

TUG OF WAR: THE WORLD BANK'S NEW GOVERNANCE AND ANTICORRUPTION EFFORTS

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The recent governance and anticorruption initiative of the World Bank¹ (the Bank) has come under intense fire from developing nations and some corners of Europe. There is little disagreement that corruption and poor governance in developing nations represent substantial impediments to sustainable growth. The issue is whether the Bank's continuing efforts to root out corruption and promote good governance encroach upon political matters forbidden by the Bank's charter.² Consideration of this issue results in criticism from three camps. Some critics raise the charge of "mission creep"—that the Bank's good governance efforts are an attempt to act beyond its mandate. Others contend that in fact, the Bank's new initiative will fail because the Bank does not adequately promote human rights and *democratic* governance. Finally, some critics charge that, irrespective of the Bank's mandate, its promotion of *laissez-faire* economic policies is the wrong prescription for the developing world because these policies fail to address weak institutions or establish rule of law.

This paper examines the likelihood of success of the Bank's governance initiative, particularly in light of the continuing debate regarding the Bank's role in economic development and poverty reduction. Part I examines the governance problem and traces the history of the Bank's efforts to combat

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1. The World Bank comprises the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). JOHN W. HEAD, *THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS: AN EVALUATION OF CRITICISMS LEVELED AT THE IMF, THE MULTILATERAL DEVELOPMENT BANKS, AND THE WTO* 3 (2005).

2. There are actually two relevant charters: the Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134 (entered into force Dec. 26, 1945) [hereinafter IBRD Charter], and the Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249 (entered into force Sept. 24, 1960) [hereinafter IDA Charter]. Both are available at <http://www.worldbank.org>.

corruption and poor governance. Part II identifies the operative provisions of the Bank's charter, arguments of the competing factions, and these arguments' relevance to the Bank's anticorruption initiative. Part III discusses key features of the Bank's initiative. Finally, Part IV evaluates the initiative in light of the criticisms leveled at the Bank. Although the initiative falls short in several aspects, this article concludes that the Bank's efforts represent a compromise and the best practical solution to the single biggest challenge facing developing countries.

I. THE PROBLEM OF CORRUPTION AND THE BANK'S EFFORTS IN RESPONSE

A. *The Problem of Corruption*

"Governance" is defined as:

[T]he exercise of authority through formal and informal traditions and institutions for the common good, thus encompassing: (1) the process of selecting, monitoring, and replacing governments; (2) the capacity to formulate and implement sound policies and deliver public services, and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them.³

The distinct concept of "corruption" is defined as "the abuse of public office for private gain."⁴ Three forms of corruption are: administrative corruption ("bribes to bureaucrats to alter the implementation of rules and regulations"), state capture ("the 'purchase' of laws and policies by corporations") and public procurement kickbacks ("payments made to secure procurement contracts").⁵

One recent estimate suggests that nearly one trillion dollars worth of worldwide transactions are tainted by corruption annually.⁶ From 2001 to 2006, the Bank identified over 2,000 instances of "fraud, corruption and other misconduct" in Bank-funded projects.⁷ Professor Susan Rose-Ackerman identifies seven incentives for private firms and public officials to engage in bribery: (1) "bribes clear the market" by soliciting scarce government resources; (2) "bribes act as incentive bonuses" to poorly paid and monitored

3. Daniel Kaufmann, *Rethinking Governance: Empirical Lessons Challenge Orthodoxy* 5 (World Bank Discussion Draft, Mar. 11, 2003), available at http://www.worldbank.org/wbi/governance/pdf/rethink_gov_stanford.pdf [hereinafter *Rethinking Governance*].

4. *Id.*

5. Joel Hellman, Geraint Jones & Daniel Kaufmann, *Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?*, TRANSITION, May-June-July 2000, at 4, 5.

6. Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, in GLOBAL COMPETITIVENESS REPORT 2005-06 83 (World Econ. Forum ed., 2005) [hereinafter *Myths and Realities*].

7. Editorial, *Corruption? Ho-Hum*, WALL ST. J., Sept. 25, 2006, at A14.

bureaucrats; (3) bribes lower costs of taxation and red tape; (4) bribes permit illegal activity; (5) bribery of politicians buys influence; (6) bribery by politicians buys votes; and (7) bribery can “override legal norms.”⁸ Corruption impacts individual households as well. In many countries, low-income families must pay bribes to access public services.⁹ For example, in the tsunami-ravaged Indonesian province of Aceh, upward of forty percent of disaster relief funds have been siphoned off by corruption.¹⁰

Many multinational business firms exploit the corrupt atmosphere to carve out a competitive advantage in developing nations. Despite anti-bribery norms such as the United States Foreign Corrupt Practices Act¹¹ and the Organisation for Economic Co-operation and Development’s (OECD) Convention on Combating Bribery of Public Officials in International Business Transactions¹² (the Convention), scholars argue that there has not been substantial improvement in corporate conduct.¹³ Ironically, many firms adhere to anti-bribery standards in their home country but demonstrate substantially lower ethical standards when operating in countries not parties to the Convention.¹⁴ State capture is most likely in countries where “firms face insecure property rights, insufficient economic liberalization and competition.”¹⁵ There is a powerful incentive for firms to engage in state capture, as “successful captor firms enjoy strong private gains in terms of performance and improved security of their property rights.”¹⁶ However, these private gains are offset when, because of corruption, developing economies often attract lower quality foreign direct investors.¹⁷ Such investors are more likely to engage in state capture than domestic investment firms.¹⁸ In sum, foreign direct investment firms actually magnify the problems of state capture

8. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 9-10 (1999); Susan Rose-Ackerman, *The Role of the World Bank in Controlling Corruption*, 29 LAW & POL’Y INT’L BUS. 93, 96 (1997).

9. *Myths and Realities*, *supra* note 6, at 85.

10. Michael Casey, *Secondary Disaster*, HOBART MERCURY (Australia), Sept. 27, 2006 at 25.

11. 15 U.S.C. § 78dd-2 (2000).

12. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999).

13. Joel Hellman, Geraint Jones & Daniel Kaufmann, *Far From Home: Do Foreign Investors Import Higher Standards of Governance in Transition Economies?*, 4 (World Bank Discussion Draft, Aug. 2002), available at <http://info.worldbank.org/etools/docs/library/17721/farfromhome.pdf> [hereinafter *Far From Home*].

14. Daniel Kaufmann, *Corruption, Governance and Security: Challenges for the Rich Countries and the World* 83, 92-93, available at http://www.worldbank.org/wbi/governance/pdf/Kaufmann_GCR_101904_B.pdf. Relying on data from the 2004 Executive Opinion Survey of the World Economic Forum, Kaufman finds “transnational firms headquartered in OECD countries, but operating in non-OECD countries, exhibit much lower (often illegal) corporate ethical standards.”

15. Hellman, Jones & Kaufmann, *supra* note 5, at 5.

16. *Id.* at 6.

17. *Far From Home*, *supra* note 13, at 4.

18. *Id.* at 4.

and kickbacks because “these forms of corruption generate substantial gains.”¹⁹

Successful good governance and anticorruption efforts profoundly impact economic growth.²⁰ A 2003 study by Daniel Kaufmann, Director of Global Programs and Governance at the World Bank Institute, found “an improvement in the rule of law . . . from relatively poor to merely average performance would result in . . . an estimated fourfold increase in per capita incomes, a reduction in infant mortality of a similar magnitude, and significant gains in literacy.”²¹

Unfortunately, over the past two decades, a number of Bank-funded projects have either failed or been suspended because of rampant corruption, most notably in sub-Saharan Africa. Since 2004, the Bank has suspended one billion dollars in loans to Kenya, India, Bangladesh, and Cameroon, among others.²²

The Bank temporarily suspended loan disbursements to Chad in early 2006 after the country’s president violated loan agreements.²³ In 1999, the Bank was warned that the Chad-Cameroon Oil & Pipeline project should be postponed until governance and human rights issues could be addressed, but the Bank proceeded even though both nations rank as two of the most corrupt countries in the world.²⁴ In 2001, it was discovered that Chad used part of a signature bonus for weapons purchases. The Bank reached an interim agreement with Chad in late April 2006, just prior to the May 3 elections, which were “already known to be so fraudulent that they would be boycotted by the opposition and ignored by international election observers.”²⁵ Development of the oil fields resulted in a substantial loss of agricultural land and caused an atmosphere of repression where

[a]ffected communities have few possibilities to obtain redress for their grievances. In cases where monetary compensation has been paid to individual households, local authorities supported by the military reportedly extort part of the compensation received by poor farmers, who have no justice system to which they can turn. Villagers who offer resistance have been beaten, and human rights workers who defend local

19. *Id.* at 21.

20. Susan Rose-Ackerman, *The Role of the World Bank in Controlling Corruption*, *supra* note 8.

21. *Rethinking Governance*, *supra* note 3, at 17 (emphasis omitted).

22. *Corruption? Ho-Hum*, *supra* note 8, at A14.

23. *Multilateral Development Banks and Infrastructure Projects: Hearing Before the Comm. on S. Foreign Relations*, 109th Congress 8 (2006) (statement of Korinna Horta, Senior Economist, Environmental Defense) [hereinafter *Hearing*].

24. *Id.* According to Horta, the pipeline project was managed by an Oil Consortium led by Exxon-Mobil. The IDA financed Chad’s and Cameroon’s minority holdings in two Consortium companies. Additionally, the International Finance Corporation, part of the World Bank Group, provided \$200 million of additional lending to the Consortium.

25. *Id.*

villagers have received death threats and have been arrested.²⁶

The political situation in neighboring Cameroon, as described by the Wall Street Journal-Heritage Foundation's 2006 Index of Economic Freedom, also highlights the need for reform. The "ruling party's long domination has encouraged corruption and cronyism" and "corruption is widespread in the government and the judiciary."²⁷ Additionally, the pipeline's route "represented an ideal pattern for the transmission of HIV/AIDS."²⁸ Health experts complained that the project "[gave] only passing attention to environmental and social aspects, and little or no decision-making power to the affected populations."²⁹

The Bank suspended debt relief to the Republic of Congo when it was discovered that President Denis Sassou-Nguesso spent nearly 170,000 pounds to host his entourage at a New York luxury hotel.³⁰ An even more extreme example of "kleptocracy"³¹ occurred in Zaire in the late 1980s. There, the government "reportedly allocated more to Mobutu [Sese Soko's] personal salary in 1989 than to education, health and social services combined."³² In September 2006, when Zambia received more than seven million dollars in debt cancellation as a reward for anticorruption efforts, its president nearly lost an intense reelection fight. The opposing candidate, supported by former president Frederick Chiluba, vowed to dismiss corruption charges against Chiluba if elected.³³

In addition to kleptocracy, typical business conditions in Africa present a formidable challenge to foreign investors. One study by the Bank indicates that twenty-seven of the thirty-five "least business-friendly" countries are located in sub-Saharan Africa.³⁴ A firm would have to pay three times its annual profit to meet the tax burden in Sierra Leone; it takes 155 days to register a business in the Congo; and it requires forty-seven procedures and over three years to enforce a contract in Angola.³⁵ This climate fosters state

26. *Id.*

27. *Corruption? Ho-Hum*, *supra* note 7, at A14.

28. *Hearing*, *supra* note 23, at 12.

29. *Id.* at 12-13.

30. Nick Cohen, Editorial, *When Giving to the Poorest Just Lines the Pockets of the Richest*, *OBSERVER* (London), Sept. 17, 2006, at 11.

31. Professor Susan Rose-Ackerman defines a "kleptocrat" as "a ruler or top official whose primary goal is personal enrichment and who possesses the power to further this aim while holding public office." ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 8, at 114 n. 2.

32. Chantal Thomas, *Does the 'Good Governance Policy' of the International Financial Institutions Privilege Markets at the Expense of Democracy*, 14 *CONN. J. INT'L L.* 551, 555 (1999).

33. *Mwanawasa reelected Zambian President*, Xinhua News Agency, Oct. 2, 2006; Joseph Schatz, *Corruption Fight at Stake as Zambia Votes*, *CHRISTIAN SCI. MONITOR*, Sept. 27, 2006, at 7.

34. *The Flicker of A Brighter Future – Business in Africa*, *ECONOMIST*, Sept. 9, 2006.

35. *Id.*

capture and other forms of corruption that discourage quality foreign investment and stunt sustainable economic growth.

In response to intense criticism, some nations have instituted strong counter-measures against corruption. In 2003, Indonesia adopted an Anticorruption Court to respond to corruption complaints from the Bank.³⁶ The Anticorruption Court has taken a tough stance on corruption and in 2005, sentenced the governor of the Aceh province to ten years in prison, a term two years longer than prosecutors had asked for.³⁷ Although progress is evident, the province continues to be victimized by corruption, especially in tsunami-relief efforts.

B. A Brief History of the World Bank's Governance Initiatives

The concept of including governance in the purview of Bank operations originated in a series of 1980s Bank studies of sub-Saharan Africa.³⁸ However, by the late 1980s the governing orthodoxy of reform and development was the so-called "Washington Consensus" (the Consensus).³⁹ The Consensus comprised ten reforms seen as essential to developing Latin American economies: fiscal discipline, reordering public expenditure priorities, tax reform, liberalization of interest rates, a competitive exchange rate, trade liberalization, liberalization of inward foreign direct investment, privatization, deregulation, and property rights.⁴⁰ The "absence of institutional and governance reforms was arguably the most glaring omission of the . . . Consensus."⁴¹ Because government and corruption were not believed to be "central to economic development," reform initiatives were deemed to be outside the Bank's mandate.⁴²

The term "good governance" was formally introduced in the Bank's 1989 World Development Report.⁴³ By 1992, the Bank embraced a formal definition of governance, concluding that four areas of governance reform were within the Bank's mandate: public sector management, legal reform, information, and transparency.⁴⁴ In 1994, the Bank released "Governance:

36. *World Watch: Indonesia Court Metes Out Stiff Graft Sentence*, WALL ST. J., Apr. 12, 2005, at A18.

37. *Id.*

38. 2 IBRAHIM SHIHATA, *THE WORLD BANK IN A CHANGING WORLD*, 54-55 (1995).

39. John Williamson, *From Reform Agenda to Damaged Brand Name: A Short History of the Washington Consensus and Suggestions for What to Do Next*, FIN. & DEV., Sept. 2003, at 10, 10.

40. *Id.*

41. *Rethinking Governance*, *supra* note 3, at 3.

42. *Id.*

43. Francis Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 FLA. J. INT'L L. 159, 162 (2001); World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, at xii (Nov. 1989).

44. Heather Marquette, *Corruption, Democracy, and the World Bank*, 36 CRIME L. & SOC. CHANGE 395, 399-400 (2001); World Bank, *Governance and Development*, at 1 (Apr. 1992).

The World Bank Experience,” highlighting public sector management activities.⁴⁵

In 1996, Bank President James Wolfensohn introduced good governance as a central reform initiative.⁴⁶ The Corruption Action Plan Working Group was charged with developing a comprehensive anticorruption strategy,⁴⁷ which was approved by the Board of Executive Directors on September 2, 1997.⁴⁸ The Bank incorporated provisions in its procurement guidelines stating that “corrupt, fraudulent, collusive, or coercive practices” could be grounds for canceling a contract.⁴⁹ Beginning in 1997, borrowing members were allowed to obtain non-bribery pledges from bidders for Bank-funded projects.⁵⁰ Between 1996 and 2000, the Bank initiated 600 governance-related programs in ninety-five countries.⁵¹ In 2000, because of the continued problem of pervasive corruption, particularly in Indonesia, the Bank’s Vice-President for East Asia and the Pacific suggested that “financial, political, or technical support” would not be provided to those nations where “governance, democracy, and human rights goals were not present.”⁵²

Good governance and anticorruption efforts immediately became a goal of former Bank President Paul Wolfowitz upon taking office in March 2005.⁵³ Wolfowitz outlined the Bank’s three-pronged strategy in an April 2006 speech delivered in Jakarta, Indonesia.⁵⁴ As a former ambassador to Indonesia, Wolfowitz was familiar with problems of doing business in the country and cited some of the challenges. He noted one survey which indicated that fifty-six percent of Indonesian firms were willing to pay more taxes to fight

45. *Id.*

46. *Rethinking Governance*, *supra* note 3, at 3.

47. Marquette, *supra* note 44, at 401.

48. 3 IBRAHIM SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 628 (2000).

49. World Bank, *Guidelines: Procurement Under IBRD Loans and IDA Credits* § 1.14 (May 2004, revised Oct. 1, 2006) available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>.

50. ROSE-ACKERMAN, *supra* note 8, at 181.

51. Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 *GEO. PUB. POL’Y REV.* 1, 2 (2001).

52. Marquette, *supra* note 44, at 402.

53. Wolfowitz resigned in June 2007. On June 25, 2007, former United States Trade Representative Robert B. Zoellick was unanimously selected by the Executive Directors as the 11th Bank President. Press Release, Int’l Bank for Reconstruction & Dev., Press Release Regarding the Selection of Mr. Robert B. Zoellick as President of the World Bank (June 25, 2007), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21385723~menuPK:34464~pagePK:34370~piPK:34424~theSitePK:4607,00.html>. Work on the Bank’s governance and anticorruption initiative continued in spite of Wolfowitz’s resignation.

54. Paul Wolfowitz, President, World Bank, *Good Governance and Development: A Time for Action* (Apr. 11, 2006), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTOFFICEPRESIDENT/0,,contentMDK:20883752~menuPK:64343258~pagePK:51174171~piPK:64258873~theSitePK:1014541,00.html>.

corruption.⁵⁵ Wolfowitz quipped, “when businessmen offer to pay more taxes to solve a problem, you know it’s a real problem.”⁵⁶ The Bank’s “Doing Business” report indicated that it took 151 days to comply with all the legal formalities when organizing a business.⁵⁷ Even worse, Indonesia ranked 145 out of 155 countries in contract enforcement.⁵⁸ Although the government has emphasized reducing red tape, the burdens of doing business in the country have created an obvious adverse effect. During the first six months of 2006, foreign direct investment had decreased forty-four percent from the previous year.⁵⁹

The three-pronged approach envisioned by Wolfowitz represented a delicate balance between making governance an integral part of Bank projects, while at the same time staying within the Bank’s non-political mandate. The approach involved: (1) expanding anticorruption support to borrowers, particularly in high-risk countries; (2) striving to minimize risk of corruption in Bank-funded projects; and (3) seeking input and coordination with stakeholders, improving cooperation with non-governmental organizations and other interested donors.⁶⁰ On September 8, 2006, the Bank outlined its plan to implement the three-pronged strategy in a release titled “Strengthening Bank Group Engagement on Governance and Anticorruption,”⁶¹ and released a follow-up draft in March 2007 incorporating the results of a series of consultations which spanned from November 2006 to January 2007.⁶² On August 17, 2007, the Bank issued a draft Implementation Plan,⁶³ which focuses on the short-term, emphasizing a “learning by doing” philosophy as the Bank develops concrete plans and processes for implementing the Governance and

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. John McBeth, *Investors Tripping Over Red Tape*, STRAIGHTS TIMES (Singapore), Oct. 31, 2006, at 1.

60. Wolfowitz, *supra* note 54.

61. World Bank Discussion Draft, *Strengthening Bank Group Engagement on Governance and Anticorruption* (Sept. 8, 2006), available at http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/gac_consultation_p_aper_8_sept_2006.pdf [hereinafter World Bank Discussion Draft].

62. World Bank Discussion Draft, *Strengthening World Bank Group Engagement on Governance and Anticorruption* (Mar. 21, 2007), available at <http://www.worldbank.org/html/extdr/comments/governancefeedback/gacpaper-03212007.pdf> [hereinafter *Strengthening World Bank Group Engagement*]. According to the strategy document, the consultations involved “representatives from governments, donor agencies, parliaments, civil society organizations, private sector, media, and other stakeholders. The consultations were held in 35 developing countries and 12 donor countries, during four global events, and through online web feedback—reaching more than 3,200 stakeholders worldwide.” *Id.* at 1.

63. World Bank Discussion Draft, *Implementation Plan for Strengthening World Bank Group Engagement on Governance and Anticorruption* (Aug. 17, 2007), available at <http://siteresources.worldbank.org/INTGOVANTICORR/Resources/gacimplementation-aug2007.pdf>.

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Anticorruption Plan.⁶⁴

II. COMPETING CRITICISMS: “NARROWNESS OF FOCUS,” “MISSION CREEP,” AND “BAD MEDICINE”

A. *The Bank’s Charter*

According to the late General Counsel Ibrahim Shihata, “[t]he Bank’s Articles of Agreement attempt to insulate its decisions and operations so far as possible from the almost inevitable politicization that usually characterizes the work of governmental and inter-governmental agencies.”⁶⁵ Three relevant provisions affect the Bank’s governance initiatives. First, the Bank is obligated under its Charter to ensure that loan funds are used and disbursed for the purposes for which such loans were granted.⁶⁶ Article III, Section 5(b), governing use of loans, provides: “[t]he Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted . . . and without regard to political or other non-economic influences or considerations.”⁶⁷ Second, political activity is prohibited by Article IV, Section 10: “[t]he 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 consideration shall be relevant. . . .”⁶⁸ Finally, the Bank is ultimately responsible for interpreting its Charter. “Any question of interpretation of the provisions of this Agreement . . . shall be submitted to the Executive Directors for their decision.”⁶⁹ The Executive Directors’ decision may be referred to the Board of Governors, “whose decision shall be final.”⁷⁰ Amending the Articles of Agreement is a difficult task, requiring approval by sixty percent of the members having eighty-five percent of the total votes.⁷¹ Therefore, the Bank has the ultimate authority to determine whether its governance policy is within its mandate.

64. *Id.* at 2. The Implementation Plan also addresses risks and steps to mitigate risks during the implementation phase. *Id.* at 11.

65. SHIHATA, *supra* note 48, at 125.

66. *Id.* at 626-27.

67. IBRD Charter, *supra* note 2, at art. III, § 5(b), *see also* IDA Charter, *supra* note 2, at art. V, § 1(g).

68. IBRD Charter, *supra* note 2, at art. IV, § 10, *see also* IDA Charter, *supra* note 2, at art. V, § 6.

69. IBRD Charter, *supra* note 2, at art. IX(a), *see also* IDA Charter, *supra* note 2, at art. X(a).

70. IBRD Charter, *supra* note 2, at art. IX(b), *see also* IDA Charter, *supra* note 2, at art. X(b).

71. IBRD Charter, *supra* note 2, at art. VIII(a). The IDA Charter provides that amendments must be accepted by “three-fifths” of the members, having four-fifths the total voting power. IDA Charter, *supra* note 2, at art. IX, § (a).

B. Bank Charter Interpretation Regarding Governance

In essence, the Bank's position is that good governance and anticorruption are inextricably tied to international development policy, but the Bank must tread carefully when developing policies to combat corruption because of the risk the Bank might stray from its charter.⁷² There is a strong distinction between the mandate of the Bank and that of the European Bank for Reconstruction and Development (EBRD). Formed to aid the transition economies of eastern Europe, the EBRD's purpose is to "foster the transition towards open market-oriented economies . . . and to promote private and entrepreneurial initiative."⁷³

According to Shihata, the "Bank is careful to avoid promoting a particular form of governance."⁷⁴ While the Bank is the sole interpreter of its charter, Shihata was adamant that political prohibitions "cannot . . . be interpreted away or treated as if they did not exist."⁷⁵ Nevertheless, he argued that because the Bank is the premier economic development agency, broad interpretation of its charter is essential to serving the needs of its members.⁷⁶ Practically, he noted that "the Bank cannot ignore certain political conditions due to their obvious effects on the feasibility, profitability, or performance of the projects it finances."⁷⁷ Anticorruption and good governance are such issues.⁷⁸ As Shihata explained, "certain events may influence stability and creditworthiness of World Bank members, hinder the ability of its borrowers to service loans and implement financed projects, or [a]ffect the World Bank's ability to monitor and supervise the implementation of such projects."⁷⁹

For example, the Bank must pay "due regard" to decisions of the U.N. Security Council, preventing a situation where a member would have to violate a Security Council resolution to meet its Bank obligations.⁸⁰ Shihata distinguished the expanding functions of the Bank "beyond the literal provisions of the Articles of Agreement" from the legal responsibilities of a borrowing member.⁸¹ In other words, because the Bank's policy goals in a specific project are met through the consent of the borrowing member, the Bank does not act outside the scope of its mandate because it has not

72. SHIHATA, *supra* note 48, at 125, *see also Strengthening World Bank Group Engagement*, *supra* note 62, at 6.

73. Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, 1990 U.S.T. 243, 29 ILM 1077 (1990).

74. SHIHATA, *supra* note 38, at 56.

75. SHIHATA, *supra* note 48, at 126.

76. Ibrahim Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U. J. INT'L L. & POL'Y 27, 30 (1992).

77. SHIHATA, *supra* note 48, at 127.

78. SHIHATA, *supra* note 48, at 629; SHIHATA, *supra* note 76, at 33.

79. SHIHATA, *supra* note 76, at 33.

80. SHIHATA, *supra* note 48, at 127.

81. Ibrahim Shihata, *Democracy and Development*, 46 INT'L & COMP. L.Q. 635, 639-40 (1997).

“imposed” policy conditions on the member.

In his 1990 interpretation, Shihata identified public sector management, accountability, transparency, and legal/judicial reform as permissible governance areas for Bank involvement.⁸² Public consultation in project development is another area that the Bank may likely regulate.⁸³ Even in expressly economic matters, however, the Bank may only include governance issues in the “policy dialogue” with a borrower.⁸⁴ Shihata also suggested that terminating projects is not necessarily the best solution to corrupt regimes, arguing “that depriving financial assistance from the unfortunate people of countries under predatory and despotic regimes might only add further insult to the injury imposed by their governments.”⁸⁵

Thus, Shihata’s broad reading of Art. III, Section 5(b) permits the Bank to act in nine key areas:

- (1) alleviating poverty;
- (2) providing universal education;
- (3) promoting preventative and curative health care along with adequate nutrition;
- (4) improving the economic and social status of women;
- (5) ensuring that children and the elderly are cared for;
- (6) protecting the quality of life for refugees, especially those involuntarily displaced as a result of developmental activities;
- (7) arresting the degradation of the environment;
- (8) conserving the environment for present and future generations;
- and (9) assuring the participation of people affected by development projects in the design and implementation of those projects.⁸⁶

The Bank argues that because sustainable poverty reduction is its “main mission,” and because such strong links exist between good governance, anticorruption efforts and aid effectiveness, its efforts are consistent with the Articles of Agreement.⁸⁷ The Bank elaborates on the linkage between corruption, poor governance and poverty in *Strengthening World Bank Engagement*:

On a daily basis, poor people around the world are unable to access health clinics, schools, or other essential services because their public systems are unresponsive or because they themselves cannot or will not pay bribes. Corruption and weak governance often mean that resources that should fuel economic growth and create opportunities for poor people to escape poverty instead enrich corrupt elites. Where transparency and

82. SHIHATA, *supra* note 38, at 57.

83. *Id.*

84. *Id.*

85. SHIHATA, *supra* note 76, at 36.

86. *Id.* at 31.

87. *Strengthening World Bank Group Engagement*, *supra* note 62, at 1-2.; World Bank, *World Bank Operations Manual*, Operations Policy 1.00 (Aug. 2004), available at <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/c9ba476af2cdf9e5852570c9002df6cf/147115a4528c81e6852570610056fbeb?OpenDocument>.

accountability mechanisms are weak or lacking, poor people's needs are often marginalized and development outcomes suffer. In some cases, extremely poor governance and corruption have contributed to financial and economic collapse, public alienation, and even violence and failed states, with disastrous consequences for the poor. Thus, improving governance and reducing corruption are crucial to helping poor people escape poverty and helping countries to achieve the Millennium Development Goals. . . .⁸⁸

The Bank must take the lead in governance efforts because Bank capital is "often the only foundation upon which a development effort can be established."⁸⁹

To fully achieve these expansive goals, it seems inevitable that the Bank must stray into political matters. No bright line is provided in Shihata's interpretation that clearly and unambiguously separates the political from the non-political.

John D. Ciorciari, former Senior Advisor for International Affairs to the U.S. Treasury Department, conducted an extensive historical analysis of potential motives for inserting the political prohibition into the Bank charter, concluding that the political prohibition is much narrower than conventional wisdom would hold.⁹⁰ He suggests that three principal motives existed in 1944 for inserting the political prohibition. First, he argues that the prohibition was included to protect member states (e.g. the Soviet Union, which participated in the charter negotiations at Bretton Woods but later declined to join the IBRD) against an anti-communist bias. As such, while the Bank may not discriminate against national political ideology, a borrowing member must (Ciorciari says) still adhere to international human rights law.⁹¹ Second, historical evidence suggests that British representative John Maynard Keynes was motivated in part to protect British economic sovereignty. Again, this reading of the political prohibition suggests it is "narrowly focused upon economic policy" and thus permits human rights considerations in lending decisions.⁹² Third, Keynes' vision of the Bank suggested that it should be "run by expert economists under conditions of minimal political influence."⁹³ Again, so long as a human rights violation amounts to an "economic concern," the Bank may safely incorporate human rights concerns into lending policy.

88. *Strengthening World Bank Group Engagement*, *supra* note 62, at 1-2.

89. Mark Wadzyk, *Is it Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?*, 17 WIS. INT'L L.J. 553, 553 (1999).

90. John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331, 369-71 (2000).

91. *Id.* at 367-68.

92. *Id.* at 368-69.

93. *Id.* at 369.

C. “Mission Creep”

This criticism has two primary components. First, the Bank’s efforts to address governance and corruption require it (according to the critics) to act *ultra vires*, or clearly outside of its charter.⁹⁴ Second, the Bank is said to be ill-suited to take on the challenges inherent in addressing governance, corruption and sustainable development.⁹⁵ Jessica Einhorn, former Managing Director of the Bank, describes the problem:

By now, its mission has become so complex that it strains credulity to portray the [B]ank as a manageable organization. The [B]ank takes on challenges that lie far beyond any institution’s operational capabilities. The calls for greater focus through reform seem to produce little beyond conferences and consternation, since every program has a dedicated constituency resisting change.⁹⁶

This “mission creep” began in earnest in 1973, when then-Bank President Robert McNamara challenged the Bank and the world community to end poverty by the end of the twentieth century.⁹⁷ Einhorn claims, “[h]is speech forcefully initiated a tradition of identifying global problems, setting bold objectives, and then attempting to tackle them no matter how complicated the undertaking.”⁹⁸ Despite substantial efforts, the Bank was unable to cope with the challenges of post-Cold War transition in eastern Europe, increasing poverty and AIDS in Africa, and the Asian financial crisis of 1997.⁹⁹ As the Bank expanded its mission to address these challenges, criticism continued to increase from opposite ends: “From those who share the [B]ank’s core beliefs, there are calls for focus and results. From those who have always opposed the emphasis on trade and markets, there is increasing stridency in the streets and at the meetings.”¹⁰⁰ Einhorn rejects the technocratic focus of the Bank and other international financial institutions, arguing that “the rhetoric of international development is deeply attached to the notion that any problem can be solved with a detailed blueprint, goodwill, and sufficient effort.”¹⁰¹

Developing member states also express concerns about the Bank’s agenda. These countries’ primary concern is that incorporating human rights issues into lending policies serves “as another lever for neocolonial influence via the organs of international finance.”¹⁰²

In sum, Einhorn identifies five “dilemmas” that preclude successful

94. HEAD, *supra* note 1, at 120.

95. *Id.*

96. Jessica Einhorn, *The World Bank’s Mission Creep*, FOREIGN AFF., Sept./Oct. 2001, at 22, 22.

97. *Id.* at 24.

98. *Id.*

99. *Id.* at 28.

100. *Id.* at 29.

101. *Id.* at 30.

102. Ciociari, *supra* note 90, at 335.

governance reform efforts.¹⁰³ First, while strong institutions are the building block to good governance and economic development, no “magic wand” exists that can create the solid foundation necessary to the Bank’s governance initiatives.¹⁰⁴ Second, the notion that good governance is key to sustainable economic growth has been empirically disproved in western Europe.¹⁰⁵ Einhorn notes that developed nations such as Germany, France and Italy have thrived despite cross-ownerships of banks and their insurers, and corruption.¹⁰⁶ Third, the Bank seems to have taken the position that the development prescription is self-evident.¹⁰⁷ In other words, “you will be developed when you are developed.”¹⁰⁸ Fourth, the Bank’s wide-ranging expertise falls victim to organizational politics.¹⁰⁹ Because the Bank possesses such diverse agendas, “all the interested parties want to control it for their own purposes.”¹¹⁰ Finally, the “politics of support can often conflict with the politics of lending.”¹¹¹ As Shihata asserted, while the Bank adamantly strives to avoid political influences, involvement and anticorruption inherently require intrusion into political matters.¹¹²

Professor John W. Head rejects this “mission creep” criticism for two reasons.¹¹³ First, the Bank has the sole power to interpret its own charter.¹¹⁴ Additionally, the charter is drafted broadly, allowing the Bank considerable leeway in establishing a link between governance and aid effectiveness.¹¹⁵ As stated above, the Bank has adequately justified the continued expansion of its mission within the confines of the Articles of Agreement.

D. “Bad Medicine”

This criticism argues that the “Washington Consensus” of *laissez-faire* economic reforms is a flawed paradigm for growth in developing countries. By the early twenty-first century, the benefits of globalization failed to trickle down into developing economies. Despite economic liberalization and increasing emphasis on free trade in the past several decades, income inequality between developed and developing nations continues to expand.¹¹⁶

103. Einhorn, *supra* note 96, at 30.

104. *Id.*

105. *Id.*

106. *Id.* at 30-31.

107. *Id.* at 31.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. HEAD, *supra* note 1, at 124.

114. *Id.*

115. *Id.*

116. Bruce R. Scott, *The Great Divide in the Global Village*, FOREIGN AFF., Jan./Feb. 2001, at 160, 160.

Harvard University Professor Bruce R. Scott agrees that corruption and poor governance significantly impede foreign direct investment in the poorest of developing countries.¹¹⁷ Nevertheless, he criticizes western efforts to impose institutional reform in transition economies.¹¹⁸ Citing the failure of “shock therapy” in the 1990s, particularly in Russia, Scott argues that mass privatization was doomed to fail without first improving the rule of law and anticorruption efforts.¹¹⁹ Put simply, “[n]aïve economic models made for naïve policy recommendations.”¹²⁰

The Bank’s efforts in Latin America and eastern Europe illustrates one of the Bank’s most difficult challenges: implementing legal and judicial reforms in developing countries. Particularly in legal and judicial systems, reform efforts often lead to a “phenomenon of transplantation,” where borrowing states adopt common law systems in place of civil law systems.¹²¹ This has led to confusion and difficulty in implementing law because of unfamiliarity and lack of precedent.¹²²

Experience in eastern Europe during the 1990s showed that “weak capacity in the legal and judicial systems was impeding investment and growth and contributing to corruption and poor governance.”¹²³ The “paradox is that judicial independence is necessary for true economic and political reform, but lack of judicial accountability is a major obstacle to economic development.”¹²⁴ Although progress has been made in these countries, much more needs to be done to ensure that transition countries can raise the quality of their judicial systems to that of developed countries.¹²⁵ Despite a strong consensus among rich and poor nations in favor of judicial reform, the results continue to be disappointing.¹²⁶

Interestingly, Scott does not discuss the Bank’s role, if any, in aiding developing countries’ governance reform efforts. He claims that developing countries “must improve the effectiveness of their institutions and bureaucracies in spite of entrenched opposition and poorly paid civil

117. *Id.* at 169.

118. *Id.* at 170.

119. *Id.* at 170-71.

120. *Id.* at 171.

121. W. Paatii Ofosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 LAW & BUS. REV. AM. 551, 576-77 (2002).

122. *Id.*

123. James H. Anderson and Cheryl W. Gray, *Transforming Judicial Systems in Europe and Central Asia* 6, Paper for ABCDE Conference, St. Petersburg, Russia (Jan. 2006), available at <http://siteresources.worldbank.org/INTECAREGTOPJUDREF/PublicationsandReports/20790760/TransformingJudicialSystemsinECA.pdf>.

124. *Id.* at 7.

125. *Id.*

126. Bryan Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383, 384 (2002).

servants,”¹²⁷ but it is those very entrenched interests that prevent these nations from reforming on their own. This implies that pressures and incentives to reform must come from the outside. Additionally, Scott argues that governance efforts must take a country-by-country approach, “conform[ing] to each country’s unique political and social context.”¹²⁸

E. “Narrowness of Economic Focus”

The Bank was founded on two premises. First, “the sovereign state was the most significant actor in the international order,” and thus, the Bank was constrained against interference “in the internal affairs of member states.”¹²⁹ Second, its mandate should be “limited to specific and defined sets of problems.”¹³⁰ Globalization has required the Bank to continuously expand its mission; these same forces have resulted in a decrease in the sovereign power of states.¹³¹

The Bank cannot focus solely on international capital flows without dealing with root causes of developing countries’ economic woes, such as poverty or environmental degradation, among others.¹³² In order to promote sustainable development, the Bank will necessarily encroach into the political matters of borrowing members.¹³³ Additionally, conditional adjustment loans inherently require a borrowing member to sacrifice some measure of sovereignty in exchange for needed funds.¹³⁴ By the middle 1990s, the Bank concluded the only way to ensure sustainable development was through policy-based lending.¹³⁵

While noting the Bank has attempted to distinguish between governance issues within the Bank’s mandate and those that are not, American University Law Professor Daniel Bradlow argues that “the distinctions that it seeks to draw are arbitrary and ultimately unsustainable.”¹³⁶ Policy-based lending has expanded the Bank’s dialogue with borrowing countries, giving the Bank considerable influence over economic, social and environmental issues in both project development and implementation stages.¹³⁷ In fact, Tulane Law Professor Gunther Handl argues the Bank is “already legally obligated to conduct banking activities in [developing member countries] consistently with

127. Scott, *supra* note 116, at 175.

128. *Id.* at 176-77.

129. Daniel Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411, 411 (1995).

130. *Id.*

131. *Id.* at 412.

132. *Id.* at 413-14.

133. Gunther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT’L L. 642, 643-44 (1998).

134. Bradlow & Grossman, *supra* note 129, at 419-20.

135. *Id.* at 421.

136. *Id.* at 422, n. 38.

137. *Id.* at 426.

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the basic objective . . . of sustainable development.”¹³⁸ As such, the Bank has “an expanded opportunity, as well as responsibility . . . to use loan criteria and standards that might not be of relevance from a narrow economic development point of view.”¹³⁹ The African Development Bank Advisory Council argues that certain non-economic factors must be considered when lending.

[W]hile economic growth is necessarily dependent on strictly economic factors, . . . these factors by themselves are not sufficient. . . . An effective public administration, a functioning legal framework, efficient regulatory structures, and transparent systems for both financial and legal accountability—in brief, those essential attributes of what is now referred to as *good governance*—have to be in place (emphasis in original).¹⁴⁰

Unfortunately, according to Bradlow, the Bank interprets the political prohibition provision of its charter arbitrarily and inconsistently. Bradlow continues,

the Bank contends that it has the authority to address human rights issues it wishes to address, such as female genital mutilation, while arguing that it does not have the authority to address other important human rights issues, such as the prevention of torture or the suppression of political dissent, because the latter are purely ‘political’ issues that do not have a ‘direct’ economic effect.¹⁴¹

For instance, Shihata contended it is appropriate for the Bank to require a borrowing member to respect freedom of expression in the participation and consultation phase of project design.¹⁴² However, outside of this limited instance, the Bank may not impose a general requirement of respect for freedom of expression on a borrowing member. The Bank must construe its charter provisions in a flexible manner.¹⁴³ Moreover, the Bank must expand its involvement into environmental, human rights, and governance matters to maximize lending effectiveness.¹⁴⁴

Bradlow also takes issue with the distinction between function and legal obligations. Even if borrowing members maintain legal responsibility for their policy choices, the Bank should not hide behind “legal formalism” to absolve itself of “responsibility for the consequences of [its] actions in development projects.”¹⁴⁵ To address intertwined problems without acting *ultra vires*, Bradlow encourages the Bank to

reinterpret [its] charter[] to clarify what issues are considered

138. Handl, *supra* note 133, at 647.

139. *Id.*

140. *Id.* at 651.

141. Bradlow & Grossman, *supra* note 129, at 431.

142. Shihata, *Democracy and Development*, *supra* note 81, at 640.

143. HEAD, *supra* note 1, at 119-20.

144. *Id.* at 152.

145. Bradlow & Grossman, *supra* note 129, at 427.

‘domestic’ political issues, and therefore outside the scope of [its] mandate. While this prohibition has a continuing validity in excluding undue influence, it should not prevent the . . . [Bank] from incorporating all matters governed by international law, such as human rights and the protection of the environment, into [its] operations. Such a reinterpretation would facilitate efforts to promote a development process that is governed by the rule of law.¹⁴⁶

Ciociari’s analysis of the Bank’s charter negotiations suggests the Bank may accomplish this reinterpretation without necessarily engaging in the very difficult amendment process.

Practically, the Bank must develop a comprehensive focus on governance and corruption. “Efforts by the World Bank to keep its own projects clean while ignoring the rest of a borrower government’s activities will be ultimately ineffective as corrupt officials and private individuals and firms seek opportunities elsewhere.”¹⁴⁷

III. STRENGTHENING BANK GROUP ENGAGEMENT ON GOVERNANCE AND ANTICORRUPTION

The consensus is that good governance efforts must focus on the following areas: transparency, reduction of incentives for state capture, and integrity in government. The Bank’s strategy for combating corruption and poor governance addresses these needs.¹⁴⁸ The following five objectives drive the Bank’s current governance initiative: (1) increase engagement with borrowing countries;¹⁴⁹ (2) integrate governance and anticorruption efforts into broader Bank lending operations;¹⁵⁰ (3) promote “systematic and consistent treatment” of these efforts in all Bank projects;¹⁵¹ (4) maintain integrity within its staff;¹⁵² and (5) strengthen partnerships with stakeholders beyond a borrowing nation’s central government.¹⁵³

Following the vision outlined in Wolfowitz’s Jakarta speech, these five objectives will be achieved through the Bank’s three-pronged plan. The first prong strengthens support to borrowing countries. The Bank’s “Country Assistance Strategies,” the “business plan that guides Bank Group activities in a member country,” categorizes borrowing members on a sliding-scale

146. *Id.* at 439.

147. Rose-Ackerman, *The Role of the World Bank in Controlling Corruption*, *supra* note 8, at 112-13.

148. World Bank Discussion Draft, *supra* note 61, at 3.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 3-4.

153. *Id.*

according to the degree of commitment to reducing corruption.¹⁵⁴ In high-opportunity countries, “[w]here . . . leadership is undertaking major governance and anticorruption reforms . . . the Bank will . . . rapidly scal[e] up technical and financial assistance to support these reforms.”¹⁵⁵ Additionally, the Bank will “make use of . . . anticorruption teams, (field-based) governance advisors, and anticorruption action plans in projects” in countries where corruption poses a “major obstacle” to poverty reduction.¹⁵⁶ Finally, in those countries where there is no commitment to reform, the Bank “will seek creative ways” to remain engaged.¹⁵⁷ Specifically, the Bank will “provide services directly to the poor using instruments such as community-driven development and third-party delivery systems which do not rely on central government administration for distributing resources.”¹⁵⁸ Using such alternative means to provide development assistance avoids undesirable “punishment” of the poor solely because of a government’s inability or refusal to reform corrupt administration of social services. As one participant in the consultations noted, “zero tolerance for corruption does not mean zero engagement.”¹⁵⁹

The Bank will also increase support to borrowing members by building “capable and accountable states in support of development and poverty reduction.”¹⁶⁰ To achieve this goal, the Bank will strengthen its assistance to civil service and local governments, while targeting its efforts to specific sectors and promote the publication and dissemination of key budget data to increase transparency.¹⁶¹ “By facilitating greater participation and oversight by civic organizations and the media,” the Bank hopes to raise the demand for greater transparency in both the public and private sectors.¹⁶² Additionally, the Bank will “[f]oster a competitive and responsible private sector.”¹⁶³ Reform efforts will address improvement in the investment climate and reduction of red-tape, strengthen ethical corporate practice, and implement “public sanctions to raise the cost to businesses of continuing to engage in corruption.”¹⁶⁴ World Bank affiliates such as the Multilateral Investment Guarantee Agency will “encourage[e] businesses to join public-private [reform] coalitions.”¹⁶⁵

154. *Strengthening World Bank Group Engagement*, *supra* note 62, at 11.

155. *Id.* at 11-12.

156. *Id.* at 12.

157. *Id.*

158. *Id.* For a discussion of specific suggested methods for Bank involvement in high-risk countries, see *id.* at 70.

159. *Id.* at 69.

160. *Id.* at 17.

161. *Id.* at 18.

162. *Id.*

163. *Id.* at 22.

164. World Bank Discussion Draft, *supra* note 61, at 14-15.

165. *Strengthening World Bank Group Engagement*, *supra* note 62, at 22.

The Bank will also seek to “[s]trengthen political accountability.”¹⁶⁶ The Bank will target financial sector reform and transparency, and seek out “champions” of reform “who have the authority to advance the reform agenda as well as the local knowledge to find a way through the inevitable obstacles.”¹⁶⁷ In its proposal, the Bank concedes that because political matters fall outside of its mandate, it will lean on partner institutions to implement this portion of the strategy.¹⁶⁸

The second prong of the Bank’s strategy is to address corruption in Bank Group operations. The Bank will place an increasing emphasis on “country systems” as opposed to stand-alone projects.¹⁶⁹ Although the current stand-alone approach allows the Bank to isolate projects against corruption, adopting a country system approach will, if effective, improve governance in member countries.¹⁷⁰ The Bank will implement risk mitigation and other special tools.¹⁷¹ Specifically, the Bank “will conduct regular risk reviews of the project pipeline and lending portfolio,” promptly investigate allegations of wrongdoing, and collaborate with governments to share information developed from investigations.¹⁷² In high-risk countries, the Bank will rely on previous experience in “fragile states” by utilizing “anticorruption action plans that synthesize the main corruption prevention aspects built into project design,” anticorruption teams to “oversee the design of projects in risky settings,” and governance advisers.¹⁷³

The third prong of the Bank’s strategy is to improve and promote global partnerships on governance and anticorruption. This involves coordination among donor countries and other multilateral development banks. A recurring complaint voiced in the consultations dispersed efforts of multiple donor organizations and the lack of regional strategies for combating corruption.¹⁷⁴ To address these concerns, the Bank will, “[w]ithin its mandate . . . strengthen partnerships with civil society organizations and the media at the country and global levels. . . .”¹⁷⁵ Finally, the Bank will support global coalitions for reform as well as international conventions such as the Organization for Economic Co-operation and Development (OECD) anti-bribery convention.¹⁷⁶ The Bank argues that ratifying the United Nation’s anticorruption convention would, in addition to improving governance, make it easier to freeze and

166. World Bank Discussion Draft, *supra* note 61, at 13.

167. *Id.* at 15.

168. *Id.* at 13.

169. *Strengthening World Bank Group Engagement*, *supra* note 62, at 24-26.

170. *Id.* at 24.

171. *Id.* at 26-28.

172. *Id.* at 26.

173. *Id.* at 27.

174. *Id.* at 29.

175. *Id.* at 30.

176. *Id.* at 28-32.

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reclaim assets stolen by corrupt regimes.¹⁷⁷

IV. THE ‘TUG OF WAR’ RESULTS IN A EUROPEAN ‘ROW’

A. *World Reaction to the New Initiative*

In September 2006, the Bank’s strategy document was introduced for approval by the Bank’s development committee. Several member countries, led by Britain, France, Germany, and Italy, objected to the lack of oversight and expressed concerns over consistent application of the initiative.¹⁷⁸ Several European members expressed the need for objective criteria, particularly when determining whether to suspend loans to a borrowing member.¹⁷⁹ Objecting to the strategy’s transparency and accountability provisions, British Development Secretary Hilary Benn even threatened to withhold pledged funding to the IDA.¹⁸⁰ China “insisted that the [B]ank abide by the ‘principle of non-politicization’ and respect country ownership of governance strategies.”¹⁸¹

In response, some senior Bank officials suggested that Benn was motivated by domestic political ambition to manufacture a “row.”¹⁸² Ironically, Benn shares the Bank’s basic philosophy regarding the importance of good governance, claiming that success “in the fight against poverty will only be achieved through effective governance.”¹⁸³ The *Washington Post* opined that Benn’s effort “risks suffocating the World Bank, which is already half-throttled by shareholder meddling.”¹⁸⁴ Daniel Kaufmann argues that the call for additional governance indicators is merely a delay tactic.¹⁸⁵

The United Nations and developing countries have also criticized the Bank’s initiative. Shortly after the row erupted between Development Secretary Benn and Wolfowitz, the U.N. Conference on Trade and Development released a report arguing that a new U.N. agency should take the Bank’s place in delivering additional aid to the developing world.¹⁸⁶ Many critics have argued the anticorruption efforts come at the expense of the

177. *Id.* at 32.

178. Chris Giles & Krishna Guha, *Blow to Wolfowitz as Governments Insist on Final Say Over Corruption*, FIN. TIMES, Sept. 19, 2006, at 8.

179. *Id.*

180. *Corruption? Ho-Hum*, *supra* note 7, at A14.

181. Giles & Guha, *supra* note 178, at 8.

182. Alan Beattie & Krishna Guha, *Benn Accused of Manufacturing Row*, FIN. TIMES, Sept. 20, 2006, at 2.

183. Chris Giles, *Governance Poses Test for World Bank*, FIN. TIMES, Sept. 26, 2006 at 11.

184. Editorial, *Mr. Wolfowitz and Corruption; The World Bank President Needs Space for His Initiative*, WASH. POST, Sept. 27, 2006, at A26.

185. Giles, *supra* note 183, at 11.

186. Angela Balakrishnan, *Poor Countries ‘Suffering from Aid Chaos’: Call for New UN Body to Take Over from World Bank*, GUARDIAN (London), Sept. 22, 2006, at 30.

poorest people who cannot control the quality of their government.¹⁸⁷ Even the Bank's former General Counsel, Ibrahim Shihata, shared the view that those in poverty should not be punished for the sins of their government.¹⁸⁸ Developing countries have also voiced an opinion. Iran's Minister of Economic Affairs, Dr. Davoud Danesh Ja'fari, urged the Bank to stay within its economic mandate, claiming the latest anticorruption initiative will "undermine economic certainty and destabilize the investment climate in developing countries."¹⁸⁹

Of significant concern is increased lending by China to African countries which have sought and received substantial financial assistance. Several countries have cited the substantial length of time to receive Bank funds, as well as the conditional nature of Bank loans, in their decision to seek alternative sources of aid.¹⁹⁰ In spite of the Bank's recent suspension of loans to some sub-Saharan African countries, China lent sixty-six million dollars to Ghana in 2006. In addition to the thwarting of anticorruption efforts, the Bank is concerned that many countries with suspended debt will find themselves once again with a sizable debt burden because of Chinese loans. Moreover, the Bank is concerned because the loans "were not lent at concessional rates or were used for projects that would not boost development."¹⁹¹

The development committee, which endorsed the governance strategy document in principle, concluded it should retain ultimate oversight over the anticorruption initiative. After an additional revision and comment period, the revised strategy was submitted to the committee for approval in the spring of 2007.¹⁹²

B. Assessment of the Bank's Initiative

i. Strengths

The 2006 proposal is the most comprehensive strategy document proposed to fight corruption and poor governance. Drawing on decades of research, and learning lessons from its own failures, the Bank has made the strongest effort yet to identify and eliminate the root causes of corruption and poor governance. The Bank strategy reflects the realization that economic growth alone cannot create strong institutions and good governance. Rather it is good governance and strong institutions which provide the foundation for sustainable development. The incentives for foreign direct investors,

187. *Id.*

188. See Shihata, *Democracy and Development*, *supra* note 81, at 642.

189. Grace Ng, *Anti-Graft Drive 'May End Up Hurting the Poor'*, STRAIGHTS TIMES (Singapore), Sept. 21, 2006, at 1.

190. Bryan Lee, *Slow Financial Aid Prompts Africa to Turn to China for Loans World Bank and IMF Funds Come too Slowly and with too Many Conditions Attached*, STRAIGHTS TIMES (Singapore), Sept. 18, 2006, available at 2006 WLNR 16145809.

191. *Id.*

192. Giles & Guha, *supra* note 178, at 8.

bureaucrats, and kleptocrats to engage in corrupt activities must be addressed to promote sustained economic growth in the poorest countries. By working with countries to develop accountable institutions, raise the cost of corruption, and lower the benefits, the Bank can substantially improve the quality of governance in many developing countries. The concern expressed by European diplomats regarding consistency in treatment seems to be addressed by the Bank's third objective. By incorporating governance metrics into the lending process, the Bank should be able to more consistently address corruption concerns, rather than "putting out fires" as they arise.

Perhaps the most promising aspect of the current initiative is the shift from a project-centered focus to a country approach. This allows the Bank to help foster a good governance environment, while adopting strategies that are tailored to the specific circumstances of each borrowing member. By working with numerous stakeholders within the borrowing country, the Bank can incorporate these stakeholders' viewpoint into lending policy, rather than having conditions imposed that do not reflect the unique circumstances of the member country. Additionally, this process gives borrowing members greater input in the conditions placed upon the funds. The biggest complaint of borrowing countries has been the lack of a voice as to what conditions are imposed on funds.

Another important proposal is the Bank's effort to promote a responsible private sector. The new initiative does not require a borrowing member to adopt the OECD Convention, however the Bank promises to "use its global influence to advocate for tougher monitoring and enforcement of" the Convention, and "will support implementation of the UN Convention against Corruption."¹⁹³ By reducing the incentives and raising the cost of bribery, state capture, and other forms of corrupt behavior, the Bank can turn private firms into allies, rather than a root cause of the problem.

ii. Weaknesses

The diplomatic row between European donors and the Bank threatens to substantially impair the Bank's ability to implement the strategy in the most corrupt countries. There are four main areas of concern. The first concern is the Bank's ability to create incentives in the poorest countries. The Bank's strategy document is exceptionally vague about the extent to which it can foster good governance in the countries where poor governance, corruption, and poverty are the most acute. The Bank insists it will not, as critics charge, simply refuse to aid those countries that are unwilling or unable to make improvements in governance. In the September 2006 discussion draft, the Bank seemingly retreated from those cases in which international efforts to promote good governance are the most needed. The Bank indicated that involvement in such countries would be "more restricted."¹⁹⁴ The original

193. *Strengthening World Bank Group Engagement*, *supra* note 62, at 31-32.

194. World Bank Discussion Draft, *supra* note 61, at 8.

strategy document did not provide any indication of what efforts, if any, would be made in these countries. As a practical matter, it seems the Bank may have little choice but to disengage from those countries where recalcitrant leaders refuse to reform governance. Particularly given the rise of China as an alternate source of aid, the incentives for borrowing members to comply with governance initiatives are reduced. There is no indication that China has incorporated any governance concerns into its lending. In fact, the lending is premised on having substantially fewer strings than Bank loans. That said, the March 2007 discussion draft is significantly more optimistic that alternative entry points exist in these high-risk countries.¹⁹⁵ Even so, there is still significant risk that in the long-term, corrupt regimes will directly or indirectly counteract Bank efforts, even where specifically targeted to the local population.

The Bank correctly recognizes that good governance means good democratic governance. The Bank's focus on transparency and strong institutions will lead borrowing members toward democratic governance, but these borrowing members must voluntarily walk down this path. The Bank cannot impose good governance on a member. The Bank will be challenged if it faces another situation like the Chad-Cameroon Oil Pipeline Project. The Bank cannot be too quick to reach agreements with governments that have a history of ignoring Bank conditions and loan agreements.

The second area of concern is the strategy document's shortcoming with respect to judicial reform. The Bank's reform efforts are mentioned only in passing in the document, with no concrete proposal included. It is unclear if the Bank will continue its previous method of judicial reform, which, as mentioned above, met with considerable difficulty in Latin America and eastern Europe. A strong, yet accountable, judiciary is central to enforcing the rule of law and assuring private firms that an impartial dispute resolution forum is available.¹⁹⁶ Moreover, because the judiciary is not immune to corruption, judicial accountability is as important as judicial independence.¹⁹⁷

The third area of concern is the lack of concrete proposals regarding state oversight institutions. The Bank concedes that state oversight institutions have not been a strong central focus of Bank governance initiatives.¹⁹⁸ Although the Bank promises to help member states improve various audit institutions in partnership with donor states, no specific proposal is articulated in the Bank's strategy document.

The fourth area of concern is the Bank's commitment to involving

195. See *supra* notes 157-59 and accompanying text.

196. Roumeen Islam, *Institutional Reform and the Judiciary: Which Way Forward?* 6-7 (World Bank Policy Research Working Paper 3134, 2003).

197. Feedback from Initiation Consultations on *Strengthening Bank Group Engagement on Governance and Anticorruption* 3 (Aug. 30, 2006), [http:// www.worldbank.org/html/extdr/comments/governancefeedback/governancenote.pdf](http://www.worldbank.org/html/extdr/comments/governancefeedback/governancenote.pdf) [hereinafter Feedback].

198. World Bank Discussion Draft, *supra* note 61, at 46.

stakeholders. The Bank has made such consultation a centerpiece of its strategy, and it must continue to expand these consultations. Initial feedback from the Bank's strategy document indicated that a common concern of stakeholders was that the consultation process was "rushed."¹⁹⁹ If the Bank is to successfully incorporate partnerships into its framework for improving governance and anticorruption, it must give all stakeholders an opportunity to participate in the policy formation stage.

iii. Responses to criticisms

The Bank's shareholders must set aside personal political differences and give the Bank the flexibility to implement its new strategy. The Bank has a fiduciary duty to ensure project funds are used for legitimate purposes. "Citizens in both donor and recipient countries want assurances not only that this assistance will be protected, but that it will make a difference in promoting growth and reducing poverty."²⁰⁰ By placing conditions and oversight on Bank management, shareholders risk dooming the new initiative before it is even formally implemented. If the Bank shareholders truly believe that good governance is key to reducing poverty, then they must allow the Bank a chance to prove it. The Bank recognizes that its charter places limits on action. For example, the Bank acknowledges that broader efforts to "strengthen political accountability" require assistance from cooperating institutions.²⁰¹

Additionally, the Bank must take the lead in improving the quality of governance in the developing world. With 185 members, the Bank has broad reach to improve governance through lending. In contrast, only thirty-six countries have ratified the OECD's anti-bribery treaty.²⁰² As a lender of last resort, the Bank has the resources, expertise, and experience to implement its strategy. The advocates of the "mission creep" criticism seem to suggest less is more. In other words, relying on smaller, more specialized entities to promote economic development is the best route. However, it seems that the best practical solution is to have a "one-stop shop," where a country can rely on the expertise and assistance of one specialized institution in implementing governance reform. It would be extremely difficult to coordinate the numerous agencies that would handle each individual issue. A developing country would potentially be subject to conflicting advice and calls for reform, and often a smaller entity would lack the resources to promote essential reforms.

Moreover, proposals for a new U.N. agency to fight poverty seem to complicate the situation, rather than offer a long-term solution. The shorter the time to bring such an agency into existence, the greater the likelihood it will lack the expertise and focus to solve the root causes of poverty. The longer the time spent developing a stronger institution, the more missed opportunities in

199. Feedback, *supra* note 197, at 7.

200. *Strengthening World Bank Group Engagement*, *supra* note 62, at 2.

201. World Bank Discussion Draft, *supra* note 61, at 13.

202. A list of countries who have ratified the Convention is available at <http://www.oecd.org/dataoecd/59/13/1898632.pdf>.

the developing world. There is a strong risk that such an agency would ignore root causes of poverty, such as corruption and poor governance, and therefore fail to encourage the sustainable development impoverished countries desperately need. More importantly, consultations reveal consensus that the current aid and development regime is too dispersed. The addition of yet another agency would exacerbate the problem. The Bank has the resources, experienced and motivated staff, and mission to eradicate poverty through development. Rather than developing an unproven agency from scratch, it is only logical to allow the institution that specializes in economic development the latitude to implement its reform initiative.

Importantly, the failure of the “Washington Consensus” is as likely to have resulted from its inattention to good governance rather than from any inherent flaw in its prescription for reforms. The criticisms are essentially that developing countries were not ready for these reforms. On the one hand, these countries did not have the institutional ability to support such drastic reforms. Additionally, these reforms were imposed without consideration and adjustment to individual countries’ unique circumstances. In other words, the Bank and other donor countries put the cart before the horse by proposing reforms that were doomed to fail unless strong institutions were in place to allow those reforms to succeed. Had greater emphasis been placed on reforming institutions, thus laying the foundation for sustainable development, it is reasonable to conclude that Bank-funded projects and other reforms would have met far greater success.

Finally, the Bank owes a duty to its shareholders to make wise lending decisions and ensure accountability once funds are disbursed. Accountable institutions are key to ensuring that Bank funds are used for their specified purpose. With already thousands of instances of corruption in Bank-funded projects since 2000, the Bank must be more aggressive and proactive in its efforts. Every dollar that is siphoned off because of bribery is one dollar less to reduce poverty and lead developing countries down the path to sustained prosperity. While the threat to withhold funding should be used only as a last resort, it makes no sense to continue to reward corrupt regimes with continued Bank funding. The small portion of Bank aid that might trickle down to impoverished citizens of the most corrupt countries seems nothing more than an insult while their government enriches itself—leaving its citizens in a perpetual state of poverty. The Bank’s governance initiative will “[s]upport [c]hampions and [l]eaders of [r]eform” with incentives including “public recognition,” but these incentives only work if the borrowing member government is committed to reform.²⁰³

CONCLUSION

The World Bank’s new initiative is ambitious and raises legitimate

203. World Bank Discussion Draft, *supra* note 61, at 15.

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concerns that it is encroaching upon the sovereignty of its borrowing members. However, blind adherence to economic solutions, without recognizing the interplay between economic growth and governing institutions, has resulted in the failure of well-intentioned development projects. The Bank cannot allow billions of dollars in annual aid to be siphoned off by corrupt governments and businessmen, while the income gap between rich and poor countries continues to grow. Research indicates that improvements in governance can have a profound impact on economic growth. The concerns of Iran's Minister of Economic Affairs (that the anticorruption initiative will destabilize investment climates of developing countries) are simply wrong. In fact, the research indicates that it is poor governance and rampant corruption that creates economic uncertainty and instability in investment. Red tape and corruption drive away sound investors, leaving low quality foreign investors willing to pay bribes in order to reap private economic gains. The best way for developing countries to achieve sustainable development is not simply through debt relief or grant-based aid, but rather through improving the quality of institutions. The Bank's new initiative is not perfect. The Bank must address the above weaknesses and address concerns raised by stakeholders in the comment period. In the long term, the Bank must consider an amendment to its charter modifying the political prohibition. Nevertheless, the Bank has considerable leeway in interpreting its charter, and it therefore has a duty to expand and promote good governance in Bank-funded projects.