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THE APPLICATION OF THE WORLD BANK STANDARDS TO THE OIL INDUSTRY: CAN THE WORLD BANK GROUP PROMOTE CORPORATE RESPONSIBILITY?

*Genoveva Hernández Uriz**

I. INTRODUCTION

HUMAN rights activists have turned their attention to international financial institutions (“IFIs”), because they have acquired more leverage in the international architecture than the traditional United Nations (“UN”)-based mechanisms.¹ The World Bank Group (“World Bank” or “Bank”) has become the world’s main developmental institution. The International Development Association (“IDA”), the soft-loan window of the World Bank, has attracted more resources on its own than the entire UN system.² The World Bank resources quadruple those of the UN when one adds the International Bank for Reconstruction and Development (“IBRD”).³ The World Bank, through its private sector arms — the International Financial Corporation (“IFC”) and the Multilateral Investment Guarantee Agency (“MIGA”) — lends and provides insurance, respectively, to companies willing to invest in developing countries.⁴ Given its vocation as an investment promoter,

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1. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2001, xviii–xix (2000), available at <http://www.hrw.org/wr2k1/intro/index.html> (last visited Jan. 25, 2002).

2. HELGE OLE BERGESEN & LEIV LUNDE, DINOSAURS OR DYNAMOS?: THE UNITED NATIONS AND THE WORLD BANK AT THE TURN OF THE CENTURY 161–62, 198, 213 (1999).

3. *Id.* at 161.

4. Articles of Agreement of the International Finance Corporation, Dec. 5, 1955, art. 1, 7 U.S.T. 2197, 264 U.N.T.S. 117 (amended Apr. 28, 1993) [hereinafter IFC Articles of Agreement].

one may wonder what the World Bank's role is in the establishment of corporate responsibility standards.

Among the different corporate activities subject to public scrutiny, the oil sector has one of the worst human rights reputations. Oil companies have been accused of supporting dictatorial regimes, using repressive armed forces to their own benefit, and externalizing the costs of the oil production on host communities that seldom receive a fair share of the benefits.⁵ However, in the last few years, corporate discourse has experienced an unprecedented shift. Companies now seem to be aware that the traditional "mind your own business" stance cannot be publicly maintained without suffering adverse marketing consequences.⁶ At least nominally, oil transnationals acknowledge that the criteria for success are broader than in the past.⁷ Major corporations are eager to declare that corporate responsibility builds shareholder value.⁸ For better or for worse, codes of conduct have been adopted in an attempt to respond to the mounting pressures on corporations to acknowledge, measure, and disclose their broader social responsibilities. The response is very patchy due to the lack of a legal framework on companies' duties and the lack of enforcement mechanisms, other than public pressure, and, occasionally, the threat of sanctions by host governments.⁹

5. See generally HUMAN RIGHTS AND THE OIL INDUSTRY (Asbjorn Eide et al. eds., 2000).

6. See, e.g., SHELL INTERNATIONAL LIMITED, THERE IS NO ALTERNATIVE: SHELL ON SUSTAINABLE DEVELOPMENT, available at http://www.shell.com/home/media-en/downloads/publications/there_is_no_alternative_12072002.pdf (last visited Sept. 23, 2002).

7. The Royal Dutch/Shell Group of Companies, *Contributing to Sustainable Development: A Management Primer*, available at www.oikos-stgallen.org/international/shellprimer.shtml (last visited Jan. 25, 2002). John Elkinton argues that in the twenty-first century, successful business will need to take into account a "triple bottom line" consisting in economic performance, environmental sustainability and social justice. John Elkington, *The Triple Bottom Line for Twenty-First Century Business*, in COMPANIES IN A WORLD OF CONFLICT: NGOS, SANCTIONS AND CORPORATE RESPONSIBILITY 32, 32 (John Mitchell ed., 1998).

8. Chevron Texaco, Social Responsibility, at http://www.chevrontexaco.com/social_responsibility/ (last visited Oct. 23, 2002).

9. As one commentator points out, "one could easily write a book describing the vast variety of codes that are being advocated by groups of all persuasions." However:

This paper will argue that a closer look at the World Bank's Operational Policies ("OPs") may be helpful in setting minimum benchmarks in oil exploitation projects. First, the question is particularly pertinent with regard to the oil market, because the World Bank has broad experience in financing expansive infrastructure and natural resource projects.¹⁰ The areas in which the World Bank has developed guidelines tackle issues where oil investments are likely to cause problems, such as indigenous peoples, involuntary resettlement, and the environment.¹¹ Moreover, the World Bank claims to have assumed the risk of ensuring that large oil exploitation projects become a vehicle for welfare.¹² More oil developments are to be expected in the future, as the World Bank has stated that the financing of petroleum projects is "of the highest priority for Bank Group support."¹³

This field of investment, however, is a controversial one. Proof of this is the launching of the *Extractive Industries Review*

one would be hard pressed to write more than a few pages if one were to report the research evidence of the effectiveness of these codes, as to intended outcomes, verification of claims, made . . . and above all, evidence of their sustained relevance and viability under various cultural and political frameworks, economic and competitive industry conditions and institutional organisational constraints.

S. Prakash Sethi, *Gaps in Research in the Formulation, Implementation and Effectiveness Measurement of International Codes of Conduct*, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 117, 119 (Oliver F. Williams ed., 2000).

10. BERGESEN & LUNDE, *supra* note 2, at 110–111. In fact, during its early years, the Bank concentrated on infrastructure projects.

11. See generally The World Bank, *World Bank Operational Manual*, at <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf> (last visited Oct. 12, 2002) [hereinafter *World Bank Operational Manual*].

12. The World Bank, *The Chad-Cameroon Petroleum Development and Pipeline Project, Questions and Answers, Why is the Bank Group Involved?*, at <http://www.worldbank.org/afr/ccproj/questions/index.htm> (last updated Aug. 15, 2002) [hereinafter *Questions and Answers*].

13. See *Project Appraisal Document on Proposed International Bank for Reconstruction and Development Loans to the Tchad Oil Transportation Company, S.A. and Cameroon Oil Transportation Company, S.A. for a Petroleum Development and Pipeline Project*, The World Bank Report No. 19343 AFR, Apr. 13, 2000, at 20, available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/10/21/000094946_00102111244720/Rendered/PDF/multi_page.pdf [hereinafter *Project Appraisal Document*].

("The Review") by the World Bank in 2001. The Review seeks to open a consultation process with governments, industries, non-government organizations ("NGOs") and academics in order to ascertain what role the World Bank might play with regard to delicate questions such as environmental and social sustainability, revenue sharing, human rights protection, and the effects of extractive industries on host communities.¹⁴

In all likelihood, the World Bank's experience and leverage may be relevant to the promotion of corporate responsibility because it incorporates project guidelines into contractual documents, and therefore makes them legally binding on borrowers.¹⁵ The furtherance of corporate responsibility through contractual mechanisms should be the subject of study at a moment in which the voluntary approach taken by internationally developed codes of conduct, such as the Organization for Economic Cooperation and Development ("OECD") and the International Labor Organization ("ILO") guidelines, has been considered unsatisfactory.¹⁶

Even when the World Bank is not sponsoring a project, it may still act as a trendsetter. The World Bank's technical assistance may encourage states to adopt the Bank's OP as internal measures, even in projects the Bank is not involved in.¹⁷ By the same token, in an environment of growing demands upon pri-

14. Extractive Industries Review, *What exactly is this Review?* (Frequently Asked Questions), at <http://www.eireview.org/eir/eirhome.nsf/EnglishOtherLinks/faq?opendocument> (last visited Jan. 25, 2002).

15. The World Bank Operational Guidelines contain express references to the incorporation of the Operational Directives and Policies in the loan documents. See *World Bank Operational Manual*, supra note 11; *World Bank Operational Manual*, Operational Directive 4.20: Indigenous Peoples ¶ 20 (Sept. 1991), [hereinafter World Bank OD]; World Bank OD 4.30: Involuntary Resettlement ¶ 30 (June 1990) (according to which the borrower's obligation to carry out the Resettlement Plan is enshrined in a legally binding document); *World Bank Operational Manual*, Operational Policy 4.01: Environmental Assessment (Jan. 1999) [hereinafter World Bank OP].

16. See Christopher McCrudden, *Human Rights Codes for Transnational Corporations: The Sullivan and McBride Principles*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 418, 419 (Dinah Shelton ed., 2000) (describing internationally developed codes of conduct as failures).

17. Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323, 323 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

vate investors, the steps taken by multilateral lenders may provide states with guidelines about what standards they should apply to be on the “safe side.” However, in order for this influence to be useful in practice, the World Bank’s financing needs to be attractive to investors. Abundant literature exists regarding the World Bank’s leverage upon borrowing states.¹⁸ As to private investment, economists have mixed opinions on whether the Bank really catalyses private investment flow.¹⁹ Although the World Bank’s role as “norm generator” may be highly dependent on its economic success as an investment catalyst, the two are not entirely co-dependent. The OPs’ application may also be significant because other development banks already follow this trend. In addition, other financing agencies often want the Bank’s imprimatur because it is a demanding lender with external credibility.²⁰

Although public attention towards the relations between corporations and international financial institutions (“IFIs”) has increased in the last few years, investors’ interest in IFIs is not a recent phenomenon. In the 1970s, oil companies had already declared that they valued IFI involvement in foreign exploitation ventures, not only for the contributions they made, but also because of their stabilizing role, which could help to ease tension in the company-host government relations.²¹ In addition to this conciliating role, the World Bank’s involvement in oil exploitation ventures in the 1990s may have become a crucial factor in the marketing strategy of companies willing to avoid human rights scandals.²²

It would be naive to ignore the difficulties and constraints that the World Bank faces in the development of a genuine corporate responsibility policy *vis-à-vis* its clients. So far, the

18. See, e.g., BIPLAB DASGUPTA, *STRUCTURAL ADJUSTMENT, GLOBAL TRADE AND THE NEW POLITICAL ECONOMY OF DEVELOPMENT* (1998). See also Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993).

19. See generally Graham Bird et al., *Do the Multilaterals Catalyse Other Capital Flows?, A Case Study Analysis*, 21 THIRD WORLD QUARTERLY 483 (2000). See also DANI RODRIK, *WHY IS THERE MULTILATERAL LENDING?* (Nat’l Bureau of Econ. Research, Working Paper No. 5160, 1995).

20. Kingsbury, *supra* note 17, at 336.

21. KAMAL HOSSAIN, *LAW AND POLICY IN PETROLEUM DEVELOPMENT: CHANGING RELATIONS BETWEEN TRANSNATIONALS AND GOVERNMENTS* 70 (1979).

22. *Project Appraisal Document*, *supra* note 13, at 22.

World Bank's ideology has led it to promote legal regimes in which investors' rights took pre-eminence over their obligations.²³ Moreover, the World Bank's own institutional interests may render toothless the application of a corporate responsibility policy, as there may be a practical contradiction between the roles of banker/investor and standard setter/monitor.²⁴ This conflict is especially acute in investments in which the IFC itself acquires a stake in the project.²⁵ However, these difficulties do not represent a theoretical impediment for the reinforcement of the World Bank's social and environmental guidelines, as it will be argued below.

Commentators have stressed that the World Bank is failing because of its broadening mandate.²⁶ They argue that the World Bank has taken over many areas that were previously within the UN's domain, and has at the same time lost its main asset — its expertise in a discrete number of issues.²⁷ One of the suggested avenues for change is a return to traditional project IBRD loans and an emphasis on the role of the MIGA and IFC.²⁸

This paper will study the standards imposed by the World Bank's policies and explore its capacity to act, not only as a responsible investor, but also as a trendsetter in the petroleum sector. Section II will analyze the substantive and procedural benchmarks imposed by the World Bank's policies. Section III will focus on the most important example in which these

23. For a critique of the World Bank's Policies on these grounds, see Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 253 (2000); Cahn, *supra* note 18, at 169; KEVIN DANAHER, 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (1994); DASGUPTA, *supra* note 18, at 87.

24. In this respect, Ibrahim Shihata, the Bank's former General Counsel, argued that a proactive democracy and human rights policy would lead to the politization of the Bank and its loss of credibility in the financial markets. See Ibrahim Shihata, *Democracy and Development*, 46 INT'L & COMP. L. Q. 635, 642 (1997).

25. The IFC also carries out equity investments; it purchases a stake in a project which it eventually sells off later. See IFC, *IFC Financial Products*, at <http://www.ifc.org/proserv/products/basics/basics.html> (last visited Jan. 25, 2002).

26. BERGESEN & LUNDE, *supra* note 2, at 134–40.

27. *See id.*

28. *Id.* at 139.

benchmarks have been applied in practice — the Chad/Cameroon Petroleum Development and Pipeline Project (“Chad/Cameroon Project” or “Project”). One of the main objections made to a greater involvement of the IBRD in the human rights situation of borrowing countries is its dramatic North/South dimension.²⁹ In other words, it is not very reassuring that a powerful institution dominated by a small number of countries, that has already intervened widely in its clients’ affairs (many times to the detriment of human rights), will use its power to impose human rights norms. Nevertheless, a properly reinforced application of the World Bank’s standards to its clients in the private sector does not give rise to North/South fairness questions. With this idea in mind, Section IV will explore the possibility of reinforcing the social and environmental policies of the World Bank’s private sector branches, the IFC and the MIGA.

II. THE WORLD BANK’S OPERATIONAL STANDARDS.

Originally, the Bank’s operational standards were conceived as aspirational targets.³⁰ Over time, the standards have increasingly acquired a mandatory status.³¹ The standards did not originate through a thought-out legislative process, but, rather, were created on an ad hoc basis, as problems arose with particular projects.³² The first standards were adopted in the 1970s.³³ After 1987, these original standards began to be consolidated into Operational Directives (“ODs”), which included

29. The number of votes in the Bank’s Board of Governors corresponds to the number of shares that a country has subscribed to. The largest shareholders are the U.S. (16% of the votes), Japan (7.87%), and Germany (4.49%). Since the most developed countries do not take loans from the Bank, the system is one in which the countries having more weight on the decisions never have to bear their consequences. See The World Bank, *IBRD: Votes and Subscriptions*, at <http://www.worldbank.org> [retrieve chart from the following path: “Home” > “About Us” > “Organization” > “Executive Boards” > “IBRD: Votes and Subscriptions”] (last visited Oct. 12, 2002).

30. Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 281, 283 (Dinah Shelton ed., 2000).

31. *Id.*

32. *Id.*

33. *Id.*

elements of policy, procedure, and guidance.³⁴ During the last few years, the World Bank has converted the Operational Directives into different norms called Operational Policies, Bank Procedures (“BPs”), and Good Practices. The invoked rationale for this conversion is to increase clarity for the staff, the Inspection Panel, and the affected parties.³⁵

The application of the Bank’s operational standards is fraught with a series of difficulties. First, the standards do not use normative language but are framed as a set of practical instructions to be followed in particular situations. Second, not all the standards have the same normative value. Realistically speaking, only the Operational Policies, Bank Procedures, and certain aspects of the Operational Directives are binding on the Bank’s staff, while Good Practices serve merely as recommendations.³⁶ Finally, not all of the institutions in the World Bank apply exactly the same rules, although the IBRD’s set of policies are the most highly developed.³⁷ Therefore, IFC and MIGA

34. *Id.*

35. *Id.*

36. The Bank’s OPs are defined as covering:

matters of importance to the Bank’s core objectives and provide Bank staff direction and guidance in pursuit of those objectives. OPs are short, focused statements that follow from the Bank’s Articles of Agreement, the general conditions and policies approved by the Board. They establish the parameters for the conduct of operations, and also describe the circumstances under which exceptions to policy are admissible and clarify who authorises such exceptions.

Bank Procedures (“BPs”) explain how the Bank’s staff carries out the OPs, by describing the procedures and documentation required to ensure Bank wide consistency and quality. *World Bank Operational Manual*, Definitions, *supra* note 15, at ¶¶ 3–5.

Only the violation of a binding policy triggers the jurisdiction of the World Bank Inspection Panel. See *IBRD Resolution No. 93–10, IDA Resolution No. 93–6*, The World Bank Inspection Panel, Sept. 22, 1993 [hereinafter *IBRD/IDA Resolution*] and *Conclusions of the Board’s Second Review of the Inspection Panel* (Apr. 20, 1999), at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WResolution?openview&count=500000> (last visited Jan. 25, 2002).

37. IFC and MIGA have developed their own policies although they apply IBRD’s policies when they do not have their own specific safeguard policies. The World Bank Operational Manual list of specific policies is much more extensive than that of the IFC and MIGA. Compare IFC, *Safeguard Policies*, at <http://www.ifc.org/enviro/EnvSoc/Safeguard/safeguard.htm> [hereinafter *IFC Safeguard Policies*], and MIGA, *Disclosure Policies*, at

policies are inspired by the IBRD and apply an IBRD policy when they do not have their own specific policy.³⁸

The World Bank Operations Manual contains a broad set of policies that are applicable to technical, environmental, social and cultural issues.³⁹ The policies on “Environmental Assessment,” “Indigenous Peoples,” and “Involuntary Resettlement” have been considered pillar policies.⁴⁰ It is worth undertaking a more detailed analysis of these policies because they are also the most relevant to human rights issues that are likely to appear in oil exploitation projects, i.e. environmental degradation, displacement of peoples, and the collision, in some cases, with the rights of indigenous communities. The three policies impose both substantive requirements, such as minimum benchmarks relating to the quality of the project, and procedural obligations on borrowers.⁴¹

In the substantive aspects, according to the OP on Environmental Assessment, projects financed by the Bank have to be environmentally sound and sustainable.⁴² In terms of project quality, this means that preventive and mitigative measures should take into account all aspects of the environment, such as water, air, and land.⁴³ The OP establishes a higher benchmark than mere respect for local legislation, as the World Bank also undertakes not to finance projects that could potentially contravene a country’s treaty obligations.⁴⁴ This policy provides an added value if the borrower is in a situation of non-compliance with its international obligations. Moreover, the World Bank’s policies require a project to include components that strengthen

<http://www.miga.org/screens/policies/policies.htm>, with *World Bank Operational Manual*, *supra* note 15.

38. See IFC, *Environmental and Social Review Procedure, Introduction*, at <http://www.ifc.org/enviro/EnvSoc/ESRP/esrp.htm> (last visited Oct. 12, 2002) [hereinafter *IFC Environmental & Social Review*]; MIGA, *Environmental and Social Review Procedures*, at http://www.miga.org/screens/policies/disclose/soc_rev.htm (last visited Oct. 12, 2002) [hereinafter *MIGA Environmental & Social Review*].

39. See *World Bank Operational Manual*, *supra* note 15.

40. See Boisson de Chazournes, *supra* note 30, at 289.

41. See text accompanying notes 42–80.

42. World Bank OP 4.01: Environmental Assessment, *supra* note 15, ¶ 1. The same requirement is found in IFC and MIGA’s policies.

43. *Id.* ¶ 2.

44. *Id.* ¶ 3.

a borrower's environmental capacity, both legal and institutional, when it is weak.⁴⁵

A project must also comply with the Pollution Prevention and Abatement Handbook, which lays down pollution prevention and abatement measures and the World Bank's emission level requirements.⁴⁶ The OP, however, contains a relatively open-ended exception, providing management with a wide discretionary power. After taking into account a borrower country's legislation and local conditions, the Environmental Assessment may recommend alternative emission levels and pollution prevention measures.⁴⁷ However, it is the World Bank that ultimately decides on the adequate level of justification.⁴⁸

The nature of procedural guarantees depend on project classification. Projects receiving World Bank financing can be classified as Category A, B, or C, depending on their impact.⁴⁹ Category A projects are those having a sensitive, diverse, or unprecedented environmental impact and requiring a full environmental assessment.⁵⁰ Major oil development projects are generally Category A, although the OP does not define the word "major."⁵¹ Normally, projects affecting indigenous people or causing involuntary resettlement are also Category A projects.⁵² An environmental assessment of a Category A project requires an analysis of the feasible alternatives (including the "without project" one).⁵³ Category A projects' environmental assessments also entail extensive consultation and disclosure requirements, which should be initiated as soon as possible.⁵⁴ Furthermore, the borrower should report to the World Bank on its compliance with environmental measures, including: an environmental

45. *Id.* ¶ 14.

46. *Id.* ¶ 6. The same requirement is found in IFC and MIGA's policies.

47. *Id.*

48. *Id.* ¶ 7.

49. *Id.* ¶ 8.

50. *Id.* ¶ 8(a). IFC and MIGA's policies contain the same requirement.

51. See IFC, *Environmental and Social Review Procedures, Annex B: Project Categorization Examples*, at http://www.ifc.org/enviro/enviro/Review_Procedure_Main/Review_Procedure/Annex_B/annex_b.htm (last visited Oct. 12, 2002) [hereinafter *IFC Project Categorization Examples*].

52. *Id.*

53. World Bank OP 4.01: Environmental Assessment, *supra* note 15, ¶ 8(a).

54. *Id.* ¶ 15.

management plan, mitigation, and monitoring measures.⁵⁵ There are fewer consultation requirements in Category *B* projects and none for those in Category *C*. Consequently, the project classification greatly impacts the affected populations' human rights.

The recently adopted OP on Involuntary Resettlement⁵⁶ directs the World Bank to try to avoid displacement, and if displacement is unavoidable, to fully compensate the displaced persons and to assist them in their efforts to improve their living standards or, at least, "to restore them."⁵⁷ This policy establishes a number of rules on compensation in order to ensure that resettled populations receive prompt and effective compensation at the full replacement cost of their assets.⁵⁸ It also refers to the need of granting preference to land compensation over cash compensation, especially in cases where the community livelihood is land-based.⁵⁹ In some cases, these requirements may go beyond what local laws have established. This OP also requires that resettlement plans pay special attention to the needs of vulnerable groups — those living below the poverty line; those who are landless; the elderly, women, and children; and the indigenous peoples or displaced persons whose rights are not yet recognized by local law.⁶⁰

In addition to compensation obligations, the OP states that adequate public services and infrastructure development should be provided to new communities. This requirement is based on the idea that conditions and services in host communities should improve or, at least, not deteriorate.⁶¹ Where it is necessary to minimize the negative effects of displacement, resettlement plans should include measures to ensure that the displaced persons are provided with development assistance, such as credit facilities or job opportunities.⁶²

55. *Id.* ¶ 20.

56. In December 2001, the World Bank adopted OP and BP 4.12, replacing OD 4.30 on Involuntary Resettlement. *World Bank Operational Manual, supra* note 11.

57. World Bank OP 4.12: Involuntary Resettlement, *supra* note 15, ¶¶ 2(a), (c).

58. *Id.* ¶ 6(a)(3).

59. *Id.* ¶¶ 9–12.

60. *Id.* ¶ 8.

61. *Id.* ¶ 13(b).

62. *Id.* ¶ 6(c)(iii).

During the resettlement process, the borrower must put in place mechanisms permitting that both the displaced and the host communities are consulted on resettlement options and participate throughout the process, including monitoring.⁶³ Apart from guaranteeing compensation, the plan must ensure that displaced persons receive information about their rights and options in connection with the resettlement. Furthermore, displaced persons must be consulted, and provided with feasible resettlement alternatives⁶⁴ and grievance mechanisms.⁶⁵

Read together, the OP 4.12 and the Bank Procedure 4.12 provide for project supervision in rather general terms, leaving a margin of discretion to the regional vice-president to determine appropriate measures.⁶⁶ However, there are a certain number of criteria establishing how supervision should be undertaken. The mission of supervision should include providing social, financial, legal, and technical expertise, as well as assessing compliance with the project's legal documentation.⁶⁷ Bank supervision has to continue until all the resettlement measures have been implemented.⁶⁸ Once the project is completed, the Bank issues an "Implementation Completion Report," which will draw lessons to be applied in future operations.⁶⁹ If the objectives of the resettlement plan have not been attained, the Report may include further measures, including increased supervision by the World Bank.⁷⁰

Although the Indigenous Peoples' Operational Directive ("OD") does not refer to any international human rights standards, it does include substantive benchmarks.⁷¹ Development

63. *Id.* ¶¶ 6(a), 11(a).

64. *Id.* ¶¶ 6(a)(i), (ii).

65. *Id.* ¶ 13(a).

66. *Id.* ¶ 24; World Bank BP 4.12: Involuntary Resettlement, ¶¶ 14–16.

67. World Bank BP 4.12: Involuntary Resettlement, *supra* note 66, ¶¶ 13–14.

68. *Id.* ¶ 16.

69. *Id.*

70. *Id.*

71. OD 4.20: Indigenous Peoples, *supra* note 15. The Indigenous Peoples OD is also in the process of being reviewed. It also applies to the IFC and MIGA, whose specific policies on Indigenous Peoples will be adopted once the IBRD issues a definitive version of its policy. Kingsbury finds "a troubling feature the fact that the Bank has neither committed itself to conform to the standards of the ILO Convention 169 as minimum requirements in evaluating projects, nor undertaken not to support projects that might place a borrowing

activities are required to support production systems adapted to the needs and environment of indigenous peoples.⁷² The OD states that the advice given to the borrowers should focus on the improvement of indigenous peoples' legislation and the recognition of indigenous peoples' land rights.⁷³ The OD refers to specific services to be provided to indigenous peoples, such as education, health, and training. In addition, the OD stresses that traditional health care methods be considered in planning delivery systems for health care.⁷⁴

Among the procedural guarantees, the OD is established on the assumption that the issues dealing with Indigenous Peoples must be based on the informed consent of the indigenous communities themselves.⁷⁵ Under the OD, the borrower is obliged to prepare a culturally appropriate plan for Indigenous Peoples.⁷⁶ The content of the plan itself should also satisfy some procedural obligations, such as a strategy for local participation,⁷⁷ an implementation schedule with benchmarks where progress can be measured at appropriate intervals, expert monitoring, and a detailed financing plan.⁷⁸ In the appraisal process, the World Bank must be satisfied that the indigenous peoples have participated meaningfully in the development of the plan.⁷⁹

Together with other World Bank policies, the above rules provide the framework applied to the Chad/Cameroon Project. As discussed below, the application of the World Bank policies to the Chad/Cameroon Project serves as an example of how to turn risky oil developments into investments beneficial to the affected communities.⁸⁰

country in violation of its Convention 169 obligations." Kingsbury, *supra* note 17, at 326–327.

72. World Bank OD 4.20: Indigenous Peoples, *supra* note 15, ¶ 14(e).

73. *Id.* ¶¶ 15(c), 17.

74. *Id.* ¶ 15(e).

75. *Id.* ¶ 7.

76. *Id.* ¶ 14(a).

77. *Id.* ¶ 15(d).

78. *Id.* ¶¶ 15(g), (h), (i).

79. *Id.* ¶ 18.

80. *Questions and Answers*, *supra* note 12.

III. THE CHAD/CAMEROON PROJECT — AN EXAMPLE OF THE APPLICATION OF THE WORLD BANK'S POLICIES.

On June 6, 2000, the Executive Directors of the World Bank approved its participation in the Chad/Cameroon Project.⁸¹ The approval process had been repeatedly delayed after a long high profile campaign bringing together a coalition of NGOs, public personalities, and universities criticizing the Project.⁸² The extraction and pipeline project will drill oil from three oilfields (Miandoum, Kome and Bolobo) at the Doba basin (Southern Chad) and transport it, for export, through a 1,070 km. pipeline to the Atlantic Ocean port of Kribi in Cameroon.⁸³ Because construction is expected to last nearly four years, oil will not flow until 2004.⁸⁴ Oil production will last about 25–30 years.⁸⁵ The total cost of the Project is \$3.7 billion dollars.⁸⁶ The World Bank financing includes the participation of both the IBRD and the IFC.⁸⁷

ExxonMobil, in its capacity as project operator, will carry out the drilling on behalf of the consortium.⁸⁸ Two joint-venture pipeline companies — Tchad Oil Transportation Company (“TOTCO”) and the Cameroon Oil Transportation Company (“COTCO”)⁸⁹ — will operate the export system.⁹⁰ ExxonMobil,

81. *Id.* See also The World Bank Group, *The Chad-Cameroon Petroleum Development and Pipeline Project, Project Overview*, at http://www.worldbank.org/afr/ccproj/project/pro_overview.htm (last updated Aug. 15, 2002) [hereinafter *Project Overview*]. In this section, I draw extensively from Genoveva Hernández Uriz, *To Lend Or Not To Lend: Oil, Human Rights, And The World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197 (2001).

82. Letter from Eighty-six NGOs in Twenty-eight Countries to James D. Wolfensohn, President of the World Bank, Concerning the Chad/Cameroon Oil & Pipeline (July 9, 1998) (on file with author) [hereinafter *Wolfensohn Letter*] (calling for the suspension of World Bank support until full respect for human rights and compliance with World Bank policies could be fully guaranteed).

83. ESSO EXPLORATION AND PRODUCTION CHAD INC., ENVIRONMENTAL ASSESSMENT, EXECUTIVE SUMMARY & UPDATE, chs. 4, 9, *available at* <http://www.esso.com/eaff/essochad/documentation/englishsummary> [hereinafter *ESSO ENVIRONMENTAL ASSESSMENT*].

84. *Id.*

85. *Id.* at 3-1.

86. *Id.* at 2-6. See also *Project Overview*, *supra* note 81.

87. See *Project Overview*, *supra* note 81.

88. ESSO ENVIRONMENTAL ASSESSMENT, *supra* note 83, ch. 2.

89. *Id.* at 2-6. Esso Exploration and Production Chad Inc. is the Consortium designated operator for the oilfield. The pipeline transportation system

Petronas and ChevronTexaco will jointly hold about 80% of the shares in the pipeline companies.⁹¹ Chad owns minority interests in both pipeline companies, while Cameroon only holds a minority stake in COTCO, the Cameroon pipeline company.⁹² Under the current contractual agreements, the consortium will be in charge of financing, managing, and selling the crude oil.⁹³ “Chad will receive a percentage of the sale proceeds in royalties,⁹⁴ and Cameroon will receive transportation fees and taxes.”⁹⁵ The Project’s sponsors argue that the Project will benefit Chad through the application of oil revenues to health, education, rural development, and infrastructure programs.⁹⁶ This will help Chad, one of the poorest and least developed countries in the world, to alleviate poverty.

The human rights risks that the Project poses have been at the center of an NGO campaign to halt the Project. Requesting a two-year moratorium, critics argued that the Project should not proceed until a number of environmental, good governance, and human rights concerns had been resolved.⁹⁷ Critics feared that the tragic outcomes, brought on by oil exploitation in unstable environments under repressive regimes, such as in Nigeria, would be repeated in the case of Chad.⁹⁸ In fact, the under-

will be owned by the Tchad Oil Transportation Company (“TOTCO”) and the Cameroon Oil Transportation Company (“COTCO”), the two companies that have been formed for this purpose.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2-1. Under the current agreements, Chad will receive the following direct revenues: (i) royalty payments; (ii) an upstream corporate income tax on the consortium; (iii) a pipeline corporate income tax on TOTCO (the pipeline company for Chad); and (iv) dividends for its equity holdings in TOTCO and COTCO. See *Project Appraisal Document*, *supra* note 13, at 67. The compensation received by the Chadian government has been fixed at 12.5% of the crude oil price. The Consortium enjoys an almost full tax exemption that will not be withdrawn unless the barrel price exceeds \$17. Thomas Sotinel, *Le Tchad Face aux Sirènes Pétrolières*, LE MONDE, Sept. 3, 1998, at 13, available at LEXIS, News Library, French Language News File.

95. ESSO ENVIRONMENTAL ASSESSMENT, *supra* note 83, at 2-1.

96. *Project Overview*, *supra* note 81.

97. See Wolfson Letter, *supra*, note 82.

98. Korinna Horta, *Questions Concerning the World Bank and Chad/Cameroon Oil and Pipeline Project — Makings of a New Ogoniland?*

lying human rights issues are numerous. The country has experienced an intermittent civil war.⁹⁹ Ethnic politics are extremely complicated in the country, and they may be exacerbated by an unfair distribution of the oil benefits and costs.¹⁰⁰ This risk is a real one, because the government is accused of corruption and of managing the country's affairs to the advantage of its leader's ethnic clan.¹⁰¹ Although the current government claims to have restored democracy, it has a very deficient record on human rights.¹⁰² For example, massive killings have been reported in the oil producing regions.¹⁰³ Chad's extreme poverty and underdevelopment accentuate its political instability.

The Bank, however, has enthusiastically defended the Chad/Cameroon Project, arguing that its involvement will not only ensure an orthodox application of environmental and social guidelines — including the fairness of the participation process — but also that this commercial operation will turn into a large-scale development program.¹⁰⁴ Challenging the arguments against issuing a loan to a steady human rights violator, such

Corporate Welfare Disguised as Aid to the Poor? (Mar. 1, 1997), at <http://www.environmentaldefense.org/article.cfm?ContentID=1019&Page=1>.

99. For a study of Chad's recent history, see DERLEMARI NEBARDOUM, *LE LABYRINTHE DE L'INSTABILITE POLITIQUE AU CHAD* (1998); MARIO JOAQUIM AZEVEDO, *CHAD: A NATION IN SEARCH OF ITS FUTURE* (1998).

100. U.S. DEPT. OF STATE, *CHAD COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998* (1999), at http://www.state.gov/www/global/human_rights/1998_hrp_report/chad.html [hereinafter *CHAD HUMAN RIGHTS REPORT* (1998)].

101. AGIR ICI ET SURVIE, *PROJET PÉTROLIER TCHAD-CAMEROUN, DÉS PIPES SUR LE PIPE-LINE 39-40*, (Les "Dossiers Noirs" de la Politique Africaine de la France No. 13) (1999).

102. In December 1990, Colonel Idriss Déby seized power and Habre fled the country. Robert Buijtenhuijs, *Les interventions militaires françaises: le cas du Tchad*, in *ÉTATS ET SOCIÉTÉS EN AFRIQUE FRANCOPHONE* 251 (Daniel C. Bach et Anthony A. Kirk-Greene dir., 1993). Chad has been monitored under the Human Rights Commission confidential procedure 1503. *Report on the Situation of Human Rights in Chad*, U.N. ESCOR, 54th Sess., U.N. Doc. E/CN.4/1998/R.3 (1998) [hereinafter *UN Report*].

103. Human rights organisations reported approximately 200 extrajudicial killings in two repressive campaigns undertaken in November 1997 and March 1998. One hundred unarmed people were killed. See Wolfensohn Letter, *supra* note 82. See also *CHAD HUMAN RIGHTS REPORT* (1998), *supra* note 100; U.S. DEPARTMENT OF STATE, *CHAD COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997* (1998), at <http://www.state.gov/g/drl/hr> (last visited Jan. 25, 2002).

104. *Questions and Answers*, *supra* note 12.

as the Chadian government, the Bank has reacted by emphasizing that oil extraction is the only opportunity to further the Chadian people's economic and social rights.¹⁰⁵ Moreover, the Project fits into one of the Bank's main strategic priorities — promoting development through private sector involvement.¹⁰⁶

The companies carrying out this investment consider the Bank's involvement as essential in order to mitigate their risks and safeguard their image as "good" corporate citizens willing to abide by high social and environmental standards.¹⁰⁷ The Bank affirms that it facilitates the companies' access to credit and mitigates their political risks.¹⁰⁸ Whether this is actually the case or not, oil companies in the Chad/Cameroon Project have, in fact, relied heavily on the World Bank's imprimatur. Significantly, ExxonMobil publicly announced that it would not proceed without the World Bank's participation and acknowledged the marketing importance of a clean human rights reputation.¹⁰⁹

The World Bank's involvement in the Project has implied the application of its Operational Manual to the process.¹¹⁰ A number of policies were applicable because the Project was not only environmentally sensitive, having an impact on a number of forests and natural habitats, but also involved resettlement in the oil field areas and affected indigenous peoples in Cameroon.¹¹¹ The Chad/Cameroon Project was deemed a Category A project, thereby requiring the most robust environmental assessment, disclosure, and consultation processes.¹¹² This process has been protracted. The consortium claims to have started "one of the most extensive consultation efforts ever undertaken in Africa" as early as 1993.¹¹³ Indeed, Project sponsors claim to have held nearly 900 village-level public meetings in both countries and have put a nineteen-volume informational package

105. *Id.*

106. *Project Appraisal Document*, *supra* note 13, at 20.

107. *Id.* at 22–23.

108. *Id.*

109. Interview with Jean-Pierre Petit, CEO, Esso Tchad S.A., in N'djamena, Chad (Jul. 20, 1999) (on file with author). *See also Project Appraisal Document*, *supra* note 13, at 22.

110. ESSO ENVIRONMENTAL ASSESSMENT, *supra* note 83, ch. 2.

111. *Id.* ch. 7.

112. *Id.* chs. 4 & 9.

113. *Id.* at 9-1.

about the Project at the public disposal in reading rooms throughout Chad and Cameroon.¹¹⁴ The debate has been intense at the local NGO level.¹¹⁵ Nevertheless, certain problems flaw the consultation process, such as the presence of armed guards through out the consultation and the content of the consultation materials, which seem to be more suitable for advertising than for meaningful discourse.¹¹⁶

Similar issues arise when looking closer at other aspects of the Project, such as the Environmental Management Plan ("EMP") and the resettlement process. The Bank turned down the first Environmental Assessment ("EA") submitted by the Consortium and the two governments as unsatisfactory.¹¹⁷ The definitive version of the EMP established a series of measures in order to ensure that the facilities are as least disruptive as possible.¹¹⁸ However, NGOs still complain about the lack of certainty of environmental safeguards.¹¹⁹ More troubling, however, is the shifting of the monitoring responsibility to the gov-

114. *Id.* Apart from village meetings, the information campaign has conducted one-on-one interviews with the concerned populations. According to the consortium, consultation has taken place in several languages. The project sponsors argue that, apart from the Environmental Assessment and consultation process, World Bank involvement has placed pressure on the Chadian government to modify its legislation and set up national mechanisms to oversee the oil revenues.

115. See Alan Beattie, *World Bank Team Attacks Own Oil Project*, FINANCIAL TIMES, Aug. 19, 2002, at 4; Gus Constantine, *Rights Record Defended in Bid for Pipeline Fund*, WASH. TIMES, July 22, 2001, at A10.

116. An important tool of the consultation process consisted of a twenty-minute video shown in the villages. But the video's explanation takes place at a very fast pace with relatively loud background music and stresses only the positive aspects of the oil project. Government officials appear in the video, confidently assuring that oil extraction will actually take place. This certainty, expressed by officials in a country always subjected to authoritarian rule, turns the video into propaganda, rather than information or consultation. (This information was gathered pursuant to a field study by the author at Esso Tchad S.A., N'djamena, Chad (Jul. 20, 1999)). Furthermore, although the nineteen-volume information package is very comprehensive, it cannot be very effective in a country with a 49.7% illiteracy rate and where many people cannot even reach the reading rooms.

117. AGIR ICI ET SURVIE, *supra* note 101, at 44–46.

118. For example, the pipeline will be buried one meter below ground and there will be a monitoring system to prevent oil spills. See *Questions and Answers*, *supra* note 12, ¶ 4.

119. Wolfensohn Letter, *supra* note 82.

ernments of Chad and Cameroon.¹²⁰ There is a danger that the technical advice provided by the Bank to both governments would not be enough to ensure that they will have the capacity or the will to satisfactorily carry out that role.

The creation of independent oversight mechanisms represents more innovative legal developments. These mechanisms work both internally through the reform of Chadian law, and externally through the appointment of international supervising bodies. Under the pressure from the World Bank, the Chadian government has adopted revenue management measures, described by the Bank's literature as proof of the Chadian government's commitment to clean management.¹²¹ The measures consist mainly of a law — the Revenue Management Law — which states how the oil proceeds will be distributed and creates a monitoring committee. The monitoring committee is formed by representatives of different constituencies in Chad, including four civil society representatives.¹²²

On the international level, one of the loan conditions was the creation of an independent International Advisory Group ("IAG") to provide an additional guarantee to the project monitoring.¹²³ The IAG advises the governments of Chad and Cameroon on project implementation; identifying any potential problems. The IAG reports its findings to the World Bank President and to the governments of both Chad and Cameroon.¹²⁴ The structure and functioning of the IAG, as defined by the terms of

120. *Project Appraisal Document*, *supra* note 13, at 128–130.

121. *Id.* at 22.

122. LAW ON REVENUE MANAGEMENT, Act No. 001/PR/99, Republic of Chad (1999), *reprinted in Project Appraisal Document*, *supra* note 13, at 101 [hereinafter OIL REVENUE MANAGEMENT LAW].

123. Press Release, The World Bank, World Bank Appoints International Advisory Group on the Chad-Cameroon Petroleum Development and Pipeline Project, No. 2001/235/S (Feb. 21, 2001), *available at* <http://www.worldbank.org> [hereinafter World Bank Press Release]. The work of the advisory group will be supplemented by a panel of independent experts advising the governments of Chad and Cameroon Environmental and Social Experts Panel ("ESEP") and an External Compliance Monitoring Group ("ECMG") in charge of monitoring the implementation of the Environmental Management Plan.

124. THE WORLD BANK, THE CHAD-CAMEROON DEVELOPMENT AND PIPELINE PROJECT INTERNATIONAL ADVISORY GROUP ON THE CHAD-CAMEROON PIPELINE AND RELATED PROJECTS — TERMS OF REFERENCE, ¶¶ 5, 17, *available at* http://www.worldbank.org/afr/ccproj/project/iag_tor_en.pdf (last visited Jan. 25, 2002) [hereinafter CHAD-CAMEROON TERMS OF REFERENCE].

reference released by the Bank, seeks to ensure the monitoring body's independence. The IAG is composed of six independent experts of international prestige.¹²⁵ The IAG travels to Chad at least twice a year and defines the focus of its own work.¹²⁶

When this long, highly publicized, and contested process is compared to oil investments in other repressive countries, such as Burma or Sudan, it seems more likely that the oil companies and Chadian and Camerounian governments will be closely scrutinized. This scrutiny will hopefully improve their behavior. Moreover, the discussions over the Project have fostered a participation culture within local communities, which will be difficult to eliminate.

Nevertheless, there is a risk that the Project, presented as an ideal model to the international community, will end up being a failure. The Bank's disregard for certain realities of life in Chad and Cameroon, specifically concerning good governance and human rights, may render the guarantees cosmetic or, at best, only confront problems partially. The attitude of the Bank's staff has been quite defensive throughout the process, and one wonders whether their treatment of the problems is a defensive reaction to the criticism or the result of a genuine plan.¹²⁷

A good example of this concern is the oversight board created under the Revenue Management Law. The board consists of a Supreme Court magistrate, two Members of Parliament, four high-ranking officials, and four civil society representatives.¹²⁸ In principle, one might well think that a board with such broad representation would be perfectly suited to guarantee the transparency and fairness of the expenses. However, a closer

125. *Id.* ¶ 4. See also World Bank Press Release, *supra* note 123.

126. See World Bank Press Release, *supra* note 123; ESSO ENVIRONMENTAL ASSESSMENT, *supra* note 83, ¶¶ 6, 8.

127. At the time of this writing, the project has already been the subject of an Inspection Panel request for investigation. In September 2001, the Inspection Panel had issued a report recommending that the Executive Directors open a full investigation. THE WORLD BANK, INSPECTION PANEL, REPORT AND RECOMMENDATION ON REQUEST FOR INSPECTION (Sept. 12, 2001), available at <http://wbln0018.worldbank.org/IPN/ipnweb.nsf>.

128. OIL REVENUE MANAGEMENT LAW, *supra* note 122, art. 16. In spite of the amendment, increasing the number of civil society representatives, the number of votes that is likely to endorse the government's positions still represent a majority.

inspection of its composition and within the Chadian context shows two fundamental weaknesses. Given the lack of independence of the judiciary and the non-existence of parliamentary opposition, five of the nine votes are likely to endorse the government's position.¹²⁹ Another excellent example of the Board's weakness is the public finance management training the World Bank provides to parliamentarians. The World Bank's technical advice would be extremely helpful if a meaningful parliamentary opposition existed. However, such training is of little value when members of parliament who oppose the Project are sent to jail.¹³⁰ Thus, judges and members of parliament will fail to perform their jobs properly if they are subject to removal or if they must succumb, through clientele relations, to the political party in power.

Finally, an unsolved problem is what will happen when international public pressure stops. The IAG is expected to work for up to ten years.¹³¹ However, if Chad does not meet its commitments, it is plausible that the World Bank might apply pressure through further lending or through debt relief programs.¹³² Nevertheless, the mandate of the IAG should at least be renewable in order to guarantee a long-term oversight mechanism.

129. Institutions in Chad are dysfunctional and the country lacks a strong parliamentary opposition. See *UN Report*, *supra* note 102. See also AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2001, available at <http://www.web.amnesty.org/web/ar2001.nsf/webafrcountries/CHAD?OpenDocument>. The judiciary has not consolidated its independence from the executive. The government institutions act with impunity and without accountability. For a detailed analysis, see AMNESTY INTERNATIONAL, TCHAD: U.N. PAYS SOUMIS A L'ARBITRAIRE DES FORCES DE SECURITE AVEC LA COMPLAISANCE DE PAYS ETRANGERS (1996).

130. Interview with Ngarléjy Yorongar Le Moïban, Chadian Member of Parliament and opposition member in N'djaména, Chad (July, 1997) (on file with author). See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 123-124 (1999). See also Union Interparlementaire, Comité des Droits de l'Homme des Parlementaires. Rapport de la Délégation du Comité sur sa Mission au Tchad (21-27 Novembre 1998. Cas No. Chd/01 Ngarléjy Yorongar) (on file with the author).

131. CHAD-CAMEROON — TERMS OF REFERENCE, *supra* note 124, ¶ 11.

132. Interview with Mary Barton-Dock, World Bank Representative in Chad, N'djaména (Jul. 26, 1999) (on file with author).

IV. THE INTERNATIONAL FINANCIAL CORPORATION AND THE MULTILATERAL INVESTMENT GUARANTEE AGENCY.

Private sector development has become a main priority for the World Bank.¹³³ An analysis of the IFC and the MIGA as promoters of responsible investment is justified because they are the fastest growing agencies within the World Bank.¹³⁴ The demand for their services has significantly increased as direct investment continues to grow in developing countries.¹³⁵ The role of the IFC is especially relevant to the oil sector, because the extraction industries currently occupy the third place in the IFC's loan portfolio.¹³⁶ The MIGA's role in the oil industry is currently smaller, representing only 3% of the industry's operations.¹³⁷ Though lesser involved, this article will also refer to the MIGA's policies and procedures, because MIGA shares the same mechanisms for addressing the grievances of affected

133. Chris Avery, *Business and Human Rights in a Time of Change, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 17, 35 (Menno J. Kamminga & Saman Zia-Ziarifi eds., 2000). During 1997 and 1998, the World Bank launched the initiative Business Partners for Development ("BPD"), an informal global network of business, governments, and civil society with the World Bank Group as an equal partner. The BPD aims to demonstrate the positive impact of tri-sector partnership both for the development and the business impact through the integration of corporate responsibility values in business.

134. BANK INFORMATION CENTER, TOOLKITS FOR ADVOCATES: THE INTERNATIONAL FINANCIAL CORPORATION AND THE MULTILATERAL INVESTMENT GUARANTEE AGENCY, available at <http://www.bicusa.org/toolkits/ifcmiga.htm> (last visited Jan. 25, 2002) [hereinafter IFC AND MIGA TOOLKIT].

135. *Id.* In March 1998, MIGA's Board approved a recommendation to the Board of Governors on a general capital increase, doubling the Agency's capital base from \$1 billion to \$2 billion. The objective of this capital increase is to support the growth of MIGA's gross exposure, which is expected to increase to approximately \$10–15 billion. See Motomichi Ikawa, *Multilateral Investment Guarantee Agency, in* THE WORLD BANK INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 21, 24 (Edith Brown Weiss et al. eds., 1999). The capital increase was blocked by the U.S.

136. This represents 15% of IFC's portfolio. Loans granted in 1999 to the extractive sector amounted to \$789.9 million. IFC AND MIGA TOOLKIT, *supra* note 134.

137. *Id.* at 5. This amounts to \$111 million. According to an official, MIGA has entered into very few contracts in the oil & gas sector. It currently has three gas pipeline projects (all are buried), one offshore oil and gas production project, and one small LPG terminal.

communities as the IFC, and due to the MIGA's vocation to act as a standard-setter for the petroleum industry.¹³⁸

The IFC was created in 1956 as the private sector arm of the World Bank Group.¹³⁹ Its purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries."¹⁴⁰ Since its creation, the IFC has worked with nearly 2000 companies in 129 countries.¹⁴¹ The IFC offers its clients a number of services at market rates. The best known of these services is project financing. There are several types of loan products. The IFC grants loans directly to investors (so-called "A loans"), which are made on regular market terms.¹⁴² The IFC also mobilizes private capital through syndicated loans with a group of banks (so-called "B loans").¹⁴³ Additionally, the IFC also carries out equity investments: it purchases a stake in a project, which it eventually sells.¹⁴⁴ Between debt and equity, some intermediate products exist, such as subordinated loans.¹⁴⁵ In this case, the loans are paid back to the IFC only after other lenders have been paid back.¹⁴⁶ Only through its lending operations, does the IFC have a significant impact on responsible investment. Currently, about 220 commercial banks and institutional investors participate in IFC's *B*

138. Ikawa, *supra* note 135, at 26.

139. The creation of the IFC and IDA may be seen partly as the compensation for the failure to create a Special UN Fund for Economic Development ("SUNFED"). Developing countries proposed to create such an agency under UN control to foster grant or soft loan based investment support. SUNFED can be seen as the first sustained effort to use collective strength by a UN majority to force structural change in the world economy to the benefit of poor countries. BERGESEN & LUNDE, *supra* note 2, at 41.

140. IFC Articles of Agreement, *supra* note 4, art. 1.

141. IFC AND MIGA TOOLKIT, *supra* note 134, at 1.

142. IFC, *Loans for IFC's Own Account: A-loans*, at <http://www.ifc.org/proserv/products/loans/loans.html> (last visited Oct. 25, 2002).

143. IFC, *Syndicated Loans: The B-loan program*, at <http://www.ifc.org/proserv/products/syndication/syndication.html> (last visited Oct. 25, 2002).

144. IFC, *Equity Financing*, at <http://www.ifc.org/proserv/products/equity/equity.html> (last visited Oct. 25, 2002).

145. IFC, *Quasi-Equity Financing: C-loans*, at <http://www.ifc.org/proserv/products/quasi/quasi.html> (last visited Oct. 25, 2002).

146. *Id.*

loans, most of them from Europe, North America, and Asia.¹⁴⁷ These investors participate in a broad range of industries, including mining and energy.¹⁴⁸ In March 2002, the IFC was administering \$6.6 billion in loans for others.¹⁴⁹

The MIGA started its work in 1988.¹⁵⁰ So far, it has insured around 300 investments in 52 countries.¹⁵¹ The objective of the MIGA Convention is to promote the flow of productive foreign investment from the developed to the developing countries.¹⁵²

147. IFC, *The Syndicated Loan Program*, at <http://www.ifc.org/syndications> (last visited Oct. 25, 2002).

148. *Id.*

149. IFC Annual Report 2001, Portfolio Review, at <http://www.ifc.org/ar2001/review/portfolio.html>. Apart from its project financing services, the IFC offers other advisory and risk management services. The advising consists in the provision of technical assistance to promote private sector growth in developing countries. This advice can be targeted to the private sector (e.g., helping entrepreneurs develop project proposals) or to the public sector (e.g., assisting with private sector institution building). The technical assistance to developing countries has actively promoted privatisation as a means of furthering private sector development and the attraction of foreign investment. The legal and technical advice is carried out through the Technical Assistance Trust Funds Program ("TAFT"). The IFC has also created the Foreign Investment Advisory Service ("FIAS") to assist developing countries in how to attract larger amounts of foreign direct investment. See IFC, *Technical Assistance and IFC Advisory Services*, available at <http://www.ifc.org/proserv/services/ta/ta.html> (last visited Jan. 25, 2002).

The IFC's Risk Management Program was launched in 1990. It intends to facilitate the access of Third World private sector entities to the derivative markets to reduce their currency risks. IFC, *Risk Management Products and Services*, available at <http://www.ifc.org/proserv/products/risk/risk.html> (last visited Jan. 25, 2002).

150. Convention Establishing the Multilateral Investment Guarantee Agency, Apr. 12, 1988, 1508 U.N.T.S. 181, 199, 24 I.L.M. 1605 [hereinafter MIGA Convention]. For a study of the MIGA Convention see generally, Jean Touscoz, *Les Opérations de Garantie de L'Agence Multilaterale des Investissements* (AMGI), 114 JOURNAL DU DROIT INTERNATIONAL 901 (1987). The drafting of the MIGA Convention was parallel to the drafting of a set of guidelines for the treatment of investors directed at the states signatories of the MIGA Convention. These guidelines have the form of recommendation to the states members of the World Bank Group. See generally IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES (1993).

151. IFC AND MIGA TOOLKIT, *supra* note 134, at 1.

152. Art. 23 of the MIGA Convention states: "The Agency shall carry out research, undertake activities to promote investment flows and disseminate information on investment opportunities in developing member countries with

At the time of its creation, the MIGA was designed not only to create a multilateral system of investment guarantees, but also to restore a climate of confidence after the instable period following decolonization.¹⁵³ The MIGA provides private investors insurance against the following risks: war and civil disturbance, breach of contract, currency inconvertibility, and expropriation.¹⁵⁴ When the MIGA grants an insurance contract for an investment in a signatory country, the country must grant its approval to the issuance of its guarantee by the MIGA.¹⁵⁵ Once the MIGA pays compensation to a holder of a guarantee, it subrogates to the rights or claims that the holder of a guarantee had against the host country and other obligors.¹⁵⁶ The MIGA also offers a range of advisory services, for which it charges market rates.¹⁵⁷

The IFC requires that the projects it supports meet a number of guidelines. This means that the project must be technically and environmentally sound, beneficial to the local economy, and potentially profitable.¹⁵⁸ Relatively recently, the IFC has adopted its own policies tailored to the private sector in a broad number of areas.¹⁵⁹ Prior to adopting its own policies, the IFC

a view to improving the environment for foreign investment flows in such countries." MIGA Convention, *supra* note 150, art. 11.

153. Touscoz, *supra* note 150, at 901–902.

154. MIGA Convention, *supra* note 150, art. 11.

155. *Id.* art. 15.

156. *Id.* art. 18(a).

157. IFC AND MIGA TOOLKIT, *supra* note 134, at 4.

158. IFC, Operational Policy 4.01: Environmental Assessment § 1 (Oct. 1998) [hereinafter IFC OP]. A similar language is used by MIGA, whose asserted policy is that all the investments it facilitates are carried out in an environmentally and socially responsible manner. See MIGA, *Environmental and Social Review Procedures, Introduction*, available at http://www.miga.org/screens/policies/disclose/soc_rev.htm (last visited, Jan. 25, 2002).

159. The IFC has adopted its own policies in the following areas: Environmental Assessment, IFC OP 4.01 (Oct. 1998); Natural Habitats, IFC OP 4.04 (Nov. 1998); Pest Management, IFC OP 4.09 (Nov. 1998); Forestry, IFC OP 4.36 (Nov. 1998); Safety of Dams, IFC OP 4.37 (Sept. 1996); International Waterways, IFC OP 7.50 (Nov. 1998); Indigenous Peoples, IFC OD 4.20 (Sept. 1991); Involuntary Resettlement, IFC OD 4.30 (June 1990); Cultural Property, World Bank Operational Policy Note 11.03 (Sept. 1986); Child and Forced Labor, Policy Statement (March 1998). See IFC, ENVIRONMENT: SAFEGUARD POLICIES (2000), at <http://www.ifc.org/enviro/EnvSoc/Safeguard/safeguard.htm> (last visited Oct. 3, 2002).

referred to the IBRD's, without providing any further detail. In fact, an oil investment failure in Guatemala prompted the IFC to adopt its own policies.¹⁶⁰

The IFC granted two loans to the U.S. oil company Basic Resources International Ltd. ("BASIC") to support the construction of an oil pipeline and to allow for expansion of the companies' activities in the Maya Biosphere Rain Forest in 1994 and 1996 respectively.¹⁶¹ The construction of the oil pipeline was to take place in *La Laguna del Tigre* National Park, recognized as a wetland of international importance by the Ramsar Convention on Wetlands of 1971, ratified by Guatemala in 1990.¹⁶² The first lending package was approved in 1995.¹⁶³ NGOs claimed that the environmental assessment was insufficient because even if the IFC categorized the Project as Category A, the proper consultation and public participation did not take place.¹⁶⁴ The US-based NGO Conservation International ("CI") met with the IFC twice during 1994–95 to recommend changes in the pipeline route and to promote the creation and implementation of an environmental mitigation plan.¹⁶⁵ The IFC,

160. Another project that prompted this need for specific policies was the Pangué Hydroelectric Project in Chile. See Bretton Woods Project, *Bretton Woods Update No. 9—Apr. 1998*, at <http://www.brettonwoodsproject.org/www.brettonwoodsproject.org/update/09/09b.html> (last visited, Jan. 25, 2002).

161. FRANCESCO MARTONE, OIL DRILLING IN THE GUATEMALAN RAINFOREST: A SKELETON IN THE IFC'S CLOSET (Campagna per la Riforma della Banca Mondiale, Sept. 2000), available at <http://www.ciel.org/Ifi/ifccaseguatemala.html>.

162. *Id.* Although, by law oil development is prohibited within the core zones of the Maya Biosphere Reserve, BASIC's operations were "grandfathered" into the national park because the concession was granted in 1985, five years before the reserve and park were created in 1990. The company's concession was granted in 1985, five years before the creation of the reserve and the park. BASIC's 1985 concession covered about 3% of the current area of La Laguna del Tigre National Park. However, in 1992, two years after the establishment of La Laguna del Tigre as a national park and a core zone within the Maya Biosphere Reserve, BASIC was granted a second concession that expanded the concession area to cover more than 60% of the park. See IAN A. BOWLES ET AL., THE ENVIRONMENTAL IMPACTS OF INTERNATIONAL FINANCIAL CORPORATION LENDING AND PROPOSALS FOR REFORM: A CASE STUDY OF CONSERVATION AND OIL DEVELOPMENT IN THE GUATEMALAN PETEN, available at http://www.law.ufl.edu/cgr/publications/environmental_impacts.pdf (last visited Oct. 25, 2002).

163. MARTONE, *supra* note 161.

164. *Id.*

165. *Id.*

however, replied that no route changes were possible and that the environmental assessment sufficiently addressed environmental mitigation measures.¹⁶⁶

A second IFC loan was approved in 1996.¹⁶⁷ The consultation process had improved, but local communities were still not involved in the discussion and formulation of the environmental assessment and environmental management plan required for Category A projects. Public access to documents was not guaranteed, and the only available copies were in English at BASIC's headquarters in Guatemala City.¹⁶⁸ Nevertheless, some NGOs obtained the Project documents and formulated a series of recommendations.¹⁶⁹ The NGOs claimed that the Project violated certain World Bank policies, especially the Natural Habitats Operational Policy, which obliges the Bank to fund projects only when "comprehensive analysis demonstrates that overall benefits from the project substantially outweigh the environmental costs."¹⁷⁰ An improved environmental management plan was produced, but BASIC had already started construction activities before the IFC Board had approved the loan in July 1996.¹⁷¹ Whatever the merits of the NGOs' allegations were, this and other similar projects showed that the consultation and public disclosure record among IFC projects was weak.

The IFC's own policies cover the following areas: environmental assessment, natural habitats, pest management, forestry, projects on international waterways, and the safeguarding of cultural property.¹⁷² In areas where the IFC has not yet adopted its own policy, such as indigenous peoples and involuntary resettlement, it applies the relevant IBRD policy.¹⁷³ A similar framework is applied to MIGA, which adopted its own

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* A new World Bank Operational Policy and Bank Procedure on Natural Habitats was adopted by the World Bank in June 2001. The new World Bank OP 4.04: Natural Habitats, ¶ 5, maintains the same requirement.

171. MARTONE, *supra* note 161, at 3.

172. See sources cited *supra* note 162. See also *IFC Environmental & Social Review*, *supra* note 38, ¶ 6, Table 1.

173. See *IFC Environmental & Social Review*, *supra* note 38.

Environmental Assessment Policy in 1999.¹⁷⁴ The MIGA also incorporates by reference IFC policies, “where applicable.”¹⁷⁵ Finally, the MIGA applies the World Bank Environmental Guidelines to all projects.¹⁷⁶

Both IFC and MIGA have recently adopted relatively specific policies on child labor. According to its policy statement, IFC will not support projects that use forced labor or child labor.¹⁷⁷ The MIGA applies a similar policy.¹⁷⁸ However, no specific policy exists relating to other labor standards, although the IFC’s Policy Statement affirms that “[p]rojects should comply with the national laws of the host countries, including those that protect core labor standards and related treaties ratified by the host countries.”¹⁷⁹ The Policy Statement fails to define core labor standards. It is questionable whether a general reference to “national laws of the host countries” represents enough protection against labor abuse in the projects, especially in countries that do not guarantee basic freedoms such as freedom of association. Although non-compliance with local laws and regulations now allows the IFC to call in a loan, it is doubtful whether respect for workers’ basic rights has really been mainstreamed as an essential aspect of the agencies’ operations.¹⁸⁰ As a matter of fact, when IFC management certifies that the project is in accordance with the Operational Policies during the project cycle, it does not certify the project’s performance against host

174. MIGA, *Environmental Assessment Policy (Annex B to MIGA’s Operational Regulations), Environment and Disclosure Policies*, at <http://www.miga.org/screens/policies/disclose/environ.htm> (last visited, Jan. 25, 2002) [hereinafter *MIGA Environmental Assessment Policy*].

175. See *MIGA Environmental & Social Review*, *supra* note 38, ¶ 14.

176. *Id.* ¶ 11.

177. IFC, POLICY STATEMENT ON FORCED LABOR AND HARMFUL CHILD LABOR (Mar. 1998), available at http://www.ifc.org/enviro/enviro/childlabor/Child_and_Forced_Labor.pdf [hereinafter FORCED LABOR POLICY STATEMENT].

178. In 1998, new provisions were introduced in MIGA’s contract of guarantee requiring guarantee holders to refrain from employing harmful child labour and or forced labour. These amendments also entitle MIGA to terminate a contract if the investment project does not meet these labour standards, although the client can bring them into compliance if MIGA determines that the situation can be corrected. Ikawa, *supra* note 135, at 26.

179. FORCED LABOR POLICY STATEMENT, *supra* note 177.

180. *Id.* The usual practice is to give the client some time to put itself in compliance and then call the loan. A similar mechanism is applied by MIGA.

country labor requirements.¹⁸¹ Thus, it would be necessary to adopt an operational policy requiring compliance at least with the core labor standards enshrined in the 1998 International Labour Organisation (“ILO”) Declaration.¹⁸² This operational policy should also include social protections in project assessments and especially in project monitoring.¹⁸³

Both private sector branches of the World Bank share the same dispute settlement mechanism, the Compliance Advisor Ombudsman (“CAO”), which is less well known than its World Bank counterpart — the Inspection Panel.¹⁸⁴ The CAO post was created in 1999 to enhance the overall performance and accountability of the IFC and MIGA in the social and environmental areas.¹⁸⁵ Its creation resulted from a broad consultation between the IFC, MIGA, NGOs, members of the business community, and populations affected by IFC projects in the past.¹⁸⁶ The main NGOs advocated for the extension of the World Bank Inspection Panel to the private arm branches of the Bank.¹⁸⁷ It has been argued that the IFC resisted submitting to the World Bank Inspection Panel, in spite of the pressure by some shareholders and that the CAO was created as a sort of compromise

181. *IFC Environmental & Social Review*, *supra* note 38. This is also the case in MIGA’s clearance procedure. *MIGA Environmental & Social Review*, *supra* note 38.

182. International Labour Organisation Declaration on Fundamental Principles and Rights at Work, Gen. Conf. Res., 86th Sess. (June 19, 1998), *reprinted in* 37 I.L.M. 1233 (1998) [hereinafter ILO Declaration].

183. *Id.* These principles are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. *Id.* art. 2.

184. For a study of the World Bank Inspection Panel, see Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT’L L. 553 (1994); ALVARO UMAÑA QUESADA, *THE INSPECTION PANEL’S EXPERIENCE* (1998). *But see* James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 166 (1999). For Gathii, the Inspection Panel “is simply another one of the Bank’s strategies of opening itself up to scrutiny on its own terms within its predefined projects and programs and on its own turf.” *Id.* at 166. The Panel, thus, gives the Bank the possibility of acting like a judge in its own cause.

185. IFC AND MIGA TOOLKIT, *supra* note 134, at 5.

186. *Id.*

187. *Id.* at 6.

alternative.¹⁸⁸ The CAO has been working for only a short time so it is still very early to assess its effect. Even if the CAO is not able to provide a judicial-type review of policy compliance, it can provide useful ways of addressing certain shortcomings in IFC/MIGA projects. In some cases, as will be argued below, the CAO may be more effective than the World Bank Inspection Panel, because it is less dependent on the Board of Directors.

The CAO has three roles: (a) to respond to the complaints by persons who are affected by projects and attempt to resolve the issues raised (the ombudsman role); (b) to provide independent advice to the President and senior management of IFC and MIGA (the advisor role); and (c) to oversee audits of IFC and MIGA social and environmental performance (the compliance role).¹⁸⁹ The three roles may overlap. For example, the CAO may initiate a compliance audit on its own initiative following a complaint.¹⁹⁰

Three characteristics describe the CAO's role: independence from management, flexibility in its approach to problems, and a lack of "hard" authority to impose the solutions proposed.¹⁹¹ The very open grounds for lodging a complaint demonstrate the CAO's flexibility. Complainants may refer to the non-compliance of particular guidelines or address policy issues.¹⁹² In this respect, it is easier to address a complaint to the CAO than to the World Bank Inspection Panel, because a complaint to the latter must refer to a particular policy that has been violated. Moreover, only the violation of the Bank's Operational

188. *Id.*

189. IFC, OPERATIONAL GUIDELINES FOR THE OFFICE OF THE IFC/MIGA COMPLIANCE ADVISOR/OMBUDSMAN, § 1.1.2 (Apr. 2000), available at http://www.ifc.org/cao/english/guidelines/ENGLISH_09-20-00_pdf [hereinafter CAO GUIDELINES]. On the audit role, guidelines have been developed by CAO. See CAO, CAO COMPLIANCE AUDIT ROLE: GUIDANCE ON COMPLIANCE AUDITING AND ENHANCING OUTCOMES (June 2002), at <http://www.cao-ombudsman.org>.

190. *Id.* § 5.1.2. An important part of the advisory role is commenting on the existing policies and their application in practice. A human rights sensitive CAO may have a very important impact in this field.

191. *Id.* § 1.3.2. The CAO recruits her own staff, is not part of IFC management, and reports directly to the President of the World Bank. The idea is to gain the trust of people affected by projects.

192. *Id.* § 2.4.1. The same "flexible" approach is taken with regard to compliance audits. The very section acknowledges that the operational guidelines are susceptible to different interpretations and that audits do not aim at establishing a different authoritative interpretation. *Id.* § 5.1.4.

Policies and Procedures, (as opposed to the violation of the Bank Good Practices), may render an Inspection Panel complaint acceptable.¹⁹³ The CAO may choose the means of solving a complaint. For example, it may decide not to deal with the complaint under the ombudsman role, and instead provide advice to IFC and MIGA.¹⁹⁴ Once the CAO has decided to act as an ombudsman, it has discretion as to which method should be used to address the issue: sometimes the solution would be a fact-finding mission, sometimes a “problem solving” approach through conciliation or mediation.¹⁹⁵ For investigation purposes, a proactive CAO may be more effective than the World Bank Inspection Panel, because the Executive Directors can stop a Panel proposal for an investigation whereas the CAO independently decides on the measures to take.¹⁹⁶

Therefore, the main focus of this Ombudsman capacity is to foster communication between local communities and project sponsors, and to help find solutions that are acceptable to both parties.¹⁹⁷ The solutions can eventually take a written form.¹⁹⁸ This is important because a final written compromise may then give rise to contractual obligations enforceable in local courts or arbitration. Nevertheless, the conciliating role, (as opposed to adjudicating), makes the effectiveness of the Ombudsman highly dependent on the mediators’ personal skills and experience, as well as on the magnitude of the problems. The Guidelines state that the Ombudsman will focus “on what is going to happen in the future, rather than on what happened in the past.”¹⁹⁹ Therefore, one may imagine the Ombudsman being effective when parties are discussing compensation prices and measures, but not where the human rights situation of the local populations has drastically deteriorated. An example would be

193. IBRD/IDA Resolution, *supra* note 36, ¶ 12.

194. CAO GUIDELINES, *supra* note 189, at § 3.3.4.

195. *Id.* §§ 3.3.5, 4.

196. Compare IBRD/IDA Resolution, *supra* note 36, ¶ VI, with CAO GUIDELINES, *supra* note 189, § 3. In fact, a request was denied by the Board of Executive Directors in the Itapartica Resettlement and Irrigation Project in Brazil, a case where an investigation was recommended by the Inspection Panel. SIGRUN I. SKOGLY, FROM HUMAN CAPITAL TO HUMAN RIGHTS: THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE I.M.F. 185 (2001).

197. CAO GUIDELINES, *supra* note 189, § 4.1.2.

198. *Id.* § 4.1.5.

199. *Id.* § 2.1.1.

a case in which the security forces have been called by the oil companies and exercised massive repression in the project area. In addition, the lack of specific authority makes the leverage of the CAO dependent on the amount of loan money that has already been disbursed. As the CAO has acknowledged, "where the monies are drawn down, the leverage will be less."²⁰⁰

It is important to determine whether the human rights discourse is able to improve the content and effectiveness of these mechanisms. For a number of years, the human rights obligations of international financial institutions have been the subject of an abundant literature.²⁰¹ Commentators have stressed that the World Bank, as an international organization, is the subject of international law and, as such, is bound by general rules of international law.²⁰² The problem is how to determine the exact content of these obligations. Sigrun Skogly's notion of

200. *Id.* at Introduction.

201. Commentators have dealt with the different dimensions of these obligations. There is an "internal" human rights dimension, i.e., the integration of human rights considerations into its own policies. The "external" aspect of it, i.e. the imposition of human rights conditionalities upon the Bank's clients has also been the subject of a wide debate. See Victoria E. Marmorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 J. INT'L L. & ECON. 113 (1978); Sigrun I. Skogly, *Structural Adjustment and Development: Human Rights — An Agenda for Change*, 15 HUM. RTS. Q. 751 (1993); Daniel D. Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems*, 17 HUM. RTS. Q. 411 (1995); John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331 (2000).

202. This argument is based on the Advisory Opinion on the Interpretation of the Agreement between the WHO and Egypt of 25 March 1951, 1980 I.C.J. 73, 89–90. See also Daniel D. Bradlow, *The World Bank, the I.M.F. and Human Rights*, 6 TRANSNAT'L L. AND CONTEMP. PROBS. 47 (1996). Bradlow stresses the fact that IFIs cannot violate customary international law. *Id.* at 63. During the 1960s South African loans controversy, Constantin A. Stavropoulos, the U.N. Legal Counsel responded to the Bank's argumentation that human rights were not a political affair but a source of legal obligations under the U.N. Charter. See Statement of the U.N. Legal Counsel to the U.N. Fourth Committee, reprinted in 6 I.L.M. 150, 171–73 (1967). Schermers and Blokker argue that international organizations, even in the absence of consent, are bound by international law because their subordination to it is clearer than that of states. HENRY G. SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITH DIVERSITY 988 (1995). On responsibility of international organizations, see generally PIERRE KLEIN, LA RESPONSABILITE DES ORGANISATIONS INTERNATIONALES DANS LES ORDRES JURIDIQUES INTERNES ET EN DROIT DES GENS (1998).

self-policing provides a good approach.²⁰³ Under Skogly's approach, the principal obligation of the IFIs would be to insert human rights considerations into their own projects in order to ensure that human rights are not violated.²⁰⁴ Along the continuum of respecting, protecting, and fulfilling human rights, Skogly emphasizes that the World Bank has the obligation to respect such rights, deriving from customary law and general rules of international law. However, Skogly believes it would not be plausible to argue that the World Bank has the obligation to promote and fulfill human rights, as these obligations derive from treaties to which it is not a party.²⁰⁵ The concept of respect involves both a negative obligation to ensure that the human rights situation does not deteriorate as a consequence of the project, as well as a more positive obligation to observe human rights as they are currently implemented.²⁰⁶ By the same token, the insertion of human rights considerations into World Bank contracts may be seen as part of its obligation to respect human rights.

Moreover, it can be argued that mainstreaming human rights considerations into project finance should be part of the World Bank agencies' duties to promote sustainable development. This argument is consistent with the content of the Bank's policies and with the fact that the concept of sustainable development is evolving into a general principle of international law.²⁰⁷ Increasingly, the notion of sustainable development is seen to

203. See SKOGLY, *supra* note 196, at 151–52.

204. *Id.* See also U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Doc A/CONF. 157/24 pt. 1 (1993), reprinted in 32 I.L.M. 1661. The Program directed the WB and other international institutions to assess the social impacts of the projects that they finance.

205. SKOGLY, *supra* note 196, at 151.

206. *Id.*

207. McGoldrick argues that the principle of sustainable development has made some progress to the status of a legal principle. Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 INT'L & COMP. L. Q. 796, 802 (1996). Other commentators argue that it has yet to become a norm of international law. For an example of the soft law developments in the area, see *Copenhagen Declaration on Social Development and the Programme of Action of World Summit for Social Development*, at Commitment 2 § (h), U.N. Doc. A/CONF.166/9 (1995) (encouraging MDBs to support people-centered development).

encompass not only respect for the environment but also respect for human rights and community or popular participation.²⁰⁸

With respect to asserting human rights obligations upon the World Bank, the difficult question lies in the determination of the content of the obligations, rather than the legal justifications. Would the adoption of a human rights approach be merely an intellectual exercise or would it represent any actual improvement in the quality of oil projects? Since the late 1980s, the Bank has adopted some human rights concepts, such as participation, without using human rights terminology.²⁰⁹ The Bank's current approach to programming is not enough, however, because even if the Bank claims that the furtherance of economic and social rights is its *raison d'être*, its project preparation is not in fact based on a human rights approach.²¹⁰

As Skogly points out, the duty to respect imposes both substantial and procedural obligations.²¹¹ Substantive obligations in the context of project lending may include an evaluation of the human rights impacts on the populations concerned, an identification of specific human rights, a study of each individual right to determine which problems are likely to arise, and an amendment of policies in order to avoid a deteriorated human rights effect.²¹² Procedural obligations would consist of incorporating human rights considerations into different phases of a project: identification, preparation, appraisal, loan negotiation, implementation, and evaluation.²¹³ In fact, the adoption of a human rights approach would refine the substantive content of existing operational standards. Procedures would also be modified so as to reduce management discretion in the decision-making process.

208. McGoldrick, *supra* note 207, at 800. The U.N. SG Agenda incorporates a vision of development as an integrated approach through five dimensions: peace as the foundation, economy as the engine of growth, environment as the basis of sustainability, justice as a pillar of society and democracy as good governance.

209. Patricia Armstrong, *Human Rights and Non-State Actors*, 11 PACE INT'L L. REV. 205, 239 (1999).

210. *Id.* at 243.

211. SKOGLY, *supra* note 196, at 151.

212. *Id.* at 152.

213. *Id.* at 162. See also Katarina Tomasevski, *Human Rights Impact Assessment: Proposals for the Next 50 Years of Bretton Woods*, in PROMOTING DEVELOPMENT: EFFECTIVE GLOBAL INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 82, 94 (Jo Marie Griesgrabber & Bernhard G. Gunter eds., 1995).

As noted above, the operational standards do not provide comprehensive treatment of human rights issues. A human rights approach would imply a change in the rationale of certain OD and OP provisions. The World Bank does not currently treat human rights law the same way as it treats commercial law.²¹⁴ As the following discussion will show, a modification of the “instrumental versus human rights approach” should correct the numerous insufficiencies existing within the procedural guarantees.

Some of the human rights problems concern all of the IBRD, IFC, and MIGA policies, while others are specific to the private sector character of the IFC and MIGA. It seems that, even in the event that the procedures are thoroughly respected, loopholes exist, which permit broad managerial discretion. Many of the OPs refer to vague terms, such as “where appropriate.”²¹⁵ The World Bank endeavors not to finance projects that would cause severe environmental or natural resource deterioration, displace people, or unduly compromise public health and safety, without taking mitigating measures “acceptable to the Bank.”²¹⁶

This is the case of project classification for the environmental assessment purposes. Even though the OP on Environmental Assessment establishes criteria for project classification, the final decision is left to management, which makes case-by-case determinations.²¹⁷ This fact is significant because it may affect the human rights of the populations concerned. As the more stringent consultation obligations depend on relatively discretionary managerial decisions, the consultation process may be significantly reduced. If the project is financed by the IBRD, no formal violation of the Bank’s Policies and Procedures would be found, and therefore it would not be possible to trigger the jurisdiction of the Inspection Panel. If it is an IFC or MIGA loan project, the CAO may still accept the complaint, even without a formal violation, because the CAO Guidelines do not require a policy violation to have occurred for a complaint to be accepted; instead, it requires a much weaker basis.

214. Armstrong, *supra* note 209, at 246.

215. See, e.g., OP 4.01: Environmental Assessment, ¶¶ 5, 7, 9, 12; OP 4.12: Involuntary Resettlement, ¶¶ 14, 18, 24.

216. KATARINA TOMASEVSKI, DEVELOPMENT AID AND HUMAN RIGHTS REVISITED 67–68 (1993).

217. IFC Project Categorization Examples, *supra* note 51.

Moreover, different World Bank institutions link different consultation requirements to each project category, which detracts from clarity and legal certainty. Category *B* projects, for example, have certain consultation requirements in IBRD and IDA loans.²¹⁸ In IFC loans, however, consultation in Category *B* projects takes place “as appropriate.”²¹⁹ The MIGA Environmental Assessment Policy does not even require consultation for Category *B* projects.²²⁰ Therefore, mistakes committed in the early phases of a project may affect the final outcome. In this respect, it is necessary to increase the role of monitoring bodies, such as the Inspection Panel or the CAO, to guarantee that stakeholders are properly involved and that environmental impacts are taken into account.

With respect to human rights protection, more troublesome is the process through which the World Bank is transforming its early instruments, the ODs, into more modern standards: Operational Policies, Bank Procedures, and Good Practices. The transformation process is carried out as follows: the World Bank’s management prepares a draft and opens it to the civil society for comments;²²¹ the Bank’s staff exercises discretion in deciding what comments it keeps or rejects;²²² the final version is then circulated to the Board of Directors for approval.²²³

Although this transformation may have the merit of increasing clarity as to what is mandatory and what is not, the excessive discretion of the Bank staff poses a number of risks. First, as Benedict Kingsbury observes, the empowerment of the Inspection Panel to examine projects by reference to the Bank’s Operational Policies and Procedures, but not to assess the adequacy of those policies themselves, appears to provide some incentives to the management to try to attenuate the policies.²²⁴ The drafters may, for example, put some of the former Operational Directive contents into Good Practices, which would then

218. World Bank OP 4.01: Environmental Assessment ¶¶ 15, 18.

219. IFC OP 4.01: Environmental Assessment ¶¶ 12, 14.

220. MIGA *Environmental Assessment Policy*, *supra* note 174, ¶¶ 9–12.

221. The World Bank, *Policies, Policy Formulation and Review*, at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,content/MK:20040574~menuPK:34574~pagePK:34542~piPK:36600,00.html#formulation> (last visited Oct. 25, 2002).

222. *Id.*

223. *Id.*

224. Kingsbury, *supra* note 17, at 331.

become merely hortatory. As a consequence, provisions guaranteeing respect for human rights would not be binding, and would therefore be placed out the Inspection Panel's jurisdiction.

Second, the substantive content of environmental and social protections may also be watered down. The wording of the former version of the Involuntary Resettlement Operational Directive seemed to indicate that the guarantees to be given to resettling populations were a cost to the projects rather than a fundamental right. Mentioning community involvement, it declared "initial resistance to the idea of involuntary displacement is to be expected"²²⁵ and addressed consultation as a necessary problem rather than a fundamental right, it stated: "[t]o obtain co-operation, participation and feedback, the affected hosts and settlers need to be systematically informed and consulted during preparation of the resettlement plan about their options and rights."²²⁶ Although the current version uses a more politically correct language, it has substantially reduced the protections granted to project stakeholders, as the following examples demonstrate.

Whereas the former OD contained a presumption in favor of the recognition of rights to land even without formal legal title, (for example, customary rights), the current draft version only recognizes these rights if the local legislation acknowledges a claim to such rights.²²⁷ The current OP has also eliminated some of the strongest references to community involvement. As another example, the former OD required plans to include a strategy for community participation,²²⁸ which was described as "critical."²²⁹ It also established a presumption in favor of local NGO involvement, given their ability to foster participation.²³⁰

225. World Bank OD 4.30: Involuntary Resettlement ¶ 8. This is the former version of World Bank OP 4.12.

226. *Id.* (emphasis added).

227. World Bank OP 4.12: Involuntary Resettlement ¶ 15(a)–(b). Section 3(e) of the former World Bank OD included amongst the potential compensation recipients "[I]ndigenous groups, ethnic minorities, and pastoralists who may have usufruct or customary rights to the land or other resources taken for the project. The absence of legal title to land by such groups should not be a bar to compensation." World Bank OD 4.30: Involuntary Resettlement ¶ 8.

228. World Bank OD 4.30: Involuntary Resettlement § 5.

229. *Id.*

230. *Id.*

It further stated that there should be certain institutionalized arrangements, such as regular meetings between officials and communities.²³¹ The current version of OD, however, talks vaguely about participatory processes, which must be acceptable to the Bank.²³² The current version also deals with supervision and monitoring in less detail than in the past, giving Bank officials wider discretion in both procedural and substantive issues.²³³

As the World Bank standards are in some cases the only protections available to people affected by a project, this “watering-down” of language may have serious consequences. This risk could be avoided through a greater “judicialization” of the panel — by expanding its jurisdiction to include assessment of the substantive quality of the standards. International human rights norms in the area that the relevant Guideline purports to safeguard should be the benchmarks against which the “constitutionality” of the standards is assessed.

The IFC and MIGA operational standards do not cover all the human rights issues likely to affect oil companies. For example, as reported by international human rights NGOs, violent security forces employed by oil companies are a major source of human rights violations.²³⁴ This may be a practical problem in the IFC-financed oil exploitations. Recently, the IFC has granted a loan to Harken de Colombia Ltd., a subsidiary of the Texas-

231. *Id.*

232. World Bank OP 4.12: Involuntary Resettlement ¶ 7.

233. The former World Bank OD provided for supervision during implementation through Bank missions and annual reviews of large-scale resettlement. In-depth Bank reviews of midterm progress are also “highly desirable.” World Bank OD 4.30: Involuntary Resettlement ¶ 31. Finally, the project completion report submitted to the Operations Evaluation Department (OED) should evaluate resettlement and its impact on the standards of living of the resettlers and the host population. *Id.* ¶ 32.

234. See, e.g., AMNESTY INTERNATIONAL, SUDAN: THE HUMAN PRICE OF OIL ch. 3 (Human Rights Violations Committed in the Name of Oil, 2000); HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES, ch. 5 (The Environment) (1999), available at <http://www.hrw.org/reports/1999/nigeria/index.htm>; Letter from José Miguél Vivanco, Executive Director, Americas Division, Human Rights Watch to E. John Browne, Group Chief Executive, British Petroleum Company Plc. (Apr. 17, 1998), at <http://www.hrw.org/advocacy/corporations/colombia/Oilpat-01.htm> [hereinafter Vivanco Letter].

based Harken Energy Corp., to develop four oil fields in Colombia for export.²³⁵ Prior to this granting, serious human rights violations issues arose in Columbia regarding the effect of private security forces on oil exploration.²³⁶ Therefore, an IFC-financed investment may need to address this question at some point. However, how to make project sponsors abide by their own policies within the security area is still an issue for further study. The development of voluntary auditing practices by the primary oil companies may be a promising first step. If auditing and reporting become standard practice in the industry, there would be some grounds upon which to incorporate representations and warranties into project finance. In the financial field, it is customary to include representations of the type: "the annual accounts, as audited, reflect accurately the situation of the company." If human rights considerations, including private security, become a subject of public relations for corporations, it would be easier to create contractual conditions necessary to instil human rights protections.

Some other problems linked to business development may also have an impact on human rights. In certain projects, the IFC and the MIGA are minority shareholders and have less leverage than they otherwise might have.²³⁷ On many occasions, the two agencies are called to finance projects that have already started. In such situations, the agencies must verify that the environmental and social assessments undertaken by the project sponsors conform to IFC/MIGA policies.²³⁸ In addition, the reinforcement of independent monitoring bodies is critical, in order to guarantee that the review be genuine rather than a mere formality.

235. Press Release, IFC, *IFC Finances Development of Oilfields in Colombia* (Sept. 1, 1999), at <http://wbln0018.worldbank.org/ifcext/pressroom/ifcpressroom.nsf>.

236. British Petroleum became the target of NGO criticism when it was accused of employing paramilitary forces to protect its investment in Colombia. See Amnesty International, *Colombia: British Petroleum Risks Fuelling Human Rights Crisis through Military Training*, (June 30, 1997), at <http://web.amnesty.org/ai.nsf/print/AMR23044199/?OpenDocument>. See also Vivanco Letter, *supra* note 234.

237. CAO Guidelines, *supra* note 189 (Introduction).

238. IFC OP 4.01, *supra* note 158, at ¶ 13. *IFC Safeguard Policies*, *supra* note 37.

Prepayment of loans by project sponsors is another business issue that has arisen in practice. In that event, the IFC or the MIGA exit from the project, thereby releasing the borrower from its environmental and social commitments. For example, this happened with the lending package granted by the IFC to the U.S. company BASIC for oil extraction in Guatemala.²³⁹ In cases where the loans are prepaid, it would be necessary to include contractual clauses requiring borrowers to report even after loan repayment, and to include guarantees (for example, penalty payments) to ensure their continuing compliance with environmental and social standards.

Finally, although the IFC and MIGA policies can be reinforced, some greater issues may prevent these institutions from adopting a serious monitoring role. First, there may be a contradiction between their roles as investors and development agencies. As Bergesen and Lunde point out, the World Bank raises its money in the capital markets, where the dominant criteria for lending is a project's rate of return, calculated by conventional financial input/output analysis.²⁴⁰ Despite this, the World Bank institutions' roles as development agencies and their anti-poverty strategies require a priority for the poorest countries and populations.²⁴¹

Secondly, conflicts of interests may also exist, between the IFC's role as a profit-making investor and that of an adviser, especially where some IFC departments have merged with those in the World Bank. As a result, the same group of people may be advising governments on privatization and deregulation strategies,²⁴² while discussing private sector investment plans and taking stakes in the same sector.

239. BASIC prepaid its loan in 1999. MARTONE, *supra* note 161, at 1.

240. The Bank attained its prestige on Wall Street by being a very conservative lender (it concentrated its loans especially in infrastructure), and thus gained the AAA status that permitted it to borrow at the best possible conditions. BERGESEN AND LUNDE, *supra* note 2, at 109.

241. The Bank's lending in the social sector never exceeded 6%, although the Bank itself acknowledged that the long-term rate of return of social investment is high. Tomasevski, *supra* note 216. While IFC has operations in 129 countries, it has been criticised for concentrating a large part of its activities in countries that can attract other private sector lenders by themselves, such as Brazil and Russia. See IFC AND MIGA TOOLKIT, *supra* note 134, at 1.

242. The IBRD and the IFC operate jointly the Foreign Investment Advisory Service ("FIAS"). The FIAS helps developing and transition countries design

Third, there is another potential contradiction — which was very visible in the Chad/Cameroon Project — between the World Bank's watchdog responsibilities and its lending role. On some occasions, an unyielding application of the standards may lead to the abandonment of a commercial operation, yet, as an active lender, the World Bank Group must finance projects for its very institutional survival. A good example of this contradiction would be the involvement of the IFC in a lending project to develop an oilfield affecting an indigenous community. The indigenous community, apart from not being an oil consumer, would not be keen on modifying its traditional *modus vivendi*. As an investor, the IFC would be interested in a quick and effective project cycle, and, as a lender, would also wish to further its clients' interests. However, the IFC has acknowledged that its clients are unhappy with its bureaucracy and slow project approval process.²⁴³ This illustrates that the enlargement of the World Bank's role as a standard setter must be accompanied by the development of independent monitoring mechanisms with mandatory, (as opposed to merely hortatory), powers that actually guarantee a reliable application of those standards.

V. CONCLUSION

Discussion of human rights is occupying many new fields. From the NGO forum, to scholarly writings, and international organizations, human rights have now jumped to boards of directors and stock exchange quotations. These developments prove that the human rights discourse is being mainstreamed into new areas. Earlier, human rights were the province of philosophy and the law, prominent in political theory, and in constitutional jurisprudence. Following the Second World War, human rights have become a matter of international law and international relations.²⁴⁴ Now, they also seem to be entering

initiatives to attract foreign direct investment. See FIAS, at <http://www.fias.net> (last visited, Jan. 25, 2002).

243. IFC AND MIGA TOOLKIT, *supra* note 134, at 6. Nevertheless, the fact is that the IFC is a transaction oriented agency, whereas the Bank is more strategic and policy oriented. Whereas the average project cycle is only five to seven months at the IFC, it is eighteen to twenty-four months at the Bank. See MICHELLE MILLER-ADAMS, *THE WORLD BANK: NEW AGENDAS IN A CHANGING WORLD* 59, 112 (1999).

244. LOUIS HENKIN, *THE AGE OF RIGHTS* 13 (1990).

the province of business. Paraphrasing Louis Henkin, corporations “today do not feel free to preach what they may persist in practicing.”²⁴⁵

Over the decades, the World Bank has extended its field of activities from mere project finance to cover economic and institutional reforms.²⁴⁶ As a result of this mission creep, the World Bank is now undergoing an identity crisis, because it is obliged to face conflicting goals.²⁴⁷ The clarification and systematization of these issues is outside the scope of this Article. However, the need to address an overall reform of international financial institutions is not an obstacle to the reinforcement and rule-based application of their own operational policies through the execution of the World Bank’s investments.

The World Bank’s operational standards, even if they do not use a human rights language, introduce basic human rights protections, such as consultation with affected populations. In some cases, the application of these “soft law” rules may be the only guarantee for affected populations. The World Bank may also act as a trendsetter, with regard to both public and private entities. These entities might eventually endorse, rather than reject, the operational standards, and might even apply them to projects not involving the Bank.²⁴⁸ Moreover, the World Bank has developed non-judicial procedures that may, on some occasions, be the only discussion forum provided to the affected populations. In this respect, the World Bank’s policies could potentially become an incipient international administrative law, which would establish uniform benchmarks of protection in the development of natural resources.²⁴⁹ Given the confusion

245. *Id.* at x. According to Professor Henkin, “governments today do not feel free to preach what they may persist in practicing.” *Id.* at x (emphasis added).

246. John Toye, *Structural Adjustment: Context, Assumptions, Origin and Diversity*, in *STRUCTURAL ADJUSTMENT AND BEYOND IN SUB-SAHARAN AFRICA: RESEARCH AND POLICY ISSUES* 19, 29 (Rolph van der Hoeven & Fred van der Kraaij eds., 1994). See generally MILLER-ADAMS, *supra* note 243, at 73, 112; Cahn, *supra* note 18; DASGUPTA, *supra* note 18.

247. For a recent analysis of the Bank’s dilemmas, see Christopher L. Gilbert and David Vines, *The World Bank: An Overview of Some Major Issues*, in *THE WORLD BANK: STRUCTURES AND POLICIES* 10–32 (C. Gilbert & D. Vines eds., 2000).

248. Kingsbury, *supra* note 17, at 339.

249. *Id.* at 323.

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currently reigning in the petroleum sector, a trendsetter is indeed necessary.

ADDENDUM

While this article was being prepared for publication, the World Bank Inspection Panel issued its Investigation Report on the Chad Cameroon Project.²⁵⁰ Although the Panel praises the Bank's efforts to apply its policies in a challenging environment and to build a strong external monitoring capacity,²⁵¹ it also finds that the Project is in breach with a number of World Bank Operational Policies to the extent that the Project could jeopardize its ultimate poverty reduction objective. The Panel first points out several breaches of World Bank OP 4.01 (Environmental Assessment) with respect to the definition of the region area and the assessment of the Project's environmental effects at the regional level. The Report further identifies a series of the Project's deficiencies with the capacity building and economic management.²⁵² The Panel observes that due to the Project's lack of a more thorough appraisal of its sustainability and risks, the Project fails to comply with World Bank OP 10.04 (Economic Evaluation on Investment Operations). The Panel expresses its worry over the fact that while the oil field and pipeline construction are operating ahead of schedule, the capacity building measures are falling behind.²⁵³

Although the World Bank does not have specific operational policies on good governance and human rights, the group of people who filed the request for inspection at the Panel argued that the Project violated the Bank's policies in this respect.²⁵⁴

250. See Press Release, World Bank Board of Directors Approves Management's Response to Inspection Panel Report on Chad-Cameroon Pipeline Project (Sept. 12, 2002), at <http://www.worldbank.org/afr/ccproj/news/index.htm>. For the full text of the Report, see Chad 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) (Sept. 17, 2002), at http://www.worldbank.org/afr/ccproj/project/chad_investigation_repor_final.pdf [hereinafter Inspection Panel Report].

251. Inspection Panel Report, *supra* note 250 ¶¶ 82, 308.

252. See *id.* ¶¶ 24–83. For a summary of the Bank's concerns in this respect, see Executive Summary of the Inspection Panel Report.

253. See *id.* ¶¶ 218–265, 286–293.

254. *Id.* ¶ 210.

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In spite of the controversial role of promoting human rights within the Bank's mandate, the Panel argues that it "felt obliged to examine" whether these issues may prevent the implementation of the project in a manner compatible with the Bank's policies.²⁵⁵ After considering the troublesome human rights panorama in Chad, the Panel affirms that "the situation is far from ideal," and raised questions about the Project's compliance with the Bank's policies.²⁵⁶ In the Panel's opinion, this problematic human rights situation will require reinforced monitoring by the Bank.²⁵⁷

255. *Id.* ¶ 215.

256. *Id.* at 61 ("Box 3"), ¶¶ 216–17.

257. *Id.* ¶ 217.