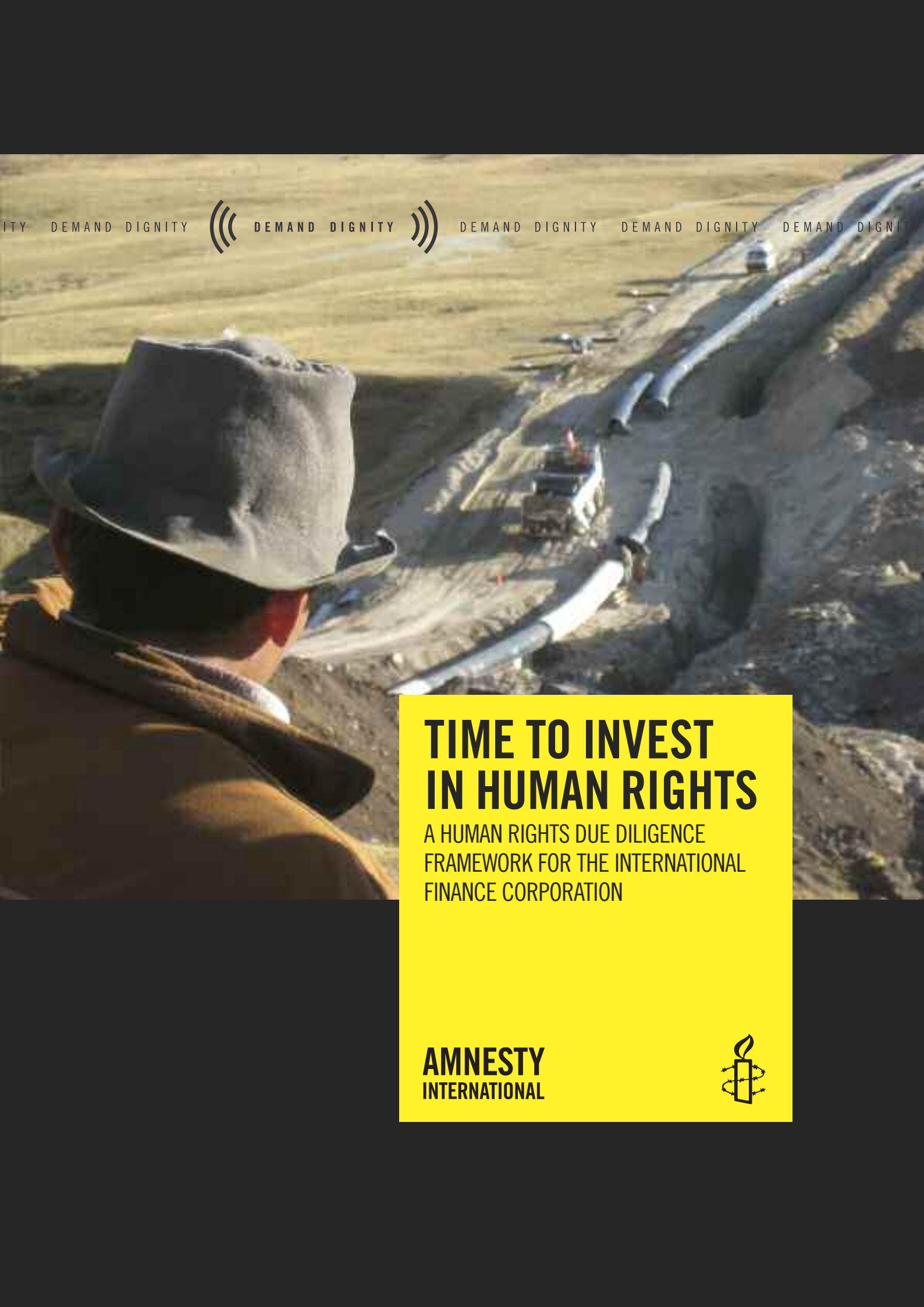


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TIME TO INVEST IN HUMAN RIGHTS

A HUMAN RIGHTS DUE DILIGENCE
FRAMEWORK FOR THE INTERNATIONAL
FINANCE CORPORATION

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Amnesty International is a global movement of 2.8 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

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Amnesty International Publications

First published in 2010 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Amnesty International Publications 2010

Index: IOR 80/004/2010
Original language: English
Printed by Amnesty International,
International Secretariat, United Kingdom

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Cover photo: A member of the Chiquintirca community in Peru views the construction site of a pipeline supported by the International Finance Corporation. The pipeline will transport Liquefied Natural Gas (LNG) from the Ayacucho Region of the Andes mountains, where the community is located, to the LNG plant at Pampa Melchorita on the coast. September 2009.

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1. INTRODUCTION

On 1 May 2010, Amnesty International provided extensive comments on the International Finance Corporation's (IFC) 2006 Sustainability Framework, which includes the Policy on Social & Environmental Sustainability (SES Policy), the Performance Standards and related Guidance Notes, and IFC Disclosure Policy. These comments included a review of the Sustainability Framework from a human rights perspective and recommendations on how to incorporate human rights due diligence into IFC's policies and operating standards as part of the current review of the Sustainability Framework.¹

On 2 June 2010, IFC released a revised draft Sustainability Framework, which "seeks to give further concrete meaning to and strengthen human rights".² IFC also released a comparative analysis of the IFC Sustainability Framework and certain human rights documents.³

Amnesty International has undertaken an analysis of these documents to determine the extent to which the revised draft SES Policy and Performance Standards are adequate to ensure that IFC-supported projects and business activities are conducted in a manner that respects human rights.

2. AMNESTY INTERNATIONAL'S ASSESSMENT SO FAR

The concerns outlined in Amnesty International's May 2010 comments on the 2006 Sustainability Framework remain largely unaddressed. As such, Amnesty International's main recommendations in respect of the revised Sustainability Framework have not changed.

In summary, these are:

- IFC Sustainability Framework should include a clear statement of policy that IFC will not support activities that are likely to cause or contribute to human rights abuses. This policy statement should make clear that 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 Professor John Ruggie, the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Special Representative on Business and Human Rights)..
- 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, IFC's systems for receipt and assessment of critical information on project impacts, engagement by IFC with affected communities and individuals, and IFC's current monitoring mechanisms should all be reviewed in light of the objective to prevent abuses of 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 assessments for projects that receive IFC support.
- Performance Standards 2 – 8 should be revised to bring them in line with relevant human rights standards.

More detailed recommendations are contained in sections 5, 6 and 7.

3. IFC MAPPING OF PERFORMANCE STANDARDS AGAINST HUMAN RIGHTS

On 2 June 2010, IFC released a comparative analysis of IFC policies with certain international human rights instruments and other documents.⁴ IFC assessed the Sustainability Framework against “applicable criteria” in: the 2008 report of the Special Representative on Business and Human Rights; the International Bill of Human Rights;⁵ “new relevant international covenants and declarations”;⁶ a business reference guide developed by the Castan Centre for Human Rights Law and others; and the Human Rights Compliance Assessment tool of the Danish Institute for Human Rights. The analysis is summarized in a matrix that is intended to outline the relationship between the rights in the International Bill of Human Rights and the Performance Standards. IFC concluded that the comparison demonstrated that:

The multiple dimensions of rights in the economic, social and cultural areas have already been well addressed in the Standards (e.g., labor rights, health/pollution prevention, involuntary resettlement, cultural heritage) ... [and] the Standards cover aspects of rights in the civil and political area that are relevant for IFC's business (e.g., community engagement, security personnel, grievance mechanisms, Indigenous Peoples, vulnerable groups).⁷

Amnesty International welcomes the recognition by IFC of the need to assess the extent to which the SES Policy and Performance Standards address human rights, and its acknowledgement of the responsibility of companies to respect human rights. Given the potential impact of IFC-supported projects on a range of human rights, and IFC's current review of its Sustainability Framework, the analysis is timely and necessary.

However, the matrix presented by IFC does not provide an adequate analysis of the human rights concerns that ought to be taken into account in the revision of the Sustainability Framework. In many areas the analysis appears superficial and lacking the necessary depth and understanding of the rights issues at stake. Consequently the matrix is inadequate to draw the conclusions reached by IFC regarding the extent to which the SES Policy and Performance Standards incorporate human rights. Further, Amnesty International considers that, contrary to IFC's stated commitment to supporting the Special Representative on Business and Human Rights' policy framework⁸ through its operations, the IFC analysis fails to identify and address the absence of robust human rights due diligence process in the Sustainability Framework.

INCONSISTENT WITH WORK OF THE SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS

In April 2010, the Special Representative of the UN Secretary-General stated that the corporate responsibility to respect human rights “constitutes a universally applicable human rights responsibility for all companies in all situations”.⁹ The corporate responsibility to respect all human rights has a corresponding requirement for concrete action by companies to discharge this responsibility, including through 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 impacts on human rights. According to the Special Representative on Business and Human Rights, corporate human rights due diligence comprises four aspects:

*A statement of policy articulating the company's commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance.*¹⁰

The Special Representative on Business and Human Rights notes that the responsibility to respect human rights is ongoing and dynamic, and that managing human rights risks needs to involve meaningful engagement and dialogue with communities and individuals likely to be affected by business activities. He also notes that because a main purpose of human rights due diligence is enabling companies to demonstrate that they respect rights, a measure of transparency and accessibility to stakeholders will be required for effective due diligence.

These four components of human rights due diligence are not reflected in the Sustainability Framework. The Sustainability Framework requires neither IFC nor its clients to have a policy expressing the organisation's or client company's commitment to respect human rights. Further, the requirements articulated under the SES Policy and the Performance Standards do not include a requirement for either IFC or its clients to undertake assessments of human rights impacts. IFC's analysis states that: "businesses, civil society, and other stakeholders understand that most human rights risks for business can be effectively addressed through social and environmental considerations".¹¹ This statement conflicts with the Special Representative on Business and Human Rights' analysis of business and human rights responsibilities, which states that human rights impacts can only be adequately assessed through a process that deliberately and explicitly references internationally recognized human rights.¹² Amnesty International's May 2010 submission on the 2006 Sustainability Framework provided several concrete examples which support this point and underline the need for an explicit assessment of human rights impacts.¹³

Lastly, there is no requirement in the Sustainability Framework for IFC or its clients to integrate human rights commitments and assessments into their oversight, tracking and reporting systems. In failing to incorporate the four components of human rights due diligence, the Sustainability Framework does not reflect IFC's stated commitment to supporting the policy framework of the Special Representative on Business and Human Rights through its operations.

FAILURE TO ASSESS THE SUSTAINABILITY FRAMEWORK AGAINST KEY HUMAN RIGHTS INSTRUMENTS

IFC's analysis focuses exclusively on the International Bill of Human Rights and does not take into account other international human rights standards that encompass a range of human rights obligations. Although the introduction to the comparison matrix states that IFC compared the Sustainability Framework to "new relevant international covenants and declarations", these are not identified and no assessment is given as to how these other covenants and declarations are incorporated into the SES Policy and Performance Standards. Most notably, no reference is made to the UN Declaration on the Rights of Indigenous Peoples, or to core UN conventions, all of which are highly relevant in the context of IFC-

supported projects and business activities. Despite IFC's recognition of gender as a cross-cutting issue, the IFC analysis makes no reference to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The IFC analysis also does not appear to refer to, or draw on, the body of expertise and jurisprudence of the UN human rights bodies tasked with monitoring and giving guidance on human rights. Reference to the guidance provided by these bodies would help to ensure the Sustainability Framework is consistent with international human rights standards.

COMPARISON LACKS DETAIL

The comparison matrix is relatively broad and somewhat superficial in its treatment of human rights. It does not go into the detail that would be necessary to informatively comment on the extent to which the Performance Standards reflect the standards outlined in the International Bill of Human Rights. In particular, the matrix does not identify the content of the rights and then assess the SES Policy and Performance Standards against that content. For example, IFC identifies the right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment and assesses that the right is adequately reflected in Performance Standards 2 and 4.¹⁴ However, the right not to be subjected to cruel, inhuman and/or degrading treatment can be violated in a number of ways, including, for example, by forced evictions.¹⁵ As such, analysis of the right should include consideration of the manner in which the IFC Sustainability Framework fails to address forced evictions in Performance Standard 5. Indeed, the continued failure of Performance Standard 5 to prohibit clients from engaging in forced evictions represents a significant challenge to the extent to which the Performance Standards could be said to adequately reflect human rights standards.

There are other problems with the way in which IFC's analysis in the matrix compares human rights with the IFC Sustainability Framework. For example, the matrix considers the extent to which the Sustainability Framework incorporates the right to an adequate standard of living (which includes rights to housing, food, water and sanitation) and concludes that "the different components of this right are addressed in a number of Standards", specifically Performance Standards 1, 2, 3, 4, 5, 6 and 7.¹⁶ While these Performance Standards may reflect some aspects of the right to an adequate standard of living, they are silent on important measures that need to be taken to ensure respect for the rights inherent in the right to an adequate standard of living, such as the right to water and the right to housing.

Overall, the IFC assessment confuses references to issues, such as housing or water, with the content of human rights. However, a reference to the potential impact of a project on water is not the same as examining the impact of a project or activity on the right to water. In order to assess the impact, one must first look at what the right to water entails; otherwise critical issues will be missed. In particular, none of the Performance Standards gives any detail of the procedural requirements and safeguards that should be in place in order to ensure respect for rights.¹⁷ These safeguards and procedural requirements should be explicitly required in the Performance Standards.

HUMAN RIGHTS NOT ADDRESSED BY THE SUSTAINABILITY FRAMEWORK

At times, the matrix suggests that human rights are addressed, when in fact the SES Policy or Performance Standard makes no or only very limited reference to the subject matter covered by the right. For example, in relation to the right to effective remedy, the IFC analysis

states that the right is addressed by the fact that the SES Policy “underlines the importance of access to an effective grievance mechanism” and Performance Standard 1 provides general requirements on grievance mechanisms, while more specific requirements are articulated in Performance Standards 1, 2, 4, 5, and 7. While grievance mechanisms are an important tool for addressing potential issues and problems, they are often not sufficient to provide an effective remedy.

Under international law, the right to an effective remedy states that “any person claiming such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any competent authority provided for by the legal system of the State”.¹⁸ This right can be interfered with by third parties, particularly companies. For example, in the Niger Delta, Amnesty International has documented cases where companies withheld vital information from courts and communities on the cause of oil spills and the full extent of the impacts of such spills on communities, thereby undermining the right to effective remedy.¹⁹ In other cases documented by Amnesty International, companies have influenced the legal framework within which they operate in a way that has reduced access to legal remedies for affected communities.²⁰ Despite the capacity of companies to impact the right to effective remedy, the Sustainability Framework does not require IFC or its clients to respect the right.

FAILURE TO ANALYSE SES POLICY

The SES Policy sets out IFC’s commitments and its due diligence framework. While the revised SES Policy now states that IFC recognizes the responsibility of the private sector to respect human rights,²¹ there is no reference to IFC itself respecting human rights. As IFC is yet to recognize its own responsibility to respect human rights, which would carry with it the responsibility to undertake human rights due diligence, the SES Policy does not establish a human rights due diligence framework.

Not surprisingly, therefore, the IFC analysis makes little reference to the SES Policy. According to the IFC analysis, only eight of the 35 human rights referred to in the matrix are reflected in the SES Policy,²² and several of these are only reflected to the extent that the SES Policy requires clients to identify their risk of being complicit in violations by third parties. The limited extent to which the IFC analysis references the SES Policy highlights the inadequacy of the SES Policy to ensure that IFC activities are undertaken in a manner that respects human rights.

FLAWED CONCLUSION

IFC concludes that “the multiple dimension of rights in the economic, social and cultural areas have already been well addressed in the Standards” and that the Standards “cover aspects of rights in the civil and political area that are relevant for IFC’s business”. Amnesty International considers that the current Performance Standards are only a partial reflection of the potential human rights impacts that need to be included in the final revised Performance Standards.

In its analysis of the 2006 Sustainability Framework and in this present document, Amnesty International has identified some key areas in which the IFC Sustainability Framework does not adequately reflect human rights. For example, the Performance Standards fail to adequately identify and address the impact of environmental pollution on affected

communities' rights to health, food, water, and housing. The Performance Standards also fail to require IFC and its clients to ensure that their activities do not lead to forced evictions. Further, the Performance Standards fail to reflect international human rights standards related to the rights of Indigenous Peoples. In light of this, and given the lack of detail in the matrix, IFC's conclusion that all relevant civil, political, economic, social and cultural rights are "well addressed" in the Sustainability Framework is not credible.

4. THE REVISED TEXT OF THE SUSTAINABILITY FRAMEWORK

In its review and update process report to the World Bank Group's Committee on Development Effectiveness (hereafter, the "CODE Report"),²³ IFC recognizes human rights as a key cross-cutting issue. Recognition of the relevance of human rights in the work of IFC is an important first step. However, it is not in itself sufficient. The IFC Sustainability Framework ought to include an explicit objective that IFC projects and other activities should not cause or contribute to human rights abuses. Such an objective would be consistent with the mission of IFC, the duties of Member States and the corporate responsibility to respect human rights.

As articulated by the Special Representative on Business and Human Rights, "the responsibility to respect is the baseline expectation for all companies in all situations".²⁴ In response to the work of the Special Representative on Business and Human Rights, the revised text of the SES Policy recognizes that the "private sector" has human rights responsibilities.²⁵ However, the approach taken by IFC in referring only to the responsibilities of the private sector constitutes a very limited interpretation. In his framework, the Special Representative on Business and Human Rights does not limit the responsibilities of business to the private sector, but rather talks about the responsibilities of all business. As with the private sector, public sector and mixed public-private sector businesses also have a responsibility to respect human rights. Similarly, as an international financial corporation, IFC must at a minimum ensure that it respects human rights, including through the proper conduct of its own due diligence. Moreover, as an inter-governmental institution whose Member States have duties to respect, protect and fulfil human rights, including to protect human rights against abuse by third parties, the Sustainability Framework of IFC ought to explicitly require IFC to take a proactive role in respecting and promoting respect for human rights.

Such an approach would be consistent with IFC's mission. While IFC's Articles of Agreement state that the purpose of the Corporation is to "further economic development",²⁶ as articulated in IFC's Mission Statement, the pursuit of this economic development is in itself for a purpose, namely "helping to reduce poverty and improve people's lives".²⁷ Respecting all human rights is key to improving the lives of people living in poverty.

Amnesty International recommendations:

1. IFC should develop and incorporate into the SES Policy a human rights policy in which IFC commits to respecting human rights and, through the elaboration of a human rights due diligence framework in the SES Policy, IFC commits to taking all possible steps to ensure that IFC clients respect human rights in IFC-supported business activities.
2. Specifically and explicitly refer to human rights throughout the Performance Standards so as to ensure clients are clear as to the requirements under the Sustainability Framework to respect human rights, and how this requirement is to be fulfilled.

3. The revised text should consistently incorporate language to require clients to address gender-differentiated risks and impacts of business activities.
4. Clarify references to communities and other stakeholders to ensure consistency – this may be assisted by use of the phrase “Community and other stakeholder” engagement.
5. Clarify that the human rights of affected communities should be prioritised in any stakeholder engagement.
6. Define and ensure consistent reference to various action plans in the Performance Standards.

4.1. DISTANCING IFC FROM RESPONSIBILITY

Not only is the revised text silent in relation to an IFC commitment to human rights, it actually further distances IFC from any responsibility for the human rights impacts of IFC-supported projects and activities. It does this by, for example, removing a reference that made the Performance Standards applicable to IFC; the Performance Standards are now expressed only in terms of their utility to IFC clients.²⁸ Other subtle changes emphasise that the risks are assumed by IFC clients, not IFC.²⁹

In the CODE Report, IFC states that “IFC is concerned that the business activities it finances identify adverse human rights risks, and avoid or address these risks”.³⁰ In terms of its own responsibility, the strongest human rights commitment made by IFC in the SES Policy is that “the risk of being complicit in gross human rights violations may require IFC to refrain from financing the business activity”.³¹ It is entirely inappropriate that this commitment is worded as a permissive statement; that IFC “may” refrain from financing business activities that involve a risk of being complicit in gross human rights violations, rather than a mandatory requirement, which would determine that IFC must not fund such activities. The reference to “gross human rights violations” also implies that IFC could indeed fund business activities that carried a risk of other human rights violations. As a minimum, IFC must ensure that the revised Sustainability Framework contains an explicit commitment to ensuring that IFC projects and other activities do not cause or contribute to human rights abuses.

The revised text also misses several opportunities to incorporate reference to international human rights law in relation to the requirements placed on IFC in the Sustainability Framework. In new text about the provision of advisory services, for example, the SES Policy only makes reference to national laws and regulations. The text explains that the advisory services of IFC include “developing social and environmental standards for the private sector”.³² Given IFC’s stated recognition of the responsibility of the private sector to respect human rights, it is incongruous that in the provision of advisory services, which include development of standards for the private sector, IFC would not be required to make reference to international human rights standards.

Similarly, paragraph 13 of the revised SES Policy contains new text regarding IFC’s commitments, but fails to reference human rights. This text refers to IFC working with business partners who pursue social and environmental outcomes in their business activities

with a view to improving “sustainability performance”, “sustainable growth”, and “sustainability value”.³³ In light of the responsibility of business to respect human rights, IFC’s role in collaborating with private entities should include assisting businesses to respect human rights in all their activities.

4.2. REQUIREMENTS PLACED ON CLIENTS IN RESPECT OF HUMAN RIGHTS

While IFC states that it recognizes that its clients should identify and avoid or address adverse human rights risks, IFC has not taken any significant steps to clarify client requirements under the Sustainability Framework to ensure they fulfil their responsibility to respect human rights. Instead, IFC has concluded that: “Business, civil society, and other stakeholders understand that social and environmental considerations in business contexts are broadly equivalent to human rights considerations”.³⁴ As a result, IFC proposes to retain a focus on social and environmental issues in the Performance Standards, while explicitly spelling out human rights considerations “where relevant”.³⁵

The approach to human rights proposed by IFC contains two fundamental flaws. First, it is erroneous to assume that social and environmental considerations are “broadly equivalent” to human rights considerations. While the processes of assessing environmental, social and human rights impacts may be linked, social and environmental assessments alone are insufficient to ensure adequate identification of potential human rights impacts. As the SRSG has distinguished, “While these [human rights impact] 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.”³⁶ The inadequacy of social and environmental assessments to ensure consideration of human rights impacts was highlighted in Amnesty International’s comments on the 2006 Sustainability Framework.

Second, despite IFC’s proposal to explicitly recognize human rights considerations “where relevant”, the revised text of the Sustainability Framework contains almost no substantive requirements for either IFC or its clients to ensure respect for human rights. The Sustainability Framework is largely silent on substantive human rights requirements for IFC clients. The SES Policy contains a general statement that IFC recognizes that the private sector should respect human rights,³⁷ and that IFC expects its clients to identify risks of complicity in human rights violations committed by third parties.³⁸ Yet these expectations are not given any weight in the Performance Standards, which contain the requirements that IFC imposes on its clients. Performance Standards 1 to 8 contain only three explicit references to human rights.

The only substantive reference to human rights in the revised draft of Performance Standard 1 occurs in a footnote. Paragraph 6 of the revised draft requires the client to identify the social and environmental risks and impacts of the project.³⁹ The footnote specifies that consideration of human rights may form part of this assessment where there is a “reasonable” expectation that human rights risks and impacts would be “significant”. Both as a matter of form and in its content, the footnote is entirely inadequate to ensure that IFC clients identify, assess, avoid and address potential impacts of their activities on human rights. As a matter of form, the identification of such an important issue in a footnote fails to give sufficient primacy to the valid concern that IFC projects and business activities frequently fail to consider human rights impacts and yet such projects and activities can have

significant adverse effects on human rights. The footnote also fails to clarify the steps that clients should take to understand and address human rights issues. Unless clients are required to identify and assess potential human rights impacts as a matter of course, it is unclear how an assessment could be made as to whether “significant” human rights risks might “reasonably” be expected to exist. Performance Standard 1 should require both explicit identification of risks to human rights and that the process of assessment of risk is itself respectful of human rights.

The most significant improvement in IFC Sustainability Framework in terms of explicit reference to human rights occurs in Performance Standard 4, which relates to community health, safety and security. This Performance Standard now requires IFC clients to be guided by international human rights principles and humanitarian law in relation to employees or contractors retained to provide security.⁴⁰ Despite this reference, Performance Standard 4 fails to identify precisely the documents in which these international human rights principles are articulated, and fails to require compliance with them; clients are only required to be “guided” by these principles. Performance Standard 4 should require clients to ensure that private security at IFC-supported projects is provided in line with the principles contained in the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the Voluntary Principles on Security and Human Rights.⁴¹ Further, where public security is provided, both IFC and its clients should be required to engage in consultations with host governments to promote observance of these guidelines by public security forces.

The third and final reference to human rights is contained in Performance Standard 7, which addresses interactions with Indigenous Peoples and retains an explicit reference to human rights in the objectives of the standard while expanding the reference to include dignity.⁴² However, the content of Performance Standard 7 fails to adequately reflect this commitment to Indigenous peoples’ human rights as recognized in international law, which would require recognition of the need to obtain Indigenous Peoples’ free, prior and informed consent (FPIC) in certain circumstances. Instead, it retains the lesser requirement of free, prior and informed consultation (FPI Consultation) in the Sustainability Framework. In its CODE report, IFC delayed consideration of the need to include language consistent with international law on the basis that it considers FPI Consultation as implemented by IFC to be “functionally equivalent” to FPIC.⁴³ The inadequacy of this approach is explored further in section 7, below.

4.3. GENDER

Gender has been recognized as one of the cross-cutting thematic areas of concern raised during the first phase of IFC’s consultation process, along with climate change, ecosystem services and human rights.⁴⁴ IFC has analysed the Performance Standards “through the lens of strengthening the gender requirements” and identified several areas where this could be done.⁴⁵ IFC states that it is committed to creating “opportunities for women [...] by an approach that promotes equality under the law, creates equal opportunities through our private sector investments and ensures that everyone has a voice while helping to better leverage the untapped potential of women as well as men in developing countries”.⁴⁶ As a result, IFC has included some specific references to the importance of a “gender-responsive approach”⁴⁷ in the revised text of the SES Policy and Performance Standards.⁴⁸

While recognition of the need to address gender-differentiated impacts is positive, the revised Performance Standards do not provide sufficient direction to IFC clients to enable them to adequately address gender issues. For example, revised Performance Standard 1 requires (in a footnote) that in identifying a project's possible social and environmental risks and impacts, the client should consider those relating to "gender differences".⁴⁹ It also requires clients to "identify groups and communities that may be directly and differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status", and clarifies (again in a footnote) that clients should also take into account factors such as gender.⁵⁰ The revised Standard also states that the client's consultation process should be inclusive of women.⁵¹ However, revised Performance Standard 1 does not go into any detail as to how clients should ensure that gender-differentiated impacts are assessed and addressed, or how to ensure that women are consulted meaningfully throughout the project life-cycle.

While the Guidance Notes provide some additional information for clients, overall, they too lack specificity as to *how*, in practice, clients should ensure that gender-differentiated impacts are taken into account. Moreover they do not include any reference to women's human rights and the necessary measures to ensure the full protection of the rights of women and girls. IFC's commitment to gender issues would benefit from much clearer reflection of relevant human rights law and standards across the SES Policy and Performance Standards. Some additional detail on this issue is provided below, in section 7.

4.4. LINGUISTIC CHANGES

Three changes proposed throughout the revised text require comment. The first relates to the move away from use of the word "communities" in favour of the word "stakeholders". The second relates to the replacement of the word "minimize" with "reduce". The third relates to continued references to action plans that are no longer a requirement in the revised text.

'COMMUNITIES' AND 'STAKEHOLDERS'

According to IFC, one of the most significant changes to Performance Standard 1 relates to expanding client requirements on community engagement so as to address all stakeholders in varying degrees rather than affected communities.⁵² In Amnesty International's view, the proposed change introduces variability and uncertainty as to whose interests, rights and concerns ought to be identified and addressed. This is partly brought about by inconsistent use of terminology throughout the Performance Standards. The revised text uses the terms "communities", "stakeholders", "Affected Stakeholders" and "other stakeholders" without consistency.⁵³ Performance Standards 5 and 7 continue to use the term "communities" almost exclusively, whereas the SES Policy, and Performance Standards 1 and 4 use both "communities" and "Affected Stakeholders".⁵⁴ The revised text also refers to "other interested parties",⁵⁵ "other parties",⁵⁶ and "key stakeholders",⁵⁷ without defining who these may be.

The inconsistent use of the terms introduces uncertainty as to the extent to which those whose rights are affected by projects should be prioritised in the identification, assessment, and management of project impacts. For example, paragraph 22 of Performance Standard 1, which deals with "Stakeholder" (previously "community") engagement states that "the nature, frequency and level of effort of stakeholder engagement may vary considerably and will be commensurate with the project's risks and adverse impacts on the Affected

Stakeholders". Paragraph 27 of Performance Standard 1 requires clients to prioritize those "directly affected". However, the mixed usage of terms ("communities", "stakeholders", "Affected Stakeholders", "parties" and so on) does not make clear who might be considered "directly affected".

The term "Affected Stakeholder" is defined in the revised text as "people, groups, or communities, who are subject to actual or potential project-related risks and/or adverse impacts on their physical environment, health, or livelihoods and who are often located in the project's near geographical proximity, particularly those contiguous to the existing or proposed project facilities". This definition is problematic. Firstly, the scope of potential risks or impacts (physical environment, health, or livelihoods) is too narrow to capture all potential human rights impacts of a project. Secondly, affected communities can be geographically remote from the project. For example, communities that may be located downstream of a project may still be significantly impacted by pollution by a project of waterways and should therefore be considered "directly affected". "Stakeholders" are defined in the text to include "other stakeholders", who are not communities, but "those people or groups that are not located in the project's geographical area of influence and have an interest in a project and/or ability to influence its outcomes". These other stakeholders could reasonably be interpreted to mean politically and economically influential individuals, companies or groups, who may or may not be considered "directly affected". In this context, the importance of integrating respect for human rights into the Performance Standards becomes clear; it should be made an explicit requirement that respect for the human rights of those communities and individuals whose human rights may be affected by the project should be given priority in the stakeholder engagement process. While the views and input of other stakeholders may be valid and valuable in the engagement process, they should not obscure the fundamental requirement of respect for the rights of project-affected people.

'MINIMIZE' REPLACED WITH 'REDUCE'

Whereas previously clients were required to "minimize" the negative impacts of their activities, the revised text only requires clients to "reduce" these business-related impacts. In particular, Performance Standard 3 now contains text that requires clients to avoid or reduce, and not minimise, adverse impacts on human health and the environment by avoiding or reducing pollution from project activities.⁵⁸ Similarly, the revised text of Performance Standard 4 now requires clients to avoid or reduce, not minimise, risks to and impacts on the health and safety of the Affected Stakeholders.⁵⁹ The revised text introduces a lower threshold for client compliance; requiring clients to only go so far as is necessary to reduce, for example, the production of hazardous wastes, not minimize their production through more effective means. The replacement of the term "minimize" can lead to the client potentially doing less than is possible to respect human rights and still be acting in accordance with IFC Sustainability Framework. In Performance Standard 4, for example, in circumstances where waste is being disposed at unlicensed sites and not according to acceptable standards, the client is only required to "reduce" the waste sent to these sites, rather than not send any waste. In Performance Standard 5, the requirement that clients "reduce" displacement could be achieved by displacing just one less person, rather than looking for all means possible to minimize any displacement.

ACTION PLANS THAT ARE NOT REQUIRED IN THE REVISED PERFORMANCE STANDARDS

Revised text in the Sustainability Framework states that clients must establish a management system that will define desired outcomes and actions to address issues raised in the risks and impacts identification process. This new text states that “the risks and impacts identification process may result in various plans such as Resettlement Action Plans, Biodiversity Action Plans, Water Resource Management Plans, Community Safety Plans, Community Development Plans or Indigenous Peoples Development Plans”.⁶⁰ However, several of these plans are not referenced in the rest of the Sustainability Framework. In particular, Performance Standards 1 to 8 do not define or require the establishment of Biodiversity Action Plans, Hazardous Materials Management Plans, Emergency Preparedness and Response Plans, or Community Health and Safety Plans. The revised text ought to align its terminology, clearly define the above-mentioned plans, and clarify when they should be developed.

5. IFC'S DUE DILIGENCE FRAMEWORK UNDER THE SES POLICY

Amnesty International's comments on the 2006 Sustainability Framework identified serious deficiencies in both the process used to identify potential project impacts and in project monitoring and supervision processes. Key areas of concern for the 2006 Sustainability Framework included the over-reliance by IFC on client information, and inadequate systems for effective monitoring and accountability. These issues have not been addressed in the revised text.

Amnesty International recommendations on the SES Policy:

The SES Policy should outline a robust human rights due diligence process, which would include the following key elements:

1. IFC undertakes preliminary assessment of human rights risks and potential impacts; this assessment should inform decisions taken in respect of the project – including decisions taken on whether IFC will support the project and how the project is classified. The preliminary assessment should also inform subsequent project monitoring.
2. IFC undertakes independent monitoring of client information regarding compliance with client human rights due diligence requirements (which should be elaborated in the revised Performance Standards).
3. Engagement by IFC with communities to ensure that communities have information regarding: (a) involvement of IFC in the business activity; (b) requirements placed by IFC on clients; and (c) the existence of the Compliance Advisor / Ombudsman and other means of raising concerns about the impacts of the business activity.

5.1. PRELIMINARY HUMAN RIGHTS IMPACT ASSESSMENT

According to IFC, the 2006 Sustainability Framework included a shift from a process-driven to an impact-based system of social and environmental categorization.⁶¹ IFC explains that categorization occurs after and is determined by the result of the client's environmental and social due diligence process, rather than categorization establishing the extent of the review process. This shift is emphasized by new text in the SES Policy, which states that IFC "categorizes the proposed business activity based on potential social and environmental risks and impacts".⁶²

Despite this emphasis, the revised Sustainability Framework continues to be silent as to whether IFC should obtain information independent of the client to determine the categorization of the project. As previously urged in Amnesty International's comments on the 2006 Sustainability Framework, IFC itself should undertake a preliminary assessment of the

human rights context and potential impacts of any proposed project; this assessment should, along with other relevant information, inform IFC decisions on the project, including how it is categorized (this includes the projects that IFC funds via financial intermediaries). The results of this assessment should also inform IFC's scrutiny of data, impact assessments and other information provided by the client to IFC.

5.2. INDEPENDENT VETTING OF CLIENT INFORMATION AND MONITORING COMPLIANCE

Revised text in the purpose of the SES Policy states that IFC will undertake environmental and social due diligence in relation to all IFC investments and business activities. Such business activities include direct and indirect investments, as well as Advisory Services. Despite this stated purpose, the text of the SES Policy fails to require IFC to implement any independent process for identifying, assessing or managing social, environmental or human rights risks or impacts. In relation to direct investments, the IFC due diligence process for identifying and assessing risks remains largely focused on reviewing client material.⁶³ The Policy does not identify any requirement for IFC to carry out an independent preliminary assessment or to independently verify information provided by the client. As was the case in the 2006 Sustainability Framework, the only express requirement on IFC to undertake its own investigation pertains to IFC assuring itself that the client's community engagement is one that involves free, prior and informed consultation and enables the informed participation of affected communities (termed "Affected Stakeholders" in the revised text), leading to Broad Community Support (BCS).⁶⁴ The process of determining BCS is discussed in more detail in section 5.3.

In relation to monitoring ongoing compliance with the Performance Standards, the SES Policy remains vague. Paragraph 15 of the revised SES Policy states that as part of its due diligence, throughout the life of IFC's investment, IFC monitors and supervises clients' ongoing performance in relation to conditions under which IFC financing for the business activity could proceed. Paragraph 34 of the revised Policy outlines in greater detail the actions to be performed by IFC in undertaking this monitoring. In many respects, the monitoring process is precisely the same as previously articulated in the 2006 Policy. The most substantive change is that the monitoring process now specifies an annual process, whereas previously it was stated to be periodic. Site visits were previously required in respect of "certain projects with social and environmental risks and impacts", without identification of criteria as to which projects would be monitored. The lack of clarity remains in the revised text.

Expansion of the Sustainability Framework to IFC support through financial intermediaries

As IFC activities funded through financial intermediaries (FIs) are increasing and now represent approximately 40% of IFC approved investments,⁶⁵ one of the more promising changes to the text of the Sustainability Framework is the expansion of its application to all business activities. IFC states in its CODE Report that the revised text of the Policy provides clarity on the due diligence process for direct and indirect investments.⁶⁶ The revised text of the Policy expresses that the purpose of the Policy is to put into practice IFC's commitments to social and environmental sustainability, and expressly extends its application to a broader array of IFC activities, including direct investments, investments implemented through FIs, and activities undertaken by IFC's Asset Management Company and IFC advisory services. Paragraph 2 of the revised SES Policy states that consistent with these commitments, IFC carries out its social and environmental due diligence against the Performance Standards.⁶⁷ Paragraph 16 of the revised Policy expressly states that social and environmental

due diligence applies to the full spectrum of IFC investment activities.

In respect of its indirect investments, however, IFC entirely delegates the responsibility for assessing and managing social and environmental risks to FIs.⁶⁸ The only due diligence undertaken by IFC in relation to indirect investments pertains to “the business portfolio of its FI clients to identify activities where the FIs and IFC could be exposed to risks as a result of their investments, and defines requirements for managing these risks”.⁶⁹ This “due diligence” in respect of an FI’s portfolio consists of a review of the FI’s social and environmental management systems, as required by Performance Standard 1, and a requirement that FIs apply Performance Standard 2 to their workers. In so doing, however, IFC explicitly states that its primary concern is the extent to which the FI and IFC may be exposed to risks as a result of their investments, rather than the extent to which IFC and the FI activities may pose social, environmental or human rights risks. As such, IFC does not itself conduct any due diligence that identifies and assesses the environmental, social and human rights risks of IFC activities conducted through FIs.

The revised text contemplates monitoring site visits to “high risk sub-projects in the case of select FIs to determine effectiveness of their social and environmental management system”.⁷⁰ Despite this progressive step, it is unclear when such a site visit to an FI sub-project would occur, as elsewhere in the revised Policy, IFC has delegated responsibility for individual transaction monitoring to the FI.⁷¹ Further, whereas IFC “may” review the results of social and environmental due diligence review conducted by the FI for sub-project investments under credit lines or other targeted finance facility,⁷² it does not seek to take a similar role where IFC provides equity, quasi-equity, or general purpose financing to an FI.⁷³

5.3. IFC COMMUNITY ENGAGEMENT

As discussed above, one of the major issues related to implementation that Amnesty International has raised is IFC’s over-reliance on client information and its lack of a proactive role by IFC in carrying out investigations to verify the information provided by the clients. In many respects, addressing these shortcomings would be facilitated by a requirement for IFC to systemically engage with local communities. In particular, IFC should have a process for engaging local communities to provide information about the effect of IFC’s involvement in the project and/or its withdrawal from a project as relevant, the requirements IFC places on clients, and the existence of the Compliance Advisor / Ombudsman.

New text in the revised Disclosure Policy now requires clients to “locally disclose” IFC’s potential participation in the proposed investment.⁷⁴ This is a positive step. However, it is not clear whether this would mean that a client must demonstrate that it has made this information accessible to affected communities, nor whether any information about the implications of IFC involvement are disclosed. Further, as documented by the Compliance Advisor / Ombudsman, there is systemic lack of disclosure by client companies to local communities.⁷⁵ As such, it is important that IFC establishes its own processes for ensuring communities are aware of IFC’s involvement or decision to cease involvement in a project. IFC should also ensure communities are aware of the requirements IFC places on its clients, including by ensuring relevant Action Plans are made accessible to local communities. While the Disclosure Policy requires IFC to make the Action Plan publicly available,⁷⁶ this is generally achieved by posting the document on the internet, which is insufficient to ensure that local communities have access to the Action Plan. The Compliance Advisor / Ombudsman recently noted that “Action Plans are often not disclosed to communities, and communities are not updated on implementation progress”.⁷⁷ If communities were made aware of Action Plans they would be in a better position to understand the full impact of the

projects, which is essential to ensuring that local communities are able to make informed decisions about issues that affect them. Moreover, if IFC ensured that communities were fully aware of the Action Plan and other requirements placed on clients, it could promote local community monitoring processes, which would ensure that contemporaneous information about client compliance would be available to IFC.

At present, the only clear requirement for IFC to obtain independent information relates to determination of Broad Community Support (BCS), yet even this process does not clearly require IFC to engage with communities directly. Amnesty International was informed by IFC that the process the institution uses for determining BCS involves a number of factors as outlined in the Environmental and Social Review Procedures,⁷⁸ which are primarily verified through review of client documentation. Direct contact with the communities is only indirectly suggested in limited form.⁷⁹ Moreover, there is no requirement for IFC to advise communities that it is undertaking a process of determining the level of support or opposition to the project. The revised Sustainability Framework proposes disclosure of a summary of the process outlining how BCS was determined.⁸⁰ Amnesty International, however, strongly urges that IFC ought to be required to fully disclose how BCS is determined for each project, given the lack of a clear methodology to establish whether BCS is in place.

6. PERFORMANCE STANDARD 1: THE CLIENT DUE DILIGENCE FRAMEWORK

Recommendations on Performance Standard 1:

Performance Standard 1 should require an effective human rights due diligence process, including:

- 1. Human rights policy.** Clients seeking IFC support should be required to have a human rights policy in which the company commits to respect all human rights consistent with international human rights standards. Clients should be able to demonstrate that policies are integrated into management systems and are implemented and monitored with adequate resources throughout the company.
- 2. Human rights impact assessment.** IFC should require clients to carry out a human rights impact assessment before final support is granted. A human rights impact assessment can occur along with environmental and social impact assessments, but the assessment must *specifically* consider human rights impacts. It should be undertaken in a manner that conforms to the following principles: clients should ensure provision of information on all aspects of the project to people likely to be affected - in a manner and within a time frame that ensures the information is accessible and useful. Clients should ensure that affected communities or individuals are able to participate in decision-making processes; and there should be disclosure, in accessible form, of the outcomes of impact assessments, as well as a process to allow people to query and challenge the assessments.
- 3. Action Plans to specifically address measures to prevent human rights abuses, and avoid, minimize and address other negative human rights impacts.** For projects that pose a risk of adverse human rights impacts, IFC should require clients to submit an Action Plan that specifically sets out how identified risks of adverse human rights impacts will be addressed and managed. Such an Action Plan should be submitted before final support is agreed. Involvement of affected communities in the development of the Action Plan will be critical in identifying effective avoidance and mitigation measures.
- 4. Engagement with affected communities and individuals.** All clients receiving IFC support should present a clear explanation of how affected communities will have access to information, including Action Plans and information about grievance mechanisms, and be consulted on decisions and activities that are likely to affect their human rights throughout the project's life-cycle.

6.1. NEED FOR A HUMAN RIGHTS DUE DILIGENCE PROCESS

Amnesty International's comments on the 2006 Sustainability Framework urged amendments to be made to title and substance of Performance Standard 1 to incorporate human rights.

The revised text of Performance Standard 1 proposes a minor change to the title, from “Social and Environmental Assessment and Management Systems” to “Assessment and Management of Social and Environmental Risks and Impacts”. The effect of the proposed change is to specifically refer to identification and management of risks, not just impacts. While this is a welcome addition, the proposed change does not go far enough in ensuring that the types of risks and impacts identified include risks to and impacts on human rights. As noted above, human rights are only referenced once in Performance Standard 1 and this occurs in a footnote. The Performance Standard should require a clear human rights due diligence process, including a requirement that clients conduct an assessment of human rights impacts.

The social and environmental assessment and management system required under Performance Standard 1 includes: (i) a policy statement; (ii) an identification of risks and impacts system; (iii) management systems, plans and agreements; (iv) organisational capacity and competency; (v) emergency preparedness and response; (vi) stakeholder engagement; and (vii) monitoring and review.⁸¹ The seven elements referred to in the revised text outline processes that existed in the 2006 Sustainability Framework, but renames them to reflect the terminology used by the Special Representative on Business and Human Rights in identifying the elements of corporate due diligence.⁸² While overall this is not an unwelcome development, the renaming fails to ensure the *content* of the framework of the Special Representative on Business and Human Rights is reflected; such as ensuring that the policy statement includes a commitment to respecting human rights, and that the assessment process explicitly considers impacts on human rights. Further, in adjusting the elements of the system to fit the due diligence outline of the Special Representative on Business and Human Rights, IFC has removed a positive element of the social and environmental management system previously required by the Performance Standards; namely, Reporting.

The limitations of Performance Standard 1 were highlighted in Amnesty International's assessment of the 2006 Sustainability Framework. These limitations remain in the revised text and as such, do not need to be repeated. IFC is urged to refer to Amnesty International's earlier comments. Beyond these comments, Amnesty International notes some minor positive changes below.

6.2. ADDRESSING THE RISKS POSED BY ACTIVITIES OF THIRD PARTIES

Paragraph 2 of Performance Standard 1 addresses the often vexed issue of risks and impacts that are the responsibility of the government or other third parties over which the client does not exercise control or influence. The issue of whether corporate actors may exercise influence over governments and other third parties is by no means a simple one, and while there may be cases in which private parties do not exercise influence over others, there are many examples of where corporations do exercise influence over governments and other third parties.⁸³ Performance Standard 1 requires clients to “identify the different entities involved and the roles they play, and the corresponding risks they present to the client”. The Performance Standard does not specify that the client should identify risks that the third party activities may pose to the human rights of local communities, social issues or the environment. It is important that private actors do not ignore the risks and impacts that the activities of other parties may pose to social, environmental and human rights considerations.

This is particularly the case where governments or other parties have engaged in activities that violate the rights of local community members prior to the entry of the client into the project.

It is important that clients identify and consider means of addressing past grievances wherever possible so as to ensure that any further activities do not exacerbate past injustices. However, paragraph 2 of the revised Performance Standard 1 only requires clients to identify the different entities, the roles they play, and “the corresponding risks they present to the client”.⁸⁴ This text should include a requirement that IFC clients identify and assess means of addressing risks and impacts on human rights and the environment resulting from third party activities prior to commencement of new activities in the same region or project.

6.3. QUALITY OF BASELINE DATA

The revised text establishing the risk and impacts identification process refers to the need to ensure that the risks identification process is based on “recent” social and environmental baseline data “at an appropriate level of detail”. The requirement that such data be recent is a welcome improvement. However, there remains an inadequate reference to other qualitative and quantitative data.

6.4. CUMULATIVE IMPACTS

A positive amendment to Performance Standard 1 is the broader recognition of cumulative impacts. Whereas previously clients were only required to identify cumulative impacts of “project-related” developments, the revised text removes these words so as to expand consideration to non-project related developments.⁸⁵ Clients are also required to consider areas potentially impacted by unplanned but predictable developments caused by the project. Amnesty International welcomes the expanded consideration of cumulative impacts, as failure to address such issues can have significant repercussions for the human rights of those affected by projects and project-related infrastructure.

6.5. GRIEVANCE MECHANISMS

Revised text in Performance Standard 1 now requires clients to establish grievance mechanisms as a matter of course, whereas previously they were only required if the client anticipated ongoing concerns. The proposed change is welcome - however, it is disappointing that IFC has not required that client grievance mechanisms conform to the principles outlined by the Special Representative on Business and Human Rights to ensure such mechanisms are credible and effective. These principles are:⁸⁶

- Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;
- Accessible: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

- Predictable: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;
- Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;
- Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;
- Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

The mechanism should also focus on direct or mediated dialogue.⁸⁷

The Special Representative on Business and Human Rights emphasised that company-level grievance mechanisms “should be designed and overseen jointly with representatives of the groups who may need to access it”. By contrast, revised text in Performance Standard 1 states that only in “some cases, the design of the grievance mechanism may be based on feedback and suggestions from Affected Stakeholders”.⁸⁸ Amnesty International believes that the involvement of local community members in the design of a project-level grievance mechanism should be considered a standard requirement unless the client can demonstrate that exceptional circumstances preclude community participation.

7. PERFORMANCE STANDARDS 3, 4, 5, 7: REVISED TEXT

Amnesty International recommendation:

1. Performance Standards 2-8 should be revised to explicitly refer to relevant international human rights instruments and standards.

In commenting on the 2006 Sustainability Framework, Amnesty International focused on four Performance Standards to illustrate some of the shortcomings of the IFC Sustainability Framework in relation to human rights. For consistency, this document will also comment on the same Performance Standards, namely: 3, 4, 5 and 7.

7.1. PERFORMANCE STANDARD 3

There is increasing recognition by human rights monitoring bodies and international regional and national courts of the causal link between poor environmental quality and violations of human rights.⁸⁹ Environmental pollution can result in violations of the right to an adequate standard of living, including the rights to food, water, and housing, the right to health, and the right to life itself. Revised text in Performance Standard 1 states that “The Client will identify the social and environmental risks and impacts of the project,”⁹⁰ including consideration and identification of “Relevant risks and impacts to [...] human health, human rights, gender differences [...] and access to water resources”.⁹¹ However, Performance Standard 3, which deals with pollution and the prevention of pollution, continues to contain no explicit requirements for clients to identify and address the risks or impacts that pollution may have in relation to human rights. Further, the relationship between Performance Standard 3 and Performance Standard 4, which addresses community health, safety and security, continues to be unclear.

The right to health is one of the many human rights that can be negatively impacted as a result of pollution. The right to health encompasses access to good quality, affordable and culturally acceptable health services, and to conditions essential for good health, such as safe water, adequate food, sanitation and shelter. The UN Committee on Economic, Social and Cultural Rights has clarified that the right to health extends to the underlying determinants of health, including “a healthy environment”.⁹² The Committee has also clarified that this extends to “the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health”.⁹³ As with all rights, ensuring non-discrimination is at the heart of the right to health.

While Performance Standard 3 makes references to human health, these references are not adequate to ensure that IFC clients identify, address, or monitor potential impacts of pollution on the human right to health. For example, paragraph 4 of revised Performance Standard 3 instructs clients to apply pollution prevention principles and techniques to “avoid, and if not possible, reduce adverse impacts on human health and the environment”.⁹⁴ Paragraph 12 of revised Performance Standard 3 likewise states that “the client will avoid the release of pollutants or, when avoidance is not feasible, reduce and/or control the

intensity and mass flow of their release so as to avoid adverse impacts to human health and the environment".⁹⁵ However, as identified in Amnesty International's comments on the 2006 Sustainability Framework, it is not clear that the client should seek to identify the impacts of project-related pollution on human health; nor is there clarity on the need to ensure that the health impacts of pollution are monitored and addressed over the project's lifetime. Additionally, Performance Standard 3 fails to instruct clients to ensure that procedural safeguards are in place to ensure respect for the right to health.

DIFFERENTIATED IMPACTS OF POLLUTION

There is insufficient clarity in Performance Standard 3 as to the manner in which clients ought to identify and address issues relating to gender differentiated impacts of pollution. As noted previously in Amnesty International's analysis of the 2006 Sustainability Framework, the impacts of pollution can disproportionately affect women and girls who are often responsible for water collection, the health and hygiene needs of the family, and crop cultivation. Despite this, there is no requirement in Performance Standard 3 for clients to assess and respond to the gendered effects of pollution. Indeed, despite improved references to gender elsewhere in the Sustainability Framework, there is no reference to gender or women in the entire text of Performance Standard 3.

Performance Standard 3 also fails to require clients to consider whether pollution will result in greater risks and impacts on some members of the community than others. Human rights law requires special measures to be taken to identify and protect the rights of individuals and groups that are at risk. There may be a variety of factors that cause some members of the community to be more vulnerable to the effects of pollution than others. The health of children, the elderly and disabled, pregnant or lactating women or members of the community who suffer from a higher incidence of immunodeficiency or other health problems, may all be at greater risk from pollution.

ENVIRONMENTAL DEGRADATION AND POLLUTION

Amnesty International has documented the differentiated impacts - based on both gender and vulnerability - that can result from environmental degradation and pollution. For example, while not an IFC-funded project, Amnesty International has reported on the impacts of oil industry pollution on pregnant women in the Niger Delta. In Ebocha, an area in the oil-producing region of the Delta, pregnant women have reportedly had to leave the area because of exhaustion they relate to gas flaring. Gas flaring, which refers to the burning of excess gas that is released in the extraction of oil, is a practice still employed by many companies in the Niger Delta despite the practice having long been acknowledged as extremely wasteful and environmentally damaging.⁹⁶ Amnesty International consulted a medical expert about the likely impacts of flaring. According to Dr Carolyn Stephens, Reader in International Environmental Health at the London School of Hygiene & Tropical Medicine, "While there is no direct evidence of impacts of gas flares on pregnant women, they are more likely to be vulnerable to any airborne contaminants during this period and exposures to oil-related contamination have been shown to be linked to maternal outcomes such as spontaneous abortion in other settings."⁹⁷ Performance Standard 3 should specifically require IFC clients engaged in activities likely to result in pollution to ensure that the differentiated effects of pollution on segments of the surrounding communities (such as pregnant women, children and the elderly) are identified and that appropriate measures are taken to address risks to their human rights.

IMPACTS OF POLLUTION ON RIGHTS OTHER THAN HEALTH

Performance Standard 3 also fails to require clients to consider the risks posed by pollution to a range of human rights, such as the rights to water, food or an adequate standard of living. There are some minor improvements in relation to the issue of water, but these do not address the human right to water. Whereas the 2006 Sustainability Framework made scant reference to water consumption, a new paragraph in the revised text of Performance Standard 3 does address the issue. While this is a positive development, the text only requires the client to adopt measures that “avoid or reduce” water usage so that the project’s water consumption does not have “significant adverse impacts upon others”. In so doing, Performance Standard 3 fails to require that clients ensure their activities do not compromise the availability of adequate, safe drinking water and water for domestic use.⁹⁸

The availability of a sufficient, safe, accessible supply of water is an essential component of the right to water, and is also closely linked to the rights to health and food. The UN Committee on Economic, Social and Cultural Rights has commented that the right to water includes the right to maintain access to existing water supplies necessary for the enjoyment of the right, and the right to be free from contamination of water supplies.⁹⁹ Performance Standard 3 gives insufficient consideration to the potential impact pollution may have on the ability of affected individuals and communities to access adequate clean drinking water, or to ensure sufficient clean water is available for bathing, washing and other domestic purposes. Additionally, procedural safeguards outlined in international standards are not reflected. In relation to the right to water there exist safeguards that should be in place before any action is taken that might result in a negative impact on an individual’s right to water. These include: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies.¹⁰⁰

The text of Performance Standard 3 also places no requirement on the client to identify and manage the risks that indiscriminate water consumption by industrial activity might have on vulnerable populations, such as individuals or communities who have no readily accessible alternative sources of water.

As with pollution of water, the potential impacts of pollution on soil and air can also impact the ability of local people to grow or harvest food. In turn, pollution of soil, water and air can negatively affect the capacity of affected communities to earn an income based on farming, fishing or rearing livestock. These potential negative impacts on human rights are not addressed.

CLIENT DISCRETION

There remains in Performance Standard 3 and the Guidance Notes significant client discretion as to the extent to which pollution avoidance and reduction measures are taken. Despite the removal of a reference to technical and financial feasibility in two paragraphs of the revised Performance Standard 3,¹⁰¹ the application of pollution avoidance and reduction measures continue to be generally subject to these broad qualifying terms.

EMERGENCY PREPAREDNESS

Amnesty International's comments on the 2006 Sustainability Framework noted that the references in Performance Standard 3 to emergency preparedness were inadequate for human rights due diligence. The revised text entirely removes any reference to emergency preparedness from Performance Standard 3. While the revised text of Performance Standard 1 contains greater elaboration of emergency preparedness involving local communities, it is essential that such emergency preparedness takes into account issues related to pollution. It is strongly recommended that there be a cross reference between Performance Standards 1 and 3 in this regard, consistent with cross references already contained in the revised text between Performance Standard 1 and Performance Standards 2 and 4.

7.2. PERFORMANCE STANDARD 4

Performance Standard 4 relates to identification and management of potential risks to the health, safety and security of communities (renamed "Affected Stakeholders" in the revised text). Performance Standard 4 seeks to address health, security and safety issues arising from buildings and other physical structures, exposure to hazardous materials, natural hazards, disease, and use of security personnel. Despite clear areas of overlap between Performance Standards 3 and 4, Performance Standard 4 states that impacts on human health due to pollution are found in Performance Standard 3. However, as noted above, the impact of pollution on the right to health is not adequately dealt with in Performance Standard 3. Additionally, Performance Standard 3 does not clarify the relationship to Performance Standard 4.

The revised Performance Standard 4 references human rights in the context of retaining security personnel. The text states that when directly retaining employees or contractors to provide security to safeguard personnel and property, clients will be "guided" by international human rights principles and humanitarian law. Clients are also required to make "reasonable inquiries" to ensure that those providing security are not implicated in past human rights abuses. While the inclusion of these specific references to human rights in Performance Standard 4 is a positive development in the revised text, the permissive nature of the text and the lack of specificity are inappropriate. Clients should be directed to require security personnel to abide by the principles contained the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the Voluntary Principles on Security and Human Rights.¹⁰²

Beyond this reference to human rights in relation to security personnel, Performance Standard 4 fails to make any other explicit reference to human rights and thereby fails to ensure that clients identify and address the many potential human rights risks associated with other health, safety and security issues. As with Performance Standard 3, Performance Standard 4 does not require clients to ensure affected communities have access to information they need to assess the risks they may face as a result of the use and disposal of hazardous materials, even if such materials may be life threatening. The revised text of Performance Standard 4 removes the requirement for the client to disclose the Action Plan and any other project-related information to the affected communities and government agencies where the project posed risk to or adverse impacts on health and safety of affected communities.¹⁰³ The earlier text also required clients to engage the affected communities

and government agencies on an ongoing basis. The removal of this disclosure and engagement requirement is retrogressive. As identified above, the communication of information to potentially affected individuals and communities is critical to ensuring that human rights are protected.

Some potential risks to communities are not identified at all in Performance Standard 4. In its identification of risks to the community Performance Standard 4 takes a 'disease specific' approach, which falls short of recognising other risks the community may face. For example, whereas paragraphs 9 and 10 require the client to avoid or reduce the potential for community exposure to various diseases, including communicable diseases that may be associated with the influx of temporary or permanent project labour, other impacts, including social impacts associated with the influx of labour, are not considered. These impacts may include gender specific impacts, particularly in circumstances where a largely male workforce is employed. For example, an increase in alcohol and drug abuse, a decrease in physical safety and increase in sexual violence, marginalisation of local male members of the community who are unable to obtain work in the project, or a reallocation of traditional work roles as a result of members of the community obtaining work in the new project, which can often result in women undertaking a greater burden of household and farming chores. It is also not uncommon for these social impacts to result in an increase in domestic violence.

Somewhat retrogressively, while the earlier text required clients to give particular attention to exposure to natural hazards "especially where the structural elements are accessible to members of the affected community", the revised text only places this requirement on clients in relation to new buildings and structures. Similarly, although paragraph 6 of Performance Standard 4 requires clients to avoid injuries to persons in the context of designing, constructing, operating and decommissioning structural elements of a project, other impacts are not considered.

7.3. PERFORMANCE STANDARD 5

Amnesty International's comments on the 2006 Sustainability Framework raised significant concerns about certain shortcomings in Performance Standard 5 which meant it was inadequate to ensure respect for human rights in the context of resettlement. In particular, Performance Standard 5 did not require that projects should not result in forced evictions. The scope of the standard was also very limited; it was applicable only in circumstances where physical or economic displacement was a result of project-related land acquisition, but not where projects impacted access to land or other usage of the land. The standard also failed to emphasise the requirement under international human rights law that eviction should be undertaken as a last resort and only after all feasible alternatives have been explored in genuine consultation with affected persons.¹⁰⁴ Performance Standard 5 did not require procedural requirements and safeguards to be in place prior to eviction, despite international recognition that these safeguards are essential to avoid an eviction being a forced eviction contrary to international law.¹⁰⁵ Other areas of concern were: weak requirements in terms of offering replacement land¹⁰⁶ 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;¹⁰⁷ and lack of a clear requirement that resettlement sites must comply with *all seven* criteria for adequacy of housing under international law.¹⁰⁸

CONTINUED FAILURE TO PREVENT FORCED EVICTIONS

The revised text of Performance Standard 5 offers some improvements, though it continues to be inadequate for ensuring that human rights risks and impacts by projects are identified and adequately addressed. Of particular concern is the fact that the Performance Standard still does not refer to forced evictions or clearly stipulate that displacement/resettlement should not contravene international standards on evictions. The language of the objectives of Performance Standard 5 has been slightly improved from the original text by clarifying that the Performance Standard relates to displacement, not just involuntary resettlement.¹⁰⁹ Nevertheless, as stated in Amnesty International's comments on the 2006 Sustainability Framework, the objectives should specify that projects should not result in forced evictions. Recognition of this objective would provide clarity to clients that Performance Standard 5 aims to protect people from forced evictions and ensure that IFC and the client both exercise the necessary due diligence to ensure that the project does not result in human rights abuses. Both the revised and original versions of the Performance Standards fail to incorporate the necessary safeguards which should accompany any eviction to ensure that it does not breach international standards.¹¹⁰

INADEQUATE SCOPE

The scope of the Performance Standard has been expanded from land acquisition to cover effects linked to restrictions on land use.¹¹¹ This is an improvement and will help address impacts of land acquisition or use by projects on communities who do not have ownership or continuous possession of land, but who nevertheless rely on the land for activities such as foraging, hunting or cultural practices.

Despite this positive development, the Performance Standard still does not adequately address displacement that results from other impacts of projects on land. For example, there is insufficient direction given to clients in revised Performance Standard 5 to identify and address the risk that project-driven pollution or erosion may cause physical or economic dispossession of land, or may prevent community access to or use of land. Paragraph 8 continues to direct clients to deal with such risks and impacts through application of Performance Standard 1. Application of Performance Standard 5 is left to the discretion of the client.¹¹² It is inappropriate to deal with de jure and de facto land dispossession in such differing ways; where people have little option but to leave or cease use of land due to pollution or other negative impacts on the land by a project, those affected by the business activities should be accorded the same protections as those whose land has been acquired through other means. Performance Standard 5 should be expanded to cover all situations of physical and economic displacement and evictions that result from the project.

ALTERNATIVES TO EVICTION AND CONSULTATION WITH COMMUNITIES

Amnesty International's comments on the 2006 Sustainability Framework noted that Performance Standard 5 would benefit from 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, consistent with international standards in relation to evictions. Amnesty International urged that 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.

Changes to the language on consultation with and disclosure to communities has been substantially improved in paragraph 11 of Performance Standard 5. The revised text states that affected persons and communities will be consulted on all key aspects of the process, including among other issues, compensation packages, eligibility requirements, resettlement assistance, the suitability of proposed resettlement sites and timing of resettlement. The inclusion of these specific issues to clarify the scope of community consultation required in cases of displacement is a welcome development and ought to be replicated in other performance standards where community consultation is required.

ABSENCE OF MANY DUE PROCESS REQUIREMENTS

Despite the advances made in relation to consultation, many other due process requirements are absent in the revised text. Amnesty International commented that the 2006 Sustainability Framework failed to require that a number of other procedural requirements and safeguards were in place before evictions are carried out. These include several safeguards and requirements not addressed in the revised text, such as: adequate and reasonable notice for affected persons prior to the scheduled date of eviction; information to be made available in reasonable time to all those affected; the presence of government officials during an eviction; all persons carrying out the eviction to be properly identified; evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; provision of legal remedies; and provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

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 consultations, 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.

IFC is regularly involved in projects in sectors in which forced evictions have been a documented phenomenon, such as large-scale mining, oil, gas and infrastructure projects. In the first half of 2010, for example, IFC has considered supporting mining, oil and gas projects in the Philippines, Argentina, Tanzania, Botswana, Ethiopia, Kuwait, Morocco, Ghana, Burkina Faso, and has approved support in at least three mining projects in that time.¹¹³ Amnesty International has documented forced evictions that have occurred as a result of the failure by security forces to comply with the abovementioned requirements and safeguards in the context of the extractive industries. For example, in April 2009, police forcibly evicted villagers living alongside the Porgera gold mine in Papua New Guinea.¹¹⁴ Families were forced to flee from their homes as police burned down their houses. In many cases residents had no opportunity to take their belongings before their houses were burned. Residents were provided with no alternative housing and many of the families from the area had no option but to rely on their relatives and friends for shelter and food. Allegations regarding improper eviction processes have also been raised by other organisations in the context of IFC-supported projects.¹¹⁵

Given the extent to which IFC services are used to promote the development of projects in industries often associated with forced evictions, it is inappropriate for IFC Performance

Standards to fail to specifically address the issue of forced evictions. Performance Standard 5 should establish clear requirements as to the steps that clients must take to prevent forced evictions occurring. Performance Standard 5 neither requires clients to ensure the relevant safeguards are in place before evictions are carried out nor to inform IFC if they are not. This is an extremely significant omission and opens IFC, its Member States and clients to risks that evictions in IFC-funded projects will be undertaken in a manner that breaches international safeguards against forced evictions as well as other human rights abuses in the context of evictions. IFC should clearly indicate in Performance Standard 5 that it will not support projects that involve evictions if required safeguards are not in place before such evictions are undertaken. 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. It should also clarify that it will not proceed to support the project if 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

Amnesty International previously raised concerns regarding various weaknesses in respect of resettlement and compensation in Performance Standard 5. Many of these weaknesses remain in the revised text. For example, the requirement to offer land-based compensation is still subject to the term “where feasible”,¹¹⁶ and the client is similarly only required to offer “compensation in kind [...] in lieu of cash compensation where feasible” to those who have no recognizable legal claim to land they use or occupy.¹¹⁷ An improvement in the revised text in relation to the offering of land-based compensation is that such compensation is termed a “priority” when those who are economically or physically displaced rely on land and/or natural resources for their livelihoods, and the client must provide verification where circumstances prevent the client from offering suitable replacement land.¹¹⁸ However, this reference to land-based compensation is in a list of possible requirements, to which the client may or may not be held.¹¹⁹ Further, it is not clear what IFC will do with information provided by a client that purports to verify that circumstances prevented suitable land-based compensation being offered.

There have been incremental improvements in the revised Performance Standard. New text includes that it “may be” necessary for the client to commission an external completion audit of the resettlement or compensation plan,¹²⁰ that the preferences of those who are displaced are to be taken into account in relation to relocation in pre-existing communities and groups, and that existing social and cultural institutions will be respected.¹²¹

7.4. PERFORMANCE STANDARD 7

Amnesty International's comments on the 2006 Sustainability Framework noted Performance Standard 7 was out of step with contemporary human rights standards on the rights of Indigenous Peoples, particularly the UN Declaration on the Rights of Indigenous Peoples and the right to Free, Prior Informed Consent (FPIC).¹²² While there are some improvements in the text of Performance Standard 7,¹²³ the fundamental problem remains that it does not incorporate the right of Indigenous Peoples to FPIC.¹²⁴ IFC has argued that a “review of standards and practices related to FPIC globally shows that it is functionally equivalent to FPI Consultation as implemented by IFC in terms of legitimacy of process with desired results”.¹²⁵

CONSULTATION IS NOT FUNCTIONALLY EQUIVALENT TO CONSENT

Amnesty International's view is that the FPI Consultation process – as it stands at present – is not functionally equivalent to FPIC because it fails to direct clients to investigate and determine how affected Indigenous communities will give their consent to a proposed project. Instead, IFC requires an impressionistic appraisal of 'expressions of support' as evidenced by a broad array of indicators (including one-to-one agreements, and agreements reached with affected households or groups).

In terms of this critical issue there is a pressing need for IFC to engage with Indigenous Peoples on this question. To date, there have been inadequate efforts to seek the views of Indigenous Peoples. On such a central question it is imperative that this shortcoming be addressed quickly before final decisions are made.

FPI CONSULTATION AVOIDS REQUIREMENT OF CONSENT

Performance Standard 7 refers to two processes of engagement with Indigenous Peoples. The first is the FPI Consultation process. In addition, there is a higher standard – recognition of the need for the client company to enter “good faith negotiation” (GFN) processes with the affected communities when projects are: (i) located on traditional lands; (ii) involve relocation; or (iii) the commercial use of Indigenous Peoples' cultural resources.¹²⁶ Both processes have as a core requirement the “informed participation” of Indigenous Peoples. For example, relocation of Indigenous Peoples cannot proceed unless the client “enters into a good faith negotiation with the affected communities of Indigenous Peoples, and documents their informed participation and the successful outcome of the negotiation”. “Informed participation” means “organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the affected communities on matters that affect them directly, such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.”¹²⁷

But the fundamental problem is that neither process is directed towards obtaining the consent of the affected community. There is no clear requirement that the client/IFC investigate *how* the community will give its consent to any proposed project. In addition, (following from this fundamental approach) the process does not see consent as an iterative requirement that will arise at different stages of the project's life-span. Instead, both the FPI Consultation and GFN processes require an impressionistic appraisal of a broad range of different factors to determine whether there has been Broad Community Support (BCS), or “expressions of support” of the community.

This requirement is contained in the Environmental and Social Review Procedure (ESRP) – not in Performance Standard 7, which raises the issue of accessibility of information on how IFC assesses evidence of BCS. The ESRP requires clients to provide evidence of the “level of support and dissent related to the project”.¹²⁸ Community support or dissent is assessed according to “an accumulation of ‘material considerations’” including formal and informal expressions of support or objection to the project.¹²⁹ The possible indicators of support include one-to-one interviews, engagement with formal and informal (traditional) institutions, and agreements reached with affected households or groups.¹³⁰ The perception is that this lack of real engagement and generality (in relation to possible indicators of support) provides ample room for IFC and its clients to bypass the typical, but legitimate, challenges that arise as a result of the requirement to obtain indigenous peoples' consent - in particular, a robust

inquiry into Indigenous Peoples' decision-making processes. In addition, the search for "expressions of support" encourages clients to gradually collect fragments of support from different quarters of the community until it has made its own assessment of whether BCS has been obtained. This piecemeal approach to accumulating BCS also risks creating significant conflict within communities and is a process potentially open to abuse by clients.

The problem is compounded by the lack of a requirement for IFC to inform the affected communities that IFC is making an assessment of BCS for a project, how it has determined BCS, or the implications of such an expression of support.¹³¹ There is no independent evaluation and verification process or a process whereby Indigenous Peoples may evaluate and validate IFC's assessment of BCS. Such a process means full control remains with IFC and its clients and the communities concerned are denied any control over the substance or process of a decision.

ACCESSING INFORMATION ON HOW IFC ASSESSES GFN AND FPICONSULTATION (BCS)

It is not possible to determine how IFC assesses whether there has been BCS in relation to FPI Consultation and GFN, without consulting a range of IFC documents, including different sections of the IFC Sustainability Policy; the Annex to the Environmental and Social Review Procedure (which states that it seeks to "clarify IFC's approach" to BCS and FPI Consultation); and the non-binding Guidance Notes.

Those seeking to understand how Performance Standard 7 operates should not have to search for the information. It should be outlined in clear terms in Performance Standard 7. In addition, the description of GFN should also be lifted out of the footnote in Performance Standard 7 and included in the main text of the Standard.

WHAT CONSTITUTES INDIGENOUS PEOPLES' CONSENT?

What is required is an objective investigation into how Indigenous Peoples make decisions, and how in relation to the proposed project, based on full disclosure of all issues to the communities, the communities will determine whether to grant consent to the project. FPIC necessarily requires greater investment by clients and IFC in time and resources.¹³²

Once IFC has determined the decision-making process through a robust investigation, it is able to counter with credibility any claims that it has not obtained community consent. As noted in our comments on the 2006 Sustainability Framework IFC should take responsibility for ensuring FPIC has been obtained. It is the inadequacy of the FPI Consultation process that exposes IFC to criticism and invites groups to resist any proposed development.

ENDNOTES

¹ *Amnesty International Submission to the Review of the International Finance Corporation (IFC) Sustainability Framework*, May 2010, AI Index: IOR 80/003/2010. Amnesty International's comments on the 2006 Sustainability Framework should be read in conjunction with comments provided on the revised text in this document.

² IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010), 1, available at <http://www.ifc.org/ifcext/policyreview.nsf/Content/IBHRandIFCPoliciesPS>.

³ IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010).

⁴ IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010).

⁵ Being the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Optional Protocols.

⁶ For the UN Human Rights Council, John Ruggie, 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*: April 2008, A/HRC/8/5.

⁷ IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010), p 2.

⁸ 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.

⁹ *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.

¹⁰ *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, A/HRC/14/27, 9 April 2010, paras 83-84.

¹¹ IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010), p2.

¹² *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, para 61

¹³ *Amnesty International Submission to the Review of the International Finance Corporation (IFC) Sustainability Framework*, May 2010 (Index: IOR 80/003/2010).

¹⁴ IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010), 7.

¹⁵ For example, the UN Committee Against Torture found that the violent way in which Roma were evicted from their homes, and their dwellings destroyed and burned in the former Yugoslavia constituted acts of cruel, inhuman or degrading treatment in violation of the Convention: *Communication No 161/2000: Yugoslavia, submitted by Hajrizi Dzemailj*. Document CAT/C/29/D/161/2000.

¹⁶ IFC, *The International Bill of Human Rights and IFC Policies and Performance Standards* (2010), 18-

19. According to IFC, this is achieved because: there is consideration of risks and impacts, including those relating to access to water resources, in Performance Standard 1; Performance Standard 2 requires the client to put in place and implement policies on the quality and management of worker accommodation and provision of basic services including water; Performance Standard 3 addresses adverse impacts on human health and the environment by avoiding or reducing pollution from project activities; Performance Standard 4 requires the client to avoid adverse impacts to communities resulting from a project's use of natural resources or from alteration of natural resources, diminishing communities' enjoyment of ecosystem services such as water (see also Performance Standard 6); Performance Standard 5 requires specific measures to improve, or restore, the livelihoods and standards of living of displaced persons; and Performance Standard 7 requires the client to avoid or reduce adverse impacts on the livelihood of project on communities of Indigenous Peoples.

¹⁷ For the right to water, these safeguards include: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies: see Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, p 17, para 56. To prevent forced evictions, the relevant requirements include ensuring that an eviction is undertaken as a last resort and only after all feasible alternatives have been explored in genuine consultation with affected communities: see Committee on Economic, Social and Cultural Rights General Comment No. 7, The right to adequate housing (Article 11(1) of the Covenant): forced evictions, para 15. See also 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, considered by the Human Rights Council in 2007.

¹⁸ International Covenant on Civil and Political Rights, Article 2(3).

¹⁹ See Amnesty International, *Petroleum, pollution and poverty in the Niger Delta*, (Index: AFR 44/017/2009) June 2009.

²⁰ For example by urging changes to legislation that limit the capacity of individuals or groups to initiate legal action. This occurred, for example, in Papua New Guinea where legislation was passed at the instigation of BHP to prevent claims from compensation related to the Ok Tedi mine. The Mining (Ok Tedi Re-stated Eighth Supplemental Agreement) Act 1995 contained a number of provisions that directly infringed on affected villagers' right to seek redress. The Act eliminated all previously available legal grounds to seek compensation from Ok Tedi Mining Limited (OTML) and its shareholders (including BHP Limited) in the PNG courts; excluded compensation claims arising from environmental or social impact; and limited claims arising from environmental impact of the mine: *Mining (Ok Tedi Re-stated Eighth Supplemental Agreement) Act 1995*, clause 5. During a trial in Australia initiated by members of some affected communities, it emerged that BHP's Papua New Guinean lawyers had been involved in drafting the legislation. BHP's role in the preparation of the legislation resulted in the community members' lawyers filing a contempt of court action with the Supreme Court of Victoria. J Cummins found BHP to have acted in contempt of court, stating in his judgement: "I am satisfied beyond reasonable doubt, that [BHP] has sought to block the actions of these plaintiffs presently before this court."... "The conduct of [BHP] is to interfere with the due administration of justice by impeding the lawful right of the plaintiffs to law.": *Dagi, Rex & Ors v BHP Ltd* (ACN 004 028 077) & *Ok Tedi Mining Ltd, Judgement, Contempt of Court*, 20 September 1995. For the full text of the Judgement, see:

<http://vsc.sirsidynix.net.au/Judgments/Civil/1990+/492814.pdf>, last accessed June 2010.

²¹ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 31, para 10.

²² Right to recognition as a person before the law (complicity only); Right to equality before the law, equal protection of the law, non-discrimination; Right to access to effective remedies; Right to be free from retroactive criminal law (complicity only); Right of protection for the child; Right to marry and form a family; Right to freedom of opinion, information and expression; Right to freedom of assembly (complicity only).

²³ IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, 14 April 2010, available at [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/\\$FILE/Compounded+C ODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/$FILE/Compounded+C ODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf), last accessed 19 July 2010.

²⁴ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/85, 7 April 2008, para 24.

²⁵ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 31, para 10

²⁶ IFC, Article I, *Articles of Agreement*, available at http://www.ifc.org/ifcext/about.nsf/Content/Article_I, last accessed 19 July 2010.

²⁷ IFC, *Mission Statement*, available at <http://www.ifc.org/ifcext/about.nsf/7afae2a79a656e70ca25692100069831/d0e9906f064f418185256d03006fcfaa?OpenDocument>, last accessed 19 July 2010.

²⁸ Former paragraph 4 of the *Policy on Social and Environmental Sustainability* (dated 30 April 2006) stated that the “Performance Standards are essential documents to help IFC and its clients manage and improve their social and environment performance through an outcomes-based approach”. The revised text removes the words “and its” and now provides in paragraph 5 that the “Performance Standards are essential documents to help IFC clients manage and improve their social and environmental performance through a risks- and outcomes-based approach”. See Para 5, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 29.

²⁹ For example, paragraph 6 of the revised *Policy on Social and Environmental Sustainability* inserts the following words (in italics): “By adhering to this Policy, IFC seeks to [...] (ii) help clients manage *their* social and environmental risks and impacts; (iii) improve *their* performance; and (iv) enhance positive development outcomes on the ground.” (emphasis added), p 30.

³⁰ IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, p 24, 14 April 2010, available at [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/\\$FILE/Compounded+C ODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/$FILE/Compounded+C ODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf), last accessed 19 July 2010.

³¹ IFC, Para 19, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 33.

³² IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 39, para 39.

³³ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 31, para 13.

³⁴ IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, p 24, 14 April 2010.

³⁵ IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, p 24, 14 April 2010.

³⁶ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/85, 7 April 2008, para 61.

³⁷ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 31, para 10.

³⁸ "IFC expects its clients to identify these risks through appropriate due diligence, taking into account the local context, its influence and control over the third party, and any benefit the clients may derive from third party acts or omissions. IFC as part of its own due diligence process will review clients' identification of risks, and will determine whether such risks are manageable, and if so under what conditions, so as to create outcomes consistent with the Performance Standards. Certain risks, such as the risk of being complicit in gross human rights violations, may require IFC to refrain from financing the business activity." : *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 39, para 19.

³⁹ Footnote 7 states that "Relevant risks and impacts to consider and identify if reasonably expected to be significant include, among others, those relating to climate change, human health, human rights, gender differences, ecosystem functions, and access to water resources". See IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, p 45, 14 April 2010.

⁴⁰ IFC, Para 12, Performance Standard 4, *Community Health, Safety, and Security*, Rev-0.1, p 70.

⁴¹ Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, <http://www2.ohchr.org/english/law/codeofconduct.htm>, last accessed 20 July 2010; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2.ohchr.org/english/law/firearms.htm>, last accessed 20 July 2010; Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/>, last accessed 20 July 2010.

⁴² One of the objectives of IFC's revised Performance Standard 7 is "To ensure that the development process fosters full respect for the human rights and the dignity, aspirations, cultures, and natural resource-based livelihoods of Indigenous Peoples". See IFC, Performance Standard 7, *Indigenous Peoples*, Rev-0.1, p 87.

⁴³ IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, 14 April 2010, p. 11. IFC has indicated that this issue will be further considered in August, with Board consideration occurring in October 2010: IFC Consultation, Brussels, 12 July 2010.

⁴⁴ *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information. Annex A. Review and Update of IFC's*

Sustainability Framework: Overview of Key Issues, IFC, April 14 2010, p. 19.

⁴⁵ *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information* p. 10, para 32.

⁴⁶ *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information* p 22 para c.

⁴⁷ *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information* p. 23, para c.

⁴⁸ The revised Policy on Social and Environmental Sustainability now contains an explicit statement that the IFC “expects its clients to minimize gender-related project risks and unintended gender differentiated impacts” and a commitment to “creating opportunities for women both through its financing activities as well as AS [Advisory Services]”: IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2020, p 31, para 11.

⁴⁹ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April, 2010, p. 45, para 6, footnote 7.

⁵⁰ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April, 2010, p. 47 para 11.

⁵¹ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April, 2010, p 47 para 27, footnote 25.

⁵² IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process* 14 April 2010 p 12, para 40.

⁵³ The revised text of Performance Standard 1 refers to the “stakeholders” as being “workers, Affected Stakeholders, and other stakeholders”. “Affected Stakeholders” are defined as “people, groups, or communities, who are subject to actual or potential project-related risks and/or adverse impacts on their physical environment, health, or livelihoods and who are often located in the project's near geographical proximity, particularly those contiguous to the existing or proposed project facilities”. “Other stakeholders” are defined as “those people or groups that are not located in the project's geographical area of influence and have an interest in a project and/or ability to influence its outcomes”. See IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, (2010), p 43, footnotes 1, 2, 3 and 4.

⁵⁴ For example, the revised draft of the Policy on Social and Environmental Sustainability states that “where the business activity to be financed is likely to generate potential significant adverse impacts on *communities* located in the project's geographical area of influence [...] IFC assures itself that the client's *community* engagement is one that involves FPIC and enables the informed participation of the *Affected Stakeholders*”, (emphasis added), IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 34, para 24.

⁵⁵ The objectives in the revised Performance Standard 1 include: “To ensure that relevant environmental and social information related to the project is accessible to Affected Stakeholders and other interested parties”, IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, p 44, 14 April 2010. See also the Disclosure Policy.

⁵⁶ The objectives in the revised Performance Standard 1 include: “To ensure that projects manage communications and grievances from Affected Stakeholders and other parties”, IFC Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 44.

⁵⁷ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 50, para 23.

⁵⁸ IFC, Performance Standard 3, Rev-0.1, *Resource Efficiency and Pollution Prevention*, p 61.

⁵⁹ IFC, Performance Standard 4, Rev-0.1, *Community Health, Safety, and Security*, p 68.

⁶⁰ See, for example, IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 48, fn 20.

⁶¹ IFC, *Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Report on the First Three Years of Application*, 29 July 2009, para 31.

⁶² IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 32, para 15.

⁶³ The revised draft states: “IFC (i) assesses the client’s social and environmental management system to verify its appropriateness in accordance with the nature and scale of the business activity and level of social and environmental risks and impacts; (ii) assists the client in developing measures to avoid, reduce, restore or compensate/offset for social and environmental impacts; (iii) categorizes the proposed business activity based on potential social and environmental risks and impacts; (iv) identifies risks and potential environmental and/or social impacts and defines conditions under which IFC financing for the business activity could proceed; and (v) monitors and supervises clients’ ongoing performance in relation to those conditions throughout the life of IFC’s investment.”, IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, pp 31-32, para 15;

Para 23 of the revised draft states: “The social and environmental due diligence typically includes three key components: (i) review of the social and environmental risks and impacts of the business activity as assessed by the client; (ii) review of the commitment and capacity of the client to manage risks and impacts, including the client’s social and environmental management system; and (iii) review of the potential role of third parties to meet the requirements of the Performance Standards.”, IFC *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 34, para 23.

⁶⁴ IFC, *Policy on Social and Environmental Sustainability*, 30 April 2006, para 20, p 4, and IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 34, para 24.

⁶⁵ IFC, *Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Report on the First Three Years of Application*, 29 July 2009, p 10, para 31.

⁶⁶ IFC, *Progress Report on IFC’s Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, para 40, p 12, 14 April 2010, available at [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/\\$FILE/Compounded+CODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/$FILE/Compounded+CODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf), last accessed 19 July 2010.

⁶⁷ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 29, para 2.

⁶⁸ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 35, para 26.

⁶⁹ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 35, para 27.

⁷⁰ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 37, footnote 2.

⁷¹ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 35, para 26.

⁷² IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 36, para 30.

⁷³ IFC, *Policy on Social and Environmental Sustainability*, Rev-0.1, 14 April 2010, p 36, para 29.

⁷⁴ *International Finance Corporation's Policy on Disclosure of Information*, revised draft, 2010, p 103, para 14(c)(xii).

⁷⁵ "Documented evidence demonstrated that just over half of the assessed projects that developed Action Plans were disclosed publicly by IFC client companies. ... None of these projects demonstrated that affected communities were updated at least annually on the Action Plan's implementation, as required by Performance Standard 1": Compliance Advisor/Ombudsman, Advisory Note, *Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information*, May 2010, p 13.

⁷⁶ *International Finance Corporation's Policy on Disclosure of Information*, revised draft, 2010, p 102, para (a).

⁷⁷ Compliance Advisor/Ombudsman, Advisory Note, *Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information*, May 2010, p 3.

⁷⁸ IFC, *Environmental and Social Review Procedures Version 4.0*, (2009), pp 34-39.

⁷⁹ Determining BCS may include "Results of IFC site visit". One-to-one interviews are also suggested as one way of gathering evidence of good faith negotiations when required under Performance Standard 7.

⁸⁰ *International Finance Corporation's Policy on Disclosure of Information*, revised draft, 2010, para (d), p 102.

⁸¹ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 44, para 4.

⁸² The SRSG has outlined that corporate due diligence includes having a human rights policy, conducting impact assessments, integrating human rights policies throughout the company, and tracking performance. See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008.

⁸³ For example, see case of Ok Tedi in Papua New Guinea described in footnote 19, above.

⁸⁴ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 43, para 2.

⁸⁵ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 46, para 7.

⁸⁶ *Protect, Respect and Remedy: a Framework for Business and Human Rights*. UN Special Representative on human rights and Transnational Corporations and other entities, June 2008, (A/HRC/8/5), paras 92-95.

⁸⁷ *Protect, Respect and Remedy: a Framework for Business and Human Rights*. UN Special Representative on human rights and Transnational Corporations and other entities, June 2008, (A/HRC/8/5), para 95

⁸⁸ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 53, para 31.

⁸⁹ See for example: Declaration of the United Nations Conference on the Human Environment, available at: <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>, last accessed 20 July 2010, para 1; 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>, last accessed 20 July 2010.

⁹⁰ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 45, para 6.

⁹¹ IFC, Performance Standard 1, Rev-0.1, *Assessment and Management of Social and Environmental Risks and Impacts*, 14 April 2010, p 45, para 6, footnote number 7.

⁹² 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.

⁹³ 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.

⁹⁴ IFC, Performance Standard 3, Rev-0.1, *Resource Efficiency and Pollution Prevention*, p 62, para 4.

⁹⁵ IFC, Performance Standard 3, Rev-0.1, *Resource Efficiency and Pollution Prevention*, p 65, para 12.

⁹⁶ Environmental Rights Action and The Climate Justice Programme, "Gas Flaring in Nigeria: A human rights, environmental and economic monstrosity", June 2005. In this report the authors quote from British government documents in the 1960s that show awareness of gas flaring as a problem. For more information, see Amnesty International, *Petroleum, pollution and poverty in the Niger Delta*, AI Index: AFR 44/017/2009, June 2009, p 18.

⁹⁷ Cited in Amnesty International, *Petroleum, pollution and poverty in the Niger Delta*, AI Index: AFR 44/017/2009, June 2009, p 36.

⁹⁸ The revised Performance Standard 4 refers to the changes that may result from a project's use of natural resources or from the alteration of such resources and the impact this may have on communities (p 70, para 8). These impacts include the "community's diminished enjoyment of ecosystem services such as water". The Performance Standard requires clients to avoid these impacts, but is silent as to how this should be done and does not require clients to assess the impact on affected communities' access to safe and sufficient water for personal, domestic or agricultural use.

⁹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),

E/C.12/2002/11, 20 January 2003, p 4, para 10.

¹⁰⁰ 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”, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, p 17, para 56.

¹⁰¹ Paragraph 4 of the revised text removes the qualification that only technically and financially feasible and cost-effective measures would be required in the application of “resource efficiency and pollution prevention principles and techniques that are best suited to avoid, and if not possible, reduce adverse impacts on human health and the environment”. Somewhat confusingly the footnote that explained the terms, “technical feasibility” and “financial feasibility”, remains in the revised text. See IFC, Performance Standard 3, Rev-0.1, *Resource Efficiency and Pollution Prevention*, pp 61-62, para 4.

Paragraph 15 also represents an improvement, replacing the word “feasible” with the word “possible”, so as to prioritize the avoidance of using or generating hazardous materials, however the feasibility of these measures is reintroduced at the end of the sentence: “The client will avoid or, when avoidance is not *possible*, reduce and/or control the use and/or generation of hazardous materials *as far as feasible*” (emphasis added). See IFC, Performance Standard 3, Rev-0.1, *Resource Efficiency and Pollution Prevention*, p 66, para 15.

¹⁰² Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, <http://www2.ohchr.org/english/law/codeofconduct.htm>, last accessed 20 July 2010; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2.ohchr.org/english/law/firearms.htm>, last accessed 20 July 2010; Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/>, last accessed 20 July 2010.

¹⁰³ IFC, Performance Standard 4, Rev-0.1, *Community Health, Safety, and Security*, p 69, deleted para 6.

¹⁰⁴ Committee on Economic, Social and Cultural Rights General Comment No. 7, The right to adequate housing (Article 11(1) of the Covenant): forced evictions, para 13; Committee on Economic, Social and Cultural Rights General Comment No. 4, The right to adequate housing, (Article 11(1) of the Covenant), para 18.

¹⁰⁵ 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, The right to adequate housing (art. 11.1 of the Covenant): forced evictions, para 15.

¹⁰⁶ The 2006 version of Performance Standard 5, stated 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), Performance Standard 5, *Land Acquisition and Involuntary Resettlement*, 30 April 2006, para 8.

¹⁰⁷ 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", General Comment No. 7, The right to adequate housing (Article 11(1) of the Covenant): forced evictions, para 16.

¹⁰⁸ 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, The right to adequate housing, (Art. 11 (1) of the Covenant), para 8.

¹⁰⁹ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 72.

¹¹⁰ 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. 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 Displacement (referred to as the Basic Principles), which reflect existing standards and jurisprudence on this issue. See: 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, considered by the Human Rights Council in 2007, available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf, last accessed 20 July 2010.

¹¹¹ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, paras. 1,5,6 and 7.

¹¹² The revised text of Performance Standard 5 states that only if such impacts "become significantly adverse [...] with resulting physical and/or economic displacement" that clients "should consider" applying Performance Standard 5. See: IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 74, para 8.

¹¹³ Information on proposed investments available at <http://www.ifc.org>, last accessed 16 July 2010; "IFC Invests in Helio to Support Future Jobs in Tanzania's Mining Industry" 27 Jan 2010 available at <http://www.marketwire.com/press-release/INC-Invests-in-Helio-to-Support-Future-Jobs-in-Tanzanias-Mining-Industry-1108372.htm>, last accessed 21 July 2010; "IFC Supports Solomon Islands Mining Sector with US\$35 million Loan to Gold Ridge Mining", 24 June 2010, available at <http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=7186B79C5AF1A8048525774C0057D50B>, last accessed 21 July 2010; "IFC Investment in Mindoro Resources Supports Responsible Mining in the Philippines", 14 July 2010, available at <http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=AF7A719FD2C1A0C785257760007547DD>, last accessed 21 July 2010.

¹¹⁴ Amnesty International, *Undermining Rights. Forced evictions and police brutality around the Porgera gold mine, Papua New Guinea*, AI Index: ASA 34/001/2010, January 2010.

¹¹⁵ See, for example, concerns raised regarding the impending eviction of 79 families affected by an IFC-supported airport expansion project in Cambodia: BIC, *Communities speak out against displacement*, (June 2010), available at <http://www.bicusa.org/en/Article.11896.aspx>; CAO complaint submitted by a local Cambodian NGO on behalf of 79 families affected by the airport project, available at http://www.cao-ombudsman.org/cases/case_detail.aspx?id=155. The CAO complaint relates to improper land acquisition and compensation, loss of livelihoods, noise pollution, environmental impact to a national park, incorrect categorization, lack of community consultation, and inadequate disclosure of project information to impacted communities.

¹¹⁶ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 74, para 10.

¹¹⁷ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 77, para 21.

¹¹⁸ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 78, para 23.

¹¹⁹ Paragraph 23 states that the client “will meet one or more of the following requirements, as applicable” - one of which relates to providing land-based compensation, rather than stating that the client should meet all applicable requirements. See: IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 78, para 23.

¹²⁰ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 76, para 15.

¹²¹ IFC, Performance Standard 5, Rev-0.1, *Land Acquisition and Involuntary Resettlement*, 14 April 2010, p 77, para 19.

¹²² FPIC is a core requirement of the Declaration. The principle has been applied by the UN CERD Committee (See UN Committee on the Elimination of Racial Discrimination, “General Recommendation XXIII: Indigenous Peoples” (18 August 1997) A/52/18, annex V, Para 5); the UN Human Rights Committee, (UN Human Rights Committee, Ángela Poma Poma 27/3/2009, Communication No. 1457/2006); and the Inter-American Court of Human Rights (See, eg, I/A HR Court, *Saramaka People v. Suriname*, Series C (No. 172) (2007)).

¹²³ For example, a recognition of the need to ensure that the assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources, see, IFC, Performance Standard 7, Rev -01, *Indigenous Peoples*, 14 April 2020, p 90, para 16.

¹²⁴ For the time-being, IFC has chosen to retain the term FPICconsultation instead of FPICconsent. IFC has stated that a final decision on “consent” will be made by October 2010. See: IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, 14 April 2010, p 11, para 35.

¹²⁵ IFC, *Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process*, 14 April 2010, p 11, para 35. Amnesty International has not seen the review to which IFC refers, and so cannot assess the

credibility of the study or its findings. However, Amnesty International notes that according to IFC as at 29 July 2009, only three projects had ever been required to document good faith negotiations with Indigenous peoples (IFC, *Report on the First Three Years of Application*, (2009), par 44.), which raises doubts about the extent to which IFC would have sufficient information to assess whether these processes could be considered equivalent to FPIC.

¹²⁶ Performance Standard 7, paragraph 11-15.

¹²⁷ Performance Standard 1, Paragraph 22.

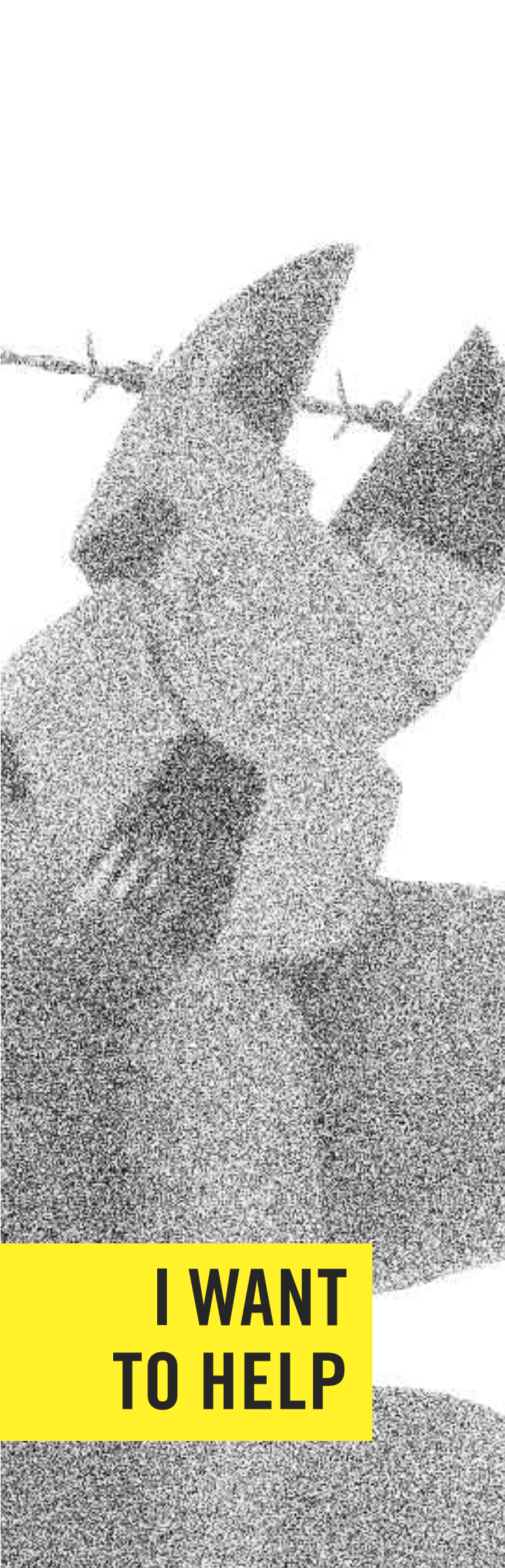
¹²⁸ See, IFC, Environment & Social Review Procedure, Version 2.0, (31 July 2007), 33.

¹²⁹ See, IFC, Environment & Social Review Procedure, Version 2.0, (31 July 2007), 38.

¹³⁰ IFC, Environment & Social Review Procedure, Version 2.0, (31 July 2007), 38-39.

¹³¹ CAO, Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, May 2010.

¹³² Indigenous peoples' representatives to the ADB policy review provided the following formulation of FPIC requirements: "For the purposes of policy application, consent refers to a collective agreement by the affected Indigenous Peoples communities, through an independent and self-determined decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices." Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008. Available at www.forestpeoples.org.



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A HUMAN RIGHTS DUE DILIGENCE FRAMEWORK FOR THE INTERNATIONAL FINANCE CORPORATION

The International Finance Corporation (IFC) is part of the World Bank Group. One of its major functions is supporting private sector investment in developing countries. These countries often face significant challenges in ensuring effective protection of human rights.

IFC supports business activities in industries such as energy and resource extraction, agribusiness and in projects such as large-scale infrastructure development, which are often associated with environmental damage and human rights abuses. IFC-supported projects are frequently carried out in areas that are home to people living in poverty.

In 2009, IFC launched a review of its Sustainability Framework, a set of policies that lays out IFC's own responsibilities and the expected behaviour of its clients. The Framework has been widely criticized as inadequate to effectively address the human rights, social and environmental impacts of IFC-funded activities.

This report provides a human rights analysis of the draft revised Sustainability Framework and also assesses IFC's own human rights analysis, which it carried out as part of the review process. Amnesty International believes that unless human rights standards are adequately reflected in IFC's revised Sustainability Framework, individuals and communities will continue to be exposed to potentially serious human rights abuses as a result of IFC-funded activities.

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Index: IOR 80/004/2010
September 2010

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