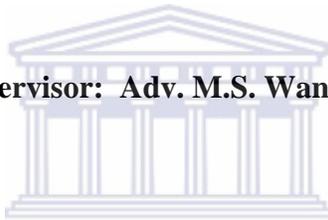


**UNFETTERING THE POLITICAL MANDATE: REFLECTIONS ON
POLITICAL PROHIBITION, THE WORLD BANK'S ROLE IN THE
PROTECTION OF HUMAN RIGHTS
AND
THE CHAD – CAMEROON PIPELINE**

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**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR AWARD OF THE DEGREE OF
MASTER OF LAWS IN INTERNATIONAL TRADE AND INVESTMENT LAW
(MODE II) IN THE FACULTY OF LAW, UNIVERSITY OF THE WESTERN
CAPE.**

SEPTEMBER 2007

TITLE

Unfettering the Political Mandate: Reflections on Political Prohibition, The World Bank's Role In the Protection of Human Rights and The Chad – Cameroon Pipeline.

KEYWORDS.

Political Prohibition, World Bank Group, World Bank Mandate, Human Rights Approach, Human Rights protection, Articles of Agreement, Chad – Cameroon Pipeline.



DECLARATION

I declare that, **Unfettering the Political Mandate: Reflections on Political Prohibition, The World Bank’s Role In the Protection of Human Rights and The Chad – Cameroon Pipeline** is my own work, that it has never been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Robert Kirunda

Signed:



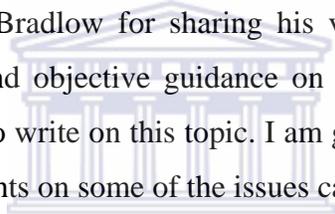
September 2007

ACKNOWLEDGEMENT

First and most importantly, I am deeply thankful to our Heavenly Father for the opportunity to study this Masters course, for all the tremendous successes that I achieved along the way, the humility to write this work, the joy that came with the good times of the course and for the strength and comfort of His Spirit to endure and weather the tough times. To Him alone and to Christ His son do I give all Glory Laud and Honor.

I am indebted beyond calculation to Advocate Maria S. Wandrag, my supervisor, for her tireless and very helpful guidance throughout the process of writing this paper and the entire duration of this course. Her meticulous views and comments have made me a better writer.

I thank Professor Daniel D. Bradlow for sharing his very diverse knowledge on the subject, and for his helpful and objective guidance on the topic. It was at one of his lectures that I was stimulated to write on this topic. I am grateful to Dr. Edward Kwakwa for sharing his thoughtful insights on some of the issues canvassed in this paper.


UNIVERSITY of the

In the process of writing this paper, I have benefited from the tremendous help of many friends. I am deeply indebted to Ms. Philippa Moore and Ms. Catherine Schenker, who always found the time to review my earlier drafts and helped greatly me through very low moments in the course of writing. I sincerely appreciate and treasure the confidence they have in me. My debt is immense to Ms. Susan Kayonde for her tireless, very thoughtful and thorough comments on earlier drafts. I specially thank my dear friend Ms. Jacinta Anyinge, for her help throughout the course, on earlier drafts and in the process of writing this paper. I cannot easily express my eternal gratitude for her time, help, and support all the way. Even then, the ideas and any mistakes, grammatical or otherwise, remain mine.

I am grateful to my parents, Drs Christopher and Rebecca Kirunda for the inspiration to aim higher in my academic pursuit and for the encouragement to excel as a budding scholar. I am only a mirror image of their zealous quest for knowledge. I am also deeply

thankful to my brother Solomon and my sisters Victoria and Joy Kirunda for their encouragement. I drew a lot of encouragement from my niece, Vanessa Xion Nakalungi, whose company I missed dearly but yet whose sweet voice from a far oft kept me going.



ANCRONYMS

IBRD	International Bank for Reconstruction and Development
IDA	International Development Agency
IFC	International Finance Corporation
MIGA	Multilateral Investment Guarantee Agency
UN	United Nations



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CHAPTER ONE

*Tempora mutantur, et nos mutamur in illis.**

1.1 INTRODUCTION.

Many an author have underscored the controversy surrounding the application and interpretation of the provisions that shackle the consideration of “political” issues in decision making in the World Bank Group (the Bank).¹ Under its constituent charter known as the Articles of Agreement (the Articles), the Bank and its officers are prohibited from interfering in the political affairs of any of its members and being influenced in the making of their decisions by the political character of the member or members concerned. It is provided that only economic considerations should be relevant in the making of its decisions and these considerations should be weighed impartially in

*Old Latin maxim translating: The times are changing and we are changing with them.

¹ The World Bank Group comprises of the International Bank for Reconstruction and development (IBRD), International Development Agency (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency and the International Center for the Settlement of Investment Disputes (ICSID). The term World Bank in this research will more generally allude to IBRD.

Some of the scholars and authors that have written on this issue include: Yozo Yokota (1976): Non-Political Charter of the World Bank, 20 Japanese An. Int'l L. 39, David Gillies, Human Rights, Democracy and “Good Governance:” Stretching The World Bank’s Policy Frontiers Montreal: International Centre for Human Rights and Democratic Development, 1994, D.D. Bradlow and C. Grossman (1996), Limited Mandates and Intertwined Problems: A new Challenge for the World Bank and the IMF Human Rights Quarterly 17.3 411-442, Caufield, C. (1998): Masters of Illusion: The World Bank and the Poverty of Nations (Houndmills: Macmillan), George, S. and Sabelli, F. (1994) Faith and Credit: The World Bank’s Secular Empire (London: Penguin), Payer, C. (1982) The World Bank: A Critical Analysis (New York: Monthly Review Press). Ibrahim Shihata (2000): The World Bank in a Changing World. Vol. 3 Kluwer Law International, Ciorciari, J.D. (2000): ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement. Cornell International Law Journal, vol.33 366, J Levinson (1998), Repressive Regimes Shouldn’t get a Loan,’ Washington Post, 15 June 1998 at A23, M Darrow (2003), Between Light and Shadow: The World Bank, the IMF and Human Rights Canan Gunduz (2004), Human Rights and Development: The World Bank’s Need for a Consistent Approach. LSE Working Paper Series Publication No. 04-49 ISSN 1470-2320 (on file with the author) Kapur Devesh, Lewis John P., Webb Richard (1997), The World Bank, its First Half Century. Vol. 1, the Brookings Institution ISBN 0-8157-5230-X (set) ISBN 0-8157-5234-2 (v.1) Ibrahim F. I. Shihata: The World Bank and Human Rights: An Analysis of the Legal Issues and Record of Achievements. 17 Denv. J. Int’l L. & Pol’y 39 1988-1989, Shihata (1991): The World Bank in a Changing World, Selected Essays Compiled by Franziska Tschofen and Antonio R. Para Martinus Nijhoff Publishers 1991 Fergus Mackay (2002) Universal Rights or a Universe Unto Itself? Indigenous People’s Rights and The World Bank’s Draft Operational Policy 4.10 on Indegenous Peoples AU Intl.L.Rev. 2002, Genoveva Hernandez Uriz (2001), To Lend or not To Lend: Oil, Human Rights and The World Bank’s Internal Contradictions. Harvard Human Rights Journal vol.14 spring 2001 ISSN 1057-5077 accessed at <http://www.law.harvard.edu/students/orgs/hrj/uriz/shtml> visited on September 1st, 2006

order to achieve the Bank's objectives.² The Bank is further obliged to ensure that funds loaned will only be used for the purposes for which they were loaned, with due attention to considerations of economy and efficiency and without regard to political considerations.³

The Bank's application and interpretation of the above articles has generated the controversy that underlies this research. This research paper points out the inconsistencies that underlie the Bank's interpretation of the provisions of its Articles of Agreement that relate to political prohibition, and the Bank's role in the protection of human rights in particular. This paper notes that human rights are political issues and to this extent, their consideration in making the Bank's decisions is expressly prohibited. Even then, the Bank has on several occasions considered human rights issues in making its decisions, and this paper argues that the Bank should indeed do so. But in the past, this approach has presented problems as to whether it is rightfully within the mandate of the Bank to consider human rights in making its decisions.

The need to reconcile the Bank's mandate, its actions and perceptions, and develop a sound and concise approach to its role in the protection of human rights is what lies at the crux of this research paper. This paper takes account of the fact that over the years, there has been a significant shift in both the events and actions that influence the work of the Bank from the situation as it was when the Articles were drafted, and the impact that of the Bank's work on human rights in the countries within which it operates. This research paper thus aims to suggest options for a coherent and credible way of including human rights in the mandate of the Bank – to the extent that they affect or their violation arises from – projects funded by the Bank. The paper will also show the limitations that surround the various options and as much as possible, make suggestions to overcome

² See Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S as amended Feb 19, 1989 Articles III section 5 (b), Article IV section 10 and Article V section 5(c). Similar provisions are found in the IDA Articles e.g. Articles I and IV Section 6.

³IBRD Articles Article III Section 5 (b), IDA Articles Article V section 1(g) Although the World Bank Group comprises of five institutions, political prohibition provisions are contained in the Articles of only the International Bank For Reconstruction and Development (IBRD) and the International Development Agency (IDA).

these limitations and hopefully, stimulate discussion of better ways of inculcating human rights into the Bank's mandate.

The relevance of these provisions at the time of drafting of the Articles has never been contested and will not be contested in this paper. Rather, a historical discourse will be undertaken in order to understand the context in which these provisions were intended to apply. While these provisions were drafted on well-intentioned premises, their current existence is questioned in light of the evolving role of the Bank in an ever-changing state of the world. If the Bank is to stay in line with the mandate for which it was established, it can no longer remain transfixed to its approach to political issues in the Articles as they were drafted in the post World War era.

The provisions largely interrelate with and affect the way in which the Bank applies and interprets other provisions in its Articles, especially its mandate.⁴ The mandate of the Bank is set out in Article I of its charter and in essence was for the reconstruction of war torn Europe and the development of the poorer countries of the world.⁵ This mandate has largely evolved. A later emphasis on large-scale infrastructure projects and economic growth gave way to the broader paradigm of poverty alleviation. This was accompanied by the shift from projects to policy based lending. Structural adjustment loans took off in the mid-1980's, and quickly evolved from macroeconomic policy reform to full-fledged reengineering of public sector policies and institutions. Such a broad excursion into arguably political domains without the adjustment of the provisions that prohibit the Bank from delving into political issues was justified with the need to create adequate

⁴ See e.g. G. Brodnig (2003), *The World Bank and Human Rights: Mission Impossible?* Carr Center for Human Rights Policy Working Paper T-01-05 at p.8 see also chapter two.

⁵The at the Bretton Woods conference in 1944, members agreed to create the IBRD (see note 1) to *inter alia*, finance the reconstruction of Europe and the IMF, to help with countries the problem of stabilizing balance of payments. These institutions have come to commonly be referred to as Bretton Woods institutions. The Bank's history is summarized in chapter two but for the most comprehensive record of the history of the Bank was published by Kapur Devesh, Lewis John p., Webb Richard (1997), *The World Bank, its First Half Century*. Vol. 1, the Brookings institution 1997 ISBN 0-8157-5230-X (set) ISBN 0-8157-5234-2 (v.1) but for a discussion of these provisions see also Mac Darrow (2003), *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* Hart Publishing chapter 1 and the subsequent discussion on political prohibition at p. 150 and Shihata (1991): *The World Bank in a Changing World, Selected Essays* Compiled by Franziska Tschofen and Antonio R. Para Martinus Nijhoff Publishers chapter 2, pp.53-96, see also Shihata: *The World Bank in a Changing World* vol.3 chapter 5, pp155-186, e.g. at p.168

“enabling environments” for economic growth and development and make reform “politically viable.”⁶

At various stages in the past years of its existence, the Bank has come up with different operational procedures, and initiatives such as the “safeguard policies” (which deal with environmental, social and legal implications of the Bank’s operations),⁷ the infamous structural adjustment programs⁸ the Comprehensive Development Framework⁹ and more recently the Highly Indebted Poor Country Initiative (HIPC).¹⁰ Each of these measures was undertaken to fit the Bank’s work in the newly defined mandate of development through poverty alleviation and to enhance that mandate.

Over time, the nexus between the Bank’s mandate and human rights has come of age.¹¹ Together with this has come the conceptualization of the right to development.¹² The

⁶ G. Brodnig (2003), *The World Bank and Human Rights: Mission Impossible?* Carr Center for Human Rights Policy Working Paper T-01-05 at p.4

⁷ *ibid* at P.5.

⁸For a discussion of the meaning of Structural Adjustment Programs, their history and effect on human rights and development, See Sigrun I. Skogly (1993), *Structural Adjustment and Development: Human Rights--An Agenda for Change* *Human Rights Quarterly*, Vol. 15, No. 4. (Nov., 1993), pp. 751-778. See also *Lena Adu-Kofi: The Impact Of The International Monetary Fund And The World Bank Structural Adjustment Programs On Sub-Saharan African Women* *New England International And Comparative Law Annual* [Vol. 4 1998] Pp.73-107 Especially At Pp. 82-85. More generally also see Caufield, C. (1998): *Masters of Illusion: The World Bank and the Poverty of Nations* (Houndmills: Macmillan), and Mallaby (2004): *The World’s Banker* Penguin Books pp. 380-385.

⁹ For A Discussion On The Comprehensive Development Framework, its history and how it got inculcated into the Bank’s work see Shihata: *The World Bank In A Changing World* Vol.3 Chapter 5, Pp109-111 And Mallaby (2004): *The World’s Banker* Penguin Books Chapter 8, Pp. 207-231.

¹⁰ For this and more examples see paragraph 21, notes 51-58 and accompanying text of Oloka-Onyango and Deepika Udagama: *The Realization Of Economic, Social And Cultural Rights: Globalization and its impact on the full enjoyment of human rights* Preliminary report submitted in accordance with Sub-Commission resolution 1999/8 E/CN.4/Sub.2/2000/13 15 June 2000. Accessed on April 2, 2007 and is available at

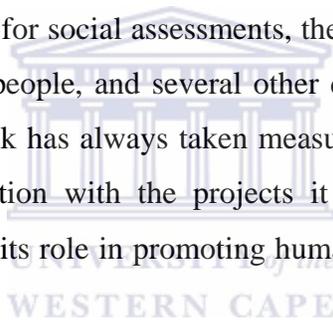
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2000.13.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument)

¹¹For an analysis of the nexus between Human Rights and development see for example the work of Amartya Sen: *Poverty and Famines: An Essay on Entitlement and Deprivation*. Oxford University Press 1981, *Commodities and Capabilities*. Amsterdam: Elsevier Publishers 1985, more recently *Development as Freedom* New York: Anchor Books 1990. See also his *Choice, Welfare and Measurement* Oxford, Blackwell 1992 and *Resources, Value and Development*. Harvard University Press, 1984. See also Dominic McGoldrick (1996), *Sustainable Development and Human Rights: An Intergrated Conception* *International and Comparative Law Quarterly* 45.

¹² United Nations Declaration of the Right to Development was adopted in 1986 by General Assembly Resolution 41/128 of December 4, 1986 available at <http://www.unhchr.ch/html/menu3/b/74.htm> see also Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*. Harvard Human Rights Journal vol.17 pp. 137-168 at pp.137-140.

Bank has indeed recognized these developments and even devoted resources to analyzing how human rights impact on its projects and detailing its “record of achievement” on human rights.¹³ As Oloka-Onyango and Deepika Udagama observe: “In the field of human rights, the Bank followed UNDP by issuing a set of guidelines linking its activities to what it perceived as its human rights obligations.¹⁴ While the guidelines do indicate that the Bank is thinking about the issue, clearly it needs to do much more.”¹⁵ The report they refer to is World Bank (1998), *Development and Human Rights: The Role of the World Bank*.¹⁶ But this report is more of a record of the World Bank’s work in the human rights dimension than a set of guidelines.

In the recent years, the World Bank has increasingly moved towards integrating human rights within its work. This has involved having its work focus on the environmental impact of its projects, the need for social assessments, the protection of cultural property, good governance, indigenous people, and several other dimensions in the human rights arena.¹⁷ Consequently, the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports but it has been less forthcoming about articulating its role in promoting human rights within the countries in



¹³ World Bank (1998), *Development and Human Rights: The Role of the World Bank* ISBN 0-8213-4340-8. On the World bank’s work on the empirical relationship between Human Rights and Governance and the Work of the World bank, see Daniel Kaufmann (2005), *Human Rights and Governance: The Empirical Challenge*, World Bank Institute. Further for a general discussion and analysis on Human Rights and Development, see Klaus Decker, Siobhan McInerney-Lankford and Caroline Sage: *Human Rights and Equitable Development*. Working Paper on file with the Author. See also Genoveva Hernandez Uriz (2001), *To Lend or not To Lend: Oil, Human Rights and The World Bank’s Internal Contradictions*. *Harvard Human Rights Journal* vol.14 spring 2001 ISSN 1057-5077 accessed at <http://www.law.harvard.edu/students/orgs/hrj/uriz/shtml> visited on September 1st, 2006

¹⁴ The report they refer to is World Bank (1998), *Development and Human Rights: The Role of the World Bank* ISBN 0-8213-4340-8. But in the author’s view, this report is more of a record of the World Bank’s work in the human rights dimension than a set of guidelines.

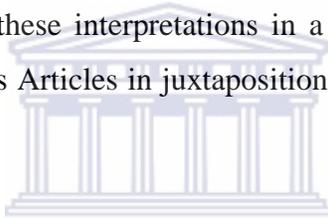
¹⁵ Oloka-Onyango and Deepika Udagama: *The Realization Of Economic, Social And Cultural Rights: Globalization and its impact on the full enjoyment of human rights Preliminary report* submitted in accordance with Sub-Commission resolution 1999/8 E/CN.4/Sub.2/2000/13 15 June 2000. Accessed on April 2, 2007 and is available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2000.13.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument)

¹⁶ op.cit note 12, World Bank (1998)

¹⁷ Gernot Brodnig *The world Bank and Human Rigts: Mission Impossible?* Carr Center for Human Rights Working Paper T-01-05 at p.9, I.F.I. Shihata: *The World Bank and Human Rights: An analysis of the Legal Issues and Record of Achievements*. 17 *Denv. J. Int’l L. & Policy* 39-66. See also Shihata, *Human Rights, Development and International Financial Institutions*. Vol.8 *Am.U.J. Int’l L &Policy* 27 1992-1993. Pp. 27-37.

which it operates let alone including them in its mandate.¹⁸ Although the Bank's pronouncements on human rights have always been broadly supportive, they have never affirmed in concrete terms that the Bank has a specific role to play in relation to human rights as legal principles, or as legal obligations.¹⁹

There is now cause to believe that what is not clear within the Bank is exactly how to formally inculcate human rights in its development mandate.²⁰ One school of thought has it that human rights have always been part of the Bank's mandate²¹ and another that human rights have become part of the Bank's mandate over the years as a result of its subsequent practice and the evolving notion of development.²² But the purposefully narrow and strict wording of these provisions as seen in the context of their history and the manner in which the provisions have been interpreted suggests otherwise.²³ This research paper thus evaluates these interpretations in a bid to reconcile them with the Bank's mandate as set out in its Articles in juxtaposition to the Bank's role in protecting human rights.



As a case study, the paper analyzes the Bank's role in the Chad-Cameroon Petroleum Development and Oil Pipeline project (the project) in which the Bank has been involved since the year 2000. The paper presents the lessons, challenges and implications from this

¹⁸ World Bank, The Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No.3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD) at p. 62

¹⁹ See Ana Palacio (Present General Counsel of the World Bank) (2006), *The Way Forward: Human Rights and the World Bank Article on the World Bank Development Outreach*, World Bank Institute, October 2006 available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445640~pagePK:64020865~piPK:149114~theSitePK:445634,00.html> accessed on 27/02/2007

²⁰ *ibid*

²¹ See for instance Canan Gunduz (2004), *Human Rights and Development: The World Bank's Need for a Consistent Approach*. LSE Working Paper Series Publication No. 04-49 ISSN 1470-2320 (on file with the author)

²² *op.cit* Brodnig at note 17, see pp.9-13 According to Brodnig, "A strong argument can be made that the Bank's Articles of Agreement permit the consideration of human rights issues, as long as such policies and practices do not violate the (considerably narrowed) political activity prohibition of Article IV/10. The evolving notion of what constitutes development together with the Bank's past practice of integrating non-economic issues into its work suggest that there are no major legal obstacles to adopting a rights-based approach to development."

²³ See chapter two. And see also Ibrahim Shihata (2000): *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, at p.155

project with regard to the Bank's approach to and future involvement in promoting the protection of human rights. The project, which at the time of its commencement was the largest single investment in Africa, was for the transportation of oil from the landlocked southern Chad to the Atlantic coast of Cameroon for export.²⁴ The developments throughout the construction process and different measures undertaken to ensure the success of this project demonstrate the interrelatedness of human rights concerns to the Bank's mandate and therefore how important it is to include human rights therein.

Given Chad's political history and record of human rights violations,²⁵ and against the background of tensions that surrounded the project prior to the World Bank's involvement, it is important to understand what factors the Bank considered in order to determine whether to get involved in the project or not. The paper also analyzes the unique structures adopted by the Bank in this project against the central question of the Bank's role in the protection of human rights.

This paper has the twin purposes of resolving the apparent contradiction in the application and interpretation of the provisions on political prohibition in the Bank's Articles and analyzing the Bank's role in the protection of human rights. By considering the Bank's own interpretation of these provisions and looking at the Chad-Cameroon project as an example of Bank's reaction to the interface of human rights with its work, the paper raises a variety of questions and makes suggestions that are aimed at presenting a clearer approach to the attendant issues.

1.2 STATEMENT OF THE PROBLEM.

The Articles on political prohibition in the Bank's decision making have long since outlived their usefulness. The situation has not been helped by the interpretations offered by the Bank's General Counsel or its inconsistent practice. The Bank has continued to

²⁴For a general description of the project see chapter 3 and Donald R. Norland: Innovations of the Chad/Cameroon Pipeline Project: Thinking outside the Box Mediterranean Quarterly: Spring 2003 pp.46-59 Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State

²⁵ Amnesty International, Contracting Outside Human Rights: The Chad Cameroon Project ISBN 1873328 62 1 at pp. 15, 17, 34-40

rely on these provisions to justify its recusal from crucial obligations and activities that are central to realizing its mandate, particularly in the area of human rights. Political considerations so far as they relate to or their violation arises from projects funded by the Bank cannot be divorced from economic factors or the realization of the Bank's mandate. This is buttressed by the complex and turbulent histories and prevalent social and economic problems in its poor members such as Chad that desperately need the Bank's funding and technical assistance.

1.3 OBJECTIVE OF THE STUDY.

The main objective of this research paper is to suggest a comprehensive approach that the World Bank can use in dealing with human rights. The paper points out the inconsistencies that underlie the Bank's interpretation of the provisions of its Articles of Agreement that relate to political prohibition. The need to reconcile the mandate of the Bank, its actions and perceptions and develop a sound and concise approach to its role in the protection of human rights is what lies at the crux of this research paper. The research paper delves into an analysis of these provisions against the backdrop of their history and shows that they have outlived their usefulness. The paper balances the historical justification for these provisions with recent development to expose the inherent conflict between the Bank's work today and its mandate. In so doing, the paper aims to show that human rights are political factors that are excluded from the mandate of the Bank by the wording of the aforesaid provisions but that their protection is central to the realization of the full benefits of World Bank funded projects and as such, central to its mandate.

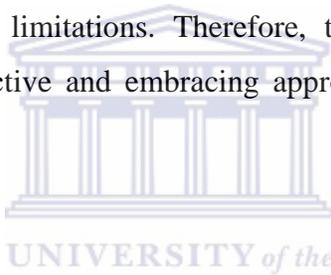
1.4 SIGNIFICANCE OF THE STUDY.

The importance of the current research is premised in the tremendous shift both of events and actions that influence the work of the Bank from the situation as it was when the Articles were drafted and the impact that the Bank's work has on human rights in the countries in which it operates. This research paper will suggest options for a coherent and credible way of including political considerations, and human rights in particular, in the mandate of the Bank – to the extent that they affect or their violation arises from – projects funded by the Bank. The paper will also show the limitations that surround the

various options and as much as possible, make suggestions to overcome these limitations and stimulate discussion of better ways of inculcating human rights into the Bank's mandate. This paper captures the latest developments and literature on the topic, hence presenting fresh justifications for the arguments it sets forth.

1.5 RESEARCH HYPOTHESIS

It serves the Bank better to amend or at least attempt to amend its Articles to eliminate the provisions on political prohibition or to enlarge them to cater for the protection of human rights as part of its mandate. This will allow the Bank to undertake ventures and resort to measures that it has hitherto declined to undertake even though they closely relate to or influence the outcome of its projects without violating its mandate or contradicting itself when it takes pro-human rights measures. But this in itself is not enough, neither is it without limitations. Therefore, the World Bank now needs a comprehensive and more effective and embracing approach to human rights and how they affect its projects.



1.6 SCOPE OF THE STUDY.

This research paper is intended to focus on specific provisions of the Bank's Articles. While other provisions will be referred to, the research is focused on Article IV section 10 of the IBRD Articles of Agreement, which provides:

“Political Activity Prohibited

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”²⁶

Broad as the range of “political” issues attributable to this discussion is, this paper

²⁶ Article IV section 10, Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S as amended Feb 19, 1989 available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049603~pagePK:43912~piPK:36602,00.html#11>

concentrates on human rights, albeit with limited reference to other issues such as the environment. In its analysis and discussion on the promotion of human rights, however, the paper does not advocate for the Bank to get involved in the enforcement of human rights for that would clearly distort the *raison d'etre*, of the Bank's existence let alone result into an overlap with other agencies of the United Nations (UN). The scope of this paper is further limited in drawing most of its illustrations from events in Chad that directly relate to the Bank's involvement in the Chad-Cameroon Project, although some other illustrations are used and the general state of human rights violations in Chad prior to the commencement of the project is taken note of.

1.7 METHODOLOGY.

This research is descriptive and analytical in nature and the handling of data is qualitative. The primary mode that was used was desk research. The research comprised of a comprehensive analysis of existing literature on the subject and the factual events in the case study. The literature relevant to this study included both primary and secondary sources of literature. The primary sources, though not many, included international legal instruments mainly treaties and international documents and reports. The secondary sources included textbooks, academic and scholarly journal articles, reports, online publications and other source available which were relevant to the research. This analysis was also supplemented by discussions with a few eminent scholars on the subject and its attendant issues.

1.8 STRUCTURE OF THE PAPER.

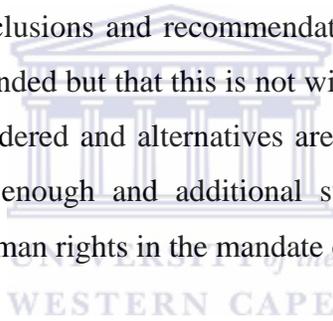
This paper is divided into four chapters. This chapter commences by introducing the subject of the research. It then sets out the statement of the problem, the main objective and significance of the study. The chapter also includes the hypothesis and research methodology and ends by setting out the structure of the rest of the paper.

Chapter two discusses the provisions on political prohibition. Drawing from the historical background of these provisions, the chapter delves into an analysis of the Bank's understanding and application of these provisions over the years and how this has

evolved and balances this approach against the relationship between human rights, the Bank and its mandate. In this process, the chapter shows the shortcomings of the Bank's current approach and suggests some ways of adjusting the Bank's apolitical mandate. There are limitations to this, however, and this chapter points them out and makes suggestions thereto.

Chapter three considers the Chad-Cameroon Project as a case study. It illustrates the magnitude to which projects in which the Bank is involved can result into or exacerbate human rights violations. The chapter takes note of how creative the Bank was in designing unique aspects in this project and vouches for a similar approach in future projects.

Chapter four contains the conclusions and recommendations. It is argued on the whole that the Articles should be amended but that this is not without limitation. The limitations to this approach are also considered and alternatives are suggested. It is also noted that amending the articles is not enough and additional suggestions towards a practical approach to the inclusion of human rights in the mandate of the Bank are made.



CHAPTER TWO

APPLICATION AND INTERPRETATION OF THE PROVISIONS ON POLITICAL PROHIBITION IN THE IBRD ARTICLES OF AGREEMENT.

*“The law like the traveler must always be ready for the morrow. It must have a principle of growth” **

Some have agreeably argued that it is now well established that the World Bank is not a politically neutral institution, concerned solely with matters of efficiency and economic growth and that in various ways, the World Bank has been engaged in an endeavor to bring political concepts into its development strategies.²⁷ Indeed, World Bank documents such as Country Assistance Strategies (CASs), World Development Reports (WDRs) and other Bank publications increasingly include political statements, or pass political judgments on situations in borrowing countries. In their attempt to carry out the ever-increasing tasks requested of them, Bank members of staff often find it relevant or useful to take certain political considerations into account. At times, they are blamed when they fail to do so.²⁸

The text of the Bank’s Articles does, however, explicitly state that the staff may not take such considerations into account in making their decisions.²⁹ This chapter sets out to investigate whether such consideration is valid and whether the provisions on political prohibition have become an atavistic anomaly to the Bank’s work. Three sets of provisions are relevant to the subject matter of this discussion and they include:

* Justice Benjamin N. Cardozo, U.S. Supreme Court. As adapted from Dennis Lloyd, *The Idea of Law*. Penguin Books, 1970 (Reprint).

²⁷ Graham Harrison (2005): *The World Bank, Governance and Theories of Political Action in Africa*, BJPIR: Vol. 7, 240–260 at p.1. See also Caufield, C. (1998): *Masters of Illusion: The World Bank and the Poverty of Nations* (Houndmills: Macmillan), George, S. and Sabelli, F. (1994) *Faith and Credit: The World Bank’s Secular Empire* (London: Penguin), Payer, C. (1982) *The World Bank: A Critical Analysis* (New York: Monthly Review Press). See also notes 13 and 14 in chapter one and accompanying text.

²⁸ Ibrahim Shihata: *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, 2000 at p.155

²⁹ *ibid*

- (a) the provisions that state the Bank's mandate and which limit the Bank's financing to specific projects except in certain circumstances. These provisions are set out in Articles I and III section 4(vii);
- (b) those that deal explicitly with political considerations. These are set out in Article III section 5 (b), Article IV section 10 and Article V section 5(c); and
- (c) those which deal with interpretation and amendment of the articles.

These provisions are purposefully narrow. The Authors of the drafts of the Articles of Agreement were cognizant, of course, of the interaction between politics and economics and the difficulty of insulating an inter-governmental institution from political considerations. Rather than weakening their resolve, such cognizance prompted them to emphasize the need to allow the Bank to operate as a universal, financial institution, which "shall scrupulously avoid interference in the political affairs of any member" and would act "in strict impartiality."³⁰

This chapter is divided into four parts. Commencing with a historical perspective of the Bank's operation and the evolution of the political prohibitions debate, the chapter proceeds to evaluate the interpretations of the aforesaid provisions as have been handed down from the Bank's General Counsel. The focus here is confined to offering an exegesis of the interpretations of the Bank's General Counsel, in light of the World Bank's approach in dealing with human rights. The third part of this chapter considers the way forward and addresses the issue of whether or not to amend the Bank's Articles. The final part presents conclusions and recommendations.

2.1 Historical Account.

Three principal reasons are given for the drafting of the political prohibition clauses. Firstly, in the global political context of the emerging Cold War, the architects of the Bretton Woods system, notably Harry Dexter White and John Maynard Keynes believed that it was essential to design the Bank as a technocratic institution isolated from political

³⁰ Ibrahim Shihata (2000): *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, 2000 at p.165

considerations.³¹ This, it was hoped, would attract members regardless of their political ideology, in particular the Soviet Union.³² There was a slightly more complex need to take account of the “tripolar ideological tensions” between communist Russia, socialist Britain and Capitalist America.³³ Secondly, Britain’s strategic concern to insulate itself against American economic dominance or anti-commonwealth bias. Thirdly, it is believed that the drafters simply wanted to ensure the efficient functioning of the Bank.³⁴ This in their view required a purely technical and economic method for resource allocation. While no single cause can be set forth for the drafting of these provisions, it is plausible to state that these provisions find their genesis in a combination of the above factors.³⁵

Despite the caution that was reflected in these provisions, political factors have been at the centre of World Bank activity, often coinciding with “creditworthiness” almost through its entire time of existence. In the Bank’s early years, political considerations manifested mostly through the importance of political ties between the United States (the Bank’s largest share holder) and other borrowing members.³⁶ In 1950, A Bank mission visited Ethiopia, for instance, targeted as an African client state by the United States. The mission found a wretchedly poor country governed by an autocrat, a public administration with virtually no technical capacity or authority to formulate or execute public works and public service damaged severely by war and administrative neglect.

³¹ *ibid*

³² E Mason and R Asher (1973), *The World Bank Since Bretton Woods* at 27.

³³ Ciorciari, J.D. (2000): ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement, *Cornell International Law Journal*, vol.33 366, see also J Levinson, *Repressive Regimes Shouldn’t get a Loan*, *Washington Post*, 15 June 1998 at A23, M Darrow (2003), *Between Light and Shadow: The World Bank, the IMF and Human Rights*, p. 169

³⁴ *ibid* Ciorciari, J.D. (2000)

³⁵ *ibid* Ciorciari, J.D. (2000), see also Canan Gunduz (2004), *Human Rights and Development: The World Bank’s Need for a Consistent Approach*. LSE Working Paper Series Publication No. 04-49 ISSN 1470-2320 (on file with the author) at p.14 see also Mac Darrow, *Between Light and Shadow: The World Bank, the IMF and International Human Rights Law* at pp. 168-169.

³⁶ Kapur Devesh, Lewis John P., Webb Richard, *The World Bank, its First Half Century*. Vol. 1, the Brookings institution 1997 ISBN 0-8157-5230-X (set) ISBN 0-8157-5234-2 (v.1) pp. 101-103. For a discussion on US influence in the World Bank see also Lena Adu-Kofi (1998), *The Impact Of The International Monetary Fund And The World Bank Structural Adjustment Programs On Sub-Saharan African Women* *New England International And Comparative Law Annual* (Vol. 4) Pp.73-107 Especially At Pp. 77-80.

That notwithstanding, three loans were arranged and approved without much preparation, the first being approved in 1951, “otherwise nothing would happen.”³⁷

One of the Bank’s largest developing country borrowers in terms of the number of loans was Nicaragua, a nation with one million inhabitants. Between 1951 and 1956, Nicaragua received nine World Bank loans, and one in 1960, owing to its political ties with the United States.³⁸ Guatemala, with three times the population of Nicaragua, was one of the first countries to receive a survey mission (published in 1951) but did not obtain a loan until 1955, as it was still under a communist regime disfavored by the United States.³⁹

The most vivid illustration that brings to the fore the debate on the political prohibition provisions is the controversy that surrounded the loan applications made by South Africa and Portugal in the 1960s. In December 1965, the United Nations General Assembly adopted two resolutions prohibiting the Bank from giving financial assistance to these countries because of their respective apartheid and colonial policies.⁴⁰ In the controversy that ensued, both the Bank and the United Nations raised various legal arguments about the scope of the Bank’s undertakings under its relationship agreement with the United Nations and the limitations imposed by the Bank’s Articles of Agreement.⁴¹

The Bank argued *inter alia*, that it would be improper to accept the recommendations of the United Nations General Assembly in the cases involved because of the political

³⁷ Ibid.

³⁸ Kapur Devesh, Lewis John p., Webb Richard, *The World Bank, its First Half Century*. Vol. 1, the Brookings institution 1997 ISBN 0-8157-5230-X (set) ISBN 0-8157-5234-2 (v.1) pp. 101-103

³⁹ Kapur Devesh, Lewis John p., Webb Richard, *The World Bank, its First Half Century*. Vol. 1, the Brookings institution 1997 ISBN 0-8157-5230-X (set) ISBN 0-8157-5234-2 (v.1) pp. 101-103

⁴⁰ ‘The Policies of the Apartheid Government of the Republic of South Africa’ GA Res 2054 A (XX), 20 UN GAOR, Supp. (No. 14) 16, UN Doc. A/6014 (1966); Implementation of the Declaration on the Granting of Independence to Colonial Countries’ People,’ GA Res 2105 (XX), 20 UN GAOR, Supp. (No.14) 16 UN Doc. A/6014 (1966) and 2107 (XX) of 15, 20 and 21 December 1965, See also Ibrahim F. I. Shihata: *The World Bank and Human Rights: An Analysis of the Legal Issues and Record of Achievements*. 17 Denv. J. Int’l L. & Pol’y 39 1988-1989 pp.39-66 at p.43

⁴¹ This controversy in its entirety and all the attendant documents and UN Resolutions are captured in the report of the UN Secretary General titled: *The Policies of Apartheid of the Government of the Republic of South Africa. Question of Territories Under Portuguese Administration. Consultation with the International Bank for Reconstruction and Development*. UNGA 22nd Session Doc. No. A/6825 15 September 1967. For a very good analysis of this controversy see Samuel A. Bleicher, *UN v. IBRD International Organizations* Vol. 24, No. 1. (Winter, 1970), pp.31-47 (on file with the author).

prohibition contained in Article IV, section 10 of its Articles of Agreement. In both cases (South Africa and Portugal), the Bank maintained its position that it was prohibited by its articles from interfering in the political affairs of its members. The Bank recognized, however, that on some occasions it does take into consideration, and is influenced in its lending decisions, by the *economic effects*, which stem from the political character of a member and from the censures and condemnations of that member by the United Nations organs.⁴²

2.2 A Murky Maze of Interpretations:

The Articles of Agreement are a treaty to which the members are bound. Their interpretation is largely based on the approach in the Vienna Conventions on the Law of Treaties and the Law of Treaties Between States and International Organizations or Between International Organizations.⁴³ The approach espoused in the Vienna Conventions is furthered by the requirement that interpretation of the Bank's Articles must be based on the purposes stated in Article I of the text of its articles.⁴⁴

The IBRD Articles have been subject to frequent interpretations, formal and informal, explicit and implied, from within and outside of the Bank.⁴⁵ Whenever clarification of the Articles' requirements has been needed within the Bank, its Executive Directors have discussed it in light of a legal opinion by the General Counsel. Such an opinion does not amount to an authoritative interpretation of the Articles, as the power to make such an interpretation is vested in the Board of Executive Directors.⁴⁶ However, the Board's endorsement of, or concurrence with, the General Counsel's opinions allows for their incorporation in the Bank's subsequent practice. While this informal approach maintains a large measure of flexibility for the Board, it also enhances the value of the General

⁴² *ibid.* Shihata at p.44. See also Memorandum of the Legal Department of the IBRD, 22 U.N. GAOR Annex II at 9, U.N. Doc A/6825 (1967).

⁴³ Vienna Convention on The Law of Treaties 1969 U.N. Doc. A/Conf. 39/11/Add.2, Articles 31 to 33 as repeated in the Vienna Convention on the Law of Treaties Between States and International Organizations 1986 U.N. Doc A/Conf 129/15. See also Shihata, *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, 2000 at p.6

⁴⁴ *ibid* Shihata at p. 17, see also Article 1 and Article IX of the IBRD Articles of Agreement.

⁴⁵ *ibid*

⁴⁶ *ibid*

Counsel's legal opinions as a *source* of the Bank's law. At least since 1983, there has been no case where the Board disagreed with the conclusions of these opinions.⁴⁷ To date, there have been at least five interpretations on the question of political prohibition.⁴⁸

Each of these interpretations presents different lessons. In the first interpretation that was offered in the wake of the South Africa and Portugal controversy discussed earlier, the IBRD General Counsel propounded that the political prohibition in the Bank's Articles had two purposes. Firstly, to prevent the possibility of using Bank financing as leverage against any Bank member in order to advance the political aims of any other member or group of members. Secondly, to assure private capital markets that economic, rather than political considerations, would guide the Bank's financial decisions.⁴⁹ This view is probably the closest, of all other views expressed in later interpretations, to what are the known historical reasons why the political prohibition provisions were included at the time when the Articles were drafted as has been discussed above.⁵⁰

In disagreeing with this opinion, the United Nations Legal Counsel opined that Article IV section 10 "would appear to have as its purpose the prohibition of interference in the internal political affairs of a member state and of discrimination against a state because of the political character of its government,"⁵¹ a view that is also traceable in later interpretations offered by Ibrahim Shihata as General Counsel of the Bank.⁵² The first

⁴⁷ Ibrahim F. I. Shihata, *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, 2000 at p.6, 16-17

⁴⁸ Legal Opinion on Human Rights and the Work of The World Bank Senior Vice President And General Counsel. January 27, 2006; Prohibition of Political Activities in the World Bank's work, Legal Opinion of the Senior Vice President and general Counsel, dated July 12, 1995; Issues of "Governance" in Borrowing Members – The extent of their relevance Under the Bank's Articles of Agreement, legal Memorandum of the General Counsel dated December 21st, 1990; and Political activities under the IBRD Articles of Agreement and its Relevance to the Work of the Executive Directors, Legal opinion of the General Counsel, dated December 23, 1987. Memorandum of the Legal Department of the IBRD 22 U.N. GAOR Annex II at 9, U.N. Doc A/6825 (1967).

⁴⁹ Mac Darrow (2003): *Between Light and Shadow: The World Bank, the IMF and International Human Rights Law* at p. 151. See also D. Bradlow (1996): *The World Bank, the IMF and Human Rights* 6 *Transnational Law and Contemporary problems* 47-90 at p.55

⁵⁰ See also Mac Darrow (*ibid*) note 184 at p.151

⁵¹ 21 U.N. GAOR 4-20, U.N. Doc. A/C.4 SR 1653 (prov. Ed.1966) reprinted in (1967) 6 *International Law Materials* 171, 172, cited in Mac Darrow (2003).

⁵² Shihata (1991): *The World Bank in a Changing World, Selected Essays Compiled by Franziska Tschofen and Antonio R. Para Martinus Nijhoff Publishers* 1991 chapter 2, pp.53-96, see also Shihata: *The world Bank in a Changing World vol.3 chapter 5, pp155-186, e.g. at p.168*

opinion thus did not only serve to refresh the historical account of these provisions but also set the pace for the interpretations that would follow. This first legal interpretation also teaches the important lesson that some countries with poor human rights records (such as the existence of apartheid policies in South Africa) may also have sound economic policies pursuant to which the Bank can safely invest in those countries.

From three interpretations subsequent to the one discussed above, all issued by Ibrahim Shihata as then General Counsel of the Bank, a refined test has been developed by the Bank in addressing the controversy of political prohibition and applied as a yardstick for the making of its decisions. In his approach, Shihata creatively “stretched” the Bank’s mandate to include attention to certain human rights and *popular participation*,⁵³ but without “distorting” its articles or conceding that all human rights should be considered. In his view, “while the *purposes* of the Bank are exhaustively stated, the *functions* which allow the Bank to serve such purposes may be expanded as deemed necessary or desirable.”⁵⁴

In an attempt to distinguish between “economic” and “political” factors, Shihata defined an “economic factor” within the meaning of the Bank’s Articles as any factor that has a direct and obvious economic effect relevant to the Bank’s work. He then defined the term “political” as going to the art and practice of running a country or governing it. In his view, political factors would include those that would require the Bank to take a side in the political system of its Borrower states, such as favoring one political system over another.⁵⁵

His suggested definition of “political” factors also includes “considerations which might result in the Bank’s decisions being influenced by the decisions, opinions, or beliefs of the people or the parties holding power in member states” but “should exclude for

⁵³ Popular participation here generally refers to wide consultation with stakeholders and the affected peoples in the areas where the project is to be built. It is now part of the World Bank’s Operation Directive principles as O.D 4.01 and must as such be sought and acted upon. See further discussion in chapter 3.

⁵⁴ Shihata (1991): *The World Bank in a Changing World*, Selected Essays Compiled by Franziska Tschofen and Antonio R. Para Martinus Nijhoff Publishers 1991 chapter 2, pp.53-96 See also Mac Darrow (2003): *The World Bank, the IMF and Human Rights* at p.153

⁵⁵ *ibid*

practical purposes of the Bank's Articles, such typical economic and technical issues, as the management of money or finances, or more generally, the management of a country's resources."⁵⁶ Thus in his view, what is important for the Bank is to limit itself to the necessary analysis needed for the purposes of its work and not interfere or take sides in the direction of the political events or factors in place and to limit itself to the direct and obvious economic effects relevant to its work. Further, that the case for a direct and obvious economic effect has to be established in a clear and unequivocal manner based on an objective analysis.⁵⁷ To conduct the objective analysis, Shihata set out a tripartite test to determine whether the economic effect of a particular factor in a Bank's operation is "direct and obvious." The economic effect must be:

- (1) "clear and unequivocal;
- (2) preponderant; and
- (3) when the issue is associated with political actions or events, the economic effect must be of such an impact and relevance to make it a Bank concern."⁵⁸

Shihata's approach (which can largely be referred to as the Bank's approach) raises several concerns. First, it reveals the ambiguity of the terms "political" and "economic," and lends itself to being interpreted or manipulated in multiple and even contradictory manners. To this extent, continued interpretation of the Articles has only resulted into an incoherent approach to human rights.⁵⁹ Consequently, divergent views have arisen from both the Bank's staff and practice on the one hand and the plethora of literature outside the Bank on the other hand, devoted to settling this question.⁶⁰ This shows how important

⁵⁶ *ibid* Shihata at pp. 70-71, Mac Darrow at p.154 see also D. Bradlow (1996): *The World Bank, the IMF and Human Rights* 6 *Transnational Law and Contemporary problems* 47-90 at p.60

⁵⁷ Ibrahim Shihata (2000): *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, at p.168

⁵⁸ Shihata (1991): *The World Bank in a Changing World, Selected Essays Compiled by Franziska Tschofen and Antonio R. Para Martinus Nijhoff Publishers* 1991 chapter 2, pp.53-96 See also Mac Darrow (2003): *The World Bank, the IMF and Human Rights* at p.154, see also D. Bradlow (1996): *The World Bank, the IMF and Human Rights* 6 *Transnational Law and Contemporary problems* 47-90 at p.60

⁵⁹ D.D. Bradlow and C. Gorossman (1996), *Limited Mandates and Intertwined Problems: The A new Challenge for the World Bank and the IMF* *Human Rights Quarterly* 17.3 411-442 at p.430-432

⁶⁰ For some of the literature that is alluded to here, see note 1 of Chapter 1. The divergent views are explored ahead in the part that deals with whether to amend or not to amend the Articles of Agreement but see also *Business Day* September 22 1998 *Blair Calls for Urgent Reform of the IMF, World Bank* at p.1, see also J. Verspaget, *Report on the Activities of the Bretton Woods Institutions (World Bank and IMF)* *Eur. Parl. Ass. Doc No. 7256* 1995, further see Markay (2002), *Universal Rights or a Universe Unto Itself?*

it would have been for the drafters to state what they intended to mean in the use of the terms “political” and “economic” considerations.

Secondly, when the General Counsel stated that when an issue is associated with political actions or events, the economic effect must be of such an impact and relevance to make it a Bank concern, he did not state any clear standard to be applied in such circumstances. This gives the Directors and subsequent Legal Counsel a lot of room in which to interpret these provisions. In effect, this test did not dissolve the ambiguity it was intended to address.

Thirdly, as chapter three will show, attempting to divest typical economic and technical issues such as the management of money or finances, or more generally, the management of a country’s resources from the Bank’s decision making, presents its own difficulties. These factors are pivotal in the Bank’s decision making if it is to ensure proper utilization of its funding and the maximization of the proceeds resulting therefrom for the alleviation of poverty.⁶¹ In some cases, as with the Chadian government, the Bank may often have to literally instruct Borrower members on how its loans and the proceeds from World Bank funded projects are to be spent. Arguably, this may not have been envisioned at the Bank’s inception, but as a development institution bent on alleviating poverty in its member countries, its work remains the only hope for a better quality of life for many a poor country and people around the world.

Also, *popular participation*, if desired or sought by the Bank, raises parallel obligations on the Bank’s part. First, that such participation will not be treated with secrecy (as was the case with the Narmada Dam project in India)⁶² but fully published in order to harness transparency on the part of the Bank. Secondly, that the Bank should be willing to deal

Indigenous People’s Rights and The World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples AU Intl. L .Rev. 2002 at p.529-532

⁶¹ The Bank’s mandate is said to have evolved from just reconstruction and development to poverty alleviation. See Shihata (2000): *The World Bank in a Changing World* vol.3 pp.158-159 and related cited works. See also Danino (2006): *Legal Opinion On Human Rights And The Work Of The World Bank* Senior Vice President And General Counsel. January 27, 2006 pages 1-3

⁶² See Catherine Caufield (1996), *Masters of Illusion: The World Bank and the Poverty of Nations*, chapter one pp 5-29

with the issues that will arise from such participation, whether political in their nature or not. Such participation cannot be invited in the expectation that it will only raise economic considerations, and so ignoring its results negates the purpose of having sought it in the first place. Also, persons offering information to the Bank may in some cases expose themselves to risks in the process, while others that desire to offer information to the Bank may decline for fear of persecution. As a result, the Bank needs to have clear and well-publicized ways and mechanisms of soliciting information and ensuring the safety of its informants for example, by securing the necessary assurances from the Borrowing government that it will do whatever is necessary to ensure that such people feel safe.

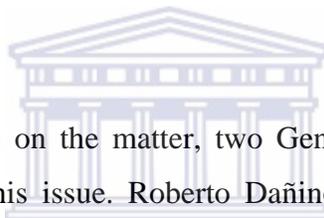
With regard to human rights, the Bank has taken a view explicit in Shihata's approach that civil and political rights fall outside the purview of the Bank's political mandate, but that it is within its mandate to consider economic, social and cultural rights. Shihata also did note that political events, which have a bearing on economic conditions of a member or on the member's ability to implement a project or the Bank's ability to supervise the project, might be taken into consideration.⁶³ He further stated that:

“While these conclusions clearly indicate that, as a general principle, the Bank and its Executive Directors may take into account political considerations, they do suggest that there are political situations which affect project implementation or monitoring which should therefore be taken into account. Human rights may under this opinion become relevant but the degree of respect paid by a government to human rights cannot by itself be considered an appropriate basis for the Bank's decision to make loans to that government.... Arguably, if a loan is rejected on the basis of the authoritarian and suppressive character of the government involved, the result may only add another injury to the country's

⁶³ Prohibition of Political Activities Under the IBRD Articles and Its Relevance to the Work of the Executive Directors. Sec M7-1409, at 8 (Dec 23rd, 1987) (Unpublished World Bank doc.) cited in Shihata: The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements 17 Denv. J. Int'l L. & Pol'y 39 1988-1989 pp.39-66 at p.46

population who already are the victims of actions of their own government and the inaction by the Bank.”⁶⁴(Emphasis added)

This approach has been criticized as rendering the individual’s rights to be subject to other (economic) concerns.⁶⁵ Further, Shihata may have contradicted himself when he opined that civil and political rights were outside the purview of the Bank’s mandate, but that situations that affect the implementation or monitoring of a project may be taken into account. One is at pains to appreciate what scenarios the General Counsel had in mind that would be included here while at the same time excluding civil and political rights. If, at the time of setting out the “direct and obvious effect” test, Shihata had in mind the fact that there are “political situations which affect project implementation or monitoring,” and that civil and political rights often have economic effects, then the “degree” of human rights enforcement or violation would inevitably have to be considered in making World Bank decisions.



Subsequent to Shihata’s views on the matter, two General Counsel of the Bank have continued the discussion on this issue. Roberto Dañino issued the next legal opinion offered by a General Counsel of the Bank interpreting these provisions on January 27, 2006. His opinion drew extensively from Shihata’s earlier views. However, while agreeing with Shihata’s position that the Bank as a financial institution is encumbered by both legal and institutional limitations, Dañino noted that “[n]either of these limitations would prevent the Bank from considering non-economic issues, including human rights, that have economic consequences or implications, provided this is done in a non-partisan, non-ideological and neutral manner, and so long as these are related to projects the Bank aims to support. Thus, taking into account, where appropriate, human rights issues and

⁶⁴ Shihata: *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements* 17 *Denv. J. Int’l L. & Pol’y* 39 1988-1989 pp.39-66 at p.47, See also Roberto Daniino: *Legal Opinion On Human Rights And The Work Of The World Bank Senior Vice President And General Counsel*. January 27, 2006 (unpublished World Bank document available at www.worldbank.org on file with the author) at p.7.

⁶⁵ Canan Gunduz (2004), *Human Rights and Development: The World Bank’s Need for a Consistent Approach*. LSE Working Paper Series Publication No. 04-49 ISSN 1470-2320 (on file with the author) at p.12

members' international human rights obligations does not contravene the Articles' prohibition on political interference."⁶⁶

Dañino further stated that consequently, there are instances in which the Bank may take human rights into account, and others in which it should and that indeed there are some activities which the Bank cannot properly undertake without considering human rights.⁶⁷ In his view, such situations include cases where member countries have human rights law obligations that they wish to fulfill such as where a country requests the inclusion of a human rights component in a project and the component has an economic impact, or where violations or non-fulfillment of obligations are at issue, and where these have an economic impact.⁶⁸ Further more, if a human rights violation leads to a breach of international obligations relevant to the Bank, such as those created by binding decisions of the UN Security Council, the Bank should take those violations into account. Similarly, that the bank can, quite properly, support national development plans or instruments such as Poverty Reduction Strategy Papers, which include human rights. In his view, this would enable the Bank to facilitate realization of human rights in partnership with its members, but would not entail the Bank imposing human rights obligations on them.⁶⁹

However, unlike Shihata, Dañino extensively discounted the de-linking civil and political rights from economic, social and cultural rights while including human rights in stating and interpreting the mandate of the Bank. Stressing the indivisibility of all human rights and the evolution of the doctrine of state sovereignty, Dañino opined that the Bank can and indeed should consider *all* human rights within the definition of its political prohibition provisions and mandate and should not make a distinction between the different types of human rights.⁷⁰ The interdependence, indivisibility and interrelatedness

⁶⁶ Legal Opinion on Human Rights and The Work Of The World Bank Senior Vice President And General Counsel. January 27, 2006 (unpublished World Bank document available at www.worldbank.org on file with the author)

⁶⁷ op.cit Danino (2006) Legal Opinion at p. 7, para 18.

⁶⁸ op.cit Danino (2006) Legal Opinion at p. 7, para 19-20

⁶⁹ ibid

⁷⁰ ibid at p.5 e.g. see Article 5, Vienna Declaration and Program of Action, UN Doc. A/CONF. 157/23 (UNGA) (July 12, 1993.)

of all human rights are widely recognized in International Law.⁷¹ Indeed, the Bank is cautious of the fact that human rights are interrelated, interdependent and indivisible and that its work has an impact on both economic, social and cultural rights as well as civil and political rights.⁷²

Ana Palacio, the Bank's present General Counsel and Senior Vice President,⁷³ provided a most succinct analysis of Dañino's opinion. In her opinion, this document marks a clear evolution from the pre-existing restrictive legal interpretation of the Bank's explicit consideration of human rights. It is "permissive": allowing, but not mandating, action on the part of the Bank in relation to human rights. It clarifies "the state of the law," and gives the Bank the necessary leeway to explore its proper role in relation to human rights, updating the legal stance adopted internally to accord with the Bank's practice and the current international legal context. It facilitates a more comprehensive understanding of human rights in development, and enables the Bank to take these issues into account where they are relevant. Finally, it represents *a point of departure for future legal analysis on human rights by the Legal Vice-Presidency* as well as further thinking on this matter by subsequent General Counsel of the World Bank Group.⁷⁴

⁷¹ Article 13, Proclamation of Teheran, UN Doc. A/CONF.32/41 at 3 (1968), GA res.42/102 Indivisibility and interdependence of economic, social, cultural, civil and political rights. (Adopted at the 93rd Plenary Meeting, Dec.7, 1987 available at

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/513/34/IMG/NR051334.pdf?OpenElement> GA Res.40/114 indivisibility and interdependence of economic, social, cultural, civil and political rights (Adopted at the 116th plenary meeting, 13 Dec. 1985.) Available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/478/21/IMG/NR047821.pdf?OpenElement>; GA Res. 13/130 (105th Plenary Meeting, Dec. 16th, 1977).

⁷² World Bank (1998), Development and Human Rights: The Role of the World Bank ISBN 0-8213-4340-8 at pp3 and 4

⁷³ Ana Palacio replaced Dañino, who left the Bank at the end of January 2006. At the time of writing (as at May 30th 2007), Ana Palacio is still Senior Vice President and General Counsel of the World Bank.

⁷⁴ Italics added to emphasize that this shows that the issue is far from resolved and that any future analysis by the General Counsel may only raise divergent views, as is indeed argued elsewhere in the thesis, hence the ardent need for a different approach and a more resolute solution as is suggested in Chapter four. See Ana Palacio (2006), The Way Forward: Human Rights and the World Bank Article on the World Bank Development Outreach, World Bank Institute, October 2006 available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445640~pagePK:64020865~piPK:149114~theSitePK:445634,00.html> accessed on 27/02/2007 She further extends the need to cautiously take into account the indivisibility of all rights and the fact that state sovereignty may no longer be a tenable defence to the entire human rights question as it has evolved.

Palacio further states that it is now clear that the Bank can “and sometimes should” take human rights into consideration as part of its decision-making process, but that the challenge it is now faced with is to clarify how these legal concepts should be specifically incorporated into the work of the Bank in order to further its mission of sustainable and equitable development. She then sets out three considerations that the Bank needs to take taking into account: first, that many areas of Bank activity have a human rights dimension and that there are wide zones of overlap between substantive areas covered by core human rights treaties and areas in which the Bank operates but that the Bank contributes to the realization of human rights in these different areas, even though its policies, programs and projects have never been explicitly or deliberately aimed towards the realization of human rights.⁷⁵

Second, that there is a need for recognition of the role of human rights as legal principles, which may inform a broad range of activities, and which may enrich the quality and rationale of development interventions, and provide a normative baseline against which to assess development policies and programming. And third, that there should be a clear understanding that in certain cases and under certain circumstances, human rights generate actionable legal obligations. Such obligations may arise from international treaties, or from rights enshrined in national laws. Here the Bank’s role is to support its Members to fulfill those obligations where they relate to Bank projects and policies.⁷⁶

Palacio continues to note that from an internal perspective, the Bank’s analytical work can benefit from a systematic inclusion of human rights considerations and the broadened range of legal analysis these require. Areas such as governance or the legal empowerment of the poor are particularly relevant in this respect. However, before stating all the foregoing, she notes that in fulfilling this role, the Bank must also respect the legal limits imposed by its Articles of Agreement.⁷⁷

⁷⁵ *ibid*

⁷⁶ *ibid*

⁷⁷ *ibid*

Palacio's views show that the Bank is now ready to inculcate human rights in its mandate, but that the issue to deal with now is how this should be done. Her enunciation of the need to recognize how human rights principles can enrich the quality of development (which is the Bank's sole purpose), and the Bank's role in supporting members to fulfill their human rights obligations need not be overemphasized. But her qualifying all this with the need to keep the Bank's work within the confines of its political prohibition provisions shows that these provisions water down the Bank's potential to reap all the expected outcomes of her suggested pro-human rights approach and shows how critical it is to unfetter the Bank's mandate.

Read together, Danino and Palacio's views reflect an internal paradigm shift towards a pro-human rights approach to the Bank's work but also reflect the imminence of the need to unfetter its mandate from the existing political limitations. Their views also lead to a *de facto* conclusion that while there is no traceable nexus between human rights and the Bank's mandate in the history of the political prohibitions as posited earlier in this chapter, their relation with the Bank's work is undeniable. Therefore, there is room, if not need, for the consideration of all human rights issues as part of a more holistic approach to development in the operations of the World Bank. This must not be limited to "doing no harm" but extend to the adoption of a policy framework that mainstreams human rights concerns.⁷⁸

There are two other issues that need to be kept in mind. First is the potential overlap between the Bank and other specialized agencies of the UN that may arise as a result of embracing human rights within the Bank's mandate and second is the question whether there is now the necessary political will to include human rights in the Bank's mandate. With regard to the potential overlaps between the Bank's area of operation, there are a number of ways in which this can be dealt with as has been stated elsewhere and as will additionally be suggested in chapter four of this paper.⁷⁹ The question of the necessary

⁷⁸ Gernot Brodnig The world Bank and Human Rigts: Mission Impossible? Carr Center for Human Rights Working Paper T-01-05 at pp.9-13

⁷⁹ For a discussion n the possible overlap and attendant limitations to the suggested ways of going round such a potential overlap between the Bank's work and other human rights treaties and specifically

political will remains a major challenge. Nevertheless, one may quite easily argue that there is barely an indication of any measures to show that this issue is being addressed and one way to test for such political will is to bring the issue to create forums at which to bring the human rights question to the attention of all members and seek their collective and participatory views, such as in an attempt to amend the Articles of Agreement, as is further argued below

2.3 To amend or not to amend: which way forward?

The debate on political prohibition is a vivid illustration of the assertion that there is no doubt that the activities of the Bank have changed over the years and are likely to experience further variation as the world in which the Bank deals changes.⁸⁰ The difficulties of adapting old legal texts to changing circumstances are well known and have been dealt with in every legal system through interpretation and the filling of gaps by the courts and legal scholars.⁸¹

In the case of the Bank, this power of interpretation was vested in and first extensively utilized by the Board of Executive Directors and later delegated to the General Counsel who have for a long time now served to clarify all such matters as have needed clarity.⁸² On the issues discussed in this chapter, however, these General Counsel interpretations have reached a crossroads. Extensive arguments have been canvassed in these opinions as to what genres of human rights (that is to say civil and political rights on the one hand or economic, social and cultural rights on the other) should be considered in the making of World Bank decisions but it is hard to reconcile Dañino and Palacio's indivisibility approach to human rights with Shihata's lopsided approach as discussed above. Also, while her views call for a cautious approach on this issue and notes that from an internal viewpoint the Bank's work can benefit from a systematic inclusion of human rights considerations and the broadened analyses these require, Ana Palacio does not provide a

mandated UN Agencies focusing on human rights see D.D. Bradlow and C. Grossman (1996), Limited Mandates and Intertwined Problems: The A new Challenge for the World Bank and the IMF Human Rights Quarterly 17.3 411-442 at pp.433-437

⁸⁰ Shihata (1991): The World Bank in a Changing World, Selected Essays vol. 1 pp.1-2.

⁸¹ *ibid*

⁸² *Ibid* at p.1

concrete approach that would reconcile the divergent views of the Bank's members on which criteria should be used in determining how human rights should be inculcated into the Bank's mandate.

The issue of whether or not the Articles need to be amended thus arises. There is an increasing demand on the Bank to be involved in an open way in the protection of political rights.⁸³ While some have argued that the articles should be amended to encompass human rights,⁸⁴ others have argued that such an amendment is unnecessary, as human rights fall within the purview of the Bank's mandate.⁸⁵ Another view is that although clarity is required in this area, an amendment would have such consequences as opening the Articles to further and easier amendments.⁸⁶ Consistent with this view is the opinion that rather than amend the articles, the General Counsel should, at the request of the Board of Executive Directors, provide a legal opinion on what political or human rights issues should be covered within or left outside the Bank's considerations in making its decisions.⁸⁷

Human rights are undoubtedly political matters and to this extent prohibited by the text of the Articles, regardless of how the issue is approached. "Stretching" the mandate by way of interpretation has only served to heighten the debate, and so will the semantics of adopting a rights-based approach without adjusting the mandate. Their inclusion in the

⁸³ Shihata (2000), *The World Bank in a Changing World* vol.2 at p.151

⁸⁴ Levinson, J. (1992): 'Multilateral Financing Institutions: What Form of Accountability?' *American University Journal of International Law and Policy*, vol.8 see also Jerome Levinson, 'Repressive Regimes Shouldn't get a Loan,' *Washington Post*, 15 June 1998 at A23.

⁸⁵ Canan Gunduz (2004), *Human Rights and Development: The World Bank's Need for a Consistent Approach*. LSE Working Paper Series Publication No. 04-49 ISSN 1470-2320 p.4, 17-21, see also House of Commons Canada, *From Bretton Woods to Halifax and Beyond: Towards a 21st summit for the 21st Century Challenge*, Report of the House of Commons Standing Committee on Foreign Affairs in International Trade on the issues of International Financial Institutions Reforms for the Agenda of June 1995 G-7 Halifax Summit, at 38-40 (1995). This report called for a task force to consider *inter alia* the amendment of the Articles of Agreement but no such proposal was made. *See also* parliamentary assembly of the Council of Europe, Report and draft resolution 7th Committee on Economic Affairs and Development on the Bretton Woods institutions (Doc. 7256, dated 17 February, 1995). The draft calls for the amendment of the Bank's articles of Agreement. The reports are also cited in Shihata (2000) *supra*.

⁸⁶ A discussion between the author and Professor Daniel Bradlow of American University on February 28th, 2007 at American University Washington College of Law.

⁸⁷ A discussion between the author and Professor Daniel Bradlow of American University on February 28th, 2007 at American University Washington College of Law.

work of the Bank is imminent. The issue of whether to include all human rights or exclude civil and political rights ought to be approached in light of their indivisible nature, thereby leading to the conclusion that civil and political as much as economic, social and cultural rights ought to be considered. A legal opinion by the General Counsel stating what political and human rights issues should be considered by the Bank in this case would be the best alternative.

However, there are limitations to this approach. Firstly, such a legal opinion would not settle this issue with finality. These opinions largely differ and such an interpretation will only leave room for a later interpretation once Legal Counsel change and others bring different and fresh perspectives to the debate. Secondly, the perception of the whole notion of human rights and their importance and relationship to development differs among countries. A critical question is which yardstick a General Counsel would use in determining which rights to include or exclude. In the event of an amendment, however, one hopes that involving all the Bank's members would go a long way in availing all members an avenue to voice their views on the attendant issues and help in reaching a common position acceptable to all the Bank's member countries.

Attempting to amend the Articles would entail a two part process: deliberation of all the attendant issues by the members and the decision making process. The feasibility of this view rests in the assumption that the deliberation process would hopefully be an avenue to shed some light on what human rights aspects and dimensions the Banks members would want to have included in the Bank's mandate. The outcome of these deliberations would then hopefully present some form of yardstick or measure by which to craft a contemporary definition of "political" as distinguished from "economic" issues in terms of the Bank's Articles and which human rights, if any, should be considered in making the Bank's decisions.

Therefore, the Board should be invited to consider whether these provisions should be retained or expunged in their entirety from the text of the Bank's Articles. In the event that this is found untenable, an amendment to their text should be considered with the

view of including human rights to the extent that their violation affects the Bank's work or impedes the full realization of its intended benefits. The amendment, if approved, will serve two purposes. Firstly, it will set out a clear and contemporary definition of what is considered "political" and how that is to be distinguished from "economic" and secondly, how human rights are to be considered in juxtaposition with the Bank's work and mandate.

While some⁸⁸ have considered the matter from the viewpoint of amending the articles to exclude countries with poor human rights records from World Bank lending, such an approach would still inflict double punishment on the populations of those countries as discussed earlier. In fact, no government has ever changed its political behavior towards its citizens due to suspension of Bank lending.⁸⁹ Besides, situations may arise (as in the case of South Africa during the Apartheid era) that a country with a poor human rights record has sound economic policies. Eliminating such countries from World Bank lending would be unjustified. The suggested amendment should thus focus on ways of encompassing human rights in the mandate of the Bank. After amending the Articles, like with the government of Chad (as will be discussed in the next chapter), the Bank may then, on a project by project basis, resort to more creative and yet highly stringent measures to compel its borrowing members to comply with both their human rights obligations as well as their obligations to the Bank.

One of the arguments raised against amending the Articles of Agreement to allow for the protection of human rights is that it is a Herculean task that may never succeed. In fact, in all the years of its existence, the IBRD articles have only been amended twice, with the second amendment making further amendment even harder.⁹⁰ But it is worth noting, albeit with no degree of absolute certainty, that if the Board chooses not to amend the Articles, the process could still yield results in reconciling the various divergent views discussed above.

⁸⁸ Shihata (2000), Jerome Levinson, 'Repressive Regimes Shouldn't get a Loan,' Washington Post, 15 June 1998 at A23.

⁸⁹ Ibrahim Shihata (2000): *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, at p.182.

⁹⁰ Shihata (1991): *The World Bank in a Changing World*, Selected Essays vol. 1 p.1

Concluding remarks.

The foregoing discussion shows that the issues at hand remain far from being resolved. The varying opinions discussed above point to the conclusion that the World Bank as a development financial institution cannot effectively do its job while ignoring political issues. In the context of human rights, while economic, social and cultural rights have long been known to affect the Bank's mandate, research has shown that substantial violation of political and civil rights are related to lower economic growth and that they causally affect economic social and cultural rights, and in the process, the rate of development in the Bank's member countries.⁹¹

As a development institution, the World Bank in determining the creditworthiness of its borrowers needs to look out for human rights issues, not with the intention of deciding whether to lend or not to lend, but with the intention of finding creative ways to address the problematic concerns against human rights violations that may arise. As will be seen in the next chapter, this approach is possible and viable, and in some cases, the development of countries well endowed with natural resources and a lot of development potential may forever be forgotten if the Bank shuns this approach. Human rights considerations vary both in nature and magnitude but are central to the wealth and development of nations as well as to the efficiency and continued existence of the World Bank.

A lesson to be learned from the South Africa and Portuguese controversy discussed earlier in this chapter is that the Bank cannot and need not deny credits to borrowers who demonstrate good economic development but are tarred by gross human rights violations. The Bank also has to consider the fact that situations where good human rights records are demonstrated in the light of poor economic policies may arise. Just as the Bank may craft ways to aid economic reform, its role in dealing with human rights issues relevant to its mandate and projects is equally important. It is not the researcher's intention to in any

⁹¹ See Robert J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study*, (Cambridge, Mass.: MIT Press, 1997) see also Daniel Kaufmann (2005): *Human Rights and Governance: The Empirical Challenge*. World Bank Institute. (On file with the Author).

way suggest that World Bank funding should be turned into some form of reward for good human rights or political performance on the one hand and *de facto* punishment for violation on the other. The solution, as has been variedly opined outside the scope of this paper, is to have a country specific approach to development problems.⁹² As with the Chad-Cameroon pipeline discussed in the next chapter, the Bank should seek and implement creative ways and means of achieving its desired development ends.



⁹² See generally Caufield (1996), *Masters of Illusion: The World Bank and the Poverty of Nations*, Mallaby (2004), *The World's Banker: A Story of Failed States, Financial Crises, and The Wealth and Poverty of Nations* Penguin Books in Chapter 8, pp.207-231 showing how Uganda's perceived success was attempted to be applied else where.

CHAPTER THREE

THE WORLD BANK, HUMAN RIGHTS AND THE CHAD-CAMEROON PETROLEUM DEVELOPMENT AND PIPELINE PROJECT: A BIRD'S EYE VIEW.

*The Bank's business is third world development, an activity that might be described as the art – for it certainly is not a science – of the life of countries in Asia, Africa and Latin America. What exactly constitutes improvement and how to achieve it have been matters of dispute for more than fifty years. But whatever development is, the World Bank is its leader. **

Oil development in Sub-Saharan Africa has a history of ruinous corruption, armed conflict, human rights violations and environmental degradation.⁹³ This is true of the situation in countries like Nigeria and Angola.⁹⁴ Despite this negative history, it remains a telling commentary on our time that nations can be propelled from obscurity to prominence by the simple announcement that oil deposits have been discovered on their territory. Such was the case in Chad with the formal approval of the Chad-Cameroon Petroleum Development and Pipeline Project.⁹⁵ Twice the size of Texas in its geographical area, with a population of 8.6 million people, a Gross National Income (GNI) per capita of US\$260, a life expectancy of 48 years and a literacy rate below 50

* Caufield, C. (1998): *Masters of Illusion: The World Bank and the Poverty of Nations* (Houndmills: Macmillan), p. 1

⁹³ See Korinna Horta (2006), *Development Effectiveness and Lessons Learned: The Chad-Cameroon Oil Development & Pipeline Project* (statement before US Senate Foreign Relations Committee) available at <http://www.senate.gov/~foreign/hearings/2006/hrg060712a.html> on file with the author, at p.4. See also Gary and Karl (2003), *Bottom of the Barrel: Africa's Oil Boom and the Poor*, Catholic Relief Services. Available at http://www.crs.org/get_involved/advocacy/policy_and_strategic_issues/oil_report_one.cfm on file with the author.

⁹⁴ A good example is the situation in Nigeria's Ogoniland, which the Chad-Cameroon project was feared to replicate. See Korinna Horta (1997), *Questions Concerning the World Bank and Chad/Cameroon Oil and Pipeline Project: Makings of a New Ogoniland? Corporate Welfare Disguised as Aid to the Poor?* (Environmental Defense Fund, Washington, D.C.). The term Ogoniland refers to the oil-producing community in the delta of Nigeria. Although the Ogonis are not the only ethnic group living in the delta, they became a symbol of human rights violations and environmental depletion caused by oil exploitation by Western multinationals. The same is now said of the Bakola/Bagyeli indigenous people of Cameroon as a result of the Chad-Cameroon pipeline. For a study of the Ogoniland struggle in the delta of Nigeria, see Amos Adeoye Idowu (1999), *Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode*, 17 *Netherlands Q. Hum. Rts.* 161. For a study of the impact of the Chad-Cameroon project on the Bakola/Bagyeli people, see Korinna Horta, Samuel Nguiffo, Delphine Djiraibe, (2007), *The Chad-Cameroon Oil & Pipeline Project: A Project Non-Completion Report* (on file with the author).

⁹⁵ Donald R. Norland (2003): *Innovations of the Chad/Cameroon Pipeline Project: Thinking outside the Box* *Mediterranean Quarterly*: Spring 2003 pp.46-59 at p.46

per cent,⁹⁶ Chad is one of the poorest and most corrupt countries in the world, ranking 167th out of 177 countries.⁹⁷

Against this background, the Chad-Cameroon project was seen by the Bank as “an unprecedented framework to transform oil wealth into direct benefit for the poor.”⁹⁸ The Bank thus set out to create a project with unique and stringent methods of supervision, monitoring and revenue management. The project has since become very widely publicized and criticized for initially bringing excitement and later resulting in shattered hopes for the people of Chad on one hand and satisfaction for the Bank on the other hand.⁹⁹

This chapter takes stock of the Bank’s role in the Chad-Cameroon project against the backdrop of human rights and development, with specific restriction to events in Chad. The chapter is divided into four parts. The first part comprises of a description of the project and how it was financed. The second part discusses the Bank’s role and the Project Revenue Management Plan. The third part evaluates the monitoring and supervision mechanisms, and the fourth draws together the conclusion.

⁹⁶ op.cit Donald R. Norland at p.46. See also World Bank: Implementation Completion Report on Two IBRD Loans in the Amount of US\$39.5 Million and In the Amount of US\$ 53.4 Million Respectively to the Republic of Chad and the Republic of Cameroon for a Petroleum Development and Pipeline Project December 15 2006 (on file with the author) at p.2 varying figures are available at http://www.unicef.org/infobycountry/chad_statistics.html the figures relied on above are those obtained from the World Bank

⁹⁷ Ian Gary, Nikki Reisch (2005), Chad’s Oil: Miracle or Mirage? Following the Money in Africa’s Newest Petro-State at p.15

⁹⁸ World Bank Press Release on approval of the project, June 2000. See also D. Djiraibe, K. Horta, S. Nguiffo, (2004) Access to Justice from Local Village to Global Boardroom: An Experience in International Accountability The World Bank Inspection Panel and the Chad-Cameroon Oil and Pipeline Project available at <http://www.if-watchnet.org/documents/item.shtml?x=43583> on file with the author.

⁹⁹ In December 2006 (two years after the completion of the project), the Bank rated its performance as satisfactory. See World Bank: Implementation Completion Report on Two IBRD Loans in the Amount of US\$39.5 Million and In the Amount of US\$ 53.4 Million Respectively to the Republic of Chad and the Republic of Cameroon for a Petroleum Development and Pipeline Project December 15 2006 (on file with the author) at p.13 See also instance Korinna Horta (2001), Chad-Cameroon: Oil Revenues Versus Human Rights and Environment, World Rainforest Movement Bulletin April 1, 2001 at p. 1, further see Ian Gary, Nikki Reisch (2005), Chad’s Oil: Miracle or Mirage? Following the Money In Africa’s Newest Petrostate at p.1 For a discussion of the criticism of the project, generally also see Donald R. Norland: Innovations of the Chad/Cameroon Pipeline Project: Thinking outside the Box Mediterranean Quarterly: Spring 2003 pp.46-59

3.1 The Project: Unprecedented Precedent.

The project consisted of a public-private partnership between the government of Chad, the World Bank, and a consortium of oil companies—including ExxonMobil as leading shareholder with a 40% stake, Petroleum Nasional Berhad (Petronas) and Chevron with 35% and 25% stakes, respectively. These organizations collaborated in the development of three oil fields in the vicinity of Doba in Southern Chad, a project that included the drilling of about 300 wells, the construction of associated infrastructure, and the construction of a pipeline 30 inches in diameter and 1,070 kilometers in length, buried 1 meter in depth, from the Doba oil fields to Cameroon's Atlantic coast at Kribi. The pipeline also has three pumping stations, ancillary facilities and infrastructure improvements, as well as offshore floating storage, offloading vessels and related facilities.¹⁰⁰ The project was completed in 2004, a year ahead of schedule.¹⁰¹

3.1.1 Financing

At a final cost of US\$ 4.8 billion,¹⁰² the project is the single largest investment in Sub-Saharan Africa today. The consortium of companies involved, complemented by World Bank loans, sourced the required capital. Project finance included loans from the World Bank Group: IBRD loans to Chad and Cameroon worth \$92.9 million and a IFC loan worth \$200 million, a European Investment Bank loan worth \$41.5 million and loans from three different Export Credit Agencies: \$200 million from the U.S. EXIM Bank, \$200 million from COFACE (France) and \$500 million from the African Ex-Im Bank. The equity partners – ExxonMobil, Chevron and Petronas – who covered the full cost of oil field development and one third of the export facilities, met more than half of the total

¹⁰⁰ World Bank (2006): Implementation Completion Report on Two IBRD Loans in the Amount of US\$39.5 Million and In the Amount of US\$ 53.4 Million Respectively to the Republic of Chad and the Republic of Cameroon for a Petroleum Development and Pipeline Project December 15 2006 (on file with the author) at p.3 See also B. C. Esty, (2001), The Chad-Cameroon Petroleum Development and Pipeline Project (A). Harvard Business School pp. 1-2 and Donald R. Norland: Innovations of the Chad/Cameroon Pipeline Project: Thinking outside the Box Mediterranean Quarterly: Spring 2003 pp.46-59 at p. 47

¹⁰¹Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State at p.25

¹⁰²op.cit World Bank (2006) at p. 23. Varying sources present different figures for the cost of the pipeline. Project cost was originally estimated at \$ 3.7 billion. In an October 2004 presentation ExxonMobil stated that the total cost was \$4.2 billion. The divergence is explained by the fact that the ultimate cost of the project exceeded the estimates. In December 2006, the Bank offered 4.8 billion as the final cost of the project.

project cost. Two commercial banks provided the rest of the financing: ABN-Amro and Credit Agricole Indosuez.¹⁰³

3.2 World Bank Involvement

There are a number of reasons that account for the World Bank's involvement in the Chad Cameroon project. Firstly, the Bank provided political risk insurance to the other lenders involved. Bank staff including President Wolfenson made it clear that they were aware of the risks involved, but that there were viable means to address such risks.¹⁰⁴ In the Bank's own words, "[its] involvement, ... provide[ed] comfort to [the] oil companies and lenders that the political risks presented by this cross-border operation and first-time petroleum export venture from Chad [could] be adequately mitigated...."¹⁰⁵ The Bank was a logical choice to approach for this insurance because it is rated as a first class borrower on the international financial market, has extensive lending and policy experience with developing countries, and has been working with Chad and Cameroon for many years.¹⁰⁶

Other reasons, both positive and negative, influenced the Bank's decision to participate. On the positive side, the Bank saw this as a commercially viable project in which it could ensure that the host countries would receive returns that were commensurate with the risks they would bear. It also saw this project as one that would allow the Bank to play an important role in protecting the environment and indigenous people.¹⁰⁷ Thirdly, the project presented a promising opportunity to jumpstart Chad's economy.¹⁰⁸

On the negative side, there was a genuine concern within the Bank that if it did not get

¹⁰³ Source: World Bank Group, Export Credit Agencies, Afreximbank, Environmental Defense, Petroleum Economist (Feb. 16, 2004 – "Chad-Cameroon: Against All Odds") see also Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State at p.6.

¹⁰⁴ Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State at p.15, see also B. C. Esty, (2001), The Chad-Cameroon Petroleum Development and Pipeline Project (A). Harvard Business School p.5

¹⁰⁵ World Bank, Chad-Cameroon Petroleum Development and Pipeline Project: Project Appraisal Document, April 2003, 2000, Annex 4, p.63, para. 8.

¹⁰⁶ Op.cit B. C. Esty, (2001), at p.5

¹⁰⁷ Ibid at p.6

¹⁰⁸ ibid at p.6. See also Ian Gary, Nikki Reisch (2005), at p.10

involved, sponsors might abandon the project and look to invest in safer countries, or, worse, Chad might have sought to develop its oil fields with the aid of other neighboring countries, notably Sudan and Egypt, both major oil exporters.¹⁰⁹ Partnerships with these countries would have had negative effects on the internal civil strife in Chad. The Sudanese government had recently financed a pipeline without the Bank's help and was using the proceeds to fund a civil conflict in Darfur. In addition, Libya's President Muammar Quaddafi had been urging Chad's President Derby to drop his deal with the west and ship oil through Libya. Both of these countries had been classified by the United States as terrorist countries, nevertheless they presented a feasible option for exporting oil.¹¹⁰

The Bank should be lauded for ultimately deciding to fund the project. All of the above reasons reflect a desire to aid development in Chad, or at least to avoid aggravating the country's poverty and civil strife with oil proceeds. However, the above discussion also shows that in deciding whether to invest in Chad or not, civil strife, bad governance and regional politics were just as important as economic development and poverty eradication. This is as true of other poor countries and just like in this case the Articles on political prohibition were not reason enough for the Bank not to invest, so should it be elsewhere.

The Bank's involvement was not without critical opposition from some of the other Bank members,¹¹¹ the local population in Chad and Cameroon, academics and civil society organizations. Some of the factors of contention included the political volatility in Chad, fears that the project would exacerbate the already terrible state of corruption in Chad, the potential misuse of oil proceeds in Chad as in other African oil exporting countries and

¹⁰⁹ *ibid* B.C. Esty (2001)

¹¹⁰ B. C. Esty, (2001), *The Chad-Cameroon Petroleum Development and Pipeline Project (A)*. Harvard Business School p.7

¹¹¹ For instance, the Dutch and German governments considered the initial Environmental studies on the project insufficient and made independent reports to that effect, prompting fresh environmental studies that were 19 volumes and reflected some changes in response to the inadequacies raised in the independent studies. See Association Tchadienne pour la promotion et Defense des Droits de l'Homme, Chad, Centre pour l'Environnement et le Development, Cameroon, Environmental Defense Fund, U.S.A. (1999): *The Chad Cameroon Oil and Pipeline Project: Putting People and the Environment at Risk*, p.3

inadequate compensation of land owners who lived along the route of the pipeline.¹¹² Several civil society organizations within and outside Chad and Cameroon watched over the project and made numerous informative reports, drawing attention to the project.¹¹³ For example, when Mr. Ngarledji Yorongar, a Parliamentarian in Chad was arrested, held in jail for nine months, and tortured, these organizations alerted the Bank's president, who intervened for Mr. Yorongar's release.¹¹⁴ This example also shows that World Bank funded projects may often give rise to political and human rights situations which only the Bank has the capacity and influence to resolve and its intervention ought not to be hampered by its limited mandate.

These organizations also played a central role in exposing major weaknesses in both the project itself and the Bank's role that were excluded from later Bank evaluation documents.¹¹⁵ A number of these weaknesses were presented in two complaints before the World Bank Inspection Panel. In one of these complaints, the panel found that the Bank had flouted some of its own Operation Procedures and Directives (ODs).¹¹⁶ Examples of such findings included the lack of consideration of the spacio-temporal context of the project, as was required by OD 4.01, the lack of cumulative effect assessment of the project and failure by the Bank's management to prepare a Regional Environmental

¹¹² Donald R. Norland (2003): *Innovations of the Chad/Cameroon Pipeline Project: Thinking outside the Box* Mediterranean Quarterly: Spring 2003 pp.46-59 at p. 49-50

¹¹³ Such organizations include Amnesty International, Catholic Relief Services, Bank Information Centre, Environmental Defence, Friends of the Earth, Association Tchadienne pour la Promotion et la Défense des Droits de l'Homme, Chad, Centre pour l'Environnement et le Développement, *Coordination permanente Pétrole Locale, Groupe de Recherches Alternatives et de Monitoring du Project Pétrole Tchad Cameroun. Groupe de Concertation et d'Action*

¹¹⁴ G. Brodnig (2003), "This is the President of the World Bank Calling..." in Amnesty International: *Human Rights Trade and Investment Matters*, ISBN1 8733_865 6 at p.8

¹¹⁵ One such report that succinctly summarized the weaknesses of the project was jointly authored by Environmental Defence, Catholic Relief Services and Bank Information Centre titled *The Chad-Cameroon Petroleum Development & Pipeline Project Environmental and Social Problems Identified by the External Compliance Monitoring Group, the International Advisory Group and The Inspection Panel* (2004). See also Association Tchadienne pour la Promotion et la Defense des Droits de l'Homme Chad, Centre pour l'Environnement et le Developpement, Cameroon, *Environmental Defense Fund: The Chad Cameroon Oil and Pipeline Project: Putting People and the Environment at Risk*. P.14.

¹¹⁶ World Bank, *The Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project* (Loan No. 4558-CD); *Petroleum Sector Management Capacity Building Project* (Credit No.3373-CD); and *Management of the Petroleum Economy* (Credit No. 3316-CD), See also World Bank: *Implementation Completion Report on Two IBRD Loans in the Amount of US\$39.5 Million and In the Amount of US\$ 53.4 Million Respectively to the Republic of Chad and the Republic of Cameroon for a Petroleum Development and Pipeline Project* December 15 2006 (on file with the author) Annex 11, notably pp.53-55

Assessment, which would have assessed the nature and extent of broader environmental and social concerns resulting from the project.¹¹⁷

Paragraph 19 of Operation Directive 4.01 further requires that as part of the Bank's policies, it is required to consult the communities that are likely to or are being affected by the projects it finances.¹¹⁸ In assessing how this process was carried out in Chad, the panel noted that consultation of affected persons was conducted in the presence of security forces, which is incompatible with the Bank's policy requirements. Further, the panel remarked that as has been noted in previous Inspection Panel reports, full and informed consultation is impossible if those consulted perceive that they could be penalized for expressing their opposition to, or honest opinions about, a Bank financed project.¹¹⁹ All of the above concerns related directly to the violation of human rights of the local people in the areas where the project was to be built, illustrating the fact that World Bank funded projects do have human rights and political consequences.

More directly on the issue of human rights, the Inspection Panel regurgitated the "direct and obvious effect" test discussed in chapter two, but disagreed with management's narrow interpretation and application of when and how relevant human rights were to this project. In its own words, the panel stated:

"On the fiftieth anniversary of [the Universal Declaration of Human Rights adopted in 1948], the Bank wrote, "The World Bank believes that creating the conditions for attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the very foundation of its approach to development, the Bank helps the people in every part of the world to build lives of purpose and hope. And while the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports, it has been less forthcoming about articulating its role in promoting human rights within the

¹¹⁷ *ibid* para 9, p.54 this was found to be in non compliance with paragraph 5 of OD 4.01

¹¹⁸ *ibid* p.57

¹¹⁹ *ibid* Implementation Completion Report at p.57

countries in which it operates.”¹²⁰

The panel acknowledged that there were other institutions including UN bodies specifically in charge of this subject. However, it stated that it “felt obliged to examine issues of human rights violations in Chad where they were such as to impede the implementation of the project in a manner compatible with the Bank’s policies.”¹²¹

The panel also commended the Bank’s management for encouraging frequent consultation with local communities and civil societies in a more conducive environment¹²² and further noted that on more than one occasion the President of the Bank had intervened when political repression seemed severe.¹²³ With regard to reports that local leaders had expressed their opinion about the project without incurring physical violence but while being harassed, the panel observed that this situation was far from ideal and that this raised questions about compliance with Bank policies.¹²⁴ One would then have expected the panel to highlight the questions to which it alluded, and to provide answers to these questions, in a bid to guide the Bank’s practice in similar situations should they arise in future projects. Unfortunately, the panel neither discussed the questions to which it made reference, nor suggested better ways in which such situations involving the participation of communities should be dealt with in future. As such, with regard to the issue of public participation, the panel’s approach is superficial, to say the least. This buttresses the need for a comprehensive and well publicized Bank policy on public participation alluded to earlier in this paper.

¹²⁰ World Bank, The Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No.3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD) at p. 62 (Emphasis in original)

¹²¹ Inspection Panel, Investigation Report, Chadian Claim, p.61-62. See also World Bank: Implementation Completion Report on Two IBRD Loans in the Amount of US\$39.5 Million and In the Amount of US\$ 53.4 Million Respectively to the Republic of Chad and the Republic of Cameroon for a Petroleum Development and Pipeline Project December 15 2006 (on file with the author) Annex 11Para 35, P. 58

¹²² World Bank, The Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No.3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD), See also World Bank: Implementation Completion Report on Two IBRD Loans in the Amount of US\$39.5 Million and In the Amount of US\$ 53.4 Million Respectively to the Republic of Chad and the Republic of Cameroon for a Petroleum Development and Pipeline Project December 15 2006 (on file with the author) Annex 11, notably pp.53-55

¹²³ ibid para 37

¹²⁴ ibid para 37, p.59

The Inspection Panel should be credited for its approach to the human rights impact resulting from the project. However, the panel's approach did not translate into the remedial action sought by the complainants. Gross human rights violations went unabated.¹²⁵ In one of its reports, Amnesty International categorized the rights broadly violated to include violation of the rights to: a remedy, non discrimination and equal protection of the law, the environmental right to a clean and healthy environment, health and safe working conditions, freedom of expression, freedom of assembly, and access to knowledge.¹²⁶ Some examples included the pacification of oil critics, summary and extrajudicial executions, massacre of unarmed civilians by government troops, inadequate and unfair compensation of land owners and involuntary resettlement and dust emissions that were not addressed resulting into disease outbreaks.¹²⁷

The failure by the Bank to comply with its Operation Directives directly allowed the perpetration of human rights violations. For example, if the Bank had ensured compliance with its environmental protection measures, all the environmental (and to some extent health) human rights violations cited above would not have occurred. The Inspection Panel, as an evaluative mechanism is intended to hold the Bank accountable to its members in the execution of its duties. On most of the complaints it handled, especially those relating to environmental and regional impact assessment and the issue of consultation in a friendly environment,¹²⁸ the Panel simply stated that more monitoring was required, but did not set the standards for such monitoring. The Panel would have done better by suggesting measures to remedy the situation. Pointing out these failures on the part of the Bank is a positive step, but an inconclusive one. A comprehensive human

¹²⁵ US Department of State 1999b Chad Country Report on Human Rights Practices for 2003. Bureau of Democracy, Human Rights and Labor, February 25th 2004, US Department of State, Bureau of African Affairs, Background note on Chad January 2002 (Amnesty International AI-Index: AFR 20/004/1997. Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State at p.17-19, end note 34, Amnesty International, Contracting Outside Human Rights: The Chad Cameroon Project ISBN 1873328 62 1 see also Ndoube Nkoto: Social Closure in the Chad Cameroon Pipeline: The Right to Repairs Damage or the Right to Profit? Available at http://www.eca-watch.org/problems/oil_gas_mining/FOCARFE_pipelinemay05.htm visited on 26/03/2007

¹²⁶ *ibid* Amnesty International, Contracting Outside Human Rights at pp. 15, 17, 34-40.

¹²⁷ *ibid*

¹²⁸ See notes 117,119 and 124 above and accompanying text.

rights approach should be one that guides even evaluative mechanisms on how this accountability is to be ensured. One may arguably say that the Panel's shortcomings lie in the limitations to which it can stretch its mandate in light of the overall mandate of the Bank, which is fettered by political prohibition and thereby restricting proactive approaches to the protection of human rights.

Thus, the Panel's failure is an indication of an even bigger flaw in the Bank's approach to human rights. As discussed in chapter two, the Bank has always distanced itself from requiring the enforcement of certain human rights (notably civil and political rights as discussed in chapter two). The broad range of rights affected by this project exemplifies how in their interrelated nature, human rights can be affected by the Bank's projects. As will further be discussed in chapter four, this interface of all these human rights in a project involving the Bank therefore draws the suggestion that the Bank as the architect of these projects should critically study the human rights situation in the Borrower country and come up with ways to improve it or avoid its aggravation. The Bank may then initiate collaboration and champion synergy between other UN agencies it deems more appropriate to deal with the human rights issues that surround or result from its investment. This may require measures such as drafting a specific human rights policy as part of its Operation Directives that must be complied with in all the projects it funds but this still raises the issue as to whether it can go to such an extent with its present limitations in the Articles of Agreement.

3.2.1 A Unique Revenue Management Plan.

In order to enhance transparency in the management of oil revenues, the Bank orchestrated a unique revenue management plan. Oversight and control was to be done by the Bank and the Chadian government, but all sector expenditure programs would require the approval of a newly formed oversight committee of nine members, the *College de Controle et de Surveillance des Ressources Petrolieres* (the Oversight Committee on the Management of Petroleum Resources, known as the *College*).¹²⁹

¹²⁹ World Bank (2006), Chad-Cameroon Petroleum Development And Pipeline Project: Overview Report No. 36569-TD (on file with the author) at p.v, see also Esty op.cit at p.8

The plan was set out in legislation that came to be known as Law 001 and, *inter alia*, comprised of setting up an overseas escrow account into which the proceeds from the project would be deposited. The Chadian government committed that it would spend 80% of the revenue on poverty eradication and set up a separate account for future generations. Resources were to be allocated according to the different needs of the different communities.¹³⁰ Suffice it to note here that in setting such conditions, the Bank, in a bid to ensure the success of this project, got involved in what Shihata had described as “such typical economic and technical issues, as the management of money or finances, or more generally, the management of a country’s resources” and had advised the Bank not to get consider as part of its work in order to steer clear of violating its apolitical mandate.¹³¹ This illustrates how indivisible political and economic issues are in the Bank’s work and the importance of political issues in its decision-making.

Law 001 was criticized as being an infringement on sovereign rights, lacking the detail to ensure effective oversight and at best, only a first and clearly insufficient step.¹³² It did not cover all the proceeds from the project, as it covered only three oil fields, and did not take into consideration the potential of more oil production beyond these three fields.¹³³ Also, the future generation account was not part of the revenues that were governed by Law 001.¹³⁴

It did not take long for the plan to show signs that it would boomerang. In January 2001, as soon as the deal was signed and Chad received a US\$ 25 million signing bonus, the president spent part of the money to purchase arms. The government of Chad later amended Law 001, precipitating the Bank to suspend any further disbursements on active

¹³⁰ World Bank (2006), Chad-Cameroon Petroleum Development And Pipeline Project: Overview Report No. 36569-TD (on file with the author) at p.v, see also Esty op.cit at p.8

¹³¹ See Chapter 2, note 22 and accompanying text, discussing Shihata’s definition of the term “political” as was intended to be used in the Articles of Agreement.

¹³² B. C. Esty, (2001), The Chad-Cameroon Petroleum Development and Pipeline Project (A). Harvard Business School p.9-10

¹³³ Ian Gary, Nikki Reisch (2005), Chad’s Oil: Miracle or Mirage? Following the Money in Africa’s Newest Petro-State at p.13.

¹³⁴ *ibid* at pp. 42-48 the report contains an indepth analysis of the above and more weaknesses of Law 001.

operations in Chad until an amicable understanding was reached because the amendments were in breach of key provisions of the legal agreements signed with the Bank. As the operation of Law 001 was directly related to the Bank's involvement and the operation of the escrow account, the suspension of further World Bank disbursements in turn, led to the freezing of the London based escrow account into which the oil revenues were being deposited by the consortium.¹³⁵

Sadly, this did not have as much effect as was expected because the government immediately exploited the lacunae in Law 001 to access the funds on the future generation account.¹³⁶ Later, the oversight committee reported problems with government spending of the oil revenues, including irregularities in the transfer of funds and the overpricing of goods and services. The situation became so critical that in August 2005, the Bank stated that it had serious concerns about how the Chadian government was using the revenues.¹³⁷

In the heat of political tensions that preceded the Presidential elections in Chad in May 2006, the Bank announced that it had signed a memorandum with the government of Chad. The Bank allowed the Chadian government to exclude the future generations account from the amended law, to decrease the percentage of oil proceeds devoted to poverty eradication from 80% to 70%, and to include the hitherto excluded military spending into priority sectors of Chad's budget, which meant that some of the oil proceeds could be spent on military expenditure, – a position the Bank had avoided in the first place by insisting on the exclusion of military spending from priority sectors.¹³⁸ The resultant understanding is a reflection of the fact that by the time the oil revenues began to flow, the Bank had substantially lost its bargaining power with Chad. In essence, this shows that political factors not only influence the Bank's decision making but also its relations with its Borrowers before, during and after a given project.

¹³⁵ *ibid* World Bank (2006), see also K. Horta, Development Effectiveness and Lessons Learned: The Chad-Cameroon Oil & Pipeline Project (2006) (on file with the Author) p.28

¹³⁶ *ibid*

¹³⁷ Dino Mahtani, World Bank Concern over Chad oil Revenues. Financial Times, August 20 2005, See also, K. Horta, (2006) at p.8

¹³⁸ K. Horta, Development Effectiveness and Lessons Learned: The Chad-Cameroon Oil & Pipeline Project (2006) (on file with the Author) p.9

The strategic innovation of the revenue management plan can be criticized but also appreciated. The major criticism against the plan used in this project was that it constituted an incursion on Chad's sovereignty. The plan and the newly created *College* suffered several flaws—especially the lack of funds and the capacity necessary to exercise its investigative authority. More than a year into Chad's life as an oil producer, many aspects of the oil management system were still being set up and lacked definition. There was also a profound lack of technical capacity in the petroleum ministry and other relevant departments.¹³⁹ However, it must be noted that it was not the idea but its implementation that failed. Viewed as a step towards poverty eradication and development of the poor, this plan was a good initiative by the Bank and a major step towards achieving its mandate.

Also, one may justifiably view such a plan as an incursion on state sovereignty.¹⁴⁰ But there are two reasons to discount this argument. Firstly, even though they were organized around the principle of sovereignty, the establishment of the Bretton Woods institutions constituted a movement away from an international legal order based on absolute sovereignty.¹⁴¹ The doctrine of state sovereignty has suffered incursion in other spheres on the international scene and is now said to have “evolved.”¹⁴² In fact, the very act of

¹³⁹Ian Gary, Nikki Reisch (2005), *Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State* at p.50

¹⁴⁰ This paper does recognize the principle of state sovereignty as established in the Lotus Case (The Case of the S.S. “Lotus”), Judgment 9, 1927, PCIJ Series A, No. 10, P.19 that the sovereignty of state is plenary in the absence of specific legal constraints to the contrary and that one does not presume or presume lightly, that the sovereignty of states is restricted. But the argument here is that the restriction discussed in this chapter is justified.

¹⁴¹ Bradlow and Grossman (1995) *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*. *Human Rights Quarterly* 17.3 (1995) 411-442 at p.418 At p. 418-419 and note 31 and accompanying text where Bradlow and Grossman further argue that World Bank lending, which entails imposition of some non-financial conditions has contributed to the erosion of absolute state sovereignty.

¹⁴² Ana Palacio (2006), *The Way Forward: Human Rights and the World Bank*. World Bank Development Outreach, World Bank Institute, October 2006 p.2, see also H.J. Steiner and P. Alston, *International Human Rights: Law, Politics and Morals* 2nd ed p.573, R. Danino, *Legal Opinion on Human Rights and The World Bank*, January 27th 2006 pp 6-7, Danino (2005), *The Legal Aspects of World Bank's Work on Human Rights Some Preliminary Thoughts* (in P. Alston and M. Robinson (Ed.), *Human Rights and Development: Towards Mutual Reinforcement* oxford University Press. P. 509-525). See also Bradlow and Grossman (1995) *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*. *Human Rights Quarterly* 17.3 (1995) 411-442 at p.411. They argue that the sovereign power states have a

allowing an institution to intrude on its sovereignty is itself an act of sovereignty.¹⁴³ Secondly, arguing the Bank should never have intruded on Chad's sovereignty is tantamount to positing the view that it is an error to place development before state sovereignty. This raises the conundrum of whether the poor actually matter in the development process.

One alternative to avoid this incursion on state sovereignty was for the Bank to decline involvement in the project. But this raises the issue of what better options are available to borrowing countries, in this case, whether the situation would have been better if the project had been developed by Sudan or Libya. One must always remember the universal conviction that, should the Bank decide to ostracize a borrower, all other major national and international powers will follow its lead.¹⁴⁴

In criticizing the plan, another alternative that was offered was for the Bank to strengthen loan conditions that reinforce the democratic process in Chad and enable the Chadian people to better determine how their resources should be spent. This, it was argued would still threaten the sovereignty of leaders but would also empower the people.¹⁴⁵ There are significant limitations to this view. Firstly, such a process would hardly be possible without addressing civil and political rights (such as the right to vote), which the Bank has for a while considered to lie outside its mandate.

Secondly, with wealth creating neighbors emerging in Africa and expressing willingness to fund such projects (in this case Libya and Sudan) and increasing Afro-Sino relations presenting the option of unconditional financing to African governments, tightening

diminished ability to manage the behavior within their borders and that this means that the resolution of most problems requires collaborative efforts that involve both states and nonstate actors. At note 12 and accompanying text, they illustrate the fact that the intertwined nature of the World's problems today has helped breakdown the distinction that the international community has maintained between purely domestic and purely international problems. But see also p.426

¹⁴³ A discussion with Dr. Edward Kwakwa, Legal Counsel World Intellectual Property Organization, a specialist in International Law. March 28th Washington D.C.

¹⁴⁴ Caufield, C. (1998): *Masters of Illusion: The World Bank and the Poverty of Nations* (Houndmills: Macmillan), p.336

¹⁴⁵ B. C. Esty, (2001), *The Chad-Cameroon Petroleum Development and Pipeline Project (A)*. Harvard Business School p.10

World Bank conditionality is more likely to push away poor borrowing countries than it was years ago when they had fewer options. Thirdly, the argument falls short of recognizing the gravity of human rights violations and the extent to which leaders in such countries are willing and able to go in order to perpetrate personally motivated agendas. It is hard to see how tightening conditionality would have democratically empowered the people in a country where the President was willing to go as far as amending the constitution to secure a third term.¹⁴⁶

3.3 Monitoring and supervision.

Monitoring took different forms: operator monitoring, government monitoring (through the Comité Technique Nationale de Suivi et de Contrôle (CTNSC) - the government body in Chad charged with oversight of the environmental and social impacts of the petroleum sector – as well as World Bank monitoring and two independent monitoring panels (the External Compliance Monitoring Group (ECMG), and the International Advisory Group (IAG)).¹⁴⁷

The IAG was a five-member independent body of experts created by the Bank in 2001 to monitor the implementation of the project and advise the project sponsors, host governments and the Bank senior management on the achievement of the broad objectives of the project and the three ancillary capacity building projects. The IAG visited the two countries twice a year and reported directly to the World Bank president.¹⁴⁸ The ECMG, staffed by D'Appalonia, a consulting firm, was contracted by the IFC to monitor the Consortium's compliance with the environmental management plan. Throughout project implementation, the ECMG conducted quarterly site visits. After project completion (certified in 2004) the ECMG was mandated to conduct yearly

¹⁴⁶ Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State at p.19.

¹⁴⁷ World Bank (2006), Chad-Cameroon Petroleum Development And Pipeline Project: Overview Report No. 36569-TD (on file with the author) at p.vii, see also Ian Gary, Nikki Reisch (2005), Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State at p.13.

¹⁴⁸ its reports were available on the Internet, <http://www.gic-iag.org/ehome.htm>

visits.¹⁴⁹

The use of such measures of monitoring and supervision was one of the novel aspects of the project, and helped to scrutinize the Chad government and the consortium. The mandate of these three monitoring bodies involved a critical look at the human rights implications of the project and how it was affecting the communities in Chad. IAG reports for instance constantly reported tensions on political issues and worker rights in Chad during the construction of the project.¹⁵⁰ If the Bank is to use such monitoring groups and they raise human rights concerns, it should be prepared to address these concerns without being limited by its Articles of Agreement. It is not enough for the Bank to set up institutions whose advice it will not act upon. This is the essence of popular participation, and the pith and marrow of some of its Operational Policies and Procedures.¹⁵¹

3.4 Conclusion

The Chad-Cameroon project presents many lessons on the role of the Bank, in such development projects in countries like Chad with enormous resources and multiple human rights and political problems. This chapter has demonstrated that it is important for the Bank to consider political factors when deciding whether to invest in a country or not, despite the provisions in its Articles of Agreement that require otherwise. In some cases, the decision not to invest may have adverse consequences for the people of its member countries. In the case of Chad, political factors played a key role not just in the Bank's relations with the country prior to the investment, but also throughout the construction of the pipeline. The Bank thus deserves credit for ultimately deciding to invest in Chad.

¹⁴⁹op.cit Ian Grey and Nikki (2005) at p.13. Since their first visit to the project site in February 2001, the ECMG has published 10 reports. These and other information about the ECMG can be found on the World Bank's website at: www.worldbank.org/afr.ccproj/project/pro_monitor.htm

¹⁵⁰ See For instance International Advisory Group: Chad Cameroon Petroleum Development And Pipeline Project Report Of Mission To Cameroon And Chad November 14-25, 2001 December 21, 2001 pp.2,6,12,13, International Advisory Group: Chad Cameroon Petroleum Development And Pipeline Project Report of Visit to Chad June 3-17, 2002 July 12, 2002 p.9, paras 54 and 55.

¹⁵¹ See for instance paragraph 19 of its OD 4.01

The strategic design of the project was innovative. It was flawed in some ways, but that shows the need for a clearer focus on the issues discussed above. Having shown the role of political and human rights issues towards the relationship between the Bank and Chad in this project, it is important for the Bank to design a better approach for addressing these issues in future projects. The Bank should be reminded by the Chad-Cameroon pipeline that development of the poor – in whichever way perceived – is its business, and political prohibition is no excuse in failing in this daunting task. The Bank must be careful not to lose sight of the fact that every single failure in its work aggravates the situation it sets out to remedy in the first place.



CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS.

*“It is now clear that the Bank can [and sometimes] should take human rights into consideration as part of its decision-making process. The challenge we now face is to clarify how these legal concepts should be specifically incorporated into the work of the Bank in order to further its mission of sustainable and equitable development...”**

4.1 Conclusions.

This research paper has discussed the World Bank’s approach to political prohibitions in light of its role in promoting the protection of human rights. The paper has noted that human rights are political issues that the Bank’s Articles prohibit its staff from considering when making its decisions. That never the less, in the recent years, the World Bank has increasingly moved towards integrating human rights within its work.¹⁵² The Bank has even devoted resources to analyzing what impact human rights have on its projects, detailing its “record of achievement” on human rights. The paper notes that the Bank has become more aware than ever before of the need to have human rights within its mandate and taken note of the empirical relationship between human rights and development.¹⁵³

From cases like the South Africa and Portugal loan controversy and more recently the Chad-Cameroon Pipeline project the paper has shown that human rights cannot be divorced from the Bank’s work and in essence, from the realization of its mandate. It has

*Ana Palacio (2006), *The World Bank and Human Rights: The way forward*. The words “and sometimes” are in brackets because the view espoused in this paper is that human rights should be taken into consideration by the Bank in all cases.

¹⁵² Gernot Brodnig *The world Bank and Human Rigts: Mission Impossible? Carr Center for Human Rights Working Paper T-01-05* at p.9, I.F.I. Shihata: *The World Bank and Human Rights: An analysis of the Legal Issues and Record of Achievements*. 17 *Denv. J. Int’l L. & Policy* 39-66. See also Shihata, *Human Rights, Development and International Financial Institutions*. Vol.8 *Am.U.J. Int’l L &Policy* 27 1992-1993. Pp. 27-37.

¹⁵³ World Bank (1998), *Development and Human Rights: The Role of the World Bank* ISBN 0-8213-4340-8. On the World bank’s work on the empirical relationship between Human Rights and Governance and the Work of the World bank, see Daniel Kaufmann (2005), *Human Rights and Governance: The Empirical Challenge*, World Bank Institute. Further for a general discussion and analysis on Human Rights and Development, see Klaus Decker, Siobhan McInerney-Lankford and Caroline Sage: *Human Rights and Equitable Development*. Working Paper on file with the Author.

been underscored in this paper first that human rights have economic consequences and not only are they interrelated but also inadvertently affect the Bank's relations with its member countries and other international organizations.

The paper has presented a number of lessons from the Chad-Cameroon project. It shows that poor Bank member countries like Chad are affected by internal and regional political insecurities in the course of development arising largely from historic and prevalent political conditions and that this in essence presents the need for the World Bank to act in situations in which it is forbidden by its apolitical mandate. As a public – private partnership, the project shows that approach as one that can be extremely beneficial if exploited more often but that this approach inevitably calls to bear domestic political issues thereby requiring the Bank to get involved with these issues even though its Articles of Agreement explicitly state otherwise. The project shows that just the fact that the Bank is involved in a given project weighs heavily in the favor of poor countries and rich multinationals in raising finances. The Bank's approach, structures and creativity in this project were innovative. They were flawed in many respects and had the flaws been dealt with, the approach would certainly be a laudable one.

One concludes nevertheless that the inevitability with which the measures were put in place is worth emulating but this requires caution that the mistakes will not be repeated or taken lightly. It is however important for the Bank to remember that any other country in which it may get involved in extractive industry projects like oil exploitation is different from Chad and therefore a difference in approach may be of necessity. This paper has shown that this unique approach exposed a number of critical flaws in the Bank's approach to human rights and vividly illustrates the need for a more comprehensive approach.

Against the background of the historical factors that influenced the drafting of the provisions that have been analyzed in this paper, justification for the purposefully stringent wording of those provisions is appreciated and credited given the prevailing circumstances of the time. However, it is concluded that the provisions are not as wide to

allow inclusion of political issues, in particular human rights, concerns through a flexibility of interpretation.

The paper has revisited the internal approach to the political prohibition question by analyzing the manner in which the Bank's General Counsel have interpreted these provisions. These General Counsel have consistently adopted a purposive approach to conclude that *some* human rights are now allowed, if not included, in the Bank's mandate as a result of its practice. However, this paper concludes that such an approach has rendered the Articles capable of manipulation to suit different circumstances. It is therefore concluded that without adjusting the wording of the mandate, to the undoubted extent that human rights are political issues, the Bank and its staff are prohibited from considering them in making its decisions.

A lesson that can be drawn from the various approaches taken by the different General Counsel is that the relevance of and approach to human rights is a subjective issue. From the divergence of their views, it is concluded that continuous interpretation has not resolved the issue. It seems safe therefore to suggest that continuing with the approach of constantly interpreting the Articles will only leave the matter unsettled. Indeed as Ana Palacio (the present General Counsel), has clearly stated, human rights need to be included in the mandate of the Bank in a more explicit manner hence raising the issue of how this is to be done.¹⁵⁴

The paper has discussed a number of options on how to include human rights in the Bank's mandate and concludes that a legal opinion by the General Counsel stating what political and human rights issues should be considered by the Bank would be the best alternative. However, as is pointed out, there are limitations to this approach. Firstly, such a legal opinion would not settle this issue with finality. These opinions largely differ and such an interpretation will only leave room for a later interpretation as Legal Counsel

¹⁵⁴ Ana Palacio (2006), *The Way Forward: Human Rights and the World Bank Article on the World Bank Development Outreach*, World Bank Institute, October 2006 available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445640~pagePK:64020865~piPK:149114~theSitePK:445634,00.html> accessed on 27/02/2007

change and others bring different perspectives to the debate. Secondly, the perception of human rights and their importance and relationship to development differs among countries. A critical question is which yardstick a General Counsel would use in determining which rights to include or exclude.

4.2 Recommendations: Towards a Comprehensive Approach:

The paper recommends a tripartite approach comprising of (1) debating and passing an amendment or attempt to amend the Bank's Articles, (2) drafting and implementing a set of Operational Directives and Procedures on human rights, also stating how the Bank is to construe "economic" as distinguished from "political" factors and (3) the World Bank taking a leading role in advancing synergy between itself and other specialized UN agencies on a project-by-project basis. Recognizing that there may not be the political will to pass the suggested amendment, this paper recommends that in the event of such a situation, the two latter suggestions would still hold.

In accordance with Article VIII of the IBRD Articles, the Board should be invited to consider whether these provisions should be expunged in their entirety from the text of the Bank's Articles.¹⁵⁵ In the event that this is found untenable, an amendment to their text should be considered with the view of including human rights to the extent that their violation affects the Bank's work or impedes the full realization of its intended benefits. The suggested amendment should focus on ways of encompassing human rights in the mandate of the Bank and not excluding countries with poor human rights records. As is, Article IV section 10 provides that:

¹⁵⁵ The procedure for amending the IBRD Articles is set out in Article VIII, which provides:

Article VIII Amendments:

(a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent (1) of the total voting power, have accepted the proposed amendments, the Bank shall certify the fact by formal communication addressed to [all] members. See Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S as amended Feb 19, 1989 available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049697~pagePK:43912~menuPK:58863~piPK:36602,00.html>

“The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”

A suggested amended text in this case would provide that:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I. *Provided however that where concerns of the violation of internationally accepted human right obligations may arise as a result of or during the process of the utilization of World Bank funding the Bank shall appraise such concerns in accordance with such guidelines as its members shall have agreed to, with the view to assess their impact on its mandate as stated in Article 1 and considering solutions to ensure that the funds it advances shall be used for the purposes for which they were loaned and to realize the highest attainable economic and development results from the funds it shall advance to its member countries.*

The process of debating this amendment, if attempted, can serve numerous purposes. Firstly, it ought to provide a clear and contemporary definition of what is considered “political” and how that is to be distinguished from “economic” factors. Secondly, how human rights are to be considered in juxtaposition with the Bank’s work and mandate. This would give the members the opportunity to agree on a unified way in which the Bank should draft a policy on how its work relates to human rights. In the process, the members would allay the question of which yardstick a General Counsel would use in determining which human rights to include or exclude from the Bank’s mandate.

There are limitations to this recommendation. Firstly, it is genuinely considered a Herculean task to amend the Bank’s Articles, as that requires the amendment to be approved by a majority of three-fifths of the members, having eighty-five percent of the

total voting power.¹⁵⁶ Secondly, different countries approach the importance of human rights from divergent viewpoints.¹⁵⁷ It is also genuinely feared that amending the Articles would subject them to more frequent amendments, a factor on the pretext of which amending them is made purposefully difficult.¹⁵⁸

Be that as it may, human rights norms and obligations are widely accepted by most of the Bank's member countries and one hopes that the proposal for an amendment would not face as much resistance as the issue of which human rights should be included in the Bank's mandate. The recommendation to amend the Articles is premised on the view that even if the members rejected any suggested amendment, their participation in reaching such a decision would go a long way in shedding light on their perception of how the Bank should approach human rights. Ultimately, what is important is that the issue of how to deal with human rights vis-à-vis the Bank's work and mandate is one that needs to be settled by its members in a participative manner and not through the interpretations of the General Counsel or other internal mechanisms. Legitimate as the fear of opening the Articles to frequent amendment may be, the preceding chapters of this work have demonstrated how long and how much it has taken for the debate on human rights and the Bank to evolve to the heights at which it is today. It has also been underscored that this development has not been in the abstract but against the backdrop of human rights as internationally recognized norms and obligations.

Further, the Bank should come up with a more explicit set of guidelines as part of its Operational Procedures that captures the divergent perceptions and approaches of its members and publicly declares which human rights aspects the Bank will tackle and how. In light of the fact that there are internationally recognized standards to which the Bank's members subscribe by virtue of their membership to the UN, one hopes that reaching agreement on what to include in the suggested Operational Procedures and Directives

¹⁵⁶ Article VIII of the IBRD Articles of Agreement.

¹⁵⁷ A vivid illustration here is Cuba, which has since ceased to be a Bank member. Other cited examples are Sudan and Iran, see Ibrahim Shihata (2000): *The World Bank in a Changing World*. Vol. 3 Kluwer Law International, at p.182. see also the discussion in chapter 2 on whether to amend or not to amend the Articles.

¹⁵⁸ See chapter 2 discussion on whether to amend or not to amend the Articles.

may not be as difficult. Never the less, as already discussed above, engaging the members in the discussion of whether to amend the Articles or not would go a long way in informing this process and giving a clearer picture of what is a more acceptable approach for the Bank to take in dealing with human rights. Also, the Bank has in the recent past been engaged in dialogue with civil society and like in the case of Chad, in addition to its Inspection Panel, engaged external monitoring mechanisms. All these initiatives can be informative to the Bank in designing its Operational Procedures and Directives on human rights.

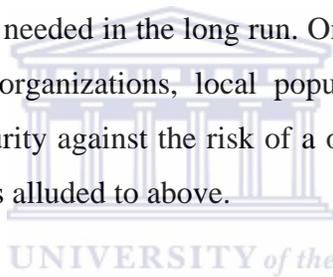
As has been pointed out earlier in this paper, there is a need for the Bank to champion synergy with other UN agencies that are directly mandated to deal with specialized human rights issues. This would help the Bank to avoid capacity constraints by drawing from the extensive human and other resources of these organizations. Bradlow and Grossman have suggested useful, albeit more general, ways in which a similar approach can be undertaken and ably highlighted the legal basis on which this can be done.¹⁵⁹ In addition, it is suggested that the Bank takes this approach on a project-by-project basis so as to avoid the problems that may result from using a one-size-fits all approach. A project-by-project approach would be most effective if prior to deciding whether to finance the project and formalizing any arrangements with the Borrower, the Bank first evaluates the potential human rights violations that may arise during or as a result of a project it is considering to finance in accordance with the Operational Procedures and Directives suggested above.

Upon determining the risks involved, the Bank may then suggest ways it finds suitable to address such issues and in the same breath both exploit its mechanisms on popular consultation by seeking the views of the people likely to be affected and other stakeholders and civil society organization and, importantly, the views of the specialized UN agencies that may be directly relevant to the given concerns. Such an approach if adopted would partner development and the respect for and enforcement of human rights

¹⁵⁹ D.D. Bradlow and C. Grossman (1996), Limited Mandates and Intertwined Problems: The A new Challenge for the World Bank and the IMF Human Rights Quarterly 17.3 411-442 at pp.434-440.

and in the process empower the populations of the borrowing countries. The difference between this approach and the existent mechanisms is that in this case, the Bank is expected to be more explicit in its human rights role as it would be acting under a liberalized mandate. It is also expected to be more accountable as the process involves more stakeholders and formally takes place before the project has been commenced. One hopes therefore that the international scrutiny would result into a higher level of accountability on the side of the Bank and its borrowers.

One major potential weakness with this approach that must be guarded against is the possibility of the Bank or other organizations assuming that each project can be approached in a single manner, leading to the vices of the one-size-fits all approach. This is not to deny that in order to ensure equitable treatment of the Bank's members, some form of "uniformity" would be needed in the long run. One hopes however, that the open involvement of civil society organizations, local populations and other stakeholders would offer some form of security against the risk of a one-size-fits-all approach due to the increase in accountability as alluded to above.



It is the researcher's belief that the foregoing recommendations, if adopted, can result in the Bank crafting creative and yet highly stringent measures to compel its borrowing members to comply with both their human rights obligations as well as their obligations to the Bank, hence enabling it to play a central role in promoting human rights without being curtailed by its Articles. As the world's leading development institution, the Bank by unfettering its mandate and embracing a pro-human rights approach will go along way in realizing its mission of poverty eradication and salvaging millions from the tragic repercussions that poverty has visited on the populations of its poorer members.

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