Developing a New E.B.R.D. Product: A Case Study on Interpreting the E.B.R.D. Agreement

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In 1990, The European Bank for Reconstruction and Development was established with the principal aims of fostering the transition towards open, market-oriented economies and promoting private and entrepreneurial initiative in the countries of Central and Eastern Europe. Following a brief comparative study between the constitutive documents of the E.B.R.D. and of other international financial institutions, the author notes that the major difference lies in the relatively detailed language of the E.B.R.D. Agreement.

The author identifies the specific provisions of the E.B.R.D. Agreement which may represent constraints on the Bank's operations and may impede its ability to adapt to changing circumstanees. Following a review of the particular process, principles, and documents which would be involved in the interpretation of these provisions, the author conducts a case study of the application of the E.B.R.D. Agreement to a recently developed financial product. This analysis leads him to conclude that the E.B.R.D. should be able to adapt itself to its clients' future needs.

En 1990, la Banque européenne pour la reconstruction et le développement a été mise sur pied, avec, pour objectifs principaux, de faire avancer la transition vers des économies ouvertes et orientées sur le marché et de promouvoir les initiatives privée et d'entreprise dans les pays de l'Europe centrale et de l'Europe de l'Est. Après une brève étude comparée entre les documents constitutifs de la B.E.R.D. et d'autres institutions financières internationales, l'auteur note que la différence principale réside dans le langage relativement détaillé de l'entente de la B.E.R.D.

L'auteur identifie les dispositions précises de l'entente de la B.E.R.D. qui peuvent contraindre les opérations de la Banque et diminuer sa capacité de s'adapter aux circonstances changeantes. Après une revue du processus particulier, des principes, et des documents qni seraient impliqués dans l'interprétation de ces dispositions, l'auteur analyse le cas de l'application de l'entente de la B.E.R.D. à un produit financier récemment développé. Cette analyse l'amène à conclure que la B.E.R.D. devrait être capable de s'adapter aux besoins futurs de ses clients.

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To be cited as: (1995) 41 McGill L.J. 295
Mode de référence : (1995) 41 R.D. McGill 295

Synopsis

Introduction

The *Agreement Establishing the European Bank for Reconstruction and Development*,[1] a treaty among states and international organisations, was signed by representatives of forty countries, the European Economic Community and the European Investment Bank. Signature and subsequent ratification of the E.B.R.D. Agreement added the European Bank for Reconstruction and Development ("E.B.R.D." or "Bank") to a small group of comparable, treaty-based international financial institutions ("I.F.I.s").[2] The Bank's core business is to lend money, make equity investments, underwrite equity issues and provide other financial products to its clients for projects in the countries of Central and Eastern Europe.[3] The majority of the Bank's business is non-sovereigu risk, that is, loans and investments not guaranteed by a state.

In 1989, the idea was first mooted of establishing a development bank to foster the transition of Central and Eastern European countries to open, market-oriented economies and to promote private and entrepreneurial initiative. At that time, it was not a foregone conclusion that a new institution would be required. The idea of using an existing regional institution, such as the European Investment Bank, had many supporters.[4] Others thought the task could be within the jurisdiction of the I.B.R.D. and I.F.C.[5] The proponents of creating a new and separate institution carried the day, however, and their ascendancy was quickly reflected in the text of the E.B.R.D. Agreement, which is the constitutive document of the Bank.[6]

Not surprisingly, this Agreement bears many similarities to the constitutive documents of other I.F.I.s. In general terms, the purposes and functions of I.F.I.s are similar to those of the E.B.R.D. as reflected in their constitutive documents. The core share-

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[1] 29 May 1990, 29 I.L.M. 1077 [hereinafter E.B.R.D. Agreement].

[2] The I.F.I.s, which are comparable to the E.B.R.D. in terms of their purpose and shareholders, include the International Bank for Reconstruction and Development ("I.B.R.D."), its private-sector oriented affiliate the International Finance Corporation ("I.F.C."), the African Development Bank, the Asian Development Bank and the Inter-American Development Bank.

[3] The E.B.R.D. Agreement authorises the Bank to conduct its operations only in "countries from Central and Eastern Europe" (E.B.R.D. Agreement, *supra* note 1 at art. 8(2)). When the Bank was formed, one of these countries was the Soviet Union. Following the dissolution of the U.S.S.R., the Bank has continued to operate in all of the countries formerly comprising the Soviet Union.

[4] One proposal suggested the creation of a special section of the European Investment Bank to make loans in Central and Eastern European countries (see D.R.R. Dunnett, "The European Bank for Reconstruction and Development: A Legal Survey" (1991) 28 C.M.L. Rev. 571).

[5] See P.A. Menkveld, *Origin and Role of the European Bank for Reconstruction and Development* (London: Graham & Trotman, 1991) at 32-47, 96-97.

[6] The debate continued after formation of the Bank, however, and the Bank suffered considerable criticism in its first two years under then-President Jacques Attali (see generally: R. Waters, "Europe expects more from EBRD" *The [London] Financial Times* (2 March 1993) 2; A. Robinson, "EBRD puts emphasis on business" *The [London] Financial Times* (16 April 1994) 3; R. Peston & J. Burns, "Aid bank overheads hit of £ 200 m but E Europe waits for loans" *The [London] Financial Times* (13 April 1993) 1).

holder base of the I.F.I.s is also, more or less, the same; therefore, by referring to existing treaties, to which those shareholders were already party, the negotiation of the new treaty was facilitated. There was also no reason to re-invent the wheel, since the constitutive documents of the existing I.F.I.s had, in large measure, proved adequate to their purposes and functions; and there was a significant history of interpretation on which to draw. Finally, the speed of the process of establishing the Bank[7] also provided a powerful incentive to work relatively closely with existing precedents.[8]

More interesting, however, are the important differences between the E.B.R.D. Agreement and the constitutive documents of the other I.F.I.s. One major difference is that no more than forty percent of the amount of the Bank's total committed loans, guarantees and equity investments can be provided to the state sector.[9] This restriction ensures a permanent focus on the fundamental goal of developing a strong private sector in the Bank's countries of operations. Another significant difference is the inclusion of explicitly political provisions in the E.B.R.D. Agreement. These provisions are designed to ensure that the Bank's resources are used only in countries making clear progress toward open, market-oriented economies and pluralist and democratic political systems.[10] These differences are among those identified by observers as defining characteristics of the E.B.R.D., setting it apart from the other I.F.I.s.[11]

A further distinction, with immediate consequences, is the high degree of detail included in the E.B.R.D. Agreement regarding the methods of operation permitted to

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[7] Formal meetings commenced in mid-January 1990 and the E.B.R.D. Agreement was signed four and one-half months later.

[8] Although the similarity is relatively easy to account for, it has not gone without criticism. For example, Ibrahim Shihata, Senior Vice President and the General Counsel of the World Bank and Secretary-General of I.C.S.I.D., states:

> The use of the familiar concepts and language of these instruments no doubt has advantages. However, the new text could have avoided pitfalls caused by the language of existing texts and could have benefitted more extensively from the elaborate interpretations, formal and informal, necessitated by the occasional vagueness of their language and the changing requirements of the work programs of their respective institutions. It could have avoided, as it partially did, the repetition of clauses which fell into disuse or proved to be unduly cumbersome in similar institutions and could have drawn on improvements introduced by more recent agreements ... (I.F.I. Shihata, *The European Bank for Reconstruction and Development: A Comparative Analysis of the Constituent Agreement* (London: Graham & Trotman, 1990) at 5-6.

[9] E.B.R.D. Agreement, *supra* note 1 at art. 11(3).

[10] The Bank's purpose is "to foster the transition towards open market oriented economies and to promote private and entrepreneurial initiative in the Central and Eastern European countries *committed to and applying the principles of multiparty democracy, pluralism and market economics*" (E.B.R.D. Agreement, *ibid.* at art. 1 [emphasis added]). Furthermore, "[t]he Bank may conduct its operations in countries from Central and Eastern Europe which are *proceeding steadily in the transition towards market oriented economies and the promotion of private and entrepreneurial initiative*" (*ibid.* at art. 8(2) [emphasis added]).

[11] See: Shihata, *supra* note 8 at 2; Menkveld, *supra* note 5 at 91; Dunnett, *supra* note 4 at 574-75.

the Bank, the limitations on the scope of its operations and its operating principles.[12] In 1990, Shihata expressed concern that the very specific language of the E.B.R.D. Agreement would prove detrimental by impeding the Bank's future operations, should unforeseen circumstances demand a level of flexibility apparently not afforded under the E.B.R.D. Agreement.[13] The Bank's operating priorities have evolved in the past four years, and this has required the development of new products. The purpose of this Note is to assess, in light of this evolution, whether Shihata's concern has been borne out in practice. The approach adopted is to examine some of the specific constraints imposed by the provisions of the E.B.R.D. Agreement as they have been interpreted in practice. The conclusion is that — at least in the case examined — the E.B.R.D. Agreement demonstrates a level of flexibility adequate to the Bank's operational needs.

I. Constraints Imposed by the E.B.R.D. Agreement

Most of the detailed constraints on the Bank's operations are contained in articles 11, 12 and 13 of Chapter III, "Operations", of the E.B.R.D. Agreement. Article 11, "Methods of Operation", provides that the Bank shall carry out its operations in furtherance of its purpose and functions as set out in articles 1 and 2 of the E.B.R.D. Agreement: (i) by making or participating in loans to private-sector enterprises and loans to state-owned enterprises that operate competitively and are moving to participation in the market-oriented economy, or if the loans facilitate transition to private ownership and control;[14] (ii) by investing in the equity capital of private-sector enterprises and S.O.E.s in transition or by underwriting equity issues by such enterprises; (iii) by facilitating access to domestic and international capital markets through the provision of guarantees — where other means of financing are inappropriate — and other forms of assistance to private-sector enterprises and S.O.E.s in transition; (iv) by deploying "special funds resources";[15] and (v) by making loans for the reconstruction

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[12] See E.B.R.D. Agreement, *supra* note 1 at arts. 11-13.

[13] Shihata wrote:

> Incorporating such details in the constituent instrument of the EBRD may have been caused by the concern that the Bank's operational policies may otherwise develop differently in practice. It may have also been based on the fact that certain policies and practices have evolved in other MDBs [multilateral development banks] over the years which the drafters of the Agreement may have wanted to emphasize or deny for the new institution. It seems they were also concerned with specifying a role for the EBRD which would distinguish it from other MDBs and ensure that it would complement, rather than compete with them. While all these are valid concerns, experience shows that a detailed text, inevitably influenced by the exigencies of the time of its drafting, may cause difficulties in its implementation over time which could not be readily cured through the cumbersome amendment process (Shihata, *supra* note 8 at 4-5 [footnotes omitted]).

[14] I will hereafter refer to these enterprises as "S.O.E.s in transition".

[15] These funds accepted for administration by the Bank which are "designed to serve the purpose and come within the functions of the Bank", and which do not form part of the ordinary resources of the Bank (E.B.R.D. Agreement, *supra* note 1 at arts. 18, 19). Special funds resources have been pro-

or development of infrastructure necessary for private-sector development and the transition to a market-oriented economy.[16] Thus, for example, the Bank cannot finance a state-owned enterprise that is not an S.O.E. in transition, other than by way of a loan for the purposes outlined in item (v), above. Article 11 also contains the portfolio-ratio restriction,[17] which requires that not more than forty percent of the amount of the Bank's total committed loans, guarantees and equity investments be provided to the state sector.

Article 12, "Limitations on Ordinary Operations", contains provisions limiting the total amount of the Bank's outstanding loans, equity investments and guarantees as well as the disbursed amount of its equity investments to stated maximums that are based on the Bank's capital and reserves.[18] Article 12 prevents the Bank from obtaining a controlling interest in an enterprise through an equity investment and from exercising control or assuming direct responsibility for management, other than in a jeopardy situation.[19] Finally, article 12(4) provides that the Bank may not issue guarantees for export credits nor undertake insurance activities.

Article 13, "Operating Principles", specifies a number of operating principles with which the Bank must comply. Dunnett has divided this article into prudential principles and policy principles;[20] although there is clearly some overlap between the two categories, this is a useful division. Prudential principles include the requirements that the Bank must apply sound banking principles to all its operations; its investments must be made on appropriate terms and conditions taking into account the enterprise's requirements, the risks assumed by the Bank and comparable private sector terms and conditions; the E.B.R.D. must have due regard to the ability of its debtors to meet their obligations; and it must diversify its investments.[21] Policy principles include the requirements that: the Bank's operations provide for the financing of specific projects, on the basis of adequate proposals and with appropriate controls over proceeds;[22] it must not provide financing to an applicant able to obtain sufficient financing elsewhere and on terms and conditions that the Bank considers reasonable;[23] it must revolve its funds

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vided, for instance, by the Nordic countries for investment in the Baltic countries and by the G-7 countries for specific Bank investments in Russia.

[16] E.B.R.D. Agreement, *ibid.* at art. 11(1)(i).

[17] See *supra* note 9 and accompanying text.

[18] See E.B.R.D. Agreement, *supra* note 1 at art. 12.

[19] See *ibid.* at art. 12(2).

[20] See Dunnett, *supra* note 4 at 589.

[21] See *ibid.* Dunnett is referring to the E.B.R.D. Agreement, *supra* note 1 at arts. 13(i), (xi), (viii), (v), respectively.

[22] See E.B.R.D. Agreement, *ibid.* at arts. 13(i), (vi), (ix), (xiii).

[23] See *ibid.* at art. 13(vii). As Dunnett anticipated, this principle is frequently in apparent conflict with the requirement that the Bank must apply sound banking principles (see Dunnett, *supra* note 4 at 589). The argument is that the "additionality" test is only truly satisfied where the Bank is taking risks that are inconsistent with the application of sound banking principles. This assumes that commercial finance is available for all projects for which it would be considered sound banking to provide finance; this cannot be the case.

whenever appropriate;[24] its resources must not be used disproportionately for the benefit of any one member state;[25] no financing may be undertaken in the territory of a member state if it objects to the financing;[26] and the Bank's financing should be contingent, in all appropriate cases, on procurement by international tender.[27]

II. The Interpretation Process

Notwithstanding the considerable detail in which the constraints described above are stated in the E.B.R.D. Agreement, their application frequently requires an exercise of interpretation to elaborate their meaning in any particular context. Under article 57(1) of the E.B.R.D. Agreement, the Bank's Board of Directors[28] has the power to decide questions of interpretation or application of the provisions of the E.B.R.D. Agreement. Where the Board of Directors has made such a decision, any member[29] may require that the matter be referred to the Bank's Board of Governors,[30] the decision of which is final. The E.B.R.D. Agreement also provides that the approval of the Board of Directors is required for each operation undertaken by the Bank, and it is expressly made responsible for the establishment of Bank policies.[31]

Ad hoc submissions regarding specific questions of interpretation of the E.B.R.D. Agreement rarely reach the Board of Directors. In practice, it decides questions of interpretation through: the adoption of general policy papers based on drafts prepared by Bank staff (often at the request of the Board of Directors) and the approval of particular operations proposed by Bank staff. This may require the Board of Directors, expressly or implicitly, to adopt or to endorse a specific interpretation of a provision of the E.B.R.D. Agreement. The process of approving operations on a case-by-case basis is, in this sense, closely analogous to the development of case law on the interpretation of the E.B.R.D. Agreement.

The Bank's multi-stage management review, which involves formal input from the Bank's Office of General Counsel, ensures that only proposed transactions that management has determined to be consistent with the E.B.R.D. Agreement are presented to the Board of Directors for approval. This preliminary determination requires detailed interpretation of the relevant provisions of the E.B.R.D. Agreement. This interpretation

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[24] See E.B.R.D. Agreement, *ibid.* at art. 13.

[25] See *ibid.* at art. 13(iv).

[26] See *ibid.* at art. 13(iii).

[27] See *ibid.* at art. 13(xii).

[28] The Board of Directors was initially composed of 23 members, including 11 from member countries of the European Community and institutions of the European Community, four from recipient countries, four from other European countries and four from non-European countries (see *ibid.* at art. 26(1)).

[29] "Any member" refers to a member state or organisation that is a party to, and ratifies, accepts or approves the E.B.R.D. Agreement (see *ibid.* at arts. 3, 61).

[30] The E.B.R.D. Board of Governors is composed of one representative of each member of the Bank (see *ibid.* at art. 23).

[31] See *ibid.* at art. 27(ii).

is guided by the principles of treaty interpretation stated in the *Vienna Convention on the Law of Treaties* and the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*.[32] The general rule of interpretation under these Conventions is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[33] The "context" of a treaty comprises its text, its preambles and annexes together with certain types of instruments constituted in connection with a particular treaty.[34] The Conventions also provide for the interpreting authority to take into account subsequent agreements relating to a treaty or its application, practices in application of a treaty and relevant rules of international law.[35] Terms may, also, be given special meanings if it is established that the parties so intended.[36] Finally, recourse may be had to supplementary means of interpretation (including preparatory work and the circumstances of its conclusion) to confirm interpretations reached by applying the principles described above or to clarify any such interpretation that leaves the meaning of the relevant provision ambiguous, obscure or produces a manifestly absurd or unreasonable result.[37] Among the supplementary means of interpretation is the *Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development*.[38] The *Chairman's Report* recorded the views of the representatives who negotiated the E.B.R.D. Agreement; according to the *Chairman's Report* "certain formulations in the text represented general understandings which needed to be recorded, but which were not suitable" for inclusion in the E.B.R.D. Agreement itself.[39] This Report was explicitly intended for "future reference in interpreting the Articles".[40]

III. A Hard Case?

Four years into the Bank's operations, a narrow focus on hard-core industrial and infrastructure project finance has not materialised, contrary to expectations for a bank established to finance "specific projects", primarily, by making loans and equity in-

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[32] *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679 [hereinafter *Law of Treaties*]; *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, 25 I.L.M. 543 [hereinafter *Law of Treaties between States*]. Section 3 of both Conventions state identical principles of interpretation.

[33] *Ibid.* at art. 31(1). The "ordinary meaning" rule requires literal interpretation, presumably informed by general legal reasoning and experience. Reference to the object and purpose of the E.B.R.D. requires that interpretations furthering the evident object and purpose of a treaty (*i.e.* teleological interpretations) be preferred to those that do not (see *Encyclopedia of Public International Law*, vol. 7 (Amsterdam: Elsevier Science, 1984), *s.v.* "Interpretation in International Law" at 322).

[34] *Law of Treaties*, *ibid.* at art. 31(2); *Law of Treaties between States*, *ibid.* at art. 31(2).

[35] See *ibid.* at art. 31(3). Practices in application of a treaty should include, for instance, tacit interpretations adopted by the Bank's Board of Directors approving specific operations.

[36] See *ibid.* at art. 31(4).

[37] See *ibid.* at art. 32.

[38] Reproduced in Shihata, *supra* note 8 at 166 [hereinafter *Chairman's Report* in Shihata].

[39] *Ibid.* at 167.

[40] *Ibid.*

vestments. Although this type of project finance remains a very significant part of the Bank's business, financial institutions and trade facilitation have also been identified as operational priorities.[41] Investment in financial institutions in the Bank's countries of operation strengthens the local financial sector, which is a crucial condition for the successful transition to a market-oriented economy. Trade facilitation efforts similarly strengthen the local commercial and financial infrastructure and unlock trade flows limited by shortcomings in that infrastructure. While project finance tends to raise relatively few issues under the E.B.R.D. Agreement, developing products for the Bank to offer its clients in the areas of financial institutions and trade has tested the flexibility of the Agreement.

One Bank product in these areas, first approved in early 1994, is already in use by a client in one of the former-Yugoslav republics. It is currently being developed for use in Russia, Belarus, Ukraine, Uzbekistan and elsewhere. The product allows local banks to increase the volume of trade transactions they finance for local clients. For example, importers in the Bank's countries of operation require resources from foreign suppliers, which frequently must be paid in a foreign convertible currency. Typically, the foreign supplier is unwilling to rely on the local importer's promise to pay for goods and requires that a bank letter of credit ("L/C") be opened. This L/C guarantees that the supplier will be paid when it presents specified documents showing that the goods have been shipped. While the importer will request a local bank to open the L/C, the supplier (or its bank) will likely be unwilling to rely directly on the credit of the local bank;[42] therefore, the L/C has to be confirmed by another bank deemed creditworthy by the supplier, or its bank. Confirmation of an L/C obliges the confirming bank to make the payment when the specified documents are presented to it. The confirming bank then claims payment from the local bank that issued the L/C. The problem is that, like the supplier, the confirming bank is rarely willing to rely directly on the local bank's credit and may, thus, require that the local bank post cash collateral of up to one-hundred percent of the amount of the L/C. This requirement drastically restricts the volume of such business carried on by local banks, because posting hard-currency collateral is expensive for the local bank, and the importer, and unproductively constrains limited supplies of hard currency. The same problems may apply to other common trade financing transactions made through a local bank, such as pre-shipment financings and advance payment bonds.

One solution to this problem is the substitution of an E.B.R.D. gnarantee, which may take the form of an E.B.R.D. L/C, for the cash collateral required by the confirming bank. For a fee paid by the local bank, the E.B.R.D. guarantees the confirming bank[43] that it will reimburse a specified percentage of the amount of the L/C not paid by the local bank, when properly claimed by the confirming bank.[44] Payment to the con-

[41] See European Bank for Reconstruction and Development, *Annual Report 1993* (London: E.B.R.D., 1994) at 7-8.

[42] This may be the case, for instance, for country-risk reasons or because the local bank is unknown.

[43] In the case discussed here, there are four confirming banks from different countries.

[44] The documentation involves a facility agreement between the E.B.R.D. and the local bank, and a

firming bank creates a debt of the local bank to the E.B.R.D. The amount of the facility and the fee charged to the local bank depend on the Bank's evaluation of the risk to which it is exposed. The evaluation is based on a combination of the geueral credit risk of the local bank and the country risk. Availability of the facility is linked to an institutional development program in the local bank.

Developing an L/C-support product of this nature raises three issues under the E.B.R.D. Agreement. First, the product may take the form of a guarantee, but the E.B.R.D. Agreement at article 11(iii) appears to place qualifiers on the Bank's power to issue guarantees. A second issue is whether an L/C-support guarantee finances a specific project, as required by article 13(ii) of the E.B.R.D. Agreement. Finally, the L/C-support product might be inconsistent with article 12(4) of the E.B.R.D. Agreement, which prohibits the Bank from issuing guarantees for export credits.

Article 11(iii) of the E.B.R.D. Agreement states that the Bank may facilitate access to domestic and international capital markets by private-sector enterprises or S.O.E.s in transition through the provision of guarantees where: other means of financing are inappropriate and through financial advice or other forms of assistance. This might mean that the Bank may issue guarantees only in these circumstances. In that case, it would be necessary to demonstrate that the L/C-support product fell within the stated criteria. However, the main subject matter of article 11(iii) is clearly the Bank's role in assisting enterprises in accessing domestic and international capital markets. On an ordinary reading of the article, the reference to guarantees is, like the reference to the provision of financial advice and other assistance, merely incidental to the purpose of the clause. It is evident, from numerous references to guarantees throughout the E.B.R.D. Agreement,[45] that the guarantee is intended to be one of the Bank's principal financial products; there is no other evidence (apart from the prohibition of guarantees for export credits discussed below) that this product was intended to be subject to more severe limitations than the Bank's loan-making power.[46] This observation leads to the conclusion that the Bank's power to provide guarantees is coextensive with its power to make loans, and that article 11(iii) does not limit the guarantee power. Accordingly, structuring the L/C-support product as a guarantee rather than as a stand-by loan facility, for instance, does not put the product outside the Bank's permitted methods of operation.[47]

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separate payment agreement between the E.B.R.D. and the confirming bank. These specify, among other matters, the form and substance of L/Cs eligible under the facility agreement, the fees charged by the Bank and the Bank's rights in the event it is called upon to make a payment to the confirming bank. The local bank's obligations to the E.B.R.D. may be partially secured to ensure that the local bank lias the proper incentives to honour these obligations.

[45] See *e.g.* EBRD Agreement, *supra* note 1 at arts. 11-15, 27.

[46] This view is reinforced because in some cases precisely the same effects as a guarantee can be achieved with a stand-by loan facility, rendering the distinction formal rather than substantive.

[47] Even if the contrary argument were accepted, any limitation imposed by article 11(iii) should not prevent the Bank from offering the L/C-support product. The use of the term "capital markets" might lead to the interpretation that Bank guarantees could be used only to facilitate access to the domestic and international markets for long-term investment funds, principally, the bond markets. The ordinary meaning of the term "capital markets", however, is arguably the market for capital generally, that is, for financing generally. There is nothing in the context of the E.B.R.D. Agreement to suggest that this

Next, article 13(ii) requires that the operations of the Bank must finance specific projects, whether individual or in the context of specific investment programmes. Narrowly construed, the phrase "specific project" might presumptively be limited to industrial projects that form the core of classic project finance; that interpretation would clearly rule out the L/C-support product. The ordinary meaning of the word "project", however, is very much wider than this: it can include virtually any plan or scheme.[48] "Specific" means clearly defined or definite.[49] There is no evidence from the context of the E.B.R.D. Agreement (except as noted below in relation to the *Chairman's Report*) or from supplementary means of interpretation that either word was intended to be given any special meaning. This suggests the Bank may finance any clearly-defined plan or scheme, so long as it does not compromise any of its other operating principles in so doing. This interpretation is generally supported by the *Chairman's Report*, which states that the purpose of including this requirement was to "make clear that fast-disbursing policy based lending is not included" in the Bank's scope of operations.[50] The intention was not, evidently, to rule out any other kind of operation. In practice, this requirement has been addressed by presenting the L/C-support product as a trade facilitation programme designed to improve the local financial infra-structure, in particular, local payment systems for international trade transactions.

The final hurdle to the development of an L/C-support product is the ban on "guarantees for export credits" contained in article 12(4) of the E.B.R.D. Agreement. The precise definition of an export credit is open to debate. There is nothing in the context of the E.B.R.D. Agreement that provides guidance on the meaning of this phrase. One possible starting point, then, is the traditional export-credit transaction involving the provision of credit directly to an importer or exporter to finance a trade transaction. Generally, this financing is supported by a public or private export-credit agency ("E.C.A.") in the country of the exporter, which has the specific objective of promoting exports from that country (hence the term "export credit" as opposed to "trade credit" or "import credit").[51] In the simplest structures, the E.C.A. guarantees a

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interpretation would be incorrect; on the contrary, it would be preferred because it would further the purposes of the Bank, such as to promote private and entrepreneurial initiative. The requirement that guarantees be used only when other means of financing are inappropriate would demand a case-by-case analysis of whether a client's financing needs and the Bank's objectives could best be met with a Bank loan or equity investment. If the determination were made that a loan would be inappropriate because of the relatively high cost involved for the borrower, and that an equity investment would be inappropriate because it would not match the financing provided by the Bank (long-term, essentially untied funds) to the financing needs of the borrower (availability of shorter-term funds for limited, specific purposes), then a guarantee might be appropriate and would be permitted under the E.B.R.D. Agreement.

[48] *The Concise Oxford Dictionary of Current English*, 9th ed., *s.v.* "project".

[49] *Ibid.*, *s.v.* "specific".

[50] *Chairman's Report* in Shihata, *supra* note 8 at 173. This statement is notwithstanding that fast-disbursing policy based lending might, on the ordinary meaning of the terms, constitute a "specific project". It is possible that the apparent narrowing of the meaning of "specific project" advocated by the *Chairman's Report* will be the subject of future debate.

[51] One example of an E.C.A. is the Export Development Corporation.

commercial bank that provides credit to the exporter or importer by directly assuming the credit risk of the exporter or importer. The E.C.A., thus, provides a guarantee for the export credit extended by the commercial bank. However, E.C.A.s increasingly engage in a wide range of financing activities other than these simple export credits. These activities include general facilities made available to financial institutions in the country of the importer. The facilities can be used for any export from the E.C.A.'s country, in which the E.C.A. assumes the credit risk of the local financial institution, rather than the exporter or importer. E.C.A.s also make direct project loans and equity investments. Arguably, the ordinary meaning of "guarantees for export credits" should be taken to be the narrower meaning cited, namely, transactions in which the guarantor guarantees that an exporter or importer will meet its financial obligations in relation to a particular transaction and, so, directly assumes the credit risk of the exporter or importer. This definition is to be preferred on teleological grounds to a broader definition that would encompass all financing instruments used by E.C.A.s in the definition of "export credit", since the broader definition would, by foreclosing many activities to the Bank, seriously impinge on the E.B.R.D.'s ability to achieve its object and purpose. This approach is consistent with the principle of general application in legal interpretation which states that exceptions to a general power and authority must be read narrowly. On this interpretation, the L/C-support product would not breach article 12(4) of the E.B.R.D. Agreement because the Bank does not, in conjunction with the issuance of its guarantee, assume the credit risk of the importer or exporter. Rather, it assumes the general credit risk of the local bank.

Adoption of the L/C-support guarantee as one of the Bank's mainstream products confirms that the detailed language on methods of operation contained in the E.B.R.D. Agreement does not rule out the development of new products. The key is whether a new product can be shown to be consistent with the E.B.R.D. Agreement's provisions. The L/C-support guarantee is an example of one such product. The process of product development will be continuous, however, as the needs of the Bank's clients change and as financial markets in the Bank's countries of operation become increasingly sophisticated.

Conclusion

This Note has summarised some of the apparent constraints stated in the E.B.R.D. Agreement, the process by which those provisions are interpreted and the application of that process to a new Bank product developed to respond to evolving operational priorities.

The Note suggests that the E.B.R.D. Agreement has afforded adequate flexibility to respond to changes in the Bank's operational needs over the first four years of its operation. Despite the potentially restrictive level of detail noted by Shihata, the Bank has been able to develop new products for new operational priorities without amending, or unduly stretching, the provisions of the E.B.R.D. Agreement. It may be that the E.B.R.D. Agreement strikes approximately the right balance between the need for detail, to ensure that the Bank's unique mission is preserved, and for flexibility, to allow changes as the needs of the Bank's clients change.