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CONFERENCE ON HUMAN RIGHTS, PUBLIC FINANCE, AND THE DEVELOPMENT PROCESS

RESPONSE TO JEROME LEVINSON

Bruce Rich*

I agree with Jerome Levinson on several major points. However, I have some questions that I would like to address in order to elucidate some issues. I will then confront one point with which I do not completely agree, namely the degree of accountability of the multilateral banks; Mr. Levinson's view is that there is a very precise structural hierarchy of accountability from the staff and management to the executive directors, governors, national legislatures and parliaments.

The observation that the social question, the political question, and the human rights question should be incorporated into the operational criteria of the multilateral development banks is something I agree with wholeheartedly. However, I am uncertain of the political likelihood and feasibility of amending the charters of agreement. As Ibrahim Shihata pointed out, amending the Articles of Agreement of the multilateral development banks requires the approval of three-fifths of the member countries, that together must hold at least eighty-five percent of the votes.¹ This arrangement gives the United States veto power. It gives a small coalition of European countries veto power. It also gives veto power to any number of possible coalitions of developing borrower countries. Even in this new world order where democracy, participation and governance are politically popular issues, I must question the likelihood of obtaining a consensus sufficient to change the charter pursuant to such a plan. Similarly, amending the Inter-Ameri-

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1. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ARTICLES OF AGREEMENT art. VIII (as amended Feb. 16, 1989). The World Bank consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA). 1991 WORLD BANK ANN. REP. 3.

can Development Bank Charter requires approval by two-thirds of the members, holding at least three-fourths of the voting power.²

Second, the question of access to information is the critical corollary of these concerns over human rights, governance and social issues. It will remain the predominant consideration so long as these multilateral institutions do not freely share information regarding their activities with the public, the developing countries, the donor countries and the executive directors. This lack of disclosure is an important point that many people are not aware of.

For example, in 1991, the United States Executive Director of the World Bank was denied access to a draft appraisal report six weeks before he was to vote on an \$80 million forestry loan. Also, the largest shareholders are unable to gain access to 90 percent of the information in the project files for the institutions they finance.

Mr. Shihata has not satisfactorily addressed this issue. I am not concerned with the general reasons given by the World Bank staff for withholding information; they may have genuinely believed it to be a good idea. Rather, I would like the World Bank staff to cite legal justification, from the Articles of Agreement for example, for withholding most project information from the Executive Directors.

The nature of this informational problem can be seen by reference to an example. In the mid-1980s, the Environmental Defense Fund worked with other environmental groups to obtain information from the World Bank regarding projects financed by the Bank in Brazil. Robert W. Kasten, Jr., then Chairman of the Senate Appropriations Foreign Operations Sub-Committee, sent a letter to the Secretary of the Treasury, Donald Regan,³ stating that the Senate Appropriations Committee was very concerned about the environmental issues involved in World Bank projects. The letter requested that the Bank give the Treasury Department access to the project files for a large road-building and agricultural colonization scheme in Brazil financed by the Bank. The letter also requested access to all project files between 1979 and 1982 concerning the environment and Indian populations, and all office supervision reports produced by the Bank from 1979 through 1984. Of course, we already knew what was in these files — we had them. The files showed that World Bank anthropologists warned that the project would result in genocide of the Indians and massive deforestation. The

2. INTERNATIONAL DEVELOPMENT ASSOCIATION ARTICLES OF AGREEMENT art. IX.

3. Letter from Robert W. Kasten, Jr., to the Hon. Donald T. Regan (Jan. 23, 1985) (on file with the author and with *The American University Journal of International Law and Policy*).

documents also revealed evidence that World Bank soil specialists discovered that there was insufficient information regarding the soils. There were memoranda from World Bank agricultural experts stating that this project seemed to be the most uneconomical agricultural project in Brazil. Other members of the World Bank staff stated that the project would proceed as planned despite these problems, and indicated their hope that senior management in the Bank would stop raising these issues, preferring, instead, to deal with them at the working level.

The World Bank management refused to deliver the documents, causing some consternation within the Treasury Department and their legal department because the Environmental Defense Fund and other environmental groups were rocking the boat. The Treasury Department took a position similar to that of the Bank, stating that they did not favor the Senate Appropriations Committee rifling through the files of the World Bank. Treasury officials cited a provision in the Bank's charter which states that the archives of the Bank are inviolable.⁴ This response from the World Bank and the Treasury upset the Senate, which felt that its role in appropriating money for the Bank entitled it to know the nature of projects undertaken, and has continued to cause friction between Congress and the Treasury Department.⁵

One reason the Bank often cites for not sharing information is the confidential relationship between the Bank and borrowing governments.⁶ Jerome Levinson also cites confidentiality as a plausible reason. In the mid-1980s, two national United States environmental groups, the Natural Resources Defense Council and the Sierra Club, grew concerned about World Bank live stock lending to Botswana and the environmental implications of such a project. In 1987, the two groups requested copies of consultant reports, commissioned by the Bank, containing information on the environmental impact of the project. The Bank refused to provide the documents. Subsequently, representatives of the environmental organizations traveled to Botswana, met with government officials, and came back with a letter from the Botswana gov-

4. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ARTICLES OF AGREEMENT, art. VII, sec. 5. Section 7 of article VII also provides that official communications of the Bank shall be accorded the same privileged treatment that the host country affords communications of member nations. *Id.* art. VII, sec. 7.

5. See JONATHAN E. SANFORD, U.S. FOREIGN POLICY AND MULTILATERAL DEVELOPMENT BANKS 132 (1982) (describing the tension between Congress and development banks over access to information). See also *id.* at 147-52 (describing the tension between Congress and the executive branch regarding access to information and supremacy in foreign policy).

6. See *supra* note 4 and accompanying text (citing the Bank's Articles of Agreement as protecting this confidentiality).

ernment stating that the reports should soon be released to the public. The groups repeated their request again in late 1987 with the letter from the Botswana government. Yet, for more than a year the Bank refused to release the documents. Not until late in 1988 were the documents finally released without any explanation for the delay, apart from bureaucratic whim. Informally, the Bank indicated that it was probably due to staff in the Bank's Legal Department who were concerned with the precedent that would be set despite Botswana's desire to release the documents. This example clearly illustrates that there is a real and significant problem regarding access to information.

Finally, I agree with Jerome Levinson that, in theory, there exists a structural hierarchy of accountability. However, I disagree with the notion that this hierarchy of accountability works well in practice. The examples I have cited illustrate the day-to-day reality. Many other factors make it extremely difficult for the executive directors and their small staffs to accurately evaluate and deal with the information that is presented to them. In reality, they have very little time to make their decisions. An average project in the World Bank might take two to three years to prepare. A loan for a hundred million dollars could involve thousands of pages of documents.⁷ Yet the executive directors receive the final appraisal report just thirteen working days before the deadline for their final decision to approve or reject the project. This extraordinary amount of information caused the United States executive director, in January of 1990, to request six weeks, instead of thirteen days, to study one controversial loan. The United States has an advantage in reviewing this information because its government is in Washington. For Japan and major donor countries in Western Europe thirteen days is insufficient to adequately review the projects.

Under current practice, the only method for securing adequate review occurs in the exceptional cases when non-governmental groups bring additional information forward at the last moment. In one case, the Environmental Defense Fund obtained a copy of a draft appraisal report and provided copies to the Treasury Department and the United States Executive Director after the Bank refused access. This exemplifies the grotesque situation surrounding approval of these projects.

7. See generally WARREN C. BAUM, *THE PROJECT CYCLE* (1991) (describing the lengthy process of obtaining a loan from the World Bank and implementing a project). Baum, Vice President of Operations Policy for the Bank, divides the project cycle into several phases: identification of suitable projects; preparation of the proposal (a two-year process); appraisal by the Bank of technical, institutional, economic and financial aspects of the project; negotiations and board presentations; implementation and supervision; and evaluation. *Id.*

It will be more difficult to achieve development successes in human rights through interpretation of the Bank's Articles of Agreement and through amendment than it is in the environmental arena. This is because the environmental arena is a more neutral political issue than human rights. Environmental issues are technical, with direct and indirect bearing on the economic performance of projects. This permits the advancement of environmental causes without requiring redress of the political, informational and other restrictions contained in the Articles of Agreement of the multilateral development banks. In contrast, human rights issues are politically charged, allowing no neutral mechanisms, such as economic or environmental analysis, for resolution.