

# Proposals for Embedding Human Rights Principles and Requirements

## Into IFC's Policy on Social and Environmental Sustainability and Performance Standards

December 2004

### Introduction

The International Finance Corporation (IFC) Safeguard Policy Review Process<sup>1</sup> offers a unique opportunity to integrate human rights considerations into IFC's policy framework. IFC should use this process to (a) respond to the private sector's need for more guidance and assistance on human rights issues; and (b) clarify the roles and responsibilities of IFC and private sector borrowers to uphold and protect human rights, particularly those of affected people, indigenous peoples and local communities. The Safeguard Policy Review Process is an opportunity to take several steps forward and define concretely IFC's commitment to, and responsibilities for, promoting human rights.

International human rights law includes civil, political, cultural, economic, and social rights, as well as the right to development<sup>2</sup>. Since these rights are central to achieving sustainable development and poverty alleviation, these rights are also central to the role and mission of the IFC and should become part of its policy framework and standards. Additionally, it is a generally accepted principle of international law, which has been affirmed by all of the UN and regional human rights treaty bodies<sup>3</sup> as well as in the Final Declaration of the Vienna World Conference on Human Rights, that "the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."<sup>4</sup> Most recently, the UN Committee on the Elimination of Racial Discrimination reaffirmed "that development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population..."<sup>5</sup>

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<sup>1</sup> This paper focuses on the Performance Standards. However, a rights based approach, including the right to information, a disposition in favor of disclosure, and meaningful participation, should be integrated into the Disclosure Policy as well.

<sup>2</sup> Declaration on the Right to Development Adopted by the UN General Assembly resolution 41/128 4 December 1986.

<sup>3</sup> See, UN Human Rights Committee: *I. Lansman et al. vs. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, 10; UN Committee on the Elimination of Racial Discrimination: *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.; UN Committee on Economic, Social and Cultural Rights: General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions (1997); Inter-American Commission on Human Rights: *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 1997, 89; African Commission on Human and Peoples' Rights: *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, at para. 58 and 69 (hereafter 'Ogoni Case') – "The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities."

<sup>4</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12 July 1993.

<sup>5</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*. UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004.

This does not mean that IFC should become a policing organization on human rights – there are other bodies and institutions that serve that function. It means that the IFC’s lending practices should respect and adhere to applicable provisions of international human rights and humanitarian law and that it should ensure that the projects that it finances do not lead to or exacerbate violations of human rights or humanitarian law – either directly or indirectly. Furthermore, it means that IFC should work with its clients and governments to assist them to respect and protect human rights.

These issues were raised by the Compliance Advisor Ombudsman (CAO) in 2003, which stated that IFC must “systematically consider risks to human rights at the project level, take appropriate [and effective] steps to mitigate them and provide clearer guidance to clients on both these aspects. [T]hese aspects should be reported on at the project level.”<sup>6</sup> Assessments and reports should be undertaken by reputable and independent third parties and not by the client itself and be a condition of IFC support for the project. Project-affected persons, communities and indigenous peoples have the right to participate in assessments, reporting and human rights audits. Furthermore, IFC should address rights-based issues in assessments and guarantee local communities and affected people meaningful input and participation in every project IFC supports.

In order to ensure that human rights are adequately respected throughout the project cycle, human rights protections should be embedded in the overall policy framework and relevant Performance Standards.<sup>7</sup> Integrating a ‘rights’ based approach means incorporating explicit language regarding the rights of affected people, indigenous peoples and local communities and the responsibilities and obligations of state and non-state actors. One useful starting point to consider when integrating human rights protections into the policy framework would be the Tilburg Guiding Principles on the World Bank, IMF and Human Rights (see Appendix 1).<sup>8</sup> In this same vein, the UN Sub-Commission on the Promotion and Protection of Human Rights’ *Norms on Transnational Corporations* are also extremely relevant, in particular as these norms represent a systematization of existing international legal principles in the context of transnational corporation operations and are of obvious importance to the formulation of IFC policy and standards in relation to human rights.<sup>9</sup>

### **General Recommendations**

- The overall policy and standards should be revised to incorporate human rights considerations. This approach should explicitly commit the IFC to achieving universal protection of human rights, including civil, political, economic, cultural and social rights,

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<sup>6</sup> *Extracting Sustainable Advantage? A review of how sustainability issues have been dealt with in recent IFC & MIGA extractive industries projects. Final Report.* Compliance Advisor Ombudsman, World Bank: Washington DC, April 2003, at 36.

<sup>7</sup> Relevant Performance Standards include PS 1 (social and environmental assessments), PS 2 (labor rights), PS 3 (pollution prevention), PS 4 (community health and safety), PS 5 (land acquisition and involuntary resettlement), PS 7 (indigenous peoples and natural resource dependent communities), PS 8 (cultural heritage), PS 9 (management systems and evaluation).

<sup>8</sup> The Guiding Principles are drafted by a Group of experts, meeting at Tilburg University, The Netherlands, in October 2001 and April 2002. Main editor: Prof Willem van Genugten; co-editors: Prof Kees Flinterman, Prof Paul Hunt and Susan Mathews, LL.M. See Appendix 1.

<sup>9</sup> *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 2003.

and it should recognize the Declaration on the Right to Development. The overall policy should include language that clearly articulates the rights of affected people, (including indigenous peoples and local communities), and the responsibilities of the private sector, IFC, and governments.

- IFC's responsibility, as a subject of international law, to respect human rights, via its lending should be clearly articulated and stated as one of its core responsibilities.<sup>10</sup>
- IFC should place more explicit emphasis on the rights of indigenous peoples and local communities to participate in, influence and consent to the various phases of project development, implementation and evaluation.
- IFC should place more explicit emphasis on assessing human rights risks, and monitoring and enforcement for compliance with human rights, including the use of independent audits, by working with other expert institutions and bodies, such as the UN, regional and national human rights bodies, to help monitor human rights situations and conditions where relevant.
- IFC should elucidate the institutional and procedural consequences of non-compliance with human rights obligations (as well as violations of any policy requirement) in the policy.
- IFC must clarify and ensure access to simple, prompt and effective grievance mechanisms and remedies for affected parties. This includes both assessing the nature and extent of remedies available in domestic law and providing independent project-specific remedies and grievance mechanisms to ensure the accountability of the IFC.

### **Specific Recommendations for Overall Policy and Performance Standards**

#### ***I. IFC Policy on Social and Environmental Sustainability, Section 2***

- The policy should explicitly state the IFC's commitment to ensuring -- throughout its operations -- the recognition and protection of the Universal Declaration of Human Rights, the majority of which is customary international law, and the other core universal and regional human rights instruments, as well as those ratified by a particular project-host State.

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<sup>10</sup> See, for instance, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS (5th ed.), London: Sweet & Maxwell (2001), 458-59 (it "has been suggested, for example, that the World Bank is not subject to general international norms for the protection of fundamental human rights. In our view that conclusion is without merit, on legal or policy grounds..."). A number of UN studies have also looked this issue and concluded that the WBG has obligations with respect to human rights law and that it has not paid sufficient attention to human rights. One of these studies concluded in relation to the WBG that "[n]o entity that claims international legal personality can claim exemption from that [human rights] regime. ... If such a claim were to be considered legitimate, it would seriously erode the international rule of law." *Globalization and its full impact on human rights. Final report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission decision 2000/105\**. UN Doc. E/CN.4/Sub.2/2003/14, at para. 37.

## **II. *IFC Roles and Responsibilities in Investment Operations: Section 3***

- One of IFC's responsibilities is to respect human rights, especially of the poorest and most vulnerable, through its investment operations, and ensure, at a minimum, that there is no deterioration of human rights.
- In reviewing new projects for consideration of financing, IFC should determine that projects it finances will help to advance the realization of human rights, or at the very least, will not hinder or contravene them. This includes a commitment that the IFC will not lend for projects that may undermine the ability of a host government to meet its obligations under international human rights treaties and humanitarian law.
- For sectors or projects that may raise human rights concerns, IFC should require an independent assessment including the involvement of expert bodies, (such as the UN, regional or national bodies, or other human rights organizations) to evaluate the situation and inform its internal deliberation process.
- The IFC should identify countries for which the human rights situation is so poor that the IFC's involvement may exacerbate problems and the likelihood that human rights will be respected is small, and will agree not to operate in these countries until the situation improves.<sup>11</sup>
- The IFC will evaluate potential clients to determine if they have a record of flagrant human rights abuses or being complicit with human rights violations. In these cases, the client will not be eligible for financial assistance until that client has taken sufficient remedial measures to correct past practices and prevent future violations.
- The IFC will not support projects in areas of armed conflict unless it is shown, through a comprehensive risk assessment, that the project will not lead to violations of international human rights or exacerbate the conflict.
- The IFC should fully adopt the recommendations on governance, transparency, and security and human rights that were included in the Extractive Industries Review and simultaneous review by the Operations Evaluations Department (OED).
- The IFC should incorporate requirements that borrowers respect, protect, and fulfill their human rights obligations into the Action Plan and loan agreements

## **III. *Performance Standard 1: Social and Environmental Assessment***

- The assessment process should include consideration of human rights issues as part of the initial scoping. The assessment should identify the rights at risk of being violated, availability of prompt and effective domestic remedies to seek redress for violations as well as recommendations for avoiding those violations. It should also include recommendations for respecting, protecting, and fulfilling human rights and measures required to provide effective remedies, including in relation to the overall accountability of the IFC itself.

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<sup>11</sup> EBRD Article 1 establishes that the EBRD is committed to applying the principles of democracy, which is broadly interpreted to include respect for human rights. This principle has been applied and affected EBRD's lending to Uzbekistan, Belarus and Turkmenistan.

- The assessment should provide for the meaningful and informed participation of peoples and communities potentially impacted by the project, including in subsequent audits and evaluations.

**IV. *Performance Standard 2: Labour and Working Conditions***

- The objective should be revised to explicitly affirm respect for international workers' rights and recognition that this contributes to equitable economic development and poverty reduction
- The standard should explicitly state the IFC's agreement and commitment to abide by the standards and conventions of the International Labor Organization (ILO), and national laws.

**V. *Performance Standard 3: Pollution Prevention and Abatement***

- The standard should ensure that local communities, workers, other individuals, and the broader public have full access to information concerning the practices and impacts of projects, including pollution emissions.
- To ensure satisfaction of health-related rights, such as the right to health, food, and water, the standard should focus on preventing, rather than controlling, pollution

**VI. *Performance Standard 4: Community Health and Benefits***

- The objective should include specific mention of the health-related rights of individuals and communities, including the right to clean air and water, the right to access resources, such as water, and the right to health and livelihood.<sup>12</sup>

**VII. *Performance Standard 5: Land Acquisition and Involuntary Resettlement***

- The standard should explicitly reference the rights to development, housing and sustainable livelihoods as part of the basic right to an adequate standard of living.<sup>13</sup>
- The standard should recognize both those with State-recognized property rights, as well as informal settlers and property rights according to customary law and traditional occupation or use, and establish the right to compensation for loss of property as well as the loss of livelihood. This is particularly important for informal settlers.
- The standard should prohibit the forced resettlement of indigenous peoples in any IFC-backed project. Such resettlement shall only take place with the free, prior and informed consent of indigenous peoples subsequent to their agreement on resettlement options, compensation and culturally appropriate benefit sharing. Unless indigenous peoples decide otherwise, compensation shall include, for example, lands of equal quality and financial compensation for the loss of cultural, spiritual and subsistence values, and they shall have the right to return to their traditional lands once the reason for resettlement no longer exists.

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<sup>12</sup> The human right to the highest attainable standard of health, should be interpreted in the light of the International Covenant on Economic, Social and Cultural Rights and in the Committee on Economic, Social and Cultural Rights' general comment 14 (E/c.12/2000/4), with its emphasis on the accessibility, affordability, acceptability and quality.

<sup>13</sup> ICESCR Art 11, General Comment 7

**VIII. Performance Standard 7: Indigenous Peoples and Natural Resources Dependent Communities**

- The standard should establish that the IFC will only support projects that have the free, prior and informed consent of affected indigenous peoples arrived at through their customary decision-making processes subsequent to meaningful and good faith consultation and their informed participation commencing at the earliest stages of project design, and agreement on benefits.
- The standard should ensure that any process for obtaining free, prior and informed consent involves assessments that correctly identify, recognize and respect the full extent of indigenous peoples' rights to lands, territories and resources traditionally/customarily owned or otherwise occupied and used by them.
- The standard should ensure consistency with the rights of indigenous peoples in international law (including their right to own, control and manage their traditional lands and territories) and the obligations of host governments and the private sector.
- The standard should not contain discriminatory limitations such as requiring protection of customary rights 'where these are vital to the sustainability of their cultures and livelihoods'. Non-indigenous people's property and other rights are not limited to those 'vital' to cultural or livelihood sustainability; it is discriminatory to apply this standard to indigenous peoples.
- To avoid confusion and potential weakening of indigenous peoples' rights, Natural Resource Dependent Communities should be addressed in a separate performance standard from indigenous peoples. Additionally, there is no valid reason that only natural resource dependent communities, as distinct from local communities in general, require protection; the same protection should also be extended and codified in relation to all local communities.

**IX. Performance Standard 8: Cultural Heritage**

- The objective should include the recognition and protection of cultural rights and cultural identity and traditional knowledge.
- The standard should include an acknowledgement of Article 27 of the Universal Declaration of Human Rights and should ensure that a project will not result in depriving a community or an individual of the moral or material interests resulting from any scientific, literary or artistic production of which he is the author.
- If cultural heritage impacted by a project is deemed 'non-replaceable,' then the standard should be that no harm will be done.
- The standard should also be consistent with indigenous peoples' rights as contained in Article 8j of the Convention on Biological Diversity (CBD), which requires that traditional knowledge may only be exploited with indigenous peoples' approval. "Approval" in the CBD has been interpreted to mean with indigenous peoples' free, prior and informed consent.<sup>14</sup> This is consistent with

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<sup>14</sup> *Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*. UNEP/CBD/WG8J/2/6/Add.1, 27 November 2001, 11. The right is also recognized in ongoing CBD work on Access and Benefit Sharing and CBD guidelines on environmental and social impact assessment. See also CBD Conference of Parties Decision V/26A, para. 11; and Seventh Conference of Parties to the Convention on Biological Diversity, Decision VII/16F, Annex: *The Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social*

present draft of OP 4.10 (December 2004), which requires that indigenous peoples' 'must agree' to and must share in any benefits from exploitation of traditional knowledge. Such protection also extends to the material resources associated with such knowledge.

**X. *Performance Standard 9: Social and Environmental Management System***

- The standard should incorporate human rights protections into Action Plans, where relevant, as well as explicit monitoring and evaluation requirements for rights-based issues.
- The standard should be revised to ensure that Actions Plans are publicly available in appropriate local languages and manners, and that the concerns and needs of affected communities are fully addressed.

Prepared and Submitted By:

Michael Bassett, Halifax Initiative  
Diana Bronson, Rights & Democracy  
Prof. Daniel Bradlow, Washington College of Law, American University  
Andrea Durbin, Independent Consultant  
Steve Herz, Independent Consultant  
Petr Hlobl, CEE Bankwatch Network  
David Hunter, Peregrine Environmental Consulting and Visiting Scholar, AU  
Fergus MacKay, Forest Peoples Programme  
Anne Perrault, Center for International Environmental Law  
Jorge Daniel Taillant, Centro de Derechos Humanos y Ambiente (CEDHA)

December 15, 2004