

# **Risk, responsibility and human rights:**

## **Taking a rights-based approach to trade and project finance**

A discussion paper prepared by

**The NGO Working Group on EDC  
A Working Group of the Halifax Initiative Coalition**

for

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This Discussion paper was originally produced in April 2004 to help prepare participants for an Expert panel meeting on the issue of Human Rights Impact Assessments. Following the conference, the original background paper was revised to reflect a number of observations made by participants, and was then distributed to a broader number of people in July 2004. This constitutes the final revised version.

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## Executive Summary

Public International Financial Institutions (PIFIs), such as export credit agencies (ECAs), the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) are a key source of loans, guarantees and insurance to companies and sovereign states doing business in developing countries. Largely mandated to promote trade and investment, over the past few decades PIFIs have supported numerous projects, such as large dams, mining projects, and oil and gas exploration, that have had devastating impacts on the environment, communities and human rights.

In response to public and political pressure, IFC, MIGA and ECAs have adopted separate environmental, social and cultural safeguards and policies for taking into account some of the harmful impacts of these projects. Policies (and practices) between ECAs and the World Bank Group (WBG), however, still remain disparate. Different national ECAs are also still implementing their 'common approaches to the environment' to a widely varying degree. Social issues and human rights concerns are for the most part included as 'add-ons' to a primarily environmental assessment.

As international human rights law and public perception evolves - identifying new roles and responsibilities for non-state actors, such as multinational corporations (MNCs) and the institutions that fund them - there is a growing pressure on PIFIs to be more comprehensive in how they take account of the human rights impacts of projects. The WBG has long steered clear of the issue of human rights, citing its limited focus on purely economic considerations. But pressure from both within the Bank, and from without, may be shifting the issue of human rights at the Bank. Similarly, ECAs have long deferred their responsibility for human rights by hiding behind a trade (rather than a development) mandate. Some have made tentative steps into the issue of human rights. However, most continue to focus their energy on refining their political risk assessments so that they better take account of human rights impacts on investment risk, rather than at the risk that the investment poses on human rights. Such a vision is not sustainable. Continued PIFI support for projects that have devastating impacts on human rights, and perverse incentives within these institutions that distort project outcomes, are two of many reasons for going beyond existing measures.

To address this shortfall, this discussion paper proposes a framework, based on best practices, for mainstreaming human rights concerns into all stages of the project cycle. It focuses on developing better process, incentives and disincentives to promote enhanced project outcomes. Consequently, the framework covers four key phases: i) the preparatory phase of the project (feasibility study, needs and options assessment); ii), the project development phase (Human Rights Impact Assessment); iii) PIFI project categorization, review and appraisal (screening, categorization - including 'No Go' zones and categorical prohibitions - review, setting conditionalities); and finally, iv) project implementation (monitoring and compliance). The paper also includes annexes highlighting potential human rights baseline studies and compensation measures, an illustrative categorical prohibitions list and human rights screening mechanism for PIFIs.

The main premise behind the paper is that a new framework needs to be developed that firmly roots corporate and PIFI processes and practice in international human rights law, because accountability and obligation – the 'responsibility' part of 'corporate social responsibility' - are missing from current voluntary codes and safeguards. In doing so, this rights-based approach to trade and project finance revives key issues of accountability, participation, equity and sustainability.

The paper is an initial attempt at moving beyond the theoretical debates about human rights and investment, to making some initial suggestions as to how this might occur in practice.

## Glossary of acronyms

CAO – Compliance Advisory Ombudsman, IFC and MIGA

COFACE – Compagnie française d'Assurance pour le commerce extérieur, France's ECA

CSR – Corporate social responsibility

FAC – Foreign Affairs Canada

Ducroire – Belgian ECA

EBRD – European Bank for Reconstruction and Development

ECA – Export credit agency

ECG – Export Credit Group of the OECD

ECGD – Export Credit Guarantee Department, the United Kingdom's ECA

EDC – Export Development Canada, Canada's ECA

EFIC – Export Finance and Insurance Corporation, Australia's ECA

EIA - Environmental Impact Assessment

ESIA – Environmental and Social Impact Assessments

EIR – Extractive Industries Review of the World Bank

ERG – Export Risk Guarantee, Switzerland's ECA

EU - European Union

Ex-Im – Export Import Bank, the US ECA

FI – Financial Intermediary

Hermes - Hermes Kreditversicherungs-AG, Germany's ECA

HRCA - Human Rights Compliance Assessment

HRIA – Human Rights Impact Assessment

IBRD – International Bank for Reconstruction and Development

ICCPR – International covenant on civil and political rights

ICESCR – International covenant on economic, social and cultural rights

IDA – International Development Association

IFC – International Finance Corporation

ILO – International Labour Organization

IMF – International Monetary Fund

IUCN – International Union for the Conservation of Nature

JBIC - Japan Bank for International Cooperation, one of Japan's ECAs

MIGA – Multilateral Investment Guarantee Agency

MOU – Memorandum of Understanding

MDB – Multilateral Development Bank

NEXI - Nippon Investment Insurance, one of Japan's ECAs

NORAD - Norwegian Development Agency

OD – Operational Directive

OECD – Organization for Economic Cooperation and Development

OPIC – Overseas Private Investment Corporation

PIFI – Public International Financial Institutions

PRA – Political Risk Assessment

PRAD – Political Risk Assessment Department

RDB – Regional Development Bank

SACE - Istituto per i servizi Assicurativi per il Commercio Estero, Italy's ECA

SIA – Social Impact Assessment

UDHR – Universal Declaration of Human Rights

WBG or WB – World Bank Group – includes the IBRD, IDA, IFC and MIGA

WCD – World Commission on Dams

WHS - Heritage Site

WRI – World Resources Institute

## **1) Introduction**

Export Credit Agencies (ECAs) are one of the central government vehicles for promoting increased trade and investment. Over the past decade, they have been coming under increasing scrutiny by civil society, the media and policy makers due to their support for investments that have had negative environmental, social and human rights impacts.

Whereas efforts have been made internationally to develop policies to address the environmental impacts and, to a lesser extent, the social impacts of ECA-backed investments, human rights impacts have remained largely outside of the reform discourse of ECAs.

In an effort to address this lack of dialogue around the issue of human rights and trade and project financing, and acknowledging the increasing pressure for corporations, ECAs and other public international financial institutions (PIFIs) to take human rights into account, the NGO Working Group on Export Development Canada (WG), in collaboration with Rights & Democracy (formerly ICHRDD), has organized a meeting in Ottawa, May 3<sup>rd</sup> and 4<sup>th</sup>, 2004 to discuss how the human rights impacts of trade and project finance can be assessed.

This conference builds on previous discussions amongst civil society on this issue. In December 2002, the WG held a meeting to look at existing impact assessment methodologies applied to large dams, and the areas of peace and conflict, gender, and human rights. The meeting fostered an early discussion about the applicability of different accountability mechanisms to PIFI-supported projects<sup>i</sup>. In June 2003, Rights & Democracy held its annual think tank on the question of human rights and investment<sup>ii</sup>. Both of these meetings spoke to the urgency of taking human rights into account in the areas of trade, export promotion, and finance. We believe that human rights impact assessments (HRIA) could facilitate this effort, and make a positive contribution to building coherence between the existing international human rights obligations and trade and finance.

The May 2004 workshop will build on those initial meetings, bringing together experts from government (including EDC), academia and civil society to explore the challenges and opportunities for developing a HRIA. This background paper is intended to kick-start discussion at that meeting. It provides a brief overview of how PIFIs, and especially ECAs, operate, and considers the policies and practices they have developed to take human rights into account. It then goes on to argue why such practices might be considered inadequate, and then presents a framework for how both companies and PIFIs might better take human rights into account. This includes a rationale for the model used, a draft framework for a HRIA, and parallel mechanisms for PIFIs to ensure that their project review necessarily safeguards core human rights standards. The paper ends by considering some further challenges and questions to the framework being proposed.

The questions highlighted throughout the paper are intended to stimulate discussion on this draft framework and associated PIFI mechanisms. It is our hope that debate and discussion on this Framework will continue beyond the May meeting and its participants.

## **2) Public International Financial Institutions and Human Rights**

### **2.1) What are PIFIs?**

Public International Financial Institutions (PIFIs) represent a broad group of organizations that provide loans, guarantees and/or insurance primarily to companies and sovereign nations to promote

trade and investment in developing countries. In general, they are public because they operate on capital either directly or indirectly contributed from central governments, and were created by an act of government(s). Here, the term “PIFI” includes the International Monetary Fund, the World Bank Group<sup>1</sup> (WBG), the regional development banks<sup>2</sup> (RDB) *and* export credit agencies (ECAs).

This discussion paper, however, will focus primarily on ECAs, although the recommendations also have strong implications for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), both part of the WBG. This is due not only to the similar role that IFC and MIGA play to ECAs, and to the overlap in the number of projects that receive both IFC and ECA-funding, but also to the use of IFC standards by ECAs.

### **2.1.1) Export Credit Agencies (ECAs)**

Export credit agencies and investment insurance agencies, or ECAs, are public agencies that provide financial and risk management services, such as loans, guarantees, and insurance, to private domestic companies primarily to help promote exports to, and investments in, developing countries and emerging markets. As such, ECAs exist to promote trade and investment in higher risk markets and transactions, which private finance and insurance was otherwise not doing. Most northern industrialized countries have an ECA, as do an increasing number of southern industrialized countries, such as Brazil, India, Mexico, and South Africa. In all there are 76 ECAs in 62 countries, although the G7 countries provide the vast majority of export credit support.

By the end of 2000, total ECA exposure to developing countries had reached \$500 billion – accounting for one-quarter of developing countries’ total long-term external debt.<sup>iii</sup> New commitments in 2000 amounted to \$50 billion (down from \$75 billion in the mid 1990s).<sup>iv</sup> Investment insurance on foreign direct investment has also risen steadily, with Berne Union<sup>3</sup> members extending \$17 billion in new insurance in 2001, and covering a total of \$72 billion by year’s end (up from a total \$26 billion in 1993 and \$46 billion in 1998).<sup>v</sup> These figures are all the more impressive, considering the substantially higher degree of private investment that ECA risk management is able to leverage.

To ensure a level playing field for all ECAs – without which, ECAs would compete to outdo each other - the Organization for Economic Cooperation and Development (OECD), provides a global forum in which ECAs report on activities, discuss technical issues and harmonize policies. The regulatory framework for ECA activity is “The Arrangement on Guidelines for Officially Supported Export Credits”, a ‘gentleman’s agreement’ exempted from the World Trade Organization’s Agreement on Subsidies and Countervailing Measures.

While the ‘Arrangement’ helps harmonize ECA policies, ECAs still vary in terms of both the structure (from fully private such as COFACE in France, to fully public such as the US Export-Import Bank) and the type of business each conducts (some, such as Japan’s NEXI, simply provide insurance).

In practice, ECAs also differ from commercial banks in three distinct ways. Firstly, while commercial banks seek market returns on their loans and insurance, ECAs only seek to recover their operating and financing costs, with limited exception, such as Canada’s EDC which is mandated to make a profit<sup>vi</sup>; secondly, whereas commercial banks offset uncollectable loans against a loans loss

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<sup>1</sup> The World Bank Group includes the International Bank for Reconstruction and Development (IBRD or 'World Bank'), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA).

<sup>2</sup> These include the African, Asian, European and Inter-American development banks.

<sup>3</sup> The Berne Union is the International Union of Credit and Investment Insurers. 51 of 76 ECAs are members.

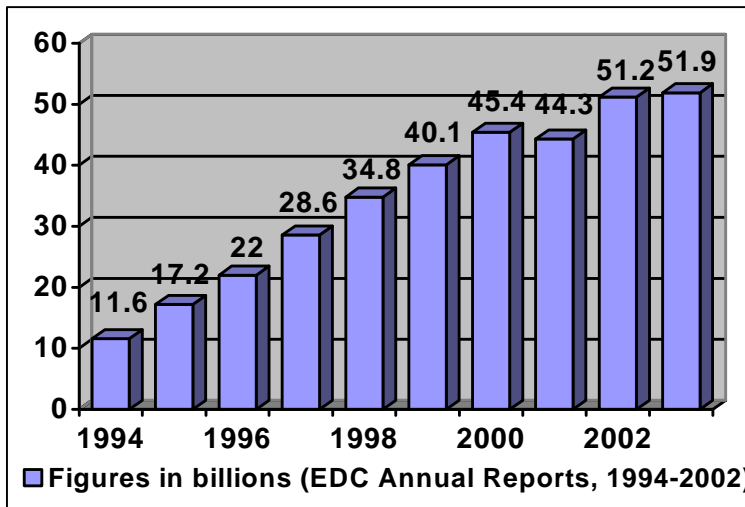


reserve, the majority of ECAs cover bad loans directly through government transfers; finally, because ECA financing is government-backed, its “Triple A” credit rating is implicitly better than what commercial banks and insurance companies can provide.

***The Canadian Context - Export Development Canada (EDC)***

Export Development Canada, or EDC, is Canada’s ECA. It is a federal crown corporation, established in 1944 through the *Export Development Act (EDA)* “for the purposes of supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities.”<sup>4</sup>

As such, it is the main source of publicly supported export financing in Canada, and like other ECAs, was designed to complement financial support provided by private sector banks and financial institutions. In 2003, it provided CDN\$51.9 billion in trade finance and risk management services to finance and insure export sales and investments, up from \$34.8 billion five years earlier (see table opposite for details)<sup>vii</sup>. Over the past ten years, approximately 20% of annual support on average goes towards project financing, with 80% for insurance.<sup>viii</sup>



EDC provides Canadian exporters with loans, guarantees, and commercial and political risk insurance. It is 100% owned by the government and its credit is backed by the government and ultimately by the Canadian public. Like other ECAs, it receives interest and dues from its trade financing and insurance business, and raises additional capital by issuing bonds on capital markets.

It is, however, also distinct from other ECAs in a number of ways. Rather than having a separate insurance facility, EDC offers both trade financing and insurance. Instead of targeting predominantly “higher risk” emerging and developing markets, EDC spreads its investments between low and high risk markets, extending the majority of its services to the US and Europe. EDC targets high-risk projects, such as the recent loan guarantee for the Cernavoda nuclear reactor, through a separate “Canada” account, designed for higher risk national interest projects in which the government assumes the risk and financing directly through its Consolidated Revenue Fund. Finally, whereas other ECAs receive periodic government infusions to offset losses, EDC maintains loan loss reserves to write down poor investments. That said, on occasion, the government has reimbursed EDC a portion of the interest payments due from defaulting countries, and has reimbursed it for write-downs of sovereign loans that have been agreed to through multilateral processes such as the Paris Club or the HIPC Initiative<sup>5</sup>.

EDC is exempt from the Canadian Access to Information act, Federal Government Sustainable Development Strategy, and the Canadian Environmental Assessment Act – in the latter case, due to the existence of its own environmental review directive.

<sup>4</sup> EDC is regulated by both the EDA and the Financial Administrations Act, which means it reports to both the Department of Finance and of International Trade. The Minister of International Trade reports to Parliament on EDC business.

<sup>5</sup> In 2002, EDC received \$402 million in debt relief from the federal government to reimburse it for an amount equal to debt relief granted by the Government of Canada to HIPC countries for debts incurred with EDC in prior years (EDC Annual Report 2002, p. 75)

### **2.1.2) World Bank Group**

The World Bank Group (WBG) includes the International Bank for Reconstruction and Development (IBRD or 'World Bank'), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes. Since this paper has implications for both IFC and MIGA, we shall briefly describe their roles relative to ECAs.

#### ***About the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA)***

IFC and MIGA are the private sector arms of the WBG, providing loans, guarantees and equity investments to private companies doing business in developing and emerging markets. IFC can also bring foreign and domestic partners together in joint ventures. In doing so, IFC, like ECAs, is able to attract additional sources of funding to these projects, in particular due to the 'stamp of approval' message that IFC support sends to private sector investors. In some cases, banks may even be co-lenders. IFC also provides advisory services and technical assistance to governments and businesses. In fiscal year 2003, IFC approved 186 projects totaling US\$5.4 billion (cf. US\$38.6 billion for EDC alone), primarily in the financial (50.2%), transportation (11.2%) and fossil fuels (7.6%) sectors in Latin America (\$2.18 billion) and Europe and Central Asia (\$1.39 billion)<sup>ix</sup>.

MIGA promotes private sector foreign direct investment into developing countries through the provision of guarantees. These guarantees are a form of insurance designed to protect investors against losses associated with non-commercial risks, including expropriation, war and civil disturbance, and breach of contract. In fiscal year 2003, MIGA issued 59 guarantees, amounting to \$1.4 billion in new coverage, supporting 37 projects, eight of which were in Africa.<sup>x</sup>

## **2.2) PIFIs and Human Rights**

### **2.2.1) International Human Rights Law**

By virtue of the international treaties they have ratified, States are legally bound to respect, protect and fulfil human rights. Far from being a voluntary standard to which governments may choose to aspire, human rights hold primacy over policies and laws which govern the economy: economic policies and laws must therefore be consistent with a State's human rights obligations.

The protection and promotion of human rights are set out in various international conventions and covenants. For example, the Charter of the United Nations obliges member states to promote "universal respect for and observance of human rights and fundamental freedoms"<sup>xi</sup> and calls on "every organ of society" to do the same. Article 28 of the Universal Declaration of Human Rights (UDHR) maintains that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."<sup>xii</sup> Specific obligations were subsequently codified in two major international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Vienna Declaration and Programme of Action, adopted by consensus by 171 UN Member States, further re-affirmed that "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments".<sup>xiii</sup> Numerous other treaties, regional conventions and accords require States parties to protect human rights.

The recognition of the universality, indivisibility, interdependence and interrelationship of all human rights and fundamental freedoms as they are defined by the UDHR is essential to any discussion of

rights. The ICESCR further extends the concept of human rights beyond civil and political freedoms, by recognizing the right to basic needs such as food, health care, education and housing. For example, in Canada, the Federal Government interpreted the right to health through domestic legislation, creating the Canada Health Act. The Act sets out as its primary objective, “...to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.” However, since the ICESCR requires the commitment of resources by the government to fulfill these needs, and since the resources may not always be readily available, states are only bound to progressively realize these obligations. This means that despite their legal value, violations of economic, social and cultural rights are common, and the application of the ICESCR is limited.

Beyond the state, the recently-drafted UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – presented as a draft proposal “with no legal standing” in April, 2004 at the 60<sup>th</sup> Session of the Commission on Human Rights – provides a comprehensive list of the human rights obligations of companies. The Norms call on companies to “refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights”<sup>xiv</sup>. While the highly-contested norms are not a formal treaty, they are not limited by clauses which are non-regulatory in nature. The norms represent a growing trend to extend human rights obligations beyond States.

Whether this will equally extend to PIFIs, whether PIFIs have a duty to ‘protect’ and ‘fulfil’ human rights, or just ‘respect’ them, and whether they have duties under international law at all, is still a topic of keen debate (see Peter Woicke’s, IFC Vice President, comments in 2.2.3). That said, there is at least a strong case for PIFIs to ‘do no harm’ under international law, since as public entities, they are state agents and act as organs of the state abroad. Therefore the actions of such agents are attributable to the state and would be considered ‘Acts of the State’ under international law.<sup>xv</sup>

**QUESTION: Is an export credit agency, by virtue of its relationship to government legally obliged to observe specific human rights standards?**

**If an ECA is legally obliged to uphold human rights standards, which ones?**

### **2.2.2) Beyond the ‘catch-all’ of the environment**

Over the past few decades, and in the absence of any standards to take the social, human rights and environmental risks of IFC, MIGA and ECA-funded projects into account, civil society groups (see box opposite) have criticized PIFIs for supporting countless ecologically and socially harmful projects, including large dams, pulp and paper mills, nuclear reactors, chemical and industrial facilities, the export of arms and military equipment, and the extractive industries<sup>xvi</sup>.

Although the WBG has developed environmental, social and cultural safeguards and policies in response to growing criticism about the harmful projects it supported, the ECA community has been less of a focus until recently, and slower to respond. In 2003, following pressure from OECD Ministerial mandates, the G8, media, civil society and the public, ECAs finally adopted by consensus the “Common Approaches on environment and officially supported export

By May 2000, close to 350 NGOs from 45 countries had signed the Jakarta Declaration for ECA Reform<sup>i</sup>, with six key demands: greater transparency, public access to information and consultation with civil society and affected people; binding common environmental and social guidelines that meet international standards for finance; *the adoption of explicit human rights criteria*; binding guidelines to end ECAs abetting corruption; the cessation of non-productive investments, such as military exports; and the cancellation of ECA debt for poor countries.

<sup>i</sup> Full text at [www.eca-watch.org/goals/jakartadec.html](http://www.eca-watch.org/goals/jakartadec.html)

credits” (Common Approaches)<sup>xvii</sup>, a set of recommendations for ECAs for screening, categorizing and reviewing potentially environmentally harmful projects (See comparative table below). Importantly, the recommendations did refer ECAs to IFC and World Bank standards, even if these standards are still far from adequate themselves. That said, strong skepticism still remains among civil society about the Common Approaches, which is criticized for being voluntary and far too flexible, and which offers no guarantee of stopping ECA involvement in environmentally and socially harmful projects.

Meanwhile, human rights impacts have been principally addressed by ECAs through social impact “add-ons” included in existing environmental impact assessment (EIA) models. As such, only selected human rights impacts are addressed, such as involuntary resettlement, project-associated health impacts, and the destruction of cultural sites or abuse of indigenous rights. Relatively speaking, the WBG has led on taking account of social impacts (at least in policy). But and duty to ‘respect, protect and fulfil’ international human rights obligations and a rights-based approach is still largely absent from both ECAs and the WBG.

	<b>Social standards (beyond the environment)</b>	<b>Institutional measures to enhance accountability, transparency, participation</b>	<b>Reference to human rights/Efforts to move human rights forward</b>
<b>International Finance Corporation</b>	Beyond the environment, IFC also provides certain social safeguards and guidelines for projects that involved occupational health and safety (Guidelines) <sup>xviii</sup> , involuntary resettlement (O.D. 4.30) <sup>xix</sup> , indigenous peoples (O.D. 4.20) <sup>xx</sup> and cultural property (OPN 11.03) <sup>xxi</sup> ) IFC does however caution that, in some cases, the magnitude and complexity of social issues go beyond the scope or responsibility of the private sector and fall within the domain of government, to be addressed on a case by case basis.	<p>Consultation encouraged, and reporting of consultations held as part of the EIA.</p> <p>IFC makes the EIA available as early as possible, but no later than 60 days prior to board approval.</p>	<p>Usually only in the context of human rights allegations associated with IFC and MIGA funded projects, such as the BTC pipeline in Turkey. In this instance, the Compliance Advisory Ombudsman of IFC and MIGA may investigate the allegations.</p> <p>Recently, however, IFC have shown interest in linking core labour standards and protocols on the use of security forces to the review of its safeguards, and are refining the Sustainability Framework they use to identify and track contributions, to make human rights more explicit. That said they see their area of responsibility as very limited.<sup>xxii</sup></p>
<b>ECAs</b>	The Common Approaches makes reference to benchmarking projects against IFC safeguards, and taking into account, as part of the environmental impact assessment, involuntary resettlement, indigenous peoples and cultural property.	<p>The Common Approaches makes no explicit reference to consultation with stakeholders, except as part of the EIA.</p> <p>EIA information will be disclosed 30 days before board approval with the company’s consent.</p> <p>In practice, ECAs vary widely on both issues. US Ex-Im, for example, makes disclosure a prerequisite of financing and encourages comments; Portugal’s COSEC only discloses project information 30 days before issuing a letter of credit.</p>	None, but see the individual national initiatives below.

### 2.2.3) *Addressing human rights within IFC, MIGA and ECAs*

Determining where IFC, MIGA and ECAs stand on human rights is a challenging task.

The World Bank has long underscored – at least in its rhetoric – the importance of respecting human rights as a central goal of development (and poverty alleviation), but it has been much slower to articulate how it might promote human rights in its operations. This has perhaps been because the Bank has long argued that its Articles of Agreement limit the range of the Bank’s activities to “only economic considerations”, prohibiting political activities<sup>6</sup>. Since the Bank’s previous General Counsel argued that human rights is a “political issue,” the Bank has limited its ability to talk about human rights issues. So while the Bank continues to underscore the importance of human rights, it has largely cut short the debate by asserting its mandate to focus on economic development.

But just as the international context for human rights slowly seems to be evolving (2.2.1 above), the focus within the Bank also seem to be changing. Although the Board doubtless remains the biggest hurdle, the Bank has started internal discussions to determine where human rights fits within its work. For example, at an open Bank discussion on the issue in 2002, Alfredo Sfeir-Younis, the World Bank’s Special Representative to the UN, said that arguments that keep the Bank from addressing human rights are no longer credible, that economic development, poverty alleviation and human rights are not mutually exclusive, and that the Bank must actively start mainstreaming human rights.<sup>xxiii</sup> More recently, the Bank’s new General Counsel Danino stated that “insofar as human rights constitute a valid consideration for the investment process they are properly within the scope of issues which the World Bank must consider when it makes its decisions. And this consideration must include all human rights: those classified as economic, social and cultural, as well as those classified as civil and political.”<sup>xxiv</sup>

The Extractive Industries Review (EIR) is now adding new fuel to the debate on the World Bank’s responsibility to protect and promote human rights. The report, for example, noted that human rights abuses and civil conflict have been linked to (WBG-funded) extractive industry projects, that these projects have often increased vulnerabilities, social antagonism and conflict, and that the extractive industry projects have not effectively contributed to poverty alleviation—the central mandate of the World Bank Group. The EIR also recognized that projects have resulted in an uneven sharing of costs and benefits, have brought social disruption to communities, and have disregarded indigenous land rights. The report even affirmed that “Resource exploitation cannot take place in a vacuum that ignores [...] human rights obligations”.<sup>xxv</sup> Among other things, the report called on the Bank to:

- mainstream human rights into all areas of WBG policy;
- adopt all four International Labour Organization (ILO) core labour standards;
- make the safeguard policies an explicit tool for ensuring the respect, protection and fulfillment of human rights, and in particular, recognize and respect the rights of women;
- incorporate experienced, independent and reputable third parties to verify the human rights status in all relevant projects; and,
- assess the human rights track record, and policies, of companies, and make compliance with human rights principles a prerequisite of WBG support.

The Report was also critical of MIGA and IFC, noting that their assessments were still solely

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<sup>6</sup> Under ‘Operations’ in the Articles of Agreement for IBRD, IDA, IFC and MIGA, is a section on “Political Activity Prohibited” which states that “The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I”.

deficient on social issues, and that gender, human rights and health were not dealt with properly<sup>xxvi</sup>. Among other things, the report's recommendations included:

- ensuring that a comprehensive options assessment be conducted before they support a project;
- requiring companies to negotiate conditions that leave affected communities better off;
- incorporating the free prior and informed consent of indigenous communities and of individuals facing resettlement into their safeguard policies;
- guaranteeing that companies have a transparent process for sharing and distributing revenues;
- developing clear guidelines for monitoring regional and local impacts and benefits of investments and guarantees, so that these are systematically monitored and mitigated.
- asking sponsors to incorporate public health prevention and reduction into project design;
- ensuring there is an effective local complaints and dispute resolution mechanism in place;
- better integrating social elements into existing EIAs;
- developing a system for determining 'no-go' zones; and,
- guaranteeing that procedural rights are a part of the decision-making process.

While the IFC has yet to articulate publicly what components they might be pursuing, they claim to be "taking the EIR recommendations very seriously" in the review of their safeguard policies despite Bank Management's position.<sup>xxvii</sup> In addition, in 2003, the Compliance Advisory Ombudsman (CAO) conducted a review of the Safeguard policies and made a number of recommendations that echoed some of the EIR findings.<sup>xxviii</sup> In terms of human rights, the CAO also conducted a study of a number of IFC and MIGA -funded projects to establish whether the outcomes would have differed had the agencies respected human rights norms. While the report was internal, and the findings therefore not disclosed publicly, it is a first step forward. In more concrete terms, IFC Vice President Peter Woicke said that agency has a "special responsibility to address these issues", because it believes in the "business case for human rights". Consequently, he said IFC has been looking into labour standards and the protocol on the use of security forces for private sector investments. But as for practical engagement, Woicke remained uncertain of IFC's level of responsibility to 'respect, protect and fulfil' human rights, he recognized the challenges of doing so "within a consistent, credible framework", and questioned whether IFC should even be responsible for resolving alleged human rights disputes.<sup>xxix</sup>

In sum, the hesitations of the WBG to take on human rights can be explained by both the narrow economic mandate in which it has historically situated its activities, and strong and resistance among certain Board members to adopt human rights criteria in lending decisions. In addition, human rights also present challenges within the Bank in terms of establishing the financial and human capacity to operationalize policies to protect and promote human rights. But with new tools being developed in consort with companies and civil society to address human rights, and with further research being conducted on operationalizing other tools, even this argument seems to fall short. The only remaining concern is around potential Bank complicity in supporting projects that violate human rights.

ECAs have, for the most part, been similarly hesitant to take on human rights, with only a few making efforts to begin internal discussions on the issue and put in place measures to take human rights into account (see Table 2 below). However, the landscape is changing, and like the Bank, ECAs are likely to come under increasing pressure to take on recommendations similar to those made in the EIR. Furthermore, the recommendations in the EIR hold equally for ECAs as for the Bank for several reasons. Firstly, ECAs often co-partner with IFC and MIGA on projects. Secondly, they continue to support large infrastructure projects that have the potential for serious human rights

impacts. Finally, ECAs often look to the WBG to take the lead on issues. In fact, the situation at ECAs is arguably cause for even greater concern since the Common Approaches already falls far short of WBG safeguards and policies, social standards are even less present in ECA policies than at IFC and MIGA (see table above), and ECAs extend more new loans and guarantees every year than IFC and MIGA combined.

<b>Ducroire</b>	<p>In January, Belgian Parliamentarians introduced legislation to ensure that businesses receiving export credit support respect the OECD guidelines for MNEs, the UN Norms for TNCs, the five core ILO labour standards, World Bank operational and environmental guidelines, and the OECD convention on corruption. If passed, when an individual deems that a company has not followed these guidelines, they can call on an ad hoc Parliamentary Compliance commission to investigate the allegation. If found guilty, the Commission could then impose sanctions<sup>xxx</sup>.</p> <p>In late April, another proposal came before the Senate proposing to establish 1) a Board for Ducroire composed of 18 members, of which 6 would be from NGOs, and 2) an <i>Ethical Committee on Multinational Enterprises</i> to advise and inform Ducroire on projects. The Committee would also inform the public, the Lower House, Senate and Government about foreign investment in general, and research, document and publish an annual report.<sup>xxxi</sup></p> <p>Both pieces of legislation will be discussed in October or November 2004.</p>
<b>ECGD</b>	<p>In terms of social standards, ECGD looks at the following: involuntary resettlement; compulsory land acquisition; impact of imported workforces; job losses among local people; damage to sites of cultural, historic or scientific interest; impact on minority or vulnerable groups; child or bonded labour; use of armed security guards.</p> <p>ECGD's Business Principles, and case impact analysis, state that it will take into account the social, environmental and human rights impacts of applications for support. To achieve this goal, the ECGD benchmarks projects against WB, RDB, EU and UN standards, but has no binding standards other than host country law. The case impact analysis is also used to check whether a country has ratified 6 core UN human rights conventions and 8 ILO "fundamental conventions"<sup>7</sup>, and expects project sponsors to comply with those that the country has ratified. As a result of parliamentary pressure, the ECGD has now adopted a policy of not supporting projects involving forced or child labour.</p>
<b>EDC</b>	<p>EDC's 'Code of Business Ethics makes reference to valuing 'human rights and promot[ing] the protection of internationally recognized human rights, consistent with the policies of the Government of Canada'. However, it is not exactly clear how it meets or measures this goal. More recently, EDC held a CSR Advisory meeting in December 2003 and an NGO Dialogue in March 2004 to explore how to better take human rights into account. (See 2.2.4 for more details below). EDC and Japan's JBIC now also have a Compliance mechanism in place to ensure that EDC complies with its policies.</p>
<b>Ex-Im</b>	<p>In April 2002, a US Member of Congress submitted a bill proposing the creation of an Office of Human Rights Assessment within the Ex-Im Bank. The office would serve an advisory function to identify and address potential human rights concerns for projects under consideration by Ex-Im. Assessments would be based on standards set by the ILO, international human rights and humanitarian law, and a number of rights indicators. It would cover labour rights, displacement of indigenous populations, social unrest, local government's freedom of speech record, treatment of ethnic minorities, religious freedoms, and women's rights. It would <i>not</i> have the authority to cancel a specific project. Currently, Ex-Im's human rights review of a project through Congress is only implemented for "every transaction over \$10 million to determine if it may give rise to human rights concerns".<sup>xxxi</sup> The bill to establish the HR office was defeated in Congress by one vote. Congress, however, has recommended that detailed information of the potential human rights impact of proposed Ex-Im projects be available.</p>

<sup>7</sup> This includes the International Covenants on civil and political rights, and Economic, social and cultural rights; Convention on the elimination of all forms of racial discrimination, Convention on the elimination of all forms of discrimination against women, Convention against torture, Convention on the Rights of the Child; in terms of ILO Conventions, it includes ILO 29 (forced labour), 87 (freedom of association and the right to organize), 98 (right to organise and collective bargaining), 100 (equal remuneration), 105 (abolition of forced labour), 111 (discrimination in employment and occupation), 138 (minimum age of employment and occupation), and 182 (worst forms of child labour).

<b>JBIC and NEXI</b>	<p>Japan's ECAs provide a good example of how far most ECAs are currently prepared to go in terms of 'human rights'. JBIC's guidelines for reviewing projects state that, "environmental and social considerations refer not only to the natural environment, but also to social issues such as involuntary resettlement and respect for the human rights of indigenous peoples." NEXI, Nippon Export and Investment Insurance, has similar language in their guidelines. "Social issues", therefore include human rights issues. Like EDC, JBIC and NEXI also have a new compliance mechanism to receive complaints and test the integrity of its policies.</p> <p>In practice, however, JBIC recently funded the San Roque dam in the Philippines, where the houses of families that were resettled were burnt, forcing them to relocate. A community leader, who is claiming he has lost his source of livelihood, is also being harassed constantly by local officials.</p>
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#### **2.2.4) Assessing human rights at EDC**

EDC's 1999 Code of Business Ethics states that, "EDC values human rights and promotes the protection of international recognized human rights, consistent with the policies of the government of Canada." The Office of the Minister of International Trade further emphasized this in 1999, suggesting the need for the crown corporation to "be mindful of Canada's international commitments in the area of core labour standards, human rights and the environment, and to promote other corporate social responsibility standards, including the [OECD] Guidelines for Multinational Enterprises."<sup>xxxiii</sup>

Although it is difficult to measure the extent to which EDC has met these goals, EDC addresses human rights issues through assessing the political risks associated with financing and insuring transactions, and by considering the social impacts as per their Environmental Review Directive.

*Political risk assessment (PRA)* – Like many other ECAs, EDC looks at human rights in the context of evaluating the potential political and market risks of conducting business in a particular country. As such, human rights concerns constitute part of EDC's PRA, which considers "actors or developments in the political, economic, and social areas of a system that have the potential to impact negatively on the delivery of EDC's services in support of Canadian exporters and investors"<sup>xxxiv</sup>.

More specifically related to human rights, the assessment of political risk takes into consideration country level risk and project-level risk.<sup>8</sup> Country level risk captures issues such as socio-economic inequality, government attitudes towards foreign investment, the relationship between the host government and elites, government interference in transactions including corruption, regime legitimacy and stability, and the existence of democratic institutions to give voice to peaceful expression of grievances. Through this, EDC considers labour issues, and discriminatory treatment of disadvantaged groups.

PRA takes into account risks of political violence, currency transfer and convertibility and expropriation. Political violence covers whether such violence already exists in the country (from protests to war with another country) and the factors that could indicate future political violence. Factors that indicate a risk of future violence are broad and include government responses to violence; the existence of disaffected and/or displaced groups, ethnic and/or religious conflict; and, government legitimacy (how it came to power, freedom of the press), as well as other factors. Project level risks include the project's relationship with the local population, costs and benefits to the country and local population, as well as other factors.

Expropriation risk assessment explores the state of the legal system in the host country (e.g., the

<sup>8</sup> Country-level and individual risk (political risk) and environmental risk, are one of countless risk considerations, including construction and development risk, market risk, input risks, operational risks, transaction risks, sponsor risks, and currency risks.



existence of an independent judiciary, use of legal precedence over personal politics, evidence of corruption), the attitude of the government toward foreign investment, the state of investment and sector regulations, and the project costs and benefits to a host country and its population vs. the environmental and social impacts.<sup>xxxv</sup>

The overall risk level of a project is derived from a combination of both country and project level risks, which are combined to establish a risk rating for each risk. Financial analysts get copies of the political risk assessment, which is submitted to the management committee as part of their project approval documentation. In most cases, a project in a country with a poor human and socio-economic rights record will have a higher transaction risk rating. The higher the risk, the less likely it is a project will receive support. Tangible human rights issues may also increase the risk rating to a point where the project is too risky for EDC to provide support, although there is no pre-determined level of risk that will effectively veto a project.

EDC derives its intelligence for assessing human rights largely through Foreign Affairs Canada (FAC). In May 2002, EDC signed a Memorandum of Understanding (MOU) with FAC to obtain country-related human rights information. This gives EDC access to FAC's annual human rights reports on specific countries, which provide a general overview of a) the status of internationally recognized human rights in that country, including economic, social and cultural rights; and, b) the status of equality and discrimination.

In addition, EDC also uses classified and open source material (Amnesty, Human Rights Watch), or assessments by other institutions (World Bank) to determine whether a specific project, or counter parties to the project, might be complicit in severe human rights violations. In extreme cases, EDC may also conduct further research to capture the nature of an abuse.<sup>xxxvi</sup>

Finally, EDC has also recently begun what it calls 'a reverse flow analysis'<sup>9</sup>, or looking at the impact of the project on the human rights situation. The results of this analysis are not included in the political risk summary, but rather as a reputational risk summary. This then goes to the decision-makers to inform EDC whether it should extend support or not.

*Social impacts* - EDC also takes account of specific social impacts (which can include human rights concerns) for loans above SDR10 million or with repayment terms of over two years. These concerns are assessed through a review of the social impacts highlighted in a company's environmental impact assessment. These include "any instance of involuntary resettlement or any other adverse change that the project imposes on indigenous or vulnerable groups or cultural heritage."<sup>xxxvii</sup>

In recent meetings, EDC has said it is committed to further improving its process and methodologies to assess human rights. In fact, Amnesty International-Canada has encouraged it to develop human rights impact assessment tools or guidelines. However, although EDC is working on enhancing its existing PRA methodology to better take account of human rights issues, it is still too early to know what these changes might entail, nor whether it will implement Amnesty's recommendation.

### **2.2.5) Going beyond existing measures – Compliance and human rights**

Section 2.2.2 and 2.2.4 and Tables 1 and 2 above indicate that ECAs, (IFC and MIGA) largely take

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<sup>9</sup> In *The Private Sector and Conflict Prevention Mainstreaming: Risk Analysis and Conflict Impact Assessment Tools for Multinational Corporations* (Country Indicators for Foreign Policy, 1992: p. 4), Ashley Campbell refers to 'the reverse flow of risk' as looking beyond the potential risks to a company and its shareholders of investing in a conflict zone, to assessing the risk of a company aggravating a conflict situation".

note of human rights issues through PRAs, and the social add-ons that are included as part of an environmental impact assessment. However, for a number of reasons, PRAs and Environmental and Social Impact Assessments (ESIAs) are themselves limited by the extent to which they can truly address human rights.

*PRAs do not take account of the impacts of projects on communities* - In terms of ensuring compliance with human rights norms, PRAs are generally inadequate because risk analysis for the most part considers the specific set of political risks of a transaction *for* the ECA (or company). Although the EDC case (2.2.4) demonstrated how human rights are incorporated into the PRA, this merely allows the ECA to protect itself and the company against potential risks. It does not provide the same level of assurance to the involuntary risk bearers, i.e. the affected communities<sup>xxxviii</sup>. In other words, while the PRA Department considers human rights issues, it translates levels of risk into corresponding premiums, rather than into specific human rights conditionalities to be associated with the project. The reputational risk assessment may have resulted in a project not going forward. However, in the case where a project is still approved, there are no mechanisms to ensure that human rights are protected.

*Social standards address a very limited number of rights and work to mitigate rather than promote and protect them* – Apart from specific transaction-related social impacts, the methodology which ECAs like EDC use to evaluate the human rights impacts of a project on specific groups remains unclear. For example, does EDC take into account its human rights obligations when assessing social impacts? What ‘mitigation’ measures and conditionalities are put in place to respect, protect, and fulfil human rights? Does EDC ask companies to respect core labour standards? How does EDC ensure that respect for these and other conditionalities is maintained?

*PIFIs continue to support projects with human rights impacts* – Publications such as *Race to the Bottom II*<sup>xxxix</sup> and *Gambling with People’s Lives*<sup>xl</sup> document how, despite their environmental and social policies, ECAs and the World Bank still have done little to protect human rights in their projects. *Race to the Bottom II* demonstrated that despite the existence of policies for taking the environment into account, ECAs have still funded projects with devastating environmental impacts. Little has been done to address issues of lost livelihoods, food insecurity, destruction of sacred or spiritual sites, poor labour conditions and worker health, social disruption, inadequate early meaningful participation, exclusion of women from consultation, harassment of ethnic minorities, use of paramilitary forces, and even violation of host country law. Furthermore, some sectors that might have traditionally escaped an environmental review, such as the telecommunications industry, have the potential to carry human rights impacts. In 2003, EDC signed a \$300 million plus line of credit with Nortel Networks for its work in Colombia<sup>xli</sup>. That same year, 10,000 unionized telecommunications workers lost their jobs in Colombia, and over 70 trade unionist were murdered by Colombian paramilitaries.<sup>xlii</sup> EDC’s environmental mechanism may not have been triggered by this transaction, but it is surprising that its PRA did not trigger better safeguards.

Other reasons to develop a stand alone human rights impact assessment procedure include the following:

*Public financial institutions, such as ECAs, are already subject to international law* - In the case of EDC, as a publicly owned institution and agent of the state, it is subject to the (domestic and international) laws that govern Canada. As such, the Canadian government has the responsibility of ensuring that EDC (and the projects it supports) complies with universal human rights standards in all areas under its jurisdiction, and that it respects the law in host countries. There are therefore (arguably) already legal obligations on EDC, and other ECAs, to protect human rights.

*Perverse incentives within PIFIs distort outcomes* – Several academic articles have documented the pressures within the World Bank to lend despite the outcomes<sup>xliii</sup>. This, however, would not seem to be unique to the World Bank. For example, in 1999, the UK’s ECGD commissioned a report by KPMG, on its risk management systems<sup>xliiv</sup>. Although it did not specifically identify the “pressure to lend”, one might interpret the report’s key recommendation of separating risk management functions from underwriting functions, as a serious concern regarding the integrity of existing risk assessment procedures.

There is also a built-in incentive among ECAs, IFC and MIGA to support riskier projects, with potentially higher human rights risks, because the PIFIs are able to make more money on the associated insurance premiums. For example, EDC employees receive bonuses based on the volume (i.e. amount, rather than number) of transactions they have managed to finance in any given year. This creates an incentive among EDC staff to push through larger projects, despite the likelihood that such projects may engender a much higher degree of political risk and potential social, environmental and human rights hazard. More disturbingly, it seems there is no corresponding mechanism for holding staff accountable when they have made a poor assessment of the risks involved, and project sponsors subsequently default on payments.

Furthermore, the IFC, MIGA, and several ECAs (including EDC) are mandated to operate at a profit, lending at near commercial rates.

**QUESTION: What sort of incentives need to be put in place to encourage both companies and PIFIs to take better account of human rights concerns ?**

*Taking human rights into account puts industry at a competitive advantage* – Industry claims that having to take human rights issues into account puts them at a competitive disadvantage. This would assume that one of the competitive advantages for Canadian companies lies in conducting, or being complicit, in human rights abuses. In contrast, not putting into place appropriate mechanisms to gain demonstrable public acceptance are likely to cost the company more in the long run through increased social antagonism and conflict, and exacerbating social and economic imbalances.<sup>xliv</sup> International Alert, for example, has underscored the business case for its Conflict Risk Impact Assessment (CRIA) by highlighting the potential material costs (particularly in terms of risk management, security and personnel costs), opportunity and reputational costs for companies when they get caught up in or exacerbate conflict situations.

Clearly, current practice must be revised, and new policies introduced to address existing gaps. The next section presents a draft framework for a HRIA and parallel review mechanisms within PIFIs to ensure due human rights diligence throughout the project cycle.

**QUESTION: Should we be advocating for Corporations, the World Bank Group and Export Credit Agencies to be conducting human rights impact assessments and screening of projects? Does this not simply further diminish the power of local communities to the advantage of already powerful entities?**

### **3) Human Rights Impact Assessment – a model of ‘best practices’**

What would a human rights impact assessment (HRIA), and the corresponding PIFI review mechanisms, look like? The remainder of this paper attempts to answer this question by presenting a draft framework for discussion. However, before discussing the specifics of what such a framework might look like, let us explore some of the guiding principles behind such a methodology.

### 3.1.1) *EIAs, SIAs and Voluntary Codes – Where do human rights fit in?*

A traditional EIA or SIA looks at the positive and negative impacts of a project on issues like habitat, biological diversity, hydrology, air and water quality, or health, minorities, gender, social networks and economic activities. The HRIA model proposes to go one step further by rooting the assessment process in human rights norms, providing an integrated impact assessment that identifies and assesses the potential cultural, economic, environmental, social, civil and political rights impacts of a project, including on vulnerable groups<sup>10</sup>. In fact, to some extent, a HRIA represents a "new and improved" impact assessment process, adding value in three ways. It underscores the core concepts outlined below (needs assessment, meaningful consultation and participation, human rights standards, etc.); it grounds the assessment in international legal obligations; and it demands accountability, and brings *the human rights elements of the SIA and EIA to the fore*. This it does by attempting to integrate into its design measures to *respect, protect and fulfil the human rights of all stakeholders*. In contrast, the WBG's EIA/SIA guidelines do not even mention human rights.

While often only making passing reference to human rights, voluntary codes of conduct have gone some way to setting ethical standards for businesses. Their proliferation over the past five years (See Table 3 below) has also brought with it a growing awareness of the notion of CSR. This is a positive step forward, as it signals a growing social conscience among the public and rising demands for transnational corporations and other businesses to act responsibly. However, the inability of some corporate actors to abide by the codes they have 'adopted', a key flaw of their non-binding nature, has resulted in increased cynicism and frustration among civil society and academia about the efficacy of such voluntary measures. The notion of 'responsibility' should speak to notions of accountability and obligation – elements that have been largely absent from current CSR practices.

#### **Table 3 – Recent Voluntary Codes of Conduct**

**United Nations Global Compact (1999)** – Based on the UDHR, the ILO Fundamental Principles and Rights at Work, and the Rio Declaration, the Global Compact encourages corporations to change their business operations in a manner in keeping with the nine core principles, namely to: 1) support and respect human rights; 2) ensure no complicity in their abuse; 3) uphold the freedom of association and recognize the right to collective bargaining; 4) eliminate all forms of forced labour, 5) harmful child labour, 6) and discrimination; 7) be precautionary in their approach to environmental challenges; 8) promote greater environmental responsibility; and 9) encourage the use of environmentally friendly technologies. ([www.unglobalcompact.org](http://www.unglobalcompact.org))

**OECD Guidelines for Multinational Enterprises (MNEs) (2000)** – Recommendations made by governments to MNEs operating in OECD countries to practice responsible business conduct, and "respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments". They cover areas including employment and industrial relations, human rights, disclosure, environment, bribery, competition, taxation, consumer protection and science and technology. ([www.oecd.org/daf/investment/guidelines](http://www.oecd.org/daf/investment/guidelines))

**Equator Principles (2002)** – As of March 2004, 20 commercial banks had voluntarily 'adopted' the EP, requiring projects they finance to meet IFC and World Bank standards and safeguards, and making continued funding contingent on the project sponsors implementing their environmental and social management plans. ([www.equator-principles.com](http://www.equator-principles.com))

The HRIA model and PIFI mechanisms proposed here attempt to give a greater voice to the neglected principles of accountability and obligation. It presents a draft framework for translating voluntary codes, existing international conventions and standards, and best practices in the field into policy, so they may be regularly and directly put into practice. The goal of this framework is to cover

<sup>10</sup> The idea of an impact assessment that includes separate environmental, social, health and cultural heritage components was raised in the WCD report, although it is referred to as a project-level impact assessment (IA) (WCD, (2000), p. 283-285).

the entire project cycle. Consequently, the paper works through each phase of the cycle, from early feasibility studies and HRIA –which are the responsibility of the project sponsors and independent experts – to project categorization, review and approval – the responsibility of the PIFI – to implementation, monitoring, and compliance – the responsibility of a number of actors. As a result, the process attempts to be fairly comprehensive, while recognizing that it can clearly not cater to the specificity and difference of every situation, location and context.

The methodology used in the development of the proposed HRIA framework attempts to draw on best practices currently in use, build from a rights-based framework, reinterpret existing impact assessments through the use and application of appropriate human rights language, apply the World Commission on Dam’s rights and responsibilities framework for stakeholder identification, and incorporate relevant human rights instruments and standards.

### **3.1.2) Use of best practices**

Wherever possible, the HRIA model has been derived from existing best practices, although given the breadth of issues covered in this paper, it cannot reflect all existing practices. Consequently, the core structure for the HRIA is derived from existing models for Environmental and Social Impact Assessments (ESIAs). Additional inputs have been derived from World Bank Group guidelines, the recommendations of the World Commission on Dams (WCD) and the Extractive Industries Review (EIR), the Akwé Kon Guidelines of the Inter-Sessional Working Group on Article 8(j) of the Convention on Biodiversity, the Human Rights and Business project of the Danish Centre for Human Rights, the Norwegian Agency for Development’s Handbook in Human Rights Assessment, the Oxfam Community Aid Abroad Ombudsman and other best practices in the field.

#### **Table 4 – Some Best Practices and Standards Reviewed**

**Biodiversity convention** - The convention sets out commitments for maintaining the world's ecological biodiversity in the context of continued economic development. The Convention establishes three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources. ([www.biodiv.org/convention/articles.asp](http://www.biodiv.org/convention/articles.asp))

**Conflict Risk Impact Assessment (CRIA)** -Company investments in conflict-affected regions often have unintended negative impacts, usually because companies do not fully understand the pre-existing context in which they work, or the dynamic interactions between their projects and this environment. CRIA is designed to help extractive sector companies address the underlying causes of conflict and contribute to long-term structures for peace. From project conception through to closure and withdrawal, the tools developed through CRIA enable companies to anticipate, monitor and assess the impact of their business operations on local, regional or national tensions, identify potential conflict triggers, and develop strategies that contribute to conflict prevention and peace-building. International Alert is currently exploring the applicability of the tool to Multilateral Development Banks (MDBs) and ECAs. The final toolbox will be published in December 2004. ([www.international-alert.org/policy/business/pnr/conflict\\_risk\\_impact.htm](http://www.international-alert.org/policy/business/pnr/conflict_risk_impact.htm))

**Extractive Industries Review** - The Extractive Industries Review was launched by the WBG to consult with stakeholders about its future role in the extractive industries. The aim of this independent review was to produce a set of recommendations that will guide involvement of the World Bank Group in the oil, gas and mining sectors. The Final Report recommends, among other things, that to combat climate change, the Bank should pull out of oil projects in five years, stop funding coalmining and increase lending for renewable energy. It should also require "free prior and informed consent" from local indigenous peoples before funding any extractive project. ([www.eireview.org/html/EIRFinalReport.html](http://www.eireview.org/html/EIRFinalReport.html))

**Human Rights and Business Project’s Human Rights Compliance Assessment** - This interactive, internet based tool was designed to provide companies with a comprehensive list of HR factors to take into account when assessing the impact of their operations. The tool enables companies to systematically address HR conditions and issues early on in their planning process, avoid violating the human rights of their employees, and foster better business practices. ([www.humanrightsbusiness.org](http://www.humanrightsbusiness.org))

**International Finance Corporation safeguard policies** - “The Safeguard Policies provide IFC with the framework to minimize and mitigate environmental and social risks in the projects IFC finances. There are ten safeguard policies addressing key environmental and social development issues including environmental assessment, natural habitats, involuntary resettlement and other policies”. ([www.ifc.org/ifcext/policyreview.nsf/e11ffa331b366c54ca2569210006982f/1790644170c3547485256dfe0056243d?OpenDocument](http://www.ifc.org/ifcext/policyreview.nsf/e11ffa331b366c54ca2569210006982f/1790644170c3547485256dfe0056243d?OpenDocument))

**NORAD Handbook in Human Rights Assessment** - The handbook and assessment tool provides a series of benchmarks regarding HR needs, criteria and follow-up that guide NORAD staff in developing policy and program. The HR form helps to assess the extent to which a program is consistent with HR treaty obligations, creates HR awareness within the target population, empowers target groups affected by the program, and how the impacts of a project affect different groups. ([www.norad.no/files/Handbook.pdf](http://www.norad.no/files/Handbook.pdf))

**UN Norms on the Responsibilities of Transnational Corporations (TNCs) and Other Business Enterprises with Regard to Human Rights (2003)** – Drawing on a broad array of legal norms, voluntary codes of conduct, labour practices and NGO guidelines, the norms set out legal norms and obligations which TNCs are expected to respect, protect and fulfil, including: the international bill of human rights; security of persons; rights of workers; international and national environment, health and safety agreements; national sovereignty and local communities; not use forced or child labour. ([www1.umn.edu/humanrts/links/norms-Aug2003.html](http://www1.umn.edu/humanrts/links/norms-Aug2003.html))

**World Commission on Dams Final Report** - The Report establishes criteria, guidelines and standards for the planning, design appraisal, construction, operation, monitoring and decommissioning of dam, energy and water planning projects. that helps determine who has a legitimate place at the negotiation table and what is on the agenda. This process allows stakeholders a greater say in the decision-making process, increases the chances that needs will be adequately addressed, ensures broader public support for projects that are accepted, and screens out inappropriate projects. Seven strategic priorities help shape these recommendations: gaining public acceptance; comprehensive options assessment; addressing existing dams; sustaining rivers and livelihoods; recognizing entitlements and sharing benefits; ensuring compliance and sharing rivers for peace; and development and security. ([www.dams.org](http://www.dams.org))

### **3.1.3) Rights-based framework**

An increasing number of development agencies, UN agencies, and civil society organizations are centering their approach to development through a *rights-based lens*. At the heart of this rights-based approach is the protection and promotion of human rights. In practice, this means that established and accepted human rights standards become the guiding principles behind development activities and initiatives. It also means that development occurs in tandem with the progressive realization of fundamental freedoms and human rights, rather than at the expense of the respect for, protection and fulfillment of these rights.

That said, unlike IFC and MIGA, ECAs do not have an explicit development component to their mandate, but instead actively seek to promote trade and investment in developing countries. In fact, only the Swiss ECA, Export Risk Guarantee (ERG), is required to harmonize its export credit support with government development aid policy objectives, and *Canada’s ECA, EDC, is explicitly exempted from the Federal Government sustainable development strategy*. The trade focus of ECAs may then put them at odds with pursuing a rights-based ‘development’ approach. But, one could also argue that not following such an approach creates potential policy incoherence between the objectives that government aid agencies are trying to promote, and the negative development impacts that some export-credit -funded ‘trade’ projects may have.

The UN Special Rapporteur on the Right to Health, Paul Hunt, echoed this notion in his 2004 report to the 60<sup>th</sup> session of the Commission on Human Rights. He suggested that “what is needed [in the context of government disconnectedness] is a coherent approach to the application of a State’s various national and international obligations, including those relating to trade, development, economics and human rights”<sup>xlvi</sup>. Dr. Hunt suggested that an increasing number of countries are addressing this “disconnectedness” by “mainstreaming” human rights within government<sup>xlvii</sup>. The

consequences of not doing so were highlighted in an earlier 2003 UN Report on Human Rights, Trade and Investment. While acknowledging the positive force that investment can play in promoting human rights, the report cited ILO research in which many countries were witnessing a downward pressure on labour and environmental standards as a result of investment. Investors and companies, it went on, are using “expropriation provisions to protect investments against new measures to protect the environment and promote human rights”<sup>xlviii</sup>. Among other things, the 2003 report advocated increasing levels of overseas development assistance alongside investment liberalization. Both the 2003 and 2004 reports also recommended developing methodologies to assess the human rights impacts of trade and investment rules and policies, including the right to health.

The HRIA framework proposed in this paper builds on this idea, and on existing methodologies, in developing a rights-based approach to international trade and project finance. *It places at its core values of accountability, participation, equity and sustainability.* This has several implications. Specifically, it means that:

- there should be no trade off between rights and development: in other words, development should be carried out in a way that is compatible with human rights
- that narrow economic terms on which project success is gauged, should be broadened to include issues such as culture, biodiversity and sustainable development;
- that project development should focus on equity, equality and the sharing of costs and benefits; and,
- that the decision-making process should be transparent and more inclusive of affected communities and civil society.<sup>xlix</sup>

#### **3.1.4) Use of human rights language**

Although built on traditional impact assessment processes, the model clearly has to reflect the above ideas and the differing language of human rights. EIAs, for example, talk about measures to mitigate and minimize impacts. An HRIA might instead talk about measures to respect, protect, or fulfil individual and collective rights of people and groups affected by the project. This would include Indigenous Peoples’ rights, the rights of local communities, recognition of customary rights, recognition of people’s own representative institutions. With this in mind, the HRIA itself, and the means by which it is carried out and reviewed, becomes a key tool towards guaranteeing respect for the inherent rights of the project-affected people and groups. At stake are issues of equity, equality, transparency, inclusion and early meaningful and informed participation. Safeguards that allow for review and appeal, negotiated settlements, and compliance mechanisms are important for ensuring the protection of individual and collective rights. This, in particular, might help give voice to otherwise marginalized groups, and ensures a certain level of accountability in the project. Finally, social development plans, negotiated compensation plans, free prior and informed consent, benefit sharing programs, and decommissioning plans are important for the fulfillment of individual and collective rights. This speaks to issues of empowerment and sustainability. At each level of the project cycle, the HRIA should ensure that people and groups are aware of their rights and that the process empowers the rights holder to claim their rights.<sup>1</sup>

#### **3.1.5) Identification of stakeholders – World Commission on Dams rights and risk framework**

This rights-based approach has important implications also for the identification of the various stakeholders associated with a specific project. Stakeholders, or rights holders, are individuals and groups whose rights will be impacted by the project. “Key stakeholders”, as defined by the WBG, are those who are the most vulnerable, including the poor and excluded social groups. Stakeholders also include those individuals and groups who involuntarily bear some of the project risks because their livelihoods and quality of life are compromised by the project, but who may be excluded from the decision-making processes that determine the parameters of the project.

Any identification of stakeholders in a human rights impact assessment process should therefore:

- recognize existing rights and those who hold them;
- identify those at risk or vulnerable to the impacts of the project; and,
- identify the constraints to establishing a level playing field for stakeholder involvement.

### **3.1.6) Identification of rights**

As mentioned above in 2.2.1, there are a growing number of conventions and legal instruments to ensure the respect, protection and promotion of people's human rights. Below is a list of some of the human rights that might be compromised by the types of projects/companies PIFIs have supported in the past and that should help guide the HRIA, its review and implementation.

#### **International Covenant on Civil and Political Rights<sup>11</sup>**

- The right to self determination for all peoples to pursue their economic, social and cultural development (Art. 1 of both Covenants)
- The right not to be deprived of one's own means of subsistence (Art. 1 and 2, both Covenants)
- Right life, liberty and security (Art. 6; Art. 9)
- Freedom from torture, or degrading punishment (Art. 7)
- Freedom of movement and freedom to choose one's place of residence for everyone within the state (Art. 12)
- Equality before the courts and tribunals (Art. 14)
- Right not to be subject to interference with their privacy, family, home or correspondence (Art. 17)
- Freedom from arbitrary arrest and detention
- The right to hold opinions without interference; freedom of expression, including the freedom to seek, receive and impart information (Art. 19)
- The right of peaceful assembly (Art. 21)
- The right to join and form trade unions (Art. 22)
- The right to take part in the conduct of public affairs, directly or through a chosen representative (Art. 25)
- Equal protection before the law (Art. 26)
- The right of minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language (Art. 27)

#### **International Covenant on Economic, Social and Cultural Rights**

- The right to work and to have the opportunity one's living by the means one chooses (Art. 6)
- The right to equal pay for equal work, to just and favourable remuneration and work conditions (Art. 7)

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<sup>11</sup> The International Covenant on Civil and Political Rights and the Covenant on Economic and Social Rights articulate in more detail many of the articles of the Universal Declaration of Human Rights (UDHR). They, instead of the UDHR, are included here because of their binding nature. However, it is also worth noting that in addition to the UDHR, there is the American Convention on Human Rights and its Protocol of San Salvador, the African Charter on Human and Peoples Rights, the European Convention on Human Rights and the European Social Charter.

- and to form and join trade unions (Art. 8)
- The right to an adequate standard of living, including food, clothing and housing, and to the continuous improvement of living conditions (Art. 11)
- The right to the enjoyment of the highest standard of health (Art. 12)

#### **ILO Core Labour Standards**

- ILO Declaration on Fundamental Principles and Rights at Work, including a) freedom of association (ILO 87), and the right to collective bargaining (98); b) elimination of all forms of forced or compulsory labour (29, 105); c) abolition of child labour (138, 182); and d) elimination of discrimination in respect of employment, occupation and wage (100, 111, 183).

#### **Women's Rights**

- Convention on the elimination of all forms of discrimination against women

#### **Children's Rights**

- Convention on the rights of the child

#### **Indigenous Rights**

- ILO 169 concerning Indigenous and Tribal Peoples in Independent Countries

#### **Migrant Workers Rights**

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

#### **Environment**

- Convention on Biodiversity
- Convention on Environmental Impact Assessment in a Transboundary Context or Espoo Convention

#### **Aarhus Convention**

- Pillar I - Access to information
- Pillar II – Public participation in decision-making
- Pillar III – Access to justice

**QUESTION: What other core rights might be integrated into the HRIA as indicators? What would this look like?**



Having identified a number of core concepts key to mainstreaming human rights throughout the project cycle, below we attempt to outline what such a mechanism might look like in practice. We have divided this into four key phases that parallel the project cycle: the preparatory stage, the actual human rights impact assessment, project review and consideration by the PIFI, and project implementation (including monitoring and compliance). Opposite is a flow chart providing a very general idea of how the project cycle currently works and where each of these phases fit in. In each case for what is proposed below, we suggest content to be added, key guidelines for achieving this, or actual procedural changes to existing practices. A flowchart illustrating Phases I to IV (outlined below) is illustrated in Annex VI.

### 3.2) Phase I: Preparatory Stage - Feasibility study

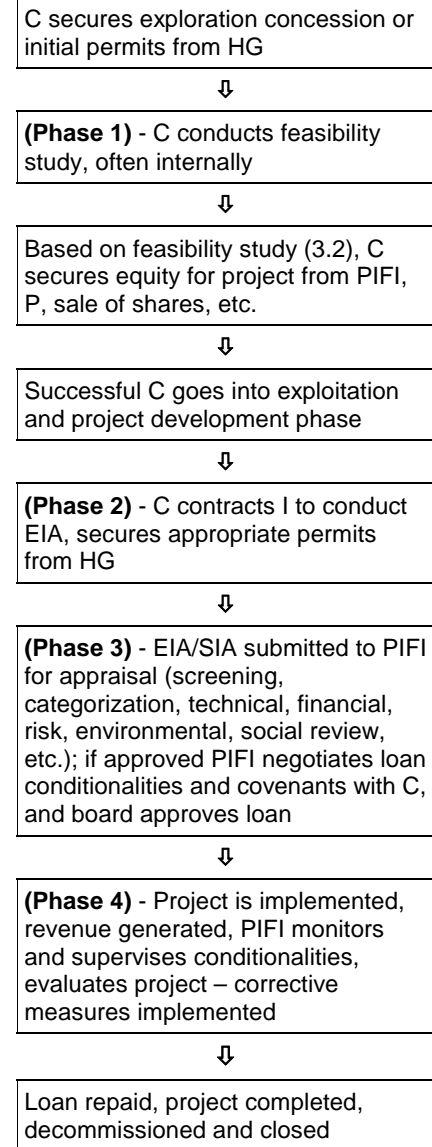
A Feasibility study is a very preliminary assessment undertaken by the project sponsor before the real work of a project starts. The goal behind the study is to ascertain the likelihood of a project's economic success, and hence whether a company should proceed with the project. The study addresses issues including the project's benefits, costs, effectiveness, alternatives considered, analysis of alternative selection, environmental effects, public opinions, and other factors. Based on the outcome of the feasibility study, the project sponsor will then use it to get equity investment from commercial banks and PIFIs.

Below we make some suggestions that seek to move Phase I of the project cycle, the feasibility study, beyond assessing the project from a purely technical, financial and/or institutional design perspective (cost-benefit), to a more people-centered perspective. This should include preliminary stakeholder identification, a baseline survey of the status of human rights protection and assessment of affected people's needs, and an analysis of project alternatives (from a 'people', rather than 'profit-making', perspective). Feasibility studies should be carried out independently of the interests of the project sponsor, and financing mechanisms should reflect this independence.<sup>lii</sup> This is described in the four sections below.

#### 3.2.1) *Appropriate identification of stakeholders through a Consultation and Participation Plan<sup>liii</sup>*

Consultation, awareness raising and early meaningful and informed participation in the decision making processes are key tenets of the World Commission on Dams decision-making framework, the Aké Kwon guidelines, and the recommendations of the Extractive Industries Review. Meaningful consultation and participation guarantees people's right to access information, right to participate in the conduct of public affairs, freedom of association and expression and the right to peaceful assembly. It allows them to be heard, to express their views, to make decisions, raise issues, and

**Table 5 – Generalized overview of the current project cycle**



**C**=Corporation  
**HG**=Host government  
**I**=Independent Consultant  
**P**=Private bank  
**PIFI**=Public International Financial Institution

become ongoing participants in the project<sup>lv</sup>. Furthermore, it is key to ensuring demonstrable public acceptance of a project, to securing the social license for the project and to guaranteeing the longer-term sustainability of the projects. As such, a consultation and participation plan, for use at the feasibility and project preparation stages, must include:

- Notification and meaningful consultation on the proposed project via appropriate public means and in the language of the area affected, while taking into account the needs of non-literate communities;
- Analysis and identification of stakeholders likely to be affected, including organizations representing affected communities. Should include groups whose lives and livelihoods are directly or indirectly put at risk, and whose rights may be impacted;
- Establishment of mechanisms to facilitate stakeholder participation, including for women, youth, the elderly, minorities, indigenous peoples and other vulnerable groups, throughout the process;
- Establishment of a process for recording the views and concerns of stakeholders potentially impacted by the project in a culturally appropriate manner and that takes into account the availability of stakeholders;
- Identification and provision of human, financial, technical and legal resources to ensure effective participation in all phases of the project cycle. Resources should be commensurate with the potential impacts of the project on the affected community;
- Establishment of guiding principles and criteria, negotiated between stakeholders and project sponsors, for future benefit-sharing, promotion and protection of rights, resettlement, development and compensation;
- Establishment of a trusted and effective grievance mechanism for review and appeals;
- Transparency of process, with the exception of information pertaining to national security or the release of information pertaining to traditional knowledge and practices;
- Establishment of provisions to get the free prior and informed consent of indigenous communities for the project.

### **“Governments grant permits, but communities grant permission”**

*Brenda Kenny, PhD Candidate, University of Calgary, speaking at the 24<sup>th</sup> Annual Conference of the International Association for Impact Assessment on “Progressing Toward Sustainable Development Through Reflexive Processes”*

**QUESTION: Is there a methodology for identifying stakeholders in keeping with the rights and risk framework? How might this mechanism for participation be improved? How much of this consultation should take place at the feasibility stage? The preparation stage?**

#### ***3.2.2) Preliminary Needs Assessment and Human Rights Baseline Survey<sup>lv</sup>***

The purpose of the Preliminary Needs Assessment and Human Rights Baseline Survey would be to put the potential project in the appropriate social, economic, cultural, environmental and legal context, and in particular, alongside existing and proposed development activities and plans within the project area that are not directly connected to the project. The needs assessment and human rights baseline survey should:

- Assess the current situation regarding human rights of the affected communities, with particular attention to right to land, food, water, expression, etc., and relevant human rights guarantees under national, regional and international law.
- Identify and analyzes the water, energy, food, development and livelihood needs of the affected community through a participatory process.
- Establish local, regional or national forums to comprehensively assess the goals of the project, and the options that best meet the needs of identified stakeholders.
- Establish an appropriate process for addressing disparities between the needs expressed, existing development plans and project objectives. (see 3.2.4 below)

- Disseminate the results of this public consultation to all stakeholders.

**QUESTION: How can we deal with situations where baseline data on human rights conditions is difficult to obtain (e.g. migrants working illegally, complex political situations, etc.)?**

### **3.2.3) Preliminary analysis of Comprehensive Options Assessment and proposal of alternatives<sup>lvi</sup>**

The WCD, as part of its decision-making framework, suggests conducting a participatory and transparent process, prior to the selection of any specific plan, to ascertain the water, energy, food and development needs of the potentially project-affected people. It suggests setting up a forum at the local, sub-national or national level to assess the various needs and options, and to plan the project. Ideally, it results in a full range of possible policy, technical and institutional options that meet these needs, placing equal weight on social, environmental, technical, and economic factors. Where there is consensus, agreements are negotiated between project sponsor and people, and these agreements become part of the project framework. Where there is no consensus, they are brought before a grievance mechanism for independent review and mediation (3.2.4 below). In general, the Comprehensive options assessment does the following:

- Outlines the cultural, economic, financial, environmental, political and social positive and negative effects of project and the various options .
- Considers opportunities to enhance existing systems.
- Reviews the basis for the project sponsor’s selection of the preferred option proposed, including a basic distributional analysis identifying the groups that will receive benefits or bear the costs of the project, with a rough indication of the expected costs and benefits<sup>lvii</sup> .
- Reviews alternatives to the proposed project site, technology, design and operation that might help further respect, protect and fulfil the rights of the affected community.
- Articulates how the choice of the final option was communicated in a timely and open manner to the stakeholders, as well as an explanation of why other options were rejected.
- Articulates the mechanisms put in place for helping to establish consensus around one project option, and the means established for independent review, mediation and dispute resolution, where there is no initial consensus (see 3.2.5 below).

### **3.2.4) Trusted and effective grievance mechanism<sup>lviii</sup>**

Since some stakeholders may be dissatisfied with the final option selected, appropriate mechanisms should be in place for airing complaints and disagreements, and ensuring that people also have a right have their complaints addressed in a democratic manner. Such a grievance mechanism must:

- Be established with the participation and agreement of stakeholders;
- Be independent of the interests of project sponsors or the various stakeholders;
- Be fair, equitable, timely and not prohibitively expensive;
- Establish provisions for addressing outstanding social and environmental impacts, resolving disagreements over options selected where there is no initial consensus is reached.

## **3.3) Phase II: Project Development – Conducting the HRIA<sup>12</sup>**

It is in this phase of the project cycle – once the project is deemed feasible by the company and it has secured equity to help finance the next stages of project development - where a full HRIA would take place. The HRIA would build on the findings of the feasibility studies, including the baseline survey on

<sup>12</sup> Unless otherwise indicated, the core framework for this HRIA is adapted from the World Bank Operational Manual for Environmental Assessments, OP 4.01, a framework currently used by ECAs as the basis for EIAs, and World Bank “Social Assessment Policies and Guidelines – G.P. 10.05 Social Analysis through Social Assessment”. That said, the WBG SIA does not focus at all on the human rights issue.

human rights, the preliminary needs assessment and the identification of stakeholders. The HRIA itself provides additional measures for assessing, managing, monitoring and evaluating the impacts of the project, and the means for remedying these impacts. As with traditional EIAs and SIAs, the assessment itself is the responsibility of the project sponsor, and should be carried out by an independent third party that has no stake in the project. Furthermore, the HRIA should not be carried out by the engineers and economists who undertake the technical and financial assessments associated with the proposed project, but by social scientists (e.g., anthropologists; sociologists), and other specialists/advisors where necessary (e.g., archeologists, gender specialists, lawyers, etc.). That said, economists and engineers do still have a vital role to play in the analysis of the feasibility and implementation of the project.

Once the HRIA has been completed, and the company/project sponsor has secured all of the necessary permits from the host government to proceed with the project, the project sponsor will approach (commercial banks and) PIFIs with the final HRIA in the hopes of securing additional financing to actually implement the project. PIFIs should therefore include a ‘model HRIA’ in their guidelines to ensure that companies know what will be expected of them when attempting to secure financing. As will be discussed later, PIFIs would also be responsible for putting in place appropriate mechanisms to *guarantee due human rights diligence* in the review, approval, post-approval/project implementation, project operation, closure and evaluation stages.

An HRIA’s scope and level of detail should be commensurate with the nature, scale and potential of the human rights impacts of the proposed project (See 4.2 below).

**QUESTION: What is the relation of a HRIA to an Environmental Impact Assessment (EIA)? SIA? What implications does its development have for ESIA? Should there be both an HRIA and EIA?**

The HRIA should include the following components:

### **3.3.1) Executive summary**

An Executive Summary should be prepared to precisely summarize key findings and recommended actions.

### **3.3.2) Policy, Legal Regulatory, and Institutional Framework.**

A review of the policy, legal and administrative frameworks of relevance to the proposed project. It also:

- Explains the environmental, social and human rights requirements of any cofinanciers; and,
- Identifies relevant international conventions to which the country is a party, and national legislation protecting the environment, human rights, and in particular vulnerable groups<sup>13</sup>.

### **3.3.3) Project Description**

A description of the proposed project, and its geographic, ecological, social, and temporal context, including any offsite investments that may be required (e.g., dedicated pipelines, access roads, power plants, water supply, housing, and raw material and product storage facilities). It should also describe cumulative impacts on habitats, natural resources, employment, housing and access to and the delivery of public services such as healthcare and education. It may also indicate the projected need for parallel planning processes (e.g., resettlement plans; social service improvements; infrastructure;

<sup>13</sup> In its HRIA, NORAD identifies state ratification of the UN Covenant on Civil and Political Rights, Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of all Forms of Racial Discrimination; Convention on the Rights of the Child; the African Charter; and the OAS Convention.

livelihood creation and economic development; closure and decommissioning; gender and minorities equity plan; education and awareness-building program, etc.). It should include a map showing the project site, the project's area of influence, and any areas with protection status or any indigenous territories, inherent or nationally protected.

#### **3.3.4) HRIA Methodology**

A definition of the tools and methods that are to be used throughout the course of the assessment process (e.g., key stakeholder interviews; focus groups; case studies; quantitative and qualitative surveys; etc.). It will also identify, with stakeholder involvement, key issues of concerns and define the terms of reference for future stakeholder involvement throughout the assessment, project preparation, implementation, operation and closure stages.

#### **3.3.5) Participation and Involvement<sup>lix</sup>**

This will articulate, among other things:

- Measures taken to notify and consult affected communities and other interested or relevant parties, and identify stakeholders;
- Mechanisms to facilitate stakeholder participation throughout the assessment process, including among vulnerable groups;
- The process for recording the informed views and concerns of the affected people, local non-governmental organizations and regulatory agencies, in a culturally appropriate manner;
- Alternative means employed for recording the views of stakeholders;
- Means taken to ensure transparency of the process;
- The human, financial, technical and legal resources set aside to ensure effective participation in all phases of the project cycle;
- Terms of reference for the grievance mechanism established for reviews and appeals.

The results of stakeholder consultations will be incorporated into the substantive discussions throughout the report.

#### **3.3.6) Baseline Studies<sup>lx</sup>**

The study team will assess the nature of the study area and describe relevant cultural, economic, social, human rights and political conditions, including any changes anticipated before the project commences. The process will also take into account existing and proposed development activities and plans within the project area that are not directly connected to the project. Data should be relevant to decisions about project location, design, operation, or measures to protect, respect and fulfil human rights and should be conducted in collaboration with identified stakeholders, or their representatives, including vulnerable groups (such as women and children, the elderly, ethnic minorities and indigenous groups, and the poor) living in and around the affected area. The section indicates accuracy, reliability and sources of the data. Baseline data should include, but not be limited to those aspects highlighted in Annex I.

**QUESTION: What additional information pertaining specifically to human rights should be gathered as part of the Baseline data highlighted in Annex I?**

**Should information on environmental impacts be absorbed into a HRIA?**

#### **3.3.7) Identification of Human Rights Impacts**

This task will predict and assess the aspects of the project likely to result in human rights violations or conversely, improve the enjoyment of human rights by project-affected communities, relative to

the baseline studies. It will identify those likely to benefit most and least from the project.<sup>14</sup> It will identify measures to respect, protect and fulfil the human rights of the affected communities. Opportunities for economic, political and social enhancement for the affected community will be explored. Opportunities for environmental enhancement, and the need to avoid destruction of any sites or areas of cultural, religious, sacred or spiritual significance will also be documented, relying on the environmental impact assessment (if conducted; see 3.3 Questions above). The process will identify and estimate the extent and quality of available data, key data gaps, and any uncertainties associated with predictions. It will also specify topics that do not require further attention.

For projects that are highly risky or contentious or that involve potential significant adverse human rights concerns, the project sponsor should normally also engage an advisory panel of independent, internationally recognized environmental and human rights specialists to advise on all aspects of the project relevant to the HRIA.<sup>15</sup>

**QUESTION: What sort of mechanism can help identify and predict potential human rights impacts? What are the mechanics and processes involved?**

### **3.3.8) Human Rights Protection Plan<sup>16</sup>**

Equivalent to a resettlement or compensation plan, and environmental mitigation measures, this will describe measures to:

- Respect, protect and fulfil human rights;
- Develop negotiated and binding agreements between project sponsor and the affected communities for compensation (see Annex II for examples)
- Establish guidelines for monitoring compliance of negotiated settlements, accident prevention and emergency response plans;
- Establish guidelines for periodic review of impacts and benefits; and,
- Define institutional measures to be taken during construction and operation to eliminate new or existing adverse effects, to offset them, or to reduce them to acceptable levels.

The project sponsor should account for appropriate financial and human resources set aside throughout the project cycle to meet the implementation, monitoring and review of these goals. *The process should indicate the institutional capacity in place to monitor and enforce agreements effectively.* As this is a crucial element related to how successful programme implementation will be, when such capacity is lacking, institutional strengthening measures should be identified. The Human Rights Protection Plan, and negotiated agreements, should be consistent with national legislation and regulations, international agreements to which the country is a party, and any existing local or regional development plans.

**QUESTION: What are some key elements to include in the guidelines for monitoring compliance with negotiated settlements, and for periodic review of impacts and benefits? How do we deal with issues related to lack of accountability?**

<sup>14</sup> The WCD provides some ideas on how to conduct a distributional analysis that looks at the risks of the project on specific sub-populations (equity assessment), the wider economic impacts (macroeconomic analysis) and the distribution of direct costs and benefits of the project (including social and environmental aspects that are valued) (economic distributional analysis). This complements the standard cost benefit analysis (WCD (2000), p. 288). A framework for valuing social and environmental aspects is also covered (WCD (2000), p. 289-290).

<sup>15</sup> Based on paragraph 4 of IFC, OP 4.01, October 1998 Environmental Assessment Operational Policies, this advisory panel would provide advice on (a) the terms of reference for the HRIA, (b) key issues and methods for preparing the HRIA, (c) recommendations and findings of the HRIA, (d) implementation of the HRIA's recommendations, and (e) development of Environmental Mitigation and Human Rights Protection capacity.

<sup>16</sup> Adapted from the recommendations of the World Commission on Dams, Guidelines 2, 18, 19, 20; Criteria Checklist 2 and 3.

### 3.3.9) Appendices

- List of individuals and organizations who prepared the HRIA report
- References - written materials, both published and unpublished, used in study preparation.
- Record of interagency meetings and participation and involvement of stakeholders.
- Tables presenting the relevant data referred to or summarized in the main text.
- List of associated reports (e.g., needs and options assessment, negotiated agreements, guidelines for monitoring compliance, emergency response plans, guidelines for review of impacts and benefits, closure or decommissioning plan).

**QUESTION: For the most part, sections 3.2 and 3.3 on the feasibility study and HRIA deal with content and not with process. What would the process and mechanics be for conducting both 3.2 and 3.3? What aspects have been omitted?**

## 4) Phase III: PIFI Project Categorization, Review, Appraisal and Loan Negotiation

This section presents a proposal for how the above HRIA might be reviewed by PIFIs. It includes a list of prerequisites that need to be in place to ensure appropriate levels of transparency and accountability, the initial screening of projects, a system for categorizing projects, and a process for reviewing projects. It is based on multiple best-practice examples from current PIFI policies, non-profit sector models and PIFI-commissioned evaluations and reports.

### 4.1) General requirements

The PIFI should

- Have clearly articulated policies that indicate the means by which projects are screened, categorized, reviewed, and monitored, including the basis for rejecting projects (this report makes recommendations for all of these, including categorical prohibitions, presented below)
- Disclose the institutional policies and processes related to how it screens and categorizes projects, reviews and monitors the HRIA;<sup>17</sup>
- Notify interested parties when a new category A has been posted to their web site;<sup>18</sup>
- Disclose the full HRIA at least 60 days prior to board approval;<sup>19</sup>
- Make financing conditional on the disclosure of the full HRIA;<sup>20</sup>
- Make the conditionalities and covenants for a Category A project available to the general public;
- Make the annual reporting by the project sponsor relating to implementation of Environmental Mitigation and Human Rights Protection Plan available to the public.

### 4.2) Screening projects<sup>lxi</sup>

A screening process allows the PIFI to classify proposed projects into categories and determine the extent of the information required for a project. Since the full project appraisal (below in 4.2.2) is likely quite time and resource consuming, this screening process helps the PIFI to distinguish those projects that require greater due diligence and review (Category A, B and FI) because of the degree of significant adverse human rights impacts, from those that need less (Category C and ‘No-Go’ projects that are ineligible for support). The classification of a project could depend on five aspects:

- “Type” of project - the illustrative Category A list in Annex III is indicative of “type”;

<sup>17</sup> IFC describes the project cycle at IFC and the environmental review steps in its Environmental and Social Review Procedure.

<sup>18</sup> As is currently the practice at OPIC

<sup>19</sup> IFC, OPIC and EBRD have a 60 day disclosure of EIAs.

<sup>20</sup> As is currently the case at US Ex-Im

- “Location” - human rights sensitive areas, such as conflict zones, totalitarian regimes, minority dominated area, where known significant minority rights violations are known to occur, export processing zones, indigenous lands and sacred or spiritual sites;
- “Country” - status of various key human rights conventions in the country,<sup>21</sup> and the incidence of egregious breaches of the convention;
- “Scale” - the nature and scale of the potential impacts; generally, larger projects are more likely to have greater impacts; and
- “Sensitivity”<sup>lxii</sup> – to projects which may:
  - ~ Have irreversible impacts (e.g., lead to loss of life, seriously compromise cultural survival),
  - ~ Compromise the health and safety of persons living in or near the project area;
  - ~ Affect vulnerable groups or ethnic minorities;
  - ~ Involve involuntary displacement (of 5000 persons); and,
  - ~ Compromise the livelihood and resources of the majority of the local and neighbouring populations by, for example, eliminating or significantly reducing hunting or fishing grounds, scarce agricultural land, and access to drinking or irrigation water, and increasing prevalence of endemic disease or ill-health among project-affected communities.

A rationale for their choice of categorization should be included and any human rights issues that are of particular concern should be noted.

**QUESTION: What other elements might be added to this screening mechanism, and what might such a screening questionnaire look like?**

ECAs categorize projects into Categories A, B and C, and use an illustrative list of Category A projects to help facilitate identification.. IFC, the US Overseas Private Investment Corporation (OPIC) and the European Bank for Reconstruction and Development (EBRD) have an additional category, applied to pre-screening sub-projects being funded by Financial Intermediaries (FI) that may result in adverse environmental impacts. OPIC also goes one step further than IFC by including a list of categorical prohibitions, or ‘no-go’ projects, that are ineligible for OPIC support.

#### *4.2.1a) Category A – Projects that require ‘Extreme Caution’.*<sup>lxiii</sup>

Accordingly, projects are deemed to be category A if they are likely to have significant adverse impacts on human rights that are diverse or unprecedented. These effects may affect an area broader than the sites subject to the physical works, may be irreversible, and seriously compromise the ability of the affected community to meet their basic human needs. The Illustrative list of Category A projects in Annex III should act as a trigger for projects that are likely to need a full HRIA.

**QUESTION: The above Illustrative list comes from a list intended to trigger reviews of projects that are potentially harmful to the environment. Many of these same projects are also likely to have harmful human rights impacts. What other indicators should this list include? How might it differ from the categorical prohibitions list below?**

#### *4.2.1b) Category B – Projects that require ‘Good Stewardship’.*<sup>lxiv</sup>

A proposed project is classified as Category B if its potential adverse impacts on human rights are less adverse than those of Category A projects. The impacts generally are site-specific, and few if any of them are irreversible; and in most cases measures to respect, protect and fulfil the rights of the affected area can be designed more readily than for Category A projects. Like Category A projects, Category B

<sup>21</sup> NORAD, in Appendix 3 and 4 of their “Handbook in Human Rights Assessment” have compiled a comparative country table highlighting which key human rights agreements countries have ratified.



projects should require a HRIA (although potentially less detailed) that examines the project's potential negative and positive impacts and recommends any measures to respect, protect and fulfil human rights in the project affected area.

**QUESTION: How would a Category B differ from a Category A in practice and process?**

*4.2.1c) Category C – Projects that require no further review.*

A proposed project is classified as Category C if it is likely to have minimal or no adverse human rights impacts. Beyond pre-screening, no further assessment action is required. Accordingly, projects in this category would be exempt from having to conduct a human rights impact assessment.

Examples of such projects include branch banking, computer software development and guarantees for credit unions running a micro-finance program.

*4.2.1d) Category FI – Financial Intermediaries*

Across the spectrum of agencies with financial intermediary (FI) provisions, FIs include investment funds, banks, private equity funds, leasing companies, insurance companies and pension funds. When OPIC, IFC or EBRD lend directly to an FI, the moneys loaned, guaranteed or insured may subsequently be used by the FI for a subproject of a Category A or B type. OPIC takes into account the nature and size of the involvement of the FI in the transaction (to see whether it meets certain thresholds), and screens and reviews the subprojects prior to approving the financing. All category A investment fund projects require a full EIA.<sup>lxv</sup> The EBRD has developed model environmental procedures and guidelines for specific types of FIs.<sup>lxvi</sup> Such a category should likely be included in any review of HRIAs.

*4.2.1e) Categorical prohibitions or ‘No-Go’ list*

Several PIFIs, including US Ex-Im<sup>lxvii</sup>, Australia’s Export Finance and Insurance Corporation (EFIC)<sup>lxviii</sup>, the European Bank for Reconstruction and Development (EBRD)<sup>lxix</sup>, and IFC<sup>lxx</sup>, have exclusion lists. These prohibit trade in such usual suspects as ozone depleting substances, PCBs, unbonded asbestos, or CITES restricted wildlife products, and in activities that may involve harmful child labour or discriminatory practices.

In contrast, the US Overseas Private Investment Corporation (OPIC), which provides investment insurance, loans and guarantees to US companies, has a Categorical Prohibitions list that clearly articulates instances that preclude OPIC involvement. This sets a base minimum of standards, and a level of accountability within the organization that is otherwise absent from other PIFIs. (See Annex IV). To this we might add countless other prohibitions, such as the WWF and IUCN recommendation for projects in UNESCO Man and the Biosphere Core areas, or the EIR recommendation of mining projects using riverine or sub-marine tailings.

Several new initiatives have also started to develop a methodology for identifying “no go” areas. The World Resources Institute<sup>lxxi</sup> developed a framework for the EIR to help identify socially and environmentally vulnerable areas that might constitute “no go” zones. In addition to including environmental and social indicators, and seismic and flood risks that signal potential mine vulnerabilities, it also includes governance capacity indicators to highlight potential risks. Furthermore, the indicators were developed for project finance decision-makers to help them determine whether a project warrants a “no-go” categorization, or further investigation, information gathering, consultation with local stakeholders and analysis. The WWF<sup>lxxii</sup> has developed a decision tree consisting of three filters: protection status, potential threats to biodiversity, and potential threats

to human communities. The Energy and Biodiversity Initiative<sup>22</sup> has developed a “site selection” framework for oil and gas projects, biodiversity indicators for monitoring impacts, and means for integrating biodiversity into EIAs.<sup>lxxiii</sup> Finally, the EIR recommended the WBG develop “No-Go” criteria for oil, gas and mining projects<sup>lxxiv</sup>.

'No-go zones' for human rights are currently determined by the UN or by foreign affairs ministries making countries 'off-cover' or applying sanctions to them. Besides following these decisions PIFIs can make regions or countries off-cover when considered high risk. (See EBRD processes)

**QUESTION: Based on existing practice or other international conventions, what are some other 'obvious' types of projects to add to the Annex III - Categorical Prohibitions list? Other categories?**

#### ***4.2.2) Review and project appraisal by PIFI***

Having categorized the projects, the review process then helps the PIFI identify, at the earliest stage possible, the potential adverse human rights impacts of Category A and B projects. In particular, it will help the PIFI Human Rights Advisor – the person responsible for reviewing the HRIA - identify areas of serious concern, will guide them in their recommendation to the board about whether or not a project should be approved or rejected, and in the former case, will help define the conditionalities that need to be linked to final loan approval (on top of the agreements that have already been negotiated between project sponsor and affected communities). The Human Rights Advisor's report is then submitted to the Board as part of the Board's assessment of the project.

Annex V includes a possible tool for PIFIs for achieving this goal. It is based on the Norwegian Agency for Development's (NORAD) Human Rights Impact Assessment (HRIA), International Alert's Conflict Risk Impact Assessment (CRIA), and the Danish Human Rights and Business Project's Human Rights Compliance Assessment (HRCA), which as their names suggest are all tools for reviewing the human rights impacts of development projects, extractive industry projects in conflict zones, and company operations, respectively (quite distinct from the HRIA outlined above in 3.3).

#### ***4.2.2a) Adding value – the Danish HRCA, International Alert's CRIA and NORAD's HRIA***

Before considering the mechanics of the review process proposed in Annex V, let us first consider some design guidelines drawn from these two models:

1. *A mix of the practical and theoretical* – All three models offer a **practical** means of screening projects (HRCA has over 300 questions and 1000 indicators), while firmly grounding the process in the **theoretical** framework of international human rights law.
2. *An evaluation of the impacts* –NORAD uses indicators and a score system to assess the potential positive (pi) and negative (ni) human rights impacts in the preparatory stage of a project.<sup>lxxv</sup> A rough gauge of 'pi' is an increased involvement of participants in the project due to an increased awareness of their rights. An 'ni' rating clearly represents the opposite – no or little effort to promote specific rights. In the case of the HRCA, responses to questions receive a yes (green light) or no (red light) response. Regardless of the response, the company then ranks the likelihood of the violation occurring, and gives their own estimation of the severity of the impact if the violation were to occur. The HRCA balances the company's opinion with an

<sup>22</sup> The initiative to integrate biodiversity conservation into oil and gas development includes BP, Chevron Texaco, Conservation International, Fauna and Flora International, IUCN, Nature Conservancy, Shell, Smithsonian Institution and Statoil.

independent overview, conducted by the Danish Institute for Human Rights, of the likelihood of human rights abuses occurring in a country. The CRIA goes one step further than this overview by providing a detailed context analysis that captures the dynamics between different actors, issues, and causes of conflict at different geographical levels.

3. *A design that meets the needs of the user* – The NORAD handbook and questionnaire were designed specifically for project-planning officers, embassy personnel and external technical advisers. The HRCA is conducted by the company to assess all its activities, with questions designed to be done by each section of a standard company (employment practices, operational practices, land management, company products and marketing practices, research and development activities, and public services). The CRIA is designed to be integrated into and complement the existing project cycle, adding conflict-sensitive components to current ESIA's.
4. *A threshold or system for flagging serious concerns* – For NORAD, a low score indicates the need for either additional information, or new dialogue between project sponsors and affected communities. For the HRCA, once the company has completed the assessment, the final HRCA report flags areas of concern with a red light. In theory, the company should react to all the red lights as soon as they are detected. This report provides the company's board with an overview of its human rights performance, so that it can decide which human rights areas the company needs to focus on improving.
5. *A trigger to identify the need for additional information* – Where it is difficult to assess whether a project will enhance or improve human rights, or where questions cannot be scored due to lack of information, NORAD marks (na) on the score system and the HRCA gives the question a yellow light, both indicating the need for further information.
6. *Tools for raising 'rights' awareness* – The NORAD Handbook serves as an awareness raising tool by referring to key human rights instruments and discussing different categories of rights. The HRCA creates general guidelines on, for example, what the right to a fair trial entails, and descriptions and indicators to help companies identify where they may not be doing this. Such guidelines would be important to include in the compliance plan for the company as they represent good indicators against which to measure and monitor compliance.
7. *Recommendations for protecting human rights* – Based on the assessment, NORAD staff make recommendations that feed into funding decisions, and establish requirements, indicators and covenants attached to the funding. The HRCA highlights areas where companies are best (green lights) and worst (red lights) at protecting or promoting specific human rights, and provides recommendations of specific actions companies can take to strengthen specific rights.
8. *Promotional activities* – The HRCA includes suggestions of ways in which the company can promote its own best practices and support state initiatives to protect rights. CRIA tools enable companies to develop mitigating strategies that contribute to conflict prevention and peacebuilding.
9. *Means of monitoring and evaluating progress* – The NORAD model uses the initial assessment and indicators to monitor and evaluate project success, or develop corrective measures, during the implementation and closure stages. If conducted once year by the company, the HRCA can be used to assess continued performance. This way, management and the board can ensure that the red lights identified earlier have been addressed and can measure how the company has improved.

10. *Long-term review* – All three models can potentially assess a project from conception to closure.

All of these elements represent potential guiding principles for the PIFI review process. That said, these models do fall short in the area of disclosure. In the case of the HRCA and HRIA, the final assessment is not publicly available, nor are the mitigation, corrective or promotional measures or conditionalities attached to the assessment. In the case of the HRCA, companies are only encouraged to share the results with local NGOs in order to identify the best way to address the red lights detected. This is clearly a shortfall which the PIFI would have to redress.

#### *4.2.2b) The mechanics of the HRIA review*

The establishment of effective HRIA review by PIFI's is the central purpose of this paper. A model for the HRIA project review mechanism is presented in Annex V.

Like the two models above, the mechanism proposed in Annex V uses a series of questions to help the PIFI Human Rights Advisor identify potential human rights abuses. Each question is grounded in a specific human right norm that needs protecting (but may be violated), and uses a series of positive and negative indicators<sup>23</sup> to help determine whether the violation of such rights is likely.

Overall, the review should assess procedural issues associated with the project's preparatory and implementation stage (public consultation, disclosure procedures, monitoring and compliance), and the actual human rights impacts (including accounting for community development planning, livelihoods assessment; options for respecting and promoting human rights such as the potential for income restoration; compensation measures; and dispute resolution mechanisms)<sup>lxxvi</sup>.

The PIFI review mechanism also attempts to put the HRIA in context, by looking at both the status of state governance capacity in the country where the project will take place, and the company's past profile on human rights. The former may already be done, to a large extent, by existing PRA methodologies, but this should add a much more explicit human rights focus. It should, for example, include questions that assess the provisions which have already been put in place by the host country to respect and protect the rights of potentially affected communities, for example, through existing land titles, labour standards, or equality before the law. The latter should include a brief profile on the project sponsor, and capture any instances in which they have failed to meet PIFI conditionalities, or been knowingly involved in any human rights abuses.

**QUESTION: Guidelines for companies on which respective rights should be included to help monitor compliance in the post-project approval phase?**

#### *4.2.3) Financial Conditionalities and Covenants*

Where impacts are potentially significant, the PIFIs and project sponsors must agree to measures to avoid or prevent human rights violations triggered by the project. This is not equivalent to what an EIA would refer to as mitigation measures, because violations cannot be 'mitigated.' As already mentioned, the context of human rights demands new language and a new framework not only because human rights violations are 'non-negotiable' and inalienable, but also because they are very difficult to quantify and directly compensate. The process by which the HRIA is conducted (and reviewed) should reflect an attempt to respect the stakeholder's rights (in particular in terms of considering a whole spectrum of different rights, and focusing on early meaningful participation,

<sup>23</sup> By positive indicators, we mean "existence of registered land titles for indigenous groups" or "strong vocal civil society"; by negative indicators, "the absence of indigenous rights" or "arbitrary use of force by the government to appease civil protest".

transparency, and accountability). This, along with the needs and comprehensive options assessment, should have helped create some awareness among the individual of his or her rights. But “mutually agreed, formal and legally enforceable mitigation, resettlement and development entitlements” between sponsor and rights holder must also be put in place to ensure the protection of these rights<sup>lxxvii</sup>. These negotiated agreements then help ensure that a person’s rights, through his or her own effort and the use of one’s own resources, can be met.<sup>lxxviii</sup>

While IFC, MIGA and ECAs do not manage the projects that they support, they have a key role to play through their ability to influence project design, implementation and management through loan conditionalities.

Loans and continued financing should be conditional on the existence of:

- Clear negotiated compliance plan that outlines specific technical, social, economic and environmental binding commitments (See Annex II, for potential examples), agreed upon by affected communities, and signed by relevant parties.<sup>lxxix</sup>
- Appropriate financial and human resources built into the budget to meet the implementation, monitoring and review of these goals throughout the project cycle,<sup>lxxx</sup>
- Guidelines and indicators for the periodic monitoring, review and evaluation of such plans, their impacts and benefits;
- Covenants that require companies to conduct periodic reviews of the benefits and impacts of the project, and appropriate resources set aside for doing so;<sup>lxxxi</sup>
- A closure or decommissioning plan (including measures for financing the decommissioning);<sup>lxxxii</sup>
- The provision of annual or semi-annual human rights reports.

The PIFI should also clearly indicate what would trigger the withdrawal of financing for a project.

**Table 6 - Human rights screening at the European Bank for Reconstruction and Development (EBRD)<sup>24</sup>**

The EBRD was set up in 1990 after the fall of the communist block, "to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative" in Eastern Europe.

It has linked country investment to political and economic reforms in given countries, on issues including free elections, representative and accountable government, free political parties, independent judiciary, equal protection under the law (including for minorities), fair criminal procedure, freedom of speech, of the media, of association and peaceful assembly, of conscience and religion, and of movement, the right to private property, and the right to form trade unions and to strike"<sup>1</sup>.

These assessments help define the EBRD’s country strategy, and help set benchmarks against which it will measure country progress. For example, in Uzbekistan, the EBRD has set the following political benchmarks:

- Ensure greater political openness of the system and freedom of the media;
- Open up the political processes to a variety of interests, including registering independent local NGOs working on the rule of law and protection of human rights;
- Improve the country’s human rights record, especially in the area of torture.

In March 2004, the EBRD will review its strategy, and if "no progress [is] made in these areas, the scope for new investments in Uzbekistan during the strategy period [...] will be limited."

Belarus (poor political and economic reform) and Turkmenistan (poor progress in developing a free and independent media, improving dialogue with civil society, and protecting national minorities’ rights) have already been exempted from EBRD financing based on their failure to meet different benchmarks. Uzbekistan is now threatened with a similar exclusion.

*From “Can MDBs deal with Human Rights? The Example of the EBRD”, Issue Paper, CEE Bankwatch, March 2004.*

<sup>24</sup> This table is presented as an example of a practice at a RDB, and not necessarily intended as an endorsement of such practice.

## 5) Phase IV: Project Implementation

Project implementation of mitigation measures and compensation agreements, monitoring of the environmental management plan, and enforcement of compliance with PIFI conditionalities, is one of the most important components of the project cycle. Yet it is also one of the most neglected. Typically, companies will devote 95% of their resources towards the development of the EIA, and only 5% to project implementation, follow-up and feedback.

Yet companies are not alone in this. The World Bank also seems to suffer from this compliance failure. On countless occasions, safeguard policies are flouted without sufficient, appropriate and independent mechanisms for redress.<sup>lxxxiii</sup> Research has further found that for a number of extractive industry and dam projects supported by the Bank, “[w]hen borrowers disregard loan conditions, the typical response of Bank management has been to look the other way or waive the relevant requirements, unless public pressure forces them to do otherwise.”<sup>lxxxiv</sup> In reviewing the Safeguard Policies, the Compliance Advisory Ombudsman (CAO) of the IFC and MIGA itself concluded that “For the Safeguard Policies to maximize their potential [..and..] make a real difference on the ground in the way they are applied, the institution must move to accountability for performance, not just process compliance.”<sup>lxxxv</sup> ‘Good policies’ and ‘due process’ clearly aren’t working if they continually lead to poor project outcomes.

The significance of this failure becomes apparent when put in the context of the types of measures that traditionally ensure appropriate project implementation by companies. In general, there are three main leveraging tools: environmental conditionalities (set by the PIFI); the disbursement of funds by the PIFI (linked to conditionalities, project progress reports and missions to the site); and, domestic environmental law (which is ultimately only as strong as the capacity of civil society and domestic environmental agencies to monitor adherence). Of the three, therefore, two stem from the PIFI. So when project compliance fails within the PIFI (as it seems to be doing), monitoring project implementation falls to civil society and domestic agencies - all of whom may lack resources, capacity, independence or will.

Clearly, the mechanisms for monitoring and compliance within PIFIs need to be rethought.

### 5.1) Monitoring

Monitoring is a means of ensuring that the compliance plan is implemented properly – that is, agreements are implemented, benefits are shared and distributed appropriately, actual project impacts are reviewed and reevaluated to determine their actual impacts, and compensation measures are renegotiated accordingly. Monitoring should be ongoing, conducted in concert with local NGOs and stakeholders. Reviewing the baseline indicators conducted for Phase I will help establish whether the situation of individuals has improved as a result of the project and the binding agreements negotiated with the stakeholders. Reports, however, should be periodic, conducted on at least an annual basis by external organizations or experts, and in consultation with project sponsors, domestic NGOs, and project-affected individuals. The report should include an analysis of whether or not the project sponsors are meeting the conditions set by both the PIFIs and the terms of the negotiated agreements, and should provide corrective measures for doing so in the instance where this is not the case. Such reports should be submitted to the PIFI but should be available to the public.

As well as disincentives (such as the withdrawal of financing), PIFIs should also develop appropriate incentives to ensure companies abide by conditionalities and negotiated agreements. This might include releasing financial guarantees, creating more favourable financing terms on satisfactory compliance with agreed milestones,<sup>lxxxvi</sup> or negotiating a whistleblower clause into all PIFI loan agreements.

Additional arbitration and compliance mechanisms measures must also be put in place to ensure that these rights are promoted and protected, as well as to resolve issues as they arise, such as complaints of non-compliance with negotiated outcomes.

**QUESTION: What is missing from this monitoring scheme? What might monitoring or compliance guidelines look like?**

## 5.2) Compliance mechanism<sup>25</sup>

### 5.2.1) *Scope of work and objectives*

The IFC and MIGA, as well as EDC, JBIC (and shortly OPIC) all have compliance mechanisms.<sup>lxxxvii</sup> Although each operates in a slightly different fashion, they all have three overlapping objectives:

- *Advisory role:* To provide advice to decision-makers, management, environmental and social staff about specific sensitive or controversial projects, about specific project issues, about ethical issues, or about environmental and social policies, procedures, guidelines, resources and systems to ensure adequate review and monitoring of PIFI-funded projects.
- *Ombudsman role:* To act as a broker between complainants in an effort to air grievances, investigate complaints, resolve differences, and foster dialogue. This entails accepting complaints from external parties affected by PIFI-funded projects, investigate these in consultation with all affected parties, project sponsors and management, and recommend actions to be take to help resolve project failures. The Ombudsman will also recommend the extent of disclosure of the findings to affected parties and the public;
- *Compliance role:* to audit overall environmental and social performance, and ensure that staff are complying with social, environmental, human rights and disclosure policies, guidelines, and procedures. Such an audit is conducted either by internal (EDC, JBIC) or external (Canada's Auditor General, CAO) experts.

These seem appropriate roles for a compliance mechanism. In addition, however, the Oxfam Community Aid Abroad Ombudsman, which accepts complaints related to mining projects involving Australian companies and largely fulfils the ombudsman role, has two additional and important objectives:

- Raising the awareness of the project-affected individual's rights; and
- Helping to guarantee that the mining industry operates in a way that protects these individual's basic human rights.

Although the research has not yet been completed, the Danish Human Rights and Business project is also currently investigating the establishment of a Complaints Commission (CC) for companies involved in human rights disputes.

**QUESTION: What are some other key objectives of a compliance mechanism?**

### 5.2.2) *Characteristics of the Compliance Mechanism*

The Oxfam Community Aid Abroad Ombudsman also identifies seven guiding principles that it sees as being key to establishing an effective complaints mechanism.<sup>lxxxviii</sup>

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<sup>25</sup> Clearly individuals have recourse to other accountability mechanisms in the area of human rights – e.g. national human rights institutions, courts, tribunals, parliament, and international and regional mechanisms – that play an important primary or secondary role. This paper, however, has purposefully restricted itself to those mechanisms already existent within PIFIs.

1. *Standards*<sup>26</sup> – Universally accepted human rights standards.
2. *Independent funding*<sup>27</sup> – The service is free of charge to complainants, and funded transparently to ensure independence and impartiality.
3. *Independent*<sup>28</sup> – Independence of all interested stakeholders, in particular industry
4. *Enforcement*<sup>29</sup> – The position should be underpinned by legislation that binds all companies, and should be able to sanction and impose penalties on companies that do not comply.
5. *Extraterritorial jurisdiction* – Applied to national companies operating worldwide
6. *Accessibility*<sup>30</sup> – All information should be available in the appropriate language to the communities at risk and should be made available at all stages of the project cycle.
7. *Accountability and transparency*<sup>31</sup> – The results of investigations should be publicly disclosed. In its report, OXFAM includes details on the location of the project, the operator, the owner, affected communities, background information, grievances filed, and recommendations and actions taken. The WCD recommends ensuring the prompt release of annual reports outlining complaints, grievances and recommendations related to projects, including human rights issues, and the corrective measures initiated to address issues raised.<sup>lxxxix</sup>

Finally, given that one of the roles of such a compliance mechanism is to investigate PIFI compliance with its policies and procedures, in order for such a mechanism to be effective, PIFIs must have clear public policies on key issues such as project categorization, screening procedures, disclosure and public participation, conditionalities, annual reporting requirements, and the compliance mechanism itself.

**QUESTION: What are some other key guiding principles to establishing an effective compliance mechanism?**

**What are other means of recourse need to be put in place to protect and promote project-affected people's rights? For example, mechanisms for redress, restitution and compensation?**

<sup>26</sup> As per above, ECAs, IFC and MIGA must comply with anything from host country laws to international standards on the environment. Social standards cover resettlement, health, and some indigenous rights.

<sup>27</sup> The CAO is funded 80% by IFC, 20% by MIGA. EDC's CO and JBIC's Manager are funded 100% by the ECAs themselves.

<sup>28</sup> The CAO, EDC's Compliance Officer (CO), and JBIC's Manager are all independent of management, and report directly to the President, Board of Directors and the Governor, respectively.

<sup>29</sup> Recommendations by the CAO, CO and JBIC's Examiner are not binding, but incumbent on management to implement them.

<sup>30</sup> Most ECAs have very poor disclosure policies, rarely ever making available the full EIA, and almost never making conditionalities and covenants attached to the approval of funding available.

<sup>31</sup> The CAO discloses a full report of its findings; EDC's CO has been transparent in terms of process, but slow to report out; JBIC highlights 'transparency' as a basic principle, and says that the Examiner's report must be publicized.



## 6) Challenges and Further Questions

This paper has attempted to draw out a draft framework for a human rights impact assessment and think through some of the mechanisms necessary within PIFIs to ensure due human rights diligence throughout the project cycle. Rather than offering a solution, it presents a starting point for discussion – and a discussion that is likely to lead to more questions. Among these questions,

- 1) Do we even develop a separate stand alone tool, or do we want to integrate it with existing methodologies, such as an EIA or SIA?
- 2) If so, what are the challenges of developing a stand alone HRIA, can they be overcome, and if so, how?
- 3) What are the procedures for realizing this HRIA – who is involved? how is it put into practice? by whom? how do we ensure it empowers, rather than disempowers, communities?
- 4) How do we operationalize its various components – e.g. free prior and informed consent, identifying rights bearers and rights holders, a human rights protection plan?
- 5) How can we raise the level of awareness about human rights at PIFIs and in the private sector?
- 6) Ultimately, who will this empower? Will it give greater leverage to affected communities and groups? Or by making IFIs and ECAs the arbiters of what human rights are relevant, does it give these financial institutions greater power and discretion?
- 7) Finally, will a HRIA make any difference? Will it make IFIs, ECAs and companies more accountable to individuals, groups, communities and the environment?

Amid all of these questions, however, one thing remains certain – PIFIs are currently not doing enough to take account of the human rights impacts of their trade and project financing. And this needs to change.

## 7) ANNEX I – Baseline Studies<sup>xc</sup>

### Cultural and cultural heritage baselines

- Knowledge, valuation and use of biological resources;
- Traditional environmental knowledge (TEK);
- Areas of particular economic or social significance;
- Significant physical features and natural factors that contribute to maintenance of livelihoods;
- Sites of social, religious, or sacred significance;
- Living culture (e.g., arts and crafts; music; dance; folklore; etc.).

### Economic baselines

- Gender-disaggregated income and asset distribution data and ownership (including land rights among natural resource rights, and their distribution between men and women, young and old);
- Levels of employment;
- Skills/interests (e.g., what types of employment are not suitable/of interest to certain cultures, to young people, etc.);
- Traditional systems of production (including gender roles in such production);
- Opportunities for employment (direct and indirect);
- Household income and expenditure;
- Household time and task allocation;
- Existing local or regional development plans.

### Environmental baselines

- Land use/tenure/access;
- Species inventories and an assessment of their life cycles;
- Endangered species or species at risk and distribution of their habitats;
- Important areas of biodiversity;
- Key natural resources for riverine, forest, pasture or lake communities;
- Incidence of natural hazards – earthquakes, flooding, excess moisture.

### Political/legal/institutional baselines

- Level of public participation and access to information;
- Stability of government;
- Structure and transparency of institutions;
- Degree of corruption;
- Existence of core labour standards;
- Civil and political rights (freedom of association, collective bargaining);
- Laws and regulations that are important or relevant to specific social groups (e.g., non-discrimination, minimum wage, maternity leave,
- Legal/regulatory structure setting of relevance to project (e.g., workplace safety regulations; environmental regulations, local content or hiring rules).

### Social baselines

- Demographic factors (number and age structure of population, ethnic grouping, population distribution and movement - including seasonal movements/out-migration);
- Housing and human settlement (involuntary resettlement, expulsion of indigenous populations from their lands, involuntary sedentarization of migratory communities);
- Health status (particular health problems, access to services and clean water, nutritional

deficiency, life expectancy, incidence of sexually transmitted diseases, use of traditional medicine);

- Basic infrastructure and social services (e.g. education level, health care, water, transportation, electricity, roads, waste disposal, water supply);
- Access to infrastructure and social services;
- Non-monetary systems of exchange;
- Gender roles and relations (social, economic, environmental and cultural role of women, gender-specific traditional knowledge, innovations and practices, gender relations in the household);
- Safety and social problems (e.g. incidence of crime, state and private violence, alcohol and drug abuse, etc.);
- Traditional lifestyles;
- Community leadership and power structures;
- Social cohesion;
- Dispute resolution;
- Discrimination.

**QUESTION: Are there any specific human rights baselines?**

## ANNEX II – Examples of potential compensation measures

### *Direct provisions<sup>xci</sup>*

These represent the provision of goods and resources that directly help to secure basic human needs, in particular for marginalized groups.<sup>xcii</sup> This might include:

- Employment in the project
- Compensation for lost assets
- Compensation for project-caused sickness, accidents
- New homes or improvements to existing homes
- A share in project revenues/royalties
- Income support for vulnerable or needy households
- Access to primary services (health, education, roads and public transport)
- Access to electricity

### *Potential indirect provisions*

This represents the provision of the means by which goods and resources can be generated to secure basic human needs, in particular for marginalized groups.<sup>xciii</sup>

- Sustainable non-agricultural employment
- Livelihood restoration and enhancement
- Interest free loans for economic activities
- Provision of agricultural land
- Provision of agricultural support services (planting materials and other inputs)
- Retraining for self-employment
- Opportunity to purchase irrigated land
- Community forests and grazing areas
- Health insurance, resettlement insurance
- Preferential electricity, tax, water or service rates and charges
- Preferential access to, or custodianship over, catchment resources for defined exploitation and management – planting fruit trees, reforestation, access to pumped irrigation

**QUESTION: Are there other strong provisions that you can think of? What might constitute a weak direct and indirect provision? Can you think of some examples?**

## **ANNEX III - Illustrative list of Category A projects<sup>xciv</sup>**

- A. Large-scale industrial plants
- B. Industrial estates
- C. Crude oil refineries
- D. Large thermal power projects (200 megawatts or more)
- E. Major installations for initial smelting of cast iron and steel and production of non-ferrous metals
- F. Chemicals
  - i. manufacture and transportation of pesticides
  - ii. manufacture and transportation of hazardous or toxic chemicals or other materials
- G. All projects which pose potential serious occupational or health risks
- H. Transportation infrastructure
  - i. roadways
  - ii. railroads
  - iii. airports (runway length of 2,100 meters or more)
  - iv. large port and harbor developments
  - v. inland waterways and ports that permit passage of vessels of over 1,350 tons
- I. Major oil and gas developments
- J. Oil and gas pipelines
- K. Disposal of toxic or dangerous wastes
  - i. incineration
  - ii. chemical treatment
- L. Landfill
- M. Construction or significant expansion of dams and reservoirs not otherwise prohibited
- N. Pulp and paper manufacturing
- O. Mining
- P. Offshore hydrocarbon production
- Q. Major storage of petroleum, petrochemical and chemical products
- R. Forestry/large scale logging
- S. Large scale wastewater treatment
- T. Any project on or encroaching on indigenous or minority territory
- U. Domestic solid waste processing facilities

- V. Large-scale tourism development
- W. Large-scale power transmission
- X. Large-scale reclamation
- Y. Large-scale agriculture involving the intensification or development of previously undisturbed land
- Z. All projects with potentially major impacts on people or serious socioeconomic concerns

## ANNEX IV – Illustrative Categorical Prohibitions List

### Environment

- Infrastructure and extractive projects located in forests in which forest dwellers rely on for livelihood, shelter and food; \*
- 'Large dams' that irreversibly disrupt natural ecosystems and hydrology, inundate large land areas, impact biodiversity, displace more than 5,000 persons, or disrupt local livelihoods; \*<sup>32</sup>
- Projects that commercially manufacture ozone-depleting substances (ODS) or POPs; \*
- Projects in or impacting areas on the UN List of National Parks and Protected Areas;\*
- Extraction or infrastructure projects in or impacting International Union for the Conservation of Nature (IUCN) protected areas, Categories I-IV (Nature Reserves, Wilderness Areas, National Parks, Natural Monuments and Habitat/Species Management Areas);\*
- Projects in or impacting areas on UNESCO Man and the Biosphere core areas;±
- Areas protected by the Ramsar Convention on wetlands.\*
- High conservation value forests where industrial use would not maintain or enhance the conservation values;+
- Mining projects that use riverine or submarine tailing disposal;φ
- Trade in wildlife or wildlife products regulated under CITES; σ
- Commercial logging operations or the purchase of logging equipment for use in primary tropical moist forest (prohibited by the Forestry policy) ; σ
- Production or trade in products containing PCBs; σ
- Production or trade in pharmaceuticals subject to international phase outs or bans; σ
- Production or trade in pesticides/herbicides subject to international phase outs or bans; σ
- Production or trade in ozone depleting substances subject to international phase out; σ
- Drift net fishing in the marine environment using nets in excess of 2.5 km. in length; σ

### Culture

- Projects in or impacting natural World Heritage Sites (WHS)<sup>33</sup>;\*
- Projects that threaten the cultural survival of a people
- Ancestral indigenous lands #

### Economic

- Gambling, casinos and equivalent enterprises; σ
- Production or trade in any product or activity deemed illegal under host country laws or regulations or international conventions and agreements; σ

### Social

- Projects that use forced labour or harmful child labour; σ ¶
- Projects involving forcible resettlement of stakeholders; \*
- Projects that require resettlement of 5,000 or more persons;\*
- Projects that do not gain the free, prior and informed consent of indigenous populations and

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<sup>32</sup> This particular prohibition is particularly interesting, since OPIC's new revised February 2004 Environmental Guidelines include a subsection under "Environmental standards" on 'dam standards', derived from the recommendations of the WCD. It further articulates what is meant by 'disrupt natural ecosystems', 'alter natural hydrology', 'inundate large land areas', 'impact biodiversity', 'displace inhabitants', 'impact on local inhabitants livelihoods'. For further details, see [http://www.opic.gov/Publications/envbook\\_2004.htm#Environmental%20Standards](http://www.opic.gov/Publications/envbook_2004.htm#Environmental%20Standards)

<sup>33</sup> In August 2003, the International Council on Mining and Metals, comprising 15 of the world's largest mining companies, issued a statement recognizing WHS as no go areas (WWF, "Keep Out! No Go Areas for Mining, Arbor Vitae, December 2003). The full list of WHS is available at <http://whc.unesco.org/heritage.htm>.

- affected communities in the affected area; φ III
- Projects in countries where the state “practices, encourages or condones”: (a) genocide, (b) slavery or the slave trade, (c) murder or disappearances of people, (d) torture or other cruel, inhuman, or degrading treatment, (e) prolonged arbitrary detention or (f) systematic racial discrimination. Ω

### Health and Safety

- Production or trade in tobacco; σ
- Production or trade in radioactive materials; σ
- Production or trade in or use of unbonded asbestos fibers; σ
- Production or trade in alcoholic beverages (excluding beer and wine) ; σ

### Conflict

- Production or trade in weapons and munitions; σ

\*OPIC; σ IFC; ± Advocated by WWF and the IUCN; +Forest Stewardship Council; φ Extractive Industries Review; ¶ UN Global Compact, ILO Convention 105; III World Commission on Dams; # ILO 169 and Convention on Biodiversity; Ω Jus Cogens violations.



## ANNEX V - Illustrative screening mechanism for reviewing HRIAs by PIFIs

This section represents a framework for PIFIs for reviewing the HRIA report presented by project sponsors seeking project support from a PIFI. The rights indicated in the left-hand column represent a purely illustrative, rather than comprehensive, list of potential rights that may be violated.

### Project sponsor profile

Potential Impacts/Rights	Question	Sample +/-tive indicators
Potential poor working conditions Improper implementation of compensation agreements or negotiated outcomes	Does the company have any previous history of complicity in human rights abuses?	<ul style="list-style-type: none"> <li>- Poor human rights record</li> <li>- Existence/absence of company human rights policies (EIR)</li> <li>- Use of armed security forces</li> <li>- Poor implementation of conditionalities attached to previous loans</li> <li>- Poor evaluation and monitoring of previous projects</li> <li>- Accidents related to previous projects and measures which the company address these</li> </ul>
	Is the company endeavouring to engage in best corporate practices?	<ul style="list-style-type: none"> <li>- Transparency in terms of what the company paid the government for its exploratory or concessionary rights</li> <li>- Host government agreements that supercede national law</li> <li>- Terms of purchase power agreements</li> </ul>
	What practices are being used for the construction of the project?	<ul style="list-style-type: none"> <li>- Type of operation</li> <li>- Waste disposal method</li> <li>- Pollution Prevention Abatement Handbook</li> <li>- Decommissioning</li> </ul>

### State Governance

Potential Impacts/Rights	Question	Sample +/-tive indicators
General overview to flag the person reviewing the project to potential foreseeable problems, or discrepancies within the HRIA. This should ideally complement a much more comprehensive PRA.	<p>Has the host country ratified the six core UN conventions and 8 ILO conventions? (ECGD, Business Principles)</p> <p>What is the country's record on gender equality?</p> <p>Is the proposed project in a country with poor governance?</p>	<ul style="list-style-type: none"> <li>- High corruption levels</li> <li>- Low adherence to the rule of law</li> <li>- Widespread human rights violations</li> <li>- Lack of freedom of expression in civil society</li> <li>- Lack of freedom of peaceful assembly and association</li> <li>- Lack of free participation in political life</li> <li>- Lack of government accountability (non-existent or weak electoral system)</li> <li>- Legal protection for women's rights</li> <li>- Government effectiveness</li> <li>- Political stability</li> </ul> <p><i>(Developed by the WRI)</i></p>

<p><b>Conflict</b></p> <p><b>Human Rights</b></p> <ul style="list-style-type: none"> <li>- The right to security of the person (UDHR, Art. 3)</li> </ul>	<p>Does the company propose using private security guards?</p>	<ul style="list-style-type: none"> <li>- Absence of guidelines indicating appropriate behaviour for security officials to implement against individuals threatening company security</li> <li>- Poor security of the individual</li> <li>- Little protection for individuals</li> </ul>
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## Procedural Issues - Preparatory Stage

Potential Impacts/Rights	Question	Sample +/-tive indicators
<p><b>Participation, consultation, resolution</b></p> <p>Gaining public acceptance in the pre preparatory stage</p> <p>Active, free, informed and meaningful participation of beneficiaries</p> <p><b>Human Rights</b></p> <ul style="list-style-type: none"> <li>- Rights to consultation in matters that affect peoples lives</li> <li>- Freedom of opinion and expression (Art. 19, UDHR)</li> <li>- Freedom of assembly and association; right to organize (Art. 29, UDHR; Art. 22, ICCPR; ILO 87)</li> <li>- Freedom from violence</li> <li>- Freedom from arbitrary arrest or detention (Art. 9, UDHR)</li> <li>- Right to receive information and have information made publicly available (Art. 19, ICCPR)</li> <li>- Right to participate in the conduct of public affairs (Art. 25, ICCPR)</li> <li>- International Convention for the Elimination of all forms of discrimination against women, political participation (Art. 7)</li> <li>- Active, free and meaningful participation of beneficiaries (Right to Development, Preamble)</li> <li>- Right to effective remedy to an</li> </ul>	<p>Have the population affected been informed about the project? (NORAD)</p> <p>Have the project sponsors respected everyone's right to seek and impart information relevant to its implementation? (NORAD)</p> <p>Have the project sponsors respected the right of individuals to express views freely in the affected communities? (NORAD)</p> <p>Have the project sponsors upheld the right to organize? (NORAD)</p> <p>What capacity do stakeholders have for informed decision making? (NORAD)</p> <p>Have sponsors effectively promoted the participation of project-affected people in the decision-making process? (NORAD)</p> <p>What mechanisms have been put in</p>	<ul style="list-style-type: none"> <li>- Efforts made to identify, notify and actively consult stakeholders by the project sponsor (Aké Kwon)</li> <li>- Existence of a consultation plan using stakeholder analysis to define the groups involved. (WCD, Guideline 1)</li> <li>- Exclusion of certain social groups</li> <li>- Processes for recording the views and concerns of stakeholders potentially impacted by the project (Aké Kwon)</li> <li>- Appropriateness of languages used in consultation (EIA)</li> <li>- Existence of freedom of expression in the country</li> <li>- Existence of protests, or protest groups opposed to the project</li> <li>- Arrests of individuals associated with project</li> <li>- Laws impeding the formulation of certain types of associations or organizations</li> <li>- Timely availability of HRIA in local language</li> <li>- Dissemination of the results of the public consultation to stakeholders. (WCD, Stage I Checklist)</li> <li>- Potential for participation in decision-making (Aké Kwon, WCD)</li> <li>- Provision of human financial, technical and legal resources to ensure effective participation in all phases of the project cycle. (Aké Kwon, WCD)</li> <li>- Number of consultations</li> <li>- Existence of stakeholder representatives on decision-making committees</li> <li>- Mechanisms for determining</li> </ul>

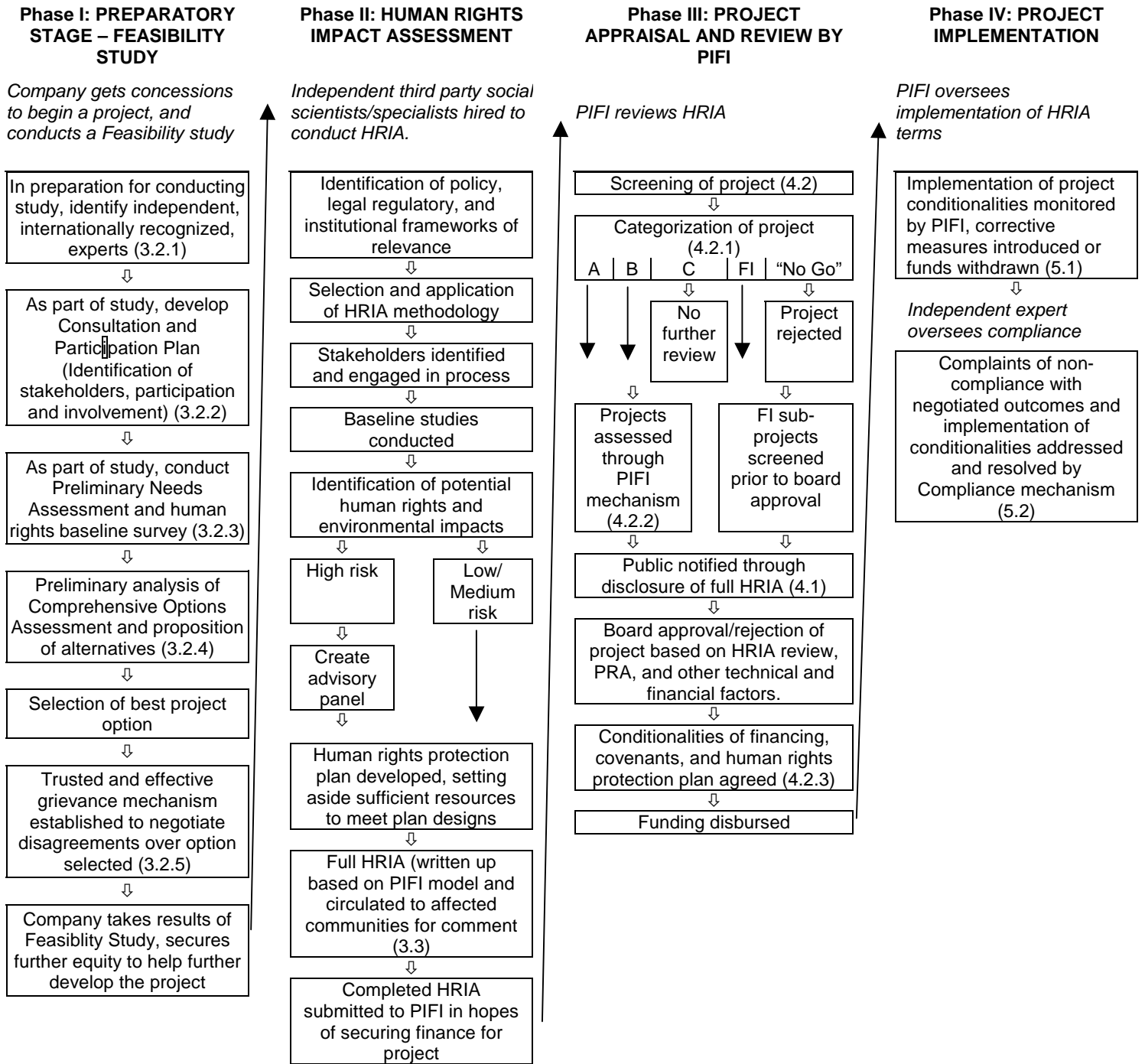


systems, and political structures, roles and customs.	How will the project respect, preserve or maintain traditional knowledge and practices?	<ul style="list-style-type: none"> <li>- Proximity of project to indigenous land</li> <li>- Destruction of sacred sites</li> </ul>
<p><b>Cultural Heritage impact*</b> The impacts on the physical manifestations of a community's cultural heritage, including on its sites, structures, and remains of archaeological, architectural, historical, religious, spiritual, cultural, ecological or aesthetic significance</p> <p><b>Human Rights</b> Right to take part in cultural life (Art. 15, ESCR)</p>	Will the proposed project area have an adverse impact (involve the destruction, flooding, etc.) on any sites of cultural heritage?	<ul style="list-style-type: none"> <li>- Baseline studies conducted with indigenous groups</li> <li>- Existence of religious claims over land</li> <li>- Existence of formal or informal claims to indigenous territory on the project site</li> </ul>
<p><b>Environmental impacts</b> Potential threats to biodiversity Disruption to habitats of medicinal species, and impact of use of chemicals, such as pesticides Environmental transboundary and global impacts</p> <p><b>Human Rights</b> Right to a clean environment (ESCR, Art. 12)</p>	<p>Does the project occur in sensitive environmental areas defined by the categorical prohibitions list?</p> <p>Does the proposed project area contain or exist within a protected area?</p> <p>What will the likely impact of the project be on local biodiversity – flora and fauna? Can these impacts be mitigated?</p> <p>Are project-related pollutants within accepted international standards?</p>	<ul style="list-style-type: none"> <li>- International, national, or regional agreements granting protection status</li> <li>- World Bank Pollution Prevention Abatement Handbook standards</li> </ul>
<p><b>Social impacts</b> Potential threats to human communities Potential abuse of civil and political rights Potential changes to health conditions as a result of the project Potential health risks resulting from various forms of pollution and social disturbance Disruption of existing social services Gender discrimination</p> <p><b>Human Rights</b> - Right to basic (social) services</p> <p>Disruption of gender roles and relations Adverse impacts disproportionately felt by women or young girls (See also below under economic)</p> <p><b>Human Rights</b> Convention on the elimination of all forms of discrimination against women</p> <p>Introduction of non-endemic diseases</p>	<p>Is the proposed project in an area with disadvantaged communities?</p> <p>What is the project's assumed actual impact on equality? (NORAD)</p> <p>Have any potential health risks</p>	<ul style="list-style-type: none"> <li>- Impoverished communities with low-levels of education</li> <li>- Widespread poverty</li> <li>- Poor access to health care, and other social services</li> <li>- Little access to infrastructure (electricity, sewage, fresh water, roads)</li> <li>- Poor standards of housing</li> <li>- Little physical or social integrity for individuals</li> <li>- Access to primary social services</li> <li>- Unequal access to project benefits for men and women</li> <li>- Compensation or property title in man's name</li> <li>- Loss of common natural resources or usufruct rights</li> <li>- Different compensation awarded to indigenous peoples and minorities</li> <li>- Neglect of persons with disabilities, or social 'outcasts'</li> <li>- Unequal access to forms of redress</li> <li>- Existence of reservoirs</li> </ul>

<p>Project related health problems Pollution Destruction of livelihoods leading to changes in diet</p> <p><b>Human Rights</b></p> <ul style="list-style-type: none"> <li>- Right to the enjoyment of the highest attainable standard of physical and mental health.</li> </ul>	<p>associated with the project been identified</p>	<ul style="list-style-type: none"> <li>- Excessive pollutants and emissions</li> </ul>
<p><b>Economic impacts (beneficial)</b> Benefit sharing, Distribution of revenues for local development, Local employment</p> <p><b>Rights</b></p> <ul style="list-style-type: none"> <li>- Right to work (UDHR, Art. 23)</li> <li>- Right to make a living by work freely chosen or accepted (ICESCR, Art. 6)</li> <li>- Right to be compensated (UDHR, Art. 8; ICCPR, Art. 2)</li> <li>- Right to an adequate standard of living, including access to adequate food and continuous improvement of living conditions (UDHR, Art. 25; ICESCR, Art. 11)</li> <li>- Right to own property and freedom from arbitrary deprivation of property (UDHR, Art. 17)</li> <li>- Right to compensation to those negatively affected</li> <li>- Right to just and favourable work conditions, including fair pay, equal work conditions for men and women, a decent living, health conditions, equal opportunity, rest and leisure (ICESCR, Art. 7)</li> <li>- Freedom of Association and protection of the right to organize (ILO 87)</li> <li>-</li> <li>- Convention on the Elimination of all forms of discrimination against women</li> </ul>	<p>How does the project benefit/disadvantage groups?</p> <p>Have project sponsors addressed the right to compensation for those negatively affected?</p> <p>Has the project affected the opportunity of people for self-provision in terms of income generating activities? (NORAD)</p> <p>Have the project sponsors guaranteed the fulfillment of the right to an adequate standard of living for affected groups, including access to adequate food and a continuous improvement of living conditions (NORAD)?</p> <p>Did the project respect the right to just and favourable work conditions? (NORAD)</p>	<ul style="list-style-type: none"> <li>- Income and asset distribution</li> <li>- Levels of employment</li> <li>- Existence of regional development plans</li> <li>- Traditional systems and means of production</li> <li>- Existence of user fees</li> <li>- Environmental Mitigation and Human Rights Protection Plan has been implemented and disputes resolved</li> <li>- Opportunities for employment</li> <li>- Compensation for lost assets</li> <li>- Compensation for livelihood restoration and enhancement</li> <li>- Compensation for resettlement</li> <li>- Existence or development of sustainable non-agricultural employment</li> <li>- Access to land, rivers, lakes, forests and other food producing activities</li> <li>- Provision of land titles, agreements, in the woman's name</li> <li>- Destination of final benefits (urban or rural electrification, roads, water treatment, social services)</li> <li>- Share in project benefits</li> <li>- Existence of long term sustainable community development plan, or closure and decommissioning plans with appropriate budget allocations</li> <li>- Existence of fair wages</li> <li>- Equal pay for equal work</li> <li>- Decent or improved living standards</li> <li>- Periodic holidays with pay</li> <li>- Safe and healthy work conditions</li> <li>- Limitations of working hours</li> </ul>

	<p>Are equal opportunities given to women for employment?          Has the gender composition of employment changed?          Is there marked occupational segregation by gender?</p> <p>Has the company developed an occupational health and safety policy for the project?</p>	<ul style="list-style-type: none"> <li>- Equal pay for equal work</li> <li>- Existence of maternity leave laws</li> <li>- Minimum of fair wage laws</li> <li>- Workplace health and safety standards or laws</li> <li>- Changes in employment opportunities for women</li> <li>- Existence of child care facilities or flexible hours of work</li>   <li>- Existence of occupational health and safety policy, detailing the organizational framework of the operational health and safety management system, objectives, hazard prevention plans, performance monitoring and measurements, reporting guidelines, and means for evaluating the policy, and action plan (as per IFC Operational Health and Safety guidelines)</li> </ul>
<ul style="list-style-type: none"> <li>- Right to organize and collective bargaining (ILO 98)</li> </ul>	<p>What is the company's/country's policy with regards to trade unions?</p>	<ul style="list-style-type: none"> <li>- Existence or lack of trade unions</li> <li>- Threats of violence against trade unionists</li> </ul>
<p>Based on an amalgam of indicators and questions from WRI paper, the *Aké Kwon guidelines, the †World Commission on Dams, the Norwegian Development Agency's Human Rights Assessment Framework,</p>		

## ANNEX VI – Flow chart illustrating Phases I-IV



## 8) ENDNOTES

- i See report at [http://www.halifaxinitiative.org/index.php/Pub\\_ECAs\\_Reports/360](http://www.halifaxinitiative.org/index.php/Pub_ECAs_Reports/360)
- ii See background paper at <http://www.ichrdd.ca/frame2.iphtml?langue=0&menu=m07&urlpage=store/>
- iii World Bank, *Global Development Finance: Analysis and Summary Tables*, Washington, DC: World Bank, 2002: p. 107.
- iv Ibid, p.108.
- v Berne Union, Berne Union Year Book 2003, pp. 189-190.
- vi “The Climate of Export Credit Agencies”, *Climate Notes*, World Resources Institute, p. 3.
- vii Export Development Canada, “A volatile 2002 sees Canadian exporters use EDC in record numbers”, Media Release, February 27, 2003; “Export Development Corporation (EDC) reports record year-end results”, Media Release, March 1, 2001;
- viii ‘EDC Business Volume’ in Presentation to the Mexican Senate Committee on Foreign Affairs, February 17, 2004. Available on-line at: [http://www.edc.ca/docs/Speeches/2004/02-17-04\\_e.pdf](http://www.edc.ca/docs/Speeches/2004/02-17-04_e.pdf)
- ix IFC, “Innovation, Impact, Sustainability – IFC 2003 Annual Report, pp. 2-3.
- x MIGA, MIGA 2003 Annual Report, available on-line at <http://www.miga.org/screens/pubs/annrep.htm>
- xi Charter of the United Nations, 26 June 1945, R.T. Canada, 1945, no. 7 11
- xii *Universal Declaration of Human Rights*, G.A res. 217A (III) U.N. Doc A/810, 71 (1948) art. 28.
- xiii *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23.
- xiv *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) art. 11.
- xv Report of the International Law Commission (1973), “The Act of State under International Law Rules of Attribution”.
- xvi See for example, ECA-Watch “Race to the Bottom – Creating Risk, Generating Debt and Guaranteeing Environmental Destruction”, ECA-Watch, March 1999.
- xvii The full text for this is available at <http://www.oecd.org/dataoecd/26/33/21684464.pdf>
- xviii Full text at [http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/EnvironmentalGuidelines/\\$FILE/OHSGuideline.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/EnvironmentalGuidelines/$FILE/OHSGuideline.pdf) . These guidelines, and the World Bank’s Pollution Prevention Abatement Handbook are sector specific.
- xix Full text at [http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies/\\$FILE/OD430\\_InvoluntaryResettlement.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies/$FILE/OD430_InvoluntaryResettlement.pdf)
- xx Full text at [http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies/\\$FILE/OD420\\_IndigenousPeoples.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies/$FILE/OD420_IndigenousPeoples.pdf)
- xxi Full text at [http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies/\\$FILE/OPN1103\\_CulturalProperty.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies/$FILE/OPN1103_CulturalProperty.pdf)
- xxii Based on remarks of Peter Woicke, Executive Vice President of IFC at a conference on “Human Rights and Development: toward Mutual Reinforcement”, New York University Law School, March 1, 2004.
- xxiii See Mr. Sfeir-Younis’s comments in “Human Rights & Sustainable Development: What Role for the Bank?” May 2, 2002, Summary of Proceedings of an internal Bank discussion. Available on-line at: [http://Inweb18.worldbank.org/essd/essd.nsf/ed184c367402e19e85256a4f00766cac/509e61fd645ffbce85256bf10075a272/\\$FILE/May2-Summary-ext.pdf](http://Inweb18.worldbank.org/essd/essd.nsf/ed184c367402e19e85256a4f00766cac/509e61fd645ffbce85256bf10075a272/$FILE/May2-Summary-ext.pdf)
- xxiv Cited in “Human Rights and Development”, World Bank Intranet Publication, March 11, 2004 available on-line at <http://intranet.worldbank.org/WBSITE/INTRANET/INTERCOMM/0,,contentMDK:20175407~pagePK:87937~piPK:87974~theSitePK:86000,00.html>, based on comments made at a one-day seminar on the World Bank and Human Rights, New York University School of Law, Monday, March 1, 2004.
- xxv Extractive Industries Review, “Striking a Better Bank – The World Bank Group and Extractive Industries”, Volume 1, The Final Report of the Extractive Industries Review, December 2003, p. 41.
- xxvi Ibid, p.46.
- xxvii Personal communication, April 24, 2004, with Motoko Aizawa, Corporate Policy Advisor and Program Manager, Environment and Social Development Department, International Finance Corporation.
- xxviii See CAO (January 2003), ‘A Review of IFC’s Safeguard Policies’ for details.
- xxix Remarks of Peter Woicke, Executive Vice President of IFC at a conference on “Human Rights and Development: toward Mutual Reinforcement”, New York University Law School, March 1, 2004.
- xxx Chambre des représentants de Belgique, Proposition de loi, 6 janvier 2004, liant l’octroi d’aides publiques belges destinées à des investissements à l’étranger à des normes d’entreprise durable et responsable, DOC 51 0648/001.
- xxxi Sénat de Belgique, Proposition de loi 3 – 649/1, 23 April 2004, organisant le Point de contact national en matière d’entrepreneuriat éthique international, on-line at <http://www.bolletino.be/nb/senaat/12/delcredere.pdf>.
- xxxii Human Rights Watch (2002) “Discussion Points on the Need for a Human Rights Assessment Office Within the Export Import Bank in the United States”, correspondence by fax with HRW.
- xxxiii Legislative Review of Export Development Corporation, Backgrounder to FAC Press Release, June 26, 2001
- xxxiv “Political Risk Assessment: Accounting for Human Rights”, Rod Lever, September 27<sup>th</sup>, 2001.
- xxxv Ibid.
- xxxvi Ibid.
- xxxvii “Annex 1– Definitions, ‘project-related social impact’”, EDC’s Environmental Review Directive, May 2002, p. 7
- xxxviii See World Commission on Dams (WCD) (2000), *Dams and Development: A New Framework for Decision-Making*. The Report of the World Commission on Dams, Earthscan publications, p. 207.
- xxxix ECA-Watch, *Race to the Bottom, Take II*, Publication of ECA-Watch, September 2003, on-line at <http://www.eca-watch.org>
- xl Environmental Defense, Friends of the Earth, International Rivers Network “Gambling with People’s Lives – What the World Bank’s New High Risk High Rewards Strategy Means for the Poor and the Environment”, September 2003, available on-line at



<http://www.irn.org/programs/finance/030919.wbgambling.pdf>

<sup>xli</sup> Nortel Networks announces US\$750 Million Support Facility with EDC and Details of Special Matters to be Considered at Upcoming Shareholders Meeting”, February 14, 2003, News Releases, [www.nortelnetworks.com](http://www.nortelnetworks.com)

<sup>xlii</sup> Personal communication, Jorge Lerma, and Justice for Colombia mailing list.

<sup>xliii</sup> See, for example, *Between Light and Shadow: The World Bank, the IMF and International Human Rights Law*. Hart Publishing, 2003

<sup>xliv</sup> ECGD, “KPMG Risk Management Review for HM Treasury and ECGD”, Queen’s Printer, December 1999.

<sup>xlv</sup> Miranda, M., P. Burris, J. Froy Bingcang, P. Shearman, J. Oliver Briones, A. La Viña, and S. Menard (2003), *Mining and Critical Ecosystems: Mapping the Risks*, Washington, D.C.: World Resources Institute, p.1. Research commissioned by the EIR. Available on-line at [http://pdf.wri.org/mining\\_critical\\_ecosystems\\_full.pdf](http://pdf.wri.org/mining_critical_ecosystems_full.pdf)

<sup>xlvi</sup> Commission on Human Rights, ‘The right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ Report of the Special Rapporteur, Paul Hunt, Mission to the World Trade Organization, E/CN.4/2004/49/Add.1, 1 March 2004, paragraph 10.

<sup>xlvii</sup> Ibid, paragraph 9

<sup>xlviii</sup> Commission on Human Rights, ‘Economic, social and Cultural Rights – Human rights, trade and investment’, Report of the High Commissioner for Human Rights to the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2003/9, 2 July 2003, paragraphs 13 and 31 (d).

<sup>xlix</sup> WCD (2000), p. 204-205.

<sup>l</sup> NORAD, “Handbook in Human Rights Assessment – State Obligations, Awareness and Empowerment”, NORAD, February 2001, P. 12.

<sup>li</sup> WCD (2000), p. 279-280.

<sup>lii</sup> Ibid, p. 283.

<sup>liii</sup> Based on the Aké Kwon guidelines and the Stage 2 Criteria Checklist of the WCD report, pp. 267-269.

<sup>liv</sup> NORAD (2001), p. 16-17.

<sup>lv</sup> Based on the Comprehensive needs and options assessment and decision-making framework of the WCD, Stage 2 Criteria Checklist.

<sup>lvi</sup> Based on the Comprehensive needs and options assessment and decision-making framework of the WCD, Stage 2 Criteria Checklist.

<sup>lvii</sup> For further details on distributional analysis, see WCD (2000), pp. 288.

<sup>lviii</sup> Based on the Comprehensive needs and options assessment and decision-making framework of the WCD, and the Stage 2 Criteria Checklist.

<sup>lix</sup> Taken from the Aké Kwon guidelines

<sup>lx</sup> These baseline studies are derived principally from the Aké Kwon Guidelines Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, adopted by the *Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions on the Convention on Biodiversity* on December 12, 2003

<sup>lxi</sup> Based on IFC screening procedures, unless otherwise indicated.

<sup>lxii</sup> Adapted from IFC definition of sensitivity, and OPIC’s new screening and assessment criteria for dams that incorporates the core values and strategic priorities of the World Commission on Dams (WCD) final report. See OPIC, ‘Environmental standards - Dam standards’, *OPIC Environmental Handbook*, February 2004.

<sup>lxiii</sup> These two headings for ‘A’ and ‘B’ form part of a ‘Decision Tree for oil and other Mineral Exploration’, developed by WWF International, Hails, C. (2002) “WWF views on extractive industries and sensitive sectors”.

<sup>lxiv</sup> These two headings form part of a ‘Decision Tree for oil and other Mineral Exploration’, developed by WWF International, Hails, C. (2002) “WWF views on extractive industries and sensitive sectors”.

<sup>lxv</sup> OPIC Environmental Handbook, February 2004

<sup>lxvi</sup> EBRD “Environmental Policy – Financial Intermediaries”, April 2003, p. 7-9. Available on-line at <http://www.ebrd.com/about/policies/enviro/policy/policy.pdf>

<sup>lxvii</sup> See <http://www.exim.gov/products/policies/environment/envexcl.html>

<sup>lxviii</sup> See <http://www.efic.gov.au/static/efi/environment/environstd.htm>

<sup>lxix</sup> See <http://www.ebrd.com/apply/trade/about/exclude.htm>

<sup>lxx</sup> See [http://ifcln1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/aa\\_exclusionlist/\\$FILE/AnA\\_exclusionlist.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/aa_exclusionlist/$FILE/AnA_exclusionlist.pdf)

<sup>lxxi</sup> Miranda, M., P. Burris, J. Froy Bingcang, P. Shearman, J. Oliver Briones, A. La Viña, and S. Menard (2003), *Mining and Critical Ecosystems: Mapping the Risks*, Washington, D.C.: World Resources Institute. Research commissioned by the EIR. Available on-line at [http://pdf.wri.org/mining\\_critical\\_ecosystems\\_full.pdf](http://pdf.wri.org/mining_critical_ecosystems_full.pdf)

<sup>lxxii</sup> Dudley, N. and S. Stolton, (2002) “To Dig or Not to Dig”, *A WWF Discussion Paper*, WWF International/WWF-UK, London, England.

<sup>lxxiii</sup> Energy and Biodiversity Initiative (EBI) online at: <http://www.theebi.org/products.html>

<sup>lxxiv</sup> World Bank (2003), *Striking a Better Balance: The Extractive Industries Review*, Vol. 1, p. x and 30.

<sup>lxxv</sup> See in particular pages 24-34, NORAD, “Handbook in Human Rights Assessment – State Obligations, Awareness and Empowerment”, NORAD, February 2001.

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- <sup>lxxvi</sup> OPIC considers these five specific provisions in its assessment of large dam projects up for support (OPIC Environmental Handbook, February 2004).
- <sup>lxxvii</sup> “Dams and Development: A New Framework for Decision-making”, World Commission on Dams report, Earthscan publications, November 2000, p.211-224.
- <sup>lxxviii</sup> NORAD (2001), p. 16.
- <sup>lxxix</sup> WCD (2000), p. 244-250.
- <sup>lxxx</sup> WCD (2000), p. 244-250.
- <sup>lxxxi</sup> WCD, 3<sup>rd</sup> strategic priority
- <sup>lxxxii</sup> WCD (2000), p. 271.
- <sup>lxxxiii</sup> For details, see Tebtebba Foundation (2003) *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank*, Ed. M. Colchester, a. Loreto Tamayo, R. Rovillos, and E. Carus, Philippines, Capitol Publishing House, in particular pp. 108-121 for analysis of project, and 122-140 on institutional failure.
- <sup>lxxxiv</sup> Marcus Colchester - Forest Peoples Programme 2000. *Dams, Indigenous People and vulnerable ethnic minorities*, Thematic Review 1.2 prepared as an input to the World Commission on Dams, Cape Town, p. 42.
- <sup>lxxxv</sup> CAO (January 2003), ‘A Review of IFC’s Safeguard Policies’, Preface.
- <sup>lxxxvi</sup> WCD (2000), pp. 245-250 and Stage 5 criteria list, p. 275.
- <sup>lxxxvii</sup> The following observations are based on a reading of the terms of reference for each of these compliance mechanisms, found at CAO: [www.cao-ombudsman.org/ev.php?URL\\_ID=1256&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201&reload=1080233603](http://www.cao-ombudsman.org/ev.php?URL_ID=1256&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1080233603) ; EDC: [www.edc.ca/corpinfo/csr/compliance\\_officer/index\\_e.htm](http://www.edc.ca/corpinfo/csr/compliance_officer/index_e.htm); and JBIC: [www.jbic.go.jp/english/environ/pdf/objection.pdf](http://www.jbic.go.jp/english/environ/pdf/objection.pdf).
- <sup>lxxxviii</sup> Oxfam Community Aid Abroad Ombudsman, Annual Report 2003, pp/ 12-14. Available on-line at <http://www.caa.org.au/campaigns/mining/ombudsman/2003/framework.pdf>
- <sup>lxxxix</sup> WCD (2000), Stage 5 criteria list, p. 275.
- <sup>xc</sup> Based on WCD Baseline Eco-system studies, and the Aké Kwon Guidelines
- <sup>xci</sup> Derived from suggestions in the WCD (2000) report, in particular pp. 300 - 301
- <sup>xcii</sup> NORAD (2001), p. 16.
- <sup>xciii</sup> Ibid, p. 16.
- <sup>xciv</sup> Based on OPIC’s Illustrative Category A list. EBRD provides a much more detailed and descriptive list of Category A projects at <http://www.ebrd.com/about/policies/enviro/policy/policy.pdf>

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