out dam safety activities for prescribed dams. It can also enter into agreements with other ministers of any state or of the Commonwealth, a university, or any other person or body to conduct investigations, studies, or research on dam safety issues. Violation of the act is an offense that can lead to trial in local courts and the imposition of a penalty.

There is further legislation in New South Wales applying to dams owned by local government authorities. The relevant provisions are found in the Local Government Act and were first enacted in 1974. These provisions are presently administered by the New South Wales Department of Land and Water Conservation, acting on behalf of the responsible minister.

### *Queensland*

In Queensland, the Water Resources Act of 1989 was superseded by the Water Act of 2000. All "referable dams" are subject to the jurisdiction of the Water Act and the chief executive (CE) of the state Department of Natural Resources and Mines, who is the party responsible for the safety of referable dams. Under the terms of the dam safety provisions of the Water Act, a dam is referable if an accepted failure impact assessment demonstrates that there will be a population at risk (PAR) in the event of dam failure.

Part 6 (sections 480–500) of the Water Act requires a person who proposes to construct a dam that meets the specified size criteria to conduct a failure impact assessment. The criteria are that the dam be more than eight meters in height and have a storage capacity greater than 500,000 liters, or be more than eight meters in height and have a storage capacity of at least 250,000 liters and a catchment area no more than three times its maximum surface area at full supply level. If a dam is below these height and volume limits and the CE reasonably believes the dam would be referable, the CE has the power to issue an order requiring the owner to assess the dam's failure impact.

A failure impact assessment is an assessment of the safety of the dam carried out and certified by a registered professional engineer, in accordance with guidelines issued by the CE. The purpose of the failure impact assessment is to determine the population at risk if the dam fails. Dams that have a PAR of fewer than two people will have no failure impact rating. Those that have a PAR of 2 to 100 people will be rated as category 1, and those that have a PAR of more than 100 people will have a category 2 failure rating.<sup>4</sup> The failure impact assessment is submitted to the CE who can accept, reject, or require a review of the assessment. In the case of category 1 dams and non-referable dams, the dam owner must repeat the failure impact assessment every five years.

The owner must pay the cost for preparing and certifying the failure impact assessment. However, if the CE has issued a notice requiring a failure impact assessment and the assessment reveals that the dam has no PAR, the department will pay the reasonable costs of carrying out the assessment. In the event that the dam has a PAR of more than two people, the dam owner must pay for the assessment.

The CE has the power to impose dam safety conditions on referable dams. Such conditions are designed to control the design, construction, alteration, repair, maintenance, operation, abandonment, and removal of all referable dams. They also typically require the preparation of an emergency action plan for the dam to cover a range of potential failure events. These requirements are applied as conditions relating to dam safety of any resulting development permit.

If the CE reasonably believes that it is in the interest of dam safety to do so, he or she can reassess and change the safety requirements in light of subsequent failure impact assessments. An example of the type of event that might trigger such a reassessment is a change in the technique for estimating the probable maximum precipitation.

The CE has the power, by written notice, to order dam owners to carry out emergency actions to prevent or minimize the impact of dam failure. Such

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4. Peter Allen, the director of the Dam Safety (Water Supply) Office in the Queensland Department of Natural Resources and Mines, estimates that the new rating system will reduce the size of the Queensland referable dam portfolio from 1,500 to 300. However, he expects that this will lead to improved management of the state dam portfolio. See Peter Allen, *A New Regulatory Framework for Dams in Queensland* (paper prepared for NZSOLD/ANCOLD 2001 Conference on Dams) (copy on file with authors).

notices also attach to the land and bind the owner and future owners of the land. If these notices are not complied with, the CE has the power to perform the work and recover the associated costs from the owner. The CE can also require the owner to give information, plans, and reports on inspections and other documents on the dam to the CE.

The CE “may from time to time” require that the preparation of designs, plans, and specifications for initial construction or subsequent alteration, repair, maintenance, operation, removal, or abandonment of a dam be under the control and direction of a “suitably qualified person experienced in the design and construction of dams.” The qualifications of the person must be satisfactory to the CE. Under the Water Act, the requirements of the “suitably qualified person” are drawn from the Professional Engineers Act of 1988.

Pursuant to section 496.1 of the Water Act, the dam owner must prepare a flood mitigation manual, if so required.<sup>5</sup> The manual must be submitted to the CE for approval. The CE may request the advice of the advisory council before approving the manual. The CE’s approval is valid for no more than five years. Thereafter it must be reviewed by the owner and then resubmitted for the CE’s approval.

Pursuant to section 500, the state and the CE are not liable for the consequences of a failure that occurs in any dam which the CE has approved for construction, operation, maintenance, alteration, repair, or abandonment. This means that the dam owner always remains responsible for the safety of the dam.

### *Victoria*

The primary law applicable to dam safety in Victoria is the Water Act of 1989.<sup>6</sup> The dam safety principles incorporated into the Water Act are that dam owners are responsible and liable for damage caused by their dams and that potentially hazardous dams need to be designed, constructed, operated, and maintained according to appropriate standards and best practices relating to dam safety.

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5. This is only done in the case of major dams with significant capacity to vary flood discharges.

6. There are also two other laws that are applicable to tailings and other dams related to projects in the mining and extractive industries sectors. These statutes are the Mineral Resources Development Act of 1990, and the Extractive Industries Development Act of 1995.

Pursuant to sections 16 and 18 of the Water Act, the dam owner is liable for any damage that results from water flow from the dam. Section 67 stipulates that dam licenses, which are required to construct, alter, operate, remove, or abandon works on a waterway, can be made subject to a range of conditions including dam safety requirements. The conditions that can be attached to a license are set out in section 71 of the Water Act. According to this section, conditions can include standards of construction, future operation and maintenance, and the qualifications of persons undertaking these works. Section 78 allows the minister to issue ministerial directions that require an owner of a dam on a waterway to operate works in a particular way or to alter the works.

The Water Act also grants the responsible minister the power to intervene and issue directions relating to inspections and dam safety. Pursuant to section 80 the minister can require dam owners to make specified improvements or to take other measures to make a dam safe. If the dam owner fails to comply with the minister's directions, section 81 of the Water Act allows the minister to carry out works and recover costs. The Water Act provides for penalties for those who fail to comply with its provisions.

The Water Act requires owners of large dams to submit their designs, surveillance plans, and emergency management plans, certified by a qualified engineer, to the licensing authorities. The operating licenses for these dams, for which private operators must pay a fee, are generally issued for a period of five years. A qualified engineer must review the dam surveillance program during the license renewal process. The Water Act also requires dam owners to supply the emergency coordinating agency with a copy of their emergency management plans.

It should be noted that in addition to the license issued pursuant to the Water Act, the planning law in Victoria requires a prospective dam owner to obtain a planning permit from a local government body before constructing a dam.

The Department of Natural Resources and Environment, which is not dedicated exclusively to dam safety issues, administers the minister's powers under the Water Act. This department maintains a comprehensive dams database, which includes nearly all referable and large dams in the state.



### *ANCOLD Guidelines on Dam Safety Management*

The Australian National Committee on Large Dams (ANCOLD) issued its Guidelines on Dam Safety Management in 1994. These guidelines apply only to “referable dams,” which ANCOLD defines as dams that are either 10 meters or greater in height and have a storage capacity of at least 20,000 cubic meters, or that are more than 5 meters in height and have a storage capacity of at least 50,000 cubic meters. The guidelines are not applicable to tailings dams. They are useful in setting out some general considerations for dam safety programs. According to ANCOLD, there are a number of key elements in a dam safety program. The first is that the program should clearly identify the responsibilities of the dam owners, the government, and the dam personnel. Second, it should make the public aware of dams and dam safety issues, and the appropriate parties should consult with the public about its concerns relating to dam safety. Third, the program should ensure that the parties involved have the appropriate expertise. Fourth, the program should designate someone as being responsible for maintaining information about the dam for public reference and for use in future investigations, surveillance, and reviews. Fifth, the program should include measures to train dam personnel in the procedures for handling possible emergencies. Sixth, the program should have a quality management program that covers all aspects of dam design, construction, and operations. Seventh, the program should allow for periodic review and, if necessary, revision of dam safety policies and procedures.

ANCOLD suggests that the role of government is to enact legislation that stipulates who has the regulatory authority and responsibility to ensure that dam owners are taking appropriate actions with regard to dam safety. This legislation should include the criteria for classifying dams. The regulatory authority should also have the power to ensure that the dams are designed and operated in accordance with currently accepted standards relating to dam operation, maintenance, and surveillance. ANCOLD also suggests that the authorities need to maintain a register of dams that includes information on the size, type, purpose, location, hazard category, designer, owner, and year of completion of the dam. Finally, ANCOLD contends that even though the dam owner is primarily responsible for dam safety, there is a need to monitor and audit dam safety to ensure it remains effective.

ANCOLD maintains that the dam owner is primarily responsible for the safety of the dam. This means that the owner has a number of obligations.

The first is to provide sufficient resources to meet the safety program requirements. Second, the owner must ensure that each dam is operated and maintained in a safe manner. Third, the owner must know the hazard category of the dam and is responsible for having the classification regularly reviewed. Fourth, the owner must implement an appropriate dam surveillance program. Fifth, there should be dam emergency plans that include information about warning systems and inundation maps. The plans should be made available to the appropriate emergency authorities. These plans should be tested annually by dam personnel, and at least every five years a drill should be conducted that is coordinated with all relevant state and local officials. The plan should also be reprinted and distributed to all parties at least every five years. Sixth, the personnel engaged to work on and inspect dams during all stages of their life cycle should have suitable qualifications and levels of experience. Seventh, the owner should ensure that the regulators and other relevant parties have the following information: the dam's emergency plan, operating procedures, operations and maintenance manuals, inspection and evaluation reports as well as construction drawings of the dam, data books, design reports, construction reports, and safety reviews. This means that they should have sufficient information on the dam so that no further investigations are needed to resolve any technical issues that may arise. This information should also be maintained in a permanent archive.

ANCOLD also suggests that in addition to dam owners, populations at risk, owners of property at risk, and those with an interest in maintaining community infrastructure facilities and the environment should also be involved in dam safety. Thus, the public should be consulted about alterations to dams and their operations.

ANCOLD makes a number of suggestions about the content of dam safety programs. First, the scope of the program should be based on the size of the dam and its storage capacity, hazard category, level of risk, and the value of the dam to the owner. Second, dam surveillance should be based on inspections, monitoring, collection of information relating to dam performance, and the evaluation and interpretation of observed data and surveillance reports. There should also be an independent review of the surveillance program. The dam safety evaluations should as far as possible be made by a dam engineer who is familiar with the detailed history of the dam and its performance to date.

## **Austria**

The relevant statute for dam safety in Austria is the Federal Water Law.<sup>7</sup> Pursuant to this law, dams with a height greater than 30 meters or a volume greater than 500,000 cubic meters, dams on the Danube, and dams that significantly affect water affairs in other countries are subject to the jurisdiction of the Supreme Water Authority in the Federal Ministry of Agriculture and Forestry (FMAF). Other dams are subject to either provincial or district government regulation. The FMAF has a Federal Dam Supervisory Section (FDSS), which examines the dam owner's annual safety reports and carries out inspections of dams subject to the jurisdiction of the FMAF. The FDSS is assisted by the Austrian Commission on Dams, which provides background information to the FDSS and passes judgment on, among other things, the safety of dam projects.

The dam owner has the primary responsibility for dam safety. In the case of dams subject to the jurisdiction of the FMAF, the dam owner must appoint qualified civil engineers with sufficient authority to oversee dam safety.

Dams must comply with current engineering practices. The approval process for dam projects involves a public hearing and, in the case of dams subject to the jurisdiction of the FMAF, the approval of the Austrian Commission on Dams. Since dam projects are expected to comply with the current state of the art, there are very few technical standards included in the applicable law.

The Water Authority (at the appropriate governmental level) supervises construction of the dam. Before it will authorize the filling of the dam, the Water Authority conducts a preliminary technical examination of the dam. After some time, when sufficient data to make an informed judgment are available, the Water Authority conducts a final examination, after which it issues a final decree of acceptance. This decree allows for the normal operation of the dam.

The operational rules of the dam are defined in the preliminary and final decrees of acceptance. The monitoring and surveillance of the dam involves periodic visual inspections, regular measurements, and data collection. It also involves annual inspections by the dam safety engineer. Every 10 years, the

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7. The information in this section is derived from *Dam Legislation* (European Club of ICOLD Feb. 2001).

reservoir of the dam is drawn down, and there is a comprehensive inspection of the dam's safety. In the case of dams subject to the FMAF, the Dam Supervisory Section conducts this overall safety assessment.

The law requires that experts with "sound engineering judgment" undertake all inspections. The inspector should also be independent of the dam owner. The dam safety engineer who is appointed by the dam owner must report to the authorities after each annual inspection in the case of dams subject to the jurisdiction of the FMAF. In the case of FMAF dams, the dam supervisory officer conducts an annual review on behalf of the relevant provincial governor. This is in addition to the 10-year inspection described above.

The relevant information on the design, construction, and operation of a dam must be collected systematically. The dam safety engineer must be informed of all extraordinary events. Most large dams have emergency plans to deal with dam failures.

### **Brazil**

Although there have been several attempts in the past to develop legislation on dam safety, Brazil currently has no such legislation at either the federal or the state level.<sup>8</sup> However, in 1999, the São Paulo branch of the Brazilian Committee on Dams published a *Basic Guide on Dam Safety* based on the *Dam Safety Guidelines* published by the Canadian Dam Association. These guidelines have become a general reference for dam owners and engineers in Brazil.

Recently, there have been some movements that may result in a Brazilian dam safety statute. The Energy Regulatory Agency (ANEEL) has requested all public and private utilities to provide it with updated and basic information on the status and operations of dams associated with hydropower plants. In addition, the new National Water Agency (ANA) has asked the Brazilian Committee on Dams to work with it on a project that is expected to result in a draft national dam safety law.

### **Canada**

In Canada water resources management is a provincial responsibility. In the absence of specific provincial legislation on dam safety, the *Dam Safety*

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8. This section is based on information provided in a communication from G. V. Canali to the authors.

*Guidelines*, issued by the Canadian Dam Association (CDA) in January 1999, are treated as evidence of best practice. The guidelines suggest that the responsibility for all aspects of dam safety must be clearly defined and the delegation of authority must be documented. They state that normally the dam owner has responsibility for dam safety, which means that the owner is responsible for ensuring that dam safety reviews and all required safety improvements are carried out by knowledgeable and qualified people. This means that the review should be carried out under the direction of a professional engineer who is qualified in the design, construction, performance evaluation, and operation of dams. This person is responsible for providing the results of the dam safety review in a dam safety report.

The owner is also responsible for preparing an emergency preparedness plan. The CDA suggests that the dam owner should also inform the public about safety and involve the public in resolving dam safety issues.

The CDA recommends that the safety review should identify reference points against which comparisons can be made so that it is possible to test if the dam's actual performance complies with internal policies, CDA guidelines, and best practices.

The CDA proposes that the responsibilities of the regulatory agencies should be clearly defined. These responsibilities can include maintaining an inventory of dams, requiring dam owners to provide periodic dam safety reports, adopting substantive standards for dam safety, requiring remedial action based on the recommendations of the engineer who conducts the dam safety review, establishing the timing of dam safety reviews, and inspecting dams. The regulatory authority should also have the power to accept or reject dam safety reports in written and reasoned statements.

The CDA also suggests that dams should be classified according to the consequences of their failure, the physical characteristics of the dam, and the perceived probability of their failure. This classification should provide the basis for determining the level of surveillance activity.

The CDA also discusses the content of dam safety reviews. It argues that these reviews should include the design, operation, maintenance, surveillance, and emergency plans and should be intended to determine if they are safe in all respects. If not, the review should seek to determine what safety improvements are required. The first inspection should be made before the initial filling of the dam in order to establish baseline data. There should be

regular inspections thereafter. These include weekly or monthly inspections conducted by the dam's staff and annual or semiannual intermediate inspections performed by appropriate representatives of the owner. In addition, there should be more comprehensive dam safety reviews, the first of which should be completed within three years of filling. This review should include an inspection of the dam structures, an assessment of its performance, and a review of the original design and construction records to ensure they meet current standards. A qualified engineer who was not involved in the design or construction of the dam and is not involved in the normal inspections of the dam should conduct this review. The level of detail of the review should be consistent with the importance, design conservatism, and complexity of the dam, as well as with the consequences of failure.

After this first review, comprehensive dam safety reviews should occur every 5 to 10 years, depending on the consequences of dam failure. These reviews should include site inspections, a review of the dam's design and construction to see if they meet current standards, a review of operations and maintenance procedures, testing instrumentation for data collection, surveillance and monitoring of the dam's emergency preparedness, and checking for compliance with the recommendations of previous reviews. At the conclusion of the review, the reviewing engineer should produce a report that addresses all aspects of the review and identifies any additional actions required for safe operation, maintenance, and surveillance of the dam.

The guidelines also propose that each dam should have an Operations, Maintenance, and Surveillance Manual (OMS Manual) that spells out the procedures for OMS.<sup>9</sup> This manual should provide adequate information to allow safe operation and to define the chain of operational responsibilities. The OMS Manual should be reviewed annually. It should also ensure that adequate records are kept on matters such as operations and operating conditions.

Finally, dams need emergency preparedness plans that include notification processes. The plans, which should be in writing, should identify the procedures and processes that dam operators should follow in case of emergency. Normally, provincial or local governments would have the responsibility to warn residents of hazardous situations based on information provided by the dam owner or operator. The dam owner is responsible for linking

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9. This OMS Manual is included as appendix VI to this study.

dam surveillance with emergency response procedures. These can include direct warnings from the owner or operator to downstream communities. It is important to note that the absence of government regulation or regulators does not negate the owner's responsibility for dam safety and emergency preparedness. The level of detail in the emergency plan should be determined by the degree of potential impact of the emergency. There should be periodic testing of the emergency preparedness plans.

Alberta, British Columbia, Ontario, and Quebec are the only Canadian provinces with specific dam safety legislation.

#### *Alberta*

The applicable laws for dam safety in Alberta are the Dam and Canal Safety Regulations of 1978, as revised in 1998; the Dam Safety Guidelines of 1975; and the 1995 Dams Safety Guidelines of the CDA. There is a dam safety branch in the Alberta Environmental Protection Agency that is responsible for the regulation of dam safety. This branch reviews applications for new dam licenses. It also compiles and updates the Inventory of Dams. The director of this branch can require dam owners to prepare emergency preparedness plans and OMS Manuals. The dam safety branch carries out audit inspections accompanied by the dam owner and related consultants. The director of the branch can require that the dam owner have an independent professional engineer carry out regular safety reviews. The owner conducts its own routine inspections and data collection activities. In the case of major dams and depending on the size of the dam, the dam safety branch, the owner, and their consultants prepare a comprehensive independent dam safety report. In the case of government-owned dams, the five-year review is carried out by an external consultant. The Dam and Canal Safety Regulations contain provisions that specify whom the owner must notify and the steps that must be taken in the case of hazardous conditions.

#### *British Columbia*

In February 2000, the government of British Columbia issued its Dam Safety Regulations.<sup>10</sup> The regulations are applicable to all dams that are more than

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10. Regulations B. C. 44/00 (Feb. 11, 2000). These regulations are included as appendix V to this study.

one meter in height and have an impounding capacity of more than 1,000,000 cubic meters, or more than 2.5 meters in height, and have an impounding capacity greater than 30,000 cubic meters, or are more than 7.5 meters in height. It also contains provisions applicable to low-capacity dams. In the case of dams classified as high or very high consequence, the dam owner must prepare and submit to the dam safety officer for approval both an emergency preparedness plan and an OMS Manual. Low-hazard dams only need to submit the OMS Manual.

The dam owner is responsible for carrying out regular inspections of the dam and for installing the required equipment. The frequency of the inspections varies according to the classification of the dam. They can vary from weekly site surveillance to reviews of the OMS plans every 7 to 10 years. The owner must record the results of these inspections and submit them to the dam safety officer, together with documentation relating to the design, construction, or alteration of the dam. The dam safety officer can also request information needed to evaluate the condition or hazard potential of a dam.

Professional engineers must conduct all dam safety reviews. The regulations are silent about whether a professional engineer must be responsible for other inspections. The regulations specify whom the dam owner must contact in case of hazardous conditions and what actions the owner must take.

#### *Ontario*

Dam safety in Ontario is governed by the Lakes and Rivers Improvement Act and the guidelines issued pursuant thereto. In 1977, the Ministry of Natural Resources, which is responsible for administering this act, issued the Lakes and Rivers Improvement Act Guidelines, which are applicable to dams in Ontario. These guidelines address construction of dams, as well as operational and safety issues. In January 2000, the relevant branch of the ministry appointed a task force to help it develop dam safety guidelines. In August 2000, the task force issued its report, which included a number of conclusions.<sup>11</sup> First, it concluded that there should be one standard for public safety policy that is applicable to all dams. In the case of dams that cannot meet this standard, the dam owners should be offered an opportunity

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11. Ontario Dam Safety Guidelines Task Force, Ontario Ministry of Natural Resources, *Summary Report* (Aug. 23, 2000) <[www.cda.ca/ontario/summary\\_report.html](http://www.cda.ca/ontario/summary_report.html)>.



to develop acceptable risk management plans to demonstrate how they will manage the increased risk to dam safety. Second, there should be one set of safety standards for both new and existing dams. If existing dams cannot meet these standards, they need to develop risk management plans to demonstrate how they will manage the increased risk. Third, environmental criteria should be considered in determining the hazard classification of the dam. Fourth, the risk management plans of dams that do not meet the safety standards should be subjected to independent review. Dams that do meet the safety standards should be subjected to independent review only if the regulator so requires. Fifth, the inflow design flood should be based on a simple approach that is linked to the hazard classification of the dam and its height and storage capacity. Sixth, government oversight of dam safety should be required in the case of dams that do not meet the current safety requirements, and there should be a selective audit of only those that do meet the current safety standards.

#### *Quebec*

Dam safety in Quebec is governed by the Dam Safety Act, which was adopted by Parliament on May 23, 2000. The act is applicable to all “high-capacity” dams, which are those that are more than one meter in height and have an impounding capacity of more than 1,000,000 cubic meters, are more than 2.5 meters in height and have an impounding capacity greater than 30,000 cubic meters, or are more than 7.5 meters in height. It also contains provisions applicable to low-capacity dams. The construction, alteration, or removal of a high-capacity dam requires the approval of the minister of the environment. The minister’s approval is based on a submitted application that must contain the plans for the dam and be prepared by an engineer. The engineer must certify that the plans conform with the government’s safety standards. The minister classifies all high-capacity dams according to the risk that they present to persons and property. Each high-capacity dam must undergo a safety inspection by an engineer at regular intervals that cannot exceed five years. The report on the safety review must be forwarded to the minister. If the owner fails to conduct these periodic reviews, the minister can have the review carried out at the owner’s expense. The owner must maintain a register for the dam that contains the information from the safety reports. The register must be available for inspection by the minister. The minister has the

power to set application fees for people seeking approval to construct or modify dams, as well as annual fees for dam owners. The annual fees should cover the cost of administering the act and regulations. The minister can also impose fines that cannot exceed Can\$500,000 for violators of these regulations.

### China

China has a number of laws and regulations dealing with dam safety.<sup>12</sup> The Flood Control Law (August 29, 1997) appears to impose on all units and individuals the duty to prevent floods. The Water Law (January 21, 1988) provides for inspections and administrative rules about water issues. The State Council issued the Reservoir Dam Safety Regulations (July 2, 1991) and the Flood Fighting Regulations (July 2, 1991). The Ministry of Water Resources issued the Reservoir Dam Safety Certification Regulations (March 20, 1995). The Ministry of Power Industries issued the Hydropower Station Dam Safety Management Regulations (January 1997), while the Ministry of Energy has issued the Detailed Rules on Hydropower Station Dam Safety Inspection (August 1988).<sup>13</sup>

According to Gong Zhenghua and others, dams in China are divided into those for water resources, which are under the jurisdiction of the Ministry of Water Resources, and those for power generation, which are under the jurisdiction of the State Power Corporation. Both of these were previously under the Ministry of Water Resources and Electric Power. In the provinces, the electric power bureaus are responsible for the management of dams associated with their hydropower stations, while the power plants themselves are responsible for dam operation. This means that there are three levels for dam safety management: ministry, province, and power plant.

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12. The information in this section is drawn from a secondary source, Gong Zhenghua and others, *Chinese Dam Safety: Philosophy and Practice in International Water Power and Dam Construction* 14–17 (Dec. 1999).

13. Other applicable laws and regulations include: Reservoir Dam Registration Regulations (Ministry of Water Resources, December 28, 1995, and revised on December 26, 1997); General Dispatching Guidelines on Multipurpose Reservoirs (Ministry of Water Resources, December 1, 1993); Care and Maintenance Specifications of Embankment Dam (SL210-98, December 23, 1998); Regulations of Data Compilation for Embankment Dam Safety Monitoring (SL169-96, January 1, 1997); Technical Criteria on Embankment Dam Safety Monitoring (SL 60-94, August 27, 1994). These laws and regulations are available only in Chinese. This information was provided by Xiaokai Li of the World Bank office in Beijing.

In addition, there are two committees with responsibility for dam safety. These are the Large Dam Safety Supervision Center (LDSSC), which was set up by the State Power Corporation in 1985, and the Dam Safety Management Center, which was established by the Ministry of Water Resources. The LDSSC has conducted two rounds of general inspections of dams constructed before 1980, and some remedial action was taken. In 1997, the Guidelines for a Register of Hydropower Stations were issued, and pursuant to them LDSSC has classified about 110 dams, of which 100 are class A. In 1992, the Ministry of Energy published the Dam Safety Monitoring Modification Program for Hydropower Stations. The various regulatory efforts in dam safety have resulted in standard criteria for monitoring technology for concrete dams, embankment dams, national standards for monitoring instruments, and the types of monitoring instruments to be used on concrete and embankment dams.

The primary responsibility for dam safety lies with the owner of the dam. The government has a supervisory function, which in 1999 it assigned to the LDSSC for hydropower stations. LDSSC fulfills this function by providing advice on dam safety management to hydropower stations and by carrying out its supervisory function for all dams within its jurisdiction.

### **Finland**

Dam safety in Finland is governed by a number of laws, including the 1984 Dam Safety Act (DSA); the Dam Safety Decree 27.7.1984/574 (DSD); the 1985 Dam Safety Code of Practice (DSCP), which was last revised in 1997; and the Water Act of 19.5.1961/1264. The DSA is supervised by the Regional Environmental Centers (RECs) under the guidance of the Ministry of Agriculture and Forestry. Rescue services fall under the Ministry of the Interior.

The Finnish regulatory framework applies to all dams that are no less than three meters in height. Pursuant to article 2, the DSA also applies to dams of less than three meters if the “volume of the substance in the basin impounded by the dam is so large or if the substance in the basin is of such a type that in the event of an accident it manifestly endangers human life, or health or manifestly seriously endangers the environment or property.” All dams covered by the DSA are classified on the basis of size and hazard risk assessment. Dams are classified at the planning stage and checked at the commissioning stage. The classifications are P dams (dangerous), N dams

(smaller risk), O dams (minor hazard risk), and T dams (temporary dams). The DSA does not apply to dams covered by the Mining Act, but the safety requirements for dams covered by the Mining Act correspond to those in the DSA. These mining dams are subject to supervision by the Safety Engineering Center of the Ministry of Trade and Industry, which uses the DSCP.

Before a dam is classified as a P dam, a hazard risk assessment must be done. RECs can require that this assessment be done for other dams. The main issues considered in this assessment are the facilities for organizing rescues and the measures needed to prevent or contain an accident. The results of this assessment must be delivered to the REC, the provincial government, and the regional and municipal fire centers. The REC classifies the dam on the basis of this report, after consulting with the Finnish Environmental Institute.

The emphasis of the DSA is on accident prevention and effective reduction of hazards if accidents do occur. The basis for evaluating dam safety is monitoring and inspection and, if necessary, investigations by the owner. If the REC considers the person who assesses dam safety to be incompetent or inexperienced, it can require the owner to do a new inspection.

Pursuant to the DSA, the dam owner, in the case of P dams, is responsible for drawing up a dam safety monitoring program which must be approved by the appropriate REC. The REC can only give its approval after obtaining an expert opinion from the Finnish Environmental Institute. The monitoring program can include both monitoring and inspections. The dam owner must maintain documents related to dam safety in a special safety file that must be kept in a readily available location. The contents of the dam safety file are specified in section 5 of the DSA and section 2 of the DSD. In sum, the DSCP indicates that the owner must keep the documents that a competent person considers essential for the preliminary assessment of dam safety. The document should also include all the information drawn from the annual inspections and monitoring that are required by the safety monitoring program. These inspection reports should also be submitted in triplicate to the REC and in the case of P dams to the provincial government. The owner also has the responsibility to familiarize itself with the current dam safety requirements. It can consult the REC and the Finnish Environmental Institute about these requirements. The REC will also inform dam owners about relevant changes in the law and regulations.

The dam safety plan must be drafted by someone who has the same competence as the designer of the corresponding structure. It may include guidelines for monitoring and regular inspections. It must be approved by the REC. There should be annual inspections whose records are kept in the safety file. In addition a more comprehensive inspection should take place at least every five years. The relevant authorities (i.e., the REC and the provincial government) must be informed about this inspection and can, if they so choose, participate in it.

The Water Act provides in chapter 21 that the supervisory authority is obliged to take measures to ensure dam safety, and that it has the right to inspect dams and to undertake investigations. It can seek the assistance of the Water Court and can recover costs for the state. The Water Act is also applicable in cases of noncompliance with safety requirements. Pursuant to this act, if the dam poses an immediate danger to public safety, then the provincial government, the police authority, and the REC are empowered to take the necessary measures to eliminate the danger.

Dam design, which must include dam safety monitoring devices, must be directed by a competent and experienced person. The REC can evaluate the person to see if he or she meets this standard. The ultimate decision to approve the design rests with the Water Court. However, the REC must be informed of dam construction in sufficient time that it has time to study the design documents before construction begins. Similarly, any dam modifications must take dam safety into account, and if dam safety is affected, the modifications must be reviewed. This review is initiated with a written notification to the REC. It includes a review of the dam plans, a monitoring program, and a field inspection. The REC can participate in the field inspection. In the case of P dams, the provincial government, the fire authorities, and the Finnish Environmental Institute also may participate. The owner organizes the inspection.

### **France**

The current French law dealing with dams dates back to the early 1960s, when it was amended following a dam accident in 1959. It was revised in the law of July 22, 1987, dealing with the prevention of major risks. Furthermore a general law on water was adopted on January 3, 1992. In addition there is a circular, No. 70/15 of August 14, 1983, issued by the Ministries of Industrial and

Scientific Development, Agriculture, and Public Works that deals with the “Inspection and Surveillance of Dams Relevant to Public Safety.” While there may be other decrees and circulars related to dams, this circular appears to be the most relevant for dam safety. One of the additional decrees is the circular of July 13, 1999, issued jointly by the Ministry of the Interior; the Director of Defense and Civilian Security in the Ministry of Defense; the Director of Gas, Electricity, and Coal in the Secretary of State for Industry in the Ministry of Economy, Finance, and Industry; and the Director of Water in the Ministry for Management of Land and the Environment (1999 Circular). There is another applicable circular, which was issued by the Secretary of State for Industry in the Ministry of Economy, Finance, and Industry on May 23, 1997, that gives additional rules for medium-size hydroelectric dams. A decree of June 13, 1966, creates a Permanent Technical Committee on Dams. This committee supervises all dam projects with a height greater than 20 meters.

Circular 70/15 stipulates that the Chef des Services du Control (SERCON) is involved in the regulation of dam safety. SERCON is responsible for maintaining an inventory of dams that can affect public safety. For each of the dams in this inventory, SERCON maintains a dossier with all relevant documents, descriptions of the actual work, and monitoring and inspection reports. In addition, the owner or operator is expected to maintain a dossier with all the relevant documents relating to the dam.

The circular offers general instructions on supervision that can then be adapted to the specifics of each dam. It stipulates that the owners and operators of dams are responsible for maintaining the dam and for any accidents that may happen. The circular requires that the first inspection occur in the course of the first filling of the dam. Diverse methods for monitoring the dam can be used in this inspection. However, the person who is in charge of the dam’s construction must also supervise the execution and monitoring of the first filling of the dam. The procedures to be followed must be approved by SERCON. The frequency of the surveillance during the filling of the dam is a function of the height of the dam. The owner of the dam must provide SERCON with a copy of the report on the first filling within six months of the filling of the dam.

After the filling of the dam, surveillance of the dam should include periodic visual inspections, and measurements done by a qualified person. The frequency of the visits and the measurements should vary according to the

importance of the dam and should be increased if there are any abnormal situations. The visits should be at least once every two weeks. Measurements should be taken at least once a month in the case of simple measurements and once a year in the case of more complex measurements. A specialized engineer should interpret the results of these inspections. In addition, a report must be submitted annually to SERCON on the surveillance and monitoring of the dam. SERCON agents will visit each dam at least once a year to conduct their own examination of the dam. SERCON requires a more detailed report every two years. Finally, SERCON will make a more comprehensive inspection of the dam every 10 years, normally after a total emptying of the dam.

Pursuant to Decree 399/997 of September 15, 1992, which deals with "Intervention Plans for Hydraulic Installations," dams that are more than 12 meters in height above ground level and have a storage capacity greater than 15 million cubic meters need to maintain an emergency plan.

The 1999 circular is designed to establish secure zones in the vicinity of and downstream from dams and other hydraulic installations. To this end, it establishes a system of concessions to which these installations are subjected. The circular establishes an interagency working group to evaluate and implement actions intended to achieve this objective. It also provides for consultations with local authorities. Under the circular, any dam operator may be required to sign an agreement with other users or local authorities that establishes the means for sharing information and warnings of problems. An annex to the circular specifies that the dam operator must conform with any rules relating to protection against floods and interventions in dam operations to avoid damage and risks to public health.

## **India**

The information on India is derived from the draft Dam Safety Act of 2000 (DSA), which offers an interesting example of a dam safety statute.<sup>14</sup> This draft has not yet become law, so its provisions are not yet applicable in India at either federal or state level. In addition to the draft act, the Dam Safety Organization of the Central Water Commission (CWC) issued in June 1987 the *Guidelines for Safety Inspection of Dams*, for adoption by the states of India.<sup>15</sup>

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14. Discussion of and reference to this draft act should not be seen as an endorsement of the draft act.

15. For a general discussion of those guidelines, see World Bank, *Staff Appraisal Report for the Dam Safety Project* (Report No. 9391—IN, Apr. 19, 1991).

The DSA requires inspection of all large dams. A large dam is defined in the DSA as any artificial barrier capable of impounding or diverting water and which is above 15 meters in height, or which is between 10 and 15 meters in height and satisfies at least one of the following conditions: the length of the crest is no less than 500 meters, or the reservoir has a capacity of no less than one million cubic meters, or the maximum discharge of the dam is not less than 2,000 cubic meters per second, or the dam has special foundation problems.

The DSA provides that each state or organization with responsibility over dams should have a Dam Safety Organization (DSO) headed by an officer with the rank of at least superintendent engineer. The DSO should have jurisdiction over the dams in the state or organization. Dam owners have to file all technical reports with the DSO. The DSO reports to the highest engineering or technical authority for irrigation or water resources in the state. It must file reports on all inspections with this authority. It also liaises with the DSO of the CWC, which gives advice on safety. In addition, dam owners must file all their technical documents with the relevant DSO. The DSO has the power to conduct investigations, which must be carried out by someone with the rank of executive engineer or higher. The timing of these inspections is specified in the DSA. Primarily they should occur both pre- and post-monsoon as well as at other times. The DSO must also evaluate or arrange for an independent panel of engineers to evaluate all existing large dams at least every 10 years. The DSO has the responsibility to pursue with the relevant project authorities any remedial action arising from these periodic inspections.

The DSO has other responsibilities. It advises states and organizations on the regulations for dam safety. It is responsible for pursuing any remedial action arising from periodic inspections with project authorities. It provides an annual report on dam safety to the state government or head of the organization and to the Central Water Commission. It must also provide the DSO of the CWC with information on the status of dams and reports on any inquiries made by the DSO of the CWC. The DSO of the CWC prepares a consolidated annual report on dam safety for the Ministry of Water Resources. The DSA also requires dam owners to file technical documents with the DSO.

Under the *Guidelines for Safety Inspection of Dams*<sup>16</sup> the key responsibility for dam safety is with the owner. Dam safety is not part of the current dam

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16. See *id.* at 24.



approval process for locally funded projects.<sup>17</sup> In the case of internationally funded dams or dam safety programs, dam safety assurances are usually required by the relevant international funding source. This was the case with the dam safety project that was funded by the World Bank in India in 1991.<sup>18</sup> The objective of the project was to improve the safety of selected dams in certain states in India (project states) through remedial works, installation of basic safety facilities, and strengthening of the DSO of the CWC and the Dam Safety Committee (DSC). One assurance in this regard required each project state to maintain the Dam Safety Review Panel during the implementation of the project, with composition, functions, and terms of reference satisfactory to the World Bank.<sup>19</sup>

In addition, India has the Indian Standards and a Code of Practice for all waterworks, including dams. These documents address safety considerations. They suggest that a dam safety review panel should review the safety of each large dam each year. The documents establish a process according to which all dams are subject to preliminary reviews and those with serious problems to a secondary review. It should be noted that dam safety guidelines may exist within each organization responsible for operating dams, such as DSO, but such guidelines are hard to obtain.<sup>20</sup>

It should be noted that currently the CWC encourages state governments to conduct dam break analyses and to prepare inundation plans, emergency action plans, and remedial plans to deal with safety-related deficiencies in dams. In addition, India has a National Dam Safety Committee (NDSC) that has advisory and recommendatory powers. The NDSC enables an exchange of information on dam safety among experts, state governments, and bodies that own large dams or significant numbers of dams. The NDSC is chaired by

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17. It is worth adding that dam safety may be a factor that is considered in the issuing of permits for new dams.

18. See Loan Agreement between India and International Bank for Reconstruction and Development (Loan Number 3325 IN), and Development Credit Agreement between India and International Development Association (Credit Number 2100 IN) both dated January 10, 1991, for the Dam Safety Project. See also the Staff Appraisal Report for this project, *supra* n. 15.

19. See Project Agreement among International Development Association, International Bank for Reconstruction and Development, and State of Madhya Pradesh, State of Orissa, State of Rajasthan, and State of Tamil Nadu, dated June 10, 1991, for the Dam Safety Project.

20. Currently, the central government has issued guidelines on dam safety that are followed in some states.

the chair of the CWC and has 12 other members, drawn from state governments and bodies that own large dams or large numbers of dams. The chief engineer of the CWC is also a member of the NDSC and serves as its secretary. The NDSC meets twice a year to exchange views and to discuss and monitor whether dam owners are following the CWC's dam safety guidelines.

### **Ireland**

According to the 1994 World Bank study on the supervision of dams,<sup>21</sup> the chief engineer in Ireland is responsible for water regulations that deal with the safe operation of dams. In addition, the chief civil engineer of the Electricity Supply Board (ESB) is designated as the person responsible for dam safety issues relating to hydroelectric dams. The ESB conducts annual inspections through a subsidiary corporation. The chief engineer of ESB carries out an inspection of ESB dams every five years. The ESB is also audited by an independent External Dam Safety Committee (EDSC) that carries out inspections, at varying levels of comprehensiveness, every year, 5 years, and 10 years. The 10-year report is formally presented to the ESB Board. The EDSC consists of internationally recognized dam experts. The chief executive of the ESB appoints the chair of the EDSC. The chief engineer of the hydro group of ESB is responsible for issuing regulations and guidelines in the form of a Structural Safety Surveillance Manual.

### **Latvia**

In December 2000, Latvia adopted the Hydropower Plant Dam Safety Act. The purpose of the act is to establish the legal grounds for determining the responsibilities of hydropower dam owners. Paragraph 12 of the draft law stipulates that the State Civil Engineering Inspection Board is responsible for overseeing compliance with the law.<sup>22</sup>

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21. Guy Le Moigne, *Supervision of Dams By Governmental Authorities World-Wide: A Survey of Countries Where Regulations Exist in the Interest of Dam Safety* (Agricultural and Natural Resources Department, World Bank, 1994).

22. It should be noted that the act entered into force quite recently, and as such it is too early to know with certainty how its different aspects will be implemented. It appears, however, that the State Construction Inspectorate, which is a unit within the Ministry of Environmental Protection and Regional Development, will also play a role in overseeing compliance with the act. This observation is based on communication from John Irving to the authors.

Paragraph 3 of the act classifies dams into three categories. Class A dams are those that in the event of an accident would “manifestly” endanger human life and health or “seriously damage” legal or natural persons or the environment. Class B dams are those that, in the event of an accident, would not create any danger for human life or health but would damage property and the environment. Class C dams are those that, in the event of an accident, would not create any danger for human life or health but could cause minor damage to property or the environment. The classification is made at the design stage of the dam.

The owner or legal titleholder of the dam is responsible for the safety of the dam. Pursuant to paragraph 4 of the act, the owner is required to take all necessary steps to ensure that the dam is not a danger to human life, health, property, or the environment. The owners of class A and B dams must insure the dam against civil liability due to the potential damage caused by a dam accident. The amount of the insurance is set by the cabinet of ministers.

Paragraph 5 of the act requires the dam owner to draft a dam safety monitoring program that it must submit for approval to the State Civil Engineering Inspection Board. Paragraph 6 stipulates that owners of class A dams must submit this program during construction of the dam. Owners of class B and C dams must do so after the commissioning of the dam. In both cases, according to paragraph 5, the program must conform to the standards established by the Cabinet of Ministers, which also determines the procedures for submission and approval of the program. The Cabinet of Ministers, according to paragraph 7 of the act, also decides which measuring devices should be used in the safety program.

Pursuant to paragraph 8, dams can only be operated when they have received a certificate of safety from the State Civil Engineering Inspection Board. The board has the authority to annul the certificate according to procedures established by the Cabinet of Ministers. According to the transitional regulations issued in conjunction with the act, the owners of dams that were commissioned before the act entered into force were required to submit their safety programs to the authorities by December 31, 2001. They must receive their certificates by March 31, 2003. The procedures to be followed and the criteria that the State Construction Inspectorate should apply in deciding whether to issue safety certificates are spelled out in Cabinet Regulation No. 351.

According to paragraph 9, dam owners are required to submit reports detailing the steps they have taken to comply with the safety program. The contents of this report and the procedures governing their submissions are established by the Cabinet of Ministers. These requirements are spelled out in Cabinet Regulation No. 257.

Paragraphs 10 and 11 deal with dam failures and accidents. Paragraph 10 provides that when observations, monitoring data, and inspections indicate that the continued operation of the dam is likely to lead to dam failure, the owner of the hydropower dam has the right to lower the reservoir level after giving notice to the operator of the transmission and distribution system and to the state fire and rescue services in the potentially affected areas. The owner must also give notice to owners of downstream hydraulic structures. Paragraph 11 of the act deals with the situation in which a dam fails. It provides that the owners of the dam must give notice to the operator of the transmission and distribution system and to the state fire and rescue services in the potentially affected areas. In addition, the owner must initiate the regional alarm system in accordance with the Civil Defense Act.

### **Mexico**

Dam safety in Mexico falls under the jurisdiction of the National Water Commission (NWC), which is an administrative unit of the Secretariat for the Environment and Natural Resources. The National Water Law, its implementing regulations, and the internal regulations of the Secretariat establish the powers and responsibilities of the NWC. It is responsible for studying, creating, and promulgating standards; monitoring; administrating; operating; and rehabilitating the dams that belong to the federal government or that are operated pursuant to concessions granted by the federal government.

Article 29 IV of the National Water Law stipulates that the owners and operators of dams are responsible for operating, maintaining, and preserving the works necessary for the stability and security of the dam, and other works required in accordance with the hydraulic safety standards.

The NWC has a number of powers that are relevant to dam safety. Pursuant to article 29 IV of the National Water Law, it can require dam owners and operators to provide the NWC with whatever information and documentation it requests. Pursuant to article 29 V, the owner and operator of the dam must allow NWC personnel to inspect the hydraulic works, take

measurements, verify the functioning of the measuring equipment, and conduct other activities necessary to comply with the law. If the owner or operator does not allow the NWC to inspect, take measurements, or monitor the dam, article 26 of the law gives the NWC the authority to suspend that owner's or operator's dam concession until the situation is corrected. The corrections must be made within 15 days. In accordance with article 83 of the law, the NWC is also responsible for issuing standards and making recommendations relating to flood control. Finally, chapter IV of the law requires the NWC to maintain a public registry of water rights.

### **New Zealand**

Dam safety in New Zealand is governed by the Resource Management Act of 1991 (RMA). Other relevant laws are the Building Act of 1991 and the Civil Defense Act of 1983.

The RMA is premised on the principle of subsidiarity, according to which decisionmaking is best left to those who are directly affected by the results of the decision. Therefore it devolves authority to the most appropriate level, and as a result, local authorities are responsible for the day-to-day implementation of the RMA. District and city councils have jurisdiction over the effects of land use and the effects of activities on the surface of lakes and rivers. They are also expected to prepare district plans, issue resource consents, take enforcement actions, and monitor actions in this regard. The regional councils are responsible for controlling the taking, damming, and diversion of water, and the discharge of contaminants into the environment. This means that they are responsible for issuing consents for dams in their area of jurisdiction. In issuing these consents they are required implicitly to consider the potential effects of a dam failure, even though the RMA imposes no explicit obligation on them with regard to dam safety.<sup>23</sup> They are also expected to prepare regional plans and policy statements, issue resource consents, take enforcement actions, and monitor actions related thereto. The powers of the central and local governments are spelled out in part IV of the RMA. The minister of the environment can issue national statements and national environmental standards, and maintains an oversight role over the

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23. See *Guidelines for Resource Consents for Dams and Associated Activities* secs. 6-4, 6-5 (Ministry of the Environment 2000).

implementation of the RMA. The Ministry of Conservation is responsible for coastal marine areas, in partnership with regional councils.

Although the Building Act of 1991 does not have any specific provisions dealing with dam safety, dams fall within the definition of a “building” contained in the act. This means that a building consent is required for all dams higher than three meters and capable of storing more than 20,000 cubic meters of water. Building permits will only be issued if the dam complies with the Building Code. It is interesting to note that the Building Code’s requirements are given in general terms and they do not have any specific provisions dealing with dam safety. International methods and codes and the New Zealand Society of Large Dams (NZSOLD) Dam Safety Guidelines are often used in the absence of a specific New Zealand standard.<sup>24</sup>

District councils are responsible for the day-to-day administration of the Building Act, and the Department of Internal Affairs is responsible for overall administration. The Building Act is currently being reviewed. Two of the issues under review are the safety of large dam structures and the monitoring of dam safety. Pursuant to section 36 of the RMA, local authorities can charge applicants for the actual and reasonable costs of processing and monitoring resource consents. The charges should be set to recover the authority’s actual and reasonable costs for these activities.

Article 330 of the RMA deals with emergencies. In cases of emergencies relating to public works that can have an adverse effect on the environment or that may lead to loss of life, injury, or serious damage to property, the RMA provides that the local or consent authority can, without notice, enter the place and take such action as is “immediately necessary and sufficient” to remove the cause of the emergency. Article 331 allows the responsible authority to obtain reimbursement for expenses from the consent holder when it incurs these expenses in dealing with emergencies that occur because of the failure of any resource consent holder to comply with the applicable laws and regulations. The law also allows any person who suffers damage because of the authority’s action to seek compensation from the authority, provided the authority’s action did not arise from any failure of the complaining party. The Civil Defense Act of 1983 may also be applicable to the case of dam

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24. *Id.* at sec. 2.3, 2–7.

failures. It provides for the declaration of local, regional, and national civil emergencies by authorized personnel. Once an emergency is declared under this act, the authorities can carry out or order the dam owners to carry out work to deal with the emergency.<sup>25</sup>

Article 332 of the RMA allows an enforcement officer:

- to obtain written permission from the responsible authority to enter, at all reasonable times, any place or structure (except a dwelling house);
- to inspect the place or structure;
- to conduct surveys;
- to carry out tests and measurements; and
- to prepare, change, or review a policy statement investigation.

Article 333 allows any enforcement officer to carry out surveys, investigations, and tests, or to take measurements and samples of air, water, soil, or vegetation.

### **Norway**

Norway recently revised its regulatory framework for dams. Its new Water Resources Act entered into force on January 1, 2001. The act, which covers a broader range of issues than dams, empowers the Norwegian Water Resources and Energy Directorate (NVE) to oversee dams in Norway. It also grants the NVE the power to issue regulations pertaining to dam safety. With regard to dam safety, the new act places a greater emphasis on the operations phase of the dam's life cycle than did the previous regulatory regime.

The NVE, which had similar powers under the previous water law, issued *Regulations Governing the Safety and Supervision of Watercourse Structures* (the Regulations) on December 15, 2000. These regulations deal with safety considerations at the planning, construction, operation, and decommissioning phases of the dam's life cycle. The NVE is also planning to issue detailed guidelines that set out the specifications and technical requirements for issues related to dam safety. It is anticipated that the NVE will have issued 25 such guidelines by the end of 2002. The NVE has also issued regulations

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25. *Id.* at sec. 2.3.1, 2-9.

detailing the qualifications required of those who plan, construct, and operate dams. In brief, they are required to be well-trained engineers.

The Regulations classify dams into three categories based on the consequences of the failure of the dam. Category 3 dams have the highest hazard potential. The basis for the classification is the number of dwelling units that could be affected by a dam failure. There is a special regulation that explains how the numbers of dwelling units are determined, with the relevant criteria being the number of people who live in a normal dwelling in Norway and the period of occupancy. The Regulations are applicable to all category 2 and 3 dams, which are those dams that are at least four meters high, or have a storage capacity of least 500,000 cubic meters, and all category 1 dams, which are those dams that are more than six meters high, or have a storage capacity of at least 500,000 cubic meters.

The Regulations specify that the dam owners must prepare an emergency plan for the dam and must have internal quality controls to ensure that the dam complies with the requirements of the Regulations. The Regulations stipulate that the NVE must approve all plans for dams. They contain detailed provisions on the technical requirements that the plans for dams must satisfy. Section 8-1 of the Regulations stipulates that the watercourse authority can compel the dam owner to take action in the case of “a special and an unusual” hazardous situation.<sup>26</sup>

The regulations require each dam to have a program of inspection. The program, which should indicate the frequency of the inspection, the scope of the inspection, and the qualifications required for the inspectors, must be approved by the NVE. It appears that these regular inspections should be conducted annually.<sup>27</sup> Section 7-3 of the Regulations states that a “reassessment,” which is “a thorough examination and review . . . intended to clarify whether the structure meets the safety requirements” set out in the Water Resources Act and subsidiary regulations, should take place on a “regular basis.”<sup>28</sup> It appears that these reassessments, which must be conducted by an independent

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26. Under the new regulatory regime, the owner is required to report all incidents that have an actual or potential impact on safety.

27. K. Molkersrod and T. Konow, *Requirements for Operation of Dams in the Revised Norwegian Legislation in Dams in a European Context* (A.A. Balkema 2001) (proceedings of the ICOLD European Symposium, Norway, June 25–27, 2001).

28. Guidelines issued by the regulatory authority contain recommendations on the frequency of dam safety inspections, but these are not legally binding.



but approved company, take place every five years.<sup>29</sup> In addition, it appears that there should be a total reassessment of each dam every 15 years. This reassessment should include a new design analysis in light of the then current state-of-the-art safety criteria, updated estimates of hydrological conditions, and changed conditions upstream and downstream from the dam.

The Regulations provide that the NVE can charge fees to cover the costs of the inspection and license approvals. It appears, in fact, that the fees cover approximately 80 percent of the NVE's actual costs.<sup>30</sup> The Regulations also give the NVE the authority to levy fines on those who fail to comply with the Regulations and other applicable regulations.

The Pollution Control Act (PCA) also seems to be applicable to dam safety. Section 6 of the PCA defines pollution as "the introduction to air, water, or ground of solid matter, fluid or gas . . . which causes or may cause damage . . . to the environment." Thus, the consequences of a dam failure could qualify as "pollution" under the terms of the PCA. The PCA is administered by the "pollution control authority," which is defined in section 83 to include the Ministry of the Environment, the Pollution Control Council, and State Pollution Control Authority, and their county and municipal equivalents.

Section 38 of the PCA stipulates that the owner of a facility that can cause "acute pollution," which is defined as "significant pollution which occurs suddenly," must have contingency plans. The pollution authorities must approve these plans, pursuant to sections 40 and 41 of the PCA. Section 39 of the PCA requires owners to notify police authorities if acute pollution occurs. However, it also gives the pollution control authority the power to impose a more rigorous notification requirement. Sections 49–51 stipulate that the pollution control authorities have the power of inspection and can require the owner to carry out inspections at its own expenses. They also impose on owners an obligation to provide the pollution control authority, if so requested, with information necessary for the authority to perform its duties. The PCA also makes the owner liable for damages caused by pollution from its facility (sections 53–64).

The PCA requires municipal and state governments to have their own contingency systems to deal with acute pollution (sections 42–44). Section 45 of the PCA establishes a Governmental Action Command Group (GACG),

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29. *Id.*

30. *Id.*

whose members include representatives of concerned authorities and other appointed persons, to deal with large-scale accidents. This group has the authority to take over the operation of the facility from the owner in cases of acute pollution (section 45).

Section 48 of the PCA stipulates that the pollution control authority must monitor the pollution situation. The PCA grants the authority certain enforcement powers in this regard. Pursuant to section 52a, the authority can require applicants to pay fees for any permits it issues and inspections it undertakes. Section 73 empowers the pollution control authority to levy fines on any licensee or permit holder who violates the PCA or the terms of the license. It can also arrange for remedial action at the violator's expense. The pollution control authority can also levy fines and seek imprisonment in cases of willful or negligent pollution.

### **Portugal**

The regulations dealing with dam safety in Portugal were adopted by a decree of law in 1990.<sup>31</sup> The regulations are complemented by four codes that define all the requirements and standards relating to the design, construction, operation, observation, and inspection of dams. One of these codes, *The Portuguese Code of Practice for Observation and Inspection of Dams*, provides methodologies for evaluating the safety of existing dams.

Dams in Portugal are classified into two categories. There are "high dams," which are higher than 15 meters, have a storage volume greater than 1,000,000 cubic meters, or pose an important risk to human life and economic concerns. The second category consists of small dams and includes all dams that do not meet the above criteria. In the four codes that complement the regulation, dams are classified into three groups on the basis of a Global Risk Index. This index takes into account three factors: external and environmental conditions, dam condition and reliability, and human-economic hazards. Each of these factors contains a number of components, which are evaluated by dam inspection. Based on this index, dams are classified into three classes according to their hazard and performance characteristics. The index values are used to determine priorities in comprehensively evaluating and dealing with dam safety.

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31. The information on Portugal is taken from *Dam Legislation, supra* n. 7.

Three government departments are involved in dam safety regulation. They are the National Institute of Water (NIW) in the Ministry of Environment and Natural Resources, the National Department of Civil Defense (NDCD), and the Commission for Safety of Dams (CSD). The NIW is responsible for approving and supervising the construction and operation of dams. However, it does not need to approve the engineers in charge of dam projects. When necessary, it will consult with the National Laboratory of Civil Engineering (NLEC). The NLEC also carries out studies for the owners of dams. The NDCD is in charge of emergency plans. The CSD prepares standards and gives opinions on issues presented to it by the NIW.

The regulatory framework in Portugal sets out general standards dealing with specific aspects of dam structures, such as the foundation and spillways. However, it does not include precise standards on these issues. The regulations do stipulate what information needs to be included in the studies submitted to the NIW when seeking approval for the project.

Pursuant to the regulation, the NIW must approve the final design of the dam and any modifications during construction. It is also empowered to respect the project site. The NIW must also accept the dam at the end of the construction phase and must approve the plan for the first filling of the dam. At the end of the filling, the NIW carries out a detailed inspection of the dam. During this period, the NLEC will also publish a final report about the behavior of the dam.

During operation of the dam, the NIW, acting on the advice of the NLEC, must approve the project monitoring system. The monitoring system must be in accordance with the regulations in the *Standards for Monitoring and Surveillance of Dams*. The regulations provide for three levels of surveillance: continuous, special, and exceptional. The NIW in collaboration with the NLEC, and in the presence of the owner, carries out periodic inspections of the dam.

Each dam is required to have an emergency plan that is subject to periodic testing. The regulations require all important dams to have a permanent communications system that connects the dam, the powerhouse building, and the operation center of the dam. The dam must also have an alarm system, paid for by the owner. In case of an emergency, the dam owner must immediately contact the civil defense center.

## Romania

The National Commission for the Safety of Dams in Romania is responsible for the regulation of dams.<sup>32</sup> The National Commission is part of the Ministry of Water, Forest, and Protection of the Environment. All large dams are owned by either the Romanian Electricity Authority or the Romanian Water Authority. Each of these companies has its own dam safety commission, which develops internal standards for the design, construction, operation, and monitoring of dams.

All dam projects require formal approval. The State Standards stipulate the technical criteria—for example, spillway capacity and earthquake resistance—that dam projects must meet. During construction, the Ministry of Public Works carries out inspections. During this stage the owner is expected to keep an up-to-date description of the progress of the operations. This description is required for the final acceptance of the dam. The Commission of Acceptance must give its approval before filling of the dam can commence.

The dam owner and operator is expected to keep a file with all the documentation about the construction of the dam and about its operation. The two primary owners of dams each have their own inspection departments. These departments establish the methods of surveillance and monitoring of dams owned by each entity. The National Committee for the Safety of Dams and Hydraulic Structures carries out periodic inspections of dams. There can also be special inspections after exceptional events. There are regulations dealing with the monitoring of dams.

All dams higher than 10 meters, with a reservoir capacity greater than 10,000,000 cubic meters and with inhabited areas closer than 10 kilometers downstream must have an emergency plan. Furthermore, a 1992 regulation requires all dam owners to install an alarm system that will alert the authorities and the potentially affected population about any emergencies.

## The Russian Federation

The relevant statute for dam safety in Russia is Federal Law 21.07.97, N117-OC, adopted by the State Duma on June 23, 1997. This statute deals with the safety of state-owned hydraulic structures. Pursuant to articles 5 and 6 of this

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32. The information on Romania is taken from *Dam Legislation*, *supra* n. 7.

law, the government of the Russian Federation designates a part of the federal executive as responsible for the safety of all hydraulic structures, except those that are owned by municipalities. Article 7 requires that the government of the Russian Federation establish a register of hydraulic structures.

Article 8 of the law sets out the requirements for ensuring the safety of hydraulic structures. It requires the authorities to establish permissible levels of risk for the failure of dams; to take actions to ensure the safety of hydraulic structures, including specifying the criteria for dam safety and the technical equipment for monitoring safety; to maintain local alarm systems for emergencies; and to finance activities related to the construction, operation, and decommissioning of hydraulic structures. Pursuant to article 10, the owner or operating agency of the hydraulic structure must file a declaration of safety with the relevant authorities. This declaration must contain information relating to the compliance of the hydraulic structure with the applicable dam safety criteria. The declaration must be made four months prior to the commencement of dam operations. Thereafter it must be repeated every five years.

Article 16 provides that natural and legal persons are entitled to compensation for harm caused by violations of dam safety legislation. Furthermore, article 17 provides that the owner or the relevant operating agency is liable for any damage caused by the failure of the hydraulic structure. However, pursuant to article 18, the state may be liable for some damage if the amount of the actual damage exceeds the amount specified as the amount of civil damage due under article 17 of the law.

### **Republic of South Africa**

The regulatory framework for dam safety in South Africa is spelled out in the 1998 National Water Act<sup>33</sup> as well as the 1986 Regulations.<sup>34</sup> Although these regulations were issued prior to the National Water Act, they must be interpreted in a manner that conforms to the act, which includes a separate chapter on dam safety.<sup>35</sup> Pursuant to section 2 of the act, dam safety and the management of floods and droughts are among the goals of the act. It should be noted that the Department of Water Affairs and Forestry (DWAF)

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33. South Africa, Act No. 36 (1998).

34. The Regulations are published in the *Government Gazette*, Vol. 253, No. 10366 (Jul. 25, 1986).

35. Chapter 12, sections 117–123. This chapter on dam safety is included as appendix IV to this study.

has drafted dam safety regulations that would replace the 1986 Regulations.<sup>36</sup> DWAF will invite public comment on these draft regulations before they enter into effect.

Pursuant to regulation 2.1 of the 1986 Regulations, all dams are classified on the basis of size (based on wall height) and hazard potential (based on potential loss of life and economic loss) into three categories. The higher the classification, the greater the size and hazard potential of the dam and the more extensive is the regulatory oversight of the dam. The classification is made by the director general of the DWAF upon the completion of the dam feasibility studies. The classification, which can be changed, affects requirements relating to the design, construction, putting into operation, operation, maintenance, alteration, and decommissioning of the dam. The considerations in making licensing decisions relating to dams include the operations and maintenance manual, which must be developed by an approved engineer, and the plans to communicate with local authorities and communities about dam safety warnings.

In the case of the higher-category dams, the regulations require the dam owner/operator to secure the services of a professional engineer. In addition, before issuing a permit to proceed with the dam, the director general may require the owner to appoint an independent panel of experts—approved by the director general—to review the dam’s proposed design, plans, or specifications. This typically will only occur in cases of unusual dams.

In general, the owner has the duty to regularly inspect its dam. This means that the owner must conduct the first inspection within three years of the dam becoming operational, and then every five years thereafter for higher-category dams. In the case of Class II dams, the inspections must be carried out by an approved professional engineer, and in the case of Class III dams, by an approved team of professional engineers. The owners may be able to obtain some government subsidies to cover the costs of these inspections. In addition, the owner must conduct an inspection as soon as a condition affecting the safety of the dam arises. The owner has an obligation to report the results of the inspection to the director general within 60 days.

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36. In general, although the draft regulations are more detailed than the current regulations, they are not substantially different in basic design. The most interesting difference is that the draft regulations take a more holistic approach to dam safety and require much more information on the social and environmental impacts of the dam than is the case under the current regulations.

In addition to these regular inspections, the director general may inspect any dam with a safety risk or require the owner to provide information on any matter affecting dam safety. The director general can also order modifications to the dam to correct problems. When so instructed, the owner must also make additional reports to the director general. The owner is also required to report emergencies to the director general.

Another obligation of the owner is to keep comprehensive records on the dam. These records and other relevant information must be provided to the minister. An approved professional engineer is required to make the reports about these dams and to see that any actions necessary to maintain the dam and ensure its safety are taken. Violators of these regulations are subject to fines or imprisonment.

The director general keeps a register of all dams with a safety risk. These are defined as dams with wall height greater than five meters and storage capacity greater than 50,000 cubic meters or dams that in the opinion of the Minister of Water Affairs and Forestry (MWAF) pose a risk to health and property. Owners of dams with a safety risk require a permit from the MWAF in order to begin construction, make alterations, or abandon the dams. The MWAF can demand an inspection of dams with a safety risk. The owners of such dams must keep comprehensive records and must conduct inspections. There is a Dam Safety Advisory Committee, appointed by the MWAF, to advise the MWAF on dam safety issues.

### **Spain**

The key regulations dealing with dam safety in Spain include the 1996 Technical Regulation about Reservoir and Dam Safety (TR); the Order of the Ministry of Public Works of March 31, 1967, approving “Instruction for the Project, Construction, and Operation of Large Dams” (MPW)<sup>37</sup>; and the 1994 Basic Directive for Civil Protection Planning Against Flood Risk. There is also a national committee, the Commission on Norms for Large Dams, that is responsible for developing technical regulations related to dam safety.

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37. This was apparently supplemented in 2000 by a new regulation titled “Standard on the Safety of Dams and Reservoirs” that is applicable to dams under the jurisdiction of the Ministries of Public Works, Transportation, and the Environment. It is important to note that the 1967 Regulation is still applicable to all dams that are higher than 15 meters, or that are higher than 10 meters and have a storage capacity greater than 100,000 cubic meters. See *Dam Legislation*, *supra* n.7.

The TR is applicable to all publicly owned dams and to all private dams built after 1996, including those that store industrial waste. Article 3 establishes classifications for dams based on their size, potential risk (hazard), and their form of construction. It classifies all dams that are higher than 15 meters, or that are 10 to 15 meters in height and have a crest greater than 500 meters, a storage capacity greater than 1 million cubic meters, or a discharge capacity greater than 200 meters per second, as large dams covered by the regulatory framework. Smaller dams that have special features can be subjected to the regulatory framework. Its hazard classification divides dams into A dams, which can cause serious material and environmental damage and loss of life; B dams, which can cause “important” material and environmental damage and loss of life; and C dams, which can cause “moderate” material and environmental damage and “incidental” loss of life.

The TR also addresses all stages of a dam project. Article 7 stipulates that the approval process for any new dam whose failure can affect people, property, or the environment includes obtaining approval for its dam safety plan. In addition, the project proposal must include an emergency safety plan that deals with the negative social and environmental impacts of dam failure, and contains information and warning systems. The emergency plan must be approved by the General Directorate for Hydraulic Works (which is an administrative unit in the Ministry of the Environment) in the case of dams situated in interregional basins<sup>38</sup> after a preliminary report has been submitted by the National Commission for Civil Protection. The dam owner must also coordinate with the General Directorate on Civil Protection, which is a unit in the Ministry of Internal Affairs. The licensing application must also include technical solutions for all safety issues and a justification for the proposed solution.

Pursuant to these regulations, the dam owner has the primary responsibility for dam safety. The regulations, however, set out the standards that the owner must take into account in developing the dam’s safety program, and in dealing with the potential social and environmental risks associated with the dam.

Article 5 of the TR specifies the dam owner’s responsibility at all stages of the dam’s life cycle. With regard to safety, this means that during the design and construction phases the owner must conduct inspections and monitor

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38. Interregional basins are water basins located in the territories of two or more autonomous communities in Spain.



activities to ensure that dam safety requirements are being met. During operations, the owner must conduct periodic inspections, provide information to the regulatory authorities and communicate with them about exceptional or abnormal events, and take steps to study and repair problems. Article 34 of the TR requires that in cases of high-hazard dams (categories A and B) the safety plans must be subjected to periodic testing. The TR also contains technical standards that the dam must meet.

Article 33 of the TR states that in addition to the owner's inspections there must be a compulsory inspection after extraordinary events such as earthquakes and large spills from the dam. If the owner fails to conduct this inspection, the Administration can do it. Article 33 also empowers the Administration to ask the owner for a report on the safety of the dam at any time. This report is separate from the regular reports submitted by the owner.

Pursuant to article 5.5, the owner must maintain a technical archive for the dam that includes information on the dam's classification, studies done for the dam, the results of tests and analyses done on the dam, and changes in the dam project's operation and maintenance activities. Article 25 stipulates that the dam owner/operator has an obligation to arrange a technical team for the project that is competent to develop and implement the dam safety plan. The technical team is also responsible for developing the technical archive for the dam. This team must be in existence at all stages of the project.

The dam owner is responsible for observing all dam safety regulations, monitoring the dam, and conducting inspections. Article 30 of the TR states that the owner is responsible for drawing up standards of operation that must include dam safety provisions. These standards of operation must be included in the technical archives. Pursuant to article 33 of the TR, these standards of operation must include a plan for inspection and monitoring of the dam, including timing of inspections, scope of data to be collected, and specifications relating to the means of collecting and processing data. The manager of the dam must prepare an annual report on the results of the inspections, detailing problems observed and proposed corrective action. This becomes part of the technical archive. In the case of the most hazardous dams (category A), a copy of this report must be sent to the Administration, which can make observations and recommendations based on the report.

The administrative agency that grants the dam license is responsible for ensuring that the dam is used for its intended purpose. The agency has the power

to monitor compliance with dam safety regulations, conduct inspections, and require modifications to the dam's design and safety plans. The regulations require the regulatory authorities to maintain an inventory of all dams.

### **Switzerland**

The applicable law for dam safety in Switzerland is the federal law regarding supervision of hydraulic structures of 1877 (*Bundesgesetz über die Wasserpolizei*, June 22, 1877) as amended. Article 3 of this act (introduced in 1953) provides that the Federal Council must take steps to ensure dam safety with regard to questions of dam maintenance and the effects of war. An executive decree of December 7, 1998 (*Verordnung über die Sicherheit von Stauanlagen, Stauanlagenverordnung, StAV*), which became effective on January 1, 1999, superseded a 1957 Statutory Rule Concerning Dams, which addressed dam safety. The 1998 Decree redistributes supervisory authority between the federal and cantonal authorities. It is applicable to all dams that are higher than 10 meters or dams with a height of at least 5 meters and a minimum storage capacity of 50,000 cubic meters. Other dams that present specific safety concerns can also be subjected to this decree and thereby made subject to its jurisdiction.

Pursuant to articles 21 and 22 of the 1998 Decree, all dams that have an impounding head of at least 25 meters, or which have an impounding head of more than 15 meters and minimum storage capacity of 50,000 cubic meters, or which have an impounding head of more than 10 meters and a minimum storage capacity of 1,000,000 cubic meters or which have a storage capacity of more than 500,000 cubic meters are under the supervision of the Swiss Federal Office for Water Management and Geology, which is the federal supervisory authority. Dams that are smaller than these specifications and are not explicitly subject to federal supervision are under the supervision of the cantons.

The 1998 Decree relies on the following three principles with regard to dam safety: structural safety, monitoring, and emergency planning. Articles 3–6 of the 1998 Decree deal with structural safety. These provisions provide that the construction of new dams and the alteration of existing dams must be approved by the authority in charge in each canton, the *Aufsichtsbehörde* (supervising authority). There is also extensive opportunity for public comment in the permit process. The licenses are only granted for a limited period and renewals depend on a new analysis of the operating and environmental

conditions. At the end of construction, the owners draw up a final report detailing all aspects of the construction, including information on the geological and geotechnical tests carried out on the dams.

Articles 7–11 deal with the operations of the dam. They provide that the supervisory authority must approve the first filling of the dam. In addition, the supervisory authority must approve the maintenance of the dam and any modifications thereto.

Articles 12–16 of the 1998 Decree deal with dam monitoring. These articles provide that monitoring of dam safety must involve regular checks, measurements, and operational tests of gates and valves. The dam owner, experienced engineers, and the supervising authority are all involved in surveillance of the dam. The owner is responsible for controlling and measuring the condition and behavior of the dam. The owner must also ensure that the measurements (which are collected automatically) are manually checked once a month by hand measurements. Article 13 states that the owner must use experienced civil engineers to continuously monitor the dam and prepare the annual report. These engineers must supplement their use of mechanical measurements with an annual visual inspection. Article 14 states that dams with an impoundment head greater than 40 meters or a storage capacity greater than 1,000,000 cubic meters must be monitored/inspected at least every five years by special experts, who must be civil engineers and geologists. Article 15 states that the dam owner must inform the authorities of the identity of the persons chosen to do this five-year inspection. The authorities can reject the engineers chosen by the owner. The owner must also report all results of the five-year inspection to the authorities. Article 16 requires the owner to maintain records and files on the dam. The authorities have the right to inspect these records.

Article 17 of the 1998 Decree requires the owner to have plans for dealing with emergencies. Pursuant to article 18, the owner must inform the supervisory authority, the cantons, and the local government of these plans. The state, the canton, and the local government can provide help to the owner in developing and implementing these plans. Article 19 requires owners of dams with a storage capacity greater than 2,000,000 cubic meters to maintain an alarm system near the dam. Article 20 requires the owner to sound the alarm in any cases of abnormal behavior, natural disaster, or sabotage.

## **United Kingdom**

The most important statute with regard to dam safety in the United Kingdom is chapter 23 of the 1975 Reservoirs Act (RA), which entered into force on December 1, 1991. The RA only applies to raised reservoirs for water. Within the meaning of the RA, this refers to dams that have a holding capacity greater than 25,000 cubic meters and do not fall within the scope of the Mines and Quarries (Tip) Act of 1969.

Article 2 of the RA requires each local authority to keep a register of all raised reservoirs in the area. Pursuant to article 3 of the RA, the local authorities must submit regular reports to the secretary of state detailing the steps they have taken to ensure that undertakers (i.e., owners and operators) observe and comply with the requirements for all reservoirs in their area. If the secretary of state is concerned that the local authority is not meeting its obligations, he or she can order an inquiry into the matter.

Article 4 of the RA creates a panel of civil engineers that are deemed “qualified engineers” within the meaning of the RA. Any engineer can apply to be included in the panel. Appointments are for five years and are open to anyone who meets the qualification standards set by the secretary of state. The secretary of state consults with the Institution for Civil Engineers in setting these standards. Article 6 of the RA stipulates that a reservoir cannot be constructed or modified unless a qualified engineer is employed to design and supervise its construction.

The act spells out clear procedures for issuing the certificate to fill and operate the dam. Pursuant to article 7 of the RA, when a qualified engineer believes a dam under construction is ready for filling, the engineer issues a preliminary certificate specifying the level to which the dam can be filled. A final certificate is issued after three years if the engineer is satisfied that the dam is sound and satisfactory and may safely be used for storing water. An annex to the final certificate should detail the issues that the supervising engineer believes need to be watched in any inspection of the dam. If a final certificate is not issued after five years, the engineer must provide a written explanation. A qualified engineer must approve the abandonment of reservoirs, according to articles 13 and 14 of the RA.

According to article 8 of the RA, if the enforcing authority believes that there is no qualified engineer responsible for the reservoir, it may serve

notice on the dam undertakers, requiring them to appoint a qualified engineer within 28 days. This engineer must inspect the dam and supervise it until a final certificate can be issued.

Pursuant to Article 10 of the RA, the undertakers of a dam must have an independent qualified engineer conduct periodic inspections on the dam and obtain from him or her a report on the results of the inspection. In the case of large reservoirs, if they are not under the supervision of a construction engineer, they must be under the supervision of a qualified civil engineer who is employed to supervise the reservoir and advise the undertakers on safety-related issues. Unless the dam is under the supervision of a construction engineer, an inspection must be conducted within two years of the final certificate being issued, as soon as practicable after alterations, whenever the supervising engineer recommends an inspection, and within 10 years of the last inspection. The inspection report should include any recommendations for improving safety. These recommendations must be carried out. If the owner fails to appoint such an engineer, the enforcing authority can order the dam undertaker to appoint an inspecting engineer within 28 days. Article 15 empowers the enforcement authority to appoint qualified engineers if the undertakers fail to do this when so ordered.

Undertakers of dams are required to keep records on critical issues relating to the dam, such as its water level and leakages. They must also install instruments to measure these aspects of the dam's functioning.

Pursuant to article 16 of the RA, if the enforcement authority decides that a dam is unsafe and that immediate action is required to protect life and property, the authorities can take such measures as they feel are necessary to prevent harm. They must appoint a qualified engineer to make recommendations in these situations. An engineer must also supervise the actions. The costs of these actions are to be paid by the undertakers. Article 17 empowers the person appointed by the enforcement authorities, at a reasonable time and after giving seven days' notice, to enter into the land of the dam to carry out surveys or other operations, to see that the dam is being constructed or altered as represented by the undertaker, and to see if the applicable recommendations related to safety are being carried out. This right to enter can be enforced by a justice of the peace. Article 18 provides that if third parties' enjoyment of their land is impaired or they suffer an injury because of the enforcement authority's exercise of its powers under article 17, the third party

can seek compensation from the enforcement authority. The authority, in turn, can recover these costs from the dam undertaker.

The RA provides the undertaker with an opportunity to challenge the recommendations of the inspecting engineer. Pursuant to article 19, any undertaker who disputes the recommendations of an inspecting engineer can refer its complaint to a referee, who is an independent qualified engineer appointed by agreement between the undertaker and the inspecting engineer. The undertaker must pay the costs for this process.

### **United States**

There are both federal and state laws in the United States that deal with dam safety. For the sake of clarity, these will be discussed separately.

#### *Federal Law*

The basic federal law is the National Dam Safety Program Act (NDSPA), passed in 1972, revised in 1984, and incorporated as section 215 of the Water Resources Development Act of 1996, PL104-303, October 12, 1996. This act establishes a National Dam Safety Review Board. It also establishes an interagency Committee on Dam Safety, which includes representatives from the Departments of Agriculture, Defense, Energy, Interior, and Labor; the Federal Emergency Management Agency (FEMA), which chairs the committee; the Federal Energy Regulatory Commission (FERC); the Nuclear Regulatory Commission; the Tennessee Valley Authority (TVA); and the U.S. section of the International Border Commission. The mandate of this committee is to encourage the establishment and maintenance of effective federal and state safety programs, policies, and guidelines through the coordination of information exchange among federal and state dam safety agencies, and among federal agencies regarding the *Federal Guidelines for Dam Safety* (issued by FEMA).

The NDSPA authorizes the secretary of the army, through its chief of engineers, to maintain an inventory of dams in the United States. In addition, the NDSPA requires FEMA to establish, maintain, and administer a coordinated national dam safety program. For these purposes, it should be noted that the NDSPA defines a dam as any barrier capable of impounding water, wastewater, or any liquidborne material that is greater than 25 feet in height or has an impoundment capacity for maximum storage elevation of at least 50 acre-feet.

The objectives of the program are to ensure that new and existing dams are maintained in a safe condition through the development of technologically and economically feasible programs and procedures, encourage the establishment of state dam safety programs, enhance public awareness so that there is increased support for state safety programs, and develop mechanisms to provide technical assistance on dam safety to the non-federal dam sector. The program must include both a federal and a non-federal component. The federal component incorporates all the activities carried out by federal agencies to implement the *Federal Guidelines for Dam Safety*. The non-federal element includes the activities of states, local governments, and the private sector to safely build, regulate, operate, and maintain dams. It also includes all federal activities designed to encourage states to develop dam safety programs.

The NDSPA requires FEMA to develop an implementation plan that will set yearly targets (up to FY2002) to demonstrate dam safety improvements and for providing assistance to dam safety programs. The NDSPA establishes some requirements that states must meet before their dam safety programs are eligible for assistance. The state programs must have the authority to review and approve plans to construct or alter dams, and to undertake inspections at least every five years. In addition, state programs must require that qualified and experienced professional engineers undertake dam inspections. A state program must also require that the owner obtain state approval before operationalizing any constructed dam. Additional requirements are that the state program have the authority to require the owner to make repairs to the dam and to take remedial action if the owner is non-compliant, that there be an emergency system for dealing with situations in which dam failure is either imminent or has actually occurred, and that the state has made a budgetary allocation for dam safety. Finally, FEMA must have approved the state plan. FEMA reviews each state program periodically and can revoke its approval of a state program. Every two years, the director of FEMA is required to submit a report on dam safety to Congress.

Federal law also requires the secretary of the army to carry out inspections of all dams in the United States, except those under the jurisdiction of the Bureau of Reclamation, the TVA, and the International Boundary Commission, that are constructed pursuant to a permit issued under the Federal Power Act or that are not deemed a threat to life and property. The secretary must share the results of these inspections with the states.

It is important to note that there is separate legislation dealing with the safety of dams located on Indian reservations. These dams are under the jurisdiction of the Bureau of Indian Affairs in the Department of the Interior.

### *State Law*

Each of the states has its own laws on dam safety. These laws are summarized in the Association of State Dam Safety Officials (ASDSO) Summary of State Laws and Regulations on Dam Safety (2000). Since many of the programs are similar to each other, this brief discussion of the state laws will merely attempt to highlight certain features of the state programs without providing a summary of each program.

The basic pattern of state regulatory schemes contains the following elements:

- A state regulatory agency, often the agency dealing with water or natural resources, has jurisdiction over dams, including dam safety. Any person interested in constructing and operating dams is required to obtain the permission of this agency before beginning construction of a dam.
- The state regulatory scheme establishes a classification scheme for dams. This scheme classifies dams according to one or more of the following factors: the dam's hazard potential, size, or condition. Most states have three categories of dams. The classification scheme determines the frequency of dam inspections, with dams having greater potential to cause harm having a higher frequency of inspections and more intensive scrutiny of dam safety. The frequency of inspections usually will vary between about 1 and 10 years.
- The primary responsibility for dam safety rests with the dam owner. This means that the owner must undertake dam safety inspections and is responsible for monitoring dam operations. Many states require that the inspections and dam design, construction, and operation be overseen by a suitably qualified person. The owner will usually be required to report on dam inspections to the relevant supervisory authority.
- The regulatory agency has the power to enforce dam safety regulations and to undertake its own inspections. The agency usually has the power to force the dam owner to undertake remedial action or to undertake the actions itself and recoup the costs from the dam owner. As part of



its enforcement powers, the regulatory agency can usually impose fines on the dam owner. These fines can vary from a few hundred dollars a day to a few thousand dollars a day. In addition, in some cases the agency can arrange for the non-compliant owner's imprisonment.

- In many states, the state authorities have immunity from liability for any damages caused by the failure of the dams subject to their jurisdiction or for which they issued the permits.

The following are some aspects of some individual state's regulatory frameworks that are noteworthy:

- In Arizona, there is limited state liability for damage arising from a state's inspection of a dam. Arizona also has created a dam repair fund that is funded through state appropriations and the fees paid by dam owners.
- The applicable California law establishes guidelines for the design and construction of dams. In California, the state conducts annual inspections of certain dams at its own expense, but charges fees for applications for a new dam or an enlargement of an existing dam. Dam owners must also pay an annual fee. The state has established a dam review board with limited numbers of members. In addition, there is an independent review board for state-owned dams.
- In Idaho, each dam is inspected by the state every two years at the state's expense. The owner is required to keep data, which it must provide to the state, but is not required to conduct its own inspections. There is state immunity for damage caused by a dam failure. The owner is responsible for liabilities incident to the ownership and operation of the dam.
- Iowa requires the dam owner to post a performance bond as a condition for obtaining the permit/approval order to construct or operate the dam.
- Kentucky requires permit applications to be drawn up by a licensed professional engineer. The applications must bear his or her signature and seal. The state carries out dam inspections. The law only requires the owner to conduct inspections in case of renovations.
- Maine's Department of Defense, Veterans, and Emergency Management has jurisdiction over dam safety. The Maine Emergency Management Agency actually exercises this authority. It inspects dams to determine their hazard potential every six years. In addition it can conduct safety

inspections, take control of dams in case of emergencies, set regulatory standards for dam safety, appoint safety inspectors, and honor petitions for inspection from third parties. It is also responsible for ensuring the competent operations of dams and for giving approval for dam construction and alteration permits. It should be noted that the Maine Department of Environmental Protection has jurisdiction over water and navigation matters.

- Michigan's Natural Resources and Environmental Protection Act has a section on dam safety. The Department of Natural Resources is responsible for dam safety. It regulates all aspects of construction and alteration of dams, provides for inspections and the protection of natural resources, and safeguarding the public trust. It is authorized to impose remedies and penalties in cases of non-compliance and to take actions to protect public safety. Owners cannot begin constructing dams without permits from the department, and the statute establishes a fee structure for permit applications. They may also be required to post a performance bond to ensure completion of the project. Plans for dams must be prepared by a licensed professional engineer. Dam owners are required to submit inspection reports prepared by a licensed professional engineer to the department every three to five years, depending on the hazard potential of the dam (this means that each year one-fifth of all low hazard potential dams and one-third of all high hazard potential dams are required to submit an inspection report). Owners of all high and significant hazard potential dams must have emergency plans that must be submitted to the department and the local emergency services coordinator.
- Missouri's Dam and Reservoir Safety Council is responsible for dam safety. It has the authority to provide adequate protection for public safety, life, and property; to make policy, rules, regulations, standards, and guidelines; and to issue permits. The Department of Natural Resources has the authority to administer and enforce the council's policies and rules and regulations. In addition, the chief engineer of the council is responsible for administering the laws for the council, including carrying out inspections. Dam owners are required to obtain three permits: one each for registration, construction, and safety. Dams must be inspected by an experienced professional engineer before the registration or safety permit will be issued or renewed (after five years).

- Montana only requires the state to conduct inspections during dam construction. The state is also required to resolve complaints and determine a dam's hazard classification. The law requires owners to have a private-sector professional engineer conduct an inspection at the owner's expense at least every five years, but the state sets the frequency of the inspection. The owner is not liable for damage arising from dam failures caused by floods that exceed the 100-year floodplain if there is no evidence of negligence.
- New Hampshire requires all dams to pay an annual registration fee.
- Ohio requires the owner to pay an annual fee to the state with the fee based on the classification and size of the dam. Each dam must have an inspection manual that includes a program for periodic inspections by the owner that are undertaken by a licensed professional engineer.
- Pennsylvania charges fees for permit applications. The state also requires the owner to notify the state and the responsible authorities of downstream communities of any condition that threatens the safety of the dam and to take corrective action.
- In Puerto Rico, dam safety is overseen by the Dam Safety Unit of the Puerto Rico Electric Power Authority. This unit is supervised by a seven-member committee composed of the executive director of the Puerto Rico Electric Power Authority, the secretary of Natural and Environmental Resources, the president of the Puerto Rico Planning Board, the chief of operations of the Puerto Rico Water Company, and three members of the public sector named by the governor.
- Utah requires intensive inspections during construction and thereafter once every five years for dams with significant hazard potential. The inspections are conducted jointly by the dam owner and the state. The state also sets minimum maintenance and operating standards. The state waives immunity for all state employees except those who are involved in "intervening during dam emergencies."
- Washington State's Department of Ecology has jurisdiction over dams and is responsible for conducting inspections. It has issued seven volumes of dam safety guidelines. The state inspections are conducted at least every six years in the case of high and significant hazard dams. In addition the owner is responsible for conducting its own regular inspections. The state charges the owner for the regular state inspections.

The fees for the inspections are based on the actual cost to the state for doing the inspection. In addition, the state charges for the permits it issues. These fees can range up to \$20,000.

- West Virginia's Dam Control and Safety Act spells out in detail the requirements for applying for dam permits. These requirements include design requirements, geotechnical evaluation and stability requirements, special considerations for gravity structures and instrumentation, parameters for site development and construction, and rules for the operation and maintenance of dams. The act requires the state to conduct inspections during construction at the owner's expense. It also requires the owner to have a registered engineer conduct inspections at regular intervals that vary according to the stage in the life cycle of the dam and its hazard classification. The owner must submit the reports from these inspections to the state.
- Wisconsin requires the owner to post a performance bond with the state equal to the estimated cost of restoring a reconstructed dam to a safe condition when seeking a permit to construct or alter a dam. The owner must also file proof of financial ability to operate and maintain a dam in good condition. In addition, the state charges a fee for permit applications.



## **PART TWO**

### **Comparative Analysis of Dam Safety Regulatory Frameworks**

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The survey of the regulatory frameworks for dam safety in the first part of the study identified a number of common issues addressed by those frameworks. Such issues can be classified into four considerations. These considerations are the legal form of the regulation, the institutional arrangements for regulating dam safety, the powers of the regulating entity, and the contents of the regulatory scheme. The legal form of the regulation deals with issues such as whether the regulatory framework consists only of a primary legal instrument, like a statute, or also involves subsidiary instruments, such as regulations, decrees, or guidelines. The institutional arrangement addresses such issues as the location of the regulatory authority within the governmental structure, the relative independence of the regulators from the policymakers and those whom they regulate, and their relationships with other governmental bodies. The powers of the regulating entity refer to such issues as whether the functions of the entity are purely advisory or its decisions are binding on the regulated entity, the rule and policymaking powers of the agency, the ability of the regulators to monitor and inspect the operations of the regulated entity, and the enforcement powers of the regulators. The contents of the regulations relate to factors like the obligations of the regulated entities, the scope of the regulations, and the consequences of non-compliance with the stipulated obligations.

In this part of the study, the dam safety regulatory frameworks described in part one are compared on the basis of these four considerations. Each consideration is dealt with separately in this part of the study. It should be noted that not all the regulatory schemes described in part one address all aspects of these issues.

### **The Form of the Regulation**

Fourteen of the regulatory schemes studied relied on specific dam safety legislation. These are the schemes in the following jurisdictions:<sup>39</sup> Argentina, Australia (New South Wales), Canada (Alberta, British Columbia, Quebec), Finland, France, India,<sup>40</sup> Latvia, Portugal, South Africa (regulations), Russia, and the United States (both federal and some state regulatory schemes).

Twelve jurisdictions deal with dam safety as one aspect in more general legislation. The applicable legislation may deal more generally with water, dams, energy, or natural resources. The jurisdictions in this group are Australia (Queensland, Victoria), Austria, Canada (Ontario), China (general statute), Mexico, New Zealand, Norway, Spain, Switzerland, the United Kingdom, and the United States (some state regulatory schemes).

### **The Institutional Arrangements**

Eleven jurisdictions have designated a regulatory authority that is exclusively dedicated to dam safety. These jurisdictions are Argentina, Austria, Australia (New South Wales), Canada (Alberta), China, France, India, Portugal, Romania, and the United States (federal and some states). In some of these countries the specifically designated regulatory authority may share jurisdiction over certain aspects of dam safety with other regulatory bodies.

In 15 jurisdictions, the regulatory authority deals with dam safety as part of broader regulatory responsibilities. These jurisdictions are Canada (Ontario), China, Finland, Ireland, Latvia, Mexico, New Zealand, Norway, Russia, Portugal, South Africa, Spain, Switzerland, the United Kingdom, and the United States (some states).

In Australia (Queensland), the regulatory framework identifies a specific individual as being responsible for dam safety issues. Interestingly, the Canadian Dam Association recommends that the regulatory framework identify a specific officer as being responsible for dam safety.

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39. For the purposes of this comparative analysis, each regulatory scheme that was specifically described in part one of this study has been counted separately in this section of the study. This means that the regulatory scheme of each state/province within a country has been counted as a separate regulatory scheme except for the United States, which in some cases is dealt with as one scheme.

40. All references to India in part two of this study are to the draft Dam Safety Act, 2000.

In three jurisdictions, the regulatory framework creates a specific commission with oversight or advisory responsibility for dam safety. These jurisdictions are Australia (New South Wales), Ireland, and South Africa.

### **The Powers of the Regulating Authority**

#### *Power to Develop Norms and Standards*

In 20 jurisdictions, the regulatory authority has the power, either explicitly or implicitly, to develop norms and standards applicable to dam safety. These jurisdictions are Argentina, Australia (New South Wales, Queensland, Victoria), Austria, Canada (Alberta, Ontario), China, Finland, France, Latvia, Mexico, Norway, New Zealand, Portugal, Romania, Russia, Spain, and the United States (federal and some states). In three other cases, South Africa, the United Kingdom, and Michigan, these standards are established in the legislation itself.

#### *Power to Issue Licenses/Permits*

In 17 jurisdictions the authority responsible for dam safety also plays some role in the issuance of permits or licenses for the construction and operation of dams. Usually this means that the dam safety regulator must approve the applicant's plans for dealing with dam safety. These jurisdictions are Argentina, Australia (Queensland, Victoria), Austria, Canada (Alberta, British Columbia, Quebec), Latvia, New Zealand, Norway, Portugal, Romania, South Africa, Spain, Switzerland, the United Kingdom, and the United States (some states). In the case of the United Kingdom, the regulatory authorities base their decisions on the recommendations of a qualified engineer who is involved in the dam project.

#### *Power to Monitor Inspections*

In 15 jurisdictions, the regulatory authority has the power to monitor inspections by the dam owner and to accept or reject the owner's reports on dam safety. These jurisdictions are Argentina, Austria, Canada (Alberta, Ontario), China, Finland, France, India, Mexico, Norway, Portugal, South Africa, Spain, the United Kingdom, and the United States (some states). The Australian Committee on Large Dams and the Canadian Dam Association, in their respective guidelines on dam safety, recommend that the regulatory authority should have this power.



#### *Power to Conduct Inspections*

In 14 jurisdictions, the regulatory authorities have the power to conduct their own inspections. These jurisdictions are Australia (New South Wales, Queensland), Austria, China, Finland, France, India, Norway, Portugal, Romania, South Africa, Spain, and the United States (federal and some states). In most of these cases, it is the dam owner or operator, and not the regulatory authority, that is the party primarily responsible for conducting safety inspections. However, in a small number of cases, for example, the states of Kentucky and Washington in the United States, the regulatory authority has the primary responsibility for conducting safety inspections.

#### *Power to Approve Inspectors*

In three jurisdictions, the regulatory authority has the explicit power to approve or reject the party selected by the dam owner or operator to conduct the safety inspection. These jurisdictions are Mexico, Switzerland, and the United Kingdom. In other cases, the regulatory authorities implicitly have similar powers because of their ability to accept or reject the owners' inspection reports and to conduct their own inspections.

#### *Maintain Register/Inventory of Dams*

Six jurisdictions require the regulatory authority to maintain a register or inventory of all dams covered by the dam safety regulatory scheme. These jurisdictions are France, Russia, South Africa, Spain, the United Kingdom, and the United States (federal). The ANCOLD and the CDA both recommend that states maintain a registry of dams.

#### *Advisory Responsibilities*

China, Finland, and India all explicitly give the regulatory authorities some role in advising dam owners on dam safety issues. They also require the regulatory authority to inform dam owners and other interested parties about developments in dam safety issues and the applicable regulatory scheme.

#### *Reporting Responsibilities*

Five jurisdictions—Argentina, India, Portugal, the United Kingdom, and the United States (federal)—require the dam safety authorities to issue periodic

reports on dam safety. These reports are public, although they may be issued in the first instance to a higher regulatory authority.

*Central Government—State/Local Government*

A number of the countries studied have decentralized governmental structures in which relations between the central government and state or local governments become an important issue. In these countries, the regulatory scheme usually addresses the relationships between the different levels of government. This is important both in order to accommodate the requirements of the governmental structure in the country and to avoid duplication or ambiguity in the regulatory framework applicable to any particular dam.

In the case of Argentina, the regulatory authority, ORSEP, has four regional offices that have independent technical and institutional authority. If the regional offices have jurisdiction over more than one province, the office will have both a regional and a provincial director. Argentina's goal, as part of its attempt to privatize energy facilities, is to develop a uniform dam safety regulatory framework for the whole country. In this regard it is important to note that ORSEP only has jurisdiction over privatized dams.

In India, the draft legislation would require dam safety offices to report to the Central DSO, which then prepares a report on national dam safety. This report is based on the various state reports plus the Central DSO's evaluation of safety at the dams for which it is responsible.

The Russian statute stipulates that all dams except those owned by municipalities are subject to the jurisdiction of the federal government.

The Swiss regulatory framework stipulates that all dams larger than a specified size are subject to federal jurisdiction.<sup>41</sup> All other dams are subject to regulation by cantons.

In the United States, the federal government has its own dam safety regulatory scheme. As part of this scheme it sets standards for state dam safety regulatory schemes. It seeks to enforce these standards by withholding assistance from any state that does not meet its basic requirements for dam safety.

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41. All dams that are higher than 25 meters, higher than 15 meters, and with a reservoir capacity greater than 50,000 cubic meters, or with a reservoir capacity greater than 500,000 cubic meters and which are under the supervision of the Swiss Office of Water Management and Geology are subject to the federal regulatory framework. A second federal decree is applicable to all dams higher than five meters and that have a storage capacity greater than 50,000 cubic meters, and all other dams that present particular safety concerns.

It should also be noted that in many countries, issues related to emergency preparedness involve some regulatory action at the municipal level. This means that dam safety in these countries will always involve some central government–state/local government interaction.

New Zealand, which is a unitary state, has attempted to address the potential problems that can arise from inadequate coordination between different governmental levels in a regulatory scheme by stating in the applicable law that the principle of subsidiarity is applicable to dam and resource management issues.

### **The Contents of the Regulatory Scheme**

#### *Dams Covered by Regulatory Scheme*

The regulatory schemes in 18 jurisdictions include a specific definition of the dams that are covered by the scheme. This definition will clarify such issues as whether the regulations are applicable to all dams or only those that involve water storage and the size and hazard characteristics of the dams covered by the regulatory scheme. These jurisdictions are Argentina (only privatized dams), Australia (New South Wales, Queensland), Canada (British Columbia, Ontario, Quebec), Finland, France, India, Latvia, Norway, Portugal, South Africa, Spain, Switzerland, the United Kingdom, and the United States (federal and states). ANCOLD, CDA, and ICOLD all recommend that the regulatory scheme should define which dams are covered by the scheme.

Some states take an innovative approach to defining which dams are covered by the regulatory scheme. For example, Portugal uses two classification systems. The first is based on size. The second is based on a global risk index that develops a global risk profile for each dam based on three criteria: external and environmental factors, the condition of the dam, and the human and economic hazard potential of the dam. The global risk index is used to rank dams according to the urgency of their need for remedial action and to establish a priority list of dams needing attention. Apparently, Brazil is considering developing a dam classification system that would classify dams according to their hazard potential based on numerical weights and parameters that produce a hazard potential value for each dam. This would allow similar prioritization for remedial action to what is possible under the Portuguese system.<sup>42</sup>

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42. Communication from G. V. Canali to the authors.

Norway focuses on the consequences of dam failure in classifying the dams that are included in its regulatory scheme. It bases its classification scheme on the number of dwelling units<sup>43</sup> that could be affected by a dam failure. Queensland in Australia utilizes a similar concept. It decides which dams to include in its regulatory scheme on the basis of the population at risk in the case of a dam failure.<sup>44</sup> All dams whose failure places more than two people at risk are covered by the regulatory scheme.

#### *Scope of Regulatory Scheme*

Finland's regulatory scheme is limited to the issue of dam safety. In the case of Australia (New South Wales, Victoria), France, and South Africa, the regulatory scheme explicitly addresses issues relating to dam construction, and operation, maintenance, and surveillance, as part of the dam safety regulatory framework. The CDA recommends that the dam safety regulatory framework should cover construction, operations, maintenance, and surveillance.

It should be noted that South Africa is currently considering a revised set of dam safety regulations. The new regulations are expected to pay more attention to the social and environmental aspects of dam safety than the current regulations do.

Another recent development is that a number of dam owners are utilizing ISO 14000 as the basis for developing procedures for dealing with the environmental aspects of dam operations.<sup>45</sup> While this is currently occurring on a voluntary basis, it is conceivable that these dam owners and South Africa are indicators of a developing trend in dam safety regulation.

#### *Primary Responsibility for Safety*

In 13 jurisdictions, the regulatory framework explicitly imposes on the dam owner the primary responsibility for dam safety and for conducting safety inspections. These jurisdictions are Canada (British Columbia), China, Finland, France, India, Ireland, Mexico, Norway, South Africa, Spain, Switzerland, the

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43. "Dwelling units" are defined in the Norwegian Water Act. See the section on Norway in part one of this study.

44. See the section on Queensland, Australia, in part one of this study.

45. Communications from G. V. Canali and David Watson to the authors. Canali cites the examples of HydroQuebec and dam owners in Brazil who are using ISO 14000 in their dam operations. ISO 14000 is a series of standards for environmental management issued under the auspices of the International Organization for Standardization. For more details on ISO 14000, see United Nations Development Programme, *ISO 14000—Environmental Management Standards and Implications for Exporters to Developed Markets* (UNDP 1996).

United Kingdom, and the United States (some states). ANCOLD and CDA both recommend making the owner responsible for dam safety, including conducting inspections. In another eight jurisdictions, the regulatory framework makes clear, through the obligations that it imposes on the owner, that the dam owner bears the primary responsibility for dam safety. These jurisdictions are Austria, Canada (Quebec), Finland, Latvia, Norway, Romania, Russia, and the United States (some states).

One issue that is not directly addressed in any of the regulatory frameworks, except for that of Argentina, is how responsibility for dam safety is handled in cases in which there is a transfer of dam ownership, such as in the case of privatized dams. In Argentina, the issue of dam safety is addressed in the contractual arrangements that exist between the state and the private dam owner. This issue is of particular importance in the case of older dams that may require some work to bring them into compliance with the most current dam safety standards. In these cases, it is important that the respective dam safety responsibilities of the old and new dam owners for bringing the dam into compliance with current safety standards be clarified.

#### *Standards and Specifications for Inspections*

In most cases, the regulatory schemes do not contain explicit standards that must be met in the inspections and surveillance activity related to dam safety. Instead the legislation leaves it to the regulatory authority to develop such standards. For example, Washington State in the United States has published seven volumes of guidelines on dam safety and operations. Even where these guidelines are not legally binding, they will provide important evidence of best practice and of the standards that dam owners should meet with regard to dam safety.

In a few jurisdictions the regulations do contain certain standards or requirements for dam safety activity. These jurisdictions are Switzerland and the following states in the United States: Michigan (addresses all stages of the dam's life cycle), California, Utah (establishes minimum standards for operations, maintenance, and surveillance), and West Virginia (establishes requirements for design, construction, and issuance of permits). Another jurisdiction that has taken this approach is Italy.

It is interesting to note that some other countries, for example, the Netherlands, Norway, and Portugal, allow for risk assessment approaches in their regulations. It should also be noted that most of the regulatory schemes that

contain standards relating to dam safety do not contain standards applicable to the operation and maintenance of the dam.

#### *Qualifications of Inspectors*

The legislation in 17 jurisdictions requires that suitably qualified engineers conduct the safety inspections. The jurisdictions are Australia (Queensland), Austria, Canada (Alberta, British Columbia), Finland, France, India, Norway, South Africa, Spain, Switzerland, the United Kingdom, and the United States (Ohio, Kentucky, Michigan, Missouri, and West Virginia). In the case of Norway, the legislation stipulates that the dam licensee shall establish the qualifications of the inspector.

The legislation in the United Kingdom requires the creation of a panel of qualified engineers. Any engineer with the requisite qualifications (which are set by the regulatory authority in conjunction with the engineering profession) can apply to be included in this panel. The legislation in the United Kingdom allows any engineer included in the panel to conduct the inspections. Portugal is an example of a country that does not explicitly require that a suitably qualified engineer conduct the inspections undertaken by the dam owner.

#### *Reporting Requirements*

Eighteen jurisdictions require that dam owners or operators or those whom they hire to conduct safety inspections file reports with the dam safety regulators. These jurisdictions are Argentina, Australia (Queensland), Austria, Canada (British Columbia, Quebec), Finland, France, India, Ireland, Latvia, Mexico, Norway, Romania, South Africa, Spain, Switzerland, the United Kingdom, and the United States (states). ANCOLD and the CDA both recommend that dam safety regulations include a reporting requirement.

#### *Timing of Inspections*

The legislation in 18 jurisdictions specifies that inspections should take place at regular intervals. These jurisdictions are Australia (Queensland), Austria, Canada (Alberta, British Columbia, Quebec), Finland, France, India, Ireland, Norway, Portugal, Romania, Russia, South Africa, Spain, Switzerland, the United Kingdom, and the United States (states). The CDA recommends that the regulatory scheme specify how often inspections should take place.

The intervals specified for inspections in these different regulatory schemes vary. In almost all cases, the frequency of the inspections varies

proportionately to the hazard classification of the dam, with more hazardous dams having more frequent inspections. The one exception is the United Kingdom, which does not categorize dams according to their hazard potential.

Many of the regulatory schemes require close inspections of the dams around the time of their first fillings or soon thereafter. Some also require relatively close monitoring of the dam during construction. After the dam becomes operational, the frequency of the inspections can vary from 1 to 10 years, depending on the regulatory scheme and the hazard classification of the dam. The dams with the greatest potential to cause harm tend to be inspected about once every 1 to 3 years.

In addition, some countries establish different inspection cycles for inspections by the owner and inspections by the regulators. For example, in Washington State the owners are required to do annual inspections, while the regulators inspect the dam every 6 years. In the case of Alberta, the regulatory framework establishes one schedule for dams that are privately owned and another for dams that are owned by the state. In the former case, dams are inspected every 1 to 10 years, depending on their classification. In the latter case the inspections are carried out by an independent consultant every 5 years.

The regulatory schemes may also require different levels of inspections. For example, the Swiss authorities require the owner to check the measurements on equipment monitoring dam safety monthly, to conduct an annual visual inspection of the dam and (for certain dams) to organize a more comprehensive inspection, conducted by qualified engineers and geologists, every 5 years. Similarly France requires the owner to visit the dam every two weeks and to take simple measurements every month and more complex measurements once a year. The owner is also required to submit a detailed report on the dam to the regulatory authority every 2 years. The French regulatory authority supplements the owner's safety investigation with its own annual examination of the dam and a comprehensive examination of the dam every 10 years. Portugal also establishes different levels of inspections, which must be conducted with different frequencies.

#### *Technical Archives/Records*

Ten jurisdictions explicitly require that the dam owner maintain a complete set of records on the dam. These records should include the dam's design,

construction records, operating records, maintenance records, records of all inspections, and measurements taken from any monitoring equipment. These jurisdictions are Australia (New South Wales), Canada (Quebec), Finland, France, India, Romania, South Africa, Spain, Switzerland, and the United Kingdom. There is some country variation regarding where the records must be kept. Some countries require the owner to keep the records both at the head office and at the dam site. Others require the owner to submit all these records to the regulator.

In Austria, while the regulatory framework does not explicitly require that the dam owner keep an archive, it does require the dam owner/operator to “systematically” collect information on the design, construction, and operation of the dam.

#### *Fees for Inspections and Permits*

Ten jurisdictions require licensees to contribute some financing toward the cost of the license. These jurisdictions are Argentina, Australia (Queensland), Canada (Quebec), New Zealand, Norway, and the United States (Arizona, California, Michigan, New Hampshire, and Pennsylvania). In some cases the regulations require the licensee to pay an application fee. In other cases, for example, California and New Hampshire, the dam owner is required to pay an annual fee for the dam license. In the case of Arizona, the legislation provides that the state will allocate the application fee and some other public funds to a dam repair fund. Three states in the United States (Iowa, Michigan, and Wisconsin) require the dam owner or operator to post a performance bond as a condition for obtaining permission to construct or operate a dam. The bond should be sufficient to cover the cost of any potential damage caused by the failure of the dam.

The legislation in four jurisdictions provides that the state can charge for any inspections that it conducts and for any remedial actions that it undertakes. These jurisdictions are Australia (Queensland), New Zealand, the United Kingdom, and the United States (Washington). South Africa adopts a different approach. Its legislation provides that the state can subsidize the cost of inspections for the owners of certain dams.

It is important to note that these provisions are the only discussion of the budgetary implications of dam safety legislation. While it is not surprising that dam safety legislation does not explicitly discuss the financing of the



regulation of dam safety, it does expose a potential weakness in the regulatory scheme. It suggests that in some cases the regulatory authority might not have sufficient resources to adequately fulfill its responsibilities.

#### *Emergency Plans*

Fourteen jurisdictions require dam owners to prepare a plan for dealing with dam emergencies. These jurisdictions are Argentina, Australia (New South Wales, Queensland), Canada (Alberta, British Columbia), France, Latvia, New Zealand, Norway, Portugal, Romania, Spain, Switzerland, and the United States (Michigan). ANCOLD and CDA both recommend that dam owners be required to prepare an emergency plan. It is important to note that in some jurisdictions, emergency plans are only required for some dams—usually those with higher hazard potentials.

Some jurisdictions require that the emergency plan be reviewed periodically and that the affected communities and other interested parties be informed of the emergency plan. In some cases, it is suggested that the affected communities and other interested parties should be consulted about the contents of the emergency plan.

It should be noted that, in some cases, the agency with primary responsibility for handling emergencies is not the agency with primary responsibility for dam safety. In these cases, the relevant agency, in addition to the dam safety regulatory authority, must be informed about the emergency plans.

The regulatory framework in some of the jurisdictions that require emergency plans do not provide extensive detail on what the plan should contain. However, approval of the plan is usually a condition for obtaining approval to operate the dam. It is widely believed that the South African regulatory framework is a good example in this regard. It provides useful and cost-effective guidelines to dam owners on what information should be included in the emergency plan.

#### *Enforcement of the Dam Safety Regulations*

Seven jurisdictions allow the regulators to impose fines on dam owners that fail to meet their obligations under the regulatory framework. These jurisdictions are Australia (New South Wales, Queensland), Canada (Quebec), New Zealand, Norway, South Africa, and the United States (states). These fines can vary from a few hundred dollars to several thousand dollars. The most severe fine can be imposed by Quebec, where the fine can be up to Can\$500,000.

In some cases, the regulations treat each day that the owner remains out of compliance as a separate infraction that is subject to a separate fine.

Eight jurisdictions empower the regulators to take action to deal with the problems caused by owners who fail to meet their obligations under the dam safety regulatory scheme. These regulators may be empowered to take remedial action and then charge the owner for the cost of these actions. Alternatively, the regulators may be empowered to seek judicial assistance to force the owner to take remedial action or to seek criminal sanctions against a non-complying owner. These jurisdictions are Argentina, Australia (New South Wales, Queensland, Victoria), Finland, Latvia, New Zealand, and the United States (some states).

#### *Liability for Dam Failures*

In general, it can be assumed that dam owners and operators are liable for the consequences of dam failures. There is some variation in their legal liability. The common law rule is that dam owners may be strictly liable for injuries to downstream communities and property caused by water escaping from the dam. However, this rule has so many exceptions that it cannot safely be assumed that dam owners will be liable in the absence of negligence on their part. Australian case law, *Burnie Port Authority v. General Jones Pty. Ltd.*,<sup>46</sup> holds that there is a negligence standard applicable to the dam owner's liability for dam failures. In Montana the regulatory framework specifically provides that dam owners will not be liable in the absence of negligence in the case of dam failures caused by floods that exceed the 100-year flood plain.

Civil law systems appear to treat dam owners more strictly. Norway's legislation stipulates that dam owners are liable for the damage resulting from the pollution they cause. The definition of pollution used in the legislation appears to include water that escapes because of a dam failure. Sweden,

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46. 68 ALJR 331 (High Court of Australia, 1994). The case dealt with an owner/occupier's liability for damage caused by the escape from its property of materials that were being maintained on the property in a dangerous or non-natural way. It held that the traditional common law rule, which was close to strict liability, had been absorbed into the general principles of ordinary negligence. As such, the owner/occupier only was liable if the owner/occupier was negligent in allowing the material to escape. It should be noted that a dam is viewed as a non-natural use of water. It is worth noting that the traditional rule of strict liability spelled out in the English case of *Rylands v. Fletcher*, 1866 LR 1 EX 265; affd (1868) LR 3 HL 330, is still applicable in England, although subsequent cases have qualified the rule.

according to Hjorth,<sup>47</sup> has introduced a strict liability standard. He claims that this has had a positive effect on dam safety.

There is another issue related to liability. This is the question of the state's responsibility for the harm that may result from its failure to adequately implement its dam safety responsibilities. In the United States, some states have explicitly claimed immunity from such responsibility. The United Kingdom has explicitly recognized that the state may be liable to third parties for the injuries caused by the consequences of the state entering into the property of the dam owner. The state can seek compensation for these expenses from the dam owner. New Zealand has taken another approach. Under its regulatory scheme, the state may be held liable for any harm caused by the acts of its regulatory authorities. Russia also appears to allow for some state liability in certain circumstances—where the state may have some responsibilities if the total damages exceed a certain amount.

An interesting issue that is not directly addressed in the regulatory frameworks examined is the issue of liability for dam failure in the case of privatized dams. It has been pointed out that problems can arise if the state was previously responsible for the maintenance and safety of the now privatized dam.<sup>48</sup> This is particularly a concern in cases involving dams that require updating to bring them into compliance with the latest safety standards. It also raises a question of whether there may not be certain situations in which the owner may be able to claim a liability waiver on the grounds of state negligence.

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47. P. Hjorth, *Operating, Monitoring and Decommissioning of Dams* 64 (paper prepared for Thematic Review IV.5: Operation, Monitoring and Decommissioning of Dams [World Commission on Dams]). Available at <[www.dams.org](http://www.dams.org)>.

48. Communication from G. V. Canali to the authors.

## **PART THREE**

### **Essential Elements, Desirable Elements, and Emerging Trends for Dam Safety**

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Based on the lessons learned from the survey and comparative analysis of the regulatory frameworks for dam safety discussed in the first two parts of this study, this part will offer some recommendations on the elements that should be addressed in any dam safety regulatory framework. Such recommendations will be related to the same four groups identified in part two of the study, namely the form of the regulation, the institutional arrangements of the regulating entity, the powers of the regulating entity, and the contents of the regulatory scheme. The recommendations are divided into three sections. These sections are the essential elements in a dam safety regulatory scheme, elements that would be desirable to include in a regulatory scheme, and emerging trends in dam safety regulation. The last section is designed to highlight elements that could become important dam safety issues in the future.

The recommendations contained in this section have purposefully been stated at a relatively general level. This is intended to facilitate the adaptation of these suggestions to the legal and administrative situation in each country. This is necessary because each country has its own legal and administrative traditions and will have to design a dam safety regulatory framework that is consistent with these traditions.

There are three issues that the drafters of any dam safety regulatory scheme must consider in designing their regulatory scheme.

First, the regulatory scheme must address two closely related but different aspects of dam safety:

1. the safety of the dam and the appurtenant structures; and
2. public safety, particularly the safety of the population living in the vicinity of or downstream from the dam.

Both aspects involve technical and “non-technical” issues. The technical issues include which instruments to use in measuring the performance of the dam, or in determining the adequacy of the dam structure and spillway system. While these technical issues are not without controversy, they are best decided by those with the technical expertise required to make such decisions. The “non-technical” issues are those that depend more on the judgment of the decisionmakers than on objective criteria. They include determining the acceptable level of risk that should be associated with a particular dam or category of dams, determining the appropriate safety-cost tradeoffs for each dam or category of dams, and determining how to address the environmental and social aspects of dam safety.

The second issue is whether the regulatory scheme should set different safety requirements for different categories of dam owners. This is particularly relevant in cases where the government is considering privatizing dams. It is also relevant in cases where the government itself is the owner or operator of the dam. Government ownership of the dam can affect questions of liability for dam failure and the independence of the dam safety activities of the regulatory authority with regard to the government-owned dam.

Third, the drafters of the regulatory scheme must decide if they want their regulatory scheme to cover all dams or only those that exceed certain size or hazard criteria. They will also need to decide if they want to have one set of requirements that is applicable to all dams or to establish different requirements for different categories of dams.

As explained above, these recommendations are divided into three parts: those that relate to the essential elements in a regulatory framework, those that would be desirable to include in a regulatory scheme, and the emerging trends in dam safety regulations.

### **The Essential Elements of a Regulatory Scheme**

The essential elements of a regulatory scheme refer to those elements that any regulatory scheme needs if it is to be capable of performing the most essential functions with regard to dam safety. In this regard it is important to note that the general principle underlying dam safety is that the owner is responsible for making the dam safe and for operating and maintaining it in a safe condition. The regulator is responsible for protecting the safety of the public by establishing the dam safety standards with which the dam owner

must comply and by monitoring compliance with these standards. This suggests that the essential elements of the regulatory framework are intended to achieve three basic objectives. The first is to clarify that the dam owner is responsible for dam safety and the regulators are responsible for monitoring the owner's performance in this regard. The second is to specify the owner's responsibilities with regard to the operation and maintenance of the dam and how the owner should review the safety of the dam. The third is to explain the ways in which the regulatory authority can perform its monitoring functions, which can include conducting its own inspections, and what powers it has to deal with non-complying dam owners and dams.

The following constitute the essential elements of any dam safety regulatory scheme:

### **1) The Form of the Regulation**

The regulatory framework should be clearly spelled out in publicly available documents. The precise form of the legal instruments used in the regulatory framework will vary depending on the specific characteristics of the legal and administrative traditions in each country. Such variations can be summarized in the following:

- In many cases the regulatory framework will consist of more than one legal instrument.
- The first of these instruments will be a statute or law that is passed by the legislative branch of government. Since changing such an instrument requires legislative approval, it should be kept relatively simple and should contain only the objectives of and the general principles governing the regulatory framework. In some jurisdictions, such as Argentina, Australia (New South Wales), Canada (Quebec), Finland, France, Latvia, Portugal, Switzerland, and the United States (federal and some states), the statute deals exclusively with dam safety. In other cases—such as Australia (Queensland, Victoria), Canada (Alberta, British Columbia, Ontario), Mexico, New Zealand, Norway, South Africa, Spain, and the United Kingdom, for example—dam safety is only one of the topics addressed in a more general statute. Usually the more general statute deals with dams, energy, or the management of water or natural resources. If dam safety is dealt with in a more general statute, it is helpful for the statute

to contain a specific section that deals exclusively with dam safety.

- The statute should stipulate in clear terms the responsibilities of all parties involved with dams, the identity of the regulatory authority responsible for dam safety, and the authority responsible for handling any emergencies that are caused by dam failure.
- The details of the regulatory scheme should be contained in legal instruments, such as regulations and decrees, that are relatively easy to change. In some cases, for example, Canada (Alberta, British Columbia), China, France, Portugal, Spain, and South Africa, these regulations deal only with dam safety. In other cases, such as some states in the United States, dam safety is one aspect of more general regulations dealing with such issues as water and environmental management.
- The regulations may also be supplemented by non-binding guidelines. This is the case, for example, in New Zealand, Norway, and Washington State in the United States.

## **2) The Institutional Arrangements**

The institutional arrangements of the regulating entity should address the following:

- a) The regulatory authority that is responsible for dam safety should be identified, and its powers and responsibilities should be clearly spelled out in the regulatory framework. Since this is an aspect of the regulatory framework that should not be easily changed, it should be addressed in the primary statute or legislation. The authority must be independent from all those who make decisions about whether to build dams and all those who are involved in the ownership and operation of dams.
  - In some cases, for example, Argentina, Australia (New South Wales), Canada (Alberta), and France, the regulatory authority is exclusively dedicated to dam safety.
  - In other cases, for example, Canada (Ontario), Finland, France, Norway, Portugal, Spain, Switzerland, and South Africa, the regulatory authority deals with dam safety as part of broader regulatory responsibilities. These broader responsibilities usually include

dams, water, or environmental management more generally. In some of these cases, for example, Canada (Ontario) and South Africa, the regulatory authority may be assisted by a specific dam safety advisory body.

- b) The regulatory authority must be provided with adequate human and financial resources to perform its functions.
- In some countries it may be possible to achieve this objective by having the authority raise a significant portion of its financing through charging fees for issuing licenses, permits, or annual fees that are paid by dam owners. This is the case, for example, in Argentina, Canada (Quebec), New Zealand, Norway, and some states in the United States.
  - In other cases, for example, South Africa, the budgetary rules in the country may mean that the regulatory authority cannot retain the funds it obtains from charging fees. In these cases, the government will have to fund the regulatory authority through its normal budgetary allocation procedures.

### **3) The Powers of the Regulating Entity**

The powers of the regulatory authority should include:

- a) The power to identify and develop norms, standards, and guidelines dealing with dam safety.
- In many countries, for example, Argentina, Austria, Canada (Alberta, Ontario), Latvia, France, Mexico, Norway, Portugal, Spain, and the United States (Washington State), the regulatory authorities are granted explicit powers to create such norms and standards. Normally, these norms and standards supplement the general standards relating to dam safety stipulated in the applicable legislation.
- b) A voice in decisions to issue permits or grant licenses for the construction and operation of dams.



- This means that the regulatory agency should be able to review the dam safety plans of the dam owner/operator and ensure that they comply with all applicable dam safety requirements. While the dam safety regulatory authority does not need to have the final decision on granting the license or permit, it should have sufficient authority to ensure that licenses or permits are not issued to applicants who fail to meet the applicable dam safety standards.
  - Countries where the regulatory authority plays some role in decisions relating to permission to construct and operate dams include Argentina, Canada (Alberta, British Columbia, Quebec), Latvia, Norway, Portugal, South Africa, Spain, and Switzerland.
  - One way of dealing with this issue is to require, as a precondition to obtaining the relevant dam permits, that the dam safety regulator approve the applicant's dam safety plans.
- c) The power to monitor inspections conducted by others and the power to reject the findings of the inspection either because the inspector is not qualified to conduct the inspection or because the report of the inspection is inadequate.
- This power is particularly important because the regulators rely on it to ensure that dam owners are complying with their responsibilities.
  - Examples of jurisdictions where the regulatory authorities have such monitoring powers include Argentina, Austria, Canada (Alberta, Ontario, Quebec), Finland, France, Mexico, and Portugal.
- d) The power to conduct its own inspections when it deems it necessary to do so.
- The regulatory authority needs this power both to monitor the owner's compliance with its safety responsibilities and to deal with the consequences of non-complying owners.
  - Examples of jurisdictions where the regulatory authorities have the power to conduct their own inspections include Australia (New South Wales), Canada (Alberta), Finland, France, Mexico, Portugal, South Africa, Spain, and the United States (federal and some states).

- e) The power to approve the party selected by the dam owner or operator to conduct the required safety inspections.
- The regulatory authority needs this power in order to ensure that the dam owner is fulfilling its responsibilities in a competent manner.
  - Examples of jurisdictions where the regulatory authority has this power are Argentina, Mexico, Spain, Switzerland, and the United Kingdom.
  - In some cases the regulatory authority, in effect, can monitor the qualifications and competence of the person conducting the inspection through its power to accept or reject the report of the inspector. This approach, however, requires the regulatory authority to have a greater level of technical capability than if it has the power to approve the inspector. The reason is that in the former case it must have the capacity to evaluate the performance of the inspector rather than just his or her qualifications.
- f) The responsibility to maintain an inventory/register of all dams in the country that are covered by the regulatory scheme.
- The inventory/register will assist the regulators and the public in monitoring the safety of the country's stock of dams and in understanding the scope of the regulatory authority's responsibilities.
  - Examples of jurisdictions that require such inventories are Finland, France, South Africa, Spain, the United Kingdom, and the United States (federal level).
- g) The responsibility to advise dam owners and other interested parties, such as affected communities and industry, about dam safety issues and developments in the regulatory framework.
- In order to ensure that dam owners and these other interested parties know about the latest developments relating to dam safety and the regulatory framework, it may be helpful for the authority to conduct seminars and issue publications about dam safety issues.

- In fulfilling this responsibility, the regulatory authority may need to pay careful attention to the multilingual nature and level of literacy of its target audiences.
  - Examples of jurisdictions where the regulators have this responsibility are China and Finland.
- h) The responsibility to make periodic and publicly available reports on dam safety issues to both higher authorities in the executive branch of government and the legislature and to advise government on dam safety issues.
- The purpose of this requirement is to ensure that policymakers know about the level of safety of the dams within their jurisdiction. This helps promote safe dams and regulatory frameworks that are up-to-date and responsive to the needs of the country, and that have adequate resources. In addition, it is a mechanism for holding the regulatory authority accountable for its performance of its responsibilities.
  - Such reporting is required in jurisdictions like Argentina, Portugal, the United Kingdom, and at the federal level in the United States.
- i) The power to enforce the dam safety regulatory framework.
- This includes the power to undertake all necessary actions relating to dam safety in the event of the owner's failure to fulfill its responsibilities, to impose significant fines on non-compliant dam owners, and to suspend or annul the dam owner/operator's permit to operate the dam.
  - In order to avoid the possibility of the regulator abusing its powers, its decisions should be subject to appeal to a higher authority or the courts. For example, in the United Kingdom, a dam owner who disputes the recommendations of an inspecting engineer can appeal to a referee at its own expense.
  - Another way to make regulators accountable is to hold them liable for the adverse consequences of their actions and decisions. For example, in the United Kingdom, a third party can seek damages for injuries caused by state inspectors to the third party's land. The danger

of relying on this means of accountability is that it creates a disincentive for the regulators, who feel that they will be punished for being creative and too diligent in the performance of their responsibilities. For this reason, the regulators should only be liable for damage that results from their negligent supervision (or lack of supervision), and for their grossly negligent acts and omissions. The liability of the regulators should not be interpreted as meaning any reduction in the owner's responsibility for the consequences of the failure of its dam. New Zealand is another example of a jurisdiction in which the regulatory authority can be held liable for any harm caused by its acts. Russia provides that the state can be held liable if the damage caused by a dam failure exceeds a certain specified amount.

- In a number of other cases, for example, the United States (Arizona, California, Montana, Utah), the state has claimed immunity from such responsibility.
- Examples of jurisdictions in which the regulatory authority has the power to impose fines or take other punitive steps in order to enforce the regulatory framework include Australia (Queensland), Canada (Quebec), Latvia, Mexico, Norway, South Africa, and the United States (some states). Some jurisdictions, for example, Argentina, Australia (Queensland, New South Wales, and Victoria), Finland, and Norway (under the Pollution Control Act) allow for criminal sanction against non-complying owners.

#### **4) The Content of the Regulatory Scheme**

The regulatory scheme should include the following:

- a) Establishment of clear and easily applied criteria for determining which dams are covered by the regulatory scheme. It is not essential that all dams be included in the scheme, but those that are excluded should be easily identified and should be too insignificant to cause harm to anyone other than the owner if they fail.
- The most common criteria used in identifying which dams are covered by the regulatory framework are the size and hazards caused by the dam. Examples of countries that use these bases for classifying

dams are Argentina, Canada (Alberta, British Columbia, Ontario, and Quebec), Finland, France, Latvia, Norway, Portugal (uses both a size and hazard and a risk classification scheme), South Africa, Switzerland, and the United States (some states).

- In these cases, the size criteria relate to the height of the dam and to the size of the reservoir created by the dam.

b) Definition of the scope of the regulatory scheme. It should address dam safety issues at all stages of the dam life cycle. Thus it should address dam safety considerations that arise during the design, construction, first filling, operation, alteration, and decommissioning stages of the dam's life.

- This life-cycle approach to dam safety is important because it makes it more likely that dam safety considerations will be given adequate attention and that, as a result, adequate resources will be allocated to dam safety at all times.
- Examples of jurisdictions that address dam safety at all these stages are Argentina, Australia (New South Wales), France, Spain, South Africa, and the United States (West Virginia).

c) Clarification that it is the owner that has the primary responsibility for dam safety and can be held liable for any damage that results from a dam failure.

- For these purposes it is important to define the "owner" of the dam. World Bank Operational Policy (OP) 4.37, on the safety of dams, states that an "owner" can be "a national or local government, a parastatal, a private company or a consortium of entities."<sup>49</sup> It adds that "If an entity other than the one with legal title to the dam site, dam, and/or reservoir holds a license to operate the dam and responsibility for its safety, the term 'owner' includes such an entity." Under this definition, it is possible that a particular dam

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49. See *supra* n. 3 at footnote 1. This operational policy is included as appendix I of this publication.

can have more than one owner and therefore more than one party responsible for its safety.

- The case of dams owned by the state can be particularly difficult for the regulatory authority. The reason is that in these cases the regulatory authority, in effect, is part of the owner of the dam. Some jurisdictions handle this problem by requiring the state to hire outside independent experts to conduct regular inspections of the dams to evaluate its safety and its compliance with the applicable dam safety standards.
- In some jurisdictions, for example, Sweden, dam owners can be held strictly liable for any harm caused by the failure of the dam. The benefit of this approach is that it gives the owner a strong incentive to pay close attention to safety issues. However, the value of this incentive depends on the credence the owners will give to the threat to hold them strictly liable. If they believe that the relevant judicial system moves very slowly and is easily manipulated, they will not find this threat credible and may fail to respond to the intended incentive.
- It may not be possible in some jurisdictions to adopt a strict liability standard because of the existing constitutional, statutory, and case law applicable to the issue of dam owner liability for the consequences of dam failure.
- Other approaches to liability that may be useful include joint and several liability and proportional liability according to which a number of parties involved in dam safety can be held fully or partially responsible for the harm caused by dam failure.
- Another means for increasing the incentive for the dam owners to pay adequate attention to dam safety is to make the owners responsible in both criminal and civil cases for dam failures. Examples of jurisdictions where the possibility of criminal liability exists are Australia (New South Wales, Victoria), Finland, New Zealand, Norway (under the Pollution Control Act), and the United States (some states).
- An important issue that needs to be addressed, particularly in countries in which privatization of dams is a possibility, is how responsibility for dam safety will move in cases of transfers of title to

the dam. This is particularly relevant in cases of transferring ownership of dams that are currently not complying with applicable dam safety requirements.

d) Stipulation of the dam safety standards and specifications with which the owner is expected to comply.

- The regulatory authority can exercise its powers to develop its own safety norms, standards or guidelines or it can require dams subject to its jurisdiction to comply with the standards issued by a recognized body such as ICOLD, CDA, or ANCOLD.
- Examples of jurisdictions which have issued their own standards or guidelines are Norway and Washington State in the United States.

e) Establishment of the qualifications required of the person who does the safety evaluations for the owner.

- These qualifications should relate to the technical expertise of the person and his or her experience. Usually the person is required to be a suitably qualified engineer.
- In the case of important inspections and events in the life of the dam, the safety evaluator should be able to demonstrate his or her independence from the dam owner/operator and the regulator.
- Examples of jurisdictions that establish qualifications for safety inspectors in their regulatory frameworks are Australia (Queensland), Finland, France, Norway, South Africa, Spain, Switzerland, and the United States (some states). The United Kingdom has established a panel of qualified engineers on which any engineer with the requisite qualifications can be included. Dam owners are free to choose any member of this panel to conduct their inspections.

f) Stipulation that the owners/operators of the dam must make periodic reports to the regulators on the results of their reviews, inspections, and monitoring of the dam's safety.

- These reports should be prepared by a qualified person and should be designed to demonstrate how the dam is complying with all applicable dam safety standards.
- Examples of jurisdictions that require such reports are Argentina, Austria, Canada (British Columbia), Finland, Latvia, Mexico, Portugal, South Africa, Spain, and the United States (Michigan and West Virginia).

g) Stipulation of the frequency with which the dam owner/operator should conduct dam safety inspections and reviews.

- The regulatory authority can require inspections of different aspects of dam safety and inspections or reviews of differing levels of intensity at different intervals over the life of the dam. Thus certain relatively superficial inspections may take place with greater frequency than more rigorous inspections.
- Examples of jurisdictions in which the frequency with which inspections must take place over the life of the dam are specified in the regulatory framework include Australia (Queensland), Finland, France, Norway, Switzerland, the United Kingdom, and the United States (some states).

h) Stipulation that the owner/operator must maintain complete records on the dam at a convenient location.

- These records should include all information relating to the construction and operation of the dam, as well as to all safety inspections. They should also include information on all unusual events in the life of the dam.
- These records can be very helpful to the regulators and the dam owners in protecting the safety of the dam and in developing plans for dealing with any dam-related emergencies.
- Examples of jurisdictions that require dam owners to keep such records include Canada (British Columbia, Quebec), France, South Africa, Spain, and the United Kingdom.



- i) Requirement of all dams to have an operations, maintenance, and supervision manual,<sup>50</sup> and an adequate budget for operation, maintenance, and supervision.
- The regulatory authority should be required to review the dam owner/operator's operations, maintenance, and surveillance manual to ensure that it remains consistent with current dam safety practices and procedures.
  - The regulatory authority should review the sufficiency of the dam's operations, maintenance, and surveillance budget when it reviews the safety reports of the dams subject to its jurisdiction.
  - Examples of jurisdictions in which the dam safety authority requires dam owners to have an operations, maintenance, and surveillance manual are Canada (Alberta, British Columbia) and South Africa.
- j) Imposition of fees that dam owners/operators must pay to the regulatory authority.
- These fees can include both an application fee for any applicable license or permit and an annual fee.
  - The purpose of these fees is to cover the costs related to the dam safety activities of the regulatory authority.
  - The revenues may also be used to ensure that the regulatory authority has the funds to deal with non-complying dams.
  - In cases where it is not feasible for the regulatory authorities to charge fees and allocate those funds to dam safety activities, they may wish to consider requiring the dam owners to post a performance bond as a condition for obtaining permission to construct or operate a dam. This is done in Iowa, Michigan, and Wisconsin in the United States. Other possibilities include creating trust funds and requiring dam owners to maintain certain levels of insurance to deal with dam safety issues. Latvia is an example of a jurisdiction that requires dam owners to maintain a certain level of insurance for their dam.

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<sup>50</sup> Appendix VI of this book contains a sample operations, maintenance, and surveillance manual.

- Examples of jurisdictions that charge fees for licenses and permits include Argentina, New Zealand, Norway, and some states in the United States.
- k) Requirement of dams with the greatest hazard potential to have an emergency plan that is provided to the regulatory authority and to all other relevant authorities and downstream communities that could be affected by a dam failure. The regulatory authorities should provide dam owners with guidance on the issues to be addressed in the emergency plan.
- If it is feasible, the regulatory framework should require all dams subject to their regulations to have an emergency action plan. The reason is that dam owners should always be prepared for dam failures, and regulators should be monitoring to ensure that they are prepared.
  - It would be useful for the regulatory framework to explain how the dam safety regulatory authority must interact with the local and national authorities responsible for dealing with emergencies. In the event that dam emergencies fall within the primary jurisdiction of the emergency management authorities rather than the dam safety authorities, the emergency management authorities should have a dam advisory board. The function of this board would be to advise the emergency management authorities about specific issues related to dam emergencies.
  - Examples of jurisdictions that require at least dams with the greatest hazard potential to have emergency action plans are Argentina, Australia (New South Wales, Queensland), Canada (Alberta, British Columbia), Finland, France, Latvia, Portugal, New Zealand, Norway, and the United States (Michigan).

#### **Elements That Would Be Desirable to Include in a Regulatory Scheme**

The elements listed in this section are those elements, in addition to the essential elements described above, that would be desirable to include in the regulatory framework.

These desirable elements are:

### **1) Institutional Arrangements**

- a) The dam safety regulatory authority is exclusively devoted to dam safety.
  - An authority exclusively devoted to dam safety will find it easier to develop its expertise in dam safety and to remain informed of new developments in dam safety than one that has responsibilities in addition to dam safety.
- b) Regulatory authorities appoint a dam safety advisory committee. The function of this committee would be to advise the authority on dam safety issues.
  - The committee membership should include technical experts and representatives of affected local authorities and communities. Such a structure can allow for some public consultation on dam safety issues.

### **2) The Powers of the Regulating Entity**

- a) The dam safety regulatory authority is empowered, where appropriate, to coordinate dam safety regulation among all the agencies at the local, regional, and national levels that are involved in or affected by the regulation of dam safety.

### **3) The Content of the Regulatory Scheme**

- a) Stipulation that the regulatory authority may make its own periodic inspections of all dams that have high hazard classifications. These inspections would be in addition to those conducted by the owner/operator of the dam.
  - These inspections can be less frequent than the owner/operator's inspection as their purpose is to verify that the condition of the dam

conforms to the representations made about the dam by its owner/operator rather than to be the primary means of determining the safety of the dam.

- b) Stipulation that the regulatory authority be provided with a copy of the dam's technical archives/records and, for the highest hazard category dams, be required to review these records in its periodic inspections of the dam.
- c) Stipulation that, as part of a process for obtaining a dam license, prospective dam owners are required to conduct a failure impact assessment. This is an effort to determine the likely impacts of a dam failure on the potentially affected communities, property, and environment. The issuance of the license would be contingent on the regulator's approval of the assessment. Once the dam becomes operational, the dam owner would be required periodically to repeat this impact assessment and submit it for reapproval to the regulatory authority.
- The purpose of this requirement is to ensure that the owner and the regulators have a good understanding of the consequences of the dam failure and of the measures they need to take to avoid this happening.
- d) The dam safety regulatory framework should establish a series of benchmarks that can be used to measure dam safety at all dams.
- These benchmarks should take into account all structural, environmental, social, health, and economic factors that make up the general concept of dam safety.
  - The purpose of these benchmarks is to determine the dam safety standards and procedures that are applicable to each category of dams.
  - Owners of dams that do not comply with the applicable standard should be required to develop a risk management plan acceptable to the regulatory authority. The plan must indicate how the dam owner/operator will deal with the higher level of risk associated with the dam.

- e) The regulatory authority requires the dam owner to conduct periodic safety reviews of all dams.
- These reviews should be designed to test each dam's compliance with a set of dam safety standards that are based on the regulatory scheme and current best practices.
  - The dam safety regulatory authority should have the ability, when necessary, to conduct these reviews itself.
- f) The regulatory authority is required to issue annual reports on the safety of the dams subject to its jurisdiction.
- These reports should be publicly available and should be submitted both to higher authorities in the executive branch of the government and to the legislature.
  - The reports should discuss, for each dam, whether the owners are meeting all their safety-related obligations; whether dam safety reviews have been completed at all dams, and whether deficiencies have been identified. The report should also detail how any deficiencies will be corrected and the steps that have been taken to deal with non-complying dam owners and dams.
- g) The regulatory authority undertakes activities designed to educate the public about dam safety.

### **Emerging Trends in Dam Safety Regulation**

Dam safety is a dynamic concept. It evolves as our understanding of the safety implications of the technical characteristics of dams evolves and as our understanding of the social, economic, and environmental implications of dam safety develops. In light of this fact, it is useful to identify a number of emerging trends in dam safety. It is important to stress that the identified trends are currently reflected in dam safety regulatory frameworks to varying degrees. However, the trends are sufficiently strong that it is reasonable to expect that they will become more prominent features of dam safety regulatory frameworks in the coming years.

The following are the emerging trends identified in this study:

### **Institutional Arrangements**

- a) There is a general trend toward making the owners responsible for monitoring dam safety and for conducting all the necessary inspections. This is linked to a trend toward limiting the regulatory authority to developing standards and norms and to monitoring the dam owner's performance.
- A consequence of this development is that there is a trend toward reducing the size of the regulatory authority. The reason is that the authority does not need large numbers of people if its responsibilities are limited to monitoring the performance of the dam owner.
  - Another consequence is that it will become more important for the regulators to ensure that they are obtaining full and adequate information from the dam owners. This means that protection for whistleblowers (that is, employees of the dam owner who are willing to provide the regulators with important information about the dam owner's performance of its obligations that the owner itself has failed to reveal to the regulators) will become a more important issue. In some countries, such as the United States, there are specific legal protections given to whistleblowers.
  - This trend is likely to be strengthened if there is more privatization of dams around the world. On the other hand, it may be weakened if dam ownership by the state grows.
  - As the trend discussed becomes stronger, it will highlight the need for the regulators to have effective mechanisms for enforcing the regulatory requirements in cases of non-complying owners and dams. This in turn will increase the need for more effective means for holding the regulators accountable for the manner in which they exercise their authority. Thus, it is likely that over time dam safety regulatory frameworks will include new mechanisms for holding the regulatory authorities accountable and for resolving disputes between the authorities and dam owners.

### **The Contents of the Regulatory Scheme**

- a) There is a trend toward taking a life cycle approach to dam safety. This means that the dam owner is required to incorporate dam safety issues into its plans for the design, construction, operation, maintenance, alteration, and decommissioning of the dam. One consequence of this trend is that more attention is likely to be given to the funding of dam safety monitoring and maintenance during the dam licensing process and during the operational phase of a dam's life.
- b) There is a trend toward requiring dam owners to pay more attention to the funding of dam rehabilitation and maintenance. The funding mechanisms that can be used for these purposes include trust funds, bonds, insurance, and sinking funds.
- c) There is a clear trend toward paying more attention to the social implications of dam safety, including health and environmental implications. This trend is likely to be strengthened, given the critical importance of social and environmental factors for sustainable development. It is also likely to be strengthened as our understanding of how these factors interact with the efficient operation and sustainability of infrastructure projects like dams develops. One potential consequence of this trend is that there is likely to be a growing role for all stakeholders in dam safety matters.
- d) There is a significant trend toward using risk analysis in dam safety. At present this trend is focused on qualitative, as opposed to quantitative, risk analysis. The purpose of this risk analysis is to develop a relative ranking of the priorities that should be attached to specific dam safety-related issues and to identify those dams that are most in need of remedial action. The factors looked at in these risk analyses include the structural aspects of the dam and its appurtenant structures, the strengths and weaknesses in the owner's internal control systems, the priorities attached to specific proposed remedial and rehabilitation measures, and the owner's emergency action plans. They also include populations at risk, risk of loss of life, social and environmental risks,



and economic impacts, including property and community damage. Consistent with the trend toward making the owner responsible for dam safety monitoring, there also appears to be a trend toward having the dam owner conduct the risk analysis, and having the regulator approve the owner's analysis and the conclusions it derives therefrom.



The world's population has more than tripled in the last century, presenting a major challenge to governments, particularly in the water sector. Urbanization and environmental degradation compound this challenge, pushing the need to rethink water resources management to the top of the global agenda. During the second half of the last century, dams emerged as the single most elaborate mechanism for managing and controlling fresh water resources. Dams have been built to provide water for irrigation; for domestic, municipal, and industrial purposes; for generation of electricity; and for controlling floods. The debate on the costs and benefits of dams has been heightened in recent years, particularly after the release of the report of the World Commission on Dams. This debate has, by necessity, been extended to the issue of dam safety and how best to ensure it.

The purpose of this study is to provide policymakers and technical experts, as well as civil society organizations, with a "tool kit" of the issues related to the regulatory framework for dam safety. Based on the survey and analysis of the regulatory frameworks for dam safety in 22 countries, both industrial and developing, the study has highlighted what it considers the four most important considerations in this field. These considerations are the legal form of the regulation, the institutional arrangements, the powers of the regulatory entity, and the contents of the regulatory scheme. Based on the lessons learned from the survey and analysis of these four considerations in the 22 countries, the study offers some suggestions regarding the elements to be addressed in any regulatory framework for dam safety. Those suggestions are classified in three sections, the first of which contains the elements we consider essential, the second those elements that we consider desirable, and the third section the emerging trends in this field.

One point mentioned earlier that needs to be emphasized is that dam safety is a dynamic, evolving concept, and should be viewed and treated accordingly. Our understanding of the technical characteristics and economic, financial, environmental, and social considerations concerning dams is in a constant state of evolution. This fact in turn would have to be reflected in our thinking and handling of the single most important issue concerning dams—that is, their safety. As such we caution against a “straitjacket” or “one size fits all” approach to regulatory frameworks for dam safety.

Another point needs to be emphasized. Although the regulatory framework for dam safety will not, by itself, resolve the problems associated with dam safety, it is difficult to imagine any effective dam safety program that is not eventually translated into a binding and enforceable framework.

## Appendices

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APPENDIX I. World Bank: Operational Policy 4.37 on the Safety of Dams

APPENDIX II. World Bank: Bank Procedure 4.37 on the Safety of Dams

APPENDIX III. World Bank: Bank Procedure 4.37 on the Safety of Dams,  
Annex A on Dam Safety Reports: Content and Timing

APPENDIX IV. Republic of South Africa, 1998 National Water Act, Chapter  
12: Safety of Dams

APPENDIX V. British Columbia, Canada, Dam Safety Regulation

APPENDIX VI. Canadian Dam Association, Sample Operations, Maintenance,  
and Surveillance Manual

APPENDIX VII. Selected Legislation on Dam Safety and Additional Information  
Sources

## APPENDIX I

### World Bank: Operational Policy 4.37 on the Safety of Dams

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# THE WORLD BANK OPERATIONAL MANUAL

## Operational Policies

OP 4.37  
October 2001

*These policies were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject.*

## Safety of Dams

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**Note:** OP and BP 4.37 replace the versions dated September 1996. Other Bank policies that may apply to projects that involve dams include the following: OP/BP 4.01, *Environmental Assessment*; OP/BP 4.04, *Natural Habitats*; OP 4.11, *Cultural Property*; OD 4.20, *Indigenous Peoples*; OD 4.30, *Involuntary Resettlement*; and OP/BP 7.50, *Projects on International Waterways*. Questions on dam safety should be addressed to the Director, Rural Development Department (RDV).

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1. For the life of any dam, the owner<sup>1</sup> is responsible for ensuring that appropriate measures are taken and sufficient resources provided for the safety of the dam, irrespective of its funding sources or construction status. Because there are serious consequences if a dam does not function properly or fails, the Bank<sup>2</sup> is concerned about the safety of new dams it finances and existing dams on which a Bank-financed project is directly dependent.

### New Dams

2. When the Bank finances a project that includes the construction of a new dam,<sup>3</sup> it requires that the dam be designed and its construction

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1. The owner may be a national or local government, a parastatal, a private company, or a consortium of entities. If an entity other than the one with legal title to the dam site, dam, and/or reservoir holds a license to operate the dam, and has responsibility for its safety, the term "owner" includes such other entity.

2. "Bank" includes the International Development Association (IDA), and "loans" include credits.

3. For example, a water storage dam for a hydropower, water supply, irrigation, flood control, or multipurpose project; a tailings or a slimes dam for a mine project; or an ash impoundment dam for a thermal power plant.

supervised by experienced and competent professionals. It also requires that the borrower<sup>4</sup> adopt and implement certain dam safety measures for the design, bid tendering, construction, operation, and maintenance of the dam and associated works.

3. The Bank distinguishes between small and large dams.
  - a) Small dams are normally less than 15 meters in height. This category includes, for example, farm ponds, local silt retention dams, and low embankment tanks.
  - b) Large dams are 15 meters or more in height. Dams that are between 10 and 15 meters in height are treated as large dams if they present special design complexities—for example, an unusually large flood-handling requirement, location in a zone of high seismicity, foundations that are complex and difficult to prepare, or retention of toxic materials.<sup>5</sup> Dams under 10 meters in height are treated as large dams if they are expected to become large dams during the operation of the facility.
4. For small dams, generic dam safety measures designed by qualified engineers are usually adequate. For large dams, the Bank requires
  - a) reviews by an independent panel of experts (the Panel) of the investigation, design, and construction of the dam and the start of operations;
  - b) preparation and implementation of detailed plans: a plan for construction supervision and quality assurance, an instrumentation plan, an operation and maintenance plan, and an emergency preparedness plan;<sup>6</sup>

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4. When the owner is not the borrower, the borrower ensures that the obligations of the borrower under this OP are properly assumed by the owner under arrangements acceptable to the Bank.

5. The definition of “large dams” is based on the criteria used to compile the list of large dams in the World Register of Dams, published by the International Commission on Large Dams.

6. BP 4.37, Annex A, sets out the content of these plans and the timetable for preparing and finalizing them. In the dam safety practice of several countries, the operation and maintenance plan includes both the instrumentation plan and the emergency preparedness plan as specific sections. This practice is acceptable to the Bank, provided the relevant sections are prepared and finalized according to the timetable set out in BP 4.37, Annex A.

- c) prequalification of bidders during procurement and bid tendering;<sup>7</sup>  
and
- d) periodic safety inspections of the dam after completion.

5. The Panel consists of three or more experts, appointed by the borrower and acceptable to the Bank, with expertise in the various technical fields relevant to the safety aspects of the particular dam.<sup>8</sup> The primary purpose of the Panel is to review and advise the borrower on matters relative to dam safety and other critical aspects of the dam, its appurtenant structures, the catchment area, the area surrounding the reservoir, and downstream areas. However, the borrower normally extends the Panel's composition and terms of reference beyond dam safety to cover such areas as project formulation; technical design; construction procedures; and, for water storage dams, associated works such as power facilities, river diversion during construction, shiplifts, and fish ladders.
6. The borrower contracts the services of the Panel and provides administrative support for the Panel's activities. Beginning as early in project preparation as possible, the borrower arranges for periodic Panel meetings and reviews, which continue through the investigation, design, construction, and initial filling and start-up phases of the dam.<sup>9</sup> The borrower informs the Bank in advance of the Panel meetings, and the Bank normally sends an observer to these meetings. After each meeting, the Panel provides the borrower a written report of its conclusions and recommendations, signed by each participating member; the borrower provides a copy of that report to the Bank. Following the filling of the reservoir and start-up of the dam, the Bank reviews the Panel's findings and recommendations. If no significant difficulties are encountered in the filling and start-up of the dam, the borrower may disband the Panel.

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7. See *Guidelines: Procurement under IBRD Loans and IDA*.

8. The number, professional breadth, technical expertise, and experience of Panel members are appropriate to the size, complexity, and hazard potential of the dam under consideration. For high-hazard dams, in particular, the Panel members should be internationally known experts in their field.

9. If the Bank's involvement begins at a later stage than project preparation, the Panel is constituted as soon as possible and reviews any aspects of the project that have already been carried out.

**Existing Dams and Dams under Construction**

7. The Bank may finance the following types of projects that do not include a new dam but will rely on the performance of an existing dam or a dam under construction (DUC): power stations or water supply systems that draw directly from a reservoir controlled by an existing dam or a DUC; diversion dams or hydraulic structures downstream from an existing dam or a DUC, where failure of the upstream dam could cause extensive damage to or failure of the new Bank-funded structure; and irrigation or water supply projects that will depend on the storage and operation of an existing dam or a DUC for their supply of water and could not function if the dam failed. Projects in this category also include operations that require increases in the capacity of an existing dam, or changes in the characteristics of the impounded materials, where failure of the existing dam could cause extensive damage to or failure of the Bank-funded facilities.
8. If such a project, as described in para. 7, involves an existing dam or DUC in the borrower's territory, the Bank requires that the borrower arrange for one or more independent dam specialists to (a) inspect and evaluate the safety status of the existing dam or DUC, its appurtenances, and its performance history; (b) review and evaluate the owner's operation and maintenance procedures; and (c) provide a written report of findings and recommendations for any remedial work or safety-related measures necessary to upgrade the existing dam or DUC to an acceptable standard of safety.
9. The Bank may accept previous assessments of dam safety or recommendations of improvements needed in the existing dam or DUC if the borrower provides evidence that (a) an effective dam safety program is already in operation, and (b) full-level inspections and dam safety assessments of the existing dam or DUC, which are satisfactory to the Bank, have already been conducted and documented.
10. Necessary additional dam safety measures or remedial work may be financed under the proposed project. When substantial remedial work is needed, the Bank requires that (a) the work be designed and supervised

by competent professionals, and (b) the same reports and plans as for a new Bank-financed dam (see para. 4[b]) be prepared and implemented. For high-hazard cases involving significant and complex remedial work, the Bank also requires that a panel of independent experts be employed on the same basis as for a new Bank-financed dam (see paras. 4[a] and 5).

11. When the owner of the existing dam or DUC is an entity other than the borrower, the borrower enters into agreements or arrangements providing for the measures set out in paras. 8–10 to be undertaken by the owner.

### **Policy Dialogue**

12. Where appropriate, as part of policy dialogue with the country, Bank staff discuss any measures necessary to strengthen the institutional, legislative, and regulatory frameworks for dam safety programs in the country.





## APPENDIX II

### World Bank: Bank Procedure 4.37 on the Safety of Dams

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#### THE WORLD BANK OPERATIONAL MANUAL **Bank Procedures**

BP 4.37  
October 2001

*These procedures were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject.*

### Safety of Dams

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**Note:** OP and BP 4.37 replace the versions dated September 1996. Other Bank policies that may apply to projects that involve dams include the following: OP/BP 4.01, *Environmental Assessment*; OP/BP 4.04, *Natural Habitats*; OP 4.11, *Cultural Property*; OD 4.20, *Indigenous Peoples*; OD 4.30, *Involuntary Resettlement*; and OP/BP 7.50, *Projects on International Waterways*. Questions on dam safety should be addressed to the Director, Rural Development Department (RDV).

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#### Project Processing

1. When the Bank<sup>1</sup> begins processing a project that includes a dam, the processing team includes individuals who have relevant experience in dam engineering and in preparation and supervision of previous Bank-funded projects that have included dams. If such individuals are not available within the Region, the task team (TT) consults the Rural Development Department for referral to appropriate specialists inside or outside the Bank.
2. Bank projects involving dams are processed according to the procedures set forth in BP10.00, *Investment Lending: Identification to Board Presentation*.
3. As soon as a project involving a dam is identified, the TT discusses with the borrower the Bank's policy on dam safety (OP 4.37).

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1. "Bank" includes IDA, and "loans" includes credits.

### **Preparation**

4. The TT ensures that the borrower's terms of reference (TOR) for technical services to investigate the site and design the dam, supervise new or remedial construction, advise on initial reservoir filling and start-up operations, and perform inspections and safety assessments, as well as the qualifications of the professionals (e.g., engineers, geologists, or hydrologists) to be employed by the borrower are adequate to the complexity of the particular dam.
5. If an independent panel of experts (the Panel) is required, the TT advises borrower staff, as necessary, on the preparation of the TOR. The TT reviews and clears the TOR and the Panel members proposed by the borrower. Once the Panel is in place, TT staff normally attend Panel meetings as observers.
6. The TT reviews all reports relating to dam safety prepared by the borrower, the Panel, the independent specialists who assess an existing dam or a dam under construction, and the professionals hired by the borrower to design, construct, fill, and start up the dam.
7. The TT monitors the borrower's preparation of the plans for construction supervision and quality assurance, instrumentation, operation and maintenance, and emergency preparedness (see OP 4.37, para. 4, and BP 4.37, Annex A).

### **Appraisal**

8. The appraisal team reviews all project information relevant to dam safety, including cost estimates; construction schedules; procurement procedures; technical assistance arrangements; environmental assessments; and the plans for construction supervision and quality assurance, instrumentation, operation and maintenance, and emergency preparedness. The team also reviews the project proposal, technical aspects, inspection reports, Panel reports, and all other borrower action plans relating to dam safety. If a Panel has been required, the team verifies that the borrower has taken the Panel's recommendations into

consideration and, if necessary, assists the borrower in identifying sources for dam safety training or technical assistance.

9. The TT and the assigned Bank lawyer ensure that the legal agreements between the Bank and the borrower require the borrower
  - (a) if a Panel has been required, to convene Panel meetings periodically during project implementation and retain the Panel through the start-up of a new dam;
  - (b) to implement the required plans (see Annex A) and raise to the required standard any that have not been adequately developed; and
  - (c) after filling and start-up of a new dam, to have periodic dam safety inspections performed by independent qualified professionals who have not been involved with the investigation, design, construction, or operation of the dam.

### **Supervision**

10. During implementation, the TT monitors all activities relating to the dam safety provisions in the Loan Agreement, using technical staff and, as appropriate, consultants to assess the borrower's performance. If performance in regard to dam safety is found to be unsatisfactory, the TT promptly informs the borrower that the deficiencies must be remedied.
11. During the latter stages of project implementation, the TT discusses post-project operational procedures with the borrower, stressing the importance of ensuring that written instructions for flood operations and emergency preparedness are retained at the dam at all times. The TT also points out that the advent of new technology or new information (e.g., from floods, seismic events, or discovery of new regional or local geologic features) may in the future require the borrower to modify the technical criteria for evaluating dam safety; the TT urges the borrower to make such modifications and then apply the revised criteria to the project dam and, as necessary, to other dams under the borrower's jurisdiction.

12. To ensure that completed dams are inspected and maintained satisfactorily, Regional staff may carry out supervision beyond the closing date of the project, either during work on follow-up projects or during specially scheduled supervision missions.<sup>2</sup>

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2. See OP/BP 13.05, *Project Supervision*.

## APPENDIX III

### **World Bank: Bank Procedure 4.37 on the Safety of Dams, Annex A on Dam Safety Reports: Content and Timing**

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#### THE WORLD BANK OPERATIONAL MANUAL **Bank Procedures**

BP 4.37 – Annex A  
October 2001

*These procedures were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject.*

### **Dam Safety Reports: Content and Timing**

1. *Plan for construction supervision and quality assurance.* This plan is provided to the Bank by appraisal. It covers the organization, staffing levels, procedures, equipment, and qualifications for supervision of the construction of a new dam or of remedial work on an existing dam. For a dam other than a water storage dam,<sup>1</sup> this plan takes into account the usual long construction period, covering the supervision requirements as the dam grows in height—with any accompanying changes in construction materials or the characteristics of the impounded material—over a period of years. The task team uses the plan to assess the need to fund components under the loan to ensure that dam-safety-related elements of the design are implemented during construction.
2. *Instrumentation plan.* This is a detailed plan for the installation of instruments to monitor and record dam behavior and the related hydrometeorological, structural, and seismic factors. It is provided to an independent panel of experts (the Panel) and the Bank during the design stage, before bid tendering.
3. *Operation and maintenance (O&M) plan.* This detailed plan covers organizational structure, staffing, technical expertise, and training required;

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1. For example, a mine tailings, ash impoundment, or slag storage dam.

equipment and facilities needed to operate and maintain the dam; O&M procedures; and arrangements for funding O&M, including long-term maintenance and safety inspections. The O&M plan for a dam other than a water storage dam, in particular, reflects changes in the dam's structure or in the nature of the impounded material that may be expected over a period of years. A preliminary plan is provided to the Bank for use at appraisal. The plan is refined and completed during project implementation; the final plan is due not less than six months prior to the initial filling of the reservoir. Elements required to finalize the plan and initiate operations are normally financed under the project.<sup>2</sup>

4. *Emergency preparedness plan.* This plan specifies the roles of responsible parties when dam failure is considered imminent, or when expected operational flow release threatens downstream life, property, or economic operations that depend on river flow levels. It includes the following items: clear statements on the responsibility for dam operations decision making and for the related emergency communications; maps outlining inundation levels for various emergency conditions; flood warning system characteristics; and procedures for evacuating threatened areas and mobilizing emergency forces and equipment. The broad framework plan and an estimate of funds needed to prepare the plan in detail are provided to the Bank prior to appraisal. The plan itself is prepared during implementation and is provided to the Panel and Bank for review not later than one year before the projected date of initial filling of the reservoir.

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2. In the dam safety practice of several countries, the operation and maintenance plan includes both the instrumentation plan and the emergency preparedness plan as specific sections. This practice is acceptable to the Bank, provided the relevant sections are prepared and finalized according to the timetable set out in this Annex.

## APPENDIX IV

### **Republic of South Africa, 1998 National Water Act, Chapter 12: Safety of Dams**

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**NOTE:** This appendix is provided merely as an example of a statute that contains specific provisions on dam safety. There are many other examples of such statutes and the inclusion of this example in this report should not be interpreted as an endorsement of this statutory model over other models.

*(English text signed by the President)*

*(Assented to 20 August 1998)*

**REPUBLIC OF SOUTH AFRICA  
NATIONAL WATER ACT  
Act No. 36 of 1998**

**ACT**

**To provide for fundamental reform of the law relating to water resources; to repeal certain laws; and to provide for matters connected therewith.**

**PREAMBLE**

Recognising that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, interdependent cycle;

Recognising that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources;

Acknowledging the National Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters;



Recognising that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users;

Recognising that the protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users; and

Recognising the need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate;

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

#### **CHAPTER 1: INTERPRETATION AND FUNDAMENTAL PRINCIPLES**

1. Definitions and interpretation
2. Purpose of Act
3. Public trusteeship of nation's water resources
4. Entitlement to water use

#### **CHAPTER 2: WATER MANAGEMENT STRATEGIES**

##### ***Part 1: National water resource strategy***

5. Establishment of national water resource strategy
6. Contents of national water resource strategy
7. Giving effect to national water resource strategy

##### ***Part 2: Catchment management strategies***

8. Establishment of catchment management strategies
9. Contents of catchment management strategy
10. Guidelines for and consultation on catchment management strategies
11. Giving effect to catchment management strategies

#### **CHAPTER 3: PROTECTION OF WATER RESOURCES**

##### ***Part 1: Classification system for water resources***

12. Prescription of classification system

##### ***Part 2: Classification of water resources and resource quality objectives***

13. Determination of class of water resources and resource quality objectives
14. Preliminary determination of class or resource quality objectives

15. Giving effect to determination of class of water resource and resource quality objectives

**Part 3: The Reserve**

16. Determination of Reserve
17. Preliminary determinations of Reserve
18. Giving effect to Reserve

**Part 4: Pollution prevention**

19. Prevention and remedying effects of pollution

**Part 5: Emergency incidents**

20. Control of emergency incidents

**CHAPTER 4: USE OF WATER**

**Part 1: General principles**

21. Water use
22. Permissible water use
23. Determination of quantity of water which may be allocated by responsible authority
24. Licences for use of water found underground on property of another person
25. Transfer of water use authorisations
26. Regulations on the use of water

**Part 2: Considerations, conditions and essential requirements of general authorisations and licences**

27. Considerations for issue of general authorisations and licences
28. Essential requirements of licences
29. Conditions for issue of general authorisations and licences
30. Security by applicant
31. Issue of licence no guarantee of supply

**Part 3: Existing lawful water uses**

32. Definition of existing lawful water use
33. Declaration of water use as existing lawful water use
34. Authority to continue with existing lawful water use
35. Verification of existing water uses

**Part 4: Stream flow reduction activities**

36. Declaration of stream flow reduction activities

**Part 5: Controlled activities**

37. Controlled activity  
38. Declaration of certain activities as controlled activities

**Part 6: General authorisations**

39. General authorisations to use water

**Part 7: Individual applications for licences**

40. Application for licence  
41. Procedure for licence applications  
42. Reasons for decisions

**Part 8: Compulsory licences for water use in respect of specific resource**

43. Compulsory licence applications  
44. Late applications  
45. Proposed allocation schedules  
46. Preliminary allocation schedule  
47. Final allocation schedules  
48. Licences replace previous entitlements

**Part 9: Review and renewal of licences, and amendment and substitution of conditions of licences**

49. Review and amendment of licences  
50. Formal amendment of licences  
51. Successors-in-title  
52. Procedure for earlier renewal or amendment of licences

**Part 10: Contravention of or failure to comply with authorisations**

53. Rectification of contraventions  
54. Suspension or withdrawal of entitlements to use water  
55. Surrender of licence

**CHAPTER 5: FINANCIAL PROVISIONS**

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56. Pricing strategy for water use charges  
57. Application of pricing strategy

- 58. Recovery of water use charges
- 59. Liability for water use charges
- 60. Water use charges are charges on land

**Part 2: Financial assistance**

- 61. Financial assistance by Minister
- 62. Regulations on financial assistance

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MINISTER AND DIRECTOR-GENERAL**

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additional powers**

- 63. Delegation of powers and duties by Minister
- 64. Expropriation of property
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84. Funding of catchment management agencies

85. Documents relating to litigation

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## CHAPTER 12 SAFETY OF DAMS

*This Chapter contains measures aimed at improving the safety of new and existing dams with a safety risk so as to reduce the potential for harm to the public, damage to property or to resource quality. To reduce the risk of a dam failure, control measures require an owner to comply with certain directives and regulations, such as to submit a report on the safety of a dam, to repair or alter a dam, or to appoint an approved professional person to undertake these tasks. These measures are in addition to the owners' common law responsibility to ensure the safety of their dams. An approved professional person has a statutory duty of care towards the State and the general public and must fulfil, amongst other things, defined responsibilities when acting under this Chapter. Not all dams are subject to regulation under this Chapter, and the Minister may exempt certain persons from its requirements. Only dams of a defined size, dams which have been declared to be dams with a safety risk, or dams falling into a prescribed category are affected. All dams with a safety risk must be registered. Compliance with any directive or regulation*



*under this Chapter does not exempt an owner from complying with any other provision of this Act, such as the requirement for a licence or other authorisation for water use in respect of the dam.*

### **Definitions**

**117.** In this Chapter –

- (a) “approved professional person” means a person registered in terms of the Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990), and approved by the Minister after consultation with the Engineering Council of South Africa (established by section 2 of that Act);
- (b) “dam” includes any existing or proposed structure which is capable of containing, storing or impounding water (including temporary impoundment or storage), whether that water contains any substance or not;
- (c) “Dam with a safety risk” means any dam –
  - (i) which can contain, store or dam more than 50 000 cubic meters of water;
  - (ii) belonging to a category of dams declared under section 118(2) to be dams with a safety risk; or
  - (iii) declared under section 118(iii)(a) to be a dam with a safety risk;
- (d) “owner of a dam” or “owner of a dam with a safety risk” includes the person in control of that dam; and
- (e) “task” includes a task relating to designing, constructing, altering, repairing, impounding water in, operating, evaluating the safety of, maintaining, monitoring or abandoning a dam with a safety risk.

### **Control measures for dam with safety risk**

**118.** (1) The owner of a dam must

- (a) within the period specified, provide the Minister with any information, drawings, specifications, design assumptions, calculations, documents and test results requested by the Minister;  
or
- (b) give any person authorised by the Minister access to that dam, to enable the Minister to determine whether
  - (i) that dam is a dam with a safety risk;
  - (ii) that dam should be declared to be a dam with a safety risk;

- (iii) a directive should be issued for specific repairs or alterations to that dam; or
  - (iv) the owner has complied with any provisions of this Act applicable to that dam.
- (2) The Minister may by notice in the *Gazette* declare a category of dams to be dams with a safety risk.
- (3) The Minister may
  - (a) by written notice to the owner of a dam, declare that dam to be a dam with a safety risk;
  - (b) direct the owner of a dam with a safety risk to submit, at the owner's cost, and within a period specified by the Minister, a report by an approved professional person regarding the safety of that dam; or
  - (c) direct the owner of a dam with a safety risk to undertake, at the owner's cost, and within a period specified by the Minister, any specific repairs or alterations to that dam which are necessary to protect the public, property or the resource quality from a risk of failure of the dam.
- (4) If the owner of the dam fails to comply with the directive contemplated in subsection (3)(c) within the period specified, the Minister may undertake the repairs or alterations and recover the costs from the owner.
- (5) Before issuing a directive, the Minister must
  - (a) be satisfied that the repairs or alterations directed are necessary, adequate, effective and appropriate to reduce the risk to an acceptable level; and
  - (b) consider the impact on public safety, property, the resource quality and socio-economic aspects if the dam fails.

#### **Responsibilities of approved professional persons**

- 119.** (1) When carrying out a task in terms of this Chapter, an approved professional person also has a duty of care towards the State and the general public.
- (2) An approved professional person appointed to carry out a task on a dam must
  - (a) ensure that the task is carried out according to acceptable dam engineering practices;

- (b) keep the prescribed records;
  - (c) compile the prescribed reports; and
  - (d) where the task includes constructing, altering or repairing a dam, issue a completion certificate to the owner of the dam to the effect that the task on that dam has been carried out according to the applicable design, drawings and specifications.
- (3) An approved professional person appointed to carry out a dam safety evaluation must –
- (a) consider whether the safety norms pertaining to the design, construction, monitoring, operation, performance and maintenance of the dam satisfy acceptable dam engineering practices; and
  - (b) compile a report on the matters contemplated in paragraph (a) according to the prescribed requirements and submit the signed and dated report to the owner of the dam within the prescribed period.

#### **Registration of dam with safety risk**

- 120.** (1) The owner of a dam with a safety risk must register that dam.
- (2) An application for registration must be made within 120 days
- (a) after the date on which the dam with a safety risk becomes capable of containing, storing or impounding water;
  - (b) after the date on which an already completed dam is declared to be a dam with a safety risk; or
  - (c) after publication of a notice declaring a category of dams to be dams with a safety risk, as the case may be.
- (3) A successor-in-title to an owner of a dam with a safety risk must promptly inform the Director-General of the succession, for the substitution of the name of the owner.

#### **Factors to be considered in declaring dam or category of dams with safety risk**

- 121.** In declaring a category of dams or a dam to be a category of dams or a dam with a safety risk, the Minister must consider
- (a) the need to protect the public, property and the resource quality against the potential hazard posed by the dam or category of dams;

- (b) the extent of potential loss or harm involved;
- (c) the cost of any prescribed measures and whether they are reasonably achievable;
- (d) the socio-economic impact if such a dam fails; and
- (e) in the case of a particular dam, also
  - (i) the manner in which that dam is designed, constructed, altered, repaired, operated, inspected, maintained or abandoned;
  - (ii) the person by whom that dam is designed, constructed, altered, repaired, operated, inspected, maintained or abandoned; and
  - (iii) the manner in which the water is contained, stored or impounded in that dam.

### **Exemptions**

- 122.** (1) The Minister may exempt owners of dams belonging to certain categories, by notice in the *Gazette*, from compliance with any provision of this Chapter or any regulation made under this Chapter, on conditions determined by the Minister.
- (2) The Minister may in writing exempt an owner of a dam belonging to a certain category from compliance with any provision of this Chapter on conditions determined by the Minister.
- (3) The Minister may withdraw the exemption or impose further or new conditions in respect of the exemption.
- (4) Before deciding on an exemption, the Minister must consider
- (a) the degree of risk or potential risk posed by the dam or category of dams to public safety, property and the resource quality;
  - (b) the manner of design, construction, alteration, repair, impoundment of water in, operation or abandonment of the dam or category of dams;
  - (c) the supervision involved in the dam or category of dams;
  - (d) alternative measures proposed for regulating the design, construction, alteration, repair, operation, maintenance, impoundment of water in, inspection or abandonment of the dam or category of dams and the effectiveness of these measures;
  - (e) the knowledge and expertise of the persons involved in any task relating to the dam or category of dams;

- (f) the costs relating to the dam or category of dams;
- (g) any security provided or intended to be provided for any damage which could be caused by the dam or category of dams; and
- (h) whether the dam or category of dams are permitted in terms of a licence or any other authorisation issued by or under any other Act.

### **Regulations regarding dam safety**

- 123.** (1) The Minister may make regulations
- (a) for the establishment of a register of approved professional persons for dealing with dams with a safety risk
    - (i) providing for
      - (aa) different classes of approved professional persons;
      - (bb) the tasks or category of tasks which each class of approved professional persons may perform; and
      - (cc) the conditions under which each class of approved professional persons may perform any task or category of tasks;
    - (ii) concerning the requirements for admission to each class;
    - (iii) setting out, in respect of each class, the procedure for
      - (aa) approval;
      - (bb) withdrawal of an approval; and
      - (cc) suspension of an approval; and
    - (iv) providing for a processing fee for an approval;
  - (b) regulating the approval of a person as an approved professional person for a specific task
    - (i) setting out the procedure for approval;
    - (ii) setting out the procedure for cancelling an approval;
    - (iii) requiring that the approved person be assisted in the task by another person or group of persons with specific experience and qualifications; and
    - (iv) providing for a processing fee for an approval;
  - (c) in respect of dams with a safety risk
    - (i) classifying such dams into categories;
    - (ii) requiring the owner of a dam of a specific category to appoint an approved professional person to

- (aa) design that dam or any repair, alteration or abandonment of the dam;
    - (bb) ensure that a task is carried out according to the applicable design, drawings and specifications; and
    - (cc) carry out dam safety evaluations on the dam;
  - (iii) requiring that licences be issued by the Minister before any task relating to a specific category of dams may commence, and the conditions, requirements and procedure to obtain any specific licence;
  - (iv) laying down licence conditions and requirements that must be met when carrying out a task on a specific category of dams;
  - (v) requiring an approved professional person, appointed for a dam of a specific category, to keep records of information and drawings, and to compile reports;
  - (vi) requiring
    - (aa) an owner of a dam belonging to a specific category of dams; and
    - (bb) an approved professional person appointed for a specific task for a specific dam, to submit information, drawings, reports and manuals;
  - (vii) determining the duties of
    - (aa) an owner of a dam belonging to a specific category of dams; and
    - (bb) an approved professional person appointed for a specific task for a specific dam;
  - (d) requiring the owner of a dam with a safety risk to accomplish regular monitoring of the dam, to the extent and manner prescribed;
  - (e) requiring the registration of a specific dam with a safety risk, and setting out the procedure and the processing fee payable for registration; and
  - (f) specifying time periods that must be complied with.
- (2) In making regulations under subsection (1)(a), the Minister must consider

- (a) the expertise required for the effective design, construction, alteration, repair, operation, maintenance and abandonment of a dam in the category concerned; and
  - (b) the qualifications and experience needed to provide the expertise for a particular category of tasks.
- (3) Before making regulations under subsection (1), the Minister must consult the Engineering Council of South Africa, established by section 2 of the Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990), and any other appropriate statutory professional bodies.

## APPENDIX V

### British Columbia, Canada, Dam Safety Regulation

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**NOTE:** This appendix is provided merely as an example of a regulation that deals exclusively with dam safety. There are many other examples and the inclusion of this example in this report should not be interpreted as an endorsement of this regulatory model over other models.

*B. C. Reg. 44/00*

*Deposited February 11, 2002*

#### **BRITISH COLUMBIA DAM SAFETY REGULATION**

#### **CONTENTS**

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2. Application
3. Operation and maintenance of dam
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5. Inspection
6. Reporting
7. Dam Safety Review
8. Hazardous conditions at a dam
9. Suspension of normal operation or removal of a dam
10. Information and evaluation
11. Instrumentation
12. Expert opinion

Schedule 1

Schedule 2



## Definitions

1. In this regulation:

“**Act**” means the Water Act

“**dam**” means

- (a) a barrier constructed across a stream, or
- (b) a barrier constructed off stream and supplied by diversion of water from a stream for the purpose of enabling the storage or diversion of water, and includes all works which are incidental to or necessary for the barriers;

“**dam owner**” means with respect to a dam, any or all of the following:

- (a) the person who holds the current license or is required to hold a license for the dam;
- (b) the person who last held a license for the dam including a license that has been suspended, cancelled, abandoned and or terminated;
- (c) if there is no person whom paragraph (a) or (b) applies, the owner of the land on which the dam is located or the person who had the dam constructed;

“**dam safety officer**” means an engineer or officer, designated in writing by the comptroller as a dam safety officer;

“**emergency preparedness plan**” means a plan prepared by a dam owner under section 3 (2) (a) that describes the actions the dam owner proposes to take in the event of an emergency at a dam;

“**height**” means the vertical distance to the top (crest) of a dam measured,

- (a) in the case of a dam across a stream, from the natural bed of the stream at the downstream outside limit of the dam, or
- (b) in the case of a dam that is not across a stream, from the lowest elevation at the outside limit of the dam;

“**Instrumentation**” means, but is not limited to, survey monuments and stations, inclinometers, extensometers, piezometers or measuring weirs;

**“maintain” or “maintenance”** means the performance of those tasks required to keep the dam in a good operating condition;

**“operation, maintenance and surveillance manual”** means a manual prepared by a dam owner under section 3 (2) (b) that describes the dam owner’s operation, maintenance and surveillance procedures for the dam;

**“professional engineer”** means a person registered, and in good standing, as a professional engineer under the Engineers and Geoscientists Act;

**“volume of water”** means the total storage volume of the reservoir at full supply level measured in accordance with one of the following:

- (a) between the natural bed of the stream and the spillway crest;
- (b) between the upstream outside limit of the dam and the spillway crest;
- (c) if a low level outlet is excavated to an elevation lower than the general foundation of the dam, between the bottom of that outlet and the spillway crest.

#### **Application**

- 2. (1) This regulation applies to all of the following:
  - (a) a dam 1 meter or more in height that is capable of impounding a volume of water greater than 1,000,000 m<sup>3</sup>;
  - (b) a dam 2.5 meters or more in height that is capable of impounding a volume of water greater than 30,000 m<sup>3</sup>;
  - (c) a dam 7.5 meters or more in height;
  - (d) a dam that does not meet the criteria under paragraph (a), (b) or (c) but has a downstream consequence classification under Schedule 1 of low, high or very high.
- (2) This regulation does not relieve a dam owner from any other requirements that may be imposed under the Act, the Water Regulation or any other applicable enactment.

#### **Operation and maintenance of a dam**

- 3. (1) A dam owner must operate and maintain a dam in accordance with all of the following:

- (a) this regulation;
  - (b) any applicable license or approval;
  - (c) any order that is made under the Act;
  - (d) the emergency preparedness plan that has been prepared and accepted in accordance with subsection (2) (a);
  - (e) the operation, maintenance and surveillance manual that has been prepared and accepted in accordance with subsection (2) (b)
- (2) A dam owner must, in the form and manner and within the time period specified by the comptroller or regional water manager, prepare and submit to dam safety officer, for acceptance by the dam safety officer, the following:
- (a) if the downstream consequence classification under Schedule 1 is high or very high, an emergency preparedness plan;
  - (b) if the downstream consequence classification under Schedule 1 is low, high or very high, an operation, maintenance and surveillance manual.
- (3) Subsection (2) applies whether there is a term or condition in an approval granted or license issued that requires the preparation of such a plan or manual for the dam.
- (4) A dam owner must ensure the dam is adequately safeguarded to prevent unauthorized operation of the dam by someone other than the dam owner or an agent of the dam owner.

#### **Alteration of dam**

4. (1) Any alteration, improvement or replacement to all or any part of a dam must be authorized by an approval, license or order.
- (2) Subsection (1) does not apply to an alteration, improvement or replacement for the purpose of
- (a) maintaining the dam as authorized under section 3, or
  - (b) addressing a hazardous condition as specified in section 8.
- (3) A dam owner must submit to a dam safety officer, on completion of the alteration, improvement or replacement, a report on the work and the manner in which any such alteration, improvement or replacement to all or any part of the dam was performed.

#### **Inspection**

5. A dam owner must do all of the following:

- (a) carry out an inspection of a dam on the frequency applicable to the downstream consequences classification for the dam as set out in Schedule 2 in order to assess the condition of the dam during the construction, operation or alteration of the dam;
- (b) record the results of every inspection performed under paragraph (a);
- (c) repair any safety hazards revealed by an inspection, if authorized to do so by an approval, license or order or as authorized under this regulation.

### **Reporting**

- 6. (1) A dam owner must, when an inspection is carried out under section 5 or when any other inspection is carried out with respect to a dam,
  - (a) submit to a dam safety officer, in the form and manner and within the time period specified by the dam safety officer,
    - (i) the record of inspection required by section 5(b), and
    - (ii) the results and analysis of any test or measurement taken including, but not limited to,
      - a) instrumentation readings and analysis,
      - b) visual records or observations,
      - c) drawings,
      - d) soil, aggregate and concrete test results, and
      - e) any other test results, and
  - (b) promptly submit to a dam safety officer the record of inspection required by section 5 (b) if the inspection reveals a potential safety hazard.
- (2) A dam owner must submit to a dam safety officer, if requested by the dam safety officer, the original or clear copies of the following documentation required for the design, construction or alteration of the dam:
  - (a) all design notes, drawings and specifications;
  - (b) hydraulic, hydrologic, geological and geotechnical data;
  - (c) reports and other similar documentation.

### **Dam safety review**

- 7. (1) If required by Schedule 2, a dam owner must have a professional engineer, experienced in dam safety analysis, do a dam safety

review and prepare, in the form and manner and within the time period specified by the comptroller or regional water manager, a dam safety report.

- (2) The dam owner must submit to a dam safety officer a copy of the dam safety report prepared by the professional engineer who carried out the dam safety review under subsection (1).

#### **Hazardous conditions at a dam**

8. If conditions are, or may likely be, hazardous to a dam, or conditions may reasonably be anticipated to cause a dam, or any part of a dam, or any operation or action at or in connection with a dam, to be or become potentially hazardous to public safety, the infrastructure or works, other property or the environment, a dam owner must promptly do all of the following:
  - (a) if an emergency preparedness plan exists, modify the operation of the dam, or any part of the dam, in accordance with the emergency preparedness plan;
  - (b) if an emergency preparedness plan does not exist, operate the dam in a manner, and initiate any remedial actions, that will
    - (i) safeguard the public,
    - (ii) minimize damage to the infrastructure or works or to other property, including that not owned by the dam owner, and
    - (iii) minimize damage to the environment;
  - (c) contact the Provisional Emergency Program contained under the *Emergency Program Act*;
  - (d) notify a dam safety officer, or the comptroller or regional water manager, of
    - (i) the nature of existing or anticipated conditions,
    - (ii) all things done by the dam owner to rectify the conditions, and
    - (iii) the time and exact nature of any information or warning of existing or anticipated conditions issued to any person under this section;
  - (e) inform local authorities, and persons who may be in immediate danger from the potential failure of the dam, of the nature of the existing or anticipated conditions and, if necessary, advise those persons who may be in immediate danger to vacate and remove any property from the endangered area;

- (f) modify the operation of the dam to minimize or prevent damage which may be caused by the failure of the dam, and undertake any other hazard response activity if required by a dam safety officer or engineer or by the comptroller or regional water manager.

#### **Suspension of normal operation or removal of dam**

- 9. (1) A dam owner must give the comptroller or regional water manager at least 60 days written notice before undertaking any of the following activities:
  - (a) removing all or a significant part of a dam;
  - (b) decommissioning or abandoning a dam;
  - (c) stopping the normal operation of a dam for a period of time longer than one year.
- (2) The dam owner must prepare, and submit to a dam safety officer for approval,
  - (a) a plan respecting an activity under subsection (1) (a) or (b), or
  - (b) if required by the dam safety officer, a plan respecting an activity under subsection (1) (c).
- (3) The dam owner must, at least 14 days before the date on which the work is expected to commence, notify a dam safety officer before commencing any work under the approved plan.
- (4) The dam owner must submit to a dam safety officer, on the completion of the work performed under the approved plan, a report on the work and the manner in which it was performed.
- (5) The dam owner must undertake any further actions that the comptroller or regional water manager requires to alleviate any adverse consequences to any person, the infrastructure or works, other property or the environment that may be affected by any work performed on the dam.
- (6) An approval under subsection (2) respecting the decommissioning of a dam is subject to the Environmental Assessment Act and to approvals, if any, required under the Act.

#### **Information and evaluation**

- 10. (1) A dam owner must, if requested by a dam safety officer, provide the following information in order to evaluate the condition or hazard potential of a dam:

- (a) information with respect to the dam including, but not limited to,
    - (i) foundation investigation results,
    - (ii) design details and as-built plans,
    - (iii) construction records,
    - (iv) operation manuals,
    - (v) records of instrumentation,
    - (vi) inspection reports,
    - (vii) safety reports, and
    - (viii) inundation studies and emergency preparedness plans;
  - (b) information with respect to the nature of the land and the stream, and the use of the land and the stream, downstream from or adjacent to the dam or reservoir, including the hydraulic, hydrologic, geological and geotechnical characteristics and the uses of the land and stream;
  - (c) information with respect to the watershed upstream of the dam.
- (2) The information requested under subsection (1) must be submitted to a dam safety officer, in the form and manner and within the time period specified by the comptroller or regional water manager.
- (3) The dam owner must conduct any inspection, investigation, survey or test that is necessary to provide the information required by subsection (1).

### **Instrumentation**

11. A dam owner must do all of the following:
- (a) install any instrumentation necessary to adequately monitor the performance of a dam;
  - (b) monitor, maintain or replace instrumentation installed at a dam to ensure continuity of readings;
  - (c) submit instrumentation readings and evaluations to a dam safety officer, in the form and manner and within the time period specified by the dam safety officer;
  - (d) submit, to a dam safety officer for approval by the dam safety officer,
    - (i) notice of any planned modifications to, changes to or removal of the instrumentation at least 60 days before the proposed modification, change or removal, or

- (ii) an annual plan outlining intended changes to the instrumentation.

**Expert opinion**

- 12. (1) If, based on information submitted in respect of a dam or related works, the comptroller or regional water manager considers that a question has arisen as to what is proper practice for resolving an issue involving a dam or related works, the comptroller or regional water manager may require a dam owner to retain an expert, satisfactory to the comptroller or regional water manager, with qualifications and experience as follows:
  - (a) In the case of a dam, in dam design, construction and analysis;
  - (b) In the case of related works, in hydraulic, hydrological, geological, geotechnical, mechanical or structural engineering or other appropriate disciplines.
- (2) The expert retained under subsection (1) must provide a report to the comptroller or regional water manager on the issue.



**SCHEDULE 1 (Sections 2[1][d] and 3[2])**

**Downstream Consequence Classification Guide**

<b>Rating</b>	<b>Loss of Life</b>	<b>Economic and Social Loss</b>	<b>Environmental and Cultural Loss</b>
VERY HIGH	Large potential for multiple loss of life involving residents and working, traveling, and/or recreating public. Development within inundation area (the area that could be flooded if the dam fails) typically includes communities, extensive commercial and work areas, main highways, railways, and locations of concentrated recreational activity. Estimated fatalities could exceed 100.	Very high economic losses affecting infrastructure, public and commercial facilities in and beyond inundation area. Typically includes destruction of or extensive damage to large residential areas, concentrated commercial land uses, highways, railways, power lines, pipelines, and other utilities. Estimated direct and indirect (interruption of service) costs could exceed \$100 million.	Loss or significant deterioration of nationally or provincially important fisheries habitat (including water quality), wildlife habitat, rare and/or endangered species, unique landscapes or sites of cultural significance. Feasibility and/or practicality of restoration and/or compensation is low.
HIGH	Some potential for multiple loss of life involving residents, and working, traveling, and/or recreating public. Development within inundation area typically includes highways and railways, commercial and work areas, locations of concentrated recreational activity and scattered residences. Estimated fatalities less than 100.	Substantial economic losses affecting infrastructure, public and commercial facilities in and beyond inundation area. Typically includes destruction of or extensive damage to concentrated commercial land uses, highways, railways, power lines, pipelines, and other utilities. Scattered residences may be destroyed or severely damaged. Estimated direct and indirect (interruption of service) costs could exceed \$1 million.	Loss or significant deterioration of nationally or provincially important fisheries habitat (including water quality), wildlife habitat, rare and/or endangered species, unique landscapes or sites of cultural significance. Feasibility and practicality of restoration and/or compensation is high.
LDW	Low potential for multiple loss of life. Inundation area is typically underdeveloped except for minor roads, temporarily inhabited or non-residential farms and rural activities. There	Low economic losses to limited infrastructure, public and commercial activities. Estimated direct and indirect (interruption of service) costs could exceed \$100,000.	Loss or significant deterioration of regionally important fisheries habitat (including water quality), wildlife habitat, rare and/or endangered species, unique landscapes or sites of cultural significance.

must be a reliable element of natural warning if larger development exists.

Feasibility and practicality of restoration and/or compensation is high. Includes situations where recovery would occur with time without restoration.

VERY LOW

Minimal potential for any loss of life. The inundation area is typically undeveloped.

Minimal economic losses typically limited to owners' property and do not exceed \$100,000. Virtually no potential for future development of other land uses within the foreseeable future.

No significant loss or deterioration of fisheries habitat, wildlife habitat, rare and/or endangered species, unique landscapes or sites of cultural significance.

**SCHEDULE 2 (Sections 5[a] and 7[1])**

**Minimum Inspection Frequency and Dam Safety Review Requirements**

<b>Item</b>	<b>Very High Consequence</b>	<b>High Consequence</b>	<b>Low Consequence</b>	<b>Very Low Consequence</b>
Site Surveillance <sup>a</sup>	Weekly	Weekly	Monthly	Quarterly
Formal Inspection <sup>b</sup>	Semi-annually	Semi-annually or annually	Annually	Annually
Instrumentation	As per OMS* manual	As per OMS* manual	As per OMS* manual	N/A
Test Operation of Outlet Facilities, Spillway Gates and Other Mechanical Components	Annually	Annually	Annually	Annually
Emergency Preparedness Plan	Update communications directory semi-annually	Update communications directory semi-annually	Update communications directory annually	N/A
Operation Maintenance & Surveillance Plan	Review every 7–10 years	Review every 10 years	Review every 10 years	Review every 10 years
Dam Safety Review <sup>c</sup>	Every 7–10 years <sup>d</sup>	Every 7–10 years <sup>d</sup>	<sup>d</sup>	<sup>d</sup>

\*Operation, Maintenance and Surveillance.

N/A Not available.

<sup>a</sup>Site surveillance may consist of visual inspections and/or monitoring of automated data acquisition systems. Reduced frequencies of visual inspections may be determined by seasonal conditions.

<sup>b</sup>Formal Inspections are intended as more thorough inspection performed by the appropriate representative of the owner responsible for safety surveillance.

<sup>c</sup>A Dam Safety Review involved collection of all available dam records, field inspections, detailed investigation and possibly laboratory testing. It then proceeds with a check of structural stability and operational safety of the beginning with a reappraisal of basic features and assumptions. The level of detail required in a Dam Safety Review should be commensurate with the importance and complexity of the dam, as well as the consequences of failure.

<sup>d</sup>Dam owners must conduct an annual review of conditions downstream of their dam and notify dam safety officer if the downstream consequence classification level increases. The downstream consequence classification guide is shown in Schedule 1.

## APPENDIX VI

### **Canadian Dam Association, Sample Operations, Maintenance, and Surveillance Manual**

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**NOTE:** This appendix is provided merely as an example of the table of contents of an OMS Manual. There are many other examples and the inclusion of this example in this report should not be interpreted as an endorsement of this model of an OMS Manual over other possible models.

#### **NON-STRUCTURAL SAFETY MEASURES DAM SAFETY PLANS**

Based on “Dam Safety Guidelines—Canadian Dam Association—January 1999”

##### **OPERATION & MAINTENANCE PLAN**

- General Information
- Operation
- Reservoir operational rules
- Flood forecasting (if available)
- Flood operating procedures
- Emergency operating procedures
- Maintenance
- Historical document
- Performance indicators
- Preventive measures
- Instrumentation Plan (see detail)
- Surveillance
- Standards
- Regular inspections
- Special inspections
- Tests
- Emergency Preparedness Plan (EPP) (see detail)

### **EMERGENCY PREPAREDNESS PLAN (EPP)**

- Responsibilities
- Emergency Identification, Evaluation and Classification
- Preventive Actions
- Notification Procedures
- Notification Flowchart
- Inundation Maps and Tables
- Testing and Upgrading the EPP
- Training

### **INSTRUMENTATION PLAN**

- Description and location of instruments and monitoring devices
- Initial datum, design limits, calibration requirements, operating ranges
- “Alarm” levels
- Mode and methodology of readings
- Data recording and storing
- Data interpretation

### **OPERATION AND MAINTENANCE (O&M) MANUAL**

#### **B.1. General**

Dam operation, maintenance and surveillance shall be provided so that an acceptable level of dam safety is ensured.

A manual (the “O&M Manual”) shall be prepared, documenting operation, maintenance and surveillance. The O&M manual shall be implemented, followed, and updated at appropriate intervals. The manual shall contain suitable and sufficient information to allow operators to operate the dam in a safe manner, maintain it in a safe condition, and monitor its performance well enough to provide early signs of any distress.

A general description of the dam should be included to indicate such items as type, size, consequence classification, age, location, and access.

Qualified personnel shall be used for the operation, maintenance and surveillance.

The O&M Manual should state the chain of operational responsibilities and requirements for training of staff at the various levels.

As a minimum, the O&M Manual should be reviewed annually to ensure that all appropriate updates of personnel or organization have been made.

The required duties and qualifications of operators in regard to dam safety should be defined, listing the appropriate areas of involvement. The description may include details of suitable training programs.

A permanent log book should be maintained, containing information and records appropriate to the type of dam, such as:

- Weather conditions
- Changes to normal operation, unusual events, conditions or public activity
- Unusual maintenance activities
- Instructions
- Alarms or annunciation
- Inspections

The log book should not detail activities of normal operation nor records routinely being maintained elsewhere. Suitable instructions should be in place for the recording of this operating information, including references to drawings and technical operation and maintenance manuals.

## **B.2. Operation**

### ***B.2.1. Flood Operating Procedures***

During the flood season, a sufficient number or capacity of gates and facilities necessary for discharging flows up to the Inflow Design Flood (IDF) shall be maintained in operable condition, and procedures for state operation shall be specified.

Any restrictions for gate operation shall be documented.

The reservoir shall be operated in such a manner that the Inflow Design Flood can be routed safely. Drawdown or other reservoir operating restrictions shall be documented.

Descriptions of all the various parts of the dam that affect the above requirements should be provided and where appropriate, manufacturers' operating manuals should be readily available.

Concise operating instructions should be provided for use, during normal operation as a well as in the case of extreme flood, by qualified dam operators who are not necessarily familiar with the particular facility or project.

Details of normal operating conditions should be provided to indicate such items as: inflows and discharges, normal levels, storage volumes, spillway and tailwater rating curves, spillwater operating parameters, power supplies and environmental restrictions. Potential emergency conditions should be identified and listed with related recommended operating parameters and restraints.

The instructions should detail the flow capacities of the structures and related water elevations, list the hazard areas and flows at which they are affected, and provide details about warning systems as well as primary and backup power systems.

### ***B.2.2. Emergency Operating Procedures***

Procedures for reservoir control and discharge in the case of a developing breach or potential breach, and for any emergency drawdown of the reservoir, shall be established.

General procedures and considerations should be outlined, such as any special instructions for spillway operation, and instructions on reservoir drawdown to alleviate the effect of emergencies. These should include any limitations on reservoir surcharge or drawdown, implications of rising flows downstream, list of erosion-prone areas of river banks, and reservoir slopes which should be monitored. Operations during an emergency would follow procedures of the Emergency Preparedness Plan, as described in Section C.

Operation to evacuate the reservoir in the event of damage to the dam, including precautions to avoid damage to facilities and any restrictions on the rate of drawdown should be provided.

### ***B.2.3. Ice and Debris Handling***

Where reservoirs can contain significant quantities of ice or debris, procedures shall be established for safely handling ice and/or debris.

The details, functions and required operating activities of log, trash and ice booms, including trash removal and any ice-growth restrictions on structures

or gates, should be described in the O&M Manual. The operation of any required bubble systems for ice prevention and/or steam lances should be described.

#### **B.2.4. Flood Forecasting**

If available, the source of flood forecasting information shall be identified.

Authorized sources of flood forecasting should be designated, with a list of other available sources of flood forecast. The Inflow Design Flood, the basis of its estimation and the capacity of the facilities should be described.

#### **B.3. Maintenance**

Maintenance policies, procedures, records and responsibilities shall be developed and implemented to ensure that the dam, together with applicable structures and equipment required for flood discharge, is maintained in a safe and fully operable condition.

Equipment shall be inspected and tested at regular intervals to ensure safe and reliable operation.

A description of maintenance policies, procedures, records and responsibilities for dams, appurtenant structures and associated equipment (including instrumentation) essential to dam safety should be available.

Maintenance requirements should also be documented for all miscellaneous structures such as timber cribs and conduits.

All relevant manufacturers' and designers' maintenance manuals should be available.

Changing conditions in the facility must be evaluated and appropriate actions taken both in regard to design reviews and necessary construction changes and/or repairs.

Instrumentation required to verify the continuing safe operation of the dam, together with any data acquisition and transmission systems, must be maintained in good working condition.

Considerations for maintenance of different types of structures and equipment are briefly outlined below.



### *Concrete Structures*

Uplift pressure and water seepage are the main potential causes of instability, under normal loadings, of part or all of the structures, as well as the primary cause of degradation due to leaching or frost action. In addition, the effects of freeze/thaw at the water line and alkali aggregate reaction (AAR) can have serious impacts on the safety of the structures.

Annual or long-term maintenance programs for concrete structures should include, but not be limited to, regular cleaning of drains and drainage systems, maintenance of sealing systems, pumping equipment, monitoring equipment and instrumentation required to assure the safety of the structures.

### *Steel Structures*

Maintenance requirements for the structural steel components of items such as gates, stoplogs, guides, hoist structures, monorails, and conduits, may apply to the following: alignment, anchor bolts, bolted, riveted and welded connections, protective coatings, support details, support grouts.

### *Earthfill Dams*

Earthfill structures require maintenance work directed essentially to controlling seepage and erosion, in order to prevent deterioration of structures and development of seepage paths.

Annual or long-term maintenance programs for earthfill structures may include regular maintenance of instrumentation, rip-rap and crest maintenance and repair, control of vegetation and burrowing animals, slope stabilization, drainage system maintenance, and removal of upstream debris, to assure the safety of the structure.

### *Equipment*

Maintenance requirements may apply to all mechanical and electrical components which are essential to dam safety, including: spillway and conduit gates, hoists, gate and guide heating systems, stoplog hoisting facilities, bubbler systems, relevant instrumentation, normal and emergency lighting and pumps.

A preventative maintenance program should be devised based upon dam consequence classification, industry standard, manufacturer's recommendations and operating history for particular pieces of equipment.

Reference should be made (with supplementary information where necessary) to manufacturers' and designers' operating and maintenance manuals for required maintenance, spare parts, and appropriate regular tests to confirm ongoing functionality.

#### *Communicators and Control*

Operating staff should have a description, including a complete overview with system schematic diagram of all the communication and control equipment. Equipment should be operated continuously and monitored to ensure integrity. The documentation should include all current test and maintenance practices.

### **B.4. Surveillance**

#### ***B.4.1. Standards***

Standards shall be established to cover inspections, monitoring of water-retaining structures, and testing of discharge facilities.

Standards or guidelines should be provided to establish the types of inspections to be carried out, the purpose of each type of inspection, frequency of inspections, type of items to be inspected, required documentation, qualification and training of inspectors and procedures for the correction of deficiencies.

#### ***B.4.2. Regular Inspections***

**Requirements:** Periodic inspections shall be performed to determine the condition of integral portions of water-retaining structures.

Appropriate investigations shall be undertaken of all potential deficiencies disclosed by regular inspection.

Instructions and procedures for the dam should provide the following information:

- Checklists for routine, intermediate and comprehensive inspections for all structures and equipment
- Frequency, responsibility and requirements for recording and reporting
- Description of additional inspections which may be required including

underwater inspections and inspections required during initial reservoir impounding

- Requirement and frequency of alignment and deformation surveys

The program of inspections, including the frequency of inspections, should be devised based upon the dam classification, industry standards, manufacturers' recommendations, operating history and condition of particular structures and equipment.

As a general guideline, "routine" inspections should be performed by project staff as a regular part of their maintenance activities. Such inspections should be carried out weekly or monthly as appropriate for the item being inspected. Reduced frequencies may be selected to suit seasonal restraints. "Intermediate" inspections are intended as more formal inspections, generally annual or semi-annual, performed by the appropriate representative of the owner responsible for safety surveillance. Comprehensive inspections (Dam Safety Review) should be performed by an independent expert or panel of experts at regular time intervals.<sup>1</sup> The review should include the O&M Plan and the EPP to determine any modifications thereof.

Procedures, including definition of responsibility, should be in place for evaluating data (obtained from visual inspections, instrumentation and design reviews of current operating conditions such as spillway capacity, freeboard, drawdown, maximum water levels) to confirm structural and operational safety and to identify areas requiring deficiency investigations. These procedures should include an "action code" to ensure that appropriate action will be taken, depending on the severity of the observed deficiency.

#### ***B.4.3. Special Inspections***

Special inspections shall be performed following potentially damaging events.

Instructions and procedures for the dam should describe special inspections and other surveillance and procedures required after floods, windstorms, earthquakes and unusual observations such as cracks, settlements, sinkholes and slopes failures. The responsibility to undertake these special inspections

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1. Review period depends on the consequence classification of the dam:

Consequence category:	Very High	High	Low
Period between reviews:	5	7	10 (years)

All test procedures should be specified in the O&M Manual and incorporated with the inspection checklists. Instructions and procedures should provide descriptions of operational and integrity tests for all mechanical and electrical components of water flow control equipment to ensure fully operational condition.

### **EMERGENCY PREPAREDNESS PLAN (EPP)**

#### **C.1. General**

Potential emergencies at a dam shall be identified and evaluated, with consideration of the consequences of failure, so that appropriate preventative or remedial actions can be taken.

An Emergency Preparedness Plan (EPP) shall be prepared, tested, issued and maintained for any dam whose failure could be expected to result in loss of life as well as for any dam for which advanced warning would reduce upstream or downstream damage.

A notification process shall be initiated as specified in the EPP, immediately upon finding a hazardous condition that could lead to a dam breach, or upon discovering a potential dam breach or dam breach in progress.

The dam owner<sup>2</sup> or operator shall assess whether dam breach warnings should be issued directly to inhabitants in areas immediately downstream of a dam, due to the short period of time before the anticipated arrival of a flood wave.

Where preventative actions are available, these actions shall be initiated, as appropriate, to prevent failure or to limit damages where failure is inevitable.

An EPP is a formal written plan that identifies the procedures and processes that the dam operators would follow in the event of an emergency at a dam. The emergency could be, for example, failure of essential equipment such as flood gates, slope failure having the potential to cause dam failure, or a complete failure of the dam caused by overtopping, earthquake or piping.

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2. As defined in this document, the term "owner" refers to the person or entity responsible for the safety of the dam.

should be assigned to all site staff and the engineer responsible for dam safety. This wide empowerment is intended to ensure timely inspection after all potentially damaging events.

Requirements for documentation and reporting should be specified with inspection checklists and procedures for review by the engineer responsible for dam safety, following the occurrence of the above events.

#### **B.4.4. Instrumentation**

Instrumentation shall be monitored, evaluated and maintained to assist in the safe operation of the dam.

Included with all descriptions of instruments should be their initial data, design limits, dates of and requirements for calibration, normal operating ranges, and “alarm” levels at which point detailed review of the readings is required. The responsibility should be assigned for routine instrument readings, changes to data, calibration and interpretation of the results.

The mode and methodology of readings should be described, i.e., automated or manual. If automated, the system should be described including modem telephone numbers. If manual, there should be documentation of methodology, maintenance, calibration and storage of instrumentation reading equipment.

Exact locations and details of the instrument installations should be provided, complete with plan views and cross-sectional drawings.

The documentation of instrumentation could be covered in a separate instrumentation report, with reference to it in the O&M Manual.

#### **B.4.5. Tests**

All operating equipment and facilities necessary to pass extreme floods shall be inspected and tested annually to ensure that they will function as required during an extreme flood.

Intake flow control equipment should undergo a balance pressure test annually before the flood season. Spillway gates should have annual operation tests to ensure correct operation. The frequency and level of inspection and testing should be compatible with the consequence category of the dam.

An EPP allows for planning by municipalities, local police, provincial agencies, telephone and transportation companies and other parties affected in the event of a dam break flood, and the coordination of efforts between provincial and municipal levels of government. In the event of an emergency, an effective, comprehensive, well-tested EPP will save lives and has the potential to reduce property damage.

### **C.2. Development of an EPP**

An EPP shall describe the actions to be taken by the dam owner and operator in an emergency. The EPP shall assign responsibility for each action to be taken to an individual and/or a backup.

Input from other agencies and affected parties shall be included in the EPP, as appropriate.

Copies of the EPP, or summaries of relevant information, shall be provided to those who have responsibilities under the plan.

The steps in developing an EPP are as follows:

1. Identify those situations or events that would require initiation of an emergency action; specify the actions to be taken and by whom.
2. Identify all jurisdictions, agencies, and individuals who will be involved in implementing the EPP.
3. Identify primary and auxiliary communications systems, both internal (between persons at the dam) and external (between dam personnel and outside agencies).
4. Identify all persons and agencies involved in the notification process, and draft a notification flowchart which shows whom should be notified, in what order and what other actions are expected of downstream agencies. Each provincial and local government agency involved may have its own general emergency plan. This would normally require amending to include actions required as a result of dam break flooding.
5. Develop a draft of the EPP.
6. Hold coordination meetings with all parties included in the notification list for review and comment on the draft EPP.
7. Make any revisions, obtain any necessary regulatory approval, finalize and distribute the EPP.

### **C.3. Contents of an EPP**

The EPP shall include the following procedures and information:

- Emergency identification and evaluation
- Preventative actions (where available)
- Notification procedure
- Notification flowchart
- Communication systems
- Access to site
- Response during periods of darkness
- Response during periods of adverse weather
- Sources of equipment
- Stockpiling supplies and materials
- Emergency power sources
- Inundation maps
- Warning systems (if used)

#### *Emergency Identification and Evaluation*

If detected early enough, potential emergencies can be evaluated and preventative or remedial actions taken. The EPP should contain clear procedures for taking action when a potential emergency is identified. Notification of emergency situations requires that a responsible contact person initiate the remedial action and decide if and when an emergency should be declared and the EPP executed. Clear guidance should be provided in the EPP on the conditions which require that an emergency be declared.

The Emergency Preparedness Plan should include a discussion of procedures for timely and reliable identification, evaluation, and classification of existing or potential emergency conditions. Major elements of these procedures are:

- Listing of the conditions or events which could lead to or indicate an existing or potential emergency. Situations involving flood emergencies due to a breach or other structural failure as well as a major flood without a breach should be included. Breach conditions could occur

as a result of such occurrences as piping, floods, earthquake, sabotage or landslide-induced waves.

- Brief description of the means by which potential emergencies will be identified, including the data and information collection system, monitoring arrangements, surveillance, inspection procedures and other provisions for early detection of conditions indicating an existing or potential emergency.
- Procedures, aids, instructions and provisions for interpreting information and data to assess the severity and magnitude of any existing or potential emergency.
- Designation of the person responsible for identifying and evaluating the emergency. This would normally be the owner or his representative: however, if the owner does not have the proper technical expertise, responsibility may need to be assigned to another individual. Appropriate alternatives should be designated to ensure that continuous coverage is provided.

#### *Preventative Action*

Where there are provisions for preventative actions available they should be clearly detailed in the EPP. These could include listings of the availability of machines, equipment, material and labour that are ready available to the dam operator in an emergency situation.

#### *Notification Procedures*

Notification Procedures must be clear and easy to follow. The EPP should contain a list of all persons to be notified in the event that an emergency is declared.

#### *Notification Flowchart*

A notification flowchart is a diagram showing the hierarchy of notification during an emergency. It is a pictorial representation of the notification procedure. The EPP should contain a notification flowchart clearly summarizing the notification procedure for each of the emergency conditions considered.

#### *Communications Systems*

Full details of internal and external communications systems as they apply to the EPP should be included.



#### *Access to the Site*

The description of access should focus on primary and secondary routes and means for reaching the site under various conditions (e.g., foot, boat, helicopter, snowmobile).

#### *Response during Periods of Darkness*

The EPP should cover the response to potential or actual emergency conditions during periods of darkness including those caused by power failure.

#### *Response during Periods of Adverse Weather*

The EPP should address emergency response under adverse weather conditions including extremes of cold, snow or storms.

#### *Sources of Equipment*

The location and availability of equipment and contractors that could be mobilized in case of an emergency should be included.

#### *Stockpiling Supplies and Materials*

The location and availability of stockpiled materials and equipment for emergency use should be addressed.

#### *Emergency Power Sources*

Details on the location and operation of emergency power sources should be included.

#### *Inundation Maps*

Inundation maps are needed by local authorities to develop an adequate evacuation plan.

#### *Warning Systems*

Warning systems are sometimes used to provide warnings to residents, campgrounds and parks that are close to the dam. Full details should be contained within the EPP.

#### *Appendices*

Additional items may be covered in appendices to the EPP. General site plans may be useful. Drawings showing the potential breach location used in the inundation study may be included. Tables showing the variation in flood stage with time at key locations in the flooded area should also be included.

#### **C.4. Maintenance and Testing of an EPP**

The EPP shall be issued to those affected, and all registered copies of the EPP shall be updated.

The EPP shall be tested.

As updates or amendments to the EPP are produced they are forwarded to each holder (as listed in the EPP) and acknowledged by the recipient. Telephone numbers and names of contact persons should be updated on a regular basis, at least annually. It is helpful to place the EPP in a loose-leaf binder so that outdated pages can be easily removed and replaced with updated information, to ensure a complete, current and workable plan. A list of planholders should appear in the EPP.

Testing is an integral part of EPP to ensure that both the document and the training of involved parties are adequate. Tests can range from a limited table-top exercise to a full-scale simulation of an emergency and can include multiple failures.

#### **C.5. Training**

Training shall be provided to ensure that dam personnel involved in the EPP are thoroughly familiar with all elements of the EPP, the availability of equipment, and their responsibilities and duties.

Technically qualified personnel should be trained in problem detection and evaluation and appropriate remedial (emergency and non-emergency) measures. This training is essential for proper evaluation of developing situations at all levels of responsibility which, initially, is usually based on observations on-site. A sufficient number of people should be trained to ensure adequate coverage at all times.

#### **C.6. Inundation Studies**

Requirement: An inundation study shall be carried out based on assumptions that will indicate all areas that could be flooded for the most severe combination of reasonably possible conditions.

Various dam failure scenarios are normally studied: these cover rapid failure times, large breach sizes and conservative antecedent conditions. The

potentially inundated area should be determined and the following conditions considered:

- Design flood failure
- Fair-weather dam failure
  - At full supply level (piping, earthquake)
  - During winter conditions where ice jam formation is possible
- Failure induced by failure of an upstream structure

Inundation maps showing the maximum flooded areas should be prepared.

Inundation maps should also be prepared for the reservoir rim and for areas affected by the backwater effect upstream of the reservoir. Two cases should be analyzed:

- Extreme flood exceeding the discharge capacity
- Reduction of discharge capacity during the passage of a large flood (for example, blockage by debris, or malfunction or non-operation of gates).

## APPENDIX VII

### Selected Legislation on Dam Safety and Additional Information Sources

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#### SELECTED LEGISLATION

##### **Argentina**

- Decree no. 239/99 (Mar. 17, 1999)

##### **Australia**

###### *New South Wales:*

- Dams Safety Act (1978)

###### *Victoria:*

- Water Act (2000)

###### *Queensland:*

- Water Resources Act (1989)
- Water Act (2000)

##### **Canada**

###### *Alberta:*

- Dam and Canal Safety Regulation (1978, as revised in 1998)
- Dam Safety Guidelines (1975)
- Dams Safety Guidelines of the CDA (1995)

###### *British Columbia:*

- Dam Safety Regulations B.C. Reg 44/00, (deposited Feb. 11, 2000, issued by the Government of British Columbia in Feb. 2000)

###### *Ontario:*

- Lakes and Rivers Improvement Act (issued by the Ministry of Natural Resources in 1977)

###### *Quebec:*

- Dam Safety Act (adopted by the Quebec Parliament on May 23, 2000)

**Finland**

- Dam Safety Act (1.6.1984/413)
- Dam Safety Decree (27.7.1984/574)
- Water Act (19.5.1961/264)
- Dam Safety Code of Practice (1985, last revised in 1997)

**France**

- Law on the Organization of Civil Security, Protection against Forest Fires, and Prevention of Major Risks (Jul. 22, 1987) [*Loi du 22 juillet 1987 relative à l'organisation de la sécurité civile, à la protection de la forêt contre l'incendie et à la prévention des risques majeurs*]
- Water Law (Jan. 3, 1992)
- Circular no. 70/15 on the Inspection and Surveillance of Dams Relevant to Public Safety (Aug. 14, 1983) [*Inspection et Surveillance des barrages intéressant la Sécurité publique*]
- Circular on the Security of Zones in Proximity to and Downstream from Dams (Jul. 13, 1999) [*Circulaire de 13 juillet 1999 relative à la sécurité des zones situées à proximité ainsi qu'à l'aval des barrages et aménagements hydrauliques, face aux risques liés à l'exploitation des ouvrages*]
- Decree Creating the Permanent Technical Committee on Dams (Jun. 13, 1966)
- Intervention Plans for Hydraulic Installations (Decree 399/997, Sept. 15, 1992)

**India**

- Draft Dam Safety Act (2000)

**Latvia**

- Hydropower Plant Dam Safety Act (Dec. 2000)

**Mexico**

- National Water Law

**New Zealand**

- Resource Management Act (1991) (amended)
- Building Act (1991)
- Guidelines for Resource Consents for Dams and Associated Activities (Nov. 2000)

### **Norway**

- Water Resources Act (Jan. 1, 2001)
- Regulations Governing the Classification of Watercourse Structures (Dec. 11, 2000)
- Regulations Governing the Safety and Supervision of Watercourse Structures (Dec. 15, 2000)
- Regulations Governing the Qualifications of Those Undertaking the Planning, Construction, and Operation of Watercourse structures (Dec. 11, 2000)

### **Portugal**

- Decree Law (1990)
- The Portuguese Code of Practice for Observation and Inspection of Dams
- Standards for Monitoring and Surveillance of Dams

### **Russian Federation**

- Federal Law 21.07.97, N117- OC (adopted by the State Duma on June 23, 1997)

### **South Africa**

- Regulations, *Government Gazette* Vol. 253 (No. 10366, July 25, 1986)
- National Water Act (no. 36, 1998)

### **Spain**

- Technical Regulation about Reservoir and Dam Safety (1996) [*Reglamento Técnico Sobre Seguridad de Presas y Embases*]
- Order of the Ministry of Public Works Approving Instructions for the Project, Construction, and Operation of Large Dams (Mar. 31, 1967)
- Basic Directive on Planning for Civil Protection against the Risk of Flood (1994) [*Directriz Básico de Planificación de Protección Civil Ante el Riesgo de Inundaciones*]

### **Switzerland**

- Federal Law Regarding Supervision of Hydraulic Structures (June 22, 1877, as amended) [*Bundesgesetz ueber die Wasserpolizei*]
- Executive Decree (Dec. 7, 1998, went into effect Jan. 1, 1999) [*Verordnung ueber die Sicherheit von Stauanlagen, Stauanlagenverordnung*]

### **United Kingdom**

- Reservoirs Act (1975, entered into force on Dec. 1, 1991)

### **United States**

- National Dam Safety Program Act, (passed in 1972, revised in 1984, and incorporated as Section 215 of the Water Resources Development Act of 1996, PL104-303, October 12, 1996 [NDSPA])
- ASDO Summary of State Laws and Regulations on Dam Safety (2000)
  1. Arizona—Arizona Revised Statutes, title 45: Waters, chap. 6: Dams and Reservoirs, art. I: Supervision of Dams, Reservoirs and Projects (ARS 45:1201-1223); Arizona Rules and Regulations Pertaining to the Supervision of Dams, chapter 15 (R12-15-151 and 152-15-1201 through 1226)—adopted 1978 and substantially revised in 2000
  2. California—California Water Code, division 3, secs. 6000-6501 (last amended 1995); California Administrative Code, title 23, ch. 2, arts. 1-301 to 5-333 (adopted 1996)
  3. Idaho—Idaho Safety of Dams Rules and Regulations (amended July 1998), implementing provisions of Safety of Dams Statutes, title 42 ch. 17 Idaho Code (as amended)
  4. Iowa—ch. 455B, division III (Water Quality), pt. (Water Allocation and Use), first enacted 1949 and last amended 1986; chs. 70–75 Iowa Administrative Code, title V, Flood Plain Development (1975), amended 1994
  5. Kentucky—Kentucky Revised Statutes, ch. 151, Geology and Water Resources (1996), amended 1990; Kentucky Administrative Code, ch. 4, title 401, Water Resources
  6. Maine—Maine Revised Statutes, title 37-B, Defense, Veterans and Emergency Management, secs. 1051–1070, ch. 21, Dams and Reservoirs and ch. 22, Dam Inspection (1983 and revised 1989 to include safety components separated from title 38 art. 3-A, Dam Registration and Abandonment, secs. 815–843); title 37-B revised in 1997 with inclusion of Section 1065(5), Correction of Unsafe Conditions and 1080, Establishment of Commission); in 1999 Section 1065 updated and added 1071, Notice of Transfer of Ownership; Regulations, ch. 3, Design and Construction Standards for New or Reconstructed Dams (1990)—laws currently under revision;

- Maine Dam Registration, Abandonment, and Water Level Act of 1983, title 38, General Provisions Relating to Rivers and Streams, ch. 5, subchapter 1, Mills and Dams, secs. 611–933 (enacted in 1983 to include safety components, amended in 1987 and changed to separate safety components in 1989)
- 7. Michigan—Natural Resources and Environmental Protection Act, pt. 315, Dam Safety (1994 PA 451 as amended); draft rules promulgated
- 8. Missouri—Revised Statutes of Missouri (RSMo.), secs. 236.400—236.500 (enacted 1989, last amended 1993); Code of State Regulations, 10CSR 22-1.010 to 10 CSR 22-4.020
- 9. Montana—Dam Safety Act, ch. 15 (85-15-101 through 504), last amended 1993; Department of Natural Resources and Conservation, Title 36, ch. 25: Safety of Dams (1988)
- 10. New Hampshire—RSA Chapter 482 (1937), last amended 1998; New Hampshire Code of Administrative Rules, ch. ENV-WR 100-800 (NH Water Division, Dept. of Environmental Services), effective 1980 and 1981, last amended 1997
- 11. Ohio—Ohio Revised Code (ORC), title XV (enacted 1963, last amended 1990); administrative rules enacted by Division of Water of Department of Natural Resources (enacted 1972, revised 1981 and 1999)
- 12. Pennsylvania—Dam Safety Encroachments Act (DSE Act), enacted 1979, last amended 1985; title 25: Rules and Regulations, pt. I: Department of Environmental Resources, subpart C, Protection of Natural Resources, article II: Water Resources, ch. 105: Dam Safety and Waterway Management (the Rules), adopted 1980; rules supplemented by subsequent policy statements incorporated into ch. 105; complete revision adopted in 1991, further revisions planned in 2000 or 2001
- 13. Puerto Rico—Puerto Rico Law Number 133 of July 15, 1986; Administrative Regulations of the Dam Safety Program may be obtained through the Dam Safety Unit of the Puerto Rico Electric Power Authority (PREPA)
- 14. Utah—Utah Code, secs. 73-5a-101 through 702 (enacted 1990 and amended 1993); State of Utah Statutes and Administrative Rules for Dam Safety (1996) contains both statutes and administrative rules



15. Washington—Revised Code of Washington, chs. 90.03, 43.21A and 86.16 (1994); Washington Administrative Code, chs. 173–175 (1992); Dam Safety Guidelines (Department of Ecology)
16. West Virginia—West Virginia Dam Control & Safety Act (1973), Code of West Virginia, chs. 22–14, last amended 1992; Dam Control Regulations, title 47, Series 34 under Division of Environmental Protection (DEP) regulations (1982)
17. Wisconsin—Regulation of Dams and Bridges Affecting Navigable Waters (1971), last amended 1984, Wisconsin Statutes, ch. 31; Dam Design and Construction Standards, Wisconsin Administrative Code, ch. NR 333 (adopted 1985, last amended 1987)

**Additional Information Sources**  
**Not Appearing in Appendices or Footnotes**

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ANCOLD Guidelines on Dam Safety Management (1994)

Dam Safety Guidelines (Canadian Dam Association, January 1999)

Pisaniello, John D., and Jennifer M. McKay, *Models of “Appropriate” Practice in Private Dam Safety Assurance 1* Water Policy 525–530 (1998)

Jeannette Marie Smith  
00803            ISN  
MC C3-301        WASHINGTON DC

*Regulatory Frameworks for Dam Safety* was conceived and prepared in response to growing concern over the safety of dams. Given the large number of dams around the world, the safe operation of dams has significant social, economic, and environmental relevance. A dam failure can result in extremely adverse impacts, including a large-scale loss of human life. For countries with large stocks of dams, the issue of dam safety is critical. *Regulatory Frameworks for Dam Safety* examines the dam safety regulatory frameworks of 22 countries. It draws comparisons and highlights similarities among the various systems. Most important, it identifies essential elements, desirable features, and emerging trends for dam safety regulatory frameworks.

The authors are leading experts in their fields. Daniel Bradlow is professor and director of the International Legal Studies Program at the Washington College of Law at American University and was a consultant to the World Commission on Dams. Alessandro Palmieri is Lead Dam Specialist in the Quality Assurance and Compliance Unit of the Environmentally and Socially Sustainable Development Vice Presidency at the World Bank. Salman Saliman is Lead Counsel in the Environmentally and Socially Sustainable Development and International Law Group of the World Bank's Legal Vice Presidency and has published extensively in the area of water law.



**THE WORLD BANK**  
1818 H Street, NW  
Washington, DC 20433 USA  
Telephone: 202 473 1000  
Facsimile: 202 477 6391  
Internet: [www.worldbank.org](http://www.worldbank.org)  
E-mail: [feedback@worldbank.org](mailto:feedback@worldbank.org)

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