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INTERNATIONAL ENVIRONMENTAL SYMPOSIUM

THE ENVIRONMENTAL IMPACTS OF INTERNATIONAL FINANCE CORPORATION LENDING AND PROPOSALS FOR REFORM: A CASE STUDY OF CONSERVATION AND OIL DEVELOPMENT IN THE GUATEMALAN PETÉN

BY

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This Article presents a case study of lending by the International Finance Corporation (IFC), the private-sector lending arm of the World Bank Group,

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in the oil and gas sector in Guatemala. The case study emphasizes the need for additional environmental reform at IFC. With two separate loans in 1994 and 1996, IFC supported the activities of a small international oil company that was operating within a national park in the northern Guatemalan Petén, an area of rich tropical forests and globally important wetlands. The company's operations had been "grandfathered" into the park upon its creation in 1990. Funding from IFC was used to construct a pipeline from the oil field in the park to a refinery outside of the park. The crux of the authors' findings is that the pipeline should have been constructed to follow the path of an existing road, rather than along the chosen route that crosses significant stretches of primary tropical forest and that opened a new right-of-way into a park already facing continued pressure from colonization. The authors conclude that a stronger set of IFC lending policies, combined with a better environmental impact assessment and more extensive public consultation, would have led to a less environmentally damaging outcome. Although the authors acknowledge the complex questions about the role of governments, development agencies, the private sector, conservation organizations, and local communities raised by this issue, they focus on the narrow subject of IFC's role in this matter, stressing the need for a reform agenda at that institution.

I. INTRODUCTION

The lending practices of the World Bank[1] have been subject to scrutiny and criticism by environmentalists and governments for nearly two decades. In particular, numerous investments in large-scale dams and other infrastructure development projects have been shown to have high environmental costs and questionable development benefits.[2] In response to these criticisms, the World Bank created a series of policy measures designed to reduce the environmental impacts of its lending. The most significant reforms so far have occurred at the International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA), the two main public finance arms of the World Bank. However, at the same time that World Bank public sector lending reforms have started to take hold, private capital flows have increased dramatically in recent years.[3] As a result, environmentalists have increased their scrutiny of the loans and lending practices of the International Finance Corporation (IFC), the private sector lending arm of the World Bank. This Article presents a case study of IFC lending in the oil and gas sector in Guatemala that underscores the need for additional environmental reform at IFC.

This case study involves IFC, a small international oil company called Basic Resources International Limited (Company), and Conservation In-

[1] The World Bank Group includes the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA), and the International Finance Corporation (IFC).

[2] See BRUCE RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT (1994) for a discussion of such projects as the Polonoroeste regional development program, Balbina Dam, and others.

[3] THE WORLD BANK, 1996 ANNUAL REPORT 61 (1997).

ternational (CI), a Washington-based conservation nongovernmental organization (NGO) with offices and a substantial field presence in Guatemala. We begin with a section containing background information on conservation measures undertaken in the northern Petén region of Guatemala, a brief history of oil development in that region prior to 1994, and an overview of current oil operations in the area. We then provide an introduction to IFC and a summary of applicable IFC policies. Next, we present an account of the major events related to the case study at hand: two IFC loans to the Company and the involvement of CI and other parties from 1994 to the present. We conclude with a discussion of lessons learned from this case study and specific proposals for a reform agenda at IFC.

At its core, this case study concerns loans made by IFC to increase significantly the efficiency and volume of oil extraction in a concession that was grandfathered into a national park. The park in question was and continues to be under sustained pressure from colonization. Over the course of two loans, IFC funds were used to construct a pipeline from the oil field in the park to a refinery outside the park and subsequently to expand production at the oil field. The crux of our findings is that the pipeline should have been constructed to follow the path of the existing road previously used by the oil trucks. Instead, the pipeline crosses significant stretches of primary tropical forest and has opened a new right-of-way into the park without adequate measures to protect the park from new colonization. It is our judgment that a stronger set of IFC lending policies, a better environmental impact assessment, and greater public consultation would have led to a different outcome. IFC should adopt stronger policies to avoid such environmentally damaging investments in the future. As extractive industries and related infrastructure push further into tropical wilderness areas, publicly financed international agencies like IFC have a particular responsibility to ensure that their loans have a net positive impact on environmental protection.

This case study is complicated by the fact that it includes two separate IFC loans. In the authors' view, there was a progression in the degree of openness and transparency on the part of IFC over the three years spanning the two loans discussed. Many of the improved practices by IFC management and staff in the second loan are a reflection of the new leadership that World Bank President James Wolfensohn has brought to IFC. The initial loan raises numerous and clear issues related to the reform agenda at IFC. The second loan presents a more complex set of issues because 1) IFC also utilized a set of public consultation and environmental impact practices that mark an improvement over those used in the first loan, and 2) the activities funded presented a narrower range of environmental risks. Matters are further complicated by the fact that the Company recently decided to prepay its loans to IFC—a step that effectively precludes IFC from any further involvement in the project, including the ability to monitor and oversee the environmental performance of its loans.

In the final analysis, the case study presents IFC as an institution in need of reform. Its environmental assessment process and operational pol-

icies to protect tropical forests and critical habitats did not lead to a project that contributes meaningfully to protection of a globally important national park. On the contrary, IFC funds were effectively used to open up a new pathway for colonization into a park that already faces considerable threat to its viability. This case study also points to shortcomings in IFC information disclosure policies—policies that allow IFC to protect itself from certain forms of public criticism but do not effectively serve the public interest. We explore these issues and recommendations in greater depth after presenting background information on this case study.

Conservation and development decisions made in Guatemala and throughout the world are made against an intricate and dynamic socioeconomic and political backdrop. It is essential to acknowledge that the development activities financed by IFC were legal under the laws of Guatemala. Although controversial, the Company complied with applicable laws when constructing and operating its oil facilities. The policies of Guatemala, or any other country, may not be congruent with those of IFC and the larger World Bank Group. Indeed, there is a confusing and contradictory regulatory framework in Guatemala. Nevertheless, it is IFC's responsibility to apply its own natural resources policies and, in any case, support the course of action that results in the least environmentally damaging option.

This case study raises numerous questions about the role of governments, development agencies, the private sector, conservation organizations, and local communities, but the authors do not attempt to address all pertinent questions in this Article. While acknowledging the larger complexities, the authors have chosen to focus on the narrow issue of IFC's role in such matters, with the goal of improving that institution's environmental performance.

II. BACKGROUND

This section provides background information on relevant conservation and oil development issues in northern Guatemala. It begins with a discussion of conservation measures undertaken to protect the natural resources of the region. It then provides a brief history of oil development in the region. Finally, it concludes with an introduction to Basic Resources International Limited (Company) and a specific discussion of the Xan oil field and the Company's operations there.

A. The Maya Biosphere Reserve and Laguna del Tigre National Park

Spanning nearly 2.1 million hectares of the northern Guatemalan department of Petén and abutting Mexico to the north and west and Belize to the east, the Maya Biosphere Reserve (MBR) is an area of primary lowland tropical forests and expansive wetlands. It contains globally important biological diversity[4] and is host to significant archaeological treasures, such

[4] BIODIVERSITY SUPPORT PROGRAM ET AL., A REGIONAL ANALYSIS OF GEOGRAPHIC PRIORITIES FOR BIODIVERSITY CONSERVATION IN LATIN AMERICA AND THE CARIBBEAN xxi (1995); E. DINER-

as the Tikal ruins, dating back to the height of Mayan civilization. Created in 1990, the MBR was the cornerstone of a Guatemalan government plan to preserve its country's vast biological wealth and stem the tide of uncontrolled logging, colonization, agriculture, and infrastructure that was spreading into the forests of the Petén.[5] The heart of the reserve is its nearly 800,000 hectares of strictly protected core zones, which include national parks and biotopes (wildlife refuges) reserved solely for conservation.[6] The rest of the reserve is composed of about 841,000 hectares of multiple-use zones—designed to accommodate environmentally sound production of timber, tourism development, and nontimber forest products—and a buffer zone of about 480,000 hectares.[7]

The biggest core zone within the MBR is also Guatemala's largest national park, the 340,000-hectare Laguna del Tigre National Park and Biotope (Laguna del Tigre),[8] which was established at the same time as the reserve in 1990. The park contains the largest protected freshwater wetland in Central America and has been recognized as a "wetland of international importance" under the 1971 Ramsar Convention on Wetlands of International Importance, ratified by Guatemala in 1990.[9] Laguna del Tigre

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STEIN ET AL., A CONSERVATION ASSESSMENT OF THE TERRESTRIAL ECOREGIONS OF LATIN AMERICA AND THE CARIBBEAN 66, map 7 (1995).

[5] STEVEN A. SADER, FOREST MONITORING AND SATELLITE CHANGE DETECTION ANALYSIS OF THE MAYA BIOSPHERE RESERVE, PETÉN DISTRICT, GUATEMALA 1, 19 (1996) (final report submitted to CI and the U.S. Agency for International Development).

[6] *Id.* at 19.

[7] *Id.*

[8] *Id.*

[9] The Convention on Wetlands of International Importance, Feb. 2, 1971, T.I.A.S. No. 11,084 [hereinafter Convention]. The convention was signed in Ramsar, Iran in 1971 and entered into force on December 21, 1975. *Id.* at 1. As of November 18, 1998 there were 113 contracting parties, with 956 wetland sites totaling more than 70 million hectares (ha). *Ramsar Convention on Wetlands* (visited Nov. 18, 1998) <http://www.iucn.org/themes/ramsar> [hereinafter *Ramsar Convention*]. Article Two of the convention requires signatories to designate at least one wetland in their country for inclusion in the List of Wetlands of International Importance. Convention, *supra*, at 5-6. Article Three requires them to formulate and implement their planning to promote the conservation of wetlands included in the list. *Id.* And, Article Four requires them to promote wetlands conservation by establishing nature reserves on listed as well as unlisted wetlands. *Id.* The convention further states in Article Four that countries should not delete or reduce the boundaries of listed wetlands unless compelled to do so by an urgent national interest. *Id.* at 6. In the event that a country is compelled to reduce a listed wetland or remove it altogether, the convention states in Article Three that the country should notify the entity performing continuing bureau duties of the change. *Id.* In addition, under Article Four, the country should compensate for any loss of wetlands resources as far as possible, in particular by creating new nature reserves for waterfowl and for remaining portions of the original wetlands habitat. *Id.*

The convention came into force in Guatemala on October 26, 1990. *Ramsar Convention*, *supra*. Guatemala currently includes three wetlands on the Ramsar list, the largest of which is the 48,372-hectare Laguna del Tigre biotope, located inside the boundaries of Laguna del Tigre National Park. *Id.* The Laguna del Tigre site is also included on the Montreux Record, a record established at the Fourth Meeting of the Conference of the Contracting Parties which lists "sites which have incurred or are being threatened by change in ecological character." *Id.*

is also an important wintering ground for North American migratory birds.[10]

B. Legal Framework for Protected Areas Management in the Petén

The natural and cultural resources within the Maya Biosphere Reserve are administered and managed by the Guatemalan National Council for Protected Areas (CONAP)[11] according to the mandate established in Congressional Decrees 4-89 and 5-90.[12] CONAP and the National Commission on the Environment (CONAMA) are housed in the President's office and serve as the country's principal environmental agencies.[13] Within the reserve, the Laguna del Tigre, San Miguel La Palotada, and Dos Lagunas biotopes are administered by the Center for Conservation Studies at the University of San Carlos (CECON).[14]

The Maya Biosphere Reserve is made up of parts of five different Guatemalan municipalities: Melchor de Mencos, Flores, San José, San Andrés, and La Libertad.[15] The Laguna del Tigre National Park is contained entirely within the Municipality of San Andrés. According to Guatemalan municipal codes, a municipality has the right and responsibility to oversee land use and environmental issues and to assist institutions dedicated to environmental conservation operating within its boundaries.[16]

C. Oil Development in the Petén

Estimates of Guatemala's oil reserves vary widely, from an oil industry estimate of 16 million barrels of exploitable reserves, to the Ministry of Energy and Mines's 1993 claim of 351 million barrels of proven reserves

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10 Olga Herrera-MacBryde & Jane Villa-Lobos, *Peten Region and Maya Biosphere Reserve* (last modified Jan. 22, 1998) <http://www.si.edu/botany/projects/centres/peten.htm>.

11 The Reserve is also administered in coordination with USAID, The Nature Conservancy (TNC), Conservation International, and CARE International. Juanita Sundberg, *NGO Landscapes: Conservation in the Maya Biosphere Reserve, Peten Guatemala* (last modified Nov. 1997) <http://www.txinfinet.com/mader/planeta/1197/1197maya.html>.

12 Herrera-MacBryde & Villa-Lobos, *supra* note 10.

13 *Documentos Basicos de la Comisión Nacional del Medio Ambiente de Guatemala (CONAMA)* (visited Feb. 7, 1999) <http://www.ecouncil.ac/centroam/conama/pres1.htm>.

14 CONSEJO NACIONAL DE AREAS PROTEGIDAS, DECRETO NÚMERO 5-90: RESERVA DE LA BIÓSFERA MAYA 8 (1992) [hereinafter CONSEJO NACIONAL]. The Master Plan for the Maya Biosphere Reserve was approved by the Guatemalan National Council for Protected Areas (CONAP) in March 1992 in Guatemala City.

15 *Id.* at 2.

16 ALEJANDRA SOBENES, FUNDACIÓN CONSERVACIÓN INTERNACIONAL/CI PROPETÉN, OBLIGACIONES DE LAS MUNICIPALIDADES EN LA PROTECCIÓN DEL MEDIO AMBIENTE 4, 5 (1996) (citing A. SOBENES, ORGANIZACION PANAMERICA DE LA SALUD OPS/OMS, LINEAMIENTOS PARA LA ELABORACIÓN DE PLANES DE ASEO URBANO: ASPECTOS LEGALES (1994) (summarizing the Código Municipal (58-88 del Congreso de la Republica de Guatemala, Artículo 7))).

and 1.43 billion barrels of probable reserves.[17] Guatemala currently consumes about 40,000 barrels per day (bpd) of oil.[18]

Although oil was discovered in Guatemala as early as the 1930s, active exploration did not begin until the 1970s, and commercial production did not begin until 1979.[19] During the early to middle 1980s, several international oil companies, including Amoco, Exxon, and Basic Resources, came to Guatemala and found large fields in the Petén.[20] However, Guatemala's civil war soon began to affect oil operations in the country, and all three companies stopped their operations in the middle to late 1980s.[21] As the political situation began to stabilize in the early 1990s, the Guatemalan Ministry of Energy and Mines again started actively to pursue bids for new oil exploration and development.[22] To date, oil contracts have been granted, or are about to be granted, for much of the area of the Petén.[23] Several of these concessions overlap with core protected areas within the MBR, despite the fact that the master plan for the reserve allows oil development only in multiple-use or buffer zones.[24]

1. The Company

Although there are several companies exploring for oil in the MBR, the Company is currently the only active producer in Guatemala.[25] The Company is a small oil company that was incorporated in the Bahamas in October 1967 with its headquarters in Paris. Its only production operation is in Guatemala. In 1970, the Company received the first petroleum exploration concession granted by the government of Guatemala for rights to explore in the region of Alta Verapaz.[26] The Company began commercial production at this concession in 1979. At the time of application for its loans from IFC, the majority shareholder in the Company was Basic Hold-

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17 Liza Grandia, Crude Destruction: The Threat of Oil to Sustainable Development in the Maya Biosphere Reserve 17-18 (Dec. 1994) (unpublished manuscript, on file with Professor David Lumsdaine, Yale University).

18 Fiona Ortiz, *Guatemala Oil Production Sees Sharp Increase*, REUTERS, June 13, 1996 (on file with authors).

19 Grandia, *supra* note 17, at 17.

20 Anson Ng, *Enthusiasm Runs Out in Guatemala Oil Industry*, FIN. TIMES, Feb. 25, 1987, at I4.

21 *Id.*

22 Although the major oil companies have not yet returned to Guatemala, there are several smaller companies, in addition to Basic, exploring there today, including Triton Energy Corp (Dallas), Ceiba Petroleo S.A. (a local partnership between Canada's Seine River and the U.S.'s Pensa Inc.), Consolidated Ramrod Gold Corp. (Canada), and Mexpetrol (a partnership between U.S. and Mexican companies). Ortiz, *supra* note 18.

23 MIGUEL ANGEL CARBALLO HERNÁNDEZ, BASIC RESOURCES INT'L (BAHAMAS) LTD., EVALUACIÓN DE EFECTOS ACUMULATIVOS EN EL CONTRATO 2-85, AREAS CONEXAS Y ALREDEDORES, at 8-9 (May 1996) (on file with authors) [hereinafter CONTRATO 2-85].

24 CONSEJO NACIONAL, *supra* note 14, at 9-10.

25 Ortiz, *supra* note 18.

26 BASIC PETROLEUM INT'L, LTD., COMMISSION FILE NUMBER 0-11923, FORM 20-F ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 1996, at 2-3 (1997) [hereinafter 1996 ANNUAL REPORT TO SEC].

ings Limited (BHL), a Bahamian company owned by officers and directors of the Company, General Oriental Investments Limited, and other investors.[27] In June 1996, the Company made a public offering of one million ordinary shares, generating net proceeds of about $27.5 million.[28] In May 1997, the Company entered into a merger agreement with Norcen Energy Resources Limited, a Canadian corporation, and SAN Limited, a wholly owned subsidiary of Norcen based in the Bahamas.[29] Norcen became the majority owner of the Company by the end of 1997.[30]

2. Xan Oilfield

Today, the vast majority of Guatemala's current oil output of more than 20,000 bpd is produced at the Company's Xan oil field,[31] the site discussed in this case study. The Xan field is located in the northwest corner of the Petén, within the Laguna del Tigre National Park.[32] The Company began working the Xan field in 1985, shortly before the withdrawal of all other oil companies from Guatemala.[33]

Although, by law, oil development is not allowed within the core zones of the Maya Biosphere Reserve,[34] the Company's Xan operations were grandfathered into the national park because the concession was granted in 1985, five years before the reserve and park were created in 1990.[35] The Company's concession under the 1985 contract covered about three percent of the current area of Laguna del Tigre National Park.[36] However, in 1992, the Company was granted a second concession that expanded its concession area to cover more than sixty percent of the park.[37] This contract was signed two years after the establishment of Laguna del Tigre as a national park and a core zone within the Maya Biosphere Reserve.[38]

The oil produced by the Company at the Xan field is a heavy, sour crude with a high sulfur content that must either be refined before sale or

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27 As of 1993, Basic Holdings Ltd. owned 29.5% of ordinary shares of Basic Resources International Limited (Company), General Oriental Investments Ltd. owned 16.7% of shares, in addition to its 30% interest in BHL, and various officers and directors of the Company owned another 4.7% of shares. BASIC PETROLEUM INT'L, LTD., COMMISSION FILE NUMBER 0-11923, FORM 20-F ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 1995, at 36-37 (1996) [hereinafter 1995 ANNUAL REPORT TO SEC].

28 1996 ANNUAL REPORT TO SEC, *supra* note 26, at 2.

29 *Id.*

30 *Id.* at 3.

31 Ortiz, *supra* note 18.

32 CONSEJO NACIONAL, *supra* note 14, at 33.

33 Ng, *supra* note 20, at I4; 1996 ANNUAL REPORT TO SEC, *supra* note 26, at 21.

34 CONSEJO NACIONAL, *supra* note 14, at 9.

35 Memorandum from Victor Bullen, U.S. Agency for Int'l Dev., Bureau for Pol'y and Program Coordination, Office of Env't, to Roberta Mahoney, U.S. Agency for Int'l Dev., Bureau for Pol'y and Program Coordination, Office of Env't 4 (July 15, 1996) (on file with authors).

36 *Id.*

37 *Id.* at 2-3.

38 *Id.*

used to produce asphalt.[39] Almost all of this crude is exported to the United States for refining,[40] although some is processed in the town of La Libertad at the Company's minirefinery, which began full-time production in January 1994.[41] The Xan field is connected to La Libertad by a 76-mile, 12-inch pipeline with a capacity of 30,000 bpd.[42] At the refinery, asphalt is produced for the local and other Central American markets, and heavy crude oil is upgraded into lighter, more commercially viable crude oil.[43] After refining, the lighter crude is transported another 67 miles to Raxrujá, where it joins up with the Company's Rubelsanto pipeline and travels another 143 miles to the Caribbean port of Puerto Santo Tomás.[44]

III. Summary of Relevant IFC Policies

In this section, we provide a review of relevant International Finance Corporation (IFC) policies and related issues, organized around the following subject areas: 1) the relationship between IFC and World Bank operational policies, 2) natural habitats policies, 3) forestry policies, 4) public consultation procedures, with specific emphasis on environmental impact reviews, 5) transparency and access to information, and 6) IFC capacity.

IFC is the private sector lending arm of the World Bank Group. Although the president of the World Bank is also the president of IFC, it is legally and financially independent from the other World Bank agencies.[45] IFC is owned by its 174 member countries, which contribute funding and determine the agency's policies and activities. The five largest shareholders are the United States, with 23.9%, Japan, with 6.3%, Germany, with 5.3%, France, with 5.0% and the United Kingdom, with 5.4%.[46] IFC's mandate is to promote economic development by encouraging private sector investment in developing countries. To achieve this goal, the agency works in partnership with private investors and advises governments on policy reform to attract private investment. Since its establishment in 1956, IFC has provided more than $15 billion in financing for 1852 companies in 129 countries, making it the largest multilateral source of financing for private sector projects in the developing world.[47]

A. The Relationship Between IFC and World Bank Operational Policies

For the purposes of this discussion, we define "World Bank regulations and policies" as those that pertain to the IBRD and IDA, and "IFC

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[39] 1996 Annual Report to SEC, *supra* note 26, at 4.

[40] *Id.* at 10.

[41] *Id.* at 4.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 8.

[45] *About IFC* (visited Nov. 11, 1998) <http://www.ifc.org/main/utml/general.html>.

[46] *Statement of Capital Stock and Voting Power* (visited Nov. 19, 1998) <http://www.ifc.org/AR97/pdf/Fin131.pdf>; <http://www.ifc.org/AR97/pdf/Fin132.pdf>.

[47] *About IFC*, *supra* note 45.

regulations and policies" as those that apply to IFC only—even though IFC is technically a part of the World Bank Group. Strictly speaking, the degree to which IFC must follow World Bank regulations is not clear.[48] Policy documents state that IFC does not consider itself subject to World Bank procedures,[49] yet IFC states it does have a commitment to follow World Bank operational policies and directives.[50] The confusion may stem from the IFC policy document *Environmental Analysis and Review of Projects*,[51] which includes contradictory formulations of its policy on World Bank operational directives.[52] In addition, the *Independent Review of the International Finance Corporation's Compliance with Applicable World Bank Group Environmental and Social Requirements*[53] conducted by the Pangue Audit Team, as well as the authors' experience, indicate that interpretations vary.[54] Perhaps the safest characterization of IFC's commitment to follow World Bank operational policies and directives is that IFC, at most, considers itself bound by "the spirit and intent" of these policies.[55] In some cases, it does not consider itself bound at all.

IFC reserves the right to pass special guidelines to accommodate its particular project cycle, which is designed for private- rather than public-sector lending.[56] IFC cites both the need to protect proprietary information provided by potential sponsors and the need to move quickly to take advantage of rapidly emerging business opportunities as the basis for deviations from World Bank Group policies.[57] The following sections explain how IFC policies differ from World Bank policies on information disclosure and environmental assessment in important respects.

B. Natural Habitats Policy

World Bank Operational Policy Note 11.02 (OPN 11.02) addresses the impacts of lending on wildlands and natural habitats.[58] In 1995, OPN 11.02

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48 JAY D. HAIR ET AL., PANGUE HYDROELECTRIC PROJECT (CHILE): AN INDEPENDENT REVIEW OF THE INTERNATIONAL FINANCE CORPORATION'S COMPLIANCE WITH APPLICABLE WORLD BANK GROUP ENVIRONMENTAL AND SOCIAL REQUIREMENTS 24-27 (1997). IFC staff acknowledges that there is substantial ambiguity regarding the terminology it uses and the degree to which it is subject to the World Bank's policies and directives. *Id.* at 24 n.2.

49 *Id.* at 27; INTERNATIONAL FINANCE CORP., ENVIRONMENTAL ANALYSIS AND REVIEW OF PROJECTS 7 (1993) [hereinafter ENVIRONMENTAL ANALYSIS].

50 ENVIRONMENTAL ANALYSIS, *supra* note 49, at 7.

51 *Id.*

52 *Id.* at 7, 9. The document states on page 7 that "IFC projects *must* comply with all relevant environmental policies, both explicitly stated policies and policies embedded in the Operational Directives" but on page 9 states that the document includes "World Bank environmental policies and guidelines which *should be considered* in an environmental analysis." *Id.* (emphasis added).

53 HAIR ET AL., *supra* note 48, at 24-27.

54 *Id.*

55 *Id.* at 31.

56 Jannik Lindbaek, *IFC Policy on Disclosure of Information: A Message From the Executive Vice President* (visited Feb. 7, 1999) <http://www.ifc.org/ifc/main/html/disclos1.html>.

57 *Id.*

58 *World Bank Operational Manual: Operational Policy 4.04* (visited March 15, 1999) <http://www.ifc.org/enviro/OP_404.html>.

was converted to Operational Policy 4.04 (OP 4.04).[59] The revised OP 4.04 states that "[t]he Bank's economic and sector work includes identification of (a) natural habitat issues and special needs for natural habitat conservation (particularly critical natural habitats); and (b) measures for protecting such areas in the context of the country's development strategy."[60] OP 4.04 also states that "[t]he Bank does not support projects involving the significant conversion of natural habitats unless there are no feasible alternatives for the project and its siting, and comprehensive analysis demonstrates that overall benefits from the project substantially outweigh the environmental costs."[61] In such a case, the World Bank requires mitigation measures, such as "minimizing habitat loss (for example, strategic habitat retention and post-development restoration) and establishing and maintaining an ecologically similar protected area."[62]

C. Forestry Policy

The World Bank's forestry policy is laid out in Operational Policy 4.36 (OP 4.36).[63] This policy affirms the Bank's goal to "reduce deforestation, enhance the environmental contribution of forested areas, promote afforestation, reduce poverty, and encourage economic development."[64] OP 4.36 also states that "in forest areas of high ecological value, [the Bank] finances only preservation and light, nonextractive use of forest resources" and that the Bank "will not finance projects that contravene any relevant international environmental agreement."[65]

D. IFC Public Consultation and Environmental Impact Assessment Procedures

During initial project review, IFC's Environment Division classifies a project according to environmental impact category and justifies the categorization.[66] Category A is the classification that attaches to the most environmentally sensitive projects—those projects that may result in "diverse and significant environmental impacts."[67] During internal initial project re-

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59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *The World Bank Operational Manual: Operational Policy 4.36* (visited Jan. 23, 1999) <http://www.ifc.org/enviro/OP_436.html>.

64 *Id.*

65 *Id.*

66 ENVIRONMENTAL ANALYSIS, *supra* note 49, annex A, at 1.

67 *Id.* annex H, at 1. Annex H also describes Category A projects as those that are "likely to have significant adverse impacts that may be sensitive, irreversible, and diverse." *Id.* annex H, at 2. The discrepancy between the two definitions within the same annex is not explained. Annex H further states that Category A projects are those in which "impacts are likely to be comprehensive, broad, sector-wide, or precedent setting" and that "[i]mpacts generally result from a major component of the project and affect the area as a whole or an entire sector." *Id.* Category B projects are those that "may result in specific environmental impacts and require adherence to certain predetermined performance standards, guidelines, or design criteria to avoid or mitigate impacts." *Id.* annex H, at 1. "Although a full environ-

view, IFC also summarizes the environmental concerns raised by the project, identifies additional information necessary for a complete analysis, and describes the standards against which the project will be reviewed (including host country requirements, internationally recognized standards, and World Bank policies).[68] If the Investment Review Committee then approves the project for evaluation and appraisal, the project is listed in the Monthly Operations Report, which is distributed to the board and includes a description of the environmental issues.

During the appraisal stage for Category A projects, the appraisal team gathers more specific environmental data and requires sponsors to prepare an environmental assessment (EA). During EA preparation, the sponsor must consult with local interested or affected parties and make the draft EA available locally, at a public place, and in a form and language accessible to interested or affected parties. The sponsor must also provide IFC with a final version of the EA and a summary of the EA in English and must give IFC permission to release the final EA publicly and without endorsement sixty days prior to the proposed board date for the project. Finally, IFC makes a final determination regarding the transparency of the EA consultation process and whether all environmental issues have been satisfactorily addressed. This process is called "environmental clearance."[69]

IFC's EA preparation and consultation process differs from the World Bank's, which is detailed in Operational Directive 4.01 (OD 4.01), in several important respects. First, unlike IFC's policies, OD 4.01 requires environmental impact assessments to be complete prior to the appraisal stage. The difference in the IFC loan approval process is based on the argument that IFC requires greater procedural flexibility than the World Bank because many sponsors approach IFC well after initial feasibility studies have been initiated or even completed. IFC also differs from the World Bank in that it does not require a sponsor to incorporate country environmental studies, overall policy frameworks, or the institutional capabilities of the country into the environmental assessment because the projects do not involve the public sector. However, like many Category A projects, the project addressed in this Article explicitly involved the public sector because it included development of public resources underlying protected public lands.

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mental assessment is not required, environmental analysis is required." *Id.* Environmental analysis for Category B projects is included in the Environmental Review Summary, which is released no later than 30 days prior to board consideration. Lindbaek, *supra* note 56. Category F1 projects are projects that "may include financing a variety of subprojects that may result in environmental impacts" and "[v]erification that the financial intermediary is capable of and committed to conducting environmental review of subprojects is required." ENVIRONMENTAL ANALYSIS, *supra* note 49, annex H, at 1. Category C projects are projects that do not result in any environmental impact. *Id.*

[68] *Id.* annex G, at 2.

[69] *Id.* annex A, at 2.

E. Access to Information

For outside parties to judge the environmental performance of a given loan, it is necessary to have access to the relevant documents. IFC makes several documents containing environmental data available to the public.[70] The Summary of Project Information (SPI) provides baseline information on a project prior to approval, including environmental categorization, project cost, sponsors, and companies involved.[71] However, IFC states that, although it attempts to make SPIs available thirty days prior to presentation of the project to the board, it retains the right to withhold an SPI or release it less than thirty days prior to board consideration if compelled by changing "market conditions."[72] As mentioned above, IFC also releases environmental assessments sixty days prior to board approval, but it must have permission from a client to do so. It retains the right to withhold the EA altogether "in exceptional cases where timing is critical and management is satisfied that World Bank environmental policies and guidelines have been met."[73] Furthermore, unlike the World Bank, which does not place any restrictions on the release of Project Information Documents, Monthly Operational Summaries, or Environmental Data Sheets, IFC does not release either Staff Appraisal Reports or Monthly Operations Reports.[74] Thus, it is possible that a highly environmentally sensitive project would meet with IFC approval without ever being subject to public scrutiny.[75]

Perhaps more importantly, although IFC requires the sponsor to include information from a project-specific environmental audit, an environmental management plan, or environmental mitigation plan in an environmental assessment, it does not make public the environmental conditions included in the loan covenant. The environmental conditions are contractually binding requirements, such as monitoring and mitigation, that IFC can impose as a condition of granting the loan.

F. IFC Capacity for Environmental Management and Enforcement

Under IFC internal procedures, a desk officer is responsible for providing environmental clearance to the investment officer. To undertake this task, the desk officer must review the technical details of a complex document involving a variety of environmental and social disciplines.

IV. The Case of IFC Lending for Oil Development in the Petén

This section introduces Conservation International (CI) and then turns to a brief chronological outline of the major events in this case study related to the two loans made by IFC to the Company.

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70 International Finance Corp., Policy on Disclosure of Information 14-15 (1997).
71 *Id.*
72 *Id.* at 8.
73 *Id.* at 9.
74 *Id.* at 5, 8-9.
75 *Id.* at 7-10, 14-16.

CI is a Washington-based, nonprofit, international conservation organization.[76] CI operates a sixty-person field office in the Petén, where it conducts a variety of conservation activities,[77] including the development and marketing of ecotourism and nontimber forest products. These products include renewable plant materials such as chicle (a natural chewing gum base), xate (an ornamental fern), allspice, and medicinal plants.[78] CI also has a mandate from the Guatemalan National Council for Protected Areas (CONAP), financed by USAID's Maya Biosphere Reserve project and the Canadian International Development Research Center's policy monitoring and research project, to assist in efforts to protect and manage Laguna del Tigre National Park.[79] CI is a field conservation organization with substantial technical expertise in protected areas, management, and economic development. It recently undertook in-depth policy research on oil and gas exploration and production activities in tropical forests and published a manual of best management practices and policies.[80] In the context of the Maya Biosphere Reserve project, CI also has a mandate to assist in the development of appropriate conservation policy in Guatemala as it relates to the Reserve, including oil and gas policy.[81]

A. IFC's First Loan to the Company

The Company first applied for IFC funding in 1993.[82] The loan was designed to finance the expansion of production at its Xan field from 8500 bpd to 11,200 bpd and to build a 120-kilometer pipeline to transport oil from Xan to its refinery in La Libertad, thereby replacing the current system of tanker trucks.[83] The $20 million lending package was approved in 1994.[84]

The planned $13 million, 12-inch pipeline was intended to save about $5 million per year by reducing transport costs from $4 per barrel to $1.63 per barrel.[85] Leaving the oil field, the proposed pipeline route would follow the existing road for approximately twenty kilometers, then split from the road while still within the borders of Laguna del Tigre National Park and continue over land through previously undisturbed forest, wetlands,

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[76] *Conservation International Website* (visited Nov. 23, 1998) <http://www.conservation.org>.

[77] ProPetén, CI's Guatemala office, has six main areas of conservation activities: land and resource management, enterprise development, park management, research and monitoring, policy, and community outreach and development. *Id.*

[78] *Id.*

[79] *Id.*

[80] AMY B. ROSENFELD ET AL., REINVENTING THE WELL: APPROACHES TO MINIMIZING THE ENVIRONMENTAL AND SOCIAL IMPACT OF OIL DEVELOPMENT IN THE TROPICS (1997).

[81] *Conservation International Website*, *supra* note 76.

[82] International Finance Corp., *IFC Invests in Guatemalan Oil Producer* (June 21, 1994) (IFC Press Release No. 94/109) (on file with authors).

[83] *Id.*

[84] *Id.* The package included a $10 million loan, a syndicated loan of $6 million from international commercial banks, and an equity investment by IFC of $4 million, making IFC a five percent stakeholder in the Company. *Id.*

[85] BASIC PETROLEUM INT'L LTD., 1993 ANNUAL REPORT 4-5, 9 (1994).

rivers, and streams, into the multiple use zone of the Maya Biosphere Reserve.[86] Once the pipeline crossed the San Pedro River, it would be outside the park and in the buffer zone.[87] The pipeline route would create a new right-of-way through the multiple use buffer zone and provide a new point of entry into the park itself.[88]

CI learned of the IFC loan[89] and the planned construction of the pipeline in mid-1994, after IFC had already approved the loan.[90] Shortly thereafter, representatives of CI asked to meet with IFC to discuss the project. CI and IFC met in November 1994 and in early 1995. At these meetings, CI expressed concern about the location and siting of the pipeline and the potential for colonization along the new access route. CI also noted that the project's EA neither considered alternative pipeline paths nor potential indirect environmental impacts of the loan, such as colonization. CI raised the additional concerns in reference to the EA, including the following: no on-the-ground archaeological analysis, no discussion of potential sabotage of the above-ground pipeline, weak socioeconomic and baseline biodiversity analyses, and insufficient provisions for local consultation and public disclosure. In essence, CI argued the pipeline financing was already approved by IFC and local stakeholders had not been sufficiently consulted in the loan approval process. CI *specifically recommended* that IFC move to reroute the pipeline to follow the existing road between the Xan oil field and La Libertad and undertake a proactive program to mitigate the environmental impact of the project.

In response, IFC indicated that these issues had been addressed in the EA process and changes in the siting of the pipeline were not possible. With regard to the separate issue of additional investments in mitigation measures, IFC offered to act as a broker among itself, CI, Guatemalan NGOs, and the Company and encouraged CI to work with its local partners to develop an appropriate mitigation plan. In May 1995, although the funds were already allocated and the pipeline had largely been built, CI submitted a proposed mitigation plan on behalf of CONAP, the Center for Conservation Studies at the University of San Carlos (CECON), and the Municipality of San Andrés in the hopes that the potential direct and indirect impacts of the pipeline might be contained. The main concern expressed in the mitigation plan was uncontrolled colonization in the park resulting from local demographic pressure and increased access via the pipeline trajectory.[91]

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[86] CONTRATO 2-85, *supra* note 23, fig.11.

[87] *Id.*

[88] *Id.*

[89] CI learned about the loan in Washington. CI's field office in Guatemala was neither informed of nor consulted regarding the loan, despite being a stakeholder in the region.

[90] Basic Petroleum Int'l, Ltd., *Basic Petroleum Will Build New Pipeline; $16.5 Million in New Financing Obtained; Board Approves 3:1 Stock Split* (June 6, 1994) (Basic Petroleum Int'l, Ltd. Press Release) (on file with authors).

[91] THE GUATEMALAN NATIONAL COUNCIL FOR PROTECTED AREAS (CONAP) ET AL., MITIGATION OF THE ENVIRONMENTAL IMPACTS OF THE CONSTRUCTION AND OPERATION OF BASIC RESOURCES' PIPELINE THROUGH THE LAGUNA DEL TIGRE NATIONAL PARK, PETÉN, GUATEMALA 2 (1995) (mitigation proposal presented to Basic Resources International Limited) (on file with authors).

The Company declined to accept the plan in mid-July, objecting to its focus on the effects of new pathways into the park and noting that the Company's only responsibility was to comply with Guatemalan law, not to provide funding for the protection of the Maya Biosphere Reserve.[92] Construction of the pipeline was completed by the Company on July 21, 1995.[93] Two weeks later, CECON wrote to IFC independently, detailing its concerns regarding illegal hunting, forest fires, and a lack of obligatory monitoring activities within the national park.[94]

B. IFC's Second Loan to the Company

In late 1995, CI learned through informal channels that the Company had recently applied for additional funding from IFC. The new financing request, totaling $24 million in long- and short-term loans, would fund both the expansion of production at the Xan oil field (from 13,000 bpd to 20,000 bpd by 1997) and construction of a 22,000 bpd, 109.5-kilometer extension of the existing pipeline (from the refinery at La Libertad to Raxrujá).[95] Although the proposed pipeline was to be constructed outside of the Maya Biosphere Reserve, CI wanted to ensure that the expansion of operations at the Xan field would not fundamentally damage the core of the park and that the operations could be integrated into the broader management plans for the park.

In January 1996, CI contacted IFC and reiterated the need for proactive mitigation of the project's environmental impacts. Later that month, representatives of CI, IFC, and the Company met in Washington and agreed to conduct a joint field assessment. CI also indicated its intention

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The mitigation proposal recommended that the Company contribute $443,000 annually to a fund that would finance four mitigation strategies: the construction of strategically placed guardhouses to patrol and control the area within the park; the development of environmental education in communities in and around the park; the monitoring of changes in population, land use, fire and other factors within the park; and the establishment of a long-term endowment fund that would take effect after the Company finished its operations in the Petén. *Id.* at 4. The Company's contribution was to be distributed as follows: $152,000 per year to CONAP, $145,000 per year to the Center for Conservation Studies at the University of San Carlos (CECON), and $146,000 per year to the Municipality of San Andrés. *Id.* at 7-9. Conservation International did not seek any funding for its ongoing involvement in this process or its conservation activities in Guatemala.

92 Memorandum from CONAP, CECON, Municipality of San Andrés, and Conservation Int'l to Basic Resources (July 11, 1995) (attachment to Letter from Rodolfo E. Sosa de León, President of Basic Resources Int'l Ltd. to James D. Nations, Vice President for Mexico and Central America, Conservation Int'l (July 11, 1995)) (on file with authors).

93 Letter from Lic. Ismael Ponciano Gómez, Director, CECON, to Hugh Henry-May, Country Manager for Central America and Caribbean, International Finance Corporation 1 (Aug. 2, 1995) (on file with authors).

94 *Id.* at attachment.

95 MIGUEL ANGEL CARBALLO HERNÁNDEZ, BASIC RESOURCES INT'L (BAHAMAS) LTD., ESTUDIO DE EVALUACIÓN DEL IMPACTO AMBIENTAL (EIA) SIGNIFICATIVO DEL PROYECTO "RAMAL LA LIBERTAD-RAXRUJÁ DEL SISTEMA ESTACIONARIO DE TRANSPORTE DE HIDROCARBUROS, CONTRATO 1-85, DE BASIC RESOURCES INTERNATIONAL (BAHAMAS) LIMITED, DEPARTAMENTOS DE EL PETÉN Y ALTA VERAPAZ, GUATEMALA" (1996) (on file with authors) [hereinafter CONTRATO 1-85]. The new segment of pipeline would link the Company's two existing segments and completely eliminate the need for truck transport. *Id.*

to closely review and provide comments on the second loan's environmental assessment. On April 15, the Company submitted its EA for public comment to the World Bank's Public Information Center (PIC) in Washington.[96] Upon preliminary review of the EA and the environmental management plan (EMP) based upon it, both CI and IFC indicated that the EMP was unsatisfactory. IFC asked the Company to revise the EMP.[97]

The sixty-day period for public comments on the EA, required by IFC procedures, was scheduled to close on June 15, one business day before the planned date for IFC board consideration of the Company loan on June 18.[98] Nevertheless, IFC staff notified CI in early May that, in order to meet a printing deadline for circulation of board documents, environmental clearance was required on the loan by June 3.[99] In addition, the revised EMP was not made available until May 20.[100] CI submitted its comments on the EMP on May 31[101] and several days later wrote to the U.S. Executive Director at the World Bank to request postponement of board consideration of the loan if a new EMP was not completed and available for review.[102]

Subsequent to CI's letter, IFC agreed on June 4 that environmental clearance would not be given until there was an agreement between the

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[96] Conrad Reining, Summary of Conservation International's Dealings with Basic Resources and the International Finance Corporation through August 1996, at 3 (Aug. 1996) (internal memorandum) (on file with authors) [hereinafter Summary of Memo].

[97] *Id.*; Memorandum from Mark Constantine, International Finance Corp., to Ian Bowles, Vice President, Conservation Policy, Conservation Int'l 2 (Dec. 15, 1996) (on file with authors).

[98] Memorandum from Conrad Reining, Conservation Int'l, to Russ Mittermeier et al., Conservation Int'l 1 (June 3, 1996) (on file with authors) [hereinafter Memo to Mittermeier].

[99] Telephone Interview by Amy Rosenfeld with Navin Mahajan, Investment Officer, Oil, Gas & Mining Dep't, International Finance Corp. (May 29, 1996) [hereinafter Mahajan Interview].

[100] Summary of Memo, *supra* note 96.

[101] *See infra* Appendix A. CI's comments to the environmental management plan (EMP) were organized around eight principles based on the World Bank's Operational Policies for Natural Habitats. Letter from Russell A. Mittermeier, President, Conservation Int'l, to Mr. Navin K. Mahajan, Investment Officer, Oil, Gas & Mining Dep't, International Finance Corp., and Mr. Ron B. Anderson, Environmental Specialist, Technical & Environment Dep't, International Finance Corp. 3-9 (May 31, 1996) (on file with authors) [hereinafter Mittermeier Letter]. IFC, as a member of the World Bank Group, is subject to these policies. The general message of CI's comments was that the draft EMP was highly inadequate for a project in such an important and sensitive location. *Id.* at 1. While the EMP offered a range of alternate technologies and practices, it gave no specific guidance on choosing an alternative and did not limit the discretion of the Company in doing so. *Id.* at 2. Furthermore, the EMP referred to "international standards" but did not define these standards and did not adequately address the indirect impacts of increased access to the park. *Id.*

[102] The letter also asked that the Company be required to produce a new EMP, based on the World Bank's Natural Habitats Policy, that the new EMP be included as a condition of the loan agreement, and that the Company agree to fund certain activities to mitigate the environmental impacts of the project. Letter from Russell A. Mittermeier, President, Conservation Int'l, to Jan Piercy, U.S. Executive Director, World Bank 2-3 (June 3, 1996) (on file with authors).

Company and CI about an acceptable EMP.[103] Later that week, CI asked IFC to sign a Memorandum of Understanding (MOU) to that effect.[104] In its draft MOU, CI proposed a seven-week timeline for reaching this agreement and achieving environmental clearance for a board meeting date in late July.[105] IFC refused to sign the MOU and notified CI on June 7 that the board meeting date had been moved back nine days to June 27.[106] IFC further stated that June 14 was the new date for environmental clearance of the revised EMP and that CI technical staff would need to meet in Guatemala City to comment on the new EMP.[107]

Recognizing that the revised timeline was unworkable, CI Chairman Peter Seligmann wrote to World Bank President James Wolfensohn on June 12. Seligmann's letter asked for Wolfensohn's intervention and laid out four prerequisites for environmental clearance.[108] After this exchange of letters, the board date was postponed further. On June 21, CI, the Company, and IFC met in Guatemala City,[109] and on June 24, the Company submitted a new EMP with substantially improved environmental management procedures.[110] On July 3, CI wrote to the Company and IFC, agreeing that the most recent version of the EMP was acceptable, based on several conditions.[111] CI's conditions included a requirement that the Company contribute $130,000 per year to a management fund and establish a performance bond of $1 million; that IFC delay disbursement of the loan until the National Commission on the Environment's (CONAMA's) and CONAP's comments on the EMP were received and incorporated into the

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103 Meeting with Ron Anderson, Environmental Specialist, Technical and Environment Dep't, International Finance Corp., in Washington D.C. (June 4, 1996).

104 The memorandum of understanding (MOU) was to be signed by the Company and IFC and witnessed by CI, CONAMA, CONAP, CECON, the Guatemalan Ministry of Energy and Mines, the Municipality of San Andrés, IDAEH, and the Nature Conservancy.

105 Draft Memorandum of Understanding between Basic Resources Int'l (Bahamas) Limited and The International Finance Corporation, (June 6, 1996) (on file with authors).

106 Summary of Memo, *supra* note 96.

107 *Id.*

108 The prerequisites for environmental clearance were: a signed MOU between the Company and IFC, witnessed by local stakeholders; an EMP for expansion of operations at the Xan field that had been reviewed and accepted by CONAMA, CONAP and that adheres to the MOU; assurance that the EMP was incorporated, in its entirety, into the investment agreement and became a condition of the loan and enforceable under Guatemalan law; and agreement by the Company to contribute funds to the management of Laguna del Tigre. The letter also stated that Laguna del Tigre National Park clearly fit the World Bank definition of a critical natural habitat and therefore IFC should adhere fully to the World Bank's Operational Policies for such habitats. Letter from Peter A. Seligmann, CEO and Chairman of the Board, Conservation Int'l, to Mr. James D. Wolfensohn, President, World Bank Group 1-2 (June 12, 1996) (on file with authors).

109 Representatives of USAID-Guatemala, CONAMA, CONAP, and the Guatemalan Attorney General's office also attended the June 21 meeting.

110 BASIC RESOURCES INT'L (BAHAMAS) LTD., PLAN GERENCIAL DE MANEJO AMBIENTAL Y SOCIOCULTURAL (PGMA), CONTRATO 2-85 Y OTROS CONTRATOS, BASIC RESOURCES INTERNATIONAL (BAHAMAS) LIMITED (1996) (on file with authors).

111 Letter from Peter A. Seligmann, Chairman and CEO, Conservation Int'l, to Mr. Rodolfo Sosa De León, President, Basic Resources Int'l (Bahamas) Ltd., and M.A.K. Alizai, Director, Oil, Gas & Mining Dep't, International Finance Corp. (July 3, 1996) (on file with authors).

final draft; and that IFC incorporate the final EMP into the loan agreement, conduct semi-annual supervision missions, and work with the Company to ensure compliance.[112] The IFC board approved the loan on July 18.[113] The final EMP, which was incorporated into the loan agreement by reference, included the provision of $130,000 per year by the Company for conservation activities to be undertaken by the government and an agreement to conduct semiannual project supervision missions.[114]

V. Analysis of Issues Raised by the Case Study

A. Enforcement of World Bank Policies Governing Forestry and Critical Habitats

The first loan to the Company financed a new right-of-way within, and a new point of entry for colonists into, Laguna del Tigre National Park, as well as a new road for some eighty kilometers within the adjoining buffer zone of the Maya Biosphere Reserve (MBR) on its trajectory to the refinery at La Libertad. In addition to the habitat degradation directly brought about by construction of the pipeline and associated service road, the pipeline project may have substantial indirect environmental impacts. Recent estimates by World Bank ecologist George Ledec suggest that for every kilometer of new road built through tropical forest, roughly 400 to 2400 hectares are deforested and colonized.[115] In the MBR, a region under great pressure from colonization, an influx of colonists and expansion of slash and burn agriculture has already occurred along the road into Laguna del Tigre National Park.[116] Most of this deforestation has occurred since 1993, and indications are that the same may occur along the pipeline right-of-way if appropriate mitigation is not conducted.[117] Recognizing that responsibility for mitigation in this instance would be shared by government agencies, other concerned entities, and stakeholders like the Company, IFC has a responsibility to ensure that projects meet World Bank environmental standards. In this case, the minimum appropriate mitigation measure would have been for the pipeline to follow the path of the existing road between the Xan oil field and La Libertad. In our view, the World Bank Wildlands Policy should have made such a measure a condition for IFC financing.

B. Public Consultation Practices

The case at hand shows evidence of shortcomings in the IFC policies and practices for public consultation regarding environmental assess-

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112 *Id.*

113 Letter from M.A.K. Alizai, Director, Oil, Gas & Mining Dep't, International Finance Corp., to Peter Seligmann, Chairman of the Board and CEO, Conservation Int'l (Aug. 6, 1996) (on file with authors).

114 *Id.*

115 George Ledec, Minimizing Environmental Problems from Petroleum Exploration and Development in Tropical Forest Areas 2 (1990).

116 Sader, *supra* note 5, at 15.

117 *Id.*

ments. The Company's first loan in 1994 included two components. Financing the construction of the pipeline from Xan to La Libertad was classified as a Category A loan, while the expansion of production and upgrading of the refinery were classified as Category B.[118] CI and its local counterparts in the MBR are important stakeholders for land-use decisions in the Laguna del Tigre National Park. Nonetheless, CI and other stakeholders did not become aware of the first IFC loan until after it was approved and construction of the pipeline was about to commence. This represents a failure in the consultation process.

The Company's second loan also included two components, the expansion of the Xan oil field and the increase in production to 20,000 bpd, both of which were classified as Category A loans.[119] Although the sponsor, in this case the Company, consulted with certain local parties and made its draft environmental assessment available at its local offices, very few organizations had the opportunity to comment on it before it was submitted to the World Bank's Public Information Center (PIC).[120] Even after the EA was submitted for public comment at the PIC in Washington, it was difficult to get a copy of the document in Guatemala. Because the practice of widespread public comment and review is still under development in Guatemala and many other countries where IFC has clients, a longer and more proactive review process—including the provision of documents in country—is necessary to ensure effective public consultation.

Finally, there are important questions about the timing and integrity of the public consultations, on the part of IFC, over environmental management practices in the second loan. In the period immediately prior to IFC board approval of the second loan, stakeholders were engaged in a detailed discussion of practices to be used for the expansion of oil production.[121] During the course of these discussions, CI learned from the news media that the expansion of oil production and construction of the pipeline extension had already begun.[122] This development brings into question the validity of IFC's consultation process. Both of these events occurred while the EA was still in process. It is essential that project activ-

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118 Grandia, *supra* note 17, at 29.

119 CONTRATO 1-85, *supra* note 95, at 4.

120 Summary of Memo, *supra* note 96.

121 Propuesta: Plan de Emergencia, segundo semestre 1996, y Plan Operativo, a Año 1997 (May 31, 1996) (document by a consortium of Guatemalan organizations including CECON, Municipality of San Andres, Institute of Anthropology and History (IDEAH), CONAMA, TNC, and CI) (on file with authors).

122 In mid-June 1996, Guatemala's Director of Hydrocarbons, Francisco Arevalo, said "In January the total production was approximately 12,000 barrels a day but the perforation of two new wells has raised production to almost 20,000 barrels a day." Ortiz, *supra* note 18. The same article stated further that

> Basic Petroleum International Ltd. . . . , Guatemala's only oil producer, brought on line in recent months wells Xan 10 and Xan 11 in northern Petén. Each produces over 2,000 barrels a day . . . . By August Basic plans to complete construction of a pipeline connecting its Xan oilfields and La Libertad refinery with an existing pipeline to a port on the Caribbean.

Id.

ities not begin until an EA has been concluded and approved. We note that this set of issues represents a point of factual disagreement with IFC, which maintains that the planned expansion to be funded by the second loan had not already taken place during these discussions with CI.[123]

C. Comment Period for Environmental Assessments

The effective public comment period on the EA, and the EMP in the case of the second loan, was narrowed to a very short period of time.[124] The sixty-day comment period for the second IFC loan closed just one business day before consideration of the loan by the IFC board of directors.[125] The EA document, because of poor distribution, effectively did not become available in Guatemala until early May. Important supporting documents, including a cumulative impacts study and a preliminary biodiversity assessment, arrived even later. The local stakeholder consultation process was chaotic and rushed. Finally, CI was asked by IFC staff to accommodate a print deadline for compilation of materials for board review and to submit comments prior to the close of the comment period.[126] It is questionable to what degree meaningful input could be provided unless a full comment period was observed. It is also unlikely that comments submitted to IFC by third parties could have been assimilated by IFC officers after the close of the comment period and prior to board consideration unless a time period was set aside specifically for this purpose. The large number of stakeholders, the complex and volatile social and political context, and the confusing and contradictory regulatory framework demanded a longer review period. The frantic pace of the short review period did not allow for adequate public consultation given the factors mentioned.

D. Public Access to Loan Documents

The commercial nature of IFC's loans justifies keeping certain information out of the public domain. However, documents on environmental and social impacts should be considered public information. In the case of the second loan, CI understood that the environmental loan conditions would be made public. This, however, did not occur and it remains unclear what environmental commitments the Company has made to IFC and whether and how it will report on the satisfaction of those commitments because those reports will also be protected from disclosure. We note that this is also an area of factual disagreement with IFC. CI interpreted IFC statements to mean that, while the EMP was already a public document as part of the broader EA, the public would also have access to the *portion of the investment agreement* that dealt specifically with legal provisions surrounding compliance with environmental conditions. IFC

123 International Finance Corp., Comments on CI's draft Report (Dec. 15, 1996) (IFC memorandum to CI) (on file with authors).

124 Memo to Mittermeier, *supra* note 98; Mahajan Interview, *supra* note 99.

125 Memo to Mittermeier, *supra* note 98.

126 Mahajan Interview, *supra* note 99.

disagrees with this interpretation and considers the *EMP itself* to constitute the environmental loan conditions that would be disclosed to the public because the EMP is incorporated into the loan document by reference.[127]

IFC made one supervisory mission to Guatemala in January 1997.[128] CI staff met with IFC before the mission to detail their concerns and questions about the Company's operation. CI received an oral summary of the mission findings. However, a written summary has not been made available to the public.

IFC also declined to provide a variety of other documents that CI requested during the course of the negotiations.[129] For example, it would not provide its own internal review of the Company's EA.[130] Both IFC and the Company also refused to provide an environmental audit that the Company had apparently submitted in the context of an earlier loan, even though IFC and the Company both claimed the audit revealed a "clean operation."[131]

E. Limited Public Benefits

IFC officers repeatedly echoed the position that IFC did not have any responsibility to address public sector issues and that IFC did not need to concern itself about the secondary impacts of its loan.[132] The rationale for this position was that the loan was to the private sector and that the government had already approved the project.[133] However, IFC is funded with public money and its projects should not exist to the detriment of the public good. In this case, IFC's lending did little to increase the capacity of public agencies in the context of a sustainable development strategy. Rather, the process worked against this goal. Although public institution capacity building is not IFC's responsibility, IFC should have recognized that the environmental regulatory mechanisms in Guatemala are relatively new and that the government is still in the process of establishing the institutional capacity to enforce and implement its regulations. Faced with this situation, IFC officers should have recommended that the International Bank for Reconstruction and Development (IBRD) or other development agencies work to help increase this capacity before moving ahead with its own project.

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127 International Finance Corp., *supra* note 123.

128 Memorandum from Conrad Reining to Ron Anderson, Deema Fakoury, and Harvey Van Veldhuiza, IFC Mission to Guatemala, January/February 1997 (Jan. 23, 1997) (internal Conservation Int'l memorandum) (on file with authors).

129 Meetings Between International Finance Corp. and Conservation Int'l (May-July 1996) [hereinafter IFC-CI Meetings].

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

F. Environmental Staffing Capacity at IFC

Providing environmental clearance of IFC loans appears to have already stretched IFC capacity beyond its limit. In the case of both loans, the EAs provided by the Company were written in Spanish, with an executive summary translated into English.[134] The desk officer responsible for reviewing the document admitted he did not understand Spanish, at least at the level of fluency necessary to read and evaluate a study of the environmental impacts of a petroleum well field and pipeline expansion.[135]

Although the environmental officer was knowledgeable in many of the issues presented by the EA, it was clear that the officer did not possess the level of sophistication in the technical aspects of the operations that the EA considered and would be relying on CI to provide technical assistance. Indeed, CI relied on assistance from experienced petroleum geologists to supplement its own developing capacity to review oil production and exploration activities. Beyond the obvious problems created by the language barrier, the environmental desk officer responsible for reviewing the EA indicated he maintains an active portfolio of hundreds of investment projects throughout the world, many of them an order of magnitude greater in size and scope than the EA.[136] During the course of the negotiations, it soon became apparent that IFC did not have the capacity to conduct meaningful environmental review of the Company's loan request, and many important technical issues raised would probably not have been adequately addressed if CI had not raised them.

G. Prepayment

IFC frequently justifies loans for environmentally and socially sensitive projects by stating that its procedural safeguards as well as its standing as a multilateral institution allow it to exert control over companies that would otherwise obtain funding free of any environmental or social constraints and contingencies. This claim has a measure of legitimacy—in this case, the Company was ultimately required to do more for the environment than it would have because of IFC and, of course, NGO pressure. However, as the issues raised above indicate, IFC's impact was far more limited than it should have been. Perhaps more significantly, the claim that IFC's presence ensures minimum standards is undermined by the fact that in this case—and at least one other prominent case where environmental considerations drew public criticism[137]—the project sponsors chose to prepay the loan rather than continue to work with IFC. If in fact most sponsors prefer to prepay loans rather than respond to calls by IFC, the public, and NGOs for more safeguards, the argument highlighting the utility of IFC's role in protecting the environment becomes highly suspect.

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134 CONTRATO 1-85, *supra* note 95.

135 IFC-CI Meetings, *supra* note 129.

136 *Id.*

137 HAIR ET AL., *supra* note 48.

VI. Conclusions and Recommendations for IFC Reform

It is our conclusion that this example lays out a compelling case for institutional reform of IFC. The loans in question concern major natural resource extraction activities in an internationally known national park. A simple reading of the World Bank's own policies on forestry and critical habitats should have prevented the first loan from proceeding as formulated. The second loan saw important progress, but the final results remain mixed, particularly in the light of the Company's recent decision to prepay its loans to IFC. The following recommendations for reform grow out of this case study. In general, it is apparent that greater transparency is needed in the investment decision-making process, consistent with legitimate respect for proprietary information.

Recommendation One: *IFC should strictly enforce World Bank policies governing forestry and natural habitats, particularly in the case of infrastructure and major resource extraction projects.* It is clear that the first loan violated the spirit of the World Bank's Wildlands, Natural Habitats, and Forestry policies, as well as several international environmental treaties. Adopting a new and more strictly constructed operational policy will aid IFC in avoiding future investments in projects that will have a substantial negative impact on natural habitats, particularly national parks. These policies are particularly important to infrastructure and resource extraction projects and provision could be made, for example, to accept or exempt small-scale sustainable community enterprise development projects from these requirements.

Recommendation Two: *IFC should design stronger mechanisms to ensure that its public consultation process is more proactive and open.* Provisions should be made for ensuring there is adequate distribution of environmental review documents and procedures for public participation in the country and in the area affected by the investment—regardless of whether it is required by local law. IFC should also restructure its public comment period for environmental assessments to reflect more realistic timeframes for review of complex, technical documents. The public comment period should be on the order of 120 days for Category A projects. Additionally, there should be a sufficient buffer between the end of the comment period and the planned date for IFC board review of the proposed loan to allow for full assimilation of comments by IFC officers.

Recommendation Three: *IFC should increase public access to certain loan documents in order to facilitate outside participation in both project appraisal and postapproval oversight of loan performance.* In the absence of compelling reasons to the contrary, environmental loan conditions, IFC environmental review documents, and staff reports should be public information, and they should be published in the relevant languages. It is impossible for the public to cooperate with IFC to provide input on projects unless these documents are publicly available with sufficient time for thorough review.

Recommendation Four: *IFC should increase its level of coordination with the rest of the World Bank Group and other development agencies.*

IFC investments should be consistent with national strategies for sustainable development. The private sector partners of IFC are regulated by public institutions that often lack capacity and experience in the regulatory process. Greater coordination with the International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA), as well as other development agencies, would help ensure that IFC lending does not undermine the effectiveness of public institutions. Lending programs should also promote greater coordination in capacity building between the public and private sectors. This recommendation is particularly important when dealing with public land and natural resources.

Recommendation Five: *IFC should recruit additional qualified environmental staff.* In order to meet the requirements of its own policies, IFC needs to hire additional environmental staff with the necessary technical expertise and language skills to review the sort of technical information presented in this case study.

Recommendation Six: *IFC should anticipate the prepayment contingency in the loan agreement.* This case study and the Pangue experience indicate that IFC can be removed quickly and completely from participation in and oversight of a project by a sponsor's decision to prepay its loan. IFC should ensure that prepayment will not have this effect by anticipating this contingency in the loan agreement. For example, the loan agreement could state that the loan is contingent upon the sponsor's commitment to continuing environmental assessment procedures, maintaining insurance coverage, continuing to make a performance bond available, and other similar measures agreed to with IFC, in addition to requirements under domestic law. The loan agreement should also impose penalties for the sponsor's failure to comply with these requirements.

VII. EPILOGUE

We prepared this Article in the second half of 1997 and early 1998. Subsequent to the events described in this study, IFC undertook a review of its environmental and social policies and procedures. The review process yielded draft policies, which were presented for consideration at an informal IFC board of directors seminar in early 1998 and then released for public comment.[138] The board of directors later approved the draft policies in principle, although official notice of approval is pending as of this writing.[139] The stated reason for delay is to ensure that the new policies will be consistent with the adoption of new internal administrative procedures[140] and also to ensure that the new policies will be consistent with minor revisions of World Bank policies.[141] However, despite these

138 IFC'S ENVIRONMENTAL AND SOCIAL POLICIES AND PROCEDURES AND POLICY ON DISCLOSURE OF INFORMATION 1 (1998) [hereinafter IFC'S ENVIRONMENTAL AND SOCIAL POLICIES].

139 Telephone Interview by Cyril Kormos with Mark Constantine, Manager, Corporate Relations, IFC (Oct. 20, 1998) [hereinafter Constantine Interview].

140 *Id.*

141 IFC'S ENVIRONMENTAL AND SOCIAL POLICIES, *supra* note 138, at 2.

delays, IFC staff reportedly have considered the new policies operational as of September 1998.[142]

The new policies will perform a number of useful functions, such as harmonizing IFC and IBRD project requirements and strengthening information disclosure and public consultation procedures.[143] For example, IFC has now drafted a "good practices" manual for its clients and will extend its environmental review procedures to projects in which it acts only as a financial intermediary.[144] IFC will also add to its public consultation requirements for Category A projects such that consultation will continue throughout parts of project implementation.[145] For Category A projects in which an EA was prepared prior to IFC involvement, IFC will now add the requirement that the client draw up a Public Consultation and Disclosure Plan to ensure adequate public participation in project development and review.[146] In addition, the new draft policies and procedures will no longer allow the board to waive disclosure requirements for Category A projects.[147] IFC now also commits to increase its own institutional capacity for consultation, community relations, information disclosure, and other key functions in the environmental review process.[148] Finally, the draft policies and procedures will also strengthen Category B Environmental Review Summaries and ensure their release thirty days before Board consideration.[149]

From our perspective, even more encouraging is the that fact IFC clearly considered NGO comments in formulating its new policies. Although in many cases IFC did not make additional modifications to the draft policies based on outside comments, IFC did strengthen certain requirements for information disclosure. Specifically, IFC will now translate and release both the Category B Environmental Review Summary and the results of "required consultations in-country in a culturally appropriate manner."[150] IFC also committed to releasing examples of standard environmental and social covenants frequently used in loan agreements and to create an archive of SPIs, ERSs, and EA reports so that these documents will be available after the current one-year posting.[151]

Despite these positive developments, however, challenges remain. The criteria used to classify projects are still imprecise; therefore, the risk continues that environmentally sensitive projects could be classified as Category B and subjected to a lower level of scrutiny.[152] In addition, disclosure of environmental impact assessments for Category A projects will

142 Constantine Interview, *supra* note 139.

143 IFC's ENVIRONMENTAL AND SOCIAL POLICIES, *supra* note 138, at 6-7, 20-21, 23-24.

144 *Id.* attachment 2, at 12.

145 *Id.*

146 *Id.*

147 *Id.* attachment 2, at 12-13.

148 *Id.* attachment 2, at 1-17.

149 *Id.* attachment 2, at 13-14.

150 *Id.* attachment 2, at 26.

151 *Id.*

152 *Id.* attachment 2, annex B, at 20.

continue to be required only 60 days prior to board consideration of a project, rather than the 120-day period required by IBRD.[153] Environmental covenants in loan agreements will also remain confidential, as will monthly operations reports.[154] Finally, portions of the language in the draft policies and procedures remain vague, discretionary, hortatory, or subject to interpretation by decision makers. Thus, there continue to be several areas in which significant improvements can still be made. In addition, given the fact that IFC took several years to review policies and procedures after NGOs began to make suggestions to strengthen them,[155] there is good reason to await full implementation of the draft policies and procedures before declaring that IFC has engineered lasting change in monitoring the environmental impacts of its lending.

153 *Id.* attachment 2, at 12-13.
154 *Id.* attachment 2, at 25-26
155 *Id.* attachment 2, at 1.

APPENDIX A

CI's comments to the environmental management plan (EMP) of Basic Resources International (Company) were grouped around eight principles, which were based on the World Bank's Operational Policies for Natural Habitats.[156]

Principle #1:

Access routes into the Laguna del Tigre National Park (Park) "that result from the past, present, and future activities of the Company, including roads, pipelines, rivers, and seismic" lines, will "be adequately controlled to discourage spontaneous colonization, illegal hunting of wildlife, looting of archaeological sites and other illegal activities associated with uncontrolled access to the Park."[157] The EMP should include an access control plan.

Principle #2:

Company activities within the Park, or Company activities that may affect the Park, will "conform to the highest appropriate design standards[,] . . . employ best management practices, and best available technologies for petroleum operations in environmentally sensitive areas, especially in tropical wetlands that represent critical natural habitats as defined by World Bank Operational Policies."[158]

Principle #3:

"Activities within the Park[,] by employees or in support of employees[,] other than those directly related to the essential operations of the Company[, will] . . . be carefully controlled and confined to the contract area."[159]

Principle #4:

> In addition to assuming environmental management responsibility in its contract area, the Company will participate with other interested parties in an appropriate financial mechanism designed to support the management requirements of the Park in a manner commensurate with the Company's responsibilities for operating within a National Park and critical natural habitat.[160]

The Company will also collaborate and cooperate with other parties, such as the Guatemalan National Council for Protected Areas (CONAP), the Center for Conservation Studies at the University of San Carlos (CECON), the National Commission on the Environment (CONAMA), Municipality of

156 Mittermeier Letter, *supra* note 101, at 3-9.
157 *Id.* at 3.
158 *Id.* at 4.
159 *Id.* at 6.
160 *Id.*

San Andrés, Institute of Anthropology and History (IDAEH), and Ministry of Energy and Mines (MEM), in the administration and protection of the Park. Administrative structures to achieve this collaboration will be developed in the context of the proposed Operational Plan and included in the EMP.

Principle #5:

The Company will provide "[a]ppropriate conservation, mitigation[,] and restoration measures to remove or reduce adverse impacts on natural habitats or their function[s] within the . . . Park that result from the operations of the Company."[161]

Principle #6:

The EMP will include

> [a]n appropriate environmental monitoring and evaluation plan in conformance with generally accepted criteria for monitoring the effects of petroleum operations in sensitive areas[,] . . . to provide feedback on conservation outcomes and to provide guidance for developing or refining appropriate actions, including . . . provisions for independent monitoring and access to the contract area for periodic inspection.[162]

Principle #7:

"An appropriate agreement . . . to implement the EMP and monitor its compliance . . . [will] be developed with the governmental entity or other entities[,]" as established pursuant to the laws of Guatemala, with management responsibilities in the Park.[163]

Principle #8:

"The EMP [will] . . . be enforceable under Guatemalan law and as a condition of the loan agreement with . . . IFC."[164]

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161 *Id.*
162 *Id.* at 7.
163 *Id.* at 8.
164 *Id.* at 9.

APPENDIX B

CHRONOLOGY OF SIGNIFICANT ACTIONS

1985:	The Company is awarded development rights to the Xan oil concession in northwest Guatemala.
1990:	The government of Guatemala creates the Maya Biosphere Reserve.
1992:	The Company is awarded a larger oil concession completely surrounding the original Xan oil field, within Laguna del Tigre National Park.
1993:	The Company first applies for funding from IFC.
May 1994:	IFC approves the first loan to the Company, totaling $20 million.
November 1994:	CI and IFC first meet to discuss the implications of this loan. Discussions include siting of the pipeline between the Xan field and the La Libertad refinery.
May 1995:	CI and local partners submit a proposed mitigation plan to offset the effects of the new pipeline.
July 1995:	The Company rejects the mitigation plan.
July 21, 1995:	The Company inaugurates its new pipeline, built with IFC funds.
Late 1995:	CI learns that the Company has applied for a second loan from IFC.
January 1996:	CI sends IFC a detailed analysis of the current situation and a renewed call for mitigation.
April 15, 1996:	The Company submits its environmental assessment for public comment to the World Bank's Public Information Center.
May 31, 1996:	CI submits comments to IFC and requests postponement of the board date.
June 4, 1996:	IFC agrees that environmental clearance will not be given until there is an agreement between CI and the Company over an acceptable EMP.
June 7, 1996:	IFC moves the scheduled board date back to June 27.
June 12, 1996:	CI writes to World Bank President James Wolfensohn requesting postponement of the board date.
June 15, 1996:	The public comment period closes.
June 18, 1996:	IFC's board of directors is originally scheduled to consider the loan.
June 21, 1996:	CI, the Company, and IFC meet in Guatemala City to discuss the EMP.
June 24, 1996:	The Company submits a revised EMP.
July 18, 1996:	The loan is presented to the IFC board and approved.