United States Council for International Business

Peter M. Robinson, President

1212 Avenue of the Americas, New York, NY 10036-1689
tel: 212-354-4480 ~ fax: 212-575-0327
e-mail: info@uscib.org ~ Internet: www.uscib.org

Serving American Business as U.S. Affiliate of:

International Chamber of Commerce (ICC)
International Organisation of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System

May 6, 2005

Ms. Motoko Aizawa
Corporate Policy Advisor and Program Manager
Environment & Social Development Department
International Finance Corporation
2121 Pennsylvania Avenue, NW, F3P-222
Washington, DC 20433

Re: IFC EH&S Guidelines Review and Update

Dear Ms. Aizawa:

On behalf of the U.S. Council for International Business (USCIB), I would like to thank you for the opportunity to offer written comments (attached) on the International Finance Corporation's (IFC) Consultation Draft Policy on Social and Environmental Sustainability and Performance Standards, dated August 12, 2004. Our views on the Draft Policy are intended to assist IFC in developing Performance Standards that stimulate investment while motivating better environmental and social practice.

USCIB supports the overall objectives of the Draft Policy, and commends the IFC for the thoughtful, inclusive manner in which this review has been conducted. As we observed in our comments on the Disclosure Policy Review, we have confidence in IFC's ability to incorporate these comments in such a way that its new policy and accompanying performance standards will inform and support better project finance decisions.

We agree that it is important to identify social and environmental impacts and risks of the proposed project as early as possible, and ensure that all identified impacts and risks – particularly adverse impacts to at-risk groups and the natural environment – are taken into account in a client's decisions and actions. In our view, there are other, broader objectives that should also be envisaged, namely: (i) promotion of increased sustainable investments in developing countries, (ii) encouragement of companies to subscribe to, and stick with, achievable environmental and social practices and policies; and (iii) enhancement of local capacity, as well the establishment of and continuous improvement of appropriate standards and practices so as to better reflect local conditions and priorities.

Under the proposed social and environmental sustainability policies, IFC and its clients grapple with a variety of international, national, and local obligations and expectations. The difference between an accepted level of environmental protection at the local level of a project versus what might be achieved under other circumstances or different regulatory approaches will be a challenging area, both for IFC in assessing projects, and for its clients. Thus, we encourage IFC to clarify how such situations will be resolved collaboratively with the input of the client, local authorities, and other stakeholders as appropriate.

We remain concerned that IFC procedures and expectations that appear to be, or are, too onerous could have a detrimental and even discouraging effect, causing potential clients to seek other sources of funding. As with some of the changes being contemplated by the bank as part of the Disclosure Policy Review, we are concerned that the perfect (or "best available") approaches contemplated under the Draft Policy could become the enemy of the "good" policies that are in compliance with or surpass local laws. We understand that IFC has envisioned some training and support for clients in following these procedures, and we would encourage IFC not to underestimate the needs on that front.

We look forward to continued dialogue with you and others at IFC, and to share USCIB perspectives on environmental, social, and sustainable development policy drawing upon member experiences and participation in initiatives under the aegis of Organization for Economic Cooperation and Development (OECD), the United Nations, and other institutions. It will be particularly important to follow-up in educating clients, Equator banks, non-governmental organizations, and the public on IFC's updated social and environmental sustainability policies and performance standards, and we stand ready to help you in such an effort.

If you have any questions on the points we have raised, please contact my office and we would be pleased to discuss these matters further.

Yours,

Peter M. Robinson

CC: Ms. Julia Lewis, IFC
Sabina Beg, Esq., IFC
Mr. George Carpenter, Chair, USCIB Environment Committee
Mr. R. Scott Miller, Chair, USCIB Investment Committee
Mr. Gene Endicott, Chair, USCIB Corporate Responsibility Committee

USCIB POSITION STATEMENT:

International Finance Corporation (IFC) Review of
its Social and Environmental Sustainability Policy

May 6, 2005

USCIB Environment Committee

May 6, 2005

USCIB Comments
IFC Review of its Social and Environmental Sustainability Policy

---

USCIB supports the objectives of the IFC Performance Standards and we are committed to working with the IFC to ensure that the IFC's social & environment policy framework promotes investment and local entrepreneurship that achieves social and environmental benefits, while also ensuring a level economic playing field.

These comments are informed by a review of the IFC's Draft Guidance Notes, dated January 31, 2005, as well as by consideration of the IFC's Consultation Advisory materials and comments from stakeholders (and IFC's responses thereto) available on the IFC web site. Moreover, certain elements of the Consultation Draft Policy on Social and Environmental Sustainability and Performance Standards overlap with, or relate closely to, elements of the IFC's Working Draft of the Policy on Disclosure of Information, dated November 24, 2004. The USCIB submitted comments on the Working Draft of the Policy on Disclosure of Information on April 5, 2005.

In general, USCIB questions whether IFC's expectations are in keeping with the capabilities and resources of its clients and stakeholders. The revisions lay out a much broader, and more complicated, set of obligations than the previous policies; a choice that seems to have been premised upon capabilities of developed country governments, large companies, and sophisticated financiers. Whether such an assumption is well founded is very much in question.

The challenge remains of whether and how developing countries, small and medium-sized firms, and less sophisticated bankers are to engage such complex challenges. These observations are especially pertinent with respect to PS 9, and the expectation therein that clients, and their financiers, will develop, implement, or oversee integrated social and environmental management systems. While the state-of-the-art in environmental management systems design and implementation ("EMS") is generally understood in the private sector and within sophisticated banking circles, very few companies and financiers currently possess the level of expertise and resources necessary to adopt, or make sound judgments concerning, social and environmental management systems ("SEMS").

We would also recommend a greater emphasis on legal compliance as an already significant indication of good practice in a given project. Projects like those that IFC funds can set an example and increase pressure to motivate all national firms to improve their compliance with the law. In many cases reasonable regulations do exist in most developing countries, but they are not always enforced, due to the limited resources and capacity of environment ministries. Emphasizing compliance with the law can address the assertion that foreign investors risk being at a competitive disadvantage because local competitors do not comply with environmental laws.

<u>Performance Standard (PS) 1, Social and Environmental Assessment.</u>

- *Scope of the Assessment.* PS 1 states that impacts and risks should be analyzed in the context of the project's "area of influence."[1] The project's area of influence encompasses areas potentially impacted by predictable developments induced by the project, as well as by cumulative impacts from other anticipated future projects and possible actions by third parties. In our view, the assessment should identify the cumulative impacts of anticipated future projects in the project's area of influence and take them into account in proposing mitigation measures. Even for developments and projects that can be anticipated with a reasonable certainty, the client cannot commit to mitigation measures outside of its sphere of influence or subject to the whim of a third party or regulator.

- *Social and Environmental Considerations*. The comprehensive list of possible issues and risks in PS 1 may not pertain to every type of project. It would be more efficient, and possibly more relevant as well, to specify that the issues and risks to be considered should be those relevant to the type of project, and appropriate to the setting in which the project is to be undertaken. We would also suggest – and perhaps it is already assumed – that a critical part of the assessment will address compliance with applicable regulations and laws – which in many cases should serve as a reflection of the environmental norms defined by the society where the project is to operate.[2]

- *Assessment Requirements.*

  - PS 1 requires assessment of a "without project" scenario in the case of projects thought to pose significant risks and adverse impacts.[3] It is arguably excessive to require assessment of a "without project" situation in each case in which a proposed investment is likely to have significant adverse social and/or environmental impacts and risks that are diverse, irreversible, or unprecedented. Presumably any SEA would commence with a reasonable description of the current conditions that prevail in the project's proposed site, and that would give an adequate indication of the "without project" conditions.

  - In the case of projects with a potential to pose significant adverse impacts, PS 1 requires clients to engage "key stakeholders" throughout the assessment process. The term "key stakeholders" should be clearly defined. Presently, neither the Draft Policy nor the Draft Guidance Notes appear to provide such a definition.[4] In its present form,

---

[1] *See also* Draft Guidance Note 1, ¶¶ 6 and 11-13.

[2] *See also* Draft Guidance Note 1, ¶¶ 1, 2, 10, 16, and 33, as well as Annexes A and B.

[3] *See also* Draft Guidance Note 1, ¶ 29 and Annex A.

[4] The term "key stakeholder" also appears in other Performance Standards, e.g., PS 9 and Draft Guidance Note 9. The IFC web site defines the term "stakeholder" but does not appear to identify criteria for distinguishing who might be considered a "key" stakeholder for such purposes. See http://www.gcgf.org/ifcext/enviro.nsf/Content/Glossary (defining "stakeholders as –"persons or groups who are affected by or can affect the outcome of a project. These can include affected communities, local organizations, NGOs and government authorities. Stakeholders can also include politicians, commercial and industrial enterprises, labor unions, academics, religious groups, national social and environmental public sector agencies and the media.")

the term could be interpreted quite broadly, and might empower individuals not directly affected by the project to hinder or delay it.

- *Community Engagement.* The Draft Policy envisions that clients will engage openly with the "affected community" on an ongoing basis and in a manner appropriate to the nature and scale of impacts and risks from the proposed project.[5] We are concerned that IFC's described due diligence to ascertain broad community support for the project by affected communities may interfere with a free, prior and informed consultation process. If such due diligence is performed after the client and the community have already reached agreement on mitigation and improvement measures, it could be seen by some members of the community as an opportunity to reopen negotiations. Therefore, we strongly recommend that IFC due diligence be performed seamlessly during the free, prior and informed consultation process.

- *Compensation.* IFC should expand the definition of "compensation," which can refer to "cash" in every instance. In principle, the client should be able to select from a full range of cash/non-cash options to address the matter of appropriate compensation.

<u>PS 2, Labor and Working Conditions.</u>

- *Worker Engagement.* PS 2 requires clients to "engage with workers to address issues relating to their working conditions and terms of employment" where national law substantially restricts workers' organizations, or where national law is silent. Guidance Note 2 elaborates on such engagement requirements,[6] and obligates clients to engage with workers and with representatives of workers' organizations. While workers and worker organizations are a potential source of information, the client should also be allowed to obtain such information from other sources, e.g., employers' associations or local chambers of commerce.

  Clients will "engage with workers" on a case-by-case basis, based on internal policies and procedures and national laws. In countries where labor unions are prohibited, controlled by national laws or silent, clients will engage on an individual basis, but will not necessarily engage with workers on a collective basis.

- *Contract Labor*. In general, PS 2 and Guidance Note 2 convey the sense that employees and contract labor should benefit from the same working conditions when on the client's premises or worksites. However, it could be the case that contractors and subcontractors belong to different trades (i.e., transportation, construction, services, etc.) with varying collective agreements and working conditions. In particular, the guidance notes should clarify that the client is not required to provide all contract workers with similar working conditions.

- *Retrenchment.* PS 2 requires clients to develop plans to address the adverse impacts of retrenchment, in the event they contemplate significant worker layoffs.[7] It should be made clear that, as a general matter, retrenchment provisions should not apply to workers hired under limited duration contracts.

---

[5] *See also* Draft Guidance Note 1, ¶¶ 36-43.

[6] *See also* Draft Guidance Note 2, ¶¶ 5 and 17.

[7] *See also* Draft Guidance Note 2, ¶¶ 25-30.

IFC should clarify "adverse impacts" with respect to retrenchment. The client should not be held responsible for such impacts on the associated community in every instance: (i) the client can layoff by attrition (i.e. stop hiring), (ii) the client can change benefits that can affect the community, or (iii) the client can outsource to contractors outside the community. The risk to clients is to inadvertently commit to taking care of the community, and perpetuating a cycle of dependency.

- *Personal Characteristics.* With respect to discrimination, "personal characteristics" require interpretation. One can have personal characteristics not related to race or gender that would make him/her unsuited for a position.

<u>PS 3, Pollution Prevention and Abatement.</u>

- *Approach.*

  - PS 3 calls for the adoption of the best available control and process techniques that are feasible and cost effective.[8] There are some instances in which the absence of certain types of infrastructure may not allow best available controls and technologies. Guidance Note 16 refers to this practical limitation, and it would be helpful if PS 3 addressed this point explicitly.

  - Moreover, although PS 3's approach to the application of best available control and process techniques takes financial feasibility into account, the criterion is based on the relative magnitude of the incremental cost and whether such incremental cost could make the project non-viable. This approach would seem to disregard the application of risk-based environmental analyses focused on preventing unacceptable environmental impacts. It would also seem to permit the significant erosion of cost-growth/economic viability without commensurate environmental improvements.

- IFC standards, policies, and positions should reference "guidance documents prepared by leading international, regional or national institutions and best industry documentation published by relevant industry groups." Establishing a different set of standards/guidance would be duplicative and could give rise to competing international standards and expectations. Such a result would be counter-productive to promoting the use of internationally agreed and accepted techniques and practices.

  Where possible, IFC should make specific references to existing technical guidelines likely to be used by IFC. As the World Bank Group's Pollution Prevention and Abatement Handbook and the IFC's Environmental, Health, and Safety Guidelines are updated, we urge the World Bank and IFC to ensure that these guidelines are also consistent with internationally recognized guidance wherever appropriate.

- *Greenhouse Gas Emissions.*

  - PS 3 requires clients "to promote the reduction and control of greenhouse gas emissions in a manner appropriate to the nature and scale of project operations and

---

[8] *See also* Draft Guidance Note 3, ¶¶ 15-17.

impacts."[9] Depending upon the scope and nature of the project, this could impose a substantial burden on the client and IFC.

- Depending upon the scope and nature of the project, the reduction of greenhouse gas emissions, especially in developing countries, could create material opportunities for the creation of carbon offsets or credits. Such reductions could be harnessed to meet client commitments, or to generate additional revenues. PS 3 and Guidance Note 3 should be substantially revised to acknowledge such burdens, highlight such opportunities, and cross-reference other IFC activities and resources in the area of carbon finance and climate change mitigation.

- Specifically, PS 3 and Guidance Note 3 should be revised to: (i) state clearly whether fuel switching is an allowable method of reducing emissions; (ii) elaborate on criteria to be applied in assessing the nature and scale of project operations and impacts" for such a purpose; (iii) elaborate criteria to be applied to determine what volume of greenhouse gas emissions will be considered "significant" for such purposes; cross-reference how such obligations are to be addressed, if at all, in the design of the clients' social and environmental management system.

<u>PS 4, Community Health & Safety.</u>

- *Community Health & Safety Plan*. PS 4 requires the client to address public exposure to risks and impacts arising from equipment accidents, hazardous materials and communicable diseases, stressing that such potential adverse impacts to community health and safety be properly managed.[10] Significantly, PS 4 states that clients must establish a community health and safety plan that addresses, among other points, "[p]riority health issues in the community" based on "the significance of reported and perceived incidence and prevalence of communicable diseases in the project workforce." Neither here nor in Draft Guidance Note 4[11] does the IFC explicitly state that clients are not required to address community health issues that were prevalent before its arrival and not impacted by its activities. This point should be clarified in PS 4, Draft Guidance Note 4, or both.

<u>PS 5, Land Acquisition and Involuntary Resettlement</u>.

- *Compensation and Benefits for Displaced Persons*. PS 5 calls for development of a resettlement plan where involuntary resettlement is unavoidable, and anticipates that clients will compensate displaced persons or communities for lost assets.[12] While the objective of a resettlement plan is to improve the livelihood and standards of living of those affected by significant loss of assets or access to assets and hence, loss of income, IFC should clarify (in PS 5, Draft Guidance Note 5, or both) that the client will not be held liable when that objective is not attained due to misconduct of the recipient of resettlement benefits.

---

9 *See also* Draft Guidance Note 3, ¶¶ 21-23, and Annex A.

10 *See also* Draft Guidance Note 4.

11 Draft Guidance Note 4 comes close to clarifying this through the revisions contemplated at note 40. The final documents should make the point explicitly.

12 *See also* Draft Guidance Note 5.

PS 6, Conservation of Biodiversity and Sustainable Natural Resource Management

- *Land Use and Habitat Conversion*. PS 6 acknowledges that projects can result in land use changes that in turn have a potential to affect the carbon cycle and specifically, sequestration of carbon and emissions of greenhouse gases.[13] The standard calls for clients to "attempt to" minimize adverse impacts and offset any significant increase in project-related greenhouse gas emissions consistent with national laws implementing country obligations under related international treaties. Significantly, PS 6 goes even further, stating that "[e]ven in the absence of [national laws implementing country obligations under such treaties], clients are encouraged to offset the increased emissions." Guidance on the nature and practical application of these far-reaching provisions is minimal. This could lead to considerable confusion, as well as to widespread variation in application among clients, depending upon their capabilities, level of awareness, and business sector. Nor is there any guidance on whether and how such efforts would be facilitated by the IFC, or how IFC's carbon finance initiatives overlap with client projects.

- *Definition of Terms*. Without definitions or reference points clearly pegged in scientific terms, national or international legal regimes, or recognized authoritative expert organizations, there can be endless debate about whose views of what is "critical or significant", or whose supposed knowledge will be correct. Clear definitions of such terms are essential if they are to support the kind of implicit and explicit prohibitions scattered throughout the performance standard and reinforced in the guidance notes. It is possible to foresee issues of concern and controversy around the terms below without clear definitions or interpretation, appropriately linked to authoritative regimes (legal or other): (i) *critical* (defined by who?), (ii) *legally protected areas* (protected by who? International law? National law? Any government?), (iii) *areas officially proposed for protection* (proposed by who? *Officially* as defined by whom and how?), (iv) areas of *known high conservation value* (known by who? High conservation value defined by who?), and (v) *populations of any recognized critically endangered or endangered species* (recognized by who?).

PS 7, Indigenous Peoples and Natural Resource Dependent Communities.

- *Customary Usage of Land and Natural Resources; Project Utilization on Natural Resources*. PS 7 requires clients to: (i) assess and identify the customary use of natural resources of Indigenous Peoples, and take into account their customary rights to use natural resources vital to the sustainability of their cultures and livelihoods; and (ii) where projects involve utilization of natural resources on lands owned or customarily used by Indigenous Peoples or natural resource dependent communities, to engage in free, prior and informed consultation with those communities concerning their rights to compensation.[14] Significantly, PS 7 states that clients should engage with affected communities to explore how they might share in benefits derived from such development, even when national law does not formally recognize such usage. PS 7 should not, however, create a right to mineral resources for indigenous peoples when the applicable national law clearly allocates mineral rights to state or federal governments and indigenous peoples had not made customary use of such mineral resources previously.

---

13 See also Draft Guidance Note 6, ¶ 24.

14 *See also* Draft Guidance Note 7.

PS 9, Social & Environmental Management Systems.

- *The Social & Environmental Management System.*

  PS 9 calls for clients to systematically manage the social and environmental risks and enhance opportunities associated with projects financed by IFC.[15] The standard envisions a management system made up of six main elements: (i) Action Plan; (ii) organizational capacity; (iii) training; (iv) community engagement; (v) monitoring; and (vi) reporting. Both the management system requirement, and the underlying Action Plan component, are closely related to compliance with requirements of PS 1.

  SEMS design presents a potentially unfamiliar and different set of challenges for companies, and for financiers seeking to evaluate corporate social and environmental sustainability performance, none the least of which involve developing practical, applied definitions of such amorphous terms as sustainable development and corporate social responsibility.

  Another challenge will be the identification of appropriate social and other sustainability issues, and the selection of metrics and criteria for measuring performance in such areas. Social issues can include cultural, health, and community and work-related aspects, many of which do not lend themselves to straightforward quantitative or qualitative analysis.[16] Indeed, the very concept of an *integrated* environmental and social management system is still relatively new, and will certainly prove a substantial management challenge for small and medium sized companies in developing countries. Thus, IFC should provide for a more flexible, "stepped" process able to accommodate the wide variation of skills, resources, and capabilities within the corporate and financial services sector.[17]

  Draft Guidance Note 9 provides guidance with respect to the structure of the management system appropriate to projects, and to corporate investments without specific project activities. In footnote 53 thereto, IFC states that the role of management systems in corporate transactions will be clarified further. Such clarification is warranted, and should be provided.

---

[15] See also Draft Guidance Note 9.

[16] In the case of environmental management, the ISO 14000 series of environmental standards, and specifically ISO 14001, the EMS specification, provide a consensus point of reference. Although ISO initiated work last month in Brazil on a corporate social responsibility ("CSR")/sustainability management system standard, the effort is nascent. Stakeholders are striving to attain common ground on definitions for sustainability and CSR, and other fundamental issues. There is no consensus on the scope or design of such systems, and even less agreement on the metrics for assessing CSR and sustainability performance. *See Noble but Daunting Task Ahead*, ENVTL. SYS. UPDATE, Vol. 10, No. 2 (Feb./March 2005). Perhaps this is in part why three of the four references cited in Draft Guidance Note 9 relates to EMS design and implementation. This list should be augmented to include other tools on sustainability management system design and implementation. We would be pleased to furnish such references upon request.

[17] Draft Guidance Note 9 states at paragraph 8 that if a client does not have an existing management system, a satisfactory system or elements of a system should be in place over a reasonable period of time. This flexibility figures to be helpful, but IFC may wish to clarify how the process would actually work in practice, and whether the bank would work with clients to implement the management system.

- *Community Engagement.* PS 9 requires clients to engage with affected communities and key stakeholders in connection with the Action Plan.[18] PS 9 and accompanying guidance should clarify whether, and if so to what extent, communities and stakeholders are to play a role in the design and implementation of the management system.

- *Monitoring.* Under PS 9, clients must establish procedures to monitor and measure key impacts of the project on communities and the natural environment.[19] This will entail, among other things, tracking performance and compliance with laws and regulations. Draft Guidance Note 9, paragraph 16, suggests that in some cases it will be appropriate for the client to establish social development measurements and indicators, and that it may even be appropriate to use community engagement to implement such measures. Further guidance on the range and type of metrics IFC considers useful for such purposes would be helpful, as would an indication of the relevance, if any, of the measures identified in the Global Reporting Initiative ("GRI"), or other widely accepted reporting frameworks. The identification, and application of social and other measures of sustainable development is not well-established in the mainstream. Accordingly, IFC will probably find it necessary to work with clients and other stakeholders to build capacity and disseminate best practice in this emergent area.

- *Reporting.* PS 9 requires clients to report regularly on the results of their monitoring programs.[20]

  - Draft Guidance Note 9 states at paragraph 21 that as part of fulfilling this obligation, clients should provide periodic reports to senior management concerning the compliance with relevant host country legal requirements. The Draft Guidance Note should clarify that information and data concerning legal obligations and compliance need not be made available to affected communities and stakeholders, save to the extent required by law.

  - Draft Guidance Note 9 suggests that clients may wish to consider using sustainability reports to report on financial, environmental and social aspects of their operations. It would be helpful to provide insight on the extent to which IFC considers the GRI reporting format useful or relevant to such an exercise. In this context, PS9 should not exclude other report tools and methodologies, such as the Oil & Gas industry's " API/IPIECA Oil and Gas Industry Guidance on Voluntary Sustainability Reporting".

---

18 *See also* Draft Guidance Note 9, ¶¶ 13-14.

19 *See also* Draft Guidance Note 9, ¶¶ 15-19.

20 *See also* Draft Guidance Note 9, ¶¶ 21-24.