UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Update of the African Development Bank's Integrated Safeguard System

Comments and recommendations of the UN Human Rights Office

17 May 2022

Contents

A. Introduction

1. We are grateful for the invitation to comment on the draft updated ISS and offer some observations from a human rights perspective. Our comments in this memo are not comprehensive, but rather are intended to focus on distinctive features and practical implications of the international human rights framework for due diligence and risk management, which in our view are not always addressed adequately in the safeguard policies of other financing institutions. In so doing, we recognise the significant advances taken by AfDB to establish its leadership in this field, highlighted in Section B (Overview) and throughout this memo.

2. We note the importance of strong due diligence and safeguards in helping clients achieve sustainable development outcomes and growth with equity, and note the findings and management responses to the September 2019 report of Independent Development Evaluation on the ISS. We are conscious of rising inequalities and governance challenges in many countries in the region, and to increasing operational challenges attributable to state fragility, discrimination and social exclusion, conflict, and environmental and Covid-19 crises. We note that the ISS will govern both sovereign and non-sovereign operations, as well as programmatic lending and a range of other financing modalities.

B. Overview

3. We very much welcome the broader scope of the draft updated ISS and AfDB's intention to address human rights concerns, in the context of contextual risk assessment and project risk management, and give greater attention to related issues such as transparency, accountability, discrimination, gender based violence (GBV), sexual exploitation, abuse and harassment (SEAH) and modern slavery. Development finance institutions (DFIs) sometimes address human rights only in aspirational terms, or as part of a "vision" for development, and it is sometimes assumed that existing environmental and social (E&S) risk management tools are sufficient to address all human rights concerns. Few other DFIs explicitly recognise economic, social and cultural rights on an equal footing with civil and political rights, as AfDB does,[1] which provides an important anchoring point for the more comprehensive integration of human rights standards and guidance. We very much welcome the numerous tangible and meaningful ways in which human rights concepts and standards have been reflected so far in the ISS, and we suggest below a number of ways in which alignment and mutual reinforcement may be further advanced.

4. Before proceeding to our recommendations, there are a number of other positive features that we particularly wish to highlight. The first is the requirement in the Environmental and Social Policy (ESP) (para. 57) for disclosure of E&S documentation 120 days before Board consideration of high risk projects. Clear time-bound disclosure in accessible languages and formats is a critical prerequisite for meaningful stakeholder engagement, prevention of harms, and sustainability, in line with MDB best practice. We also note the important requirements concerning contextual risk assessment, including human rights and discrimination aspects, which will inform project

[1] OS 7, para. 1. This recognition is also notable in the 2013 ISS.

risk ratings and E&S risk management.[2] The clear requirements throughout the ISS to prevent and address reprisals are especially important, in OHCHR's view, as are the proposed portfolio approach to FI risk management,[3] the robust requirements for Bank supervision and client reporting for high risk projects[4] and, for undertakings involving multiple projects and sub-projects, the specific requirements to report "materially significant adverse events" (including human rights violations) within clear timeframes.[5]

5. One further positive feature warrants mention, in OHCHR's view, which is the important recognition in different parts of the ISS of the need to remedy adverse impacts. Mitigation hierarchies emerged from environmental risk management practice which may not translate fully to the management of social risks, particularly where human rights impacts, involving fundamental considerations of human dignity, are concerned. Subject to the recommendations below, we very much welcome the explicit recognition of "remedy" in various parts of the ISS[6], the requirements to build contractual leverage up-front,[7] the requirements for client disclosure of GRMs, the explicit requirement for costed remedial actions in ESAPs[8] and accompanying recognition that E&S costs to be fully "internalised" within the project.[9] With these building blocks, subject to the discussion below, we hope that AfDB will establish a robust framework for enabling remedy that will constitute best practice among DFIs globally.

6. Against this backdrop, we offer recommendations in the following areas: (a) Strengthening alignment of the ISS with international human rights standards; (b) enabling remedy; (c) addressing supply chain risks; (d) responsible exit; (e) gender equality and lesbian, gay, bisexual, transsexual and intersex (LGBTI) peoples' rights; (f) indigenous peoples' rights; (g) addressing digital technology risks; (h) financial intermediary operations; (i) results-based financing; (j) program-based operations; (k) waivers and deferrals; (l) adaptive risk management; and (m) clarifying AfDB and client responsibilities.

7. The issues selected for discussion here reflect OHCHR's assessment of their practical importance, human rights implications, and potential global significance for development finance institutions and national E&S frameworks. The comments in this memo address substantive policy and procedural issues rather than implementation requirements, although we recognize that positive development outcomes depend on both.

[2] Overview, para. 6(ix), OS1, para. 19 and Annex I ("Indicative Content of an ESIA") and Section G ("Contextual Risk Assessment"). The guidance in Annex I for clients to consider the implications of contextual risks for the fulfilment of members' obligations under international human rights law is particularly welcome in OHCHR's view, although we'd note that para. 29 of the Policy could make it clearer that the outcomes of contextual risk assessment should influence the project risk classification and should be integrated on an ongoing basis in due diligence and E&S risk managment throughout the Project cycle. Moreover, as a minor editorial point, we'd note that the reference to "case law of the Inter-American Court of Human Rights" in Annex I, Section G, should be replaced with "jurisprudence of the African Commission and Court on Human and Peoples' Rights."

[3] OS9, para. 6. Further elaboration of supervision requirements may be desirable, however, as suggested further below.

[4] ESP paras. 64 and 67, OS1 para. 42, and OS9 para. 17(g). The Policy also clearly states consequences for non-compliance (paras. 68 and 70).

[5] ESP para. 35 (such incidents are to be reported in not less than 3 days), and OS1 paras. 56, 58 and 59.

[6] OS2 paras. 17, 42, 45, 47; OS5 para. 3; OS7, paras.11, 17 and 19.

[7] ESP, paras. 68 and 70.

[8] OS5, para. 31.

[9] OS1 para. 36.

C. Strengthening alignment with international human rights standards

8. As indicated at the outset, OHCHR welcomes the clear intention of the ISS to align with international human rights standards and the numerous cross-references to specific instruments. The draft ISS goes further in these respects than most other DFIs. The suggestions offered below are intended to strengthen alignment and policy coherence further, and encourage AfDB to require the application of the most stringent applicable set of standards for E&S risk management purposes.

9. Firstly, in its "Vision for Sustainable Development" (para. 8), we note the statement that the AfDB's activities "support the realisation of human rights" and that, through its activities, it seeks to avoid adverse impacts and support member countries in realising their human rights commitments. However the first part of this statement seems to be more in the nature of an empirical claim than a policy commitment, and the second part seems overly aspirational. OHCHR recommends that ADB consider replacing para. 8 with a clear and robust policy commitment to *respect* human rights, taking inspiration from the IDB's Environmental and Social Policy Framework (ESPF) and EBRD's Environmental and Social Framework (ESF).[10]

10. Secondly, while the draft updated ISS usefully cites a range of relevant international human rights conventions, we note with concern the lack of any reference to the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and are the most authoritative framework for enhancing standards and practices with regard to human rights risks related to business activities. The UNGPs reflect existing human rights law pertaining to State regulation of corporate activity, and are reflected in the IFC's Sustainability Framework (Guidance Note to Performance Standard 1), the IDB's ESPF (ESPS 1, fn 52), the Equator Principles, OECD's Guidelines for MNEs and Responsible Business Conduct Due Diligence Guidance (2018),[11] and are applicable to sovereign and non-sovereign lending.

11. The UNGPs provide authoritative and practical guidance that could be integrated into the ISS and strengthen AfDB's approaches in connection with: (a) risk assessment, prioritizing severity (including *irremediability)* over likelihood (UNGP 24); (b) due diligence, encouraging the application of human rights due diligence as a routine matter throughout the project cycle (rather than as a static exercise at a fixed point in time, applicable only in exceptional

[10] See IDB ESPF, para. 1.3: "The IDB is committed to respecting internationally recognized human rights standards. To that end, in accordance with Environmental and Social Performance Standard (ESPS) 1 of this Policy Framework, the IDB requires its Borrowers to respect human rights, avoid infringement on the human rights of others, and address risks to and impacts on human rights in the projects it supports." The EBRD ESF has a policy requirement in similar terms.
[11] See https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm. Bilateral DFIs' safeguards, such as those of FMO and Finnfund, also frequently reference the UNGPs. BII's Policy on Responsible Investing (2022) includes the UNGPs as part of the reference framework in connection with Investee E&S requirements for labour and working conditions, supply chain risk management, and consumer protection. It also requires investees to "ensure that, where material human rights issues are identified (including in supply chains) the UNGPs are integrated into an Investee's management systems and appropriate capacity and governance oversight embedded in an Investee's operations." (Annexes A and C respectively)

circumstances)[12]; (c) addressing supply chain risks (discussed further below); and (d) enabling remedy (discussed further below). Rigorous alignment with the UNGPs would also help AfDB to meet evolving stakeholder expectations and emerging regulatory requirements such as those associated with EU human rights due diligence legislation, which may have implications for AfDB clients, contractors and supply chain risk management.[13] The ISS update process offers AfDB an important opportunity to anticipate and stimulate analogous regulatory shifts in the African region, with potentially significant benefits for accountability and sustainability in development financing.[14]

12. Finally, on our reading of the draft ISS, there may be lack of clarity and consistency about the relative priority to be given to national and international law in risk assessment. This is an important issue, given the relative weakness of national laws on many social issues, as the AfDB has documented.[15] The requirement to observe international standards seems stronger for labour rights than other issues, in the ISS, although OS1 (para. 15) states that the requirements of ISS Guidance Notes should prevail over host country requirement in the event that the latter are less stringent. However we'd note that the adjective "directly applicable" in OS 1, para. 22 and Section B (p.41), a term found in certain other MDB safeguards, seems redundant or alternatively in need of clearer definition given the wide scope of E&S issues that may be relevant when contextual risks are factored in. OHCHR would suggest that a definition of "applicable law" be included in the glossary, comprising all relevant sources of law (national, regional, international) on an equal footing, and be used consistently throughout. We would also recommend that social and environmental risk assessment and management, due diligence, and assessments of country/corporate systems should be informed by all applicable bodies of law, whichever sets the highest standard.

OHCHR recommends that:

- *Section 1.4 of the Policy should contain a more specific commitment that: "AfDB respects human rights in connection with the projects it finances. AfDB will require clients 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."*

[12] Certain MDBs encourage human rights due diligence explicitly, but only in relation to "special high risk circumstances" (e.g. IFC PS 1 fn 12; *cf*. IDB ESPF fn 52, limiting human rights due diligence only to "significant risk" projects). These constraints overlook the dynamic nature of risk and the need for human rights due diligence to inform risk classification at the outset, as well as throughout the project cycle.

[13] See e.g. Simmons & Simmons, "ESG: Human rights and environmental due diligence proposal" (Mar. 3, 2022); Norton Rose Fulbright, "European Commission tables long awaited human rights and environment due diligence law" (Feb. 2022); Clifford Chance & Global Business Initiative on Human Rights, "Business and Human Rights: Navigating a Changing Legal Landscape" (Jan. 2022). While the principal addressees of the EU legislation are larger companies in certain higher-risk sectors, affected companies will be required to cascade human rights due diligence obligations through their business relationships and value chains.

[14] See e.g. Joseph Kibugu, "Is it time for African countries to introduce mandatory due diligence on human rights?" Business and Human Rights Resource Center (July 29, 2019).

[15] African Development Bank Group, Assessment of the Use of "Country Systems" for Environmental and Social Safeguards and their Implications for AfDB-Financed Operations in Africa (Abidjan, 2015). The report compared AfDB safeguards and six country systems and concluded that (a) there was a strong correlation between each country's level of governance and socioeconomic development and the performance of the country's environmental safeguards system; (b) the degree of equivalence of country systems was particularly low for policies on, among others, involuntary resettlement and working conditions; and (c) there were no legal/regulatory provisions or local expertise on most social themes (gender, working conditions, vulnerable groups etc.). See also AfDB Independent Development Evaluation, Evaluation of the AfDB's Integrated Safeguards System: Summary Report, p. 42.

- *The UN Guiding Principles on Business and Human Rights should be integrated explicitly within the ISS in order to strengthen the framework for: (a) risk assessment; (b) ongoing, risk-based due diligence; (c) addressing supply chain risks; and (d) enabling remedy.*

- *The term "applicable law" should be defined in the glossary, listing international and national law on an equal footing, and should be applied consistently throughout the OS's.*

- *Social and environmental risk assessment and management, due diligence, and assessments of country/corporate systems should be informed by all applicable bodies of law, whichever sets the highest standard.*

D. Enabling remedy

13. As indicated at the outset, OHCHR warmly welcomes the numerous specific requirements in the draft updated ISS concerning remedy (including OS 7 paras. 11 and 17[16]), its requirement for costed E&S remedial action plans in ESAPs, its commitment to fully internalise E&S costs within projects, and its provisions regarding GRMs. Moreover under the recently revised procedures of the AfDB Independent Recourse Mechanism (IRM), we note that management action plans must include "clear time-bound actions for returning the Bank to compliance and achieving remedy for affected populations."[17] This is among the strongest remedy frameworks of any IAM. The following suggestions are offered to further strengthen AfDB's and clients' approaches to remedy, and tighten internal coherence between and facilitate implementation of the ISS and AfDB-IRM policy.

14. Firstly, under international human rights law, which the draft updated ISS has committed to respect, "remedy" is a holistic concept encompassing not only compensation (a standard component of DFI mitigation hierarchies), but also restitution, rehabilitation, satisfaction (including public accounting, aimed at restoring the dignity of those who have suffered human rights violations), and guarantees of non-repetition (including policy changes to prevent recurrence). Where projects are associated with serious abridgements of human rights, such as forced evictions, GBV or SEAH, or reprisals against environmental or human rights defenders, a combination of the above remedies will often be required in order to make people whole. OHCHR would recommend that this multi-faceted definition of remedy be included in the glossary, and that the mitigation hierarchy in the ISS consistently refer to: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to *remedy* such impacts."[18] [Emphasis added].

15. Secondly, while welcoming the important recognition in the draft ISS on the limitations of "offsetting" biodiversity impacts,[19] there does not seem to be any recognition of the in

[16] However these references may be undercut by OS 7 para. 20 which states that "[t]he Borrower and affected vulnerable groups will identify mitigation measures in alignment with the mitigation hierarchy described in OS1", which is to avoid, minimise, mitigate, and compensate/offset.
[17] AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 69 (b). The CAO's revised (2021) procedures have a similar provision, as does EBRD-IPAM "Project Accountability Policy" (London, 2019), para. 2.7 (a). The GCF-IRM is explicitly authorised to recommend compensation. See also World Bank, "Guidance note for borrowers – Environmental and Social Framework for IPF operations – ESS1", para. GN27.1(c), which specifically includes the responsibility to remedy.
[18] OHCHR's Remedy in Development Finance: Guidance and Practice (2022), Chapter II, elaborates more extensively on this theme.
[19] OS 1, para.23, fn 20, and OS 6, paras. 15-16, reflect a cautious approach to biodiversity offsets.

appropriateness of offsetting for social (including human rights) impacts. OS 1 (para. 5, and Section H. (ESMP)) contains no restrictions on off-setting for social impacts, and the ISS Overview (para. 13) seems to reflect an assumption that offsetting may apply across the scope of all OS's, with a precautionary approach only for biodiversity offsets. A general distinction between environmental and social issues in this regard is reflected in the Preamble of the 4th revision of the Equator Principles which states: "Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimised and mitigated, and where residual impacts remain, clients should provide *remedy* for human rights impacts or offset environmental impacts as appropriate." [Emphasis added]. In line with the Equator Principles, we would recommend that a similar reference be included in the definition of "remedy" in the draft updated ISS, noting the inappropriateness of off-setting where social (including human rights) impacts are concerned.

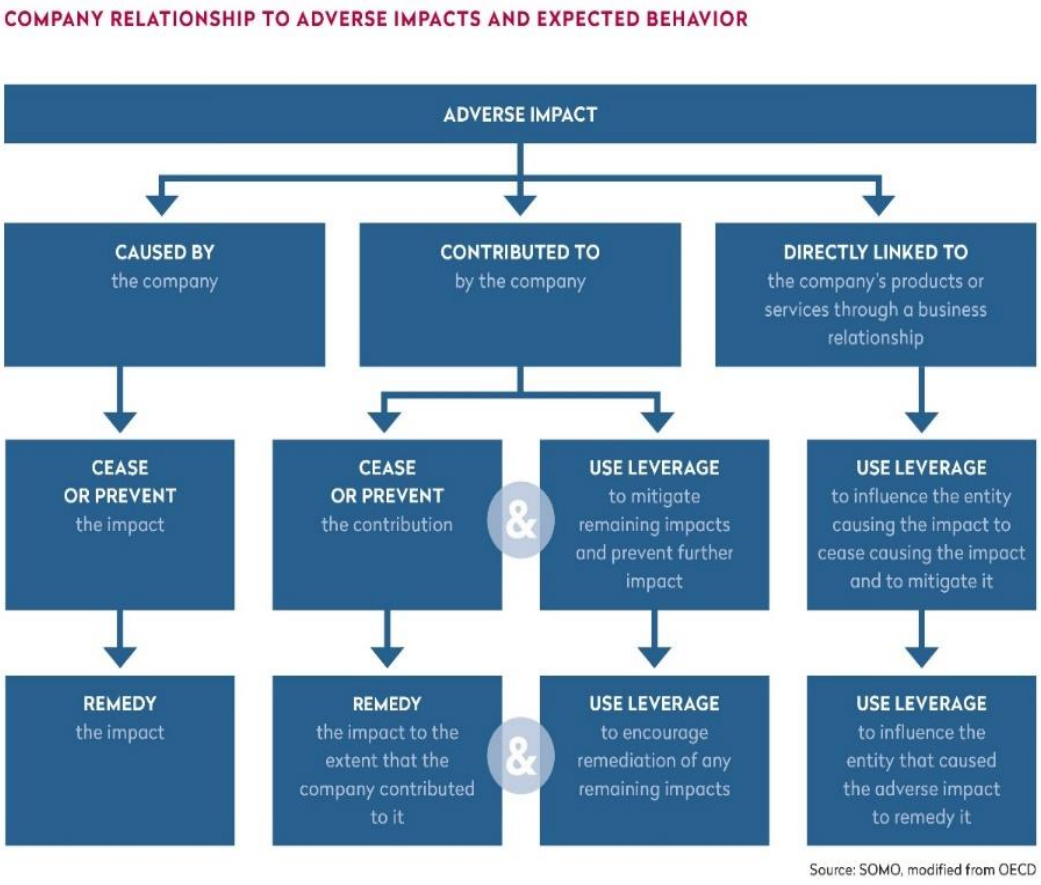
16. Third, we would recommend that AfDB's and clients' responsibilities for remedy explicitly take into account their respective involvement in impacts. Under the UNGPs and OECD RBC guidance, banks' responsibilities in connection with adverse impacts should be determined in light of whether they may fairly be said to have "caused" or "contributed to" adverse impacts, or alternatively are "directly linked" to those impacts through their business relationships and financial products or services. This was among the central recommendations of the recent IFC/MIGA External Review on E&S Accountability.[20] "Linkage" situations (rather than "causing" or "contributing to" impacts) are the most common scenario in the context of development financing.[21] Where adverse impacts are "linked" to AfDB's operations, products or services by its business relationship with another entity, AfDB should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGPs 13(b) and 19).[22] In this regard, we would note that the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and AfDB's financial product or service. Rather, the link needs to be between the financial product or service provided by AfDB and the adverse impact itself.[23]

17. However, there may well be circumstances where AfDB by its own actions or omissions has "contributed" to harms together with an implementing organisation (such as where AfDB has not carried out adequate due diligence).[24] In "contribution" situations, under the UNGPs and OECD RBC guidance, the financial institution should: (i) cease its own contribution; (ii) use its leverage with the implementing organisation 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,

[20] IFC/MIGA External Review on E&S Accountability (June 2020), paras. 306-339.
[21] OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), p. 3.
[22] For an illustration, under the EIB's (former) 2018 safeguards: "The promoter is recommended to regularly carry out human rights due diligence in order to identify and assess any actual or potential adverse impact with which it may be involved (i.e. impacts that it may cause or contribute to as a result of its own activities or which may be directly linked to its operations, products or services by its business relationships). This is of special relevance in the case of business enterprises. As outlined in the UN Guiding Principles on Business and Human Rights, this process should: (a) draw on internal and/or independent external human rights expertise; and (b) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the of the business enterprise and the nature and context of the operation." EIB, Environmental and Social Standards (2018), ESS 9, fn 45.
[23] OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), pp.5-6. See also OECD (2018) "Due Diligence for Responsible Business Conduct", p. 71.
[24] For a discussion of relevant factors determining "contribution" to harm see OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), pp.5-10.

depending on its own actions and omissions.[25] Figure 1 summarises these principles, applicable to DFIs as well as their clients.

Figure 1



18. "Contributing to remedy" means providing remediation appropriate to one's share in the responsibility for the harm. Whether providing for or cooperating in remedy,[26] the processes should be legitimate in the eyes of those who have suffered the harm and should follow basic requirements of fairness and due process. Cooperating in remediation does not necessarily mean that the financial institution should be expected to provide financial compensation to project-affected people, although there may well be a compelling case to do so. Other means of contribution may include engagement of expert studies, supporting the engagement of a facilitator, providing technical expertise, and working with co-financers or other relevant parties to improve the situation. Ultimately, affected stakeholders should be meaningfully consulted

[25] *Id*.
[26] On the distinction between "providing for" and "cooperating in" remedy, see OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (New York and Geneva, 2012), p. 64.

about the type of remedy that would be appropriate in a given situation and the manner in which it should be delivered.[27] OHCHR recommends that the above definitions and distinctions be reflected in the ISS in order to ensure that AfDB's and clients' respective responsibilities are more clearly understood and closely aligned with the UNGPs and relevant regulatory developments, thereby stimulating more consistent and effective remedial responses.

19. We also note that ESP paras. 72-73 would require complainants to bring their concerns to the Bank prior to approaching the IRM. Whilst it is of course desirable in principle that Bank management should have an opportunity to respond and address any concerns, there may be good reasons (such as reprisals risks or serious confidentiality concerns) why complainants may not wish or feel able to do so in specific cases. Hence we'd recommend that prior referral to the Bank be articulated as an expectation, subject to legitimate exceptions as the case requires, rather than a categorical requirement. This recommendation is consistent with the revised AfDB-IRM policy which allows for exceptions to the requirement for prior engagement with Bank management in cases where this engagement would be "futile or potentially harmful to the complainants."[28]

20. Finally, we would also recommend that OS 10 paras. 28-31 and OS 10, Annex I, specify requirements that clients make the existence of the GRM and IRM known to project-affected people in a timely and accessible fashion, and that clients are obliged to cooperate in GRM and IRM processes, and that these requirements be included in loan and investment agreements. In order to strengthen GRMs, we'd also suggest that OS 10 paras. 28-31 and/or OS 10, Annex I, spell out the effectiveness criteria for GRMs in UNGP principle 31.[29]

OHCHR recommends that:

- *A multifaceted definition of remedy be included in the ISS Glossary: "Restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition." Such a definition would better reflect international human rights standards and equip the AfDB and clients to address a wider range of adverse social (including human rights) impacts.*

- *The definition of "remedy" in the ISS should recognise the inappropriateness of off-setting where social (including human rights) impacts are concerned.*

- *The mitigation hierarchy in the ISS should be amended to: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts."*

- *Responsibilities to address adverse impacts should take into account the respective involvement of clients and AfDB in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*

[27] A/HRC/44/32, annex, policy objective 12, para. 12.2; and A/HRC/44/32/Add.1, paras. 64–66.
[28] AfDB-IRM Policy (2021), para. 16(c).
[29] At present, OS 10 and Annex I discuss a few UNGP principle 31 criteria, particularly accessibility, transparency and predictability. But there is more guidance that could usefully be offered to clients on these criteria, as well as on the UNGP's expectation that GRMs be legitimate, equitable, rights-compatible, a source of continuous learning, and based on engagement and dialogue (UNGP, principle 31).

- *AfDB should consider removing the proposed categorical requirement in ESP paras. 72-73 that complainants must bring complaints to the Bank prior to the IRM, or at least explicitly permit exceptions as complainants' circumstances require.*

- *OP 10 should specify that clients are required to make the existence of the GRM and IRM known to project-affected people in a timely and accessible fashion, and that clients are obliged to cooperate in GRM and IRM processes. Consistent with DFI best practice, these requirements should be included in loan and investment agreements. OHCHR would also recommend that the ESP specify that AfDB should also ensure that the existence of the IRM is made known to project-affected people in a timely and accessible fashion.*

E. Addressing supply chain risks

21. We note that under OS 1, para. 30, the environmental and social assessment will include consideration of risks and impacts associated with primary suppliers, and the borrower's responsibilities in this regard will depend upon its "control or influence" over those suppliers. We note that in line with other MDBs[30] the term "primary suppliers" is defined quite restrictively: "Primary suppliers are those suppliers who, on an ongoing basis, provide directly to the project goods or materials essential for the core functions of the project. Core functions of a project constitute those production and/or service processes essential for a specific project activity without which the project cannot continue."

22. In OHCHR's view a more proactive approach would be strongly desirable if issues such as forced labour, often buried deep in supply chains, are to be more consistently identified and tackled. For example, under the ISS's current definition of "primary supplier", if there was a supply chain disruption in relation to a given project, the client might disavow responsibility for E&S risks in relation to the (temporary) supplier, because the supply relationship was not an "ongoing" one. In OHCHR's view, consistent with the UNGPs, the scope of supply chain due diligence should cover all those impacts with which AfDB is involved (including those directly linked to its operations, products or services by its business relationships),[31] whether or not these relate to primary suppliers.

23. A further problem, in OHCHR's view, is that the "control or influence" test in the ISS (ESP para. 9; OS 1 para. 30, OS 2 para. 47; OS 6 para. 46) may have an unintended effect of lowering the level

[30] See e.g. IFC, Guidance Note 1, Assessment and Management of Environmental and Social Risks and Impacts (Jan. 1, 2012), para. 10: "Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with primary supply chains, as defined in Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30)." To similar effect see World Bank, Guidance Note for Borrowers (ESS 1) (June 2018), para. 34.

[31] UNGP, Principle 17. The commentary to GP 17 recognises that where business enterprises have large numbers of entities in their value chains it may not be possible to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence. OHCHR, Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), p.42.

of ambition and discouraging clients from proactively building and exercising leverage to ensure that more E&S risks and impacts are identified and addressed.[32] Under the UNGPs and OECD RBC guidance, the client's existing level of control or influence does not affect the scope of harms that they should be trying to identify and address. The same should apply to DFIs in principle. Where it is necessary to prioritize actions to address harms, this should be determined by the severity (scale, scope and irremediability)[33] of risk, not the client's existing control or influence. In OHCHR's view, clients (and AfDB) should be encouraged to lean into risk and proactively seek avenues through which leverage could productively be exercised across the scope of their business relationships, while avoiding any categorical cut-off point at the level of primary suppliers.[34]

24. More positively, however, under para. 47 of OS2, we note that where forced or child labour impacts are in a client's supply chain and where remedy is not possible, clients can be required to shift their supply chains to suppliers that can demonstrate that they comply with safeguard policy requirements.[35] OHCHR suggests that this important requirement should be included in the ISS in respect of all serious adverse human rights impacts in supply chains (not limited to forced or child labour issues, and not limited to primary suppliers), if clients do not eliminate such practices within a reasonable timeframe.[36]

OHCHR recommends that:

- *The ISS should clarify that AfDB and clients should address all potential human rights impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, without any categorical limitation to "primary suppliers".*

- *The ISS should spell out different kinds of leverage (including commercial, contractual, convening, normative, and capacity building) that may be built and deployed by AfDB and clients to address human rights risks in which they are involved.*

- *When it's necessary to prioritize actions, AfDB and clients should start with the most severe risks and impacts, taking into account their scale, scope and irremediability.*

- *Where serious human rights impacts are in a client's supply chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate*

[32] By contrast IFC PS 1 does include a requirement (of sorts) to build leverage in the context of supply chain risk management: "Where the client does not have control or influence over the management of certain environmental risks and impacts in its supply chain, an effective ESMS should identify the entities involved in the value chain and the roles they play, the corresponding risks they present to the client, and any opportunities to collaborate with these entities in order to help achieve environmental and social outcomes that are consistent with the Performance Standards."
[33] UNGPs, Principle 24.
[34] For illustrative discussions on the ways in which banks and clients may build and exercise leverage on E&S issues in the finance value chain (including but not limited to contractual leverage), see the report of the Dutch Banking Sector Agreement working group on enabling remediation (2019), and OHCHR, Remedy in Development Finance: Guidance and Practice (2022), Chap. III.
[35] A similar requirement is in IFC PS 2, para. 29.
[36] For comparison see EBRD PR 2, para. 26. Under the UNGPs, the reasonableness of the timeframe to eliminate human rights abuses depends, among other things, of the seriousness of the impacts in question and prospects for exercising leverage – individually and collectively – to encourage better performance.

that they comply with safeguard requirements or to eliminate such practices within a reasonable time frame.

F. Responsible exit

25. We note that there is inconsistent practice and, often, unclear policy among DFIs on how to address E&S issues post-exit. We note that the subject of "responsible exit" has recently been under discussion in certain DFIs including IFC and FMO, and that IDB Invest is currently implementing a responsible exit action plan after exiting from its San Mateo and San Andès hydro-dam investments in Guatemala.[37] But in general terms there seems to have been an imbalance between the efforts expended by DFIs on up-front compliance and development impact when entering projects, compared with exit.[38] Data on this issue is scarce: most recent DFI Safeguard evaluations have generally neglected E&S issues at closure, and for the most part, exits occur completely out of the public eye.

26. In OHCHR's view, it should be made clear that safeguard compliance and accountability are expected after the project has ended, along with client contribution to mitigation post-project completion as needed. This of course raises the question of what mechanisms AfDB may have to ensure compliance, and how leverage may consciously and systematically be built at the beginning of client relationships. In OHCHR's view, the ISS should map the various means by which AfDB can build and exercise leverage in practice, ideally through a thoroughly consulted action plan that covers remedial measures as necessary, backed by explicit remediation requirements in safeguards and legal agreements. Beyond legal agreements, options to build leverage may include working with syndicated lenders or other investors in the client company to pressure the client to take action, engaging with national authorities, providing incentives for bringing the project into compliance (such as the prospect of repeat loans), among others,[39] along with capacity support for the client where needed.

27. We would also recommend that the ISS specify that human rights violations are among the conditions warranting project termination, and that project termination is considered a last resort. In line with the UNGPs, decisions to terminate a project should also take into account a rigorous assessment of potential human rights impacts on project-affected people. OHCHR's *Remedy in Development Finance: Guidance and Practice* (2022), chapter V, contains more detailed discussion and recommendations on these issues.

OHCHR recommends that:

- *The ISS should include a brief summary of the various means by which AfDB can build and exercise leverage post-closure in practice (through legal agreements and otherwise), ideally through a thoroughly consulted action plan that covers remedial measures as necessary, backed by explicit remediation requirements in safeguards and legal agreements.*

[37] See https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1567711961-1924.
[38] A recent World Bank evaluation noted shortcomings in how Safeguard non-compliance issues were addressed at project closure. World Bank Independent Evaluation Department (2018a) "Results and Performance of the World Bank Group 2018", p.170.
[39] OHCHR, Remedy in Development Finance: Guidance and Practice (2022), Sections III and IV.

- *The ISS should outline the main elements of a "responsible exit framework" applicable across the full project cycle, including:*
  - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
  - *A clear requirement not to exit without first using all available leverage and exploring all viable mitigation options, and without conducting a human rights impact assessment and consulting with all relevant stakeholders;*
  - *A commitment not to leave behind unremediated harms, including those arising from the exit;*
  - *A commitment to ensure that project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
  - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
  - *A commitment to seek a responsible replacement(s) for AfDB, or the client, as the case may be, on exit.*

- *The ISS should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.*

- *The safeguards should require public disclosure of termination provisions of loan agreements in order to help understand whether they require any assessment of unremediated environmental and social impacts as a condition of exit.*

G. Gender equality and the human rights of LGBTI people

28. OHCHR welcomes the high priority given to discrimination issues in the draft ISS (Vision para. 7, ESP para. 3, OS 1 para. 24, OS 7 and other OS's) and the recognition (draft OS 7 para. 3) that vulnerability is "not an inherent characteristic and does not occur in a vaccum" and can be caused by discrimination. Nevertheless we would respectfully suggest that the draft updated ISS and OS7 may still give the overall impression that women, minorities, persons with disabilities and so forth are inherently "vulnerable." Should AfDB retain OS 7 in its present form, as a composite OS concerned with a wide range of population groups, we would suggest that the title "Vulnerable or marginalised groups" might better reflect the AfDB's stated intention.

29. Whether or not AfDB retains a broad-ranging OS addressing vulnerable or marginalised population groups generally, OHCHR would recommend that AfDB consider adopting a stand-alone OS on gender equality such as that contained in the IDB ESPF (ESPS 9),[40] inlcuding addressing discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). There are many reasons for which heightened visibility and explicit treatment of gender equality is warranted, in OHCHR's view. The great majority of African States are party to the Convention on the Elimination of All Forms of Discrimination Against Women,[41] and the Protocol to the African Charter on the Rights of Women in Africa ('the Maputo Protocol') is one of the world's most comprehensive and

[40] Available at https://www.iadb.org/en/mpas.
[41] See https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en.

progressive women's human rights instruments.[42] Gender equality is not only intrinsically important, but is a powerful development multiplier. Globally, the loss of human capital wealth due to gender equality has been estimated at USD 160.2 trillion.[43] For the most unequal countries, according to the IMF, closing the gender gap could increase GDP by an average of 35 percent.[44] The G20 Principles on Quality Infrastructure Investment (QII) recommend that "the design, delivery and management of infrastructure should respect human rights", including women's rights.[45]

30. Discrimination experienced by women in the private and public spheres drives vulnerability and undercuts women's participation and equal access to the benefits of development projects. This is even more pertinent in the context of recovery from the COVID-19 pandemic, given the significant setbacks that have occurred across the Africa region in relation gender equality. Women and girls are often absent in designing, implementing and monitoring development projects,[46] and when they are present, their voices do not always have same weight as those of men. Women are often first in line defending their homes from forced evictions and last in line for compensation. Women in rural areas or belonging to ethnic groups face multiple forms and layers of discrimination and marginalization, which are often exacerbated in the contexts of negative impacts of development projects.

31. The exclusion of women from the formal economy and social protection systems,[47] the denial of bodily autonomy and SRHR, shrinking civic space, GBV and SEAH are among the factors which critically undermine women's economic participation. GBV (including from worker influx) remains a stubbornly common feature of development projects, exacerbated by the Covid-19 pandemic.[48] Personal security risks continue to limit the access by many women to transport, sanitation and other infrastructure and services. Displacement and dispossession may dramatically alter women's social and economic roles and expose women and girls to higher risks of human trafficking and other exploitative practices as well as GBV.

32. Development projects should take particular care to avoid exploiting unpaid and underpaid informal work of women.[49] Free-riding women's unpaid and underpaid care work not only

[42] See https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa; and African Union & OHCHR, Women's Rights in Africa (2016). We welcome the referencing of the Maputo Protocol and African Charter in fn. 3 of draft OS 7.
[43] World Bank, How Large is the Gender Dividend? Measuring Selected Impacts and Costs of Gender Inequality (Feb. 2020).
[44] Kristalina Georgieva, A New Bretton Woods Moment, Oct. 15, 2020.
[45] G20 QII Principle 5.2 (June 2019). Also, Principle 5.3 provides: "5.3. All workers should have equal opportunity to access jobs created by infrastructure investments, develop skills, be able to work in safe and healthy conditions, be compensated and treated fairly, with dignity and without discrimination. Particular consideration should be given to how infrastructure facilitates women's economic empowerment through equal access to jobs, including well-paying jobs, and opportunities created by infrastructure investments. Women's rights should be respected in labor market participation and workplace requirements, including skills training and occupational safety and health policies." See https://www.mof.go.jp/english/policy/international_policy/convention/g20/annex6_1.pdf.
[46] For example, the percentage of women in public administration in the Sub-Saharan Africa and Northern Africa and Western Asia regions is 38 and 37 per cent, respectively. UNDP: Global Report on Gender Equality in Public Administration, 2021, p.29.
[47] In 2021 women in Africa had the lowest rates of legal coverage (3.9 per cent) of comprehensive social protection. UN Women: Beyond COVID-19: A feminist plan for sustainability and social justice (2021), p.22.
[48] The UN has referred to a "shadow pandemic" of GBV in East and Southern Africa: UN Women & UNFPA, The Impact of Covid-19 on Gender Equality and Women's Empowerment in East and Southern Africa (Apr. 2021), p.iv.
[49] See https://data.unwomen.org/publications/whose-time-care-unpaid-care-and-domestic-work-during-covid-19.

undermines women's enjoyment of human rights but also compromises the outcomes of development projects. For example, countries in sub-Saharan Africa rely on over 900,000 community health workers to support their health systems, including in the pandemic response. Nearly 70 per cent of these workers are women, and some 86 per cent are unpaid, shouldering unmanageable caseloads while lacking basic health protection and training.[50] Such exploitation of women's unpaid labour risks women's health and compromises the quality of health care services.

33. Conversely, investing in hte care economy may contribute significantly to the economy and advance gender equality at the same time. For example, it is estimated that in South Africa, making childcare services universally available to all children under the age of 5 could create 2.3 million new jobs and raise female employment rates by 10 percentage points. New tax and social security revenue from these jobs would reduce the required fiscal outlay from 3.2 per cent to 2.1 per cent of GDP.[51]

34. A self-standing gender equality OS should also address the human rights of LGBTI persons in the region, in line with the findings of African and United Nations human rights mechanisms. Discrimination on the grounds of sexual orientation and gender identity is mentioned in the draft updated ISS, but only in passing. Yet despite recent progress in certain countries in the region,[52] nearly half of the countries worldwide where consensual same-sex relations are outlawed are in Africa.[53] The African Commission on Human and Peoples' Rights has expressed alarm at the fact that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity. The abuses include 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity.[54]

35. Abuses and discrimination against LGBTI people undercut a wide range of rights essential for participating in, contributing to and benefiting from development. The World Bank has documented high economic and social costs of exclusion of LGBT persons.[55] Homophobia and transphobia can cost 1% or more of a country's GDP.[56] Studies show that discrimination against LGBT people results in lost labour time, lost productivity, underinvestment in human capital, and the inefficient allocation of human resources.[57] Violence, stigmatization and discrimination

[50] UN Women: Beyond COVID-19: A feminist plan for sustainability and social justice (2021), p.43.
[51] UN Women: Beyond COVID-19: A feminist plan for sustainability and social justice (2021), p.41.
[52] In recent years Angola, Botswana, Mozambique, Lesotho and the Republic of the Seychelles decriminalized consensual same-sex relationships.
[53] See https://www.globalcitizen.org/en/content/countries-legalized-same-sex-relationships-africa/. As of 2022, three countries in Africa still have the death penalty for homosexuality: Nigeria, Mauritania and Somalia. (Sudan eliminated the death penalty in 2020). See https://ilga.org/sudan-removes-death-penalty-same-sex-relations.
[54] African Commission on Human and Peoples' Rights, Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity - ACHPR/Res.275(LV)2014, 2014.
[55] World Bank Report on A Comparative Analysis of the Socioeconomic Dimensions of LGBTI Exclusion in Serbia, 2019, and World Bank Working Paper on the economic cost of stigma and the exclusion of LGBT people : a case study of India, 2014.
[56] Lee Badgett, *The Economic Case for LGBT Equality: Why Fair and Equal Treatment Benefits Us All* (Boston: Beacon Press, 2020).
[57] Lee Badgett, Kees Waaldijk & Yana van der Meulen Rodgers, "The relationship between LGBT inclusion and economic development: Macro-level evidence," Vol. 120 *World Development* (Aug. 2019), pp.1-14.

against LGBTI people are rooted in negative gender stereotypes and perceptions that LGBTI people defy gender norms. Integrating protections of the rights of LGBTI people within a stand-alone gender equality safeguard would elevate the intrinsic and economic importance of this issue, reinforce an intersectional approach to addressing discrimination issues in the ISS, and help to ensure that no one is left behind.

OHCHR recommends that:

- *AfDB should consider including a stand-alone OS focused on gender equality, including the rights of women and girls and inclusion of LGBTI people, modelled upon IDB ESPS 9. A stand-alone gender equality safeguard should include robust protections against discrimination on the grounds of SOGIESC.*

- *AfDB should specify in the ISS that conflicts between applicable international and national legal standards governing women's rights, gender equality issues, the rights of LGBTI people should be resolved in favour of the more stringent standard.*

H. Indigenous peoples' rights

36. OHCHR recognises the important roles played by MDBs, including AfDB, in setting high standards on social and environmental issues and, through their financing, technical advice and policy dialogues, exerting a postive influence on their shareholder members' legal and regulatory frameworks. This seems particularly important given the widening gap between national and international standards on many social issues in Africa and other regions.

37. We note AfDB's intention to address indigenous peoples' rights within the wider scope of OS 7, and that FPIC (as defined in the Glossary, ESP (para. 63, fn 45) and OS 7 (paras. 35-41)) will be applicable to "highly vulnerable rural minorities" as defined in OS 7 (paras. 14-15).[58] We note the contested nature of indigenous peoples' rights in many contexts, including in many African countries, but that the situation is not static and country positions and voices are not monolithic: the position of foreign, finance, and social affairs ministries within any given country may differ, and government perspectives often differ from those of their own National Human Rights Institutions (NHRIs)[59] and indigenous communities and organisations.

38. We note that the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP, listed in the draft ISS Abbreviations and Acronyms but not otherwise referenced in the Policy or OS's) was endorsed by all but three countries in the African region,[60] and provides a potentially valuable anchor for clear and strong indigenous rights requirements in the ISS.[61] Shareholder members of the AfDB are party to a range of regional and international conventions protecting

[58] We note one minor editorial issue: the reference to FPIC in the table of Abbreviations and Acronyms should be changed to "Free, Prior and Informed *Consent*" (rather than "consultation").
[59] There are currently 28 "A" accredited NRHIs in Africa, signifying relatively high levels of independence, pluralism and robustness: https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/StatusAccreditationChartNHRIs.pdf. The more active NHRI's on indigenous rights issues include those of Kenya, South Africa and Namibia.
[60] No country in the region voted against UNDRIP, although Burundi, Kenya and Nigeria abstained. See https://www.usetinc.org/general/undrip2021/.
[61] See African Commission on Human and Peoples' Rights (ACHPR), Advisory Opinion on the UNDRIP (2007).

indigenous peoples' rights.[62] A range of important developments can be seen at country level including: in Uganda, where the Ministry of Gender, Labour and Social Development is developing an Affirmative Action Programme for Indigenous Peoples; in the Republic of the Congo, where Parliament adopted a law for the promotion and protection of the rights of indigenous populations and has launched a national action plan for 2022-2025; and in DRC, where a law on the promotion and protection of the rights of indigenous Peoples has been adopted and is currently pending endorsement by the Senate. At the same time, we note that debates concerning indigenous peoples' rights in Africa (as in Asia) have sometimes (controversially) been conflated with debates about historical precedence ("who came first"), rather than indigenous peoples' inherent social and cultural characteristics, collective rights and relationships to land.[63]

39. We note that within the timeframe allowed for the ISS review, it has not been possible for multi-stakeholder consultations to be undertaken at country level on the optimal structure and content of the ISS from the perpsective of indigenous peoples' rights. Nevertheless, as a general matter, OHCHR has consistently argued for stand-alone DFI Safeguards addressing indigenous peoples' rights specifically, for the following reasons:
    a) Risks and threats: Indigenous peoples' rights are facing increased threats in African and other regions of the world. Indigenous peoples are often the most marginalized and vulnerable populations in connection with development projects, and have been subject to particular prejudice, stigmatization, forced assimilation and, often, extreme violence and alleged genocide. The risks faced by indigenous peoples appear to be increasing in line with the erosion of democratic governance and spread of xenophobia and ethno-nationalist sentiment in many countries, increasing inequalities and inter-group conflicts over natural resources, and environmental stresses including those brought about by climate change.
    b) Specific, collective rights: Under international law, and in the work of the African Commission on Human and Peoples' Rights, indigenous peoples are distinct groups of people entitled to the enjoyment of collective (not just individual) rights, and whose cultural identities and practices (and, often, survival) are intimately tied to their lands. The collective nature of their rights has distinctive implications for DFI Safeguards, including in connection with FPIC and the appropriateness of individual land titling projects in indigenous territories. The distinctive content and character of indigenous peoples' rights may be diluted or overlooked if they are merged with those of other population groups.
    c) Benefits and costs: The explicit recognition and protection of indigenous peoples' rights in MDB safeguard policies may generate significant benefits in practice, as the experience of

[62] These include the African Charter on Human and Peoples' Rights, the 1966 International Covenant on Civil and Political Rights (including art. 1 on the right to self-determination and art. 27 on minority rights), the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1969 International Convention on the Elimination of all forms of Racial Discrimination. For a list of relevant UN treaties to which the great majority of African countries have subscribed see https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples/international-standards. By contrast, only six African countries (Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia) have ratified ILO Convention 107 on Indigenous and Tribal Populations, and only one country in Africa (Central African Republic) has ratified ILO Convention 169. Ratification rates of ILO Convention 169 are also notably low in the Asia and Pacific regions.

[63] *Cf*: African Commission on Human and Peoples' Rights (ACHPR): "'Indigenous Peoples' has come to have connotations and meanings that are much wider than the question of 'who came first'. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction." ACHPR (2003) Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, cited in ACHPR, Extractive Industries, Land Rights, and Indigenous Populations'/Communities' Rights (2015), p.25. See also ACHPR Advisory Opinion on the UNDRIP (2007), pp.3-4. On the Asian context, see Stefania Errico, The Rights of Indigenous Peoples in Asia, ILO (2017), p.10.

the World Bank in the DRC has shown.[64] Conversely, racial discrimination has large economic costs.[65] A failure to respect indigenous peoples' rights, and operating without the support and trust of local communities, can lead (and has led) to violent conflict, litigation, operational delays, project closure and potentially irremediable human and environmental losses. Recent evaluations by the IDB and other organizations have found that lack of community consultation and lack of transparency have caused social conflict and have been major factors in the failure of infrastructure projects in the Latin American region.[66] Failed stakeholder engagement in the extractives sector, similarly, has been shown to be very costly.[67]

40. We note that ADB and AIIB have adopted stand-alone indigenous peoples safeguards,[68] in a region where recognition of indigenous peoples' rights is also often actively contested, as have IDB, IFC, and EBRD.[69] We understand that AfDB's intention is to lift the level of protection and accord FPIC to an ostensibly wider range of groups ("highly vulnerable rural minorities" or HVRM) than that comprised by indigenous peoples alone.[70] However, given that the definition of HVRM in OS 7 (paras. 14-15) seems to correspond closely to that of "indigenous peoples" in other MDBs' Safeguards,[71] it does not seem clear to OHCHR what the practical differences would be.

[64] In the DRC, a World Bank Inspection Panel investigation led to the recognition of Pygmies as indigenous peoples by both the government and the World Bank, resulting in new commitments to mainstreaming indigenous peoples as a crosscutting theme across activities in the country, as well as community-managed forest concessions granted to indigenous peoples. World Bank Inspection Panel, Investigation Report, Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC) (2007); World Bank Inspection Panel, Indigenous Peoples, Emerging Lessons Series No. 2 (Oct. 2016), p.v.

[65] See e.g. Joseph Losavio, What Racism Costs Us All, *Finance & Development* (Fall 2020).

[66] Graham Watkins et al, Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean (Sept 2017), p.15, noting that the average delay caused by social conflict in projects under review was approximately 5 years, and the average publicly reported cost overrun from sampled projects was US$1,170 million, or 69.2% of average original budget. To similar effect see Boston University, Global Development Policy Center (2018), Standardizing Sustainable Development? Development Banks in the Amazon.

[67] See e.g. First Peoples Worldwide/University of Colorado, Social Cost and Material Loss: the Dakota Access Pipeline (2018), noting that investors lost $7.5B and banks financing the Dakota Access Pipeline in the USA incurred an additional $4.4B in costs in the form of account closures, not including costs related to reputational damage. More generally see Rachel Davis & Daniel Franks, Cost of Company-Community Conflict in the Extractive Sector (2014), noting lost production costs of up to $20M for major mining projects between $3-5B capital valuation.

[68] ADB Safeguard Policy Statement (2009), App. 3, Safeguards Requirement 3; AIIB ESF (2021), ESS 3.

[69] IFC PS 7; EBRD PR 7; IDB ESPF (2020), ESS 7. To similar, but not identical, effect see World Bank ESS 7. Indigenous peoples' rights are more widely recognised in the Latin American region. Fifteen of the twenty-four States parties to ILO Convention No. 169 are from the Latin American region.

[70] Among the positive aspects, in OHCHR's view, are the clear requirements for engagement of independent specialised expertise to support screening of HVRMs including indigenous peoples: ESP (para. 17), OS 1 (paras. 21 and 29), OS 7 (footnote 8 and paras. 33 and 37). We would also note the relevance and potential contributions of NHRIs in this context, noting that 28 NHRI's in Africa (a high proportion) are Category "A".

[71] All the major MDBs have a definition along the same lines: (ADB SPS, App. 3) "[T]he term Indigenous Peoples is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees: (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; (iii) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (iv) a distinct language, often different from the official language of the country or region."

41. Nevertheless, in the formulation and implementation of its updated ISS, we would strongly encourage AfDB to strive for (upwards) harmonisation with relevant regional and international human rights standards. This is already a clear strength of the draft updated ISS in general terms, compared with peer institutions, but may be tightened further in the context of indigenous peoples' rights in the following respects, in OHCHR's view:

    a) In determining whether particular populations are indigenous, the ADB and AIIB Safeguards provide that "national legislation, customary law, and *any international conventions to which the country is a party* will be taken into account" [emphasis added].[72] We'd suggest a similar provision be included within OS 7, in order to take into account recommendations and jurisprudence of the African Commission on Human and Peoples' Rights and relevant UN and ILO supervisory bodies.[73]

    b) The draft ISS (ESP, para. 63, fn 45 and the Glossary) contains a brief definition of FPIC (focusing on the "free, prior and informed" elements). Triggers for FPIC are set out in OS 7, para. 36,[74] comparable to those prescribed in UNDRIP, and the content and implications of FPIC are otherwise elaborated in OS 7, paras. 38-39 and elsewhere. However in OHCHR's view the ISS could more explicitly state the essential purpose of FPIC processes, which is to achieve the consent of indigenous peoples through their own decision-making processes. Moreover, in OHCHR's view, the "veto" reference in ESP fn 45 may be potentially inflammatory, as well as unnecessary, given the clear recognition elsewhere (ESP, para. 63, OS 7, para. 40) that aspects of projects affecting VHRMs for which FPIC cannot be ascertained will not go ahead.

    c) The collective nature of indigenous peoples' claims and attachment to land necessarily constrains the extent to which investment projects affecting their lands may entail individual land titling. We note the important recognition in ESS's 5 and 7 of traditional and customary forms of land tenure, however unlike certain other MDB Safeguards, we could see no clear prohibition concerning projects that entail individual titling in indigenous territories, nor (where customary rights to land are threatened by a project) any requirement that the client formulate an action plan to legally recognise affected populations' customary land tenure systems or convert customary usage rights to communal ownership rights, as appropriate.[75]

OHCHR recommends that:

- *AfDB should include in OS 7 a requirement that, in considering whether particular population groups are indigenous: "national legislation, customary law and any international conventions to which the country is a party will be taken into account".*

[72] See e.g. ADB SPS (2009), App. 3, para. 7; AIIB ESF (2021), ESS 3, para. 2. To similar effect IDB ESPF (2020) (ESS 7, para. 8) provides: "The Borrower will respect and take into account the rights of Indigenous Peoples and individuals as contained in applicable legal obligations and commitments, which include pertinent national legislation, applicable international law, or in indigenous legal systems. Indigenous legal systems are those that are recognized under national laws. In the absence of such laws, indigenous systems will be recognized if they are not inconsistent with applicable national legislation and international laws."

[73] The African Commission on Human and Peoples' Rights regularly makes recommendations to States parties to the African Charter on Human and Peoples' Rights on indigenous rights issues. See e.g. ACHPR, Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya (2016), paras. 24, 47 and 63.

[74] As a minor editorial point we note that the 2nd bullet point in OS 7, para. 28, should refer to "paragraph 36 of OS 7" rather than paragraph 34.

[75] *Cf*. IDB ESS 7, para. 17: "The Borrower will not pursue projects that entail individual titling in indigenous territories." Other MDBs require the development of action plans to formalise the customary rights of indigenous peoples prior to the project going ahead, as needed. See e.g. World Bank ESS 7, para. 29; ADB SPS, App. 3, paras. 27-28.

- *The definition of FPIC in the Glossary should be clarified along the following lines: "Free, Prior and Informed Consent is a process of dialogue and negotiation, that goes beyond mere consultation, where seeking the consent of indigenous peoples is always the objective and in certain circumstances (OS 7, para. 36) consent is actually required. The pursuit of FPIC should be undertaken in accordance with indigenous peoples' own customary norms and traditional methods of decision-making, with their legitimate representatives, and should be culturally appropriate. Any conflict should be resolved within the community membership itself. Each element of FPIC should be present, i.e. the process should be "free" (without intimidation or harassment), "prior" (commence at the earliest possible stage, allowing sufficient time to access information and prepare responses), and "informed" (objective, clear, accurate).*

- *The reference to a "veto" in the FPIC definition (ESP para. 63, and p.137 of the Glossary) should be deleted, given its redundancy[76] and its potential divisive impacts upon indigenous peoples.*

- *UNDRIP's provisions pertaining to FPIC should be cited in the ESP and OS 7 where relevant.[77]*

- *OS 7 should require that the borrower not pursue projects that entail individual titling in indigenous territories. Alternatively, where customary land rights are threatened by a project, the client should formulate an action plan to legally recognise affected populations' customary land tenure systems or convert customary usage rights to communal ownership rights, as appropriate.[78]*

I. Digital technology risks

42. We note that, in most MDBs' social and environmental safeguards, social risks are still defined mainly by reference to conventional investment projects with a relatively well-defined physical footprint. We note the increasing support and investments of MDBs in digital technology and telecommunications infrastructure, and the fact that digital technology is increasingly built into a wide range of other projects including health, education, agriculture, transport infrastructure and governance.

43. The opportunities of digital technology (including for safeguard monitoring and access to information) are well documented, but less so the E&S risks (including in supply chains[79]). Across all MDBs, risk management for digital technology projects frequently includes privacy and data security considerations, but not (yet) other human rights risk factors associated with the various phases of the data cycle (collection, storage, use/reuse) including:
    a) abridgement of freedom of information due to internet shutdown;

[76] ESP, para. 63, and OS 7, para. 40 already clarify that initiatives and aspects of projects affecting VHRMs for which FPIC cannot be ascertained will not go ahead.
[77] UNDRIP arts. 10, 19, 29(2) and 32(2).
[78] See World Bank ESS 7, para. 29; ADB SPS, App. 3, paras. 27-28.
[79] Sarah George, "World's largest ICT companies failing to tackle human rights abuses in supply chains" (Jun. 12, 2020). The above report assessed ICT companies on a bundle of indicators relating to commitments; governance; traceability and risk assessments; purchasing practices; recruitment practices; monitoring; ensuring worker voice and remediation when breaches occur.

b) collective privacy (in addition to individual privacy) such as when sensor data is collated and used in ways that communities are not aware or would not approve of;
c) exclusion by sensors of particular population groups (such as fingerprint sensors failing to register manual laborers, or facial recognition biases according to skin colour), which may result in those groups being excluded by social protection and other public administration systems that rely on such censor data for identification purposes;
d) abuse of surveillance technology;
e) environmental harms and abridgements of the right to water due to excessive consumption by data centers;
f) displacement and forced/child labour impacts in data center construction projects;
g) exclusion bias in data standards or formats (for example, data collection through binary "male/female" gender classifications);
h) gender gaps in data collection, and conversely, discriminatory impacts caused by over-representation of marginalized groups in certain data systems;
i) discriminatory biases in algorithms;
j) distortion of free speech through social media or speech-based platforms,
k) human rights risks from abuses of facial recognition and biometric technology;
l) problems of inaccuracy, discrimination and lack of agency arising from data sharing and combination for individual rating or assessment systems (e.g. credit checks, student grade systems, or health assessments); and
m) discrimination, exposure to harm, and function creep from digital ID systems.[80]

44. In OHCHR's view, addressing such risks will be critical for AfDB to effectively support the digital transformation with inclusive growth in Africa.[81] The UNGPs can help to identify, assess and mitigate adverse impacts, including through human rights due diligence.[82]

OHCHR recommends that:

- *Safeguard provisions concerning the design and use of technology should become a routine part of the assessment and risk categorisation of projects. This assessment should start with the political and social context and an analysis of the freedoms of information, association, assembly and expression, non-discrimination, and the protection of privacy (including through data protection).*

- *Safeguards should include routine, specific requirements concerning the protection of digital rights (human rights online) within projects. Where these protections are weak or actively undermined in the wider operating context, consideration should be given to whether the project may still proceed, and if so, what additional mitigation measures should be required.*

- *For high energy demand digital projects, assessments should also address the mitigation of energy demand and associated climate and environmental impacts.*

[80] New York University, International Organizations Clinic, Digital Due Diligence and Multilateral Development Banks (March 2021).
[81] See https://www.afdb.org/en/news-and-events/accelerating-africas-transformation-via-a-vibrant-digital-economy-19391.
[82] For more specific guidance on the parameters of human rights due diligence in the digital technology context see OHCHR's B-Tech project.

J. Financial intermediary operations

45. We note that DFI financing through private and public sector FIs is rising, and for some DFIs has reached more than 50% of their total investment portfolio, and that transparency and E&S risk management has consistently proven problematic for these kinds of operations.[83] We note the reported challenges confronted by AfDB in connection with finance sector development, and intermediated finance more specifically, including challenges in relation to client reporting, Bank supervision, and reaching excluded segments of the population.[84]

46. We note a number of positive features of draft OS 9, including the clear reporting periodicity (annual and quarterly: paras. 17(g) and 24), the requirement that the client report to AfDB any "materially significant adverse events" (including human rights violations) within 3 days (Policy, para. 35; and to similar effect but less clarity, OS 9, para. 23), screening risks against AFDB's negative list, and the portfolio approach to be applied in the case of general purpose FI financing (OS 9, para. 6).[85] However we would offer a number of suggestions on how E&S risk management in OS 9 might be strengthened, taking into account lessons emerging from FI operations to date and best practices in other DFIs.

47. Firstly, in terms of the AfDB's own due diligence, we note the requirements in the Policy (paras. 38-40) regarding the client's ESMS and the requirement (para. 41) that the Bank review high-risk samples of sub-projects. However, in broad terms, it seems that the E&S risk management provisions proposed in OS 9 reflect a considerable degree of delegation to the FI. Given the mixed incentives of FIs[86] and relatively poor track E&S track record of FI operations across DFIs to date, more detailed, proactive and clearer due diligence requirements by the Bank would seem to be warranted. We'd suggest that these include a referral procedure for higher-risk sub-projects (taking into account recent updates to AIIB's ESF[87]), and more proactive support by the Bank, taking into account EBRD's policy.[88] The flagging of higher risk projects could be accompanied by more specific requirements concerning AfDB site visits, stakeholder engagement, technical support and/or third party monitoring, in OHCHR's view. We would suggest that more robust due diligence requirements should be undergirded by (and indeed should begin with) more proactive requirements in the Policy (para.15) for the Bank to seek information from independent sources, rather than request and review information provided only by the client. This would also seem to be needed in order to enable the Bank independently to assess the evolving risk profile of sub-projects (para. 17(f)).

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[83] Publish What You Fund, "Financial Intermediaries," Workstream 5 Working Paper (2021), p. 5.
[84] AfDB, Independent Development Evaluation, Evaluation of AfDB's Role in Increasing Access to Finance in Africa (July 2020), pp.5-6; AfDB, Independent Development Evaluation, Evaluation of the AfDB's Integrated Safeguard System (Sept. 2019), pp.4 and 12, although both evaluations reflected positive findings concerning FIs' E&S performance at appraisal.
[85] We note however that the value of the portfolio approach, as distinct from ring-fencing, depends upon the rigour and effectiveness of the reporting and supervision arrangements in place.
[86] See e.g. CEE Bankwatch, CounterBalance, Euronatur & Recourse, "Why can a third of European Investment Bank lending evade the bank's environmental and social rules?" (Sept. 21, 2021), p.3.
[87] AIIB: "Prior Approval of Higher Risk Activities. The Bank requires the FI to furnish to the Bank for the Bank's prior approval the FI's detailed environmental and social due diligence assessment and instruments for all Higher Risk Activities."
[88] "EBRD will assist FIs with the appraisal of these [referral list] subprojects. EBRD environmental/social specialists will review the due diligence information collected by the FI, determine any additional information needed, assist with determining appropriate mitigation measures and, if necessary, specify conditions under which the subprojects may proceed."

48. Second, the draft OS 9 does not seem to reflect sufficiently precise and robust requirements for disclosure of sub-projects, in OHCHR's view. We note the important requirements in OS 9 (paras. 27 and 28) regarding the disclosure of the FI's ESMS and any sub-projects categorised as high-risk under the FI's own categorisation system, along with E&S monitoring reports. However, in line with MDB best practice (including the IFC), and mindful of the dynamic nature of sub-project risk, we would recommend that OS 9 require the periodic disclosure by FI's and AfDB of the name, sector and location all projects which may entail significant environmental, social or human rights risks.[89] Consistent with the Policy (para. 57) and DFI best practice,[90] we would recommend that OS 9 specifies that ESIA's and other relevant E&S documentation for high-risk projects should be made public 120 days prior to FI or AfDB Board approval, whichever is earlier.

49. Third, under draft OS 9, we note that lower risk sub-projects would be subject to national law, but that any sub-project involving resettlement (draft OS 5) and/or the subject matter of OS's 4, 7 or 8 would be subject to the OS's (OS 9, paras. 12, 14 and 17(c)). Given the relative weakness of national laws on many social issues, compared with international human rights standards, and given the broad scope of social issues and risks relevant to any given FI operation, OHCHR would recommend that *higher-risk sub-projects should be governed by national law, the OS's, and/or international law, whichever sets the most stringent standard*. This suggested approach would be consistent with AfDB's and other DFIs' approaches for forced and child labour issues, and would ensure that other social risks of comparable severity (for example, GBV, and reprisals risks) are recognised and addressed as such. It is vital that such requirements for higher risk sub-projects be stipulated in contracts between AfDB's FI client and sub-borrowers, in OHCHR's view, to encourage consistent implementation and accountability.

50. Finally, on the subject of remedy, we note that OS 9, paras. 9 and 26 require only an "external communications mechanism", rather than mechanism more specifically geared towards receiving and resolving grievances. In line with best practice, we'd recommend that each FI should be required to have an institution-level GRM that complies with the "effectiveness criteria" of the UNGPs.[91] In order to make accountability and remedy possible, we would also recommend that the AfDB's support for a sub-projects be disclosed at sub-project sites along with information about the roles, functions and contact details for the FI (and any sub-project) GRM, and the AfDB-IRM, in an accessible, visible and comprehensible manner from the perspective of people affected by the sub-project.

[89] The EBRD and AIIB definitions of "higher risk" sub-projects may be useful here. The AIIB defines Higher Risk Activities as 'a) all Category A activities; and (b) selected Category B activities, as determined by the Bank, that may potentially result in: (i) Land Acquisition or Involuntary Resettlement, (ii) risk of adverse impacts on Indigenous Peoples and/or vulnerable groups, (iii) significant risks to or impacts on the environment, community health and safety, biodiversity, and cultural resources, (iv) significant retrenchment of more than 20% of direct employees and recurrent contractors, and/or (iv) significant occupational health and safety risks.' The criteria in the EBRD's Referral List are similar. However in OHCHR's view it is important to include human rights risks specifically given their distinctive meanings and accountability requirements under international and national laws, and given the underlying public interests involved.

[90] GCF, Information Disclosure Policy (2016), para. 17(a).

[91] The GCF requires each "accredited entity" (financial institution) to have an institution-level GRM that complies with the UNGPs. GCF, ESP, para. 12(c). The effectiveness criteria in UNGP principle 31 are: legitimacy, accessibility, predictability, transparency, equitability, rights compatibility, source of continuous learning, and based on engagement and dialogue. The GCF-IRM also has a mandate to build the capacity of the GRMs of Direct Access Entities (national and regional FIs). In March 2022 the GCF-IRM published a self-assessment against the UNGP 31 effectiveness criteria. This was the first such self-assessment of any member of the global IAMs Network.

OHCHR recommends that:

- *The ESP (para. 15) should reflect clearer requirements for AfDB to proactively seek information from all available sources, not only information provided by the client, in order to provide a robust basis for its own due diligence.*
- *OS 9 should require:*
  - *compliance of sub-projects with international law, national law, and the OSS's, whichever sets the most stringent standards, and that this should be a contractual requirement between the FI adn sub-borrower;*
  - *advance DFI approval of high-risk sub-projects, and referral of higher-risk projects for DFI due diligence and monitoring;*
  - *clear supervision requirements for the DFI, including site visits and/or third party monitoring for high-risk sub-projects;*
  - *clear requirements regarding stakeholder consultation in connection with client monitoring reports for sub-projects;*
  - *publication of ESIA's and other relevant E&S documentation for high-risk projects 120 days prior to FI or AfDB Board approval, whichever is earlier;*
  - *time-bound disclosure of the name, sector and location of sub-projects on AfDB's and the FI client's website, prior to the FI operation's approval and periodically thereafter;*
  - *the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and*
  - *disclosure at the project site of AfDB's involvement in sub-projects, and of the existence of the AfDB-IRM and project-level GRM, ensuring that this information is clearly visible and understandable to affected communities.*

K. Results-based financing

51. OHCHR notes the potential importance of results based financing (RBF) in incentivising and strengthening the efficiency and effectiveness of government-owned programs. Such operations can strengthen country systems and stimulate sector-wide improvements and institutional development, and their effects can be tangible. We note that the quality of results depends among other things upon the quality and robustness of national (or sub-national, depending upon the focus) E&S systems and of Bank monitoring, supervision and implementation support. Accountabilty is a particular challenge: like development policy financing, the quick disbursing nature of RBF makes it more challenging for affected stakeholders to be aware of these operations, to understand them and to participate in consultations.

52. We note, positively, that high risk (Category 1) operations will be excluded from RBF, and that environmental and social systems assessments (ESSA's) will be consulted upon publicly and disclosed (ESP, para. 40). We also note that where risk ratings of sub-projects increase over time, the client will be required to apply the OS's and implement an action plan agreed with the Bank (ESP, para. 42). As to accountability challenges, we take it that OS10 would apply to RBF operations but that, depending upon the project and context, other grievance redress mechanism (judicial and non-judicial) at national and sub-national levels may also have roles to play, and could usefully be mapped as part of the ESSA. Insofar as the Bank's own accountability is concerned, we note that the AfDB-IRM's June 2021 procedures embody best practice in permitting complaints filed 24 months after the completion of an operation or 24 months after the complainant becomes aware of the adverse impact, whichever is later.[92] This welcome measure of flexibility may help to ensure that people adversely affected by RBF operations have a reasonable opportunity to register their grievances in practice.

53. Notwithstanding these positive features, we note that benchmarking is proposed to be carried out in relation to the "objectives and outcomes" of the OS's, which are framed mostly in quite general terms and may not offer a sufficiently detailed or robust basis for analysis. We also note that the requirement for program action plans (to fill E&S system gaps as identified in the ESSA) does not seem to be spelled out in the ESP other than in situations where higher-risk sub-projects have been identified.[93] Requirements regarding Bank supervision, implementation support and accountability, likewise, may benefit from further elaboration, in OHCHR's view, taking into account comparative practice at other MDBs.

OHCHR recommends that:

- *ESSA's should include an analysis of obligations of the borrower under the African Charter on Human and Peoples' Rights and UN human rights treaties and ILO conventions to which the borrower is party.*

- *ESSA's should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts of RBF operations.*

- *RBF operations should be informed by contextual risk analysis, taking into account human rights information sources, at all stages of the project cycle.*

- *The ESP should contain further detail on the Bank's monitoring, supervision, verification protocols, and implementation support role, as well as on remedies and sanctions.*

- *The ESP should include a general requirement for program action plans (not confined to situations where higher-risk sub-projects have been identified), which should be the subject of stakeholder consultation and disclosed.*

[92] AfDB-IRM, Operating Rules and Procedures (June 2021), para. 12.
[93] By way of contrast, see e.g. World Bank, Bank Policy: Program-for-Results Financing (Mar. 25, 2022), para. 13; and ADB, Operations Manual: Policies and Procedures, OM Section D18 (Mar. 10, 2021), para. 7.

L. Program-based operations

54. OHCHR notes the apparent lack of any reference in the ISS to program-based operations (PBOs) or budget support operations, which are increasingly influential form of financing including in the context of Covid-19 and other emergencies, but present particular challenges in terms of social and environmental safeguards. We note that PBOs are addressed by a separate policy ("Bank Group Policy on PBO", Feb. 2012), and we note the various challenges identified in the Independent Evaluation of PBOs (2018) and Findings and Lesson from AfDB Crisis Response Budget Support Operations (2021). We also note the finding from the 2019 Independent Development Evaluation of the ISS to the effect that the ISS (which applies to all Bank operations) has only been applied in a very limited way to PBOs to date.[94]

55. We note that the 2012 PBO policy refers to financial accountability and mutual accountability in the aid effectiveness sense, but not to accountability or remedy for adverse E&S impacts. This may be a significant omission given the clear human rights risks associated with PBOs. For example, the UN Special Rapporteur on the Right to Adequate Housing has drawn attention to concerns about impacts of development policy lending on housing affordability, location, tenure security and the availability of services.[95] Policy based lending in other contexts has even raised questions about potential complicity in international crimes.[96] As with RBF, the quick disbursing nature of PBOs makes it more challenging for affected stakeholders to be aware of these operations, to understand them and to participate in consultations. And as with RBF, windows to bring complaints to IAMs may be very short.

56. We note that AfDB's 2012 PBO policy appropriately contains guidance on political analysis (within the bounds of AfDB's Articles), stakeholder consultation (as part of mutual accountability), and integrating gender and attention to vulnerable groups (para. 32). In view of the broadened scope of the ISS's, and the challenges in integrating gender to date, we'd respectfully suggest that the ISS review and update might present a useful occasion to strengthen the social risk management and accountability dimensions of PBO operations, whether within draft ESP (Section III.2.2 "Special Project Types") and/or by way of amendment to the 2012 PBO policy.

OHCHR recommends that:

- *Guidance for PBOs should be updated to include the full scope of social issues addressed by the ISS, taking into account borrowers' obligations under the African Charter on Human and Peoples' Rights and UN and ILO conventions.*

- *PBOs should be informed by contextual risk analysis (as defined in OS 1, Annex 1, Section G), taking into account human rights information sources.*

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[94] AfDB Independent Development Evaluation, Evaluation of the AfDB Integrated Safeguard System (Sept. 2019), pp.2 and 15.

[95] UN Special Rapporteur on Adequate Housing, Submission to the World Bank's Safeguard Review and Update Process (Phase 1 – Public Consultation) (2013), p. 14. And as the ADB evaluation deparment has noted, even if sub-projects under an RBL operation are relatively small-scale, their cumulative impacts may be large: ADB Independent Evaluation Department (2017) "Results-Based Lending at the Asian Development Bank: An Early Assessment".

[96] OHCHR, Comments on the Review and Update of the Safeguard Policy Statement (Apr. 2021), pp.7-9.

- *Analytical work for PBOs should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts. A description of grievance redress mechanisms, including the AfDB-IRM, should made publicly available in stakeholder consultations associated with PBOs.*

M. Waivers and deferrals

57. OHCHR is concerned at the wide scope for potential waivers and deferrals under draft ESP Part V, para. 80 in circumstances of urgency (such as pandemics), capacity constraints, and/or other justifications to be considered in light of public consultations. We know of no precedent for such a waiver in other DFIs. OHCHR appreciates the desire for flexibility in certain emergency situations, however safeguard flexibility may be counterproductive if the conditions and limits are not carefully defined, and may compromise more fundamental E&S sustainability objectives.[97]

58. Weakened safeguards may not only undermine development outcomes but may also be problematic where forced evictions, forced labour or gender-based violence or other subjects of immediate, legally binding human rights obligation are concerned.[98] We'd also note that the implementation of human rights obligations (corresponding to the subject matter of the draft OS's) is a function of commitment as much as capacity. For these reasons, in OHCHR's view, the inclusion of ESP para. 80 may be detrimental from an E&S sustainability perspective and may constitute an unwelcome precedent for DFI safeguards globally.

OHCHR recommends that:

- *ESP, para. 80 should be deleted.*

N. Adaptive risk management

59. We note that OS 1, para.11, would require the borrower to meet the OS's "in a manner and timeframe acceptable to the Bank", rather than a more objective, auditable standard. We note that the trend in MDBs towards adaptive risk management and the implementation of (aspirational) environmental and social action plans place a heavy premium on supervision and reporting. This can raise potentially difficult questions about how a Bank's leverage and incentives to encourage safeguard policy compliance change throughout project implementation, particularly where the client's traditions of transparency and accountability are relatively weak, or where political will or capacities are lacking. In OHCHR's view a more rigorous, auditable standard would better serve E&S sustainability and accountability objectives. For example, the IFC requires the PS's to be met within a "reasonable timeframe", and EBRD PR1, para. 5, provides that new projects are "designed to meet the PRs from the outset."

OHCHR recommends that:

- *OS 1 should require compliance with the OS's within a "reasonable manner and time frame," and should specify that new projects should be designed to meet the OS's from the outset.*

[97] Of similar concern are the deferral provisions of the AIIB ESF (2021), para. 53.
[98] All AfDB shareholders are party to one or more (and, frequently, several) of the core 10 UN human rights treaties. Immediate obligations can apply to economic, social and cultural rights, as well as civil and political rights.

O. Clarifying AfDB and client responsibilities

60. We note that the ESP, footnote 41, states that: "The Bank's clearance of E&S documentation does not confer legal and implementation responsibility on the Bank for the risks, impacts and management measures that may ensue during any phase of the project, that are the responsibilities of the Borrower." Rather, it is stated in this context that clearance "only confirms that the Bank has exercised its due diligence" in a number of relevant respects.

61. It does not seem clear on its face what function this disclaimer is intended to serve, particularly given that the performance standards structure reflected in the draft OS's and other MDBs' safeguards, adapted from the IFC Sustainability Framework, is precisely intended to clarify and distinguish the Bank's obligations from those of the client. OHCHR can find no equivalent provision in other DFI safeguard policies. The first part of the footnote seems to reflect a disproportionate concern about the Bank's own legal liability exposure, and seems to be predicated upon a questionable assumption that strong due diligence by the Bank might increase (rather than decrease) that exposure.[99] Without further clarifications there may be a risk that this text may be read in a way that discourages proactive engagement by AfDB with risk, or alternatively, that it may be seen as a putative accountability carve-out in respect of the Bank's due diligence and supervision responsibilities.

OHCHR recommends that:

- *ESP, footnote 41, should be further clarified or deleted.*

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[99] For a discussion of DFI lender liability issues and the relevance of lender due diligence in this context see OHCHR, Remedy in Development Finance: Guidance and Practice (2022), pp.20-21. The AfDB's broad jurisdictional immunities should also alleviate any excessive concerns about legal liability risk exposure, in addition to the generally limited scope of lender liability laws and significant practical barriers to successful claims, particularly international claims.

List of recommendations

Strengthening alignment with international human rights standards

1. *Section 1.4 of the Policy should contain a more specific commitment that: "AfDB respects human rights in connection with the projects it finances. AfDB will require clients 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."*

2. *The UN Guiding Principles on Business and Human Rights should be integrated explicitly within the ISS in order to strengthen the framework for: (a) risk assessment; (b) ongoing, risk-based due diligence; (c) addressing supply chain risks; and (d) enabling remedy.*

3. *The term "applicable law" should be defined in the glossary, listing international and national law on an equal footing, and should be applied consistently throughout the OS's.*

4. *Social and environmental risk assessment and management, due diligence, and assessments of country/corporate systems should be informed by all applicable bodies of law, whichever sets the highest standard.*

Enabling remedy

5. *A multifaceted definition of remedy be included in the ISS Glossary: "Restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition." Such a definition would better reflect international human rights standards and equip the AfDB and clients to address a wider range of adverse social (including human rights) impacts.*

6. *The definition of "remedy" in the ISS should recognise the inappropriateness of off-setting where social (including human rights) impacts are concerned.*

7. *The mitigation hierarchy in the ISS should be amended to: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts."*

8. *Responsibilities to address adverse impacts should take into account the respective involvement of clients and AfDB in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*

9. *AfDB should consider removing the proposed categorical requirement in ESP paras. 72-73 that complainants must bring complaints to the Bank prior to the IRM, or at least explicitly permit exceptions as complainants' circumstances require.*

10. *OP 10 should specify that clients are required to make the existence of the GRM and IRM known to project-affected people in a timely and accessible fashion, and that clients are obliged to cooperate in GRM and IRM processes. Consistent with DFI best practice, these requirements should be included in loan and investment agreements. OHCHR would also recommend that the ESP specify that AfDB should also ensure that the existence of the IRM is made known to project-affected people in a timely and accessible fashion.*

Addressing supply chain risks

11. *The ISS should clarify that AfDB and clients should address all potential human rights impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, without any categorical limitation to "primary suppliers".*

12. *The ISS should spell out different kinds of leverage (including commercial, contractual, convening, normative, and capacity building) that may be built and deployed by AfDB and clients to address human rights risks in which they are involved.*

13. *When it's necessary to prioritize actions, AfDB and clients should start with the most severe risks and impacts, taking into account their scale, scope and irremediability.*

14. *Where serious human rights impacts are in a client's supply chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate that they comply with safeguard requirements or to eliminate such practices within a reasonable time frame.*

Responsible exit

15. *The ISS should include a brief summary of the various means by which AfDB can build and exercise leverage post-closure in practice (through legal agreements and otherwise), ideally through a thoroughly consulted action plan that covers remedial measures as necessary, backed by explicit remediation requirements in safeguards and legal agreements.*

16. *The ISS should outline the main elements of a "responsible exit framework" applicable across the full project cycle, including:*
    - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
    - *A clear requirement not to exit without first using all available leverage and exploring all viable mitigation options, and without conducting a human rights impact assessment and consulting with all relevant stakeholders;*
    - *A commitment not to leave behind unremediated harms, including those arising from the exit;*
    - *A commitment to ensure that project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
    - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
    - *A commitment to seek a responsible replacement(s) for AfDB, or the client, as the case may be, on exit.*

17. *The ISS should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.*

18. *The safeguards should require public disclosure of termination provisions of loan agreements in order to help understand whether they require any assessment of unremediated environmental and social impacts as a condition of exit.*

Gender equality and the human rights of LGBTI people

19. *AfDB should consider including a stand-alone OS focused on gender equality, including the rights of women and girls and inclusion of LGBTI people, modelled upon IDB ESPS 9. A stand-alone gender equality safeguard should include robust protections against discrimination on the grounds of SOGIESC.*

20. *AfDB should specify in the ISS that conflicts between applicable international and national legal standards governing women's rights, gender equality issues, the rights of LGBTI people should be resolved in favour of the more stringent standard.*

Indigenous peoples' rights

21. *AfDB should include in OS 7 a requirement that, in considering whether particular population groups are indigenous: "national legislation, customary law and any international conventions to which the country is a party will be taken into account".*

22. *The definition of FPIC in the Glossary should be clarified along the following lines: "Free, Prior and Informed Consent is a process of dialogue and negotiation, that goes beyond mere consultation, where seeking the consent of indigenous peoples is always the objective and in certain circumstances (OS 7, para. 36) consent is actually required. The pursuit of FPIC should be undertaken in accordance with indigenous peoples' own customary norms and traditional methods of decision-making, with their legitimate representatives, and should be culturally appropriate. Any conflict should be resolved within the community membership itself. Each element of FPIC should be present, i.e. the process should be "free" (without intimidation or harassment), "prior" (commence at the earliest possible stage, allowing sufficient time to access information and prepare responses), and "informed" (objective, clear, accurate).*

23. *The reference to a "veto" in the FPIC definition (ESP para. 63, and p.137 of the Glossary) should be deleted, given its redundancy and its potential divisive impacts upon indigenous peoples.*

24. *UNDRIP's provisions pertaining to FPIC should be cited in the ESP and OS 7 where relevant.*

25. *OS 7 should require that the borrower not pursue projects that entail individual titling in indigenous territories. Alternatively, where customary land rights are threatened by a project, the client should formulate an action plan to legally recognise affected populations' customary land tenure systems or convert customary usage rights to communal ownership rights, as appropriate.*

Digital technology risks

26. *Safeguard provisions concerning the design and use of technology should become a routine part of the assessment and risk categorisation of projects. This assessment should start with the political and social context and an analysis of the freedoms of information, association, assembly and expression, non-discrimination, and the protection of privacy (including through data protection).*

27. *Safeguards should include routine, specific requirements concerning the protection of digital rights (human rights online) within projects. Where these protections are weak or actively undermined in the wider operating context, consideration should be given to whether the project may still proceed, and if so, what additional mitigation measures should be required.*

28. *For high energy demand digital projects, assessments should also address the mitigation of energy demand and associated climate and environmental impacts.*

Financial intermediary operations

29. *The ESP (para. 15) should reflect clearer requirements for AfDB to proactively seek information from all available sources, not only information provided by the client, in order to provide a robust basis for its own due diligence.*

30. *OS 9 should require:*

- *compliance of sub-projects with international law, national law, and the OSS's, whichever sets the most stringent standards, and that this should be a contractual requirement between the FI and sub-borrower;*
- *advance DFI approval of high-risk sub-projects, and referral of higher-risk projects for DFI due diligence and monitoring;*
- *clear supervision requirements for the DFI, including site visits and/or third party monitoring for high-risk sub-projects;*
- *clear requirements regarding stakeholder consultation in connection with client monitoring reports for sub-projects;*
- *publication of ESIA's and other relevant E&S documentation for high-risk projects 120 days prior to FI or AfDB Board approval, whichever is earlier;*
- *time-bound disclosure of the name, sector and location of sub-projects on AfDB's and the FI client's website, prior to the FI operation's approval and periodically thereafter;*
- *the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and*
- *disclosure at the project site of AfDB's involvement in sub-projects, and of the existence of the AfDB-IRM and project-level GRM, ensuring that this information is clearly visible and understandable to affected communities.*

Results-based financing

31. *ESSA's should include an analysis of obligations of the borrower under the African Charter on Human and Peoples' Rights and UN human rights treaties and ILO conventions to which the borrower is party.*

32. *ESSA's should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts of RBF operations.*

33. *RBF operations should be informed by contextual risk analysis, taking into account human rights information sources, at all stages of the project cycle.*

34. *The ESP should contain further detail on the Bank's monitoring, supervision, verification protocols, and implementation support role, as well as on remedies and sanctions.*

35. *The ESP should include a general requirement for program action plans (not confined to situations where higher-risk sub-projects have been identified), which should be the subject of stakeholder consultation and disclosed.*

Program-based operations

36. *Guidance for PBOs should be updated to include the full scope of social issues addressed by the ISS, taking into account borrowers' obligations under the African Charter on Human and Peoples' Rights and UN and ILO conventions.*

37. *PBOs should be informed by contextual risk analysis (as defined in OS 1, Annex 1, Section G), taking into account human rights information sources.*

38. *Analytical work for PBOs should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts. A description of grievance redress mechanisms, including the AfDB-IRM, should made publicly available in stakeholder consultations associated with PBOs.*

Waivers and deferrals

39. *ESP, para. 80 should be deleted.*

Adaptive risk management

40. *OS 1 should require compliance with the OS's within a "reasonable manner and time frame," and should specify that new projects should be designed to meet the OS's from the outset.*

Clarifying AfDB and client responsibilities

41. *ESP, footnote 41, should be further clarified or deleted.*

* * *