



March 1, 2011

IFC Policy Review
International Finance Corporation
2121 Pennsylvania Avenue NW, MSN F 3P-301
Washington DC 20433, USA
By email to: policyreview@ifc.org

Re: International Finance Corporation Policy and Performance Standards on Social and Environmental Sustainability, and Access to Information Policy – Review and Update Process

We are writing in response to the International Finance Corporation's (IFC) request for comments on proposed amendments to the Policy and Performance Standards on Social and Environmental Sustainability, and Access to Information Policy (the Performance Standards)¹. NEI Investments commends IFC for its continuing efforts to enhance the Performance Standards, and for seeking input in this process.

With over C\$5 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will provide higher risk-adjusted returns over the long term. Through our company evaluations, our active engagement with the companies in our funds, and our issues research, we have developed considerable insight into good practices and weaknesses in corporate ESG performance, which we endeavour to share in the context of consultations on policy and standards.

Our ESG Program has a special focus on financial institutions and extractives industries, because these sectors are so heavily represented on Canadian exchanges. Lack of consensus on expectations of companies with respect to human rights and indigenous rights has long been a source of reputational and social license risk for Canadian companies, particularly for mining and oil and gas companies that operate in high-risk countries and may create major impacts on host communities. For the past several years we have been engaging extractives companies held in our funds on human rights and indigenous rights issues, including free, prior and informed consent (FPIC). We have also been engaging the major Canadian banks on integration of human rights, indigenous rights and other ESG considerations into their lending policies. The IFC Performance Standards are highly influential as benchmarks for both sets of companies, and have also been incorporated within the mandate of the Canadian extractive industry Corporate Social Responsibility (CSR) Counsellor².

We see much value in the proposed amendments to the Performance Standards. In particular, we note the new focus on inherent sector and local risk; the recognition of resource efficiency as a performance consideration; the incorporation of the principle of FPIC for projects impacting indigenous communities; and improved information disclosure requirements. In the following pages we set out key recommendations on human rights and indigenous rights aspects, as well as detailed comments on the draft Performance Standards relating to these issues.

¹ **International Finance Corporation.** Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Access to Information Policy. [Online] 2010.

[http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase3_FINAL_CODE+PACKAGE/\\$FILE/Phase3_FINAL_CODE+PACKAGE.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase3_FINAL_CODE+PACKAGE/$FILE/Phase3_FINAL_CODE+PACKAGE.pdf)

² **Foreign Affairs and International Trade Canada.** Corporate Social Responsibility Counsellor – About Us. [Online] 2011.

http://www.international.gc.ca/csr_counsellor-conseiller_rse/About_us-A_propos_du_bureau.aspx

Key recommendations

- We urge IFC to ensure that the Performance Standards are aligned with, and support, the “Protect, Respect and Remedy” Framework³ of the Special Representative of the United Nations Secretary-General for Business and Human Rights (UNSRSG). In particular, we recommend that the Performance Standards explicitly address the requirement for corporate due diligence on human rights (including human rights impact assessment in some circumstances), as well as effectiveness of grievance mechanisms to remedy human rights impacts and abuses.
- We strongly support the inclusion of the requirement for free, prior and informed consent (FPIC) in Performance Standard 7 (Indigenous Peoples). The incorporation of FPIC not only brings the IFC Performance Standards in line with emerging international indigenous rights expectations, but it also represents a prudent fiduciary action for IFC and its clients, in terms of mitigating risk to project social license to operate.
- We strongly support the increased emphasis on transparency in the revised Access to Information Policy. Our understanding of the document is that public disclosure on verification of FPIC claims will normally be required 60 days before a decision is presented to the Board, but explicit language should be added to clarify this.

Detailed comments on the proposed amendments to the Performance Standards

We preface our specific comments on the consultation drafts with a general observation. According to the consultation document, IFC’s intention in amending the Performance Standards is to clarify or strengthen its commitments on environmental and social issues, including human rights (page iii), and to follow the work of UNSRSG in the human rights area (paragraph 32). This intention is welcome: in the recently-circulated draft Guiding Principles for the implementation of the “Protect, Respect, and Remedy” Framework⁴, UNSRSG makes explicit reference in Guiding Principle 11 to the need for multilateral institutions – including international financial institutions - to promote corporate respect for human rights, through technical assistance, capacity building, and awareness-raising.

In this context, we are concerned at what appears to be a general absence of explicit, specific reference to human rights in the amended Performance Standards. While key human rights considerations are mentioned in the accompanying Guidance Notes, lack of specific attention to human rights in the text of the Standards is a missed opportunity to contribute to operationalization of Guiding Principle 11. We recommend that the text of each Performance Standard be reviewed for consistency with the language and content of the “Protect, Respect and Remedy” Framework. In particular, we believe that due diligence on human rights risks should be specified as a requirement for IFC support.

Policy on Social and Environmental Sustainability

We draw IFC’s attention to a number of sections in the Policy document which could be revised to better reflect UNSRSG’s “Protect, Respect and Remedy” Framework:

³ UN Human Rights Council. Protect, Respect and Remedy: a Framework for Business and Human Rights. [Online] 2008. <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁴ UN General Assembly. Guiding Principles for the implementation of the United Nations “Protect, Respect and Remedy” Framework. [Online] 2010. <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>

Paragraph 11:

UNSRSG sets out a specific approach to the corporate responsibility to respect human rights in Guiding Principles 12-22, incorporating human rights policy, due diligence and remediation. Paragraph 11, which sets the basis for treatment of human rights elsewhere in the Performance Standards, does not appear to acknowledge all the elements of the corporate responsibility to respect identified by UNSRSG, beginning with the foundational principles set out in Guiding Principle 12. Some elements of the foundational principles can be found elsewhere in the Performance Standards – for example, Guidance Note 1 (46) highlights the pre-eminence of the International Bill of Rights for the identification of human rights that may be at risk – but we believe bringing this content together and integrating it into the main text would improve clarity and create more consistency with the work of UNSRSG.

Paragraph 19 – 38:

There is no specific reference to human rights due diligence in the description of IFC’s own due diligence procedures. This section should be reviewed for consistency in supporting the corporate human rights due diligence approach set out in UNSRSG’s Guiding Principles 15-19.

Paragraph 22:

The most recent revision to Paragraph 22 deletes a reference to the risks faced by companies due to the omissions and negative actions of others, including possible complicity in human rights violations through third parties. This deletion does not improve the clarity of the document and we recommend that the text be reinserted. While IFC may feel that human rights are implicitly covered in this paragraph, we suggest that the special nature and gravity of this area of risk makes it advisable to retain the explicit reference. Paragraph 22 goes on to state that “certain risks may require IFC to refrain from supporting the business activity”, but language relating to decisions on projects posing risk of complicity in gross human rights violations has also been deleted here. Once again, the intention may have been to make the text inclusive of a wider scope of risks, but we feel the deletion affects the clarity of the document.

Performance Standard 1: Assessment and Management of Social and Environmental Risks and Impacts

The current version of Performance Standard 1 seems to imply that social and environmental due diligence incorporates, and can be a proxy for, human rights due diligence. Guidance Note 1 (48) suggests that Performance Standard 1 addresses the “respect” and “remedy” aspects of UNSRSG’s Framework by way of the requirements for a management system that assesses and mitigates risks, and for a grievance mechanism. However, in the text of Performance Standard 1 itself, there is no explicit reference to a specific need for assessment and mitigation of human rights impacts. Recognizing the dynamic nature of human rights risks and impacts, UNSRSG’s Guiding Principles set out an approach to human rights due diligence that goes beyond traditional social and environmental performance monitoring. We would argue that due diligence in identifying and addressing potential human rights risks is a key corporate tool for enabling respect for human rights, ultimately reducing risk to the project - and by extension, to investors.

Paragraph 5 (Policy):

Performance Standard 1 requires the client to establish an overarching policy covering the project that addresses social and environmental objectives and principles, in order to drive social and environmental performance. UNSRSG’s Guiding Principle 12 notes that the responsibility to respect human rights applies to all enterprises, while Guiding Principle 14 highlights the need for companies to express their commitment to respect human rights in a formal corporate policy. UNSRSG follows the same logic that IFC uses in mandating an environmental and social policy in Performance Standard 1 – that policy will, ideally, drive performance. We recommend that IFC include in Paragraph 5 a specific requirement for policy to address human rights objectives and principles alongside other social and environmental goals.

Paragraph 6 (Identification of Risks and Impacts):

Having established that the responsibility to respect human rights applies to all enterprises, UNSRSG’s Guiding Principle 15 specifies that assessment of human rights risk is an essential part of human rights due diligence. Paragraph 6 describes the process companies should undertake to identify social and environmental risks and impacts of a project, but does not explicitly identify human rights as one area of risk and impact. The previous version included a reference to human rights in a footnote, but this has been deleted. To support UNSRSG’s work, we recommend that Paragraph 6 should make explicit reference to human rights, ideally in the body of the text and not just in a footnote.

Footnote 11 does suggest that companies may choose to use Human Rights Impact Assessment (HRIA) in limited high-risk circumstances. We suggest that in high risk situations where potential for serious human rights impacts is apparent, IFC might better require that HRIA is undertaken as a condition of support, rather than merely suggesting it as an option. In our submission to the consultation on UNSRSG’s Guiding Principles, we suggested elaborating the discussion of considerations for defining the approach to assessment of human rights impacts, including the role of formal HRIA - especially in light of the work already undertaken by UNSRSG on the topic of HRIA⁵, and examples of practice in the field. UNSRSG’s Guiding Principle 16 provides useful guidance on human rights impact assessment for proposed or new operations, and for human rights aspects that companies have more experience in managing. However, we would argue that many companies face more complex human rights-related challenges, involving existing operations with a problematic human rights history, and human rights matters on which they as yet lack well-developed internal expertise⁶. In these cases, a formal HRIA may be a particularly appropriate risk mitigation tool.

Paragraph 36 (Grievance Mechanism for Affected Communities):

Paragraph 36 addresses the basic requirements of a grievance mechanism for Affected Communities. We suggest that this be reviewed against the comprehensive set of criteria for an effective grievance mechanism set out by UNSRSG in Guiding Principle 29:

- Legitimate
- Accessible
- Predictable
- Equitable
- Rights-compatible
- Transparent
- Based on dialogue and engagement

⁵ The Special Representative submitted a report in 2007 discussing the basic tenets of Human Rights Impact Assessment (HRIA). This report outlined a number of private sector initiatives and NGO approaches that were under development including guidance documents, assessment tools and pilot projects. See: **UN Human Rights Council**. Human rights impact assessments - resolving key methodological questions. [Online] 2007. <http://www.reports-and-materials.org/Ruggie-report-human-rights-impact-assessments-5-Feb-2007.pdf>

⁶ In 2008, we were part of a group of responsible investors that called on Goldcorp, a Canadian gold mining company, to commission an independent Human Rights Impact Assessment (HRIA) of the Marlin mine in Guatemala. Goldcorp agreed to the request, and we were involved in the process as a member of the independent steering committee responsible for overseeing the assessment. In keeping with the tenet of transparency, the Marlin Mine Human Rights Assessment was released publicly in 2010. Not only was this a demonstration of openness and commitment to action on the part of the company, but it also made available an important body of work on methodology in the emerging field of HRIA. See **Steering Committee**. Human Rights Assessment of Goldcorp’s Marlin Mine. [Online] 2010. <http://hria-guatemala.com/en/default.htm>

We recently compared UNSRSG's criteria for grievance mechanisms against several current and proposed standards: the IFC's own Performance Standards⁷, the Canadian CSR Counsellor's review mechanism⁸, the complaint mechanism proposed under Canadian Bill C-300 on extractive activity in developing countries⁹, and the Responsible Jewellery Council code of practices¹⁰. We found that UNSRSG's Guiding Principles criteria reflected, or went beyond, the current scope of these principles and mechanisms, and therefore recommend them to IFC.

Performance Standard 4: Community Health, Safety, and Security

With respect to Performance Standard 4, we reiterate our over-arching concern that the current text does not align sufficiently with UNSRSG's "Protect, Respect, and Remedy" Framework and Guiding Principles, and lacks clarity with respect to assessment and mitigation of human rights risks. Although there is brief mention of human rights in the security context in the objectives set out in paragraph 2, there is little explicit reference to human rights subsequently, even though the topics covered (such as impacts on ecosystem services and personal safety) are strongly linked to fundamental human rights. We recommend, therefore, that the entire text of Performance Standard 4 be reviewed from the perspective of human rights.

Paragraph 8 (Ecosystem Services):

Proposed revisions to Paragraph 8 provide better context on the importance of ecosystem services and more clarity on the expectation for clients to mitigate impacts. However, clarity could be further enhanced through explicit reference to the link between access to ecosystem services and basic human rights. In particular, guidance to clients should be provided on IFC's expectations for due diligence in assessing and mitigating human rights impacts resulting from impacts to ecosystem services.

Paragraph 12 (Security Personnel Requirements):

In our experience, few areas of corporate activity generate more human rights risk than project security. There is significant risk that companies will become complicit or be directly implicated in human rights abuses through the actions of contracted or government security personnel. We believe that Paragraph 12 should make explicit reference to this risk, and that in general Performance Standard 4 should provide more guidance on IFC's expectations on avoiding human rights abuses linked to security personnel. Removing a direct reference to international human rights principles and humanitarian law from Paragraph 12 weakens the draft, while reducing clarity. Guidance Note 4 (32) states that where force is used by security personnel, this should be done in a way that respects human rights – but no explanation is offered as to what that might mean in practice. The Voluntary Principles on Security and Human Rights¹¹ are referenced as a general source, but could be drawn upon for clarifications. We note that the Voluntary Principles have been incorporated alongside the IFC Performance Standards in the mandate of the Canadian CSR Counsellor¹².

⁷ **International Finance Corporation.** Performance Standards on Social & Environmental Sustainability. [Online] 2007.

[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)

⁸ **Government of Canada.** Review Process of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor. [Online] 2010.

http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/info%20brochure%20Nov1.pdf

⁹ **House of Commons Canada.** Bill C-300. [Online] 2009. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>

¹⁰ **Responsible Jewellery Council.** Principles and Code of Practices. [Online] 2009.

http://www.responsiblejewellery.com/downloads/boxed_set_2009/S001_2009_RJC Prin COP.pdf

¹¹ **The Voluntary Principles on Security and Human Rights.** The Voluntary Principles on Security and Human Rights. [Online] 2011.

http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf

¹² **Foreign Affairs and International Trade Canada.** Corporate Social Responsibility Counsellor – About Us. [Online] 2011.

http://www.international.gc.ca/csr_counsellor-conseiller_rse/About_us-A_propos_du_bureau.aspx

Performance Standard 7: Indigenous Peoples

We strongly support the proposed incorporation in Performance Standard 7 of requirements for free, prior and informed consent (FPIC) of Indigenous Peoples. This reflects the emerging international norm expressed in the UN Declaration on the Rights of Indigenous Peoples¹³, and growing momentum towards affirmation of the rights of Indigenous Peoples. For the past several years we have been engaging extractive industry companies in our funds to adopt the principle of FPIC for projects that impact on the rights of Indigenous Peoples, as well as encouraging the major Canadian banks to incorporate FPIC into their project lending criteria. In our 2008 report, *Winning the Social License to Operate: Resource Extraction with Free, Prior and Informed Community Consent*¹⁴, we highlighted the value of FPIC as a strategy to mitigate reputational, operational and fiduciary risks of extractive projects. We are firm in our belief that companies adopting FPIC will benefit from greater project certainty, reduced delays, superior community relations - and that, ultimately, this will increase returns for investors.

While we offer a number of minor suggestions for refining the text of Performance Standard 7, in general we feel that the current draft represents a good combination of promoting indigenous rights, while setting out clear and reasonable expectations for clients. We strongly encourage the IFC to retain the new FPIC language in the final version of the Performance Standards. We also commend IFC's proposed commitment in Guidance Note 7 (33) to verify client documentation and engage with affected communities to validate claims of FPIC.

Paragraph 1 (Introduction):

Paragraph 1 rightly recognizes the vulnerability of some Indigenous Peoples, and highlights the stresses that resource extraction can place on identity, culture, and economic wellbeing. We feel, however, that this overlooks a reality that Indigenous Peoples are not just passive recipients of negative impacts or economic benefits, but can strongly influence the success or failure of a project – in particular, where they have legally-recognised rights over territory or resources. For example, in 2010 regulatory approval for Vedanta Resources' bauxite mine in Orissa, which had been strongly opposed by some of the affected indigenous communities, was refused on the basis of infringements of tribal rights under India's Forest Rights Act. We suggest adding a reference to the growing importance of corporate relations with Indigenous Peoples to the progress and success of projects that impact upon their communities.

Guidance Note 11 (Social and Environmental Risks and Impacts Identification):

Guidance Note 11 rightly highlights the importance of a participatory approach to identification of project impacts that reflects "the views of the affected communities of Indigenous Peoples on expected project risks, impacts, and benefits". This is an important issue, and could be further emphasized. In order to arrive at a meaningful assessment of the nature and scale of potential impacts on indigenous communities, an effective consultation process is essential. This consultation should be "free, prior and informed", but it should also be an iterative process in which the client provides information on its own understanding of the project's risks and impacts, and the indigenous community adds further context, so that considerations such as sacred sites and traditional use areas can be properly taken into account.

Paragraph 15 (Special Circumstances Requiring Free, Prior, and Informed Consent):

At various points throughout the Performance Standards, it is acknowledged that effective consultation with affected communities is not a time-bound exercise ending once approval is granted - rather, it should be an ongoing process throughout the life of the project (see for example, Performance Standard 1, paragraphs 27 and 32; and Performance

¹³ **United Nations.** Declaration on the Rights of Indigenous Peoples. [Online] 2007. <http://www.un.org/esa/socdev/unpfi/en/drip.html>

¹⁴ **Ethical Funds.** Winning the Social License to Operate with Free, Prior and Informed Community Consent. [Online] 2008. <http://www.neinvestments.com/neifiles/PDFs/5.4%20Research/FPIC.pdf>

Standard 7, paragraph 10). We strongly agree with the viewpoint that effective consultation should be a continuing process of identifying and mitigating risks as the project progresses. The concept of a continuing consultation process should also be applied, however, in the context of FPIC. We recommend making explicit reference in paragraph 15 or the accompanying Guidance Notes to a requirement for ongoing consultation throughout the life of the project to reaffirm any previously determined FPIC of Indigenous Peoples, so that consent remains valid and meaningful.

Paragraph 17-18 (Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use):

Within the section on “Special Circumstances Requiring Free, Prior and Informed Consent”, it is explicitly stated that clients must obtain FPIC of Indigenous Peoples in cases of relocation (paragraph 19) and impact on cultural resources (paragraphs 20-21). For consistency, we suggest that similarly explicit language could be added to the text relating to cases of impacts on lands and natural resources (paragraphs 17-18).

Consistent Use of “FPIC” and “Broad Community Support”:

We recommend that the IFC review Performance Standard 7 and Guidance Note 7 to ensure that the concepts of “free, prior and informed consent” and “broad community support” are always used in a consistent way, to avoid possible confusion. Examples of possible inconsistency in the text include the following:

- Guidance Note 7 (33) describes IFC engaging affected communities to verify that they are broadly in support of a project in cases requiring FPIC.
- Guidance Note 7 (37) describes IFC evaluating client documentation of engagement to establish that broad community support exists in cases of relocation – although it is stated earlier that these cases require FPIC.

Access to Information Policy

Paragraph 31 (Broad Community Support):

Paragraph 42 of the consultation document states that, “where relevant, IFC will disclose its determination of whether and how [Broad Community Support] or FPIC have been obtained”¹⁵. We understand this to mean that, in the special circumstances requiring FPIC outlined in Performance Standard 7, IFC is committing to verify the client’s claim of FPIC, and make this verification public. We strongly support this transparency, and congratulate IFC on proactively addressing stakeholder concerns about the lack of disclosure around its decisions.

We believe that greater transparency will ultimately be in the best interest of all parties. Affected communities will have the opportunity to confirm to IFC that FPIC has been reached, answering concerns that have been expressed by Indigenous communities about lack of transparency. The increased level of oversight created by public disclosure of the verification will encourage improved due diligence process by the client, which will tend to reduce risks to the project from community opposition. Having IFC’s verification on public record will increase the client’s credibility among stakeholders - including investors, who will have added assurance that the company is mitigating the risks posed by community opposition. One caveat with regard to disclosure is that it must be done in such a way as to ensure the privacy and security of individuals or groups in the community. Although IFC has recognized the general need to protect security in disclosure decisions in Access to Information Policy Paragraph 11(f)(iii), we would emphasize the need to apply this consideration in FPIC disclosure.

¹⁵ **International Finance Corporation.** Progress Report on IFC’s Policy and Performance Standards on Social and Environmental Sustainability, and Access to Information Policy. [Online] 2010.
[http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase3_FINAL_CODE+PACKAGE/\\$FILE/Phase3_FINAL_CODE+PACKAGE.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase3_FINAL_CODE+PACKAGE/$FILE/Phase3_FINAL_CODE+PACKAGE.pdf)



Paragraph 31 states that, where applicable and where this can be determined in advance, IFC will disclose how it has made a determination of broad community support before the Board of Directors review the investment. We assume that this commitment will also be applied to FPIC determinations, but this should be clarified.

In its *Environmental and Social Review Procedures*¹⁶, IFC outlines its process for determining achievement of broad community support. We assume the approach to verifying FPIC claims might be similar, but this should be clarified, and the procedures document (and any references to it) should be revised to take into account the new FPIC requirement.

Conclusion and main recommendations

We commend IFC's continuing commitment to review and enhance the Performance Standards. We support the proposed amendments, and ask IFC to consider our enhancement suggestions. In particular, we recommend that IFC:

- Ensure that the Performance Standards are fully aligned with UNSRSG's "Protect, Respect and Remedy" Framework on business and human rights.
- Maintain and where necessary clarify the new language on free, prior and informed consent (FPIC).
- Maintain the enhanced disclosure commitments, and clarify how these apply for FPIC determinations.

Should you have any questions with regard to this submission, please do not hesitate to contact Michelle de Cordova, Manager, Public Policy & Research (mdecordova@NEIinvestments.com, +1-604-742-8319).

Sincerely,

NEI Investments

A handwritten signature in black ink, appearing to read "Robert Walker", with a long horizontal line extending to the right.

Robert Walker
Vice President, ESG Services

CC: Board of Directors, NEI Investments

¹⁶ **International Finance Corporation.** Environmental and Social Review Procedures, Version 4.0. [Online] 2009. [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_ESRP2009/\\$FILE/ESRP2009.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_ESRP2009/$FILE/ESRP2009.pdf)