



AFE BABALOLA
UNIVERSITY
ADO EKITI NIGERIA

JOURNAL OF SUSTAINABLE DEVELOPMENT
LAW AND POLICY



**“HUMANIZING” INVESTMENTS IN THE EXTRACTIVE
INDUSTRIES IN AFRICA THROUGH THE IFC’S
SUSTAINABILITY POLICIES**

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ABSTRACT

International financial institutions face enormous challenges in Emerging Markets and Developing Economies (EMDEs). They finance infrastructure projects, manage vast investment portfolios, offer advisory services, and contribute to economic development in EMDEs. In the process, they are exposed to huge risks and face reputational damage if they act recklessly or have little or no regard for their projects’ adverse impacts on third parties. In the context of natural resource exploitation in Africa, the weak governance of environmental and social risks often results in devastating consequences for communities proximate to investment projects. Promises of infrastructure and social services, job opportunities and economic boom have only often delivered land grabs, forced displacement, cultural infringements, environmental pollution, conflicts, health disasters, misery and sometimes deaths. As calls for greater corporate scrutiny increase, investment project facilitators in the extractive industries like the International Finance Corporation (IFC) must respond appropriately. To preserve its reputation and long-term market access, the IFC needs to apply a higher degree of due diligence and sustainable business conduct that proactively treat risks and limit its exposure. With the rising number of complaints against IFC policy compliance, including projects tainted by scandals and the debarment of companies from accessing international finance, this article demonstrates that merely

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promoting sustainable investment policies on paper is inadequate. Using a human rights-centred approach to development project financing, the article critically assesses the extent to which the implementation of the IFC's sustainability framework can practicably protect resource-rich communities, safeguard human rights and ensure sustainable development outcomes in Africa.

Keywords: Extractive Industries, Human rights, Project Financing, IFC, Compliance, Sustainable Development.

DOI: <https://dx.doi.org/10.4314/jsdlp.v11i2.6>

1. INTRODUCTION

For many countries in Africa, the discovery of mineral resources in commercial quantity offers enormous opportunities to stimulate economic growth and propel development in the local economy. It can attract investments in the extractive industries, promote important technology and skills transfer between developed and less developed countries and foster improvement in the living standard of communities. In advanced economies, the extractive sector has facilitated the realization of ambitious economic and political goals, affording governments the much-needed revenue to finance public spending on infrastructure such as hospitals, roads, schools, electricity, housing, and potable water. Extractive investments can help poor countries exclusively dependent on subsistence agriculture or emerging from conflict transition into better diversified economies, catalyse their industrial growth potentials, shore up sovereign wealth savings for posterity and prepare for moments of austerity. Even so, the sector connects the world, meeting the global demands for energy and creating cross-cutting value chains that permeate the length and breadth of many societies.

Yet, the adverse impacts of natural resource exploitation are often disproportionate to its benefits. Belying the opportunities for economic and social transformation that extractive investments routinely create are many risks and controversies.¹ In countries with a generally poor

1 Natural Resource Governance Institute, "Strong Laws, Poor Implementation Characterize African Resource Sector" (April 2019) <<https://resourcegovernance.org/news/strong-laws-poor-implementation-characterize-african-resource-sector>> accessed 12 December 2019.

regulatory environment and weak institutions, the sector operates at high environmental and social (E&S) costs to industry workers, local communities and ecosystems. For example, in many resource-rich communities in Africa, promises of infrastructure and social services, job opportunities and economic boom have frequently only delivered land grabs, environmental pollution, public health disasters, forced displacements, cultural infringements, conflicts and even deaths.² Frequently, behind the veil of these challenges are multinational corporations (MNCs) and local private enterprises. These conditions of extractive business stir the hornet's nest of environmental scandals and social abuses. Critically, also, is the challenge of global climate change. Investments in fossil fuels and non-renewable minerals are antithetical to the Sustainable Development Goal 13 (SDG 13) that seeks to combat climate change and its harmful impacts globally.³ As Olawuyi states, overdependence on oil, gas and other mineral resources that release green house gases in the manufacturing or services value chain is "a chief contributor to global climate change."⁴

Despite the compelling risks in the sector, international financial institutions (IFIs) have continued to expand their investment portfolios in African countries, offering advisory services to companies and contributing to private capital growth and development.⁵ The International Finance Corporation (IFC), the private sector arm of the World Bank Group, is one such institution exclusively dedicated to promoting private investments in Africa. Its services branch off into many important sectors of development, including the extractive industries, energy, and the environment. In Nigeria's Niger Delta region, Zambia's

2 Eugene Cairncross and Sophia Kisting, "Platinum and gold mining in South Africa: The context of the Marikana massacre" [2015] 25(4) *New Solutions: A Journal of Environmental and Occupational Health Policy* 513, 518-526.

3 United Nations, "SDGs Goal 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages" <sdgs.un.org/goals/goal3> accessed 23 July 2020; D.S. Olawuyi, *Extractives Industry Law in Africa* (Springer, 2018) 299.

4 As above, SO Aghalino, "Gas Flaring, Environmental Protection, Pollution and Abatement Measures in Nigeria 1969-2001" (2009) 11 *Journal of Sustainable Development in Africa* 219-238.

5 Makhtar Diop, Yuan Li, Li Yong and Ato Ahmed Shide, "Africa Still Poised to Become the Next Great Investment Destination" (*World Bank*, 30 June 2015) <<https://www.worldbank.org/en/news/opinion/2015/06/30/africa-still-poised-to-become-the-next-great-investment-destination>> accessed 12 December 2019; John Gerard Ruggie, *Just business: Multinational corporations and human rights* (WW Norton & Company, 2013) 32 & 122.

Copperbelt province, the Katanga district of the Democratic Republic of Congo (DRC) and many other parts of Africa, companies supported by the IFC like Shell and Anvil Mining have been put in the spotlight of some of the worst E&S abuses.⁶

This article, therefore, examines the IFC's responsibility for its projects' impacts in Africa and determines the extent to which its sustainability policies can be instrumental to ensuring responsible and sustainable business practices in the extractive sector. It examines the IFC's sustainability framework and its role in fostering socio-economic development that is humane, responsible, and sustainable. Using a human rights-centred approach, it advances two important propositions. First, although the IFC did not always speak in the language of human rights until recently, its policies on environmental and social sustainability are fundamentally in alignment with global discourse on environmental, social, and human rights issues. The IFC's Sustainability Framework articulates the goals of preventing or mitigating environmental and social harms in ways that are manifestly consistent with the human rights due diligence objectives of the UN Protect, Respect and Remedy Framework 2008,⁷ the UN Guiding Principles on Business and Human Rights 2011

6 Adam McBeth, "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector" (2008) 11 *Yale Human Rights and Development Law Journal* 127, 159-162; Environmental Justice Atlas, *Massacre in Kilwa facilitated by Anvil Mining, operating Dikulushi open pit, Katanga province, DR Congo* (18 August 2018) <<https://ejatlas.org/conflict/kilwa-mine>> accessed 12 December 2019; Compliance Advisor Ombudsman, *CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in The Democratic Republic of the Congo* (2005) 22 <<http://www.cao-ombudsman.org/cases/document-links/documents/DikulushiDRCfinalversion02-01-06.pdf>> accessed 12 December 2019. Also see the cases of *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013) or 569 US 108 (2013); *Vedanta Resources PLC and Another v Lungowe and Others* ([2019] UKSC 20; *Nyasulu and others v Konkola Copper Mines Plc and others* (2007/HP/1286) [2011] ZMHC 86 (31 December 2010); *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd* 500-09-021701-115 24 January 2012 (Québec Court of Appeal, Canada).

7 United Nations Human Rights Council "Protect, Respect and Remedy: A Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie" (7 April 2008) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>> accessed 23 July 2020.

(UNGPs),⁸ the Equator Principles (EPs)⁹ and other international human rights standards.¹⁰ Second, the IFC wields enormous leverage over governments and businesses engaged in the extractive sector that can offset the harsh environmental and social practices of companies and the weak resource governance regime in Africa. The IFC is well placed to deploy its guidelines and performance standards to ensure that companies and governments comply with its environmental and social procedures and, thus, foster greater protection of resource-rich communities as proposed under Goals 10, 16 and 17 of the SDGs.¹¹

Structurally, the article is divided into six sections. The introductory section above provides an overview of the extractive industries and the role of the IFCs in mobilizing and financing investment projects. The second and third sections assess the dilemma of resource governance in Africa and the opportunities for IFIs like the IFC to play a leading role in counterbalancing the challenges of governance through responsible and sustainable business practices in the extractive industries. In the fourth section, the article evaluates the challenge of implementing IFC's Safeguard Policies and Standards, while the fifth section canvasses a human rights-based approach for future investment projects in the extractive industries. Section six is the concluding section.

8 United Nations Office of the High Commissioner for Human Rights "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 23 July 2020. The UNGPs fleshes out the responsibility of corporations to respect human rights in accordance with international human rights and labour standards.

9 Equator Principles Association "The Equator Principles" (2020) <<https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf>> accessed 23 July 2020. The EPs are a set of benchmarks for the financial industry for identifying, assessing and managing environmental and social risks in project finance.

10 International human rights standards include the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966 and other standards adopted under the auspices of the United Nations (UN) and the International Labour Organization (ILO).

11 United Nations, "Transforming our world: The 2030 Agenda for sustainable development" (2015) <<https://sdgs.un.org/2030agenda>> accessed 23 July 2020.

2. THE DILEMMA OF SUSTAINABLE RESOURCE GOVERNANCE IN AFRICA

Africa's hold of a significant share of global natural resource wealth is often unbalanced by an efficient and egalitarian system of resource administration. Africa houses the largest arable landmass, the second largest tropical rainforest, and the second largest and longest rivers (the Congo and Nile rivers).¹² It sits on 30 per cent of global mineral reserves, 8 per cent of the global stock of oil and 7 per cent of global natural gas. It is surrounded by an estimated US\$24 billion value of fisheries and aquaculture sector. According to the African Natural Resources Centre, "[m]inerals account for an average of 70 per cent of total African exports and about 28 per cent of gross domestic product."¹³ For this reason, the contribution of natural resources to the overall economic growth and development of African countries cannot be overstated. Furthermore, the African Development Bank (AfDB) estimates that the extractive industries could potentially contribute US\$30 billion in annual government revenue for the next decade.¹⁴ Beyond existing estimates that Angola and Nigeria's reserves can last up to another four decades, recent finds of oil, gas and mineral reserves in Ghana, Liberia, Mozambique, Sierra Leone, Tanzania and Uganda could also "contribute between 9 per cent and 31 per cent of additional government revenues over the first ten years".¹⁵ These statistical estimations underscore projections that mineral resources will remain relevant in the quest for economic growth and development in Africa.

Yet, resource wealth does not always equate economic success. Quite the opposite, a distinct attribute of natural resource-dependent countries is that "over half of the economies it has driven are *not* catching up" with its promises.¹⁶ Unlike in the Middle East and Scandinavia, resource-

12 African Natural Resources Centre, "Catalyzing Growth and Development through Effective Natural Resources Management" (2016) 3 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf> accessed 14 June 2019.

13 As above.

14 As above.

15 As above.

16 Richard Dobbs, Jeremy Oppenheim, Adam Kendall, Fraser Thompson, Martin Bratt and Fransje van der Marel, *Reverse the Curse: Maximizing the Potential of Resource-Driven Economies* (McKinsey Global Institute New York: McKinsey & Company 2013) 6.

driven development outcomes in Africa have been faint and less beneficial. As can be seen from the 2018 Human Development Index, many resource-rich countries score quite poorly on human development.¹⁷ Although rich in mineral resources, African states such as Nigeria, South Africa and the DRC have some of the highest rates of extreme poverty and social inequality in the world.¹⁸ Countries which have been projected to make significant leaps upon finding huge mineral deposits have often fallen for the resource trap. Rather than engineer sustainable socio-economic development and industrialization, they have witnessed “slower growth, greater inequalities, and impoverishment in rural areas, as well as bad institutions and increased risk of civil conflict”.¹⁹ These conditions are by no means accidental. As Halland, Lokanc, Nair and Kannan argue, they are a legacy of weak institutions and poor governance.²⁰

Underlying the challenges of resource governance are significant obstacles that prevent African countries from utilizing their natural resource potential to foster broad-based growth and development. The African Mining Vision (AMV) highlights that the failure of many African states to seize the resource endowment opportunities that they possess in order to make the critical linkages that underpin diversification, growth and development is largely due to weak governance arising from “the lack of or inappropriate institutions”.²¹ As many resource-rich African countries show, there is a chain of causation between high resource rent and institutional weakening. One impact of the decline of state institutions is the erosion of the capacity of countries to develop or reform laws and regulate the harmful impacts of extractive activities. Widespread corruption in public institutions hinders transparency and accountability from taking root. Cameron and Stanley state that “[w]eaknesses in

17 United Nations Development Programme, “Global Multidimensional Poverty Index 2019: Illuminating inequalities” (2019) 4 <http://hdr.undp.org/sites/default/files/mpi_2019_publication.pdf> accessed 30 June 2019.

18 Lerato Mbele-Roberts, “Perspective: The Race against Africa’s “Stubbornly High” Extreme Poverty” (*NewAfrican* 22 September 2019) <<https://newafricanmagazine.com/19828/>> accessed 24 September 2019.

19 Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (World Bank Publications, 2017) 27; Richard Auty, *Sustaining Development in Mineral Economics: The Resource Curse Thesis* (London: Routledge, 1993).

20 Håvard Halland, Martin Lokanc, Arvind Nair, and Sridar Padmanabhan Kannan, *The Extractive Industries Sector: Essentials for Economists, Public Finance Professionals, And Policy Makers* (World Bank Publications, 2015) 5.

21 African Union *African Mining Vision* (2009) 14.

governance mechanisms can constrain governments' ability to be accountable to their citizens."²²

This impacts the efficiency of law enforcement and industry regulation. With the absence of strong institutions, not only does the policy thrust of government regarding the sector tend to be derailed, a large chunk of the populace is deprived of the benefit of a well-coordinated, all-inclusive and sustainable development. The lack of probity of supervisory institutions can mean that the negotiation of resource concessionary contracts, the issuance of exploration and drilling or mining licences, the environmental and social implications of projects, tax incentives to MNCs, and revenue payments to government may be shrouded in secrecy. With weak institutions, poor resource-potential data and a lack of awareness of the sector's complexities, many developing countries often lack the capacity and technical sophistication to effectively negotiate resource contracts against developed countries and powerful MNCs that benefit the entirety of the population, ensure good corporate citizenship and prevent abuses.

Another important dimension of the weak institutional enforcement of the extractive sector in African countries is the lack of fiscal accountability by government and the private sector. Due to the inaccessibility of information and absence of transparency in the sector, governments are unable to effectively track and block the illicit (out)flows of revenues from Africa. According to a 2018 OECD report, such outflows cost Africa upwards of US\$50 billion every year.²³ Between 1980 and 2009, an estimated US\$1.2 to US\$1.4 trillion was illegally repatriated from Africa.²⁴ In a 2015 report, the High-Level Panel on Illicit Financial Flows from Africa commissioned by the Economic Commission for Africa (Panel) found that about 65 per cent of illicit financial flows (IFFs) are done by business (with criminal activities accounting for 30 per cent

22 Cameron and Stanley (n 19 above) 7.

23 OECD, *Illicit Financial Flows: The Economy of Illicit Trade in West Africa* (OECD Publishing: Paris, 2018) 13 <<https://doi.org/10.1787/9789264268418-en>> accessed 24 July 2019; Claire Guyot, "Illicit financial flows cost Africa \$50 billion a year, states new report" (22 February 2018) <<https://www.euractiv.com/section/africa/news/illicit-financial-flows-cost-africa-50-billion-a-year-states-new-report/>> accessed 24 July 2019.

24 Masimba Tafirenyika, "Illicit Financial Flows from Africa: Track It, Stop It, Get It" *African Renewal* December 2013 <<https://www.un.org/africarenewal/magazine/december-2013/illicit-financial-flows-africa-track-it-stop-it-get-it>> accessed 20 July 2019.

and corruption 5 per cent).²⁵ The Panel also found that the highest incidents of IFFs occur in the extractive industries, with over 56.2 per cent of the IFFs from Africa coming from oil, copper, ores, iron and steel and precious metals and minerals and concentrated in a few countries.²⁶

The Panel report also finds that companies and financial institutions involved in the extractive industries, with the help of corrupt government officials, engage in various shades of dubious activities to dishonestly ship taxable revenues out of Africa to, mostly, Canada, China, France, Germany, India, Japan, South Korea, Spain and the United States. Particularly, MNCs engaged in the oil, gas and mining sectors employ various tax avoidance tactics such as company registration in offshore tax havens, ghost company ownership in secrecy jurisdictions, trade mispricing and mis-invoicing, transfer pricing, posting fictitious losses, money laundering, and bribery of officials to circumvent legal tax payments. The report also highlights that IFFs undermine state structures and that resource-rich countries with a non-existent or inadequate institutional architecture were most vulnerable.²⁷

The risks of environmental and social disasters in the extractive industries are made worse by the opacity of resource governance. After an appraisal of the scope of governance deficit in 81 resource-rich countries, the launch of the 2017 Resource Governance Index (RGI) confirms that no fewer than ten African countries got “failing scores” on the quality of policies and practices that govern the extractive industries, including big resource-dependent economies like Botswana, Madagascar, Nigeria, South Africa, and Sudan. The Natural Resource Governance Institute asserts that in countries like Nigeria, “licensing is the weakest link” reflecting “opacity in key decisions including qualification of companies, process rules and disclosure of terms of extraction.”²⁸ Based

25 Imani Countess, “Illicit Financial Flows Thwart Human Rights and Development in Africa” February 5, 2015 <<http://www.cadm.org/Illicit-financial-flows-thwart-human-rights-and-development-in-Africa>> accessed 24 July 2019.

26 ECA, “Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa” (2015) 97 <https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf> accessed 26 July 2019.

27 ECA (n 26 above) 20.

28 Natural Resource Governance Institute, “Resource Governance Index: From legal reform to implementation in Sub-Saharan Africa” (2019) 12 <<https://resourcegovernance.org/sites/default/files/documents/rgi-from-legal-reform-to-implementation-sub-saharan-africa.pdf>> accessed 24 July 2019; Natural Resource Governance Institute, “Nigeria: Oil & gas” (2019) <<https://resourcegovernanceindex.org/country-profiles/NGA/oil-gas>> accessed 24 July 2019.

on the RGI, not one resource-dependent African country received a “good” score. Rather, 26 out of the 28 African countries considered exhibited “weak, poor or failing resource governance” with only Botswana and Ghana showing some “satisfactory” score. Also, the RGI found that although 22 African countries had undertaken significant legal reforms in their oil, gas and mining sectors between 2000 and 2016, they continue to lag behind in the implementation of transparency and accountability standards.²⁹

One thing is clear. The inability of African countries to improve the quality of their laws and standards is partly responsible. Where they have managed to undertake reforms, the failure to implement them seemingly underlie their poor performance.³⁰ For instance, in the Niger Delta, decades of untamed gas flaring have led to broad health and environmental complications. Owing to prolonged exposure to atmospheric contaminants such as carbon dioxide, nitrogen dioxide and sulphur dioxide emissions, communities have become prone to torrents of acid rain and left to feed off highly acidified and nutrient-depleted lands.³¹ Large swaths of land, fishing colonies, and springs of fresh water have been contaminated by frequent oil spills and gas explosions, depriving locals of access to food, farming and animal husbandry. Although Nigeria wholly domesticated the EITI in 2007 with the adoption of the Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007, between 2007 and 2017 senior Nigerian government officials have been embroiled in several high-level corruption scandals in the oil and gas sector involving oil majors such as Eni and Shell.³²

In South Africa, besides the poor labour conditions that fuelled the

29 Natural Resource Governance Institute, “2017 Resource Governance Index” (2017) 16.

30 Natural Resource Governance Institute, “Strong Laws, Poor Implementation Characterize African Resource Sector” 15 April 2019 <<https://resourcegovernance.org/news/strong-laws-poor-implementation-characterize-african-resource-sector>> accessed 25 July 2019.

31 Anslem O. Ajugwo, “Negative Effects Of Gas Flaring: The Nigerian Experience” (2013) 1(1) *Journal of Environment Pollution and Human Health* 6, 7-8.

32 Cain Burdeau, “Two Convicted in Giant Nigerian Oil Corruption Case” (21 September 2018) <<https://www.courthousenews.com/two-convicted-in-giant-nigerian-oil-corruption-case/>> accessed 24 July 2019; Nshira Turkson, “The Nigerian Oil Company’s Missing Billions: A Government Audit Says \$16 Billion Is Missing” (18 March 2016) <<https://www.theatlantic.com/international/archive/2016/03/nigeria-oil-corruption-buhari/473850/>> accessed 24 July 2019.

Marikana massacre in its North West province in 2012, mountains of mining dumps, gold tailings, abandoned shafts and unchecked spills have left communities in highly toxic environments and bequeathed locals with poor eye-sights, chronic respiratory and skin infections, and air and ground-water pollution.³³ Despite its progressive constitution and laws, mining companies have been accused of “capturing” the state and swaying state decision-making to the detriment of the wider population.³⁴ In Angola, Sanangol – Angola’s national oil company – has been plagued by allegations of corruption and embezzlement.³⁵

For investors looking to tap into Africa’s resource potential, the deficit in resource governance pose immense risks and offer entrapping avenues for callous exploitation. The absence of strong institutions to regulate extractive operations, public health, labour conditions, corporate conduct, and the environment places individuals, mineworkers and entire communities (especially children, women, minorities and indigenous peoples) in harm’s way. Already, the influx of Western and Chinese corporations competing for Africa’s resources has, with the complicity of government or SOEs, seen rapid increases in human rights, labour, health and environmental abuses. Indigenous and local communities have been arbitrarily displaced from native land without any regard for their historical, spiritual, and cultural ties. The abuses arising from these devastations not only tarnish the activities of existing players in the extractive industries, they also present cautionary red flags to newcomers.

Since 2001, for instance, the World Bank has been engaged in the extractive industries in the DRC. It facilitated the Dikulushi Copper-Silver Mining Project by Anvil Mining by providing insurance against political risks, including damages arising from conflict to the tune of US\$13.3 million.³⁶ Following Anvil’s established complicity in the 2004 Kilwa massacre, civil society organizations (CSOs) filed a request for investigations by the IFC/MIGA Compliance Advisor/Ombudsman (CAO)

33 Cairncross and Kisting (n 2 above) 518-526.

34 Llewellyn Leonard, “Mining Corporations, Democratic Meddling, and Environmental Justice in South Africa” (2018) 7(18) *Social Sciences* 259, 263.

35 Clifford Krauss “Angolan Leader Ousts Predecessor’s Daughter As Oil Chief” (*New York Times*, 15 November 2017) <<https://www.nytimes.com/2017/11/15/business/energy-environment/angola-oil.html>> accessed 24 July 2019; Phillip Van Niekerk and Laura Peterson, “Making a killing: Greasing the skids of corruption” (12 March 2012) <<https://www.icij.org/investigations/makingkilling/greasing-skids-corruption/>> accessed 24 July 2019.

36 McBeth (n 6 above) 159-162; Environmental Justice Atlas (n 6 above).

into the due diligence procedures and alleged violations of the rights of indigenous and forest-dependent communities. In 2006, the CAO found that MIGA's due diligence approval that the project harboured a low risk did not follow the Bank's Environmental and Social Review Procedures and that MIGA's "follow-through on social aspects was weak" in several key areas.³⁷ In particular, the CAO noted that not only did MIGA fail to identify a number of potentially important social issues, no social specialist was involved in the project.

Regardless of these challenges, many foreign investors remain inclined to grab a share of Africa's vast mineral resources. Despite the weak legal framework and fiscal regulation, poor organization of the industry, and lack of robust risk management systems in African countries, the continent has become "the second most attractive investment destination in the world".³⁸ The scale of investments coming into the continent suggests that the potential for continued abuses abound. In the absence of any strong supervisory institutions that investors can be concerned about, unscrupulous investors may seek to take advantage of legal and implementation gaps. It is precisely for this reason that all category of players must anticipate, prevent or, at the very least, mitigate the adverse impacts of their investments on third parties.

Considering the growing number of MSIs and international human rights and environmental standards on corporate accountability and disclosure, investors can no longer turn a blind eye to poor environmental and social risk assessment practices in the extractive sector. If they disregard the potential adverse impacts of their operations on communities, they may earn high-profit margins momentarily but invariably endanger their future business success in the long run and incur incalculable damage to the corporate brand. More especially, poor environmental, social and governance (ESG) practices can occasion other multiple losses, including of reputation, access to the market and international finance.

Project financiers stand equally exposed to the controversies and risks in the sector. Development finance institutions such as the IFC, in particular, which support governments and the private sector, are not

37 Compliance Advisor Ombudsman, "CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in The Democratic Republic of the Congo" (2005) 22 <<http://www.cao-ombudsman.org/cases/document-links/documents/DikulushiDRCfinalversion02-01-06.pdf>> accessed 26 July 2019.

38 Diop *et al* (n 5 above).

immune. In 2011, the Independent Evaluation Group acknowledged that despite improvements in World Bank due diligence processes, weaknesses yet remain in much of its public consultation processes and disclosure of environmental and social review findings with respect to community health, safety and security.³⁹ As bearer of responsibility to do no harm and to respect the human rights and fundamental concerns of communities, the IFC has a responsibility to ensure that projects that it finances do not cause environmental and social harms or hardship in the spirit of the SDGs and international human rights standards.⁴⁰ Specifically, Goal 10 envisions the reduction of inequality within and among countries, while Goals 16 and 17 contemplates that development institutions will play an active role in preventing widening inequality and promoting social inclusivity and justice through the leverage they have over business and development partners. The responsibility to reduce inequality, promote equal and inclusive societies, ensure institutional accountability and access to justice, and forge partnerships that drive the realization of the SDGs strikes at the heart of the IFC's financial engagements in Africa.

3. THE IFC AND SUSTAINABLE PROJECT FINANCING IN AFRICA

Based on its founding Articles of Agreement, the IFC was established “to further economic development by encouraging the growth of productive private enterprise in member countries.”⁴¹ To achieve this enormous objective, it is enabled to collaborate with private investors “in financing the establishment, improvement and expansion of productive private enterprises”, mobilize investment opportunities through local and foreign private capital, and help stimulate fruitful investment in developing countries.⁴² The IFC carries out this mandate by what is known as project financing that aims to develop infrastructure, create jobs and promote

39 Independent Evaluation Group, “Review of MIGA's Experience with Safeguards and Sustainability Policies (1999–2008)” (2011) 15 [Andres Liebenthal] <<http://documents.worldbank.org/curated/en/315621468152971744/pdf/653570NWPOBox30GAWorkingpaper201102.pdf>> accessed 8 July 2019.

40 Guiding Principles on Business and Human Rights (n 8 above) Principles 11-24

41 IFC Articles of Agreement 1956 art 1.

42 IFC Articles of Agreement 1956 art 1(i)-(iii).

economic opportunities. Investment project finance is “a debt finance technique used for the development of a public infrastructure [or other] project where lenders rely primarily on the cash flow produced by the project to service their loan”.⁴³ Unlike other forms of commercial secured lending, the financial structure offered by the IFC places significant reliance on the cashflows generated by the project itself rather than on government guarantee or creditworthiness of the project sponsors. For this reason, the IFC performs detailed specialist evaluation of the project and its ability to generate revenue. It monitors the project closely throughout the project lifecycle to ensure that it complies with its lending policies and due diligence procedures.

Since its establishment, the IFC has been heavily involved in Africa. It has spent upwards of US\$25 billion over the last six decades.⁴⁴ However, quite silent on the need for accountability to a large range of stakeholders, the Articles of Agreement does not prescribe a standard of conduct for the potential impact of its activities on third parties. This meant that, on the surface, the institution did not consider that it had any human rights or environmental and social responsibility to those that could have been affected by its projects. It was not until the IFC’s involvement in the Chilean Pangu Hydroelectric Project in 1995 that the need arose to reform its engagement with projects that had significant environmental and social risks.⁴⁵ Objections from indigenous peoples proximate to the project and pressures from environmental and human rights organizations not only called to question existing IFC approach to environmental and social issues, it precipitated a change in the WBG’s approach towards sustainable development.⁴⁶

43 Dinesh D Banani “International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction” (2003) 26(2) *Boston College International and Comparative Law Review* 355 355-356.

44 IFC, “IFC in Sub-Saharan Africa” <https://www.ifc.org/wps/wcm/connect/region_ext_content/IFC_External_Corporate_Site/Sub-Saharan+Africa> accessed 6 July 2019.

45 Claudio A. Agostini, Carlos Silva and Shahriyar Nasirov, “Failure of Energy Mega-Projects in Chile: A Critical Review from Sustainability Perspectives” (2017) 9 *Sustainability* 1073, 1075-1076.

46 Adebola Adeyemi, “Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation” (2014) 16(2) *Environmental Law Review* 91, 96; Susan Park, “Becoming Green: The World Bank Group, Norm Diffusion and Transnational Environmental Advocacy Networks” in Diane Stone and Christopher Wright (eds), *The World Bank and Governance: A Decade of Reform and Reaction* (Routledge, 2006) 168-188.

For example, a fallout arising from the project sponsor's refusal to disclose the environmental assessment report of the project (implying that it had tremendous negative impacts on communities and the environment) proved to be an invaluable lesson for IFC management and staff. It exposed the lack of effective community engagement or their free, prior and informed consent (FPIC) to the project. It also revealed the lack of trust that key stakeholders can have towards a project where there is no transparency.⁴⁷ The issues that arose from the Pangué project, however, were an eye-opener for the IFC. In its aftermath, it led to "the strengthening of IFC's institutional capacity to address environmental and social issues".⁴⁸ In particular, it led to the establishment of the IFC's Environmental and Social Department, the creation of environmental and social review procedures, the establishment of the CAO, and most importantly, the adoption of the "safeguard" policies.

3.1 The Safeguard Policies

Conscious of the high ESG costs associated with investing in the energy and extractive industries in fragile, violent and conflict settings, the IFC adopted a set of Environmental and Social Safeguard Policies (ESSAP or Safeguard Policies) in the late 1990s. The ESSAP applied to investments made prior to 30 April 2006.⁴⁹ Although the IFC previously had Safeguard Policies on cultural property, indigenous peoples and involuntary resettlement between 1986 and 1991, it had no clear standard on environmental and social risks to sufficiently address the concerns generated by the Pangué project.⁵⁰ Based on the challenges encountered,

47 Lidewij Van der Ploeg and Frank Vanclay, "A Human Rights Based Approach to Project Induced Displacement and Resettlement" (2017) 35(1) *Impact Assessment and Project Appraisal* 34-52.

48 IFC, "Lessons Learned: Pangué Project" <<http://documents.worldbank.org/curated/en/601861468236080935/pdf/365360ENGLISH0Pangué0lessons01PUBLIC1.pdf>> accessed 8 July 2019; John Gerard Ruggie "Global Governance and New Governance Theory: Lessons from Business and Human Rights" (2014) 20 *Global Governance* 5.

49 IFC, "Former Environmental and Social Safeguards and Supporting Materials" <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/safeguards-pre2006#safeguard> accessed 8 July 2019).

50 Previous policies include: Environmental Analysis and Review of International Finance Corporation Projects 1993 and Environmental Assessment Sourcebook 1991.

in 1998 the IFC swiftly adopted a number of Safeguard Policies to provide operational guidance to itself and clients on Environmental Assessment (OP 4.01), natural habitat, pest management, forestry, dams safety, international waterways, and child and forced labour.⁵¹ The Safeguard Policies also included a Disclosure Policy, a set of Guidance Notes to IFC staff and clients, an Environmental and Social Review Procedure manual, the Environmental, Health, and Safety (EHS) Guidelines and Pollution Prevention and Abatement Handbook (PPAH), the IFC Exclusion List, and other industry guidelines, all relevant to investments in the extractive industries.

The ESSAP were intended to guide the IFC and clients on the modalities for preventing and mitigating harm to individuals, communities and the environment. The policies defined the environmental and social parameters within which IFC staff were to undertake projects. The policies also set procedural and performance standards for project sponsors and companies, given the nature and volume of risk exposure that the IFC had. For instance, the Operational Policy on Environmental Assessment (OP4.01) prescribed that it was the responsibility of clients to carry out environmental assessment which includes public consultation and disclosure. Clients were also expected, under the environmental assessment policy, to comply with the EHS Guidelines and PPAH.

Although the ESSAP set the IFC on the path to sustainable development, the efficacy of its implementation was quite contentious for several reasons. First, the IFC, like any business enterprise, is driven by the objective of profiting from its arrays of investments in developing countries. Balancing between this interest and those of communities and environmental activists has been somewhat conflicting and complicated. Second, like MIGA's poor assessment of the Dikulushi mining project, loopholes in the IFC's enforcement of its own due diligence methodology exposed it to complaints by Chilean communities and organizations. Poor consultations and lack of information disclosure led to distrust and rapidly escalated friction with communities impacted by the project. Last, as project financier, the IFC failed to properly appreciate that compliance-monitoring of its Safeguard Policies did not start and

51 IFC, "Former Environmental and Social Safeguards and Supporting Materials" <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/safeguards-pre2006#safeguard> accessed 8 July 2019.

end at the stage of initiation and commencement, but throughout the project's lifecycle.

In 2003, the CAO found that, with respect to the extractive industries, the IFC and MIGA's compliance with a wider set of emerging "non-mandatory" sustainability criteria such as human rights, forced displacement, health impacts, loss of access to environmental resources and how to deal with archaeological finds were markedly low and often ignored.⁵² For instance, the IFC's decision to invest in diamond prospecting in the Central Kalahari Game Reserve in Botswana despite early signs that showed increased risk of displacement of the indigenous San community exposed the weak implementation of ESSAP⁵³ Complaints were also lodged against the IFC-supported Marlin Gold Mine project in Guatemala and the Konkola Copper mine project in Zambia due to threats of displacement and involuntary resettlement of local communities.⁵⁴ In the Niger Delta, complaints were also filed against the IFC's lack of consultation and transparency and its partnerships with Shell despite Shell's poor environmental and employment records.⁵⁵

By slackening its oversight over project compliance, the IFC ESSAP proved to be weak in four identified areas – the indirect impact of projects on the living standards of poor communities; the cumulative impact of one project on a previous non-IFC funded project; sustainability of community development programme; and the importance of disclosure and accountability. Based on independent studies and self-evaluations, the IFC saw a need to review the ESSAP.⁵⁶ Following several complaints

52 CAO, "Extracting Sustainable Advantage? A Review Of How Sustainability Issues Have Been Dealt With In Recent IFC and MIGA Extractive Industries Projects" (2003) 36 <<http://www.cao-ombudsman.org/howwework/advisor/documents/FINALExtractiveIndustriesReviewReport.pdf>> accessed 8 July 2019; CAO, "Annual Report 2002-03" (2003) 12-13 <http://www.cao-ombudsman.org/publications/documents/CAO_AR2003_ENG.pdf> accessed 8 July 2019.

53 CAO, "2004-05 Annual Report" (2005) 10-11 <http://www.cao-ombudsman.org/publications/documents/CAO_AR2005_ENG.pdf> accessed 8 July 2019.

54 CAO, "2005-06 Annual Report" (2006) <<http://www.cao-ombudsman.org/publications/documents/CAOAR2006English.pdf>> accessed 11 July 2019.

55 As above.

56 IFC, "Lessons learned: Pangué project" <<http://documents.worldbank.org/curated/en/601861468236080935/pdf/365360ENGLISH0Pangué0lessons01PUBLIC1.pdf>> accessed 8 July 2019. Also see CAO, "2000-01 Annual Report" (2001) 8-11 <http://www.cao-ombudsman.org/publications/documents/CAO_AR2001_ENG.pdf> accessed 10 July 2019.

about the IFC's breach of its Safeguard Policies, the subsequent findings of the World Bank Inspection Panel and the CAO investigations revealed that the IFC's due diligence operational procedures were yet failing. The accountability mechanisms suggested that the failure to identify gaps in the environmental and social assessment of projects led to a sustained disregard of institutionalized risk management review procedures and guidance notes.⁵⁷

3.2 2006 Sustainability Framework

After broad review consultations, the Safeguard Policies were revised and transformed into the IFC Environmental and Social Sustainability Framework in 2006 (2006 Sustainability Framework).⁵⁸ However, the optimism that greeted the change from ESSAP to the Sustainability Framework did not last long. Between 2006 when the Framework came into operation and 2008 alone, 54 new complaints were lodged against the IFC and MIGA for various environmental and social abuses in the extractive and other sectors.⁵⁹ That is, over 110 per cent more complaints than the total number of complaints lodged in the preceding seven years combined. Why were there now more complaints in the two years following the operationalization of the 2006 Sustainability Framework? What went wrong? A critical look at the ESRP processes will show an IFC misdiagnosis and misappraisal of the E&S assessment reports of project sponsors. Categorization of project risks as category B (projects with few reversible adverse environmental or social impacts) or Category C (projects with minimum or no adverse impacts) when a wider appraisal would

57 Oxfam, "Billions in "out of control" IFC investments into third-parties causing human rights abuses around the world" (2 April 2015) <<https://www.oxfam.org/en/pressroom/pressreleases/2015-04-02/billions-out-control-ifc-investments-third-parties-causing-human-rights-abuses>> accessed 18 July 2019.

58 Christopher Wright, "From "safeguards" to "sustainability": the evolution of environmental discourse inside the International Finance Corporation" in Diane Stone and Christopher Wright (eds), *The World Bank and Governance: A Decade of Reform and Reaction* (Routledge, 2006) 67-87; IFC, "International Finance Corporation's Policy on Social & Environmental Sustainability" (30 April 2019) <<https://www.ifc.org/wps/wcm/connect/f12fa7cb-267e-442b-ab9d-58f371b9198a/SustainabilityPolicy.pdf?MOD=AJPERES&CVID=kpI-B8K>> accessed 28 July 2019.

59 CAO "2007-08 Annual Report" (2008) <http://www.cao-ombudsman.org/publications/documents/CAOAnnualReport2008_English.pdf> accessed 12 July 2019.

have shown it to be category A (projects with significant irreversible adverse impacts) was often “incorrect and prevented affected communities from accessing project information and commenting during IFC’s due diligence phase.”⁶⁰ Unfortunately, the slight amendments to the IFC categorization methodology and staff responsibilities in the ESRP Manuals of 2007 and 2009 did very little to correct this anomaly.

3.3 2012 Sustainability Framework and Human Rights

The UN Human Rights Council’s adoption of the UN Framework in 2008 and, importantly, the UNGPs in 2011 was a watershed in the global discourse on business and human rights. It resolved what was before then bitter contestations among countries, scholars, business professionals, environmental and human rights non-governmental organizations and interest groups on the human rights responsibility of business. These documents affirmed the corporate responsibility to respect human rights by refraining from causing harm to the people or environment where they operate. As a specialized agency of the UN, this warranted that the WBG and component institutions had to align their policy commitments with this important normative statement. For the IFC, this meant that it needed to revise the 2006 Sustainability Framework. After a relatively extensive consultation and review process, noticeable rather than drastic changes were made to the Framework.

In 2011, the IFC approved the updated Sustainability Framework. The new Framework came into effect on 1 January 2012 and applies to “all investment and advisory clients whose projects go through IFC’s initial credit review process after January 1, 2012.”⁶¹ The Framework comprises the Policy on Environmental and Social Sustainability, Performance Standards, and Access to Information Policy,⁶² and stands out in several ways.

First, the IFC makes striking commitments to human rights that are quite novel in the world of international development finance. Unlike the 2006 Sustainability Framework where the IFC merely acknowledged

60 CAO (n 59 above) 31.

61 IFC, “IFC Sustainability Framework – 2012 edition”.
<https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/ifcsustainability_framework_2012> access 14 July 2019.

62 As above.

that the role of the private sector in respecting human was still “emerging”, the new Framework expressly “recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfil human rights.”⁶³ In doing so, it endeavours to be guided by the International Bill of Human Rights and the International Labour Organization’s eight core conventions.⁶⁴ Also, in contrast to the one-time reference to human rights in the 2006 Framework, the 2012 Framework references “human rights” at least 30 times throughout the document. It also recognizes and implores clients to be mindful of gender-related risks and gender-differential impacts of investment projects. With respect to the extractive industries, the IFC affirms the importance of ESG risk assessment and information disclosure of “material project payments” to governments as a means of managing risks.⁶⁵

Second, the revised Performance Standards are also credited with important additions that advance a human rights-centred approach to IFC business. For one, it reviewed the first performance standard to focus on “Assessment and management of environmental and social risks and impacts”. Its emphasis on *risks* and adverse *impacts* is important because it is brought in alignment with the language of the UNGPs and the current global discourse on business and human rights. Under this performance standard, the IFC affirms the responsibility of clients to “avoid infringing on the human rights of others and address adverse human rights impacts” that they may cause or contribute to.⁶⁶ Under the fourth performance standard dealing with community health, safety and

63 IFC, “IFC Sustainability Framework” (2011) para 12 <https://www.ifc.org/wps/wcm/connect/ea072259-f715-4971-a920-90c0ca90bc95/IFC_Sustainability_2BFramework.pdf?MOD=AJPERES&CVID=kTjZB1i> accessed 17 July 2019. Cf IFC (n 58 above) para 8.

64 The eight Core Conventions of the ILO are: Forced Labour Convention 1930 (No. 29), Freedom of Association and the Right to Organize Convention 1948 (No. 87), Right to Organize and Collective Bargaining Convention 1949 (No. 98), Equal Remuneration Convention 1951 (No. 100), Abolition of Forced Labour Convention 1957 (No. 105), Discrimination (Employment and Occupation) Convention 1958 (No. 111), Minimum Age Convention 1973 (No. 138), and Worst Forms of Child Labour Convention 1999 (No. 182). Also see the ILO Declaration on Fundamental Principles and Rights at Work (1998) and the Tripartite declaration of principles concerning multinational enterprises and social policy 2017 (MNE Declaration).

65 IFC (n 63 above) paras 48-50.

66 IFC (n 63 above) PS 1(3); Deanna Kemp and Frank Vanclay, “Human rights and impact assessment: Clarifying the connections in practice” (2013) 31(2) *Impact Assessment and Project Appraisal* 86-96.

security, the IFC commits to ensuring that the safety of personnel and property is carried out not only in line with human rights principles but in a way that prevents or mitigates risks to affected communities.⁶⁷ Similarly, the seventh performance standard harps on the need to ensure that the development process initiated by investment projects “fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.”⁶⁸

Third, the new Access to Information Policy is a technical reference document to the IFC’s commitment to transparency in the Policy on Environmental and Social Sustainability.⁶⁹ This Policy sets out the scope of information that the IFC will disclose or require clients to disclose in order to facilitate better understanding and informed engagement on its business activities. Through the Policy, the IFC recognizes that openness enriches stakeholder engagement, which, in turn, enhances project and policy design and implementation.

Among other notable improvements in the Framework are the application of the principle of FPIC in IFC and clients’ engagements with indigenous people, attentiveness to climate change (and the IFC’s commitment to lowering carbon footprints), and the need for clients to screen and monitor risks in their supply chains.⁷⁰ These transformative additions in the 2012 Framework also informed several consequential changes to the ESRP Manual in 2013 and 2016, respectively. It incorporated FPIC as a key means of having good faith negotiation and obtaining broad community support. Notably, these policy changes have opened a new focus on *impact investing* for the IFC. Impact investing is defined as investment made into corporate institutions and financial vehicles with the purpose of adding calculable positive economic, social and environmental impacts apace with good financial returns.⁷¹ According to the IFC’s operating principles for impact management, impact investing

67 IFC (n 63 above) PS 4.

68 IFC (n 63 above) PS 7.

69 The Access to Information Policy became the successor document of the erstwhile Policy on Disclosure under the ESSAP and the 2006 Framework.

70 IFC, “Fact sheet: IFC’s updated Sustainability Framework” <https://www.ifc.org/wps/wcm/connect/9190e290-4ce1-445f-a847-3c6b193a3719/Updated_SustainabilityFramework_Fact-sheet.pdf?MOD=AJPERES&CVID=jAcDpev> accessed 26 July 2019.

71 Antony Bugg-Levine and Jed Emerson, “Impact investing: Transforming how we make money while making a difference” (2011) 6(3) *Innovations: Technology, Governance, Globalization* 9 10. See also Anna K Höchstädter and

aims “to achieve positive impact on targeted social, economic, or environmental goals” in addition to financial returns.⁷²

Despite its significant policy commitments to avoid or mitigate the potential or actual adverse impacts of investment projects on communities, the IFC continues to falter in the implementation of its own rules in relation to extractive and other projects in a way that detracts from Goal 10. Since 1 January 2012, there has been noticeable shortcomings in terms of how IFC reviews environmental, social, and human rights risks and impacts in the extractive industries. For example, in 2018, CAO investigations found significant faults in the IFC review of the Amulsar gold mine in southern Armenia. The CAO established that there were errors in the IFC’s E&S review of the mine exploration phase and “gaps in how project impacts on local tourism and communities were assessed.”⁷³ Also, there is the Santa Rita Hydro-electric Power project in Guatemala, where the IFC staked equity investment in 2012 in the Latin Renewables Infrastructure Fund – a financial intermediary. The project was abruptly stopped due to several E&S concerns by the affected community and conflict. In 2017, the CAO’s compliance audit on the IFC’s ESRP conducted on the Santa Rita project showed that the IFC’s approach to E&S reviews and appraisals of its equity investments in financial intermediaries was flawed as it was often not commensurate to risk.⁷⁴

Barbara Scheck, “What’s in a name: An analysis of impact investing understandings by academics and practitioners” (2015) 132(2) *Journal of Business Ethics* 449; Edward T Jackson, “Interrogating the theory of change: Evaluating impact investing where it matters most” (2013) 3(2) *Journal of Sustainable Finance & Investment* 95 97; Paul Brest and Kelly Born “When can impact investing create real impact” (2013) 11(4) *Stanford Social Innovation Review* 22-31; Karim Harji and Edward T. Jackson *Accelerating impact: Achievements, challenges and what’s next in building the impact investing industry* (New York, NY: The Rockefeller Foundation, 2012).

72 IFC “Guide to investing for impact: Operating principles for impact management” (October 2018) <<https://www.impactprinciples.org/sites/opim/files/2019-08/Operating%20Principles%20for%20Impact%20Management%20Guide%20Aug%202019.pdf>> accessed 23 July 2020.

73 CAO, “FY2018 Year in review: Solutions, accountability, learning” (2018) <http://www.cao-ombudsman.org/publications/documents/CAO_annualreport_English_web_000.pdf> accessed 24 July 2019.

74 CAO, “CAO Investigation of IFC Environmental and Social Performance in relation to: Latin Renewables Infrastructure Fund, Latin America Region, as related to Hidroeléctrica Santa Rita complaint” (14 August 2017) <http://www.cao-ombudsman.org/cases/document-links/documents/CAOInvestigationReportREALLRIF_Final.pdf> accessed 26 July 2019.

Some of the faults associated with the IFC's compliance failures include rushed review procedures that can be a recipe for missteps and the inadequate consideration of the broader risks and impacts that extractive projects may have on communities.⁷⁵ Such broader risks for communities include the sustainability of access to water and land, source of livelihood, the sacred attachment to and traditional practices with land, and the long-term preservation of the social fabric of communities. For clients and the IFC, dependence on the revenues generated from the projects often means that timely execution must be prioritized. However, this is done at the expense of such broader, often non-mandatory considerations on sustainability. In other cases, the IFC ESRP is often disengaged from a pragmatic application of the principles of FPIC in engaging and obtaining the broad support of communities. Besides the CAO internal fault-finding with the IFC review process, a consortium of international CSOs led by Oxfam International found that the IFC "is failing to perform due diligence and to identify or effectively manage risk in many of its investments in third-party lenders."⁷⁶ Based on a 2015 independent investigative report on IFC investments in high-risk financial intermediaries since 2012, it was found that "there is no public information about where 94 percent of the IFC's recent high-risk investments end up."⁷⁷ The report also accuses the IFC of poor risk identification and assessment, "a large-scale failure of due diligence", "lack of transparency" on the identity of high-risk clients,⁷⁸ failure "to track and monitor its investments," and the miscategorization of risks.⁷⁹

75 CAO, "IFC's Management's Response to the CAO Investigation Report on the Latin Renewables Infrastructure Fund, as related to the Hidroeléctrica Santa Rita complaint (project #31458)" (6 October 2017) <<http://www.cao-ombudsman.org/cases/document-links/documents/IFCManagementResponseToCAOInvestigationReportforLatinRenewables....pdf>> accessed 24 July 2019.

76 ESCR-Net "International Finance Corporation Investments Cause Human Rights Abuses around the World" 10 April 2015 <<https://www.escri-net.org/news/2015/international-finance-corporation-investments-cause-human-rights-abuses-around-world>> (accessed 23 July 2020).

77 Oxfam International, "The Suffering of Others: The Human Cost of the International Finance Corporation's lending through financial intermediaries" (April 2015) <<https://oxfamilibrary.openrepository.com/bitstream/handle/10546/347438/ib-suffering-of-others-international-finance-corporation-020415-en.pdf;jsessionid=E3ACF9CCE61C396CCCA9CEB93E43446C?sequence=20>> accessed 23 July 2019.

78 Oxfam International (n 77 above) 7.

79 Oxfam International (n 77 above) 18.

4. SCRUTINIZING THE IFC'S DUE DILIGENCE CHALLENGES

One way to evaluate the efficiency of the IFC's due diligence approach to adverse E&S risks or impacts in the extractive industries is to query the quality of compliance with its own policies and review procedures. To do this, one need not look any further than the discernible trends from CAO's compliance audit of IFC-involved projects since the adoption of the 2012 Framework. According to recent CAO statistics, 28 complaints were filed in 2018 alone (87 per cent of these were exclusively against the IFC and 12 per cent jointly against the IFC and MIGA). Only 1 per cent has been exclusively against MIGA. That means, roughly 99 per cent were IFC-involved projects. By regions, 28 per cent of all cases are from Sub-Saharan Africa, the highest of all the various regions. After infrastructure projects which account for 29 per cent of cases (and are often linked to natural resources), the oil, gas and mining sectors accounted for 19 per cent of the total number of complaints by sector.⁸⁰ From the audit, the CAO found that 56 per cent of all complaints dealt with policy compliance, 50 per cent with community health and stakeholder engagement, 46 per cent with economic displacement, 43 per cent with pollution and compensations, and 40 per cent with risk assessment as well as biodiversity and natural resource impact.⁸¹ These are comparable to the 2019 figures. Of the 51 cases pending as of June 2019, the Sub-Saharan Africa region had the highest number of complaints with 13 cases. By sector, the oil, gas and mining sector also came second after infrastructure with 13 cases.⁸²

Beyond the retinue of cases filed before the CAO, allegations of fraud, bribery and corruption have not only further scandalized the IFC's policy compliance approach, the spate of debarment of companies cleared by the IFC E&S review process further puts the IFC in the spotlight. Sobják claims that "half of bribes paid are in industries with the largest spending on infrastructure, namely the extractive (19 per cent), construction (15 per cent) and transportation (15 per cent) sectors".⁸³ The high corruption

80 CAO (n 73 above) 20-22.

81 As above.

82 CAO, "CAO Update" (Issue 16 July 2019) 4 <http://www.cao-ombudsman.org/publications/documents/CAO_News_Issue2019-Q4PRESS.pdf> accessed 26 July 2019.

83 Anita Sobják, "Corruption risks in infrastructure investments in Sub-Saharan Africa" (2018) <<https://www.oecd.org/corruption/integrity-forum/academic->

risks associated with infrastructure projects linked to the extractive industries have not always turned out well for the IFC. A series of allegations of misconduct involving IFC-funded projects have been reported to the WBG's anti-corruption arm, the Integrity Vice Presidency (INT), which investigates practices considered to be corrupt, coercive, collusive, fraudulent and obstructive.⁸⁴ Determinations by the INT are referred to the World Bank Suspension and Debarment Officer for appropriate action. Some of these have frequently resulted in suspension or disbarment from World Bank-linked projects and further muddied the IFC brand. Of the over 343 corruption cases opened between 2013 and 2017, at least, 13 of such debarment cases specifically pertained to the IFC.⁸⁵ The INT confirms that fraud and corruption, if unchecked in World Bank-supported investments, can lead to over-estimated project costs and limit development outcomes.⁸⁶

What do these numbers say about the IFC's compliance and how has its implementation complementarily responded to the deficits of resource governance and the challenges communities face in African countries? They suggest that the sustainability policies may be doing no more than simply "greenwashing" the IFC corporate brand. One thread that has dotted the complaints against the IFC's approach to ESG issues in the extractive industries and other business sectors is its reactive outlook. There is a common perception by IFC staff and sustainability scholars that the pioneering adoption of E&S policies and standards puts the IFC ahead of the curve in the sustainability discourse. Yet, weighed against its mandate of reducing poverty and creating opportunity

papers/Sobjak.pdf> accessed 25 July 2019; OECD, *Corruption in the extractive value chain: Typology of risks, mitigation measures and incentives* (2016) 30-32 <<http://www.oecd.org/dev/Corruption-in-the-extractive-value-chain.pdf>> accessed 27 July 2019.

84 Maria Barton, "Understanding the World Bank Group's anti-corruption measures in project financing" (2011) 3 <<https://www.lw.com/thoughtLeadership/world-bank-group-anti-corruption-measures-in-pf>> accessed 25 July 2019; RAID, "The World Bank in the Democratic Republic of Congo" (2006) <<http://www.raid-uk.org/sites/default/files/briefing-worldbank-drc.pdf>> accessed 26 July 2019.

85 WBG, "Annual update: Integrity Vice Presidency" (2017) 24 <<http://pubdocs.worldbank.org/en/703921507910218164/2017-INT-Annual-Update-FINAL-spreads.pdf>> accessed 26 July 2019.

86 World Bank Group Integrity Vice Presidency, "Annual update: Fiscal year 2014" (2014) 26 <<http://pubdocs.worldbank.org/en/663211449168835106/INT-FY14-Annual-Update.pdf>> accessed 27 July 2019.

for all, neither the trends nor available statistics from the CAO speak in support of that assumption. In fact, since 1986, its policy commitments, performance standards, ESRPs and EHS Guidelines have nearly always only responded to grievances arising after the fact. Due to its profit-before-people approach, it has been quite slow, if not unable, to take the initiative to pre-emptively anticipate, develop strategic responses and seamlessly initiate proactive plans of action that address the every-day concerns of communities or the broader issues on sustainability.

Ordinarily, the IFC is both a norm-setter and norm-implementer – the twin characteristics that should not be evaluated separately. Its sustainability policies and performance standards are primarily intended, not as a publicity stunt but, to guide it and its clients on the assessment and management of risks and impacts associated with projects. As such, compliance with responsible and sustainable business practices must be scrutinized against the backdrop of *adopting* and *implementing* its own policies and standards as well as broader international standards on human rights, labour and the environment. The IFC cannot be seen to take the glory for adopting standards if it is not prepared to accept fault for their poor implementation. Since 2000, the failure to representatively and respectfully engage communities, obtain their FPIC, secure broad community support, and build as well as maintain trust through early disclosure and sustained dialogue, are some of the faults precipitating the IFC's poor E&S review processes. Other shortcomings include the poor management of compensation and non-resettlement of communities on agreed terms (as was the case in the New Liberty Gold Mining Project in Liberia).⁸⁷ With respect to clients, hurried reviews of client-prepared environmental and social impact assessments (ESIAs), aggressive pursuit of project deadlines, and failure to continuously monitor clients' E&S action plans to avoid or mitigate risks and adverse impacts have greatly undermined the integrity of the IFC's due diligence process.

Considering the daunting challenge of resource governance in Africa, the cost of enervated implementation should not be underestimated. Between 2003 and 2014, an estimated three million people have been displaced on account of poorly evaluated risks associated with IFC

87 Emmanuel Freudenthal and Alloycious David, "How a Gold Mine Has Brought Only Misery in Liberia" (21 March 2017) <<https://www.thenewhumanitarian.org/investigations/2017/03/21/how-gold-mine-has-brought-only-misery-liberia>> accessed 19 July 2019.

investment projects. At the moment, several complaints from communities and organizations affected by IFC-funded projects in the extractive industries in Africa are still pending. In Marikana, South Africa, a Category A Lonmin Platinum mine project threatens to contaminate air and groundwater, and negatively impact the living conditions of local communities. Funded by the IFC since 2016, the project raises dust about the scoping of IFC E&S reviews.⁸⁸ In Uganda, multiple injuries arising from the construction of the run-of-the-river 250 megawatts Bujagali Energy Project has resulted in several complaints by workers engaged by the construction company. These poke holes in the IFC review of the company's labour conditions, workers' compensation structure and safety supervision.⁸⁹ In Liberia, an IFC-funded rubber plantation project expansion of a local company, Salala Rubber Corporation, has led to complaints by 22 communities for lack of consultation, land grabbing, economic displacement, forced eviction, loss of livelihood, abusive labour and employment conditions, gender-based violence, intimidation and threats.⁹⁰ In Nigeria's Port Harcourt in Rivers State, where the Eleme Fertilizer construction plant project is being executed, allegations of dangerous working conditions, discriminatory remuneration between local and foreign staff for similar tasks, and the forceful repression of peaceful protests over these conditions have warranted complaints against the IFC's involvement.⁹¹

The reverberating nature of this kind of cases and more from other parts of the world demonstrate the fundamental disconnect between policy and implementation. What is clear is that despite the IFC's leadership in advancing sustainability norms, there is a consistent gap in its due diligence implementation process. The cases equally highlight that profit remains prioritized over people and that this may be the unseen hand behind the IFC's impending policy compliance collapse.

88 CAO, "Compliance appraisal: Summary of results" (4 December 2017) <http://www.cao-ombudsman.org/cases/document-links/documents/CAOAppraisalLonmin_Dec4.pdf> accessed 28 July 2019.

89 CAO, "Uganda / Bujagali Energy-08/Bujagali" (6 June 2017) <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=1265> accessed 28 July 2019.

90 CAO, "Liberia / Salala Rubber Corporation-01/Margibi and Bong" (27 May 2019) <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=3282> accessed 28 July 2019.

91 CAO, "Nigeria / Eleme Fertilizer-01/Port Harcourt" (11 April 2018) <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=1273> accessed 28 July 2019.

5. A HUMAN-CENTRED APPROACH TO FUTURE IFC PROJECTS

Overcoming the IFC's crisis of implementation requires both an institutional remodelling and a human face. As shown above, the policy transition from the ESSAP to the 2012 Sustainability Framework has seen progress in how the IFC engages E&S risks and impacts in investment projects. Yet, that trajectory has not fixed the broken link between its policy commitments and compliance challenges on the ground. In Africa, especially, a sustained trend of poor consultations, lack of transparent community engagement and FPIC, hostility and corruption have weighed down the integrity of the IFC's compliance processes. A common factor in all three regimes of sustainability policies and governance is that the ESRPs have been more of a tick-box exercise and blind to human rights and the broader concerns of communities. This suggests that the problem is much more a matter of business approach than it is of policy or normative gap. It is antithetic to pursue development projects without prioritizing the communities for whom they are meant.

To stop the haemorrhaging of the IFC's E&S due diligence processes, there needs to be an institutional shift from a profit-based to a human-centred or human rights approach to development. The human rights-based approach is "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights."⁹² It analyses development problems that are underscored by inequalities and the unjust distributions of power for better development outcomes on the basis of fundamental human concerns. The human-centred approach is relevant to IFC-funded projects because it offers an important paradigm shift from a checklist-style of risks assessment and management to an all-inclusive environmental, social and human rights due diligence approach that is more circumspect of the concerns of people and society. It is based on human (and peoples') rights and draws from the understanding that development, security and human rights are mutually reinforcing.⁹³ It recognizes that only by placing people at the

92 UNICEF, "Human Rights-based Approach to Programming" <https://www.unicef.org/policyanalysis/rights/index_60319.html> accessed 28 July 2019.

93 UN General Assembly, "In larger freedom: Towards development, security and human rights for all - Report of the Secretary-General" UN Doc A/59/2005 (21 March 2005) paras 14-16 <<https://www.globalpolicy.org/images/pdfs/followupreport.pdf>> accessed 29 July 2019.

core of development projects can the goal of eliminating poverty and promoting shared prosperity be attained. Characteristically, the approach seeks the integration of the internal goals of the IFC with the external concerns of communities based on established international standards on human rights, labour, the environment and sustainable development.

The human-centred approach to development credits its origin to the institutional reform of the UN between 1997 and 2005 and the then UN Secretary-General's call for the mainstreaming of human rights into the activities and programmes of all entities of the UN system.⁹⁴ The call also required that all affiliated entities to adopt what is now widely known as the *human rights-based approach* (HRBA) to development.⁹⁵ To that extent, it is safe to state that the HCBM to development finance is not at all inconsistent with the HRBA to development as a concept. The HCBM places human beings and human dignity at the centre of the business enterprise, which are equally both at the heart of the HRBA. As a specialized agency of the UN, the WBG (and, by necessary implication, the IFC) equally have a responsibility to incorporate the HRBA into not only its internal affairs but also its external engagements with investment projects. Unfortunately, the WBG – including the IFC – has been relatively slow in integrating and implementing this important policy-implementation approach in its own goal of ending poverty and boosting shared prosperity.

For the WBG, the “currency of change” and the ever-urgent need for reforms are a constant imperative.⁹⁶ No doubt, such pressures have seen to the Bank's adoption of a sustainability-based investment outlook and precipitated the evolution of the IFC Sustainability Policies and Standards, including the recent WBG's Environmental and Social Framework (ESF). The ESF was adopted in 2016 and came into operation on 1 October 2018 with human rights embellishments. Yet, despite its fairly forward-looking approach to managing E&S issues associated with

94 As above.

95 HRBA Portal, “The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies” <<http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>> accessed 27 July 2019.

96 Diane Stone and Christopher Wright, “Introduction: The Currency of Change: World Bank Lending and Learning in the Wolfensohn era” in Diane Stone and Christopher Wright (eds), *The World Bank and Governance: A Decade of Reform and Reaction* (Routledge, 2006) 1, 2-8.

all WBG projects, it risks falling into the same compliance trap as the IFC if it does not adopt a human rights-centred approach to development.⁹⁷

Aware of this, the WBG is currently working with several partners on a human-centred business model (HCBM) project. The project is being developed within the framework of the Global Forum on Law, Justice and Development as a “holistic approach to a sustainable business ecosystem”.⁹⁸ Focusing on human beings and the environment, the HCBM seems to be the business version of the HRBA. It seeks to draw long-term benefits and sustainable value to companies, stockholders and the wider community where they operate by aligning the drive for profit with the broader interests of communities and other external stakeholders. The HCBM also seeks to address “not only the internal systems within the Human-Centred Enterprise (HCE) but also the external context” by fashioning and facilitating, sustainable and viable “ecosystem” for business that is inclusive of financial, fiscal, legal and corporate governance, procurement and stakeholder relationships.⁹⁹ The project is intended to deliver a set of HCBM Social Sustainability Principles.¹⁰⁰

If applied to the extractive industries context, the human-centred approach to investment project finance will enable the IFC to proactively address the broader issues of sustainability, human rights and E&S concerns while also driving its goal of profit. By placing human rights at the core of its policy implementation and E&S review procedures, it will help IFC staff and clients to holistically engage and address the regular and remote concerns of individuals and communities from the outset of a project. This will be possible because the approach gives little room for clients and IFC staff to miss the immediate and long-term risks or impacts of investment projects. Integration of the HRBA or HCBM into the IFC’s approach to business will enable the IFC to better understand the linkages between good corporate governance, E&S review procedures, CSOs, and local communities, on the one hand, and development and social transformation, on the other. With the approach, pre-project consultations

97 World Bank, “Environmental and Social Policies” (2016) <<https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>> accessed 16 June 2019.

98 Teodorina P. Lessidrenska, “Human centered business model social principles and indicators paper” (10 October 2018) 20 <<https://www.unidroit.org/english/news/2018/181112-hcbm-workshop-guiding-principles-rome/lessidrenska-hcbm-social-sust-e.pdf>> accessed 26 September 2019.

99 As above, 21.

100 As above, 23.

and engagements can be expected to be free, prior and informed, based on transparency and be broad as well inclusively representative of affected communities.

6. CONCLUSION

For the extractive industries to deliver real economic growth and development in line with the SDGs, its high environmental, social, and human rights costs to communities have to be addressed in a transparent, responsible and sustainable way. The failure of African host governments to effectively supervise the sector and protect affected communities as well as the environment creates vast resource governance gaps that have often led to significant abuses by companies. However, given the enormous investment support that such companies get from IFIs, institutions like the IFC have a crucial complementary role to play in preventing or mitigating the adverse impacts of investment projects in African countries. International standards on human rights, labour and the environment and MSIs affirm the responsibilities of IFIs to respect human rights and refrain from causing harm.

The IFC in particular, as a leading IFI, has great leverage over the E&S risks and impacts of its investment projects in African countries. Over the last two decades, it has developed extensive E&S sustainability policies and standards to govern its relationship with clients in terms of how project risks or impacts are assessed and managed. From the Safeguard Policies adopted in the 1990s to the 2006 and, subsequently, 2012 Sustainability Framework, the IFC has amassed a great deal of experience in conducting E&S reviews that seek to promote sustainable investments and mitigate or avoid harm. However, despite much progress, a relatively high number of complaints by affected communities show that there is a great deal of disconnect between its policy commitments and procedural compliance. Consultations and engagements with local groups, workers' rights and the long-term E&S impacts of projects remain weak and continue to evade IFC due diligence compliance contrary to Goals 10 and 16 of the SDGs.

As this article has shown, the detachment between the IFC's policies and standards, on the one hand, and project implementation, on the other, is a matter of business approach. The prioritization of profit over people is largely responsible for the IFC's failing compliance system. To reverse the tide, the IFC may need to integrate the human rights-based approach or, at the very least, the HCBM, in its review process in order to

ensure that the pursuit of profit is coherent with the development needs of local communities and the global concerns for the environment. Until this is done, the IFC's E&S policies will remain a mere paper tiger in the sustainability discourse and its compliance record an embarrassing reference point on IFI abuses in the developing world.