

# THE IMF-WORLD BANK GLOBAL BANK INSOLVENCY INITIATIVE. ITS PURPOSES AND PRINCIPAL FEATURES\*

Ross LECKOW\*\*

SUMMARY: I. *Background. What is the GBII and How Was it Developed?* II. *The GBII. The Legal and Institutional Framework.* III. *The GBII. Important Challenges in Designing a Framework.* IV. *Conclusion.*

1. Bank insolvency can threaten financial stability. The failure of a large, important bank can bring about the collapse of a country's financial system and its economy. There are far too many examples of single or multiple bank failures that have sent shock waves through a country's economy and sparked a balance of payments crisis. It is, therefore, essential that a country's financial supervisors have the necessary tools to effectively prevent and resolve bank insolvencies. Foremost among these tools is a strong legal framework.

2. The question, therefore, arises: what should this legal framework look like and what are its principal elements? This issue has, in recent years, received considerable attention in the international community – amongst international organizations like the International Monetary Fund (“IMF”) and the World Bank, and the authorities of their member countries. A par-

\* A previous version of this paper was presented at the Seventh Meeting of Central Bank Legal Advisers organized by the Center for Latin-American Monetary Studies (CEMLA) in Buenos Aires, Argentina in September, 2005. The views expressed in this paper are those of the author and should not be attributed to the International Monetary Fund, its Executive Board, or its management.

\*\* Ross B. Leckow, Assistant General Counsel, International Monetary Fund.

ticularly important development in this area is the IMF/World Bank Global Bank Insolvency Initiative (the “GBII” or the “Initiative”).<sup>1</sup>

3. This paper provides an overview of the GBII. The paper first examines the purpose of the Initiative and the process under which it was developed. It then reviews the GBII’s principal features before discussing the more challenging legal questions which the Initiative confronted. It ends with a brief conclusion.

## I. BACKGROUND. WHAT IS THE GBII AND HOW WAS IT DEVELOPED?

4. The GBII is, first and foremost, a report, drafted principally by IMF and World Bank staff,<sup>2</sup> that describes a legal and institutional framework which countries could put in place to address cases of bank insolvency.<sup>3</sup> The Initiative builds on important work done by other organizations<sup>4</sup> and was a product of extensive cooperation within the international community. It was launched in January 2002 by the IMF and World Bank—in coordination with the Bank for International Settlements, the Financial Stability Institute, the Basel Committee on Banking Supervision, and the Financial Stability Forum—. It benefited from the work of a “Core Consultative Group” of experts from international organizations, national institutions and the private sector who reviewed and commented on successive

<sup>1</sup> *Global Bank Insolvency Initiative: Legal, Institutional, and Regulatory Framework to Deal with Insolvent Banks* (in draft form).

<sup>2</sup> For both the IMF and the World Bank, questions of bank insolvency and financial stability are of paramount importance. In the case of the IMF, the promotion of the stability of the international monetary system is a central pillar of its mandate. See *Articles of Agreement of the International Monetary Fund*, Article I.

<sup>3</sup> The GBII’s principal objectives are: (i) to identify the appropriate legal, institutional and regulatory framework for addressing cases of bank insolvency; (ii) to build progressively an international consensus towards the acceptance of this framework; (iii) to provide guidance for the evaluation of national bank insolvency regimes; and (iv) to provide a basis for a policy dialogue between international financial institutions and countries on these issues and to facilitate the provision of technical assistance to countries.

<sup>4</sup> Important initiatives include the report of the task force of the Basel Committee on Banking Supervision on “Supervisory Guidance on Dealing with Weak Banks”, the task force of the Financial Stability Forum on deposit insurance, and the Group of Ten “Report on Legal and Institutional Underpinnings of the International Financial System”.

drafts of the report.<sup>5</sup> The report is still in draft form. It will be finalized after further experience is gained in applying its principal recommendations.

5. The report describes international “sound practices” that countries may employ in designing a legal and institutional framework for bank insolvency.<sup>6</sup> It does not propose a “one-size-fits-all” approach. There is no single, universally accepted legislative model for bank insolvency. Countries take different approaches to the same problems. Moreover, the report does not seek to establish an international “standard” that would be used by the IMF or the World Bank for assessments under their standards and codes initiatives.<sup>7</sup> Rather, the report will be used by the two institutions primarily in providing technical assistance.

## II. THE GBII. THE LEGAL AND INSTITUTIONAL FRAMEWORK

6. The legal and institutional framework described in the GBII recognizes two important principles: a) bank insolvency is different from corporate insolvency; and b) the legal and institutional framework for bank insolvency needs to be built upon an effective regime for banking supervision more generally. Each of these principles is examined below.

7. *Bank insolvency and corporate insolvency.* Bank insolvency is, in several important respects, different from corporate insolvency. The legal framework for corporate insolvency is essentially designed to intermediate conflicts between private parties. It facilitates the maximization of value of an insolvent enterprise’s estate and, to the extent possible, the satisfaction of claims. In contrast, the legal framework for bank insolvency serves a broader public interest—to protect the stability of the financial system—. A bank’s failure can produce a wider array of problems than can that of a non-financial enterprise. An insolvent bank’s inability to execute pay-

<sup>5</sup> The report also benefited from consultations with the authorities of different countries which took place in a series of seminars held in each region of the world.

<sup>6</sup> The report discusses these issues in the domestic context and does not address issues of cross-border bank insolvency. It also identifies the type of bank insolvency regime that would be most appropriate for countries with weak institutional environments. While the report discusses changes that would need to be made to a country’s legal and institutional framework in the context of a systemic crisis, these issues will not be discussed in the present paper.

<sup>7</sup> See: *Standards and Codes; the IMF’s Role* (IMF Issues Brief (01/04)).

ments instructions may disrupt the operation of payments and securities transfer systems, and may cause losses to counterparties in the interbank markets and to the depositing public. In a worst-case scenario, a bank failure may give rise to a systemic crisis. The bank insolvency framework, therefore, seeks to protect the smooth functioning of payments and settlements systems, and the depositing public.

8. It is for these reasons that many countries put in place rules governing bank insolvencies that differ from those applicable to corporate insolvencies. In some countries, the authorities may rely upon corporate insolvency law with appropriate modifications. In other countries, the authorities may put in place a special legal regime for bank insolvency, entirely separate from the corporate insolvency framework. Regardless of the approach taken, the bank insolvency framework will often differ from that applicable to corporate insolvencies in at least three important respects. First, a special role will be reserved to the supervisory authorities (the “banking authorities”) in commencing and conducting insolvency proceedings; in contrast, the creditors normally play the leading role in corporate insolvency proceedings. Second, the bank insolvency framework will frequently allow insolvency proceedings to be commenced at a relatively early stage of a bank’s difficulties in order to facilitate prompt intervention by the banking authorities. Third, special rules may apply to the collection and/or payment of financial claims.

9. *The framework for banking supervision.* A country’s bank insolvency framework forms part of a broader regime for banking supervision. It cannot be expected to be effective if other aspects of the supervisory framework are not.<sup>8</sup> In particular, the legal and institutional framework for banking supervision needs to ensure that the banking authorities have a sufficient degree of autonomy in their operations but are accountable for their actions.<sup>9</sup>

<sup>8</sup> Of course, the bank insolvency framework also needs to be based upon a strong legal framework in the country more generally that provides, *inter alia*, for well-defined property and contractual rights, and effective procedures for the enforcement and collection of financial claims.

<sup>9</sup> The law should also ensure timely and effective coordination between different public authorities responsible for bank insolvencies (*e. g.*, the central bank, the bank supervisor if this is not the central bank, the operators of payments and settlement systems, the deposit insurance agency). In particular, there should be a sound legal basis for the exchange of in-

10. To preserve their autonomy, the banking authorities should have the legal powers and the resources necessary to do their job effectively, subject to clear objectives set out in legislation. The framework should specify rules that, on one hand, shield the banking authorities' senior officials from undue interference (*e. g.*, rules on their appointment and dismissal) and, on the other hand, subject them to the highest professional standards (*e. g.*, rules respecting conflict of interest, financial disclosure, and use of confidential information). The banking authorities and their staffs should be given adequate legal protection from liability for actions taken in the course of their duties.

11. To ensure their accountability, the banking authorities should, in particular, be required to regularly publish reports on their operations, including audited accounts. In certain circumstances, their actions should be subject to challenge in the courts (more about this below).

12. *The bank insolvency framework – insolvency proceedings.* Against this background, the question arises: what are the principal features of an effective legal and institutional framework for addressing cases of bank insolvency? As explained in the GBII, the primary legal mechanism through which insolvent banks are dealt with in most countries may be referred to as “insolvency proceedings”. Insolvency proceedings comprise those forms of official action which involve the removal of management and/or the imposition of limits on, or suspension of, the rights of shareholders and the assumption of direct control by the banking authorities or other officially appointed person over a bank that has crossed an insolvency-related legal threshold. Such proceedings can be administrative in nature or court-based. They may be distinguished from situations where the authorities take control of a bank for reasons unrelated to its insolvency (*e.g.*, where the bank's management has engaged in criminal activities). The initiation of insolvency proceedings may result in the bank's survival as a legal entity or its liquidation.

13. The GBII describes two types of insolvency proceedings: a) official administration; and b) liquidation proceedings. Not every country's bank insolvency framework provides for both types of proceedings, although most countries do have a form of liquidation proceedings. In some cases, the two proceedings are combined. Each is reviewed below.

formation between the public bodies involved, both within the domestic context and with foreign supervisory agencies, while protecting the confidentiality of this information.

14. *Official administration.* Official administration<sup>10</sup> refers to those forms of insolvency proceedings in which an officially appointed person assumes direct managerial control of an insolvent bank with a view to protecting its assets, assessing its true financial condition and, to the extent possible, restructuring the bank's business and restoring it to soundness. It continues until the bank has been restored to soundness or placed in liquidation.

15. Official administration consists of two phases: a) a diagnostic phase; and b) a restructuring phase. Under the diagnostic phase, the official administrator engages in due diligence, assesses the true financial position of the bank, and decides how to proceed. Under the restructuring phase, the official administrator engages in restructuring operations with a view to restoring, to the extent possible, the bank's business to soundness.<sup>11</sup> Where appropriate, the official administrator, on the basis of his assessment of the bank's financial condition, may refrain from conducting any restructuring operations and, instead, make arrangements for the commencement of liquidation proceedings.

16. The legal framework for official administration needs to address a number of important issues. In particular, it should clearly specify the moment at which control of a bank is transferred from the owners and managers to the official administrator and should allow for no "interregnum" that would permit the dissipation of the bank's assets.<sup>12</sup> The official administrator should, at a minimum, be authorized to exercise full control over the bank's management and day-to-day operations, and to pursue the bank's claims, protect its assets, and defend against claims made against the bank. In this regard, the bank will remain open during official administration.

17. The fact that a bank will remain open raises another important point: official administration should be temporary and short. A timetable should be specified for an assessment of the bank's financial condition and the completion of official administration. The rules governing official admin-

<sup>10</sup> In some countries, what the GBII refers to as "official administration" may be known as "bank intervention", "temporary administration", or "trusteeship".

<sup>11</sup> Restructuring operations can include the merger of the insolvent bank with another bank, the conduct of "purchase and assumption" transactions, "bridge bank", and "good bank-bad bank" techniques.

<sup>12</sup> The law should specify qualifications for appointment and rules of conduct (*e. g.*, fit and proper criteria, avoidance of conflicts of interest) that ensure observance of the highest professional standards.

istration should not permit an insolvent bank to be kept open for an extended period.<sup>13</sup>

18. *Liquidation proceedings.* A bank's business that cannot be restored to viability should be liquidated. In liquidation proceedings, an insolvent bank is dissolved after a liquidator assumes legal control of its estate, collects together and realizes its assets, and distributes the proceeds to creditors, in full or partial satisfaction of their claims, in accordance with the applicable rules on priority. Upon the commencement of liquidation proceedings, the bank will continue to exist as a legal entity but will no longer be a going concern.<sup>14</sup> Upon the completion of the proceedings, the bank will cease to exist as a legal entity.

19. There are many important questions that need to be addressed in the legal framework governing liquidation proceedings. In particular, clear rules should be established for the formal placement of a bank in liquidation, the termination of its banking activities, and the assignment of the bank to an officially appointed person to liquidate its estate. Immediately upon appointment, the liquidator should be given full control of the bank's assets, become its sole legal representative, and succeed to all governance rights and powers of its shareholders and directors. The law should specify the degree of supervision and oversight to which the liquidator will be subject.<sup>15</sup> The liquidator should be required to report periodically on his actions.

20. The liquidator must also be given the necessary power to preserve and maximize the value of the bank's assets. He should be able to exercise all rights of the bank in the assets, make payments directly out of the value of the estate, and advance funds to protect collateral supporting the bank's

<sup>13</sup> As noted in the draft GBII Report, "official administration does not imply that the bank should be kept open against all judgment or for an indefinite period of time. Especially, in a weak institutional environment it may not be feasible or even advisable to keep the bank open". Moreover, "keeping the bank open under official administration may give rise to expectations of a general bail-out of creditors, which will often be inappropriate".

<sup>14</sup> As their primary objective is to ensure the maximization of value and optimal collection of the bank's assets and their distribution to creditors, bank liquidation proceedings in many countries closely resemble liquidation proceedings applicable to corporate insolvencies.

<sup>15</sup> While the liquidator should not be required to seek the appointing authority's permission for every action, he can be subjected to the appointing authority's instructions on the general direction of the liquidation and possibly to the appointing authority's prior approval for certain important decisions.

assets. The liquidator should be authorized to enter into contracts to employ various professionals to assist him in his functions, terminate certain executory contracts (*i. e.*, for the purpose of “cherry-picking”), and apply to court for the avoidance of certain transactions and transfers that are unfair and prejudicial to creditors (*e. g.*, fraudulent transactions).

21. A particularly important issue concerns the imposition of a moratorium. The placement of a bank in liquidation should lead to an automatic moratorium or suspension of all collection activity against the bank. The moratorium should, *inter alia*, provide for a stay on all current legal actions against the bank and a bar against the filing of new actions, except with the permission of a court or another appointing authority.

22. In the context of a bank insolvency, a moratorium raises three important issues; a) the effect of the moratorium on depositors; b) the timing of the moratorium; and c) the treatment of netting and set-off provisions in financial contracts. Each of these is reviewed below.

23. With respect to depositors, the moratorium will invariably preclude depositors from gaining access to their savings. Where no system of deposit insurance exists, there will be hardship. To deal with these cases, the liquidator may be authorized to make immediate distributions, up to a specified proportion, against the bank’s deposit liabilities. Moreover, depositors may be given a preferential position on the distribution of the proceeds of liquidation.

24. On the timing of the moratorium, policymakers will need to decide how to deal with transfer orders for payments and securities that are entered in a payment or securities settlement system on the day on which a bank’s insolvency is declared, including those that are settled before the issuance of declaration. Some legal systems employ the “zero hour” rule according to which the effects of the initiation of liquidation proceedings are dated back to the beginning of the day on which the bank’s insolvency is declared. As a result, all outgoing and incoming payments and transfers of securities taking place on that day (including those which preceded the declaration) could be rendered void or unenforceable and would need to be unwound. Given the adverse consequences which such a rule can have for an insolvent bank’s counterparties and for the stability of the financial system, some countries have introduced rules which promote “settlement finality”. Under this approach, the commencement of liquidation proceedings gives rise to only prospective effects; it cannot lead to a reversal of



settlements of transfer orders which precede a formal declaration of insolvency (or, in some countries, the moment at which the payment or securities settlement system is informed of the declaration of insolvency). A few countries go even further by establishing that the moratorium only takes effect at the beginning of the day following the declaration of insolvency or at a moment to be determined in the insolvency decision itself.

25. A third question which needs to be resolved is whether netting and set-off arrangements should be recognized in liquidation proceedings. Payments and settlement systems often operate on a net-settlement basis. Similar arrangements involving netting, set-off, novation, and/or close out arrangements can often be found in financial contracts (*e. g.*, foreign exchange contracts, repurchase agreements). Upon the insolvency of a counterparty to such a contract, the application of such provisions by the solvent counterparty will permit it to apply the total amount of its claims on the insolvent bank against the total amount of its obligations to the bank; in this manner, the solvent counterparty will be able to satisfy its claims up to the total amount of its obligations. If such arrangements are not recognized in liquidation proceedings, the solvent counterparty will need to pay its obligations to the insolvent estate in their full amount and file for what is owed to it as an unsecured creditor and, probably, never recover a significant portion of its claims. In deciding whether or not to recognize such arrangements, a country's policymakers will have to weigh the preferential treatment which such arrangements accord to financial-sector counterparties against the need to minimize contagion risk in financial markets.

26. Liquidation proceedings result in the realization of the bank's assets and the distribution of the proceeds to creditors in accordance with priorities specified in the law.<sup>16</sup> The legal framework will need to provide for notice to creditors to file their claims, the verification of such claims by the liquidator, and the distribution of the proceeds of liquidation. Once the liquidator has completed the realization of assets of the estate, made a final

<sup>16</sup> The liquidation framework needs to recognize that an insolvent bank's estate will largely comprise financial claims with respect to which traditional means of sale (*e. g.*, public auction) may not be appropriate. Accordingly, the liquidator needs to be given sufficient flexibility to dispose of assets, either individually or in bulk, using techniques that ensure minimal loss of value. As such assets will often take the form of contractual interests and entail corresponding obligations, the liquidator should be permitted to transfer contractual relationships without the consent of the counterparty.

distribution to creditors, and prepared final accounts and his report, the liquidation ends.

### III. THE GBII. IMPORTANT CHALLENGES IN DESIGNING A FRAMEWORK

27. In the design of a bank insolvency framework, a number of questions will arise for which there are no universally accepted solutions. Participants in the GBII confronted a number of these issues. Several are set out below.

28. *Administrative versus judicial proceedings.* Policymakers must choose between bank insolvency proceedings that are administrative in nature (i.e., under which the proceedings will be conducted by the banking authorities without the involvement of the courts) and those which are conducted through the courts. For countries that rely upon the corporate insolvency law (possibly with a few modifications) to deal with bank insolvencies, insolvency proceedings will invariably take place in the courts.<sup>17</sup> In contrast, where a special regime for bank insolvency is established, the proceedings may be either administrative in nature or court-based. There are also systems in which some forms of insolvency proceedings (*e. g.*, official administration) are administrative while others (*e. g.*, liquidation proceedings) are judicial.

29. There is no universally accepted model. Policymakers must choose between the need to resolve an insolvent bank quickly and efficiently, on one hand, and the need to protect the rights of affected parties, on the other hand. Avoiding the delays that often characterize general corporate insolvency proceedings is a major motivation for transferring responsibility from the insolvency courts to the banking authorities. Given the potentially systemic nature of a bank insolvency, the authorities must be able to respond more quickly than court-based proceedings might permit. Moreover, the necessary expertise is, in many countries, found with the banking authorities rather than the courts.

<sup>17</sup> A country should rely upon its corporate insolvency framework only if it is effective. To the extent that the corporate insolvency regime is considered to be weak or out-dated, or if the authorities responsible for its application (*e. g.*, the courts) are considered to be inefficient or possibly corrupt, the case for a special regime becomes more compelling.

30. At the same time, bank insolvency proceedings will normally suspend or extinguish property rights—in particular, those of the owners—. In many countries such action can only be taken in a judicial proceeding. Moreover, even where the conduct of bank insolvency proceedings is vested in an administrative agency, it will often prove difficult for legislators to completely exclude the courts. The banking authorities' actions to resolve an insolvent bank in administrative proceedings may subsequently be reviewed and possibly overturned in court. Where the banking authorities' actions are subject to judicial review, it is not clear that an administrative proceeding is always more efficient than a judicial one.

31. While one can find examples of both systems in developed and developing countries, it may be argued that an administrative proceeding is particularly useful in a country with a weak institutional environment. In such countries, the general corporate insolvency legislation may be poorly structured and ineffective. The courts may be slow and inefficient. The judiciary may be poorly trained and unable to deal with the complex financial issues that often arise in a bank insolvency. In a worst-case scenario, the judiciary may be corrupt.

32. In such circumstances, it may prove advisable to remove cases of bank insolvency from the courts' competence and to entrust them to the banking authorities who possess the expertise necessary to resolve them efficiently. However, a word of caution is in order. Where a country's judicial institutions are weak and inefficient, it will not necessarily be the case that the banking authorities will be any better. There may be equally valid concerns over the competence and integrity of administrative agencies, including those responsible for supervising the banking system. There is also a danger that, by giving broad powers of intervention and resolution to administrative agencies, policymakers may undermine the status and prestige of the courts, and the legal system's respect for the rights of the country's citizens.

33. *Threshold for commencement of insolvency proceedings.* A second challenging question concerns the choice of the legal threshold that must be crossed before insolvency proceedings may be commenced. Different legal systems often employ different tests for this purpose. The GBII focused on three of the most important.

34. The first such threshold may be termed the "liquidity threshold". Thus, insolvency proceedings may be commenced where the bank is un-

able to pay its obligations as they fall due. While appropriate in the context of corporate insolvency, this test is not sufficient in the context of bank insolvency. A bank can have temporary liquidity problems without being fundamentally insolvent. It can be insolvent without having liquidity problems. Liquidity problems in a solvent bank can, in most cases, be addressed through interbank borrowing or the lender-of-last-resort function of the central bank.

35. A second threshold may be termed the “balance sheet threshold”. Thus, insolvency proceedings may be commenced against a bank whose balance sheet shows that its liabilities exceed its assets. This test is, perhaps, a more accurate “yardstick” than is the “liquidity threshold” for the true financial position of a bank. However, the “balance sheet threshold” is a necessary but insufficient test. Exclusive reliance upon the balance sheet threshold gives rise to a basic problem. A key purpose of a bank insolvency regime is, in many cases, to ensure early intervention by the banking authorities, if possible, to restore the bank to viability. If insolvency proceedings can be commenced only when the bank’s liabilities already exceed its assets, it may be too late to take any action other than to liquidate the bank.

36. It is for this reason that some legal systems establish a third, lower threshold which allows the authorities to commence insolvency proceedings at an earlier stage. Under the “regulatory threshold”, insolvency proceedings may be commenced when the bank still has positive net worth but its net financial position has fallen below a specified level. While the purpose of the threshold is clear, the fact is that many legal systems would not recognize this as “insolvency” in the classic sense. Moreover, some countries employ different thresholds for different types of insolvency proceedings. The regulatory threshold may be appropriate for the imposition of official administration but not for the commencement of liquidation proceedings; the latter may only be commenced after the bank is “balance sheet insolvent”.

37. *Mandatory versus Discretionary systems.* Policymakers must also decide whether the initiation of insolvency proceedings should, after a particular threshold is crossed, be mandatory or discretionary. On the one hand, mandatory systems can limit the exercise of regulatory forbearance and opportunities for political interference, and provide a clear signal to banks and to the public that action will be taken when a bank is insolvent. On the other hand, a discretionary system is inherently more flexible and may facilitate a more calibrated response to address individual cases.

38. While some industrialized countries lean towards a mandatory approach, such a system may be particularly appropriate in countries with weak institutional environments. In such cases, the supervisor may be under undue pressure to exercise forbearance and avoid proceeding against an insolvent bank. A system which requires the commencement of insolvency proceedings in certain circumstances may limit moral hazard and prevent the further accumulation of losses that would otherwise spread throughout the banking system.

39. *Powers of the official administrator.* In the context of an official administration that is conducted without judicial involvement, policymakers need to decide on the precise scope of the powers to be given to the official administrator. More specifically, what should the official administrator be permitted to do to restructure a bank and restore its business to viability? In some countries, the official administrator is empowered only to take control of the bank, assess its financial position, and manage its day-to-day operations; to the extent that the official administrator wishes to engage in restructuring operations (*e. g.*, the transfer of assets and liabilities of the bank), the consent of other parties (*e. g.*, the shareholders) will be required. Under another approach, bank insolvency legislation will empower the official administrator, even though he acts without judicial oversight, to restructure the insolvent bank (*e.g.*, by transferring assets and liabilities to other banks) without the consent of the shareholders or of other affected parties. While the conferral of such broad powers on an official administrator facilitates a prompt and efficient response to a bank insolvency, the legal systems of many countries will not permit their exercise by an administrative agency without judicial oversight.

40. *Standards for judicial review.* Another important question concerns the standard of judicial review to be applied by the courts in reviewing (and possibly overturning) actions taken by the banking authorities in the context of insolvency proceedings. Such cases will generally arise only in the context of insolvency proceedings of an administrative nature. Where the banking authorities have exceeded their legal powers in taking action against a bank, affected parties should be able to challenge such action in the courts. At the same time, the exercise of discretion on the part of the banking authorities should be respected. A court should not be able to substitute its own policy decisions for those of the banking authorities. The legal framework should only “seek to ensure that the banking authorities act

legally and within the limits of their powers, and should not allow a reassessment of their actions on substantive grounds”.<sup>18</sup>

41. Two important questions respecting judicial review will need to be addressed: a) the timing of judicial review; and b) the remedy available. On timing, judicial review should generally be available only after the fact. A request for judicial review should not, in most cases, result in a stay of the relevant insolvency proceedings; otherwise, the banking authorities may be prevented from taking actions that are essential to preserve the stability of the financial system. Such an approach will limit the remedies available to affected parties. As affected parties will be generally be unable to seek redress before supervisory action has been taken, it will seldom be the case that the restoration of the previous situation will be possible, even where the banking authorities are found to have exceeded their legal powers. When the courts intervene, the relevant bank may already have been closed and its assets and liabilities transferred to other institutions. Under such a system, damages will be the only effective remedy.

#### IV. CONCLUSION

42. The GBII, although a work in progress, represents a major step forward in the efforts of the international community to address the problems of bank insolvency. Throughout the world, there is a growing awareness of the threat which bank insolvency can pose to financial stability. It has also been recognized that bank insolvencies cannot be resolved effectively without a strong legal and institutional framework. While different countries often adopt different approaches to the problems of bank insolvency, international cooperation in this area is increasing. Policymakers worldwide are becoming increasingly aware of the approaches and experiences of their peers in other countries. As international cooperation grows, the bank insolvency frameworks of countries throughout the world will be strengthened. By drawing on the collective experience of the international community, the GBII will serve as a major catalyst in this process.

<sup>18</sup> Draft GBII Report, Chapter 2.