



# **ONE STEP FORWARD, ONE STEP BACK**



*An Analysis of the International Finance Corporation's  
Sustainability Policy, Performance Standards and  
Disclosure Policy*

**May 2006**



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Disclosure Policy*

**Edited by the  
Halifax Initiative Coalition**

This analysis of the International Finance Corporation's (IFC) Sustainability Policy, Performance Standards and Disclosure Policy was commissioned by the Halifax Initiative Coalition. It is intended to be used by the international civil society community, as well as to inform Canadian organizations preparing for a series of public roundtables in 2006 on 'Corporate Social Responsibility and the Extractive Sector in Developing Countries'. The roundtables will examine the need for policy and legal reform in Canada regarding the overseas activities of the Canadian extractives sector. The IFC's Performance Standards are promoted by some actors as the central guidelines against which all Canadian extractives activity should be measured. This report assesses whether the Standards provide an appropriate framework, and identifies gaps and shortcomings in the Standards, with particular reference to the extractives sector.

Andrea Durbin was the principal author of this overview and received input from a number of sources. Dana Clark, of the International Accountability Project, was responsible for the analysis of Performance Standard 5 on Land Acquisition and Involuntary Resettlement. Fergus MacKay, from the Forest Peoples Programme, was responsible for the analysis of Performance Standard 7 on Indigenous Peoples. Jennifer Kalafut from the Bank Information Center was responsible for the analysis of the Disclosure Policy. The final text was edited by Fraser Reilly-King and Karyn Keenan, Halifax Initiative Coalition.

The Halifax Initiative Coalition wishes to thank the Human Security Policy Division of Foreign Affairs and International Trade for providing the funding to make this overview possible.

*Cette publication est également disponible en français.*

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Canadian NGOs formed the Halifax Initiative in December 1994 to ensure that fundamental reform of the international financial institutions (IFIs), namely the World Bank and International Monetary Fund, was high on the agenda of the Group of Seven's (G7) Halifax Summit. Today the Halifax Initiative is a Coalition of 22 development, environment, faith-based, human rights and labour groups, and the Canadian presence for public interest advocacy and education on the IFIs.

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#### ***List of Acronyms***

CAO	Compliance Advisor Ombudsman
EHS	Environmental, Health and Safety Guidelines
EIR	Extractive Industries Review
ESRP	Social and Environmental Review Procedures
ESRS	Environmental and Social Review Summary
FPIC	Free, Prior, Informed Consent
ICMM	International Council for Metals and Minerals
ILO	International Labour Organization
IFC	International Finance Corporation
IUCN	The World Conservation Union
MMSD	Mines, Minerals and Sustainable Development
OECD	Organisation for Economic Co-operation and Development
OPIC	Overseas Private Investment Corporation
PS	Performance Standard
PSES	Policy on Social and Environmental Sustainability
SEA	Social and Environmental Assessment
SPI	Summary of Proposed Investment
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organization
WHO	World Health Organization

## ***Introduction***

### **One Step Forward, One Step Back**

The International Finance Corporation (IFC) is the private sector lending arm of the World Bank Group. The IFC recently concluded a process to revise its social and environmental policies, moving from the former Safeguard Policies, to a new system and set of policies called the Performance Standards. The IFC argued that in order to remain competitive in its financing, it needed policies that were more outcome, than process-oriented, and that offered guidance and support to the private sector in addressing social, as well as environmental issues.

The review process was also motivated, in part, by internal critiques of the IFC by its ombudsman, the Compliance Advisor Ombudsman (CAO). In a 2003 report, the CAO criticized the IFC for failing to rigorously implement its policies, for supporting companies with negligible commitments to environmental and social responsibility, and for failing to invest in projects that reduce poverty and promote sustainable development.<sup>1</sup> The CAO's review also pointed to inadequate attention by the IFC to social issues, including social assessments and labour issues.

Despite these critiques, the new Performance Standards raise a number of concerns. The Standards represent a shift towards a more flexible system that relies heavily on the discretion of clients and individual decision-makers at the IFC. A significant degree of leeway is permitted in their application, and non-compliance is tolerated as long as clients continue to improve their performance. In its Policy on Social and Environmental Sustainability, the IFC explains that it “endeavors to invest in sustainable projects that identify and address economic, social and environmental risks with a view to continually improving their sustainability performance *within their resources and consistent with their strategies*. IFC seeks business partners who share its vision and commitment to sustainable development, who wish to raise their capacity to manage their social and environmental risks, and *who seek to improve their performance in this area*”<sup>2</sup> (emphasis added). Moreover, there is no requirement that an IFC client comply with the Performance Standards for the life of the project and beyond. The IFC will merely “encourage the client to continue to meet the Performance Standards after IFC’s exit from the project.”<sup>3</sup> Finally, in the case of client non-compliance, the IFC pledges to “work with the client to bring it back into compliance *to the extent feasible*, and if the client fails to reestablish compliance, exercise remedies *when appropriate*”<sup>4</sup> (emphasis added).

The Performance Standards stake out a bigger role for the client. They increase reliance on client-generated information and on self-monitoring by the private sector. The Action Plan, which forms part of most IFC loan agreements and which sets out how the client will comply with the Performance Standards in the form of project-specific actions and mitigation measures, provides a good example. These Plans are developed by IFC clients, who assess the anticipated impacts of their projects and identify corresponding mitigation measures. In the past, an independent, third party expert produced the project assessment. Now the client may prepare the Social and Environmental Assessment (SEA), a document that defines the scope of project impacts, potential remedies and responses. As a result, through its SEA, the client will influence (and even determine) the range of issues that will be assessed by the IFC. The client then uses its SEA to identify necessary improvement and/or mitigation measures in its Action Plan. Furthermore, affected communities are not guaranteed the opportunity to review a project’s Action Plan before it is finalized, but instead, must place their faith in the IFC and the client to accurately address their concerns.

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<sup>1</sup> CAO, *Review of the IFC’s Safeguard Policies*, January 2003.

<sup>2</sup> IFC, *Policy on Social and Environmental Sustainability*, April 30, 2006, p. 2.

<sup>3</sup> *Ibid.*, p. 5.

<sup>4</sup> *Ibid.* p. 5.

In announcing the revision process, the IFC said it aimed to position the institution as a leader in the development of international environmental and social standards that could be adopted by the private sector. Nevertheless, upon reviewing the standards adopted by its peer institutions and the business sector, the Performance Standards are not always as rigorous, particularly around issues of climate change, human rights, the protection of indigenous peoples and biodiversity.<sup>5</sup>

Finally, the Standards do little to address the CAO's finding that the IFC has failed to select projects that meet its goal of poverty alleviation. In fact, the IFC successfully resisted pressure from stakeholders and some board members to include requirements regarding the identification of a project's anticipated poverty alleviation benefits and to report on the outcomes.<sup>6</sup>

The result is a system based on enhanced flexibility and subjectivity without the counter-weight of accountability and transparency. Given this, many stakeholders remain critical of the system in spite of some advances on particular policy issues.

### **Global Significance of the Performance Standards**

The IFC is an important global financier and influences other international financial entities. In 2005, the IFC's committed portfolio reached \$19.3 billion and helped to syndicate a further \$5.3 billion in financing. Many private commercial banks and some export credit agencies have adopted the IFC's policies through an initiative called the Equator Principles. More than 40 financial institutions, responsible for over 80 percent of global project finance voluntarily apply the IFC's policies and environmental management system approach to their project finance lending.<sup>7</sup> The Equator Principles Financial Institutions are currently revising their framework, following introduction of the new Performance Standards. The revised Equator Principles will become operational on July 1<sup>st</sup>, 2006.

In addition, export credit agencies (ECAs) are beginning a revision process of the *Common Approaches* through the OECD. The *Common Approaches* is a policy initiative that sets out how ECAs take account of social and environmental considerations in their review of proposed projects. In the fall of 2006, ECAs will evaluate the Performance Standards and consider whether to reference or adopt them as part of the *Common Approaches*.

### **The IFC's Social and Environmental Policy Framework**

Although the Performance Standards (PSs) are the element of the IFC's new policy framework that has received the most attention (perhaps because they relate most directly to the former Safeguard Policies), the PSs are just one of seven key components of the IFC's new approach to assessing

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<sup>5</sup> WWF/BankTrack, *Shaping the Future of Sustainable Finance: Moving from Paper Promises to Performance*, January 2006.

<sup>6</sup> The Summary of Proposed Investment (SPI) includes the project's anticipated development impact, and IFC's expected development contribution, but IFC will not publicly report on this. See analysis of Disclosure Policy for more detail.

<sup>7</sup> Project finance is "a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure.[...] In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility's output, such as the electricity sold by a power plant. [...] The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets." Source: Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards ("Basel II")*, June 2004, <http://www.bis.org/publ/bcb107.pdf>

project impacts. They include the following:

1. The *Policy on Social and Environmental Sustainability*,<sup>8</sup> which applies only to the IFC, sets out the institution's specific role and responsibilities with respect to proposed projects.
2. The *Procedure for Social and Environmental Review of Projects*,<sup>9</sup> which applies only to the IFC, details its review process, and gives guidance to IFC staff on how to implement the Policy on Social and Environmental Sustainability and how to review project implementation and compliance. The Procedure includes the IFC's exclusion list, which sets out which types of projects are barred from receiving IFC support.<sup>10</sup>
3. The *Performance Standards*<sup>11</sup> define the requirements for receiving and retaining IFC support, and IFC clients' roles and responsibilities for managing their projects. There are eight issue-specific Performance Standards including: Environmental Assessment and Management Systems; Labor and Working Conditions; Pollution Prevention and Abatement; Community Health, Safety and Security; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Natural Resource Management; Indigenous Peoples; and Cultural Heritage. The Performance Standards apply to all of the IFC's investments (project support, equity investments, etc.). Investments through financial intermediaries (FI)<sup>12</sup> and advisory work<sup>13</sup> follow different standards.
4. Each Performance Standard is also accompanied by a *Guidance Note*.<sup>14</sup> The Guidance Notes provide more detailed information on how each Standard should be applied and operationalized. The Guidance Notes offer information to IFC staff but are not binding.
5. Sector-specific standards are contained in IFC's *Environmental Health and Safety Guidelines* and the *World Bank's Pollution Prevention Abatement Handbook*.<sup>15</sup> These standards apply to specific types of projects, such as coal mines, offshore oil and gas development, geothermal projects or aluminum smelters. A revision of these technical standards is slated for mid-2006.<sup>16</sup>
6. The *Action Plan* articulates how the client mitigates or compensates for project impacts. Action

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<sup>8</sup> *International Finance Corporation's Policy on Social and Environmental Sustainability*, April 30, 2006, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf)

<sup>9</sup> *International Finance Corporation's Policy on Social and Environmental Review of Projects*, December 1998, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_ESRP/\\$FILE/ESRP.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_ESRP/$FILE/ESRP.pdf)

<sup>10</sup> *IFC Exclusion List*, <http://www.ifc.org/ifcext/enviro.nsf/Content/IFCExclusionList>

<sup>11</sup> *International Finance Corporation's Performance Standards on Social and Environmental Sustainability*, April 30, 2006, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_PerformanceStandards2006\\_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)

<sup>12</sup> Per *IFC Sustainability Policy*, para. 28, recipients of FI finance will be required to follow national laws for Category B projects and apply the Performance Standards to Category A projects. The IFC's exclusion list (projects that the IFC is barred from financing) applies to both categories. See footnote 15 for an explanation of project categories.

<sup>13</sup> *IFC Sustainability Policy*, para. 30, "[w]hen IFC is providing advice for large-scale investment projects, the Performance Standards are used as a reference in addition to national laws" (emphasis added).

<sup>14</sup> *International Finance Corporation's Guidance Notes: Performance Standards on Social and Environmental Sustainability*, April 30, 2006, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_GuidanceNote\\_full/\\$FILE/GuidanceNote\\_full.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_GuidanceNote_full/$FILE/GuidanceNote_full.pdf)

<sup>15</sup> On-line at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/06/03/000094946\\_99040905052283/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/06/03/000094946_99040905052283/Rendered/PDF/multi0page.pdf)

<sup>16</sup> For details on the review, see <http://www.ifc.org/ifcext/policyreview.nsf/Content/EHSGuidelinesUpdate>

Plans are only developed for those projects “where the client identifies specific mitigation measures and actions necessary for the project to comply with applicable laws and regulations and to meet the requirements of the PSs” (PS1, para. 16). The Action Plan details IFC’s expectations of the client and is covenanted as part of the IFC’s loan agreement.

7. Finally, the *Policy on Disclosure of Information*<sup>17</sup> sets out the IFC’s disclosure requirements both for institutional information (e.g. policies, by-laws) and project-specific documentation. This policy only applies to the IFC.

The remainder of this report provides detail and analysis on IFC’s Sustainability Policy, the eight Performance Standards and the Disclosure Policy.

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<sup>17</sup> *International Finance Corporation’s Policy on Disclosure of Information*, April 30, 2006, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_Disclosure2006/\\$FILE/Disclosure2006.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Disclosure2006/$FILE/Disclosure2006.pdf)

## ***Overview of the Policy on Social and Environmental Sustainability***

### **Central Requirements**

In addition to laying out IFC's mission to "promote sustainable private sector development in developing countries, helping to reduce poverty and improve people's lives" and "do no harm" (Sustainability Policy, paras. 6, 7 and 8), the Policy on Social and Environmental Sustainability (PSES) outlines the IFC's expectations of the client, and delineates its own roles and areas of responsibility.

The client is required to do the following:

1. Assess the social and environmental risks and impacts of the project, and prepare the Social and Environmental Assessment (SEA);
2. Design a Social and Environmental Management System to manage project risks. The System should include measures to meet the requirements of the Performance Standards;
3. Engage with communities through disclosure of relevant project information, consultation and by facilitating their informed participation;
4. Collaborate with third parties (such as government agencies, contractors or suppliers) to achieve project outcomes consistent with the Performance Standards; and
5. Provide annual monitoring reports to the IFC on social and environmental performance.

The IFC is expected to do the following:

1. Conduct a social and environmental review of the project. This review is based on the client's Social and Environmental Assessment and its Social and Environmental Management System. The review allows the IFC to ascertain whether the project can be expected to meet the Performance Standards;
2. Assist the client to develop measures to avoid, minimize, mitigate or compensate for social and environmental impacts;
3. Categorize the project (based on the severity of expected social and environmental impacts). A project's categorization determines several obligations, including project-specific public disclosure requirements;
4. In the case of projects with significant adverse impacts on affected communities, ensure that there is broad community support for the project within the affected communities;
5. Assess how the project will contribute towards host country development and evaluate the level of benefits it will bring, relative to costs;
6. Monitor the client's social and environmental performance throughout the life of the IFC's investment;<sup>18</sup> and

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<sup>18</sup> Per PS 1 paras. 25 and 26, the actual monitoring reports that the client submits to the IFC on its social and environmental management system are not publicly available. However, periodically clients are required to

7. If a client fails to comply with its social and environmental commitments, work with the client to bring it back into compliance, to the extent feasible.

Several additional components of the policy include:

1. Sector-specific requirements. For example, significant extractive industry projects require additional assessment of governance risks, transparent revenue management systems and disclosure of key government agreements, including host government agreements (HGAs). For public infrastructure projects (utilities like water, electricity, telecommunications, gas and their delivery), the client is encouraged to disclose documents of public interest (household tariffs, service standards, investment obligations, concession fees);
2. Specific terms for dealing with financial intermediaries (FI). The IFC reviews the projects of FI clients whose activities may entail some level of social and environmental risk;<sup>19</sup>
3. Information regarding the institution's social and environmental advisory services for clients; and
4. Details on how project-affected communities can file grievances with the Compliance Advisor Ombudsman.

#### **Improvements from Previous Policy**

Although there is no former policy against which the Sustainability Policy can be compared, there are some notable advances from previous practice.

The additional requirements for the extractives sector and infrastructure projects are welcome, although they are narrow in their application. For example, the additional extractives requirements are only relevant to significant projects - those expected to account for more than ten percent of government revenues. Moreover, the IFC merely *encourages* companies to disclose information relating to its investments in utilities. There is no guarantee that this information will be released.

The IFC has also strengthened some requirements around lending to Financial Intermediaries. Where an FI sub-project may have significant social or environmental risks, the FI must apply the Performance Standards. This means, for instance, that a high-risk FI sub-project would need to include a Social and Environmental Assessment and the project sponsor would need to develop an Action Plan.

#### **Shortcomings and Weaknesses**

The Sustainability Policy language on human rights is weak and ineffective. It states that the IFC recognizes “that the roles and responsibilities of the private sector in respecting human rights are emerging as an important aspect of corporate social responsibility. The Performance Standards, developed by IFC to help private sector clients address environmental and social risks and opportunities, are consistent with these emerging roles and responsibilities.” (Sustainability Policy, para. 8). The IFC's lending practices should explicitly respect and adhere to applicable provisions of international human rights and humanitarian law and the IFC should ensure that the projects that it

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release a public report on the implementation of the mitigation measures identified in the Action Plan, and at the very least, annually. See PS 1 for more details.

<sup>19</sup> The IFC also makes loans to financial institutions that in turn lend this money to clients in the form of project finance, loans to small, medium and large businesses, microfinance, trade finance, housing finance and private equity (PSES, para. 27).

finances do not lead to or exacerbate violations of human rights or humanitarian law – either directly or indirectly. The Sustainability Policy does not achieve these goals.

In 2003, the CAO argued that the 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>20</sup> The human rights assessments and reports recommended by the CAO should be undertaken by reputable and independent third parties and not by the client itself, and should be a condition of IFC project support. Project-affected persons, communities and indigenous peoples have the right to participate in assessments, reporting and human rights audits. Furthermore, the IFC must address rights-based issues in assessments and guarantee local communities and affected people meaningful input and participation in every project that the IFC supports. The IFC’s new social and environmental policy framework does not include these measures.

Unlike the Equator Principles Financial Institutions, which explicitly prohibit loans to borrowers who will not, or are unable to comply with their policies and procedures,<sup>21</sup> the IFC works with companies to bring them into compliance with its policies, over time. The IFC states that it will seek business partners who want to improve their management of environmental and social issues and will finance new business activity as long as the client can be “expected to meet the Performance Standards over a reasonable period of time.” This flexibility permits IFC clients to avoid compliance with applicable policies, as long as they are seen to be advancing towards their implementation. Such tolerance encourages unsustainable practices, supported by public funds.

The IFC fails to require the free, prior and informed consent of project-affected people and communities, as recommended in the Extractive Industries Review. Free, prior and informed *consultation* excludes affected people from decision-making about the use of local land and resources. Although the IFC has made a commitment not to support projects that do not enjoy broad community support, this concept is poorly defined,<sup>22</sup> granting the IFC significant leeway in its determination.

Finally, because the Performance Standards were intended to be adopted by other entities, including the Equator Principle Financial Institutions, they were developed to address investments, generally, and do not include sector-specific requirements. They also focus exclusively on the responsibilities of private sector project sponsors. IFC responsibilities were separated out in the Social and Environmental Sustainability Policy. While this is logical, the result is that some key elements incorporated in the Sustainability Policy (exclusion list, sector-specific requirements, broad community support, monitoring) do not apply to other institutions adopting the Performance Standards. The failure to incorporate some of these important aspects of the Sustainability Policy in the Performance Standards is a major shortcoming.

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<sup>20</sup> Compliance Advisor Ombudsman, *Extracting Sustainable Advantage? A review of how sustainability issues have been dealt with in recent IFC & MIGA extractive industries projects. Final Report*, World Bank: Washington DC, April 2003, p. 36.

<sup>21</sup> *The Equator Principles Draft*, March 2006. This language is also included in the Equator Principles adopted in 2003.

<sup>22</sup> Broad community support is a collection of expressions by the affected communities, through individuals or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project.

## **Overview of Performance Standard 1: Social and Environmental Assessment and Management Systems**

### **Central Requirements of the Performance Standard**

Performance Standard 1 (PS 1) does the following:

1. Sets out the requirements for the Social and Environmental Assessment (SEA) that is prepared by the client. PS 1 also identifies specific SEA requirements for different types of projects, depending on project size and impact. PS 1 requires that the client publicly release its SEA;
2. Sets out general requirements for the client to establish a Social and Environmental Management System. The System identifies the programs, procedures and organizational structures that the client will establish in order to manage the social and environmental impacts of the project;
3. Defines the Action Plan, which is the key element of the Social and Environmental Management System. The Action Plan is included in the legally-binding loan agreement between the client and the IFC. The Plan includes specific mitigation measures and other actions necessary for the project to comply with applicable national laws and regulations, and to meet the requirements of the Performance Standards. PS 1 requires that clients disclose the final Action Plan to affected communities, as well as periodic progress reports on its implementation, no less than once a year;
4. Describes general terms for community engagement and consultation processes. This includes the requirement that the client disclose information and seek input from affected communities early in the project development process, as well as consult with communities on an ongoing basis. For projects with significant adverse impacts (Category A), PS 1 states that the consultation process will ensure the communities' 'free, prior and informed consultation' and facilitate their informed participation; and
5. Requires that the client establish a project-level grievance mechanism to address project-related problems or complaints from the community, or in situations where communities face on-going risk or adverse impacts. The mechanism should "address concerns promptly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, and at no cost and without retribution." (PS 1, para. 23). If that process fails, communities can access the IFC's accountability mechanism – the Compliance Advisor Ombudsman (CAO), which is described in IFC's Sustainability Policy.

### **Improvements from Previous Policy**

Performance Standard 1 requires a more comprehensive and integrated social impact assessment. As part of the Social and Environmental Assessment (SEA) process, disadvantaged or vulnerable groups are to be identified. The client is asked to propose and implement measures to ensure that adverse impacts do not fall disproportionately on these groups and that they are included among project beneficiaries (PS 1, para. 12).

Another improvement in PS 1 is the requirement that clients report at least annually on implementation of the project Action Plan. These reports comprise the only information *required* to be disclosed during project implementation. They must be made publicly available in a format accessible to project-affected communities (PS 1, para. 26).

Finally, the requirement that clients establish project-level grievance mechanisms is an important improvement.

## Shortcomings and Weaknesses in PS 1

A major problem with PS 1 is that it does not require release of the draft Action Plan to affected communities.<sup>23</sup> The Action Plan is extremely important as it sets out those actions required of the client in order to comply with the Performance Standards. Moreover, because the Action Plan forms part of the loan contract between the client and IFC, it is legally-enforceable against the client. Affected communities should have the opportunity both to review this document in its draft form and to provide input prior to its finalization. In this way, communities will ensure that the Action Plan accurately addresses their concerns and that it includes any commitments made by the client. Failure to involve affected communities in the Action Plan development process seriously compromises their rights.

When a client is in violation of the terms of the Action Plan, the IFC will work with the client to bring it back into compliance, “to the extent feasible,” and will “exercise remedies when appropriate” (Sustainability Policy, para. 26). Enforcement of the Action Plan is therefore left to the IFC’s judgement.

In comparison to the former Safeguard Policy (OP 4.01), PS 1 is weakened in several significant ways. First, the former policy required that the environmental assessments for all Category A projects (those with significant adverse impacts) be completed by independent experts. This requirement promoted the inclusion of objective information and analysis. In contrast, while PS 1 states that clients may be required to retain external experts to assist in the assessment process, it does not require that they do so, nor does the policy specify that external experts be independent from the client (PS 1, para. 7).

Another major setback concerns stakeholder consultation. The new policy fails to set clear, minimum requirements for consultation with local communities, and instead uses vague and general language. The former Safeguard Policy required project sponsors for Category A projects to consult “project-affected and local nongovernmental organizations at least twice during the EA process: (a) shortly after environmental screening and before the terms of reference for the EA are finalized [i.e. during scoping], and (b) once a draft EA report is prepared.”<sup>24</sup> Performance Standard 1 states that consultation will be “carried out on an ongoing basis as risks and impacts arise,” (PS 1, para. 21) but gives no clarity on what is minimally required of clients. This lack of direction grants clients far too much discretion in what is a critical area of project governance.

### Specific to Extractives: What Is Missing?

A number of shortcomings in Performance Standard 1 are particularly relevant to the extractives sector. Extractive industry projects are often criticized for offering few benefits to affected communities, who suffer a disproportionate share of the negative impacts. For this reason, one of the major recommendations of the World Bank’s Extractive Industries Review (EIR) was to assess the relationship between extractive investments and poverty alleviation. To ensure that these investments alleviate, and do not exacerbate poverty, PS 1 should require that the poverty and development related impacts and benefits of extractives projects are fully assessed and monitored as part of the assessment and ongoing monitoring requirements. Furthermore, PS 1 does not recognize free, prior and informed consent for affected communities, nor does it guarantee a role for local communities in ongoing monitoring, as advocated by the EIR. The EIR further recommended that prior to project approval, IFC should assess the capacity of the host government to regulate extractive

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<sup>23</sup> While PS 1 does not require the disclosure of a draft Action Plan, IFC’s internal Social and Environmental Review Procedures (ESRP) note that one criterion in the determination of whether a client has undertaken a free, prior, informed consultation with communities is whether there has been disclosure of “successive drafts of [the] Action Plan” [ESRP, Annex 3.5.3].

<sup>24</sup> IFC, Operational Policy 4.01, *Environmental Assessment*, October 1998, at para. 12.

investments, address corruption issues and ensure a more equitable sharing of project benefits. The ability of governments to address these governance related issues should be explicitly included in the Performance Standard assessment process.

Finally, PS 1 falls short by not explicitly requiring that SEAs address human rights issues, including an assessment of the host government and project proponent's human rights records, as well as the project's expected human rights impacts.

## **Overview of Performance Standard 2: Labour and Working Conditions**

### **Central Requirements of the Performance Standard**

Performance Standard 2 (PS 2) does the following:

1. References the International Labour Organization's Core Labour Standards, including freedom of association, the right to organize and engage in collective bargaining, a prohibition on forced and child labour, and the principles of non-discrimination and equal opportunity;<sup>25</sup>
2. Requires clients to develop a plan to mitigate the adverse impacts of economic cutbacks (retrenchment) on employees in the event of significant loss of jobs;
3. Sets out the terms to establish grievance mechanisms for workers and their organizations to raise and resolve workplace-related concerns;
4. Addresses safe and healthy work environment issues, and requires clients to take steps to reduce threats and harms in the workplace;
5. Requires clients to inquire about and address child and forced labour issues in its supply chain; and
6. Extends some aspects of the Performance Standard to contract employees.

### **Improvements from Previous Policy**

Performance Standard 2 builds on commitments made by the IFC in a March 1998 Policy Statement to prohibit child and forced labour. Improvements include explicitly referencing the International Labour Organization's four core labour standards, and adding freedom of association and the right to collective bargaining, as well as a ban on discrimination.

In addition, PS 2 addresses supply chain issues by requiring clients to determine if their supply chain providers use, or benefit from, forced or child labour.

### **Shortcomings and Weaknesses in PS 2**

While the language addressing supply chain is an improvement, the provisions do not guarantee that clients will not benefit from forced or child labour through their supply chain relationships. PS 2 merely states that the client will inquire into and address these issues, leaving it to the discretion of the client as to *how* this is undertaken.

### **Specific to Extractives: What Is Missing?**

PS 2 addresses occupational safety and health issues (PS 2, para. 16), which includes emergency response and planning. The standard can be improved to take into account the particular risks and threats posed by the extractive industries, including the high risk of accidents. For example, between 1983 and 2002, there were 150 mining accidents in World Bank-funded projects.<sup>26</sup> PS 2 should extend the rights of workers to include opportunities to contribute to the development of emergency plans and should ensure public access to these documents.

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<sup>25</sup> Specifically, it states that the PS has been "guided by a number of international conventions negotiated through the International Labour Organization (ILO) and the United Nations (UN)" (PS 2, para. 2), and references the eight conventions that constitute the core labour standards and Art. 32.1 of the Convention on the Rights of the Child.

<sup>26</sup> Extractive Industries Review, *Striking a Better Balance* Volume 1, January 2004, p. 26.

## ***Overview of Performance Standard 3: Pollution Prevention and Abatement***

### **Central Requirements of the Performance Standard**

Performance Standard 3 (PS 3) does the following:

1. Establishes that the client will meet either host country pollution standards or the IFC Environmental, Health and Safety Guidelines (EHS), whichever is most stringent. In terms of the transboundary movement of hazardous waste, and the manufacture, trade and use of chemicals and hazardous materials, PS 3 sets out language consistent with the Stockholm Convention on Persistent Organic Pollutants, the Montreal Protocol and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes;<sup>27</sup>
2. Requires clients to avoid or minimize the generation of pollution, hazardous materials and waste;
3. Requires clients to be prepared for an emergency or accident, and depending on the level of risks associated with a project, prepare an emergency response plan;
4. For projects that produce more than 100,000 tons of CO<sub>2</sub> per year, requires that the client quantify direct emissions from the facilities that it owns or controls, as well as indirect emissions associated with off-site power production for the project; and
5. When project activities include the use of pesticides, PS 3 requires clients to use pesticides known for their low human toxicity and minimal effects on non-target species and the environment. PS 3 excludes the use of pesticides classified by the World Health Organization as extremely, highly and moderately hazardous.

### **Improvements from Previous Policy**

The previous policy did not address the threats of climate change. PS 3 takes an initial step by requiring “greenhouse gas accounting” for projects with significant carbon emissions (more than 100,000 tons of CO<sub>2</sub>/year).

The language addressing pesticides is also an improvement because it requires that clients select pesticides that are “*low in human toxicity*,” in addition to being effective against the target species, and that have minimal effects on non-target species and the environment (PS 3, para. 13).

Finally, the client is encouraged to incorporate energy efficiency and cleaner production approaches into its operations (PS 3, para. 4). Addressing cleaner production and energy efficiency is an important first step that could be strengthened through the adoption of mandatory language.

### **Shortcomings and Weaknesses in PS 3**

While PS 3 takes a step in the direction of addressing climate change, by requiring greenhouse gas accounting, it does not require a reduction in greenhouse gas emissions. PS 3 asks clients to merely evaluate feasible measures to reduce or offset emissions. However, it is not clear how determinations of feasibility will be made by the IFC or its clients, nor are there clear reporting requirements for

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<sup>27</sup> *IFC Performance Standards*, para. 6, “[t]he client will avoid the manufacture, trade, and use of chemicals and hazardous materials subject to international bans or phase-outs due to their high toxicity to living organisms, environmental persistence, potential for bioaccumulation, or potential for depletion of the ozone layer,” footnote 7, “[c]onsistent with the objectives of the Stockholm Convention on Persistent Organic Pollutants and the Montreal Protocol on Substances that Deplete the Ozone Layer. Similar considerations will apply to certain World Health Organization (WHO) classes of pesticides.”

these determinations. It is also unclear if annual reporting requirements on emissions will be made public. One way to enhance this policy is to require that a transparent Options Assessment be conducted, through which the IFC works with clients and the public to identify opportunities to reduce emissions.

PS 3 falls short on other critical issues, such as failing to require that clients publicly disclose pollution release information and pollution prevention plans. Public transparency and disclosure around pollution emissions have proven to be an important aspect of pollution reduction strategies and an indicator of best practice.

Finally, neither PS 3 nor PS 4 on Community Health and Safety directly address pollution-related health impacts. Toxic pollution can cause serious and sometimes deadly impacts to a community, particularly the most vulnerable members of society, such as women and children. To address these problems, the client should be required to assess and anticipate pollution-related health impacts on communities where project-generated pollution creates public health risks. Furthermore, the health impacts on the affected community should be monitored and assessed over time, the results of which should be publicly disclosed, and the client should be required to respond to these threats in a responsible and timely manner.

#### **Specific to Extractives: What Is Missing?**

PS 3 provides guidance for acceptable levels of pollution and certain sectoral practices by referencing the Environmental Health and Safety Guidelines (EHS). These guidelines cover technical standards for mining, as well as offshore and onshore oil and gas development.

In 2006, the IFC will begin a process to update and revise these standards, along with the World Bank's Pollution Prevention and Abatement Standards, the combination of which will ultimately be referred to as the EHS Guidelines. These guidelines will set permissible pollution levels for specific sectors, and establish a framework for certain practices, such as tailings disposal.

With respect to the mining sector, the EHS guidelines should be revised to explicitly ban the use of riverine tailings disposal, a practice that has been abandoned by several mining companies, including Falconbridge, WMC and BHP. The pollution standards should also adopt the precautionary approach for submarine tailings disposal that would, in essence, ban its use unless it is independently and scientifically proven to be safe to ecosystems and human health, as recommended by the Extractive Industries Review (EIR). The EIR further advocated that regardless of the outcome of such scientific research, submarine tailings disposal should be banned in areas such as coral reefs that have important ecological functions or cultural significance or in coastal waters used by indigenous peoples and local communities for subsistence purposes.<sup>28</sup> Finally, the EHS standards should require safer substitutes for certain mining related toxins, such as cyanide and mercury. At the moment, PS 3 does not address these mining related issues and the EHS guidelines are out of date and out of step with current international best practice.

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<sup>28</sup> Extractive Industries Review, *Striking a Better Balance* Volume 1, January 2004, p. 57.

## ***Overview of Performance Standard 4: Community Health, Safety and Security***

### **Central Requirements of the Performance Standard**

Performance Standard 4 (PS 4) does the following:

1. Requires the client to evaluate the risks and impacts of the proposed project on the health and safety of the affected community during the design, construction, operation and decommissioning of the project. Measures to address these impacts seek to prevent or avoid these risks, over minimizing or reducing them. Where the project poses risks to the community, the client is required to disclose relevant information to help the community and relevant government agencies understand the potential health risks;
2. Calls on the client to prevent or minimize the potential impacts of project-induced natural hazards, such as landslides or floods, on communities, and the potential for community exposure to hazardous materials. The latter includes adverse impacts to the natural resources used by the community (such as soil and water);
3. Calls on the client to prevent or minimize the potential for community exposure to communicable diseases, including diseases associated with the influx of temporary workers associated with the project;
4. Requires the client to develop an emergency preparedness and response plan. The client must disclose, to the affected community and relevant government agencies, “appropriate” information on this response plan, in the Action Plan or other relevant documents; and
5. Addresses security personnel issues by requiring that a client make “reasonable inquiries to satisfy itself that those providing security are not implicated in past abuses” and train adequate security personnel “in the use of force and appropriate conduct towards workers and the local community” (PS 4, para. 13).

### **Improvements from Previous Policy**

The inclusion of a policy on community-related health, safety and security issues is an important advancement in the protection of local communities. With the exception of issues related to infrastructure and equipment safety, and emergency response plans, Performance Standard 4 incorporates new areas of policy. This standard incorporates new elements on security personnel taken from the UK-US Voluntary Principles on Security (PS 4, para. 13-15) and addresses community risk from communicable diseases and the influx of temporary workers in some project areas (PS 4, para. 10-11). PS 4 also addresses hazardous materials safety (PS 4, para. 7) and protection of natural resources from project-induced natural hazards, such as landslides or flooding, often a problem associated with the mining industry (PS 4 para., 8-9).

### **Shortcomings and Weaknesses in PS 4**

There is an unfortunate disconnect between PS 4 on Community Health and Safety and PS 3 on Pollution Prevention and Abatement. An important issue that is not addressed fully or appropriately in either standard is the risk to, and adverse impact on, communities that is caused by pollution and exposure to toxic contaminants. While PS 3 establishes the technical standards for pollution levels, neither standard requires the client to anticipate and minimize the risk and threats to community health caused by pollution releases into the air, water or soil, or to monitor pollution-related community health problems. For the extractive sector, this is a crucial issue, since mining, oil and gas projects release emissions that have potential health impacts.

The PS 4 security personnel requirement differs from the *US-UK Voluntary Principles on Security and Human Rights* in two important ways. First, the language does not explicitly require that the client consult with affected communities on security matters. While these issues may come up in the consultation processes described in Performance Standard 1, PS 4 would be strengthened by explicitly noting that consultation on these matters is essential. Secondly, the scope of client-conducted risk assessments on security issues is narrow and ill-defined (limited to a satisfactory inquiry that “those providing security are not implicated in past abuses,” para. 13). For example, clients are not explicitly instructed to assess the risks of potential violence beyond the immediate project site,<sup>29</sup> the nature of local conflicts or the potential for future conflict.<sup>30</sup>

### **Specific to Extractives: What Is Missing?**

Project closure and land reclamation are critical issues in the extractives sector, particularly for the mining industry. Adequate mine closure is essential to the health and safety of surrounding communities and ecosystems. A major omission in PS 4 is the failure to address project closure issues or standards for reclaiming the land.

Mine closure standards require the company to provide a financial guarantee up-front to pay for clean-up, restoration and on-going monitoring. For instance, the Mining, Minerals and Sustainable Development Project (MMSD), a multi-stakeholder project initiated by the World Business Council for Sustainable Development, calls on companies to address mine closure issues by focusing on community aspirations at the time of mine closure (through a Community Development Plan), required resources, and a clear allocation of roles and responsibilities. The EIR also calls for the development of clear guidelines on mine closure and the requirement that sufficient closure funds are set aside and ‘ring-fenced’ to ensure that the resources will remain for decommissioning and reclamation of a project area. These issues can be addressed in the revision process for the EHS Guidelines and Pollution Prevention and Abatement Handbook standards.

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<sup>29</sup> *US-UK Voluntary Principles on Security and Human Rights Risk Assessment, para. 2*: “[d]epending on the environment, violence can be widespread or limited to particular regions, and it can develop with little or no warning. Civil society, home and host government representatives and other sources should be consulted to identify risks presented by the potential for violence. Risk assessments should examine patterns of violence in areas of Company operations for educational, predictive, and preventative purposes.”

<sup>30</sup> *US-UK Voluntary Principles on Security and Human Rights Risk Assessment, para. 5*: “[i]dentification of and understanding the root causes and nature of local conflicts, as well as the level of adherence to human rights and international humanitarian law standards by key actors, can be instructive for the development of strategies for managing relations between the Company, local communities, Company employees and their unions, and host governments. Risk assessments should also consider the potential for future conflicts.”

## ***Overview of Performance Standard 5: Land Acquisition and Involuntary Resettlement***

### **Central Requirements of the Performance Standard**

Performance Standard 5 (PS 5) does the following:

1. Requires the client to avoid or at least minimize involuntary resettlement, wherever feasible, by exploring alternative project designs. Involuntary resettlement refers to both physical and economic displacements that result from project-related land acquisition. Economic displacement results from an action that interrupts or eliminates people's access to jobs or productive assets. Resettlement is involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement (e.g. lawful expropriation);
2. Where displacement is unavoidable, requires that the client provide opportunities for displaced persons and communities to derive appropriate development benefits from the project;
3. Requires the client to mitigate adverse impacts and compensate displaced persons and communities for the loss of assets (e.g. crops and irrigation structures) at full replacement cost. The client must also provide adequate replacement housing with security of tenure. The client is required to provide displaced people with additional targeted assistance (e.g. credit facilities, training and job opportunities) and transitional support. Displaced persons must be able to improve or at least restore their livelihoods, capacity, production levels and standards of living;
4. With respect to physical displacement arising from loss of land, people who have nationally recognized or recognizable claims to their land are entitled to replacement property of equal or higher value, equivalent or better characteristics and advantages of location, or cash compensation at full replacement value. People who do not have nationally recognized or recognizable claims to their lands but who were present on the land before the cut-off date (see point 8 below) are barred from receiving compensation for the loss of land, although they are entitled to compensation for the loss of structures and other assets (as noted above);
5. Where livelihoods of displaced persons are land-based, or where land is collectively owned, the PS requires the client to offer land-based compensation, where feasible;
6. Requires the client to disclose relevant information, consult with affected communities and persons, and facilitate their informed participation in decision-making related to resettlement;
7. Instructs the client to establish a grievance mechanism per PS 1 to address concerns related to compensation and relocation;
8. Requires that the client identify, via census, those persons who will be displaced and to establish a reasonable cut-off date to identify those who are eligible for compensation. Where resettlement requires physical displacement, either because of expropriation or negotiated settlements, the client will be required to develop a resettlement plan; and
9. Advises the client to consider applying PS 5 in situations where displacement has occurred because of the adverse economic, social or environmental impacts of project activities (other than land acquisition).

### **Improvements from Previous Policy**

The objective of achieving enhanced living conditions with adequate housing and security of tenure is a

good improvement on OD 4.30,<sup>31</sup> although the IFC has failed to adequately define these terms. Security of tenure should be explicitly defined to include an ownership interest in replacement land and/or housing.

PS 5 introduces the important concept of negotiated settlements to avoid forcible removal of people from their lands.<sup>32</sup> Unfortunately, the standard undermines the negotiating power of those who do not have a nationally recognized or recognizable claim to their lands, as described below.

### **Shortcomings and Weaknesses in PS 5**

PS 5 reverses the World Bank's policy with respect to landless people. The World Bank's resettlement policy (OP 4.12) and the IFC's previous safeguard policy (OD 4.30) both explicitly allow for compensation for loss of land (in addition to land-related assets), even for those people without nationally recognized or recognizable claims to the land. PS 5 only requires compensation for loss of land for people with nationally-recognized or recognizable title to land, but not necessarily for those tenants, sharecroppers, family members and others who are physically or economically displaced from that land but have no 'recognizable' claim to title.<sup>33</sup> These people would only receive compensation for lost assets, a significant blow that exacerbates their economic and politically marginalized status.

The Performance Standard does not provide for independent resettlement monitoring to ensure the provision of complete and objective information about implementation.<sup>34</sup> Instead, the policy embraces self-monitoring by the client. In addition, the client is given discretion to resolve grievances with local affected people.

Footnote 11 of PS 5 implies that while informal settlers in urban locations may gain security of tenure for new housing, they may lose advantages associated with their previous dwellings, such as access to sources of livelihood, schools, and social support services, including health care and child care. These locational issues are integral to the concept of, and right to adequate housing and should not be traded off against security of tenure.

The previous World Bank policy and IFC's prior safeguard policy also require time-bound resettlement plans with budgets. These requirements have been dropped from PS 5.

Finally, only business owners (and not workers) are compensated for the costs of reestablishing commercial activities, for lost net income during transition, and for the costs of equipment transfer and reinstallation.

### **Specific to Extractives: What Is Missing?**

The EIR recommended that in assessing project design, the IFC should ensure that resettlement agreements are backed by adequate client financing. In addition, it recommended that "[p]erformance bonds or resettlement insurance should be available in case initial efforts to achieve better livelihoods

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<sup>31</sup> World Bank Operational Directive on Involuntary Resettlement.

<sup>32</sup> PS 5, para 3, "[n]egotiated settlements can usually be achieved by providing fair and appropriate compensation and other incentives or benefits to affected persons or communities, and by mitigating the risks of asymmetry of information and bargaining power."

<sup>33</sup> However, as noted above, the policy (PS 5, para. 8) does require that, "[w]here livelihoods of displaced people are land-based, or where land is collectively owned, the client will offer land-based compensation, where feasible."

<sup>34</sup> PS 1, para 7.

are not effective.”<sup>35</sup> There is no mention of these tools in the final version of PS 5 or the most recent version of the Guidance Notes.

Development indicators, specifically relating to poverty reduction, were recommended in the EIR. The IFC does not require any tracking or reporting on the number of people displaced by each project, or of the impoverishment or enrichment impact on displaced people. Such measures are necessary to determine if displaced people’s standards of living improve and whether their livelihoods are restored.

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<sup>35</sup> Extractive Industries Review. *Striking a Better Balance* Volume 1, January 2004, p. 55.

## ***Overview of Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management***

### **Central Requirements of the Performance Standard**

Performance Standard 6 (PS 6) does the following:

1. Generally, it expects clients to avoid impacts, where feasible, and to adopt specific project actions to mitigate impacts in a generally sustainable manner;
2. For *Modified Habitat*,<sup>36</sup> requires that clients “exercise care” and “identify opportunities to enhance habitat;”
3. For *Natural Habitat*,<sup>37</sup> prohibits clients from significantly degrading or converting habitats unless no other technical or feasible options are available, or where the benefits outweigh costs and degradation can be mitigated;
4. For *Critical Habitat*,<sup>38</sup> bars project implementation if there are measurable adverse impacts and threats to populations of endangered (or critically endangered) species. For forest related projects or plantations, the standard states that the client will not convert or degrade critical habitats;
5. In *Legally Protected Areas*,<sup>39</sup> requires that clients follow a management plan, consult with protected area sponsors, managers and stakeholders, and enhance the conservation of the area;
6. Prohibits clients from intentionally introducing invasive species and requires that they exercise due diligence to prevent unintended introductions; and
7. Requires that clients manage renewable natural resources, such as forests and aquatic systems, in a sustainable manner and, where possible, calls on clients to adopt independent certification.

### **Improvements from Previous Policy**

Performance Standard 6 not only recognizes the Convention on Biological Diversity’s definition of biodiversity, but also states that PS 6 is grounded in the Convention’s objectives, namely to conserve

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<sup>36</sup> Defined in PS 6, para. 5 as areas “where there has been apparent alteration of the natural habitat, often with the introduction of alien species of plants and animals, such as agricultural areas.”

<sup>37</sup> Defined in PS 6, para. 5 as, “land and water areas where the biological communities are formed largely by native plant and animal species, and where human activity has not essentially modified the area’s primary ecological functions.”

<sup>38</sup> Defined in PS 6, para. 9 as, “areas with high biodiversity value [that meet the criteria of the World Conservation Union classification], including habitat required for the survival of critically endangered or endangered species [as defined by the IUCN Red List of Threatened Species or as defined in any national legislation]; areas having special significance for endemic or restricted-range species; sites that are critical for the survival of migratory species; areas supporting globally significant concentrations or numbers of individuals of congregatory species; areas with unique assemblages of species or which are associated with key evolutionary processes or provide key ecosystem services; and areas having biodiversity of significant social, economic or cultural importance to local communities.”

<sup>39</sup> PS 6, para 11, footnote 6, “[a]n area may be designated as legally protected for different purposes. This Performance Standard refers to areas legally designated for the protection or conservation of biodiversity, including areas proposed by governments for such designation.”

biodiversity and promote the use of renewable natural resources in a sustainable manner.<sup>40</sup>

Performance Standard 6 requires that clients assess project impacts on all levels of biodiversity, including ecosystem services, with a focus on major threats to biodiversity, including habitat destruction and invasive alien species. The IFC's inclusion of ecosystem services is a welcome nod to the findings of the Millennium Ecosystem Assessment.

Furthermore, PS 6 defines *Critical Habitat* as a more sensitive area than either *Modified* or *Natural Habitat* and is relatively well-defined, compared with previous drafts. In paragraph 10, no project activities are allowed if there are any "measurable adverse impacts" to the integrity of these critical habitats or if there is a reduction in the populations of endangered or critically endangered species. This rather stringent provision appears to require that clients sequence due diligence activity prior to the start of construction activities in particularly high risk, socially and environmentally sensitive situations. Inclusion of the word "measurable" to describe adverse impacts provides space for stakeholders to hold the IFC and its clients to the findings of credible independent review processes.

Finally, PS 6 requires that clients carry out additional due diligence with protected area managers, local communities and other key stakeholders for projects in *Legally Protected Areas*. These extra provisions open up consultation requirements with, for instance, indigenous peoples that might live in these areas. It is important to note that while the criteria for Critical Natural Habitats are absolute, they do leave space for different perspectives about what is "measurable" and which actions will maintain the integrity of these sensitive areas.

#### **Shortcomings and Weaknesses in PS 6**

A major weakening from the previous safeguard is the absence of any requirement that the IFC apply a precautionary approach to natural resource management in its lending practices. A precautionary approach is essential to ensuring that the integrity of the environment is protected in the initial stages of project design and implementation. Without exercising precaution and initial prudence towards the environment, both the client and the IFC run the risk of facing severe, costly and reputationally-sensitive impacts.<sup>41</sup>

Unlike the previous safeguard, PS 6 does not require that all IFC financed projects be situated on lands that have experienced some physical conversion. PS 6 only requires that plantations be sited on converted or unforested land, wherever feasible.<sup>42</sup> With this omission, the IFC risks potentially unnecessary environmental impacts, and could incur additional project costs and delays. If there is an opportunity to locate a project in a site that would suffer minimal environmental impacts (already converted), then project development would be much more time and cost effective for both the client and the IFC.

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<sup>40</sup> PS 6, para. 1, "[t]he components of biodiversity, as defined in the Convention on Biological Diversity, include ecosystems and habitats, species and communities, and genes and genomes, all of which have social, economic, cultural and scientific importance. This Performance Standard reflects the objectives of the Convention on Biological Diversity to conserve biological diversity and promote the use of renewable natural resources in a sustainable manner."

<sup>41</sup> As stated in World Bank OP 4.04, "[t]he Bank supports, and expects borrowers to apply, a precautionary approach to natural resource management to ensure opportunities for environmentally sustainable development." This language is missing from IFC PS 6.

<sup>42</sup> Defined in PS 6, para. 16 as, "[w]here feasible, the client will locate plantation projects on unforested land or land already converted (excluding land that is converted in anticipation of the project)." World Bank OP 4.04, however, requires that, "[w]herever feasible, Bank-financed projects are sited on lands already converted (excluding any lands that in the Bank's opinion were converted in anticipation of the project)."

In addition, some key terms in PS 6 are not defined and are left open to interpretation. For example, *Natural Habitats* are not to be “significantly” converted or degraded unless three conditions are met: there are no feasible alternatives, the benefits outweigh the costs, and conversion is appropriately mitigated. “Significantly” is defined in a general manner in a footnote. However, it is unclear how feasibility, costs/benefits and “appropriate” mitigation are to be determined. Similarly, with *Modified Habitat*, clients must “exercise care” and “identify opportunities to enhance habitat,” but these requirements are not defined. Given that Guidance Notes are non-binding, this leaves a wide range of discretion to the IFC and its clients. Furthermore, while the mitigation measures are defined in the Performance Standard, they are not comprehensive and PS 6 does not mandate monitoring or evaluation regarding their implementation. These actions are essential for determining conservation outcomes, or refining appropriate corrective actions [as per World Bank OP 4.04].

Likewise, the provisions addressing invasive alien species are not straightforward. IFC clients cannot introduce invasive alien species *unless* there is a regulatory framework that allows for this. However, if no regulatory framework exists, the client must simply address the introduction of the species in an open-ended manner in the Social and Environmental Assessment. Regardless, clients cannot introduce high-risk species “deliberately.” These provisions will require close monitoring by independent experts and local communities.

#### **Specific to Extractives: What Is Missing?**

Performance Standard 6 ignores an important issue that is gaining increased acceptance by the extractive industries – the recognition of ‘no-go zones.’ Extractive industry companies are recognizing that certain areas should not be developed due to potential threats to biodiversity or cultural heritage. For example, companies like Shell and Placer Dome, the International Commission of Mining and Metals, and some Equator Principle banks such as ABN Amro and JP Morgan Chase, have agreed not to invest in projects located in UNESCO World Heritage Areas. The 2000 IUCN World Conservation Congress adopted a resolution calling on all states to ban investments of extractive projects in protected areas, classified as IUCN categories I-IV. Some agencies, such as the Overseas Private Investment Corporation (OPIC), will not finance projects in World Heritage Sites, Ramsar areas or IUCN areas category I-IV. Similarly, some governments, such as the Philippines, have outlawed mining in IUCN I-IV areas.<sup>43</sup>

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<sup>43</sup> Miranda, Marta et al., *Mining and Critical Ecosystems: Mapping the Risks*. Washington, D.C.: World Resources Institute.

## ***Overview of Performance Standard 7: Indigenous Peoples***

### **Central Requirements of the Performance Standard**

Performance Standard 7 (PS 7) does the following:

1. Acts as the primary reference point for IFC projects affecting indigenous peoples. It is also cross-referenced in other Performance Standards, such as PS 1 on Assessment and PS 5 on Resettlement. In some cases, PS 7 must be read in conjunction with these other standards. PS 7 does not provide a definition of indigenous peoples, but sets out a number of criteria, including self-identification, which may be used to determine if an affected group qualifies as an indigenous people for the purposes of the IFC;
2. As part of avoiding or, when not possible, mitigating adverse impacts, PS 7 requires the client to conduct a social and environmental impact assessment that identifies all potentially-indigenous peoples within the project's 'area of influence;'
3. Establishes that where avoidance is not 'feasible,' the client must develop a 'time bound plan' with the informed participation of indigenous peoples. This plan must set out mitigation measures and provide for development benefits that are identified with indigenous peoples' participation; and
4. Sets out special measures in relation to projects that are on traditional indigenous lands or that use resources found on such lands; that involve involuntary resettlement and economic displacement; or that involve the commercial development of traditional knowledge.

### **Improvements from Previous Policy**

For projects located on traditional or customary lands that are expected to have adverse impacts, clients "will enter into good faith negotiations with the affected communities of Indigenous Peoples, and document their informed participation and the successful outcome of the negotiation" (PS 7, para. 13). This is an improvement over previous IFC policy. The requirement is triggered in projects that may be on, or that commercially develop natural resource within, "traditional or customary lands under use," where "adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual use that define the identity and community of the Indigenous Peoples..." (PS 7, para. 13). It is clear that a formal, legally-binding agreement is not necessarily required by the PS. Leaving aside the many issues involved with negotiation processes – such as inequality of bargaining power – there should be no reason to rule out the possibility that indigenous peoples can either refuse to negotiate – thus there would be no successful outcome and in principle no IFC financing – or require that negotiations culminate in a legally-binding instrument.

The good faith negotiation standard also applies to physical relocation (PS 7, para. 14; PS 5, para. 19); economic displacement due to land acquisition/compulsory takings for project purposes (PS 5, para. 21); and commercial use of cultural resources, traditional knowledge, innovations and practices (PS 7, para. 15). In general, good faith negotiations must do the following: involve indigenous peoples' representative bodies, be gender and generationally inclusive in a culturally appropriate manner, and provide sufficient time for indigenous peoples' collective decision making processes (PS 7, para. 9).

Paragraph 13 should also be read in connection with PS 6 on biodiversity, which defines 'critical natural habitats' to include areas "having biodiversity of significant social, economic or cultural importance to local communities," presumably also including indigenous peoples (PS 6, para. 9). Paragraph 10 in PS 6

states that the client will not implement any project activities in critical natural habitat unless “there are no measurable adverse impacts on...the functions of the critical habitat” in relation to its social, economic or cultural importance to local communities. In principle, this creates a higher standard in relation to areas used by indigenous peoples for, among others, “cultural, ceremonial, or spiritual” purposes, although it is likely that the term ‘functions’ will serve as a major limitation.

### **Shortcomings and Weaknesses in PS 7**

In international human rights law, indigenous peoples have the right to give or withhold their free, prior and informed consent (FPIC) in relation to activities that may affect the lands, territories and resources traditionally owned or otherwise occupied and used. This standard is increasingly reflected in development policy instruments and was endorsed by the Extractive Industries Review in relation to World Bank Group projects. PS 7 does not comply with this standard, but instead requires free, prior and informed consultation, informed participation, and for certain projects, good faith negotiation.

While the negotiation standard is an improvement over ‘broad community support,’ paragraph 13 nonetheless contains a number of potentially inappropriate limitations. How, for example, will the terms ‘customary or traditional lands’ and the language, “that define the identity and community of Indigenous Peoples” be interpreted, and what does it mean to say that lands must be ‘under use’? The latter is especially discriminatory as protections for non-indigenous persons’ property rights are not limited to cases where their property is under use. Also, what is meant by ‘commercially develop natural resources’ – does this, for instance, apply to a mining company using water from indigenous lands for processing, when the actual mine and plant are located somewhere else? These issues are not clarified in the draft Guidance Notes for PS 7, which raise more questions than they answer.

Many of PS 7’s provisions contain the expression ‘when feasible.’ There are no formal guidelines or indicators on the applicable thresholds that should apply to such determinations. Feasibility is presumably client/project specific and may come down to relatively small financial margins. This may mean that compensation or mitigation, rather than avoidance measures, are implemented because of certain increases in overall project costs. Given that avoidance of adverse impacts must be prioritized, IFC support for a project should also look at ways of making avoidance feasible and this is not catered for in PS 7 or elsewhere.

Finally, there is no explicit requirement that indigenous peoples participate in project impact assessments. This is highly problematic considering that the assessment identifies a project’s anticipated risks and impacts, as well as those people and communities who will be adversely affected. Assessment results act as a trigger for the provisions of PS 7. This omission is particularly problematic in light of past and contemporary failures to adequately assess impacts on indigenous peoples.

### **Specific to Extractives: What Is Missing?**

As United Nations human rights bodies and the Extractive Industries Review have affirmed, recognition of indigenous peoples’ right to give or withhold free, prior and informed consent is the only meaningful and effective safeguard for the free exercise of indigenous rights. Good faith negotiation is not equivalent to FPIC and the IFC does not necessarily require a formal legal agreement confirming indigenous peoples’ acceptance of a project. The effective exercise of the right to FPIC is also dependent on a full recognition of indigenous peoples’ rights to own and control their traditional lands, territories and resources. It is unclear whether PS 7 adequately defines the scope of these rights. It is equally unclear which standards apply when the IFC invests in an existing project that is on indigenous lands, rather than supporting a project from its inception.

## **Overview of Performance Standard 8: Cultural Heritage**

### **Central Requirements of the Performance Standard**

Performance Standard 8 (PS 8) does the following:

1. Requires clients to comply with relevant national law on the protection of cultural heritage,<sup>44</sup> and follow internationally-recognized practices to protect cultural heritage;
2. Sets ‘only if’ conditions for the removal of cultural heritage;<sup>45</sup>
3. In the case of ‘critical cultural heritage,’<sup>46</sup> requires the client to conduct good faith negotiation with communities, and document the informed participation of the affected communities, as well as the outcome of the negotiation. Impacts on critical cultural heritage must be appropriately mitigated; and
4. Where a project uses the cultural resources, knowledge, or practices of a local community, requires clients to enter into good faith negotiation with the community, document its informed participation and the successful outcome of negotiations. The client must also provide fair and equitable sharing of benefits from the commercialization of use of cultural heritage.

### **Improvements from Previous Policy**

There are two noteworthy improvements in this policy. First, the standard acknowledges and values intangible cultural heritage (i.e. cultural knowledge, innovations and practices of communities), not just tangible cultural heritage (i.e. property and sites of archeological, historical, religious and cultural significance and environmental features that embody cultural values). Second, it requires fair and equitable sharing of benefits with the community from the commercialization of cultural heritage.

### **Shortcomings and Weaknesses in PS 8**

Performance Standard 8 permits projects that generate significant damage or loss to critical cultural heritage, endangering the cultural or economic survival of communities within the host country who use the cultural heritage for long-standing cultural purposes. Such grave impacts should be avoided and the IFC should deny funding for projects with such outcomes.

Removal of cultural heritage is permitted when the expected benefits are “great,” as determined through a cost-benefit analysis. Where such cultural heritage is associated with indigenous peoples, the international legal standard is consent, not a cost-benefit analysis.

### **Specific to Extractives: What Is Missing?**

Increasingly, the extractive industries agree that they should not invest in culturally important areas and recognize World Heritage Sites as ‘no-go’ zones. For instance, Shell Oil and fifteen mining companies of the International Council for Metals and Minerals (ICMM) have agreed not to invest or open mines in World Heritage Sites.<sup>47</sup>

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<sup>44</sup> Including national law to implement obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage.

<sup>45</sup> Only when there are no feasible or technical alternatives, the benefits outweigh the anticipated loss of cultural removal and any removal is conducted by the best available technique.

<sup>46</sup> Defined as internationally-recognized heritage of communities for long-standing cultural purposes and legally-protected cultural heritage areas.

<sup>47</sup> These include the following: Alcoa, Anglo American, AngloGold, BHP Billiton, Freeport-McMoRan Copper & Gold, Mitsubishi Materials, Newmont, Nippon Mining & Metals, Noranda, Pasminco, Placer Dome, Rio Tinto, Sumitomo, Metal Mining, Umicore and WMC Resources.

## **Overview of IFC Policy on Disclosure of Information**

### **Central Requirements of the Disclosure Policy**

The IFC Policy on Disclosure of Information does the following:

1. Describes the disclosure responsibilities of the IFC and outlines the information that the IFC will publish on its website, including general institutional information, investment-specific information, and information related to technical assistance and advisory services. The policy does not apply to IFC's clients, whose disclosure responsibilities are described in the Performance Standards, nor does it apply to the Equator Principle Financial Institutions;
2. For each proposed investment, requires that the IFC disclose an Environmental and Social Review Summary (ESRS) and a Summary of Proposed Investment (SPI) at least 60 days (for Category A projects) or 30 days (for all other projects) before the investment is discussed at the IFC's Board of Directors;<sup>48</sup>
3. Stipulates that the SPI and ESRS are released only after the IFC has assured itself that the project sponsor is likely to undertake the project in a manner consistent with the Performance Standards and has completed its disclosure and consultation requirements. Therefore, project sponsors' Social and Environmental Assessments and Action Plans would need to be released earlier than the IFC's 30-day and 60-day minimum disclosure timelines;
4. Lists disclosure exceptions or types of information that the IFC will keep confidential;
5. Describes "exceptional circumstances" when IFC senior management may decide that information normally considered confidential should be disclosed because the information "would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment;" and
6. Establishes a "Disclosure Policy Advisor" who receives and reviews complaints from the public if there is concern that a request for information has been unreasonably denied. This Advisor reports directly to the Executive Vice-President of the IFC.

### **Improvements from Previous Disclosure Policy**

The IFC has made some improvements to its disclosure policy. First, it has expanded the range of general institutional information it will routinely disclose on its website. The new policy requires the disclosure of minutes of Board meetings, IFC Strategic Directions Papers and more detailed budgetary and financial information. The IFC has also committed to reporting, at least annually, on its development effectiveness at an organizational, not project level.

Second, while the IFC has not expanded the range of investment-related information that is publicly available, it has slightly deepened the content of the SPI and ESRS. The SPI now includes information on the anticipated development impact of the project and, for projects in the extractive industries sector, the SPI will provide an assessment of the governance risks to projected project benefits. The ESRS will include a rationale for IFC's project categorization decision, a description of the main social and environmental risks and impacts, and an identification of the key mitigation measures, including those in the client's Action Plan.

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<sup>48</sup> An ESRS is only developed for Category A and Category B projects and not for investments in Financial Intermediaries.

Third, the IFC has incorporated into its policy a modest version of a ‘public-interest override’ – an increasingly recognized best practice in national access to information regimes. The override allows for the disclosure of otherwise confidential information if there is an overwhelming public interest that merits its release.

Fourth, an improvement in the IFC’s disclosure policy is the institutionalization of some minimum information request process guarantees. The IFC has identified timelines for responses to requests for information (within 30 days) and minimum standards for the content of those responses. It has also taken the first step towards a disclosure policy appeals system by establishing a Disclosure Policy Advisor. This officer will review disclosure policy complaints and help ensure IFC compliance with the policy.

### **Shortcomings and Weaknesses in the Disclosure Policy**

Perhaps the most significant failure of the disclosure policy is that the IFC has not committed to report on development impacts on a project-by-project basis. While the IFC will collect data on project level impacts, they will only report on the development impacts “at least annually” and on the institution’s “performance as a whole.”

The lack of specific commitments to more timely disclosure of information throughout the project cycle is particularly disappointing. While the IFC has shifted much of the responsibility for investment-related disclosure to its clients, it has not adopted comparative improvements to its own transparency commitments. The IFC will not disclose its most detailed information about an investment project, including the full Environmental and Social Review Document. It will not disclose either the draft or final project proposal that is presented to IFC’s Board of Directors (Board Report). Nor has the IFC attempted to improve early disclosure by lengthening the 60- and 30-day minimum disclosure timelines for social and environmental information – benchmarks that have been in place since 1998.

The IFC also failed to improve disclosure during project implementation. Outside of the annual reports on development impact performance, the disclosure policy does not require the public release of any IFC information after project approval. There is no requirement to update the ESRS and SPI on a regular basis throughout the life of the project, and IFC documentation such as Project Supervision Reports and Corrective Action Plans are not disclosed.<sup>49</sup>

Lastly, the IFC has failed to significantly narrow the list of disclosure exceptions and continues to classify broad categories of information as confidential. For example, the disclosure policy does not allow the release of “non-public information provided to IFC” or “any internal documents, memoranda, or other communications that are issued by or between members of IFC’s Board of Directors, the advisers and staff of IFC’s Board members, members of IFC management, IFC staff, or IFC’s consultants, attorneys, or agents.” Exceptions such as these could include almost all information held by the institution. Instead, disclosure policy constraints should be narrowly drawn and apply only where disclosure poses a serious risk of harm to a legitimate secrecy interest.

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<sup>49</sup> The Independent Evaluation Group of the IFC is updating its disclosure policy and may release additional investment-specific reports.

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