

LEGAL ASPECTS OF WORLD BANK
PARTICIPATION IN MINERAL
EXPLOITATION PROJECTS

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I. INTRODUCTION

The following is an attempt to describe some of the salient features of the financing of projects by the World Bank Group,¹ and particularly the infrastructure portions thereof, in the mining sector. In order to better understand the operating norms as well as the policies and practices which have underlined the Group's institutional approach to the mineral industry in the past, a brief summary of the background, structure, and framework of these organizations is necessary. Absent this explanation, the realities and the constraints of its operating norms cannot be fully appreciated. As is well known, the International Bank for Reconstruction and Development, commonly known as the IBRD or World Bank, is the largest and oldest cooperative or multilateral institution in the field of development finance. Its principal purposes are expounded in its Articles of Agreement,² which is also its governing charter. These purposes, which prescribe the limits of its operational freedom, include: (1) assisting in the development of the economies of its members by facilitating the investment of capital for productive purposes, and (2) promoting private investment and, where private capital is not available on reasonable terms, financing productive projects from its own resources. Finally, the Bank is directed to "conduct its

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¹ The Group includes three financial institutions: the International Bank for Reconstruction and Development (IBRD); the International Finance Corporation (IFC); and the International Development Association (IDA). The Group also includes one nonfinancial institution, the International Centre for the Settlement of Investment Disputes (ICSID).

² Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440 (1946), T.I.A.S. No. 1502, 2 U.N.T.S. 134.

operations with due regard to the effect of international investment on business conditions in the territories of its members."³

The Bank is a cooperative stock corporation, whose shares are owned by its 124 member governments. The more needy of these governments are the beneficiaries of its loans. The Bank has a capital structure that is designed to enable it, indeed to compel it, to obtain the bulk of its loanable funds through borrowings in the private capital markets of the world. This is because the Bank's articles provide that not more than 10 percent of the Bank's subscribed capital may be used in its lending operations. Nine-tenths of this 10 percent is not even freely usable for loans in the case of the vast majority of members because their currencies are not convertible. In effect, the balance constitutes a guarantee fund to be called upon to meet the Bank's own borrowings or obligations. The amount of money which the Bank has borrowed since it was founded is indeed staggering. For example, in the 6-year period ending June 1974, borrowings reached almost \$8.85 billion, an average of well over \$1.4 billion per annum. By far the major portion of the Bank's outstanding obligations, *i.e.*, its bonded debt, is held by private, institutional investors. Thus, the Bank's issuing activity is an important factor in the mobilization of private capital for development finance.⁴ It is the confidence and support of these private investors which furnish the funds for the Bank's operations and enable it to make its contribution to the development process. While the Bank is authorized to guarantee loans as well as to lend directly, it has never availed itself of these guarantee powers (which would entail greater costs for borrowers) and has confined itself exclusively to direct lending.

The Bank's ability to promote direct private investment has been found to be considerably more limited. This inability is, *inter alia*, due to the following factors: (1) the Bank is unable to take a risk capital position, *i.e.*, to participate in equity as opposed to debt financing; and (2) the Bank's loans must be made either to governments directly or, if the government is not the borrower, with the guarantee of the member government in whose territory the project is located. Even at this early stage, it should be mentioned that in the latter case the guaranteeing member must assume the financial obligations of the loan as a joint debtor; *i.e.*, as the standard Bank agreements define it, "as primary obligor, and not as a surety merely."

³ *Id.* art. I, § v.

⁴ The sale of participations in Bank loans performs a similar function. The aggregate amount of participations which has been sold to institutional investors to date exceeds the equivalent of \$2 billion.

The Bank's limited ability to promote direct private investment led to the creation of the International Finance Corporation (IFC), the Bank's first affiliate, in 1956. The IFC provides financial assistance by direct equity investment as well as through lending or participating in loans to private enterprise in developing countries. In other words, the IFC cannot participate in a project that is not privately owned. It also cannot participate in an enterprise if the member government in whose territory the project is located fails to support it. The IFC has acted as a catalyst for attracting a large volume of direct private participation, both foreign and local, to the economies of its developing members. The mining industry is an example of an area in which some of its investments and loans have been made, but even though the IFC's overall commitments continue to expand, its financial resources compared to the Bank's are relatively small.⁵ This fact has required it to limit its direct investments in any single project to between \$1 million and \$20 million even though the financial needs of such projects have ranged between \$100 million and \$400 million. In addition, since the government of the country in which the project is located cannot be involved directly in IFC projects, the IFC is often not considered a suitable vehicle for financing these types of projects. World Bank presence is at least partially sought for its salutary effect on a partnership involving foreign private and local public (natural) resources. The Bank's presence is often requested as a precondition to participation by other commercial lenders. However, the IFC may usefully lend its assistance to the establishment in the developing countries of mineral processing facilities or mining companies (by providing equity capital participation). It may be expected to increase its involvement in this area in the future. One of its declared policy aims is to increase the proportion of local ownership of projects in which it participates.

The International Development Association (IDA), the other financial affiliate, is the last of the Group's institutions to be described.⁶ The IDA was created in 1960 as the "soft loan" window of the World Bank Group. Its purpose is to provide development finance to those countries in the Group whose economies are too poor (and foreign exchange earnings too small) to service conventional Bank loans. Unlike the Bank or the IFC, membership in the IDA is formally and legally divided into

⁵ E.g., as of June 30, 1974, there was \$107.2 million in share capital plus \$65.3 million in reserves, plus approximately \$428 million in borrowing authority.

⁶ For a discussion of the Bank's nonfinancial affiliate, the ICSID, see Sassoon, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 1 ISRAEL L. REV. 27 (1966).

two distinct groups. There are 21 (part I) donor countries and 95 (part II) beneficiary countries. However, not all of the part II countries are eligible to be beneficiaries. IDA credits require no interest, except for a service charge of 0.75 percent on amounts withdrawn, and the IDA allows 50 years for repayment, including a 10-year grace period. The concessionary terms also require that the IDA obtain its resources from donations or contributions from its more affluent members. Therefore, the IDA depends on grants which must, of course, be appropriated from the budgets of the donor countries. In other words, the very survival of the IDA depends upon the allocation of tax money and other revenues collected from the citizens of the richer countries. However, there are many domestic needs which often seem more pressing to the average taxpayer in the developed parts of the world than foreign aid. For this reason the amounts at the IDA's disposal are clearly inadequate to meet all the needs of development. Consequently, the IDA must allocate its scarce resources rather carefully and will not be involved in mining projects. Mining projects ought to reflect the true cost of capital and are not economically feasible unless they generate sufficient revenues to produce a profit on this cost. The export-oriented nature of the industry usually means that the revenues will be in foreign exchange. As a result, the Bank is the only substantial source of funds for these types of projects.⁷

The Bank's duty to assist its member countries in their economic development effort has already been mentioned; so has its reliance for its resources on the private capital markets of the world. The latter aim, quite apart from the duty towards its own shareholders to preserve their capital and not incur losses, would be jeopardized if the Bank's lending operations were not conducted with a great degree of caution. The confidence of the market expresses itself in the willingness to purchase World Bank bonds in the vast amounts which are required and at the most advantageous interest rates prevailing at the time of issue. This confidence would be seriously eroded if the Bank departed from the standards of prudence and care that have characterized its operations from its inception. The victims of any such adverse market move would be the developing countries themselves.

⁷ This has led to the creation of the term "enclave project." An enclave project is a project which is outside the mainstream of economic activity in the country where it is located. It contributes to the economy principally through royalties, taxes, and profit sharing. Consequently, these projects are eligible for Bank financing, even when situated in IDA countries. The credit-worthiness of the surrounding economy is immaterial because the project will generate sufficient foreign exchange to pay for itself.

II. PROBLEMS OF BANK PARTICIPATION IN THE MINING SECTOR

The following factors help to explain the relatively limited involvement of the Bank⁸ in the mining sector: (1) the special features of the mining sector, including the fact that it operates at levels of physical, commercial, and political risk which are normally significantly higher than those of other industries; (2) the extremely heavy investments these projects require, including not only the physical and social infrastructure facilities, but also the early expenditures for exploration and metallurgical testings; (3) the fact that much of the requisite technical expertise continues to be concentrated in the hands of a relatively small number of multinational corporations which have free access to the capital markets of the world on their own account; (4) the fact that the investment climate of the past was more stable in that nationalizations and expropriations of foreign-controlled mines were less customary, with the perceived risks being lower and thus more readily financeable without participation of the Bank; and (5) the reluctance of previous boards (representing the member governments) of the Bank to finance governmentally owned and managed industrial enterprises. This latter attitude of reluctance has long been abandoned, but it was rather prevalent in the early years of the Bank's operation.

Since it first entered this sector in 1957, the Bank has made some 15 loans aggregating \$480.8 million for mining projects.⁹ However, the depletion of the existing, nonrenewable, known resources and the projected growth of demand resulting from higher living standards and expectations, together with the new political, social, and economic realities of the world, quite clearly point to a much greater Bank effort in this sector in the future. Indeed, an increasing role by the Bank in this sector can be predicted with almost virtual certainty. As a rule, mining projects in the past were financed on a project-by-project basis rather than in the framework of a balanced sector approach. Most projects were referred to the Bank from the outside, generally after most of the contractual arrangements between the foreign private participants and the host country were totally or substantially completed. This is not to

⁸ The Bank's involvement in the mining sector is slightly less than 2.5 percent of the total Bank Group lending.

⁹ The IFC has participated in seven more such projects. The projects have yielded a total of \$88.2 million. Bank Group financing has been confined to 13 countries in Africa, Asia, Central America, and South America. There has been some financing in Europe and the Middle East. The mineral sector makes a major contribution to the economies and exports of six of these countries: Brazil, Chile, Gabon, Guinea, Mauritania, and the People's Republic of Congo. The Bank has also carried out mining sector studies in other countries.

say that the Bank accepted these contractual arrangements in every case. Where these arrangements appeared unfair, the Bank simply refused to participate in the project.

The General Counsel of the Bank has stated that the policy of the Bank in this area is very clear, and that the Bank has no business financing these types of projects "unless they [produce] a significant, and in the circumstances, fair and reasonable yield to the host country."¹⁰ This obviously places the Bank in a very delicate position. To what extent should the Bank try to influence the terms and conditions of the transaction between the private foreign investors and the host government? Quite clearly where the safety of the Bank's own investment is concerned, the answer to this question is in the affirmative. But how far, if at all, should the Bank go beyond that? Should the Bank act as the advocate of the government in its negotiations with foreign investors? According to the General Counsel, the answer to this last question is "no." However, according to the General Counsel, there is one point of which the Bank makes quite sure; namely, that the government secures competent legal and business advice. Where it feels necessary, the Bank makes the retention of outside legal and other counsel a condition *sine qua non* of its participation in mining projects.¹¹ Where appropriate, the Bank is even willing to include the cost of such services in the loan proceeds for the project. The Bank is never prepared to assist in the financing of a mining project involving foreign investors unless it first satisfies itself that the agreements governing the relationships between the parties are fair and equitable. The Bank also has to be satisfied that the government has available to it suitable professional advice to assist it in negotiating the terms of the agreement. Whether the Bank's posture in this area of agreements between foreign participants and host governments will change and become more active in the future, and if so, what particular form this involvement may take, remains to be seen. If the Bank can assist in formulating an adequate mineral policy and in accelerating developing countries' access to the relevant expert assistance by working out the terms of potentially more durable relationships between suppliers and consumers, it is quite possible that the Bank would be willing to take steps in the future to become involved in mining projects at an earlier stage than it has in the past. Certainly, many expect that its impartial expert advice would have a salutary effect

¹⁰ Broches, *The Role of the World Bank in International Transactions*, in SOUTHWESTERN LEGAL FOUNDATION, PRIVATE INVESTORS ABROAD 185, 203 (V. Cameron ed. 1970).

¹¹ *Id.*

in this area. As much as 80 percent of all exploration expenditure is now being invested in the developed countries. The aggregate of non-fuel mineral reserves (excluding the reserves found in countries with centrally planned economies which contain about 30 percent of the world's reserves) are estimated to be divided approximately evenly between developed and developing countries. The potential of future reserves is clearly higher in the developing countries. This disproportionate amount of investment in the developed countries cannot last and clearly calls for some action.

III. BANK FINANCING OF MINING PRODUCTION AND INFRASTRUCTURE FACILITIES

A more detailed description of the Bank's past involvement with mining projects is necessary. In every case the Bank looked at the project as a whole. This was true irrespective of the portion of the project which the Bank was asked or was willing to finance. The Bank had to satisfy itself: (1) that the deal was fair to the member of the Bank in whose territory the project was located (*i.e.*, the host government); (2) that the allocation of benefits and risks was properly balanced; (3) that the project made economic sense; and (4) that the Bank's investment was secure. Attempts to curtail the Bank's examination of these various aspects was attempted through the establishment of subsidiaries with limited responsibility for only a part of the project. These attempts were unsuccessful. The Bank was unwilling to participate in the financing of a railway or port facility (if its main purpose was to facilitate a mining project) unless it had examined the mining aspects of the project. The Bank insisted upon satisfying itself as to all of the above-listed points. The same held true if the request was to finance a township associated with a mining development. Because of this analysis of the entire deal or transaction, the actual part of the project which the Bank financed was immaterial. The identity of the borrower was normally immaterial also.

The Bank has financed infrastructure facilities as well as mining production facilities. Whether or not it would finance infrastructure facilities depended upon the particular circumstances. The Bank has lent to a private corporation, when it was the project entity, as well as to a host government or one of its agencies. Of the 22 projects financed by the Bank Group to date, four of the loans financed infrastructure facilities, while 11 financed production facilities. The remainder financed both production and infrastructure facilities. IFC finance was exclusively for private enterprise. Bank loans were made equally to both the private and

government sectors, although in the majority of projects, control of the mines was in private hands. However, the government may wish to avoid the concentration of ownership of all the facilities in one hand for fear of impeding further development. This often explains the host government's desire to assume direct responsibility for the infrastructure.

The Bank does have certain preferences in these areas. It prefers to lend directly to the entity or enterprise which will be responsible for the construction and operation of the project in order to avoid the danger that shortcomings and problems in the execution of the project might not be remedied immediately. Since experience has shown that physical or administrative distance may hinder or delay corrective steps, the Bank prefers to have as close a relationship as possible with the project and with those responsible for its construction and operation. If the project is to be carried out by a private corporation, then the guarantee of the host country, which is required by the Bank's articles, will normally be confined to the payment of the debt service on the loan. This is true even when there is some governmental participation in ownership if the private character of the corporation is essentially unaltered. This is typically the case when the governmental participation is in consideration for the grant of a mining concession to the enterprise.

The host country's guarantee will not extend to the full performance of the borrower's undertakings. The guarantee will also not extend to the provision of the funds and other facilities required to complete the project. The latter is the case when the loan is made to a state corporation or enterprise with the guarantee of the member. In such an arrangement, all the guarantor government will usually be requested to covenant is "not to take, cause, or permit to be taken any action which would prevent or interfere with the construction and operation of the project or with the performance of the borrower's obligations." This principle of operations is a general practice of the Bank. The choice of borrower under the loan in question will thus be resolved by reference to the particular portion of the project which the Bank is asked to finance and is willing to finance.

Under its Articles of Agreement, the Bank is normally required to finance the foreign exchange cost of projects. Financing of local cost expenditures is only permitted in exceptional circumstances. For this reason, the Bank's participation in projects which require large foreign exchange expenditures will usually be confined to the financing of imported equipment and materials. Mining projects in the less developed countries almost always fall into this category. As this may to some extent have a bearing on the portion of the project that the Bank is

willing to finance, it is also a factor to bear in mind with respect to the choice of borrower. In other words, since the Bank is more likely to participate in financing the importation of large pieces of equipment connected with a mining development than to participate in the financing of local labor costs, its participation may be directed to that portion of the project where such items are concentrated. When other lenders whose aid might be tied are involved, the range of options might not always be as broad as would be desirable. However, beyond these considerations, there is no relevance as to what portion of the project is being financed by the Bank in terms of the Bank's interest in the project as a whole.

Assuming that the Bank is willing to finance any or all of the power, water, township, or transportation infrastructure of a mining project, it would still wish to examine in the greatest possible detail a number of arrangements. These arrangements relate to production, marketing, security, risks, and the sharing of benefits (whatever their particular form—taxes, royalties, dividends, employment opportunities, etc.), and to the management of the entire operation. Ecological and environmental safeguards are also considered. This was the Bank's practice in the following projects: (1) the Falconbridge ferronickel mine in the Dominican Republic (financing of power facilities); (2) the Miferma iron-ore project in Mauritania (financing of railway and port facilities); (3) the Comilog Manganese project in Gabon and Congo/Brazzaville (financing of cableway and railway facilities); and (4) the Camel liquefied gas project in Algeria (financing of port and power facilities in addition to a liquification plant). These are only a few examples. In all of these cases the loans were made directly to the mining company. However, the same was equally true of the following projects: (1) the Burfell power project in Iceland (serving the Alusuisse aluminum smelter); (2) the Volta power project in Ghana (serving the Valco aluminum smelter); (3) the Boke railway, port, and township project in Guinea (serving the bauxite mining operation of an international consortium of aluminum companies); (4) the Shashi power, water, railway, and township project in Botswana (serving the nickel and copper mining operation of BCL, a subsidiary of Roan Selection Trust); and (5) the REFFSA Minaes Gerais-Sepatiba Bay railway link in Brazil (serving the MBR iron-ore mine). The loans in the Brazilian project were made to the host country government or to one of its agencies which was responsible for the operation of the infrastructure facilities in question. Admittedly, these two forms of financing (*i.e.*, direct financing of the project entity and indirect financing of the supporting outside infrastructure facilities) in-

volve different legal and financial problems and techniques, but the choice of one or the other form is essentially irrelevant to the Bank's evaluation of the project as a whole.

IV. SECURITY ARRANGEMENTS

In all of the cases noted above, the companies operating the mining facilities were the real parties to which the Bank looked for assumption of the risk and for security of its loan repayment. Where the borrower was a project entity which was privately owned, substantial shareholder equity or subordinated debt was required for the financing. Normally, shareholder guarantees for cost overruns and repayment were also sought. These usually included financial commitments to provide all funds necessary to complete the project and repay the loan. Obviously, these commitments are quite apart from other more customary types of security, such as plant mortgages etc. In the case of the Shashi project in Botswana, the private party was required to assume one-half of the cost of the engineering studies of the water, power, transport, and township facilities, which had been financed under a \$2.5 million IDA credit to the government. This was done in case the private party failed to proceed with the mining project. In addition, the Bank has insisted for some time now that in all nongovernmental projects the private borrower not be given the advantage of the Bank's subsidized lending rate. Rather, the Bank requires that the host government charge the private investors a guarantee fee equal to the difference between the market rate of money and the Bank's current lending rate. The Bank's practice is to charge a uniform lending rate which is kept as low as is consistent with its own financial well-being. There is no reason to give the benefit of this low long-term rate to a private investor. The low rate was designed to lighten the burden that the financing of economic development places upon the balance-of-payments positions of Bank members. Thus, the Bank has insisted that the host government charge the project entity a guarantee fee. On the other hand, if the loan was made to the government or to one of its agencies in support of a mining venture, the lending rate was the usual uniform low rate, because the direct beneficiary of the loan was the government itself. But this does not mean that the Bank looked to the government as the real provider of the funds to cover the debt service of the loan. In all of these cases, since the infrastructure facilities in question were designed to service the mining operation or enterprise, the Bank insisted that adequate arrangements be made. These arrangements ensured that the government had a sufficient source of revenue from the private participants in the mining venture. This was

in consideration for the government's investment through the World Bank loan in the infrastructure supporting facilities. The government needed a sufficient source of revenue not only to repay its obligations to the Bank, but also to justify the entire investment.

Security arrangements in these cases have also taken other forms. The Bank has occasionally insisted on obtaining liens or pledges which could be enforced directly against third parties who were, for example, to be the purchasers of the produce. Shareholder guarantees running directly to the Bank are also in this category, because the Bank can enforce them as a party to the contract in question. When the Bank is not a party to the arrangement, the security will run directly from the consumer or from the shareholders to the borrower. These arrangements do not involve a right which the Bank can enforce directly, but in effect they produce a somewhat similar financial guarantee for the borrower.

From a legal point of view, a distinction can clearly be made between arrangements which give the Bank direct rights and remedies against a third party (*i.e.*, one other than the borrower) and those arrangements which do not establish a direct contractual relationship between the Bank and a third party. The distinction is financially less significant. This is because arrangements of the second kind, by aiming at strengthening or safeguarding the financial position of the borrower, also contribute, even if more indirectly, to the protection of the Bank's investment.

Such arrangements are best illustrated by examples. A company wanted to borrow funds for a large power project. Most of its output was to be sold to two other power companies in a neighboring state. Apart from the fact that the buyers might have been financially stronger than the producer, the success of the entire project depended on the sales actually taking place under terms foreseen at the time the loan was made. The buying companies committed themselves to take a certain quantity of the power production. They also undertook to pay the producing company for its annual production costs, including interest payments, depreciation, taxes, and even a certain return on share capital. The unusual feature of this arrangement was that the consumers were paying for their energy not on the basis of units purchased but on a prorated share of the cost of production. These obligations were unconditional, and the sales contracts which contained them were assigned to the Bank as security for its loan.

The assignment of a "take-or-pay" long-term purchase contract is a form of security arrangement which is frequently encountered in the

type of loans under discussion. It consists of the obligation of a third party to purchase a product or service, or to pay for it even if it is not purchased. In some cases the obligation to pay exists even if the product involved has not been produced. The third parties involved may be the shareholders of the borrower, as in the Falconbridge project. In other instances they are outsiders interested in a steady supply of the product. In yet other examples, it may be the private mining company who agrees to pay for transportation and for other infrastructure facilities which the government provides by means of the Bank loan (as was the case in the MBR iron-ore project in Brazil).¹² In some cases payments for the service or the product in question are made to a trustee who must earmark and apportion the receipts between the various creditors, including the government, in accordance with the priorities which have been agreed upon. This must be done before the trustee can transfer any money to the private producer. There is no established pattern and each individual case is governed by its own circumstances.

One of the Bank loans was an interesting case in which two "take-or-pay" agreements were involved. The borrower was a government-owned power agency. A large part of its output was to be used by a foreign-owned company for its aluminum smelter. The company undertook to buy a set quantity of power at set minimum prices. The shareholders of the company also committed themselves to supply it with the raw materials for processing and to pay a processing charge based upon a percentage of the world market price for aluminum. In the event that the charges for aluminum actually processed did not cover the smelting company's operating costs, including debt service and power payment obligations, the shareholders were to make a minimum quarterly payment to the company sufficient to meet these operating costs. This case provides an interesting example of arrangements that pierce the screen of existing corporate structures by involving the real economic forces behind the project, its promoters, and sponsors.

The foregoing examples demonstrate that the form of security varies from transaction to transaction, depending on the individual characteristics of the project, and will most probably be different where the loan is made to a private entity, rather than to the government or to one of its agencies. No matter what form the particular security takes, the infrastructure, if publicly owned, will have to be secured by the mining

¹² In the Shashi project in Botswana, the private mining company was required to pay a minimum monthly payment to cover loan authorization, operating costs, and return for the power and water. A similar formula for the other infrastructure services and facilities, whether supplied or not, was established.

operation and its sponsors. The obligation of the government as a borrower or guarantor in these cases will protect the Bank's loan, but this protection is in addition to, and not in lieu of, the security which the private investors must furnish. In effect, the specific security arrangements are designed to protect the government as guarantor, or as borrower, as much as they are designed to protect the Bank as lender. This is because there is less likelihood of the Bank having to invoke the government's direct obligation in these circumstances. As already noted, it is for this reason that such projects can receive Bank rather than IDA financing, even though the country itself may normally have access to IDA funds only. Even in the unlikely circumstance of the Bank having to enforce the government's direct obligation, the government will then be subrogated to the rights and benefits of the security arrangements in question. Naturally, private parties furnishing such security want to be free from their commitment in the event that government interference causes the need to enforce the security in the first place. In other words, they insist on limiting their obligations to cover technical or commercial risks. Understandably, they will refuse to accept or to underwrite the political risks, especially if they emanate from the host government itself.

Here we tread on delicate ground. The subject is known in Bank parlance as the *force majeure* exception and in fact explains some of the Bank's prior involvement in the mining sector. The reason for requesting the Bank's financial participation in these cases was frequently not lack of money. The mining companies could have probably raised the money on their own. Rather, the object was to facilitate the raising of capital via the presence of the World Bank in the deal, which was sought for what might be termed as its stabilizing influence. This is an influence which is often sought by host governments requesting Bank involvement in their mineral sector because of the useful role they expect the Bank to play in any conflict which may develop between them and the mining companies. Thus, although World Bank Group lending has accounted for less than 1.5 percent of the total flow of funds into the developing countries for mineral projects, the Bank has been involved in projects involving 6 to 8 percent of total mineral expenditures, and has contributed between 20 and 25 percent of the cost of those projects for the period from 1957 to the present. The buffer or umbrella presence of the Bank is designed to give the project a measure of political stability and to restrain the government from taking any actions in violation of its project undertakings that would make the government bear the brunt of repayment. This is because the security required of the private inves-

tors cannot be invoked when the investors are deprived of the benefits they had planned to derive from operating the project, if deprivation occurs via an act of the host government or through acts of revolution or war.¹³ Therefore, many of these security arrangements contain *force majeure* exceptions releasing the private parties from their obligations to supply funds, regardless of the particular technique used, for cost overruns or repayment of the loan capital in the event of political interference.

No description of the Bank's practice in this area would be complete without mentioning at least some of the differences which distinguish loans to private parties from loans to the government or one of its agencies in the mining sector. Where the borrower is a private corporation, its debt/equity ratio may be subject to limitations imposed by the Bank. A restriction is normally placed on shareholder dividends or on interest on shareholder advances. A commitment to keep working capital at adequate levels is often obtained. Substantial equity or other subordinated financial investment participation by the private shareholders is required. All of these covenants do not apply in the case of loans which are made to governments or to governmental agencies that are involved in providing mining infrastructure facilities with the assistance of Bank financing. In fact, liens on specific revenues or assets as security for loans which are valid against third parties will usually not be sought from governments or governmental agencies. Such liens will generally not be sought unless another creditor or lender participating in the financing has obtained such a security, or unless the specific assets, even though not encumbered, would be reachable outside the member country by another creditor. As mentioned earlier, a typical form of security that the Bank seeks in lending to a private investor in the mining sector is precisely of this kind; namely, a shareholder's commitment to the Bank or an assignment to the Bank of a contract to take or pay for the produce of the mine.

On the other hand, all loans to governments have contained negative pledge clauses. These are agreements that if the government creates any specific lien or pledge on any of its revenues or property to secure any other external debt, the Bank will have a right to share in such security *pari passu*. However, this principle is applied by the Bank, without exception, to all of its loans to members and guarantees of members, regardless of the type of project for which the Bank's assistance is given.

¹³ These are risks which the private investor and his commercial lenders would normally seek to protect against by means of national investment guarantee programs.

It is the Bank's usual policy not to require specific security for its loans to governments or governmental agencies. It normally permits the governments to borrow on the basis of their general credit. On the other hand, the Bank does not wish other lenders to take specific security or to acquire preferences or priorities of payment which could put the Bank in a subordinate position. Nor does the Bank wish to make payment to the Bank more difficult than payment to another creditor. Therefore, the Bank includes in its agreements with members a "negative pledge" provision which assures it of equal and *pari passu* treatment if specific security or preference is later given to another lender. The Bank has sometimes agreed to waive the right to participate in a security by virtue of the negative pledge undertaking if the circumstances justified such a waiver. However, it would be less than prudent, and it could weaken the Bank's position in the capital markets of the world, thereby resulting in a rise in the cost of its own borrowing. Ultimately, this would also lend to an increase in its lending rate if it did not pursue the practice of including a negative pledge covenant in its agreements with governments.

V. CONCLUSION

So much for current practice. What of the future? As already intimated, a growing and larger Bank role and a noticeable increase in financing projects in this sector may be expected. There will probably be more emphasis on local participation and on the fairness and openness of the agreements governing the relations between the foreign and local participants. This emphasis will probably involve different legal and financial problems from those described, but these problems should not pose any real difficulties and the appropriate techniques will be found. But this will also entail the assumption of greater risks on behalf of already overstrained economies. For example, the high cost of exploration is often wasted, since there is no assurance that a commercially exploitable discovery will result. Returns usually take many years to be realized. It would be irresponsible to focus attention only on the profits of successful ventures without taking into account the potential for losses and the grave risks involved. The bargaining power and the geological and technological knowledge of the producing countries must be strengthened. The promotion of adequate mineral policies and exploration work must be accelerated so that the economic and social benefits of successful operations might be realized more quickly. This would conform more closely to the expectations of the people who are fortunate enough to possess mineral wealth within their lands. If the problems

which now beset the industry are to be solved, and they are essentially political in nature, a closer partnership between producers and consumers must be forged.