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David A. Wirth
Boston College Law School, wirthd@bc.edu

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CHAPTER 7

ECONOMIC ASSISTANCE, THE WORLD BANK, AND NONBINDING INSTRUMENTS

by David A. Wirth

Introduction

This chapter addresses nonbinding instruments in operational aspects of economic assistance policies and programs, using the World Bank as an example. To that end, the discussion will (1) provide a structure for legal analysis of the role of nonbinding instruments in operational aspects of economic assistance programs; (2) frame issues for further investigation and research; (3) suggest opportunities for more intensive utilization of nonbinding instruments in economic assistance programs than has been the case in the past; and (4) stimulate further consideration of this topic in the context of the role of nonbinding international instruments more generally.

The chapter first addresses the scope of the issue, in particular by reference to the kinds of institutions whose operations might be amenable to this analysis. Second, the wide variety of nonbinding instruments is surveyed with an eye to their potential utility in economic assistance programs. Third, the World Bank is selected and analyzed as a concrete case that raises two discrete aspects of the larger issue: (1) the application of internal standards; and (2) the potential utility of nonbinding guidelines and principles that originate outside the institution. The chapter concludes with observations concerning the potential for expanding the use of nonbinding instruments in the work of relevant institutions and recommendations for further research. It should be emphasized that it is based on an initial investigation whose principal purpose has been to identify productive areas for further inquiry. Due to the
nature of the subject matter, some of the observations are based on information of a preliminary, anecdotal character.

Scope

A large variety of organizations are engaged in providing economic assistance, broadly defined. Indeed, the scope of the institutions and programs of potential interest is so expansive that no single term in common use, such as "development assistance," encompasses them all. For the purposes of this research on the application or utilization of nonbinding instruments, the institutions of interest are those that provide financial assistance whose source is public monies to promote economic development abroad. Although not widely employed, for want of a better term one might speak of "economic assistance" provided through the operational activities of the following institutions:

- the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the International Finance Corporation (IFC) (collectively, the "World Bank group");
- the regional development banks, including the Inter-American Development Bank (IDB), the African Development Bank (AfDB), the Asian Development Bank (AsDB), and the European Bank for Reconstruction and Development (EBRD);
- the International Monetary Fund (IMF);
- the United Nations Development Program (UNDP);
- the European Investment Bank (EIB); and
- the United States Agency for International Development (U.S.A.I.D.).

These institutions exhibit a wide variety of operational approaches to the commonly shared mission of promoting economic development abroad, with a particular emphasis on the developing world. Some, such as U.S.A.I.D., are bilateral in nature, creatures of national governments and parliaments. Others, such as the World Bank group, the regional banks, UNDP and the IMF, are multilateral, intergovernmental institutions accountable to a multiplicity of states. Among multilateral bodies, the World Bank group and the IMF operate pursuant to weighted voting rules that emphasize the influence of donor country governments. By contrast, recipient country governments have a stronger voice at UNDP, as they do in
the United Nations system generally. The World Bank group and the regional banks award loans, whereas UNDP and U.S.A.I.D. provide assistance in the form of grants. The IBRD and IDA lend exclusively to governments and the IFC only to private borrowers; the EBRD, as mandated in its charter, engages in both sovereign and private sector lending. The World Bank group and the IMF make extensive use of reciprocal promises from recipients, or "conditionality," with respect to the use of funds by recipients, whereas UNDP customarily does not. UNDP's technical assistance grant program supports clearly delineated projects, whereas the IMF's stabilization lending is intended to address short-term macroeconomic imbalances. The World Bank not only supports specific projects, but also undertakes adjustment lending that targets medium-term policy adjustments and sector lending that can serve as a vehicle to address larger institutional reforms and capacity, as, for example, in the area of a country's energy policies.

Despite these significant differences in institutional structure and function, from the point of view of the instant discussion these entities share one crucial feature: Each is engaged in the transfer of public money to support or encourage activities overseas. This provides a relatively obvious juncture at which nonbinding instruments might apply. Another common feature concerns the potential or actual divergence between the policies of donors and the desires of recipients. In the case of multilateral institutions, such as those comprising the World Bank group, the policy of the intergovernmental organization, as distinct from those of either its donor or recipient country members, is another mediating consideration.

As a preliminary analysis purposely limited in scope, this chapter addresses only those "windows" of the World Bank group that engage in sovereign lending operations: the IBRD and IDA, which, unless the context indicates otherwise, will be referred to in the remainder of this paper collectively as the "World Bank." The reasons for this focus are several. For one, institutional structures, operational missions, and even terminology vary widely among the entities enumerated above. For the sake of clarity, it is helpful to consider only one institutional setting. Further research that might be appropriate for other institutions can then be identified through a process of extrapolation by induction from this particular concrete case. Second, as the result of the relatively intense scrutiny by governments and the public of its performance in the fields of environment, human rights and social welfare over the past decade
or more, the Bank in response has adopted a series of reasonably concrete policies and instituted a number of specific institutional features, such as the recently-created Inspection Panel. Perhaps not coincidentally, those junctures create relatively frequent opportunities to apply nonbinding instruments. As such, the World Bank is a relatively highly developed structural environment that can serve as a paradigm for further research to examine the implementation and application of nonbinding instruments. Moreover, both the Bank's professional staff and outside observers of the institution generally have greater institutional experience in implementing the subject matter addressed by the bulk of these nonbinding instruments than do at least some of the other entities enumerated above.

Range and Utility of Nonbinding Instruments

Nonbinding instruments have been extensively treated in the literature, and only the most salient features will be summarized here. Perhaps the most familiar nonbinding vehicles are those which, like binding international agreements, are adopted by states and addressed to states. However, the procedural posture and mode of adoption of nonbinding or "soft" instruments is quite wide-ranging, and probably considerably broader than that of the binding or "hard" law arising from international agreements. For instance, nonbinding instruments need not necessarily have been adopted or approved by representatives of governments. Nonbinding instruments may also be addressed to private parties, as opposed to governments. There are even examples of nonbinding instruments that have been both adopted by and addressed to private entities. To that extent, nonbinding instruments may be more sensitive indicators of recent developments that afford non-state actors a stronger voice in international affairs than do most binding international agreements. Unlike an international agreement, a nonbinding instrument by its very nature ordinarily does not have identifiable parties that are bound by its terms. Nor are there widely accepted procedures for the process by which such instruments are adopted and enter into force. And, of course, a nonbinding instrument by definition lacks objective indicia of an intent to be bound.

Nonbinding documents may serve a number of purposes. Perhaps the most important function of "soft" law is consciously to establish normative expectations—to be contrasted with binding obligations, which in principle are the realm of "hard" law. To that
extent, nonbinding instruments often function as "good practice standards," phrased in terms of "shoulds" rather than obligatory "shall." While not creating formal international legal obligations, these advisory instruments can nonetheless establish widely accepted standards for desirable or sound state practice. Adjectives typically applied to this category of instruments include "hortatory," "precatory," and "aspirational." Recommendations of the Organization for Economic Cooperation and Development (OECD) and guidelines and principles adopted under the auspices of the United Nations Environment Programme (UNEP), along with the 1972 Stockholm\textsuperscript{4} and 1992 Rio Declarations,\textsuperscript{5} are perhaps the most familiar and influential.

Because they often establish performance standards, these "normative" nonbinding instruments (or parts of instruments, for one document may serve a number of purposes) are among those with the greatest application to operational aspects of economic assistance programs. Especially to the extent that those instruments are specific from either a process or substantive point of view or both, nonbinding vehicles may find ready application in operational aspects of donor-financed projects and programs. For instance, the Food and Agriculture Organization (FAO) Pesticides Code\textsuperscript{6} contains reasonably specific recommendations relating to testing, labelling, packaging, storing, and disposing of pesticides. Similarly, the nonbinding forest principles\textsuperscript{7} adopted at the United Nations Conference on Environment and Development (UNCED) held in June 1992 in Rio de Janeiro—the so-called "Earth Summit"—might well find application in projects, programs, and policies financed with development assistance. Such instruments are not confined to the environmental area. For instance, the World Health Organization's infant formula code\textsuperscript{8} has a similarly specific, operational focus amenable to application through programs of economic assistance.

In this normative capacity, "soft" good practice standards may very well "mature" into binding obligations, of either customary or treaty origin or both. The most familiar example in the area of environment and natural resources is probably Principle 21 of the 1972 Stockholm Declaration. Although originally framed as a nonbinding exhortation, over time Principle 21 has acquired the status of a substantive rule of customary international law, of which the originally precatory language is now evidence. Principle 21 was also codified verbatim in the operative portion of the 1992 UN Biodiversity Convention\textsuperscript{9} (a most curious interpolation as the Biodiversity Convention is intended to address \textit{in situ} species
principle of the Rio Declaration, another nonbinding instrument, somewhat modified the text of Stockholm Principle 21. This altered version then appeared in a subsequent multilateral agreement on desertification. This altered version then appeared in a subsequent multilateral agreement on desertification (another unexpected importation because this agreement is not primarily concerned with transboundary pollution either).

Multilateral nonbinding instruments may also be useful as collective statements of political will or purpose, and especially as precursors to concerted multilateral action on the international level. This is probably the best way to characterize the declarations from the annual meetings of the Group of Seven (G-7) industrialized countries. Often, such “political” instruments may precede the adoption of binding requirements in established treaty regimes. The treatment of sulfur emissions in Europe in the mid-1980s, adjustments and amendments to the Montreal Protocol in the early 1990s, and the recent amendment to the Basel Convention banning exports of hazardous wastes from developed to developing countries provide good examples of the incremental, sequential purposes for which nonbinding instruments may be employed as precursors to binding legal obligations. Final acts of international gatherings, of which the best known is most likely the “Helsinki Final Act” resulting from a summit-level multilateral meeting in 1975, may perform similar functions. Although there is no hard and fast rule, those instruments, as discussed above, that are themselves intended to establish normative expectations are often negotiated over some time with a reasonably high level of attention to detail. By contrast, the “political” declarations, consistent with their more self-consciously preliminary or preparatory functions, often result from a single international conference.

Nonbinding instruments sometimes contain action plans for the future, in which case they consciously serve as “agenda-setting” vehicles. Although it also contains some normative elements, Agenda 21, the 40-chapter action plan for the next century adopted at UNCED, is probably the most prominent example. The 1972 Stockholm conference also produced an action plan including 109 recommendations for future implementation at the national and international levels.

The competing advantages and disadvantages of “soft” versus “hard” approaches invite a larger debate over what might be described as “choice of instrument.” For example, nonbinding instruments can serve an educational function by allowing reluctant
or diffident states an opportunity to gain experience in a particular field in a low-stakes environment. To that extent, a "soft" instrument may be appropriate in situations in which a high degree of consensus cannot be obtained, in which speed is desirable, or in which widespread scientific agreement on the need for action is lacking. Consequently, the potential for overcoming inertial "least common denominator" results\textsuperscript{17} is often cited as one of the primary advantages of the nonbinding, "soft" format. On the other hand, "soft" approaches are sometimes criticized as inappropriately relieving policy pressure for more aggressive action or attenuating already thin notions of law on the international level.

Because of the innately aspirational character of nonbinding instruments that is rarely found in binding treaty obligations, "soft" instruments may very well provide an occasion for more expansive approaches to certain policy problems. For example, the Experts Group on Environmental Law of the World Commission on Environment and Development was charged not just with codifying existing legal principles, but also with giving "special attention to legal principles and rules which ought to be in place now or before the year 2000 to support environmental protection and sustainable development within and among all States."\textsuperscript{18}

It is important to recognize that there is no fixed trajectory in which binding instruments are necessarily less ambitious than counterpart "soft" documents, or vice versa. For instance, in the mid-1980s UNEP adopted what in retrospect was a relatively modest set of guidelines and principles for the environmentally sound management of hazardous wastes.\textsuperscript{19} The binding Basel Convention\textsuperscript{20} followed in relatively short order. Due to a number of highly publicized cases in the intervening period involving the dumping of toxic wastes from the industrialized world in Third World countries—dubbed "toxic terrorism" and "garbage imperialism"—the binding convention contains considerably more stringent regulatory requirements than the precursor guidelines.

Similarly, nonbinding instruments are sometimes said to permit more flexibility in implementation than "hard" treaty obligations. There is, however, no inherent reason why that must be the case. UNEP's guidelines on international trade in pesticides and industrial chemicals,\textsuperscript{21} for example, contain detailed procedural requirements of a much higher level of specificity than the obligations found in many environmental "framework" or "umbrella" conventions.

One may well question whether there is a distinction between "hard" and "soft" instruments, or whether that distinction, if it once
existed, continues to be either clear or relevant. According to one authoritative observer, moreover,

> [t]he very success of soft-law instruments in guiding the evolution of contemporary international environmental law has also produced a backlash effect: governments have become wary of attempts at formulating reciprocal principles even when couched in non-mandatory terms, well knowing that “soft” declarations or recommendations have a tendency to harden over time and to come back to haunt their authors. 22

For instance, in the mid-1980s, the position of the United States with respect to many “soft” instruments was to treat them as de facto “hard.” That is, the Executive Branch would not agree to a multilateral nonbinding document unless the U.S. was capable of, and prepared to, implement that instrument fully—an approach that arguably defeats the benefits of the “soft” approach not only for the United States, but for the international community generally.

**Nonbinding Instruments at The World Bank**

One of the World Bank’s principal functions, as defined in IDA’s charter, is “to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world . . . in particular by providing finance to meet their important developmental requirements.” The IBRD, established in 1945, lends roughly at prevailing market rates of interest. IDA, created in 1965, lends to the very poorest countries in the form of concessional “credits,” which carry very low interest rates or no interest whatsoever. Although a group of intergovernmental organizations constituted by their own organic treaties, the World Bank, through an agreement with that organization, has the status of a specialized agency of the United Nations. As of the end of 1995, the IBRD had 179 member states and IDA had 158. In the fiscal year that ended in the middle of 1995, the IBRD and IDA together approved 242 loans and credits totalling $28.2 billion, many of which financed major development projects.

The IBRD and IDA share common institutions within the Bank. One Governor, ordinarily that country’s finance minister, represents each member state at the Bank. The Board of Governors meets as a body only once a year and in practice gives only very general guidance to the Bank’s professional staff. Day-to-day authority is
exercised on behalf of the Governors by twenty-four Executive Directors, appointed or elected by member country governments, who have offices physically located in the World Bank headquarters complex in Washington and who, pursuant to the Articles of Agreement, approve staff proposals for individual loans. The United States, Japan, Germany, the United Kingdom, France, China, Saudi Arabia, and Russia are represented by a single Executive Director each. Other Executive Directors represent groups of states. For instance, one Executive Director represents the Netherlands, Armenia, Bulgaria, Croatia, Cyprus, Georgia, Israel, the former Yugoslav Republic of Macedonia, Moldova, Romania, and Ukraine. The individual commonly identified as the Executive Director for Canada also represents most of the Caribbean countries.

The Board of Executive Directors takes decisions by weighted majority voting. Votes are allocated according to a formula that depends on the number of a member state's shares and its capital contribution to the institution. So, among the current IBRD members, the United States now exercises somewhat less than 17 percent of the total voting power in the IBRD, nearly three times as much as the next largest shareholder, Japan. No single shareholder holds enough votes unilaterally to direct the Bank as an institution to take a particular action, such as the approval or rejection of a particular lending proposal.

The World Bank's professional staff, headed by the President of the Bank, is somewhat analogous to the secretariats of other international organizations. Bank staff work for the international institution of the World Bank and do not represent the interests of their own national governments. Bank staff are specifically charged with the operational task of preparing or "appraising" specific loan proposals for approval by the Bank's Board of Executive Directors.

**Internal Bank Policies and Loan Conditions**

Lending proposals must be agreed between the professional staff and the borrowing country government before presentation to the Board of Executive Directors for its subsequent approval. This consensual relationship between the Bank and the borrower is characterized by certain promises or "conditions" that the borrowing country government agrees to perform in return for the loan, including of course, but not limited to, repayment of the loan proceeds. The most important, but not necessarily all, conditions associated with a particular loan are memorialized in promises or "loan covenants" contained in the loan agreement. Loan agreements
between the Bank and borrowing countries have a status in international law similar to that of treaties\textsuperscript{23} and are consequently enforceable by the Bank against the borrower. For example, if the borrowing country government were to fail to perform the loan conditions fully or satisfactorily, the Bank could suspend further disbursements, which are customarily made in phases or "tranches."

The most complete description of the design of a proposed project or other loan, including the conditionality associated with it, is not contained in the loan agreement, but in a document known as the "staff appraisal report," which is prepared at an earlier phase in the project cycle before approval by the Bank's Board of Executive Directors. Management presents the appraisal report, together with the President's report and recommendation, to the Board of Executive Directors when that body is requested to approve a particular loan. A variety of internal Bank standards govern the substance and process of loan preparation and appraisal on such matters as prior evaluation of environmental impacts,\textsuperscript{24} involuntary resettlement,\textsuperscript{25} treatment of indigenous peoples,\textsuperscript{26} natural habitats,\textsuperscript{27} water resources management,\textsuperscript{28} pesticide use,\textsuperscript{29} forestry,\textsuperscript{30} international waterways,\textsuperscript{31} and dam and reservoir projects.\textsuperscript{32} In general, however, the Bank's professional staff has a great deal of discretion in crafting the conditionality associated with a particular loan.

Whereas the Bank's internal policies and procedures are technically enforceable, there are a number of institutional incentives and structural features within the Bank that have been identified as impeding full implementation of, and compliance with, these internal Bank policies or loan conditions or both. While such generalizations are necessarily based on informed anecdotal accounts, suggestions of some of these systemic impediments have found their way into the literature.\textsuperscript{33} The day-to-day dynamics within the institution, so the argument goes, tend to discourage both the inclusion of strict requirements in accordance with Bank policies as a condition of loan approval and stringent oversight of the implementation of loan conditions after Board approval and during implementation. An institutional imperative, reinforced by career incentives to professional staff, is said to encourage the Bank's management to "move" large amounts of capital out the door and into the hands of borrowing country governments. The imposition of conditionality may delay or impede this objective. These same staffers, who have often invested months or years in the development of a particular loan, are the same individuals that respond to
concerns from member country governments, citizens organizations in donor and borrowing countries, and members of the public both before and after loan approval. For this structural reason, there may also be an institutional impediment to rigorous implementation of, and compliance with, loan conditionality. As many as 30 to 40 percent of Bank-financed projects are reported to be poorly implemented.

In response to generalized concerns such as these and as a result of a specific case involving the creation of an ad hoc oversight mechanism, in September 1993 the World Bank's Board of Executive Directors created an Inspection Panel that provides new opportunities for private parties to initiate proceedings to encourage compliance with and implementation of the Bank's internal standards. Most international organizations, such as the Bank, the UN, and the International Labour Organisation (ILO), have administrative tribunals with limited jurisdiction to adjudicate disputes, primarily employee grievances, between officials of the organization and the organization itself. The Inspection Panel is the first time such external oversight has been applied to the implementation of its operational mandate by an intergovernmental organization. The Panel consists of three independent experts appointed in their personal capacities. Nongovernmental organizations may seek review of both failures by the Bank's professional staff to observe that institution's own internal standards and inadequate supervision by Bank staff of the implementation of loan covenants by borrowing country governments. Consequently, at least in principle, the Inspection Panel provides a vehicle for assuring implementation at two major junctures where Bank policy is made and implemented: (1) through review of the observance and implementation of the institution's internal policies by the Bank's professional staff in designing and appraising loans; and (2) through review of the implementation of borrowers' contractual obligations, which reflect the Bank's policies and procedures, in cases in which Bank staff's oversight of those obligations is alleged to be deficient.

The resolution creating the Panel establishes some potentially significant limitations to its authority that are of particular interest in the instant context. The Panel, pursuant to the resolution creating it, is confined to considering "a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank." The Bank's "operational policies and procedures" referred to in the resolution creating the panel do not necessarily reflect even binding
customary norms in such areas as human rights, let alone the good practice standards contained in nonbinding multilateral instruments. There is also some question whether certain Bank policies, even those phrased in mandatory terms, are sufficiently binding, as opposed to hortatory, that they might be enforceable through the Inspection Panel process. Moreover, according to anecdotal reports from the Bank’s professional staff, conditionality contained in Bank documentation, such as a staff appraisal report, that does not appear either explicitly or by reference in the legal documentation, including covenants in the loan agreement, may not be amenable to oversight through the Inspection Panel process.

The resolution establishing the Inspection Panel specified a scheduled review two years after the Panel began its work in 1994. During that review, some reports suggested that there was considerable potential for the powers of the Panel to be attenuated. In October 1996, the Bank’s Board issued a statement clarifying the original Inspection Panel resolution and permanently extending the previously provisional status of the Panel without, however, altering the text of the instrument that created that body. One of the principal issues in the review concerned the initial assessment undertaken by the Panel, previously limited to twenty-one days strictly for the purpose of ascertaining the standing or “eligibility” of the entity initiating the request for inspection. As a result of the Board’s clarification, the first phase of a Panel investigation can now be extended up to eight weeks, and potentially indefinitely, to provide an opportunity for a more thorough inquiry “to establish whether the complaint is prima facie justified and warrants a full investigation because it is eligible under the [original Inspection Panel] Resolution.” The Inspection Panel members themselves were reported to support broadening the range of entities eligible to initiate a request for inspection, while at least some Executive Directors wanted to contract the scope of eligibility; the result was a reaffirmation of the existing terms. The clarification also exhorts Bank management to engage in more extensive outreach efforts to inform the public of the existence of the Inspection Panel and its work.

Based on the limited experience to date, the Panel has served as an important vehicle for highlighting gaps in the implementation of Bank policies in a public forum. In the three years since it commenced operation, the Inspection Panel has formally reviewed ten Bank-financed projects. The AsDB and the IDB have also recently established analogues to the World Bank Inspection Panel.
It is important to recognize that these independent oversight mechanisms are but one channel, albeit an important one, for drawing attention to the need for full implementation of binding and nonbinding instruments. Both private parties and governments can also avail themselves of other mechanisms, such as direct communications with Bank staff, to encourage implementation or enforcement, even of those requirements that are not binding.

A second, related issue concerns the terms of the policies themselves, which are currently under review. To streamline, simplify, systematize and clarify the application of the multiplicity of current Bank policies, management is replacing existing “Operational Directives” with “Operational Policies,” “Bank Procedures,” and “Good Practices.” In principle, the first two categories are binding and the third advisory, but the enforceable character of the instrument also depends on the phraseology employed in it. As a general matter, the new policies have been described as less comprehensive in scope, but more specific, in part to render enforcement and implementation through the Inspection Panel process somewhat more predictable. Some observers have questioned whether this conversion process is an opportunity for attenuating the mandatory character of these instruments, and therefore the potential for enforcement through the Inspection Panel process, by substituting policies of a precatory or hortatory character. As of this writing, about 80 percent of the Bank’s generic policies have been “reformatted,” although according to some, these are the less significant in operational terms. The other 20 percent, including those addressing resettlement, indigenous peoples, and environmental assessment, have been highly contentious; proposed changes that have been circulated or leaked have provoked vociferous objections, reportedly resulting in something of a stalemate. Because of this debate, indications from within the Bank suggest that there may be considerable utility to an objective comparison of the texts of the Bank’s new policy instruments with the language of those that they replace to facilitate an objective conclusion. In any event, the related concepts of “mandatory” and “enforceable” would appear to be more useful in discussing this area of internal bank standards than is the term “binding.”

Further research in this area is highly desirable, at a minimum to monitor developments on both these fronts. In particular, the relationship between these two areas—review of the Inspection Panel and revision of the Bank’s operational policies and procedures—should be more closely scrutinized to determine the
connections, if any, between them and the significance of those relationships. For instance, this may very well be an example in which the creation of accountable compliance and implementation mechanisms discourages the adoption of mandatory, binding and enforceable standards by an international institution in the first place—a finding that would be quite significant for this project more generally.

Nonbinding Instruments in Loan Preparation and Appraisal

The preceding section addresses policies—e.g., Bank operational directives and loan conditionality—and mechanisms—e.g., the Inspection Panel—whose source is purely internal, within the Bank. In addition, both binding and nonbinding instruments that originate outside the Bank may well be relevant to the lending operations of the institution.

According to its policies, the Bank “will not finance projects that contravene any international environmental agreement to which the member country concerned [i.e., borrowing country] is a party.” 42 This requirement does not, however, address situations in which a borrowing country is not a party to a binding multilateral environmental agreement, even one of near-universal application. Although there appears to be nothing in writing to this effect, the author has heard senior Bank officials opine that the Bank will not ordinarily expect borrowing countries to adhere to the obligations of international agreements to which the borrower is not a party as a condition of an IBRD loan or an IDA credit. The Bank's General Counsel has stated in writing that obligations in multilateral agreements to which a borrowing country is not party cannot be enforced by the Inspection Panel. 43 That would appear to be a relatively straightforward conclusion, in that multilateral agreements to which a borrower is not party would not appear to be Bank “operational policies and procedures” as that term is used in the Inspection Panel resolution. Far more important is the question whether the obligations in multilateral agreements to which a borrower is not party should, might, or must be taken as a benchmark of “good practice standards” and thereby incorporated directly or by reference as loan conditionality in the Bank's operations.

There are some precedents that strongly suggest that there is no legal impediment to such a practice. The Global Environment Facility (GEF), a freestanding trust fund administered by the Bank
together with UNEP and UNDP, provides a telling example. As determined by the conferences of the parties to those instruments, those countries that are not party to the relevant agreement, such as the Biodiversity Convention or the UN Climate Convention, are ineligible as recipients for GEF projects in that area—\textsuperscript{4}—the ultimate form of conditionality. While the GEF technically is a separate institution that operates pursuant to its own constitutive instruments, there appears to be nothing fundamentally different in the World Bank's institutional and legal structure that would preclude a similar posture or policy. Although the author has not been able to obtain any Bank documentation to this effect, Barber Conable, President of the Bank at the time of the adoption of the Basel Convention, is reported to have directed Bank staff to refrain from financing projects involving transboundary movements of hazardous wastes.\textsuperscript{5} If anything, this is a situation in which the Bank's policy appears to be more stringent than the obligations contained in the relevant international instrument. There are indications that the environmental impact assessment standards of the Espoo Convention,\textsuperscript{6} a regional agreement applicable in Europe and North America and that is not in force even there, may be employed in other geographic areas. There are also suggestions that at least certain members of the Bank's professional staff view promoting wider ratification of multilateral environmental agreements as an element of the Bank's operational mandate.

As far as binding international law of customary origin is concerned, the Bank's practice is even less clear. The Bank "will not finance projects that could significantly harm the environment of a neighboring country without the consent of that country."\textsuperscript{47} This requirement closely tracks a customary standard prohibiting transboundary pollution as found, for instance, in Principle 21 of the Stockholm Declaration. Otherwise, customary international legal standards do not appear to operate as a constraint on the Bank's operations, either as a matter of principle or of practice. Indeed, as discussed above, customary legal requirements that are more demanding than the Bank's operational policies and procedures cannot be taken into account by the Inspection Panel. On the other hand, the Bank's policy on international waterways is said to track customary norms in this area.

The extent to which nonbinding instruments whose origin is external to the Bank play a role in the institution's operations is not entirely clear. For example, the Bank's pesticide guidelines reference a number of nonbinding instruments. The FAO Code of Conduct is
identified as containing "internationally accepted general standards on labeling, packaging, storage and disposal, and pesticide management." Some Bank staff informally suggest that nonbinding instruments with an operational character can perform a "legitimating" function for conditions incorporated in project design. In addition to the FAO Code of Conduct, action plans associated with UNEP regional seas conventions, UNEP's London Guidelines addressing international trade in industrial chemicals and pesticides, and UNEP's Montreal guidelines on land-based sources of marine pollution have been mentioned in this regard. At the same time, there is very likely a considerable untapped potential for implementation of these "external" nonbinding instruments, and perhaps even some concern among Bank staff about potential legal constraints on incorporating the standards in these instruments into loan conditionality.

As discussed above, the critical element of consent is fundamental to the relationship between the Bank and the borrower. Lending proposals must be agreed between the professional staff and the borrowing country government before presentation to the Board of Executive Directors for its subsequent approval. Bank staff may choose not to pursue negotiations on a loan proposal, or the borrowing country government may not be prepared to accept the conditionality considered by Bank staff to be appropriate for the circumstances. Negotiations between the borrowing country government and the Bank may break down, or the borrower may withdraw its request, on any number of other grounds. For any of these entirely legitimate reasons, a particular loan proposal may not reach the Board. Indeed, given the legal and institutional structure of the Bank, in which loan proposals must be approved by the Board of Executive Directors, a member country can hardly be said to have a legally identifiable right to a particular loan.

As the Bank's General Counsel and others have pointed out on numerous occasions, the Bank's Articles of Agreement provide the Bank's borrowers certain assurances that loans will not be disapproved for inappropriate political, as opposed to economic, reasons. That requirement, however, is a far cry from an entitlement to any particular loan and, accordingly, presents few if any impediments to the kinds of conditionality that can be, should be, and are utilized to assure sound project design. Moreover, as the Bank's acceptance of environmentally sustainable development as its core mission demonstrates, the operational distinction between "political" and "economic" is far from clear.
In recent years, the Bank’s increasing tendency to include environmental conditionality as a component of its operational lending program has been the source of some friction with borrowing country governments. The Bank’s borrowing countries have on occasion objected to environmental conditions in loan agreements not just as ill-judged exercise of Bank staff’s considerable discretion or even as departures from the Bank’s Articles of Agreement. Instead, so-called “green conditionality” has incorrectly been attacked as an outright violation of sovereignty that implies an infringement of the exclusive prerogative of borrowing states to govern within their territories.51

While these sentiments may very well create some reluctance as a policy matter upon the part of Bank staff to utilize instruments, whether binding or nonbinding, as a reference point for conditionality in particular loans, it is clear that there is no legal impediment to such a practice. As a legal matter, there is no distinction between environmental conditionality and any other technical specifications the Bank may choose to impose as a condition of a loan. If the borrower agrees to the terms on which the loan is offered, then the loan agreement with the Bank operates per se as a consensual derogation of sovereignty and is no different in this respect from any other international agreement. If, on the other hand, the borrower rejects the terms proposed by the Bank, there is no violation of international law because the borrower has no right to the loan in the first place and has voluntarily declined to enter into the agreement it in any event.

This analysis strongly suggests that there is no legal impediment that prevents the Bank’s professional staff from relying on good practice standards that originate outside the Bank as conditions of the institution’s lending operations. Nonbinding standards such as the FAO Pesticide Code might well be employed for such a purpose. To that extent, the “good practice standards” contained in nonbinding instruments are no different from a legal point of view than the Bank’s internal requirements. Indeed, as the GEF example makes clear, there is no doctrinal reason why even binding obligations contained in multilateral treaties to which the borrower is not a party cannot be adopted as loan conditions—of course, with the agreement of the borrower, as is true in every consummated loan agreement. To that extent, the principles contained in nonbinding instruments and the obligations in multilateral environmental agreements if anything have greater legitimacy as loan conditions, as they reflect generally accepted
international standards. The “operationalization” of such standards as mandatory requirements for Bank staff, as in the Bank’s own internal policies, or as binding conditions, as in loan agreements, is consequently not only legal, but entirely appropriate.

In the case of customary legal obligations, there is even quite a compelling argument to the contrary: As a public, multilateral, intergovernmental organization, the Bank is considerably more than just an agent of borrowing country governments. Instead, the Bank, whose membership is now nearly universal, is accountable to the international community as a whole and is consequently under an obligation not to act inconsistently with international law. In other words, the Bank’s Articles of Agreement ought to be read in light of customary international law binding on the Bank’s member states and the Bank itself as subjects of public international law. In the case of a nonbinding instrument, this legal argument admittedly does not have the same force. It would nonetheless appear to be only natural, and certainly appropriate, to assume that widespread, generally accepted multilateral standards contained in nonbinding instruments would be presumed to apply in the Bank’s lending operations.

While difficult to document, it is probably fair to say that a majority of Bank staff have given little or no thought to this question, and the views of those who have may not be informed by a great deal of analytical rigor. This “baseline” level or awareness ought to be investigated further. Moreover, so far as can be determined, there may be misconceptions about the extent to which legal principles constrain the implementation of nonbinding guidelines and principles as conditionality in the Bank’s lending operations. Inquiries of representative members of the Bank’s professional staff should clarify current attitudes. Through a dialogue with management at the Bank, this project might well contribute to reversing any misimpressions concerning applicable legal constraints, or the lack thereof, through an appropriate doctrinal analysis of the role of nonbinding instruments in a legal and institutional setting such as the Bank.

Conclusion and Recommendations

Further research should be undertaken with respect to all the institutions identified earlier in this chapter, not only to determine current practices and policies, but also to elevate awareness of the potential utility of nonbinding instruments from an operational point
of view. But notwithstanding what one would expect to be the relative maturity of this concern at the World Bank, there appears to be some uncertainty among the institution's professional staff as to how to engage with the structural, institutional, policy and legal issues presented by nonbinding instruments. Accordingly, focusing this research in the near term on the World Bank would appear to be highly desirable.

The geographical location of the institution makes it readily accessible to American scholars. More importantly, within the universe of entities of interest in this area, a case study of the Bank is the most ripe. While other institutions have yet to adopt operational policies in many areas that overlap existing nonbinding norms, the World Bank already has considerable experience in implementation. Indeed, the organization is already engaged in a reevaluation of the policies themselves and one of the principal mechanisms for encouraging implementation and compliance, the Inspection Panel. The GEF, much of whose staff is housed at the Bank, is also likely to provide ready examples of alternative policies and practice to those employed in the Bank's mainstream portfolio. As the shape of the issue at the Bank becomes clearer, the research agenda might then expand to other institutions that present similar questions, such as UNDP.

Some further desk research will be required. This chapter focuses on environment and natural resources, in part because it has been an area of great activity by the Bank. A similar analysis would also be appropriate in other areas, such as human rights. A systematic attempt to canvass and identify the universe of nonbinding norms would be a logical first step. Those instruments should then be compared to the Bank's own standards, bearing in mind the Bank's ongoing internal revisions. Some additional doctrinal work may also be necessary in light of subsequent findings in such a research agenda.

The greater need, however, seems to be not for further book research, but for more empirical evidence to determine the "fit" between an appropriate analytical construct on the one hand and perceptions and practice at the Bank on the other. A systematic collection of anecdotal impressions and accounts from Bank staff could shed a great deal of light on the real-world issues of enforcement, compliance, and implementation. The relationship between the mandatory character of Bank policies and the availability of enforcement, implementation, and compliance mechanisms, discussed above, is a particularly promising area.
The application of nonbinding norms whose origin is external to the Bank—e.g., UNEP guidelines and principles—is a particularly difficult area to penetrate. Even at the World Bank, where one would expect discussion to be more advanced than at other institutions, there has been apparently meager thought, little practice, and virtually nothing reduced to writing. Two initial priorities would be (1) to determine the formal position, if any, of the Bank’s Legal Department on this question; and (2) to survey the attitudes, perceptions, and practice of the Bank’s professional staff more generally. On this question in particular, research is a particularly fertile occasion not only to observe existing policies and practices, but also to influence policy beneficially by engaging the institution in a dialogue that may very well highlight and enhance the potential utility of nonbinding instruments in realizing the Bank’s operational mission.

Endnotes

[This work was supported in part by grants from the Creswell Foundation and the Frances Lewis Law Center of Washington and Lee University. Portions of this chapter are based on the author’s previous published work in related areas.]


United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, pmbtl.


Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopting binding amendment to Basel Convention that would ban exports from developed to developing countries of hazardous wastes intended for final disposal or recycling).


17 See PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 5 (1990) ("Unlike decisions by a national legislature, internationally agreed-upon standards tend to reflect the lowest common denominator—the bottomline.").

18 REPORT OF WCED LEGAL EXPERTS, supra note 1, at 1 (emphasis in original) (chairman's introduction to final report noting the principal guidelines of the Experts Group).


27 World Bank Operational Policy No. 4.04: Natural Habitats (Sept. 1995).


34  The World Bank’s Board of Executive Directors created the Inspection Panel after the release of a report prepared as a result of an ad hoc independent review of the Bank-funded Sardar Sarovar Projects. SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW (1992). In 1985, the World Bank agreed to lend a total of $450 million to the Government of India for a series of dams and irrigation projects on the Narmada River. One of them, the Sardar Sarovar Dam, became the subject of heated environmental and human rights controversy. In an unprecedented step, the Bank appointed Bradford Morse, former Administrator of the U.N. Development Program, to lead a panel of independent experts appointed in their personal capacities in examining the scheme. The Independent Review confirmed the anticipated displacement of at least 100,000 people, the lack of an adequate prior environmental analysis by either the borrower or the Bank, and virtually no attention by the Bank to the project’s potential to increase the incidence of water-borne disease. This extraordinary independent review in effect became a conduit for the local public—the intended
beneficiary of the project—to have an input into the design and supervision of project preparation by the Bank. See SHIHATA, supra note 24, at 9–13 (“The Narmada Lesson”).


36 See SHIHATA, supra note 24, at 43–47.


41 See SHIHATA, supra note 24, at 45–46.

SHIHATA, supra note 24, at 97.

See, e.g., International Agreements on Environment and Natural Resources: Relevance and Application in Environmental Assessment (March 1996) (publication of Environment Department of World Bank updating Environmental Assessment Sourcebook) [hereinafter International Agreements on Environment and Natural Resources].

See, e.g., Thomas Land, Managing Toxic Waste: International Regulation of Hazardous Waste Materials, THE NEW LEADER, Nov. 27, 1989, at 4 (available in LEXIS, News file) (“the World Bank . . . has announced that it will refuse to finance any development project and [sic] involves the disposal of another country’s toxic waste”).


World Bank Operational Manual Statement No. 2.36: Environmental Aspects of Bank Work, para. 9(f), supra note 42; International Agreements on Environment and Natural Resources, supra note 44.


Under the heading “Political Activity Prohibited,” both the IBRD and IDA charters specify that

The [international organization] and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the
purposes stated [in the relevant treaty].


52 See International Agreements on Environment and Natural Resources, supra note 44 (World Bank publication stating that “[t]he World Bank, an organization created and governed by public international law, undertakes its operations in compliance with applicable public international law principles and rules”).

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