MEMORANDUM ON

THE EXPANSION OF THE WORLD BANK'S POWER TO IMPINGE ON THE ECONOMIC SOVEREIGNTY OF BORROWER NATIONS

The Development GAP

2005

During much of 2005, The Development GAP, with the pro bono assistance of a major U.S. international law firm, explored the legal limits of World Bank and IMF intrusion into national policy space with their continued imposition of structural adjustment programs. Coudert Brothers, in the person of senior partner Jonathan Cahn, had previously supported our successful challenge to the Bank's attempt to block the flow of Belgian government funds to the SAPRIN civil-society network during the SAPRI investigation, questioning the Bank's sovereign immunity in the process. Our relationship was subsequently extended to tackle the question of the limits placed by the Bank's charter and internal procedures on its prescribed roles in assisting borrower countries, relating in particular to what are essentially political matters more appropriately reserved for citizens, national lawmakers and sovereign governments.

Although the dissolution of Coudert Brothers in September 2005 after 153 storied years as this country's oldest international law firm effectively stalled our work in this area, The Development GAP maintains an interest in the issue. While our input into, and challenges to, the Bank's drafts of its Operational Policy 8.60 centered on the authority it reserved for itself and the IMF to determine the economic policy of borrower nations, we and others also questioned the lifting of a ceiling on the percentage of Bank lending that could go to structural adjustment programs. The Bank's charter specifically limits non-project lending to "special circumstances", but the emergence of adjustment lending had lifted the ceiling to 25 percent from the implicit maximum of below 10 percent, with exceptions as high as 60 percent during the Asian financial crisis of the late 1990s. In the drafting of OP 8.60, the ceiling, both formal and informal, was eliminated completely, as the Bank redefined the meaning of "special circumstances" to fit its needs.

We asked Kiersten Jensen, a law student volunteering with The Development GAP in 2005, to investigate this issue. Her memo follows:

The World Bank's Articles of Agreement state that Bank loans or guarantees must be intended to fund "specific projects of reconstruction or development," IBRD Articles of Agreement, Art. III § 4(viii), "except in special circumstances," id. Given that the agreement presents non-project spending as an exception to project spending rather than as an alternative to project spending, and that the language throughout the Articles refers primarily, if not exclusively, to project loans, IBRD Articles of Agreement (referring to borrowing countries exclusively as "the territories in which the project is located") (emphasis added), it can safely be inferred that the drafters intended that the Bank should primarily fund projects.

The scope of the "special circumstances" exception provided for in Art. III is open to interpretation. The Articles do not delineate the requisite characteristics of a "special circumstance," nor do they further address the proper purpose of loans in another section of the agreement. They do, however, authorize unrelated actions in "extraordinary circumstances" in other parts of the agreement. Id. Art. IV § 3(iii). If the drafters did not intend "special" and "extraordinary" to have interchangeable meanings, and their use of different terms where they could have avoided ambiguity by using only one suggests that they did not so intend, then placing the terms relative to each other will help define precisely how rare the drafters intended a "special circumstance" to be. "Extraordinary" is a more forceful descriptive term than "special," so "special circumstances" probably fall between "extraordinary circumstances" and "average circumstances" in frequency. The language of the Agreement itself provides nothing more than this amorphous standard.

Adjustment loans, which do not indicate specific projects towards which the funds are to be used, must be justified as being issued pursuant to the "special circumstances" provision. Therefore, the Bank has attempted to further define the "special-ness" standard in the context of non-project lending, although the current trend moves towards further ambiguity.

In the 1990's, the Bank's policy was to interpret "special circumstances" as those occurring less than 25 percent of the time. Based on this figure, it reasoned that if structural loans accounted for less than 25 of the Bank's total loans, all of such expenditures fell within the "special circumstances" provision of the Articles. "Adjustment Lending", Operational Directives 8.60 (1992) (providing that "adjustment should not normally exceed 25 percent of Bank … lending, aggregated over the Bank as a whole and averaged over a three-year period.").

A 25 percent cap is not inconsistent with a broad interpretation of the standard implied in the Articles as an occurrence that happens a quarter of the time is both less than usual and more than extremely rare. Nonetheless, determining that a qualitative requirement has been satisfied in multiple cases based solely on an aggregate quantitative value is simplistic, and the Bank seems to have viewed their 25 percent cap on non-project lending more as an objective than as a rule. Operations Policy and Country Services, Adjustment Lending Retrospective (2001), p. 4 (noting that the share of adjustment lending has "broadly followed the [25%] guideline").

Indeed, the volume of structural loans was 26% of total lending from 1980 to 2000. Id. (noting that spikes in adjustment lending from FY89-92 and "the late nineties" deviated substantially from the norm). However, the volume of adjustment loans has increased steadily since 1980, from 3.7% in FY80 to 11.2% in FY85, 26.5% in FY90 to 52.9% in FY99, and 33.4% in FY00, id.; see also id. p. 2, fig. 2 "Volumes of World Bank Adjustment and Investment Lending since 1980"; id. p. 2, fig. 3, "Adjustment Lending Share of IBRD, IDA, IBRD/IDA, FY90-01," and Adjustment Lending Retrospective, issued in 2001, indicates that the bank found the 25% cap impracticable and would likely revise it.

The Bank rejected its quantitative cap (or "guideline) in the subsequent OP 8.60. Operational Policies, 8.60 (2004). Indeed, the document addresses the issue of circumstances under which structural loans may be issued only very briefly, noting that "the Executive Directors consider and approve each development policy operation as meeting the special circumstances provision of the Bank's Articles of Agreement," id. § 8, with no further guidelines on the matter. The Adjustment Lending Retrospective notes that "the Articles do not require that adjustment lending be kept with a predetermined portion of the Bank's lending operations," before defining a "special circumstance" as "a situation [that] is such as to justify a departure from the general rule," which the Executive Directors will determine on a case-by-case basis. Adjustment Lending Retrospective, p. 3, citing Ibrahim Shihata, Authorized Purposes of Loans Made or Guaranteed by the Bank, Memorandum of the Vice President and General Counsel (SecM88-517), April 8, 1988.

Determining which circumstances are "special" under the meaning of Art. III is probably better done by analyzing the particulars of a situation than by determining retroactively that they comprised a requisite percentage of total spending. However, OP 8.60's tautological definition of a special circumstance offers little guidance and a great deal of freedom to determine that a certain loan scheme is justified under Art. III. After all, each country finds itself in a unique economic situation; it is easy to argue from there that any country's circumstances are "special." The volume of non-project loans issued since OP 8.60 replaced OD 8.60 is unavailable; indeed, such numbers would be irrelevant under the new policy, at least for purposes of determining that the loans are justified. However, the Executive Directors now have such wide latitude in deciding that a structural adjustment loan is appropriate under Art. III that the volume of adjustment lending has probably not decreased. The drafters of the Articles intended that the bulk of loans be made to support projects; otherwise, they would not have specifically so provided in Art. III § 4(viii).

Non-project spending is expressly unauthorized under Art. III except in "special circumstances." The Bank's Executive Directors now have unfettered freedom to determine that the exception applies to any circumstance. Therefore, the Bank must take care not to let the exception contained within Art. III § 4(viii) negate the meaning of the clause itself.