

Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development

The European Bank for Reconstruction and Development (EBRD) stems from an initiative by President Mitterrand of France, strongly endorsed by the European Council at Strasbourg on 9 December 1989, as a positive reaction from the European Community to the dramatic political and economic changes in Central and Eastern Europe.

From the beginning it was envisaged that the meetings to discuss the setting up of the Bank would be open to other countries as well as those of Central and Eastern Europe. The first meetings of potential members took place in Paris on 15 and 16 January 1990, with representatives from all 24 members of the Organization for Economic Cooperation and Development; Malta and Cyprus; eight Central and Eastern European countries; the European Economic Community and the European Investment Bank. At meetings from 8 to 11 March 1990, these Delegates were joined by representatives from Egypt, Israel, the Republic of Korea, Liechtenstein and Morocco and on 8 and 9 April also by representatives from Mexico. The final negotiations were in Paris on 20 May 1990.

During the meetings to discuss the EBRD Articles, Delegates came to the view that certain formulations in the text represented general understandings which needed to be recorded, but which were not suitable for the Articles. It was therefore agreed that the Chairman would produce this report summarizing these understandings and that the report would form part of the EBRD's basic documents, for future reference in interpreting the Articles. The explanatory paragraphs attached to this introduction, which form the bulk of this report, should be viewed against that background. A Signing Ceremony for the Agreement took place in Paris on 29 May 1990, in the presence of President Mitterrand and many Ministers from countries participating in the Bank.

Explanatory notes

Article 2

1. Delegates were anxious to show that the focus of the Bank's functions was the private sector but, given that the private sector in the potential recipient countries was at present either small or non-existent, that the Bank would also support the public sector in its transition from purely centralized control to demonopolization, decentralization or privatization and to a competitive business environment, and would assist recipient member countries in implementing structural and economic reforms, only through the measures described in subparagraphs (i) to (viii) inclusive of paragraph 1 of this Article.
2. In paragraph 1, subparagraph (i), Delegates shared the view that "other interested investors" covered both domestic and foreign investors.
3. In paragraph 1, subparagraph (iii), Delegates understood that "infrastructure" might include training in managerial and technical skills.
4. In paragraph 1, subparagraph (vii), Delegates recognized the serious environmental problems in Central and Eastern Europe, and emphasized that principles of environmentally sound development must be integrated into the full range of the Bank's operations. Thus Delegates intended "in the full range of its activities" to include all of the Bank's activities, including technical assistance and all special operations, and not merely that the Bank should be able to provide support directly for specific environmental projects.
5. In paragraph 2, Delegates believed it essential that the Bank should work in "close co-operation" with the IMF and the World Bank Group (including the IFC and MIGA), so as to ensure compatibility with their activities and to benefit from their experience and expertise, as well as to ensure that recipient member countries were pursuing sound economic programmes.
6. In continuing that the close co-operation should be "with all its members", Delegates had especially in mind the important role of the European Economic Community and the European Investment Bank.
7. In the same paragraph, Delegates also understood that "other related bodies and any entity, whether public or private" included such bodies as the Council of Europe (and in particular the Social Development Fund), the International Investment Bank, the Nordic Investment Bank and the Economic Commission for Europe. Delegates noted that the Bank was free, in accordance with paragraph 1 subparagraph (viii) of Article 20 of the Agreement, to enter into agreements of co-operation with any such body.

Article 3

1. Delegates agreed that both the European Economic Community and the European Investment Bank (EIB) should be members, given the importance accorded to their role by the European Community Heads of State or Government who had first endorsed the idea of the Bank. It was not intended that their membership would be a precedent for other organizations or Banks to become members of the Bank, or that their membership would be used as a precedent for them to become members of other organizations or other banks.
2. Delegations took note that the EIB and its participating members confirmed that the EIB had legal power to make a capital subscription to the Bank under the Statute of the European Investment Bank.

Article 4

The essentially European character of the Bank lent itself to the denomination of its original authorized capital stock in the European Currency Unit, the ECU. Delegates understood the ECU to be at the centre of the European Monetary System and formulated in relation to a basket of European Community currencies, the weights of which are re-examined by European Community Finance Ministers every five years or, on request, if the weight of any currency has changed by 25 per cent.

Article 5

1. Paragraph 3 requires the Board of Governors to review the adequacy and composition of the Bank's capital stock at least every five years. A decision may then be taken either to increase the capital stock or not. This paragraph lays down the pre-emptive rights of all members in the event of an increase and stipulates that there is no obligation upon any member to subscribe to new shares. These rights are then protected by paragraph 2 of Article 56 of the Articles of Agreement.
2. Paragraph 4 provides for the possibility of decisions to allow individual members to increase their shareholding in the Bank. Where such an increase is not possible without an increase in the total capital stock, the pre-emptive rights and other requirements of paragraph 3 are brought into play.

Article 6

1. In paragraph 2, Delegates agreed that the drawdown of promissory notes should be pro rata based on a schedule to be established by the Board of Directors who should take account of the net financing requirement based on historical resource flows.
2. In paragraph 3, Delegates agreed that the initial choice between ECU, United States dollars or Japanese yen made by each member would apply to the payment of all of the instalments mentioned in paragraph 1, as well as to the payments made as a result of a call on the original capital.

Article 8

In relation to the implementation of paragraph 3 of this Article, Delegates understood that the same procedures and voting arrangements described in this paragraph for suspending or otherwise modifying a member's access to Bank resources should apply to the reverse circumstances, namely when a member's access to Bank resources was being reconsidered in the light of its resuming the implementation of policies consistent with Article 1 of the Agreement.

Article 11

1. This Article establishes the ways the Bank shall carry out its purpose and functions, including in relation to regional projects. In describing recipients of Bank financing and assistance, and in setting limits on Bank financing and assistance to the state sector, the Article seeks to take into account the different arrangements in the different countries.
2. Delegates emphasised, in relation to the reference to private ownership and control in this Article, that control by private investors meant the ability effectively to determine enterprise decisions and policies.
3. In paragraph 1 subparagraph (v), Delegates were aware that the infrastructure needs of the potential recipient countries were immense but also that there were existing bilateral and multilateral sources of help for that purpose. They thus deliberately limited the Bank's possible activities relating to infrastructure reconstruction and development to those "necessary for private sector development and the transition to a market-oriented economy".
4. Delegates intended that paragraph 1, subparagraph (ii)(c) of this Article would be read together with subparagraph (vii) of Article 13. The Bank was not to engage in underwriting when private sector securities firms or others were able to provide the relevant financing, services and facilities on reasonable terms.

Article 12

1. Delegates intended this Article to reinforce the financial soundness of the Bank.
2. In interpreting the meaning of "the total amount of outstanding loans, equity investments and guarantees" in paragraph 1, Delegates shared the view that the Board of Directors should exercise prudence in approving all such commitments in line with its obligations under paragraph 1 of this Article.
3. In paragraph 2, Delegates intended the Board of Directors to make a rule stipulating the maximum stake that the Bank should take in the equity of any enterprise, but that this rule should include provision for exceptions in specific circumstances where this seemed desirable or necessary. Such circumstances might for instance arise if a financing partner decided to reduce its own stake in the relevant equity.
4. In paragraph 3, Delegates meant "disbursed equity investments" to be interpreted as excluding any such investments as might subsequently have been disposed of to the value achieved by such realization.

Article 13

1. Delegates expected that the operational principles set forth in this Article would be supplemented by a more detailed and comprehensive statement of operating policies to be adopted by the Board of Directors. This statement of policies would cover, among other things: the extent to which the Bank would be expected to go to satisfy itself that the funds which it invested were used efficiently and economically and, where such funds were used for the purchase of goods, that the goods were bought on reasonable terms and in favourable markets; and the detailed requirements for the identification, appraisal, monitoring, implementation and ex-post evaluation of all projects, including their economic, technical, managerial, financial and environmental aspects.
2. In sub-paragraph (i), the stipulation that the Bank should apply sound banking principles to all its operations was meant to cover all of its activities, including its financial policies (for example its management of exchange rate risks) and not just the activities listed in the rest of the Article.
3. In sub-paragraph (ii), Delegates described the precise form of programme lending in which the Bank could become involved as “projects, whether individual or in the context of specific investment programmes”, so as to make clear that fast-disbursing policy-based lending is not included.
4. In sub-paragraph (vii), the intention of Delegates was that the Bank should not compete with other organizations; rather, it should complement or supplement existing financing possibilities. Delegates also understood that “financing” and “facilities” were broad terms involving the whole range of Bank operations, including underwriting. Delegates intended this sub-paragraph to be read together with sub-paragraph (xi), where the latter applies.
5. In sub-paragraph (x), Delegates intended the word “investments” to cover the Bank’s loans and guarantees as well as its equity investments. In connection with this provision it had seemed desirable to avoid writing into the Articles any requirement that preference be given to any particular class or classes of purchasers. However, the Bank could often find it necessary or appropriate, when making an investment, to give to private investors with which it was associated in the enterprise a right of first refusal, within a reasonable time limit, to purchase the Bank’s interest therein. Moreover, if the Bank had various opportunities of selling an investment on roughly the same terms, it should bear in mind, in deciding among them, the desirability of fostering local capital markets.
6. In sub-paragraph (xii), Delegates agreed upon completely open procurement (and not procurement open only to members), based on international tendering, where appropriate, and believed that such tenders should be genuinely competitive, in line with the GATT Agreement on Government Procurement. Private sector enterprises in which the Bank held equity or debt might be encouraged, but not obliged, to use international tenders to obtain goods or services efficiently and economically. Delegates were also anxious to give less developed countries, who might not become members, the opportunity to tender for Bank contracts, on equal terms with Bank members, as a means of assisting their development process and of

reassuring them, through this original gesture, that the interest of shareholders in the new Bank did not mean reduced interest in their traditional partners in development.

Article 14

1. Paragraph 1 requires the Bank, in setting terms and conditions for its financing operations, to take full account of the need to safeguard its income. Delegates envisaged that this requirement would avoid the risk of such operations being in practice subsidised from the cost-free resources available to the Bank from members' paid-in subscriptions.
2. The wording of paragraph 2 of this Article gives the Bank some flexibility to react according to circumstances and would permit the Board to consider a wide range of factors in deciding a policy on guarantees for loans to state-owned enterprises.
3. In reaching decisions on these issues, the Board would need to bear in mind that a fundamental goal of the Bank was to develop a strong private sector in eligible member countries. To ensure that private entrepreneurs took full responsibility for their commercial undertakings, the Board shall follow the present practice of the international Finance Corporation in not requiring a member government guarantee on loans to private sector enterprises. It could take into account the fact that a state-owned enterprise would be more likely to respond quickly to market forces, and to make the transition to market-oriented economies, if that enterprise could not rely on a government guarantee to discharge its responsibilities under a Bank loan. The Board could also set loan terms, pursuant to paragraph (xi) of Article 13, to compensate the Bank for any commercial or other risks should it decide not to require a guarantee by a member government.
4. For the purpose of Article 11, paragraph 3, when the Bank does require a member country guarantee to a state-owned enterprise (i.e. a guarantee by the member or a public agency or instrumentality), the loan shall be considered as made to the state sector unless that state-owned enterprise is in transition to private ownership and control. A former state-owned enterprise which has achieved private ownership and control shall be regarded as a private sector enterprise, and the Bank shall not require member country guarantees on new loans to that enterprise.

Article 17

Delegates made no provision in respect of possible losses arising on special operations. Delegates envisaged that the Bank would make specific arrangements with the source of each relevant Special Fund in the agreement governing its use, so as to protect the separation of each type of resource in accordance with paragraph 2 of Article 10.

Article 18

Delegates understood that Special Funds accepted by the Bank would be assets of the Bank for the purposes of the privileges and immunities provisions of the Articles. Delegates envisaged that each Special Fund would be used and accounted for separately, but this was not specified since it was a matter for the source of each such Fund to determine in consultation with the Bank.

Article 20

1. In giving the Bank the general power to underwrite under this Article, Delegates had in mind that the Bank could agree to take on to its own books, if necessary and for a commission, some agreed portion of any shares and securities unsold as a result of a public or private enterprise issuing equity share capital or securities. If the issue proved a complete success such shares or securities would not need to be taken up by the Bank. If some remained unsold, however, and if the Bank's underwriting commitment was invoked, such shares and securities would then form part of the Bank's overall exposure in the country concerned and be subject to any limits applicable.
2. Delegates agreed that underwriting should only represent a small part of the Bank's activities, in view of the financial risks involved; that the Bank should only undertake underwriting services when necessary to fill market gaps; and that the general power to underwrite would be subject to the provisions on underwriting in Articles 11 and 13.
3. In paragraph 1, sub-paragraph (iii), Delegates did not intend this provision to prevent the Bank using private placement or other means of disposing of securities in which it had invested, if an adequate secondary market in those securities did not exist.
4. Delegates agreed that the authority specified in sub-paragraph (iv) of this Article to guarantee securities in which the Bank had invested should not be used in the case of securities which the Bank had acquired as part of its liquidity investments.

Article 24

Delegates agreed that the Bank would bear the cost of remuneration of not more than four people working full time on Bank matters, in respect of each Directorship.

Article 26

1. In paragraph 2 of this Article, Delegates hoped that as far as possible Directors would also have a wide and well-balanced knowledge of Central and Eastern Europe, so as to contribute competently to the Bank's purpose and functions as set out in Articles 1 and 2 and to fulfil competently their obligations in paragraph 3 of Article 8.
2. Delegates recognised the importance for the original member countries from recipient countries listed in Annex A of maintaining at least four Directors for this group, so as to allow each such country either its own Director or its own Alternate in the event that the list of such countries is modified. Delegates agreed that in deciding to increase or decrease the size, or revise the composition of the Board of Directors, in order to take into account changes in the number of the members of the Bank, as provided in paragraph 3 of this Article, the Board of Governors should take account of this wish.
3. Delegates agreed that Directors and their Alternates should be resident at the headquarters of the Bank.

Article 28

In paragraph 3, Delegates noted that usual practice in other International Financial Institutions was not to permit a prospective borrower specially to be represented at the Board.

Article 29

1. Delegates intended that members whose payments, including encashment of promissory notes, fell short of the full amount due on the relevant dates to the Bank in respect of their paid-in shares should forfeit the corresponding percentage of their voting power unless and until the shortfall was made good.
2. The intention in paragraph 3 was to allow split voting by Directors representing more than one member, without making such voting obligatory.
3. Delegates intended that, in the case of differing views on whether or not issues involved “general policy”, decisions would be made by the Board on the basis of advice from the Legal Counsel. In general, decisions on individual operations would not involve such issues, but “general policy issues” would include, inter alia, the budget; the annual programme of operations; borrowing policy, including borrowing limits; interest rate policy; exchange risk management policy; the drawing down of notes; underwriting policy and the organizational structure of the Bank.

Article 30

Delegates intended that men and women should be given equal opportunities in the recruitment process and in terms of service, training, promotion and career development generally.

Article 35

1. Delegates agreed that there was no need to have a provision about working languages in the Articles. The letter from the Conference Chairman to all Delegates (copy attached to this Report) sets out the understanding of Delegates about working languages.
2. Delegates were conscious that there might be little to report initially on the Bank’s environmental impact and that the form of the first annual reports on this subject might be very different from later versions.

Article 36

Delegates were of the view that the principle behind paragraph 2 was that the distribution of cash should be strictly proportional to the cash payments made by each member, and the notes encashed, in respect of its paid-in shares.

Article 39

In paragraph 2, Delegates envisaged that all potential new members would join the Bank by subscribing to share capital at par value, with no account being taken of accumulated reserves. Delegates were thus concerned that those who later chose to leave the Bank for any reason should not profit unduly by so doing, or indeed have any profit incentive to do so, in the event of the book value of their shares having greatly increased since their original purchase. The wording of this paragraph therefore had the aim of ensuring that they should not get back more than they had paid in. The reference to “shown by the books of the Bank” could permit adjustments in Bank financial statements to reflect current and accumulated losses.

Article 46

Delegates noted that this Article was almost exactly the same as Section 3 of Article VII of the I.B.R.D.’s Articles of Agreement. They hoped that courts construing it would draw on the jurisprudence that had evolved in connection with the I.B.R.D.’s Articles.

Article 52

Delegates accepted paragraph 2 of Article 52 in the light of the locations then being considered for Bank operations.

Articles 51 and 55

These Articles were worded to reflect recent international thinking and practice, in accordance with the strong wishes of many Delegates.

Article 53

1. With respect to Article 53, paragraphs 1, 2 and 3, Delegates shared the view that members would accord the greatest deference to the Bank on whether a Bank activity was “official” or whether a purchase of goods and services was “necessary” for the “official” activities of the Bank, e.g. a duly authorized purchase of goods is to be presumed as “necessary” for the “official” activities of the Bank. Beyond this, Delegates shared the view that paragraph 2 was to be interpreted in the light of national practices applicable to international organizations with similar provisions.
2. It was accepted that nothing in Article 53 was to be interpreted as preventing any member from granting greater exemption from taxation than that provided for in this Article.
3. It was the common understanding of Delegates that “duties”, whilst “import duties” and “export duties”, in paragraph 3, include customs duties.
4. In paragraph 6, Delegates understood that the “internal effective tax” was not a tax as that term is commonly used in tax treaties, national tax practice and so forth, and was not a tax which is imposed in the exercise of sovereign power. In addition they understood that the Bank’s contracts of employment would contain provisions regarding the “internal effective tax”.

5. With respect to paragraphs 6 and 7, Delegates shared the view that the Bank will regularly inform the members concerned, according to arrangements made with such members, of the amount of the salaries and emoluments paid to its Directors, Alternates, officers and employees in order to enable them to tax those salaries and emoluments (paragraph 7) or to tax properly the income from other sources than the exempt salaries and emoluments (paragraph 6).
6. Delegates took note of the importance placed by some members on their right to tax income derived by their residents who are officers or employees of the Bank. The provisions of paragraph 6 and 7 of Article 53 do not preclude these members from lodging appropriate reservations in accordance with international law.

Articles 60 and 61

Delegates intended that these Articles should be read in conjunction with Article 3. Prospective members who sign the Agreement by the date specified in Article 60 and who deposit instruments of ratification, acceptance or approval by the date specified in paragraph 1 or paragraph 2 of Article 61, shall become parties to the Agreement in accordance with the Articles and shall, inter alia, be entitled to subscribe to the number of shares allocated to them in Annex A. The terms and conditions of membership of prospective members who sign the Agreement after the date specified in Article 60 and/or who deposit their instruments of ratification, acceptance or approval later than the date in paragraphs 1 or 2 of Article 61 will be determined by the Bank in accordance with paragraph 2 of Article 3. In respect of the initial shares to be subscribed to by such members, paragraph 2 of Article 3 should be read in conjunction with paragraph 2 of Article 5.

Article 62

Delegates intended, immediately after the adoption of the Agreement by Heads of Delegations, to start discussion on the possibility of transitional arrangements allowing the operations of the bank to start as soon as possible after the date of entry into force of that Agreement.

Letter from the Chairman of the conference to all delegations

During our discussions about the European Bank for Reconstruction and Development, we agreed to follow the normal practice of making no reference to the working languages in the Bank's Statutes. This letter is therefore to record the understanding we reached together, that the four languages of the authentic text of the Agreement, mentioned in the testimonium, would be the Bank's working languages, to be used by the Bank according to its day to day needs, and taking into consideration the interests of efficiency and economy.