

The Record of International Financial Institutions on Business and Human Rights

Jessica EVANS*

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I. IFIS AND CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

As lenders to both governments and corporations, International financial Institutions (IFIs) have the sway and responsibility to prevent and address human rights abuses perpetrated by businesses. Alternatively, however, they can support a culture in which such abuses are ignored and allowed to continue. Working in some of the most challenging contexts, where rule of law is weak and public criticism is quashed, IFIs' corporate clients have been linked to various human rights abuses—from forced evictions to killings—and host governments have been either unwilling or unable to prevent these abuses or hold companies to account.

This article draws on the UN Guiding Principles on Business and Human Rights 'Protect, Respect, and Remedy' framework to measure IFIs' business and human rights performance. It describes how IFIs do very little to encourage or support governments to protect their people from corporate abuse, shy away from human rights due diligence, and, with the exception of their independent accountability mechanisms which capture a tiny fraction of their mistakes, fail to ensure remedy for abuse. It then sets forth a path for change.

To date, no International Financial Institutions (IFIs) ensure that the environmental and social due diligence of companies that they finance encompasses human rights due diligence to identify, prevent, and mitigate potential adverse rights impacts of their activities. Rather than pledging commitment to international human rights law, IFIs have typically worked to create policies in which they deal with select individual human rights issues to varying degrees in their own way, often while avoiding the phrase 'human rights' entirely.¹ With the exception of the European Investment Bank (EIB), those IFIs that do explicitly reference human rights commitments do not operationalize them by

* Jessica Evans is a human rights lawyer, Senior Advocate and Researcher on International Financial Institutions at Human Rights Watch.

requiring human rights due diligence. Perhaps of most concern though, irrespective of their standards, is the recurring failure of IFIs to ensure that companies comprehensively analyze potential social impacts, taking into account the complexities of the environment within which they are operating, and identify and report emerging risks. Alongside this, the IFIs themselves do not comprehensively and continually analyze social risks.

The EIB is the most explicit in requiring respect for human rights in its activities, stating that ‘the Bank will not finance projects which result in a violation of human rights’.² It then integrates human rights considerations in its social and environmental handbook. Despite these strong standards, with only a handful of social and environmental experts on staff, the EIB does not have the capacity to ensure compliance.

Following much debate, the International Finance Corporation (IFC) recognized the responsibility of businesses ‘to avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to’ in its 2012 Sustainability Policy.³ The IFC asserts that its Performance Standards, which require social and environmental due diligence with special attention paid to labor rights, indigenous peoples’ rights, involuntary resettlement, and security, are consistent with this responsibility.⁴ The European Bank for Reconstruction and Development (EBRD) includes similar language, although it goes a step further in confirming that references to ‘social’ include human rights.⁵ The IFC also includes in its Performance Standards a footnote which provides; ‘In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business’.⁶ To date, despite much internal discussion, the IFC has not determined how to operationalize this footnote. The remaining IFIs only address human rights indirectly and inadequately through their standards on indigenous peoples, resettlement, and labour.

Irrespective of their standards, IFIs face a broader problem of a culture and incentives that measure results purely in financial terms. In an investigation concerning an investment in a company that was at the center of a spate of violence and killings in Honduras, the IFC’s accountability mechanism, the Compliance Advisor Ombudsman (CAO) found that the IFC’s vast deficiencies were in part due to its culture, encouraging staff to ‘overlook, fail to articulate, or even conceal potential environmental, social, and conflict related risks’, regardless of the organization’s policies. This is a problem that

¹ Human Rights Watch, ‘Abuse-Free Development: How the World Bank Should Safeguard against Human Rights Violations’, (22 July 2013), <https://www.hrw.org/report/2013/07/22/abuse-free-development/how-world-bank-should-safeguard-against-human-rights> (accessed 5 February 2016); Human Rights Watch, ‘At Your Own Risk: Reprisals against Critics of World Bank Group Projects’, (22 June 2015), <https://www.hrw.org/report/2015/06/22/your-own-risk/reprisals-against-critics-world-bank-group-projects> (accessed 5 February 2016).

² European Investment Bank (EIB), ‘The EIB Statement of Environmental and Social Principles and Standards’, (2009), http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf (accessed 5 February 2016) 10.

³ IFC, ‘International Finance Corporation’s Policy on Environmental and Social Sustainability’, (1 January 2012), http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES (accessed 5 February 2016).

⁴ *Ibid.*

⁵ European Bank for Reconstruction and Development (EBRD), ‘Environmental and Social Policy (ESP)’, (7 May 2014), <http://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html> (accessed 5 February 2016) 1.

⁶ IFC, note 10.

extends to each of the IFIs, and while the IFC has undertaken to learn from its mistakes, we await meaningful changes.⁷

II. IFIS AND GOVERNMENTS' OBLIGATION TO PROTECT PEOPLE FROM CORPORATE ABUSE

The World Bank, which lends more than other IFIs to governments, has significant potential to support governments to protect against corporate abuse by providing technical support and financing to develop a legal and policy framework that regulates businesses and holds them to account. But the Bank's safeguards languish behind those of other development agencies, international organizations⁸ and IFIs, as UN Special Rapporteur on Extreme Poverty Philip Alston has written, treating 'human rights more like an infectious disease than universal values and obligations'.⁹ The Bank is in the final stages of revising its safeguards, but in the current draft human rights are addressed only in the nonbinding vision statement and, even there, they are referred to as aspirations rather than legal obligations.¹⁰

In any event, IFIs largely ignore their social and environmental policies when providing advice to governments about the regulatory environment for companies. For instance, in a US\$48.3 million sustainable mining project in Uganda, the World Bank and African Development Bank ignored their safeguards in the advice they provided to the government, applying them only to the small infrastructure component of the project.¹¹ At a minimum, the World Bank should have ensured its advice was consistent with its policies, including its policy on indigenous peoples, which currently requires free, prior, and informed consultation with indigenous peoples, leading to broad community support, before proceeding with development projects that affect them.¹²

⁷ Compliance Advisor/Ombudsman (CAO), 'Honduras / Dinant-01/CAO Vice President Request', (17 April 2012), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=188 (accessed 5 February 2016); CAO, 'CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras', (20 December 2013), http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf (accessed 5 February 2016).

⁸ The World Bank and OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, 2nd edn., (Washington DC: World Bank, OECD, 2013), 4–6, Table 1.1. The United Nations Development Program (UNDP), for example, has implemented an Environmental and Social Screening Procedure for its projects, through which it seeks to identify and avoid potential negative human rights impacts resulting from its activities: United Nations Development Programme (UNDP), 'Environmental and Social Screening Procedure (ESSP)', (2014), <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP-Social-Environmental-Screening-Procedure-1January2015.pdf> (accessed 5 February 2016).

⁹ Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', A/70/274 (4 August 2015), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/274 (accessed 8 February 2016).

¹⁰ World Bank, 'Second Draft Social and Environmental Framework', (1 July 2015), <https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> (accessed 8 February 2016).

¹¹ The project was funded by UD\$30 million of credits from the World Bank's International Development Association, UD\$7.7 million grant from the African Development Bank, UD\$7 million from the Nordic Development Fund, and UD\$3.6 million from the Ugandan government. World Bank, 'Sustainable Management of Mineral Resources Additional Financing', 23 September 2008), <http://www.worldbank.org/projects/P111097/sustainable-management-mineral-resources-additional-financing?lang=en> (accessed 5 February 2016); Joshua Tuhumwire, 'Supporting the Advancement of Artisanal and Small Scale Mining (ASM) in Uganda', (2012), http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1237387264558/5930373-1237390689503/Tuhumwire_EIGender.pdf (accessed 5 February 2016).

In addition, the World Bank Group is more often associated with deregulation than supporting governments to properly regulate business conduct. The IFC measures and reports annually on the ‘ease’ of doing business.¹³ This report, which has been subject to much criticism, rewards governments for lowering corporate tax rates and, in the past, rewarded them for inadequate labor protections. Through this report, the IFC could measure the degree to which governments require businesses under their jurisdiction to carry out robust and transparent human rights due diligence and publicly report on their human rights, social, and environmental impacts, and payments made to domestic or foreign governments, as well as their enforcement of these requirements.

III. IFIs AND REMEDY FOR CORPORATE ABUSES

IFIs have created independent accountability mechanisms (IAMs) within their institutions over the last 23 years, responding to demands that these institutions be held to account for the harm that their activities have had on people and the environment. With the institutions themselves claiming immunity from suit in almost all jurisdictions, and with the local justice systems in many of the places where IFIs invest being inaccessible or ineffective, these accountability mechanisms are often the only place to which communities can turn to seek redress beyond appealing to the company directly. While the mechanisms differ greatly in terms of their effectiveness, it is generally accepted that communities that appeal to these mechanisms are better off than they would have been without them; but the outcome rarely provides adequate remedy or results in systemic changes within the company responsible or the financing IFI.

Each of the mechanisms is empowered to review whether the IFI complied with its internal policies in the project in question, and some also have mediation and/or advisory functions. The mechanisms differ with respect to selection processes and reporting lines, and therefore independence, the timeframes within which complaints can be received, impacting their accessibility, and the participation of complainants in the process, impacting equitability.¹⁴

A recent multiple-NGO report¹⁵ found that of all 684 concluded complaints, IAMs had determined less than half eligible and under 20 per cent resulted in a successfully

¹² Human Rights Watch, “‘How Can We Survive Here?’: The Impact of Mining on Human Rights in Karamoja, Uganda”, (3 February 2014), <https://www.hrw.org/report/2014/02/03/how-can-we-survive-here/impact-mining-human-rights-karamoja-uganda> (accessed 5 February 2016); World Bank, ‘Operational Policy 4.10, Indigenous Peoples’, (July 2005), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (accessed 5 February 2016).

¹³ World Bank, ‘Doing Business’, (2016) <http://www.doingbusiness.org> (accessed 8 February 2016).

¹⁴ For a full discussion of the IAMs measured against the criteria for adequate remedy, see C. Daniel et al (eds.), ‘Glass Half Full? The State of Accountability in Development Finance’, *SOMO* (January 2016), http://www.somo.nl/publications-en/Publication_4275 (accessed 5 February 2016).

¹⁵ SOMO, Both ENDS, Center for International Environmental Law, CEE Bankwatch Network, Accountability Counsel, Natural Justice, Foundation for the Development of Sustainable Policies, Inclusive Development International, Centre for Human Rights and Global Justice, and Washington College of Law - Program on International & Comparative Environmental Law.

negotiated settlement or a publicly disclosed compliance report.¹⁶ For those cases, the report authors concluded that, 'Complainants' concerns may be validated, their issues may receive attention at the international level, and sometimes, though not often enough, their lives may be changed for the better as a result of their complaints'.¹⁷ However there is little evidence of changed behaviors at IFIs as a result of IAM complaints. In only seven per cent of concluded cases did IFI management produce action plans, and in only a tiny fraction of those were plans fully implemented. To ensure the effectiveness of the IAMs, the authors call on the IFIs to grant the IAMs the mandate to direct IFI staff and clients to take action to address noncompliance and remedy harm.

Despite the limitations and inadequate reach of these IAMs, their processes have resulted in significant outcomes for several communities. In Nicaragua, sugar cane workers who had developed chronic kidney disease while working in the industry have struggled to feed their families, generate income, or improve their living conditions because of the disease and its progression.¹⁸ An eight year dispute resolution process through the CAO has gone some way towards addressing these challenges, with IFC's client, Nicaragua Sugar Estates Limited and the German Investment Corporation (which also financed the company) funding improvements to the local health center, medication and supplies, and other short-term health initiatives.¹⁹ The company has also funded monthly food distribution for those who can no longer work, new homes that meet the conditions necessary for dialysis to be provided within them, a microcredit facility, a poultry production project, and other local business initiatives. While these measures are inadequate to remedy the loss of lives and livelihoods of the workers, they have made a real difference. The IFC itself, however, has to date neither contributed to these measures nor changed its internal practices.

More recently, in Cambodia a CAO dispute resolution process has resulted in an agreement that the company involved will not clear or develop community lands and will repair and maintain roads and bridges in the villages that were damaged by its operation.²⁰ The CAO's compliance review process in Honduras, combined with immense pressure from the World Bank Group's Board of Executive Directors and civil society, has also motivated the IFC to try to address alleged land and security-related abuses by its client Dinant.²¹

For communities to appeal to IAMs, they have to be able to identify not only the company involved, but the financier. They then have to discover that the financing

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ CAO, 'Nicaragua / Nicaragua Sugar Estates Limited-01/León and Chinandega', (1 March 2008), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=82 (accessed 5 February 2016).

¹⁹ CAO, 'Dispute Resolution Conclusion Report- Nicaragua Sugar Estates Limited-01', (August 2015), http://www.cao-ombudsman.org/cases/document-links/documents/CAOConclusionReport_NSEL_August2015_ENGLISH.pdf (accessed 5 February 2016).

²⁰ CAO, 'Cambodia / Cambodia: VEIL II-01/Ratanakiri Province', (November 2015), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=212 (accessed 5 February 2016); 'Joint Statement, Dispute Resolution Process between HAGL company and its subsidiaries and indigenous villages', (19 January 2016), <http://www.cao-ombudsman.org/cases/document-links/documents/JointStatement-Final-kh-eng.pdf> (accessed 5 February 2016).

²¹ CAO, 'CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras', (20 December 2013), http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf (accessed 5 February 2016).

institution has an IAM that they can access. As such, communities only seek help from IAMs in a tiny fraction of cases.

IV. CONCLUSION

In 2004, then-World Bank President James Wolfensohn said:

When I came to the Bank ... I was told by the general counsel within days of my getting to the institution, and in great secrecy, "Don't mention the 'C' word." So I asked, "What's the 'C' word?" He replied, "Corruption." Well, maybe we now need to mention the 'R' word, which is 'Rights'.²²

Three World Bank presidents later, we are not much further along and IFIs as a whole have floundered in this leadership gap. Now is the time for the World Bank to lead on human rights and show other IFIs how it can, and should, be done. The Bank should leave behind its 'incoherent, counterproductive and unsustainable' approach on human rights—as Alston has coined it—by integrating human rights due diligence into its policies and practices, embedding it in its technical advice as well as its budget support and project lending. Both existing and emerging IFIs, like the Asian Infrastructure Investment Bank and the BRICS' New Development Bank, can then follow suit.

²² James Wolfensohn, 'Some Reflections on Human Rights and Development' in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (New York: Oxford University Press, 2005) 22.