



THE INTERNATIONAL FINANCE CORPORATION'S PERFORMANCE STANDARDS AND THE EQUATOR PRINCIPLES: RESPECTING HUMAN RIGHTS AND REMEDYING VIOLATIONS?

A Submission to the U.N. Special Representative
to the Secretary General on Human Rights and
Transnational Corporations and other Business Enterprises

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August 2008

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EXECUTIVE SUMMARY

Over the last several years, the International Finance Corporation's (IFC) Performance Standards and the Equator Principles (PS/EPs) have become the most widely-accepted framework among international project financiers for managing environmental and social risks of projects in the developing world. This submission to the United Nations Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (Special Representative) considers the extent to which the PS/EPs provide sufficient guidance for project sponsors to manage the human rights risks of their operations. It finds that *the PS/EPs do not provide project sponsors with a robust framework for meeting their responsibility to respect or remedy human rights*. In particular, the PS/EPs fall short in three critical areas:

- **Substantive Standards:** The PS/EPs do not address many critical human rights issues, and address others only partially or in ways that do not meet international norms and standards.
- **Due Diligence Procedures:** The PS/EPs do not provide an adequate procedural framework for conducting human rights due diligence. Although the PS/EPs require a comprehensive environmental and social assessment for high-impact projects, they do not require explicit assessment of potential impacts on human rights.¹
- **Grievance Mechanisms:** While the PS/EPs require project sponsors to implement project-level grievance mechanisms, these mechanisms are not required to meet any minimum due process standards.²

As a result of these shortcomings, we believe that the PS/EPs must be significantly amended if they are to provide project sponsors with appropriate guidance for meeting their human rights responsibilities and minimizing human rights-related risks.

We respectfully submit that during the next phase of the mandate the Special Representative could make an important contribution to the effort to ensure that projects financed under the PS/EPs meet their baseline responsibility to respect human rights by addressing how these policy regimes could be harmonized with international human rights norms. Specifically, the Special Representative could build upon the insights and achievements of his previous mandate by:

¹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, para. 61 (April 7, 2008) [hereinafter *Protect, Respect and Remedy*] (The Special Representative emphasizes the importance of robust due diligence procedures).

² The Special Representative discusses the critical role that rights compliant grievance mechanisms can play in remedying violations in *Protect, Respect and Remedy*, paras. 92, 100.

- Assessing potential approaches for IFC, Export Credit Agencies (ECAs) and Equator Principle Financial Institutions (EPFIs) to embed human rights standards and rights-compliant procedures and accountability mechanisms into their financing requirements;
- Facilitating a dialogue between civil society and the relevant decision-makers at IFC, ECAs and the EPFIs to explore improvements to current practice;
- Reporting on these issues in subsequent reports to the Human Rights Council.

We would welcome the opportunity to assist and collaborate with the Special Representative on these issues during the next phase of the mandate.

I. INTRODUCTION

Large-scale infrastructure projects, extractive industries operations, and other projects that are financed on the international project finance markets often pose particularly serious environmental and social risks, including human rights risks.³ Due to the size and complexity of many of these projects, they may produce impacts that are profound, cumulative, and difficult to anticipate, and that may affect a variety of different stakeholders. As a result, such projects often present especially difficult assessment and mitigation challenges for their sponsors.

Over the last several years, the International Finance Corporation's (IFC) "Performance Standards" have become the most widely-accepted framework among international project financiers for managing environmental and social risks of projects in the developing world. In addition to their application to IFC's lending, more than 60 leading international institutions have committed to adhere to IFC's Performance Standards in their project-finance lending under the rubric of the Equator Principles. In 2007, US\$52.9 billion of project finance debt in emerging market economies was subject to the Equator Principles, representing over 70 percent of all such financing in emerging markets.⁴ In addition, the export credit agencies (ECAs) of the members of the Organization for Economic Co-operation and Development have agreed to adopt the

³ 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." www.equatorprinciples.com.

⁴ "Equator Principles Celebrate Five Years of Positive Environmental Impact and Improved Business Practices," May 8, 2008, at www.equator-principles.com.

Performance Standards as a common environmental and social benchmark for export credits and loan guarantees.⁵

Given that the Performance Standards/Equator Principles (PS/EPs) apply to a significant number of projects with potentially serious human rights risks, and that they have gained prominence and normative weight among project financiers as a leading benchmark of sustainability, it is critical that the PS/EPs provide appropriate guidance for project sponsors to manage human rights risks. In 2006, the Special Representative observed that initiatives such as the PS/EPs could be invaluable tools for ensuring that human rights standards are respected in internationally-financed investment projects.⁶ However, the Special Representative also noted that in order to serve this function, these frameworks must address the full range of human rights issues, and incorporate the standards and definitions employed in internationally-agreed norms.⁷

In his April 2008 report to the Human Rights Council, the Special Representative provided further insight into how initiatives like the PS/EPs can improve the human rights performance of project sponsors. The Special Representative affirmed that companies have a “baseline responsibility” to respect all internationally recognized human rights.⁸ He then explained that corporations must do two things to ensure that they meet this baseline responsibility. First, they must implement a robust due diligence framework that will enable them to identify, prevent, and address adverse human rights impacts.⁹ This includes both substantive benchmarks to provide detailed guidance on acceptable outcomes and clear procedures to assess potential impacts, devise avoidance and mitigation strategies, and ensure that substantive standards are achieved.¹⁰ Second, companies must ensure that stakeholders have access to effective grievance mechanisms to redress adverse human rights impacts.¹¹

In light of the Special Representative’s recognition of the important role the PS/EPs could play in helping companies to meet their human rights responsibilities, this submission analyzes the extent to which the PS/EPs (including IFC’s “Environmental, Health and Safety Guidelines”¹² and a subset of its explanatory “Guidance Notes”¹³) satisfy the Special Representative’s criteria for an appropriate human rights framework. Our analysis proceeds as follows. Part II establishes the relevance of human rights standards to internationally-financed investment projects by identifying the human rights issues that have arisen in a broad sample of these projects. Part III assesses the

⁵ Organisation for Economic Co-operation and Development Working Party on Export Credits and Credit Guarantees, Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (2007).

⁶ Interim Report of the Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises, at 11, paras. 52, 53 (February 2006).

⁷ *Id.*

⁸ *Protect, Respect and Remedy*, paras. 24, 54.

⁹ *Protect, Respect and Remedy*, paras. 25, 56.

¹⁰ *Protect, Respect and Remedy*, paras. 61-63.

¹¹ *Protect, Respect and Remedy*, paras. 93, 94.

¹² IFC, *Environmental, Health, and Safety (EHS) Guidelines* (2007).

¹³ IFC, *International Finance Corporation’s Guidance Notes: Performance Standards on Social & Environmental Sustainability* (2006).

substantive policy requirements of the PS/EPs. First, it considers the extent to which the PS/EPs directly reference and incorporate key international human rights instruments and initiatives. Then, it applies the Danish Institute for Human Rights' *Human Rights Compliance Assessment* tool (HRCA) to determine the extent to which the PS/EPs implicitly incorporate human rights norms and standards where they do not directly reference them.¹⁴ Part IV considers the assessment, implementation and oversight processes required by the PS/EPs in light of the Special Representative's recommendations regarding effective due diligence. Part V considers the extent to which the grievance procedures required by the PS/EPs are consistent with the minimum due process standards for a rights-protective mechanism referred to by the Special Representative.

II. RELEVANCE OF HUMAN RIGHTS STANDARDS FOR LARGE-SCALE PROJECTS FINANCED BY IFC, ECAs AND THE EPFIs IN THE DEVELOPING WORLD

A. Methodology for Assessing Relevance of Human Rights for Private-Sector Lending

In order to assess the extent to which human rights may be at risk in the kinds of internationally-financed projects that the PS/EPs are intended to cover, we reviewed 61 projects that have generated complaints or objections from locally affected communities. This sample included (1) ombudsman reports produced by the IFC's Compliance Advisor/Ombudsman (CAO); (2) complaints to the National Contact Points for the OECD Guidelines for Multinational Enterprises; (3) complaints to Oxfam Australia's Mining Ombudsman; (4) the Bank Information Center's "Problem Projects;" (5) reports by independent advisory panels commissioned to look at specific projects; (6) "Dodgy Deals" compiled by the BankTrack coalition; and (7) field investigation reports of civil society organizations that monitor projects in these sectors.

In these complaints and case studies, the affected parties typically did not frame their concerns in human rights terms. As a result, the language of the stakeholders' complaints or descriptions of their concerns did not necessarily reveal the extent to which internationally recognized human rights were implicated. We therefore independently assessed whether internationally recognized rights were implicated in the complaints and case studies. To ensure that this assessment was consistent with our analysis of the policy gaps in the PS/EPs discussed in Part IV, we considered whether the rights included in the Danish Institute's Human Rights Compliance Assessment were implicated in each

¹⁴ We do not assess whether gaps in coverage of human rights standards by the PS/EPs would leave human rights unaddressed in the cases we assessed in Part II. Given the nature of these case studies, it was not feasible to link stakeholder complaints to specific gaps identified in the HRCA. The affected peoples typically did not frame their concerns in human rights terms; even where they did, they did not do so with the specificity of the HRCA. Thus, rather than try to reframe the complaints to correlate with specific questions and indicators, Part II assessed the extent to which the *rights* addressed in the HRCA were implicated in the complaints and case studies.

of these cases. In this way, we determined the frequency with which a right addressed in the HRCA arose in the cases in our sample.

B. Findings of Case Studies

The case studies that we examined implicated most of the internationally recognized human rights included in the HRCA. Table 1 shows the frequency with which the rights included in the HRCA analysis arose in the case study samples. The nature of the cases and the rights that were implicated are explained further in Appendix 1.

TABLE 1	
Right	Incidence in Case Studies (60 Cases)
Right to Food	46
Right to Property	44
Right to Life	43
Right to Health	37
Right to Housing	28
Right to Adequate Standard of Living	26
Right to Freedom of Movement	15
Right to Freedom from Torture	13
Right to Culture	12
Right to Freedom of Opinion/Religion	9
Right to Assembly	5
Right to be Free from Forced Labor	5
Right to Participate in Government	4
Right to Work	1
Right to Family Life	1
Right to Privacy	1
Right to Fair Trial	0
Right to Intellectual Property	0
Right to Education	0

Our analysis of the case studies confirms that large-scale infrastructure and extractive industry projects financed on the international capital markets—like the broader set of business operations the Special Representative considered—can adversely impact the full range of internationally recognized human rights. Moreover, it also supports the Special Representative’s conclusion that some rights may require more focused attention in certain business operations than in others.¹⁵ As Table 1 illustrates, the projects in our sample may have adversely affected a number of core rights with some frequency.

¹⁵ *Protect, Respect and Remedy*, para. 52.

III. THE SUBSTANTIVE CONTENT OF THE PS/EPs

A. Explicit Incorporation of Human Rights Instruments and Initiatives

As the Special Representative notes in his report, due diligence frameworks should derive their substantive content from, and explicitly reference, internationally recognized human rights.¹⁶ The Special Representative has also noted that intergovernmental and multi-stakeholder soft law initiatives play an important role in “crystallizing emerging norms” and defining standards of practice with regard to these internationally recognized rights.¹⁷ Accordingly, the explicit incorporation of human rights instruments and voluntary initiatives into the PS/EPs serves two important functions. First, it is the best way for the IFC, ECAs and EPFIs to ensure that their policy frameworks are consistent with internationally recognized human rights standards (and best practice approaches for implementing those standards), and to communicate to their clients that they expect them to meet their responsibility to adhere to those standards. Second, direct incorporation helps promote these standards and serves an important norm-reinforcement function. When the IFC, ECAs and the EPFIs explicitly reference a given standard or voluntary initiative, they (a) “promote” the standard or initiative with their organizational influence and prestige; and (b) defer to the work of other international bodies with greater authority, legitimacy, and competence to articulate human rights standards.

Conversely, when these institutions decline to explicitly adopt internationally accepted standards they implicitly withhold their organizational support for the norm or initiative, and assert their own competence and authority to articulate alternative standards. This is particularly problematic for IFC and the public ECAs acting through the OECD. IFC and OECD are leading public, multilateral institutions that should be expected to pay due regard to the human rights commitments of their member governments and to properly acknowledge the authority and competence of other international bodies that have developed broadly accepted standards. They should avoid putting their imprimatur and substantial normative weight behind policy initiatives that undermine or contradict these commitments.

The PS/EPs almost entirely eschew any explicit discussion of human rights. By and large, they do not require clients to adhere to principles enshrined in key international human rights conventions, or to the guidelines included in voluntary initiatives. To cite one prominent example, Performance Standard 5 (Land Acquisition and Involuntary Resettlement) does not refer to the right to housing or other economic and social rights that may be jeopardized by forced displacement, or incorporate the corpus of

¹⁶ *Protect, Respect and Remedy*, paras. 58, 61.

¹⁷ *Protect, Respect and Remedy*, para. 17; *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, paras. 52-62 (March 2006).

interpretation and elaboration of those rights that has been developed by the Committee on Economic, Social and Cultural Rights or other authoritative bodies.

There are only three qualified instances in which the PS/EPs discuss or explicitly incorporate internationally-agreed human rights principles and norms. First, Performance Standard 2 (Labor and Working Conditions) explains that it is “in part guided by a number of international conventions negotiated through the International Labour Organization (ILO) and the United Nations (UN).” The voluntary *Guidance Notes* assert that by adhering to Performance Standard 2, a client will be able to operate in accordance with the ILO’s core labor standards. Indeed, provisions of the *Guidance Notes* are explicitly based on these standards. The definitions of several critical terms, for example, are taken from the relevant ILO Convention or other human rights instruments. However, Performance Standard 2 does not actually incorporate the ILO standards, and clients are not expected to adhere to the requirements of ILO Conventions, interpretations and recommendations except to the extent that the PS/EPs have implicitly adopted them.

Second, although Performance Standard 1 (Social and Environmental Assessment and Management Systems) does not require that human rights impacts be assessed or mitigated, the *Guidance Notes* suggest that “the Assessment process is a useful tool to analyze these risks and to consider management measures,” and point out that clients that are concerned about the human rights impacts of their operations “can consider carrying out an Human Rights Impact Assessment along with the Social and Environmental Assessment.” Third, although Performance Standard 7 (Indigenous Peoples) does not explicitly incorporate the large body of international law and best practices standards that have been promulgated to protect the rights of indigenous peoples, the *Guidance Notes* at least recognize that “key UN human rights conventions...form the core of international instruments that provide the rights framework for the world’s indigenous peoples.”

The PS/EPs thus do not capture the benefits of explicit incorporation of internationally agreed norms: they do not express a clear expectation that clients will meet their responsibility to adhere to human rights standards, and they do not “promote” human rights by placing the organizational influence and prestige of the IFC, ECAs and EPFIs squarely behind key instruments and initiatives. To the contrary, the PS/EPs tend to undermine the legitimacy of broadly accepted standards and the authority of the entities that have developed those standards by promulgating an alternative, weaker set of “best practice” standards for adoption among key private-sector actors.

B. Implicit Consistency with Human Rights Norms and Standards

Even where IFC, ECAs and the EPFIs decline to directly reference and incorporate human rights standards, they should adopt policies that are consistent with the norms and standards embedded in widely accepted international conventions and soft law instruments. Because these norms and standards have been incorporated into international instruments and/or developed through broad participatory processes, they reflect a consensus of governments or other leading policy-makers on the importance of the issue, the need for international action, and the appropriate policy response. They

therefore provide authoritative guidance for what a human rights policy framework should include, and a sounder basis for policy development than the discretion of IFC and Equator Bank management and staff. Accordingly, this section considers the extent to which the provisions of the PS/EPs are consistent with the substantive requirements of these human rights instruments.

1. Methodology: The Danish Institute for Human Rights' *Human Rights Compliance Assessment Tool*

In order to assess the extent to which the PS/EPs incorporate international human rights norms, we analyzed the PS/EPs using the Danish Institute for Human Rights' *Human Rights Compliance Assessment (HRCA)* methodology. The HRCA is a diagnostic tool that is designed to help companies understand how their operations might violate the human rights of their employees, local residents and other stakeholders. It uses a database of approximately 350 questions and more than 1,000 corresponding human rights indicators based on the provisions of the Universal Declaration of Human Rights and over 80 other major human rights treaties and ILO conventions.¹⁸ The Danish Institute updates the standards and indicators in the database annually to incorporate feedback from companies and human rights groups and to reflect developments in international human rights law.¹⁹

The real world relevance of the questions and indicators was vetted by the Danish Institute through a participatory development process. Since most human rights standards and implementation modalities have been developed for governments, the Danish Institute recognized that substantial stakeholder involvement would be necessary to ensure that the HRCA methodology for applying them to private-sectors actors had broad acceptance across diverse stakeholder groups. Towards this end, the Danish Institute partnered with the EU to conduct an extensive participatory review process that included 80 companies and a number of human rights organizations.²⁰ This process was explicitly designed to ensure that business concerns were given adequate attention alongside community/rights interests. Accordingly, the HRCA's questions and indicators reflect the human rights risks that the participants have encountered, or are likely to encounter, in their own business operations or corporate advocacy and engagements.

The HRCA's questions and indicators are organized in two ways. First, they are grouped by human right. Thus, the HRCA includes questions and indicators with regard to the right to:

- Fair trial;
- Adequate food;
- Adequate housing;
- Adequate standard of living;
- Education;

¹⁸ See Appendix 2 for a list of the major human rights conventions referenced in the HRCA.

¹⁹ http://www.humanrightsbusiness.org/040_hrca.htm

²⁰ Danish Institute for Human Rights, *Human Rights Compliance Assessment Quick Check* (2006).

- Family life;
- Freedom from forced labor and involuntary servitude;
- Freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- Freedom of movement;
- Freedom of opinion, expression, conscience, thought and religion;
- Health;
- Intellectual property;
- Life, liberty and security of person;
- Property;
- Participate in cultural life;
- Peaceful assembly and freedom of association;
- Privacy;
- Participate in government;
- Work and just and favorable conditions of work.

Second, the HRCA also considers how each of these rights may be violated in the context of six different aspects of business operations:

- Community impact;
- Company products and marketing services;
- Employment practices;
- Land management;
- Providing utilities/services; and
- Research and development activities.

The HRCA scores responses to its questions and indicators based on a “stoplight” system. A “red light” score indicates that the policy framework is not in compliance with the particular question and needs to be remedied. A “yellow light” score indicates that the issue has been partially addressed, but further action is needed to fully comply. Finally, a “green light” indicates that the policy framework complies with the question as phrased.

In light of its detail and the participatory process through which it was developed, the HRCA “full check” methodology is probably the most rigorous, comprehensive and widely-accepted tool available for companies to test whether their internal policy frameworks address the range of human rights risks that may arise in their operations. As such, it provides a valuable lens through which to assess the strengths and weaknesses of the PS/EPs as a human rights risk management tool. The HRCA therefore facilitates a rigorous assessment of the extent to which a company that implements the PS/EPs can be confident that it has adequate policies and management systems in place to minimize the risks of violating the human rights of its stakeholders.

2. Findings

We analyzed the PS/EPs in two stages. First, we evaluated them using the HRCA “full check” methodology. Then, to provide a more complete picture of the content of the PS/EP policy framework we looked at a subset of the questions to see if the weaknesses revealed were redressed by the explanatory *Guidance Notes*.²¹ It should be remembered, however, that the Guidance Notes are not mandatory for IFC clients and were not formally adopted by the EPFIs. The results of the HRCA analysis are summarized below and explained in greater detail in Appendix 3.

The HRCA analysis reveals substantial and pervasive gaps between the internationally-recognized human rights of those who are potentially affected by a company’s operations and the provisions of the PS/EPs. Of the 335 questions posed in the HRCA “full check,” the PS/EPs earned a “green light” for full compliance with only two. They earned a “yellow light” for partial compliance with four other questions. The PS/EPs received a “red light” for failure to comply with the remaining 329 questions.

The disproportionately high number of “red lights” was the result of two types of shortcomings. In many cases, the PS/EPs simply failed to address a human rights issue raised by the HRCA. In a number of other cases, the PS/EPs (including the Guidance Notes and EHS Guidelines) may have treated the issue in a broad or general fashion, but without the depth, specificity and rigor necessary to comply with the HRCA questions and indicators (or to provide sponsors with appropriate guidance on how to address human rights risks in their operations).

The analyses of three internationally recognized rights—the right to property, right to food, and right to health—illustrate how the PS/EPs only partially satisfy the requirements of the HRCA. First, consider property rights. In some areas, the PS/EPs address issues raised in the HRCA, but lack its scope or specificity. For example, the PS/EPs require clients to document use of land by indigenous peoples and to inform them of their rights under national laws, but they do not require clients to respect customary or use rights that are recognized under international law.²² In other areas, the PS/EPs entirely miss property rights issues raised by the HRCA. For instance, the PS/EPs do not require clients to enter into agreements with local communities regarding the use of publicly or privately held natural resources that are shared by the local community, nor do they require sponsors to recognize the access and usage rights of local and indigenous communities, or to educate security personnel and other employees about those rights.

²¹ Questions were selected according to their relevance to projects governed by the PS/EPs.

²² International and regional human rights bodies have recognized the importance of these rights to indigenous peoples, and have indicated that many countries fail to address these rights adequately in national law. For example, the Committee for the Elimination of all Forms of Racial Discrimination, interpreting the Convention on the Elimination of all Forms of Racial Discrimination, notes in Recommendation XXIII, “The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”

The HRCA analysis also revealed significant gaps in the PS/EPs with respect to the right to adequate food. For example, the PS/EPs do not require clients to assess or monitor the effect of their operations on local food prices. They also fail to address the impacts that the purchase of food producing lands and the displacement of communities from those lands can have on the right to food. Moreover, although the PS/EPs require project sponsors to compensate owners when acquiring land, they allow sponsors to purchase and convert critically productive agricultural land and to restrict access to hunting or fishing grounds. And prior to the sale of the land, project sponsors need not ensure that the land is free from contaminants and able to support agriculture.²³

With respect to the right to health, the PS/EPs fail to require clients to provide free health care for work-related injuries, to have medical staff available to workers, or to contribute to a worker compensation scheme. The PS/EPs also do not fully address the risks that a company's operations may adversely impact the right to health of local communities. For example, they do not require clients to have a public information center where communities can access detailed information about the company's occupational, health and safety records, external audit reports, and environmental records.

The HRCA revealed similar gaps with respect to each of the other internationally recognized human rights included in its analysis. ***In light of the frequency and significance of these gaps, the PS/EPs do not provide appropriate substantive guidance for project sponsors to address the human rights impacts that may arise in their operations.***

IV. DUE DILIGENCE PROCEDURES

The Special Representative has recognized that companies must implement adequate due diligence procedures to discharge their responsibility to respect human rights. The Special Representative has also recognized that in addition to a comprehensive set of rights-protective policies, an appropriate due diligence framework requires that effective management systems are put in place to (a) assess potential human rights impacts; (b) integrate human rights considerations into all relevant business operations; and (c) monitor impacts to ensure that performance meets substantive benchmarks over time.²⁴

The PS/EPs satisfy some of the Special Representative's criteria for an effective due diligence system. They require project sponsors to conduct a comprehensive environmental and social impact assessment, and to develop and implement a "social and environmental management system" to address any adverse impacts that are identified in the assessment process. As part of this management system, project sponsors must prepare an "action plan" that specifies the corrective actions that it will undertake to mitigate potential impacts. Project sponsors must also consult with affected stakeholders to ensure that the action plan is responsive to their concerns, provide appropriate

²³ Similarly, the right to housing is implicated if the client does not return the land to habitable conditions.

²⁴ *Protect, Respect and Remedy*, paras. 62, 63.

organizational capacity and training to achieve desired environmental and social performance, and monitor and measure the effectiveness of the management system over time. (Performance Standard 1).

Contrary to the rights-compliant framework articulated by the Special Representative, however, the PS/EPs do not specifically require that risks to internationally recognized human rights be assessed or managed.²⁵ The Special Representative has noted that while it may be expedient to integrate human rights impact assessments into a broader assessment of environmental and social impacts, such comprehensive assessments should explicitly reference human rights.²⁶ The Special Representative's Discussion Paper on *Human Rights Impact Assessments* explains that generic social assessments can overlook "important human rights conditions that are embedded in a particular society, such as discrimination ... or restrictions on freedom of expression or collective bargaining."²⁷ Human rights impact assessments, on the other hand, "use international human rights standards (the Universal Declaration of Human Rights and International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights) as their framework, and assess the state of realization of a broad spectrum of rights...."²⁸ In the absence of a rigorous HRIA component, the PS/EPs' due diligence procedures may not alert project sponsors to the full range of human rights risks in its proposed operations.

V. GRIEVANCE MECHANISMS

The Special Representative has noted that in order to fully discharge their responsibility to respect human rights, companies must provide a means for people who have had their rights adversely affected by the company to seek redress.²⁹ The Special Representative has also noted that such grievance mechanisms may take a variety of forms: they may be specific to a given project or company, or they may be linked to multi-stakeholder or industry initiatives.³⁰ Whatever form grievance mechanisms take, however, they must meet baseline due process standards to be credible and effective. At a minimum, a grievance mechanism must be legitimate, accessible, predictable, equitable, rights-compatible, and transparent.³¹

In a project conducted under the auspices of the Special Representative, the Corporate Social Responsibility Initiative (CSRI) at Harvard University's Kennedy

²⁵ IFC is currently developing a human rights impact assessment methodology, but is not clear how, or whether, it will eventually be integrated into the Performance Standards.

²⁶ *Protect, Respect and Remedy*, para. 61.

²⁷ Office of High Commissioner for Human Rights, *Discussion Paper on Human Rights Impact Assessments*, at 2 (2006).

²⁸ *Id.*

²⁹ *Protect, Respect and Remedy*, paras. 82, 93.

³⁰ *Protect, Respect and Remedy*, paras. 93, 100.

³¹ *Protect, Respect and Remedy*, para. 92.

School of Government elaborated on the concept of rights compatibility.³² The paper explains that grievance mechanisms must be rights-compatible in both substance and process. With regard to substance, complaints must be addressed in a manner that respects human rights, including, the right to an effective remedy. With regard to process, the mechanism must be based on the principles of inclusion, participation, empowerment, transparency, attention to vulnerable people and fundamental fairness.³³ The CSRI refers to the Oxfam Australia Mining Ombudsman as an example of a dispute resolution mechanism that has incorporated these elements with significant success.³⁴ For example, the Mining Ombudsman has played a key role in addressing community grievances relating to pollution of water sources by mining operations, and in disputes relating to forceful acquisition of indigenous land.³⁵ In each case, the process was based on community participation, prioritising the needs of the most vulnerable, and facilitating the complainants' right to be heard.

Of all the institutions that adhere to the PS/EPs, only the IFC has a grievance mechanism that comes close to meeting the minimum due process standards articulated by the Special Representative. The IFC's Compliance Advisor/Ombudsman operates under a set of fair, transparent and predictable grievance and dispute resolution procedures that explicitly empower it to consider claims based upon violations of international law.³⁶ Despite considerable public pressure, the EPFIs have not adopted an analogous initiative-wide grievance process.³⁷

The PS/EPs require project sponsors to establish a project-level grievance mechanism "to receive and facilitate resolution of the affected communities' concerns and grievances about the client's environmental and social performance."³⁸ The grievance mechanisms contemplated by IFC's Performance Standards meet the Special Representative's minimum due process criteria insofar as they must be accessible, transparent and not impede access to judicial or administrative remedies.³⁹ But in other respects, these grievance mechanisms lack minimum substantive or procedural standards. For example, the PS/EPs do not require that the grievance mechanism be independent of the project sponsor to ensure legitimacy. To the contrary, the Guidance Notes anticipate that the mechanism will be staffed by the project sponsor and housed within its organizational structure.⁴⁰ Moreover, the PS/EPs do not specify acceptable procedures,

³² Corporate Social Responsibility Initiative, Kennedy School of Government Harvard University, *Rights Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders*, (2008).

³³ *Id.* at 7.

³⁴ *Id.* at 18, 28. See <http://www.oxfam.org.au/campaigns/mining/ombudsman>.

³⁵ See e.g. the cases of Tolukuma in Papua New Guinea and Tintaya in Peru:

<http://www.oxfam.org.au/campaigns/mining/ombudsman/cases/tolukuma>;

<http://www.oxfam.org.au/campaigns/mining/ombudsman/cases/tintaya>.

³⁶ IFC Compliance Advisor/Ombudsman, *Operational Guidelines*, at 21 (2007).

³⁷ *Protect, Respect and Remedy*, para. 100.

³⁸ Performance Standard 1, para. 23; Equator Principle #6.

³⁹ The Equator Principles drop the requirement that grievance mechanisms do not impede access to justice. *Equator Principles, Principle 6 (Grievance Mechanisms)*.

⁴⁰ *Guidance Notes* at 20.

time frames for hearing and resolving disputes, or appropriate remedies. And they do not require that the mechanism's outcomes and remedies accord with internationally recognized human rights norms. Rather, all of these fundamental issues appear to be left to the unguided discretion of the sponsor. And in practice, many projects have received financing without a functioning grievance mechanism in place, let alone a rights-compliant one.

VI. CONCLUSION

The kinds of private-sector investment projects financed by IFC, ECAs and the EPFIs often have a high risk of adversely affecting core human rights. Yet the PS/EPs do not take human rights into account in a systematic or comprehensive way. The PS/EPs do not (a) incorporate substantive standards that meet international norms; (b) require sufficient due diligence procedures; or (c) require project sponsors to implement rights-compliant grievance mechanisms.

As a result of these shortcomings, we believe that the PS/EPs must be significantly amended if they are to provide project sponsors with appropriate guidance for meeting their human rights responsibilities. During the next phase of the mandate, the Special Representative could make an important contribution to the effort to ensure that projects financed under the PS/EPs meet their baseline responsibility to respect human rights by:

- Assessing potential approaches for IFC, ECAs and EPFIs to embed human rights standards and rights-compliant procedures and accountability mechanisms into their financing requirements;
- Facilitating a dialogue between civil society and the relevant decision-makers at IFC, ECAs and the EPFIs to explore improvements to current practice;
- Reporting on these issues in subsequent reports to the Human Rights Council.