Supplementary Submission

Senate Standing Committee on Foreign Affairs, Defence and Trade

Review of the Export Finance and Insurance Corporation (New Mandate and Other Measures) Bill 2013

EFIC and the IFC Performance Standards

During the 17 May 2013 hearing of the Senate Standing Committee on Foreign Affairs, Defence and Trade held in relation to the above captioned review there was considerable reference to the International Finance Corporation Performance Standards (PS). Witnesses from the Export Finance and Insurance Corporation (EFIC) referred to the PS when describing the approach EFIC undertakes to assessing the environmental and social risks associated with funding proposals and exposures.

The Committee members present in the hearing demonstrated limited knowledge of the IFC PS. Jubilee Australia, therefore, provides these comments on the content and application of the PS which summarise the points made in the attached article published by London-based NGO Bretton Woods Project (BWP) entitled *IFC updated performance standards weak on human rights, other shortcomings.* The BWP article is itself an amalgamation of the comments of a range of NGO World Bank observers with different areas of interest and specialist knowledge.

In the Senate hearing EFIC correctly indicated that the PS are the "best practice" international standards providing guidance to international businesses seeking IFC support for projects which are likely to have adverse environmental and social impacts. Jubilee Australia acknowledges EFIC's testimony that they are "committed to using [the PS] as our usual benchmark" to "cover off a whole range of environmental and social issues."

Our recommended reforms to the EFIC Act relating to environmental and social due diligence are aimed at requiring prior disclosure of those assessments and benchmarking analyses so that EFIC can fulfil its responsibility to inform the public adequately of the risks to the environment, people and communities posed by the projects it proposes to support.

The IFC PS

1. The IFC PS were introduced in 2006 to provide guidance for IFC clients to "avoid and mitigate adverse impacts and manage risk as a way of doing business in a sustainable way." The PS were recently updated. Together with the IFC Policy on Environmental and Social Sustainability and a new IFC Access to Information Policy, the eight revised performance standards make up the IFC's updated Sustainability Framework. It came into force in January 2012.
2. These are the eight Performance Standards – the categories of standards that the client is required to meet for the duration of involvement with IFC or other the party applying the PS:

   PS1 – Assessment and Management of Environmental and Social Risks and Impacts;
   PS2 – Labour and Working Conditions;
   PS3 – Resource Efficiency and Pollution Prevention;
   PS4 – Community Health, safety and Security;
   PS5 – Land Acquisition and Involuntary Resettlement;
   PS6 – Biodiversity Conservation and Sustainable Management of Living Natural Resources;
   PS7 – Indigenous Peoples; and
   PS8 – Cultural Heritage.

It is our understanding that EFIC will provide the Committee with the IFC PS in response to a request made by Senator Eggleston during the Hearing.

Civil Society Comments on the IFC PS

3. The updated framework acknowledges the responsibility of the private sector to respect human rights, but falls short of human rights due diligence requirements for business actors. The IFC has elected not to address the needs of international businesses seeking guidance on how to meet their responsibility to respect human rights. In neglecting to provide this guidance to clients the IFC appears to reject the idea that it and others applying the PS must refrain from funding projects that violate human rights.
4. The updated framework does not address crucial weaknesses identified by both CSOs and the World Bank's arms-length watchdog, the Independent Evaluation Group (IEG), such as the lack of independent verification or adequate disclosure of project monitoring and supervision reports.
5. New requirements for project proponents to obtain the Free, Prior and Informed Consent (FPIC) of people in project-impacted communities were welcomed by CSOs, but a) FPIC will only be required under "certain circumstances" that are tightly restricted, and b) the provisions do not meet the consent requirements already included in the UN Declaration on the Rights of Indigenous Peoples. The revised framework requires additional consultation for projects that have "potentially significant adverse impacts" on local communities but it is unclear when different consultation or consent requirements are triggered or what processes are adequate to fulfil them.
6. Weak language mars the requirement that projects report annual greenhouse gas emissions above 25,000 tons of CO_2 (reduced from 100,000 tons of CO_2 in the previous policy). It also fails to clarify whether the data generated will be independently verified and disclosed to the public.
7. The updated framework includes requirements for supply chain risk management in only two of the PS: on labour (PS2) and biodiversity (PS6).
8. There is clear tension in the language of the PS between commercial and developmental objectives. Rather ambitious objectives are generally qualified by such phrases as "where feasible" or "where commercially viable." It is difficult to imagine the robust application of the PS where there is language that permits something far less.
9. The aforementioned weaknesses in the PS reinforce the need for the EFIC Act to identify the international obligations, including human rights obligations, that EFIC should comply with.

IFC updated performance standards weak on human rights, other shortcomings

By: Bretton Woods Project
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The International Finance Corporation (IFC), the Bank's private sector arm, has concluded a two-year review of its performance standards on environmental and social sustainability, but its weak human rights approach has angered rights organisations.

The performance standards were introduced in 2006 to provide guidance for IFC clients to "avoid and mitigate adverse impacts and manage risk as a way of doing business in a sustainable way". Together with the policy on environmental and social sustainability and a new access to information policy, the eight revised performance standards make up the IFC's updated sustainability framework. Approved by the board in May, the updated framework was only disclosed in early August and will come into force in January next year.

Key changes include: the categorisation of financial intermediaries (FI) projects according to risk; a requirement for free prior and informed consent (FPIC) from indigenous peoples in certain situations; the addition of protection for migrant workers; strengthened transparency on greenhouse gas emissions; the disclosure of extractives project contracts; and the promise of more project-level information. The IFC proposed to review experiences with this updated framework after five years of implementation.

Undermining rights standards?

Despite a series of stakeholder consultations during the review, the revised policy confirmed civil society groups' concerns about a lack of human rights language to ensure communities affected by IFC's activities are protected. The updated framework "acknowledges the responsibility of the private sector to respect human rights", but falls short of due diligence requirements for business actors, as outlined by the principles proposed by United Nations Special Representative on business and human rights John Ruggie and endorsed by the UN Human Rights Council last June. "In doing so, the IFC has not only potentially undermined the UN guiding principles, but missed an important opportunity, as many businesses are seeking guidance on how to meet their responsibility to respect human rights", said Kirk Herbertson of US NGO the World Resources Institute.

A joint civil society statement issued by 60 organisations in March urged the IFC to be "fully consistent with international human rights standards", establishing "a clear requirement that IFC and its clients undertake human rights due diligence" and making "a clearly stated commitment … that it will not support activities that are likely to cause, or contribute to, human rights abuses." Giorgiana Rosa of NGO Amnesty International highlighted that "the IFC should have done much more to adopt the necessary safeguards to ensure that its activities do not expose communities to possible human rights abuses." Kris Genovese from the US NGO Center for International Environmental Law (CIEL) added that the IFC "missed a key opportunity to ensure protection of human rights. It rejected the idea that it must refrain from funding projects that violate human rights. Does the IFC really want to keep that option open?"

The risk-based categorisation of FI projects responded to one of the recommendations of a July evaluation by the Bank's arms-length watchdog, the Independent Evaluation Group (IEG), on the Bank's safeguards and sustainability policies. However, unlike other types of lending that are entirely covered by the revised performance standards, these will only apply to high risk FIs and higher risk activities supported by FI projects in the moderate risk categories. Projects in the lower risk category will only need to "screen new investments against the IFC Exclusion List and national law".

The IEG evaluation also echoed criticism from civil society groups about the miscategorisation of projects across the World Bank Group. "[S]everal high-risk category-B projects (substantial impact) financed by IFC would have likely been categorised as category-A (very high impact) projects using the Bank's screening system", said the report, finding that this affected 27 per cent of category B projects in the sample analysed. In the revised sustainability framework, the IFC finally agreed to better align the categorisation of projects with the World Bank, predicting that "this will double the number of category A projects entering [the] IFC's portfolio."

Nevertheless, the updated framework does not address a crucial weakness identified by the IEG in the IFC's performance standards: the lack of independent verification or adequate disclosure of its monitoring and supervision reports. Despite promising the disclosure of extractives project contracts and of "more project-level information, including on environmental, social, and development outcomes during all stages of the project", the access to information policy still allows for a blanket ban on the disclosure of "commercially sensitive and confidential information" and of "deliberative information", effectively excluding stakeholders from any information or documents discussed within the IFC while projects are being designed.

FPIC at last

Civil society groups that have long advocated for FPIC welcomed its inclusion in the revised performance standards, together with key disclosure requirements for FPIC documentation in the new access to information policy. However, FPIC will only be required under "certain circumstances" that are tightly restricted, and it does not meet consent requirements under the UN Declaration on the Rights of Indigenous Peoples. Helen Tugendhat of UK NGO Forest Peoples Programme noted that "the requirement for FPIC suffers in places from weakened language, notably in reference to critical cultural heritage (where adverse impacts must be judged significant before protections are granted), hazy requirements for individually titled indigenous territories and from a lack of independent verification of consent." The revised framework also requires additional consultation for projects that have "potentially significant adverse impacts" on local communities, but it is still unclear when different consultation or consent requirements are triggered or what processes are adequate to fulfil them.

Weak language also mars the requirement that projects report to the IFC annual greenhouse gas emissions above 25,000 tons of CO_2 (reduced from 100,000 tons of CO_2 in the previous policy). A March letter signed by CIEL and other civil society groups criticised this requirement for having a weak methodology that does not identify all potential emissions. The IFC also failed to clarify whether the data generated will be verified and disclosed to the public, according to the letter, which concluded that a "requirement that clients quantify emissions by itself is a relatively meaningless exercise".

Following the controversy surrounding the IFC's failure to take into account whole supply chain impacts of its palm oil investments, the updated framework included requirements for supply chain risk management in only two performance standards: on labour and biodiversity. Although IFC clients are required to identify and mitigate risk in primary supply chains, and "where possible" shift to suppliers that comply with the performance standards, there is still significant scope for interpretation in the acknowledgement that "there are real limits to client actions depending on the position of the client in the supply chain and the dynamics of each individual supply chain."

Concerns that weak language in the performance standards could undermine their impact were highlighted by a July study published by think tank the International Institute for Environment and Development. It analysed several investment principles, including the IFC performance standards and the Equator Principles (EPs), a set of international standards for reducing environmental and social harm adopted by 72 export credit agencies and private commercial banks that is based on the IFC framework. The study noted "a clear tension between commercial and developmental – particularly environmental – objectives … made very clear in IFC documents, where rather ambitious objectives are generally qualified by such phrases, as 'where feasible' or 'where commercially viable'."

Similarly, the EPs were described in the study as "weak" and "exacerbated by vague language", with "terms such as 'where appropriate' or 'as far as possible'", meaning that "their integration of environmental, social and governance criteria is limited to the level of aspiration rather than requirement." Following the update of the IFC's performance standards, the EP Association kicked off a very rapid review of its own principles in July. A 60-day public comment process is expected to be launched in December, while the updated EP framework is due to be finalised in March 2012.

The IFC is expected to publish updated implementation guidance notes by November, but questions about whether the new standards will translate to reality on the ground still remain. The umbrella body for trade union confederations, Global Unions, warned in a September statement that, although the IFC's performance standard on labour could ensure the protection of workers' fundamental rights if fully complied with, "some serious lapses in implementation remain". The statement urged the IFC to "improve its monitoring and implementation procedures … [to] … make clear to borrowing companies that … failure to meet the Performance Standards will lead to loss of financial support."

Lessons for Bank safeguards?

Global Unions also asked that a labour safeguard be included in the Bank's safeguards review due to end in 2012. While the IFC uses the performance standards framework for the private sector, the public sector arms of the Bank use the safeguards framework. Tugendhat urged "the extension of the positive changes seen on FPIC in the IFC updated Sustainability Framework to the rest of the World Bank Group as part of the wider safeguard review." While little news about the review process has been heard since its announcement last year, a letter signed by 238 civil society groups was sent to Bank president Robert Zoellick at end August asking for the Bank to engage in public consultations and assure that the safeguards will be clarified, strengthened and expanded to cover existing gaps and all forms of lending.

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