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The World Bank and the Environment: a Legal Perspective

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ARTICLES

THE WORLD BANK AND THE ENVIRONMENT: A LEGAL PERSPECTIVE

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I. INTRODUCTION

This article deals with the policies and procedures of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) in relation to the environment.[1] While environment as such is not mentioned in the Articles of Agreement of either institution, both have a mandate under their respective Articles to promote economic development in their member countries through making or guaranteeing loans for specific projects and, in special circumstances, for other purposes which facilitate investment.[2] Each of the institutions has thus assisted in financing a broad array of development projects and programs, most of which have had an impact on or have been influenced by the environment. The effect of these projects on the environment both in the countries concerned and beyond their boundaries received much attention in the 1980s. In the process, conflicting conclusions have been reached about the nature of the performance of the Bank and the environmental impacts of its projects.[3] An objective assessment must rely on a broad

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1. The International Finance Corporation has similar environmental policies and procedures which have been tailored to suit its distinct operations. The IBRD and IDA will hereinafter be referred to as the "Bank," unless the context requires otherwise and the word "loans" in the text will include "credits" made by IDA.

2. Article III, §§ 1 (a) and 4 (vii) of IBRD Articles of Agreement; Article V, § 1 (b) of IDA Articles of Agreement.

3. *See, e.g.*, FINANCING ECOLOGICAL DESTRUCTION: THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (1987), published by a group of non-governmental organizations (NGO's); Bruce M. Rich, *The Multilateral Development Banks, Environmental Policy and the United States*, 12 ECOLOGY L. Q. 681 (1985); John Horberry, *The Accountability of Development Assistance Agencies: The Case of Environmental Policy*, 12 ECOLOGY L. Q. 817 (1985); ROBERT L. AYRES, BANKING ON THE POOR: THE WORLD BANK AND WORLD POVERTY (1983).

understanding of the Bank's work in this important area. The purpose of this article is to provide the background information needed for such understanding and to clarify, in particular, the regulatory aspects of the Bank's involvement and contribution.

II. DEVELOPMENT AND THE ENVIRONMENT—THE INTRINSIC RELATIONSHIP

The intrinsic relationship between development and the environment, though somewhat controversial in the past, seems now to be universally accepted. This is certainly the case in the World Bank at present, following a series of developments. The Brandt Commission noted in its report that the United Nations Conference on the Human Environment, held in Stockholm in 1972 (Stockholm Conference), was an important milestone in environmental awareness.[4] Building on the conclusions of this conference, the Commission indicated that protection of the environment could no longer be seen as an obstacle to development but rather needed to be considered as an essential aspect of it. More specifically, after stating that environmental impact assessments should be undertaken whenever investment or other development activities may have adverse environmental consequences, the Commission urged multilateral development banks to be ready to assist in carrying out environmental assessments to ensure that an ecological perspective would be incorporated into development planning.[5]

The relationship between development and the environment has been further sharpened by the work of the World Commission on Environment and Development (WCED), also known as the Brundtland Commission, which followed the same line of thinking but added an important contribution. It gave prominence to the notion of "sustainable development," defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[6] This concept has since been broadly accepted as an important goal by all international institutions involved in the development process. The WCED noted that the multilateral development banks should take a leading role in assisting developing countries to

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4. INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, NORTH-SOUTH: A PROGRAM FOR SURVIVAL 114 (1980).

5. *Id.* at 115.

6. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987) [hereinafter OUR COMMON FUTURE]. *See also* WARREN S. BAUM & STOKES M. TOLBERT, INVESTING IN DEVELOPMENT: LESSONS OF WORLD BANK EXPERIENCE 527-38 (1985).

make the transition to sustainable development. In particular, it spoke of the significant lead that the World Bank had taken to reorient its lending programs to reflect a much higher sensitivity to environmental concerns.[7]

The Bank's concern with the environment, however, predated the work of these commissions. Projects financed by the Bank since the 1950s took into account some aspects of what are now being classified as environmental concerns. However, the broad realization that development projects have an impact on the environment was clearly articulated by the President of the Bank for the first time in a major speech before the United Nations Economic and Social Council in 1970. In that speech, Mr. Robert McNamara stated the Bank's deliberate concern with environmental issues and the manner in which it planned to address them in what may now seem to be only a modest beginning:

> The problem facing development finance institutions, including the World Bank, is whether and how we can help the developing countries to avoid or mitigate some of the damage economic development can do to the environment, without at the same time slowing down the pace of economic progress. It is clear that the costs resulting from adverse environmental change can be tremendous. It is equally clear that, in many cases, a small investment in prevention would be worth many times over what would have to be expended later to repair the damage.
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> In the Bank, therefore, we recently have established a small unit to foresee, to the extent possible, the environmental consequences of development projects proposed to us for financing. Even more important, we want to work toward concepts that will enable us and other development financing agencies to consider the environmental factors of development projects in some kind of cost-benefit framework.[8]

This modest beginning soon led to further steps. Under Mr. McNamara's guidance, the Bank played a significant role in deliberations leading to the drafting of recommendations in 1981 for incorporating environmental policy into the development process.[9] These rec-

7. OUR COMMON FUTURE, *supra* note 6, at 337.

8. Robert S. McNamara, Address to the UN Economic and Social Council (November 13, 1970).

9. *The Cocoyoc Declaration*, *in* IN DEFENSE OF THE EARTH: THE BASIC TEXTS ON ENVIRONMENT, (United Nations Environment Programme Executive Series No. 1,

ommendations were intended to be taken into account by the Bank and other multilateral funding agencies in the appraisal of projects to be financed by them. In his subsequent address before the 1972 Stockholm Conference, which led to the establishment of the United Nations Environment Programme (UNEP), Mr. McNamara, speaking for the Bank, established the nexus between environment and development in clearer terms. The question, according to him, was not whether economic growth should be continued at the expense of the environment. Nor was it whether these two considerations were interlocked. Rather, the solution to the dilemma revolved only around how to address the relationship between the two.[10]

The Bank's President gave an account on that occasion of how the Bank had dealt with environmental issues in its day-to-day operations. In fact, as noted in that speech, guidelines had been prepared in 1970 for use by Bank staff in determining how to weigh environmental factors in any given project.[11] Basically, the procedure required first that all identified projects under consideration be sent to the Bank's Office of Environmental Affairs as early as possible in the project cycle.[12] Second, if the project warranted it, a detailed investigation was to be undertaken to provide a better understanding of the nature, dimension, severity, and timing of the problems likely to arise with respect to the project. The results of the investigation were to be taken into account in devising appropriate safeguard measures which were then to be incorporated into project design and discussed with borrowers. Where necessary, appropriate commitments were to be obtained from the recipient government to carry out the required actions. In connection with its work, the Office of Environmental Affairs issued guidelines as well as a comprehensive checklist which illustrated the typical environmental issues which may arise in different types of projects and sectors. These guidelines were subsequently expanded, and the Bank translated its experience in handling environmental matters into a book which was widely distributed.[13] In investigating environmental consequences of proposed projects, all factors, including the legal aspects, were to be considered.

According to reports maintained by the Office of Environmental

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1981).

10. Robert S. McNamara, Address to the United Nations Conference on the Human Environment 4 (Stockholm, June 8, 1972).

11. *Id.*

12. *See generally* WARREN C. BAUM, THE PROJECT CYCLE (1982).

13. WORLD BANK, ENVIRONMENTAL, HEALTH, AND ECOLOGIC CONSIDERATIONS IN ECONOMIC PROJECTS (1972).

Affairs covering the period July 1, 1971 to June 30, 1978, 63% of Bank-financed projects (1,342 in total) revealed no apparent or potential environmental issues. Thirty-seven percent of projects that raised environmental issues were dealt with through special studies carried out by Bank staff or consultants or by other agencies such as the United Nations Development Programme (UNDP) and the World Health Organization (WHO).[14] In addition, several internal guidelines, handbooks, checklists and criteria were issued to assist staff and borrowing countries in the preparation of projects. Meanwhile, a wide range of environment-related workshops for Bank staff were held to increase environmental knowledge and sensitivity to development projects.

The guidelines and other material dealing with environment-related issues were consolidated and issued in 1984 as an operational manual statement (OMS).[15] The OMS recalled the Bank's increased attention to environmental issues, indicated that projects in most economic sectors might have significant environmental implications, and identified the agricultural, energy, transportation, industrial and urban sectors as those most likely to raise such issues. It noted that relatively few environmental effects might be found in primary education, health and telecommunications projects. More importantly, the OMS noted that the Bank's approach was tailored to local circumstances and its policy was therefore to consider each project unique with respect to its total setting and the ability of the government or executing agency concerned to manage the environmental aspects. The OMS stated that the Bank would be guided by the following principles:

> [The Bank:]
> (a) endeavors to ensure that each project affecting renewable natural resources (e.g., as a sink for residues or as a source of raw material) does not exceed the regenerative capacities of the environment;
> (b) will not finance projects that cause severe or irreversible environmental deterioration, including species extinctions without mitigatory measures acceptable to the Bank;
> (c) will not finance projects that unduly compromise the pub-

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14. WORLD BANK, ENVIRONMENT AND DEVELOPMENT 9 (1979).

15. Operational Manual Statement (OMS) No. 2.36, *Environmental Aspects of Bank Work* (May 1984). The Bank had earlier published sector policy papers on rural development (1975), forestry (1978), agricultural land settlement (1978), and fisheries (1982), all containing sections relating to the environment. (This and other Bank internal documents mentioned in the article have limited circulation).

> lic's health and safety;
> (d) will not finance projects that displace people or seriously disadvantage certain vulnerable groups without undertaking mitigatory measures acceptable to the Bank. . . ;
> (e) will not finance projects that contravene any international environmental agreement to which the member country concerned is a party;
> (f) will not finance projects that could significantly harm the environment of a neighboring country without the consent of that country. The Bank is willing to assist neighboring members to find an appropriate solution in cases where such harm could result;
> (g) will not finance projects which would significantly modify natural areas designated by international conventions as World Heritage sites or Biosphere Reserves, by national legislation as national parks, wildlife refuges, or other protected areas; and
> (h) endeavors to ensure that projects with unavoidable adverse consequences for the environment are located in areas where the environmental damage is minimized, even at somewhat greater initial costs.[16]

A study carried out by the International Institute for Environment and Development in 1979 specifically recognized that the unique practical concerns shown by the Bank since the early seventies indicated greater awareness of these issues by the institution, but called for a more systematic and far-reaching approach.[17] On the basis of this study, the Bank, together with many other multilateral financing agencies,[18] the European Economic Community (EEC), the Organization of American States (OAS), UNEP and UNDP, signed a declaration in New York in 1980 pledging the support of these institutions for the creation of systematic environmental assessment and evaluation proce-

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16. *Id.* at para. 9; for more detailed guidance on Bank projects on wildlands, *see also* G. LEDEC & R. GOODLAND, WILDLANDS — THEIR PROTECTION AND MANAGEMENT IN ECONOMIC DEVELOPMENT (1988).

17. ROBERT E. STEIN & BRIAN JOHNSON, BANKING ON THE BIOSPHERE? ENVIRONMENTAL PROCEDURES AND PRACTICES OF NINE MULTILATERAL DEVELOPMENT AGENCIES 137-40 (1979).

18. The Asian Development Bank, the Inter-American Development Bank and the Arab Bank for Economic Development in Africa initially signed the declaration. The African Development Bank, the European Investment Bank, IFAD, the Nordic Investment Bank and the Central American Bank for Economic Integration subsequently signed the declaration.

dures for all development activities.[19] They further supported proposals specifically designed to protect, rehabilitate, manage or otherwise enhance the human environment, the quality of life, and resources related to them. With this act, the international agencies concerned also formed the Committee of International Development Institutions on the Environment (CIDIE) which has met every year since then to discuss matters relevant to the implementation of the declaration and to exchange information on environment-related issues.

Following Mr. McNamara, successive Presidents of the Bank have reiterated the Bank's attention to these issues.[20] The tenure of Mr. Barber Conable, in particular, witnessed major initiatives in this field, including organizational changes in the Bank to bring environmental concerns more systematically into the mainstream of its operations. During this period, international recognition of the economic importance of environmental degradation led to the consideration of the relationship between environment, growth and development by the Development Committee (of the Boards of Governors of the Bank and the IMF) in 1987.[21] Their main conclusion was that the project-by-project approach that had been followed by the Bank for many years was no longer tenable in view of the effect of environmental factors on the economies of developing countries.[22] Special attention was to be given, instead, to designing economic incentives to induce environmentally sound management of resources.

That Development Committee meeting was followed by a major restructuring of the Bank in 1987. One of the prime objectives of this reorganization was to ensure that environmental considerations were fully integrated into all aspects of the Bank's operations. As a result, a new Environment Department was established in the policy complex of the Bank, together with a regional environmental division in each of the four regions of the Bank's operational complex. The newly created

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19. New York Declaration, para. 4 (1980).

20. *See, e.g.*, A.W. Clausen, *Sustainable Development: The Global Imperative, in* THE DEVELOPMENT CHALLENGE OF THE EIGHTIES: A.W. CLAUSEN AT THE WORLD BANK (1986); Barber B. Conable, Speech to the World Resources Institute (May, 1987) *in* THE CONABLE YEARS AT THE WORLD BANK: MAJOR POLICY ADDRESSES OF BARBER B. CONABLE, 1986-91 (1991) [hereinafter THE CONABLE YEARS]; Conable, Statement at the Oslo Conference on Sustainable Development (July, 1988); Conable, Statement to the International Institute for Environment and Development (March 19, 1991) *in* THE CONABLE YEARS.

21. WORLD BANK DEVELOPMENT COMMITTEE, ENVIRONMENT, GROWTH, AND DEVELOPMENT (Pamphlet No. 14, 1987).

22. *See* WORLD BANK, THE WORLD BANK AND THE ENVIRONMENT: FIRST ANNUAL REPORT 12 (1990).

units have been staffed with a variety of specialists, including ecologists, sociologists, anthropologists and industrial engineers.[23] The Legal Department, responding to the greater role of the Bank in this field, also appointed for the first time lawyers who specialize in environment-related issues. In addition, more than 50 operational lawyers who cover the Bank's lending work received training in handling legal aspects of such issues. With its strengthened capacity to deal with environmental issues, the Bank started preparing country environmental issues papers which have now been completed for virtually all borrowing countries. The Bank soon became involved in global environmental concerns as well. At the end of the 1980s, it participated in the discussions leading to the establishment of the Ozone Multilateral Fund and initiated the work which led to the establishment of the Global Environment Facility in 1991.

Bank strategies for environmental work in each borrowing country are based on the issues paper for that country and include a formal environmental action plan as well as a regional analysis of specific problems of a regional nature (e.g., water resources). Environment is addressed in all stages of the project cycle — in the policy dialogue with the country, in adjustment lending activities, and in the Bank's extensive research work.

III. The Bank's Operational Directives on the Environment

As indicated above, the Bank has from time to time issued operational directives, operational circulars, guidelines, explanatory notes, memoranda and *ad hoc* instructions to guide its staff in carrying out their functions, particularly in the preparation, appraisal, negotiation and implementation of Bank-financed projects. The Bank's main directive on environmental issues continues to be OMS 2.36, referred to already in this article. This OMS is undergoing a careful review at present with a view to broadening its scope and taking into account developments in the environmental field since 1984. It will be issued in due course as Operational Directive (OD) 4.00. In the meantime, OD 4.01 on environmental assessment and an annex (B) to the (future) directive 4.00 have already been issued covering specific environmental

23. For a full description of the organization of the Bank's environment work, *see* World Bank Development Committee, Environment and Development: Implementing the World Bank's New Policies (Pamphlet No. 17, 1988); *see also* The World Bank and the Environment, FY90, *supra* note 22 and same, FY91, Section II, forthcoming. At the end of FY91, 106 higher level and 34 support staff were working at the Environment Department and the four Regional Environment Divisions.

requirements.

A. Operational Directive 4.01 on Environmental Assessment

Declared since the early 1970s, the Bank's policy of incorporating environmental considerations into its activities received a significant boost by the issuance in October 1989 of operational instructions on environmental assessment in the form of Annex A to its Operational Directive (OD 4.00) on environmental issues.[24] This operational document was modestly revised in October 1991 and renamed OD 4.01 on Environmental Assessment.[25] In view of its importance, this document, both in its original and revised form, was discussed in draft by the Executive Directors of the Bank at a Board seminar prior to its finalization. This was an unusual step, as operational directives and their annexes represent management's instructions to staff and as such are clearly within the prerogative of Bank management in the implementation of policies determined by the Board. The main purpose of the OD on Environmental Assessment is to standardize and formalize a process in which all projects to be financed by the Bank undergo a specific assessment. This assessment is required to ensure that the environmental effects of projects are discerned as early as possible in the project cycle and that measures are incorporated to minimize, mitigate or compensate for adverse environmental impacts of the project or to enhance environmental benefits.

All projects are classified on the basis of a screening system incorporated into the OD. This system is based on the nature, magnitude and sensitivity of anticipated environmental issues. Thus, "Category A" projects are those that may have diverse and significant environmental impacts and therefore require a full-scale environmental assessment (EA). "Category B" projects consist of those projects which may have specific environmental impacts which should be examined but would not require a full-fledged EA. "Category C" projects are those projects with no discernable environmental impacts which therefore require no environmental analysis.[26] The Bank, through its Monthly Operational

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24. World Bank Operational Directive 4.00, annex A (October 31, 1989), replaced by OD 4.01.

25. World Bank Operational Directive 4.01 on Environmental Assessment (October 1991) [hereinafter OD 4.01]. This Directive applies also to the projects financed under the Global Environment Facility referred to *infra*. *See* OD 4.01 n.1.

26. *See id.*, annex E para. 1. Annex E paras. 5-7 give an illustrative list of the types of projects falling under each category. The former Annex A of OD 4.00 included a fourth category, D, comprising environmental projects, i.e., projects where environment would be the major focus of project preparation, for which separate EAs

Summary,[27] summarizes the main environmental issues to be examined and indicates the schedule for carrying out the EA. In addition, the OD includes, among others, a sample outline of a project-specific "environmental assessment report" as well as a checklist of potential issues according to the various sub-sectors which fall under "environment."

One of the important elements of this OD is that it contains a provision pursuant to which the Bank would require governments of borrowers which are responsible for carrying out the assessment "to take the views of affected groups and local nongovernmental organizations (NGOs) fully into account in project design and implementation, and in particular in the preparation of EAs."[28] Such consultations improve decision-making without reducing the authority of the borrower. The OD also notes the value of consultations with NGOs when the assessment report is prepared. In the discussions on the OD in its original form, concerns were raised regarding the timing of the release of the environmental assessment report by the borrower to affected persons and NGOs in the country involved and also to the Executive Directors of the Bank in advance of the presentation of the full project proposal to them for approval. It was noted in this respect that the EA report was the property of the potential borrower and that in some countries the legislative framework may not allow such reports to be released routinely to affected persons or to NGOs even after their completion. OD 4.01 now provides that, prior to consultations, local NGOs ought to receive relevant information which includes a summary of the description and objectives of the project and its possible adverse effects as well as a summary of the conclusions of the EA report (para. 21 of the OD). Moreover, OD 4.01 now normally requires the engagement of an advisory panel of independent, internationally recognized environmental specialists for "major, highly risky, and contentious projects with serious and multi-dimensional environmental concerns." Under the former Annex A of OD 4.00 this process was optional.

With respect to release of the EA report to the Bank's Executive Directors, OD 4.01 requires Bank staff to obtain the permission of the potential borrower prior to such release.[29] Unless decided otherwise by the Bank's senior management for reasons unrelated to the environmental soundness of the project, the Bank will normally not proceed with further work on the project if the borrower demurs or indicates

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were not required. This category is eliminated as a separate category in the new Directive.

27. This document is available for public subscription.

28. OD 4.01, *supra* note 25, para. 19.

29. *Id.* at para. 22.

that it is not in a position to release the report. This rule is based on the principle that while the environmental assessment report is the property of the borrower, the issue is of such importance to the Bank and its members that no Bank action will take place until the assessment is released. In rare exceptions, further work on the project will continue despite borrower objections to releasing the report in situations where the report includes confidential data (e.g., information related to the country's security). However, this does not mean that the Bank would proceed in the absence of the *completion* of a satisfactory assessment.

The scope, depth and analytical techniques of each EA depend on the particular circumstances of each proposed project. However, in each exercise, the EA must assess the policy, as well as the legal, technical and administrative framework within which the environmental issues relating to the project should be tackled.

B. Operational Directive 4.00: Annex B on Environment Policy for Dam and Reservoir Projects

The Annex to OD 4.00 on dams and reservoirs codifies the best practice prevailing in carrying out such projects.[30] The first basic principle is that projects must be carefully planned in order to minimize or mitigate adverse effects and to enhance beneficial effects. Thus, possible environmental effects should be studied as early as possible in the project cycle. In addition, cost-benefit analyses should explicitly include estimates for all necessary mitigatory measures, as well as quantifiable potential environmental losses and enhancement due to the project, where feasible. The Annex contains an attachment which lists in a comprehensive manner the typical environmental effects of dams and reservoirs, including land losses, potential health problems arising from water-related diseases such as onchocerciasis and schistosomiasis, as well as effects on water quality and on plant, animal and aquatic life. An environmental assessment pursuant to the Operational Directive on Environmental Assessment is also required.[31] This assessment should normally take account of the legislative and procedural requirements of the country concerned.

In addition, the Annex requires careful planning to assist the potential borrower to establish, where necessary, appropriate environmental agencies to ensure that the project is carried out with due diligence and efficiency and in accordance with sound environmental manage-

30. *See* World Bank Operational Directive 4.00, annex B (April 28, 1989).
31. *See* OD 4.01, *supra* note 25.

ment policies. Thus, the Annex requires the establishment of environmental units within the project-implementing agency where the project involves a large dam or has significant environmental implications.[32] It also requires the establishment of an environmental panel for each project, which is to be composed of independent, internationally recognized environmental specialists to advise the borrower periodically on all aspects of the project. In addition, it notes that the Bank encourages consultations with NGOs and other affected groups, a policy which is consistent with the Bank's above-described requirements for preparation of environmental assessments. Finally, since these projects almost invariably involve the displacement of populations, the Bank has policy guidelines which emphasize the maintenance or restoration of the social and economic production systems and income levels of both the displaced population and the host communities to which they are relocated.

C. The Operational Directive on Involuntary Resettlement

The basic policy objective set forth in the OD on involuntary resettlement is that "involuntary resettlement should be avoided or minimized where feasible."[33] Where displacement is unavoidable, displaced persons should be "(i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve their former living standards, income earning capacity, and production levels, or at least to restore them."[34] A resettlement plan must be prepared to ensure that displaced persons are treated appropriately; therefore, there must be a clear understanding of the legal framework relating to the envisaged resettlement. More importantly, in the context of this article, the resettlement plan must also

32. World Bank Operational Directive 4.00, *supra* note 30, at para. 17. The Bank has specific policies applicable where the project in question is on an international waterway. *See* World Bank Operational Directive 7.50: Projects on International Waterways (April, 1990). This OD requires the potential borrower to notify other riparians of such waterways unless the project involves additions and alterations to on-going schemes, provided such schemes will not adversely change the quantity or quality of water flows and will not be affected by the use of such waterways by other riparians. *Id.* at paras. 5-8.

33. World Bank Operational Directive 4.30: Involuntary Resettlement para 3(a) (June 29, 1990).

34. *Id.* at para 3(b). For a more detailed discussion of the Bank's policy on involuntary resettlement, *see* IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD 181-99 (1991).

take into account the environmental aspects of the project concerned in order to provide appropriate mitigation measures in the interests of the displaced people. This may involve plans to deal with deforestation, overgrazing, soil erosion and pollution.

D. Other Operational Directives and Guidelines on Environment

The Bank has guidelines and directives on other areas of the environment which presently remain in effect but are currently being reviewed for the purpose of further developing the underlying policies. These include directives on agricultural pest management, protection and management of wildlands, and the principles to be applied to land settlement, indigenous people and cultural property.[35] In addition, guidelines on specific environment-related issues have been prepared for use by staff.[36] The Environment Department and the Regional Environment Units have also prepared working papers on various issues to encourage discussion of such issues among the staff prior to the development of new policies.

IV. ENVIRONMENT CONDITIONALITY IN BANK LOANS

As indicated above, environment-related issues arise in many projects, particularly in the agricultural, energy, transportation and industrial sectors. During the preparation and appraisal of such projects, consideration is given to measures needed to avoid or at least minimize environmental risks or to enhance environmental benefits. In this respect, the Bank has to assure itself that any measures agreed upon will in fact be carried out by the borrower and the project-implementing agency concerned. Typically, such measures are incorporated into the overall design and implementation program for a project. A variety of legal techniques are used to enable the Bank to ensure that the actions required will in fact be carried out.

The principal legal instruments which evidence Bank financing of

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35. World Bank Operational Directive 4.02: Agricultural Pest Management (draft); World Bank Operational Directive 4.04: Wildlands (draft); World Bank Operational Directive 4.31: Land Settlement (draft); World Bank Operational Directive 4.20: Indigenous Peoples (September 17, 1991); World Bank Operational Directive 4.25: Cultural Property (draft).

36. *See, e.g.*, Environmental Guidelines (August, 1988); Occupational Health and Safety Guidelines (September, 1988); The Safe Disposal of Hazardous Wastes: The Special Needs and Problems of Developing Countries (3 vols. 1989); Wildlands - Their Protection and Management (1988). (All are internal documents, on file with the World Bank).

a project are the "loan agreement" (for the IBRD) or "development credit agreement" (for IDA) entered into with the borrower and the "project agreement" entered into with the project-executing agency. The loan/credit agreements normally contain, *inter alia*, the terms of the loan or credit, the repayment obligations, provisions for use of the proceeds of the loan and for procurement financed by it, and, in this context, obligations with respect to carrying out the project. Such obligations include the borrower's undertakings with respect to the environment and are complemented at times by detailed requirements in "project agreements" concluded with the project-executing agencies.

The Legal Department of the Bank is responsible for drafting and negotiating all such agreements. Several devices have been used in these documents to promote and monitor compliance. The main vehicle is the inclusion of specific covenants requiring that environment-related actions be taken. To begin with, each loan or credit agreement includes a provision which requires the borrower and the project-executing agency to declare their commitment to the objectives of the project and to carry out the project with due diligence and efficiency and in conformity with appropriate practices which may be applicable to the project.[37] This provision is based on the Articles of Agreement of the Bank which require the Bank to make arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided and with due attention to considerations of economy and efficiency. The General Conditions, which apply to all loan and development credit agreements and are deemed an integral part of such agreements, require the borrower or project-executing agency to maintain appropriate records relating to the project and to send these at regular intervals to the Bank.[38] In addition, Bank staff regularly supervise the execution of the project. A project completion report, setting forth details relating to the execution and initial operation of the project and its costs and benefits, is also a requirement of all Bank loans and credits.

In all cases where the execution of a project might have an impact on the environment, the clause in the agreement requiring the borrower

37. This formulation was introduced upon the suggestion of the author in 1984 to ensure that borrowers are truly committed to the projects' objectives and accept full responsibility for their implementation and to clarify that the so-called World Bank projects are the borrowers' own projects where the Bank plays the role of a supportive financier.

38. *See* IBRD General Conditions Applicable to Loan and Guarantee Agreements; and IDA General Conditions Applicable to Development Credit Agreements (both dated January 1, 1985).

or project-executing agency to carry out the project with due diligence is amplified to require "due regard to be paid to environmental and ecological factors." This technique has been utilized since the early 1970s, and is often supplemented with detailed provisions which require more specific actions on the part of the borrower or project-executing agency.

A few examples are worth noting to illustrate the wide range of legal approaches utilized in projects in different sectors since the early seventies. In the preparations for the *Brazil-MBR Iron Ore Project*,[39] financed by a loan signed in 1971, the consequences to the environment of the mining project were reviewed by the Bank through an ecological study prepared by consultants. As a result, explicit provisions were included in the legal documents for the project to ensure that it would be carried out with minimum adverse effect on the regions surrounding the mine location and the ocean. Thus, the project-executing agency (the borrower) was required to "take all feasible measures to ensure" that the project was "carried out with due regard to ecological and environmental factors." Without limiting the generality of that provision, the borrower was further required to prepare plans, acceptable to the Bank and the Government of Brazil (the guarantor of the loan), to protect the waters of the Sepetiba Bay from pollution and to carry out either the plans agreed upon or acceptable alternatives prior to the completion of the project. In addition, the borrower was permitted to erect pelletizing plants at the Bay only after consultation with the Bank and approval by the Government of Brazil. In a similar project during the same year, the *Botswana-Shashe Project*,[40] a specific covenant was included in the loan agreement requiring the borrower, the Government of Botswana, to take all action, including the enactment of pollution control legislation, to ensure that the operations of the mining project were conducted with due regard to public health and preservation of the environment. In addition, the borrower was required to see to it that the project-executing agency, which was under its control, complied with pollution control legislation and regulations in force in Botswana from time to time.

As a complement to such lending-document provisions, the standards applicable to a particular operation may be set forth in an annex or a letter supplemental to the loan agreement in question. Thus, in the *Morocco-Jerada Coal Mine Modernization and Expansion Project* for

39. Loan Agreement for MBR Iron Ore Project between IBRD and Mineracoes Brasileiras Reunidas, SA-MBR, Section 4.03 (August 25, 1971).

40. Loan Agreement for Shashe Project between IBRD and the Republic of Botswana, 849 U.N.T.S. 3 (June 30, 1971).

which loan documents were signed in 1985,[41] the health and occupational safety of the mine in question was identified as a specific issue during project preparation. Through a provision in the Loan Agreement, the borrower and the Bank agreed that the borrower would implement health and occupational safety standards acceptable to the Bank. These standards were formulated during the preparation and appraisal of the project and were included in a supplemental letter which was signed together with the Loan Agreement.

Projects which have a beneficial impact on the environment are relatively uncomplicated from a legal perspective. This is because the environmental actions to be taken are normally included in the design of the projects and are part of the project as described in the legal documents which the borrower or project-executing agency is required to carry out. This was the case with the first free-standing environment project financed by the Bank in 1975. This project, the *Finland-Water Pollution Control Project*, involved the financing of part of Finland's ten-year national program to control water pollution caused by industries. It was also the first Bank-financed project to incorporate the principle of "the polluter pays" by requiring the largest polluters in Finland, including those corporations operating in the pulp and paper industry, to undertake projects to reduce water pollution caused by their activities. As part of project preparation, an investigation was carried out on all aspects of pollution control in Finland, including a review of the legislative framework. The review recognized the possibility of conflict or institutional duplication between efforts to control air and water pollution. Thus, the Government agreed to provide the Bank with draft legislation on industrial air pollution for Bank comment. In addition, the Government agreed to collaborate with the Bank in research aimed at strengthening the effectiveness of the national water pollution control program. This last agreement was reflected in specific covenants in the legal documents related to the project.[42]

Where the proceeds of the Bank loan are passed through local development financing companies to be on-lent by them to finance specific sub-projects in a borrowing country, the Bank may request the intermediary companies to require compliance with applicable environmental laws and regulations and also may require environmental impact assessments prior to approving the sub-projects. Legal documents for

41. Loan Agreement for Jerada Coal Mine Modernization and Expansion Project between IBRD and Charbonnages du Maroc (June 3, 1985).

42. Loan Agreement for Water Pollution Control Project between IBRD and the Mortgage Bank for Finland (May 19, 1975); Guarantee Agreement between Republic of Finland and IBRD (May 19, 1975).

the *Philippines (Industrial Investment Credit Project)*, for example, included such provisions as well as specific components which required the borrower (the Development Bank of the Philippines) to carry out sub-sector restructuring studies, to review environmental standards and existing pollution control measures, and to develop more comprehensive studies of measures to improve environmental regulatory capacity.[43]

Forestry projects financed by the Bank have generally been more comprehensive in the sense that many of them cover a broad spectrum of issues associated with the forestry sector. In its first policy paper on forestry, published in 1978,[44] where the linkage between forestry and environment was clearly articulated, the Bank required each project appraisal to include an assessment of the ecological benefits and environmental effects[45] and indicated that the main emphasis in Bank forestry lending would be on financing broadly based national forestry programs. From a legal perspective, this meant that an appropriate legal and institutional framework should exist to enable the borrower or the project-implementing agency to carry out the intended program.

An example of this comprehensive approach to forestry lending is the *Uganda Forestry Rehabilitation Project*, which had the objective of increasing the forest area and improving the management of natural forests in Uganda.[46] In connection with the appraisal of this project, a thorough review was made of the legal and institutional frameworks for the management of forests in Uganda. The development credit agreement then included covenants which, *inter alia*, required the borrower to adopt a new policy acceptable to the Bank on forest resource management and to take legislative measures to ensure that the existing laws were consistent with the adopted policy. The borrower was also required to take measures to guarantee that industries granting forest-harvesting licenses would operate in conformity with sound forestry management practices. Another provision required the project to be executed and operated with due regard to ecological and environmental

43. Loan Agreement for Industrial Investment Credit Project between IBRD and the Development Bank of the Philippines (November 9, 1989).

44. WORLD BANK, FORESTRY SECTOR POLICY PAPER (February, 1978). This policy has recently been reviewed and revised with a view to incorporating improved knowledge and understanding of forestry lending considerations and requirements for sustainable management and conservation of forest resources, particularly in tropical regions. Section V.E. of this article discusses the Bank's new forestry policy in more detail.

45. *Id.* at 46.

46. Development Credit Agreement for Forestry Rehabilitation Project between the Republic of Uganda and IDA (July 6, 1987) [hereinafter Uganda Credit Agreement].

factors consistent with the new forest resource management policy to be adopted under the agreement.[47] Similar covenants may be found in an earlier Kenyan Project,[48] where the borrower was required to pay particular regard to the land clearance and planting systems used to minimize erosion damage, wasteful utilization of forest resources and adverse effects on fauna and flora.

Another legal technique utilized is to require, by virtue of the loan agreement, that critical action be taken to ensure the success of the project prior to the effectiveness of the agreement. In the Uganda Project referred to above, such a situation arose regarding the protection and supervision of the protected areas. Although forest guards played a key role in the implementation of forest policies, they were not part of the civil service and thus did not receive adequate compensation and benefits to give them the necessary job security to carry out their duties. Reinstallment of these guards in the staff establishment was included in the development credit agreement as a condition of effectiveness.

In recent years, the Bank's Legal Department has also attached an implementation program or plan of action as a schedule to the loan agreements, in order to amplify the actions to be taken by the borrower or project-executing agency in carrying out the project. Generally, such a program specifically prescribes the actual steps to be taken in the execution of the project, those responsible for taking action, and the timing or phasing of the project, as appropriate. While such a program or plan is tied to a specific covenant in the loan agreement, it is normally written in less formal language and its inclusion in the legal documents allows the parties formally to endorse the key implementation actions. Such actions would otherwise appear in the appraisal report which is not part of the legal documents. If adverse environmental impacts appear during the course of project execution, modifications in the implementation procedures may be made to tackle the problem, as long as they are consistent with the objectives of the project. This is normally done without amending the loan agreement, as the "description of the project" schedule is usually written in a flexible manner.[49] In addition, as in the case of the Ugandan project referred to above, a provision may be included in the loan agreement for a mid-term review

47. *Id.* at §§ 3.04, 3.07 and 3.09.

48. Development Credit Agreement for Second Forestry Plantation Project between Kenya and IDA (June 27, 1975). *See also* Loan Agreement for Forest Sector Project between Côte d'Ivoire and IBRD (April 24, 1990) [hereinafter Côte d'Ivoire Loan Agreement].

49. *See, e.g.*, Côte d'Ivoire Loan Agreement, *supra* note 48.

during project implementation so that changes in implementation procedures can be made, if required, to ensure the achievement of the objectives of the project.[50]

It is well recognized that appropriate covenants in the legal documents do not by themselves ensure that the required action will be taken. For this reason, provisions are included in the General Conditions and in the loan agreements to give the Bank power to suspend disbursements if the borrower or project-executing agency defaults in carrying out agreed upon actions. This is a potent remedy when project implementation is still in progress. Problems that arise after the completion of the project and the full disbursement of loan proceeds to the borrower are more difficult to handle. However, in such cases, the Bank may still enforce the borrowers' commitments by declaring that the borrower has defaulted in performing its obligations under the loan agreement. This could lead, if acceptable action is not taken by the borrower within the period indicated by the Bank, to the acceleration of maturity of the loan and could affect future Bank operations in the country. This is obviously a serious path to take which has not actually been followed so far due to the grave negative effects of its use on the Bank's relationship with the borrower involved.

While legal provisions may clearly specify required actions, it is important to note that the Bank does not rely solely on such provisions to ensure compliance. Each project financed by the Bank is subject to supervision which is carried out by Bank project staff. This activity, coupled with the ongoing country dialogue, is probably more effective, from a practical viewpoint, than punitive action in ensuring the proper implementation of Bank-financed projects. Much greater efforts will have to be exerted, however, to ensure that project implementation is consistent with loan conditionality. While fostering an "implementation culture" is called for in the Bank's operations generally, it is of particular importance in this context. Where the environment is concerned, an *ex post* discovery of poor implementation often results in irreversible harm. The need for strengthening the Bank's supervisory capacity in this field cannot therefore be overstated.

V. New Bank Initiatives in the Environment Field

A. *Integration of Environmental Management into Economic Planning: Environmental Action Plans*

With the significant enhancement of the Bank staff's capacity to

50. *See, e.g.*, Uganda Credit Agreement, *supra* note 46, at § 3.08.

deal with the intensive emphasis on environment-related issues, new initiatives have started to emerge. Consistent with the Brundtland Commission's recommendation that environmental management should be integrated into economic planning, the Bank instituted, in 1988, a program for the gradual preparation of environmental action plans in all its borrowing countries. This program was welcomed by the Development Committee at its meeting in September 1989.[51] More importantly, representatives of the donor governments to the negotiations for IDA's Ninth Replenishment of resources noted the progress achieved by the Bank in this connection and recommended that such action plans for all IDA borrowing countries be completed by the end of the IDA9 period, on June 30, 1993.[52]

Environmental action plans involve an in-depth analysis of the state of natural resources and environmental management in each country with a view to developing a strategy in the short, medium and long term to deal with emerging problems. A typical exercise involves the identification of priority problems affecting optimum natural resources and environmental management, a diagnosis of the direct and underlying causes of such problems, development of alternative ways of dealing with them, and finally, discussion of the sources of finance required to carry out the remedial program.

This process is not unlike the familiar course followed in any law reform program. In most cases, a complete inventory is undertaken of the substantive provisions of existing legislation (including subsidiary legislation). These pieces of legislation are then studied to determine whether the substantive provisions assist in achieving the objectives of the government concerned, and whether any gaps or overlaps exist. Decisions of the courts interpreting or applying provisions of such laws are also studied and discussions are held with the institutions in charge of implementation or enforcement with a view to understanding the identified issues. After this process is completed, recommendations are developed indicating, as the case may be, whether new legislation is required, whether existing legislation should be revised or repealed or whether scattered, existing rules should be consolidated into a new legal framework. The Legal Department has been responsible for this aspect of work related to the environmental action plans, often in close collaboration with lawyers in the country concerned or through the use

51. Development Committee Press Communiqué, paras. 13 - 15. (September 25, 1989).

52. World Bank, *Summary Proceedings, 1990 Annual Meetings of the Board of Governors, Report of the Executive Directors of IDA*, para. 17 (Washington, D.C., September 25-27, 1990).

of consultants.[53] It must be noted that this is viewed as an inter-disciplinary exercise where lawyers, technical specialists, economists and administrators all cooperate with one another.

B. The Mediterranean Environmental Technical Assistance Program

An enlargement of this environmental action plan theme is exemplified by the environmental program for the Mediterranean region where a similar exercise has been carried out jointly by the Bank, the European Investment Bank (EIB), and UNEP. In this connection, an analysis was undertaken to develop a program to deal with serious environmental degradation occurring in many parts of the Mediterranean region, focusing on four subjects of special concern: degradation of coastal areas, water resources management, marine pollution from oil and chemicals, and the management of solid and hazardous wastes.[54] In this context, a review similar to that undertaken in the preparation of environmental action plans was carried out. This exercise included a review of the effectiveness of relevant regional and international agreements as well as relevant local laws. One of the findings was that the lack of appropriate laws and enforcement mechanisms was a central factor contributing to environmental degradation.[55] This review led to the recommendation for the establishment of the Mediterranean Environmental Technical Assistance Program (METAP), which is designed to identify and prepare specific projects and institution-strengthening activities. Such activities include the development of specific recommendations for improving, at the sub-regional, regional and national levels, the legislative and regulatory frameworks which involve the environment.[56] The Bank serves as executing agency for the UNDP, which is providing resources for the program. The European Community (EC) has also agreed to provide resources for METAP, and the Bank, the EIB and the EC have entered into an agreement for collaboration in carrying out the program, which will be implemented along with the EC's own action program for the protection of the environ-

53. In this connection, *see* environmental plans on Mauritius, Lesotho, Nigeria, Tunisia, etc. The Legal Department of the World Bank has also prepared a checklist to be used in carrying out such activities.

54. *See* WORLD BANK & EUROPEAN INVESTMENT BANK, THE ENVIRONMENTAL PROGRAM FOR THE MEDITERRANEAN - PRESERVING A SHARED HERITAGE AND MANAGING A COMMON RESOURCE (1990).

55. *Id.* at chapter 3.

56. *Id.* at 64-65.

ment in the Mediterranean region.[57] Grants under METAP will be administered following the Bank's normal procedures with respect to technical assistance activities. Annual work programs will be prepared and discussed by the participating agencies and governments in the region.

C. Free-Standing Environmental Projects

In-depth analysis of the state of natural resources and environmental management is being emphasized in the Bank's work in order to produce comprehensive strategies for the sound management of the environment and natural resources in borrowing countries. This has led to a significant increase in Bank financing of free-standing environmental projects primarily designed for strengthening relevant institutions. Indeed, it is expected that about 45 such projects will be financed in Fiscal Years 1990-93, several of which are expected to be based on the environmental action plans prepared by borrowing countries.[58] Four projects to be financed by the Bank are illustrative examples of this type of project.

The *Mauritius-Environmental Monitoring and Development Project* (1991) is a good example of the linkage which is expected to be made between environmental action plans and environmental project financing. This project is one of the components of the environmental investment program developed under the comprehensive national environmental action plan undertaken by the Government with the assistance of the Bank in 1988. Following the completion of the plan, the Government adopted a new National Environmental Policy and has begun the process of implementing the projects envisaged under the environmental investment program associated with the plan and the Policy. The project has the basic objective of assisting the borrower in establishing a policy and an institutional framework to permit the effective management and coordination of physical planning, land use control, infrastructural investment and environmental control. Thus, it contains a variety of components ranging from the establishment of a national park to preserve endangered endemic species, to the preparation of a marine conservation management plan and a national physical develop-

57. Memorandum of Understanding between Commission of the European Communities, European Investment Bank and IBRD (March 15, 1991).

58. THE WORLD BANK AND THE ENVIRONMENT, FY90, *supra* note 22. In FY90, eleven free-standing loans were approved for a total of $405 million. In FY91, the Bank approved 22 loans for projects with major environmental components, including 7 free-standing loans.

ment plan.[59] In addition, the Bank is an executing agency for a UNDP-financed project designed to develop the necessary legal and institutional framework to ensure efficient, equitable and sustainable environmental and natural resource management in Mauritius. This UNDP project includes the preparation of an environmental protection law with appropriate subsidiary legislation, including standards, effluent limitations and compliance-monitoring provisions. Other donors have also begun implementation of other projects included in the investment program.

The *Brazil - National Environmental Project* (1990) is designed to strengthen institutions involved in carrying out activities included in the Government of Brazil's national environmental program. This project consists of several components covering a wide range of activities, including strengthening the national system of conservation units, carrying out specific activities to protect ecosystems in several states of Brazil, and strengthening federal and state environmental agencies through staff training and technical assistance.[60]

Following an initial review of the major causes of environmental degradation in *Poland*, a project was prepared to assist it in strengthening the institutional and regulatory frameworks for environmental protection and in developing programs to improve environmental quality. Included in the components for the project are the development of a comprehensive regional air pollution abatement strategy of some of the major industrial areas of Poland and development of pilot institutions for integrated planning and management of water resources for the heavily polluted Upper Vistula River Basin.[61] A more comprehensive project is under preparation for financing by the Bank in the near future.

A fourth project derives from a comprehensive review of agricultural productivity and natural resources degradation in *Burkina Faso*. This project is designed to support the borrower's newly-developed strategy to prevent further degradation and rapid depletion of its natural resources, to promote sustainable agricultural growth and to protect and manage its forest and wildlife resources on a sustainable basis.[62]

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59. Loan Agreement for Environmental Monitoring and Development Project between Mauritius and IBRD (February 11, 1991).

60. Loan Agreement for National Environmental Project between the Federative Republic of Brazil and IBRD (August 16, 1990).

61. Loan Agreement for Environment Management Project between the Republic of Poland and IBRD (April 25, 1990).

62. Development Credit Agreement for Environmental Management Project between Burkina Faso and IDA (May 15, 1991).

In all of the projects discussed above, several of the techniques described earlier in this article were utilized in the agreements between the borrower and the Bank.

D. *Indirect Support of Debt-for-Nature Swaps*

Proposals have been made by some governments, notably the U.S., and by some non-governmental organizations, that multilateral financial institutions should participate in debt-for-nature swaps similar to the transactions which have been carried out by certain non-governmental organizations since the early 1980s.[63] The report of IDA's Executive Directors on the IDA Ninth Replenishment mentioned that the donors had requested IDA to play a catalytic role in facilitating debt-for-nature transactions in support of sustainable development and asked IDA to consider the specific modalities of such assistance, including lending and non-lending approaches.[64] These issues were explored within the Bank (IBRD and IDA), and a paper was prepared for discussion by the Executive Directors.[65] The paper outlined the various types of debt-for-nature swaps which had been completed by NGOs. These have ranged from cases in which the foreign debt was converted into local currency and the debt was then forgiven against environmental action by the government concerned, to those in which debt was purchased by a non-governmental organization and donated to the government in return for environment-related action on its part. The paper concluded that while the Bank cannot participate directly in such transactions by forgiving or selling part of its outstanding loans at a discount, it should encourage and facilitate them as part of its ongoing work.

The Bank neither purchases debt from commercial banks nor lends to NGOs for that purpose. From a legal perspective, the Bank can make loans to governments for debt reduction purposes only when it is satisfied that such lending would have a material effect on the investment prospects in the indebted country.[66] Such materiality may be difficult to meet by the small amounts of debt reduction which may

63. *See, e.g.*, Marilyn Post, *The Debt-for-Nature Swap: A Long-Term Investment for the Economic Stability of Less Developed Countries*, 24 INT'L LAW. 1071 (1990).

64. *See* Additions to IDA Resources: Ninth Replenishment 7 (IDA/R 90-1, January 5, 1990).

65. Possible World Bank Support for Debt-for-Nature Swaps (IDA/R 90-74, May 8, 1990).

66. *See* Authorized Purposes for Loans Made or Guaranteed by the Bank, Memorandum of the General Counsel (SecM85-172, February 15, 1985); Materiality Criteria for Bank Lending (R89-136, June 9, 1989).

be associated with environmental actions alone. However, the Bank could play a catalytic role in facilitating debt-for-nature transactions in several ways. First, it was agreed that the Bank could work with governments through the Bank's economic and sector analysis and its policy dialogue to create macroeconomic, environmental, or regulatory frameworks which would facilitate debt-for-nature transactions by others. Second, it could assist in resource mobilization for such transactions as part of a larger program of environmental action or debt reduction. Third, it could provide the necessary background and other information to governments on potential transaction opportunities and possibly serve as an intermediary to bring interested governments, commercial banks and other corporate entities and non-governmental organizations together. Fourth, its operations in countries could be coordinated with debt-for-nature transactions to provide the government concerned with assistance to carry out, in an efficient and reliable manner, the environment-related action to which the government has agreed. Finally, its loans or credits for structural adjustment could include arrangements whereby local currency resources arising from such transactions could be used to finance specific environmental activities.[67]

Within this broad framework, the Bank has been looking for innovations to support debt-for-nature swaps involving other financiers. It has recently made a loan to the Government of Madagascar for the establishment of the *Association Nationale pour la Gestion des Aires Protégées* to construct and equip its headquarters and to train its staff to implement a program of planning, administration and management of protected areas and their buffer zones envisaged under a debt-for-nature transaction. This transaction involves the United States Agency for International Development and the World Wildlife Fund.[68] In addition, the Bank is acting as Administrator for the Kingdom of Norway which has agreed to finance part of the project.[69]

E. A New Forestry Policy

Prior to fiscal year 1978, total Bank commitments for forestry had been $117 million for nine projects. Since the issuance of the 1978 pol-

67. Report referred to *supra*, note 65, at 7.

68. *See* Development Credit Agreement for Environment Project between the Democratic Republic of Madagascar and IDA (May 1, 1990).

69. Norwegian Grant Agreement for Environment Project between the Democratic Republic of Madagascar and IDA, as Administrator of development aid funds provided by the Royal Ministry of Foreign Affairs of the Kingdom of Norway (November 19, 1990).

icy paper cited earlier in this article,[70] commitments soared to $2.2 billion for 73 projects (not including the forestry components of agriculture and rural development projects). Experience with forestry problems and better understanding of their causes and implications called for a reorientation of Bank policy in this field to heighten attention to avoiding potential negative effects of infrastructural and land-using projects. The Bank's 1978 forestry policy has recently been reviewed to reflect lessons learned in the past several years.

A policy paper issued to the Bank's Board in the summer of 1991 identifies the achievement of a careful compromise between the active promotion of forest conservation on the one hand, and sustainable development of forest resources through policy, research and operations as a main, long-term objective on the other. Sustainable use, conservation and development of forest resources require merging conservation and development objectives, which, while seemingly incompatible, could be complementary in the long run.[71] The policy paper suggests that, in view of experiences gained, the Bank should depart from past practice which had relied primarily on a project-by-project method relating to forestry activities and institutions. Instead, the paper proposes a new multi-sectoral approach, which it considers of critical importance for the success of the Bank's forestry policy.[72] Such an approach would encompass sociopolitical, economic, institutional and agricultural aspects. It would also take into account market demands and public policies and would be designed with a view to long-term needs. Moreover, the policy paper emphasizes four major "principles" underlying Bank involvement, which are outlined below.[73]

First, the Bank will support *international efforts*, including the adoption of international legal instruments conducive to sustainable forest development and conservation as well as further cooperation with other agencies and NGOs concerned with forestry issues. Particular reference is made in this respect to the Bank's support for the adoption of an international convention for the promotion of sustainable forest development and conservation. Second, the Bank will assist governments in *policy reform and institutional strengthening*, including rectifying market and policy failures that encourage deforestation and inhibit sustainable land use. Third, the Bank will expand its efforts to

70. *See supra* note 44.

71. WORLD BANK, THE FOREST SECTOR: A WORLD BANK POLICY PAPER (1991). This paper was discussed by the Executive Directors on July 18, 1991 and its recommendations were approved as Bank policy.

72. *Id.* at 62.

73. *Id.* at 62 - 66.

finance the creation of additional forest resources. This *resource expansion* will include promotion of people's participation in tree planting in degraded areas, public accountability, and development through proven techniques such as farm-family and farm-forestry group approaches. It also includes other relevant specific targets such as the augmentation of forest resources (forestation of wastelands, shrublands, abandoned farmlands, etc.) and the strengthening of forest management systems.

Finally, the Bank will support initiatives for the *preservation of intact forest areas*, with special emphasis on already existing "viable conservation units." While deforestation and degradation of tropical dry and temperate forests will be addressed by the Bank, the preservation of tropical moist forests (TMFs) is also an important priority. The Bank will target selected countries whose TMFs are critically affected. Priority will be given, within this group, to countries displaying a strong political commitment to forest preservation. The Bank will under no circumstances support commercial logging of primary TMFs. The financing of infrastructural projects, which may lead to the loss of such forests, will be subjected to rigorous environmental assessment as mandated for all Bank projects raising significant environmental issues. The Bank's efforts will also be directed towards amelioration of environmental damage in temperate and boreal forests, through rehabilitation and reforestation coupled with abatement of industrial pollution and energy conservation programs.

The dimension and ramifications of these tasks realistically require the setting of priorities for the Bank's work in these areas. Bank operations will thus establish specific conditions for expanded investments and improved management of forest resources. Specifically, forestry lending programs will be preceded by sector analyses, which look at land use, institutional and legal regulation, forestry management, and pricing and trade policies. They will also have a long-term focus and will show flexibility in financial arrangements supporting forestry initiatives, e.g., through debt-for-nature swaps or trust funds. Emphasis will be put on enhancing the project involvement of indigenous groups, women and the private sector, on supporting forest research and technology, and on avoiding involuntary resettlement.

According to this new policy, which is based on creating economic incentives for the pursuit of appropriate policies, the Bank will distinguish in its lending conditions between clearly "environmentally protective" and "small farmer oriented" projects on the one hand, and all other forestry operations on the other hand.[74] While the first two types

74. *Id.* at 66.

will be evaluated according to their social, economic and environmental merits, Bank involvement in the latter type of project will be conditioned on a government commitment to "sustainable and conservation oriented forestry" as evidenced by five strict conditions.[75] Countries failing to demonstrate a commitment to meeting these conditions will receive only the support necessary for achieving them.

The Bank's new forestry policy is not meant to reduce the Bank's activities in this sector, but only to further ensure their positive effects. Average annual forestry lending between FY92 and FY95 is expected to be $438 million, compared with an annual average of $217 million over the period FY85-90.

VI. Special Financing Mechanisms

In addition to the support provided by the Bank for environmental projects or project components, the Bank has been involved in multilateral efforts to mobilize resources for the protection of the global environment and to ensure efficient utilization of such resources through the Bank. The Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer requires both developing and developed countries to take action for the reduction in the production and consumption of chlorofluorocarbons (CFCs).[76] However, it does not provide a specific mechanism for meeting the substantial costs which developing countries would have to bear to adopt substitutes for ozone-depleting substances.[77] Article 9(1) of the Protocol merely requires that both groups of countries cooperate in the research, development and exchange of information on the best technologies for improving the containment, recovery, recycling or destruction of controlled substances (halons and CFCs), develop possible chemical and product substitutes, and absorb the costs of relevant control strategies. Furthermore, Article

75. These conditions include i) the adoption of policies and institutional frameworks to ensure conservation and sustainable use of existing forests and to promote more active participation of local people and the private sector in the long-term management of natural forests, ii) the adoption of a comprehensive and environmentally sound forestry conservation and development plan, iii) the undertaking of social, economic, and environmental assessments of the forests considered for commercial use, iv) the setting aside of adequate compensatory preservation forests, and v) the establishment of the necessary institutional capacity to implement and enforce these measures. *Id.*

76. UN Doc. UNEP/IG/53/5/RW.1, March 22, 1985, *reprinted in* 26 I.L.M. 1529 (1987).

77. *See The Economic Implications for Developing Countries of the Montreal Protocol*, United Nations Environment Programme, UNEP/OzL. Fin. 1/Info.1. (January 18, 1990).

10(1) requires the developed country parties to cooperate in providing technical assistance to developing countries in order to facilitate their participation in, and implementation of, the Protocol. In connection with this latter aspect of the Protocol, the Bank has been brought into the discussions of international financing and other mechanisms for assisting developing countries under the Montreal Protocol. Subsequently, the Bank's involvement has extended to other existing international agreements as well as to agreements relating to global environmental concerns which are presently being negotiated.

The issue of financing mechanisms for the environment was raised during the 1989 Development Committee meeting at which the Bank was requested to prepare a report assessing the requirements for additional funding associated with its increased attention to environmental issues and to prepare recommendations of possible mechanisms for managing such resources.[78] This request came amid various proposals made by governments and NGOs for the funding of programs to deal with environmental concerns. Such proposals included a call by the heads of Non-Aligned countries in their 1989 Belgrade meeting to establish a special environmental fund, a specific proposal by the World Resources Institute to establish an international environmental facility,[79] and UNEP's proposed Fund for the Conservation of Biological Diversity. However, the matter came to the attention of the Development Committee through a proposal made by the Government of France in the September 1989 meeting of the Committee for an SDR 1 billion fund to be associated with programs of the World Bank. Consequently, the Bank participated in negotiations which led to the establishment of a fund for the purposes of the Montreal Protocol and took the initiative in establishing the more comprehensive Global Environment Facility.

A. The Interim Multilateral Fund

The Interim Multilateral Fund was established to assist developing countries in meeting their obligations under the Montreal Protocol. After several meetings held by an Open-Ended Working Group (of the Parties to the Protocol) on Financial Mechanisms, in which the Bank participated as an observer, a decision was made by the Parties to establish an Interim Multilateral Fund for the three-year period beginning January 1, 1991. This Interim Multilateral Fund is designed to

78. Development Committee Communique, *supra* note 51, at 4-6.

79. WORLD RESOURCES INSTITUTE, NATURAL ENDOWMENTS: FINANCING RESOURCE CONSERVATION FOR DEVELOPMENT (1989).

assist developing countries which are parties of the Protocol in complying with the requirements for early adoption of ozone-protecting technologies and the use of safe alternatives to ozone-depleting substances pursuant to Article 5 of the Protocol.[80] Contributions to the Interim Multilateral Fund are based on the UN scale of assessments, with a maximum of 25% for any one country, and with contributions to be paid in kind and/or in national currencies. Contributions from other sources are also encouraged. $240 million has been pledged so far under the Montreal Protocol.

The executive arm of the Parties for the operation of the Interim Multilateral Fund is the Executive Committee, which is composed of fourteen member countries. Seven of those members are developing countries which are potential recipients of financial assistance from the Fund and seven are industrialized contributing countries.[81] The principal functions of the Executive Committee are varied and include the following tasks in particular: 1) to develop and monitor the implementation of specific operational policies, guidelines and administrative arrangements, including the disbursement of resources; 2) to develop a three-year plan and budget for the Interim Multilateral Fund, including the allocation of resources among the three implementing agencies, namely, UNEP, UNDP and the Bank; 3) to develop criteria for project eligibility and guidelines for implementation of activities to be supported by the Interim Multilateral Fund; 4) to approve country programs for compliance; 5) to monitor and evaluate expenditures, performance (relative to plans), and annual contributions; and 6) to supervise and generally guide the administration of the Interim Multilateral Fund.[82] Additionally, the Executive Committee must discharge its tasks and responsibilities with the cooperation of the three implementing agencies as well as other appropriate agencies, according to their respective areas of expertise.

The role of the respective implementing agencies is novel and their collaboration was seen as a possible model which could open the way, as has actually happened, for future joint action by such agencies in dealing with global environmental issues. The role given to each agency under this arrangement is based on the concept of comparative advan-

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80. *See Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, United Nations Environment Program, UNEP-OzL. Pro. ⅔ (1990) [hereinafter UNEP Report].

81. The following countries are members of the Executive Committee at present: Canada, Finland, Germany, Japan, the Netherlands, USA, USSR, Brazil, Egypt, Ghana, Jordan, Malaysia, Mexico and Venezuela.

82. UNEP Report, *supra* note 80, at 45.

tage. The Bank will cooperate with the Executive Committee in administering and managing a program to finance specific investment projects which will enable developing countries to comply with their obligations. UNDP, with its recognized expertise in technical assistance, will assist in managing funds related to carrying out feasibility and pre-investment studies as well as other technical assistance activities. UNEP will cooperate with the Executive Committee in politically promoting the objectives of the Montreal Protocol and carrying out research, data gathering and clearing-house functions.[83] The Parties expect that, while the functions of these agencies will be technically distinct, they will be carried out in a manner which will ensure "complementarity, coherence and cost effectiveness." On this basis, the three agencies have entered into procedural arrangements which specify the nature and extent of their cooperation.[84] Pursuant to these arrangements, the agencies, while retaining their respective responsibilities for preparing their individual programs of activities, have agreed to consult with each other to ensure that they will achieve the objectives of complementarity, coherence and cost effectiveness. The arrangements provide for continuous consultation among the agencies as well as a high-level management meeting which is to take place every year within 90 days before the annual meeting of the Parties to the Protocol.

Each of the three agencies has entered into a separate agreement with the Executive Committee for carrying out the activities to be financed by the Interim Fund. The Bank's agreement, negotiated in June 1991, envisages the establishment of an Ozone Projects Trust Fund to be financed by the Interim Multilateral Fund and the preparation of an annual work program by the Bank, in cooperation with recipient countries, UNEP and UNDP, which will be approved by the Committee.

B. The Global Environment Facility

Concurrent with the negotiations of the Montreal Protocol Interim Multilateral Fund, negotiations were held for the establishment of a global environment facility based on the above-mentioned proposal for a separate facility made by the Government of France. These negotiations were completed in November 1990, and the Bank established a Global Environment Facility (GEF) in a resolution adopted by its Ex-

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83. *Id.* at appendix IV.

84. *See Procedural Arrangements Among the IBRD, UNEP and UNDP for Cooperation and Assistance in Protecting the Ozone Layer in the Context of the Vienna Convention for the Protection of the Ozone Layer and Its Montreal Protocol on Substances that Deplete the Ozone Layer*, Doc. 2516L (effective March 12, 1991).

ecutive Directors on March 14, 1991.[85] The GEF consists of the Global Environment Trust Fund (GET), initially envisaged as a three-year pilot program, Cofinancing Arrangements with the GET, the above-mentioned Ozone Projects Trust Fund (OTF), and other trust funds such as the Bank may agree to administer in the future within the framework of the Facility.

The GET is operated by the World Bank in cooperation with two partner agencies, UNEP and UNDP. Again, the tasks in this partnership are distributed according to the expertise and comparative advantages of each institution. The Bank administers the Facility's trust funds and is responsible for investment operations. UNDP coordinates and manages the pre-investment phase (financing and execution) and administers technical assistance. These activities will be facilitated by grants through a fund managed by UNDP and financed through the GET. UNEP coordinates research and data providing the overall scientific and technological guidance for selecting and evaluating projects. UNEP also heads a Scientific and Technical Advisory Panel (STAP) which gives advice on broad scientific and technical issues related to the Facility both to the Participants and to the three institutions involved. (STAP will also be financed through the GET.) The three institutions cooperate in identifying other agencies (e.g., NGOs and UN specialized agencies) to assess local project impact and to support project design and implementation.

The basic purpose of the Facility is to assist in the protection of the global environment and to promote environmentally sound and sustainable economic development in developing countries. These countries can address such concerns only through additional and concessional financing by the international community. Accordingly, the Facility will provide grants from core allocations to the trust funds or arrange concessional loans from cofinancing contributions to developing countries to assist them in implementing programs and activities for the protection of the global environment.[86] The proceeds of the trust funds established under the GEF will be used in four selected areas of global environmental priority, namely: 1) protecting the ozone layer consistent

85. Resolution 91-5 of the Executive Directors of the IBRD (March 14, 1991) [hereinafter Resolution 91-5].

86. Participants in the GEF agreed that Core Fund resources should be made available on a grant basis. As for the loans provided through cofinancing arrangements, "every effort will be made to blend the loans made, to achieve the same level of concessionality as if grant financing has been provided." Establishment of the Global Environment Facility (attachment A to World Bank document R91-34, February 25, 1991), at 17 [hereinafter GEF Document].

with the provisions of the Vienna Convention and its Montreal Protocol; 2) limiting emissions of greenhouse gases which have been found to be a major contributor to global warming; 3) protecting ecosystems and biodiversity in the developing countries; and 4) protecting international waters from industrial, wastewater and hazardous waste pollution. The Bank chose these four areas because it saw a need for measures which would benefit the world at large and were not otherwise fully financed by existing development assistance or environmental programs. Without GET's financial assistance, developing countries might not have the incentive to give priority attention to these areas of worldwide concern.

While the GET is funded by direct contributions from the participating countries, the OTF will be constituted by funds transferred to the Bank by the Executive Committee of the Interim Multilateral Fund under the Montreal Protocol referred to above, pursuant to the provisions of the agreement between the Bank and the Executive Committee. The Resolution also includes specific provisions relating to the cofinancing of projects pursuant to which interested donors may cofinance GET-funded projects. By April 1991, the U.S., Japan and Switzerland had indicated their intention to do so.

Participation in the GET is open to all states, except that, to be eligible, a country must contribute at least four million SDRs over eight years, the minimum contribution set for Part B (developing) countries.[87] Direct initial contributions amounted to SDR 561.5 million, to which other cofinancing arrangements would add SDR 219.82 million (grant equivalents) and the Bank some SDR 23.3 million from its FY90 net income. Country eligibility to benefit directly from the GET funding is limited — according to the Bank's report on the Facility (a negotiated document) — to "developing countries and territories with UNDP programs" with a per capita GNP at or below $4,000 in 1989. However, the resolution establishing the Facility also authorizes grants "for other activities promoting the purposes of the Facility . . . as determined by the Trustee," i.e., by the Bank. This presumably covers grants to other international or non-governmental organizations for eligible projects of global benefit.

Participants in the Facility are to meet semi-annually "to review the operations of the GET and the cofinancing arrangements" on the basis of reports prepared by the Bank after consultation with UNEP

87. Grant pledges to the GET have been initially made by 13 developed countries and 6 developing countries. Two of the contributing developed countries have also pledged to contribute to GET's activities through cofinancing by concessional loans. The U.S. has limited its contribution to such cofinancing arrangements. *See id.* at 14.

and UNDP.[88] The Bank's report on the Facility elaborates on this review role in several places. It mentions that "the terms and conditions for use of GEF resources will be established at the outset by the GEF participants."[89] Participants will also "review the application of the terms and conditions and determine whether any changes should be recommended."[90] In addition, they will review a free-standing project (a project unrelated to other projects financed by the Bank or another multilateral development bank) if its value is between $5 million and $10 million, even though the approval of such a project falls within the competence of the Bank's management.[91] Participants will also "discuss the overall policy framework governing the Facility; consider the proposed work programs of the three implementing agencies; and review the progress made in implementing these programs."[92] In addition, the Participants may agree, in rare cases, to finance a project not otherwise eligible for financing from the GET.[93]

Neither the Resolution establishing the Facility nor the negotiated document which led to its adoption provide for a voting system to be followed in the meeting of the Participants. It was presumed that the Bank, which chairs these meetings, would follow the sense of the meetings as summed up by the Chairman. This normally reflects the consensus reached in each meeting and has to be consistent with the Bank's Articles and resolutions.[94] Approval of projects financed by the GET is explicitly provided for in the negotiated document as falling outside the

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88. *See* Resolution 91-5, *supra* note 85, at 7, para. 7.

89. GEF Report, *supra* note 86, at 9, para 19. The report is not always clear on the distinction between the GET and the GEF as a whole.

90. *Id.* The document does not specify to whom the recommendation should be made. It is assumed, however, that such recommendation will be made to the Bank. There may be some inconsistency in giving the Participants the power to *establish* the terms and conditions and then only the power to *recommend* changes in them.

91. *Id.* at 7, para. 18. A free-standing project cannot exceed $10 million in value. A project smaller than $5 million is to be approved by Bank management without prior review by the Participants. *Id.* Projects otherwise financed by the Bank or another multilateral development bank are subject to the normal procedure for the approval of projects in such institutions.

92. *Id.* at 9, para. 19.

93. *Id.* at 5, para. 16.

94. The Bank document referred to above mentions that the Participants' agreement to finance an otherwise ineligible project will be reached by consensus. *Id.* at para. 16. The Resolution establishing the Facility explicitly states that it will be administered by the Bank according to its Articles, By-Laws, decisions (including that Resolution), any agreement made pursuant to the Resolution and such rules and regulations consistent with the above as the Bank may adopt. *See* Resolution 91-5, *supra* note 85, at para. A1.

mandate of the Participants' meetings.[95]

The cooperation arrangements for the GET among the Bank, UNDP and UNEP are similar to those of the Interim Multilateral Fund. It should be noted, however, that in this case, the agencies report to the participants of the GET and there is no intermediary entity such as the Executive Committee of the Interim Multilateral Fund. After consultation with the other two implementing agencies, UNEP established a Scientific and Technical Advisory Panel (STAP) for the Facility. STAP's activities include establishing specific guidelines, rendering technical advice, monitoring implementation of specific activities, developing scientific, technological, eligibility and implementation criteria, and providing technological options regarding the assessment of priorities.[96]

The projects to be financed out of GET resources must meet four conditions. They should be "consistent with global environment conventions," a requirement to be verified by UNEP. They should also be "consistent with the country specific environment strategy or program." They must utilize "appropriate technology from the spectrum of available options," and they must be "both cost effective and of high priority from the global perspective."[97] Furthermore, investments funded from the GET should be different from regular projects which could otherwise be funded. Typically, these would cover investments which are not justified in a country context if the full costs were to be born by the country alone and would thus need the additional financing from GET to be attractive to the country. Also, they would cover investments which are justified in a country context but would require more money to bring about additional global benefits. As already mentioned, projects which are economically viable on the basis of domestic benefits and costs "should not be eligible for GEF financing unless the participants agree in advance by consensus that — despite the attractive rate of return — the operation in question would not proceed without GEF involvement."[98] In addition, the participants have requested the implementing agencies to seek the advice of non-governmental organizations in both the design and implementation of such projects, especially in the area of biodiversity.[99]

While the Resolution provides that grants under the GET and the

95. *See id.* at 7.

96. *See* Report by the Chairman to the Participants Meeting to Discuss the Global Environment Facility (May, 1991).

97. *See* GEF Document, *supra* note 86, at 6-7.

98. *Id.* at 5.

99. *Id.* at 12.

OTF should be approved and administered by the Bank in accordance with the rules of the Bank, it is expected that the policies normally applicable to Bank-financed projects will be applied with flexibility. At the same time, however, it is expected that all projects will be designed to meet the normal Bank condition that the proceeds of any financing should be used only for the purposes for which they are given. In this connection, work has begun with a view to including global environmental considerations in the Bank's appraisal methodologies to guide Bank staff in the appraisal of eligible projects to be financed under the GEF. More specific guidelines are also being developed to ensure that there will be a clear distinction between GEF-financed projects and regular Bank-financed projects in order to maximize the use of the GEF resources.[100] The legal documents for GEF-financed projects to be administered by the Bank would follow the usual Bank format. An agreement would be entered into between the government or project-executing agency concerned and the Bank, as Trustee of either the GET or the OTF. The techniques described earlier in this article would be utilized to ensure that the objectives of the respective projects are achieved.

It is hoped that during its first three-year phase, the GEF will serve the vital need of providing a permanent mechanism not only for the initial four purposes for which it was established, but for all environmental concerns, especially those of global and regional interest. This goal will not be possible to reach, however, if the experience of the GEF's operations prove it to be a cumbersome mechanism for future cooperation.

C. *Other Grant Programs for the Environment*

As part of the effort to secure concessionary funding for environment-related activities of the Bank and its borrowers, the President of the Bank, Mr. Conable, announced to the Development Committee meeting in May 1989 the Bank's intention to establish a Technical Assistance Grant Program for the Environment. The program began later that month. The main contributor to the program was the Government of Japan, which on the basis of an arrangement signed between it and the Bank, agreed to provide 700 million yen.[101] The funds contributed under the program are to be used in the preparation of innovative projects designed to protect or enhance the environment or of project

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100. *See, e.g.*, 28 FINANCE & DEVELOPMENT 24 (March, 1991).

101. *See* Grant Facility for the Environment Agreement with the Government of Japan (July 14, 1989).

components in environment-related activities. For example, funds may be contributed to projects aimed at strengthening environmental policies and institutions, to land management projects, including land and resource surveys, to forestry projects designed to achieve afforestation or prevent deforestation, and to projects to conserve and protect natural heritage sites, biodiversity and cultural property. However, in selected cases, the funds may be used to implement pilot programs or to carry out environmental assessments of major projects expected to have adverse environmental impacts. All such projects must be consistent with the overall environmental priorities of the country concerned. Apart from Japan, other countries making commitments to this program now include Canada, Denmark, Finland, France, Norway and Sweden.

In each case where a project is selected for financing under this program, a grant agreement is entered into between the recipient government and the Bank, specifying the items to be financed, the responsibilities of the government and the Bank, and the rules applicable to the procurement of goods and recruitment of consultants. It should be noted that under this program, the Bank may execute projects on behalf of the government at the government's written request.

VII. Bank Participation in Negotiations of International Environmental Agreements

The Bank is a Specialized Agency of the United Nations and is required by its Articles to "cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields."[102] However, it is operationally independent of the United Nations and its political bodies. The Bank maintains a close relationship with other UN specialized agencies, particularly those with special responsibilities in economic and social sectors. In this context, it maintains an extensive and growing technical relationship with UNEP, the entity within the UN system which plays the role of catalyst and coordinator of environment-related issues. In this capacity, UNEP has been concerned with the promotion and development of environmental law, including international agreements and international guidelines, principles and standards.[103] While the Bank has participated in various negotiations leading to the conclusion of such agreements and the issuance of such guidelines and principles, its

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102. *See* Article V, § 8 (a) of IBRD Articles of Agreement; Article VI, § 7 of IDA Articles of Agreement.

103. For a description of the role of UNEP in treaty-making, *see* Peter H. Sand, Environmental Law in the United Nations Environment Programme (October, 1984).

close involvement with recent and ongoing negotiations on global environmental issues reflects its interest in achieving worldwide development on a sustainable basis. In addition, increasing attention is being paid to the mechanisms through which developing countries may finance activities for environmentally sound management of their resources. Thus, developing countries and UNEP are seeking the Bank's participation in this process. For example, the Bank participated as an observer in negotiations leading to the conclusion of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*.[104]

Apart from the two reasons referred to above, the Bank's participation in these particular negotiations also arose out of fears expressed by certain African member governments that hazardous wastes might be dumped in their countries, thereby hampering their efforts to bring about sustainable development. Prior to its involvement in these negotiations, the Bank had prepared a policy on the transboundary shipment and disposal of such wastes, particularly from developed to developing countries. In his statement on July 10, 1988 at the *Oslo Conference on Sustainable Development*, the President of the Bank, Mr. Conable, noted the Bank's commitment to the promotion of sustainable development and the fact that hazardous wastes could pose a danger to its achievement. He indicated that, within the framework of its lending policies and operations, "the Bank will not finance any projects that involve the disposal of hazardous wastes from another country nor will it finance the shipment of such wastes for disposal in any developing countries." The President stated further that the Bank was ready to cooperate with the international community in the development of a legal framework whereby international shipment of hazardous wastes would take place only with the prior, informed consent of competent government authorities, after certification that the transport method used meets international conventions and standards, and after assurances that the shipment will move through safe transfer facilities to appropriate and environmentally sound storage and disposal sites managed by experienced, responsible and certified operators under adequate monitoring safeguards.[105]

Representatives from the Bank participated actively in the negotiations of the Basel Convention and raised various issues, some of which

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104. 28 I.L.M. 657 (1989).

105. The above quotations may be found in Bank News Release 89/SI. *See also* Barber B. Conable, Manila Speech, The Challenges of Development (February 16, 1989).

received much focus in the context of the negotiations.[106] The Bank indicated that it would continue to support the efforts of developing countries by financing facilities for the environmentally safe disposal of internally generated hazardous wastes and providing training in the management of such substances.[107] The Bank also offered to assist such countries in devising appropriate legal and institutional frameworks to facilitate effective implementation of the provisions of the convention. Since the adoption of the Basel Convention, the Bank has published a three-volume technical paper on the safe disposal of hazardous wastes which takes into account the special needs and problems of developing countries.[108]

The Bank is now represented in all negotiations on global environmental issues such as biodiversity, climatic change, and funding assistance to developing countries under the Montreal Protocol. It is also pursuing ongoing efforts to arrange for greater climatic biological and chemical security through multilateral conferences and conventions. As new multilateral agreements and arrangements are reached on environment-related issues (such as the projected code of environmentally sound conduct "Earth Charter," and conventions on the global climate and on biological diversity), the need will arise for assuring compliance through financing incentives to compensate for the cost to be incurred by developing countries. The Bank is likely to remain the preferred forum for the administration of such mechanisms and may be called upon to play a role in devising and monitoring international environmental standards. For these reasons, the Bank can only assume a proactive role in the preparation of such future agreements and arrangements both before, during and after the projected 1992 United Nations Conference on Environment and Development (UNCED 92).

VIII. Conclusion

The detailed account provided in this article leaves no doubt as to the pervasive involvement of the World Bank in environmental issues. The Bank has become one of the leading international organizations

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106. Issues raised included the desirability of banning ocean dumping, careful and comprehensive definition of hazardous wastes, stringent certification and notification procedures, and appropriate provisions on liability.

107. Statement of Bank Representative to the Conference of Pleni-potentiaries on the Convention (March 22, 1989).

108. World Bank, The Safe Disposal of Hazardous Wastes: The Special Needs and Problems of Developing Countries (Technical Paper Number 93, Batstone, Smith & Wilson eds., 1989).

concerned with these issues in developing countries.[109] This is a particularly interesting phenomenon. Not only is environment not mentioned in the Bank's Articles of Agreement, but there are other international programs which, unlike the Bank, were established exclusively to deal with the environment.

Two reasons account for the Bank's increasingly deep involvement in environmental issues. First, the Bank, like many others concerned with the processes of economic growth and development, has come to realize from hard experience the possible detrimental effects of proceeding with economic development without paying adequate attention to its effect on the environment. The Bank has also become fully aware of the mutually reinforcing relationship between poverty and environmental degradation. "Sustainable development," as it has widely come to be called, cannot really be achieved at the expense of the environment. Second, many governments, as well as inter-governmental and non-governmental agencies concerned with the environment, have also come to realize the formidable role the Bank can play in the environmental field. The Bank is the premier development finance institution which can be counted upon to help mobilize the needed financial resources. It plays an acknowledged role as an intellectual leader which often sets the world agenda on development issues. It also assumes an important research and advisory function with respect to developing countries. Thus, the Bank has understandably become a focal point for the concerted demands, as well as frustrations, of many of those concerned with the environment.

The Bank goes far beyond its activities as a provider of financial assistance in the area of environmental issues in that it accepts a social responsibility in ensuring that its assistance enhances or at least does not undermine the quality of life in its borrowing countries. In addition to what may be termed "environment conditionality" in its project loans, the Bank now provides assistance to countries in the preparation of environmental action plans and strategies. Furthermore, it plays an important role in institution-building in the environmental field by helping countries to introduce appropriate legal and regulatory frameworks and to build up institutions capable of applying and monitoring the application of such regulations. This is particularly evidenced by the Bank's free-standing environment loans and some of its adjustment loans.[110] The Bank is now administering the Global Envi-

109. The Bank's increasing involvement with the environment led its former President to declare that "it must also be an environmental agency." Barber B. Conable, Speech at London Conference (March 20, 1991).

110. In addition to the free-standing environment loans mentioned *supra*, note 58,

ronment Facility with its two major trust funds. It also provides grants from trust funds to the IDA-only countries to enable them to prepare national environment plans and strategies. In fact, given the pace of the Bank's increasing attention to environmental issues, it would not be surprising if the Bank's future areas of special emphasis were to include what OXFAM calls "primary environment care" as much as they now include primary education and primary health care.[111]

The Bank's country-specific actions are complemented by international endeavors addressing global environmental concerns through international legal action (treaties and organizations) and through the concessional funding of activities of global interest which individual countries may find of low priority from a narrow national perspective. The Global Environment Facility administered by the Bank, in cooperation with UNDP and UNEP, may well provide an acceptable general framework within which additional funding of environmental activities with global effect, including those undertaken under present and future international conventions, may be channeled to developing countries.

Both in its country work and at the global level, the Bank's role is subject to continuous development and improvement. The previous Annex A to its Operational Directive on the environment has been revised in light of recent experiences and reissued as OD 4.01. Periodic reviews of the national environmental action plans which the Bank has helped countries to prepare are also underway. The Bank's own business plans for the coming three years envisage a substantial increase not only in lending for environmental improvement, but also in associated research work. The Bank's *World Development Report 1992*, which is devoted to environmental issues and draws on experiences in both industrialized and developing countries, should provide an opportunity to guide the

an illustrative list (in THE WORLD BANK AND THE ENVIRONMENT: A PROGRESS REPORT, FISCAL 1991 at pp. 111 to 126) of projects with environmental or energy efficiency components or objectives approved in fiscal 1991, includes thirteen projects with "primarily" environmental objectives (where the costs of environmental protection measures or the environmental benefit accruing from the project exceed 50% of the total costs or benefits) and ninety-one projects where environmental costs or benefits exceed 10% of total costs and benefits. About 50% of all approved loans contained components designed to deal with environmental issues in FY91.

111. "Environmental protection has been written into the constitutions of at least 37 countries," including such developing countries as Brazil, China, the Philippines and Thailand. While the practical effect of such constitutional provisions has been very limited, there is a clear trend towards the recognition of a right to a healthy environment and ensuing legal obligations. *See* L.K. Caldwell, *A Constitutional Law for the Environment: 20 years with NEPA Indicates the Need*, 31 ENVIRONMENT 6, 28 (1989).

Bank's work in this important area with a view to making it more effective and more responsive to international concerns.

The Bank's role in the protection and improvement of the environment and the changes introduced so far in its internal organization to allow it to play this role effectively may not be adequately known or appreciated. Nor could the effects of this role be measured in a particular country or region in the short term. This article is meant to contribute to a better understanding of this role. It should not, however, hide the fact that the Bank, like others, is still a beginner in this field and inevitably makes mistakes in the learning process. Its critics should also realize that the Bank was established to undertake activities which by their very nature introduce changes to the natural state of affairs. It has gone a long way to reconcile this developmental objective with conservation and preservation concerns. The Bank cannot be expected, however, to act only as a conservationist agency at the expense of the economic development objective it has been established to pursue. Nor should it do so. The inherent and circular relationship between poverty and environmental degradation points to the fact that the absence of economic development, rather than its presence, may greatly contribute to environmental damage. The global interest requires that a judicious and workable balance be struck between the requirements of development and those of a safe environment. Neither of these essential goals needs to be achieved at the expense of the other. On the contrary, the compatibility of the two goals requires that both should be fully reflected in the work of the Bank and the future efforts of its members.