

Amnesty International Submission to the Review of the International Finance Corporation (IFC) Sustainability Framework

May 2010

1. Introduction

Amnesty International welcomes the current review of the IFC's Sustainability Framework, which includes the Policy on Social & Environmental Sustainability, the Performance Standards and related Guidance Notes, and the IFC Disclosure Policy. This submission by Amnesty International focuses on the Policy on Social & Environmental Sustainability and the Performance Standards.¹ Amnesty International is calling for human rights due diligence to be incorporated into the IFC's Sustainability Framework.

The commercial projects that the IFC supports can pose substantial risks to the human rights of individuals and communities. There are a number of reasons for this. The IFC invests in industries such as energy and resource extraction, and projects such as large-scale infrastructure development that are often associated with environmental damage and human rights abuses. The projects that the IFC supports are frequently carried out in areas that are home to people living in poverty or marginalized communities, including Indigenous Peoples, who can be particularly vulnerable to human rights abuses in the context of commercial activity. Moreover, the IFC supports projects in countries that often face significant challenges in ensuring effective protection of human rights because the state is either unable or unwilling to effectively regulate corporate activities and hold companies to account.

Box 1: Corporate responsibility to respect human rights

The IFC's clients are companies. The clearly emerging consensus on corporate responsibility for human rights is that companies should – at a minimum – respect all human rights. The UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (UN Special Representative on business and human rights) has highlighted that “the corporate responsibility to respect human rights exists independently of States’ duties or capacities...” and “it constitutes a universally applicable human rights responsibility for all companies in all situations”.² The corporate responsibility to respect all human rights has a corresponding requirement for concrete action by companies to discharge this responsibility, including the exercise of human rights due diligence. The concept of corporate human rights due diligence describes the steps a company must take to become aware of, prevent and address adverse effects on human rights.

The IFC's current Sustainability Framework is an acknowledgement of some of the social and environmental risks that projects confront, and the IFC has stated that: “Central to IFC's development mission is its efforts to carry out its investment operations and advisory services

¹ In June 2009 Amnesty International made comments on the World Bank's Approach Paper 'Towards Greater Transparency: Rethinking the World Bank's Disclosure Policy', AI Index Number IOR 80/005/2009. The recommendations made in this paper also apply to the IFC disclosure review.

² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further steps towards the operationalization of the "Protect, Respect and Remedy" Framework*, A/HRC/14/27, 9 April 2010, para 65.

in a manner that ‘do no harm’ to people or the environment”.³ However, as this paper will demonstrate, by failing to adequately reflect human rights standards, the Sustainability Framework leaves affected individuals and communities exposed to potentially serious human rights abuses, which can deepen their poverty and further entrench marginalization.

Box 2: Human rights and the IFC

While the primary obligation for the protection of human rights lies with the state where the violation occurs, the IFC, its Member States and client companies also have responsibilities to ensure that projects supported by the IFC do not cause, or contribute to, human rights abuses.

The UN Committee on Economic, Social and Cultural Rights, the expert body that monitors state compliance with the International Covenant on Economic, Social and Cultural Rights, has consistently held that the obligations of states that are parties to the Covenant extend to state action as part of inter-governmental organizations, including international financial institutions such as the IFC. The Committee has stated that all states parties should take due account of their obligations under the Covenant when acting as members of such institutions.⁴ At a minimum, when acting through inter-governmental institutions, such as the IFC, Member States must ensure that the actions of these institutions do not result in, or contribute to, human rights violations. The same point has been underlined by the UN Special Representative on business and human rights, who stated in his 2010 report that: “Greater policy coherence is needed at the international level. States do not leave their human rights obligations behind when they enter multilateral institutions that deal with business-related issues.”⁵ However, despite the recommendations of the Committee on Economic, Social and Cultural Rights and the UN Special Representative on business and human rights, Member States of the IFC have not acted to ensure that the IFC’s operations do not cause or contribute to human rights abuses.

It should be clear that most of the social and many of the environmental risks identified in the IFC’s Sustainability Framework have human rights implications. For example, pollution frequently affects the rights to health, water and food of affected communities. Land acquisition and resettlement will often have direct impacts on a range of human rights, including the rights to housing, work and freedom of movement. The failure to clearly articulate and provide guidance to clients on the potential human rights impacts of projects, however, means that negative impacts on human rights are frequently invisible in IFC processes. While some human rights impacts may be captured within social and environmental impact assessment processes, these processes are not adequate to ensure all of the human rights impacts are identified and considered. Additionally, the guidance provided within the Performance Standards and Guidance Notes on addressing social and environmental impacts is not consistent with established human rights safeguards in several cases. A clear example of these limitations is the failure to reflect the prohibition on forced evictions within Performance Standard 5 (which deals with relocation and eviction of people for development projects). Following the processes laid out by the IFC in Performance Standard 1 (on social and

³ International Finance Corporation’s Policy on Social and Environmental Sustainability, 30 April 2006, p 2.

⁴ For example: General Comment No. 14, on the right to the highest attainable standard of health, asserts that “States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health” and that “States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions”: Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4, 11 August 2000, para 39. With respect to the right to adequate housing, the Committee has clarified that there is a duty on international financial institutions to ensure that measures they promote do not undermine the realization of that right. Committee on Economic, Social and Cultural Rights, General Comment No. 4, para 19 states that: “International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing”.

⁵ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further steps towards the operationalization of the “Protect, Respect and Remedy” Framework*, A/HRC/14/27, 9 April 2010, para 65.

environmental impact assessment) and Performance Standard 5 would not clearly identify and prevent forced evictions, although forced eviction is a clear risk in many cases of relocation for development or commercial projects. Moreover, because the issue of forced evictions is not explicitly covered, the Performance Standards do not reflect a number of specific safeguards on evictions which have been developed to ensure evictions do not result in human rights violations (further details are provided in section 4, below).

Human rights law and standards have been developed through a process of negotiation by states, scholars, lawyers and judges as well as diverse civil society actors over a period of many years. They reflect consensus on the standards that should apply, as well as a breadth and depth of practical experience on how to prevent and address breaches of the standards. As such, human rights standards provide a tested and robust framework.

If the potential for IFC projects to cause or contribute to negative human rights impacts is not clearly articulated in the IFC Performance Standards, it is very difficult to see how the Performance Standards can be consistent with the duties of Member States or the corporate responsibility to respect human rights, which underlines the importance of companies taking adequate steps to become aware of and prevent negative impacts on human rights. In their present form, the Policy on Social & Environmental Sustainability and the Performance Standards not only undercut the work of the UN Special Representative on business and human rights, they also undermine a clear and consistent understanding among companies on human rights standards and the responsibility to respect human rights.

A clear, stated objective of the IFC Sustainability Framework should be to ensure that IFC projects and investments do not cause or contribute to human rights abuses.⁶ Such an objective would be consistent with the mission of the IFC, the duties of Member States and the corporate responsibility to respect human rights. This objective should be reflected both in the processes outlined within the Policy on Social & Environmental Sustainability and Performance Standard 1 as well as in relation to the substantive human rights issues which are affected by Performance Standards 2 – 8.

In respect of Performance Standard 1, attaining the objective would require both explicit identification of risks to human rights and that the process of assessment of risk is itself respectful of human rights. This would include ensuring that people are able to participate in the process, that their knowledge and views are respected and given due weight and that the process reflects principles of non-discrimination. These requirements are spelt out more fully in the section on Performance Standard 1, below.

In respect of Performance Standards 2 – 8, ensuring that IFC projects do not cause or contribute to human rights abuses would require explicit recognition that the issues covered by these standards affect human rights. It would also require that in cases where a project will affect human rights, the process followed by the companies to address identified risks is fully in line with the safeguards that exist in human rights standards (such as the safeguards on evictions, described above). These are the standards that states should apply; bringing the IFC Sustainability Framework in line with existing, agreed standards would therefore ensure consistency with the legal obligations of Member States.

⁶ While ensuring that prevention of, and appropriate response to, human rights abuses in respect of investment projects should be a core objective, the IFC should also ensure that the institution and its clients are required to take appropriate action when human rights are threatened in the context of a project where the threat is not directly related to the project. This principle has been clearly reflected in such instruments as the Voluntary Principles on Security and Human Rights, which require that positive steps be taken by the companies in contexts where human rights are under threat.

2. Incorporating human rights in the IFC Sustainability Framework

The IFC Policy on Social & Environmental Sustainability lays out the basic due diligence processes of the IFC as an investment institution. The Performance Standards encapsulate the due diligence required of clients. The associated Guidance Notes provide additional advice to clients on implementation of the Performance Standards, but clients are not required to comply with the advice in the Guidance Notes. While the three texts make some references to human rights, these references are limited, and in some instances alternative or lower standards to those contained in international human rights law and standards are presented. The failure to reflect the prohibition on forced evictions in Performance Standard 5 and the use of free, prior, informed *consultation* as opposed to free, prior and informed *consent* in respect of Indigenous Peoples in Performance Standard 7 are two examples.

The following sections of this submission outline Amnesty International's main recommendations for amending the Policy on Social & Environmental Sustainability and the Performance Standards in line with human rights standards. Section 3 looks at the Policy on Social & Environmental Sustainability, while Section 4 focuses on the Performance Standards. Particular attention is paid to Performance Standard 1 which underpins assessment and management of risk, while analysis of three of Performance Standards 2 – 8 is provided to illustrate some of the shortcomings of the IFC Sustainability Framework in relation to human rights.

Amnesty International's main recommendations, in summary, are:

- The IFC Sustainability Framework should include a clear statement of policy that the IFC will not support activities that are likely to cause or contribute to human rights abuses. This policy statement should make clear that the IFC will undertake adequate human rights due diligence as a financial institution, as well as requiring due diligence by client companies in line with the recommendations of the UN Special Representative on business and human rights.
- Performance Standard 1, which lays out the impact assessment and social and environmental management processes, should be revised to require human rights due diligence, including human rights impact assessment for projects that receive IFC support.
- Performance Standards 2 – 8 should be revised to bring them in line with relevant human rights standards.
- Systems related to the implementation of the Performance Standards and oversight of the impact of client projects on affected individuals and communities should be overhauled to increase effectiveness. In particular, the IFC's systems for receipt and assessment of critical information on project impacts, engagement by the IFC with affected communities and individuals, and the IFC's current monitoring mechanisms should all be reviewed in light of the objective to prevent abuses of human rights.

3. Policy on Social & Environmental Sustainability

Amnesty International would highlight shortcomings in four areas of the Policy on Social & Environmental Sustainability: (a) the absence of any reference to the IFC's responsibilities in relation to human rights; (b) weakness both in the process used to identify likely project impacts and in project monitoring and supervision processes, which rely too heavily on client information; (c) shortcomings in the community engagement process; and (d) lack of effective monitoring and accountability mechanisms. A summary, rather than exhaustive, critique of these issues is presented below, followed by recommendations for improving the Policy on Social & Environmental Sustainability.

No recognition of an IFC responsibility to ensure human rights are not abused

In its 2006 Policy on Social & Environmental Sustainability, the IFC recognized emerging clarity on the roles and responsibilities of the private sector in respecting human rights.⁷ However, this recognition is not reflected in the substantive elements of the Policy; moreover, the Policy does not appear to recognize the role of the IFC itself in respecting human rights through its business operations.

Inadequate assessment of impacts

The Policy states that the IFC's social and environmental review of projects includes an assessment of the social and environmental risks of the project, *as assessed by the client* (emphasis added). Subsequent monitoring of project impacts over the lifetime of the project also relies heavily on information provided to the IFC by the client. This information is not subject to independent verification, but is frequently the basis on which critical decisions are taken by the IFC. The practice of relying largely on assessments and information provided by the client is insufficient to ensure the IFC has taken adequate steps to become aware of and prevent human rights abuses.

Failure to effectively engage with and ensure the meaningful participation of affected communities in decisions that affect their human rights

Allied to the over-reliance on information provided by the client, the IFC does not appear to give adequate weight to information provided by affected communities and other independent sources. There is no clear process whereby the IFC proactively seeks information from project-affected people in relation to potential and actual impacts of projects on them. The processes for, and the purpose of, the IFC's engagement with affected communities lack clarity. In practice, most of the engagement is done by the client companies. There is insufficient priority given to ensuring that communities have been appropriately consulted, informed and enabled to participate in decisions that affect their rights. Communities are often unaware that the IFC is involved in projects.⁸ Even when communities are aware of IFC involvement they often do not know what the IFC requires of clients and rarely have the means to challenge companies for failure to act in accordance with IFC policies. In many cases this leaves communities vulnerable to manipulation and to having their views misrepresented.

The lack of a clear and effective process of engagement by the IFC with affected communities undermines the ability of the IFC to adequately monitor project impacts and become aware of and address human rights concerns.

Box 3: Broad community support: problems with the concept and process

The concept of broad community support and the allied concept of free, prior, informed consultation outlined in Performance Standards 1 and 7, as well as the processes used to assess this, are particularly problematic within the IFC Sustainability Framework. The IFC Policy on Social & Environmental Sustainability requires that projects with potentially significant adverse impacts and those that affect Indigenous Peoples must have "broad community support" in order to receive IFC funding. In order to determine whether a project enjoys broad community support, the IFC "will review the client's documentation of the engagement process" and "through its own investigation assures itself that the clients' community engagement is one that involves free, prior and informed consultation and enables the informed participation of the communities leading to the broad community support of the projects by communities".

However, the IFC does not disclose how it has reached its conclusion in assessing the existence of broad community support and appears in practice to rely heavily on documentation provided by its clients. It is not clear the extent to which the IFC receives

⁷ IFC, Policy on Social and Environmental Sustainability, p 7.

⁸ As noted by the Compliance Advisor Ombudsman, Meg Taylor, at the World Bank Autumn Meeting in October 2009 in Istanbul, Turkey.

confirmation of broad community support from affected communities. As noted above, communities affected by IFC funded projects are often poor or marginalized and frequently do not have information on IFC involvement or know what is expected of the client. This makes them vulnerable to manipulation and exploitation. The IFC's current system is not adequate to prevent abuses occurring in the process.

More critically, this standard falls short of the now clear international norm of "free, prior and informed *consent*" (FPIC) of Indigenous Peoples to the decisions over projects on their land. Anything less will not adequately protect the rights of Indigenous Peoples and will expose states, and increasingly other actors, to findings of human rights violations.⁹

In 2004, an independent review of the World Bank's extractive industries portfolio recommended that the Bank incorporate the principle of FPIC into its policies. However, the Bank's Board of Directors expressed concern on the grounds that it might give individuals a veto power over projects that are otherwise in the broader public interest. This position does not reflect the history of FPIC, which emerged as an indigenous priority due to the well-recorded practice of states engaging in projects on Indigenous Peoples' traditional lands without their consent and often in the name of some broadly expressed 'national interest'. The UN Declaration on the Rights of Indigenous Peoples requires that FPIC should involve a robust process that would require Indigenous Peoples and states to enter discussions with the objective of reaching mutually acceptable agreements.

The IFC should also take note of the comments of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in this regard. The Special Rapporteur has stated that a "significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent."¹⁰

Weaknesses in the compliance system

The IFC, through the Compliance Advisor/Ombudsman (CAO), has in place a process to address situations where individuals or communities believe that companies have not complied with the Performance Standards or where they have experienced negative social and/or environmental impacts as a consequence of the project. While the CAO can provide some measure of oversight, it cannot be viewed as a process for remedying human rights abuses or as a fully effective accountability mechanism, as there remain significant weaknesses in the CAO process. Specifically:

- The IFC does not consistently implement the findings of the CAO (the compliance function).
- Companies are not required to participate in CAO mediation (the ombudsman function) – their participation is voluntary.
- The IFC frequently ignores the CAO's advisory research (the advisory function), as evidenced by the IFC and CAO putting out separate good practice notes on grievance mechanisms that contain recommendations that are not fully in line with each other.¹¹
- CAO recommendations are not binding on the IFC or clients.

⁹ See for example the decisions of the Inter-American Court of Human Rights in the *Mayagna (Sumo) Awas Tingni Community v Nicaragua* case, judgement of 31 August 2001; and *Yakye Axa Indigenous Community v Paraguay*, Series C (No. 125) (2005); and *Saramaka People v Suriname*, Series C (No. 172) (2007).

¹⁰ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples, *Promotion and protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, A/HRC/12/34 (15 July 2009).

¹¹ CAO Advisory Note, *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*, (2008), available at: www.ifc.org/ifcext/media.nsf/Content/CAO_Grievance_Mechanisms_Jul08; IFC, Good Practice Note, *Addressing Grievances from Project-Affected Communities. Guidance for projects and companies on designing grievance mechanism* (September 2009),

- The CAO has not been given the mandate to do sufficient monitoring and follow up on cases.

Recommendations

In order for the IFC to bring its Sustainability Framework in line with an objective of ensuring that IFC funded projects do not cause or contribute to human rights abuses, Amnesty International would highlight the following revisions as critical:

Include a clear policy on preventing human rights abuses

- The revised Policy on Social & Environmental Sustainability should include a clear policy commitment that the IFC will take all reasonable measures to ensure that the potential impact of projects supported by the IFC, as well as IFC activities and policies, are assessed against international human rights standards, with the aim of preventing projects from causing or contributing to human rights abuses. The Policy should also make clear that the IFC will take appropriate action to address cases where projects it supports cause or contribute to abuses. All policies and projects supported by the IFC should be informed by such a human rights policy.
- The Policy should be renamed to incorporate human rights in its title, in order to ensure clarity of purpose and signal the IFC's commitment to ensuring that IFC loans do not cause or contribute to human rights abuses.

Carry out a preliminary human rights impact assessment

- Amnesty International recommends that the IFC itself should undertake preliminary assessment of the human rights context and potential impacts of any proposed project before deciding how to classify it (this includes the projects the IFC funds via financial intermediaries). The preliminary impact assessment should identify: individuals or communities likely to be affected by the proposed project; any major human rights concerns as a result of proposed activities; and any issues arising from the national legal or policy context that could compromise the ability of the IFC and its clients to ensure that they do not cause or contribute to human rights abuses. The preliminary human rights impact assessment should be conducted in an open and transparent manner involving the participation of those likely to be affected by the proposed commercial activity. It should inform the IFC's categorization of projects as well as the IFC's scrutiny of data and impact assessments provided by the client to the IFC.
- In cases where the IFC is considering finance for a later phase of a project that is already under way, the preliminary human rights assessment should identify any existing problems in relation to human rights impact and the steps taken to address them. If human rights abuses have occurred in earlier phases of a project the IFC should assess whether the abuses have been fully and adequately addressed, including provision of effective remedy to those whose rights were abused. The IFC should also ensure that appropriate measures are in place to ensure problems are not replicated.

Ensure ongoing, effective monitoring of human rights impacts, in consultation with affected people

- Improvements to the content of the Sustainability Framework will only be effective if supported by robust monitoring and implementation systems. The IFC should establish a clear, effective and transparent system for monitoring projects with specific reference to risks to human rights identified in impact assessment processes. The IFC should undertake regular reviews of the project, which should include consideration of the impacts and implications of changes in project context or operation, in order to be able to foresee new risks that may emerge. Monitoring processes should be established for all

projects including for projects that are already underway when the IFC becomes involved (such as when the IFC is providing funding to one phase of a project). Monitoring and implementation reports on projects should be made public.

- The IFC should proactively inform those likely to be affected by projects about the IFC's role in the project and assure itself that people are aware of the full potential impact of the project, have access to all relevant information and adequate time to understand and participate in the impact assessment process, and (if funding goes ahead) are involved in the development of any mitigation measures. The IFC should also ensure that communities are made aware of existing compliance and accountability mechanisms, including the CAO and the company grievance mechanism, and how they can be accessed. This should not be left to the client but done directly by the IFC.
- The IFC should directly engage, throughout each phase of the project cycle, with communities likely to be affected by the project. This engagement should respect the principles of non-discrimination and inclusiveness, and apply clear and transparent methodology aimed at seeking information directly from the community on project impacts.
- The IFC should make public the basis upon which it decides whether the project receives broad community support and the methodology it has used to make the determination. This information should be made public sufficiently in advance of sending the project for Board approval, in order to give communities or other interested actors the possibility to challenge the determination.

Strengthen compliance and accountability mechanisms

- A number of the recommendations made above, including reducing the existing heavy reliance on client information, more effective and rights-respecting engagement with project-affected people and ensuring those affected have full information on what is required of IFC clients and the means by which concerns can be raised with the IFC's CAO, are critical to ensuring improved client compliance and accountability.
- While the responsibility for preventing violations of human rights, and taking appropriate steps to hold those responsible accountable, rests with the state, the IFC can and should take appropriate action when clients do not implement adequate or agreed due diligence measures, as well as situations where there are credible allegations of human rights abuses associated with the operations of the client company or the project as a whole. These actions can range from intervention and support to redress a situation, to sanctions including withholding further loan disbursement or requiring immediate repayment of the loan. The potential human rights impacts of any sanctions on project-affected communities should be fully considered before any action is taken.

4. The Performance Standards and human rights

A key element of the IFC's own due diligence is ensuring that the companies to which it provides support are committed to respecting human rights and that they, in turn, carry out adequate due diligence in respect of the project to which support is provided. This would require revision of each of the Performance Standards, with particular emphasis on Performance Standard 1.

4.1 Building human rights due diligence into Performance Standard 1

Performance Standard 1 deals with the identification and assessment of social and environmental impacts and establishing a management system to avoid or, where avoidance is

not possible, minimize, mitigate or compensate for adverse impacts on workers, affected communities and the environment.

Performance Standard 1 should be amended in title and substance to become, 'Human Rights, Social and Environmental Assessment and Management Systems'. It should incorporate a clear human rights due diligence process, including a requirement that clients conduct an assessment of human rights impacts. This would be in addition to the initial assessment carried out by the IFC as part of its own due diligence. Currently the Guidance Notes suggest that a human rights impact assessment may be an element of the impact assessment where human rights impacts are "likely to be a significant and specific risk". Given that the identification and understanding of human rights impacts (such as the extent to which the project presents a risk to the right to water or to the highest attainable standard of health) will often only emerge *as a result* of an effective human rights impact assessment process, carrying out a human rights impact assessment should be an IFC requirement of the client and should be embedded in the Performance Standard itself, not a voluntary element referred to only in the Guidance Notes.

Assessment of human rights impact is at least as critical as assessment of environmental impact, and such assessments are increasingly seen as vital for business. Environmental and social impact assessments are not sufficient to identify, assess or address the range of human rights impacts a project is likely to have. This point was expressly recognized by the UN Special Representative on business and human rights, who has stated that, "While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis."¹²

While environmental and social impact assessment process may capture some human rights issues, unless the requirement to consider human rights impacts is explicitly stated, then some critical factors are likely to be overlooked. In particular the procedural safeguards contained in international human rights law and standards are likely to be overlooked. This issue is covered in more depth in section 4.2.

The field of human rights impact assessment is a developing one and additional guidance and tools may be required to aid clients in the assessment process; however, some key principles of human rights impact assessment¹³ should be reflected within the main Performance Standard text, including the following:

Explicitly apply the human rights framework

A human rights impact assessment must be explicitly based on universally recognized human rights standards. An assessment based on a limited portion of these or which sought to synthesize human rights law and standards into a series of general principles would not effectively assess human rights impact. The client should assess the impact on all human rights – civil and political as well as economic, social and cultural – and indirect as well as direct human rights impacts.

Adapt to different circumstances and phases of the projects

The potential and actual human rights impact of each project will vary; thus indicators of human rights impact must be selected in order to best reflect the likely impact of the specific

¹² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, 7 April 2008, A/HRC/8/5, Para 61.

¹³ These are adapted from Professor Paul Hunt, United Nations Special Rapporteur on the right to the highest attainable standard of health, and Gillian McNaughton, Senior Research Officer, Human Rights Centre, University of Essex, 'Impact Assessment, Poverty and Human Rights: a case study using the right to the highest attainable standard of health', 31 May 2006, p 32.
http://www.essex.ac.uk/human_rights_centre/research/rth/docs/Impact_Assessments_9Dec06%5B1%5D.doc.

project. A generic tool is likely to lack the specificity to assess the actual human rights impact of a project.

Performance Standard 1 also indicates that the range of influence of the project which is to be assessed is essentially geographic; however, it is important to look at the scope of impact more broadly. Commercial projects can have impacts on the legal or policy framework in a state, for example where legal changes are required to enable the project to go ahead. Such changes can affect human rights both in the context of the specific project and well beyond.

Uphold rights to participation and information

People have a right to participate in decisions that affect the realization of their human rights.¹⁴ For participation to be meaningful and respect rights, people must be informed sufficiently in advance of the process, and informed in a manner and through mediums that fully respect the principles of accessibility of information and non-discrimination. Where necessary, assistance should be provided to support people's participation.

Performance Standard 1 does not fully reflect these requirements. The sub-section on Community Engagement characterizes the purpose of engagement as being to “build and maintain over time a constructive relationship with these communities”, rather than to ensure their genuine participation in decisions that affect their human rights. Performance Standard 1 requires consultation with affected communities where there are risks of negative impact and only requires an element of participation for projects judged likely to have a “significant impact”. However, the nature of any negative impact – and the assessment of whether or not such impact is ‘significant’ – can only emerge fully through an impact assessment process that involves affected people. The distinction in the current text (consultation for risks; participation for serious risks) implies that the IFC and its clients will pre-judge the level of risk before any process of consultation. It also creates a degree of confusion about when people should be engaged in the assessment process.

The sub-section on Disclosure includes some positive elements; however, it does not contain a commitment to disclose all relevant information to people whose rights may be affected (which will in most cases be more than “local communities”) and leaves the clients too great a degree of discretion in deciding what will be disclosed and when. For example the statement: “For projects with adverse social or environmental impacts, disclosure should occur early in the Social and Environmental Assessment process and in any event before the project construction commences...” is very problematic. Firstly it reflects a recurring problem within Performance Standard 1 and the Guidance Notes – an assumption that the IFC client decides if a project will have adverse impacts before any process of consultation or engagement with affected communities has taken place. The affected communities should be part of process of identifying what, if any, negative impacts a project may have. Secondly, the statement “in any event before the project construction commences” undermines the principle – articulated elsewhere in the Performance Standards – of timely disclosure of information to ensure affected communities have a meaningful opportunity to act on the information.

The principles of rights to information and participation should be reflected more fully, consistently and centrally in Performance Standard 1 and throughout the other Performance Standards. There should be a clear and consistently expressed requirement for full and effective participation in decisions that affect human rights. Additionally, as noted earlier, this standard falls short of the now clear international norm of “free, prior and informed consent” of Indigenous Peoples to the decisions over projects on their land.

¹⁴ Interpreted to cover “all aspects of public administration, and the formulation and implementation of policy”: Human Rights Committee, General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7. The Human Rights Committee has found that individuals have the right to participate in decision-making which may affect the realization of their rights in e.g. *Apirana Mahuika et al v New Zealand* (CCPE/C/70/D/547/1993).

Ensure non-discrimination and equality

Equality and non-discrimination should be ensured throughout the impact assessment process. Performance Standard 1 places the onus on the client to identify individuals and groups that may be differentially or disproportionately affected by the project, “propose and implement differentiated measures to mitigate the adverse impacts on those individuals and groups”. However, from a human rights perspective there must be consideration of both procedural and substantive issues in relation to non-discrimination and equality. All persons likely to be affected by the project should be enabled to participate in the assessment process on a non-discriminatory basis, including those individuals or groups that may be differently or disproportionately affected by the project. They should be part of the process to identify potential impacts and should be able to participate in deciding what measures are appropriate to address adverse impacts and thereby ensure the project does not result in, contribute to or exacerbate discrimination or inequality. While there is some recognition of this in sections of the Guidance Notes dealing with gender, as noted above, overall the guidance on participation by individuals and communities in the assessment and decision-making processes is inconsistent and leaves considerable scope for interpretation.

Gender issues are addressed in the Guidance Note for Performance Standard 1. However, the importance of considering gender-related impacts of projects (both substantive impacts and issues related to processes, such as involvement in consultation and participation) should be reflected in the main Performance Standard text for Performance Standard 1 as well as throughout the Performance Standards.

The Management Programme and Action Plan

An impact assessment is not an end in itself and should form part of a holistic human rights centred process of project development and implementation. At present Performance Standard 1 requires clients to develop a Management Programme that takes into account the relevant findings of the Social and Environmental Assessment. An Action Plan is required where the client identifies specific mitigation measures and actions necessary for the project to comply with applicable laws and regulations and to meet the requirements of Performance Standards 1 – 8. While Performance Standard 1 states that an Action Plan should reflect consultation and be disclosed to the affected communities, it does not make provisions for community involvement in its development. Affected people should be involved in decisions on how potential negative impacts will be managed. The process of developing the Management Programme and Action Plan should also fully reflect requirements of consultation in cases of interference with or threats of interference with the exercise of rights. For example, the UN Committee on Economic, Social and Cultural Rights has stated in relation to the right to water: “Before any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected;...”¹⁵

An Action Plan or Management Programme should include ongoing monitoring against agreed benchmarks, but also have sufficient scope that new or unexpected risks to or impacts on human rights that emerge during the project’s lifetime can be identified and addressed.

Grievance mechanisms

While the requirements in relation to establishing grievance mechanisms provide clients with some guidance on the principles that should underpin any such mechanism (such as accessibility and transparency), the client is only required to establish a grievance mechanism in cases where “the client anticipates ongoing risks to or adverse impacts on affected communities...”. Key processes and safeguards should not be made so dependent on the client’s assessment. There should be a presumption that the client will establish some form of grievance mechanism, suited to the project’s likely impacts, unless the client can show that it is clearly not needed (for example, because the project is in a very isolated area).

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 56.

The Guidance Notes in relation to grievance mechanisms are very weak. They focus on engagement processes rather than addressing grievances. There is no clear requirement for clients to ensure that the grievance mechanism deals effectively with grievances raised by communities, and no guidance on how to deal with legitimate grievances. Nor is there any requirement to keep a record of grievances brought forward and how they were addressed.

4.2 Aligning Performance Standards 2 – 8 with human rights standards

Many of the issues covered by Performance Standards 2 to 8 – such as resettlement and environmental pollution – have a clear human rights dimension, and would be likely to affect the human rights of individuals and communities. For example, resettlement processes should always take account of the impact on the right to an adequate standard of living, including the rights to housing, food and water. Unless the human rights are explicitly acknowledged resettlement may result in forced eviction, and undermining access to food, water and livelihood – all of which are violations of human rights.

The sub-sections below examine three of the Performance Standards (3, 5 and 7) from a human rights perspective and make recommendations on how to align these Performance Standards with international human rights law and standards. Performance Standards 2, 4, 6 and 8 should also be revised in line with human rights law and standards.

Reflecting human rights impacts of pollution in Performance Standard 3

Performance Standard 3 deals with pollution and the prevention or abatement of pollution associated with the project. As noted earlier, pollution can have serious impacts on human rights. The most common examples include pollution of water, soil and air, resulting in violations variously of rights to an adequate standard of living, to adequate food, to water, to adequate housing, to health and to life. The links between environmental quality, pollution and human rights have been recognized in international human rights law. Human rights monitoring bodies and international, regional and national courts are increasingly recognizing poor environmental quality as a causal factor in violations of human rights.¹⁶

Judge Weeramantry of the International Court of Justice, the principal judicial organ of the UN, has stated in an opinion, “The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate this, as damage to the environment can impair all the human rights spoken of in the Universal Declaration and other human rights instruments.”¹⁷

The UN Committee on Economic, Social and Cultural Rights has also clarified that the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights extends to the underlying determinants of health, including “a healthy environment”.¹⁸ The Committee has also clarified that Article 12.2(b) extends to “the prevention and reduction of

¹⁶ See for example: Declaration of the United Nations Conference on the Human Environment, para 1, available at: <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>; African Commission on Human and Peoples' Rights, Decision on Communication of The Social and Economic Rights Action Center (SERAC) and *Center for Economic and Social Rights (CESR) v Nigeria* (155/96), para 54. The decision was adopted at the 30th ordinary session of the African Commission of Human and Peoples' Rights, Banjul, 13-27 October 2001. *SERAC and CESR v Nigeria* available at <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>.

¹⁷ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, 1997 ICJ Rep 7 (separate opinion of Justice Weeramantry).

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2000/4, 11 August 2000, para 4.

the population's exposure to harmful substances such as ... harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health".¹⁹

The corporate responsibility to respect human rights requires that companies become aware of and prevent human rights abuses. However, Performance Standard 3 deals with pollution largely from an environmental perspective and, despite references to human health in the text, does not require companies to identify the potential human impacts of pollution. The general requirement in Performance Standard 3 is that the client "consider ambient conditions and apply pollution prevention and control technologies and practices (techniques) that are best suited to avoid or, where avoidance is not feasible, minimize or reduce adverse impacts on human health and the environment while remaining technically and financially feasible and cost-effective".²⁰ However, without a requirement to identify and assess the human impacts of pollution, this is insufficient to ensure pollution does not violate human rights.

The sections below identify some of the most significant gaps in the current version of Performance Standard 3:

Inadequate scope

Performance Standard 3 does not make any reference to the potential for pollution to impact human rights. The Performance Standard and Guidance Note make a number of references to human health, but there is no requirement for the client to specifically identify health impacts of pollution or other environmental damage associated with the project. Similarly, there is no requirement to ensure that governmental health surveillance systems are monitoring these issues and have sufficient information on the potential and actual pollution that is occurring as a consequence of the project. While some health-related issues are addressed in Performance Standard 4, there is no clear connection between the issues covered in Performance Standard 3 and Performance Standard 4. It is therefore not clear what action the client company should take in relation to potential or actual human health impacts of pollution.

Additionally, there is no clear requirement for clients to consider the other potential human impacts of pollution, such as impacts on the availability of, access to and quality of water or food.²¹ Nor is there any reference to potential impacts on livelihood, or to the link between the natural resource base and local livelihoods. Paragraph 9 of Performance Standard 4 refers briefly to avoiding or minimizing adverse impacts – due to project activities – on soil, water and other natural resources in use by the affected communities, but does not clarify what 'in use by' means. Nor – critically – does it require clients to identify what the adverse impacts would be (which should be done in consultation with the affected communities) or to ensure that any negative impacts are dealt with appropriately (which, in several circumstances, would require disclosure of information to and consultation with affected communities to be consistent with safeguard requirements of human rights law²²).

¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2000/4, 11 August 2000, para 15.

²⁰ Performance Standard 3, para 3.

²¹ The reference to potable water in paragraph G4 of the Guidance Notes and consideration of existing ambient conditions in paragraph 9 of Performance Standard 3 are inadequate and underline a core problem of Performance Standard 3 – that the human rights implications of these environmental issues are not given any attention. References to health and safety in Performance Standard 4 and the associated Guidance Notes also fail to consider negative impacts on people's access to livelihoods and food, and there is very limited reference to the identification of sources of drinking water.

²² For example, the Committee on Economic, Social and Cultural Rights, General Comment 15, para 56, states: "Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected;..." and in General Comment 7, at paras 13 and 15: "States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. ... Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced

In order to establish the potential human rights impacts of project-related pollution it is important that Performance Standard 3 (as well as Performance Standard 1) reflects a requirement to identify the extent of communities' reliance on the natural resource base for food, livelihood and access to water for domestic use. The IFC should also require clients to identify, in consultation with the affected communities, other potential human rights impacts of pollution. For example, the right to private and family life, home and correspondence may be violated where severe pollution affects "individuals' well-being and prevent[s] them from enjoying their homes in such a way as to affect their private and family life adversely", even where this does not affect their health.²³

Assessment of potential and actual rights impacts of pollution should reflect gender considerations. For example, in many contexts women and girls are responsible for water collection and cultivation of crops, and could therefore be disproportionately affected by changes in water and soil quality if these were to affect food and water sources.

An environment and social impact assessment process may capture some of these issues. However, the lack of a clear human rights framework within Performance Standard 1 coupled with the treatment of pollution in Performance Standard 3 as primarily an environmental issue means the environmental and social impact assessment process outlined within the Performance Standards would be unlikely to capture many important human rights impacts of pollution on affected communities.

The language in Performance Standard 3 should be clarified to require clients to prevent pollution and its negative impacts as a primary objective, and to ensure that pollution does not result in human rights abuses.

Monitoring and disclosure of information

The collection, analysis and disclosure of information are critical to ensuring that human rights are protected in many contexts. In respect of pollution, failure to capture and monitor data – on pollutants and their human impacts – can contribute to serious human rights violations. For example, failure to monitor levels of toxicity or the health implications of pollution may result in failure to become aware of and deal with the risks posed to the population, leaving people exposed to potentially serious and long-term health impacts.

The references to monitoring in the Guidance Note for Performance Standard 3 are inadequate. Monitoring is encouraged but mainly in technical terms, with no reference to monitoring the human impacts of pollution. Disclosure requirements are minimal and, for the most part, disclosure of information is encouraged rather than required. The lack of clarity about what information is shared with communities and when, which was noted in relation to Performance Standard 1, persists in Performance Standard 3.

A reference to health monitoring in the Guidance Note for Performance Standard 4 does not aid clarity – there is no requirement for the IFC or the client to ensure health impacts of pollution are covered under government health surveillance programmes or what action the company or the IFC should take if not. Pollution from commercial activity often falls outside the scope of standard health monitoring processes and specific measures may need to be put in place to ensure that adequate impact monitoring is done. There is almost no mention of monitoring of water quality, food safety or the specific impacts of pollution on human health. While such monitoring may not always be needed there is no guidance on when clients and the IFC should establish a monitoring process or ensure the government has done so.

evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected."

²³ *López Ostra v Spain* (1994) 20 EHHR 277 at para 51.

The failure to monitor the human rights impacts of pollution can also have a direct impact on people's right to effective remedy. For example, when communities claim they have experienced negative health impacts as a consequence of project-related pollution they are often unable to bring forward sufficient evidence to prove their case, because of a lack of health monitoring.

Failure to consider people at risk

Human rights law requires special measures to identify and protect the human rights of groups that are at risk. From a human rights perspective impact assessments should consider whether some members of the community are more vulnerable to damage to the environment because of poverty or a significantly higher degree of reliance on the natural environment for survival, or underlying health vulnerabilities. Performance Standard 3 and the associated Guidance Note do not include any reference to identification of vulnerable groups or the need for adequate measures to address the negative impacts of pollution on vulnerable groups. References to vulnerable groups contained elsewhere in the Performance Standards do not make any clear link to the issue of pollution.

Ensuring Performance Standard 3 is consistent with established human rights safeguards

Neither Performance Standard 3 nor the associated Guidance Note incorporates the necessary safeguards which should be applied if pollution will interfere with the enjoyment of human rights. Human rights standards include requirements for procedural safeguards and consultation in cases of interference with or threats of interference with the exercise of rights. For example in the context of the right to water – which could be negatively affected by pollution – the UN Committee on Economic, Social and Cultural Rights has stated: “Before any action that interferes with an individual’s right to water is carried out by the State party, or *by any other third party* (emphasis added), the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected;...”²⁴ The Performance Standards should be consistent with these requirements.

Emergency preparedness

The section on emergency preparedness is not sufficient to comply with due diligence requirements. The emergency preparedness and response requirements of Performance Standard 3 are aimed primarily at “contingencies that could affect personnel and facilities within the physical project boundaries”.²⁵ The Guidance Note states that clients are only expected to “take into account” the need to protect the health and safety of project workers and the affected community.²⁶ Performance Standard 4 requires that the client “will assess the potential risks and impacts from project activities and inform affected communities of significant potential hazards in a culturally appropriate manner.”²⁷ The lack of consistency and clarity between Performance Standard 3 and Performance Standard 4 could result in pollution-related risks and their impacts on affected people being treated differently to other potential threats. This inconsistency should be rectified. Emergency preparedness and response should reflect all of the risks to which the project exposes workers and communities. Moreover disclosure of information to and training of communities (where appropriate) should not be based solely on an assessment by the client that there is a “significant potential hazard”, but should be carefully considered by the IFC and discussed with local authorities.

Reflecting the prohibition on forced evictions in Performance Standard 5

Performance Standard 5 deals with an issue that has repeatedly raised significant concerns – amongst civil society organizations and affected communities – in the context of IFC and other World Bank funded projects: the issue of land acquisition and involuntary resettlement. However, Performance Standard 5 does not address one of the main human rights issues

²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 15, para 56.

²⁵ Guidance Note 3, para 22.

²⁶ Guidance Note 3, para 22.

²⁷ Performance Standard 4, para 12

relevant in the context of land acquisition and involuntary resettlement – that of forced evictions. Forced evictions²⁸ have been described by the UN Commission on Human Rights as a “gross violation of human rights, in particular the right to adequate housing”.²⁹ Though Performance Standard 5 contains many useful elements, such as ensuring that resettlement activities are implemented with consultation and informed participation of those affected, it does not identify a requirement that projects should not result in forced evictions. The recognition of this objective is essential to provide clarity to clients that Performance Standard 5 aims to protect people from forced evictions and to ensure that the IFC and the client both exercise the necessary due diligence to ensure that the project does not result in human rights abuses. Furthermore, the current version of the Performance Standards does not incorporate the necessary safeguards which should accompany any eviction to ensure that it does not breach universally recognized international standards.³⁰

Safeguard measures that should be applied to all evictions have been clearly articulated by the UN Special Rapporteur on Adequate Housing in the Basic Principles and Guidelines on Development-based Evictions and Displacement³¹ (referred to as the Basic Principles), which reflect existing standards and jurisprudence on this issue. They include detailed guidance on steps that should be taken prior to, during and following evictions in order to ensure compliance with relevant principles of international human rights law. The Basic Principles are an excellent guide for the IFC for the revision of Performance Standard 5 and the associated Guidance Notes. The failure to reflect international standards greatly increases the probability of human rights abuses occurring in the context of IFC projects that involve relocation and eviction.

Using international standards as a guide, the sections below identify some of the most significant gaps in the current version of Performance Standard 5:

Inadequate scope

The scope of Performance Standard 5 is limited to physical or economic displacement as a result of project-related land acquisition, where individuals and communities do not have the right to refuse land acquisition that would result in displacement. These are defined as situations where eminent domain or expropriation are used or can be resorted to. Performance Standard 5 does not apply to resettlement from voluntary land transactions or adverse impacts from project activities other than land acquisition. These situations are meant to be dealt with under Performance Standard 1 though the client is encouraged to consider applying the requirements of Performance Standard 5 should impacts become significantly adverse.

As a result of this extremely narrow scope, the Performance Standards do not adequately address situations where pollution from the project or changes in the physical environment effectively make it impossible for people to continue to live and work on particular pieces of land or diminish access to other natural resources that they rely on to earn their living or to

²⁸ Forced evictions have been defined by the UN Committee on Economic, Social and Cultural Rights as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”, Committee on Economic, Social and Cultural Rights, General Comment No. 7, Forced evictions, and the right to adequate housing (16th session, 1997), UN Doc. E/1998/22, annex IV at 113 (1997) para 3. Not every eviction that is carried out by force constitutes a forced eviction – if appropriate safeguards are followed, a lawful eviction that involves the use of force does not violate the prohibition on forced evictions.

²⁹ Commission on Human Rights, Resolution 1993/77, para 1.

³⁰ Various international human rights treaties require governments to prohibit and prevent forced evictions, including by private actors. These include Art. 11, International Covenant on Economic, Social and Cultural Rights; Art. 17, International Covenant on Civil and Political Rights; Art. 5 (e), Convention on the Elimination of All Forms of Racial Discrimination. The Committee Against Torture has stated that in certain circumstances forced evictions may amount to cruel, inhuman or degrading treatment or punishment and contravene Art. 16 of the Convention Against Torture (see *Hajrizi Dzemajl v Yugoslavia*, UN Doc. CAT/C/29/D/161/2000, 2 December 2002). All IFC Member States are parties to at least one if not more of these treaties.

³¹ Basic Principles and Guidelines on Development-Based Evictions And Displacement, Annex 1 of the report A/HRC/4/18 of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, were considered by the Human Rights Council in 2007, available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf .

grow food. Such situations can result in communities having to move somewhere else, as well as negative impacts on communities' rights to work, food and to an adequate standard of living. Performance Standard 5 should be expanded to cover all situations of physical and economic displacement and evictions which result from the project, and not just those that are a consequence of project-related land acquisition.

Exploring alternatives to evictions: a last resort option

Under international human rights law, eviction should be undertaken as a last resort and only after all feasible alternatives have been explored in genuine consultation with affected persons.³² Though Performance Standard 5 notes as an objective that “involuntary resettlement should be avoided or at least minimized” and states “that the client will consider feasible alternative project designs to avoid or at least minimize physical or economic displacement”, it falls short of the standards required under international law.

While both Performance Standard 5 and the accompanying Guidance Note stress the importance of information, consultation and informed participation of affected people in resettlement activities and plans, no such requirements are included for exploring alternatives to evictions. The Guidance Note encourages the client to avoid acquisition of land that results in displacement of people or where such displacement is ‘unavoidable’ to minimize adverse impacts through adjustments in routing or site location of facilities, but does not require the client to inform and consult with affected communities while doing so.

While there is a brief mention in the Guidance Note that the Resettlement Action Plan should demonstrate that displacement is unavoidable³³, this point should be included in the main Performance Standard text. There should also be greater clarity on the steps that the client should take to meet the requirement of exploring alternatives to eviction in genuine consultation with affected persons. The Basic Principles outline the steps that should be taken in this regard³⁴ and these requirements should be reflected in Performance Standard 5. These issues should also be incorporated within Performance Standard 1. Impact assessments should explore alternatives to evictions and strategies to minimize negative impacts on affected communities and take into account the possible differential impacts of evictions on the most disadvantaged groups.

Due process requirements

There are also a number of other procedural requirements and safeguards which should be in place before evictions are carried out,³⁵ as well as requirements in respect of how any evictions that do go ahead are carried out.³⁶ These requirements are essential to ensure that evictions are undertaken in a manner that complies with due process requirements and that gives communities sufficient time to seek judicial and other remedies and to ensure genuine

³² Committee on Economic, Social and Cultural Rights General Comment No. 7, para 13; see also General Comment No. 4, para 18.

³³ See also Guidance Note 5, para 28, which makes a reference to “involve them in a process that considers alternatives to the project that minimizes displacement”.

³⁴ Basic Principles and Guidelines on Development-Based Evictions And Displacement, Annex 1 of the report A/HRC/4/18 of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, see in particular paras 32, 33, 37 – 41.

³⁵ These include, among others, “a) an opportunity for genuine consultation with those affected; b) adequate and reasonable notice for affected persons prior to the scheduled date of eviction; c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;... g) provision of legal remedies; and h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts”, Committee on Economic, Social and Cultural Rights General Comment No. 7, para 15.

³⁶ These include “(d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise”, Committee on Economic, Social and Cultural Rights General Comment No. 7, para 15. See paras 45 – 51, Basic Principles; see also requirements in relation to protection of rights to life and security of person in the International Covenant on Civil and Political Rights that any use of force respect the principles of necessity and proportionality, including guidance offered to law enforcement officials on use of force such as the ‘Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’.

consultations. They also minimize the possibility of use of force during evictions and ensure that, if evictions are undertaken with the use of force, this is proportionate and lawful. These requirements also offer opportunities for communities to salvage their possessions and building materials and take steps to ensure protection of the most vulnerable members of the community in eviction situations.

Neither Performance Standard 5 nor the associated Guidance Notes however make any reference to these requirements. Nor is the client obliged to verify if these requirements are in place before evictions are carried out and to inform the IFC if they are not. This is an extremely significant omission and opens the IFC, its Member States and clients to risks that evictions in IFC funded projects will be undertaken in a manner which breaches international safeguards against forced evictions as well as other human rights abuses in the context of evictions. The IFC should clearly indicate in Performance Standard 5 that it will not support projects that involve evictions, if mandatory safeguards³⁷ are not in place before such evictions are undertaken. It should also clarify that it will not proceed to support the project if the IFC discovers, in the course of its due diligence and preliminary impact assessment, that forced evictions have occurred or unless suitable corrective action is taken in situations where there is a risk of forced evictions.

Resettlement and compensation

While Performance Standard 5 and the associated Guidance Note contain several positive elements in relation to resettlement, such as requirements in terms of information, consultation and informed participation of those affected in resettlement activities and planning, there are some critical gaps and weaknesses in the requirements and guidance offered, which could be addressed by incorporating the guidelines in the Basic Principles in this regard.³⁸ Briefly, some of the main areas of concern are: weak requirements in terms of offering replacement land³⁹ to communities; lack of a clear requirement to provide alternative adequate housing in all situations where people may be unable to provide for themselves and may be left homeless as a result of the eviction;⁴⁰ lack of a clear requirement that resettlement sites must comply with *all seven* criteria for adequacy of housing under international law⁴¹.

At present the Guidance Note only suggests that clients should “include one or more of the aspects of adequate housing [...] in order to offer improved living conditions at the resettlement sites”⁴². This would imply for example that clients would only be required to ensure that a project site has basic infrastructure but could ignore the additional criteria under international law for adequacy of housing that it be at a location, which allows access to employment options. The Guidance Note should be revised and the Performance Standard should stipulate that resettlement sites comply with *all* the requirements for adequacy of housing.

The Basic Principles, which reflect both international standards and many years of experience of monitoring impacts of evictions, stress that “cash compensation should under no circumstances replace real compensation in the form of land and common property resources”.⁴³ Performance Standard 5 should stress the importance of fair and just

³⁷ This includes the requirement that all feasible alternatives to evictions are explored in genuine consultation with affected communities and evictions are only undertaken as a last resort.

³⁸ Basic Principles and Guidelines on Development-Based Evictions And Displacement, Annex 1 of the report A/HRC/4/18 of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, see paras 52 – 58, 60 – 63 in particular.

³⁹ Performance Standard 5, para 8, provides that “where livelihoods of displaced persons are land-based; or where land is collectively owned, the client will offer land-based compensation, *where feasible*” (emphasis added).

⁴⁰ The Committee on Economic, Social and Cultural Rights has stressed that “Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights”, Committee on Economic, Social and Cultural Rights General Comment No. 7, para 16.

⁴¹ These requirements are 1) legal security of tenure; 2) availability of services, materials, facilities and infrastructure; 3) location; 4) habitability; 5) affordability; 6) accessibility; and 7) cultural adequacy, Committee on Economic, Social and Cultural Rights General Comment No. 4, para 8.

⁴² Guidance Note 5, para 6.

⁴³ Basic Principles and Guidelines on Development-Based Evictions And Displacement, Annex 1 of the report A/HRC/4/18 of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, para 60.

compensation to all persons and strengthen requirements to provide land-based compensation. Similarly it must incorporate requirements to provide adequate alternative housing, particularly in situations where people would be unable to provide for themselves, and to ensure that resettlement sites comply with requirements for adequacy of housing.

Implementation of the Performance Standard and associated Guidance Note would also be improved if the guidance was simplified to clarify the basic requirements in terms of resettlement policies that should be followed in all contexts, irrespective of the tenure status of the affected communities. It should particularly highlight requirements for situations involving disadvantaged communities, who would be unable to provide alternative housing for themselves. It could then identify additional requirements in terms of compensation for property rights.

Considering the impact that evictions and displacement can have on communities if undertaken without necessary safeguards it is essential that the IFC close the gaps in protection in the current review process. If this is not done, the IFC and its Member States risk continuing to fund projects without adequate and clear safeguards in place to ensure that such projects do not result in human rights abuses. It is worth noting that the Committee on Economic, Social and Cultural Rights has expressly stated that "international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account".⁴⁴

Performance Standard 7 and the rights of Indigenous Peoples

Guidance Note 7 on Indigenous Peoples states that the "IFC recognizes that the rights of Indigenous Peoples are being addressed under both national and international law" and that "Under international law, key UN human rights conventions [...] form the core of international instruments that provide the rights framework for the world's indigenous peoples". However, Performance Standard 7 does not adequately reflect the human rights protection afforded to Indigenous Peoples under international human rights law. Neither Performance Standard 7 nor the accompanying Guidance Note make reference to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The UNDRIP affirms and builds on the fundamental human rights protections provided for Indigenous Peoples under other international Covenants (e.g. International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child, among others). The UNDRIP does not create new rights, but rather is an elaboration of the fundamental human rights that apply to all peoples. The UNDRIP takes these rights and principles and adapts them to the specific circumstances of Indigenous Peoples, emphasizing the collective nature of their rights, and their right to maintain their cultural distinctiveness.

Performance Standard 7 should refer expressly to, and be guided by, UNDRIP as *the* most authoritative international statement on the human rights of Indigenous Peoples. This text was agreed after 20 years of intensive negotiations between Indigenous Peoples and states, and was voted for in the UN General Assembly by 143 states.

States are obliged to comply with these international obligations. Companies must, as a minimum, also respect human rights independently of States' duties or capacities. Nevertheless, Amnesty International recognizes that many states – and companies – as yet do not have clear standards of FPIC that are consistent with these obligations, or struggle to implement the standards in practice. As a result, in such cases, it is critical that the IFC

⁴⁴ Committee on Economic, Social and Cultural Rights General Comment No. 2, paras 6 and 8 and Committee on Economic, Social and Cultural Rights General Comment No. 7, para 17.

establish, in conjunction with the affected communities and – where possible – the participation of the relevant state authorities, a process to seek FPIC that is consistent with UNDRIP. While the client company and state may be involved in implementing the process steps to seek FPIC, the IFC should ensure robust oversight, including by ensuring that an independent monitor, agreed with the affected communities, is engaged. Affected Indigenous communities should have full information on the proposed project, expected impacts, and on the process and their rights within that process.

In aligning Performance Standard 7 with international standards on the rights of Indigenous Peoples, the IFC should pay particular attention to the following:

Self-identification

A key demand of Indigenous Peoples involved in drafting UNDRIP, was that the criterion for identifying Indigenous Peoples ought to be self-identification by a community as such. This was a response to many years of being categorized and defined by states and their connection with assimilation policies designed to integrate Indigenous Peoples into the dominant culture.

If Performance Standard 7 continues to refer to a set of objective criteria/characteristics, it should ensure that self-identification is accorded greater weight than other criteria. At present, Guidance Note 7 states “each characteristic is evaluated independently, and no characteristic weighs more than the others”. In addition, the requirement that Indigenous Peoples be recognized by others should be removed as it undermines the right of Indigenous Peoples to self-identify as such. Anthropologists or sociologists with local expertise should always be involved in the process of identification to assist with consideration of the objective criteria for determining Indigenous Peoples status in Performance Standard 7.

Relocation of Indigenous Peoples from traditional or customary lands

One of the clearest international standards for Indigenous Peoples is their right not to be removed from their traditional or customary lands without their consent. Performance Standard 7 and the Resettlement Planning and Implementation requirements of Performance Standard 5 need to be revised to incorporate this principle. The relevant international standard is Article 28 of UNDRIP. The standard is also contained in the International Labour Organization Convention 169 (1989).

Free, Prior and Informed Consent (FPIC)

The UNDRIP requires states to seek free, prior and informed consent from Indigenous Peoples. For Indigenous Peoples, FPIC reflects:

- the historical experience of states depriving Indigenous Peoples of their territories and political power and their right to determine their membership.
- the continued existence and viability of Indigenous Peoples as culturally distinctive communities.

Such consent is required in a broad range of circumstances, including those cases where a project affects Indigenous Peoples’ lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. In the last five years there have been numerous guidelines and statements issued by Indigenous Peoples’ organizations, NGOs, and inter-governmental bodies which refer to the need for a clear FPIC-procedure, and effective monitoring, enforcement and grievance mechanisms reflect the following key principles:⁴⁵

⁴⁵ See, for example, ‘Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples’, UNPFII, E/C.19/2005/3; and ‘Free prior, informed consent: the role of mining companies’, Oxfam Australia, 2007. ‘Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples’, *Promotion and protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, A/HRC/12/34 (15 July 2009), para 46.

- **Free:** Consent must be freely given without manipulation, coercion, threat, fear of reprisal, corruption or inequality of bargaining power.
- **Prior:** Indigenous Peoples should be given sufficient time to give their free consent to a proposed activity according to their values, tradition and circumstances.
- **Informed consent:** There must be full, clear, objective and culturally-appropriate disclosure of a proposed activity; Indigenous Peoples must be informed of their rights (including lands, resources and traditional knowledge) **and have the right to obtain independent advice.** The greater the impact on the Indigenous Peoples – e.g. development on traditional lands, relocation, storage of hazardous materials – the greater the onus on those proposing the activity to show that the process was robust.
- **Consent:** Means the right to say no; and FPIC may be required at different stages of a proposed activity. Consent does not mean broad community support. Rather consent requires collective agreement by the affected Indigenous Peoples in accordance with their cultural traditions, customs and practices.
- **Inclusive Indigenous Peoples' decision-making:** It is the consent of the *peoples* that is required through their chosen representative structures and decision-making processes. Therefore, decisions need to include all, including women and other community members who may be marginalized within the community.

The rights of Indigenous Peoples affected by any project funded by the IFC should be central to Performance Standard 7. The UNDRIP's Article 32, for example, specifically relates to the right of Indigenous Peoples to free, prior, informed consent over extractive industry projects on their land.

The International Labour Organization Convention 169 (1989), an international binding treaty, contains an explicit reference to Indigenous Peoples' informed consent in the context of relocation. In addition it requires that Indigenous Peoples "decide their own priorities for the process of development" and consultations with them should be through their representative institution "with the objective of achieving agreement or consent to the proposed measures".⁴⁶

UN treaty bodies also have called upon states to uphold the right of Indigenous Peoples to free, prior, informed consent. The Committee on the Elimination of Racial Discrimination (CERD) has emphasized the requirement to obtain the free, prior and informed consent of indigenous communities for activities that affect such communities⁴⁷ In particular, CERD's General Recommendation XXIII on Indigenous Peoples requires that "no decisions directly relating to [Indigenous Peoples'] rights and interests are taken without their informed consent".⁴⁸ In addition to the CERD Committee, other treaty bodies such as the UN Committee on Economic Social and Cultural Rights and UN Human Rights Committee⁴⁹ have also instructed states to seek consent from Indigenous Peoples in a range of matters affecting their communities and natural resources.⁵⁰

Despite such clear guidance, the IFC applies a lower standard: a requirement that clients engage in a process of free, prior and informed consultation with affected communities of

⁴⁶ International Labour Organization Convention 169 (1989) Art. 6. Art. 15 further requires consultation in the context of exploration or exploitation of sub soil resources.

⁴⁷ See: UN Doc CERD/C/RUS/CO/19 20 August 2008 'Concluding observations of the Committee on the Elimination of Racial Discrimination' Russian Federation 73rd CERD session. CERD/C/ECU/CO/19 15 August 2008 available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD.C.ECU.CO.19.pdf>. Letter to Government of Australia August 2006 available at <http://www2.ohchr.org/english/bodies/cerd/docs/69letter-australia.pdf>.

⁴⁸ See UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII.

⁴⁹ See UN Human Rights Committee decision, Ángela Poma Poma 27/3/2009, Communication No. 1457/2006.

⁵⁰ See Concluding Observations of the Committee on Economic, Social and Cultural Rights to Ecuador 32nd Session 26 April - 14 May 2004 E/C.12/1/Add.100, para 12; see also Concluding Observations of the Committee on Economic, Social and Cultural Rights to Colombia 27th Session 12-30 Nov. 2001 E/C.12/1/Add.74, para 12. CERD Concluding Observations Ecuador 2003 CERD/C/62/CO/2 "as to the exploitation of subsoil resources located subjacent to the traditional lands of indigenous communities the committee observes that mere consultation of these communities prior to exploitation falls short of meeting the requirements set out in General Comment XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought".

Indigenous Peoples. The use of an alternative, lower standard not only undermines a common, clear, consistent understanding of Indigenous Peoples' rights, but could lead to the IFC endorsing action which would contribute to or result in abuse of rights. The IFC should require FPIC for any project it funds where FPIC would be required under UNDRIP.

While bringing its policies in line with UNDRIP the IFC should also address weaknesses and gaps in the process stipulated within Performance Standard 7 and the associated Guidance Notes in relation to provision of information and process to seek consent. These include: the need for Indigenous Peoples to be provided with full, clear, objective, and culturally-appropriate information about the proposed projects; and that they be informed of their rights (including in relation to lands, resources and traditional knowledge) and have the right to obtain independent advice. The process of getting to consent should include the need for robust mechanisms of dialogue to facilitate mutually acceptable agreements; dispute resolution processes (both to mediate internal and external disputes); and independent monitoring mechanisms. These processes should be clearly outlined in an Indigenous Peoples Development Plan prepared jointly by the client and affected Indigenous Peoples. The IFC – and, where appropriate, an independent body – should ensure that the Indigenous Peoples Development Plan is complied with.

Box 4: UN Declaration on the Rights of Indigenous Peoples

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous Peoples shall have the right to participate in this process.

Article 28

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. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Impacts on traditional or customary lands under use

Indigenous Peoples traditional and customary lands are not limited to those under legal ownership but include those used and occupied according to tradition. It is important that the nature and extent of traditional and customary lands is determined from the perspective of Indigenous Peoples. For example, ordinarily, traditional lands are not confined to areas occupied and used on a regular basis but also include lands used according to season or otherwise used and occupied according to tradition. There is much authority for this in international law.⁵¹

At present, the client's obligations under Paragraph 13 of Performance Standard 7 are triggered when:

- the client proposes to locate the project on, or commercially develop natural resources located within, traditional or customary lands under use; and

⁵¹ I/A HR Court, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Series C (No. 79) (2001); *Moiwana Community v Surinam*, Series C (No. 124) (2005); *Yakye Axa Indigenous Community v Paraguay*, Series C (No. 125) (2005); *Sawhoyamaya Indigenous Community v Paraguay*, Series C (No. 146) (2006); I/A HR Court, *Saramaka People v Suriname*, Series C (No. 172) (2007); Mary and Carrie Dann, Case 11.140 (United States) (27 December 2002) Inter-Am Comm H R, Report 75/02.

- adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual use that define the identity and community of the Indigenous Peoples.

Where a project is to be located or resources developed on Indigenous Peoples' traditional lands, there should be a presumption that there will be adverse impacts for the Indigenous communities. Additionally, the reference to matters that "define the identity of the community" is too restrictive and should be removed. The question ought to be simply whether the impact is on the community and their livelihoods, or cultural, ceremonial or spiritual use.

In addition, paragraph 13 requires that: "The affected communities of Indigenous People will be informed of their rights with respect to these lands under national laws, including any national law recognizing customary rights or use." Reference should also be made to international human rights standards, particularly the UNDRIP.

At present, Performance Standard 7 notes that where members of the affected communities of Indigenous Peoples individually hold legal title, or where the relevant national law recognizes customary rights for individuals, the requirements of Performance Standard 5 will apply. Care needs to be exercised here as often governments have individualized Indigenous communal title as a means to integrate Indigenous communities into the dominant culture. The individual title holders should be given a choice as to whether Performance Standard 7 or Performance Standard 5 will apply.

Performance Standard 7 should also be fully aligned with the protections contained in UNDRIP on the issues of compensation, due process, culturally appropriate development opportunities, and good faith negotiation. The relevant provisions are Articles 27 and 28 (see box 4).