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American Bar Association Section of International Law and Practice Standing Committee on World Order under Law Report to the House of Delegates - International Monetary Fund and the World Bank Group

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American Bar Association Section of International Law and Practice Standing Committee on World Order Under Law Report to the House of Delegates†

International Monetary Fund and the World Bank Group*

RECOMMENDATION

RESOLVED, that the American Bar Association recommends that the United States government:

(a) Give strong support to the International Monetary Fund and the World Bank Group and provide assistance in the ongoing scrutiny of their operations;

(b) Support the International Monetary Fund undertaking a thorough re-examination of the IMF role vis-à-vis international capital movements and private international capital markets, including consideration of an enhanced role for the IMF in the monitoring and appropriate regulation of international capital movements and capital market operations in order to achieve a principal purpose of its charter: the promotion of a stable system of exchange rates in the world economy; and

(c) Support the International Monetary Fund and the World Bank Group giving increased attention to the development of the legal systems in member

†The following Recommendations and Reports are two of six developed by the Section's International Institutions Committee through its Working Group on United Nations Specialized Agencies. The remaining four reports—on the International Labor Organization, the International Atomic Energy Agency, the U.N. Educational, Scientific and Cultural Organization, and the World Health Organization—will be published in the Fall 1996 issue of *The International Lawyer*.

*This Recommendation and Report was approved by the House of Delegates in February 1996. It supersedes the recommendation and report on the same subject adopted in August 1995.

H. Francis Shattuck, Jr., Chair, Richard W. Edwards, Rapporteur, John W. Head, Stephen Zamora, Michael A. Heller, John F. Murphy, and Louis B. Sohn were principally responsible for this report.

countries, particularly those countries undergoing major institutional reform.

REPORT

A. The IMF and the World Bank Group—Introduction

The International Monetary Fund (IMF) and the World Bank Group are the subjects of this report. The report, with its accompanying recommendation, is one of several reports on selected United Nations specialized agencies and the International Atomic Energy Agency. The report has been developed by the Section of International Law and Practice, International Institutions Committee, through its Working Group on UN Specialized Agencies. This is a contribution to the 50th Anniversary of the United Nations in fulfillment of the American Bar Association's Goal VIII—to advance the rule of law in the world. The accompanying recommendation addresses issues of an enhanced role of the IMF in promoting a more stable system of exchange rates, legal technical assistance to member countries of the IMF and the World Bank Group undertaking institutional reform, and the support by the United States to the IMF and the World Bank Group.

Of all the Specialized Agencies of the United Nations, perhaps the International Monetary Fund (IMF) and the World Bank Group have the highest profile and draw the most attention, both favorable and unfavorable. They stand at the center of the international economic system. This report addresses a few key matters that appear crucial to the future of the IMF and the World Bank Group—with particular emphasis on issues that have a legal aspect. The report begins with a limited set of conclusions and recommendations. It then presents facts and findings that support these recommendations. The Working Group has concluded that on balance, these institutions make valuable contributions to the global economic order and deserve continued support from the United States, including financial support.

B. Conclusions and Recommendations

(1) THE ROLE OF THE UNITED STATES IN THE IMF AND THE WORLD BANK GROUP

(a) The United States should continue to give strong support, including financial support, to the IMF and the World Bank Group. The United States should consider increasing its level of financial contributions to the International Development Association (IDA), the entity of the World Bank Group that provides assistance to the poorest countries of the world.

(b) Coupled with continuing U.S. support, however, should be continuing scrutiny, in order to encourage the IMF and the World Bank Group to make further improvements in certain areas. These include:

—giving adequate attention to the impact on the environment—both physical and human—of projects financed with World Bank resources;
—incorporating the views and input of beneficiaries and nongovernmental organizations in the identification and implementation of projects supported by the World Bank;
—providing adequate disclosure of information to earn confidence, among governments and in the public generally, as to the fairness and appropriateness of World Bank and IMF actions; and
—emphasizing legal reform in their member countries, as discussed in more detail in point (3)(b) below.

(c) When change is needed in the IMF or World Bank Group, the United States should seek to build a consensus for change and should avoid, to the extent possible, unilateral actions, such as threats to withhold or condition U.S. financial support.

(2) NEW AREAS OF EMPHASIS FOR THE IMF AND THE WORLD BANK GROUP

(a) The IMF Executive Board should undertake a thorough re-examination of the IMF's role vis-à-vis international capital movements and private international capital markets. Such a re-examination should include consideration of an enhanced role for the IMF in the monitoring and appropriate regulation of international capital movements and capital market operations in order to achieve one of the principal purposes of its charter: the promotion of a stable system of exchange rates in the world economy.

(b) Both the IMF and the World Bank Group should give increased attention to the development of the legal systems in their member countries, particularly in those countries undergoing major institutional reform, by providing competent legal advice on the application of effective legal structures to local cultural and legal traditions. Technical assistance (including that provided by the ABA's Central and East European Law Initiative) should be part of coordinated efforts, such as that exemplified by the Joint Vienna Institute.

(3) THE RELATIONSHIPS BETWEEN THE UNITED NATIONS AND THE IMF AND THE WORLD BANK GROUP

(a) No major change in the relationships between the United Nations and the IMF and the World Bank Group is necessary. Specifically, there is no need to revise the relationship agreements between the organizations.

(b) The United Nations General Assembly and other organizations or groups of countries should resist the temptation to politicize these institutions—that is, to press the IMF and the World Bank Group to take actions that are not central to those institutions' economic and monetary objectives,

such as meting out punishments or rewards to countries for adopting particular ideologies.

(c) The IMF should establish a procedure or mechanism, perhaps similar to the Inspection Panel of the World Bank, to assure internal and external accountability.

C. A Map of the Institutional Landscape: The IMF and the World Bank Group in a Nutshell

The International Monetary Fund (IMF)[1] and the International Bank for Reconstruction and Development (IBRD)[2] were created by agreements negotiated at an international financial conference held at Bretton Woods, New Hampshire, in July 1944. The conference took place while World War II was in progress and a year before the San Francisco Conference that created the United Nations.

Two financial institutions affiliated with IBRD have been created: the International Development Association (IDA)[3] and the International Finance Corporation (IFC).[4] In addition, two multilateral treaties, one relating to the guarantee of private investments against noncommercial risks and the other to the settlement of investment disputes, were negotiated under the auspices of the IBRD and are administered by Bank personnel: the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)[5] and the Convention on the Settlement

1. The Articles of Agreement of the International Monetary Fund have been amended on three occasions, most recently effective Nov. 11, 1992. The texts appear at: original Articles, formulated July 22, 1944, effective Dec. 27, 1945, 60 Stat. 1401, 3 Bevans 1351, TIAS No. 1501, 2 UNTS 39; first amendment effective July 28, 1969, 20 U.S.T. 2775, TIAS No. 6748, 726 UNTS 266; second amendment (which substituted a complete new text of articles and schedules in place of the former text) effective April 1, 1978, 29 U.S.T. 2203, TIAS No. 8937, _____ UNTS _____; third amendment effective Nov. 11, 1992, TIAS No. 11898, 31 I.L.M. 1307.

For general background on the IMF, written from a legal perspective, see RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION (1985). *See also* IMF Treasurer's Dept., Financial Organization and Operations of the IMF, IMF Pamphlet Series, No. 45 (2d ed., 1991).

2. The Articles of Agreement of the International Bank for Reconstruction and Development have been amended once, effective Dec. 17, 1965. The original Articles, formulated July 22, 1944, effective Dec. 27, 1945, appear at 60 Stat. 1440, 3 Bevans 1390, TIAS No. 1502, 2 UNTS 134. The amendment effective Dec. 17, 1965, appears at 16 U.S.T. 1942, TIAS No. 5929, 606 UNTS 294.

For general background on the IBRD, written from a legal perspective, see IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD (1991).

3. Articles of Agreement of the International Development Association, done Jan. 26, 1960, effective Sept. 24, 1960. 11 U.S.T. 2284, TIAS No. 4607, 439 UNTS 249. For general background, *see* SHIHATA, *id.*

4. The Articles of Agreement of the International Finance Corporation have been amended on two occasions, most recently effective Sept. 1, 1965. The texts appear at: original Articles, done May 25, 1955, effective July 20, 1956, 7 U.S.T. 2197, TIAS No. 3620, 264 UNTS 117; first amendment effective Sept. 21, 1961, 12 U.S.T. 2945, TIAS No. 4894, 439 UNTS 318; second amendment, effective Sept. 1, 1965, 24 U.S.T. 1760, TIAS No. 7683, 563 UNTS 362.

5. Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), done Oct. 11, 1985, entered into force April 12, 1988. TIAS No. _____, 24 I.L.M. 1598.

of Investment Disputes between States and Nationals of Other States (ICSID).[6] The IBRD and IDA together are often referred to as the "World Bank," and these two organizations plus the IFC, MIGA, and ICSID are known as the "World Bank Group." A state cannot be a member of the IBRD without also being a member of the IMF, although the reverse is possible.

The IMF, IBRD, IDA, and IFC are international organizations whose members are nation states. Each organization has nearly universal membership (177 member states in the IBRD, for example) and each organization has a somewhat unique mission. The IMF, IBRD, IDA, and the IBRD on behalf of the IFC have relationship agreements with the United Nations, described below.

(1) THE IMF

The International Monetary Fund (IMF) is primarily concerned with international monetary problems and issues, and related balance-of-payments problems of its members in the short-to-medium term. The IMF's concern is with rich as well as poor countries (e.g., the United States has significantly benefited from IMF financial assistance, most recently in 1978 as described below). Although the public perceives the IMF as primarily a lending institution, it does not in a technical sense "make loans." It buys and sells currencies in arrangements with members that have the financial effect of "loans." The sources of funds used by the IMF come from paid-in quota subscriptions of member countries and borrowings by the IMF from national governments and their central banks. The IMF has not borrowed in the public market.

The IMF is the issuer of a monetary reserve asset called the Special Drawing Right or "SDR." The SDR can only be owned and used by official entities, not by private parties. In dealings of governments and other official holders, the SDR functions much like a national currency. As the issuer of the SDR, the IMF at the international level plays a role somewhat comparable to a national central bank in national economies. The SDR is also the unit of account of the IMF and a number of other international organizations. It is currently valued in relation to an index consisting of five widely used national currencies. On April 3, 1995, the SDR had a value of U.S.$1.566.

Relatively few members of the public are aware that the IMF, in addition to its financial operations, plays regulatory roles—what have been called "rule-creating" and "rule-enforcing" roles. The IMF administers what are informally called "rules of good conduct" in international monetary affairs. These rules, which are set forth or have their basis in the IMF's Articles of Agreement, relate to such matters as exchange rate arrangements, national restrictions on currencies

6. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done March 18, 1965, entered into force Oct. 14, 1966. 17 U.S.T. 1270, TIAS No. 6090, 575 UNTS 159.

and payments, sharing of information, and obligations of members to cooperate and collaborate in dealing with international monetary problems. The IMF holds consultations with each of its members regularly in which the member country's exchange rate arrangements and currency exchange restrictions are reviewed.

While the IMF does not directly regulate the activities of private parties, Article VIII, sec. 2(b), of the IMF's Articles of Agreement requires member countries to assure that their administrative authorities and courts not enforce private contracts that are contrary to exchange control regulations of another member where those controls are consistent with the IMF Articles. The Bretton Woods Agreements Act of the United States makes that provision of Article VIII directly applicable to litigation in U.S. courts.[7] It is also directly applicable in the courts of other IMF members. The provision has spawned an extensive jurisprudence in the state and federal courts of the United States.

(2) THE WORLD BANK GROUP

In the field of development finance from public sources, the World Bank Group has been, and continues to be, the dominant institution in the world. As noted above, the founding institution, the International Bank for Reconstruction and Development (IBRD), has evolved into five organizations. Three of these are complementary financial organizations, each created by multilateral agreement of nation states: the IBRD, the International Development Association (IDA), and the International Finance Corporation (IFC). The World Bank Group also includes two organizations of a highly legal character related to private investment: the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

IBRD: The IBRD is the oldest and largest of the World Bank Group organizations. Under its Articles, it can only lend to governments or with government guarantee. For practical purposes, this means that virtually all of the Bank's loans are to governmental entities. Most IBRD loans in recent years have been made in support of projects in what might be called the "middle group" of developing countries. These are not the poorest countries. Nor are they the richer developing countries that have ready access to international capital markets. Total IBRD lending since its establishment amounts to around $300 billion. In the fiscal year ended April 30, 1994, the IBRD approved loans totaling $14.2 billion.

The vast bulk of the funds loaned by the IBRD have been obtained through borrowings by the Bank on the international capital market, where its bonds enjoy an AAA credit rating. In general, the Bank borrows long-term and loans medium-to-long term. In many cases, the Bank is able to borrow on the international market at low enough rates so that, even after expenses and a modest

7. 22 U.S.C. § 286h.

"profit," it can loan to member governments at substantially lower rates that those at which they could borrow in the market.

IDA: Because the interest rates on IBRD loans to its members are keyed to the interest rates paid by the Bank on its own borrowings and expenses, the rates are higher than many of the poorest members most in need of development capital can afford. These are also countries shunned by productive private investment (except sometimes in extractive industries). In 1960 the International Development Association (IDA) was formed. As explained below, it is institutionally associated with the IBRD. It is primarily financed by what are called "replenishments," which essentially are funds periodically donated by member states. IDA makes loans (called "credits") to the poorest of the developing countries for projects of "high developmental priority."[8] The credits are often for the very-long term—usually 35-40 years. They carry no interest charges but do have a small service charge. Often, IBRD loans and IDA credits are blended into a package. IDA has concentrated its assistance on the poorest countries in sub-Saharan Africa and south Asia. In the fiscal year ended April 30, 1994, IDA approved credits totaling $6.6 billion.

IFC: As noted above, the IBRD is only authorized to make loans to governments or with government guarantee of repayment. Although not required by its Articles, the IDA normally only makes loans to governmental bodies. Because it is rarely appropriate for a government to guarantee the commercial success of a private enterprise, in the mid-1950s the International Finance Corporation (IFC) was formed to assist the financing of private enterprise in developing countries. The IFC, which is affiliated with the IBRD, is authorized to make loans and take equity positions in enterprises whether or not there is governmental participation in the enterprise. The IFC is not limited in its financing techniques. Article III, section 2, of the IFC's Articles of Agreement provides: "The Corporation may make investments of its funds in such form or forms as it may deem appropriate in the circumstances." The IFC obtains its funds primarily through borrowings in the international capital market and sales of participations in its investments.

The IFC is the World Bank Group institution that has sustained the most growth in percentage terms in recent years. It is currently approving new loans and investments at a rate of about $2.5 billion a year, and within five years the rate is expected to double to about $5 billion. It is estimated that each dollar of IFC investment leverages about $6 in other private investment.

MIGA and ICSID: The World Bank Group, in addition to developing international law as it relates to public lending, has worked to develop international legal structures to encourage and protect productive private investment. As noted earlier, the Multilateral Investment Guarantee Agency (MIGA), affiliated with the World Bank, issues insurance to private investors against noncommercial

8. IDA Articles, Art. I.

risks. The International Centre for the Settlement of Investment Disputes (ICSID), also affiliated with the Bank, provides an arbitration forum for resolving investment disputes between foreign private investors and host governments.

(3) HOW THESE INSTITUTIONS DIRECTLY BENEFIT THE UNITED STATES AND U.S. TAXPAYERS

It seems appropriate to correct the common misapprehension that the IMF and the entities in the World Bank Group constitute huge financial drains on the U.S. Treasury. These institutions produce a net economic gain for the United States.

In the case of the IMF, the payments made by the U.S. Treasury in support of the U.S. subscription in that institution are in reality only an exchange of assets (dollars for SDRs), which the United States can readily reverse. Indeed, unconditional drawing rights of the U.S. in the IMF are included in official statements of U.S. monetary reserves. Moreover, the IMF pays interest (technically called "remuneration") to the United States for the IMF's use of its dollar holdings in making financial transfers to other countries. The United States has actually made money from its membership in the IMF.

In the case of the World Bank Group, the picture is more complicated but the effect is similar. More money flows into the United States as a result of its participation in the IBRD, IFC, and IDA than flows out in the way of subscriptions and contributions. First, as for the IBRD and IFC, only small proportions of the U.S. subscriptions have had to be paid in. The remainder is "callable." Because of the strong financial position of these institutions, it is doubtful that the callable capital will ever be called in. As for IDA, although the contributions are relatively large, the tangible return is also large. That "return" takes the form of payments made to U.S. businesses that win contracts for goods and services required under projects financed by loans supported by the World Bank Group. A recent report of the Treasury Department stated that in 1993 the amounts paid by the United States—about $2.7 billion—was less than the amounts coming back into the U.S. private sector through such contracts—about $5.0 billion.[9]

D. The IMF and the World Bank Group—Structure and Organization

The IMF, IBRD, IDA, and IFC have governing structures that are somewhat different from most other nonfinancial international organizations. For one thing, weighted voting is used, as distinct from the one-state one-vote structure in, say, the UN General Assembly. A member country's voting power in the IMF, IBRD, IDA, and IFC is based on its financial subscription in the organization, which

9. U.S. DEPT. OF TREASURY, MULTILATERAL DEVELOPMENT BANKS: INCREASING U.S. EXPORTS AND CREATING U.S. JOBS (1994). *See also* John W. Head, *International Business Opportunities with the World Bank and Other Development Banks*, _____ INT'L CONTRACT ADVISOR _____ (forthcoming).

in turn is related to the country's international economic position. Currently, the United States holds about 17% of the votes in all of these organizations, with Japan, Germany, the UK, and France each having about 5% or 6% of the votes.

(1) Governing Structures of the IMF and the IBRD

The IMF and the IBRD each has as its highest organ a plenary body (called a "board of governors") in which each member state is represented by a governor and alternate governor. However, the plenary body usually meets only once a year (the annual combined meeting of the IMF and World Bank) and then meets only for a week. Below the board of governors, the IMF and the IBRD each has an executive board. The executive boards are legally in continuous session and, in fact, meet once or more times a week. The Managing Director of the IMF and the President of the World Bank preside at meetings of the respective executive board. The executive boards both make policy decisions of general applicability (e.g., the terms under which financial assistance will be made available to member countries) and the decisions relating to specific member countries (e.g., the approval of individual IMF stand-by arrangements and World Bank loans).

There are currently 24 executive directors of the IMF and 24 executive directors of the World Bank. A few countries (generally those having the largest subscriptions) are represented by individual directors who represent one country only. However, most member countries are represented by executive directors who represent groups of countries. Voting in the executive boards, as in the boards of governors, is by weighted voting. However, in the executive board, a director cannot split his votes where states the director represents have different views—the votes of each director are cast as a lot. Except on matters where special majorities are required (e.g., 70% of the weighted voting power), most decisions are in fact made on the basis of consensus as assessed by the chairman of the board (Managing Director of IMF or President of World Bank).

(2) Governing Structures of the IDA and the IFC

The governing structure of the International Development Association (IDA), in accordance with its charter's design, is virtually identical to that of the IBRD and the same persons serve as President, governors, and executive directors of the two organizations.[10]

The International Finance Corporation (IFC) does not have an executive board but has, similar to private corporations, what is called a "board of directors." The membership of the IFC's board of directors is basically the same as the membership of the IBRD's executive board. The President of the IBRD is the chairman of the IFC's board of directors. The IFC has its own President, who

10. IDA Articles, Art. VI.

is appointed by its Board of Governors on recommendation of the President of the IBRD.[11]

(3) Management and Staff

The Managing Director and staff of the IMF and President and staff of the World Bank Group play relatively more important roles in the organizations compared to the secretary-generals and staffs of many other international organizations. Staff members negotiate directly on behalf of the organizations with officials in the governments of member states. The staffs are highly expert. Their expertise rivals, and often exceeds, the expertise of staffs in the finance ministries, central banks, and development agencies of member states, including even the most powerful of those states. Further, because of the information obligations of member states under Article VIII, sec. 5, of the IMF Articles of Agreement, the staffs have knowledge of a great deal of information and data about national economies.

In accordance with IDA's Articles of Association, the officers and staff of the IBRD are, to the extent practicable, appointed to serve concurrently as officers and staff of IDA.[12] Although the IBRD provides administrative services to the IFC, the staff of the IFC is legally independent of the Bank's staff.

E. The "A-Political" Focus of the IMF and the World Bank Group

The charters of the IMF and entities of the World Bank Group are intended to restrict the effects of political considerations in decision making. The Articles of Agreement of the IBRD provides:

> 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. . . .[13]

The Articles of Agreement of the IMF prohibits the organization from publishing a report critical of changes in "the fundamental structure of the economic organization" of a member[14]—e.g., changes from a capitalist to a socialist orientation (or vice versa).

Careful adherence to the organization's constitution is a principle that has historically figured prominently in decision making in the IMF and World Bank. The legal departments of the organizations have played important roles in the development and operations of the organizations. The Articles of Agreement of the International Monetary Fund has been amended three times—in large part

11. IFC Articles, Art. IV.
12. IDA Articles, Art. VI, sec. 5(6).
13. IBRD Articles, Art. IV, sec. 10.
14. IMF Articles, Art. XII, sec. 8.

to clearly establish the authority of the IMF and to avoid controversy about what some might otherwise view as excessively flexible interpretations of a founding instrument. Similar concerns to assure legality have guided decisions in the World Bank Group.

F. Relationships of the IMF and the World Bank Group with the United Nations

The IMF, IBRD, IDA and the IBRD on behalf of the IFC have formal relationship agreements with the United Nations in accordance with Article 63 of the UN Charter.[15] While these organizations are "specialized agencies" in terms of Article 57 of the UN Charter, the organizations rarely describe themselves as "specialized agencies" and never as "agencies of the United Nations." The UN relationship agreements recognize the IMF and the entities of the World Bank Group as "independent" international organizations.[16]

The relationship agreements restrict the information that the IMF and the IBRD are required to provide to the UN. Specifically, no information need be provided to the UN that either the IMF or the IBRD would judge to constitute a violation of the confidence of any member or to interfere with the orderly conduct of the organization's operations.[17]

Both the IMF-UN agreement and the IBRD-UN agreement prohibit UN bodies from making formal recommendations to the IMF or Bank except after "reasonable prior consultation with regard thereto."[18] That prohibition is buttressed by the following provision in the IBRD-UN agreement:

> The United Nations recognizes that the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognizes, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank.[19]

The IMF-UN and IBRD-UN relationship agreements make clear that even UN Security Council decisions under UN Charter Articles 41 and 42 are not directly binding on the IMF and World Bank. The language is that each of the two financial organizations "takes note" of UN Charter Article 48 (making decisions of the

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15. Agreement between the United Nations and the International Monetary Fund, signed April 15, 1948, entered into force Nov. 15, 1947, 16 UNTS 325; Agreement between the United Nations and the International Bank for Reconstruction and Development, signed April 15, 1948, entered into force Nov. 15, 1947, 16 UNTS 341; Agreement between the United Nations and the International Development Association, entered into force March 27, 1961, 394 UNTS 221; Agreement between the United Nations and the International Bank for Reconstruction and Development (Acting on Behalf of the International Finance Corporation), entered into force Feb. 20, 1957, 265 UNTS 312.

16. IMF-UN agreement, Art. I; IBRD-UN agreement, Art. I.

17. IMF-UN agreement, Art. I; IBRD-UN agreement, Art. I.

18. IMF-UN agreement, Art. IV; IBRD-UN agreement, Art. IV.

19. BRD-UN agreement, Art. IV, para. 3.

Security Council under Articles 41 and 42 binding on UN members), and obligates the IMF and World Bank to "have due regard" for Security Council decisions under Charter Articles 41 and 42.[20]

The IMF-UN agreement and the IBRD-UN agreement contemplate no role for the UN General Assembly or the Economic and Social Council of the UN (ECOSOC) with respect to the budgets of the two organizations.[21] Representatives of the United Nations have no general right to attend meetings of the executive boards of the IMF and Bank.[22]

The World Bank has a formal relationship with the United Nations Development Programme (UNDP) and with the United Nations Environment Programme. The UNDP is an important source of technical assistance to developing countries. Its assistance is mostly nonmonetary consisting of training of personnel and the assignment of experts. The UNDP and the World Bank cooperate to identify and help design development projects. However, the Bank has found it difficult to rely exclusively on other organizations for specialized expertise. The Bank found, for example, that it was necessary to develop "in house" environmental expertise.

One of the reasons why UN influence has not been greater on the work of the IMF and the World Bank may relate to constituencies. The IMF and World Bank deal primarily with persons in national finance ministries and national central banks, and to a much less extent with persons in national foreign ministries. The UN, by contrast, deals primarily with persons in national foreign ministries.

G. Relationships of the IMF and the World Bank Group with Each Other and with Other Organizations

Many persons may believe that the IMF and World Bank Group have closer relations with each other than has proved to be the case. While their boards of governors hold their annual meetings jointly and many persons serve as governors (and some even as executive directors) of both organizations, in fact the IMF and the World Bank Group have not historically had a particularly close working relationship.

One of the reasons that the organizations have not always worked closely together is that each has seen its mission differently, reflecting the different purposes enumerated in their charters. The IMF has been concerned with the macroeconomic policies of its members, including its most powerful members. The Bank historically generally had a microeconomic orientation that centered on particular projects and programs of borrower countries.

20. IMF-UN agreement, Art. VI; IBRD-UN agreement, Art. VI.
21. IMF-UN agreement, Art. X; IBRD-UN agreement, Art. X.
22. IMF-UN Agreement, Art. II; IBRD-UN agreement, Art. II.

Some changes in the respective roles of the IMF and the World Bank have occurred in the past decade or so. In response to the debt crises in the early 1980s, the IMF shifted its emphasis from primarily short-term financial assistance to the medium term. At about the same time, the World Bank began making loans for "sectoral adjustment"—medium-term loans supporting comprehensive change in sectors such as agriculture—in addition to loans for specific projects. With these changes, some operations of the institutions tended to overlap, prompting some competition and, with it, a need for better coordination between the IMF and the World Bank. With some "fits and starts," this coordination has increasingly been achieved. It is now common for IMF staff to be included in World Bank missions, and vice versa, when financial assistance from both organizations may be contemplated. However, the missions of the IMF and the World Bank Group remain distinct. Proposals to merge the two institutions would not achieve significant efficiencies and would likely undermine the effectiveness of each organization.

The IMF has working relations with several international organizations that are not in the "UN family," including the General Agreement on Tariffs and Trade (now succeeded by the new World Trade Organization), the Bank for International Settlements in Basel, Switzerland, and the Organisation for Economic Cooperation and Development. It also has working relations with the institutions of the European Monetary System and other regional monetary institutions.

The World Bank Group has served as the model for regional development banks, including the Inter-American Development Bank, the African Development Bank, the Asian Development Bank, and (to a lesser extent) the European Bank for Reconstruction and Development. The World Bank Group has working relationships with these regional development banks and has participated with them in coordinated financing activities.

H. Appraisal of the Organizations

When the IMF and World Bank were created near the close of World War II, the causes of the war, especially economic policies that helped bring on the war, were in the minds of the founders. There was a strong sense that the lack of attention to international economic relations by the League of Nations, and its ineffectiveness in dealing with economic matters, contributed to the outbreak of World War II. The founders of the IMF and the IBRD contemplated effective and powerful international institutions that would be the forums for consultation and the driving engines for collaboration in building a better international economic order.

The IMF and the World Bank Group have been key players in the development of international economic law, both substantive and procedural. They do not simply administer sets of rules embodied in treaties. They are organic institutions with ongoing responsibilities.

(1) APPRAISAL OF THE IMF

The work of the IMF has been intensively appraised from an economic perspective.[23] This appraisal centers on issues that have a legal component.[24] It can be said that the International Monetary Fund "virtually created" international monetary law, as very little international law relating to monetary matters existed prior to the IMF's formation.

The purposes of the IMF, stated in the Articles of Agreement, begin with the idea that the IMF is to be a "permanent institution which provides the machinery of consultation and collaboration on international monetary problems."[25] The idea of creating an organic institution and not just rules was a fundamental decision. This most important of purposes has been achieved.

Exchange Controls: The IMF has played a major role in the liberalization of trade by what can only be described as "spectacular" work in establishing a multilateral system of payments in respect of trade and other current transactions. National foreign exchange restrictions that inhibited trade and other current transactions were widespread and integral to the protectionist practices that prevailed in 1944. Such restrictions have now been virtually eliminated by the major economic powers and reduced (if not completely eliminated) by most others.[26]

Financial Assistance: The IMF is best known to the public for the large-scale financial assistance that it has provided to countries facing balance-of-payments problems. The IMF's record in providing such assistance has been a good one. While it is always possible to find fault with a creditor's lending policies, the IMF has developed policies and practices that have sought to balance in an appropriate manner the needs of countries in difficulty and the needs to safeguard the financial integrity of the IMF. The idea is that the IMF should stand ready to provide large amounts of funds but for only temporary periods.

The IMF's "guidelines on conditionality" reflect the balance. On the one hand, the guidelines require that the IMF not provide funds to a member country without a strong showing of commitment on the part of that country to address domestic economic and financial weaknesses that caused or contributed to the balance-of-payments problem that prompted the request for IMF financing. On the other hand, the "conditionality" guidelines require that the IMF "pay due regard to the [particular country's] domestic social and political objectives, economic priorities, and

23. For recent appraisals from an economic perspective, see PETER B. KENEN (ed.), MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS (1994); and BRETTON WOODS COMMISSION, BRETTON WOODS: LOOKING TO THE FUTURE; CONFERENCE PROCEEDINGS (July 20-24, 1994) and COMMISSION REPORT, STAFF REVIEW, BACKGROUND PAPERS (1994).

24. For a comparable analysis, *see* Stephen Zamora, *Economic Relations and Development*, in OSCAR SCHACHTER & CHRISTOPHER C. JOYNER (eds.), UNITED NATIONS LEGAL ORDER (1995), vol. I at 503.

25. IMF Articles, Art. I(i).

26. See *Toward Full Convertibility*, 1995 IMF SURVEY 33.

the circumstances."[27] The IMF's lending policies have evolved over time and that process will continue as the organization seeks to learn from the longer-term experiences of countries to which it has provided assistance.[28]

Examples: Two examples illustrate how the right to purchase foreign currencies from the IMF in relatively large quantities provides a "line of defense" for countries facing a balance-of-payments crisis. In November 1978, following a persistent decline of the dollar in the exchange markets, the United States purchased Deutsche mark and Japanese yen then equivalent to $3 billion from the IMF and used SDRs (equivalent to an additional $2 billion) to obtain currencies for use in stabilizing the dollar's exchange rate. This was done very quickly with no protracted negotiations.[29]

In early 1995, Mexico faced a currency crisis. Mexico was permitted to draw immediately currencies equivalent to $7.8 billion from the IMF and entered into a standby arrangement under which it could draw an additional $10 billion of currencies from the IMF, for a total equivalent to $17.8 billion. This was an unprecedented action both for its total size and in relation to Mexico's quota ($17.8 billion is 688 percent of Mexico's quota in the IMF). The IMF arrangement was critical to working out the Mexico "package" that also involved assistance from the United States, the Bank for International Settlements, and other countries, making total credit available of about $52 billion.[30]

Debt Crises: The IMF played a crucial role, both in its own right and as a catalyst, in dealing with debt crises in the 1980s. While the United States and other national governments played important parts, the IMF was the leading international organization involved—working, consulting, and coordinating with officials in creditor and debtor countries in the so-called Paris Club involved with official debt rescheduling and with private commercial banks. Often, a key element of a rescheduling plan was institutional restructuring in the debtor country supported by an IMF "standby" arrangement.[31]

Economies in Transition: Russia and countries in eastern Europe are called "transitional economies." They are in the process of changing from centrally

27. IMF Executive Board Decision No. 6056 (79/38) (1979), in SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND (19th issue, 1994) at 85. See also the Executive Board's other general decisions on the use of the IMF's financial resources, collected *id.* at 55-192.

28. *See, e.g.*, MARGARET GARRITSEN DE VRIES, BALANCE OF PAYMENTS ADJUSTMENT, 1945-1986: THE IMF EXPERIENCE (1987); and C. FRED BERGSTEN (ed.), INTERNATIONAL ADJUSTMENT AND FINANCING: THE LESSONS OF 1985-1991 (1991).

29. *See* EDWARDS, *supra* note 1, at 532-34.

30. *See IMF to Lend Up to $17.8 Billion to Mexico*, 1995 IMF SURVEY 33; and *IMF Takes Exceptional Action to Support Mexican Program, id.* at 53. *See also Mexico Unveils Program of Harsh Medicine*, WALL ST. J., March 10, 1995, at A3; and *Argentina Is Seeking More IMF Funding as Fallout from Mexican Crisis Continues*, WALL ST. J., March 10, 1995, at A6.

31. *See generally* MARGARET GARRITSEN DE VRIES, THE IMF IN A CHANGING WORLD (1986); V. SUNDARARAJAN & TOMAS J.T. BALINO (eds.), BANKING CRISES: CASES AND ISSUES (1991); and Joseph Gold, Prospects for International Lending and Reschedulings (SMU Institute Intl Finance, 1988).

planned "command economies" to more open "market economies" where economic decision making is decentralized and where the price system plays a key role in the allocation of economic resources and labor. The IMF has provided support to these countries both in the form of technical assistance and large-scale financing. It is too early to make judgments about the successes and failures of the IMF in working with its members engaged in such dynamic times. As commented later, structural reform is legal reform. The role of lawyers is as important to the success of structural reform as the role of economists.[32]

Technical Assistance: Although not mentioned explicitly as a purpose, the IMF has played an important role in providing technical assistance to its members. This has included legal assistance in drafting central bank legislation, reform of currency exchange controls, and other matters. The importance of the work of the IMF and other organizations (including the Central and East European Law Initiative of the American Bar Association [CEELI]) has become more apparent to the general bar when seeing the current challenges facing countries of Eastern Europe. However, this is not a new area of work for the IMF. Since its founding, it has provided technical legal assistance in domestic legal matters relating to monetary law to its member countries.

Exchange Rates and Capital Movements: It is with respect to exchange stability that the IMF has been most incisively criticized. Today, exchange rate instability, rather than stability, seems to be the norm. However, there are different views among economists and officials about what is meant by "exchange stability" and "orderly exchange arrangements." Is the purpose primarily to maintain orderly exchange arrangements in the sense of system stability or is rate stability to be the goal? Economists and officials differ regarding whether floating exchange rates are desirable over the long term or are only to be tolerated as a temporary fact of life. In any event, the par value system that contemplated stable exchange rates embodied in the original Articles of Agreement was replaced in the 1970s by softer rules that have allowed national authorities greater freedom in choosing and modifying exchange arrangements.[33]

Let us now turn to concerns today that were not on the agenda in 1944. In 1944 national restrictions on exchange and international financial transactions were the norm. At that time only the United States and Canada had liberal regimes. By the early 1960s restrictions on payments for current international transactions

32. *See* note 38, *infra*, and accompanying text. *See also Assessing the Reform Record in Transitional Economies*, 1995 IMF SURVEY 2; and *Russia and the IMF to Sign Loan Pact of $6.25 Billion Amid Doubt on Reforms*, WALL ST. J., March 10, 1995, at A6. For criticism of the IMF's dealings with Russia, *see* Jeffrey Sachs, *The Reformer's Tragedy: How the IMF Pushed Russia to the Brink*, N.Y. TIMES, Jan. 23, 1994, at E17.

33. Actions taken by international organizations and national courts when dealing with uncertainties caused by fluctuating exchange rates are examined by JOSEPH GOLD, LEGAL EFFECTS OF FLUCTUATING EXCHANGE RATES (1990). *See also* JOSEPH GOLD, EXCHANGE RATES IN INTERNATIONAL LAW AND ORGANIZATION (1988), for an exhaustive examination of the international legal regime applicable to exchange rates.

were by and large eliminated in the economically powerful countries. In the last 25 years restrictions on capital movements have been radically reduced. Private participation in the exchange markets has grown dramatically. The result is an international financial market whose size is so large as to be almost impossible to fathom. While active exchange markets and freedom of capital flows transnationally have many positive aspects for economic growth, there are also negative aspects that deserve attention.

A whole industry has developed composed of persons (usually employed by commercial banks and investment houses) who seek to detect incipient movements in exchange rates and to "get on the bandwagon early." The result has been both sharp and rapid movements in exchange rates and general exchange instability as participants in the market (primarily commercial banks) widen their "bid" and "asked" quotations for currency exchanges whenever the market appears unsettled. The impact of large, essentially "speculative," short-term capital movements on exchange rates has frustrated the IMF in the performance of one of its primary purposes—the promotion of exchange stability.[34]

National monetary authorities, even when they cooperate among themselves, have difficulty regulating, or even influencing, the conduct of commercial banks and other private entities that engage in transnational financial operations. Effective regulation of global securities and exchange markets probably requires regulation that itself is global as compared to national. Consideration needs to be given to an enlarged role for the IMF in the close monitoring of large capital movements and possible exercise of direct regulatory powers over private financial institutions.[35]

Relations with Powerful Countries: Another challenge that has faced and continues to face the IMF is how to deal effectively (maintain a degree of discipline) with its most powerful members. This is particularly apparent in the exchange-rate area. Achievement of greater exchange rate stability is probably dependent upon the more powerful members being subjected to a tighter legal regime than is the case at present.

(2) Appraisal of the World Bank Group[36]

Shift in Loan Portfolio: The World Bank Group institutions complement each other and provide a range of financing techniques that can be tailored to the situation of the beneficiary country. While the World Bank is probably best known to the public for the large infrastructure projects that it has financed (e.g.,

34. IF Articles, Art. I(iii) and Art. IV, sec. 1.

35. *See* Stephen Zamora, *Regulating the Global Banking Network: What Role for the IMF?* 62 Ford. L. Rev. 1953 (1994); and Richard W. Edwards, Jr., *International Monetary Law: The Next Twenty-Five Years*, 25 Vand. J. Int'l L. 209 at 222-23 (1992).

36. For appraisals of the World Bank on its 50th anniversary in 1994, *see* Bretton Woods Commission, *supra* note 23; Kenen, *supra* note 23; and Harry Owen, *The World Bank: Is 50 Years Enough?* 73 Foreign Affairs, no. 5 at 97 (Sept./Oct. 1994). *See also* Shihata, The World Bank in a Changing World, *supra* note 2.

highly visible hydroelectric dams), much of its financing (especially in recent years) has gone to smaller projects, including some "micro-credit" loans intended to give financial support to small entrepreneurs. The continuing efforts of the World Bank Group to strengthen the private sector should be noted. In addition, some IBRD and IDA lending in recent years has been "program lending" and "sectoral adjustment lending." Program lending is finance in support of regulatory and institutional reforms in particular areas of a country's economy such as energy, agriculture, or education. Sectoral adjustment lending provides financing during the transitional period when fundamental institutional changes are made affecting industry, agriculture, and labor as the country moves, for example, from a command-economy to a market-oriented economy.

The United States should consider increasing the level of its financial contributions to the International Development Association. IDA development financing goes where such financing is most needed and is not available from other sources—that is, to the economically poorest countries. IDA's assistance in the improvement of agriculture resulted in the so-called green revolution that has led to agricultural self-sufficiency in such countries as India. As mentioned below under Technical Assistance, IDA financing can leverage broad-scale legal reform which private financing cannot do effectively. Every dollar contributed by the U.S. generates about five dollars from other contributors. IDA projects build markets for U.S. goods. As noted earlier, the U.S. contribution in 1993 of $2.7 billion was balanced by revenues of $5 billion to U.S. vendors and contractors.

IFC: The IFC has historically centered its attention on the "project deal" rather than the broader investment environment. Most of the IFC's investments have been in the "better off" developing countries. The IFC should give more attention to the cultivation of private investment opportunities in countries that are not as well off as those to which it has devoted most of its attention in the past. It needs to work more closely with the Bank in identifying domestic institutional changes (law reform) as part of a development strategy in which private investment is an integral feature.[37]

Technical Assistance: From its beginning, the World Bank has seen technical assistance as an integral part of its activities. A successful hydroelectric project, to take an example, not only requires sound engineering design, but creation and reform of legal institutions that set the rates for electric power sales, that determine the release of water for agricultural purposes, that allocate funds for maintenance, that assure funds are available to meet debt service obligations, and the like.

One of the advantages that the World Bank Group enjoys comes from its intergovernmental public character. When its assistance is contemplated, it can involve itself in broad-scale institutional reform in a way that would be seen as inappropriate for a foreign private lender or investor, or even for an individual government. In

37. *See generally* RICHARD W. RICHARDSON & JONAS H. HARALZ, MOVING TO MARKET: THE WORLD BANK IN TRANSITION (Overseas Development Council, 1995).

addition, the Bank acts as a clearinghouse which collects "best practices" from around the world and disseminates those experiences to member countries.

Institutional Reform: The World Bank Group, like the IMF, deals with matters that governments have traditionally treated as outside the scope of international review—domestic taxation, spending, fiscal policy, and industrial policy. The success of the Bank when consulting with countries on these matters and building them into reform programs to be supported by Bank financial assistance hinges in large measure on the expertise of Bank personnel, the soundness of the policy recommendations, and the perception that the Bank and its personnel are fair and impartial.

Role of Legal Reform: The World Bank Group has tended to see reform in economic terms. While there are economists at all levels of the Bank's operations, lawyers tend to be concentrated in the Bank's Legal Department. Lawyers are rarely involved in substantive project design or ongoing policy dialogue with member governments. Lawyers could play valuable roles in other areas of the Bank, especially in groups that negotiate and design sectoral adjustment programs. Economists may not always appreciate the complex legal and institutional underpinnings that a market economy requires. Structural reform is primarily legal reform.[38] Legal reform is fundamental to sustainable development. The Bank will increasingly require access to sophisticated legal skills as its lending mix continues to shift towards enabling private investment and away from the former state-driven physical investment mold.

For example, there is a need to involve lawyers more effectively and to improve coordination among organizations that provide training support in Eastern Europe to countries in transition from centrally planned to market-based economies. The principal multilateral institutions have made an effort to coordinate their activities and more could be done. The Joint Vienna Institute established by an agreement among the IMF, IBRD, the European Bank for Reconstruction and Development, the Organisation for Economic Cooperation and Development, and the Bank for International Settlements[39] is an example of cooperation.

Environment and Human Rights: The World Bank has been criticized in the past for adverse environmental impacts of some of the major projects that it has financed—including deforestation and large-scale forced movements of persons. The Bank has brought onto its staff experts in assessing environmental impacts.[40] Environmental assessment is now an integral part of project planning. In fact,

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38. *See* Cheryl W. Gray, Rebecca J. Hanson, Michael A. Heller, Peter G. Ianachkov & Daniel T. Ostas, *The Legal Framework for Private Sector Development in a Transitional Economy: The Case of Poland*, 22 GA. J. INT'L & COMP. L. 283 (1992); and Cheryl W. Gray, Rebecca J. Hanson & Michael A. Heller, *Hungarian Legal Reform for the Private Sector*, 26 GEO. WASH. J. INT'L L. & ECON. 293 (1992).

39. Agreement for the Establishment of the Joint Vienna Institute, entered into force Aug. 19, 1994, 33 I.L.M. 1505.

40. *See* Ibrahim F.I. Shihata, *The World Bank and the Environment: A Legal Perspective*, 16 MD. J. INT'L L. & TRADE 1 (1992); and John W. Head, *Environmental Conditionality in the Operations of the International Development Finance Institutions*, 1 KAN. J. L. & POL'Y 15 (1991).

the environmental assessment reports on projects proposed for World Bank funding are now made available to the public. However, environmental impact is more than a project-by-project matter. Environmental improvement must be an integral part of development strategy.

The Bank has also been chastised for being insensitive to the human rights records of some of the governments to which it has made loans.[41] The Bank, while still resisting outside efforts that intrude upon its lending jurisdiction, has come to recognize the human dimension of successful development. The Bank should continue to adjust its policies to see the promotion of human rights (what sometimes are called "governance issues") as integral to economic development.[42]

(3) IMF AND WORLD BANK ACCOUNTABILITY

At several places in this report, the need for the IMF and the World Bank Group to be more accountable to governments and to the public has been pointed out. However, it is important that these organizations not become the puppets of particular states or groups. When change is needed in the IMF or World Bank Group, the United States should seek to build a consensus for change and should avoid, to the extent possible, unilateral actions. An example of a fruitful initiative was the congressional action in the early 1990s to require the U.S. Executive Director in the IBRD to withhold support for World Bank financing for any project unless an environmental impact assessment was released prior to the Executive Board's consideration of a project loan.[43] The insistence by the United States in the early 1990s on an amendment to the IMF's Articles of Agreement (to add a new form of punishment for those few members that are delinquent in loan repayments) was counterproductive because of the ill will it engendered.[44] Threats to cut off U.S. funding or to condition it on certain actions by the World Bank are usually ill-advised.

Concerns have been raised about the secretiveness of the IMF and the World Bank, and calls have been made for an "improvement of transparency." Meetings of the executive boards are not open to the public or press. Information about what transpired at those meetings may only become available with a delay of

41. For tension between the World Bank and the UN relating to bank lending in the 1960s and human rights, *see* 1967 U.N. Jurid. Y.B. 109-131.

42. *See* document entitled "The World Bank and the Promotion of Human Rights" submitted to the 1993 World Conference on Human Rights, UN Doc. A/CONF. 157/PC/61/Add. 19 (1993). *See also* WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992); LAWYER'S COMMITTEE FOR HUMAN RIGHTS, THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS (1993); and Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DEN. J. INT'L L. & POL'Y 39 (1988).

43. U.S. International Financial Institutions Act, 22 U.S.C. § 262m-7.

44. *See* John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF's Charter*, 33 VA. J. INT'L L. 591 (1993).

years. On the other hand, some commercial banks appear to have "effective intelligence networks." They have been able to obtain, often through national officials, IMF and World Bank documents that are supposed to be confidential. This raises questions about who outside the IMF and World Bank is and should be privy to unpublished materials.

The Executive Board of the World Bank in September 1993 established an Inspection Panel.[45] The panel is composed of persons who are knowledgeable about the Bank's work but independent of the Bank. The panel provides a mechanism for review of the Bank's policies and practices and a measure of external public accountability.

Similar steps should be taken in the IMF. The organizations policies and actions have profound impacts on the international economy and national economies. Its financial resources are huge. In addition to procedures for auditing the uses of its funds, there is a need for independence in program and performance evaluation. Indeed, since the IMF's use of funds often triggers the availability of other global credit, thought should be given to instituting procedures that will provide greater accountability—both internally and externally—for all of the actions of the IMF.

It is only in relatively recent years that nongovernmental organizations have given informed attention to the work of the financial organizations. The IMF and the World Bank Group need to improve the mechanisms for dealing productively with nongovernmental citizen organizations, commercial banks, and other private bodies.[46] Specifically, a new set of policies and procedures for information sharing and consultation with these groups should be developed, along the lines of recent World Bank efforts to involve beneficiaries and nongovernmental organizations in the design and implementation of projects.

I. Conclusion

The IMF and the World Bank Group make valuable contributions to the global economic order. They deserve continued support from the United States. A few areas in which change would be desirable have been identified in the recommendations at the beginning of this report.

Respectfully submitted,
Michael D. Sandler
Chair

February, 1996

45. IBRD Res. 93-10 (Sept. 23, 1993); IDA Res. 93-6 (Sept 23, 1993). *See generally* IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL (1994); and David D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994). *See also, A World Bank Panel Breaks Legal Ground*, NATL L.J., Dec. 19, 1994, at 1.

46. *See* Ibrahim F.I. Shihata, *The World Bank and Non-Governmental Organizations*, 25 CORNELL INT'L L.J. 623 (1992). *See also* Bradlow, *supra* note 45.