CHAPTER-3

INTERNATIONAL DEVELOPMENT ASSISTANCE

3.1 Introduction

A pattern of exploitation developed that continues to exist today. Following the end of colonialism, it was commonly believed that the states of the South would be able to “catch up” to their Northern counterparts. Certainly, many Southern states were able to develop quickly and establish independent and strong socio-economic structures. However, many did not and are still struggling to do so today\(^1\). International development assistance has established itself as the common answer to this problem. States are recognizing the importance of the growing inter-connections between them and working to promote growth in underdeveloped states. Constructs of international development are increasingly being included in the foreign policies of states and other international bodies. Underdeveloped states have become the battlegrounds for issues like conflict and climate change and as such, global actors are recognizing the importance that promoting development and growth in these states has on the preservation of international order and to the success of all. This chapter examines the currently accepted liberal concept of international development assistance, assessing what development is, who is involved and how it has developed into its current form. This examination will then critique this mainstream perception through the lens of realist political thought, making conclusions as to an alternative understanding of international development assistance and its role in the study of international political economy\(^2\).

3.2 International Development

The creation of a comprehensive definition of development is a contested issue in current dialogue on the subject. What actually is development and how can it be defined? It is difficult to create a single statement that can encompass the multitude of factors and instances in which development is said to occur. Development

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processes vary as much as the societies that partake in them\(^3\). Development can however be understood as a set of principles that drive the many different components it can entail.

It is foremost important to understand what international development is not. Development “is not just a question of a one-off process of change to something better, but implies a process which builds on itself, where change is continuous and where improvements build on previous improvements\(^4\).” It is concerned, first of all, with the relationships between the economic and political domains across territorial boundaries. Second, attention should be paid to the role of the state as the focus of decision-making in a system of competitive states that is, in turn, interdependent within a transnational market economy.\(^5\) This economic focus is the result of international development’s origin.

This particular definition is important because meliorism has been defined by others as the innate desire of a society to improve another society’s conditions based on the former’s set of values”. It can, however, be generally accepted amongst all parties that, “over the long term it implies increased living standards, improved health and well-being for all, and the achievements of whatever is regarded as a general good for society at large.\(^6\)”

International development is very much a product of liberal theory; “the underlying assumption of political liberalism is the intrinsic value of individuals as the primary actors in the international system. Liberalism is thus permeated with a concern for enhancing the freedom and welfare of individuals\(^7\).” One can even go as far as saying that “the decisive role in defining development practice is the norms of a liberal international economic order (LIEO). In most general terms, these norms involve a commitment to free markets, private property and individual incentive, and

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\(^3\) Id.p.198  
\(^7\) Supra note 9, p.76.
a circumscribed role for government. Development then refers to processes that create the environments for people to prosper and acquire the ability to provide for them. Mahubal Haq, founder of UNDP’s Human Development Report, a series issued annually since 1990, explains: ‘the basic purpose of development is to enlarge peoples’ choices’. According to the most recent report, “development is about people. It is about expanding peoples’ real choices and the substantive freedoms – the capabilities – that enable them to lead lives they value.” In the current climate of world affairs, international development has become more important than ever. Poverty has become rampant across much of the globe and more than ever the difference between being developed and developing is staggering. There are more hungry people in the world than ever before, and their numbers are increasing. So are the numbers who cannot read or write the numbers without safe water or safe and sound homes, and the numbers short of wood fuel with which to cook and warm themselves. The gap between rich and poor nations is widening not shrinking and there is little prospect, given present trends and institutional arrangements, that this process will be reversed. (Thus, international development can be understood as a process, both economic and political, influenced by liberal theory whereby actors participate in order to create the conditions for the gap between developed and underdeveloped societies to be lessened. It is suitable, considering the complexity of defining international development, that the actors that participate in this process are just as varied as the definitions. Furthermore, the roles that these actors play can differ depending on the situation and who exactly is involved.

The public sector is the predominant party involved in the pursuit of development both home and abroad. Actors within the public sector include international organizations, governments, and non-governmental organizations (NGOs). One major source of international development assistance is international

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10 id p.82
13 id. p 10
organizations. These include organizations like the United Nations or the European Union and international financial institutions like the World Bank and the International Monetary Fund. In terms of their assistance “multilateral development banks mainly provide loans. The UN, European Union, and bilateral donors, however, primarily supply grants. Around three-quarters of the total concessional assistance of bilateral donors is in the form of grants. These grants support a broad range of activities, including sustainable development projects, education programs, technology transfers, food relief, and emerging assistance."  

In domestic politics, governments routinely act as a buffer between the interests of the private sphere and the interests of all its citizens. The aim is to promote economic growth while ensuring the welfare of the citizenry. The same applies in international development; “the rationale for involving government in social protection, rather than leaving action to the private sector, relates to the inability of the private sector, unaided, to solve two problems: firstly the low level of income (and hence high poverty) of some individuals or groups, and secondly the vulnerability of others to transient poverty due to high variability of incomes and lack of effective consumption smoothing strategies." This does not, however, mean that the public sector does not have a role in international development.

The private sector's involvement in international development is to promote economic growth with the intention that human development will emerge from this growth. This has largely taken the form of public-private relationships, which are agreements between the traditional bodies (states and international organizations) and corporations in the private sector. These partnerships have grown as a result of the increasing "disillusionment with the UN and its agencies. Concerns about the effectiveness of the UN, including increasing evidence of overlapping mandates and interagency competition, led directly towards the establishment of partnerships to deal with specific and limited issues." “Most donor agencies see their role as supporting

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long-term reductions in poverty, which offers an eventual reduction in the need for aid, rather than providing protection of livelihoods, especially where such assistance has characteristics of a recurrent service with no clear exit.”

A common trend that has emerged is that the majority of the parties that provide assistance for development come from a select group. It is “the rich and powerful who are in the position to be able to promote development. Unfortunately, they are likely to do so in ways which benefit themselves.”18 Each of these types of actors may have the same goal in mind but their motivations are quite different19. “Why should the world’s richest countries support the efforts of its poorest countries to adapt to the human development case for urgent international action is rooted in the ethical, social and economic implications” that are inherent in the problems that development attempts to address20. But why then would the private sector be interested in promoting international development. Simply put, “the private sector is central to the lives of the poor because all poor people are consumers, and because most earn income in the private sector, whether by working for a business or by running one”. Corporations can build favour and customer bases by ensuring that people in developing societies have the ability to acquire the goods and services they need to survive, including those that the involved corporations may sell21.

3.3 The Growth of International Development

“Development was now a ‘euphemism’ used to refer to United States hegemony, and it was ideals and ‘programs’ from the United States and its (Western) European allies which would form the basis of development everywhere.”22 At this point development’s nature was international in that the actors were trying to develop states other than their own but it did not reflect the level of globalization that it has become. “Mainstream explanations of the development process and evaluative judgments of the goals of development were both conducted within a national frame

19 Id.p.96
of reference. Promoting international trade was not as important as building stable, national economies. These rebuilt economies would reflect liberal qualities to combat against the spread of communist ideals.

As the Cold War waned and the threat of communism lessened, a new trend in international development arose, based on the growing popularity of neo-liberal economic theory, and called the Washington Consensus. Much like the initial stages of development, this practice was rooted in the political and economic aims of US policymakers in Washington, D.C.; hence the name. “Rather than combining normative economic nationalism with a methodological internationalism, the Washington Consensus was its mirror image. It combined normative economic internationalism with a methodologically nationalist form of explanation which attributed what was happening within countries mainly to national factors and policies.” The idea behind this policy agenda was to promote development through the economic side of development. “The main types of policy changes called for were those that opened up developing-country economies to the world economy. The purpose was to facilitate trade and investment and ultimately economic growth.”

“These structural adjustment loans have enabled the IMF and World Bank to wield considerable influence over economic policies and outcomes in poor regions of the world. Not only are these agencies themselves a significant source of funds to developing countries, but their policy advice also influences other development banks as well as donor states”. Other sources of development aid began to require that applicant states adopt these policies and receive approval from the IMF and World Bank before they could qualify for any assistance programs. Unfortunately, these policies subjected the fate of citizens in developing nations to the exploitive nature of the private sphere. Developing counties “argued that exploitation by global capitalists was a core reason for their high levels of poverty in the first place. Global economic institutions were singled out for pushing them to export raw materials on declining terms of trade this led to many developing countries to call for global economic

25 “G-15Meet” Times of India, 18 April 1993
reforms as part of efforts to solve” international development and environmental issues.”

This has led to the evolution of “sustainable development” or development that promotes growth while accommodating for long-term realities including environmental impact and patterns of poverty. This means “the current view of the developmental state can be encapsulated in the concept of good governance, in which the state connects to citizens, civil society, and the private sector in ways that enable socio-economic progress but also are characterized, by accountability, transparency, responsiveness, participation, and equity.”

This shift away from the neo-liberal policies and towards the ideals of sustainable development can largely be attributed to the outcomes of the Millennium Conference. “In 2001, the UN-sponsored summit set forth eight goals known as the Millennium Development Goals (MDGs). These goals are designed to reduced poverty and promote sustainable human development in direct response to globalization. For each substantive goal (poverty reduction, better education, improved health, environmental sustainability, and global partnerships), there are specific targets, time frames and performance indicators with an implementation plan.”

3. 4 Realism in International Development

A pioneer in realist political thought, Hans J. Morgenthau, believed that “international politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is the immediate aim.” Power can mean many things in terms of this reference; it can mean political influence, wealth, manpower and/or military strength. For Morgenthau, “the main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest in terms of power.”

30 Id.p.95
International development assistance “has, through its history, been driven by more than a concern for development and development strategy. It has also been driven by the political, economic, and institutional circumstances of both donors and recipients, which have led them to engage in development assistance”. For the purposes of this analysis, the array of international development actors described previously (states, international organizations and non-governmental actors) will be considered legitimate actors in international politics. This may contradict the fact that political realism considers states to be the only legitimate actor but this paper’s conception of actors will reflect current realities in the relations of nations. Development assistance, from the perspective of realism, is an excellent way to acquire the power and influence necessary to pursue one’s interests. Development practices can achieve this by building goodwill, influencing domestic policies both home and abroad and, in building communities of nations with favourable policies towards donors. International development assistance is an excellent way to build the diplomatic credit or “soft power” that has become a necessity for achieving one’s interests in today’s international community.

International Development can also be used by actors to achieve domestic conditions, both home and abroad, which are in their best interests. It is a common practice in international development for states to “use economic statecraft both positive and negative sanctions to try to influence other states. Positive sanctions involve offering a ‘carrot’, enticing the target state to act in a desired way by rewarding moves made in the desired direction. The assumption is that positive incentives will lead the target it to change its behaviour” to follow the policies of the donor state. This has traditionally been found in the private sector’s development activities. This takes the form of Foreign Direct Investment (FDI), which is investment by foreign entities into the domestic economies of states. This can have an immense impact on developing economies because of the desire by the developing states to attract foreign investors.

3.5 Forms of Development Assistance

The area of development economics is infinitely complex. The variables considered are similarly extensive, essentially economic but also social, cultural, political and legal. The approaches and strategies of International Development Assistance from the end of the Second World War have evolved over time. There have been constant interactions among the development theories, actual world events and the assistance effort. A number of organizations are active in the development assistance field at a number of different levels; national, bilateral, regional, international, non-governmental and private. Though some of them have ancillary expectations, but related to ideology or foreign policy, which seek improved economic conditions for the aid recipients.\(^{34}\)

International development assistance comes in different forms. The main forms of development assistance are:

- Aid
- Issuing of loans
- Relief from economic burdens such as relief from debts
- Measures which promote investment
- Provision of dispute resolution apparatuses
- Assistance of technical nature

The provision of the above can emanate from international economic organizations, private companies and States. For this reason, assistance need not necessarily come from nation states alone. It may be a corporation from the private sector which provides for this. But the role of the

3.6 The World Bank

The International Bank for Reconstruction and Development (IBRD), popularly known as the World Bank, owes its birth to the deliberations of the United Nations Monetary and Financial Conference which met at Bretton Woods, New Hampshire, to prepare the final text of the Articles of Agreement of the International Monetary Fund and the IBRD, from July 1 to July 22, 1944.\(^ {35}\) The World Bank was


\(^{35}\) Id.p.347
established on December 25, 1944 when the Articles of Agreement of the Bank were ratified by the requisite number of member governments. The global war had completely dislocated the multilateral trade and had caused massive destruction of life and property. The economies of England and other countries in Europe had been completely shattered. While the need for promptly reconstructing the war-damaged economies of European countries was recognized, it was also recognized that stable world peace was threatened from the presence of great disparities in incomes and wealth manifested in the wide differences in the standards of living between the developed and the underdeveloped countries. Consequently, the problem of raising the standard of living of the vast masses of people of the underdeveloped countries brought to fore the need to develop the economies of these countries. Thus, the Bretton Woods Conference was also responsible for establishing the IBRD\textsuperscript{36}.

The principal purposes or functions of the World Bank are:

1. To assist in the reconstruction and development of the territories of its member governments by facilitating investment of capital for productive purposes,
2. To promote foreign private investment by guarantees or through participation in loans and other investments of capital for productive purposes,
3. Where private capital is not available on reasonable terms, to make loans for productive purposes out of its own resources or out of the funds borrowed by it, and,
4. To promote the long-range growth of international trade and the maintenance of equilibrium in the balance of payments of members by encouraging international investment for the development of the productive resources of members\textsuperscript{37}.

3.7 Membership and Organization

Any country is eligible for membership of the World Bank if it subscribes to its Charter under the Bank’s Articles of Agreement. Only those countries which are members of the International Monetary Fund can be considered for membership of IBRD. Subscriptions by member countries to the capital stock of IBRD are related to


each member’s quota in the IMF, which reflects the country’s relative economic strength. A member can withdraw at anytime its membership of the Bank. Its withdrawal, however, is effective upon receipt by the Bank of a written notice from the member to that effect. Failure to fulfil its obligations toward the Bank may lead to suspension of a member. Even when a government ceases to be a member, it is obliged to repay on demand its portion of the losses, if any, sustained by the Bank on its operations till the date when that government ceases to be a member.38

3.7.1 Capital

At the time of establishment, the authorised capital of the World Bank was $10,000 million which was divided into 1,00,000 shares of $1,00,000 each. Of this $9,400 million was subscribed. A member’s total subscription in the capital of the Bank is divided into following three parts.

I. Two per cent of the subscription is payable in gold or US dollars and is freely available for lending.

II. 18 per cent of the subscription is payable in member’s own currency and is available for lending with the consent of the member whose currency is involved, and

III. The remaining 80 per cent of the subscription is not available for lending and is subject to call as and when required to meet the Bank’s obligations.

The capital of the Bank provides it with substantial lending resources from its paid-up capital (20 per cent) and much more sizeable guarantee resources to enable it to mobilise private capital for international investment either through the sale of Bank’s obligations to private investors or through the Bank guarantees of private international credit.39 As a consequence of the enlargement of the World Bank’s resources in the form of increase in members’ subscriptions and as a result of the increase in its membership, the total subscribed capital of IBRD has increased to US $1,82,426 million which is 97 per cent of its balance amount of US $1,71,378 million is subject to call.40

40 Id.p.97
The principal purpose of increasing the Bank’s capital resources is to increase its ability to lend for financing projects for economic development. Under the Bank’s Articles of Agreement, the amount of Bank’s disbursed and outstanding loans cannot exceed the total of its subscribed capital and reserves. Now that Bank’s capital resources have been augmented in a large measure, the Bank is in a stronger position to extend its lending activities. All members, especially the less developed nations, feel gratified at this step to augment the capital resources of the Bank.\textsuperscript{41}

3.7.2 Activities

The fundamental aims underlying the World Bank’s activities are:

1. The Bank is not intended “to provide the external financing required for all meritorious projects of reconstruction and development (but) to provide a catalyst by which production may be generally stimulated and private investment encouraged.\textsuperscript{42}"

2. “The Bank should encourage necessary action by the member governments to ensure that the Bank’s loans will actually prove productive. The promotion of sound financial programmes, the removal of unnecessary barriers, and the regional integration of production loans, where appropriate, are some of the fields in which the Bank may be able to exert a helpful influence,” and

3. “The Bank must play an active rather than a passive role (and take advantage of its international cooperative charter) to initiate and develop plans to the end that the Bank’s resources are used not only prudently from the standpoint of its investors but wisely from the standpoint of the world\textsuperscript{43}.”

4. The World Bank is more than the usual type of lending institution. Its concern is primarily to ensure that its loans make the greatest possible contribution to increasing the production, raising the investment in borrowing member country. As matter of policy, the IBRD does not reschedule payments. Under its Articles of Agreement, the Bank cannot allow itself to be influenced by the political character of a member country; only economic considerations are relevant. It also seeks to ensure that the developing country gets full value for the money it borrows from

\textsuperscript{43} Official website of the World Bank.
the Bank. Consequently, Bank’s assistance is untied in that it can be used to purchase goods and services from any member country\textsuperscript{44}.

Over the course of time, the scope of Bank’s assistance to its members in their economic development has been considerably widened. From the monolithic, engineering-oriented projects of the late 1940s and the early 1950s, the concept of ‘Bank projects’ has developed to the multifaceted oriented-to-policy and demonstration projects and the limitations supposed to be inherent in the concept of lending for ‘projects’ have been greatly ‘modified.’ In its early years, most of the Bank’s lending was for ‘hardware’ projects which simply added to physical work or goods in the economy, like dams, roads and power plants\textsuperscript{45}. Now, the Bank is lending frequently for ‘software’ like education, health, population and nutrition, social sector, urban development, water supply and sanitation etc\textsuperscript{46}.

3.8 Lending Operations

The Bank makes loans to members in any one or more of the following ways:

1. By granting or participating in direct loans out of its own funds.
2. By granting loans out of the funds raised in the market of a member or otherwise borrowed by the Bank, and
3. By guaranteeing in whole or part loans made by private investors through the investment channels.

The total outstanding amount of the loans made or guaranteed by the Bank is not to exceed 100 per cent of its total unimpaired subscribed capital, resources and supplies. Before a loan is made or guaranteed, the Bank ensures that the

(i) Project for which the loan is asked has been carefully examined by a competent committee as regards the merits of the proposal,
(ii) Borrower has reasonable prospects for repayment of loan,
(iii) Loan is meant for productive purposes, and

\textsuperscript{44} P. Subba Rao, \textit{International Monetary Fund and Developing Countries, Economic and Business Review}, (1979), p.87.
\textsuperscript{45} Supra note 75, p.34.
(iv) Except in special circumstances the loan is meant to finance the foreign exchange requirements of specific projects of reconstruction and development.

The World Bank normally makes medium and long-term loans, the term being related to the estimated useful life of the equipment or plant being financed. The Bank keeps itself informed on the projects which it finances by means of periodic reports received from the borrower and through on-the-spot inspections by its representatives. The interest rate charged by the Bank on its loans is the estimated cost to the Bank of borrowing money for a comparable term in the money market and is uniform without any distinction being made among the borrowers.\textsuperscript{47}

3.9 Technical Assistance and Other Activities

Apart from giving massive loan assistance to its members for various economic development projects, the IBRD has also been giving technical assistance to members on matters relating to loan operations, particularly in regard to:

1. Defining priorities among different projects.
2. Modifications in the technical plans for project designed to reduce its cost or to make it more efficient, and
3. Administrative or organisational arrangements for a project or as to plans for its financing, including the raising of local capital.\textsuperscript{48}

The Bank has also provided technical assistance in development programming through various Survey Missions which make intensive studies of national resources of developing member countries and make recommendations to serve as the basis of long-term development programmes. The Bank has made surveys in the member countries providing valuable unbiased expert advice to governments of the surveyed countries on economic development and matters relating to policy formulation. The provision of technical assistance continues to be an integral and important element in Bank’s work. By far the largest element is the advice and assistance given by the Bank in the normal course of economic and sector work, and identification, preparation, appraisal and supervision of projects supported by the Bank. For this reason alone, some of the Bank’s member countries which no longer require a net

transfer of resources from the Bank nevertheless want the Bank to continue project lending to key sectors of the economy in need of the technical assistance, including assistance in establishing strong national institutions to promote development\textsuperscript{49}.

During 1996-97, the IBRD subjected its technical assistance to considerable scrutiny as its performance had not been satisfactory. The Bank-supported technical assistance in the early years and through the 1970s and much of the 1980s had focussed on engineering assistance in designing bridges, dams, highways, telecommunications systems\textsuperscript{50}. In recent years, however, technical assistance has increasingly been directed at capacity building entailing a more complex process of creating and disseminating knowledge for development purposes at all levels of society. It is largely culture bound and process oriented. The Institutional Development Fund established in 1993 has provided grants for capacity building activities not directly linked to Bank operations. Since its inception up to 1997, the Economic Development Institute, held more than 30 governance-related activities in more than a dozen countries across the five regions\textsuperscript{51}.

The World Bank has also promoted international peace by successfully resolving difficult international disputes. It settled the dispute between the United Kingdom and the United Arab Republic on the nationalization of Suez Canal. The Bank added another important feather to its cap when it successfully liquidated in September 1960 one of the toughest and most frustrating disputes between India and Pakistan over the sharing of the waters of the Indus System of rivers. But for the sincere endeavours which culminated in the creation of Indus Basin Development Fund, the dispute would never have been resolved. In bringing about this settlement of a most knotty problem, the World Bank had been motivated by a sincere desire to remove sources of threat to world peace.

Bank’s activities have been further diversified by taking urban development, population planning and tourism within its activities and a Population Projects Development and a Population Studies Division have been set up in the Economic

Department of the Bank. Bank’s first population mission, consisting of 33 staff members and three outside experts visited Jamaica in 1976-77 to assist that country’s government in preparing a long-range family planning programme. To assist the developing countries in increasing their foreign exchange income through the development of tourism, the Bank has established a new Tourism Projects Department which provides technical assistance to the International Finance Corporation on possible new IFC tourist investments. Bank’s tourism missions have visited many countries.

In addition to the conventional loans which it has made available for development projects, the World Bank has made sincere efforts to secure outside assistance from developed countries for under-developed countries. Due to the sincere efforts of the Bank, a consortium of 12 lending western nations known as ‘Aid India Club’ comprising the UK, the USA, West Germany, Japan, France, Canada, Italy, Sweden, Austria, Belgium, the Netherlands and Holland was formed to help India out of her foreign exchange difficulties. The Club had provided $ 5,472 million financial assistance to India during the Third Plan period to aid India’s economic development programme. The India Development Forum, which is a consortium of international donors had pledged further liberal total assistance of $ 66.9 billion to India during the fiscal years beginning from 1988-89 to 1997-98. The Bank also established a ‘Help Pakistan Club’ with the USA, UK, Japan and other West European countries as members, with a view to inducing these countries to raise finances for Pakistan’s planned economic development. At the request of both donor and recipient governments, the Bank has taken the lead for many years in organising aid coordination mechanisms for a number of developing countries which received assistance from several bilateral and multilateral sources. The establishment of International Development Association, nicknamed as ‘soft loan window’ from which underdeveloped countries have borrowed in hard currencies without being worried to repay in the same currencies and the amendment to the Charter of International Finance Corporation to enable it to provide equity capital to private industrial

undertakings in the underdeveloped countries are important developments to which the World Bank has made substantial contribution\textsuperscript{54}.

The Bank’s lending to poor countries among the developing countries with annual per capita income of below $296 has risen more than ten times from the low annual average of $800 million in 1981-82 to more than $8,000 million in 1996-97. Further, the sectoral shift in Bank’s lending has been increasingly in favour of agriculture and rural development, transportation, education, multi-sector, urban development, social sector and industry – sectors whose development is vital for the growth of borrower countries’ economies\textsuperscript{55}. The poverty alleviation programme initiated by the Bank and the Joint Initiative by the Bank and IMF to reduce the external debt burden of heavily indebted poor countries is indeed praiseworthy\textsuperscript{56}.

\textbf{3.9.1 Criticisms}

The \textit{modus operandi} of the Bank has been criticised on various grounds. It is alleged that the Bank charges a very high rate of interest on its loans, even when its loans are guaranteed by governments of the borrowing member countries and there is no risk of loss of capital. These is truth in it because the loans India received from the Bank bear interest of over seven per cent including the commission of one per cent which is credited to the Bank’s special reserve fund. While there is no harm in the Bank being run on sound business principles, it should not be devoid of missionary helping spirit \textit{vis-a-vis} the borrowing countries because it was created to be an active instrument in the establishment of lasting international economic peace by making it possible for the economically weaker nations to come up by mobilising their resources. This purpose of the Bank can be fulfilled only when the rate of interest charged by the Bank is low enough for all countries to enable them to take loans from the Bank more frequently. Besides, the commission of one per cent which the Bank charges on its loans does not have much sense in it. Now, however, the Bank has adopted a new more rational formula for determining the interest rate which it charges on new loans after July 1, 1976. Under the new formula, the Bank’s lending rate is reviewed quarterly and will be 0.5 per cent above the weighted average cost of funds.

\textsuperscript{55} P. Sands, \textit{“International Law in the Field of Sustainable Development”} (1994) B. Y.L.L 303
borrowed by the Bank in the preceding 12 months. As a consequence of this new approach to charge the rate of interest on the funds lend to members, the Bank’s lending rate has become flexible and varies from time to time according to the conditions prevailing in international money and capital markets.

The Bank’s insistence on the presence of transfer or repaying capacity in the borrower country before granting the loan is faulty. The Bank should not apply orthodox standards of judging the transfer capacity of a borrower country. The transfer capacity follows rather than precede the utilisation of the loan. It is created as the projects financed by loans materialise. In an underdeveloped country with its vast untapped resources awaiting exploitation, search for the transfer capacity before granting the loan is a misnomer that falls considerably short of wisdom on the part of the World Bank.

The Bank is a non-political and nonpartisan institution. It is expected to treat all members equally being enjoined not to discriminate against some and in favour of others in granting the loans. It should give loans purely on merit basis. However, in practice, loans have not been given purely on merit and economic considerations. It is only recently that economically backward countries of Asia and Africa have caught the eyes of the Bank. And even now the position is alarming. While the Bank claims to have given loans in an increasing amount to the Asian and African countries during 1954-55 to 1996-97, with the result that the total percentage of loans to these two areas has risen from 23 per cent to more than 80 per cent, these is another aspect of the picture also. Asia and Africa have taken together the largest population, area and unexploited economic resources in the world. Furthermore, the people are poor notwithstanding the richness of the resources. Consequently, the phenomenon of “actual poverty amidst potential plenty” is in full swing in these continents. On the contrary, Europe and Western Hemisphere are smaller both from population and area considerations and even then they have received huge amounts of loans. All this cannot be defended on economic consideration alone. While it will be ungenerous to belittle the importance of the Bank in reshaping and moulding economic structures of the countries to which the Bank’s loans have flowed, it is still far from playing an effective role in developing properly the economies of the member countries.
3.10 World Bank Group: Its Institutional\textsuperscript{57} Aspects

The World Bank Group, also referred to as the Bank Group, is one of the world’s largest sources of funding and knowledge for developing countries. Its main focus is on helping the poorest people and the poorest countries. Through its five institutions, the Bank Group uses financial resources and extensive experience to help developing countries reduce poverty, increase economic growth, and improve the quality of life. The institutions that make up the World Bank Group specialize in different aspects of development, but they work collaboratively toward the overarching goal of poverty reduction. The terms “World Bank” and “Bank” refer only to IBRD and IDA, whereas the terms “World Bank Group” and “Bank Group” include all five institutions. The World Bank Group\textsuperscript{58} comprises the following:

- The International Bank for Reconstruction and Development (established in 1946)
- The International Development Association (established in 1960)
- The International Finance Corporation (established in 1965)
- The International Centre for Settlement of Investment Disputes (established in 1966)
- The Multilateral Investment Agency (established in 1988)

Each institution plays a different role in the World Bank’s mission for global poverty reduction and the improvement of living standards. For example, the International Bank for Reconstruction and Development focuses on middle income and creditworthy poor countries, whereas the International Development Association is mainly concerned with the poorest countries in the world. Together these provide

\textsuperscript{57} The term ‘Institution’ is very broad and goes beyond the public sector. It encompasses an amorphous concept meant to include organizations, associations, informal groupings and unspoken understandings. Among the institutions critical to development, public sector institutions (any institutions that shape the way public functions are carried out in World Bank) are the most important for governance purpose.

\textsuperscript{58} The term “world bank” was first used in reference to the International Bank for Reconstruction and Development (IBRD) in an article in The Economist on July 22, 1944, in a report on the Bretton Woods Conference. The first meeting of the Boards of Governors of IBRD and the International Monetary Fund (IMF), which was held in Savannah, Georgia, in March 1946, was officially called the “World Fund and Bank Inaugural Meeting,” and several news accounts of this conference, including one in the Washington Post, used the term “world bank.” What began as a nickname became an official shorthand for IBRD and IDA in 1975.
low-interest loans, interest-free credit and grants to developing countries. The twin pillars of its strategy for reducing poverty are:

- Supporting the creation of a favorable investment climate, and
- Empowering poor people.

Today, the World Bank Group is

- the world’s largest funder of education
- the world’s largest external funder of the fight against HIV/AIDS
- a leader in the fight against corruption worldwide
- a strong supporter of debt relief
- the largest international financier of biodiversity projects, and
- the largest international financier of water supply and sanitation projects

Through its five institutions, the Bank Group works in more than 100 developing economies, bringing a mix of financing programs and ideas to improve living standards and eliminate the worst forms of poverty. This role has grown in relative importance in the world of international finance in recent years as private sector net financial flows to developing countries have declined\(^59\).

**3.11 The World Bank: IBRD and IDA**

For all its clients, the Bank emphasizes the need for;

- Investing in people, particularly through basic health and education
- Focusing on social development, inclusion, governance, and institution building as key elements of poverty reduction
- Strengthening the ability of the governments to deliver quality services efficiently and transparently
- Protecting the environment
- Supporting and encouraging private business development
- Promoting reforms to create a stable macroeconomic environment that is conducive to investment and long-term planning.

Effective poverty reduction strategies and poverty-focused lending are central to achieving the Bank’s objectives. Bank programs give high priority to sustainable social and human development and to strengthened economic management, with a growing emphasis on inclusion, governance, and institution building. The Bank has helped build a consensus in the international community that developing countries must take the lead in creating their own strategies for poverty reduction. It also plays a key role in helping countries implement the Millennium Development Goals, which the United Nations and the broader international community seek to achieve by 2015. In conjunction with IFC, the Bank is also helping countries strengthen and sustain the fundamental conditions they need to attract and retain private investment. With Bank Group support both lending and advice governments are reforming their overall economies and strengthening banking systems. Investments in human resources, infrastructure, and environmental protection help enhance the attractiveness and productivity of private investment.

### 3.11.1 IBRD: International Bank for Reconstruction and Development

IBRD, established in 1945, is the original institution of the World Bank Group and the source of the loans for which the Bank Group is best known. IBRD remains what many people mean when they refer to the World Bank. It has the largest country membership, the broadest mission, and the greatest number of staff in the Bank Group, both at headquarters and in the field.

Specifically, IBRD

- Supports long-term human and social development needs that private creditors do not finance
- Preserves borrowers’ financial strength by providing support in crisis periods, when poor people are most adversely affected
- Uses the leverage of financing to promote key policy and institutional reforms (such as safety-net or anticorruption reforms)

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62 Id. p.39
• Creates a favorable investment climate in order to catalyze private capital
• Provides financial support (in the form of grants made available from IBRD net income) in areas that are critical to the well-being of poor people in all countries.

IBRD helps members achieve results by delivering financial products, knowledge and technical services and strategic advice, while using its capacity to call members together to discuss ways to further their specific development objectives. It strives to increase its impact in middle-income countries by working closely with the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA); capitalizing on middle-income countries' own accumulated knowledge and development experiences; working closely with the International Monetary Fund (IMF) and other multilateral development banks; and collaborating with foundations, civil society partners and donors in the development community.\(^{64}\)

IBRD has three main business lines:

1. Strategy and coordination services
2. Financial services
3. Knowledge services comprising:
   (a) Poverty assessments
   (b) Social and Structural Reviews
   (c) Public Expenditure Reviews
   (d) Sector Reports
   (e) Country Economic Memoranda
   (f) Knowledge Sharing

3.11.2 The Sources of Finance

IBRD raises most of its funds on the world's financial markets.\(^{65}\) It has become one of the most established borrowers since issuing its first bond in 1947 to finance the reconstruction of Europe after World War Two. Investors see IBRD bonds as a safe and profitable place to put their money and their cash finances projects in middle-income countries.\(^{66}\) IBRD became a major player on the international capital markets by developing modern debt products, opening new markets for debt issuance, and by

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building up a broad investor base around the world of pension funds, insurance companies, central banks, and individuals\textsuperscript{67}.

3.11.3 IDA: International Development Association

After the rebuilding of Europe following World War II, the Bank turned its attention to the developing countries. In the early 1950’s, reports from the United Nations and the U.S. government supported the establishment of a programme to lend to poor countries on concessional terms with the backing of multilateral donors. It became clear that the poorest developing countries could not afford to borrow capital for development on the terms offered by the Bank; hence, a group of Bank member countries decided to found IDA as an institution that could lend to very poor developing nations on easier terms. To imbue IDA with the discipline of a bank, these countries agreed that IDA should be part of the World Bank\textsuperscript{68}. With an initial funding of $912.7 million, IDA was launched on September 24, 1960 with 15 signatory countries - Australia, Canada, China, Germany, India, Italy, Malaysia, Norway, Pakistan, Sudan, Sweden, Thailand, United Kingdom, United States, and Vietnam\textsuperscript{69}.

IDA emphasizes broad-based growth, including:

- Sound economic policies, rural development, private business, and sustainable environmental practices
- Investment in people, in education and health, especially in the struggle against HIV/AIDS, malaria, and TB
- Expansion of borrower capacity to provide basic services and ensure accountability for public resources
- Recovery from civil strife, armed conflict, and natural disaster
- Promotion of trade and regional integration

The operations financed by IDA address primary education, basic health services, clean water and sanitation, environmental safeguards, business climate


improvements, infrastructure and institutional reforms. These projects pave the way toward economic growth, job creation, higher incomes and better living conditions.

In fiscal year 2013 (which ended June 30, 2013), IDA commitments totaled $16.3 billion (including IDA guarantees), of which 15 percent was provided on grant terms. New commitments in FY13 comprised 183 new operations. Since 1960, IDA has provided $271 billion to 108 countries. Annual commitments have increased steadily and averaged about $16 billion over the last three years.

3.11.4 Fund Replenishments

IDA is funded largely by contributions from the governments of the industrial member countries. Representatives of donor countries meet every three years to replenish IDA funds. Their cumulative contributions since IDA’s beginning total some US$109 billion. Additional funds come from repayments of earlier IDA credits and from IBRD’s net income.

3.11.5 Crisis financing

IDA countries are subject to a variety of crises and emergencies that can undermine their economic and social development efforts. These include economic shocks such as food, fuel and financial crises, and natural disasters, such as droughts, earthquakes, floods, tsunamis and storms. IDA countries have limited capacity to address the impact of such crises given their limited resources, infrastructure gaps, limited economic diversification, environmental vulnerabilities, widespread poverty and often poorly developed formal safety nets. The long-term development effects of the crises often include lower growth, destruction of infrastructure assets, and declines in government revenues and resources for core development spending.

3.11.6 Fostering Gender Equality

Gender equality is a key priority for the International Development Association (IDA), the World Bank’s fund for the poorest. IDA works to reverse millennia of gender discrimination by getting girls to school, helping women access land titles and financing to start small businesses, and ultimately helping to improve

70 Art. 1 Para 1 of CERDS and see for example N. Schrijver, (1997) p19.
the economic prospects of families and communities\textsuperscript{72}. IDA is uniquely suited to support gender equality outcomes, which requires integrating work across multiple sectors and sustaining efforts over long periods. Progress on key gender indicators—such as girls’ school enrollment and completion rates, maternal mortality, labor force participation, and asset ownership also depends on investments in water, sanitation, transport, productive assets, and access to financial services\textsuperscript{73}. While many agencies cover gender issues in education and health, few can match IDA’s potential to provide complementary support in infrastructure, private sector development, agriculture, and financial service delivery. All are essential to expanding women’s economic opportunities.

\subsection*{3.11.7 Conflict-Affected States}

While millions are stepping out of poverty in developing countries, some 1.5 billion of the world’s poorest people live in countries where conflict and fragility have trapped them in a cycle of poverty and violence.

But the International Development Association (IDA), the World Bank’s fund for the poorest, is making a difference. IDA supports fragile and conflict-affected states by providing interest-free financing and the knowledge needed to rebuild institutions and economies, and by putting in place the building blocks people need to resume peaceful and productive lives. Since 2000, IDA has provided more than $22 billion in support for fragile and conflict affected states—among other things, helping immunize 10 million children and providing prenatal care to 1.5 million women. IDA has also provided $4 billion in debt relief. Exiting fragility is possible, but it requires the creation of well-functioning institutions. IDA’s flexible, predictable, and country-based model is particularly effective. IDA doesn’t pull out when the cameras leave, and IDA is a critical piece of the larger development equation, serving as a platform for donor coordination (including the implementation of multi-donor trust funds), and promoting transparency and accountability of both donors and states\textsuperscript{74}.

Despite overwhelming challenges, there has been important progress: 20 fragile and conflict-affected states have recently met one or more targets under the

\textsuperscript{73} V Pechota. “Equality; Political Justice in an Unequal World” in R std Mac Donald & D.M. Johnstne, (1999). p 453
\textsuperscript{74} Legal Advisor of the US Department of State, D.R. Robinson, (1982), p 1326.
Millennium Development Goals (MDGs), and an additional 6 countries are on track to meet individual MDG targets ahead of the 2015 deadline.

3.12 Managing Climate Change

Climate change is here. Extreme weather events during the last decade have led to widespread human suffering and increasing economic damage around the world. Shifting rain patterns are wreaking havoc on food supplies, power generation, and the availability of water for basic sustenance. Heat waves and violent storms cause drought and flooding. And things are only expected to get worse, especially for the poorest and most vulnerable.

Addressing climate change is an urgent priority for the International Development Association (IDA), the World Bank’s fund for the poorest. From July 2011 to June 2012, IDA provided $2.3 billion to help countries adapt to the effects of climate change and another $2.3 billion to mitigate the effects.

3.13 Building Strong Institutions

Good governance and strong and accountable institutions are crucial for poverty reduction and development impact. The International Development Association (IDA), the World Bank’s fund for the poorest, builds the systems that make assistance more effective. IDA works with ministries, agencies, and departments of the executive branch on managing public institutions and finances. On broader governance issues, IDA works with the legislative and judicial branches and other institutions that promote public accountability and greater engagement with society. As a result, governments become more transparent, more accountable to their citizens, less susceptible to corruption, and better at delivering services. From improving people’s access to the justice system in Honduras to removing “ghost workers” in Malawi, an effective public sector means better services for people and greater citizen participation.

76 Shrimps Case,(1999). p. 188
3.14 The International Finance Corporation

The International Finance Corporation (IFC) was established in 1956 as the private sector arm of the World Bank Group to advance economic development by investing in strictly for-profit and commercial projects which reduce poverty and promote development. The stated objective of the IFC is to create opportunities for people to escape poverty and achieve better living standards by mobilizing financial resources for private enterprise, promoting accessible and competitive markets, supporting businesses and other private sector entities, and creating jobs and delivering necessary services to those who are poverty-stricken or otherwise vulnerable. IFC is an international financial institution which offers investment advisory and asset management services to encourage private sector development in developing countries.\(^{79}\)

In 1984, the IFC became financially autonomous and was authorized to issue its own bond instruments across international capital markets, thereby ending its reliance on World Bank financial support. The Corporation’s shareholders approved a capital increase of $1.2 billion in order to expand its work in private development. The IFC increasingly invested in private energy from 1966 to 1994, financing 34 projects in the electric power sector worth approximately $7.4 billion USD. It financed 88 infrastructure projects across 26 member states at a total cost of $15 billion USD. It had invested in one energy project in 1966 and another in 1981, but in the six years between 1988 and 1994 it invested in a bulk of 32 energy projects.

3.14.1 Environmental and Social Standards

The IFC adopted its Environmental and Social Standards in 1998 with the intent of prioritizing sustainability in its investment activities\(^{80}\). In 2001, the corporation began attempting to implement such concerns into its investments. Critics have questioned the sustainability of some projects funded by the corporation. The IFC approved a $90 million loan in 2007 for the upgrading of a slaughterhouse facility in the Amazon region owned by Brazil’s biggest beef producer Bertin, despite

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opposition from local NGOs, the Sierra Club and the advisement against by the Bank’s Independent Evaluation Group\textsuperscript{81}.

3.14.2 Governance

The IFC is owned and governed by its member countries, but has its own executive leadership and staff which conduct its normal business operations. It is a corporation whose shareholders are member governments which provide paid-in capital and which have the right to vote on its matters. Originally, more financially integrated with the World Bank Group, the IFC was established separately and eventually became authorized to operate as a financially autonomous entity and make independent investment decisions. It offers an array of debt and equity financing services and helps companies face their risk exposures, while refraining from participating in a management capacity\textsuperscript{82}. The corporation also offers advice to companies on making decisions, evaluating their impact on the environment and society, and being responsible. It advises governments on building infrastructure and partnerships to further support private sector development\textsuperscript{83}.

3.14.3 Membership

The IFC is owned by its 184 member governments which pay in capital, vote on matters of policy, and approve all of its investing activities. Each member country is a shareholder of the IFC, and the percentage of each member’s ownership share is determined by the amount of capital it pays into the IFC. As of 2011, the United States is the IFC’s single largest shareholder with a share of 24%. Japan holds a share of 6%, while each of Germany, France, and the United Kingdom hold 5%. The IFC’s share capital amounted to approximately $2.4 billion as of 30 June 2011, of which 51% is controlled by the seven largest member governments of the OECD. Membership in the IFC is available only to countries who are members of the World Bank, particularly the International Bank for Reconstruction and Development\textsuperscript{84}.

\textsuperscript{81} World Bank, World Bank Annual Report, (1976), p.34.
\textsuperscript{83} F Mann , The Legal Aspects of Money , (1993), p. 471.
\textsuperscript{84} F Francioni, (1999), p. 122.
3.14.4 Services

The IFC’s financial products and investment services include:

1. Loans
2. Syndicated Loans
3. Equity Finance
4. Structured Finance
5. Risk Management Products
6. Local Currency Financing
7. Private Equity and Investment Funds
8. Trade Finance

1. Loans

IFC offers fixed and variable rate loans for its own account to private sector projects in developing countries. Most IFC loans are issued in leading currencies, but local currency loans can also be provided. The loans typically have maturities of seven to 12 years at origination. Grace periods and repayment schedules are determined on a case-by-case basis in accordance with the borrower's cash-flow needs. If warranted by the project, IFC provides longer-term loans and longer grace periods. Some loans have been extended to as long as 20 years.

IFC operates on a commercial basis. It invests exclusively in for-profit projects in developing countries and charges market rates for its products and services. In FY13, IFC made commitments for nearly $8.5 billion in new loans, bringing the total committed loan portfolio to around $31.5 billion. Loans from IFC finance both early-stage companies and expansion projects in developing countries. The Corporation also makes loans to intermediary banks, leasing companies, and other financial institutions for on-lending. The credit lines are often targeted at small and medium enterprises or at specific sectors.

To ensure the participation of other private investors, A-loans are usually limited to 25 percent of the total estimated project costs for Greenfield projects, or, on an exceptional basis, 35 percent in small projects. For expansion projects, IFC may provide up to 50 percent of the project cost, provided its investments do not exceed 25

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85 Id. p 128
percent of the total capitalization of the project company. Generally, loans for IFC’s own account range from $1 million to $100 million. The Corporation is willing to extend loans that are repaid only from the cash flow of the project, without recourse or with only limited recourse to the sponsors. 

2. Syndicated Loans

IFC promotes development by mobilizing financing for the private sector in its developing member countries. In carrying out this role, we operate as both a financial and developmental institution. This developmental mandate is what differentiates IFC from commercial financiers. IFC acts as a catalyst in raising capital from foreign and domestic sources, in both private and public markets, for projects in the private sector of its member countries.

IFC’s Syndicated Loans and Management Department mobilizes funds for the Corporation through: i) Syndicated ‘B’ Loans, ii) Coordinated and/or syndicated parallel loans, and ii) A Loan Participations (ALPs). The Providers of funds under the B Loan Program are mainly commercial banks, while the providers of funds for parallel loans are mainly development finance institutions (DFIs) and international financial institutions (IFIs).

3.14.5 Response to the 2008 Financial Crisis

The IFC performed a critical function by helping developing countries deal with the aftermath of the 2008 financial crisis. It provided a $16.2 billion line of credit to small and medium businesses (34% more than in 2007) and authorized a $200 million selective capital increase, of which $130 million accounted for new shares which grew the representation of developing countries by 6.07% to a total share of 39.48%. Although the IFC coordinates its activities in many areas with the other World Bank Group institutions, it generally operates independently as it is a separate entity with legal and financial autonomy, established by its own Articles of Agreement. The corporation operates with a staff of over 3,400 employees, of which half are stationed in field offices across its member nations.

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91 Id, p 228
3.14.6 Financial Performance

The IFC prepares consolidated financial statements in accordance with United States General Accepted Accounting Principles which are audited by KPMG. It reported income before grants to IDA members of $2.18 billion in fiscal year 2011, up from $1.95 billion in fiscal 2010 and $299 million in fiscal 2009. The increase in income before grants is ascribed to higher earnings from the IFC's investments and also from higher service fees. The IFC reported a partial offset from lower liquid asset trading income, higher administrative costs, and higher advisory service expenses. The IFC made $600 million in grants to IDA countries in fiscal 2011, up from $200 million in fiscal 2010 and $450 million in fiscal 2009. The IFC reported a net income of $1.58 billion in fiscal year 2011. In previous years, the IFC had reported a net loss of $151 million in fiscal 2009 and $1.75 billion in fiscal 2010. The IFC's total capital amounted to $20.3 billion in 2011.

3.15 The Multilateral Investment Guarantee Agency

The Multilateral Investment Guarantee Agency was established in 1988 as an effort to complement existing sources of non-commercial risk insurance for investments in developing countries, and thereby improve investor confidence. It is an international financial institution which offers political risk insurance guarantees. Such guarantees help investors protect foreign direct investments against political and non-commercial risks in developing countries. All members of the International Bank for Reconstruction and Development are eligible to become members of the agency.92

The stated mission of the MIGA is “to promote foreign direct investment into developing countries to support economic growth, reduce poverty and improve people’s lives.” The agency's mandate to be apolitical has been said to be an advantage over private and national risk insurance markets. By serving as a multilateral guarantor, the agency reduces the likelihood of confrontations among the investor's country and the host country93. The agency focuses on member countries of the International Development Association and countries affected by armed conflict. It targets projects that endeavour to create new jobs, develop infrastructure, generate new tax revenues and take advantage of natural resources through sustainable policies

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and programmes. By serving as a multilateral guarantor, the agency reduces the likelihood of confrontations among the investor's country and the host country.\textsuperscript{94}

MIGA has four guiding principles:

- Focus on clients: Serve investors, lenders, and host-country governments by supporting private enterprise and promoting foreign investment.
- Engage in partnerships: Work with other insurers, government agencies, and international organizations to ensure complementarily of services and approach.
- Promote developmental impact: Strive to improve the lives of people in emerging economies, consistent with the goals of host countries and with sound business, environmental, and social principles.
- Ensure financial soundness: Balance developmental goals and financial objectives through prudent underwriting and sound risk management.

MIGA provides non-commercial guarantees (insurance) for cross-border investments into developing countries. The guarantees protect investors against the risks of transfer restriction (including inconvertibility), expropriation, war and civil disturbance, breach of contract, and non-honouring of financial obligations. The agency insures cross-border investments including new investments as well as investments associated with the expansion, modernization, improvement, or enhancement of existing projects, or where the investor demonstrates both the development benefits of, and a long-term commitment to, the project.\textsuperscript{95} Acquisitions by new investors, including the privatization of state-owned enterprises, may also be eligible. Projects must support the host country's development goals, comply with MIGA’s Policy on Social and Environmental Sustainability and anti-corruption and fraud standards, and also be financially viable.\textsuperscript{96}

\textbf{3.15.1 Extent of Coverage}

Regardless of the nature of the project, an investor is required to remain at risk for a portion of any loss.\textsuperscript{97} For equity investments, MIGA may guarantee up to 90 percent of the investment, plus up to an additional 500 percent of the investment contribution to cover earnings attributable to the investment. For loans and loan

\textsuperscript{95} Supra note 23, p.76.
guarantees, MIGA may guarantee up to 95 percent of the principal, plus an additional 135 percent of the principal to cover interest that accrues over the term of the loan. For technical assistance contracts and other contractual agreements, MIGA may insure up to 90 percent of the total value or remuneration of payments due under the insured agreement (up to 95 percent in exceptional circumstances). MIGA currently has a limit of $720 million per country on a net basis. However, MIGA works closely with public and private insurers, using, for example, treaty and facultative reinsurance as well as coinsurance to augment its capacity limits.\footnote{P.R. Marson and Mussa, \textit{The Role of The IMF}, (1995) p 23.}

\subsection*{3.15.2 Governance}

MIGA is governed by its Council of Governors which represents its member countries. The Council of Governors holds corporate authority, but primarily delegates such powers to MIGA’s Board of Directors. The Board of Directors consists of 25 directors and votes on matters brought before MIGA. Each director’s vote is weighted in accordance with the total share capital of the member nations that director represents. MIGA’s board is stationed at its Washington, D.C. headquarters where it meets regularly and oversees the agency’s activities. The agency’s Executive Vice President directs its overall strategy and manages its daily operations.\footnote{Supra note 65, p.321.}

\subsection*{3.15.3 Eligibility}

MIGA insures cross-border investments made by investors in a MIGA member country into a developing member country. In certain cases, the agency may also insure an investment made by a national of the host country, provided the funds originate from outside that country. Corporations and financial institutions are eligible for coverage if they are either incorporated in, and have their principal place of business in, a member country or if they are majority-owned by nationals of member countries. A state-owned company is eligible if it operates on a commercial basis. An investment made by a non-profit organization may be eligible if it is carried out on a commercial basis.\footnote{T. Killick \textit{The Quest for Economic Stabliation The IMF and The Third World}, (1984), p. 285.}
3.15.4 Investment guarantees

IGA offers coverage for five non-commercial risks. Coverage may be purchased individually or in combination.

1. Currency Inconvertibility and Transfer Restriction

Protects against losses arising from an investor’s inability to legally convert local currency (capital, interest, principal, profits, royalties, and other remittances) into hard currency (Dollar, Euro or Yen) and/or to transfer hard currency outside the host country where such a situation results from a government action or failure to act. Currency depreciation is not covered. In the event of a claim, MIGA pays compensation in the hard currency specified in the contract of guarantee.\textsuperscript{101}

2. Expropriation

Protects against losses arising from certain government actions that may reduce or eliminate ownership of, control over, or rights to the insured investment. In addition to outright nationalization and confiscation, "creeping" expropriation—a series of acts that, over time, have an expropriator effect is also covered. Coverage is available on a limited basis for partial expropriation (e.g., confiscation of funds or tangible assets).\textsuperscript{102}

In case of total expropriation of equity investments, compensation to the insured party is based on the net book value of the insured investment. For expropriation of funds, MIGA pays the insured portion of the blocked funds. For loans and loan guaranties, MIGA can insure the outstanding principal and any accrued and unpaid interest. Compensation would be paid upon assignment of the investor's interest in the expropriated investment (e.g., equity shares or interest in a loan agreement) to MIGA.

3. War, Terrorism, and Civil Disturbance

Protects against loss from, damage to, or the destruction or disappearance of, tangible assets or total business interruption (the total inability to conduct operations essential to a project’s overall financial viability) caused by politically motivated acts of war or civil disturbance in the country, including revolution, insurrection, coups.

\textsuperscript{102} Supra note 76, p. 76.
d'état, sabotage, and terrorism. For tangible asset losses, MIGA would pay the investor’s share of the lesser of the replacement cost and the cost of repair of the damaged or lost assets, or the book value of such assets if they are neither being replaced nor repaired. For total business interruption that results from a covered war and civil disturbance event, compensation would be based, in the case of equity investments, on the net book value of the insured investment or, in the case of loans, the insured portion of the principal and interest payment in default\textsuperscript{103}. This coverage encompasses not only violence in the host country directed against a host country government, but also against foreign governments or foreign investments, including the investor’s government or nationality\textsuperscript{104}. Temporary business interruption may also be included upon a request from the investor and would cover a temporary but complete cessation of operations due to loss of assets or unreasonably hazardous conditions in the host country, which result in a temporary abandonment or denial of use. For short-term business interruption, MIGA would pay unavoidable continuing expenses and extraordinary expenses associated with the restart of operations and lost business income or, in the case of loans, missed payments\textsuperscript{105}.

4. Breach of Contract

Protects against losses arising from the government’s breach or repudiation of a contract with the investor (e.g., a concession or a power purchase agreement). Breach of contract coverage may be extended to the contractual obligations of state-owned enterprises in certain circumstances. In the event of an alleged breach or repudiation, the investor should invoke the dispute resolution mechanism (e.g., an arbitration) set out in the underlying contract. If, after a specified period of time, the investor has been unable to obtain an award due to the government’s interference with the dispute resolution mechanism (denial of recourse), or has obtained an award but the investor has not received payment under the award (non-payment of an award), MIGA would pay compensation. If certain conditions are met, MIGA may, at its discretion, make a provisional payment pending the outcome of the dispute and before compensation for non-payment of an award is paid\textsuperscript{106}.

\textsuperscript{105} Id. p.28.
For non-payment of an award, MIGA would pay the investor’s interest in the award. For denial of recourse, MIGA would pay the investor's interest in the amount which, according to MIGA’s claims determination, the host government would have to pay to the investor pursuant to the contract. In either case, MIGA’s compensation would be capped by the amount of guarantee stated in the guarantee contract.  

3.16 Dispute Resolution

As a member of the World Bank Group, MIGA provides an umbrella of deterrence against government actions that could disrupt insured investments and helps resolve potential disputes to the satisfaction of all parties—both of which enhance investor confidence in the safety of investments and encourage the flow of foreign direct investment. In order to prevent a potential claims situation from escalating, we provide dispute resolution services to all of our clients. In order to mitigate against the risk of loss in the case of investment disputes, we require investors to notify MIGA as early as possible of difficulties with a host government that might give rise to a claim of loss under the guarantee. To date, MIGA has been able to resolve disputes that would have led to claims in all but two cases. We have paid four additional claims resulting from damage due to war and civil disturbance.

3.17 Reinsurance

Since 1997, MIGA has successfully used reinsurance to leverage its investment guarantee capacity, manage the risk profile of its portfolio and foster the growth of the private political risk insurance market. Significant benefits have accrued both to MIGA’s investors, who have gained access to larger levels of coverage for projects in developing countries, and to the host countries that have benefited from much higher levels of productive foreign investment.

3.18 Trust Funds

MIGA makes available special guarantee facilities and trust funds to encourage investment in areas of special need, working with partners to leverage the amount of coverage the agency can provide. Currently, MIGA offers support through two trust funds:

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The Environmental and Social Challenges Fund for Africa is a pilot facility to help foreign investors address environmental and social challenges in Africa. It was created with a $1 million grant from the government of Japan.

The West Bank and Gaza Investment Guarantee Trust Fund aims to encourage investors to increase investment in the West Bank and Gaza. Increased investment in productive areas is expected to contribute to the economic development of the region. MIGA administers the trust fund on behalf of its current sponsors—the Palestinian Authority and the Government of Japan.

3.19 Small Investment Programme

The agency’s Small Investment Program aims to promote FDI into specifically small and medium enterprises. The program offers standard MIGA coverage types except it does not cover breaches of contract. Under the program, small and medium enterprises may take advantage of discounted insurance premiums and no application fees, which are not available to larger investors. To qualify an investment for the Small Investment Program, MIGA defines small and medium enterprise projects as having 300 or fewer employees, total assets not to exceed $15 million and annual revenues not to exceed $15 million. MIGA limits the request amount for the investment guarantee to $10 million, and will guarantee only up to 10 years with a possible 5-year extension\(^{109}\).

3.20 The International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes is an autonomous international Institution which facilitates arbitration and conciliation of legal disputes between international investors. It is established in 1966 under the Convention of Settlement of Disputes between States and Nationals of Other States (the ICSID or the Washington Convention). The ICSID is a member of the World Bank Group and is headquartered in Washington DC, United States. The objective of the Centre is to encourage international flow of investment and mitigate non-commercial risks\(^{110}\).

Although the ICSID receives its funding from the World Bank, it was established as an autonomous institution by a separate treaty. The ICSID is contracted with and governed by its member countries, but has its own Secretariat which carry out its normal operations\textsuperscript{111}. The Centre facilitates arbitration and conciliation proceedings, allowing independent tribunals and arbitration mechanisms to hold proceedings under its rules, and all contracting member states agree to enforce and uphold arbitral awards in accordance with the ICSID Convention. The ICSID also helps administer dispute resolution proceedings under other treaties and for alternative arbitration mechanisms. It also performs advisory activities and maintains several publications\textsuperscript{112}.

3.20.1 Organizational Structure

ICSID has a simple organizational structure consisting of an Administrative Council and a Secretariat\textsuperscript{113}. The Administrative Council is the governing body of ICSID. It is comprised of one representative of each of the ICSID Contracting States. The Administrative Council convenes annually in conjunction with the joint World Bank/International Monetary Fund annual meetings. All representatives have equal voting powers. The President of the World Bank is \textit{ex officio} Chairman of the ICSID Administrative Council but has no vote. Principal functions of the Administrative Council include the election of the Secretary-General and the Deputy Secretary-General, the adoption of regulations and rules for the institution and conduct of ICSID proceedings, the adoption of the ICSID budget, and the approval of the annual report on the operation of ICSID.

3.20.2 Dispute Settlement Facilities

ICSID does not conciliate or arbitrate disputes; it provides the institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted in each case to resolve the dispute. The Centre has two sets of procedural rules that may govern the initiation and conduct of proceedings under its auspices. These are: (i) the ICSID Convention, Regulations and Rules; and (ii) the ICSID Additional Facility Rules.

\textsuperscript{111} The World Bank Annual Report, (1982), p.3.
\textsuperscript{113} P Sand \textit{International Law in Field of Sustainable Development Emerging Legal Principals} w. Lang Sustainable Development and International Law,(1995), p. 58.
3.20.3 ICSID Convention, Regulations and Rules

The ICSID Convention provides the basic procedural framework for conciliation and arbitration of investment disputes arising between member countries and investors that qualify as nationals of other member countries. This framework is supplemented by detailed Regulations and Rules adopted by the ICSID Administrative Council pursuant to the Convention. A principal feature of conciliation and arbitration under the ICSID Convention is that they are based on a treaty establishing an autonomous and self-contained system for the institution, conduct and conclusion of such proceedings\textsuperscript{114}.

There are several essential jurisdictional conditions for access to arbitration or conciliation under the ICSID Convention:

- The dispute must be between an ICSID Contracting State and an individual or company that qualifies as a national of another ICSID Contracting State. (ICSID Contracting States may designate constituent subdivisions and agencies to become parties to ICSID proceedings).

- The dispute must qualify as a legal dispute arising directly out of an investment.

- The disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration or conciliation.

3.20.4 ICSID Additional Facility Rules

Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention\textsuperscript{115}. These include:

- Conciliation and arbitration proceedings for the settlement of disputes arising directly out of an investment where either the State party or the home State of the foreign national is not an ICSID Contracting State.

\textsuperscript{114} Supra note 76, p.87.
\textsuperscript{115} Id. p 534.
• Conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not directly arise out of an investment.

• Fact-finding proceedings\(^\text{116}\).

3.20.5 Other Dispute Settlement Activities of the Centre

Additional activities of ICSID in the field of the settlement of disputes have included the Secretary-General of ICSID accepting to act as the appointing authority of arbitrators in *ad hoc* (i.e., non-institutional) arbitration proceedings. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), which are specially designed for ad hoc proceedings. At the request of the parties and the tribunal concerned, ICSID may also agree to provide administrative services for proceedings handled under the UNCITRAL Arbitration Rules. The services rendered by the Centre in such proceedings may range from limited assistance with the organization of hearings and fund-holding to full secretariat services in the administration of the case concerned\(^\text{117}\).

3.20.6 Institutional arrangements

As a general rule, ICSID proceedings are held at the Centre's headquarters in Washington, D.C. However, parties may agree to hold their proceeding at any other place, subject to certain conditions. The ICSID Convention contains provisions that facilitate advance stipulations for such other venues when the place chosen is the seat of an institution with which the Centre has an arrangement for this purpose\(^\text{118}\).

ICSID has to date concluded such arrangements with the:

• Permanent Court of Arbitration at The Hague;
• Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo, at Kuala Lumpur and at Lagos;
• Australian Commercial Disputes Centre at Sydney;
• Australian Centre for International Commercial Arbitration at Melbourne;

\(^{118}\) The Economic Weekly, Bombay, (1965), p.34.
• Singapore International Arbitration Centre;
• Gulf Cooperation Council Commercial Arbitration Centre at Bahrain;
• German Institution of Arbitration;
• Maxwell Chambers, Singapore;
• Hong Kong International Arbitration Centre;
• Centre for Arbitration and Conciliation at the Chamber of Commerce of Bogota; and

3.20.7 Some Cases Dealt with by ICSID

• The Indonesia government was sued in June 2012 by a London-based mining company Churchill Mining after the local government revoked the concession rights held by a local company in which the firm had invested. The government is countering the Churchill case, claiming that Churchill did not have the correct type of mining licenses.

• In October 2012, an ICSID tribunal awarded a judgment of $1.8 billion for Occidental Petroleum against the government of Ecuador. Additionally, Ecuador had to pay $589 million in backdated compound interest and half of the costs of the tribunal, making its total penalty around $2.4 billion. The South American country annulled a contract with the oil firm on the grounds that it violated a clause that the company would not sell its rights to another firm without permission. The tribunal agreed the violation took place but judged that the annulment was not fair and equitable treatment to the company.

• Irish oil firm Tullow Oil took the Ugandan government to court in November 2012 after VAT was placed on goods and services the firm purchased for its operations in the country. The Ugandan government responded that the company had no right to claim tax on such goods prior to commencement of drilling. The case also attracted criticism for Tullow’s use of local legal representation, Kampala Associated Advocates (KAA); the Ugandan law firm was founded by Elly Kurahanga, the president of Tullow’s operations in Uganda and concerns were raised over his impartiality in the issue.
• Tobacco major Philip Morris sued Uruguay for alleged breaches to the Uruguay-Swiss BIT for requiring cigarette packs to display graphic health warnings and sued Australia under the Australia-Hong Kong BITS for requiring plain packaging for its cigarettes. The company claims that the packaging requirements in both countries violate its investment\textsuperscript{120}.

3.21 THE ROLE OF WORLD BANK

IFC combines strong innovation with resource mobilization; the Bank Group launched initiatives on bank capitalization, trade finance, infrastructure, and microfinance. A well capitalized World Bank Group would be positioned to play a leading role in the global response to the challenges of globalization, development, and financial crisis\textsuperscript{121}. Four key drivers are likely to shape the Group’s post-crisis role: The first driver is traditional and innovative development finance. There is strong demand from the Bank Group’s clients for the institution to come out of the crisis well-capitalized and to be able to sustain the delivery of a critical mass of financing to support global economic growth and to overcome poverty. The World Bank Group can play this role in several ways. The Bank can contribute to fiscal stimulus and protect core spending in countries that are not in a position to implement counter-cyclical policies; can help to boost global demand to support global recovery; finance and support trade; assist the private sector to assume the critical handoff from the governments’ crisis response actions; and through investment, we can help to build multiple poles of growth with responsive, accountable public sectors and dynamic private sectors\textsuperscript{122}.

3.21.1 World Bank: Development Economics, Neo-liberalism and Debt crisis

The World Bank is an institution that grew and affirmed itself out of confronting crises or challenges. Since the 1980s it has faced three of them. First, the growth strategy it originally adopted has blurred since the late 1970s, when development economics fell into a deep crisis and the role of the state in the economy was challenged. Second, the very idea of a development bank is at bay, as the Bank

\begin{footnotesize}
\textsuperscript{120} Harold Graves “(1968), p.34.


\textsuperscript{122} Id.p 278
\end{footnotesize}
tends to lose the role of a net provider of funds to developing countries. Third, the Bank performed poorly when the foreign debt crisis broke out in the early 1980s.\textsuperscript{123}

3.21.2 Development Economics and the Bank

The crisis of development economics and the emergence in the 1980s of a kind of neoliberal consensus in Washington embodied a crisis - specifically an intellectual crisis - for the World Bank, since it was founded and institutionalized on the basis of development economics. The basic tenets of development economics were also the principles that originally oriented the institution and the action of the Bank.

Development economics emerged in the 1940s as a basic critique to neoclassical economics. Keynes, in the 1930s, developed the macro-economic critique, i.e. the short-term or business cycle critique, of neoclassical thinking. Development economists, two decades later, made a complementary critique on a long-term viewpoint. The basic objectives of the new theory were: (1) to legitimate industrialization, given the historical, obvious argument that all developed countries were industrial countries\textsuperscript{124}; (2) to increase the savings and investment capacity of underdeveloped countries from around 10 to 20 per cent of GDP;\textsuperscript{125} (3) to promote the take off into sustained growth.\textsuperscript{126}

3.22 The Evolution of International Standards and Practices for Banking Institutions

NIFA objectives have been the development, implementation and dissemination of “international standards,” “best practices” or “principles” with respect to a number of financial-related areas.\textsuperscript{127} The Basel Committee is briefly

\textsuperscript{123} John A King, \textit{Reorganizing the World Bank},(2004), P. 76.
\textsuperscript{125} Lewis was very specific on this subject: “The central problem in the theory of economic development is to understand the process by which a community which was previously saving and investing 4 or 5 percent of its national income or less, converts itself into an economy where voluntary saving is running at about 12 to 15 percent of national income or more.” See Lewis, Arthur W. (1954) 'Economic development with unlimited supply of labour', The Manchester School, May 1954. (Reproduced in Agarwala and Singh,(1958), p. 416.
\textsuperscript{127} On NIFA, see chapter 9 of Douglas Arner, \textit{Financial Stability, Economic Growth and the Role of Law} (Cambridge: Cambridge University Press, forthcoming); Sheng, "The New
touched upon in this subsection to make the point that long before the NIFA gave consideration to the banking systems of developing countries, a G10 subcommittee was well on its way to formulating international banking standards for industrialized countries, a framework that was transported substantially to the developing-country arena in the latter half of the 1990s\textsuperscript{128}.

Quite clearly, the development of international banking standards by the Basel Committee long antedates the emergence of the NIFA. In fact, the ministers of finance and central bank governors of the Group of 10\textsuperscript{129} became interested in the possible development of international bank supervisory standards in 1974 due to the interrelated insolvency of two small international banks, the German Bankhaus Herstatt and the American Franklin National Bank. These banks had failed due to excessive exchange rate risks and lack of coordinated supervision by the relevant regulatory authorities. As a result, the Group of 10 established what the Basel Committee is now in 1975\textsuperscript{130}. Although this incident did not make the central bank governors concerned about a specific systemic crisis, it dawned on them that in the new 1970s era of global floating exchange rates, international risks for banking institutions had increased and there was no agreed mechanism for coordinating cross-border supervision of such institutions\textsuperscript{131}.


\textsuperscript{129} The G10 Group came about in 1974 as a consequence of the General Agreement to Borrow (GAB) in 1962, which was established pursuant to a decision of the Executive Board of the International Monetary Fund (IMF). The Group was informally established with the support of the IMF, OECD, the Bank for International Settlement (BIS) and the finance ministers of Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, United Kingdom and United States. Its primary purpose was intergovernmental consulting regarding the implementation of calls on lines of credit extended to the IMF under the GAB. The scope of consultation was broadened over the years. Subsequently, Switzerland became an active member of the Group, rendering the “G10” designation a misnomer. The G10 Group operates through respective finance ministers at the highest level, but also through various ad-hoc committees on specific subjects. For example, a committee of the central bank governors of the member states of the G10 meets ten times a year at the BIS; the governors, finance ministers and staff of the IMF, BIS, and OECD also meet several times a year. (See generally, Group of Ten homepage on the OECD website, www.oecd.org/document/32/0,2340, en_2649_34115_36191264_1_1_1_1,00.html.

\textsuperscript{130} A Press Communiqué of the G10 central bank governors dated February 12, 1975 (issued through the BIS) refers to the founding mandate of the Basel Committee.

\textsuperscript{131} See Norton, \textit{Devising International Bank Supervisory Standards}, chapter 4, section II A.
3.23 Financial Sector Reform and International Standard Setting

Since the mid-1990s, a primary instrument for achieving the G8 agenda of handling financial crisis and related contagion prevention, as well as fostering global financial stability, has been the development and coordination of international financial standards and their global transmission within the developed and developing worlds. The “transmitters” have ranged from international organizations such as the OECD (corporate governance), to unofficial arrangements of a limited number of bank supervisors and/or regulators, such as the Basel Committee (banking and financial conglomerates) to a much broader array of domestic governmental bodies and private capital market authorities and organizations such as IOSCO (securities markets). The World Bank’s role in this process has largely been that of a “transmitter” of these standards through its conditionality’s/structural adjustment lending and technical assistance, although its role includes that of an “assessor” through the FSAP program. The Bank can, moreover, be viewed as an actual standard setter in connection with its corporate and bank insolvency initiatives. As is emphasized throughout this paper, it needs to be kept in mind that historically, the formulation of international financial standards has been driven by the highly industrialized countries, whose concerns have been primarily been:

- financial crisis avoidance and resolution
- financial stability
- financial services liberalization
- regional and global cooperation

More recently, financial sector reform has also been driven by industrialized countries’ concern over financial sector integrity, a notion that has come to embrace the following:

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134 For example, the formation of the BCBS-Basel Committee came about in the mid-1970s as a result of the concerns of central bank governors of the G10 countries about possible exchange-rate risks, as exemplified in the non-systemic “Herstatt crisis.” The Committee gave global significance to capital adequacy concerns in the 1980s with respect to the industrialized countries. This was the beginning of the Committee’s role in developing a range of “international standards” in the bank supervisory/regulatory area. See Norton, “Capital Adequacy.”
• anti-money laundering (resulting from drug dealing and other criminal activities)
• combating terrorism financing (post-September 11)
• anti-corruption
• corporate governance of financial institutions
• transparency and accountability
• greater availability of information (enhanced disclosure)\textsuperscript{135}

While one can reasonably and in good faith rationalize, as does the Bank and other IFIs, that these focal points are directly related to the economic development processes of developing countries, the truth is that these concerns have been engendered directly by industrialized countries. In most instances, the interconnection between their concerns and substantive development goals, such as poverty reduction, is indirect and in some instances, quite tenuous at best\textsuperscript{136}. Taking this into account, the role of the Bank in financial sector reform over the past decade has been mandated largely by the G7/G8 global policy determinations and “directives.”

3.23.1 The Reform Agenda

To serve the changing global economy, the world needs agile, nimble, competent, and accountable institutions. The World Bank Group will improve its legitimacy, efficiency, effectiveness, and accountability, and further expand its cooperation with the UN, the IMF, the other Multilateral Development Banks, donors, civil society, and foundations which have become increasingly important development actors.

3.24 The Search for Global Financial Stability and Financial Sector Integrity

Financial sector legal reform as a mandate for domestic and international financial authorities is clearly of recent vintage. This type of reform is largely the

\textsuperscript{135} Id p 6
\textsuperscript{136} For example, having “Basel-compliant” banking systems is a good goal for all countries—developed and developing alike—but for a developing country, compliance does not really get to the core issue of how the banking and financial system should best be structured to serve optimum country-specific economic and social development needs. One can also readily see that whereas corruption is a key issue for donor countries and IFIs, it is also a core concern for effective development. When one gets to the area of antimony laundering and counter-terrorism financing, these objectives are clearly of key concern to the USA and other highly industrialized countries in the so-called “global war on terrorism,” but it is quite dubious that the amount of effort that development banks now devote to this area produces any real development benefits that could justify this effort or its cost.
reactive by-product of a number of factors: financial crises and the quest for global financial stability, the collapse of the Soviet empire, the new “transitioning economies, the enlargement of the European Union and the ongoing onslaught of economic globalization—all of which are interconnected in various ways. It is true that there are anecdotal examples of financial law related reforms in the 1960s and 1970s, but these were largely one-off, isolated reforms designed to facilitate specific development projects.\(^{137}\)


At the 1997 Denver Summit, the G7 heads of state and finance ministers again put financial stability center stage, issuing a final report on the subject.\(^{138}\) Greater cooperation among supervisors of internationally active supervisors and among the IFIs was further encouraged. Interestingly, corruption and anti-terrorism also became main subjects of consideration. The summit even focused on the role of small- and medium-sized enterprises (SMEs), a subject that, if pursued in later summits (it was not), might have become linked to developing country issues of access and equality. Yet, while greater emphasis was placed on emerging markets, the summit really concentrated on the wider transmission of the new (1977) “Core Principles” of the Basel Committee to banking supervision authorities in these countries.\(^{139}\)

\(^{137}\) When I taught “Legal Aspects of International Financial Law” and “Emerging Markets: Investment and Finance” at the University of London, one of my co-teachers was a senior international finance partner at a major law firm for the financial services industry. He would periodically entertain the graduate students with the occasional anecdote about how his firm had to draft a business and/or financial law on short notice to effect a project in one of the “oil kingdoms” ruled by an absolute ruler, or alternatively, that in South Central Asia, his firm had to have the “parliament” under the control of a military ruler pass, over a weekend, a needed piece of financial legislation in order to deliver a required legal opinion on a project. Another, more IFI-related example of this type took place in the early years of the EBRD, which views itself as more an IFC-type, commercially-oriented development institution. In the 1990s, any institutional or legal reform in its mandate countries had to be specifically project-focused. Only by mid-decade did the ERRD set up a legal reform component within its General Counsel’s Office and this division tended to look more at generic issues of legal reform, such as model secured transaction law. See, for example, J.J. Norton and M. Andenas, eds., *Secured Transactions and Emerging Economies* (The Hague: Kluwer, 1997).


\(^{139}\) See Basel Committee, “Core Principles for Effective Banking Supervision,” 2006 rev., Basel, Switzerland.
The G7 finance minister reports in Cologne (June 1999) and Okinawa (June 2000) specifically followed up on the following NIFA components in some detail:

- strengthening macroeconomic policy for emerging economies
- strengthening and reforming IFIs
- accurate and timely information flows and transparency
- strong financial regulation in industrial countries
- strong financial systems in emerging markets
- exchange rate policies
- sound accounting standards
- legal infrastructure
- corporate governance
- anticorruption and money laundering
- technological innovation and adaptation
- risk management

Integral to all these components was a significant “law-based dimension” that involved global principle and standard setting, including:

- banking regulation
- capital markets regulation
- insurance supervision
- corporate governance
- financial conglomerates
- payment, settlement and custody mechanisms
- pension funds and collective investment schemes
- accounting and auditing standards

3.26. The Supporting Legal and Judicial Framework

As IFIs came to learn and incrementally appreciate during the 1990s, the legal framework of a country supports its financial system by establishing clear rights, responsibilities and liabilities of parties in a transaction; maintaining appropriate incentives and adequate information to facilitate market forces; and providing the means to enforce legal obligations and claims effectively. For the legal system to achieve these objectives, key legislation needs to be put into place. At a minimum, this legislation should include modern contract, corporate, bankruptcy, private property and commercial laws, as well as modern banking and investment securities laws (and most probably, a basic asset securitization law). These latter legal
provisions specifically govern financial activities and need to be “rule-based” and transparent, while preserving the required degree of flexibility to adapt to innovations and changing market conditions. Financial legislation and/or regulation should also promulgate disclosure of information to enable market forces to discipline the activities of financial institutions and other market players. Clarity of entry and exit standards for financial institutions reduces uncertainty within financial markets. In addition, a well-defined exit policy is especially imperative, since such a policy applies at times when the market is likely to act rashly and cause self-fulfilling bank runs. Two specific priorities are seen as improving the enforcement of financial contracts:

- Effective means for taking possession of collateral; and
- Revision and updating of legal codes to reflect new market realities.

Lack of legal remedies in the case of non-compliance can paralyze well-functioning markets and discourage foreigners from investing in emerging markets. The uncertainty surrounding the outcome of legal procedures and processes also inhibits the robustness of financial markets. Other key components of modern international financial best practices and/or standards might well include the following:

- Transparency, accountability and disclosure
- Market structure
- Corporate governance
- Stakeholder oversight
- Stakeholder protection
- International surveillance, oversight, data assembly and dissemination
- Sound regulation and supervision


• Market discipline
• Sound accounting standards and practices

All these reform components serve to strengthen and deepen the stability of a pre-existing financial sector, which in reality is only representative of the top of the economic and social pyramid. They are not designed to broaden the financial base of the sector.

3.26.1 THE BANK'S RESPONSE

Throughout the 1980s the two basic contradictions that we have been examining deepened. The Bank does not have a positive development strategy anymore, i.e. a strategy that involves projects and requires external financing, justifying the existence of a development bank, nor does it dispose of the financial means that permit a negative cash flow towards the developing countries. On the other hand, for highly indebted underdeveloped countries it does not make sense to increase their debt.

3.27 Conclusion

For many years, the rationale behind the international development assistance was that the prosperous, developed world has an obligation to provide some of its resources to the poor, developing countries. Indeed, this notion still exists in terms of absolute amounts of assistance. The majority of financing is derived from a group of rich, industrialized countries which apart from that are also responsible in shaping the existing norms and concepts in development assistance. Specifically, the bulk of bilateral ODA, namely 95 per cent, is provided by the 23 members of OECD’s DAC (Development Assistance Committee). Moreover, significant amounts are given by some agencies which provide mainly multilateral aid: a set of international financial institutions (IFIs), such as the World Bank, the International Monetary Fund (IMF), a number of regional development Banks (including ADB, AfDB etc.), a number of United Nations agencies as well as a growing set of “other agencies”.

These agencies constitute by no means a homogenous group with the same kind of interests, principles and objectives in their development policies. However, they dominate the international development assistance in terms of specifying and providing a common agreed framework in which various donors may interact with

each other with a greater degree of cooperation\textsuperscript{144} (Rowlands, 2008). This effort of coordination by shaping international norms and concepts is embedded within the traditional donors’ agencies. A benchmark of these attempts is the target of 0.7 percent of GNI (gross national income) for ODA in which all the so called traditional donors are obliged, as well as the adoption of the eight MDGs (Millenium Development Goals) at the Millennium Summit in 2000. Furthermore, common principles and motives are reflected by the Rome and Paris Declaration giving commitments about better coordination and synergy in aid allocation.

The other side of the coin shows that, apart from the conventional and long lasting North-South development cooperation relations, there is also a South-South support which is used to describe various types of assistance among the developing world. This phenomenon of collaboration between the poor states is on no account recent, on the contrary sometimes is of equal significance and magnitude as the privileged and dominated North-South modality. Sometimes it is admitted in the literature that the two types of cooperation are fundamentally common in terms of motives as well as efficiency\textsuperscript{145} However it was the last two decades that the scholars became particularly concerned and interested in analyzing further South-South cooperation and the actors involved. This was a consequence after Western “failures” and asymmetries which challenge the conventional wisdom that only the North could bring growth to the South.

Lately, as the aid architecture is undergoing through significant changes due to the proliferation of non-Western donors, the domination of the traditional donors in the development assistance has been challenged in several ways. There is a growing hysteria about these emerging states regarding their rising role in the international politics and their establishment as providers of development assistance. An existing perception is that they may undermine the norms and concepts established by the traditional donors and that they may jeopardize even more the efforts of making aid more efficient. On the other hand, a more optimistic approach is that they may contribute by raising the global aid budgets and by providing alternative and more efficient means for better development outcomes.

\textsuperscript{144} Emerging Donors in International Development Assistance: A Synthesis Report Dane Rowlands Norman Paterson School of International Affairs Carleton University, (2008), p.34.
\textsuperscript{145} South-South Aid: How Developing Countries Help Each Other, Donald Bobiash,(1992), p.34.