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Comments on the Draft Environmental and Social Sustainability Framework (ESSF) of the European Investment Bank (EIB) Group

August 2021

Office of the United Nations High Commissioner for Human Rights

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Introduction

1. The Office of the UN High Commissioner for Human Rights (OHCHR) welcomes the opportunity to comment on the draft Environmental and Social Sustainability Framework (ESSF) of the European Investment Bank Group (EIB or "the Bank").

2. Given OHCHR's mandate, OHCHR's comments focus principally on the content and potential impacts of the draft safeguards from the perspective of international human rights law, particularly in relation to social impact assessment and risk management (Environmental and Social Policy (ESP) and Environmental and Social Standard (E&S Standard) 1), together with specific comments and recommendations in relation to thematic E&S Standards.

3. We note that the EIB is among the leaders in seeking to align its ESP and E&S Standards with international human rights legal principles and standards, in line with European Union (EU) legislation and the international obligations of EU members and other countries where the EIB operates. OHCHR's comments aim to further strengthen these attributes of the ESP, to help ensure that the ESP is implemented in accordance with the evolving and contextual specificities of international human rights law, for more sustainable development outcomes and superior long-run investment returns.

I. Environmental and Social Policy (ESP)

4. OHCHR welcomes the EIB Group's new aspirational vision informed by the commitment to sustainable development, environmental sustainability and social development and inclusion. OHCHR further welcomes the clarification of the Bank's due diligence roles and responsibilities in the draft ESP and their integration within a single policy framework, which could lead to greater transparency and a more efficient management of environmental and social impacts and risks by the Bank.

5. OHCHR notes, and welcomes, the various references to human rights in the text of the ESSF, signaling the EIB's renewed commitment to the respect for and long-term promotion of human rights in line with the principles and standards of the EU Charter of Fundamental Rights and other international and regional instruments.

6. The integration of human rights risk information in the due diligence process of development finance institutions present clear benefits for the effective discharge of their mandates to alleviate poverty and promote sustainable development. OHCHR has analyzed a range of investment projects supported by multilateral banks where human rights risks were, or should have been, apparent at an early stage of the preparation of the investment yet did not appear to have been identified or prioritized, or alternatively were taken into account too late. Frequently, failure to take account of available human rights risk information has led to investigation and non-compliance findings of independent accountability mechanisms, administrative and reputational costs, and avoidable harms to individuals and communities.[1]

[1] See e.g. OHCHR, Comments on the Review and Update on the ADB Safeguard Policy Statement (29 April 2021), Annex I, pp.36-65, available at https://www.ohchr.org/Documents/Issues/Development/DFI/ADB_SPS_29April2021.pdf.

A. Human rights policy commitment

[Para. 1.3]

7. A firm commitment to respect human rights and to be guided by international human rights norms constitutes a solid foundation for any development finance institution aiming at conducting human rights due diligence and integrating human rights risks and impacts as part of its overall environmental and social management system – i.e. to ensure that human risks and adverse impacts are identified and acted upon. The explicit connection to internally recognized human rights standards helps clarify the scope of this exercise and links up to the international obligations of the countries of operation.

8. In this regard, OHCHR notes the EIB's commitment to finance "*operations that do no limit the enjoyment of human rights"* in the ESP's vision section (para. 1.3). While acknowledging the intention to transcend a "Do No Harm" approach, the notion of limitation to the enjoyment of human rights could be problematic as it lacks sufficient definition. Moreover, limitations on human rights can be permissible under international human rights instruments, provided that certain well-recognized criteria are met.[2]

9. Instead, OHCHR would recommend that the EIB's general human rights commitment be anchored in the *responsibility to respect human rights*, which is the minimum standard of conduct for non-State entities as reflected inter alia in the UN Guiding Principles on Business and Human Rights (UNGPs). The "responsibility to respect" puts the emphasis on the identification, prevention, mitigation and accounting for negative human rights impacts, irrespective of the original intent, and encourages ongoing, risk-based due diligence. The recent safeguard policy revisions of the European Bank for Reconstruction of Development (EBRD) and Inter-American Development Bank (IDB) could serve as guidance for reformulating this commitment in a way that integrates the principle of respect for human rights while at the same time distinguishing the Bank's responsibilities from those of its clients/promoters.[3] This approach would be also be consistent with the language utilized in the Explanatory Note for the ESSF consultation.[4]

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[2] The criteria are legality, necessity, proportionately and the non-discrimination principle. See, e.g. OHCHR, Emergency Measures and COVID-19: Guidance (27 April 2020), at https://www.ohchr.org/Documents/Events/EmergencyMeasures_Covid19.pdf; and Universal Declaration of Human Rights, UNGA/RES/217A/1948, art. 29 (2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society").

[3] According to the EBRD's Environmental and Social Policy (2019): "The EBRD is committed to the respect for human rights in projects financed by EBRD. EBRD will require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients. EBRD will continuously improve the projects it finances in accordance with good international practice and will seek to progressively strengthen processes to identify and address human rights risks during the appraisal and monitoring of projects." EBRD, Environmental and Social Policy, para 2.4. The IDB's ESPF, para. 1(3) is in almost identical terms.

[4] See EIB Environmental and Social Sustainability Framework – Explanatory Note (3 June 2021) ("EIB Explanatory Note"), p. 11 ("The EIB is therefore required to respect the rights, observe the principles therein and promote the application of the Charter [of Fundamental Rights of the European Union] in accordance with its respective powers").

10. In OHCHR's view, the fact that the EIB's overarching human rights commitment is reflected in paragraph 1.3 of the ESP's vision (which focuses exclusively on environment sustainability, resiliency and climate) is also problematic. OHCHR would suggest that this commitment be located either in paragraph 1.4 (which tackles social as well as environmental sustainability) or, preferably, be included as a stand-alone paragraph, reflecting the importance of human rights for the Bank's policies and operations.

[Paras 2.1-2.4]

11. OHCHR would strongly encourage the Bank to incorporate a full subsection on human rights as part of the EIB "Group's Contribution" in the ESP (paras. 2.1-2.14). This would give the EIB's commitment to respect human rights the same saliency as the other "ten key areas for actions" that define the "environmental and social components of sustainable and inclusive development" under the ESP. The latter areas, in particular "Reducing discrimination and fostering social inclusion", "Fostering gender equality and women's economic empowerment" and "Promoting fundamental rights at work," are closely related to human rights. The lack of any dedicated subsection on human rights would seem to be at odds with the importance attributed to human rights standards and principles in the ESP.

12. The content of the new subsection could be inspired by the specific chapter included in the Explanatory Note on the ESSF consultation. The chapter ("The EIB approach to human rights"),[5] provides useful guidance on how human rights considerations are expected to be incorporated in the EIB's work, including through the Bank's due diligence and by requiring promoters to consider human rights as part of the environmental and social risk management process. However, unfortunately, we note that relevant and useful guidance in the Explanatory Note does not always seem to have been translated into commitments and requirements in the ESP and ESSs.

[Para. 4.4]

13. Similar reasoning could be applied to the reference to human rights in the ESP's section concerning the Bank's roles and responsibilities. Paragraph 4.4 specifies that the EIB "*shall not, to the best of its knowledge"* finance projects that do not comply with national legislation and relevant international treaties, and it "*shall not, to the best of its knowledge, finance projects that have the effect of limiting people's individual rights and freedoms or violating their human rights*". However, in OHCHR's view, the reference to the Bank acting "*the best of its knowledge*" is unwarranted and may generate perverse incentives and discourage proactive information gathering on potential human rights risks in practice.[6]

14. Similarly, the formulation "*projects that have the effect*" may imply unrealistic assumptions concerning the predictability and determinacy of human rights violations in practice. In OHCHR's view, a commitment by the Bank *to respect human rights* and *undertake all necessary measures to ensure that the projects its finances do not violate/ infringe upon human rights* would more pragmatically and accurately reflect risk management demands, global normative expectations, and the EIB's own commitment to integrate human rights in its due diligence processes.[7]

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[5] *Ibid*., pp. 11-13.

[6] OHCHR, Benchmarking Study of Development Finance Institutions' Safeguards and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights (2019) (hereinafter "OHCHR Benchmarking Study"), p. 9.

[7] Ibid, p. 10.

OHCHR recommends that:

- *The human rights policy commitment in paragraphs 1.3 and 4.4 should be amended in light of the considerations above. The wording of the EBRD's and IDB's human rights policy commitments could serve as inspiration in this regard.*
- *A specific subsection dealing with human rights should be incorporated as part of the EIB Group's Contribution in the ESP (paras. 2.1-2.14).*

B. Reference to UN human rights instruments

[Preamb. para. 14]

15. Paragraph 14 of the preamble[8] could be amended to better reflect the fact that the Universal Declaration of Human Rights formally affirms legally-binding standards (and not just principles). OHCHR also recommends that the list of international instruments could reflect other international human rights instruments that are binding upon EU Member States and that have been widely ratified by non-EU countries. These include, as a minimum, the International Covenant on Civil and Political Rights (ICCPR) (ratified by all EU Member States and by 89.6% of UN Member States) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (also ratified by all EU Member States and by 88.6% of UN members). The UDHR and the two Covenants are commonly referred to as the International Bill of Rights, and constitute the baseline normative framework for conducting human rights due diligence.[9]

16. Moreover, OHCHR encourages EIB to make explicit reference in the ESP to the UNGPs. The UNGPs are referenced in the Consultation Paper, according to which they "guide" the EIB's work,[10] but they are not explicitly cited in the ESP nor in the E&S Standards. The UNGPs constitute the authoritative global standard for preventing and addressing the risk of adverse human rights impacts of business activities, and apply also to the financial sector.[11] The UNGPs constitute the authoritative standard for human rights due diligence, consistent with the EIB's commitment to undertake "human-rights-responsive environmental and social due diligence."[12] An explicit reference to the UNGPs in the ESP would provide a solid normative foundation for this commitment.

[Para. 4.8]

17. The ESP affirms that the legal foundations of the E&S Standards, outlining the promoter's responsibilities in developing and implementing projects, is the "EU legal framework" (ESP, para. 4.8). While we acknowledge that, as the lending arm of the EU, the EIB is guided by EU policy and legislation, this should not preclude consideration of other normative sources in the definition of the requirements stemming from the thematic E&S Standards, which are typically guided by international best practice, including the policies of other development finance institutions, as well as relevant international agreements.

[8] Draft ESP (3 June 2021), p. 3.
[9] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31/Annex ("UNGPs"), principle 12.
[10] EIB Explanatory Note, p. 11.
[11] See, e.g. OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector (2017), available at: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.
[12] EIB Explanatory Note, p. 11.

18. This consideration is particularly relevant in light of the EIB's commitment to incorporate "human rights considerations" through "specific requirements" and "explicit references" in the E&S Standards.[13] The latter standards reflect the content, and reference explicitly, international human and labour rights instruments to varying degrees. More systematic referencing of relevant international instruments would be particularly useful to guide the interpretation and implementation of the E&S Standards in diverse national contexts. OHCHR would therefore recommend that paragraph 4.8 be amended to reflect other international normative sources beyond EU legislation.

OHCHR recommends that:

- *Paragraph 14 of the preamble should be amended as follows:*

  The Policy is based on the Charter of Fundamental Rights of the European Union and is guided by the fundamental rights and freedoms recognised by the European Convention on Human Rights **and the International Bill of Rights**, as well as the ~~Universal Declaration of Human Rights~~ ***UN Guiding Principles on Business and Human Rights*** and the EU Human Rights Sanctions regime [footnotes omitted]

- *Paragraph 4.8 of the ESP should be amended as follows:*

  The EIB shall adopt a set of Environmental and Social Standards ("E&S Standards" or the "Standards"), based on the EU legal framework and other relevant sources of international law, that shall outline the promoter's responsibilities in developing and implementing projects …"

C. Human rights due diligence

[Para. 4.11]

19. OHCHR notes the EIB's intention to pursue "an integrated *human rights-based approach* to its ECS [Environmental, Climate and Social] due diligence and monitoring" and to undertake "a *human rights-responsive due diligence* process whereby impacts and risks are screened and assessed against its E&S Standards, which in turn are grounded in human rights principles" (ESP, para. 4.11). In OHCHR's view, these two concepts would seem to require further clarification, particularly given that the detailed description in the consultation's Explanatory Note of how human rights are integrated into EIB's due diligence[14] processes has not been translated into specific requirements in the ESP.

20. The notion of "human rights due diligence" (HRDD) refers to the effective integration of information regarding human rights risks and impacts in an entity's risk management processes in order to prevent negative impacts on people. It is a methodology whereby business actors seek "to proactively manage potential and actual adverse human rights impacts" with which

[13] Ibid.
[14] Ibid., p. 12.

they may be involved.[15] Originally coined by the UNGPs as one of the main components of the corporate responsibility to respect human rights, HRDD methodologies are now widely used by other actors aiming at integrating human rights within their environmental and social risk management systems. It is now widely understood that the responsibility to respect human rights applies also to actors, including financial institutions, which may contribute or otherwise be directly linked to negative human rights impacts caused by third actors.[16]

21. According to the UNGPs, conducting HRDD implies a bundle of processes, involving (i) identifying and assessing actual or potential human rights impacts; (ii) integrating findings across relevant functions and processes, and taking appropriate action; (iii) tracking the effectiveness of measures and processes, and (iv) communicating how impacts are being addressed.[17] The UNGPs do not necessarily require that HRDD processes be independent of the entity's wider risk management system, provided that human rights risks and impacts are given explicit consideration.

22. While the EIB's intention to explicitly link the Bank's due diligence processes to human rights is necessary and noteworthy, the proposed introduction of new terminology such as "*human rights-responsive due diligence"* may cause confusion. Instead, OHCHR would strongly advocate for the use of the expression "human rights due diligence" in line with international human rights standards and international best practice. HRDD has a specific, internationally accepted meaning, grounded in the UNGPs, authoritative interpretations by international human rights mechanisms, and evolving practice in the business, finance and development communities.

23. As suggested above, an explicit reference to HRDD would not necessarily involve a structural change in the way the ESP conceives the EIB's overall social and environmental due diligence (i.e. it does not necessarily imply a new stand-alone process), but rather, it could bring clarity concerning the practical implications of integrating human rights within the Bank's wider due diligence processes. This is also a matter of international policy coherence. As pointed out in the official commentary to the UNGPs, "[w]hile processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights." It is vital, in OHCHR's view, that development finance institutions avoid renegotiating and inadvertently undermining existing international human rights standards.[18]

24. A central component of HRDD is the integration of human rights risk information in the environmental and social risks due diligence. The term "human rights risk information" refers to the information generated by duly mandated and independent human rights reporting and monitoring bodies, including those within the UN system as well as other reputable sources, relevant to environmental and social risk assessment and management. [19] Information and

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[15] *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A//73/163, (2018), para 10.

[16] See, e.g. OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector (2017), available at: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

[17] Ibid. para 10. Cfr. UNGP, Principle 17.

[18] Ibid, Principle 18, Commentary.

[19] OHCHR, *Review and Update of the World Bank's Safeguards Policies Comments and recommendations of UN/OHCHR in relation to the draft Environmental and Social Framework* (15 March 2016), Annex II: "The Benefits of Integrating Human Rights Risk Information into the World Bank's Due Diligence", p.28. Available at:

recommendations from UN human rights bodies (such as treaty bodies, special procedures and the Universal Periodic Review or UPR) address many issues relevant to the assessment of social and environmental risks and contextual risks in relation to investment projects. The same holds true for the ILO supervisory bodies, regional human rights mechanisms (which is a particularly relevant and rich information source in the EU context), and non-governmental sources.[20] In OHCHR's view, human rights risk information should be dealt with in the same way as other potentially relevant information sources, strengthening country diagnostics and social and environmental risk assessment and informing monitoring, redress and mitigation measures.[21]

25. The draft ESSF links the screening and assessment of human rights impacts and risks to the EIB E&S Standards "which in turn are grounded in human rights principles" (para. 4.11). In OHCHR's view, the restriction of EIB's due diligence to the human rights issues covered by the E&S Standards is unwarranted and should be revised. Under the UNGPs, HRDD should cover "adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships."[22] The scope of HRDD should therefore cover the whole spectrum of human rights that could be negatively impacted as a result of the entity's activities or business relationships. According to the UNGPs this should include, as a minimum, the rights enshrined in the International Bill of Rights and eight ILO core conventions as set out in the ILO Declaration on Fundamental Principles and Rights at Work.[23] These could be complemented by the standards affirmed in other instruments depending on the specific context.[24]

26. Because projects financed by multilateral banks may have an impact on virtually the entire spectrum of internationally recognized human rights, the EIB's HRDD should not be restricted solely to the issues covered by the thematic E&S Standards. The latter standards cover environmental and social issues that are particularly salient in investment project financing, and address a number of human rights issues that have commonly arisen in relation to these projects (e.g. forced evictions, sexual exploitation, child labour or dispossession of indigenous traditional lands). Heightened due diligence could be called for in relation to the issues covered by E&S Standards, as they relate to a core set of human rights risks commonly arising in investment projects. However, due diligence should not be restricted only to those issues. There will always be instances where human rights concerns relating to a given project are not covered by one or more thematic standards.

27. Moreover, while efforts have been made to align the E&S Standards with international human rights standards and principles, there will always be certain gaps and contradictions between the two, given their different nature and function. Human rights have specific, internationally accepted meanings, and they provide the normative basis for the country-

https://www.ohchr.org/Documents/Issues/Development/DFI/CommentsrecommendationsrelationWorldBanksDraftEnvironmentalSocialFramework.pdf. See also OHCHR, fn 1 supra, Annex II.

[20] Ibid.

[21] Ibid., p.21

[22] UNGPs, Principle 17(a).

[23] Footnote 9, above, and accompanying text.

[24] UNGPs, Principle 17(a), Commentary. Standards and jurisprudence of the European human rights system would be particularly relevant in the present context. See https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3. It is also worth noting that the EU is party to, and legally bound by, the UN Convention on the Rights of Persons with Disabilities, a convention with direct and obvious implications for many EIB-supported investment projects. See https://ec.europa.eu/social/main.jsp?langId=en&catId=1138.

specific human rights risk information produced by international human rights mechanisms and other sources which, as pointed out above, should constitute the foundation for any HRDD process. A reference to international human rights standards, and not to thematic E&S Standards, would serve as an entry point for the integration of human rights risk information in the EIB's due diligence. Moreover, consistent adherence to international human rights instruments may help to alleviate potential confusion and contradictions in connection with co-financed projects, as these instruments "are the benchmarks against which other social actors assess the human rights impacts of business enterprises."[25]

28. Lastly, OHCHR welcomes the reference to term "human rights-based approach" (HRBA) in paragraph 4.11, and notes that this term is increasingly well-recognized (though not always well implemented) in development practice.[26] In the most common usage, arising from the usage in by UN agencies, the HRBA refers to the use of standards and principles derived from international human rights instruments to guide all development cooperation and programming.[27] Applicable human rights principles include, inter alia, non-discrimination and equality, and participation and inclusion. The HRBA aims at the realization of international human rights through development cooperation, policies and technical assistance, and "contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.[28]

29. We would strongly encourage the EIB to implement a HRBA throughout all its policies, financing and operational activities, and would suggest that this commitment could be reflected more broadly in the ESP, in connection with the Bank's overall human rights policy commitment. However, we would suggest that the concept of HRDD, as elaborated by the UNGPs, be the main reference point for integrating human rights in the EIB's due diligence processes. Conceptual confusion may result otherwise, and undermine implementation.

<u>OHCHR recommends that:</u>

- *The notion of "human rights-responsive due diligence" (para. 4.11) should be replaced by the more specific term "human rights due diligence" (HRDD), in accordance with international standards and emerging global practice.*
- *The ESP section on due diligence should be revised in light of the distinctive requirements of HRDD in relation to other due diligence areas. This includes the explicit integration of human rights risk information in the EIB's due diligence, and the reference to international human rights standards as defining the scope of the Bank's due diligence, beyond the coverage of thematic E&S Standards.*
- *The reference to the "human rights-based approach" should be retained, but be moved to a different section of the ESP dealing with the EIB's overall policy commitment (e.g. para. 1.3 or within a new subsection within the section on the "Group's contribution", as suggested above).*

[25] UNGPs, Principle 17(a), Commentary.
[26] United Nations Development Group, "The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies" (2003), p. 1. Available at: https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un.
[27] United Nations Development Group, "The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies" (2003), p. 1. Available at: https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un.
[28] Ibid.

D. Risks of reprisals

[Preamb. para. 16]

30. OHCHR's work with project-affected communities and in-country monitoring reveals and reflects the increasing risks faced by indigenous populations, women and girls, environmental and human rights defenders and others, including threats and risks of reprisals against individuals who express critical views or bring their concerns to multilateral Development Banks (MDBs) and Independent Accountability Mechanisms (IAMs). While too few Banks and accountability mechanisms publish data on this issue, we note that one third of complaints brought last year to the International Financial Corporation's Compliance Advisor Ombudsman (CAO) were associated with allegations of intimidation or reprisals.

31. In this regard, OHCHR welcomes the recognition of "the rights [sic] of stakeholders to engage with [the Bank] and its counterparties freely and without fear or coercion", as well as the statement of "zero tolerance" for "reprisals, intimidation, threats, harassment, violence or any other abuse of the rights of individuals and in particular of human rights' defenders and environmental activists" (Preamble, para. 16). OHCHR notes that this statement correlates with the general statement included in the EIB's webpage on human rights[29] as well as to the similar provision in the EIB Complaint Mechanism (CM) Policy regarding reprisals against complainants and complaint-related people.[30] We also note the important provisions concerning reprisals within the EIB's 2020 Stakeholder Engagement Guidelines (pp.33-35) and proposed requirements in draft ESSF Standard 2 for projects located outside the EU.

32. Most MDBs and IAMs have developed, or are developing, policies and specific procedures to help identify and address reprisals risks. In OHCHR's view, the ESSF review offers the EIB a timely opportunity to strengthen is own policies and procedures in this area. This could involve the incorporation of specific requirements in the operational parts of the ESP (under the EIB due diligence section) and the incorporation of more detailed guidance (such as that contained in the 2020 Stakeholder Engagement Guidelines) with draft ESSF Standard 2, for projects within and outside the EU. The inclusion of specific, legally binding requirements concerning reprisals as recommended here, embedded in loans and investment agreements, would help to ensure that these important commitments are implemented in practice.

<u>OHCHR recommends that:</u>

- *The EIB should include detailed requirements regarding protection against reprisals in the ESP, Standard 2 and loans and investment agreements, for all projects within and outside the EU.*

[29] https://www.eib.org/en/about/cr/human-rights/index.htm

[30] EIB Group, Complaint Mechanism Policy (November 2018), para. 2.6 (affirming that "[c]omplainants to the EIB Group Complaints Mechanism must not be subject to any form of retaliation, abuse or any kind of discrimination based on the fact that they have exercised their right to complain").

II. Standard 1 - Environmental and/or Social Impacts and Risks

A. Human rights risks and impacts

[Paras 3(c), 7]

33. OHCHR welcomes the explicit reference to human rights as part of the requirements for the project promoter's environmental and social risk assessment and management. We take note, in this regard, that one of the objectives of Standard 1 is to ensure "respect for human rights by integrating human rights considerations into the impact assessment process" (para 3.c). The requirement for promoters to "include considerations of potential human rights risks" (para. 7) in their assessment of "social aspects" is also welcome.

34. While these references represent relevant entry points for the incorporation of human rights risk information into the Environmental and Social Impact Assessment (EIA) and other relevant risk assessment tools, there is room for further strengthening, in OHCHR's view.

35. Firstly, the terms "human rights *considerations*" or "*considerations* of *potential* human rights risks" appear imprecise, and in our view should be replaced by simpler and more familiar terms such as "human rights risks and impacts" or "impacts on human rights", as used in the EIB's existing safeguards.[31]

36. Second, the requirement to incorporate human rights risks and impacts within the scope of the promoter's environmental and social risk management seems to be unduly restricted to projects *outside* the EU and EFTA, Candidate or potential Candidate countries (para. 7). Even if the EIB may require promoters to carry out issue-specific assessments beyond EU requirements, "as relevant and if deemed necessary by the EIB", the list of potential issues does not explicitly include human rights.[32] The exclusion of EU and EFTA, Candidate or potential Candidate countries from human rights requirements seems difficult to justify given the potential tensions between EU legislation and international human rights law and implementation gaps in practice.

37. In this regard it is worth noting that the current EIB safeguard standards do incorporate explicit requirements for borrowers in EU countries to take human rights risks and impacts into account. Thus, according to these standards, "operations…which are likely to have significant effects on the environment, human health and well-being and *may interfere with human rights"* will be subjected to an EIA;[33] and social impact assessment, including "impacts on…*human rights*" may be required under the umbrella of the ESIA, "[i]n line with relevant EU legislation and best international practice."[34] In OHCHR's view it would be important to maintain these requirements for all countries.

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[31] EIB, *Environmental and Social Standards*, Standard 1: Assessment and Management of Environmental and Social Impacts and Risks (2018), paras. 11, 32.

[32] EIB, Draft Standard 1: Environmental and/or Social Impacts and Risks, para 6(c) (stating that EIA and SEA may be "coordinated with and/or complemented by any applicable requirements and/or one or more of the following assessments…[p]ertaining to specific topics that may require particular attention: biodiversity and ecosystem services, climate change, cultural heritage, social impacts, as relevant and if deemed necessary by the EIB"). We note that "social issues" as defined in Draft Standard 1 includes human rights among other issues.

[33] Ibid., para. 8 (emphasis added).

[34] Ibid., para. 9 (emphasis added).

[Fn 10]

38. In relation to the "potential human rights risks" referred to in Standard 1, paragraph 7, footnote 10 states that these risks include, but are not limited to "data protection and privacy rights." In our view this selection of human rights seems unduly narrow and provides little guidance for users of the EIB standards on the scope of human rights risks and impacts. OHCHR would therefore recommend that the footnote be revised and refer to the responsibility to respect human rights under the UNGPs (the International Bill of Human Rights and the eight ILO core conventions as set out in the ILO Declaration on Fundamental Principles and Rights at Work).[35]

OHCHR recommends that:

- *The language in Standard 1, paras 3(c) and 7 should be simplified to refer to "human rights risk and impacts".*
- *The requirement to integrate human rights risks and impacts should be extended to EU and EFTA, Candidate or potential Candidate countries.*

B. Scope and applicable standards

[Paras. 3, 5, 7]

39. OHCHR notes that the provisions of Standard 1 would apply to "to all projects likely to have significant environmental, climate and/or social impacts and risks" (para. 3), which would presumably trigger the application of the thematic E&S Standards (Standards 2-11). However, the articulation between Standard 1 and the rest of the standards does not seem to be sufficiently clear. On the one hand, the ESP states that E&S Standards "outline the promoter's responsibilities in developing and implementing projects" "based on the EU legal framework" (ESP, para. 4.8). However, there are only limited references to the thematic standards in Standard 1, which simply states that promoters should comply with "applicable national and EU legislation" (for projects located in the EU and EFTA, Candidate and potential Candidate countries) (Standard 1, para. 5), or "national legislation and…the principles of EU legislation" for projects in the rest of the world (ibid., para. 7).

40. There are clear connections between the EIA/ESIA process and thematic E&S Standards in principle. The latter standards provide a list of environmental and social questions that should be prioritized as part of the impacts and risks assessment process. Stakeholder engagement is a crucial component of this process, and, as such, Standard 2 requirements should apply to the EIA/ESIA process; this is the approach taken, for instance, by the World Bank Environmental and Social Framework.[36] Moreover, the EIA/ESIA process should not be disconnected from the requirements stemming from the Standard 7 ("Vulnerable groups and Indigenous Peoples"), particularly if the objective is to "ensure compliance with this Standard as early as possible in

[35] UNGPs, Principle 12.
[36] The World Bank, Environmental and Social Standard 1: Assessment and Management of Environmental and Social Risks and Impacts, para 15(2).

the project cycle and, in any case, no later than during the environmental and social impact assessment process" (Standard 7, para. 14).

OHCHR recommends that:

- *The thematic E&S Standards should be referenced or integrated more clearly in Standard 1, including in relation to the definition of the applicable normative framework for project promoters (paras 5, 7), the scope of EIA/ESIA (paras 9, 21), and the requirements of stakeholder engagement (Standard 2), including the participation of and consultation with indigenous peoples and "vulnerable" groups (Standard 7).*

C. Environmental Impact Assessment (EIA)

41. OHCHR notes that, in keeping with EU legislation and existing EIB standards, draft Standard 1 relies on EIAs (or in the case of projects outside EU, EFTA, Candidate and potential Candidate Countries, Environmental and Social Impact Assessment, ESIAs) as the main tool for the assessment and management of environmental, climate and/or social impacts and risks by the promoter. The determination of the need for such studies relies, to a great extent, on the promoter's own assessment. In OHCHR's view, the autonomy of the promoter in determining the need for and scope of the EIA/EIAs should be complemented by clearer requirements concerning the EIB's due diligence responsibilities in relation to the project's overall environmental and social management.

[Para. 10]

42. For Projects located in the EU, EFTA, Candidate and potential Candidate Countries, under Standard 1, the determination of the need for an EIA relies exclusively on the "relevant competent authorities." Where an EIA is not deemed necessary, the promoter may be required to submit the authorities' decision along with the information originally provided to them by the promoter, but only "upon [EIBs'] request" (para. 10). In OHCHR's view, the submission of the relevant decision and information should be mandatory, and EIB should have the specific authority to review the promoter's original information and request a new determination of the EIA applicability as needed.

[Paras. 18, 19]

43. Similarly, in relation to projects located "in the rest of the world", draft Standard 1 proposes that the determination of the applicability of the ESIA should be made by the promoter, on the basis of the criteria specific in Annex 1a of Standard 1 (para. 18). The outcome of and justification for this determination would be communicated to the EIB "upon request" (para. 19). Again, in OHCHR's view, the information and justification relevant to a determination not to undertake a ESIA would seem to be important information which should routinely be communicated to the EIB as a mandatory requirement, rather than in exceptional cases. We would recommend that Standard 1 should explicitly vest the EIB with the capacity to review such determinations.

OHCHR recommends that:

- *Paragraphs 10 and 19 should explicitly require promoters to provide information and justification for any determination not to proceed with an EIA/ESIA, and vest the EIB explicit authority to review such determinations.*

D. Human rights Impact Assessments (HRIAs)

44. OHCHR welcomes the reference in the ESSF consultation's Explanatory Note to the requirement for stand-alone Human Rights Impact Assessment (HRIA) in appropriate cases, depending upon the promoter's capacity, the location of the project in a fragile or conflict-affected area, the prevalence of systematic human rights abuses, among other factors. However, we note with concern that the expectations set forth in the Explanatory Note have not been translated into any specific requirements in Standard 1 nor in any other thematic standard. This omission would seem to warrant particular justification given that the current EIB standards explicitly include such a requirement.[37]

45. OHCHR strongly recommends the reinstatement of an HRIA requirement in appropriate circumstances. This approach would be consistent with the UNGPs (which indicate that "a range of approaches may be appropriate for assessing human rights impacts," including either assessments focusing exclusively on human rights or "integrated" assessments),[38] and with the practice of international human rights mechanisms[39] and financial institutions.[40]

46. Moreover, there seems to be no compelling reason why the HRIA requirement (or the possibility thereof) should be limited to countries other than EU and EFTA, Candidate or potential Candidate countries, as it is the case in the current EIB safeguards policy. OHCHR notes, in this connection, that the consultation's Explanatory Note does not restrict the HRIA requirement to "projects located in the rest of the world", and would strongly recommend that draft Standard 1 takes the same approach.

[37] Ibid., para 11 ("If deemed necessary by the EIB, based on the nature of the project and country context, the promoter may be required to carry out a stand-alone human rights impact assessment and/or other supplementary assessments").
[38] The Danish Institute for Human Rights, *Human Rights Impact Assessment Guidance and Toolbox* (2020), p. 14 (citing UNGPs, Principle 18, Commentary).
[39] See, e.g. Guiding principles on human rights impact assessments of economic reforms, A/HRC/40/57 (2018) (prepared by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights).
40 See IFC-The Global Compact, *Guide to Human Rights Impact Assessment and Management (HRIAM)* (2010). Available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/GuidetoHRIAM.pdf.

OHCHR recommends that:

- *The requirement (in appropriate circumstances) for a stand-alone HRIA should be reinstated in Standard 1. This requirement should be extended to EU and EFTA, Candidate or potential Candidate countries.*

  .
- *Paragraphs 6 and 9 should be amended in light of the above.*

III: Thematic standards

Standard 2 – Stakeholder engagement

47. OHCHR notes the consolidation of stakeholder engagement requirements in draft Standard 2 and welcomes the explicit incorporation of relevant human rights principles and standards, such as those affirmed in the United Nations Economic Commission for Europe (UNECE)'s Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (which is an integral part of the EU acquis) and the UNGPs. OHCHR also welcomes the requirement to respect human rights in the context of the stakeholder engagement process (paras. 9-10).

Scope

[Para. 5]

48. The application of Standard 2 seems to be conditioned to a determination of its "relevance" during the environmental impact assessment/environmental and social impact assessment (EIA/ESIA) process. In OHCHR's view, this provision appears to conflict with the cross-cutting nature of Standard 2[41] and its stated objective of "[p]romoting and enabling the meaningful and free participation and input of stakeholders in project-related decision-making processes" (para 3.c).

49. Moreover, this requirement may be inconsistent with other requirements set forth in this and other E&S Standards. For instance, Standard 2 explicitly requires that stakeholders be engaged by the promoter "early on in the decision-making process, when all options are still open, to allow for their meaningful contribution and ensure that their opinions, interests and concerns are taken into account" (para. 8). On the other hand, Standard 1 clearly stipulates that engagement with the project stakeholder is "an integral part" of the ESIA process (para. 16), while the "effective participation of the public concerned in the decision-making procedures" is required by the EU Directive (art. 6).

50. In light of the above, OHCHR recommends that paragraph 5 be revised to remove the reference to the EIA/ESIA. As an alternative, paragraph 5 could mirror the corresponding provision in Standard 1, paragraph 4 ("This Standard applies to all projects likely to have significant environmental, climate and/or social impacts and risks").

[Para. 9]

51. OHCHR notes the requirement that stakeholder engagement shall be carried out in a manner "that is free from intimidation, coercion or violence against any individuals, in particular

[41] As appropriately indicated in the EIB Explanatory Note on the ESSF consultation, p.7.

those who voice their opinion in relation to the projects" (para. 9). This is an important and welcome provision, consistent with other MDBs' safeguards, however we'd suggest that it might be strengthened to reflect the reality that project promoters themselves may often be directly or indirectly involved in acts of intimidation or reprisals against project stakeholders and human and environmental rights defenders. In this regard, OHCHR recommends that paragraph 9 should restate that the EIB "does not tolerate any action by, or on behalf of, a promoter that amounts to retaliation within the context of the projects it finances" (as affirmed in the 2020 Guidance note for EIB Standard on Stakeholder Engagement in EIB Operations, p. 33). Paragraph 9 could also reference the EIB policy of "zero tolerance" on reprisals (ESP, preamb. para. 16).

Identification and analysis of the stakeholders

[Para. 18]

52. Paragraph 18 requires that, "[w]hen community representatives play a significant role in the engagement process, the promoter shall verify that such persons do, in fact, represent the opinions, facilitate the communication and convey the comments of affected communities, as appropriate." In OHCHR's view, the formulation of this requirement is problematic, without more stringent safeguards, as project promoters may have mixed incentives or conflicts of interests and may lack the requisite expertise and objectivity to assess the quality of community representation. As worded, this paragraph may contradict the objectives and spirit of the Standard and infringe applicable human rights requirements.

53. In OHCHR's view, community representatives should be incorporated, as a matter of principle, in all stakeholder engagement processes. This is clearly provided for in the EIB Guidance Note on Stakeholder Engagement, which includes all "directly and indirectly project-affected persons" within the scope of stakeholder engagement," including their legitimate representatives" (p. 8). OHCHR strongly recommends that paragraph 18 should be redrafted, substituting the current approach with a more proactive statement and requirements regarding the need for the promoters to engage with the "legitimate representatives" of the stakeholder concerned. The text of footnote 15, listing potential stakeholder representatives, could form part of the new paragraph.

<u>OHCHR recommends that</u>:

- *Paragraph 5 should be revised to remove the reference to the EIA/ESIA, and to mirror the corresponding provision in Standard 1, paragraph 4.*
- *Paragraph 9 should be strengthened by restating that the EIB "does not tolerate any action by, or on behalf of, a promoter that amounts to retaliation within the context of the projects it finances". Paragraph 9 could also reference the EIB policy of "zero tolerance" on reprisals (ESP, preamb. para. 16).*
- *Paragraph 18 should be redrafted with a more proactive statement and requirements regarding the need for the promoters to engage with the "legitimate representatives" of the stakeholder concerned. The text of footnote 15 could form part of the new paragraph.*

Standard 3 - Resource efficiency and pollution prevention

54. OHCHR notes that there is currently no reference to human rights, or to rights-holders, in draft Standard 3, although many of the issues tackled in the standard, such as pollution and waste management, have direct impacts on internationally recognized human rights. Hazardous substances threaten a wide range of rights including the rights to bodily integrity, health and a healthy environment. A human rights-based approach (HRBA) that emphasizes the respective duties and responsibilities of States and businesses to prevent and minimize exposure to hazardous substances is needed to ensure sustainable development and the realization of human rights for all everywhere.[42]

55. Central components of an HRBA to hazardous waste management are the right to access to information, participation and justice in environmental matters.[43] These rights have been applied in environmental matters as per the Aarhus Convention (to which the EU has been a Party since 2005), and are elements of sectorial treaties (e.g. the Minamata Convention).[44] Access to information and meaningful participation are critical to empower all people to avoid exposure to hazardous substances in consumer products, at the workplace, in their homes and communities, or via food, water, air or other sources and to seek remedy in response to harms occurring from such exposure.

56. However, OHCHR notes that Standard 2 is not referenced in Standard 3, and the only reference to the consultation with and participation of interested stakeholders is limited to the design of emergency plans (para. 16). In OHCHR's view, requirements for stakeholder engagement, as well as to disclosure of information and grievance mechanisms, should be incorporated in relation to all measures covered by Standard 3, including pollution prevention and control, and management of waste and of hazardous substances and materials. Moreover Standard 3 should incorporate explicit references to the requirements of Standard 7 in relation to indigenous peoples' consultation and participation, including, when applicable, the requirement of obtaining indigenous peoples' free, prior, and informed consent (FPIC).

Pollution prevention and control

[paras. 11, 13]

57. In line with the comments to Standard 1, EIB should retain a monitoring role in relation to the determination of the applicability of environmental instruments. In this regard, project promoters should be required to systematically provide the EIB (not only "upon request") with information regarding projects associated with modifications and/or extensions of existing activities/facilities (paras. 11, 13).

Sound management of hazardous substances and materials. pesticide use and management

[paras. 20, 23]

58. When there are risks of irreparable harm to the human rights to health and to a health environment, the precautionary principle should apply in relation to the use and management of hazardous substances and materials, and lack of full scientific certainty or economic considerations should not be used as a reason for postponing preventative action. In this regard, Standard 3 could be strengthened by explicitly including the precautionary principle within its

[42] See UNEP-OHCHR, *Human rights and hazardous waste: Key messages* (2019), available at: https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMHazardousSubstances25febLight.pdf.
[43] Ibid.
[44] Ibid., p. 5.

objectives (para. 3). Moreover, in OHCHR's view, the Standard should be revised to remove all necessary caveats that limit the application of the precautionary principle, including in relation to eliminating and/or minimizing use of "hazardous substances and materials of high concern" (which applies only "where suitable economically and technically viable alternatives are available") and to eliminating and/or reducing the use of pesticides "in sensitive areas" (para. 23).

OHCHR recommends that:

- *Standard 3 should explicitly incorporate the application of the precautionary principle as one of its objectives (para. 3).*
- *Standard 3 should incorporate a human rights-based approach (in line with Standard 4), including the incorporation of specific reference to stakeholders' participation, disclosure of information, and grievance mechanisms in relation to all areas covered by the standard (e. g in paras. 18, 19, 21 and 23). Relevant requirements in Standard 2 and 7 should be cross-referenced.*
- *Caveats limiting the requirements regarding the use* of *hazardous substances and materials of high concern (para. 20) and the use of pesticides in sensitive areas (para. 23) should be removed.*
- *Information regarding projects associated with modifications and/or extensions of existing activities/facilities should systematically be communicated to the EIB (paras. 11, 13).*

Standard 4 – Biodiversity and ecosystems

Introduction

[Para. 2]

59. OHCHR notes the explicit reference to the impacts on the degradation of ecosystems on "vulnerable" communities and indigenous peoples. Indeed, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has found that the fulfilment of a broad range of human rights depends on thriving biodiversity and healthy habitats and ecosystems.[45] In this regard, the explicit commitment to promote "a human rights-*responsive* approach" to the protection of biodiversity of ecosystems is noteworthy. However, OHCHR would suggest that the term *human rights- based approach* be used instead, in line with international practice and the draft ESP.

Assessment of significant impacts and risks affecting biodiversity and ecosystems

[Para. 12. Fn. 9]

60. OHCHR welcomes the reference to stakeholder engagement as a "key part of the assessment of impacts and risks affecting biodiversity and ecosystems" (para. 12), as well as the

[45] UNEP-OHCHR, *Human Rights and Biodiversity: Key Messages* (2019), para. 1. Available at: https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBiodiversity26febLight.pdf

requirement to carry out this engagement according to the specifications included in Standards 2 and 7.

61. In OHCHR's view, footnote 9 (discussing the importance of stakeholder engagement for indigenous peoples and other communities that rely on ecosystems for their livelihoods) is particularly relevant, and should be moved to the body text. In order to strengthen this point, paragraph 12 could include a reference to the rights to access to information, participation and justice in environmental matters, as outlined by Rio Principle 10, Escazú Agreement and the Aarhus Convention. Moreover, the paragraph could restate the requirement to obtain the free, prior and informed consent (FPIC) of indigenous peoples in relation to projects "affect[ing] the lands, territories and resources that Indigenous Peoples customarily own, occupy or otherwise use" (Standard 7, para. 44) and assert the objective of including and supporting indigenous peoples' and other affected communities' participation in the management and ownership of efforts to combat biodiversity loss.

Protection and conservation of high-value biodiversity

[Para. 16]

62. OHCHR would suggest that the reference to "*appropriate* consultation" be substituted by "*meaningful* consultation," consistent with the terminology used in Standard 2 and in the common Glossary.

OHCHR recommends that:

- *The notion of a "human rights-responsive approach" should be replaced by "human rights-based approach" (para. 2).*
- *Paragraph 12 should be strengthened by incorporating the text of footnote 9, along with references to information disclosure and grievance mechanisms (Standard 2), indigenous peoples' FPIC (Standard 7, para 44) and the objective of "including and supporting indigenous peoples' and other affected communities' participation in the management and ownership of efforts to combat biodiversity loss."*
- *The notion of "appropriate consultation" should be replaced by "meaningful consultation" (para. 16).*

Standard 5 - Climate change

Objectives

[Para. 4]

63. OHCHR welcomes the range of improvements introduced in draft Standard 5, including its alignment with the objectives of the Paris Agreement and the EU taxonomy, as well as the EIB Group Climate Roadmap and Climate Strategy. However, OHCHR notes that the current draft contains no reference to "just transition", the subject of the Silesia Declaration at COP 24 and the Just Transition Mechanism being developed under the European Green Deal.

Physical climate risk assessment and minimisation

[Para. 16, fn 17]

64. OHCHR notes that there is only a single reference to stakeholder engagement in Standard 5, in relation to the Climate Risk and Vulnerability Assessment (CRVA) (para. 16). A reference to Standard 7 has been included in footnote 17, relating to the gender-differentiated aspects of environmental and social risks and impacts, but this reference does not appear to be connected to any participation/consultation requirement.

65. In OHCHR's view, these provisions should be strengthened. As indicated above in relation to Standard 3, the rights to access to information participation and justice have been applied in environmental matters under the Aarhus Convention, to which the EU has been a Party since 2005, and are key elements of the Paris Agreement itself (see e.g. Article 12 regarding public participation and access to information). OHCHR recommends that Standard 5 should include specific requirements with relation to stakeholder participation, access to information and, where applicable, grievance mechanism, at a minimum referring to the relevant requirements in Standards 2 (and Standard 7, in relation to Indigenous Peoples). In OHCHR's view, these requirements should expand beyond CRVAs in relation to other areas covered by Standard 5.

Climate-related aspects of economic analysis

[para 17]

66. OHCHR notes, and supports the requirement for the promoter to provide an assessment of "climate-related project impacts on different groups in society, with a particular focus on vulnerable groups" in relation to projects "motivated primarily by climate considerations" (para. 17). Yet, this requirement applies only "when practical and feasible" (ibid). In OHCHR's view, this limitation is unwarranted and should be removed, while paragraph 17 should incorporate specific requirements regarding engagement with relevant stakeholders, including "vulnerable groups", in relation to the preparation of such assessments.

OHCHR recommends that:

- *Standard 5 should incorporate the objective of promoting a "just transition" within the meaning of the Silesia Declaration and other international policy instruments (para. 3).*
- *Standard 3 should incorporate a human rights-based approach, including the incorporation of specific references to stakeholders' participation, disclosure of information, and grievance mechanisms (e. g in paras. 16 and 17). Relevant requirements in Standard 2 and 7 should be cross-referenced.*
- *The caveat limiting the requirement to assess climate-related project impacts on different population groups (para. 17) should be removed.*

Standard 6 - Involuntary resettlement

67. OHCHR welcomes the technical improvements introduced in relation to Standard 6, such as the principle of land-for-land compensation in relation to land-based livelihoods or collective land tenure, as well as the requirement to undertake a Livelihood Restoration Plan (LRP) in cases of economic displacement. We also welcome the various references to international and regional human right principles and standards, which, in OHCHR's view, may provide a valuable

entry point for the application of a human-rights based approach to the implementation of the standard.

Objectives

[para 4]

68. OHCHR welcomes the objective of improving the living conditions among "displaced poor and other vulnerable groups" [para. 4.d]. OHCHR would also suggest that draft Standard 6 explicitly recognize resettlement as a *development opportunity*, a people-centered notion which puts the emphasis on benefit-sharing rather than on compensation. The wording included in the objectives of the World Bank's Environmental and Social Standard 5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement) could be a useful reference in this regard: "To conceive and execute resettlement activities as sustainable development programs, providing sufficient investment resources to enable displaced persons to benefit directly from the project, as the nature of the project may warrant".

69. OHCHR recommends that the wording of paragraph 4(e), referring to mitigation measures for social and economic impacts from involuntary resettlement, be updated to refer to the possibility of in-kind compensation (as provided for in paragraph 25) and the principle of land-for-land compensation.

Scope

[Para. 11]

70. OHCHR welcomes the reference to the UN Guiding Principles on Internal Displacement and the requirement for promoters to resort to the Guiding Principles as the framework for projects that may involve the involuntary resettlement of refugees and/or internally displaced persons. OHCHR would recommend that the EIB's commitment not to finance projects that may result in arbitrary displacement be cross-referenced to the definition enshrined in the Guiding Principles.[46]

General requirements

[Paras. 12, 15]

71. OHCHR welcomes the reference to "international instruments" as the normative framework for project promoters in EU and EFTA countries, along with national and EU legislation and European Court's case law. OHCHR would recommend that the term "international instruments" be amended to "international *human rights* instruments", consistent with the reference in paragraph 15 (projects in all other countries).

72. A footnote referencing the main applicable international human rights instruments could provide useful guidance for promoters. These could include the UN Basic Principles and Guidelines for Development-based Evictions and Displacement, already referenced in footnote 17 in relation to forced evictions.

[Para. 13]

73. Paragraph 13 states that the promoter "shall prepare and implement a plan" in relation to projects "requiring the displacement of persons that are occupying land or assets without a formal title", such as "slum-dwellers or squatters". In OHCHR's view, this requirement does not seem to be sufficiently clear. According to paragraph 53, which defines the requirements of resettlement planning documents (applicable in principle to all projects, irrespective of the

[46] UN Guiding Principles on Internal Displacement E/CN.4/1998/53/Add.2) (1998), Principle 6.

geographical location), planning documents shall be prepared whenever "a project leads to involuntary resettlement", irrespective of the level of security of tenure. Moreover, persons and communities may hold ownership rights over the lands they currently occupy even in the absence of a formal title deed, including many indigenous communities and other groups whose land and resource rights derive from customary tenure, within EU and non-EU countries. OHCHR would recommend that paragraph 13 be revised to address these potential inconsistencies.

74. For the sake of consistency, the term "plan" in paragraph 13 could be replaced by "resettlement planning document", which is the term used in the rest of the standard.

Valuation, compensation and income restoration

[Paras. 23, 25]

75. OHCHR notes the incorporation of a new provision favouring land-for-land compensation in cases of (i) economic displacement (ii) affecting people whose livelihood is land-based or the land is collectively owned (para. 23). This provision is of clear importance in safeguarding against the economic destitution that often accompanies involuntary resettlement activities, particularly in the context of communities practicing traditional or subsistence economies. Following this rationale, it does not seem clear why the prioritization of land-for-land compensation should be restricted only to cases of economic displacement rather than physical displacement (in relation to which para. 25 provides: "the promoter shall offer all PAPs an informed choice of either compensation in kind (land-for-land; house-for-house; shop-for-shop) or monetary compensation"). OHCHR would recommend that the principle of priority for land-for-land compensation in relation to land-based livelihood or collective land ownership be extended, as a general requirement, to all resettlement activities.

76. The priority for land-for-land compensation in paragraph 23 is limited by the possibility that the promoter "provide justification to the EIB as to why this option is not feasible". In OHCHR's view, this option could be further restricted, in line with the World Bank's standards, to cases in which "equivalent replacement land is unavailable", which should be demonstrated to the Bank's satisfaction.[47] A explicit reference to indigenous peoples could also be introduced.

Stakeholder engagement and disclosure

[Para. 43]

77. Paragraph 43 cross-references Standard 7 and requires that the promoter shall pay "special attention" to "vulnerable groups that might be disproportionally affected by the resettlement process" and "apply special provisions to consultations that involve Indigenous Peoples". Standard 7 also requires the free, prior and informed consent (FPIC) of indigenous peoples in relation to projects "affect[ing] the lands, territories or resources that [they] customarily own, occupy or otherwise use". OHCHR would therefore suggest that the requirement to obtain indigenous peoples' FPIC be included also in paragraph 43.

[47] The World Bank, Environmental and Social Standard 5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement), para. 14.

Vulnerable groups and gender dimensions

[Para. 52]

78. According to paragraph 52 the project's promoter shall "use best efforts in exploring alternative project designs to avoid the physical or economic relocation" of indigenous peoples. If "avoidance is impossible," the promoter would be then required to devise a resettlement plan.

79. In OHCHR's view, the requirement in paragraph 52 does not seem to adequately reflect the international norm prohibiting the relocation of indigenous peoples from their traditional lands and territories without their FPIC. This general prohibition, which stems from the recognition of the relationship of indigenous peoples with their traditional lands and territories, is clearly stipulated in international standards. Thus, according to UN Declaration on the Rights of Indigenous Peoples:

> *Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return*.[48]

80. A similar prohibition is found in ILO Convention 169.[49] MDB policies reflect this general prohibition to varying degrees. A good example, in OHCHR's view, is the IDB's Environmental and Social Policy Framework (ESPF), which, in addition to restating the general prohibition, allows certain exceptions if conditions are met, including obtaining indigenous peoples' FPIC:

> *The Borrower will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from communally held lands and natural resources subject to traditional ownership or under customary use…If such relocation is unavoidable, the Borrower will not proceed with the project unless (i) the resettlement component will result in direct benefits to the affected community relative to their prior situation; (ii) customary rights will be fully recognized and fairly compensated; (iii) compensation options will include land-based resettlement; and (iv) FPIC has been obtained as described above*.[50]

81. OHCHR would strongly recommend EIB to explicitly reflect the general prohibition to relocate indigenous peoples, as affirmed in international standards, and consider using the IDB model to indicate the conditions under which this relocation may be exceptionally permissible, including the requirement of indigenous peoples' FPIC. This would be fully compatible with provisions of Standard 7, which require FPIC in relation to projects that involving the relocation of indigenous peoples "from land and natural resources subject to traditional ownership or under customary use or occupation" (para. 44).

Forced evictions

[Para. 46]

82. OHCHR welcomes the definition of forced eviction, which adheres to the widely accepted definition as elaborated by the UN Committee on Economic, Social and Cultural Rights.[51] OHCHR would recommend that the reference to "basic *principles* defined in this

[48] UN Declaration on the Rights of Indigenous Peoples, UN/RES/61/295 (2007), art. 10.
[49] ILO Convention on Indigenous and Tribal Peoples in Independent Countries, No. 169 (1989), art 16.
[50] IDB, Environmental and Social Performance Standard 7 (2020), para. 19.
[51] *General Comment No. 7: The right to adequate housing (Art.11.1): Forced evictions*, UN Doc. E/1998/22 (1997), para. 4.

Standard" be replaced by "basic *requirements*", in keeping with the new ESSF terminology and other provisions of Standard 6 (cf. para. 15).

Resettlement planning documents

[Paras. 53-58]

83. OHCHR notes that, while Standard 6 refers to the concept of "resettlement planning documents", these are only spelled out relatively late in the text, which may lead to confusion. Moving the subsection on "Planning requirements" (paras. 53-58) to a different part of the standard (e.g. immediately after "Project design") could facilitate the understanding of the planning cycle up front and simplify the implementation of this Standard.

[Annex 1.A and 1.B]

84. Given the special relationship that indigenous peoples maintain with their traditional lands and territories, as well as their particular vulnerability to physical and economic displacement, the differentiated impacts of resettlement activities on indigenous peoples would seem to require individualized consideration in resettlement planning documents, as well as in the description of how the applicable requirements regarding indigenous peoples in Standards 5 and 7 have been met. OHCHR notes, however, that Annex 1.A and 1.B, which detail the contents of the Resettlement Frameworks and Resettlement Plan & Livelihood Restoration Plans make no explicit reference to indigenous peoples (although Annex 1.B refers generally to "vulnerable groups"). On the other hand, paragraph 52 stipulates that a resettlement plan may be devised "in coordination with or as part of the Indigenous Peoples [Development] plan [IPDP] as defined in Standard 7". The interaction between resettlement planning documentation and indigenous peoples planning documents may benefit from further clarification, in OHCHR's view.

OHCHR recommends that:

- *Standard 6 should explicitly incorporate in paragraph 4 the objective of conceiving of resettlement activities as a development opportunity, similar to the World Bank's standards.*
- *The provisions regarding the applicability of the UN Guiding Principles on Internal Displacement to the resettlement of refugees and IDPs should be strengthened by including an explicit prohibition of arbitrary displacement, as defined in the Guiding Principles (paragraph 11).*
- *The reference to "international instruments" in paragraph 12 should be amended to "international human rights instruments," in line with paragraph 15. Relevant international instruments could be referenced in a footnote.*
- *The prioritization of land-for-land compensation (paragraph 23) should be extended to all cases of displacement, and not only to economic displacement. The wording of this provision could be strengthened to limit the exceptions to this principle, and an explicit reference to indigenous peoples could be introduced.*
- *The general prohibition of relocation of indigenous peoples should be spelled out explicitly in Standard 6. The provisions in paragraph 52 should be revised to strengthen the exceptions to this general prohibition and should include, as a minimum, the requirement of indigenous peoples' FPIC. OHCHR notes the World Bank's standards as a useful reference in this regard. The requirement for indigenous peoples' FPIC could be also incorporated within the stakeholder engagement requirements (para. 43).*

- *Paragraph 46 on forced evictions could be amended to refer to the "basic requirements" under Standard 6.*
- *The contents of Annex 1.A and 1.b should be revised to better reflect the articulation between Standards 6 and 7 as they relate to indigenous peoples. The subsection on "Planning requirements" (paras. 53-58) could be relocated earlier within Standard 6 to ensure internal coherence and simplify implementation.*

Standard 7 –Vulnerable groups and indigenous peoples

Terminology

85. OHCHR notes the potentially problematic connotations associated with the term "vulnerable groups" in the title of Standard 7 and throughout the text of ESSF. While the term has been commonly used until the present, it is increasingly considered outdated and arguably, to some extent, discriminatory, to the extent that it attributes vulnerability to qualities inherent in specific populations groups rather than on the structural conditions of discrimination and marginalization. We welcome the fact that this problem is recognized in the introduction to the standard,[52] however we would recommend that "vulnerable groups" be replaced by a more suitable term, such as "marginalized groups" (Cf. Standard 7, paras. 1, 17, 15), "discriminated groups" (ibid, paras. 15, 18), "excluded groups", "groups at risk", or a combination of these.

86. OHCHR notes that the title of the standard has been revised to include indigenous peoples, with the intention – presumably – of highlighting the distinct characteristics of these peoples in relation to other groups in situations of vulnerability. OHCHR considers, however, that the distinctiveness of potential risks and impacts of development projects concerning indigenous peoples and their traditional territories, as well as the level of the specificity of safeguard requirements affecting them, should ideally warrant a separate thematic standard. Indigenous peoples' safeguard requirements will more likely to be triggered in the EIB's project finance as it seeks to enlarge its operations beyond the EU and Candidate countries. Moreover, a separate thematic indigenous standard would be in line with the standard practice among MDBs (with the exceptions of the World Bank and African Development Bank), Equator Principles Banks and other relevant financial actors within the private sector. A self-standing EIB standard on indigenous peoples would facilitate co-financing arrangements with these institutions.

Coverage of women and gender issues

87. Standard 7 considers women as a "vulnerable group" falling within its scope of application. Gender and gender identity are mentioned in the definition of "vulnerable groups" (para. 2, Glossary). According to paragraph 16, the promoter shall adopt a "gender-responsive approach to the identification, management, and monitoring of environmental and social impacts and risks that takes into account the rights and interests of women and girls, and men and boys". Moreover, women and gender issues are referenced in various parts of the standard, including the possibility of conducting a "gender assessment" as part of the assessment and

[52] EIB, Standard 7: Vulnerable groups and Indigenous Peoples, para. 3 (noting that these groups "*are not inherently more vulnerable than others* but due to discriminatory practices and norms, and therefore a less enabling environment, they often face additional barriers that limit their opportunity or ability to equally participate in decision-making related to the project and enjoy project benefits") (emphasis added).

management of impacts and risks (para. 23) and "[g]ender-responsive consultation mechanisms" as part of stakeholder engagement (para. 27).

88. While the consideration of women as "vulnerable groups" may be particularly problematic, for the reasons outlined above, OHCHR considers that the consideration of gender-differentiated impacts may require a different methodological approach. In OHCHR's views, the ESSF could benefit from a self-standing gender equality standard, which could make it clear that a gender analysis and consideration for gender equality and women's rights should be applied across all Standards and all procedures under each Standard, and also in relation to all groups identified under Standard 7. This is the approach that is favoured by OHCHR, taking into consideration the example set by the IDB (Environmental and Social Performance Standard 9 Gender Equality).

89. Irrespective of whether a self-standing gender equality is adopted, it would be important to ensure the systematic integration of gender and women's rights considerations in each Standard, including in particular in relation to the ESP, Standard 1, and Standard 2, given their cross-cutting nature. In the case of the ESP, while the policy incorporates the objective of "Fostering gender equality and women's economic empowerment" as part of the EIB Group's "Contribution" (paras. 2.1-2.2), a gender perspective is completely absent in the operational requirements. Gender differentiated risk and impact assessment and management also appears to be absent from the requirements of Standard 1 (references to women and gender are only found in the annexes).

Scope

[Para. 9]

90. OHCHR notes that paragraph 9 conditions the application of the Standard to a determination made during the environmental impact assessment/environmental and social impact assessment (EIA/ESIA) process, as outlined in Standard 1. In OHCHR's view, this requirement is problematic, and may be inconsistent with the requirements on screening specified elsewhere in the standard.

91. For instance, paragraph 21 states that the promoter shall "identify the likelihood of the project disproportionately impacting individuals and groups who might be vulnerable…". This assessment should require the support of "qualified specialists" and may require a "more in-depth social analysis" (para. 22). If further assessment is needed, this could be done as part of the environmental and social impact assessment (para. 23). If could therefore be logically understood that the promoter's screening of the existence of "vulnerable groups" takes place before the EIA/ESIA process.

92. Similarly, in relation to projects potentially impacting indigenous peoples, the promoter is required to report the confirmed or potential presence of indigenous peoples "*from the very outset*" (para. 31). In these cases, the promoter shall present to the EIB a "a study by appropriate specialists to identify Indigenous Peoples, assess the potential project impacts on these groups and gather their views regarding the project," when the project is still in "an initial design stage." This study could be either part of the ESIA or be a standalone study.

93. In OHCHR's view, one way to addresses these potential inconsistencies and ensure that indigenous peoples and other relevant groups are identified as early as possible in the project

cycle, paragraph 9, could simply be to eliminate the requirement that these groups are to be identified in the EIA/ESIA process. The scope of Standard 7 could be then defined in objective terms, whenever potentially impacted indigenous peoples/"vulnerable" groups exist, irrespective of whether they have been identified in the EIA/ESIA or not.

[Para. 10]

94. In OHCHR's view, the criteria governing the definition of indigenous peoples in paragraph 10 appear excessively restrictive, and seem to risk excluding from the scope of Standards 7 many groups that would otherwise qualify as indigenous peoples according to national legislation and international practice. This is particularly true in relation to indigenous groups and persons who no longer speak their traditional languages, often a result of historical marginalization and forced acculturation. OHCHR would therefore recommend that paragraph 10 be amended as follows:

> *In this Standard, the term Indigenous Peoples is used in a generic sense to refer exclusively to a distinct and/or vulnerable sociocultural group possessing all* ***or several*** *of the following characteristics* (…)

[Para. 11]

95. Paragraph 11 appropriately notes that the terminology applied to indigenous peoples may vary according to the specific country context. However, to OHCHR's knowledge, the notion of "Sub-Saharan African historically underserved traditional local communities" is not a terminology that is used by any country. Rather, it seems to derive from the World Bank's Environmental and Social Standard 7, as a compromise following contentious negotiations with finance ministers from certain African countries, and is not a term that human rights specialists, indigenous peoples and may other constituencies agree with. OHCHR would recommend that paragraph 11 simply list "historically underserved communities" and "traditional local communities" on the same footing as other alternative denominations referred to in the paragraph.

Specific requirements

[Paras. 17-29]

96. OHCHR notes that the section on specific requirements is divided into two separate parts, one dealing (presumably) with "vulnerable groups" in general (paras. 17-29) and one dealing specifically with "Requirements for projects affecting Indigenous Peoples" (paras. 30-59). This may create parallel, and to a certain extent, overlapping requirements and confusion in practice. In OHCHR's view, should the EIB decide to have a standard embracing both indigenous peoples and other "vulnerable" groups, the section on specific requirements in Standard 7 should be revised to better articulate the provisions applicable in each case and cross-reference applicable requirements. This could include, for instance, revising the subsection on screening (paragraphs 11-12) to indicate that, in case an initial assessment identifies the existence of indigenous peoples who may be potentially affected by the proposed activities, this should trigger the application of specific requirements in paragraphs 30-59.

97. OHCHR welcomes the incorporation of specific requirements relating to grievance mechanisms and compensation/benefit-sharing in relation to projects affecting indigenous peoples (paras 50-2, 57-59). However, it does not seem clear why similar requirements are not included in relation to other groups covered by the standard.

Requirements for projects affecting indigenous peoples

[Para. 40]

98. OHCHR notes that paragraph 37 identifies three different planning documents that could apply whenever the promoter identifies impacts on indigenous peoples: an Indigenous Peoples Development Plan (IPDP), a Community Development Plan (for projects impacting groups other than indigenous peoples) and an Indigenous Peoples Planning Framework (for sub-projects). For the sake of clarity, these documents could be referenced explicitly in paragraph 40, instead of the reference to "other appropriate plans."

Meaningful consultation

[Para. 42]

99. OHCHR notes that Standard 7 appears to reflect a certain degree of confusion, which is not uncommon in other MDB safeguards, regarding indigenous peoples' consultation and free, prior, and informed consent (FPIC). As currently formulated, Standard 7 appears to see consultation and FPIC as unrelated processes, placed under specific subheadings and without any clear relationship between the two.

100. This is not the way consultation and FPIC are articulated in international human rights standards. The latter standards consider FPIC is as the objective of *all* consultation processes with indigenous peoples, and only a specific requirement in relation to activities that may have a major impact on indigenous peoples' rights (such as forced relocation). Thus, according to the UN Declaration on the Rights of Indigenous Peoples, "States shall consult and cooperate in good faith with the indigenous peoples concerned…to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" (art. 19). Similarly, ILO 169 requires that the consultations carried out with indigenous peoples should aim at "achieving agreement or consent to the proposed measures" (art. 6.2).

101. In light of this, OHCHR would recommend that paragraph 42 be amended to state the objective of "achieving the FPIC of indigenous peoples regarding the proposed activities, in accordance with the requirements of this Standard."

102. OHCHR would also recommend that paragraph 42 be rephrased as follows: "In addition to the general requirements for meaningful consultation, this process with Indigenous Peoples will include the following specific elements: (…) The involvement of legitimate Indigenous Peoples' **traditional authorities**, representative bodies, Indigenous Peoples' organisations as well as members of the affected communities of Indigenous Peoples."

Free, Prior and Informed Consent (FPIC)

103. Consistent with the above reflections, OHCHR would recommend a revision of the relevant requirements on FPIC (paras. 43-49), to ensure better articulation between requirements relating to "meaningful consultation" and FPIC.

[Para. 43]

104. Paragraph 43 defines FPIC as "the process whereby the affected community of Indigenous Peoples arrives at a decision undertaken with sufficient time and in accordance with their cultural traditions and practices." In OHCHR's view, this definition presents a number of problems that may led to confusion regarding the practical implementation of the FPIC requirements. In strict terms, FPIC/consent is not properly a "decision;" in the end, the objective of FPIC is not other than to *involve* indigenous peoples *in decision-making* in relation to the proposed measure or activity, through meaningful consultation and negotiations processes. "Agreement", in line with the language utilized in ILO Convention 169, could be viewed as a better term, with the advantage that it highlights the negotiated nature of FPIC (as distinct from a unilateral decision or veto power). This is also consistent with paragraph 47, which refers to FPIC as the result of a "mutually accepted process between the parties, carrying evidence of *agreement* between them *as the outcome of the negotiations.*"

[Para. 48]

105. Finally, the reference in paragraph 48 to the agreement between the promoter and indigenous peoples on "would constitute 'consent'…" is problematic, as it may allow the promoter to agree with the indigenous peoples on requirements less stringent that than those affirmed in the Standard 7. OHCHR would therefore recommend deleting this phrase.

[Para. 49]

106. If FPIC is conceived as the objective and desired outcome of consultation and negotiation processes, the term "FPIC process" may be confusing. In this regard, some of the requirements included under this section, including paragraph 49 (dealing with representativeness and legitimacy), may more appropriately be articulated as special considerations for meaningful consultations with indigenous peoples more generally, as they may affect the quality of such consultations (e.g. freedom from coercion/intimidation, timely disclosure of information in a culturally appropriate format). Correspondingly, we would recommend that an explicit requirement should be introduced that "*FPIC should be obtained as a result of a meaningful consultation processes as defined in paragraphs 41-42 of the standard*."

107. OHCHR would also recommend that paragraph 49 be rephrased as follows: "The promoter shall also consider the following factors: (…) The capacity of the communities concerned to negotiate **on an equal basis."**

OHCHR recommends that:

- *The notion of "vulnerable groups" should be replaced by a more suitable term, such as "marginalized groups", "discriminated groups", "excluded groups", "groups at risk", or a combination of these.*
- *A stand-alone thematic Environmental and Social Standard on Indigenous Peoples should be adopted. The section on specific requirements in Standard 7 should be revised to better articulate the provisions applicable to indigenous peoples and other groups and cross-reference applicable requirements.*

- *A stand-alone thematic Environmental and Social Standard on Gender equality should be adopted. Additional efforts should be made to mainstream gender and women rights' considerations throughout the ESSF, particularly in the ESP and in Standards 1 and 2.*
- *Paragraph 9 should be revised to eliminate the requirement that these groups are to be identified in the EIA/ESIA process.*
- *Paragraph 10 should be amended as follows: "the term Indigenous Peoples is used in a generic sense to refer exclusively to a distinct and/or vulnerable sociocultural group possessing all* ***or several*** *of the following characteristics (…)."*
- *The notion of "Sub-Saharan African historically underserved traditional local communities" in paragraph 11 should be deleted and substituted by references to "historically underserved communities" and "traditional local communities."*
- *Requirements relating to grievance mechanisms and compensation/benefit-sharing should be included in relation to groups other than indigenous peoples*.
- *Paragraph 40 should be revised to make a reference to the three types of indigenous peoples planning documents described in paragraph 37.*
- *Paragraph 42 should be amended to state the objective of "achieving the FPIC of indigenous peoples regarding the proposed activities, in accordance with the requirements of this Standard," and be rephrased as follows: "The involvement of legitimate Indigenous Peoples'* ***traditional authorities****, representative bodies, Indigenous Peoples' organisations as well as members of the affected communities of Indigenous Peoples."*
- *The FPIC requirements (paras. 43-49) should be revised to ensure better articulation between requirements relating to "meaningful consultation" and FPIC.*
- *The term "decision" in the definition of FPIC (para. 43) should be replaced by the term "agreement." An explicit requirement should be introduced to the effect that "FPIC should be obtained as a result of a meaningful consultation processes as defined in paragraphs 41-42 of the standard*."
- *The reference to the agreement between the promoter and indigenous peoples on "would constitute 'consent'…" in paragraph 48 should be deleted.*
- *Paragraph 49 should be rephrased as follows: "The promoter shall also consider the following factors: (…) The capacity of the communities concerned to negotiate* ***on an equal basis****."*

Standard 11 – Intermediated finance

108. Experience shows the challenging nature of financial intermediary (FI) operations from a risk management perspective,[53] requiring rigorous due diligence and carefully articulated responsibilities for impacts and remediation in the finance value chain. The UNGPs call for consideration of human rights impacts in supply chains and other business relationships. The

[53] See e.g. CAO Audit of a Sample of IFC Investments October 10, 2012 of a Sample of IFC Investments in Third-Party Financial Intermediaries Report No. I-R9-Y10-F135 (10 October 2012) *at* http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf, and ADB IED, Corporate Evaluation Study: Safeguards Operational Overview (Oct. 2014), pp.52-64, at https://www.adb.org/sites/default/files/evaluation-document/89401/files/ces-safeguards.pdf, and the strengthened safeguards introduced to FI operations in IFC and EBRD, among others.

draft ESP commits EIB to avoid supporting activities which may cause or contribute to human rights violations, however in OHCHR's view draft Standard 11 does not seem to provide an adequate framework for ensuring that EIB can consistently meet this objective in the context of its FI operations. The IFC's and EBRD's FI standards seem to provide stronger frameworks for E&S (including human rights) risk management, including with respect to risk classification, specification of the Bank's due diligence and supervision obligations, scope and applicability of performance standards, level of specification of FIs' environmental and social management systems, FIs' reporting obligations to the Bank (periodically rather than on request), stakeholder engagement, and screening of sub-projects against exclusion lists.[54] Subject to the comments below, OHCHR would recommend that EIB take inspiration from the IFC's and EBRD's FI standards in finalising Standard 11.

109. In situations where adverse impacts are "linked" to EIB's operations, products or services by its business relationship with another entity, which may include adverse impacts of sub-projects of an FI client, EIB should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGPs 13(b) and 19). Strong E&S Standards for FIs would help EIB in meeting this responsibility. There may also be situations where EIB by its own actions or omissions has "contributed" to harms together with an FI client (which will be more likely where EIB has failed to carry out adequate due diligence).[55] In such situations EIB should: (i) cease its own contribution; (ii) use its leverage with the client to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between "contributing to" and having a "direct link" to an adverse human rights impact, and a financial institution's involvement with an impact may shift over time, depending on its own actions and omissions.[56] OHCHR recommends that these distinctions be reflected in the ESP and E&S Standard 11.

110. Draft Standard 11 also seems to be silent on grievance mechanisms for FI operations. We note that the Green Climate Fund requires each "accredited entity" (FI) to have an institution-level GRM that complies with the UNGPs.[57] We would suggest that: (i) the objective of "remedy" should be included explicitly in the description and functions of grievance mechanisms in the context of FI operations, (ii) grievance mechanisms should be assessed in accordance with the criteria in UNGP Principle 31; (iii) all necessary steps should be taken to ensure that the existence of project-level GRMs and EIB's IAM are publicly known, and (iv) clients should be encouraged to take into account and implement recommendations from OHCHR's Accountability and Remedy Project.[58]

111. Finally, it would seem to be important to have a consistent position regarding the source of law applicable to FI operations. Draft para. 6 appears unduly limited in terms of sources and scope of applicable law, in OHCHR's view. In this regard we note that the IFC's Interpretation Note for FIs (para IN 25) contains an open-ended list of potentially relevant international

[54] See IFC, Interpretation Note on Financial Intermediaries (updated 2018), at https://www.ifc.org/wps/wcm/connect/a6de7f69-89c8-4d4a-8cac-1a24ee0df1a3/FI+Interpretation+Note+November+2018.pdf?MOD=AJPERES&CVID=msNA7rQ; and EBRD, PR 9.

[55] For a discussion of relevant factors determining "contribution" to harm see OHCHR, "The application of the UNGPs in the context of the banking sector" (June 2017), pp.5-10, available at https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

[56] Id./*-

[57] Green Climate Fund, Environmental and Social Policy, para. 12(c).

[58] See https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.

standards relevant to higher-risk clients.[59] For clarity, as well as rigour, OHCHR recommends that FIs should comply with the E&S Standards and relevant national and international laws, and due diligence should be informed by all applicable bodies of law, whichever sets the highest standard.

OHCHR recommends that:

- *Higher-risk FI operations should be subject to the E&S Standards and international human rights law.*
- *ESS 11 should be strengthened in line with MDB best practice (e.g. IFC, EBRD) including with respect to risk classification, specification of EIB's due diligence and supervision obligations, level of specification of FIs' environmental and social management systems, clarity and specificity of FIs' reporting obligations to EIB, stakeholder engagement, and screening of sub-projects against exclusion lists.*
- *Effective grievance redress mechanisms (GRMs) should be required for the FI and sub-project clients. In this regard: (i) the objective of "remedy" should be included explicitly in the description and functions of grievance mechanisms in the context of FI operations, (ii) grievance mechanisms should be assessed in accordance with the criteria in UNGP Principle 31; (iii) all necessary steps should be taken to ensure that the existence of project-level GRMs and EIB's IAM are publicly known, and (iv) clients should be encouraged to take into account and implement recommendations from OHCHR's Accountability and Remedy Project.*

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[59] See https://www.ifc.org/wps/wcm/connect/a6de7f69-89c8-4d4a-8cac-1a24ee0df1a3/FI%2BInterpretation%2BNote.pdf?MOD=AJPERES&CVID=n27ywSg.