

WORLD BANK GRANTS IN A CHANGED WORLD ORDER: HOW DO WE REFEREE THIS NEW PARADIGM?

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ABSTRACT

Pressures rippling through the universe of overseas development aid over the last fifteen years are transforming overseas development aid from a top-down, government-only endeavor into a multi-layered, multi-party endeavor which engages governments and citizens at every level. In addition, aid priorities now reflect the reality that global problems (such as climate change and HIV/AIDS) need serious attention and that developing countries need grant finance to address these problems and other problems that stem from abject poverty. For the reasons described in this Article, these changes have made overseas development aid heavily dependent on grants channeled through the World Bank (referred to, throughout this article as “World Bank grants”). This dependence poses challenges for an institution set up to provide loans, not grants, and accustomed to thinking of a grant as a form of gentleman’s agreement rather than a binding commitment which may range from hundreds of dollars to millions and which, whatever the amount, reflects a host of interests and voices that clamor to be heard. These challenges set the context for this Article’s inquiry.

This Article begins by describing the changes that recent trends in overseas development aid have wrought and the reasons those changes have placed the World Bank at center stage of development grant finance. It then focuses on the legal framework governing World Bank grants. Its key inquiry is the extent to which that framework facilitates and effectuates the goals and values that development grant finance aims to achieve. This Article is not about whether grants for development aid achieve their targets (for example a reduction of greenhouse gas emissions in a recipient country or in the number of AIDS-related deaths), an important question but one for another day. Rather, it is about whether such grants are negotiated, agreed to, and delivered in a

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way that promotes the inclusive, participatory, and collaborative approaches that recent trends in development aid hold paramount.

As a starting premise, this Article concedes that the legal framework governing development grant finance is unclear (an inevitable state of affairs given the lack of clarity surrounding the legal status of a grant in the national jurisdictions of most developed countries, and, therefore, in an international legal system built on principles drawn from them). In the face of this lack of clarity the terms of the grant agreements, pursuant to which development grants are made, become the operative legal framework. And so, this Article looks to those terms to determine whether such grants comport with current thinking on optimal development approaches.

But not all terms of an agreement are created equal. This Article posits that in the world of development grant finance, the key elements of a grant agreement to evaluate in order to determine whether the agreement reflects an inclusive, participatory, and collaborative approach are the elements that deal with the right of the grantor to cancel or suspend a grant and the provisions that apply when things go, or appear to have gone, wrong—namely the dispute resolution arrangements. The grantor is always in a position of power; dispute resolution arrangements set the parameters within which such power may be exercised. For this reason, this Article examines the dispute resolution arrangements in World Bank grant agreements.

That examination reveals that World Bank grant agreements reflect a top-down, take it or leave it relationship that does not promote or facilitate inclusion, participation, and grantor/grantee collaboration. This Article concludes with some suggestions for the principles that should guide the redress of these deficiencies and the re-design of the dispute resolution arrangements that is required.

1. INTRODUCTION

Overseas development aid means many things to many people. Ever since such aid became a phenomenon, different sectors have competed for priority. In the 1950s, for example, aid focused on post war reconstruction. In the 1960s, the emphasis shifted to rural and agricultural development; in the 1980s it shifted again to the financial sector; and in the 2000s governance became the Holy Grail.

Attitudes about how aid should be delivered have also changed over time. In the 1990s, certain fundamental changes in the world's approach to aid occurred that cut across all sectors. Indeed, fear emerged among the developed countries of the impact global problems could have on them if such problems were left ignored in developing countries. This shift in thinking led to a consensus that tackling global problems in developing countries should be a development priority. These changes led to an exponential increase in the amount of overseas development aid that was made available in the form of grants (as distinct from loans or other financial instruments). It also led to an expansion in the range of aid donors and in the range of direct recipients of aid. This in turn led to a change in expectations regarding the nature of the relationship between the donors and the recipients of aid.

The implications of making global problems a development priority were far reaching. First, it was clear that developed countries would have to provide developing countries grants if they wanted developing countries to address these problems. Currently, environmental concerns tend to be a priority for resource-starved developing countries. And whilst HIV/AIDS might be a priority for some, the virility of the virus and the huge costs involved in providing adequate medicines and a health infrastructure to address it would quickly overwhelm even some of the more robust developing country economies.

Second, such grant funding would have to be provided through multilateral, pooled funding mechanisms as global problems are not amenable to piecemeal, uncoordinated solutions. Therefore, developed countries wanted to pool the resources they were making available to address these problems in a central fund that would provide grants to developing countries on the basis of a coordinated platform that was continually informed by the latest research on how these problems should be tackled. This desire to act collaboratively gave rise to a need for an entity that would manage the financial aspects of such a central fund which, at a minimum, involves collecting, holding, and investing the funds contributed to the central fund and then disbursing them in accordance with the donors' intentions. As an international financial institution with established links to the finance ministries and central banks of both developed and developing countries, the

World Bank¹ was an obvious (though not uncontroversial) choice to fill that role. Hence, the seeds of an increase in development grant finance, funded out of central funds administered by the World Bank and channeled through the World Bank, acting as a conduit for external donors, were sown.

These seeds sprouted fast. In 1991, the world's major economic powers, including the United States, Japan, the United Kingdom, France, and Germany, created a \$1 billion global trust fund to provide grants to developing countries for environmental improvements, the "Global Environment Trust." Three years later, donors expanded and restructured the fund and it became the Global Environment Facility Trust Fund ("GEF Fund"), now a \$3 billion fund. This was followed seven years later by the G-8 countries' creation of the Global Fund for HIV/AIDS, Malaria and Tuberculosis ("Global Fund"), a \$2 billion dollar fund to provide grants to developing countries to fund efforts to stall and treat those diseases. And, more recently, in 2006, a group of government donors, including the European Union, China, and Australia, among others, created a multi-million dollar central fund to provide grant finance to developing countries for avian flu eradication efforts.

Several additional implications flowed from the developed world's embrace of global problems as a development priority. The strongest proponents of making the environment and HIV/AIDS development priorities were civil society groups and nongovernmental organizations in developed countries. Not surprisingly, those groups also pressured for inclusive approaches to the design and delivery of aid. Accordingly, in the case of the GEF, they fought for, and obtained, a seat at the table for developing countries, who participate with developed countries in deciding on the allocation of GEF grants. Further, the GEF's policies provide for extensive consultation with civil society groups, many of whom are heavily involved in implementing GEF-funded projects.

¹ The World Bank consists of two legally separate, but closely related, institutions; the International Bank for Reconstruction and Development ("IBRD"), and the International Development Association ("IDA"). They have distinct sources of funding but are both managed and operated day-to-day by the IBRD Board of Executive Directors and the IBRD President and staff. *See generally* IBRAHIM F. I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* (1991); *WORLD BANK, 2007 ANNUAL REP.* 4 (2007).

In the case of the Global Fund, civil society argued forcibly that that grants from that fund should be targeted to the grass roots level rather than government ministries. In response, donors agreed to use in-county participatory governance mechanisms ("Country Coordinating Mechanisms") which draw upon mechanisms already existing in recipient countries and facilitate reaching the grass-roots level. In short, these global funds did not simply create a new source of multilateral funding to be provided as grants, they also created new norms for how development grant finance should be designed, delivered, and implemented.

The vastness of the needs to be addressed and the relative paucity of government aid resources also underscored the importance of reaching out to non-government sources of development aid such as foundations and the private sector. With this outreach, another new norm emerged: the building of public-private partnerships for development grant finance, involving government and non-government actors both at the donor and the recipient level.

With the dawning of the new millennium, the overseas development aid norms that evolved during the 1990s to tackle global problems spread more generally to other aspects of development aid. In September 2000, 145 representatives of governments and the world's leading development institutions met at the Millennium Assembly of the United Nations ("UN") in New York to decide on a coordinated overseas development aid agenda for the new millennium. They agreed on eight goals, the Millennium Development Goals ("MDGs"), which include tackling global problems, building a "global partnership for development," and achieving universal primary education, improved maternal health and reduced child mortality in an effort to eradicate extreme poverty.

The adoption of these goals contained an implicit acknowledgement that further grant funding would be made available from the developed world for these purposes. This implicit acknowledgment took concrete form with the creation of the Education for All Fast Track Initiative which included a multimillion dollar trust fund set up by signatories of the Millennium Declaration, and administered by the World Bank, aimed at providing grant funding to the poorest developing countries for primary education.

Prior to the creation of the global funds and the adoption of the Millennium Development Goals, the key tool for providing

multilateral assistance to the world's poorest countries was the International Development Association ("IDA"), the arm of the World Bank Group which is funded by contributions from developed member countries of the World Bank (which are replenished on a regular replenishment cycle) and charged with the task of making highly concessional loans to the world's poorest countries. In 2001, however, the idea of helping the poorest countries by means of grants rather than loans that had been adopted in the case of the global funds and, to a considerable extent, for the achievement of the MDGs, gained further traction. This traction was fuelled by a separate, although related, trajectory: concern about mounting levels of unsustainable developing country debt.

This concern had been growing since the mid 1980s. In 2001, however, it came to a head when an International Financial Institutions Advisory Commission, set up by U.S. Congressional Republicans, suggested that IDA, should generally discontinue issuing loans and, instead issue grants. This suggestion was not adopted by other IDA donors but it led, gradually, to an expanding set aside of a portion of IDA funds for grant assistance. This culminated in 2005 in an agreement amongst all IDA donors that certain developing countries should henceforth receive all IDA funding allocated to them (in accordance with a pre-agreed set of core criteria applicable to all countries eligible for IDA) in the form of grants.

As a consequence of these fundamental changes in overseas development aid that began in the 1990s and have continued into the new millennium, millions of dollars now pass annually from the developed world to the developing world in the form of World Bank grants. Moreover, many parties including government and non-government donors and recipients are involved. Further, a grant can take a multitude of forms, ranging from an IDA grant of several million dollars to a developing country government, to a grant of several hundred dollars from a trust fund administered by the World Bank to a non-governmental organization operating at the grass roots level. This exponential rise in grant finance poses new challenges for the World Bank, an institution set up to provide loans², not grants, and for the international legal order.

² Specifically, loans may be made to developing countries through the IBRD or the IDA.

The thesis of this Article is that the legal framework governing this grant finance is currently inadequate and that designing a dispute resolution mechanism for that framework should be the top priority in addressing those inadequacies, in chief because it sets the parameters for the donor-grantor relationship. Further, this Article maintains that any such mechanism must contain a menu of options tailored to the expansive range of endeavors funded by World Bank grants. In addition, the dispute resolution mechanism must be flexible and inclusive enough to meet the needs of the multiple stakeholders involved (governments, civil society, and the private sector) and responsive to the highly charged authorizing environment in which development aid is provided.

This huge increase in development grant finance being channeled through the World Bank is an under-studied phenomenon in legal scholarship, although it has been widely studied in development economics.³ There is considerable legal scholarship on certain aspects of the trend, for example, the legal aspects of trust funds for the environment have been studied by international environment scholars.⁴ But the nature of the legal relationship between a grantor of aid and the recipient of such aid and the need for a process to manage disputes that arise in the course of such a relationship, have not been addressed. This Article seeks to remedy that deficit.

My starting premise is that the adequacy of the legal framework governing grants for development finance should be

³ See generally Jeremy Heimans, *Multifactor Global Funds New Tools to Address Urgent Global Problems* (World Inst. for Dev. Econ. Res., Research paper No. 2004/47); STEVEN RADELET, CTR. FOR GLOBAL DEV., *THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA: PROGRESS, POTENTIAL, AND CHALLENGES FOR THE FUTURE* (2004); Beryl A. Radin, *Performance Measurement and Global Governance: The Experience of the World Bank*, 13 *GLOBAL GOVERNANCE: A REV. OF MULTILATERALISM AND INT'L ORGS.* 25 (2007); JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 210 (2005).

⁴ See, e.g., Peter H. Sand, *Trusts for the Earth: New International Financial Mechanisms for Sustainable Development* in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 167, 167 (Winfried Lang ed., 1995) (articulating the history and development of the trust as a viable legal means for foreign aid and environmental protection); David Freestone, *The Establishment, Role and Evolution of the Global Environment Facility: Operationalising Common but Differentiated Responsibility?*, in *LIBER AMICORUM FOR THOMAS A. MENSAH: LAW OF THE SEA, PROTECTION OF THE MARINE ENVIRONMENT AND SETTLEMENT OF DISPUTES* 1077 (Tafsir Malick Ndlaye & Rüdiger Wolfrum eds., 2007)

judged by the extent to which it advances the evolving overseas development aid paradigm that grant finance is designed to effect. As a threshold matter (and for reasons beyond the scope of the Article's main focus), this Article takes the position that World Bank grants, which currently contain no governing law clause, should include such a clause, and that it should provide for the application of public international law. Further, this Article favors specifying the sources of public law for such purposes in a manner which parallels the sources adopted in Article 38 of the International Court of Justice (i.e. treaties, custom, and general principles).

Whilst favoring the application of public international law drawn from treaties, custom, and general principles as the preferred governing law for World Bank grants, this Article concedes that the legal status of promises to make donative transfers is inherently uncertain under public international law, reflective of the considerable uncertainty surrounding the legal status of donative transfers under the national jurisdictions of both donor and recipient countries. Given the millions of dollars that change hands every year pursuant to development grant agreements, however, this Article maintains that the operative legal framework governing these grants consists of the terms and conditions of the grant agreements themselves. Thus, for development purposes, the crucial question is whether the grant agreement defines the terms of engagement, and the grantor and recipients' interaction for the duration of the grant in a way which is consistent with the shared values of partnership and collaboration that undergird the ideals of development grant financing. Donors' preference for providing aid by means of a World Bank grant is not only about providing assistance that does not increase developing country debt. It's also about providing assistance in a way that allows for partnership and collaboration between the donors, recipients, intermediaries like the World Bank, and other stakeholders.

This Article maintains that the key elements of a grant agreement to evaluate in order to determine whether the agreement reflects an inclusive, participatory, and collaborative approach are the elements that deal with the power of the grantor to cancel or suspend a grant and the provisions that apply when things go, or appear to have gone, wrong—namely the dispute resolution arrangements. These provisions set the parameters within which the power, which a grantor inevitably has vis-à-vis a

grantee, may be exercised. For this reason, this Article focuses primarily on the dispute resolution arrangements in World Bank grant agreements.

A review of the legal framework governing World Bank grants shows that the framework falls short of what is needed. Up until July 2006, many World Bank grants were made pursuant to grant agreements that contained no dispute resolution provisions at all. When, in 2006, concern increased regarding fraud and corruption as the size and scope of grants grew, the World Bank decided to introduce a set of standard conditions for all World Bank grants which included a dispute resolution provision.

Instead of designing a customized provision to meet the distinct needs of the development grant universe, however, the Bank simply used the dispute resolution provision it uses for loans, all of which involve high-value, Bank-to-government transactions. This provision provides for a *sui generis* UNCITRAL-type procedure that does not contain any options or varying stages that can be tailored to the size of the grant, the capacity of the parties or the nature of the dispute. Thus, the provision fails as an adequate dispute resolution mechanism for the diverse universe of World Bank grants.

This Article maintains that the inadequacies of the current dispute resolution mechanisms in World Bank grant agreements are all the more problematic in light of some developments that have occurred in the wake of developed countries' increased commitment to providing grant assistance. These stem from the distinctive characteristics of a grant as compared to a loan. With grants, there is always the fear that the grant funds will simply disappear. Whilst loans may not ultimately be used for the purposes intended, the fact that they have to be paid back means that there is less concern that the funds lent will simply disappear. In response, to this concern regarding grant finance, donor countries have begun to insist that grant funds be made available on the basis of stringent performance benchmarks and a pre-agreed results matrix. Measuring results by effectiveness, as distinct from keeping track of loan repayments, invites ongoing dialogue between the grantor and recipient. Making disbursement of grant proceeds dependent on the achievement of agreed measures of progress calls for collaboration and cooperation between the grantor and grantee and make it critical for the grant agreement to promote dialogue and understanding and a clear opportunity for all stakeholders to be heard. That dialogue and

opportunity would be reflected in a well-designed dispute resolution mechanism.

In addition, recent years have seen an increase in concern about fraud and corruption in all forms of overseas development aid, as well as concern about aid getting into the hands of terrorist groups. Further to this concern, donors have insisted on the inclusion of measures in World Bank grant agreements that will minimize the risk that grant funds will be diverted through fraud and corruption or somehow be siphoned off into the hands of terrorist groups. In response the World Bank has introduced stringent provisions concerning fraud and corruption in its loan arrangements, which make the borrower liable for any fraud or corruption that occurs at any stage in the chain. It has included the same kinds of provisions in its standard conditions for grants. In such a climate of high vigilance, where the Bank is under pressure from donors and others to sanction at the first hint of a problem, the need for a robust dispute resolution mechanism becomes even more acute. Such a system can head off problems before they spiral, serving the interests of all parties concerned.

Having found the existing dispute resolution mechanism in World Bank grant agreements lacking, this Article calls for a new approach, citing the elements that an adequate dispute resolution mechanism should contain. These include (i) a range of procedures tailored to the nature of the dispute (with the stages of investigation and degrees of investigatory powers adjusting accordingly); (ii) a sequenced set of procedures (which would begin with consultation and progress, as necessary through negotiation, mediation, fact-finding, and arbitration); (iii) means of empowering recipients where appropriate to enable them to participate in a meaningful way (such means could include ways of enabling them to supplement their skills and, in some instances, making representation available to them). Further, this Article maintains that any dispute resolution system should be transparent but time bound (to avoid protracted proceedings which could have a negative impact on the case for overseas development aid generally) and that representatives of all stakeholders should be consulted in its design.

The first part of Section 2 of this Article traces the emergence of the World Bank grant as an instrument of overseas development aid. Section 2 shows how the changes in development norms that began to occur in the 1990s led donor countries to create centralized funds under the umbrella of the World Bank as

administrator and trustee. These changes in norms included recognition of the need to address global problems through coordinated, multilateral initiatives; a collective acknowledgement that certain aspects of development require grant finance not loans; a renewed donor commitment to eradicating abject poverty; a new openness to building partnerships with non-governmental entities, including civil society and the private sector both to fund development initiatives and to implement them; and a determination to enhance accountability in overseas development assistance through the use of performance targets and results management measures.

The second part of Section 2 shows how early suggestions that the IDA provide a portion of its assistance in the form of grants evolved over a period of ten years into a decision to provide all IDA funds allocated to debt distressed countries by way of grants. I show how the basic premises underlying this change in the IDA's policies mirrored those underlying the explosion in the creation of many central funds to provide grant assistance—namely, concern about developing countries' levels of debt and a determination to tie continued support to “good” performance, which, in the context of IDA, means progress in attaining transparency and accountability in government.

Having traced the emergence of the World Bank grant as a financing mechanism, this Article, in Section 3, shows how World Bank grants have become a core part of development finance and how they span a vast range of activities that vary greatly in purpose, size, and scope and in the nature of the parties involved. It shows how grants funded from special purpose central funds, IDA, and grant programs funded out of World Bank net income fall into several broad categories which include grants to safeguard global public goods, grants dedicated to fund the social sectors in the ongoing effort to relieve poverty, grants to provide relief in the event of a crisis or to meet the needs of societies in war-torn post-conflict situations, and grants to jump start innovative financing initiatives (such as output-based aid schemes and crop insurance).

Recognizing the varied range of activities and actors that come within the World Bank grant umbrella and the very differing scope and scale that such grants involve, Section 4 of this Article explores the legal framework governing such grants. Conceding that the legal status of grants is uncertain, it points to the terms and conditions of the agreements which govern World Bank grants as

the operative legal framework that defines the relationship between the parties involved. Analyzing those terms and conditions, which vest the World Bank with extensive powers to suspend or cancel a grant, Section 4 then reviews whether such agreements include a dispute resolution mechanism that reflects the values of the donors or grant finance, serves to protect recipients against heavy handed or peremptory action on the part of the World Bank, and facilitates dialogue, negotiation, and reconciliation if a problem arises.

Section 4 concludes that the dispute resolution mechanism in World Bank grants, which is drawn from the heterogeneous large-value transfers world of World Bank loans, reflects a heavy-handed top-down approach which is out of sync with current development aid norms. It urges that a new dispute resolution system be designed for World Bank grants which contains a menu of options tailored to the idiosyncrasies of the World Bank grant universe. In particular, I urge that any such mechanism help to re-adjust, or equalize, grantor/grantee leverage by taking into account the continuing nature of many World Bank grant relationships, the David and Goliath syndrome that's a fact of life for most parties dealing with the World Bank, and the fact that World Bank grants involve multiple stakeholders in a sensitive authorizing environment.

This Article concludes by noting that the trends that have led to the explosion in the use of grant finance are here to stay. Accordingly, developing effective dispute resolution mechanisms for World Bank grants will meet an important policy need. Overseas development aid is a high stakes endeavor both for the tax payers of donor governments and the citizens of recipient countries whose needs far exceed the supply of funds available. This makes it incumbent on the legal regime to foster workable and responsive legal relationships. Fostering such relationships implies anticipating stressors and building a process that allows for investigation and aversion of problems before they morph into scandals with the potential to de-rail the broader aid effort.

2. THE EMERGENCE OF THE WORLD BANK GRANT AS AN INSTRUMENT OF OVERSEAS DEVELOPMENT AID

2.1. *Background: Loans and Grants in Context*

To understand the significance of the grants for overseas development aid that are channeled through the World Bank

("World Bank grants"), the terms and conditions on which they are given and the need for robust dispute resolution mechanisms to process differences when things go wrong, it is first necessary to understand where such grants fit in the overseas development aid architecture.

2.1.1. *Overseas Development Aid Defined*

World Bank grants are part of the financial assistance provided to developing countries⁵ by a network of national and international aid agencies, programs, and related institutions that together constitute what is known as overseas development aid (a term used interchangeably with overseas development assistance)⁶ Overseas development aid traces its historical beginnings to the development activities of the colonial powers in their overseas territories, the institutions and programs for economic cooperation created under United Nations auspices after the Second World War, the United States Point Four Program,⁷ and the large-scale support for economic stability for the countries on the periphery of the Communist bloc of that era.⁸

Multilateral overseas development aid emerged as a form of international finance in the immediate aftermath of the Second World War, when the forty-four allied nations met at the United

⁵ For the purposes of this Article a developing country is a country in which the majority of the population lives on significantly less money than the population in highly industrialized countries and often lacks basic public services.

⁶ See Org. for Econ. Coop. & Dev. [OECD], *The Story of Official Development Assistance: A History of the Development Assistance Committee and the Development Co-operation Directorate In Dates, Names and Figures*, at 22, OCDE/GD(94)67 (1996) (prepared by Helmut Führer), available at www.oecd.org/dataoecd/3/39/1896816.pdf (defining ODA as "official transactions with the main objective of promoting the economic and social development of developing countries . . . the financial terms of which are 'intended to be concessional in character'"). Note, the World Bank also channels grants to the developing world from non-government sources, such as, for example, the Gates Foundation and the Soros Foundation, when such sources pool their contributions with other contributors in programs being administered by the World Bank. To that extent, references to overseas development aid made in this Article encompass assistance provided by a broader range of sources than Overseas Development Assistance as defined by the OECD.

⁷ The United States Point Four Program is a program for development assistance introduced by President Truman in 1949 and endorsed by Congress in 1950 with the enactment of the Act for International Development. Point Four Program, 64 Stat. 204 (1950).

⁸ OECD, *supra* note 6, at 21 (providing a history of the development of ODA).

Nations Monetary and Financial Conference at Bretton Woods, New Hampshire and created the International Bank for Reconstruction and Development (“World Bank”) and the International Monetary Fund (“IMF”) pursuant to the Bretton Woods Treaty.⁹ The World Bank was originally set up to assist in reconstructing the economies of its members destroyed by war.¹⁰ The IMF was set up to oversee the international monetary system and promote stable exchange rates. The creation of these institutions was followed in 1950 by the establishment of the United Nations following the United Nations Conference in San Francisco in 1945 when representatives of fifty nations agreed to the United Nations Charter, whose purposes include promoting the economic and social advancement of all peoples.¹¹

Bilateral overseas development aid as a form of international finance gained momentum somewhat later. The United States, the United Kingdom, and France were the first countries to create formal bilateral overseas development assistance agencies.¹² In the 1960s, many other countries, including Japan, Germany, and Sweden followed suit, prompted by former colonies beginning to attain their independence. The former colonial powers were eager to maintain strong ties with their former colonies on which they still depended heavily for the supply of commodities and raw materials. Thus, they had a strong interest in the financial sustainability of these newly minted states and created aid

⁹ See generally International Monetary Fund [IMF], IMF Archives: Finding Aids—Bretton Woods Conference Collection—Bretton Woods Conference Files, <http://www.imf.org/external/np/arc/eng/fa/BWC/s4.htm> (discussing the origins of the IMF) (last visited Dec. 1, 2008); World Bank, Archives: World Bank History, <http://go.worldbank.org/2GIYUD9KB0> (discussing the origins of the World Bank) (last visited Dec. 1, 2008).

¹⁰ David D. Driscoll, IMF, *The IMF and the World Bank: How Do They Differ?*, at 1 (1996), <http://www.imf.org/external/pubs/ft/exrp/differ/differ.pdf>.

¹¹ UN CHARTER pmbl.

¹² In 1945, “the United Kingdom reorganis[ed] its development assistance through the ‘Colonial Development and Welfare Act’ (following previous acts passed in 1929 and 1940)” and “France establish[ed] the Fonds d’investissement économique et social des territoires d’outre-mer.” OECD, *supra* note 6, at 4–5. In 1951, the United States passed the Mutual Security Act, which provided for major aid programs for South Korea, Taiwan, Vietnam, the Philippines, Thailand, India, Iran, Jordan, and Pakistan, to be administered by a new Mutual Security Agency, reconstituted from the Economic Cooperation Agency which had administered the Marshall Plan. Mutual Security Act of 1951, ch. 479, 65 Stat. 373–387 (1951); OECD, *supra* note 6, at 6.

agencies charged with the task of administering programs of overseas development aid to them.¹³ The United States and Canada, meantime, sought to advance their strategic interests. Canada created an external aid office in 1960, which subsequently became the Canadian International Development Aid Agency in 1968. The United States created the Agency for International Development and the Peace Corps, and launched the Alliance for Progress, a ten-year program of cooperation with Latin America.¹⁴

These bilateral efforts were accompanied by additional, multilateral efforts, most notably, the creation of IDA in 1960, which was set up by member countries of the World Bank for the purpose of providing highly concessional loans to the poorest developing countries, most, if not all, of which were former colonies.¹⁵

2.1.2. *Overseas Development Aid Norms (1960s–1990s)*

Developed countries continue to provide their overseas development aid through a mix of bilateral and multilateral channels. Bilateral aid is aid provided directly by a donor country to a recipient country—for example, from France to Cameroon. Bilateral aid arrangements may take a variety of forms, including commitments from the developed country government to provide goods and services such as food, medical supplies, or technical assistance to the developing country government and direct financial assistance.¹⁶ Grants are the preferred form of bilateral financial assistance.¹⁷

¹³ In 1961, France established a Ministry for Co-operation with responsibility “for assistance to independent, mainly African developing countries;” Germany established a comprehensive development assistance program, including creating a separate ministry for development assistance; Japan set up the Overseas Economic Cooperation Fund to provide loans to developing countries and, the following year, created an Overseas Technical Cooperation Agency, Sweden created an Agency for International Assistance (transformed in 1965 into the Swedish International Development Authority); Switzerland created a technical cooperation service within its Department of Foreign Affairs. OECD, *supra* note 6, at 13.

¹⁴ OECD, *supra* note 6, at 13 (citing the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424).

¹⁵ See IDA, What is IDA?, <http://go.worldbank.org/ZRAOR8IWW0> (describing the establishment and goals of the IDA) (last visited Dec. 1, 2008).

¹⁶ The United Kingdom Department for International Development [DFID] provides its overseas development aid in the form of commitments to provide goods and services and does not provide financial assistance directly to the

Multilateral aid is the overseas development aid a country channels through intergovernmental organizations like the World Bank and the United Nations. Like bilateral aid, it can take a variety of forms. In order to become a member of the World Bank, for example, member countries subscribe shares and commit to making good on World Bank financial obligations in the event the World Bank's is unable to do so.¹⁸ Those subscriptions and commitments constitute overseas development aid even though they are mostly in the form of callable obligations.¹⁹ Through the financial backing of its member countries, the World Bank is enabled to raise funds by issuing bonds on the international capital markets.²⁰ Those bonds are the World Bank's source of cash for the loans it makes to developing countries.²¹ Member countries' contributions to IDA also constitute overseas development aid. Unlike member subscriptions to World Bank shares, contributions to IDA involve the transfer of hard cash from the donor country to IDA every three years. Until 2005, IDA conveyed the bulk of its assistance to developing countries by way of loans.

In sum, therefore, up until the early 1990s, the overseas development aid landscape had well defined parameters. It consisted primarily of government-to-government transactions. These could be bilateral arrangements involving the transfer of

developing country recipient. See DFID, About DFID: Who DFID Works With (Nov. 4, 2008), <http://www.dfid.gov.uk/aboutdfid/dfidwork/> (describing bodies and agencies that comprise the DFID "global aid 'system'"). USAID also uses this modality of assistance along with several other modalities. See USAID, Doing Business with USAID (May 4, 2007), <http://www.usaid.gov/business/> (describing the acquisition and assistance instruments used to attain USAID objectives).

¹⁷ Daniel Cohen, Pierre Jacquet, & Helmut Reisen, Beyond "Grants versus Loans": How to Use ODA and Debt for Development 1-2 (2005) (paper prepared for AFD/EUDN International Conference), http://www.pierrefacquet.net/IMG/pdf/Cohen_Jacquet_Reisen_EUDN_final.pdf. A few donor governments, however, most notably Japan, provide assistance in the form of loans. France and Italy provide a small percentage of their overseas development assistance in the form of loans. *Id.* at 2.

¹⁸ IBRD, *Information Statement*, at 2-4 (2006), <http://treasury.worldbank.org/web/InformationStatementFinal.pdf>.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 4. Because World Bank bonds have the financial backing of all the developed countries of the world, they are rated AAA and are favored investments of banks seeking to satisfy reserve requirements and other institutional investors. *Id.* at 35.

²¹ *Id.*

either services, tangibles (such as food aid), or funds from a developed country government to a developing country government. Where the transfer involved funds, they would, in almost all cases, be conveyed to the developing country as a grant. Multilateral aid, on the other hand, involved conveying assistance to the developing world through an intermediary, an intergovernmental organization such as the U.N. or the World Bank, which was conveyed to developing countries was conveyed (with some minor exceptions)²² in the form of loans.

2.1.3. *Changes in Overseas Development Aid Norms (1990s–Present)*

Starting in the 1990s, an explosion in donors' use of trust funds to convey grant aid to developing countries for special purposes;²³ and a change in the nature of the assistance IDA should provide to debt distressed countries materially altered the pre-1990s bilateral/multilateral, grants/loans parameters for overseas development aid and gave rise to the phenomenon of the World Bank grant.

The changes that occurred in overseas development aid norms throughout the 1990s and early 2000s were fuelled by several competing forces. In the beginning of the 1990s, national budgets for overseas development aid declined in the face of widespread questioning about aid's effectiveness.²⁴ Criticism of multilateral institutions like the World Bank, the U.N., and the World Trade Organization ("WTO") was rampant and they became a favored target of anti-globalization protesters.²⁵ At the same time, concern

²² The World Bank served as trustee of some minor trust funds prior to the 1990s. Joseph Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 AM. J. INT'L L. 856, 859–61 (1978); Sand, *supra* note 4, at 167.

²³ World Bank, *A Management Framework for World Bank Administered Trust Funds*, at 1 (2007), available at <http://go.worldbank.org/OHJ0PRQF90> [hereinafter TRUST FUNDS BOARD REPORT].

²⁴ See Jean-David Naudet, Comment, in DEVELOPMENT AID: WHY AND HOW? TOWARDS STRATEGIES FOR EFFECTIVENESS 97, 102–103 (2005), available at <http://www.afd.fr/jahia/webdav/site/afd/users/administrateur/public/publications/notesetdocuments/ND-22.pdf> (reviewing cross-country econometric analyses, performed in the mid-1990s, of the effectiveness of development aid and highlighting the "[a]id fatigue" of "political authorities, public opinion and even the development community").

²⁵ See Anup Shah, *Public Protests Around the World*, GLOBAL ISSUES, Nov. 25, 2003, available at <http://www.globalissues.org/article/45/public-protests->

increased about global problems, such as pollution and the spread of HIV/AIDS which underscored the deep need for aid. It became clear that these problems threatened to engulf the developed world if left unchecked in the developing world. It was also clear that developing countries needed grant finance to address these problems as they had neither the will nor (in many cases) the capacity to address them themselves.²⁶ Over time, concern about how best to address global problems in developing countries expanded into a broader concern about the need for more grant finance generally as the crippling effects of developing country debt became increasingly apparent. In the face of these competing sentiments, pressure mounted to explore new approaches to overseas development aid.

In response to these pressures, several new, inter-linked trends emerged. These included: (i) a proliferation of trust funds for overseas development aid designed to target aid to specific issues and policy areas, and to allow for participatory rather than top-down development; (ii) an effort to create partnerships for development aid whereby government and non-government donors combine resources to make grants available for development challenges; and (iii) a determination to change development aid to the world's poorest countries from loans to grants. Each of these trends has had a major impact on the amount of overseas development aid being made available to the developing world in the form of World Bank grants.

2.2. *The Rise of the World Bank Grant: Trust Funds*

2.2.1. *The Impact of Donors' Preference for Trust Funds*

An unprecedented and exponential growth in the use of the trust fund as a mechanism for overseas development aid, which began in the 1990s and still continues,²⁷ has led to a huge increase in World Bank grants because donors usually rely on the World

around-the-world (reporting on the large protests at WTO meetings, at IMF, World Bank, G8, and other summits against globalization and increasing disparities between the rich and poor).

²⁶ Heimans, *supra* note 3, at 2-4; RADELET, *supra* note 3, at 4.

²⁷ TRUST FUNDS BOARD REPORT, *supra* note 23, at i. In the early 1990s, the World Bank held about two billion dollars in trust funds. By 2007, this amount had risen to over twenty-one billion dollars. *Id.* It continues to rise with the Bank now serving as trustee to some seven hundred sixty-six different trusts. *Id.* at 10-11.

Bank to serve as trustee for such grants. The growth in the use of such trust funds began with the creation of trust funds to protect global public goods. It subsequently expanded to include the use of trust funds to target specific sectors or issues, to provide funds for debt relief, and as vehicles for creating a pool of funds drawn from a wide range of government and non-government donors. Trust funds are also commonly used to pilot new initiatives. These uses are in addition to the trust fund's traditional use as a vehicle for mobilizing resources for crisis relief, humanitarian needs, and post-conflict resources. Most trust funds for overseas development are created to provide grant financing to developing countries and so more trust funds means more grant finance.

Donors choose the trust fund mechanism as an alternative approach to providing development aid for several reasons. The trust fund affords donors a way to pool their resources with those of other donors for a common purpose, pursuant to an agreed agenda.²⁸ It also gives donors a way of retaining active, ongoing control over the use of their aid resources because when donors create a trust fund with other donors, the trust arrangement usually provides that the donors, acting together as a donor council, will decide on the allocation of the trust fund resources.²⁹ Thus, although the World Bank administers the trust fund as trustee, the donors will often call the shots on the specific allocations of trust fund resources. This gives donors more direct control and influence over the use of their funds than they have within the governance structures of institutions like the World Bank and the UN.

2.2.1.1. *Global Trust Funds*

For global issues, such as the environment and HIV/AIDS, for example a coordinated donor-controlled approach was seen as crucial for effectiveness. The donors to the GEF Fund were skeptical of the World Bank's commitment to protecting the environment in 1994 and the donors to the Global Fund did not trust any intergovernmental organization to rely on grass roots

²⁸ See generally Sand, *supra* note 4.

²⁹ TRUST FUNDS BOARD REPORT, *supra* note 23, at 17 ("Many of these funds are implemented in the context of partnership governance agreements that are designed to be broadly representative and often external to the Bank (for instance, the GEF Council has 32 constituencies representing 177 countries)."). See generally Sand, *supra* note 4, at 180.

networks in 2000. Hence, they created new trust funds to direct resources at these issues instead of seeking to utilize the regular channels of existing multilateral institutions.³⁰ The creation of the first global funds, the GEF Fund and the Global Fund, illustrated the advantages of the trust fund approach for donors and paved the way for a subsequent plethora of special purpose trust funds for development.³¹

2.2.1.1.1. *The GEF Fund*

Set up as a pilot initiative in 1991, with about one billion dollars in funding (and subsequently restructured in 1994), the GEF Fund was designed to help developing countries meet the costs involved in meeting their obligations under the United Nations Framework Convention on Climate Change and the United Nations Framework Convention on Biological Diversity.³² The GEF Fund's largest contributors are the United States, Japan, France, and Germany.³³ It now holds over three billion dollars, contributed by thirty-four countries.³⁴ Although the Instrument establishing the GEF Fund authorizes assistance in several forms including loans, guarantees, and grants, most of its resources are conveyed to developing countries by way of grant.³⁵ The GEF Fund also serves as a precedent for ongoing proposals to set up additional global

³⁰ Sand, *supra* note 4, at 168-75.

³¹ See Global Environment Facility [GEF], About the GEF, <http://www.gefweb.org/interior.aspx?id=50> (last visited Dec. 1, 2008) (explaining the objectives of GEF); see also GEF, Conventions, <http://www.gefweb.org/interior.aspx?id=108> (last visited Dec. 1, 2008) (listing international environmental conventions which provide "broad strategic guidance" to the GEF Council).

³² United Nations Framework Convention on Climate Change, Mar. 9, 1992, 1771 U.N.T.S. 107; Convention on Biological Diversity, Jun. 5, 1992, 1769 U.N.T.S. 79. It now also serves as the financial mechanism for the Convention to Combat Desertification and the Stockholm Convention on Persistent Organic Pollutants.

³³ GEF Council, *Trustee Report*, at 11, GEF/C.34/Inf.3 (Nov. 7, 2008), available at [http://www.gefo.org/uploadedFiles/Documents/Council_Documents_\(PDF_DOC\)/GEF_C34/C.34.Inf.3%20Trustee%20Report.pdf](http://www.gefo.org/uploadedFiles/Documents/Council_Documents_(PDF_DOC)/GEF_C34/C.34.Inf.3%20Trustee%20Report.pdf).

³⁴ GEF, GEF Structure and Organization (Dec. 18, 2007), http://www.gefcountrysupport.org/report_detail.cfm?projectId=200; Press Release, GEF, World Environment Body Gets A US\$ 3.13 Billion Boost (Aug. 28, 2006), http://thegef.org/uploadedFiles/External_Affairs/Media/GEF_4th_Replenishment_Final.pdf.

³⁵ Instrument of the Establishment of the Restructured Global Environment Facility arts. I(2), I(9)(b)-(c), Mar. 2008, available at http://thegef.org/uploadedFiles/GEF_Instrument_March08.pdf.

trust funds to finance activities aimed at combating the effects of global climate change.³⁶ These proposals further the trend of having grant finance serve a critical role in the protection of the environment in developing countries.

2.2.1.1.2. *The Global Fund for HIV/AIDS, Malaria, and Tuberculosis*

The idea of having a global fund to provide grant financing to developing countries to protect the environment was followed by the idea of creating a global fund to provide grant financing to address issues of global health. The leaders of the G8 countries acknowledged in July 2000 that HIV/AIDS, tuberculosis, and malaria threatened to “reverse decades of development and to rob an entire generation of hope for a better future.”³⁷

Beyond the acknowledgement, the leaders of the twenty-eight G8 Summit agreed to implement a comprehensive plan on HIV/AIDS, malaria, and tuberculosis.³⁸ Then-U.N. Secretary General, Kofi Annan, initiated the idea of creating a global fund dedicated to the battle against these diseases in April 2001 at a special summit of the Organization of African Unity held in Abuja, Nigeria, where it received strong support from African leaders.³⁹

³⁶ For example, the GEF Fund has paved the way for a joint proposal from the United States, the United Kingdom, and Japan to create two additional multi-billion dollar global funds, the Strategic Climate Fund, and the Clean Technology Fund to provide grants to developing countries for activities aimed at addressing climate change. This proposal was announced at the Thirteenth Session of the Conference of Parties of the United Nations Framework Convention on Climate Change. Conference of Parties to the United Nations Framework Convention on Climate Change, Bali, Indon., Dec. 3-14, 2003, *Report of the Co-Facilitators of The Dialogue on Long-Term Cooperative Action to Address Climate Change by Enhancing Implementation of the Convention*, para. 1, FCCC/CP/2007/L.7/Rev.1 (Dec. 14, 2007).

³⁷ Communiqué of Okinawa G8 Summit, Okinawa, Jap., July 23, 2000, para. 26, available at <http://www.g7.utoronto.ca/summit/2000okinawa/finalcom.htm>.

³⁸ See Chair's Summary of Kananaskis G8 Summit, Kananaskis, Alberta, Jun. 27 2002, available at http://www.g8.fr/evian/english/navigation/g8_documents/archives_from_previous_summits/kananaskis_summit_-_2002/the_kananaskis_summit_chair_s_summary.html (summarizing the annual Summit discussion of, among other things, terrorism, sustainable development and Africa's development).

³⁹ See Press Release, U.N. Info. Serv., United Nations Secretary-General Kofi Annan Calls for Large-Scale Mobilization in Fight Against AIDS (Apr. 25, 2001), available at <http://www.unis.unvienna.org/unis/pressrels/2001/note137.html>

Subsequently, in June 2001, the creation of a "global HIV/AIDS and health fund to finance an urgent and expanded response to the epidemic" was announced at the close of the U.N. General Assembly Special Session on HIV/AIDS.⁴⁰

Kofi Annan appealed to countries and the private sector to contribute to the fund. In July 2001, at a meeting of the G8 countries in Genoa, leaders of the G8 vowed to make the fund operational by the end of the year and established a working group charged with the task of developing a new structure and methodology that would enable the fund to spend resources most cost-effectively and in ways that would produce measurable results.⁴¹

Advocates for the Global Fund campaigned for, and secured, a facility targeted towards reaching recipients at the grass roots level.⁴² To further the intention of creating a fund that would reach the grass roots level and be quick and non-bureaucratic, donors set the fund up as an independent, nonprofit foundation.⁴³ It is set up under Swiss law with headquarters in Geneva.⁴⁴ The World Bank serves as trustee of all monies entrusted to the Global Fund. The

(discussing Annan's statements to the African Summit about how to wage an effective global campaign against AIDS).

⁴⁰ Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶ 90, U.N. Doc. A/RES/S-26/2 (Aug. 2, 2001).

⁴¹ Communiqué of Genoa G8 Summit, Genoa, It., July 22, 2001, ¶ 15, available at http://www.g8italia.it/_en/docs/XGKPT170.htm.

⁴² See ALEXANDER SHAKOW, GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA [Global Fund] & WORLD BANK GLOBAL HIV/AIDS PROGRAMS, COMPARATIVE ADVANTAGE STUDY (2006) (discussing the role of the Global Fund and World Bank in addressing the "implementation crisis" that arises when large international organizations attempt to address public health problems at the national level); see also First Meeting of the Transitional Working Group to Establish a Global Fund to Fight AIDS, Tuberculosis, and Malaria, Brussels, Belg., Oct. 11-12, 2001, *Final Report* (Oct. 30, 2001) (discussing whether the GEF will be formally or informally established, and if formally, under which nation's law); Third Meeting of the Transitional Working Group to Establish a Global Fund to Fight AIDS, Tuberculosis, and Malaria, Brussels, Belg., Dec. 13-14, 2001, *Final Report* (establishing an oversight committee).

⁴³ Fifth Board Meeting of the Global Fund to Fight AIDS, Tuberculosis, and Malaria, Geneva, Switz., Jun. 5-6, 2003, *Report of the Governance and Partnership Committee, Annex 6, Update on Legal Status for the Global Fund* [hereinafter Global Fund's Fifth Board Meeting, Annex 6].

⁴⁴ Global Fund, History of the Fund, <http://www.theglobalfund.org/en/history/?lang=en> (last visited Dec. 1, 2008)

Global Fund made its first round of grants in April 2002, for the benefit of a total of thirty-six countries.⁴⁵

2.2.1.1.3. *The Avian and Human Influenza Facility*

More recently, in 2006, the global trust fund approach to garnering support for global health needs was adopted with the creation of the Avian and Human Influenza Facility.⁴⁶ Created at an international pledging conference held in Beijing in 2006, the purpose of the facility is to provide grants for actions that will minimize the risk and socio-economic impact of avian influenza (and other zoonoses) and of possible human pandemic influenza.⁴⁷ It is funded by a group of government donors, including China, Australia, the United Kingdom, and the Russian Federation among others, whose pledged commitments amount to eighty-three million dollars.⁴⁸

2.2.1.2. *Other Trust Funds*

Even for issues that do not have a global reach, donors have come to believe that increased donor control allows for a more efficient and less bureaucratic form of aid that will be mobilized faster than aid from multilateral channels. However accurate the perception, trust funds are seen as magnets for raising funds from public and private sources because they create a sense of urgent and focused attention on a particular issue.⁴⁹

Donors also like the ability to customize the governance structure of a trust fund as a way of creating multilateral aid initiatives which involve multiple stakeholders including non-governmental organizations and the private sector in decision-making, financing, and implementation responsibilities. Finally, donors favor trust funds because they are perceived as more amenable to being held accountable for results. Indeed, funds donated to a trust fund are seen (and sold to taxpayers) as more

⁴⁵ Global Fund, Funding Decisions, <http://www.theglobalfund.org/en/fundingdecisions/> (last visited Dec. 1, 2008).

⁴⁶ For more information on the Avian and Human Influenza Facility, see generally World Bank, Avian and Human Influenza Facility, <http://go.worldbank.org/D805PSGGI0> (last visited Dec. 1, 2008).

⁴⁷ *Id.*

⁴⁸ *Id.* The other donors to the Facility include Iceland, Estonia, Korea, and Slovenia.

⁴⁹ Heimans, *supra* note 3, at 3-4.

traceable than monies that become part of the maw of an existing intergovernmental organization.⁵⁰ All such trust funds rely heavily, however, on the financial infrastructure of existing institutions, and nine times out of ten, that means channeling the trust fund resources through the World Bank.⁵¹

2.2.2. *The Impact of Donors' Renewed Commitment to Relieving Abject Poverty*

Fueled by prosperous times, the beginning of the new millennium was marked by optimism about overseas development aid, which led to an increase in development grant finance.⁵² In 2000, the United States' economy was booming, there was economic progress in India, China, and Russia, and "the IT boom was still in its full glory."⁵³ While Africa "remained a place of unrelieved crisis," there was hope that the wealth, new technology, and new global interconnectedness and awareness with which the developed world entered the twenty-first century could make a difference to the vexing challenges of environmental degradation, illness, and abject poverty.⁵⁴

In September 2000, at a meeting of most of the world's governments and its leading development institutions at the Millennium Assembly of the United Nations in New York, this optimism and determination was formalized through the adoption of the Millennium Development Goals ("MDGs").⁵⁵ The MDGs, which are set out in the Millennium Declaration, reflect the agreement on priorities for overseas development aid in the twenty-first century.⁵⁶ They include (i) the eradication of extreme poverty and hunger, (ii) universal primary education, (iii) promotion of gender equality and empowerment of women, (iv) reduced child mortality, (v) improved maternal health, (vi) the

⁵⁰ *Id.* at 7-8.

⁵¹ TRUST FUNDS BOARD REPORT, *supra* note 23, at 1.

⁵² SACHS, *supra* note 3, at 210.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 211.

⁵⁶ See U. N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/Res/55/2 (Sept. 18 2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf>; see also United Nations, U.N. Millennium Development Goals, <http://www.un.org/millenniumgoals/statements.shtml> (last visited Dec. 1, 2008). The meeting included 147 heads of state and government. SACHS, *supra* note 3, at 210.

combat against HIV, AIDS, malaria, and other diseases, (vii) environmental sustainability, and (viii) the development of a global partnership for development.⁵⁷

The year 2015 was chosen as the year by which the MDGs should be achieved, and the UN subsequently set a global monitoring system in place whereby countries' progress towards achievement of the goals are reviewed and reported on annually.⁵⁸ Developed country governments confirmed their commitment to the Millennium Declaration in 2002 at a conference held in Monterrey, Mexico to discuss ways of providing the financial means necessary to implement the goals and agreed to make concrete efforts to increase their assistance.⁵⁹ Donors have been eager to show progress on the highly visible aid platform they agreed to in 2000 and since that time, have dedicated much of their aid to achieving the MDGs, frequently by contributing resources to trust-funded global programs managed by the World Bank.⁶⁰ All such assistance is then provided to recipients in the form of grants.⁶¹

2.2.3. *The Impact of New Donor Partnerships*

The eighth MDG, the goal of creating partnerships for development, reflected an explicit recognition by developed countries and development institutions that governments alone

⁵⁷ United Nations, U.N. Millennium Development Goals, <http://www.un.org/millenniumgoals/statements.shtml> (last visited Dec. 1, 2008).

⁵⁸ *Id.*

⁵⁹ SACHS, *supra* note 3, at 217-18 (discussing the "Monterrey Consensus").

⁶⁰ Press Release, U.N. Dep't of Pub. Info., Progress Towards Dev. Targets is Mixed, UN Finds, U.N. Doc. DPI/2464 A (July 2, 2007), available at www.unescap.org/unis/press/2007/jul/MDGs_report07_global_pr.pdf. See generally Mukesh Kapila, *Healing Broken Societies: Can Aid Buy Love and Peace?* in 13 GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INT'L ORGS. 17, 19-23 (2007) (evaluating the practicality and efficacy of using international aid to encourage peace and security in the receiving countries); Radin, *supra* note 3, at 25-33 (describing the World Bank's dual strategy of employing both a "bottom-up process" of "civic engagement" and a "top-down effort that emphasize[s] efficiency outcomes and market-based solutions" in its performance activities). The merits of this approach of providing aid to specific development goals have been questioned as it has led to a fragmented aid landscape and a host of programs with highly specific mandates, each providing narrowly targeted assistance. *Id.*

⁶¹ See Heimans, *supra* note 3, at 1.

cannot accomplish development and that broad-based partnerships are necessary to make progress. Recognizing that development demands collaboration with many actors has two aspects: collaborating with a wide range of recipients who may implement activities on behalf of the aid's ultimate beneficiaries (the world's poor) rather than confining the aid relationship to country governments; and reaching out to multiple possible sources of funds for development in recognition of the fact that official aid alone will never be sufficient to meet all the needs of the developing world.⁶²

Further to this second aspect, and spurred on by former World Bank President James Wolfensohn, a staunch proponent of collaborations among the World Bank, governments, and non-government donors in the aid effort,⁶³ the World Bank reached out to many non-government sources of development aid throughout Wolfensohn's tenure. The World Bank's efforts led to the creation of numerous new global programs funded by diverse sources, working together in partnership with each other and with recipients to provide grants. As a result, the World Bank now hosts over seventy separate grant-making global programs, all of which operate with their own distinct identities under the umbrella of the World Bank, which typically serves as trustee of the funds that donors commit to the partnership.⁶⁴ The partners include many foundations and non-governmental organizations. The partnerships usually have their own governing bodies, comprised of partner representatives and their own secretariat (which will frequently be comprised of Bank staff). They include, for example, the Critical Ecosystems Partnership, the Global Water Partnership, Popular Coalition to Eradicate Hunger and Poverty, Cities Alliance, and the Global Road Safety Partnership.⁶⁵ They

⁶² SACHS, *supra* note 3, at 212-13.

⁶³ See James D. Wolfensohn, President, World Bank, Speech to the Cambridge Business and Environment Program (Nov. 17, 1998), *available at* <http://go.worldbank.org/B4SIAP9ZM0> (calling on members of business, government, and civil society to cooperate in addressing the myriad challenges facing the modern global community).

⁶⁴ World Bank Operations Evaluation Department [OED], *Addressing the Challenges of Globalization: An Independent Evaluation of the World Bank's Approach to Global Programs* xxii (2004), *available at* [http://lnweb90.worldbank.org/oed/oeddoelib.nsf/24cc3bb1f94ae11c85256808006a0046/762997a38851fa0685256f8200777e15/\\$FILE/gppp_main_report_phase_2.pdf](http://lnweb90.worldbank.org/oed/oeddoelib.nsf/24cc3bb1f94ae11c85256808006a0046/762997a38851fa0685256f8200777e15/$FILE/gppp_main_report_phase_2.pdf).

⁶⁵ For a more extensive list of such programs, see *id.* at Annex H.

exercise a considerable degree of autonomy in the design and purpose of the grants they provide and set their own criteria for grant assistance.⁶⁶

2.2.4. *The Impact of Donors' Concern About Developing Country Debt*

Starting in the late 1980s, concern about unmanageable levels of developing country debt translated into a series of actions that ultimately increased, to a great degree, the amount of development assistance passing through the World Bank to developing countries in the form of grants. The actions began with an initiative to provide heavily indebted poor countries with grant finance to be used for paying off commercial loans. That was followed by initiatives to cancel some of the debt owed by heavily indebted countries to IBRD and IDA. Those initiatives then evolved into gathering momentum in favor of having IDA provide funds in the form of grants rather than loans. The initiatives to cancel debt owed to IDA and to provide IDA assistance in the form of grants operate on the premises that: (a) debt relief and IDA grants should only go to countries that are committed to good governance; (b) such commitment should be measured in accordance with agreed performance targets; and (c) donors should allocate such assistance within a results management framework.

The first debt relief initiative, the IDA Debt Reduction Facility, emerged in 1989, following the announcement of the United States Brady Initiative.⁶⁷ It was set up to provide grants to countries that

⁶⁶ *Id.* at xxi–xxii.

⁶⁷ World Bank, *World Development Report: Poverty*, at 8 (Oxford Univ. Press, 1990), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/12/13/000178830_98101903345649/Rendered/PDF/multi_page.pdf. The Brady Initiative was launched in March 1989 and is designed to achieve “case-by-case debt reduction accompanied by official financial support that is conditional on domestic policy reform.” *Id.* Named for its proponent, U.S. Treasury Secretary Nicholas Brady, the Brady Initiative proposed allocating resources from the World Bank and the IMF to promote the reduction of debtor countries’ debt obligations and interest payments. The allocated funds were used to augment the credit-worthiness of securities to be exchanged for commercial banks’ already existing loans. Mexico was the first country to enter a debt agreement under the Brady initiative and over five hundred banks worldwide negotiated to exchange their Mexican loans with enhanced bonds or to lend Mexico new money. The banks could choose to either convert their outstanding debt to bonds with a reduced face value and market-based interest rate, or convert their outstanding debt to bonds with the

qualified for loans from IDA but not from IBRD (“IDA-only countries”) for commercial debt reduction operations.⁶⁸ It was initially funded out of IBRD net income.⁶⁹ In 1996, the Bank and the International Monetary Fund developed a more ambitious framework of action, the Heavily Indebted Poor Countries Debt Relief Initiative (HIPC), to address heavily indebted poor countries’ external debt burden. The framework (which was amended in 1999 to provide faster and deeper relief) provides a basis for creditors to provide debt relief to thirty-seven countries identified as heavily indebted poor countries.⁷⁰

To be eligible for debt relief under the framework, a country has to be an IDA-only country, face an unsustainable debt situation, as determined by the Bank, after all traditional debt relief mechanisms have been exhausted, and pledge to undertake a series of macroeconomic reforms.⁷¹ The costs of the initiative to multilateral creditors are met in part by support from a trust fund, the HIPC Trust Fund, to which donors pledged over \$3 billion.⁷² The trust fund reimburses IDA and certain regional and sub-regional multilateral creditors for debt relief provided to HIPC-eligible countries.⁷³ These efforts to provide debt relief served as the precursor of a major shift in IDA from loan assistance to grant assistance for heavily indebted countries that subsequently occurred in 2005.

same face value but a reduced and fixed interest rate, or they could provide new loans. Haluk Unal et al., *The Brady Plan, 1989 Mexican Debt-Reduction Agreement, and Bank Stock Returns in the United States and Japan*, 25 J. MONEY, CREDIT & BANKING 410, 410–11 (1993).

⁶⁸ World Bank, FAQs—Debt Reduction Facility—Questions and Answers (Apr. 6, 2007), <http://go.worldbank.org/KLJLN9UHR0>.

⁶⁹ *Id.*

⁷⁰ *Id.* A “heavily indebted poor country” is defined as a country “struggling to cope with heavy debt.” World Bank, FAQ—Debt Relief, <http://go.worldbank.org/2YHKG4QYS0> (last visited Dec. 1, 2008). Countries that fit this definition include Benin, Bolivia, Ghana, Ethiopia, Rwanda, Madagascar, and Nicaragua, among others. World Bank, Heavily Indebted Poor Countries, <http://go.worldbank.org/4IMVXTQ090> (last visited Dec. 1, 2008).

⁷¹ Alejandra Viveros, Debt Relief: Debt Strategies for Sustainable Growth and Poverty Reduction (Sept. 2008), <http://go.worldbank.org/KNZR2IIQG0>.

⁷² GOBIND NANKANI & TIMOTHY GEITHNER, IMF & WORLD BANK, HEAVILY INDEBTED POOR COUNTRIES (HIPC) INITIATIVE—STATISTICAL UPDATE 3 (2003).

⁷³ *Id.*

2.3. *The Rise of the World Bank Grant: IDA*

2.3.1. *Background*

IDA's switch in emphasis from loan finance to grant finance for debt distressed countries evolved gradually over the course of several IDA replenishments. IDA's Articles of Agreement authorize the replenishment of IDA by providing for the periodic review of the adequacy of IDA's resources.⁷⁴ IDA replenishments are negotiated over the course of a series of meetings between representatives of donor countries known as IDA Deputies.⁷⁵ Each replenishment has two distinct phases. First, the IDA Deputies negotiate the total amount of the three-year replenishment, individual donor country contributions, and overall policy.⁷⁶ Second, each member country passes legislation authorizing an appropriation for its respective contribution.⁷⁷

2.3.2. *The Push for IDA to Provide Grant Assistance*

Pressure to make some IDA funding available in the form of grants, subject to the recipient country making progress on macroeconomic reforms, began in 1996 in the course of the

⁷⁴ TONY FAINT, *SELECTIVITY AND ACCOUNTABILITY IN IDA'S REPLENISHMENTS* 3 (2003). *See also*, IDA, *THE IDA DEPUTIES: AN HISTORICAL PERSPECTIVE* 1-2 (2001), available at <http://siteresources.worldbank.org/IDA/Resources/Seminar%20PDFs/deputS.pdf> (describing the replenishment process and providing a history of IDA replenishments).

⁷⁵ IDA, *supra* note 74. Since the thirteenth replenishment of IDA ("IDA 13"), which took place in 2002, representatives of countries receiving IDA assistance have been invited to attend IDA replenishment meetings. They do not, however, have a vote. *See* IDA, *ADDITIONS TO IDA RESOURCES: THIRTEENTH REPLENISHMENT* 1 (2002), available at <http://siteresources.worldbank.org/IDA/Resources/IDA13Report.pdf>. Under Article III, Section 1(d) of IDA's Articles of Agreement, IDA replenishments must be approved by a two-thirds majority of IDA's members.

⁷⁶ MARTIN WEISS, *CONG. RES. SERV., THE WORLD BANK'S INTERNATIONAL DEVELOPMENT ASSOCIATION (IDA)* 5 (2007), available at <http://fpc.state.gov/documents/organization/84308.pdf>.

⁷⁷ *Id.* In the United States, for example, Congress authorizes the United States participation in an IDA replenishment on the basis of the agreement that has been forged by the IDA Deputies. Once that authorization is in place, the U.S. President seeks annual appropriations from Congress for the U.S. share of each replenishment. *Id.*

eleventh IDA replenishment.⁷⁸ At that time, IDA Deputies agreed that some of the resources of the replenishment should be used to provide grants, but only in selected cases, exceptional circumstances (as determined by the Bank's Board of Executive Directors), and on a limited scale.⁷⁹ In 1999, in the course of negotiating the twelfth IDA replenishment, IDA Deputies expanded the availability of grant financing from IDA by providing that IDA resources could be used to provide grants in furtherance of the HIPC program or to assist post-conflict countries prior to arrears clearance as a last resort.⁸⁰

2.3.2.1. *The Meltzer Commission Recommendations*

The push for IDA to provide grant assistance received a further boost upon publication of the report of the International Financial Institutions Advisory Commission, chaired by Carnegie Mellon University Professor, Alan Meltzer ("the Meltzer Commission") in 2001. The Meltzer Commission was set up by Congressional Republicans in 1998 in response to legislation enacted that same year authorizing the United States to participate in deliberations on an IMF quota increase.⁸¹ Among other suggestions, the report proposed a radical change in both the World Bank and IDA's operations, recommending that both the World Bank and IDA discontinue issuing loans, absent certain circumstances, and instead issue what it described as "special purpose grants."⁸²

The report recommended that the World Bank and IDA replace their loan programs with grant programs geared specifically towards alleviating poverty and promoting structural reform and focused on areas such as health care, primary education, and physical infrastructure. Further, it suggested that the World Bank be terminated and replaced with a new grant program funded entirely through a trust fund capitalized by the World Bank's paid-in capital.⁸³ The report also specified the manner in which IDA

⁷⁸ INTERNATIONAL DEVELOPMENT ASSOCIATION, IDA ELIGIBILITY, TERMS AND GRADUATION POLICIES 8 (2001), <http://siteresources.worldbank.org/IDA/Resources/Seminar%20PDFs/ida%20eligibility.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Raymond F. Mikesell, *Review Article: Meltzer Commission Report on International Institutions*, 49 *ECON. DEV. & CULTURAL CHANGE* 883, 883 (2001).

⁸² Jonathan E. Sanford, *World Bank: IDA Loans or IDA Grants?* 30 *WORLD DEV.* 741, 748 (2002).

⁸³ *Id.*

and the newly constituted World Bank should make grants, stressing that the availability of grant assistance should be tied to the recipient's achievement of specific performance goals.⁸⁴ In addition, it recommended that the grants be funneled through private suppliers of goods and services that would be compensated upon verification by independent auditors that the quantitative goals agreed upon in advance had been achieved.⁸⁵

2.3.2.2. *An Increased Set Aside for Grants*

The international community did not embrace the sweeping changes advocated by the Meltzer Commission, but the United States adopted many of the Commission's ideas as part of its agenda for the IDA.⁸⁶ In the negotiations leading up to the thirteenth replenishment of IDA ("IDA 13"), the United States pushed for policy changes in IDA that flowed directly from the philosophy of the Meltzer Commission. First, it urged that the Bank's system of allocating IDA funds amongst countries eligible to receive IDA assistance should be changed. Prior to IDA 13, the amount of IDA funds allocated to a country for each three-year replenishment period depended on a formula which took into account both the country's commitment to, and progress on, reforming its policy and institutional framework (i.e. the quality of a country's governance) and the country's level of poverty.⁸⁷ The United States wanted IDA to change the formula so as to accord much greater weight to a country's governance than to its level of poverty.⁸⁸ Second, the United States urged that IDA substantially

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Santosh Anagol, *Reforming the International Development Association: Are Grants the Solution?* (May 20, 2002) (unpublished B.A. thesis, Stanford University) available at http://www-econ.stanford.edu/academics/Honors_Theses/Theses_2002/Anagol.pdf.

⁸⁷ The allocation process set a norm, not a hard and fast entitlement to receive IDA funding. IDA, *ALLOCATING IDA FUNDS BASED ON PERFORMANCE: FOURTH ANNUAL REPORT ON IDA'S COUNTRY ASSESSMENT AND ALLOCATION PROCESS 1-2* (2003), <http://siteresources.worldbank.org/IDA/Resources/PBAAR4.pdf> [hereinafter *FOURTH ANNUAL REPORT*]. It established an envelope of resources that each country eligible for IDA assistance could expect to receive. *Id.* at 2.

⁸⁸ IDA, *IDA'S PERFORMANCE-BASED ALLOCATION SYSTEM: CURRENT AND EMERGING ISSUES 1, 3-4* (2003), available at <http://siteresources.worldbank.org/IDA/Resources/MTRPBA.pdf>.

increase the percentage of its resources used to make grants.⁸⁹ The United States indicated that it would increase its contribution to IDA if these changes were adopted.⁹⁰

In the thirteenth replenishment of IDA, the IDA Deputies adopted these policy changes.⁹¹ With respect to IDA providing grants, IDA Deputies decided that eighteen to twenty-one percent of IDA financing provided during the thirteenth replenishment period should be in the form of grants.⁹² They limited IDA grants, however, to programs or projects in five designated categories: (i) HIV/AIDs relief; (ii) reconstruction necessitated by natural disasters; (iii) "poorest countries" relief; (iv) "poorest and debt-vulnerable countries" relief; and (v) "post-conflict countries" relief.⁹³ Although grant assistance was not limited to specific sectors, investments improving education, health, and the provision of clean water and sanitation were to receive special attention.⁹⁴

2.3.2.3. *The Gleneagles Commitment: Grants Not Loans for Debt-Burdened Countries*

IDA's thirteenth replenishment opened the door for IDA to provide a significant amount of its funds in the form of grants. The fourteenth replenishment ("IDA 14") opened that door wider.⁹⁵

⁸⁹ JODY ZALL KUSEK & RAY C. RIST, A HANDBOOK FOR DEVELOPMENT PRACTITIONERS: TEN STEPS TO A RESULTS-BASED MONITORING AND EVALUATION SYSTEM 7 (2004), <http://www.oecd.org/dataoecd/23/27/35281194.pdf>.

⁹⁰ *Id.* The Thirteenth Replenishment also introduced a results measurement framework for the IDA, designed to inform discussions about IDA's effectiveness and to measure IDA countries' aggregate progress towards the Millennium Development Goals. *Id.*

⁹¹ EXECUTIVE DIRECTORS OF IDA, ADDITIONS TO IDA RESOURCES: THIRTEENTH REPLENISHMENT 42-43 (2002), <http://siteresources.worldbank.org/IDA/Resources/IDA13Report.pdf> [hereinafter IDA 13 ADDITIONS].

⁹² Jonathan E. Sanford, *IDA Grants and HIPC Debt Cancellation: Their Effectiveness and Impact on IDA Resources*, 32 WORLD DEV. 1579, 1588 (2004).

⁹³ IDA, IDA GRANTS—IMPLEMENTATION IN FY03 1-3 (2003), available at <http://siteresources.worldbank.org/IDA/Resources/MTRgrantsFY03.pdf> [hereinafter GRANT IMPLEMENTATION IDA 13]. "Poorest Countries" signified IDA-only countries having a GNP per capita equal or less than \$360. "Poorest and Debt-Vulnerable Countries" meant IDA-only countries with demonstrated debt vulnerability and having a GNP/capita equal to or less than \$360. *Id.* at 3.

⁹⁴ IDA 13 ADDITIONS, *supra* note 91, at 13.

⁹⁵ See generally IDA, *Assessing Implementation of the IDA14 Grants Framework*, at 1 (2006), <http://www-wds.worldbank.org/external/default>

Following the commitment made by the G-8 heads of state at their July 2005 summit in Gleneagles, Scotland to address the problem of developing country debt,⁹⁶ IDA abandoned the IDA 13's approach of limiting grant finance to eighteen to twenty percent of IDA's resources and to certain categories of programs. Instead, IDA Deputies created a system whereby countries which qualify for IDA funding but are debt distressed receive grant assistance provided that they exhibit good governance, defined as adopting economic plans, determined by IDA to be sound.⁹⁷ IDA donor countries pledged the largest expansion of IDA resources in two decades to fund this new approach.⁹⁸

Under the IDA 14 system, the amount of grant assistance a country receives from IDA in the form of grants depends on the country's debt status. IDA determines the debt risk of recipient countries in accordance with a scale that ranges from low risk of debt distress to moderate and high risk, with the final rating being

[/WDSContentServer/WDSP/IB/2006/10/31/000011823_20061031140856/Rendered/PDF/37870.pdf](#) (describing IDA 14's new loosened eligibility requirement for countries to receive grants from IDA—that is to demonstrate a risk of debt distress).

⁹⁶ Communiqué of Gleneagles G8 Summit: Africa, Gleneagles, Scot., July 6-8, 2005, *Climate Change, Energy and Sustainable Development*, paras. 29-30, available at <http://www.g7.utoronto.ca/summit/2005gleneagles/communique.pdf>. The G8 representatives at Gleneagles also decided that a substantial amount of outstanding debt to IDA should be cancelled. See *id.* at para. 29 (stating that the G8 agreed to a proposal to cancel all outstanding debts). This decision was implemented in March 2006, when the World Bank established the Multilateral Debt Relief Initiative, which provides heavily indebted poor countries with 100 percent cancellation of debts owed to IDA and other international financial institutions. See World Bank, *IDA's Implementation of the Multilateral Debt Relief Initiative*, at 1-2 (2006), <http://siteresources.worldbank.org/IDA/Resources/MDRIfinalimplementation.pdf> (discussing the key features of the Multilateral Debt Relief Initiative). As of March 2008, some twenty-three countries had qualified for this form of relief. IMF, *The Multilateral Debt Relief Initiative Factsheet*, <http://www.imf.org/external/np/exr/facts/mdri.htm> (last visited Dec. 1, 2008).

⁹⁷ See IDA, *IDA Results Measurement System: Recommendations for IDA14*, at 1 (2004), <http://siteresources.worldbank.org/IDA/Resources/IDA14resultsrecommendations.pdf> [hereinafter *IDA 14 Results Measurement*] (stating that the IDA Results Measurement System's "performance-based allocation system provides incentives to countries to improve policies and strengthen institutions in pursuit of longer-term results").

⁹⁸ IDA, *Additions To IDA Resources: Financing The Multilateral Debt Relief Initiative*, at 13 (2006), http://siteresources.worldbank.org/INTDEBTDEPT/Resources/35768_2.pdf.

“in distress.”⁹⁹ A country’s grant/loan ratio is determined according to its debt rating, with countries identified as being “in debt distress” receiving 100 percent of the IDA funds allocated to them in the form of grants.¹⁰⁰

The IDA 14 system greatly expands the availability of grant finance. The threshold qualification for obtaining IDA assistance (whether in the form of loans or grants) remains commitment to, and progress in, setting in place good governance. Once that threshold is met, however, a country can qualify to receive a substantial amount of the funds allocated to it by IDA in the form of grants. This approach to grant finance has continued in the fifteenth replenishment of IDA, for which negotiations were completed in December 2007.¹⁰¹ At that time, donor countries to IDA pledged a record \$25.1 billion, the largest expansion of donor funding in IDA’s history.¹⁰²

In sum, the emergence of the World Bank grant as a core instrument of overseas development aid resulted from a combination of factors which, taken together, have led to new norms and changed the face of overseas development aid. They include a proliferation of trust funds formed to address special purposes, an increasing prevalence of public-private partnerships for development, a recognition of the importance of incorporating the views of aid recipients and civil society in the design and

⁹⁹ See *IDA 14 Results Measurement*, *supra* note 97, at 2–3. IDA rates countries’ level of debt in accordance with an analytical tool developed jointly by the IMF and the World Bank, known as the Debt Sustainability Framework (“DSF”). *Id.* at 1. The DSF analyzes external and public sector debt to determine a country’s projected debt burden over a twenty-year period and its vulnerability to external and policy shocks. See IMF & World Bank, *Debt Sustainability in Low-Income Countries: Further Considerations on an Operational Framework and Policy Implications*, at 19 (2004), <http://siteresources.worldbank.org/INTDEBTDEPT/PolicyPapers/20279458/DSfullpapersept.pdf> (discussing further operational considerations for the proposed debt sustainability).

¹⁰⁰ IDA, *Debt Sustainability & Grants*, <http://go.worldbank.org/16FWL21Y51> (last visited Dec. 1, 2008); IDA, *How IDA Resources are Allocated* (June 2008), <http://go.worldbank.org/F5531ZQHT0> (describing IDA’s method of evaluating a country’s efforts to implement satisfactory economic policies in order for IDA to determine the amount of funds that should be allocated to the country in need).

¹⁰¹ World Bank, *IDA15 Replenishment*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21234677~menuPK:3492269~pagePK:51236175~piPK:437394~theSitePK:73154,00.html> (last visited Dec. 1, 2008).

¹⁰² *Id.*

delivery of aid and a more realistic approach to the ability of certain developing countries to absorb further debt. As Section 3 shows, the range and scale of activities that World Bank grants address touch upon every aspect of development.

3. THE WORLD BANK GRANT AS A CORE INSTRUMENT OF OVERSEAS DEVELOPMENT AID

The breadth, range, and scale of grants channeled through the World Bank underscores the vital role that World Bank grants now play in the broader aid agenda. The primary sources of this grant assistance are trust funds and IDA funds directed at debt distressed countries. Grants from trust funds break down into several categories; (i) grants to safeguard global public goods; (ii) grants to achieve the Millennium Development Goals and advance other global programs; (iii) grants for crisis relief, humanitarian needs, and post-conflict assistance; (iv) grants for debt relief; and (v) grants to pilot innovative financing initiatives. Grants from IDA, on the other hand, span the full range of IDA's development objectives.

In addition, a further source of finance for World Bank grants, which consists of set asides from the World Bank's net income, directed at funding some World Bank grant programs primarily designed to provide seed money for initiatives that would not qualify for a loan. Examination of the nature of the grants that make up this expansive World Bank grant universe reveals a span of activities involving many stakeholders and different kinds of actors that calls for a nuanced, flexible, and sophisticated legal framework.

3.1. Grants from Trust Funds

3.1.1. Grants to Safeguard Global Public Goods¹⁰³

3.1.1.1. GEF Trust Fund Grants

The World Bank serves as both trustee and implementing agency of the GEF Fund. As trustee, it transfers trust fund resources to certain entities the donors have approved to serve as implementing and executing agencies for the Fund. These include a number of U.N. affiliated programs and agencies and the four regional development banks: the Asian Development Bank, the European Bank for Reconstruction and Development, the African Development Bank, and the InterAmerican Development Bank.¹⁰⁴ These intermediaries pass on GEF funds to developing countries in the form of grants, which can be made to both government and non-government entities.

GEF grants vary significantly in scale and are divided into four categories: full-sized grants (over \$1 million); medium-sized (between \$1 million and \$500,000); grants for enabling activities, i.e. activities which finance the preparation of a plan or strategy to fulfill a country's commitments under a global environment convention (which can range from \$100,00 to over \$1 million); and project preparation grants (reimbursements of the actual costs of preparing project proposals).¹⁰⁵ Recent grant proposals under discussion, for example, include projects to develop renewable energy technologies in the Marshall Islands, to phase out methyl bromide in Ukraine, and to develop a basin management framework for the Tisza Tran boundary River Basin.

Non-government organizations have a keen interest in GEF grants as they frequently play a key role in implementing them. The GEF Secretariat consults semi-annually with non-

¹⁰³ The term "global public good" is drawn from economics which differentiates between private goods and public goods. Inge Kaul et al., *Why Do Public Goods Matter Today?*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 3, 3 (Inge Kaul et al. eds., 2003). The benefits of private goods are rival in consumption and excludable. In contrast, those of public goods are non-rival and non-excludable. *Id.* Thus, public goods are in the public domain, there for all to consume. Depending on the reach of their benefits, they are categorized as local, national, regional, or global. *Id.*

¹⁰⁴ Freestone, *supra* note 4, at 1078-79, 1106 n.127.

¹⁰⁵ The World Bank, GEF Grants, <http://go.worldbank.org/ZTPX1HP1D0> (last visited Dec. 1, 2008).

governmental organizations and civil society representatives also regularly attend meetings of the GEF Council as observers.¹⁰⁶

3.1.1.2. *Global Fund Grants*

Grants from the Global Fund cover a wide range of activities, including preventing the spread of diseases, treating people who are ill, and providing care and support for affected people and communities by scaling up existing effective interventions or piloting new and innovative responses.¹⁰⁷ Grant activities may also include efforts to improve the availability of health services, strengthen health systems and human resource capacity, promote behavior change, provide critical health products (such as antiretroviral therapy, drugs for tuberculosis, and anti-malarial drugs), or conduct operational research.¹⁰⁸ Examples of activities that have been funded worldwide by the Global Fund include providing antiretroviral treatments for HIV, tuberculosis treatment under directly-observed treatment, short-course (“DOTS”), and distributing insecticide-treated bed nets to protect families from malaria.¹⁰⁹

Eligible grant recipients include government ministries, nongovernmental and faith-based organizations, private sector firms, and foundations.¹¹⁰ They are expected to be local stakeholders rather than United Nations agencies or other

¹⁰⁶ First GEF Council Meeting, Washington, D.C., July 12–13, 1994, Joint Summary of the Chairs, 3–4, available at http://www.gefweb.org/Documents/Council_Documents/Joint_Summary_-_July_1994_English.pdf.

¹⁰⁷ Anne Triponel, *Global Fund To Fight AIDS, Tuberculosis and Malaria: A New Legal And Conceptual Framework for Providing International Development Aid*, in MULTILATERAL CONCESSIONAL FINANCING: ORGANIZATION, DECISION-MAKING, MODALITIES (forthcoming 2009).

¹⁰⁸ *Id.* (citing Global Fund, Guidelines for Proposals Round 7, at 31 (2007), http://www.theglobalfund.org/en/files/apply/call/seven/Guidelines_for_Proposals_R7_en.pdf [hereinafter, Global Fund, Guidelines for Proposals Round 7]).

¹⁰⁹ See generally Global Fund, *Partners in Impact: Results Report 6* (2007), <http://www.theglobalfund.org/en/files/about/replenishment/oslo/Progress%20Report.pdf> (presenting the Global Fund model for providing services geared to combating the three pandemic diseases); Global Fund, *How the Global Fund Works*, <http://www.theglobalfund.org/en/how/> (last visited Dec. 1, 2008) (describing the principles and programs of the Global Fund).

¹¹⁰ See Global Fund, Guidelines for Proposals Round 7, *supra* note 108, at 35.

multilateral or bilateral development agencies.¹¹¹ Direct recipients of Global Fund grants will frequently disburse the grant proceeds to sub-recipients who implement the grant activities. The direct recipient, however, is the entity that is accountable to the Fund for the use of the grant proceeds.¹¹² Grant proposals are initiated at the country level, whereby, in a manner unique to the Global Fund, representatives from the government and non-government sector – with expertise on many levels in the treatment and care for HIV, AIDS, malaria, and tuberculosis – agree together on a coordinated country proposal to be submitted to the Global Fund.¹¹³

3.1.1.3. *Avian and Human Influenza Facility Grants*

Unlike the Global Fund, the Avian and Human Influenza Facility channels its grant financing primarily to governments. A typical grant from the Avian and Human Influenza Facility is the \$2.9 million grant recently made to Uzbekistan for activities designed to enhance its capacity to prevent the spread of avian flu.¹¹⁴

3.1.2. *Grants to Achieve the Millennium Development Goals and Other Global Program Objectives*

From the beginning, it was understood that the developing world would need grants from the developed world in order to achieve the MDGs. Indeed, adoption of the goals as a priority platform for overseas development aid was premised on the understanding that developed country governments would

¹¹¹ See Global Fund, *Fiduciary Arrangements for Grant Recipients*, at 3–4 (2003) (stating the duties and obligations of grant recipients).

¹¹² *Id.* at 4.

¹¹³ These representatives work together as a group, termed, in the constituent documents of the Global Fund, a “Country Coordinating Mechanism.” See Triponel, *supra* note 107, at n.134 (noting that the Global Fund is flexible in terms of which entities function as in-country structures); see also Global Fund, Country Coordinating Mechanisms, <http://www.theglobalfund.org/EN/mechanisms/> (last visited Dec. 1, 2008) (stating that the purpose of Country Coordinating Mechanisms is to enable countries to participate in the decision making process of creating grant proposals to be submitted to the Global Fund and implementing them upon approval).

¹¹⁴ Press Release, World Bank, World Bank Supports Avian Influenza Control and Human Preparedness and Response Project in Uzbekistan (May 3, 2007), available at <http://go.worldbank.org/4EODSHVO40>.

increase their development assistance.¹¹⁵ Although the resources that have been forthcoming to further the goals have fallen short of what is needed,¹¹⁶ the goals have served as a galvanizing force to target grant funds to the eight goal areas. The Education For All Fast Track Initiative Catalytic Trust Fund, set up by several donor countries in 2003 to provide grants to developing countries to support primary school education, further to the achievement of MDG Two (universal primary school education by 2015), is an example of such an initiative.¹¹⁷

The seventy global programs set up by multiple public and private partnerships and housed and administered by the World Bank make grants in widely varying amounts to a wide range of recipients for a wide range of purposes. Examples include a grant of \$500,000 to Mozambique from Cities Alliance (a global program set up by several donors to provide grants to cities to address slums and other city-specific needs) for the improvement of water and sanitation in Quelimane City and a grant of \$220,000 to Fondation Zakoura in Morocco from the Consultative Group to Assist the Poor (“C-GAP”) (a program set up by multiple donors to fund research on microfinance).¹¹⁸

3.1.3. *Grants for Crisis Relief, Humanitarian Needs, and Post-Conflict Assistance*

Grant funds are, necessarily, the funding vehicle of choice to respond to crises brought about by natural phenomena, such as a tsunami or earthquake. They are also the only feasible form of

¹¹⁵ See Michael A. Clemens et al., *The Millennium Development Goals, Aid Targets, and the Costs of Over-Expectations*, 6 SUSTAINABLE DEV. L. & POL’Y 58, 58–59 (2005) (discussing the causal chain between increasing aid and reaching the MDGs, and assessing the likelihood of attaining these goals).

¹¹⁶ See SACHS, *supra* note 3, at 270 (commenting on the “chronically underfunded” nature of the programs of the MDGs).

¹¹⁷ See Sophie Smyth & Anna Triponel, *Education as a Lynchpin of Development: Legal and Policy Considerations in the Formation of the Education For All – Fast Track Initiative Catalytic Trust Fund*, 6 SUSTAINABLE DEV. L. & POL’Y 8, 8–9 (2005) (discussing the idea behind the Education For All Fast Track Initiative and its objectives).

¹¹⁸ Cities Alliance: Cities Without Slums, List of Cities Alliance Financed Activities (Dec. 31, 2006), <http://www.citiesalliance.org/activities-output/activities-financed.html>; World Bank, GAP Grant to Fondation Zakoura, <http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P077491> (last visited Dec. 1, 2008).

assistance for a country that is war-torn or struggling to cope with civil war and political strife. Accordingly, donors of development aid have established a range of funds to provide grant assistance in the wake of natural disasters, such as the Multi-Donor Fund for Aceh and Nias—a \$704 million fund set up to provide grant assistance to Indonesia following the 2005 tsunami.¹¹⁹ They have also set up funds dedicated to providing grants to countries in post-conflict situations.¹²⁰ In recent years funds set up to provide grant assistance to Iraq and Afghanistan have swollen the grant resources available in this category.¹²¹ Non-governmental organizations play an active role in implementing these kinds of grants.¹²²

Grants in these categories are very varied. The Aceh and Nias Fund has focused on grants to rebuild housing and other physical assets and infrastructure and creation of a government-led Economic Development Financing Facility to foster job creation.¹²³ The Afghanistan Reconstruction Trust Fund recently made a grant of several million dollars to the government of Afghanistan's National Solidarity Program for water, road, and other small infrastructure projects.¹²⁴ The projects were designed with input from a network of non-government organizations and rural community representatives.¹²⁵ On a smaller scale, the Post-Conflict

¹¹⁹ Multi Donor Trust Fund for Aceh and Nias—Bersama Membangun, <http://www.multidonorfund.org> (last visited Dec. 1, 2008).

¹²⁰ See World Bank, Afghanistan's National Solidarity Program: Overview & Challenges, <http://go.worldbank.org/FE0JQLDI10> (last visited Dec. 1, 2008) (furnishing an overview of the National Solidarity Program's approach and achievements in war-torn Afghanistan).

¹²¹ TRUST FUNDS BOARD REPORT, *supra* note 23, at 7.

¹²² See generally Ibrahim F. I. Shihata, *The World Bank and Non-Governmental Organizations*, 25 CORNELL INT'L. L. J. 623 (1992) (discussing interaction and legal aspects of collaboration between World Bank and NGOs).

¹²³ Press Release, Multi Donor Fund, The Multi Donor Fund Reports on Impact and Support for Transition (Dec. 18, 2007), *available at* <http://go.worldbank.org/R4LM3EJW30>.

¹²⁴ See World Bank, Strengthening Local Governance and Promoting Community Based Development in Afghanistan, <http://go.worldbank.org/XS6ZPWKT90> (last visited Dec. 1, 2008) (noting the development of local governance in Afghanistan); World Bank, Afghanistan: Schools, Roads, and Drinking Water for Villages, <http://go.worldbank.org/T9531FFHW0> (last visited Dec. 1, 2008) (discussing the priorities of the Afghani people upon return home after living as refugees).

¹²⁵ World Bank, Strengthening Local Governance and Promoting Community Based Development in Afghanistan, *supra* note 124.

Fund recently made a grant of \$50,000 to the Iraqi Widow's Organization for a project aimed to boost widows' incomes by providing them with small loans to start their own businesses.¹²⁶

3.1.4. *Grants for Debt Relief*

In addition to the extensive debt relief initiatives funded by HIPC and, subsequently, by the Multilateral Debt Initiative, grants have been used to give debt relief assistance. IDA Debt Reduction Facility grants have been used to finance legal and financial advisors to help countries prepare commercial debt reduction operations and to finance the cost of their implementation. Most of these operations have been cash buybacks at significant discounts. Such operations have been carried out in many countries, including Albania, Bolivia, Nicaragua, Vietnam, Guyana, and Senegal, among others.¹²⁷

3.1.5. *Grants for Innovative Financing Initiatives*

Grants have become a favored modality for launching experimental and innovative initiatives. Trust funds that provide grants for output-based aid approaches and for covering the costs of catastrophe insurance for crops being grown in the developing world, for example, provide a vehicle for such approaches to be piloted. Typical grants in this category include grants from the Global Partnership on Output-Based Aid ("GPOBA") and the Caribbean Catastrophe Risk Insurance Facility ("CCRIF").¹²⁸

The GPOBA funds output-based aid methods to promote increased access to infrastructure and social services for the poor in developing countries. GPOBA's focus sectors are water, sanitation, electricity, health, telecommunications, transportation, and education. As of June 2008, the GPOBA has provided over \$150 million to fund sixty-seven projects.

¹²⁶ Press Release, World Bank, Post-Conflict Grant to Boost Iraqi Widows' Incomes Through Microcredit (May 15, 2004), available at <http://go.worldbank.org/4TR73267Z0>.

¹²⁷ World Bank, *Global Development Finance: Striving for Stability in Development Finance*, at 70–79 (2003), available at http://siteresources.worldbank.org/INTRGDF/Resources/GDF_vol_1_web.pdf.

¹²⁸ See Global Partnership on Output-Based Aid, About GPOBA, <http://www.gpoba.org/gpoba/index.asp> (last visited Dec. 1, 2008) (describing the nature of this trust fund and the grants it offers); see also sources cited *infra* note 131 (describing formation of a new trust fund to assist Caribbean nations).

The CCRIF is a trust fund established in February 2007 from grants made by Japan, France, Canada, Bermuda, the United Kingdom, the Caribbean Development Bank, IBRD, and IDA totaling almost \$50 million. The CCRIF is a trust fund that provides Caribbean community ("CARICOM") member or associate-member countries with immediate liquidity if hit by a natural disaster such as a hurricane or earthquake.¹²⁹ The CCRIF is a pooled facility that allows Caribbean countries to buy insurance coverage for natural disaster risks at a significantly reduced cost.¹³⁰ The CCRIF provides member countries with immediate payment using a parametric system of claims and determinations. Eighteen Caribbean governments participate in the CCRIF and each participating country determines the level of coverage it purchases.¹³¹

3.2. Grants from the IDA

IDA grants cover the full spectrum of IDA's operations, including basic social services, clean water and sanitation, infrastructure, and institutional reforms. They can be for many millions of dollars. Typical IDA projects include a rural electrification project in Bangladesh, for which IDA provided \$191 million, a rural water supply and sanitation project in Yemen, for which IDA provided \$165 million, and a road sector development project in Ethiopia, for which IDA provided \$306.5 million.¹³²

¹²⁹ World Bank, *The Acting Corporate Secretary: Proposed Trust Fund for the Caribbean Catastrophe Risk Insurance Facility*, ¶¶ 1, 3-4 n.5, Doc. 38927 (Mar. 6, 2007) [hereinafter CCRIF Memo], available at <http://go.worldbank.org/OIWBB9CEB1> (internal World Bank document on file with author); Press Release, World Bank, First Ever Regional Catastrophe Risk Insurance Pool for the Caribbean Receives US \$47 Million From Donors (Feb. 26, 2007) [hereinafter CCRIF Press Release], available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21234428~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

¹³⁰ CCRIF Memo, *supra* note 129, ¶ 3.

¹³¹ CCRIF Press Release, *supra* note 129.

¹³² See World Bank, *Electricity for Rural Population in Bangladesh* (June 2007), <http://go.worldbank.org/HJCNIRQ9G0> (detailing the IDA contribution to an electricity project for rural populations in Bangladesh); IDA, *Reaching Out to Yemen's Poorest, Most Remote Communities* (Mar. 2007), <http://go.worldbank.org/EPN0AR8GY0> (describing the IDA contribution to a project which channeled resources to remote populations in Yemen); IDA, *Improved Roads in Ethiopia Stimulate Integration of Markets* (Mar. 2007), <http://go.worldbank.org/IIXE4PKC60> (describing the IDA contribution to the project for improved roads

Grants can be made to a variety of entities such as governments, political subdivisions of governments, public or private entities in member territories, and public international or regional organizations.¹³³

3.3. *Grants from the World Bank's Net Income*

Further to the quest for effective innovative approaches to development aid, the World Bank funds two grant programs out of its own net income that provide seed money to new initiatives. These are the Development Marketplace (which is also supported by some trust funds and other sources) and the Development Grant Facility. The Bank also provides some grant funding for small-scale initiatives through its Small Grants Program and to governments for law reform and institution-building through the Institutional Development Fund.

The Development Marketplace ("DM") is a competitive grant program administered by the Bank and supported by various partners which aims to fund innovative, early-stage projects with potential for development impact.¹³⁴ DM competitions, which are open to individuals and organizations, are held at the global, regional, and country level. Each competition has a development focus, such as health and nutrition, water supply and sanitation, and livelihoods in a sustainable environment. Since its inception, the DM has provided more than \$46 million in grants to support over one thousand projects worldwide.¹³⁵ Supported projects

in Ethiopia). Subject to the need to allocate IDA resources equitably amongst qualifying countries, much of IDA's support for such projects will now be made available through grants rather than credits. IDA, Debt Sustainability & Grants, <http://go.worldbank.org/16FWL21Y51> (last visited Dec. 1, 2008) (describing the eligibility for grants).

¹³³ See IDA Articles of Agreement of the International Development Association art. V, § 2(c), Aug. 9, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249 [hereinafter IDA Articles of Agreement] (stating the form and terms of financing of the IDA).

¹³⁴ Partners include the Gates Foundation, the MacArthur Foundation, multilateral agencies, and various other entities such as embassies, local government organizations, research centers, and large corporations. Grants range from \$50,000 to \$200,000 with the average grant being \$180,000. Global Development Marketplace, DM2008 Competition Guidelines, <http://go.worldbank.org/EZLKFQGK40> (last visited Dec. 1, 2008).

¹³⁵ See World Bank, Development Marketplace—Projects, <http://go.worldbank.org/0G0PN590D0> (last visited Dec. 1, 2008) (describing the selection criteria for DM projects); World Bank, Development Marketplace:

include one providing plastic buckets with ultraviolet lighting to purify water in Mexico, another building eco-friendly homes for the poor in Kyrgyzstan, and a third providing low-cost reading glasses to the poor in India.¹³⁶

Established in 1998, the Development Grant Facility (“DGF”) supports global programs and partnerships that the Bank deems to be of high value to the Bank’s borrowing member countries but that are not readily amenable to being funded through regular Bank loans. The DGF gives grants based on three objectives: (1) encouraging innovation through seed money and cutting-edge approaches; (2) catalyzing partnerships through convening and building coalitions and raising funds; and (3) expanding Bank services by increasing the effectiveness of country programs. The Bank allocates approximately \$170 million annually of its own resources to the DGF.

Examples of programs that have received DGF support include a Roma Education Fund, the Global Road Safety Facility, and the Global Facility for Disaster Reduction and Recovery. Examples of grants provided by the Institutional Development Facility and the Small Grants Program include a \$300,000 grant to Uruguay for the “Institutional Justice Strengthening for Equitable Development Project” aimed at creating a consensus to implement key actions to improve domestic abuse victims’ access to justice, and a \$35,000 grant from the Small Grants Program to the Sri Lankan Youth Parliament and five other Sri Lankan organizations to support activities for creating knowledge-sharing networks.

4. THE LEGAL FRAMEWORK GOVERNING WORLD BANK GRANTS

As the preceding Sections of this Article show, changing norms in overseas development aid throughout the 1990s and early 2000s have resulted in the World Bank grant becoming a core instrument of development aid. Moreover, the increased use of the World Bank grant reflects significant changes in what overseas

Turning Ideas into Action, <http://go.worldbank.org/TPSFTH9420> (last visited Dec. 1, 2008); World Bank, DM2007 Competition Guidelines, <http://go.worldbank.org/DEBXLIIYS0> (last visited Dec. 1, 2008).

¹³⁶ See generally, World Bank, UV Buckets Bring Clear Water to Poor Families in Mexico, <http://go.worldbank.org/A3SSOWSNL0> (last visited Dec. 1, 2008); World Bank, DM Project Builds Eco-Friendly House for Poor in Kyrgyzstan, <http://go.worldbank.org/JNFGFGET0> (last visited Dec. 1, 2008); World Bank, Reading Glasses for the Poor in India, <http://go.worldbank.org/YFY0W2AD50> (last visited Dec. 1, 2008).

development aid involves. Prior to the early 1990s, development aid routed through the World Bank was primarily a government-to-government affair. The donors and recipients were governments; aid involved large-value transfers and was primarily in the form of loans. Today, aid directly involves many stakeholders. Governments, foundations, and non-government organizations may all be donors of aid. And, along with governments, there are many non-government recipients.

Additionally, aid is no longer limited to large-value transfers. The fragmentation of aid into issue-specific programs, and the wider net of aid recipients, means that transfers of aid can range from transfers of several million dollars to transfers as small as a few thousand dollars. A further consequence of increased grant aid is that it brings with it a renewed emphasis on performance targets and an effort to increase scrutiny of effectiveness. In contrast to loans, where payment tranches may be made conditional on earlier loan re-payments having been made, grants payable in tranches will likely be conditioned on a showing of progress and results. This can place a recipient in a vulnerable position, especially given that the driving forces to make a loan (the prospect of earning interest) do not apply to a grantor who does not have the equivalent incentive to release grant funds. These changing norms call for a review of how well the legal framework governing such grants has, or should be, adapted.

4.1. The Legal Status of a World Bank Grant

The question of what law governs World Bank grants is unsettled but some guidance on what law could or should govern can be gleaned from the attention that has been given to the question of what law governs World Bank loan agreements. World Bank loan agreements do not contain a typical governing law clause.¹³⁷ Instead they provide that the rights and obligations of the parties “shall be valid and enforceable in accordance with their terms notwithstanding the law of any State or political subdivision thereof to the contrary.”¹³⁸

The traditional view, as espoused by the World Bank, is that World Bank loan agreements with governments are governed

¹³⁷ See generally John W. Head, *Evolution of the Law Governing World Bank Loan Agreements*, 90 AM. J. INT’L L. 214 (1996) (examining the governing law for loan agreements entered into by the World Bank).

¹³⁸ *Id.* at 220.

by international law and that World Bank loan agreements with state-owned entities¹³⁹ are not governed by international law, whilst being exempt from the operation of municipal law.¹⁴⁰ This view leaves World Bank loan agreements with non-state entities in a “legal no man’s land.”¹⁴¹ It has been proposed that both kinds of loan agreement should specify public international law as the governing law and, in doing so, enumerate the sources of public international law to be applied, along the lines of those enumerated in Article 38(1) of the Statute of the International Court of Justice.¹⁴²

Analyzing the legal status of World Bank grant agreements in the context of this dialogue, such agreements too, under current practice, fall into a “legal no man’s land” except when the recipient is a government.¹⁴³ Currently, World Bank grant agreements do not contain a governing law clause.¹⁴⁴ This Article ascribes to the position, however, that all World Bank grant agreements, regardless of the nature of the recipient, should provide that they are governed by public international law. Further, this Article maintains that World Bank grant agreements should specify that, for such purposes, the sources of public international law will be those set out in Article 38(1) of the Statute of the International

¹³⁹ Both IBRD and IDA may make loans to member states, state-owned enterprises or private entities. If a loan is made directly to a state-owned enterprise or a private entity, IBRD is required (and IDA is permitted) to have the loan guaranteed by the government of the member state in which the project is being carried out. See Articles of Agreement of The International Bank for Reconstruction and Development art. III, §4(i), July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134, amended Dec. 16, 1995, 16 U.S.T. 1942, 606 U.N.T.S. 294; IDA Articles of Agreement, *supra* note 133, art. V, §2(d). IDA loans have traditionally been made only to member states. See Head, *supra* note 137, at 216 n.12.

¹⁴⁰ Head, *supra* note 137, at 220.

¹⁴¹ *Id.*

¹⁴² *Id.* at 227-28 n.121 (noting that the fourth clause of the Statute of the International Court of Justice lists judicial decisions and the teachings of publicists as “subsidiary means for the determination of rules of law”).

¹⁴³ The theory underlying the World Bank’s view that World Bank loans to member states are governed by public international law is that the World Bank, both as an international organization and a member state is a subject of international law. See Head, *supra* note 137 (citing ARON BROCHES, SELECTED ESSAYS—WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 221 (1995)). On this view, World Bank grant agreements with member states would be governed by international law.

¹⁴⁴ Standard Conditions for Grants Made by the World Bank Out of Various Funds (July 2006) [hereinafter *World Bank Grant Agreement Standard Conditions* or *Standard Conditions*] (on file with author).

Court of Justice, which provides that the Court is to apply treaties, custom and general principles in deciding disputes submitted to it.¹⁴⁵

Despite the uncertainty surrounding the legal status of World Bank grant agreements, millions of dollars pass annually from the World Bank to the developing world pursuant to these agreements. Many of these agreements implement significant policy decisions and all of them respond to the intentions and needs of the many different stakeholders involved. These include the donors (which, in the case of donor governments, mean the developed world's tax payers), the recipients (who may be governments or non-government entities but who are intended to serve as conduits for the ultimate beneficiaries of a grant; the poor in the developing country which the grant is intended to help), and the World Bank (whose credibility as an institution is tied to the effectiveness with which it manages, disburses, and monitors the grant funds). For these reasons, it is important that the terms and conditions of these agreements reflect and respond to the needs and interests of the stakeholders they affect. This makes it crucial for such agreements to provide for a dispute resolution mechanism that facilitates dialogue, review, and resolution when something goes, or appears to have gone wrong. Therefore this Article evaluates the World Bank grant agreements according to the extent to which they respond to this need.

4.2. *The Terms and Conditions of World Bank Grant Agreements*

4.2.1. *The "Let a Thousand Flowers Bloom" Approach*

Examination of the legal framework for grant arrangements between the World Bank and the recipients of grant aid reveals that it has been slow to evolve and has trailed far behind the rapid

¹⁴⁵ Detailed reasons for supporting public international law as the governing law for World Bank grants are beyond the scope of this Article. To the extent that general principles are relied upon, it must be observed that the legal status of grants in the national jurisdictions of many major donor countries is unclear. See generally Fernanda Nicola, Book Review, 44 HARV. INT'L L.J. 597 (2003) (reviewing THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW (James Gordley ed., 2001)). For a view of a system which relies on treaties, see Luke Eric Peterson & Nick Gallus, *International Investment Treaty Protection of Not-for-Profit Organizations*, 10 INTL. J. OF NOT-FOR-PROFIT L. 47 (2007) (suggesting that bilateral investment treaties grant certain legal protections to non-governmental organizations). Whether, treaty, custom, or general principles will be the most pertinent source will depend on the nature and scope of a given grant agreement.

expanse in World Bank grants. Up until July 2006, the arrangements that governed the numerous grants made by the World Bank took multiple forms, ranging from lengthy loan look-alikes to sparse letter arrangements that were more in the nature of gentlemen's agreements.¹⁴⁶ Under pre-July 2006 practices, most grant arrangements the World Bank entered into with grant recipients contained a basic set of provisions, regardless of whether the World Bank was acting as a grantor of its own funds, as a grantor of IDA funds, or as a trustee. Those provisions spell out the respective responsibilities of the Bank and the recipient in executing the grant. They specify the objectives of the grant activities, the activities and expenditures that are eligible to be funded out of the grant proceeds, and the recipient's obligations with regard to procurement of goods and services, contract administration, financial management, and auditing and progress reporting.¹⁴⁷

Under standard disbursement arrangements, the recipient receives the grant proceeds from the World Bank in increments, based on a written application indicating the expenditures for which the funds sought will be used.¹⁴⁸ Typically, a lump sum is made available to the recipient upon execution of the grant agreement with further transfers being made contingent on the recipient's submission to the Bank of financial and progress reports as provided for in the grant agreement.¹⁴⁹

Within this standard *modus operandi* there was some variation. IDA grants, for example, and grants from the GEF, entered into solely with governments, were governed by means of a lengthy agreement that was modeled on an IDA Loan Agreement, with the repayment provisions removed.¹⁵⁰ Those

¹⁴⁶ Executive Directors of the World Bank, Information Note for Borrowers—Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices, 1-2 (Aug. 1, 2006), <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/SanctionsReformNoteBorrowers.pdf>.

¹⁴⁷ World Bank, Disbursement Handbook, ch. 3, available at <http://www.worldbank.org.cn/English/projects/chapter3.shtml>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ The legal provisions governing a typical World Bank Loan Agreement appear in two main documents, a set of General Conditions and a project-specific Loan Agreement between the World Bank and the borrower. See generally Head, *supra* note 137. IDA and IBRD have separate General Conditions, which do not

agreements set out the express powers of the World Bank to suspend or cancel the grant in certain circumstances and included a provision for arbitration in the event of a dispute between the World Bank and the recipient, identical to the arbitration procedures the World Bank provides for in connection with its loans.¹⁵¹

Grants made from trust funds were generally governed by a standard form Trust Fund Grant Agreement.¹⁵² That agreement did not contain any dispute resolution mechanism.¹⁵³ Nor did it set out the express powers of the Bank to suspend grant disbursements or cancel the grant.¹⁵⁴ Further, it was not used by most of the trust -funded global programs funded by partnerships, such as Cities Alliance.¹⁵⁵ The global programs crafted their own template agreements on their own program-specific letterhead. Like the Bank's standard trust fund grant agreement, the global programs' agreements did not contain any dispute resolution provision.¹⁵⁶

The Bank's own grant programs, including the Development Grant Facility, Development Marketplace, the Institutional Development Fund, and the Small Grants Program, added further variety to this miscellany. Only one of those programs, the Small Grants Program, contained a dispute resolution mechanism: a provision for UNCITRAL arbitration.¹⁵⁷

4.2.2. *A Drive for Uniformity*

In 2006, the Bank embarked upon a drive for uniformity in its grant arrangements. This drive was sparked in part by IDA's switch to significant amounts of grant financing after the G-8 Gleneagles meeting. It was also spurred on by a separate and

differ materially from each other in respect of the provisions discussed in this Article.

¹⁵¹ International Bank for Reconstruction and Development, General Conditions Applicable to Loan and Guarantee Agreements, Jan. 1, 1985, § 10.01. See Pre-1996 Model IDA Grant Agreement and Model GEF Full-Sized Grant Agreement (on file with author).

¹⁵² TRUST FUNDS BOARD REPORT, *supra* note 23.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ An indicative sampling of pre-1996 Global Program Grant Agreements are on file with author.

¹⁵⁷ See Pre-1996 Small Programs Grant Agreement (on file with author).

unrelated development, the renewed emphasis on addressing fraud and corruption that former Bank President Paul Wolfowitz decided to make a central theme of his presidency, immediately upon taking office in March 2005.¹⁵⁸ In an April 2006 speech, Wolfowitz outlined a three-prong strategy to address fraud and corruption which included expanding anti-corruption support to Bank borrowers, striving to minimize the risk of corruption in Bank-funded projects, and seeking input and coordination with all stakeholders.¹⁵⁹ Subsequently, in August 2006, the Bank's board of executive directors approved a package of reforms aimed at strengthening the Bank's ability to combat fraud and corruption in Bank-financed projects.¹⁶⁰ These reforms included introducing a set of Anti-Corruption Guidelines ("Guidelines").

The Guidelines set out a framework for sanctioning persons involved in fraud and corruption and obstructive practices aimed at preventing the detection of fraud and corruption. They also provided for amending the World Bank's General Conditions for Loan Agreements so as to state expressly the contractual remedies the World Bank may invoke if fraud, corruption, or obstructive practices occur in the use of loan proceeds.¹⁶¹ The Guidelines were to be incorporated by reference into all of the World Bank's loan

¹⁵⁸ Wolfowitz resigned in June 2007. On June 25, 2007, the Executive Directors unanimously selected former United States Trade Representative Robert B. Zoellick as the 11th Bank President. Press Release, IBRD, Press Release Regarding the Selection of Mr. Robert B. Zoellick as President of the World Bank, IBRD Doc. 2006/481/EXT (June 25, 2007), available at <http://go.worldbank.org/GHI5BFNLR0>. Work on the Bank's governance and anticorruption initiative has continued in spite of Wolfowitz's resignation. For more information on the Bank's anti-corruption efforts, see J. Nolan McWilliams, *Tug of War: The World Bank's New Governance and Anticorruption Efforts*, 17 KAN. J.L. & PUB. POL'Y 1 (2007).

¹⁵⁹ Paul Wolfowitz, President, World Bank, Good Governance and Development: A Time for Action (Apr. 11, 2006) (transcript available at <http://go.worldbank.org/13LNL85QD0>).

¹⁶⁰ WORLD BANK GROUP, DEP'T OF INSTITUTIONAL INTEGRITY, IMPROVING DEVELOPMENT OUTCOMES: ANNUAL INTEGRITY REPORT 65 (2007), available at <http://siteresources.worldbank.org/INTDOII/Resources/fy07reportcomplete.pdf>.

¹⁶¹ WORLD BANK, WORLD BANK ANTI CORRUPTION GUIDELINES AND SANCTIONS REFORMS, Annex B (2007), available at http://p2dtk.bappenas.go.id/referensi/world_bank_new_anti_corruption_guidelines_and_sanctions_reforms_150507.pdf.

agreements but the Board left open the question of whether these changes should also be applied to World Bank grants.¹⁶² Bank Management subsequently decided that the Guidelines should apply to all IDA and full-sized GEF grants. This was a predictable conclusion, given that the scale of such grants equates with the scale of World Bank loans. It led to the creation of a new standard form grant agreement for IDA and GEF grants. In an unfortunate expansion of its zeal to stamp out fraud and corruption, however, Bank management then decided that a set of standard terms and conditions, mirroring the model IDA and GEF grant agreement, should be used for all World Bank grants. Implementing this decision meant dispensing with the many different arrangements being used to document World Bank grants and replacing them with a standard agreement built on a set of standard conditions applicable to all World Bank grants (“Standard Conditions”).¹⁶³ This approach ignored the great divergence in the size and scope of World Bank grants and in the size, capacity and resources of the grant recipients.

Concerns about development aid funds falling into the hands of terrorists, or groups linked to terrorists, added further weight to the push for uniformity in the Bank’s grant arrangements. Before the Bank’s introduction of the current Standard Conditions, the Bank routinely included a provision in its grant agreements requiring recipients to certify that no grant proceeds would be used to make payments prohibited by any sanctions regime in effect under a decision by the United Nations Security Council taken under Chapter VII of the U.N. Charter.¹⁶⁴ In recent years, however, many donors of trust fund monies (among them the United States, Australia, and Canada) sought additional assurances that measures would be taken to prevent any part of their contributions from falling into terrorist hands.¹⁶⁵ Such measures ultimately end up being reflected in provisions in the pertinent World Bank grant agreements, which impose stringent policing responsibilities on recipients.

¹⁶² *Id.* at n.1.

¹⁶³ *World Bank Grant Agreement Standard Conditions*, *supra* note 144.

¹⁶⁴ *Id.* at art. III, § 3.06(b). This provision is identical to a provision included in most trust-funded grant agreements prior to the adoption of the Standard Conditions.

¹⁶⁵ World Bank, *Anti-Money Laundering and Combating the Financing of Terrorism*, <http://www1.worldbank.org/finance/html/amlcft/index.htm> (last visited Dec. 1, 2008).

4.2.3. *Sticks and Sanctions*

The Standard Conditions afford the Bank sweeping powers to suspend or cancel a grant and to demand that a recipient refund a grant. The World Bank may suspend disbursements of grant proceeds, for example, if the recipient is a government or is located within the territory of a country whose government has taken any action that would interfere with the execution of the project; if the recipient has failed to perform any obligation under the grant agreement; if the World Bank has suspended loans or IDA credits to the country where the grant is being executed; or if such country has ceased to be a member of the Bank.¹⁶⁶ It may also suspend disbursement of grant proceeds if the recipient makes any material misrepresentation to the Bank with respect to the grant; if the recipient assigns any of its obligations under the grant agreement to a third party without the World Bank's consent; or, in the case of a non-government recipient, if the recipient dissolves or undergoes a change in its legal character which, in the opinion of the World Bank, may adversely affect the recipient's ability to carry out its obligations under the grant agreement.¹⁶⁷

The Bank may, in addition, cancel a grant if events leading to a suspension continue for thirty days or if it determines that misprocurement, fraud, or corruption has occurred.¹⁶⁸ Misprocurement occurs if the goods or services being financed out of grant proceeds are procured in a manner which is inconsistent with the procurement procedures specified in the grant agreement.¹⁶⁹ Fraud and corruption leading to cancellation occurs if, in the opinion of the World Bank, corrupt, fraudulent, collusive, or coercive practices were engaged in with respect to the grant either by the recipient or (in the case of grants made to non-government recipients) by representatives of the member country in whose territory the grant is being executed, or by a sub-grantee without the recipient or pertinent member country government having taken timely and appropriate action, "satisfactory to the World Bank," to remedy the situation.¹⁷⁰ The Bank may demand that a recipient refund an amount of grant proceeds to the Bank if

¹⁶⁶ *World Bank Grant Agreement Standard Conditions*, *supra* note 144, art. IV, §§ 4.02(a)-(d).

¹⁶⁷ *Id.* art. IV, §§ 4.02(e)-(h).

¹⁶⁸ *Id.* art. IV, §§ 4.03(a), (c).

¹⁶⁹ *Id.* art. IV, § 4.03(c).

¹⁷⁰ *Id.*

it determines that such amount was used in a manner inconsistent with the grant agreement.¹⁷¹

4.2.4. *Dispute Resolution Mechanisms*

The litany of possible wrongdoings warranting suspension of disbursements or cancellation of a grant by the Bank poses fertile ground for disputes to arise. Furthermore, the wide-sweeping powers of the Bank to act unilaterally and the expansive reach of its powers (which may be invoked even when the perceived wrongdoer is not the recipient itself) mean that many different kinds of entities may be involved. The broad nature of these powers increases the need for dispute management.

The only dispute resolution mechanism provided for in the Standard Conditions is an ad hoc arbitration procedure which has been adopted in toto from the Bank's lending operations. Under that procedure, either party to the grant arrangement may submit a claim which the parties have been unable to settle between themselves to arbitration.¹⁷² The arbitral tribunal is comprised of three arbitrators.¹⁷³ All parties are given a hearing and each party bears its own costs and an equal share of the arbitral tribunal costs and of the arbitrators' remuneration.¹⁷⁴ The arbitrators decide by majority vote and all awards are final and binding on the parties.¹⁷⁵ Proceedings before the tribunal are exclusive; the arbitration provision expressly provides that any arbitration is in lieu of any other procedure for the settlement of controversies or claims between the parties arising out of the grant agreement.¹⁷⁶ Parties may seek judicial enforcement of an arbitral tribunal award if the party against whom it has been issued has failed to comply within thirty days of entry of the award.¹⁷⁷

The deficiencies of this provision as the sole dispute resolution mechanism for the diverse universe of World Bank grant agreements are striking. First, it provides no pre-arbitration steps. Ideally, a full blown mandatory arbitration provision should be the next to last resort (prior to suit for enforcement), not the sole means

¹⁷¹ *Id.* art. IV, § 4.05.

¹⁷² *Id.* art. V, § 5.03.

¹⁷³ *Id.* art. V, § 5.03(b)

¹⁷⁴ *Id.* art. V, § 5.03(h)

¹⁷⁵ *Id.* art. V, §§ 5.03(f), (g)

¹⁷⁶ *Id.* art. V, § 5.03(i).

¹⁷⁷ *Id.* art. V, § 5.03(j)

for airing resolving differences. A comprehensive dispute resolution mechanism begins with a requirement for consultation and negotiation and then provides for follow up interim steps such as fact-finding, investigation and mediation, offering many ways of resolving differences or concerns before resorting to arbitration.

Second, this provision flatly ignores the differences in capacities and resources between the World Bank and grant recipients and the total lack of capacity or resources of smaller grant recipients to initiate an arbitration proceeding. Third, as mentioned previously, it provides no guidance on the law that an arbitral body would apply. The lack of certainty on this issue could serve as a deterrent to parties who might otherwise avail of the process. These deficiencies prompt consideration of an alternative approach, molded by the goals to be advanced in providing for a dispute resolution mechanism and grounded in the distinct characteristics of World Bank grant agreements..

4.3. Dispute System Design for World Bank Grants

The common characteristics shared by all World Bank grants, whether large or small, to governmental or non-governmental parties, shape what an effective dispute resolution mechanism should look like. Ultimately, all dispute resolution systems depend for their efficacy on the extent to which they take the interests of their users into account.¹⁷⁸ These common characteristics include: the likelihood that the grantor/grantee relationship will be a continuing one, a David and Goliath aspect to the grantor/grantee relationship, and a highly charged authorizing environment which makes foul ups very costly.

4.3.1. Honoring the Continuing Nature of the Grant Relationship

Given that the World Bank administers over seven hundred trust funds and global programs, there is ample scope for a recipient to receive multiple grants from the Bank in its capacity as trustee for several different funds, in addition to IDA grants and grants from the Bank's own grant programs. A small, short term

¹⁷⁸ STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 324 (5th ed. 2007) (adapting Stephen B. Goldberg, Jeanne M. Brett, & William L. Ury, *Designing an Effective Dispute Resolution System*, in DONOVAN LEISURE NEWTON AND IRVINE ADR PRACTICE BOOK 38-47 (J. Wilkinson ed., 1991)).

grant for a discreet activity will often lead to other grants and additional engagement between the World Bank and the recipient. Most grants, therefore, have the potential to be the first step in a multi-layered long-term relationship. This characteristic has implications for the design of an appropriate dispute resolution mechanism. To the extent that grants frequently result in continuing relationships, this suggests that, as in all continuing relationships, disputes will be inevitable. Accordingly, all World Bank grant arrangements merit the inclusion of a dispute resolution mechanism. The stakes may be much higher than the amount of the grant suggests.

4.3.2. *Dealing with the David and Goliath Syndrome*

All recipients, whether they are a government or a community-based non-governmental organization, are in a position of weakness relative to the World Bank. Inevitably, the relationship is one of vulnerability. Competition for grant financing is fierce and the need for such grants far out paces the availability of grant resources. Actual and potential recipients are readily replaceable.

The relative vulnerability of recipients is increased by the World Bank's sweeping powers to suspend or cancel a grant. The Bank's power to suspend a grant vests considerable discretion in the Bank. As currently framed, the Bank acting unilaterally can decide whether a recipient has taken an action that is likely to interfere with the grant activity, or has made a material misrepresentation in connection with a grant or has undergone some change in its legal character likely to adversely affect the grant.¹⁷⁹ Further, the Bank has extensive powers to determine that fraud, corruption, or the financing of an entity with suspect links to a terrorist group, has occurred. Moreover, the economic incentives that may constrain the Bank from exercising these powers in a loan context (where the Bank may be adversely affected economically if it suspends or cancels a loan) do not exist to operate as a restraint on the exercise of such powers in the grant context.

The implications of this vulnerability point to a number of considerations that should be taken into account in designing an appropriate dispute resolution mechanism. It suggests, for example, that the ideal mechanism would contain a range of procedure tailored to the nature of the dispute; an opportunity, in

¹⁷⁹ *World Bank Grant Agreement Standard Conditions*, *supra* note 144, art. IV.

other words, for the parties to “fit the forum to the fuss.”¹⁸⁰ A procedure suited to pursuing a concern about a qualification in an audited financial statement received from a recipient, for example, might differ significantly from the kind of procedure that would be appropriate to pursue strong evidence of embezzled funds.

This vulnerability also suggests that serious consideration should be given to designing a system that provides for a sequenced set of procedures that vary according to the stage of the dispute.¹⁸¹ The first stage in such procedures would be notification and consultation and the process would only advance to final decision-making arbitration if a series of interim steps built into the process failed to resolve the dispute.¹⁸² Interim steps could include negotiation and mediation, but also some form of independent fact finding by an external third party, where the nature of the dispute (e.g., an allegation of embezzlement) warranted it.¹⁸³ The advantage of including a fact-finding stage is that a fact-finding process, once completed, can establish a floor upon which mediation or negotiation can then proceed.¹⁸⁴ Ideally, the dispute resolution mechanism would provide for the possibility of returning to mediation and/or negotiation at various stages in the process as the facts and merits unfold.¹⁸⁵

Mandatory arbitration procedures resulting in a final award would remain an essential part of any comprehensive dispute resolution mechanism as there is always the possibility that a dispute will arise that is not amenable to resolution by agreement between the parties. Including multiple pre-arbitration procedures, however, would preserve arbitration as the process of last resort.¹⁸⁶ Further, the arbitration procedures should clarify what law the arbitrators would apply.

Finally, the inequality of stature and resources between the World Bank and grant recipients may also necessitate empowering recipients so as to strengthen basic due process rights and enable them to participate in dispute resolution in a meaningful way.

¹⁸⁰ To borrow a phrase, see Frank E. A. Sander & Stephen B. Goldberg, *Fitting The Forum To The Fuss: A User-Friendly Guide To Selecting An ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

¹⁸¹ GOLDBERG ET AL., *supra* note 179, at 322.

¹⁸² *Id.* at 323.

¹⁸³ *Id.* at 324–25.

¹⁸⁴ *Id.* at 325.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Steps to empower grant recipients could include supplementing their skills to represent themselves and making resources available to them to do so.

4.3.3. *Respecting the Reality of Multiple Stakeholders in a Highly Charged Authorizing Environment*

The stakes are high for all stakeholders in World Bank grants, not only for the grant recipient. The world of overseas development aid, like the world of philanthropy, does not operate in a benign environment. The developing world is frequently blamed for its own plight.¹⁸⁷ In the face of such prejudice, any hiccup in the proper use of development aid funds has the potential to have a devastating effect on the availability of grant funds for the future. Official development aid is sensitive to taxpayer pressure and news of funding foul ups, however small in the scheme of things, can diminish public support.¹⁸⁸ Other sources of such aid are also ultra-sensitive to bad news; all donors want to make a difference and have a very low tolerance for wasted funds.¹⁸⁹ These realities augur for a dispute resolution mechanism that is transparent but also reasonably efficient so that damaging attention is confined to a limited time span and not dragged out indefinitely.

In light of the sensitivities of this environment, it would also be imperative that any dispute resolution system be designed in consultation with representatives of all stakeholders.¹⁹⁰ In this universe, this would include recipient representatives, including developing countries, international and regional organizations, and non-government organizations, in addition to the donors of aid. Allowing for such participation in the design stage would maximize the likelihood that the aid system ultimately adopted has credibility with all stakeholders.¹⁹¹ A broad-based participation by stakeholders would also enhance the likelihood of compliance with the system's outcomes because, once having participated in the

¹⁸⁷ SACHS, *supra* note 3, at 81.

¹⁸⁸ *Id.* at 269.

¹⁸⁹ *Id.*

¹⁹⁰ Cathy A. Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems*, in GOLDBERG ET AL., *supra* note 178, at 330–31.

¹⁹¹ *Id.*

system's design, parties have a sense of ownership in both the process and its results.¹⁹²

5. CONCLUSION

In sum, the distinct characteristics of World Bank grants point to the inclusion of some essential building blocks in the design of a comprehensive dispute resolution mechanism for World Bank grants. As a starting point, all such agreements should include a dispute resolution provision, coupled with a governing law clause. In addition, the dispute resolution provision should afford parties multiple opportunities to resolve concerns before they ever reach the arbitration stage. Finally, in recognition of the reality that World Bank grants implicate many more parties than the World Bank and the immediate recipient, it is imperative that any dispute resolution system adopted for such grants be broadly understood and endorsed.

World Bank grants are now firmly established as a core part of overseas development aid. Adopting a comprehensive dispute resolution mechanism for them would foster the collaborative and participatory approach to development that much of grant finance aims to achieve. It would also break new ground in this evolving area of international finance and create a valuable precedent for other grantors, such as bilateral aid agencies, regional development banks and foundations, to follow. Such a step would emphasize the importance of building a new paradigm that balances between the interests of governments, inter-governmental and non-governmental actors in developed and developing countries, an equilibrium which the global economy exerts increasing pressure on all stakeholders to achieve.

¹⁹² *Id.*