COMMENTS ON THE ASIAN DEVELOPMENT BANK DRAFT SAFEGUARD POLICY STATEMENT (OCTOBER 2007)

THE NEED FOR AN INTERNATIONAL STANDARDS-BASED APPROACH

SUBMITTED BY THE BANK INFORMATION CENTER[1]

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I. INTRODUCTION

The Bank Information Center (BIC) welcomes the opportunity to comment on the Asian Development Bank's Draft Safeguard Policy Statement (SPS). We fully support the ADB's goal of strengthening the policy framework to "promote the sustainability of project outcomes by protecting the environment and people from potential adverse impacts of projects." (para. 36) Towards this end, we believe it is essential that ADB develop a robust set of Safeguard Policies to ensure the costs of its projects do not fall disproportionately on the poor or marginalized, that the environment is not degraded in the process and that natural resources are managed sustainably. In addition, we agree with ADB that a robust social and environmental safeguard framework "enhances the predictability, transparency, and accountability of [ADB's] actions and decision-making; [and] helps borrowers/clients manage social and environmental impacts and risks…" (para. 38)

We had hoped that ADB would use the SPS process to help define the next generation of best environmental and social practices for its peer development finance institutions. Unfortunately, rather than seizing the mantle of global (or even regional) leadership by promulgating a cutting-edge policy framework, ADB seems to have contented itself with tinkering at the margins of business as usual. The Consultation draft does not improve upon the existing standards of peer institutions in any notable way. On the contrary, it frequently adopts policies that lag far behind those of its peer institutions.

Moreover, the Consultation draft is generally heedless of the broad range of internationally-agreed upon principles, objectives and commitments regarding economic and social development and environmental protection. Thus, it makes little effort to align ADB policies with relevant international conventions, treaties, codes, action plans, soft law instruments, and sectoral "best practice" standards.

These shortcomings can only impede ADB's ability to achieve the laudable objectives it has set for itself in the SPS. To achieve those objectives, ***ADB should adopt a set of clear, mandatory***

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policies that meet and explicitly reference relevant international law and best practice standards, including those of other MDBs. Towards this end, the next iteration of the SPS should clearly benchmark its policy provisions against relevant international standards, and explain any gaps or derogations from those standards.

II. The Importance of Aligning ADB's Safeguards with International Standards and Objectives.

One of the overarching objectives of the SPS is to harmonize ADB's approach to social and environmental issues with those of other multilateral development institutions. (paras. 2, 7). The SPS explains that, among other benefits, such harmonization will make it easier for donors and borrowers to collaborate on achieving shared development commitments and objectives such as the Millennium Development Goals. (para. 7).

In addition to the Millennium Development Goals, ADB should align its policies with a broader range of internationally-agreed upon principles, objectives and commitments regarding economic and social development and environmental protection. These include international conventions, treaties, codes, action plans, soft law instruments, and sectoral "best practice" standards. Accordingly, the policies and procedures of other donor institutions should not be the primary benchmark for harmonization

Towards this end, the revised Safeguard Policies should meet or exceed, and explicitly reference, these international legal norms and best-practice standards. ADB should not develop its safeguard policies de novo.

In addition to ADB's harmonization objectives, there are four other normative and practical reasons why ADB should incorporate international standards into its revised Safeguard Policies:

First, standards that have been incorporated into international instruments or developed through broad participatory processes reflect a consensus of governments or other leading policy-makers on (1) the importance of the issue; (2) the need for international action; and (3) the appropriate policy response. They therefore provide authoritative guidance for what the policies of an international institution should include, and thus a sounder basis for policy development than the discretion of ADB staff.

Second, ADB should be at the forefront of disseminating international best practice standards to public- and private-sector project sponsors in the region. Due to ADB's considerable stature and influence in the Asia-Pacific region, its operational policies may serve a normative and declarative function. By explicitly tethering its operational policies to international standards, ADB would make a powerful statement about the nexus between these environmental and social practices and sustainable and inclusive economic development. Conversely, by declining to clearly integrate international standards into its policy framework, ADB misses an important opportunity to promote international best practice and the rule of international law.

Third, notwithstanding its public interest mission, ADB is still, at the end of the day, a bank, with relatively little capacity or expertise to make policy or generate international norms. Other

international institutions—such as the ILO, FAO, UNEP, WHO, and the secretariats for multilateral environmental agreements (such as the Convention on Biological Diversity and the Stockholm and Rotterdam Conventions)—are much better positioned to undertake this kind of standard setting. Indeed, many of these organizations have already issued substantial guidance in their areas of expertise. By tethering its policies to international hard and soft-law standards, then, ADB would (1) leave global standard-setting to the relevant experts; (2) pay due regard to its own technical and institutional limitations vis-à-vis other international bodies; and (3) facilitate consistency across international institutions.

Fourth, there is now a broad consensus among international jurists, legal scholars and practitioners that "international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law."[2] Accordingly, ADB has a responsibility to ensure that its policies are consistent with these international law obligations. A more complete discussion of the legal obligations of the ADB and other international financial institutions is provided in Appendix A.

Other international financial institutions such as the World Bank, the International Finance Corporation and the European Investment Bank have begun to align their safeguard policies with international standards. For example, last December the World Bank announced that contractors on projects supported by the institution would be required to adhere to the core labor standards defined by the International Labor Organization (ILO). The International Finance Corporation has gone even further. In the process of developing a new set of Performance Standards for its clients, IFC conducted a gap analysis to determine where its existing policies fell short of certain international standards. On a number of substantive issues—including labor conditions and practices,[3] hazardous waste and toxic pollution,[4] pesticide use,[5] the protection of habitats and biological diversity,[6] and the protection of cultural heritage[7]-- the new Performance Standards explicitly reference relevant international standards. Finally, the European Investment Bank emphasizes that EU laws and directives and other international best practice benchmarks are critical sources of substantive and procedural standards for its environmental governance, even for projects outside of the EU where it is not legally compelled to apply EU standards.[8]

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[2] August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 46 (2005).
[3] International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 2: Labor and Working Conditions, para. 2 (2006).
[4] *Id.* Performance Standard 2: Labor and Working Conditions, paras. 4-6, 11.
[5] *Id.* Performance Standard 3: Pollution Prevention and Abatement, paras 14, 15.

[6] *Id.* Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management, paras. 1, 9, 10.
[7] *Id.* Performance Standard 8: Cultural Heritage, para. 4.

[8] European Investment Bank, *Environmental Statement*, 4 (2004). This approach is bolstered by EIB's commitment to the European Principles for the Environment, which requires EIB to "comply with the appropriate EU environmental principles, practices and standards…subject to local conditions."

For these reasons, ***ADB should benchmark its safeguard policies against international standards—including, but not limited to, the relevant policies of other MDBs.*** The remainder of this paper explains where ADB meets or derogates from these standards with respect to each of the draft new safeguard policies.

III. ENVIRONMENT POLICY: DEROGATIONS FROM INTERNATIONAL STANDARDS.

A. Does not clearly require that social impacts be assessed as part of project due diligence.

Comprehensive, participatory social assessments are increasingly recognized as an indispensable tool for designing and implementing environmentally and socially sustainable projects. In particular, robust baseline studies and social impact analysis are increasingly seen as essential for avoiding or mitigating adverse social effects, ensuring development effectiveness, and improving poverty reduction outcomes.[9] Standards and guidelines for effective social assessments have been promulgated in the World Commission on Dams' *Guidelines* and the Convention on Biological Diversity's (CBD) *Akew: kon Guidelines*.[10]

Institutions such as the European Union,[11] the European Investment Bank,[12] the African Development Bank[13] and the International Finance Corporation[14] have affirmed the importance of an early, integrated assessment to identify the social impacts, risks, and opportunities of the projects they support. For example, IFC requires its borrowers to assess the full range social impacts, particularly those that are addressed in other performance standards (i.e. labor and working conditions, indigenous peoples, community health, involuntary resettlement),[15] and recommends that they use international best practice such as the CBD's *Akwe: kon Guidelines*.[16]

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http://www.eib.org/site/index.asp?designation=epe&childHeaderId=414 . However, the EIB remains insufficiently clear about when EU standards will apply—or, more precisely, under what circumstances the EIB will allow projects to derogate from those standards. See, Steven Herz, *An Environmental Policy Framework for the European Investment Bank (EIB): The Need for an International Law-based Approach* (2006). http://www.bankwatch.org/right_to_appeal/background/environmental_policy_framework_herz.pdf

[9] See e.g., Cruz, M. and Davis, S. *Social Assessments in World Bank-GEF Funded Biodiversity Conservation: case studies from India, Ecuador and Ghana*, Social Assessment Series Paper No. 043, World Bank (1997).

[10] World Commission on Dams, *Dams and Development* (2000); Convention on Biological Diversity, *Akwe: kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments*

[11] European Commission, *Communication form the Commission—Halting the Loss of Biodiversity by 2010—and Beyond: sustaining ecosystem services for human well-being* (2006) (committing the EU to applying the *Akwe: kon Guidelines* in its development cooperation with countries outside of the EU).

[12] European Investment Bank, *The Social Assessment of Projects in Developing Countries: the Approach of the European Investment Bank* (2006).

[13] African Development Bank, *Environmental and Social Assessment Procedures for the African Development Bank's Public Sector Operations* (2001).

[14] International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 1: Social and Environmental Assessment and Management Systems (2006).

[15] *Id.* para 4.

[16] International Finance Corporation, *Guidance Notes: Performance Standards on Social and Environmental Sustainability*, Guidance Note 7 (2006).

To ensure that social assessments are useful in helping ADB advance its poverty alleviation mandate and the poverty reduction objectives of the Millennium Development Goals, they must analyze the distribution of costs, benefits and risks between disparate populations.[17]

The Draft SPS, however, is ambiguous with respect to when a systematic assessment of social impacts will be required to avoid adverse impacts on affected peoples, and what those social assessments will entail. The draft explains that a key objective of ADB's safeguard policies is to "avoid adverse impacts of a project on the environment *and affected people*, where feasible." (para. 37)(emphasis added). And it explicitly requires borrowers to assess the potential social impacts on certain populations--indigenous peoples (Attachment C, paras. 14-16) and those who may be involuntarily resettled (Attachment B, para. 12). It is not at all clear, however, when, or whether, social impacts on other populations must be assessed. For example, the environmental classification system set out in the Draft SPS does not specify whether ADB will factor social impacts into project classification. (para. 42). And the draft Environmental Assessment policy is inconsistent with regard to social assessments. While paragraph 4 defines environmental assessments as "an ongoing process of environmental analysis and planning to address environmental impacts associated with a project," paragraph 5 requires that "socio-economic aspects" be considered in an integrated fashion along with environmental impacts.

B. Does not require that human rights impacts be assessed as part of project due diligence.

A human rights-based approach to impact assessment is critical to ensure that projects do not transgress the internationally recognized rights of affected people, and positively contribute to the realization of those rights. The Draft SPS, however, does not require clients to systematically assess the potential impacts on the internationally recognized rights of affected people.[18]

C. Does not meet international standards with respect to the assessment and monitoring of environmental impacts.

The Draft SPS:

- Does not adopt a precautionary approach to environmental decision-making in the face of uncertainty.[19]

- Does not require borrowers to disclose environmental management plans.[20]

[17] For example, IFC Performance Standard 1 requires clients to "identify individuals and groups that may be differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status. Where groups are identified as disadvantaged or vulnerable, the client will propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities." (para 12).

[18] See e.g., International Finance Corporation, *Guide to Human Rights Impact Assessment* (2006); European Commission, *Communication on the European Union's Role in promoting human rights and democratization in third countries* (2001).

[19] UNEP, Rio Declaration on Environment and Development, Principle 15 (1992).

- Does not ensure that affected communities have the right to be fully informed, including by requiring release of all impact assessments at least 120 days before the decision to finance is made.[21]

- Does not require that clients have an EMS in place that is compliant with ISO 14001, EMAS or a similar system.[22]

- Does not require sponsors of projects with significant environmental or social impacts to obtain the consent or support of non-indigenous affected people, or enter into negotiated agreements with them.[23]

D. Does not meet international standards with respect to biodiversity protection and the sustainable management of natural resources.

The Draft SPS:

- Does not establish a policy objective of achieving "no net loss of biodiversity."[24]

- Does not reference, or commit ADB to adhere to the Convention on Biological Diversity (CBD);[25]

- Allows ADB to support projects that would adversely impact protected areas set aside for conservation (as defined by IUCN categories I-IV);[26] wetlands protected under the Ramsar Convention;[27] and World Heritage Sites;[28]

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[20] IFC Performance Standard 1: Social and Environmental Assessment and Management Systems, paras 16, 26; OECD Guiding Principles for Chemical Accident Prevention, Preparedness and Response (2003)(requiring disclosure of emergency response plans), http://www2.oecd.org/guidingprinciples/index.asp.

[21] The Draft SPS abandons the 120 day requirement that is incorporated in existing policy. Asian Development Bank, Operations Manual: Operational Procedures: Environmental Considerations in ADB Operations, para. 10. (Sept. 2006).

[22] International Standards Organization, ISO 14001:2004: Environmental Management Systems, www.iso.org; European Commission, Eco-Management and Audit Scheme, http://ec.europa.eu/environment/emas/index_en.htm.

[23] World Commission on Dams, *Dams and Development*, ch 7; IFC Policy on Social and Environmental Sustainability, para 15, 19, 20. The Draft SPS uses IFC's definition of broad community support. However, while IFC's Policy says that IFC will ensure that broad community support is achieved in all consultative engagement processes, ADB requires it only where communities of Indigenous Peoples are affected. (para 47). ADB therefore does not require that consultations reach any particular outcome.

[24] IFC Performance Standard 6, (para 8).

[25] UN Convention on Biological Diversity (1992), http://www.biodiv.org [CBD].

[26] IUCN, *Guidelines for Protected Area Management Categories* (1994), http://www.iucn.org/dbtw-wpd/edocs/1994-007-En.pdf; CBD, *supra* note 1, at article 8.

[27] Ramsar Convention on Wetlands (1971).

- Allows ADB to support projects that (1) have adverse impacts at the community or population level on species identified on the IUCN Red List of Threatened Species;[29] or (2) threaten migratory species listed under the Convention on the Conservation of Migratory Species of Wild Animals;[30]

- Does not require ADB to refuse to support the production or trade in any living modified organism, except with the approval of the importing country and as otherwise required under the Cartagena Protocol.[31]

- Does not require clients to obtain consent from the country of origin for any activity involving access to genetic resources;[32] or to operate under mutually agreed access and benefit sharing agreements with the country of origin.[33]

- Allows substantial adverse impacts on "critical natural habitats." The Draft SPS adopts IFC's definition of critical natural habitats.[34] (para 18, fn 3). But while IFC's Performance Standards prohibit project activity that has a "measurable impact" on the ability of such habitat to support targeted species, the Draft SPS only precludes project activity that causes "significant conversion or degradation" to such habitats. (para. 20).

E. Does not meet international standards with respect to pollution prevention and abatement and the use of hazardous chemicals.

- Does not require project sponsors to incorporate any resource conservation or energy efficiency measures.[35]

- Does not require project sponsors to reduce greenhouse gas emissions. The greenhouse gas emissions provisions of the Draft SPS apply only to projects that are expected to produce significant quantities of greenhouse gases. (para 27), and they only require sponsors of such projects to quantify emissions and evaluate options to

[28] Convention Concerning the Protection of the World Cultural and Natural Heritage (1972).
[29] IUCN Species Survival Commission, Red List of Threatened Species; *see e.g.*, IFC Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management, at paras. 9-10 (refusing to support project activities that result in the reduction in the population of any recognized critically endangered or endangered species).
[30] Convention on the Conservation of Migratory Species of Wild Animals (1979) [Bonn Convention].
[31] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) [Cartegena Protocol].
[32] Cartegena Protocol, article 10.
[33] CBD, article 15(5).
[34] IFC PS 6, para 9.

[35] Cf. IFC Performance Standard 3: Pollution Prevention and Abatement, para 4 ("client should examine and incorporate in its operations resource conservation and energy efficiency measures, consistent with the principles of cleaner production.").

reduce or offset them. It treats emissions reductions and offsets as interchangeable options.[36]

- Does not require clients to "avoid" emitting pollutants, and to minimize or control their emissions only when avoidance is not possible.[37] (para 26).
- Does not reference or incorporate the provisions of key international agreements regarding the environmentally sound management of chemicals and waste.[38]
- Does not require chemical manufacturers to test for environmental and health impacts of the chemicals they produce, or that any chemical used has been tested for environmental and health impacts.[39]
- Does not require that borrowing companies receive the prior informed consent of countries into which they will be importing listed chemicals.[40]
- Does not require borrowers to publicly report on their pollutant releases and transfers.[41]
- Does not prohibit financing of the manufacture of chemical weapons or inputs for chemical weapons.[42]

IV. INDIGENOUS PEOPLES POLICY: DEROGATIONS FROM INTERNATIONAL STANDARDS.

There is a large body of international law and best practices standards that recognize that indigenous peoples have inherent rights that derive from their distinct identities and their collective, close and special attachment to their ancestral lands. These rights are established in human rights instruments including the International Covenant on Civil and Political Rights

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[36] Cf. IFC Performance Standard 3: Pollution Prevention and Abatement, para 10 (requiring all clients to reduce "project-related greenhouse gas (GHG) emissions in a manner appropriate to the nature and scale of project operations and impacts."); UNFCCC at 8; World Bank, *Clean Energy for Development Investment Framework: The World Bank Group Action Plan* at 28 (2007).

[37] Cf. IFC Performance Standard 3: Pollution Prevention and Abatement, para 4.
[38] E.g. Strategic Approach to International Chemical Management (SAICM) (2006); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1992); Stockholm Convention on Persistent Organic Pollutants (POPs) (2000).
[39] The EU REACH Regulation (Registration, Evaluation, Authorisation and Restriction of Chemicals), formally adopted on 18 December 2006 by the Council of Environment Ministers, entered into force on 1 June 2007.
[40] Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), http://www.pic.int.
[41] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), at article 5 [Aarhus Convention].
[42] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1997).

(ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), and the Convention on Biological Diversity (CBD), among others.

Most importantly, the rights of indigenous peoples have been consolidated in the UN Declaration on the Rights of Indigenous Peoples, which was passed by the United Nations General Assembly in September 2007 with *not one Asian government voting in opposition.* The UN Declaration affirms that indigenous peoples' have the right to, *inter alia*:

- self-determination and self-development;
- free and prior informed consent (FPIC);
- ownership and control over their traditional territories, lands and resources;
- cultural integrity;
- collective as well as individual rights;
- equal protection of the law and non-discrimination;
- be free from forcible relocation;
- exercise their customary law;
- represent themselves through their own institutions;
- participate in decisions and activities which may affect them;
- a healthy environment;
- control and share in the benefits of the use of their traditional knowledge;
- restitution of lands and property taken unjustly or without prior consent; and
- fair compensation for the irrevocable loss of property and other rights.

The Draft policy statement falls short of existing international standards for indigenous peoples on a number of key points: Specifically, the Draft SPS:

A. Does not reference or incorporate key international agreements, legal norms and laws regarding the rights of indigenous peoples, in particular the UN Declaration on the Rights of Indigenous Peoples.

Safeguard policies that are intended to benefit and protect indigenous peoples should specifically incorporate internationally-recognized indigenous rights, such as those contained in the UN Declaration on the Rights of Indigenous Peoples. To ensure the projects that it finances comport with international standards, international standards, the policy should specifically prohibit support for projects that transgress these norms.

B. Fails to apply a human rights-based approach to development.

Safeguards intended to benefit and protect indigenous peoples should be designed with reference to the need to protect their human rights.[43] The International Finance Corporation, World Bank and Inter-American Development Bank have each recognized the importance of protecting the

[43] World Commission on Dams, *Dams and Development* (2000).

rights of indigenous peoples in the "objectives" statements of their respective indigenous peoples safeguard standards. Thus, IFC explicitly seeks to "foster full respect for the dignity, human rights, cultural and natural resource-based livelihoods of indigenous peoples;" the World Bank seeks to ensure "that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples;" and the IDB seeks to "safeguard indigenous peoples and their rights."[44]

C. Does not protect or recognize the right to free, prior and informed consent.

The right of indigenous peoples to give or withhold their free, prior and informed consent (FPIC) is directly referenced and protected in Articles 10, 11, 19, 28, 29 and 32 of the Declaration on the Rights of Indigenous Peoples.

The Draft SPS, however, does not reference or protect the right to free, prior and informed consent during initial project planning and screening, and at subsequent stages of project development. Instead, following IFC's Performance Standards, the Draft SPS requires "free, prior and informed consultation leading to broad community support" for all projects with potential impacts on indigenous peoples. (Attachment C, para. 8). The SPS provides that "when the borrower/client and the affected Indigenous Peoples have serious differences and disagreements on the project, its components, or IPP, the borrower/ client should adopt good faith negotiations for them to resolve such differences and disagreements." (Attachment C, para. 11). However, unlike IFC's Performance Standard 7, the SPS does not actually require these negotiations to reach a successful outcome.

The Draft SPS also fails to reference the right to FPIC in other, more specific circumstances:

1. Physical Relocation

Article 10 of the UN Declaration on the Rights of Indigenous Peoples protects indigenous peoples from physical relocation without their consent.[45] Similarly, the Inter-American Development Bank has recognized the right to FPIC requirement for forced relocation, and IFC requires "informed participation" and "successful outcomes" of "good faith negotiations" before resettlement can take place—a standard that functionally approximates FPIC.[46]

The draft SPU, however, requires only that:

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[44] International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 7: Indigenous Peoples (2006); World Bank, Operational Policy 4.10 (2005); IDB Operational Policy on Indigenous Peoples, OP-765.

[45] Article 10 provides,

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place **without the free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

[46] Inter-American Development Bank, Policy on Involuntary Resettlement; International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 7: Indigenous Peoples (2006).

> In exceptional circumstances, when avoidance is proven to be impossible, the borrower/client will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process. (Attachment C, para 50)

Since the SPS requires "broad community support" for ALL ADB projects impacting on indigenous peoples, it provides no additional protections for projects involving physical relocation. It does not require 'successful outcomes' or any other such formulation that would imply agreement or consent.

2. Restriction of Access

Article 26 of the UN Declaration on the Rights of Indigenous Peoples provides that indigenous peoples should have access to their traditional lands.[47] Article 28 affords indigenous people the right to compensation where this right is abridged without consent.[48] The World Parks Congress has also recognized the FPIC rights of indigenous Peoples when protected areas are created that deny indigenous peoples access to their traditional lands.[49]

However, the Draft SPS requires only that "for all projects affecting Indigenous Peoples' ownership and access to land and natural resources...the borrower/client will document the results of the free, prior and informed consultation process for that particular Indigenous Peoples community." (Attachment C, para. 47)

D. Does not require borrowers to recognize and respect customary or traditional land tenure.

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[47] Article 26 provides:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
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> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

[48] Article 28 provides:

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged **without their free, prior and informed consent**.

[49] IUCN, Durban Action Plan, Vth IUCN World Parks Congress, Outcome 5, Durban, South Africa, 8-17 September 2003.

Article 26 of the UN Declaration on the Rights of Indigenous Peoples affirms the customary land and property rights of indigenous peoples.[50]

The Draft SPS recognizes the importance of land and resources to indigenous peoples. It requires that borrowers and clients of the Bank "pay particular attention to" issues such as "the customary rights of indigenous peoples, both individual and collective, pertaining to ancestral domains, lands or territories that they traditionally owned, or customarily occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihood systems." (Attachment C, para. 44 (i)). Language elsewhere in the draft also underscores the importance of land and resources to the identities, cultures and survival of indigenous peoples.

While the SPS asks borrowers to "pay particular attention" to these issues, however, it does not actually require them recognize or respect customary land rights. In contrast, IFC's Performance Standard 7, for example, requires client to "offer affected communities of Indigenous Peoples at least compensation and due process available to those with full legal title to land in the case of commercial development of their land under national laws…"[51]

E. Does not apply key policy provisions to all Bank-supported activities.

International standards with regard to the protections afforded to indigenous peoples should be upheld regardless of the financing modality under which a particular activity is supported. However, the policy requirements in the current draft depend on the nature of ADB's support. Section C establishes a set of "General Requirements" for all projects and all funding modalities, and Section E defines the "Special Requirements" that are triggered when the project may cause particularly sensitive impacts on indigenous peoples. Although Section E addresses the most sensitive impacts, its heightened requirements do not apply to activities funded under Program Loans, Multi-tranche Financing Facility, Emergency Assistance, Sector Finance or Financial Intermediaries. (SR 32, 34, 35, 37, 38, 39(ii)).

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> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

[51] International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 7: Indigenous Peoples (2006).

V. INVOLUNTARY RESETTLEMENT POLICY: DEROGATIONS FROM INTERNATIONAL STANDARDS.

There is a growing body of international conventions, norms and best practices standards that define the legal requirements and best practice standards for involuntary resettlement.[52] To be consistent with these norms, standards and guidelines, a resettlement policy must:

- Require that involuntary resettlement should be avoided or minimized whenever feasible by exploring all viable alternative project designs, including the "no-project" alternative;[53]

- Prohibit discrimination—in purpose or effect--based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in the siting of facilities that require resettlement, the identification of populations to be displaced, or the distribution of project benefits, compensation, or rehabilitation measures.[54]

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[52] These include:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Universal Declaration of Human Rights
- World Commission on Dams (WCD), *Dams and Development* (2000).
- Organization for Economic Cooperation and Development (OECD), *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects*;
- UN Expert Seminar on the Practice of Forced Evictions (UN Guidelines), *Comprehensive Human Rights Guidelines On Development-Based Displacement*;
- UN Special Rapporteur on the Right to Adequate Housing Guidelines, *The Basic principles and guidelines on development-based evictions and displacement* ("Kothari Guidelines").
- International Finance Corporation, Performance Standard 5: Land Acquisition and Involuntary Resettlement (2006);
- World Bank Operational Policy 4.12: Involuntary Resettlement (2001).
- Inter-American Development Bank Operational Policy 710: Involuntary Resettlement (1998);
- African Development Bank Involuntary Resettlement Policy.

[53] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement

[54] International Covenant on Civil and Political Rights, Art. 26; Convention on the Elimination of All Forms of Racial Discrimination.

- Require that all involuntarily resettled people share in the benefits of the project[55] and that their social and economic well-being is improved;[56]

- Require that the economic and social rights of involuntarily resettled persons—including the rights to adequate housing, water, food, etc—not be adversely affected, and that the project contribute to the realization of those rights;[57]

- Define "displacement" include both physical displacement (loss or relocation of land, shelter, and other fixed assets) and economic displacement (loss of assets or access to assets that leads to loss of income sources or means of livelihood);[58]

- Ensure that affected people are compensated for all lost assets through cash or replacement assets;[59]

- Give preference to land-based resettlement strategies for displaced persons whose livelihoods are land-based;[60]

- Require that compensation and rehabilitation measures account for common property resources, cultural property, public facilities and infrastructure;[61]

- Require that the client fully inform and consult with affected people during planning, implementation and monitoring of resettlement activities;[62]

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[55] World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

[56] OECD, *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects.*

[57] International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A

(XXI) (16 Dec 1966), U.N. Doc. A/6316 (1966).

[58] World Commission on Dams, Dams and Development: A New Framework for Decision-Making.

[59] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

[60] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

[61] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

- Require that compensation and other relocation assistance be provided prior to displacement;[63]

- Require compensation and rehabilitation even in the absence of a formal title;[64]

- Require that specific measures be planned and implemented to mitigate risks to the poorest and most vulnerable groups?[65]

The provisions of the Draft SPS derogate from these standards in several important ways. Specifically, the SPS:

A. Does not require that displaced persons share in project benefits.

Where a project is intended to have public benefits, displaced persons should have priority in enjoying those benefits. The Policy does not explicitly require this. Indeed, benefit sharing provisions in the July 2007 version of the draft were stricken from the October 2007 version. Principle 7 does mandate that "involuntary resettlement should be conceived as part of a development project or program." While this may arguably be read to imply that involuntary resettled people should share in project benefits, the policy never explains what this actually requires.

B. Does not reference or adequately protect the economic and social rights of involuntarily resettled persons.

The policy does not explicitly refer to the economic and social rights of affected peoples. While it does require that the "income-earning capacity, production levels and standard of living" be improved or at least restored (para 8), and that involuntarily displaced persons are entitled to

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[62] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

[63] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

[64] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

[65] OECD, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects; World Commission on Dams, Dams and Development: A New Framework for Decision-Making; Miloon Kothari, UN Special Rapporteur on the right to adequate housing, The Basic principles and guidelines on development-based evictions and displacement.

adequate replacement housing (para 6), the policy should be clear that the full range of recognized economic and social rights will not be adversely affected, and that rehabilitation measures will contribute to their realization.

C. Does not prohibit discriminatory purpose or impacts in the siting of facilities that require resettlement, the identification of populations to be displaced, or the distribution of project benefits, compensation, or rehabilitation measures.

One of the most fundamental principles of international human rights law is that all people should be entitled to the equal protection of the laws, and should not be discriminated against on the basis of race, color, religion, political opinion, or other invidious classification.[66] Too often, however, governments make decisions regarding the siting of locally-undesirable land uses, and the allocation of project benefits, costs, and risks that have discriminatory purposes or impacts. Nevertheless, the SPS does nothing to preclude invidious discrimination in decisions regarding where facilities that require resettlement will be sited, who will be resettled, and how benefits and rehabilitation efforts will be allocated.

D. Does not give adequate preference to land-based resettlement strategies for displaced persons whose livelihoods are land-based.

Principle 3 expresses a preference for land-based resettlement strategies when livelihoods are land-based. However, this preference is not reflected in the requirements in Attachment B. Indeed, Attachment B appears to give borrowers the option to provide either land-based or cash compensation. (para. 6). Only "business owners with legal rights or recognized or recognizable claims to land where commercial activities are carried out" are entitled to a preference for land-based compensation. (para 7). Moreover, the current draft does not require that affected people who do not have legally recognizable title to land be compensated for loss of access to land, or provided with access to replacement land.[67]

E. Does not require that compensation and rehabilitation measures account for common property resources, cultural property, public facilities or infrastructure.

ADB's existing Involuntary Resettlement Policy includes detailed requirements for restoring access to common property resources such as forests, grazing lands, public facilities and cultural sites. These provisions have not been carried over to the current draft, which does not require borrowers to address the loss of common property resources.

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[66] United Nations, *Universal Declaration of Human Rights* (Article 7); United Nations, *Convention on the Elimination of All Forms of Racial Discrimination*; United Nations, *International Covenant on Civil and Political Rights*. United Nations, *International Covenant on Economic, Social and Cultural Rights*.

[67] Cf. In contrast, the Involuntary Resettlement Policy of the African Development Bank, while broadly adhering to the same compensation framework, specifies that in lieu of compensation for land, non-titled affected people should receive resettlement assistance that includes "land, housing and infrastructure" (AfDB, p. 12, III.3.4.3)

F. Does not require that specific measures be planned and implemented to mitigate risks to the poorest and most vulnerable groups.

One of the "Objectives" of the policy is to "improve the standards of living of the affected poor and other vulnerable groups." Accordingly, Principle 2 requires borrowers to "[p]ay particular attention to the needs of vulnerable groups, especially those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, or persons without legal entitlements." However, the policy does not require any specific measures to achieve these objectives and policy principles.

G. Narrows the definition of who is considered "displaced" and what actions will trigger the policy, such that not all affected people will be covered.

International best practice on involuntary resettlement requires that any persons who are physically or economically displaced by project-related activities and impacts should be covered under involuntary resettlement safeguard entitlements.[68] Consistent with this standard, one of the objectives of the Draft SPS is to "…clarify that the policy is triggered by involuntary acquisition of land and land-based assets, *changes in land use patterns*, and restricting access to common land and legally designated protected areas." (para. 24).

Nevertheless, the text of the Draft SPS departs from this standard in two ways. First, it explicitly exempts "*adverse economic, social or environmental impacts from project activities other than land acquisition*" from the scope of the policy. Second, while the current Involuntary Resettlement Policy applies to people who are displaced by "*changes in land use*" and "*restricted access to natural resources*," the Draft SPS applies only to the narrower category of people who are harmed by "*involuntary restriction* on land use" and "involuntary restriction of access to legally designated parks and protected areas." Furthermore, the SPS does not define "involuntary," raising the possibility that it will be improperly applied in circumstances in which coercion or disparities in bargaining power induced ostensibly consensual agreements. By comparison, other organizations, such as the World Bank and IFC, have sought to address the inherent coercion involved in the use of expropriation or other government land use restrictions by narrowly defining "involuntary."[69]

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[68] World Commission on Dams, at 103.

[69] IFC Performance Standard 5 provides: "Resettlement is considered involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement. This occurs in cases of (i) lawful expropriation or restrictions on land use based on eminent domain; and ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land ise if negotiations with the seller fail." Similarly, the World Bank policy defines involuntary as "actions that may be taken without the displaced person's informed consent or power of choice." (OP 4.12, footnote 7).

APPENDIX A: THE OBLIGATIONS OF THE ADB AS A SUBJECT OF INTERNATIONAL LAW

There is now a broad consensus among international jurists, legal scholars and practitioners that "international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law."[70]
Several international courts and tribunals have concluded that international organizations must operate within the broader rubric of international law, and that their international law obligations are not circumscribed by their charter agreements. Most notably, the International Court of Justice concluded in its *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that "International Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are a party."[71] Similarly, in the criminal context, the International Criminal Tribunal for the Former Yugoslavia has found that the Statute of the Tribunal applies not only to individual States, but equally to "collective enterprises undertaken by States, in the framework of international organizations."[72] Finally, in a case that specifically addressed the human rights obligations of an international organization, the European Court of Justice concluded that while the European Community could not formally accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, "respect for human rights is a condition of the lawfulness of Community acts," because human rights, including the provisions of the ECHR, must be given binding effect as "general principles" of EC law.[73]

United Nations entities that have considered the question have also concluded that international organizations have obligations under international law. Most importantly, the influential International Law Commission, in its *Draft Articles on the Responsibility of International Organizations*, concluded that "[e]very internationally wrongful act of an international organization entails the international responsibility of the international

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[70] August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 46 (2005).
[71] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C. J. Reports 1980, 73 at 89-90.
[72] *Prosecutor v. Simic et al.*, Case IT-95-9-PT, Decision on motion for judicial assistance to be provided by SFOR and others, 18 October 2000, para. 46 (concluding that the Statute of the Tribunal applies to "collective enterprises undertaken by States, in the framework of international organizations" such as the NATO-led Stabilisation Force (SFOR)).

[73] *Advisory opinion of 28 March 1996 of the European Court of Justice on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. See also, the* European Court of Justice decision in *Ellinki Radiophonia Tileorassi (ERT)*, Case C-260/89 (1991) ("[T]he Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures…. It follows that...the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed); *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 Case 4/73, *Nold v. Commission* [1974] ECR 491, Case 36/75, *Rutili* [1975] ECR 1219; Case 5/88, *Wachauf* [1989] ECR 2609, para.2639.

organization."[74] Similarly, Special Rapporteurs of the United Nations Commission on Human Rights have observed that as "creatures of the international legal system," intergovernmental organizations are bound by "fundamental principles of international law such as the obligation to respect universal human rights norms."[75]

Leading scholars, publicists and other commentators have been virtually unanimous in their affirmation of the principle that international organizations have obligations under international law.[76] For example, before she became the President of the International Court of Justice, Rosalyn Higgins served as a Special Rapporteur to the Institut de Droit International on *The Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties*.[77] The resolution she authored concluded that an international organization is liable for its own obligations towards third parties, and that those obligations may arise under international law—including, but not limited to, the internal rules of the organization.[78]

Perhaps the most authoritative treatment of the obligations of international organizations has come from the International Law Association' Committee on Accountability of International Organizations.[79] The Committee, comprised of distinguished international law scholars from around the world, observed that "[t]here is no reason in principle why primary rules of international law should not apply to collective enterprises undertaken by states in the framework of [international organizations]"[80] It concluded that it is now accepted as a principle of customary international law that international organizations are responsible for any acts that they may commit in violation of international law, even if those acts are in conformity with the organizations' charter or internal policies and procedures.[81] Accordingly, the Committee issued

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[74] United Nations Int'l L. Comm'n, First Report on Responsibility of International Organizations, Art. 3 (March 2003).

[75] Joseph Oloka-Onyango and Deepika Udagama, *Globalization and its impact on the full enjoyment of human rights*," Progress report submitted to the United Nations Commission on Human Rights, E/CN.4/Sub.2/2001/10, 25-27 (2 August 2001).

[76] See, e.g. August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 46 (2005); Eisuke Suzuki and Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms Of Multilateral Development Banks*, 27 Mich. J. of Int.L.177, 179 (2006) (arguing that it is now clear that the legal personality of international organizations entails a responsibility to non-state actors.) Mahnoush H. Arsanjani, *Claims Against International Organizations: Quis Custodiet Ipsos Custodies*, 7 Yale J. World Pub. Ord. 131, 133–34 (1981); S. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001); A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, 137-59 (2006); M. DARROW, BETWEEN LIGHT AND SHADE: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND INTERNATIONAL HUMAN RIGHTS LAW (2003).

[77] Institut de Droit International, *Resolution on The Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties* (1995).

[78] *Id.*

[79] Report of the Seventy-First Conference, Berlin, Aug. 16–21, 2004 *Final Report of the International Law Association Committee on Accountability of International Organizations*, 26.

[80] *Id.*, at 18.

[81] *Id.,* at 26.

the following "Recommended Rules and Practices" on the international legal responsibility of international organizations:

> 1. Every internationally wrongful act of an IO [International Organization] entails the international responsibility of that IO.
>
> 2. There is an internationally wrongful act of an IO when conduct consisting of an action or omission is attributable to the IO under international law and constitutes a breach of an applicable international obligation.
>
> 3. The characterization of an act of an IO as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the IOs internal legal order….[82]

Specifically with respect to the human rights obligations of international organizations, the Committee concluded simply that "[international organizations] should comply with basic human rights obligations."[83] The Committee explained:

> Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon [international organizations] in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an [international organization] is authorised to become a party to a human rights treaty.[84]

The authors of four of the most prominent treatises on the law of international organizations have concurred with the ILA's assessment that international organizations have obligations under international law. Henry Schermers and Niels Blokker, in their *International Institutional Law: Unity Within Diversity 3rd ed.*, conclude that the rules of international law apply to international organizations "directly as part of the legal order of the organization in question…."[85] Similarly, Moshe Hirsch argues in *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* that since "[t]he principles of state responsibility apply by analogy *mutatis mutandis* to the responsibility of international organizations…international organizations are bound to comply with the norms of international law flowing from any source…."[86] C.F. Amerasinghe likewise concludes in *Principles of the Institutional Law of International Organizations* that "…there can be no doubt that under customary international law…international organisations can also have international obligations towards other international persons…."[87] And Philippe Sands and Pierre Klein concur in

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[82] *Id.*, at 27.
[83] *Id.*, at 22.
[84] *Id.*
[85] H. SCHERMERS AND N. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 3rd ed., 822 (1995).
[86] M. HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES 189, 190-91 (1995).
[87] C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW FO INTERNATIONAL ORGANIZATIONS, 240 (1996).

Bowett's Law of International Institutions that the proposition that international organizations are bound by the generally accepted standards of international law, including those relating to the protection of fundamental human rights and the environment, is "unimpeachable."[88]

Finally, there is a rich and growing scholarly literature that addresses how the general principle that international organizations have obligations under international law applies to the specific question of the human rights obligations of IFIs. Thomas Buergenthal, now a member of the International Court of Justice, has concluded that the World Bank has obligations that arise under the United Nations Charter and other human rights treaties.[89] Sigrun Skogly takes a similar position in her *The Human Rights Obligations of the World Bank and the International Monetary Fund*, perhaps the most prominent treatment of the subject,[90] as have the vast majority of other academic commentators who have addressed the question.[91] Indeed, to the extent that there is a live debate in the academy over the human rights obligations of IFIs, it centers on the scope— not the existence—of those obligations.[92]

To summarize, the great weight of legal precedent and commentary recognizes that IFIs and other international organizations have binding obligations to comply with international law, including basic human rights norms. Nevertheless, some IFIs such as the World Bank and the International Monetary Fund have long denied that they operate within the rubric of international law, and have refused to recognize any international legal obligations beyond their charter obligations to their member states.[93] Recently, however, the World Bank has begun to relax this

[88] P. SANDS AND P. KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS, 5TH ED. 458-59 (2001);

[89] Thomas Buergenthal, *The World Bank and Human Rights* in E. BROWN WEISS, A. RIGO SUREDA, AND L. BOISSON DE CHAZOURNES (EDS.), THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW (1999).

[90] S. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001).

[91] See e.g., Daniel D. Bradlow, *The World Bank, the IMF and Human Rights*, Transnational Law & Contemporary Problems (Spring 1996); A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, 137-59 (2006); M. DARROW, BETWEEN LIGHT AND SHADE: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND INTERNATIONAL HUMAN RIGHTS LAW (2003); Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 Am. U. Int'l L.Rev 527 (2001), Adam McBeth, *Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial* Institutions, 10 Int. J. of Hum. Rights 385 (2006). For a dissenting view see, Robert McCorquodale, *Overlegalizing Silences: Human Rights and Nonstate Actors*, American Society for International Law Proceedings, 384 (2002) ("The international human rights law system is a statebased system…. It ignores actions by nonstate actors, such as the United Nations and other intergovernmental organizations….)

[92] In particular, there is some disagreement regarding whether IFIs have a duty to "respect," "protect," and "fulfill" human rights, or only some more limited range of duties. For an overview of this debate see CLAPHAM, *id.,* at 150-52.

[93] For the IMF's perspective, see François Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund: Working paper submitted by the General Counsel of the International Monetary Fund to United Nations Economic and Social Council* (May 7, 2001); Francois Gianviti, Economic, Social, and Cultural Human Rights and the International Monetary Fund, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 113-38 (2005). The views of the former General Counsel of the World Bank can be found at Ibrahim Shihata, "The World Bank and Human Rights", presented at International Commission of Jurists conference on economic,

narrow understanding of its international law obligations. For example, in January 2006, the World Bank's outgoing General Counsel concluded that its Articles of Agreement "permit, and in some cases require the Bank to recognize the human rights dimensions of its development policies and activities."[94]

Bank Information Center (BIC) partners with civil society in developing and transition countries to influence the World Bank and other international financial institutions (IFIs) to promote social and economic justice and ecological sustainability. BIC is an independent, non-profit, non-governmental organization that advocates for the protection of rights, participation, transparency, and public accountability in the governance and operations of the World Bank, regional development banks, and the IMF.

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social and cultural rights, Abidjan, 1998, p. 145; Ibrahim F. I. Shihata, Human Rights, Development, and International Financial Institutions, 8 Am. U. J. Int'l & Pol'y 27, 28 (1992) (arguing that the World Bank's Articles of Agreement preclude the Bank from applying certain human rights norms in its operations). The United Nations, by contrast, has been far more willing to interpret the provisions of its Charter in accordance with the basic norms of international law. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 294 (1973); United Nations, General Assembly, Vienna Declaration and Programme of Action, para. 4, U.N. Doc. A/Conf.157/23 (1993)(recognizing the promotion and protection of human rights as priority objective of the United Nations [despite the UN Charter's prohibition on involvement in the domestic jurisdiction of any state]).

[94] World Bank, "Legal Opinion on Human Rights and the Work of the World Bank," Senior Vice President and General Counsel, January 27, 2006, at 9.