

Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities

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I. Introductory Remarks on the World Bank and the Protection of the Environment

The International Bank for Reconstruction and Development (IBRD) has been established as a leading financial institution providing long-term finance for productive projects, initially for reconstruction and development purposes². The purposes of the IBRD as set forth in the Articles of Agreement may be summarized as follows: (1) to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, (2) to promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and (3) when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources³.

¹ The opinions expressed are those of the author and not of the Organization.

² There are no criteria to distinguish between reconstruction and development projects in the World Bank's Articles of Agreement.

³ Article I of the Articles of Agreement. Of course, the Bank is a cooperative institution whose resources are available only for the benefit of members.

The Bank conducts its activities principally through loan operations. It was empowered either to borrow in private capital markets and then lend or to guarantee loans made directly by private creditors⁴. All lending activities to borrower countries are on commercial or near commercial terms. However, for countries that cannot borrow at these terms, a specific branch of the IBRD has been established: the International Development Association (IDA) to provide "soft loans" or concessional loans to the poorest among developing countries⁵. The World Bank also has two affiliates: (1.) the International Finance Corporation (IFC) which makes loans and equity investments in private sector projects, and (2.) the Multilateral Investment Guarantee Agency (MIGA) which provides insurance against political risks faced by private sector investments in developing countries. Together, the four institutions are referred to as the *World Bank Group*⁶.

The World Bank is made up of member countries which have agreed to the Bank's Articles of Agreement⁷ and the Bank's by-laws which prescribe specific financing purposes for the World Bank. The World Bank's Articles of Agreement require the imposition of certain basic terms and conditions⁸ for its loan and guarantee operations. The terms on which any given loan, credit or guarantee is made are laid down in a loan agreement with the borrower or the guarantor. As a result, every lending operation leads to an agreement between the Bank and a member government, either as borrower or guarantor. These agreements incorporate by reference standard provisions adopted by the Bank from time to time. In addition to the normal terms and conditions imposed

⁴ In practice, the IBRD has lent more often than it has used its guarantee powers. Guarantees were intended to be the primary means of financing followed sequentially by co-financing and direct loans in case private capital was not available at reasonable terms. The World Bank's Executive Directors approved a policy for mainstreaming the guarantee instrument in Bank operations especially for infrastructure and energy projects in developing countries, see T. Hassan, "Legal Aspects of World Bank Financing", *Butterworths Journal of International Banking and Financial Law* 13 (1998), 284 et seq., (286).

⁵ Those having per capita income below US\$ 1465.

⁶ For the purpose of this paper, the World Bank is referred to as IBRD and IDA except if one of the two agencies is explicitly singled out.

⁷ IBRD Articles of Agreement- UNTS Vol.2 No. 20 (b), amended by TIAS No. 5929, 16 December 1965, and IDA Articles of Agreement- UNTS Vol. 439 No. 6333.

⁸ Hassan, see note 4, 288.

by the World Bank's Articles of Agreements, policy conditionality has appeared as a commonly used feature of loan and guarantee operations.

Project lending represents the bulk of the World Bank's activities and accounts for over four-fifths of all Bank lending and credits. Over the first half century of its existence, the World Bank established itself as the premier development institution⁹. The Bank also does "Structural Adjustment Lending" (SAL) and "Sectoral Adjustment Lending" (SE-CAL) which have been viewed as a significant departure from earlier project financing, because they are provided to support policy reforms¹⁰. For developing countries without access to private capital markets, the World Bank remains virtually the only source of long-term external capital apart from bilateral aid and direct foreign investment in selected activities. The World Bank remains predominantly a project lending institution with more emphasis on the soft issues such as education, environment, health and capacity building. The investments and programs that the World Bank supports in the environmental field range from fully-fledged environmental projects to sectoral projects with environmental components, as well as projects implemented by the World Bank but funded by third organizations such as the Global Environment Facility (GEF) or other bilateral and multilateral institutions¹¹. In terms of activities, these range from reform of policy and legal structures to capacity building for environmental monitoring and enforcement and targeted funds for pollution prevention, park protection, integrated basin management and international waters protection¹². The influence of the World Bank's financial resources is amplified by the policy dialogue and policy advice that often accompanies lending op-

⁹ A.O. Krueger, "Whither the World Bank and the IMF?", *Journal of Economic Literature* XXXVI (1998), 1983 et seq., (2007).

¹⁰ These non-project financing instruments have been developed to address the severe balance of payments issues in the 80s, and have been subjected to two conditions: (1) deterioration of the borrower's balance of payments, and (2) willingness of the borrower to formulate and implement a suitable program of structural adjustment. See Hassan, see note 4, 289.

¹¹ In general, these institutions make specific arrangements for the World Bank to manage funds on their behalf or establish trust funds for which the World Bank is designated as trustee.

¹² World Bank portfolio dedicated to environmental projects includes a total of US\$ 10.7 billion and its growth is continuing (1998). See *Five Years after Rio. Innovations in Environmental Policy*, World Bank (ed.), Environmentally Sustainable Development Studies and Monographs Series No. 18.

erations¹³. It is worth mentioning at this point that the drafters of the Articles of Agreements of the IBRD have not seen the protection of the environment as a subject matter for its activities and lending operations. In fact, as mentioned by Ibrahim Shihata, the World Bank's Articles of Agreement do not refer to the term "environment"¹⁴, nor do they refer to "sustainable development"¹⁵.

II. The World Bank Environment-Related Policies: Evolution and Content

During the 1970s, the World Bank had begun to take the environment into consideration in its project-financed design¹⁶. However, it was only in 1984 that it issued its first environmental policy known as the Operational Manual Statement (OMS) 2.36¹⁷ "which recognized that the Bank's environmental practices were still evolving, but that there was a body of international environmental law the Bank would help to promote"¹⁸. OMS 2.36 has been instrumental to further the World Bank's environmental policy development. The cornerstone of these policies is the Environmental Assessment (EA) policy issued in 1989¹⁹ which ap-

¹³ It is a fact that the Bank's policy leverage increases with the concessional content of its loans, and decreases with the borrower's ability to turn elsewhere for needed funds, and so varies tremendously across countries and sectors.

¹⁴ I.F.I. Shihata (ed.), *The World Bank in a Changing World*, Selected Essays, 1991.

¹⁵ Ch. Di Leva, "International Environmental Law and Development", *Geo. Int'l Envtl. L. Rev.* 10 (1997/1998), 501 et seq., (505).

¹⁶ Di Leva mentions that "Since its beginning, the Bank has been applying policies linked to environmental protection". He mentions a water resource management project concerning the Indus River system and the Aswan Dam project in Egypt which were both criticized on various grounds, environment being the less important, see above at 519.

¹⁷ OMS 2.36.

¹⁸ Di Leva, see note 15, 520.

¹⁹ Environmental Directive 4.00 Annex A (1989) and 4.01 (1991) on environmental assessment. Operational Directive 4.01 has been converted into the new policy format which comprises Operational Policy (OP), and Bank Procedure (BP) which are binding upon Bank staff, and Good Practices (GP) which are non-binding, collectively referred as OP/BP/GP.

plies if there is the potential for any project to result in adverse environmental impact²⁰. The EA process and findings help the World Bank and the borrower to better assess the economic, social and environmental aspects of any proposed project and define environmental management plan and/or mitigation measures to avoid and/or alleviate its harmful effects. Moreover, since 1984, major environmental policies have been issued by the World Bank and constitute the most comprehensive environmental policy that frames investment and other development activities of any development agency²¹. Other policies were adopted to address various environmental issues including the use of pesticides, the rights of indigenous peoples, hazardous wastes, the protection of forest, water resource management, involuntary resettlement, projects in international waterways, and protection of cultural heritage, all of which, causing the Bank to start its move towards the status of a modern sustainable development agency

From the legal point of view, these policies are internal rules that provide guidance to Bank staff in their activities to ensure their consistency with the international mandate of the World Bank. These policies are being made specific and compliance with them is being closely monitored by various mechanisms. They are now widely disseminated

²⁰ Bank projects are classified in three categories (A, B, C) to determine the appropriate level of environmental analysis and assessment to which they will be subjected. A *Category A* project is likely to have significant "adverse environmental impacts that are sensitive, diverse or unprecedented..." OP 4.01 is submitted to a full environmental assessment. A simple environmental analysis is required for a *Category B* project. A *Category C* project is a project which has no adverse impact on the environment and would not be subjected to any environmental analysis or assessment. A fourth category exists — called a *Category F1* project which involves investment of Bank funds through financial intermediary in subprojects that may result in environmental assessment. Subprojects under a F1 Category project would have to be categorized individually as category, B or C projects.

²¹ This comprehensive policy document is the sum of all applicable environmental policies including: OP/BP/GP 4.01 on Environmental Assessment (EA); OP 4.04 on Natural Habitats; OP 4.09 on Pest Management; Operational Directive (OD) 4.20 on Indigenous Peoples; OD 4.30 on Involuntary Resettlement; OP 4.36 on Forestry; OP 7.50 on International Waterway; and the Operational Policy Note 11.03 on Cultural Heritage. See below on some of these policies. See Di Leva, see note 15.

and disclosed outside the World Bank²², which strengthens their role as benchmark to assess the quality of Bank lending activities²³. Bank policies are not international legal rules, but may enter the international legal order through the international agreements related to the World Bank financed projects. These policy instruments have influenced other international institutions and states which have introduced some of their features into their own legal order²⁴.

Although the World Bank has been taking decisive measures to develop its environmental policies, critics voiced concerns that the World Bank investment programs have damaged the environment²⁵ and harmed the poor. Therefore, it is no surprise if the development of the World Bank's environmental policies have been considered as an answer to those who viewed the IBRD as "too friendly" to developing countries and insufficiently critical of their environmental policy framework while occasionally lending in support of ill-advised projects²⁶. However, such critics have overlooked the extent to which the World Bank has been and continues to be working at integrating the twin imperatives of environmental protection and economic development. In fact, since the beginning of the 80s, the World Bank is paying more attention to environmental issues and is playing an important role in encouraging com-

²² Disclosure Policy, 1993. See I.F.I. Shihata, *The World Bank and Non-Governmental Organisations*, 1995; id., *The World Bank in a Changing World*, Vol. II., 1995, 237 et seq.

²³ This aspect has been tremendously deepened after the establishment of the Inspection Panel in 1993. See I.F.I. Shihata, *The Inspection Panel*, 1994.

²⁴ OD 4.01 on Environmental Assessment served as model for the drafting of various domestic legislation in developing countries, and the principle of environmental assessment has been introduced in the legal system of various borrower countries to help these countries comply with Bank policy first and expand the scope of EA in development activities.

²⁵ This was the case in the Gafsa Phosphate Project in Tunisia (Loan 1042; app.1974) which is a mining project. Mining operations produced waste such as sludge containing phosphate to be dumped into a seasonal river basin. It was found at appraisal that since the project did not raise any ecological issue, the inclusion of any covenant to that effect in the loan agreement was not necessary. When the project was completed, some washing of the sludges occurred during the rainy season carrying them downstream. As a result, potential for contamination of groundwater existed at the so-called chott or depression area where the riverbed met the groundwater close to the surface. The problem remained unresolved.

²⁶ See Krueger, see note 9.

pliance with sound environmental standards and policies²⁷. In addition to requiring more attention to environmental aspects during project preparation, the World Bank's loan documents frequently include covenants and/or conditionalities to protect environmental and social interests²⁸. Under some circumstances, environmental covenants and conditionalities play an important role in paving the way towards a real effort for sustainable development. These circumstances include the modalities of adoption and definition of the content of the environmental covenants and conditionalities.

It is only since environmental assessment became mandatory²⁹ that environmental covenants and "green conditionalities" have been considered as a common feature of project-related legal agreements. The Operational Directive 4.01³⁰ on environmental assessment was a significant step not only as an instrument to impose on the World Bank and borrower governments for consideration of environmental impacts of proposed projects, but also to require public disclosure of project specific

²⁷ I.F.I Shihata, "The World Bank and the Environment: Legal Instruments for Achieving Environmental Objectives", in: id., *The World Bank in a Changing World*, Vol.II, see note 22, 183 et seq.

²⁸ After suffering from criticism for its poor environmental and social track record, especially with allegations that its lending for transmigration in Indonesia, Road building in Brazil and support to large dams building in various countries were accelerating tropical deforestation and impoverishing indigenous peoples, the Bank responded by policy development actions designed to prevent its financing from harming the environment or the interests of vulnerable groups, including prohibition of financing logging in primary tropical forests (OP 4.36). However, the issue of compliance with Bank's environmental policies is still to be dealt with in a practical and efficient manner to ensure the passage from a "do no harm agenda" to a real "sustainable development financing". See below.

²⁹ The Bank established mandatory Environmental Assessment (EA) procedures in 1989 through an Operational Directive (OD 4.01). This directive has been issued into a new Operational Policy/Bank Procedure/Good Practices -OP/BP/GP- format. In addition to the EA policy, other Bank's policies with an important environmental content include those related to Indigenous Peoples (OD 4.20 of September 1991); Natural Habitats (OP 4.04 of September 1995); Forest, Water Resources Management (OP 4.07 of July 1993); Pest Management (OP 4.09 of July 1996); Involuntary Resettlement (OD 4.30 of June 1990). The bank is currently reviewing and re-issuing major environmental policies including those related to indigenous peoples, involuntary resettlement and forestry.

³⁰ OD 4.01 has been converted to the new OP/BP/GP format as OP 4.01.

information prior to the project's consideration by the Board of Directors of the Bank. This policy served as an early warning device to enable all project stakeholders and affected people to challenge questionable projects while they are still in the pipeline and leveraging some up-stream changes in the project pipeline itself.

Environmental assessment serves as a tool to define needed mitigatory measures and other treatment of environmentally harmful effects of proposed projects including defining alternative projects³¹. It is a critical instrument to help the World Bank and the borrower to decide what actions need to be taken to ensure the environmental soundness of the project. Some of these measures may be taken in designing the project, but others relate to the project implementation phase. In that regard, the analysis of the environmental assessment report and the project appraisal³² will allow the World Bank and the borrower to decide on the appropriateness and content of environmental covenants within the project-related legal documents. By complying with this procedure, the borrower and the World Bank will have opportunities to discuss, negotiate and agree on the content of the environmental measures that need to be undertaken by the borrower to pave the way to the World Bank financing, and later to define the needed conditionalities and covenants to ensure the environmental soundness of the project.

Since the Rio Summit in 1992, the World Bank has been developing a new approach to development and environmental protection. This approach has evolved from "doing no harm" to strategically "mainstreaming" biological diversity conservation, affirmative conduct in en-

³¹ For a Category A project, an environmental management or mitigation plan is often required. The environmental management plan is an "instrument that details (a) the measures to be taken during the implementation and operation of a project to eliminate and offset environmental adverse impacts, or to reduce them at acceptable levels; and (b) the actions needed to implement these measures"- OP 4.01- Annex A.

³² When actions need to be taken before the project appraisal, the Bank will require compliance with them through separate communication with the borrower. The Bank in general communicates through exchange of letters following a pre-appraisal mission or the analysis of the environmental assessment documents. In general the Project-appraisal documents will mention the borrower's compliance with these environmental requirements. When actions have to be taken before negotiations, they are mentioned in the project appraisal document, and the minutes of negotiations would mention the borrower's compliance with them.

vironmental protection and social development³³, and developing new instruments to deal with the most crucial environmental challenges such as climate change, biological diversity conservation or desertification. By doing so and incorporating environmental concerns into its development-oriented activities, the World Bank is critically helping in the implementation of sound environmental policies consistent with international environmental law. It appears therefore normal that environmental covenants of general nature have been introduced into almost all legal agreements related to World Bank financed or implemented projects to indicate the Bank and the borrower's commitment to deal adequately with environmental issues and to implement all projects in a sound environmental manner. Also, because of the involvement of the Bank in the promotion of compliance with international environmental law and good governance standards, environmental covenants are becoming more sophisticated including reference to stakeholder participation in environmentally sensitive projects and compliance with stringent quality standards.

III. Environmental Covenant, "Green Conditionality" and State Sovereignty: General Considerations

Environmental covenants in IBRD loan and IDA credit agreements have appeared since the 1970s³⁴. From the theoretical and practical point of view, there is an important distinction between conditionality and

³³ G. Handl, "The Legal Mandate of Multilateral Development Banks as Agent for Change toward Sustainable Development", *AJIL* 92 (1998), 642 et seq., (663).

³⁴ See for example *Botswana*, Shashe Project Loan 776- 1971 (Section 4.08 -a- "The Borrower shall take all action, including enactment of pollution legislation and regulations, required to ensure that the operations and emissions of the mining Project and of the Project shall be conducted with due regard to public health and the preservation of the environment...". *Kenya*, Second Forestry Plantation Project, Cr. 565-KE; 1975 (Section 3.06- "The Borrower shall take all reasonable measures to ensure that the execution of the Project is carried out with due regard to ecological and environmental factors...". *El Salvador*, Ahuachapan Expansion, Loan 1288, 1976 (Section 3.04- "The Borrower shall take all necessary measures, satisfactory to the Bank, to ensure that the Ahuachapan plant is operated with due regard to ecological and environmental factors, particularly with regard to disposal of geothermal effluents...".

environmental covenants. A covenant is the expression of a promise to take an action. From the legal standpoint, the mechanism to enforce that promise is the suspension of a right already vested. A conditionality offers an incentive for action by providing for financing only if the agreed action is implemented. It is worth noting that conditionality could be stated through a covenant, but all environmental covenants are not conditionalities. Conditionality can be added to the promise that the covenant constitutes, or can complement a covenant adding to its effectiveness. Conditionality can be made at various moments of project processing. A specific event can be made a condition for negotiation of the project³⁵, or a condition to the effectiveness of the loan³⁶, or a condition to the disbursement of the proceeds of the loan, credit or grant³⁷. The World Bank, in addressing environmental issues, has used these entire hypotheses.

Environmental covenants and conditionalities are not the translation of unilateral actions of the World Bank or sole consequences of its policy instruments. They are in general the result of a deep dialogue and exchange of views with borrower country officials and staff involved in environmental considerations relating to the project to be financed³⁸. This dialogue includes the analysis of all project components including their consistency with the Bank's environmental policies and international obligations of the borrower under international environmental law. In the World Bank project cycle, special covenants and conditionalities are envisioned and discussed during project pre-appraisal and project appraisal³⁹ stages, so that the stakeholders involved will be in a

³⁵ If the condition referred to is not satisfied, the negotiations can not take place.

³⁶ If such condition is not satisfied, the agreement does not become effective and therefore can not be implemented.

³⁷ In case the condition is not satisfied at a certain point of project implementation, the disbursement of the loan, grant or credit will be suspended. In some case, the suspension of disbursement may affect a specific component of the project that has been targeted by the conditionality.

³⁸ It is a central issue dealing with project effective implementation. Crucial to the effectiveness of any legal covenant and conditionality is the way all stakeholders, including borrower country officials, executing agencies, project beneficiaries and project affected peoples, have been involved in project design.

³⁹ At that point all covenant and/or conditionality implications are assessed within the social, institutional, political and environmental context of the country.

position to understand their objectives. However, although environmental covenants and conditionalities are prepared, discussed with the involvement of major stakeholders, and negotiated between the World Bank and the borrower, observers and developing country members questioned the ability of the World Bank to impose its own imperatives concerning environmental policies on developing countries⁴⁰.

The President of the World Bank has raised the issue of the acceptability of any environmental conditionality in any development project financing⁴¹. The question whether a conditionality constitutes an infringement of any right of the borrower has been asked by various observers⁴². A former Director of Environment at the World Bank, effectively argues that "green conditionality" tied to resource transfers is perhaps a latter day expression of colonialism⁴³. Although, nobody contests the fact that environmental issues are global in scope and transcend the states, states remain the primary actor in international relations and a tension is still apparent between the need of collective actions and state sovereignty. In the development financing process this tension is highly visible⁴⁴. However, from the legal point of view, it is

⁴⁰ K.W. Piddington, "Sovereignty and the Environment: Part of the Solution or Part of the Problem?", *Environment* 31 (1989), 18-20, 35-39, (18).

⁴¹ B. Conable, former President of the World Bank, has declared in a speech at the World Resource Institute, that "[w]e have not yet arrived at the point where, like peace and security, the restoration and preservation of the health of planetary ecosystems is perceived as factor of the highest common welfare ... [and] unless and until the industrialized world is prepared to accept and act upon its own environmental shortcomings, it will be difficult to persuade developing nations that there is such thing as a collective global responsibility for our planet's health", in: International Environment Report (BNA), 1989, 356 and P.A. Rodgers, "Looking at Gift in the Mouth, The World Bank and Environmental Accountability", *Geo.Int'l Envtl.L.Rev.* 3 (1990), 457 et seq.

⁴² Piddington, see note 40.

⁴³ Piddington, see note 40, 18.

⁴⁴ Y. Berthelot, "Are International Institutions in Favor of Environment?", in: L. Campiglio (ed.), *The Environment After Rio*, 1994, 267 et seq., this author writes: "The developed countries will consider significant transfers to help pay for the "greening" of developing countries only if those countries undertake economic (and, in some cases, even political) reforms. This attitude is regarded by the developing nations as a clear transgression of their sovereignty. Similarly, the developed countries want to retain control

quite simple to point out that environmental covenants and conditionalities are part of an international agreement that has been negotiated by two subjects of international law and that all obligations and rights contained in such agreement are deemed to have been accepted by the two subjects on an equal basis. It is up to the borrower to decide whether any environmental covenant or conditionality attached to the financing are realistic and acceptable or not.

The position of developing nations has positively evolved during the two last decades, mainly under the influence of two factors. The first factor lies in the recent international environmental conventions that provide specific funding mechanisms for environmental protection and management in developing countries⁴⁵. Although the financing provided under major international environmental conventions and other financing mechanisms is far from being sufficient, it is a positive step that has strengthened environmental protection at international level and made environmental covenants and conditionalities "more agreeable" in development projects. The second factor derives from the developing nations' move to tighten the relationship between environmental protection and development. This has started to be done through the complex process of preparing and implementing National Environmental Action Plans (NEAP), conservation strategies, Tropical Forest Action Plans (TFAP) and other more specific environmental programs⁴⁶. The World Bank has played a significant role in this process by providing resources and expertise and coordinating foreign assistance. A policy has been issued on environmental action plans⁴⁷ which states that IDA eli-

over any resources which they do transfer, whilst the developing countries prefer to be able to dispose of these resources as they judge best", at 275.

⁴⁵ K. Ginther, E. Denters and P.J.I.M de Waart (eds), *Sustainable Development and Good Governance*, 1995, also G. Taylor, *Financing Sustainable Development*, Report of the 3rd Talloires Seminar on International Environmental Issues, Tufts University, 1985.

⁴⁶ F. Falloux, L.M. Talbot, *Crisis and Opportunity. Environment and Development in Africa*, 1993, which provides an excellent analysis of the National Environmental Action Plan preparation process in African countries and the role played by the World Bank and donor community.

⁴⁷ OP 4.02 "Environmental Action Plan" which states "The Bank encourages and supports the efforts of borrowing countries to prepare and implement an appropriate Environmental Action Plan (EAP) and to revise it periodically..." [...] the EAP preparation process "is expected to form an integral part of the overall national development policy and decision making". It should be noticed that this policy has been frequently criticized.

gible countries must provide the World Bank with a NEAP agreed upon by the relevant national authorities before presenting any environmental project for Bank financing.

Also, from the legal point of view, developing nations have also started to formally accept the view that environmental destruction transcends national borders and that there is a clear and urgent need to protect the environment and the natural resource base for future generations⁴⁸. Therefore, it is widely accepted now that environmental covenant and/or conditionalities would be accepted as a normal feature of any international financing instrument when the link between development and environmental protection is clearly evidenced in project design and understood by recipient countries as a non negotiable part of the development project⁴⁹. This trend is being reinforced by the fact that experience has demonstrated that once information is provided to those likely or potentially to be affected by environmentally hazardous projects, the government and the society respond positively and accept environmental covenants and safeguards to be included in any international donor financed project.

Conditionalities and covenants are enhanced in relation to the Bank-financed projects' environmental assessment. In fact, as noted by Shihata, "environment-related issues do arise in many projects [...]. During the preparation and appraisal of such projects, consideration is given to measures needed to avoid or at least minimize environmental risks or to enhance environmental benefits". In this respect, the Bank has to assure itself that any measures agreed would in fact be carried out by the borrower and the project implementing agency concerned. Typically, such measures are incorporated into the overall design and implementation programs agreed for the project ("... a variety of legal techniques are used to enable the Bank to see to it that the actions required will in fact

⁴⁸ It is important to mention here that within developing nations, a real environmental awareness has been observed, especially in those countries which have suffered from important damage to their environment (India, Brazil, Algeria, South Africa, Sri Lanka). For example, it was a public outcry by a Sri Lankan-based environmental NGO that led to unprecedented environmental conditionalities and safeguards in a World Bank credit.

⁴⁹ What have been called "big dam controversies" have forced the Bank to strengthen its policy on Dam financing, and to impose rigorous conditions on any country. After the controversy over the Sardar Sarovar Dam project in India, the Bank placed a number of substantial conditions on any further support to the project. India, unable to meet those conditions withdrew its request for Bank support and has continued the project on its own.

be carried out"⁵⁰). The loan, credit or grant agreement⁵¹ will include all obligations and undertakings of the borrower including those concerning the environment. In the processing of a partial-risk guarantee operation, the World Bank in general verifies that the design and operation of the project to be financed by private funds will be consistent with the Bank's requirements for environmental protection. The Bank will ascertain that the borrower will carry out an environmental assessment and ensure that the emission levels are acceptable to the World Bank⁵². Environmental covenants may be introduced in the Guarantee Agreement to ensure that appropriate emission standards shall be implemented consistent with its own recommended standards, international standards⁵³, national legislation and local conditions⁵⁴. In this case, the EA report must provide full and detailed justification for the levels and approaches chosen for the project and its recommendations may be translated into the project-related documents, including a bidding document to build and operate the project and a partial-risk guarantee agreement.

This practice of inclusion of environmental covenants into legal agreements between the World Bank and its borrower countries has greatly assisted in the recognition and the strengthening of a new general principle of international law⁵⁵. According to this principle, states should not harm the global environment. This general principle derives

⁵⁰ Shihata, see note 14.

⁵¹ The latter is mainly used for GEF projects implemented by the World Bank.

⁵² The levels of emission acceptable to the World Bank are set forth in the Pollution Prevention and Abatement Handbook, 1998.

⁵³ Among these, WHO and FAO standards are widely used in developing countries.

⁵⁴ The environmental assessment may also recommend alternative emission levels and approaches to pollution abatement for the Project. The World Bank will review the EA to ensure its consistency with its policy and advise the borrower on any issue related to EA implementation.

⁵⁵ Ph. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles", in: W. Lang, *Sustainable Development and International Law*, 1995, 53 et seq. One of these covenants and the oldest one reads as follows: the borrower affirms "its commitment to carry out the project with due diligence and due respect for environmental and ecological factors". This statement is now widely accepted in international relations and is considered as a ground for the development of a general principle of law.

from the landmark "Trail Smelter Case"⁵⁶, the subsequent international jurisprudence including the recent ruling of the ICJ concerning the "Gabčíkovo-Nagymoros Project"⁵⁷, and the subsequent practice of states and international institutions to prevent pollution and environmental harm at both national and international levels. This general principle is being used as a way to develop environmental safeguards for all World Bank-financed activities. The implementation of these environmental safeguard policies constitutes a ground for the inclusion of general and specific environmental covenants in almost all the legal documents related to World Bank financed projects.

IV. Environmental Covenant

An environmental covenant is generally described as a covenant requiring that environment-related actions be taken. These actions may take the form of:

- (1) issuance of appropriate environmental regulations or standards;
- (2) enforcement of existing legislation, regulations and standards;
- (3) carrying out of environmental studies, including environmental impact assessment;
- (4) provision of resources for environmental purposes;
- (5) installation of clean technologies; and
- (6) public participation or consultation of project affected peoples. Environmental covenants may be found in project agreements, loan agreements, credit agreements, grant agreements and guarantee agreements. Environmental covenants may be of general nature, calling government or project implementing agencies to carry out their activities with due consideration of good environmental practice and due regard to ecological factors without reference to any specific action or due regard for pre-defined standards. In other cases, they will be precisely defined and would refer to very specific standards and actions to be followed or taken.

⁵⁶ U.S. v. Canada, RIAA Vol.3, 1907.

⁵⁷ Case Concerning The Gabčíkovo-Nagymoros Project (Hungary v. Slovakia), ICJ Reports 1997, 7 et seq.

V. Environmental Covenant of General Nature

As we mentioned earlier, the World Bank has made efforts to cover environmental issues and to secure attention by its borrowers to environmental concerns in project-related legal documents. Legal agreements related to loan, credit, guarantee and grant, include a general clause related to the borrower's commitment "to the objectives of the project, to carry out the project with due diligence and efficiency and in conformity with appropriate practices" which are applicable to the project in question. This formulation was introduced upon the suggestion of Shihata in 1984 to ensure that borrowers are truly committed to the project's objectives and accept full responsibility for their implementation and to clarify that the so-called World Bank projects are the borrowers' own projects where the Bank plays the role of a supportive financier⁵⁸. Before this, a general covenant was introduced in legal agreements related to projects with environmental components or highly visible environmental components. These covenants stipulated the borrower's commitment to carry out the project with "due diligence and due regard to environmental and ecological factors". The use of this general covenant was widespread in the seventies.

Although all the provisions of the legal documents of a Bank financed project have the status of international obligations, it has been noticed by analysts and observers that these general covenants are generally viewed, at best, by both the borrower and the World Bank as prescribing a "soft" obligation which is closer to non-binding guidelines for project execution and operation. "Due diligence" and "due regard" both refer to some vague standards that do not give the Bank a leverage to use any remedies to ensure that environmental issues are dealt with and properly resolved during project implementation.

These general covenants requiring the borrower to exercise due regard to the environment are viewed as no more than non-binding guidelines for project execution and operation, especially when they do not refer to specific standards to be applied to project activities⁵⁹. These covenants are based on a vague standard ("due regard"), and do not provide for remedies. General environmental covenants have been used in all categories of projects including industrial, forestry, biological diversity, social development and others. The environmental performance

⁵⁸ Shihata, see note 22.

⁵⁹ J. Meinel, *Environmental Covenants in Development Loan Agreements*, World Bank Internal Paper, 1987, 2.

of the project is rendered impossible, and Bank staff in charge of supervision have looked at the objectives of these covenants as non-essential to the project's successful completion. Critics of the poor track record of the Bank in environmental protection activities have used examples of such projects. Interesting cases may be found in projects where in addition to the general covenant, legal agreements included a number of specific measures to protect specific components of the environment⁶⁰. Sometimes the borrower implements parts of the measures agreed upon, so there was partial compliance with the environmental covenant.

Another example would help to highlight the inefficiency of general environmental covenants and the need to develop more specific covenants. For example, let us consider the Power Project that provides financing for geothermal power plants and dam. The legal agreement for these categories of projects clearly mentions that the borrower country shall "carry out the Project with due regard to ecological and environmental factors". The design of such projects provides that effluents from the geothermal wells are to be discharged into the open waterways or ocean by the way of underground canal. However, it appears that in some cases these canals are not ready or not built during the first years of operation of the geothermal unit. It may happen that the effluent is discharged partly in open air, harming the environment of neighbouring countries and the health of the population. When facing such situations, Bank staff, in general express concern to the borrower on the possible health hazard of such discharges, the environmental harmful effects and the potential international complications where an international waterway is involved. However, it is rare for the disbursement to be suspended, mainly because the discussion of Bank comments and the interpretation of the vague standard may lead the operator of the geothermal unit to consider itself in compliance with the general covenant. From experience, it appears that discussion between Bank and borrowers, coupled with protests from stakeholders and others may force the borrower to ensure that an acceptable level of effluent discharge into a given waterway is not exceeded and to consider boosting the construction of the needed infrastructures and the development of pollution control policies.

⁶⁰ Sometimes specific measures may include: the demarcation of nature reserves, a study to determine the need for additional nature reserves, the gazetting of treated land by increased pressure from farmers as forest reserves and all are partially implemented.

The same issue may be faced in projects concerning green issues such as forestry⁶¹ where it is assumed that projects could be operated on the principle of sustained yield using a forest inventory to establish for each area the quantity of hardwood that could be harvested each year without deterioration of the forest. In general, borrowers agree to manage the project according to sound silvicultural practices and to maintain a project unit for monitoring the annual allowable cutting rate. However, it may appear during supervisions, that the forests are overexploited, and that population of wild fauna including wild elephants are severely impaired. Sometimes, wild elephants are domesticated and used for timber extraction which aggravate both the decline of the trees and the elephants. It remains difficult in those cases to take appropriate action, namely to stop the use of domesticated elephants to exploit the forests, because no specific language or covenant has been included in the legal document. This demonstrates how difficult and complex is the task of the Bank staff to get borrowers to comply with the latter and the spirit of environmental covenant when they are written in vague language with no specific standards referred to in them.

As we may conclude from the above-mentioned examples, general covenants have been useless when environmental effects were not anticipated at project design and appraisal. In fact, general covenants attempt to address environmental issues and problems not anticipated at project appraisal, but that may occur during project execution or operation. Thus they are intended to provide contractual standards which the borrower is expected to adhere to. However, the borrower's obligation as defined in a general environmental covenant is very weak because of the absence of reference and vagueness of the applicable standards, and also the absence of specific resources to deal with the environmental problem to be resolved. However, historically the introduction of the environmental covenant of general nature in the legal documents related to World Bank financed projects has paved the way for the development of more specific environmental covenants. In fact, it appeared that if a general environmental covenant is to have any positive action on project environmental performance, it is essential to complement it with specific standards applicable to the project's activities. Such standards may be defined by specific environmental covenants, set forth in an Annex or a supplemental letter to the agreement in question. Such Annex or supplemental letter are as binding as the principal legal

⁶¹ This category of projects and the problems it raised is very well known across all regions.

agreement is and are executed at the same time⁶² under the same legal conditions.

The examples discussed have somehow showed the limited usefulness of environmental covenants of general nature where the partners agree upon no specific covenants and binding guidelines⁶³. Their contractual function was not clear, because if they were intended to cover environmental or technical problems not anticipated during the project appraisal, the general environment covenant does not provide leverage to urge remedial action. Moreover, when a specific environmental covenant or specific environmental measures are defined in addition with the general covenant, it remains unclear what the function of the general covenant is, given that specific actions to be taken had been agreed upon in the specific covenant. This is why more specific and better-defined environmental covenants have been included in loan, credit, grant and/or project legal documents.

VI. Specific Covenants and Conditionality

To ensure proper implementation and compliance with all environmental requirements, the World Bank has managed to negotiate the inclusion of specific measures into the legal agreement itself. This inclusion may take the form of a specific detailed covenant, or of a conditionality linked to the disbursement of the proceed of the loan, credit or grant. These measures may include:

- (1) the definition of environmental actions to be taken into the schedule related to project description and implementation, including the establishment of a specific environmental unit, training of staff, recruitment of consultants to advise on environmental issues and solutions;
- (2) the preparation and/or implementation of environmental studies, plans or policies;

⁶² Shihata, see note 14.

⁶³ Now, it is more common to have a clear reference to pollution control standards in the legal document. The Pollution Prevention and Abatement Handbook (1998) is a good reference for different types of projects for which it provides good reference standards which the World Bank staff should follow when appraising projects.

- (3) the submission of reports to the Bank at specific periods of project implementation;
- (4) the carrying out of consultation with stakeholders;
- (5) the purchase, installation and operation of specific equipment to fight, control or reduce pollution⁶⁴;
- (6) the enactment of new and/or updated legislation;
- (7) the enforcement of existing or issuance of new regulations, standards and guidelines;
- (8) the provision of resources for environmental purposes;
- (9) the carrying out of consultation with stakeholders involved in project implementation;
- (10) the implementation of international agreements or compliance with some of their requirements⁶⁵.

Specific covenants may be included in all categories of projects and are likely to be found in project-related legal documents in environmentally sensitive activities (e.g. pollution control, water resources management, mining, transportation, forestry, road construction, housing). They also may be part of the design of the World Bank's assistance to member countries in the framework of its adjustment lending. In fact, environmental covenants may be included in SAL and or SECAL. A clause such as the following is part of a Structural Adjustment Loan Agreement: "the Borrower has issued guidelines under its Industries (Development and Regulations) Act ... as amended, clarifying that industrial licensing decisions in respect of projects and facilities located within less than 25 kms of cities of over one million population will be based solely on environmental safety, land-use, congestion, ur-

⁶⁴ For all these types of actions, see above the description of the specific environmental covenants.

⁶⁵ In the framework of the regional project (Solid and Ship-Generated Waste Management Projects) in the Caribbean Region, 1995 (Antigua & Barbuda, Commonwealth of Dominica, Grenada, St. Kitts & Nevis, St. Lucia and St. Vincent & The Grenadines) the Bank provided a GEF grant and credit or loan for each of these countries. As a condition of effectiveness for each country component, it was agreed that an environmental assessment be completed for landfills to be financed, a legislative framework for waste management be developed and put into effect, including the establishment of an independent waste management unit in each country, and that each country should reach agreement with other funding agencies for parallel-financing of specific project's component.

ban planning, and other related considerations⁶⁶. From this example, we can see the critical aspect of such specific covenants and their relevance to environmental protection.

In fact, these specific covenants have been developed to address the most critical environmental impacts and concerns by borrowers and/or implementing agencies. They are considered as an integral part of the project's objectives. For these specific covenants, various legal techniques may be used to ensure monitoring and compliance⁶⁷. As mentioned above, some of these covenants may be considered as a traditional conditionality linked to the effectiveness of the project or the disbursement of the proceed of the loan, credit or grant, while others may be seen as part of the projects and whose implementation could be done without relying on sanctions such as disbursement suspension and or project cancellation. Among all of these, we may distinguish the following actions:

- (1) compulsory action could be required to be taken prior to the effectiveness of the agreement⁶⁸ (e.g. delimitation of protected area, enactment of pollution control guidelines and/or regulations, pollution equipment to be installed);
- (2) an implementation program may be attached to the agreement as a means to ensure compliance with the environmental covenant⁶⁹. These implementation programs are sophisticated in that they in-

⁶⁶ As part of the Structural Adjustment Credit (SAC III), to Cameroon (3 August 1998), it was agreed that as a "condition for the release of the second tranche of the credit" would be that the Government "has adopted regulations" related to forest management and "defined a strategy , satisfactory to the Association, for the delimitation of areas which may be awarded as concessions, taking into account requirement for sustainable forestry land-use management", Annex II to the Credit Agreement.

⁶⁷ Shihata, see note 14.

⁶⁸ Environmental conditionalities are sometimes prior conditions to loan, credit or grant effectiveness. A GEF Grant Agreement related to a Biodiversity Conservation and Management Project states in its article VI that as condition of effectiveness, "the Recipient shall have issued the decree on fauna implementing the Recipient's Forest Law 94-01 ", 22 May 1995.

⁶⁹ For the same GEF project cited here above, see note 68, a condition of effectiveness has been included requesting the recipient to sign "contracts, satisfactory to the Trustee, with selected non-governmental organizations (NGOs) responsible for Project implementation".

roduce criteria to monitor project objectives implementation and compliance with specific covenants⁷⁰;

- (3) the inclusion of specific environmental components as part of the project;
- (4) the implementation of pre-defined international or World Bank environmental standards⁷¹ which are often used as specific covenants⁷².

It appears from experience that World Bank-financed projects show a better record of compliance with respect to specific environmental components and covenants when such components and covenants are viewed as part of the project's objectives and/or are critical to the successful completion of the project as a whole⁷³. The example of an Industrial Pollution Control Project which the World Bank is financing may illustrate this statement. The legal agreement related to this project has defined various environmental covenants and includes a whole range of measures, including: (1) the closing of polluting factories and (2) introduction of cleaner technologies⁷⁴ in public enterprises that were

⁷⁰ These are called "Performance Indicators".

⁷¹ These will be found in the Pollution Prevention and Abatement Handbook (August 1998) which succeeded the World Bank Environmental Guidelines that were published in 1988 to provide technical advice and guidance to staff and consultants involved in pollution-related projects. The Handbook comprises three major parts: on "key policy lessons", "implementation of policy objectives" and "detailed requirements" to be taken into account in the preparation of World Bank Group financed or guaranteed projects. The Handbook is specifically designed to be used in the context of the Bank's environmental policies set out in OP 4.01 and related documents.

⁷² It happened in some cases that compliance with specific environmental covenants was not always successful. In one case the World Bank requested the borrower to prepare a suitable legislation including sanctions and requirements of a regular monitoring for an orderly development of the country groundwater resources. It was agreed that the Government would appoint an expert committee to review the issue and that the Committee would submit its proposals for review by the Bank by a certain date. After project completion, an audit has revealed that the Government failed to regulate groundwater exploitation and to draft any legislation on this. The exploitation of groundwater continued in a rather non-rationalized manner.

⁷³ Meinel, see note 59.

⁷⁴ Algeria: Loan Agreement for the Industrial Pollution Control Project 4034 of June 1996, in Schedule 2 annexed to the agreement it was specified, that

polluting important urban and coastal areas. These covenants have been complied with because of the well-defined measures required and their clear link to much needed health, environmental and economic improvement as well. In the framework of a regional project involving the environmental protection of international waters and executed by an international legal entity, the legal agreement included two environmental covenants: one that reads as follows: "the Recipient shall carry out its business and operations, and otherwise conduct all its affairs, in accordance with sound professional, administrative, international waters and biodiversity protection, economic and financial practices, and in accordance with appropriate environmental standards, acceptable to the Bank, and at all times under the supervision of qualified and experienced management assisted by competent staff"⁷⁵. Another, of a more specific nature, specifies that the beneficiary has been requested to implement the IMO standards of an oil spill control and for the preparation of a oil spill contingency action plan. It happens often, that provisions which define in detail the appropriate environmental standards that would be acceptable to the Bank back up a less specific environmental covenant. In such a case the agreement will refer to a specific document annexed to it or any other relevant sources of reference where such standards are defined.

To prevent failure of the borrower to comply with such covenants, the legal agreement prescribes proper remedy. In the same agreement related to the project, related to international waters referred to above, it was agreed that the Bank would suspend the disbursement if "any" of

the borrower will undertake the following: "Part B. 1. Dismantling and decontamination of the sulfuric and phosphoric acid plants...; 3. Rehabilitation of the gas treatment system in the nitric acid plant...; 4. Installation of a scrubber or a granulator...; 6. Support in the area of plant operation and management, and workers' health and safety standards, ... and Part C. "Installation of dust removal systems ... and of suitable door cleaning system in the coke ovens...; 2. ...equipment for the construction of two wastewater treatment plants and the renovation of the existing biological wastewater treatment plant...; Provision of laboratory equipment to monitor pollution...".

⁷⁵ Section V of the Global Environment Facility Trust Fund Grant Agreement related to the Western Indian Ocean Oil Spill Contingency Planning Project, between the IBRD and the Indian Ocean Commission acting on behalf of the member countries to the Victoria Agreement of 10 January 1984 namely, Federal Republic of Comoros, the Republic of Madagascar, Republic of Mauritius and Republic of the Seychelles.

the countries "having jurisdiction over the Recipient⁷⁶ shall have taken any action, including the enactment or issuance of laws and regulations, which, in the opinion of the Bank, may adversely affect, prevent, or interfere with, the carrying out of the Project or the performance by the Recipient of any of its obligations under this Agreement"⁷⁷. The interpretation of such conditionalities will be made with reference to Schedules 2 and 4 of the legal agreement, which describes the Project's components and the implementation program including performance indicators. It is the role of the Bank staff during the supervision of the Project to verify whether the necessary conditions are met and whether the laws and regulations of the countries involved oppose the agreed environmental standards.

Other examples show that more detailed environmental covenants may help to avoid the complexity and ambiguity of interpretation⁷⁸. In the case of the Congo Wildlands protection project, an environmental conditionality has been included in the legal agreement as a condition for project effectiveness. This conditionality requires the government of Congo to issue "an appropriate legal instrument prohibiting the prolongation of current and the issuance of new logging concessions in the five priority project sites pursuant to Schedule 3..."⁷⁹. In this case, the schedule was very concise in defining the undertakings of the Govern-

⁷⁶ In this case the recipient was the Secretariat of an international convention, acting on behalf of seven country members to the Convention and mandated by them to implement the project.

⁷⁷ Section VI lit. (b) of the above-mentioned Agreement in note 75.

⁷⁸ Although specific environmental actions are often described as part of the Project, remedies have not been used against borrowers who failed to perform its obligations under a loan agreement. In the case of the Sebou II Development Project (Morocco), sugar factories along the Sebou River were believed to contribute substantially to water pollution. To address the issue of water pollution, the Project provided for a study of existing industrial pollution in the lower Sebou river to be performed and, if justified by such a study, the construction of an effluent treatment plant to prevent pollution by the wastewater of the sugar cane industry. The study was not carried out and the fund allocated for the purpose of building the effluent treatment plant were eventually canceled. A new pollution control project is being prepared to address the Sebou river pollution issue.

⁷⁹ The Global Environment Trust Fund Grant Agreement related to the Wildlands Protection and Management Project, between the IBRD and the Republic of Congo, dated 4 March 1993, Section 5.01 lit.(c).

ment to protect the natural environment of the project site⁸⁰. However, the Government of Congo has granted a gold mining concession within the territory of one of the project sites during project implementation, based on a restrictive interpretation of the conditionality (i.e., mining is not logging). The World Bank warned the Government that it might suspend the disbursement if mining operations start within the project site⁸¹. After lengthy discussion, it was agreed that the company that has been granted a gold exploration permit would finance an independent environmental impact analysis of the planned exploration work. The Bank has reviewed the terms of reference for this analysis which started in 1997, and the World Bank has informed the Government of Congo that in view of the risk that gold exploration will be found to be incompatible with effective conservation, all project activities at the site have been suspended, pending the receipt and review with the government of the environmental impact assessment conclusions.

VII. Compliance and Implementation Issues

By ratifying an agreement, negotiated and signed, with the World Bank, a borrowing country is under an obligation to comply with all the provisions of such agreement and to take necessary measures to implement its obligations. The environmental requirements of World Bank policies are translated into international legal obligations once introduced into legal documents. They establish proper safeguards that in general go along with adequate provisions to ensure their implementation by both the World Bank and the borrower. Under some circumstances, the borrower may be in a situation where it cannot implement its obligations concerning environmental requirements because of the lack of resources

⁸⁰ During the project implementation, the government has granted a logging permit for a forest area close to a project site. The World Bank insisted on reviewing the limits of the concession, to make sure that it would not impact the core reserve where the project's conservation work has been focusing. IUCN, which was spearheading the conservation work at that site, has met with the logging company and negotiated a series of safeguard measures to ensure that its activities are consistent with conservation in the core reserve, including support for anti-poaching patrols and an alternative food supply system to minimize the consumption of bushmeat.

⁸¹ The project site in question is Dimonika, which has been classified as a biosphere reserve by UNESCO and is considered as a high value area for its biological diversity patrimony.

and/or capacity. This question is very sensitive from the developing countries perspective and must be addressed at project design if the Bank and the borrower want to avoid non-compliance issues⁸².

The borrower is under an obligation to implement all of its obligations including compliance with environmental requirements. The World Bank retains the power to suspend disbursements, accelerate its maturity or cancel it⁸³ if the borrower or project implementing agency default in carrying out agreed environmental avoidance or mitigatory measures⁸⁴. This is the last resort solution that the World Bank always tries to avoid. This is why the role of World Bank staff in supervising the implementation and compliance with the environmental covenants is crucial to the success of avoiding or mitigating environmental impacts and assisting borrower countries to comply with their obligations under agreements with the World Bank. It happens, that during project supervision, a dialogue develops with the borrower to adjust environmental requirements, or define additional resources to help compliance with them⁸⁵. It should be noted that, in many cases, compliance with environmental covenants can not be fully assessed until a project is completed, or at least until the project has been in operation for some time, unless the related covenant has been dated for its implementation⁸⁶.

Major steps in implementation and compliance with environmental legal covenants have been the issuance of the World Bank disclosure

⁸² In one case, it has been recognized that even though the Government was willing to implement an environmental covenant, this has not happened because the Project does not provide the necessary funding and the Government lacked funding to finance the agreed measures. It was decided to amend the projects legal document and to transfer resources from another category of activities to fund the necessary environmental actions.

⁸³ This solution is rarely used by the Bank staff who favours the continuation of a constructive dialogue with the borrower to find ways to adjust the situation created by non-compliance with a legal agreement.

⁸⁴ This path has not been followed due to the negative effects of its use on the Bank's relationship with the borrower involved, cf. I.F.I. Shihata, "Implementation, Enforcement and Compliance with International Environmental Agreements — Practical Suggestions in Light of World Bank's Experience", *Geo.Int'lEnvtl.L.Rev.* 9 (1996/1997), 37 et seq.

⁸⁵ In such cases, modification and/or amendment to the legal documents may be needed to adjust the obligations of both partners.

⁸⁶ See above, under IV.

policy⁸⁷, the development of internal review procedures to ensure environmental quality⁸⁸ of Bank funded projects and the establishment of the Inspection Panel. The Inspection Panel raised legitimate expectations that environmental policies will be better complied with in all World Bank supported and funded activities. The Inspection Panel has been established as an independent organ within the World Bank with the mandate to receive and investigate complaints from groups whose rights or interests have been or are likely to be adversely and directly affected by the World Bank's failure to implement and comply with its own operational policies⁸⁹. The Inspection Panel may be instructed by the Board of Directors of the World Bank to undertake an inquiry. Therefore, there is a potential for Non Governmental Organizations and other groups of affected peoples to introduce requests to the Inspection Panel to investigate any World Bank' staff failure in implementing environmental and social requirements as translated into legal documents as a consequence of World Bank's environmental and social policies⁹⁰. This is how the Inspection Panel may help improve compliance with environmental safeguard policies, notably to ensure proper environmental requirement implementation in Bank supported and/or

⁸⁷ Bank Procedure 17.50 on Disclosure of Operational Information, issued in September 1993. It is also appropriate to mention the Good Practices 14.70 on Involvement of Non-Governmental Organizations, in: Bank-supported Activities issued in March 1997.

⁸⁸ This includes not only a new quality at entry review, but also the review of Bank projects by a Quality Assurance Group and finally the evaluation of all projects by the Operational Evaluation Department, which is an independent evaluation unit within the Bank. OED's function is to evaluate projects after their completion. OED looks at all aspects of the project including its environmental features. OED's reports include recommendations and are submitted to the Board.

⁸⁹ However, the Inspection Panel shall not investigate such complaints without the prior approval of the World Bank's Board of Directors. See Memorandum of the Senior Vice-President and General Counsel — "Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection" dated 3 January 1995, *ILM* 34 (1995), 503 et seq.

⁹⁰ Although this is the general and explicit mandate of the Inspection Panel, the Board of Directors of the World Bank issued a Resolution related to the "Clarifications of Certain Aspects of the Resolution Establishing the Inspection Panel" (17 October 1996) which clarifies the role of the Inspection Panel to review the consistency of the Bank's practice with any of its policies and procedures; see The Inspection Panel, Annual Report 1996-97, 1997, 30.

financed activities. This should be interpreted in a restrictive manner, because within its mandate the Inspection Panel has to decide on the applicability of World Bank's policies and interpret their content at the same time as assessing the potential failure of the World Bank to comply with them.

It is widely admitted that the World Bank is currently the leading World's development agency and that its environmental portfolio is reaching a wide range of development projects. "From a legal perspective, an improvement in environmental indicators requires that the Bank's lending strategy continues to take into account relevant international and national legal instruments, as well as Bank environment-related policy"⁹¹. Well defined and negotiated conditionalities and environmental covenants would play an important role not only in mitigating harmful effects of development projects, but also in helping build "legal frameworks and institutional capacity" for sustainable development.

⁹¹ See Di Leva, see note 15, 512-513 and on the same subject Handl, see note 33.