



**SUBMISSION TO THE INTERNATIONAL FINANCE CORPORATION
ON THE REVIEW OF ITS
PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY,
AND DISCLOSURE POLICY**

Submitted by e-mail to: policyreview@ifc.org

Gary Pienaar
For the Economic Governance Programme
Idasa, an African Democracy Institute, South Africa
31 July 2010
E-mail: gpienaar@idasa.org.za

CAPE TOWN DEMOCRACY CENTRE
6 SPIN STREET • CHURCH SQUARE • CAPE TOWN • 8001
PO BOX 1739 • CAPE TOWN • 8000 • SOUTH AFRICA
TEL +27 (021) 467-7600 • FAX +27 (021) 461-2589
e-mail: info@idasa.org.za

KUTLWANONG DEMOCRACY CENTRE
CNR VISAGIE & PRINSLOO STREETS • PRETORIA • 0001
PO BOX 56950 • ARCADIA • 0007 • SOUTH AFRICA
TEL +27 (012) 392-0500 • FAX +27 (012) 320-2414/5
e-mail: info@idasa.org.za

<http://www.idasa.org> • REG NO: 1987/00079/08
IDASA IS AN INDEPENDENT NON-PROFIT PUBLIC INTEREST ORGANISATION PROMOTING DEMOCRACY

OFFICERS & BOARD OF DIRECTORS AVAILABLE ON REQUEST

Background

The IFC's self-assessment

The IFC's own report on the first three years of application of its Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information¹ finds that:

- 'IFC considers the framework to be sound and effective. It does not hinder IFC's business and helps with risk management.
- The Performance Standards framework is adaptable even in the face of the financial and economic crisis and to different financial instruments as well.
- Recent annual client survey results show continued satisfaction with IFC on environmental and social matters. Clients did not find implementation to be excessively costly. These conclusions are based on client survey results from over 140 existing clients that apply the Performance Standards.
- Implementation of the disclosure requirements has begun to improve transparency, and increased awareness among stakeholders, regarding IFC's investments and advisory services projects.'

The report also identifies several 'implementation lessons and challenges from policy and operational perspectives'.²

- 'Management of cross-sectoral global environmental issues such as climate change and biodiversity protection.
- Social development issues such as consultation with affected communities, broad community support, project level disclosure, resettlement, labor issues and retrenchment policies, and human rights.
- Process challenges such as managing financial intermediary risks and differing stakeholder views on how IFC categorizes projects.
- Management of supply chain issues, especially in the agribusiness sector where E&S³ risks continue to grow in complexity.
- Project categorization, especially for new financial products.'

¹ 29 July 2009, and which in this submission will, for convenience, be referred to as the 'Sustainability Framework'.

² According to the Executive Summary in the Report, at pg iv, these conclusions are drawn from the 'IFC's own experience, independent views from IEG and CAO, and ongoing feedback from external stakeholders, such as the financial institutions that apply the Performance Standards, and civil society organizations'.

³ i.e 'Environmental and Social'

The Report concludes that '[i]n terms of the impacts on market practices, the Performance Standards have made a positive contribution to the global convergence of E&S risk management practices. There are now 68 financial institutions that have adopted the Equator Principles. Public development financial institutions such as the OECD Export Credit Agencies and European Development Finance Institutions have also publicly referenced the use of the Performance Standards.'⁴

Regarding its experience of implementation of its Disclosure Policy, the Report finds that the IFC is 'generally effective in meeting its institutional requirements, as defined in the Disclosure Policy'. However, the Report notes that 'disclosure of information regarding IFC's activities throughout the life cycle of the project remains inconsistent. Implementation experience also suggests that the degree of disclosure, documented evidence of community engagement, and quality of information disclosed varies across IFC's clients. The result is that stakeholders must often look both to IFC and to clients to piece together a picture of the project, whom it affects, the expected development outcomes, how the project is being implemented, and whether IFC achieved the development goals and outcomes for the project.' In particular, the Report notes, there is 'significant interest in more measurement and reporting of project-level development impact results'.

The Report's findings conclude that, 'on balance, the updates to the policy framework should focus on clarifications to further strengthen the risk management aspects of the framework, and adjustments to address evolving internal and external context, not wholesale revision or addition.'

Compliance Advisor Ombudsman Report

In May 2010, the IFC's Compliance Advisor Ombudsman (CAO) released a report (an 'Advisory Note') on its assessment of the IFC's implementation of its Policy and Performance Standards on Social and Environmental Sustainability (PPS), and its Policy on the Disclosure of Information (DI).⁵

The CAO's advisory note dealt with the following key questions:

⁴ Ibid. at pg v

⁵ i.e the Sustainability Framework. See www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

- ‘Has IFC’s application of the PPS throughout its portfolio supported the establishment of transparent client company requirements and clear expectations and predictability for both client companies and communities at the project-level?
- Has IFC’s own environmental and social management system and supervision capacity been adequately strengthened to support the move from process compliance to accountability for outcomes, ensuring the effectiveness and impact of the PPS?’⁶

The CAO’s findings and recommendations⁷ included eight questions organised within three broader categories. It is worth repeating those findings and recommendations here, as an official assessment of some of the major weaknesses in the current Sustainability Framework.

‘A. Predictability for Host Communities and Client Companies

1. Did the Performance Standards create predictability around impacts and mitigation measures for host communities and client companies?

The CAO found that while the Performance Standards have encouraged consultation with host communities across a range of investments, there are still gaps in engagement around impact mitigation activities and Action Plans, as well as in reporting on development impact. These gaps undermine efforts to build constructive relations and secure community support. Further, the clarity of client company requirements established in Action Plans varies across investments.

2. What is IFC’s approach to Broad Community Support?

IFC’s implementation of its Broad Community Support commitment has been highly restrictive and not transparent. As a result, IFC has missed the opportunity to play a leadership role in helping to advance the implementation of local approval processes. IFC’s application of the Broad Community Support commitment has changed over time, yet these changes have not been clearly communicated.

⁶ Ibid. at pg 1. The Advisory Note explains that, to address these questions, the CAO carried out a ‘mini portfolio review of IFC projects processed under the PPS, and commissioned an in-depth field study of local stakeholder perceptions around five IFC projects Subsequently, the CAO met with IFC investment and environment and social (E&S) specialist staff to verify findings and test conclusions for their systemic relevance. Finally, CAO’s extensive outreach to civil society in IFC member countries provided valuable input to assess the effectiveness of IFC’s Policy on Disclosure of Information.’

⁷ At pg 1 ff

B. The Performance Standards in the Context of IFC's Changing Business Model

3. What has been IFC's experience with applying the Performance Standards to client companies with lower capacity?

IFC's work with lower capacity companies has strong development impact potential, however, incentives for staff and client companies alike could be more closely aligned with this goal. While low capacity companies need support to upgrade their management systems, IFC's Advisory Services are not readily available to support them.

4. What works well and where are the challenges in applying the Performance Standards to different IFC activities?

IFC has implemented the Performance Standards in the context of equity investments and corporate loans through a focus on the quality of its client companies' E&S management systems. Delineation of due diligence boundaries represents a challenge for these types of investment. Further, there is a lack of clarity and gaps in institutional infrastructure regarding application of the Performance Standards to Advisory Services.

5. How has IFC assured itself of adequate environmental and social risk management for its financial intermediary (FI) investments?

Despite improvements, there is still a substantial gap between theoretical E&S requirements and their practical application. Weak support from investment staff and management, together with significant resource constraints, hinder E&S specialists' efforts to improve the E&S performance of financial intermediary clients. Incentives provide an ideal mechanism for IFC to ensure sound E&S performance. IFC's E&S requirements represent a more rigorous standard than what is generally expected of financial intermediaries by regulators and other investors. With the adoption of the Equator Principles, IFC has become a standard setter in financial markets, and as such, IFC can play an increased role in the dissemination and application of E&S standards in the sector.

C. IFC's Management Systems & Information Disclosure

6. How effective has IFC been in establishing processes and practices to support effective implementation of the PPS?

A company's commitment, its capacity, and IFC's own influence and leverage are all important factors in achieving strong E&S performance. Although IFC addresses these risk factors implicitly, it has not established guidance and indicators or a separate system to assess and track them in its investments. Annual Monitoring Reports provided by client companies are inconsistent in quality, which creates knowledge gaps for IFC. To complete the integration of E&S concerns into IFC's risk management, IFC should consider the most effective organizational position of its Environmental and Social Development Department.

7. Do IFC's institutional culture and incentives support effective integration of environmental and social issues?

The effectiveness of IFC's E&S due diligence is affected by investment staff support. CAO found that investment staff support for E&S risk and impact management is inconsistent. There is a gap between the perceptions of the value of IFC's E&S inputs by investment staff on the one hand and client company feedback on the other hand. Investment staff does not appear to be adequately incentivized to support E&S risk and impact management.

8. How transparent and accessible is IFC to its stakeholders in member countries?

IFC's Disclosure Policy sets out a presumption in favor of disclosure. However, the policy undermines this very presumption by specifying what information can be disclosed, rather than establishing a limited list of information that cannot. CAO found that the level of awareness about IFC in its member countries is very low. IFC's main portal for stakeholders to access information is its website. However, IFC does not routinely update public information available about its investments. Further, language is a major barrier to effective access to information for non-English speaking stakeholders in IFC member countries.'

The Advisory Note also quoted Prof. John Ruggie, UN Special Representative on Business & Human Rights: "Effective grievance mechanisms are an important part of the corporate responsibility to respect human rights. A major barrier to victims' accessing available mechanisms, from the company or industry to the national and international levels, is the sheer lack of information available about them."⁸

⁸ U.N. Doc. A/HRC/11/13/22 April 2009/paras.100; U.N. Doc. A/HRC/8/5/7 April 2008/para.93; U.N. Doc. A/HRC/11/13/22 April 2009/paragraph 107. At pg 14 of CAO Advisory Note, above

Recommendations

The CAO made recommendations to address each of the eight findings,⁹ including the following ‘priority recommendations’:

- ‘Improve project-level engagement
- Address gaps in the E&S performance of IFC’s financial intermediary portfolio
- Enhance IFC’s capability to incorporate E&S risk factors into decision-making processes’

Idasa’s comments and recommendations

Against this background, Idasa wishes to offer the following submission on the PPS and the DP, the Sustainability Framework. In so doing, we indicate our support for other comments and submissions made to the IFC, as well as noting some additional proposals.¹⁰

A. Extractive Industries Contract and Revenue Transparency

1. Require contract disclosure of all IFC extractive industry (EI) projects

Currently, the IFC Sustainability Policy requires contract disclosure only for “significant” extractive industry projects, defined as accounting for 10 percent or more of projected government revenues.¹¹ Such a threshold criterion is arbitrary and has, we believe, been ineffective in ensuring contract transparency in IFC projects, despite the intention behind Bank Management’s endorsement of the Extractive Industry Review. Since the inception of the Policy in 2006, we are led to believe, in excess of 55 IFC extractive industry projects have been approved and not one of these projects has entailed this requirement. It is important to recognise that project developmental and fiscal impacts, especially at the local and regional levels, occur irrespective of the size of a country’s total revenues.

⁹ The complete set of recommendations is provided in Table 5 and 6 at pp 29 - 30

¹⁰ We recognise the contribution to our thinking of, particularly, the ‘Review of IFC Sustainability Policy, Performance Standards and Disclosure Policy: Concerns and Policy Recommendations’ Bank Information Centre, 11 May 2010; and the ‘Submission by Civil Society Organizations to the International Finance Corporation, Commenting on The Social and Environmental Sustainability Policy, Performance Standards and Disclosure Policy’, 11 March 2010

¹¹ Para 22 of the IFC’s Sustainability Policy

Arguments concerning the need to protect confidential business information over concerns of commercial disadvantages are, we believe, largely unjustified. A recent study published by Revenue Watch Institute and Columbia University (2009)¹² reportedly “found no strong defenders and few well-articulated defenses of contract secrecy, despite its pervasiveness”. Trade secrets are not typically contained in contracts, and ‘commercially sensitive’ information is a vague term. The research found little evidence that companies actually remove anything from such agreements even when they have the option and that, within the industry, supposedly confidential contracts are “bought and sold, analyzed, and even ranked”.

The revised Sustainability Framework should, therefore, incorporate the following:

- All IFC-supported EI projects must disclose all contracts, principal and derivative, related to the EI operation to which the government is a party, including: between host governments and companies (e.g. Host Government Agreements, Production Sharing Agreements, Power Purchasing Agreements, Concession Agreements), and between governments (e.g. Inter-Governmental Agreements).
- Further, all IFC-supported EI projects must disclose all contracts and agreements affecting the payments ultimately made to government, including those involved in pricing methods of the companies and formulas that change government payments based on changes in commodity prices, project costs, or other factors.

2. Require disclosure of “material” revenue of all IFC extractive industry projects

The public disclosure of such contracts and of revenue flows is an essential first step towards the responsible management of extractive industries in the broader public interest in host countries, and towards realising the potential contribution of revenues to poverty reduction.

In order to promote more effective contract and revenue transparency in IFC-supported EI projects, we support the recommendation that the revised Sustainability Framework should require contract disclosure and minimum revenue reporting requirements that are applied equally to all EI operations.

¹² Rosenblum, Peter and Susan Maples, 2009. ‘Contracts Confidential: Ending Secret Deals in the Extractive Industries’. Revenue Watch Institute, New York. Cited in BIC, above.

It is necessary to define the minimum revenue reporting requirements for all extractive industry projects. The progress made by the IFC towards enhancing EI revenue transparency through its Policy requirement¹³ has been recognised, as has the important step taken by the IFC to provide links on the IFC website to revenue information disclosed by its EI projects.

Unfortunately, however, the types of revenue data reported by IFC EI projects appear to vary greatly across companies and frequently are not clear or easy to find. This practice has led to confusion when attempting to track this information and an “asymmetric” availability of information between IFC clients. We understand that IFC staff recently provided a revenue disclosure template, in order to encourage clients to make available more uniform data across projects. We wholeheartedly support this initiative, but the template reportedly does not include all relevant payments and does not resolve the deficit of project-level disclosure or regulate the timing of reporting. In order to improve the effectiveness of this effort, we endorse the recommendation that the IFC includes a list of minimum revenue disclosure reporting requirements in a revised Sustainability Policy, which should include the following:

- All “material” project payments from EI operations to the government must be disclosed, including: royalty payments, taxes, profits/dividends, commodity-based payments, signing bonuses, pipeline/transit tariffs, dividends, acreage fees, rental fees, investments in social development funds, and payments to local communities.
- Revenue disclosure must be reported according to payments made to each level of government, e.g., federal government, regional, provincial or state government, and local authorities.
- Revenue disclosure must be made at project level and on an annual basis. Revenue reporting must be timely, within 3-4 months of the end of the calendar or fiscal year, to coincide with the company’s annual report.

B. Assessment of Risk and the IFC’s Due Diligence and Oversight Obligations

1. Client assessments, monitoring and reporting

We believe that the IFC’s policy and practice do not provide the environmental and social due diligence required to support development that alleviates poverty and does

¹³ Para 22 of the IFC’s Sustainability Policy

not harm local communities. Provisions of the IFC's Social and Environmental Sustainability Policy and the Environment and Social Review Procedure (ESRP) that relate to pre-appraisal, appraisal, and supervision of projects, are fundamentally deficient in several respects. Moreover, inadequate implementation has undermined existing due diligence requirements.

The Policy and ESRP promote excessive reliance on information provided by the client, which has not been adequately verified for accuracy or comprehensiveness by the IFC or another independent source. Too often, it appears, unverified information provided by the client forms the basis for critical and significant decisions by IFC, including decisions related to:

- Whether the project is characterised as one with significant adverse impacts and, in turn, whether external experts are necessary and broad community support for the project must exist;
- What is included in action plans; and
- Whether the client is meeting commitments reflected in the action plan and loan agreement.

These decisions profoundly impact communities and development results.

Compounding these problems is the related absence of a clear requirement in the ESRP that the IFC must provide any critical evaluation of the client's environmental and social impact assessment; the ESRP directs the IFC primarily to evaluate the "scope" of the assessment.

Inadequate requirements for categorisation of projects are also problematic. The IFC's failure to categorise projects based on an accurate assessment of risks has, we are led to believe, contributed to rights violations in IFC investments.

Improper categorisation results in the failure to incorporate environmental and social requirements necessary for effective risk management. It also leaves projects that have potentially significant impacts less transparent, since disclosure requirements vary depending on project category.

Implementation of even existing pre-appraisal, appraisal, and supervision requirements is apparently inadequate.¹⁴ An additional factor limiting effective implementation may be the reporting structure. As environmental and social specialists have a different reporting line than loan officers, information provided by these specialists may not be given the same consideration as information that is strictly financial. Also reported are failures by the IFC to ensure that clients are meeting obligations to make assessments public, report to communities on implementation of action plans, and establish strong, credible grievance mechanisms.

More importantly, communities are not always informed that the IFC is investing in a given project, that environmental and social requirements apply, and that they have rights to information and accountability.

Client assessments of social and environmental impacts are inadequate in many projects. These flaws can be explained in part by inadequate assessment requirements, including because the IFC's definition of "associated facilities" often excludes assessment of the upstream and downstream impacts of the project. The IFC requires that clients conduct a social and environmental assessment covering the project's "area of influence," which encompasses the primary project site as well as "associated facilities that are not funded as part of the project...and whose viability and existence depend exclusively on the project and whose goods or services are essential for the successful operation of the project." In practice, IFC's interpretation of the definition of "associated facilities" has proven unreasonably narrow, in our view.

In order to correct this, the IFC should remove the phrase "and whose viability and existence depend exclusively on the project" from its "associated facilities" definition so that consideration is given to all reasonably related components of a project.

2. Accountability

To strengthen impact assessments as a risk management tool, the IFC should also ensure that clients:

- Include a "no project" alternative within the impact assessment;

¹⁴ As highlighted in a CAO audit report following a complaint about the IFC's loans to the Wilmar Corporation, cited in the civil society letter of March 2010. The audit report states, "Because commercial pressures dominated IFC's assessment process, the result was that environmental and social due diligence reviews did not occur as required."

- Account for and publicly report direct and indirect GHG emissions associated with project activities;
- Identify and publicly report on impacts on all ecosystem services;
- More effectively consider and publicly report on cumulative impacts of projects on regional development; and
- Assess and publicly report on potential human rights impacts of projects.

Ultimately, the inadequate implementation by IFC clients of assessment, monitoring and reporting requirements is also a significant problem that should be addressed by a requirement in the Sustainability Framework that the IFC must monitor and ensure that clients implement critical requirements.

Despite requirements in Performance Standard 1 ‘Social and Environmental Assessment and Management System’ that clients respond to communities’ concerns, including through the establishment of “grievance mechanisms,” the IFC has not reported on whether adequate project level grievance mechanisms were established in any of the projects undertaken since the Standards came into force in 2006.

At a minimum, grievance mechanisms should be independent and have the trust of communities. They should be easy to access and able to address communities’ complaints effectively and in a timely manner.

More specifically, Performance Standard 1 should mention that company-sponsored mechanisms should exist within an “accountability framework” that includes:

- Community access to remedies through courts, the Compliance Advisor Ombudsman (CAO), and other independent dispute-resolution bodies;
- Third party monitoring and verification; and
- Public reporting.

Furthermore, IFC should require clients to disclose the existence of the CAO and explain how to access its services.

To secure the trust and buy-in of communities, essential elements of local grievance mechanisms, Performance Standard 1 should clearly state that the client shall work in consultation with the community to establish a grievance mechanism. It should also mention that monitoring, reporting and evaluation are essential elements of a community-based grievance mechanism, as discussed in the CAO’s 2008 Advisory Note.

C. Reporting on Development Implications and Outcomes

In order to enhance accountability and clearly demonstrate the IFC's progress toward achieving its poverty reduction mandate, the revised Sustainability Framework must introduce a rigorous framework for public reporting on development outcomes for each project. The IFC should better demonstrate its 'value-addition' in its investments, which should go beyond "do no harm" and client's compliance with Performance Standards.

1. Reporting on development outcomes should be at project level

Currently, the IFC reports on development outcomes annually, aggregating results by sector or area, rather than at a project level. For example, the IFC does not require any tracking or reporting on the number of people displaced by each project, or on the impoverishment or enrichment of displaced people. Project level disclosure would serve as an important gauge to assess which types of projects have a positive impact on communities and contribute to poverty reduction.

We support the view that development outcome tracking should be continuous, and include interim and completion reports. A project approach allows for monitoring of progress toward anticipated development outcomes and enables project managers and civil society to identify particular problems at an early stage. It is our understanding that such objectives are already utilised by several of the international financial institutions.¹⁵

2. Outcome tracking should emphasise progress towards sustainable development and result in quantitative and qualitative reports for each project

The IFC's vision is that "people should have the opportunity to escape poverty and improve their lives."¹⁶ Consequently, project impact reports should emphasise achievements in poverty reduction, empowerment, expansion of opportunities in communities, and sustainable development, in addition to the business and financial performance of the project. We endorse the view that the IFC should also report on "qualitative outcomes, such as equity in terms of the prevailing power relations in the

¹⁵ The Inter-American Development Bank (IDB)'s Loan Review Documents and the World Bank IBRD/IDA's Implementation Completion and Result reports are examples of such ongoing and *ex-post* reporting. The European Bank for Reconstruction and Development (EBRD) has also started disclosing brief evaluations of its projects on its website.

¹⁶ See www.ifc.org/ifcext/about.nsf/Content/Mission

project, and progress on protection of the rights and interests of women and vulnerable groups, particularly when it comes to participation, consultation, land titles, property rights, compensation and decision making". We agree with the assessment that reporting on qualitative improvements cannot be achieved by means of the limited number of quantitative indicators currently incorporated in the IFC's Development Outcome Tracking System (DOTS). The IFC should, moreover, supplement quantitative data with narrative reports elaborating on whether and how anticipated development outcomes may have been achieved.

3. Reporting should capture both positive as well as negative outcomes

The IFC's DOTS and client-submitted information presently capture mainly positive outputs, such as the number of jobs created, or expenditure in the local economy. Certain projects, however, result in differentiated impacts, creating opportunities for some groups while harming others. All reporting on project outcomes should be comprehensive and balanced, to include information concerning both winners and losers, and to consider the overall impact in the entire community, supply chain or sector. This type of approach would help reveal when the vulnerable disproportionately bear any negative impacts, and whether project benefits effectively target and reach those most in need.

4. The IFC should disclose relevant client documentation

The IFC can strengthen development outcomes reporting by making clients' documents publicly available on the IFC's website, in addition to the disclosure of its own assessment. The IFC can disclose how its clients are implementing Community or Indigenous Peoples Development Plans (IPDP), any benefit sharing agreements that project sponsors and affected communities may conclude, or clients' reports on social assistance provided to communities. This requirement would have the added benefit of reinforcing clients' responsibility to report on development outcomes to communities directly.¹⁷

¹⁷ Disclosing client's reports on impacts is consistent with the 2008 recommendation of IFC's Compliance Advisor/Ombudsman (CAO) on improving local development impacts at the project level.

5. Project appraisals should be more extensive

Project appraisals are narrowly focused on the direct implications of the project to be financed. An adequate appraisal would include ‘associated facilities and services’ in which associated infrastructure required to service, supply and support the project, and contractors and sub-contractors’ supply chains as assessed.

6. Sensitive projects should be subject to independent impact assessments

In the case of high-risk projects, the IFC’s Sustainability Policy should require an independent in-depth evaluation of project impacts and contribution to sustainable development. Such a requirement would reflect the current requirement of the Multilateral Investment Guarantee Agency (MIGA) for impact assessments, as delineated in its disclosure policy.

7. The project should be evaluated on its “replicability” and strategic value

The IFC’s Summary of Proposed Investment (SPI)¹⁸ and subsequent outcome reporting should reflect the strategic value of the project and how IFC’s value addition can be replicated elsewhere. The strategic value of a project involves demonstrating how a project has advanced relevant institutional, national and sector-wide development objectives, as determined by the country itself. ‘Replicability’ implies that reporting should identify poverty reduction and sustainability solutions that can be adopted and scaled up by others within or across sectors, or within a supply chain.

D. Explicit and Comprehensive Recognition and Incorporation of Human Rights Standards

1. Adopt the EBRD’s standard concerning the principle of free, prior and informed consent (FPIC) for projects with potential negative impacts on Indigenous Peoples, their livelihoods and cultural heritage

With regard to the principle of ‘Free Prior and Informed Consent’ (FPIC), the IFC Sustainability Framework should be enhanced to ensure consistency with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007, and the

¹⁸ Now renamed Summary of Investment Information (SII) in the draft revised Policy

Environmental and Social Policy of the European Bank for Reconstruction and Development (EBRD) 2008.

The UNDRIP affirms rights that are recognised and protected by binding international conventions, and contains specific requirements related to FPIC. Thus, the UNDRIP requires that consent be sought in good faith for any activity that might affect the lands, territories or resources of indigenous peoples; before any relocations (which are prohibited in the absence of consent by indigenous peoples); before adopting or implementing legislative or administrative measures that might affect indigenous peoples; and when indigenous peoples' cultural, intellectual, religious and spiritual property are to be used. Lack of consent should halt any activities or decisions that might directly affect indigenous peoples' property rights.

The EBRD's 2008 Environmental and Social Policy represents a significant example of recognition that the free, prior, and informed consent of communities must exist for projects that might impact indigenous peoples or their lands and resources. The EBRD's Performance Requirement 7 states:

*"4. Need for free, prior and informed consent. This PR recognises the principle, outlined in the UN Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required for the project-related activities identified in paragraphs 31–37, given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects."*¹⁹

At present, the IFC's Sustainability Policy and Performance Standard 7 on Indigenous Peoples does not fully respect this principle, requiring merely 'free, prior and informed consultation'.²⁰

It is our understanding that the IFC's approach to "broad community support" (BCS) in practice is to determine if significant objections exist to a project. In the absence of major objections, IFC staff assumes the project has "support." This approach does not clearly ensure that "consent" of indigenous communities has been secured, or even that a project has support. Indeed, the general tenor of the 'Requirements' for the implementation of this Standard is that, while negative impacts should be identified by the client, the language suggests that the required consultation should/may focus on

¹⁹ EBRD Environmental and Social Policy, 2008. Performance Requirement 7: Indigenous Peoples, page 50. <http://www.ebrd.com/downloads/research/policies/2008policy.pdf>

²⁰ Para 9, at pg 29

the benefits and any mitigation measures, without explicitly requiring the client to expressly and fully inform the affected indigenous community of the likely impact or harm.

2. For non-IP projects, publicly demonstrate evidence of adequate consultation with affected communities and existence of BCS for a proposed project

For all other projects entailing risk, but not affecting Indigenous Peoples (IP), the IFC should show how the client and the IFC validated that broad community support (BCS) exists for a proposed project. The Performance Standards should require clients to explicitly inform communities about the opportunity to provide or withhold their support for the project or particular related activities before financing from IFC can be secured. In determining whether BCS exists for a proposed project, the IFC should document clear expression of support rather than merely noting any objection.

The IFC should then publicly disclose how the client identified stakeholders, conducted free prior and informed consultations with affected communities, the results of those consultations and how the IFC verified that BCS exists for the project.

Consequently:

- Performance Standard 1 should require the client to inform communities of the client's intention to seek financing from IFC, about the existence and content of the IFC's Performance Standards and the existence of, and the service available from, the CAO as part, and during the early stages of, the consultation process;
- Performance Standards 1 and 7 should require the client to unequivocally inform communities that Board consideration of the project is contingent on good faith negotiations and BCS. The Environmental and Social Review Procedure (ESRP) should require the IFC, when the IFC assesses the client's due diligence, to verify the existence of this knowledge by a community at the time of consultations.
- The Disclosure Policy should also require disclosure of how the IFC has verified the client's documentation regarding BCS.
- The Sustainability Framework, including the Disclosure Policy, should require disclosure of information related to continuity of community support throughout the life cycle of the project.
- Information related to the IFC's determination of the existence of BCS should be disclosed well before the Board's consideration of the project, so that affected communities have the opportunity to verify this information, and to ensure that

potentially affected people have agreed to any environmental and social risks associated with a project, as well as the client's proposed mitigation measures.

3. Involuntary resettlement and land

Performance Standard 5 'Land Acquisition and Involuntary Resettlement' extends protections only to those physically or economically displaced by land-acquisition, leaving without any protection those who have been 'constructively evicted' because their lands have become uninhabitable as a result of polluted fisheries, water, or air. The IFC does not require clients to replace lost land with land. This fails to meet the United Nations' *Basic Principles and Guidelines on Development-based Evictions and Displacement*, which states that land taken away "should be compensated with **land** commensurate in quality, size and value or better" (emphasis added).

The civil society letter to the IFC identifies an underlying issue limiting the development effectiveness of displacement and resettlement programmes as the lack of sound economic evaluation. While the IFC is proud of the quality of its mandated economic and financial feasibility project analyses, it does not require the application of the same economic and financial feasibility tests to resettlement action plans (RAPs). Numerous studies have reportedly shown that project costs, including resettlement costs, are routinely under-estimated, while project benefits are overstated. "This ongoing failure to adequately measure the full costs of resettlement implementation allows IFC clients to under-finance and under-budget resettlement operations, ultimately resulting in impoverishment of displaced persons."

4. Explicit recognition of international human rights standards

IFC activities can significantly impact human rights. The Chad-Cameroon Oil & Pipeline project, for example, is an IFC investment that is associated with deepening poverty, deterioration in governance, and violent conflict, according to the civil society letter. The IFC remains engaged in the project even though IDA/IBRD withdrew from it in 2008 citing systematic violations of loan agreements by the Chadian government. The Policy and Performance Standards do not ensure that human rights are fully respected and we do not believe that they are adequate to prevent a repetition of this experience.

Risk management and human rights

We share others' concern that the IFC's current sustainability and risk management framework seeks primarily to minimise and manage risks that social and environmental concerns pose to the project and to the IFC's clients, and does not take adequate account of risks that projects may pose to individuals and communities likely to be affected.

This approach to risk and harm is neither effective nor adequate from a human rights perspective. Generally, the IFC's Sustainability Framework would be immeasurably enhanced were it to give explicit recognition to the obligation to respect binding human rights standards.

Its PS2 on 'Labour and Working Conditions' make explicit their link with international labour conventions. As part of the World Bank Group, which is bound to cooperate with the United Nations, which is the source and repository of many of these standards, it should extend this recognition to other international human rights standards. The IFC should require, as a prerequisite for investment, a positive independent assessment or appraisal of the client's ability to protect and ensure adherence to such standards.

An adequate starting point for assessing human rights-related risks should at least consider the following, which may lead to reasonable adjustments to the project to reduce or avert the foreseeable impacts:

- Will any action in this project produce a foreseeable risk to the rights of individuals and communities likely to be affected? If so, have reasonable steps been taken to avoid those risks?
- What foreseeable impact will this project have on rights not directly affected by the project, for example, wider issues related to access to food or water?

The IFC's current Performance Standards do not address these concerns, presenting, instead, alternative lower standards that undermine a common, clear and consistent understanding of rights. Moreover, they do not cover the entire range of human rights that the IFC's activities may impact.

As the civil society letter observes: "While the Guidance Notes that accompany the Performance Standards reference some human rights standards and treaties, these references do not fully embrace recognition and implementation of key human rights

standards, and, as non-binding guidance, fail to require any such recognition or implementation. Failure to carry out adequate human rights due diligence can result in serious human rights abuses that often disproportionately affect the most marginalised people and communities.”

We endorse the recommendation that failure by an IFC client to ensure that IFC projects respect human rights should carry severe consequences, include termination of the contract, refusal to make outstanding disbursements, disbarment of the company from future IFC support, and we recommend the additional requirement that the IFC must request the CAO to conduct an investigation into whether adequate due diligence was carried out.

The IFC must, moreover, ensure that a host government’s ability to strengthen laws and policies relating to human rights, as well as other social and environmental concerns, is not limited by ‘stabilisation’ clauses in host government agreements, which allow the client to take advantage of, and benefit from, the (forcible) continuation of laws, policies or practices that fail to respect such standards.

D. Environment

1. Climate change

Consistent with commitments at the G20 Pittsburgh Summit, the Sustainability Policy should include a specific obligation that the IFC’s investment decisions must mitigate climate change. For example, we recommend that the IFC should:

- Make a clear commitment to a timetable to reduce total GHG emissions related to its investment portfolio;
- Set ambitious targets that reflect a substantial real decrease in financial support for GHG emission-intensive projects; and
- With a commensurate scaling up of its portfolio financial support for and investment in energy efficiency, energy demand management, and sustainable renewable energy and low-carbon technology projects.

2. Ecosystems, biodiversity and water supply

Affordable and equitable access to water and sanitation are not explicitly mentioned in the current version of the IFC's Performance Standards. Currently, the standards address impacts on water resources and overall water quality, but do not identify potential project impacts such as those related to access, cost of service and distribution.

These are critical issues that must be addressed, particularly when the project itself is a water supply and/or sanitation project. These issues could be covered in Performance Standard 1, as well as Performance Standards 2, 3, and 4.

Access to water is an issue of particular concern in emerging markets. The civil society letter records that the United Nations acknowledged in 2002 that the right to water "is a pre-requisite to the realisation of all other human rights." In that context, it is incumbent on the IFC to ensure that water quality and access implications are an integral part of the performance standards used for assessing the impacts of all development projects.

E. Financial Risk Management

The current review provides an opportunity to incorporate lessons learned from the response to the financial crisis. The crisis underscored the need to provide clear expectations and standards for private sector actors, as well as adequate transparency, due diligence, and oversight procedures to ensure that risks are adequately assessed and mitigated.

We share the concern that the approach adopted by the IFC in 2006, prior to the crisis, to introduce greater flexibility in IFC standards, and to shift monitoring and supervision responsibilities to private sector clients, is evidently inconsistent with the stringent lessons about how to deal with financial risks, and constrains efforts to secure strong development outcomes.

For example, the IFC's growing support in recent years for financial intermediaries (FIs) – including non-banking private financial institutions engaging in high leverage practices and taking significant financial risks – is not consistent with expectations of the general public. Rather, the expectation is that multilateral public support will be awarded to the private financial sector on the basis of much stricter and more sound due diligence,

while support to the types of actors who substantially contributed to the financial crisis of the last 2-3 years will be avoided.

Disclosure Policy

The IFC has stated that it “believes that transparency and public dissemination of information regarding its activities can strengthen public trust in IFC and its clients, and enhance the development impact of its initiatives”.²¹ It said that it had updated its Disclosure Policy in 2006 “to reflect its commitment to enhancing transparency of its activities and promoting good governance. The guiding principle in the new policy is a presumption in favor of disclosure.”

However, we endorse the call that the IFC should adopt a presumption of disclosure, subject only to clear and justified exceptions, which is currently not the case. We believe that the IFC should adopt other features from the World Bank’s newly implemented disclosure policy. For example, the IFC should release so-called “draft” documents simultaneously with their transmission to the Executive Directors, including drafts of the Project Assessment Documents, Programme Documents, and policy documents. The draft revised policy does not follow the World Bank’s lead in adopting the disclosure of staff recommendations in advance of Board meetings.²²

For example, the draft policy would prevent the release of “financial, business, proprietary or other non-public information provided to IFC by its clients or other third parties.” The “deliberative process” exemption completely precludes the release of materials exchanged with countries or within the IFC.

As mentioned above, the IFC’s reliance on its clients to make certain disclosures has inherent weaknesses, and the IFC should set clearer standards for their disclosure performance and institute disclosure oversight mechanisms.

The IFC should ensure full disclosure of the Environmental and Social Review Document, as well as post-approval documents, such as supervision reports, annual monitoring

²¹ IFC Three Years of Application Report, *ibid*.

²² Toby McIntosh <http://www.freedominfo.org/2010/05/ifc-draft-disclosure-policy-minuses-and-pluses/>

reports, project implementation evaluation and completion reports, and the clients' environmental and social monitoring reports. Summaries are not adequate. Annual ESAP Environmental and Social Action Plan (ESAP) updates should, moreover, like other documents, be publicly disclosed on the IFC's website.

Also necessary is clarification of where and how to submit requests, and to provide for appeals to be heard by an independent and authoritative body, empowered to make binding decisions.

Proactive Disclosure

We recognise that there are some advances concerning the disclosure of information for projects under consideration. The disclosure of information about proposed projects is governed not only by the disclosure policy, but also by the IFC's Performance Standards. The IFC proposes to periodically update the primary public document about proposed projects, now to be called the Summary of Investment Information (SII).²³ The draft states that the IFC "makes publicly available information about an investment while it is still under consideration by IFC and also provides periodic updates on the investment, once made..."

We cautiously welcome the proposal that the IFC will "where possible" release the information prepared by an IFC client "even before [the] IFC has completed, or in some cases even started" its own environmental and social assessment of the project. As much of the early information about a proposed project is likely to come from the client, the primary responsibility for early disclosure of information to affected communities will continue to be placed on the client, whose disclosure responsibilities would increase. Given the concerns expressed above regarding the IFC's failure to proactively ensure complaint disclosure, we would welcome an explicit provision in this regard.

We note that the proposed policy retains current language stating that the SII's release will take place "... once [the IFC] has assured itself that the client can be expected to undertake the project in a manner consistent with the Performance Standards and that the client has undertaken its disclosure obligations and where applicable, conducted an effective consultation process consistent with the performance standards." It is with some reservation that we note that it appears we will be obliged to trust that the IFC does undertake a rigorous assurance process in this regard.

²³ Previously termed the Summary of Proposed Investment (SPI).

Nevertheless, it is pleasing to note that the proposed policy would require that SIIs be updated throughout the life of the project, and that the IFC is responsible for this task, while allowing the client to check it for accuracy - Clause 14(d).

We are encouraged that the policy defines the contents of an SII, significantly including “development outcome indicators” for projects with potentially significant adverse social or environmental risks and/or impacts.

For some of these projects an expanded Project Supervision Report (XPSR) would be prepared. The policy, however, permits only a “summary’ of the XPSR to be released, after the client has reviewed it.

Clause 13 ‘Social and Environmental Information’ obliges clients to engage with affected stakeholders and disclose information, and these responsibilities are amplified in the social and environmental performance standards. A welcome improvement is the inclusion of the requirement that “[t]he information provided should be transparent, objective, meaningful, easily accessible, in culturally appropriate local language(s) and format, and understandable to Affected Stakeholders.”

“Stakeholder engagement” is encouraged “as early as possible” in the process. The disclosure of various documents, including the “Action Plan” about mitigating risks, is required. The PS requires clients to assess who is affected, to develop an appropriate “Stakeholders Engagement Plan” and to disclosure relevant documents, and that the terms for a consultation process are also laid out. While we support the fact that the PS acknowledges the need to monitor projects and “where appropriate” involving stakeholders “to complement or verify monitoring activities”, we are disappointed that the draft policy appears not to require disclosure of all the results.

“Periodic” reports describing implementation of the Action Plan must be provided to affected “stakeholders” (which is a welcome broadening from the current term “communities”) at least annually.

Summaries, not complete documents

In a number of areas, however, as noted above, the proposed disclosure policy provides only for the release of summaries of documents. Other sections of the policy would make it all but impossible to obtain the full document. For example, Clause 13(d) offers to disclose only “a summary of the process outlining” how a decision was made that

Broad Community Support exists for a project. Likewise, annual updates of the Action Plan “for direct investments with potential significant adverse social or environmental risk and/or impacts” are to include “a summary” of key actions that have been taken to implement the plan. It is to be doubted that this will be adequate in all instances.

Exemption of advisory services

The IFC does not currently release advance information about “advisory services” projects, which represent a significant proportion of IFC spending, but we note that it is proposed to release slightly more information after approval. Clause 17 would provide for the release of periodic updates on development outcomes for advisory services projects worth more than \$2 million, which is welcomed. When evaluations are completed for randomly selected projects, however, once again only summaries of the findings will be disclosed.

Other

It is disappointing to note that the IFC is not planning to follow the World Bank’s lead in releasing summaries of meetings - Clause 20(d).

Nevertheless, it is very pleasing to note that the IFC proposes a new appeal process that will allow requesters to bring their complaints to a three-person body composed of three outside experts. The required standard, however, constitutes quite a high threshold — the appellant must have a *prima facie* case that the IFC had no reasonable basis for determining that there is a compelling reason not to disclose the information in terms of the exemptions in Section 9.

Disappointingly, unlike the new World Bank disclosure policy, the draft IFC policy does not permit the IFC to override its disclosure policy if the benefits of disclosure would outweigh the costs. Rather, the IFC draft policy retains the more narrowly worded provision that would permit disclosure in “exceptional circumstances”, which is defined as necessary “to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment.”

Conclusions and recommendations

Despite the widespread criticism that the IFC’s effort to delegate more responsibilities to clients, including the disclosure of information, is not proving to be an effective risk

management strategy, it doesn't appear that the IFC is willing to vigorously assert its role in ensuring closer adherence to what remain essentially voluntary and extensively unsupervised standards.

It is a matter of concern that the IFC apparently still plans not to disclose its determinations concerning when proposed projects have the necessary "Broad Community Support."

We strongly support the call²⁴ that more information should be made available about the growing number of currently undisclosed projects funded through financial intermediaries (FIs), which now amount to about half of IFC lending. Specifically, IFC and Financial Intermediary supervision and monitoring reports should be publicly available.

While we have recorded above our support for the proposal that the IFC will publicly report Development Outcomes information, it is regrettable that this will apparently include only projects with significant adverse outcomes (Category A), which constitute only a very small fraction of the IFC's portfolio.

Disclosure of the specific performance standards being used for evaluations is recommended, as is that the IFC report on the effectiveness of a larger range and number of projects.

The IFC should, moreover, disclose its reviews of client action plans and its evaluation of whether the client has disclosed the plan to affected stakeholders. For "significant adverse projects" the IFC proposes to provide (only) summaries of annual updates of action plans, but, as mentioned above, we share the concern that these reports will be based solely on unverified information supplied by the client. An acceptable remedy for this concern would be if the client's monitoring reports and the IFC's supervision reports are made public, preferably on the IFC's website, rather than to just 'stakeholders', a term that could be narrowly defined in practice.

²⁴ *IFC Rewrite of Disclosure Policy Criticized* 16 July 2010 <http://www.freedominfo.org/2010/07/ifc-rewrite-of-disclosure-policy-criticized/>

Ultimately, the proposed revisions do not appear to address the full extent of the concerns expressed and recommendations made in the CAO's assessment noted at the start of this document.