Office of the United Nations High Commissioner for Human Rights
Memorandum
Comments on the Review and Update of the ADB Safeguard Policy Statement
29 April 2021

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Introduction

OHCHR welcomes the opportunity to offer comments in relation to the review and update of the 2009 Safeguard Policy Statement (SPS) of the Asian Development Bank (ADB). We note the positive precedent and impacts of the SPS to date[1] and the very significant human rights implications and potential impacts of the ADB's successor framework. While the consultation plan for the SPS review has not yet been finalized, we note that a significant part of the groundwork for the review has already been laid through IED's Corporate Evaluation of the Effectiveness of the Safeguard Policy Statement (2020; "IED Evaluation"), Management response, Board decision, draft Stakeholder Engagement Plan (7 April 2021), and preparatory studies identified in the November 2020 Background Information Paper for the SPS review ("Information Paper").

We note ADB's intention to modernize the policy, promote harmonization with other MDB safeguard standards, reflect the changing development context and evolving developing member country (DMC) and client needs and capacities, address the diversity of ADB lending modalities and particularities of private sector operations (PSOs), and respond to operational demands in fragile and conflict-affected situations (FCAS) and small island developing states. The comments in this note address these objectives and several specific issues identified in the Information Paper, informed by case study analysis of ADB-supported projects (Annex 1), OHCHR's policy-level and project-level engagement with DFIs, governments and communities in Asia and other regions, and OHCHR's analysis of practice in other multilateral development banks (MDBs).[2]

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 safeguard frameworks, as well as our sense of where significant gaps may still be and where the framing of a given issue may benefit from a human rights perspective at the outset. Particular attention is drawn to thematic and operational issues the subject of normative processes under the auspices of the UN Human Rights Council, OECD, the Equator Principles financial institutions and other relevant forums, particular insofar as PSOs are concerned. 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.

[1] IED, Corporate Evaluation: Effectiveness of the 2009 Safeguard Policy Statement (2020), p.xviii, and paras. 105-106 (hereafter "IED SPS evaluation").

[2] See e.g. OHCHR, "Benchmarking Study of Development Finance Institutions' Safeguard Policies and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights" (Sept. 2019), https://www.ohchr.org/Documents/Issues/Development/DFI/OHCHR_Benchmarking%20Study_HRDD.pdf.

We also note that human rights trends in the region have, if anything, worsened since the adoption of the SPS, and particularly so since the onset of the COVID-19 pandemic.[3] This concerns human rights of all kinds (economic, social, cultural, civil and political), including increased discrimination against women, ethnic minorities, migrants and other population groups, erosion of democratic governance, inequalities in opportunities and access to essential services, and increased threats to civil society and closure of civic space in many countries in the region.[4] Problems have been exacerbated in many countries in the region, including larger middle-income countries, by competitive deregulation in the labor market and in connection with social and environmental issues in order to attract foreign investment.[5]

We note that development finance institutions are not always equipped and incentivized to effectively address social and environmental risks and the human rights implications of their operations, and that the problem of risk aversion was highlighted repeatedly in the IED Evaluation. For these reasons, this memo draws particular attention to how a human rights lens and routine access to human rights information sources can strengthen ADB's due diligence and clients' risk management practices (Annexes I-III). However it is recognized that recommendations along these lines, if they are to have a positive impact, will require strong management support, sustained capacity building, and some degree of re-alignment of internal incentives, accountability procedures and reward systems.

Our comments below address the following issues: (A) clarifying the safeguard components of human rights; (B) safeguards for new financing instruments and new modalities; (C) strengthening versus using client risk management frameworks and/or country safeguards systems; (D) balancing downstream ("adaptive") risk management with continued, rigorous up-front requirements; (E) stakeholder engagement and reprisals against project-affected individuals; (F) the need for a proactive and consistent approach to remediating adverse impacts; (G) infrastructure safeguards, supply chain risks, vulnerable and marginalized groups, indigenous peoples, gender equality, and safeguards for digital technology.

A. Clarifying the safeguard components of human rights

As will be seen below, human rights legal and policy considerations affect the scope of social and environmental risk assessment as well as responsibility, accountability and remedy for

[3] See e.g. Press release, "Asia: Bachelet alarmed by clampdown on freedom of expression during COVID-19" (June 3, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920#:~:text=GENEVA%20(3%20June%202020)%20%2D,false%20information%20must%20be%20proportionate.

[4] University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Asia-Pacific Region (2021).

[5] See e.g. ILO, Memorandum of Technical Comments on the draft Omnibus Law on Job Creation (Ruu Cipta Kerja) of the Republic of Indonesia (May 2020); and IED SPS evaluation, para. 107.

adverse impacts. Yet in development practice generally, human rights issues and risk factors are often treated as marginal to social and environmental risk management, and are often thought of as extreme, or exceptional, rather than routine.[6] The IED SPS evaluation (p.xxv) recommended that ADB "clarify the safeguard components of other key ADB objectives, which have increased in importance since the SPS, such as .. human rights." However this recommendation does not appear to be reflected in the Information Paper or other preparatory work for the SPS review.

In OHCHR's view, it would be a major missed opportunity if the latter recommendation of the IED was not the subject of a dedicated background paper and public consultation, in view of: (i) the positive contributions of human rights to due diligence and risk management (Annexes I-III), (ii) the contributions of human rights to economic growth and sustainable development,[7] (iii) the increasingly serious human rights challenges facing countries and particular population groups in the region, and the operational and reputational risks that these may present to the bank, (iv) the fact that project-affected people are increasingly identifying with and articulating their needs in human rights terms; (v) the widening gaps in many countries between international and national laws governing social issues within the scope of the SPS,[8] (vi) the importance of understanding human rights violations as causal factors for conflict, violence and state fragility, and how human rights can contribute to pathways out of conflict and fragility,[9] (vii) the fact that all ADB shareholders have subscribed to multiple (and frequently, several) of the core 10 UN human rights treaties[10] and ILO conventions; and (viii) the growing maturity, operational relevance and practical utility of normative frameworks regulating human rights impacts of business activities and finance under the auspices of the United Nations, OECD[11] and the Equator Principles Association.

Human rights considerations have been reflected to varying degrees in recent MDB safeguard policy updates however there is still considerable confusion about what is entailed by addressing human rights risks and impacts explicitly,[12] and what difference this makes

[6] For a discussion see Rachel Davis, "Exploring the relationship between human rights due diligence and broader environmental and social due diligence" (2018) at https://norad.no/en/front/evaluation/news/2018/exploring-the-relationship-between-human-rights-due-diligence-and-broader-environmental-and-social-due-diligence/.

[7] For project-specific examples and a sampling of the empirical literature see the work product of the World Bank's Human Rights, Inclusion and Empowerment Trust Fund, at https://www.worldbank.org/en/programs/human-rights-and-development-trust-fund.

[8] University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Asia-Pacific Region (2021).

[9] See World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025 (Feb. 2020) ("World Bank Group FCV Strategy") at pp. viii-ix, 2-3, and paras. 8, 12-13, 48, 53, 87, 97, 99, 126-8, 148, 164, 172, 230 and Annex 2; and World Bank Group-United Nations, Pathways to Peace: Inclusive Approaches to Preventing Violent Conflict (2018).

[10] See UN human rights treaty dashboard at https://indicators.ohchr.org/.

[11] See https://mneguidelines.oecd.org/rbc-financial-sector.htm.

[12] For example, fn 24 of the IED SPS evaluation incorrectly refers to human rights impacts as (categorically) "intangible", in the context of SPS 3 on indigenous peoples. While not all human rights (or social or

compared with addressing "social" risks and impacts. These issues may be particularly challenging for the ADB in view of the IED's observations on the bank's reported tendency towards risk aversion and relatively weak performance on SIAs compared with EIAs.[13] The IED SPS evaluation (p.xxv) also suggested that ADB build on the IFC or EBRD safeguards as a template. However, despite important recent strides by some banks, very few MDB safeguards adequately address human rights risks of investment projects. The IFC PSs have been overtaken by other MDBs and Equator Principles in certain important respects, including in connection with the preconditions and parameters for explicit human rights due diligence (making human rights due diligence routine rather than exceptional), the risk mitigation hierarchy (avoiding human rights offsetting), and addressing supply chain risks.[14]

In view of the above factors, we'd recommend that the ADB consider articulating a clear and robust policy commitment in its revised safeguards to respect human rights, back by detailed implementation guidelines and robust implementation capacities. The IDB's new Environmental and Social Policy Framework (ESPF) and EBRD's Environmental and Social Framework (ESF) provide good examples.[15] Moreover, in order to promote more consistent engagement with human rights risk factors, and more systematic access to available human rights risk information (see Annex II), OHCHR recommends that human rights due diligence should be an explicit requirement in the ADB's revised safeguards and – consistent with the Equator Principles – should not be limited to special or high risk circumstances.[16] The benefits, compared with costs, of integrating human rights information in investment project due diligence are discussed in Annex III.

Moreover, we recommend that specific human rights due diligence procedures be developed by ADB in line with the UN Guiding Principles on Business and Human Rights (UNGPs).[17] 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

environmental) issues are clear-cut, many project-related risks like forced evictions, labour rights violations, and threats to environmental and human rights defenders are tangible and quantifiable.

[13] IED SPS evaluation, paras. 50 and 53.

[14] For a more detailed gap analysis of MDB safeguards by reference to the UN Guiding Principles on Business and Human Rights see OHCHR, "Benchmarking Study of Development Finance Institutions' Safeguard Policies and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights" (Sept. 2019), https://www.ohchr.org/Documents/Issues/Development/DFI/OHCHR_Benchmarking%20Study_HRDD.pdf.

[15] 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."

[16] Equator Principles 4 (2020). Until 2020 the Equator Principles, like the IFC Performance Standards, only required a human rights impact assessment in "limited, high-risk circumstances." However the fourth revision of the Equator Principles in 2020 contains a new requirement that potential adverse impacts be assessed for every project regardless of whether the risk merits a full Environmental and Social Impact Assessment (Principle 2).

[17] The UNGPs are available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

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), IDB's Social Impact Assessment Guidelines (2018), the, OECD's Guidelines for MNEs and Responsible Business Conduct Due Diligence Guidance (2018),[18] and sustainability frameworks of a growing number of bilateral DFIs and other financial institutions. The UN Guiding Principles provide authoritative and practical guidance that could be further integrated into the ADB's new safeguards on such matters as: (a) risk assessment, prioritizing severity (including *irremediability)* over likelihood (UNGP 24) (in line with the IED's analysis and recommendations[19]); (b) differentiating the scope of due diligence and contribution to remedy by reference to responsibility for impacts (UNGPs 17 and 22); (c) unpacking the concept of *leverage* (UNGP 19), requiring the client to build and use all potential leverage through the value chain, including but not limited to primary suppliers; and (d) criteria for establishing and assessing the effectiveness of project Grievance Redress Mechanisms (GRMs, UNGP 31).

Finally, there are minor inconsistencies in the SPS concerning the application of international human rights legal requirements which the SPS review process could usefully address. Positively, para. 73 of the SPS provides that "[t]he borrower/client must comply with host country laws, regulations, and standards, *including host country obligations under international law*." (Emphasis added). In a similar vein, Annex II (para. 15), provides that a "project's potential social impacts and risks will be assessed against the requirements presented in this document and applicable laws and regulations of the jurisdictions in which the project operates that pertain to involuntary resettlement matters, *including host country obligations under international law*."[20] (Emphasis added).

However, by contrast, para. 47 of the SPS provides that "ADB will not finance projects that do not comply with … the host country's social and environmental laws and regulations, *including those laws implementing host country obligations under international law*."[21] (Emphasis added). The latter prohibition is not the same as direct prohibition against financing projects which may contravene host country obligations under international law (including human rights law), and overlooks the fact that international law forms a direct part of the constitutional order in numerous countries in the region without need for implementing legislation, and the fact that implementing laws often fall short of international legal requirements. It would be important to have a clear and consistent approach across the ADB on respecting the international law threshold, in OHCHR's view.

[18] IDB, Social Impact Assessment: Integrating Social Issues in Development Projects (2018), fn 63, 69, 146 and 149 and accompanying text (focusing on the "cause, contribute, direct linkage" concept in particular), and https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.
[19] IED SPS evaluation, pp.xxii, xxiv, and paras. 294 and 303.
[20] SPS, Appendix 3, para. 13, contains a similar provision.
[21] SPS, Appendix 1, para. 5, contains a similar provision.

Of course, it should not be the ADB's role to determine when a human rights violation has actually occurred (which can be difficult even for specialized human rights tribunals) or to resolve conflicts between various sources of human rights law applicable to the subject matter of the safeguards and a given project. Risk management on social (or any other) issues simply requires the exercise of best professional judgement, taking into account all relevant information sources including those listed in Annex II. Human rights information sources can provide the basis for an informed judgement on gaps in the form of the law and, critically, its implementation in practice. OHCHR recommends 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*.

The need for human rights due diligence – case study in Myanmar

Myanmar provides a sobering but compelling illustration of the importance of integrating information from the UN human rights system within investment project due diligence and risk assessment, as well as more macro-assessment tools such as contextual risk assessments, strategic environmental and social assessments, and sectoral environmental and social assessments, relevant to the ADB's safeguard policy objectives.

MDBs have been active in Myanmar since the reopening of the economy in 2012, although gross human rights violations in northern Rakhine State from 2017 and the February 2021 military coup have had significant (macro-critical) impacts on investor behaviour, third country sanctions policies, and development financing and procurement decisions, and call for heightened due diligence. The September 2020 report of the UN human rights office documented continuing impunity, discrimination against ethnic groups including the Rohingya, razing of particular villages in northern Rakhine State, obstruction of evidence relevant to the proceedings against Myanmar in the International Court of Justice under the Genocide Convention 1948 (*Gambia v. Myanmar*), and fresh evidence of what may constitute war crimes and crimes against humanity by the Tatmadaw in Chin and Rakhine States.

Moreover, the September 2019 report of the UN Independent International Fact-Finding Mission on Myanmar (FFM) on "the economic interests of the Myanmar military" identified 133 businesses and affiliates across diverse sectors of the economy – from construction and gem extraction to manufacturing, insurance, tourism and banking – owned by two Tatmadaw conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), which in turn are owned and influenced by senior Tatmadaw leaders allegedly responsible for gross violations of international human rights law and serious violations of international humanitarian law. The FFM underscored the importance of ensuring that external financing supports alternative SMEs unaffiliated with the two conglomerates and the Tatmadaw. The FFM's reporting also exposed how infrastructure investment could be associated with serious human rights violations and the obstruction of evidence pertaining to the investigation of genocide and other alleged international crimes.

OHCHR recommends that:

- *ADB commission a background paper and convene a dedicated public consultation on the safeguard components of human rights.*
- *A policy commitment should be included within the ADB's revised safeguards along the following lines: "The ADB is committed to respecting internationally recognized human rights standards. To that end, in accordance with its safeguards, the ADB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports."*
- *Human rights due diligence should be an explicit requirement in the ADB's revised safeguards, and should not be limited to special or high-risk circumstances. Specific due diligence procedures should be elaborated in line with the UNGPs.*
- *In line with the UNGPs: (i) the risk classification provisions in the ADB's revised safeguards should prioritise the severity (scale, scope and irremediability) of impacts; (ii) the revised ADB safeguards should specify that the extent of the ADB's due diligence and client's risk management responsibilities should vary in accordance with the severity (scale, scope and irremediability) and their own involvement in adverse impacts; (iii) the revised safeguards should require the client to build and use all potential sources of leverage in the project's area of influence; and (iv) the UNGPs' effectiveness criteria for GRMs should be integrated.*
- *International human rights law and information from UN human rights bodies (Annex II) should guide: (i) ADB's risk classification and due diligence, (ii) social and environmental assessments, (iii) assessments of the robustness of client risk management systems (equivalence assessments), (iv) contextual risk analysis[22] and Strategic Environmental Assessments, and (v) assessments of country/implementing authorities' implementation practice, track record, capacities and commitment.*
- *The above assessments should be informed by all applicable bodies of law, whichever sets the highest standard.*

B. Safeguards for new financing instruments and new modalities

We note that new financing instruments and modalities (including corporate finance and private equity investment, and project implementation in fragile and conflict-affected situations (FCAS)) will be the subject of a background study for the SPS review.[23] We also note

[22] For a definition see IFC, Interpretation Note on Financial Intermediaries (Jan. 1, 2012, updated Nov. 2018), fn 9: "Contextual risks -from a private sector, E&S perspective – are defined as risks in the external environment [at a country, sector or sub national level] that the client does not control but which could negatively impact the ability of a project or private sector client to meet IFC's E&S requirements. Examples of contextual risks include among others land disputes as a result of internal displacement or conflict; systemic issues such as minority discrimination, lack of freedom of association, wide spread use of child labor; historical government actions related to land contamination, forced evictions, etc." The importance of contextual risk analysis is highlighted in CRP, Lessons Learned from Compliance Reviews of the ADB (2004-2020): Rehabilitation of the Railway Project in the Kingdom of Cambodia (2021), paras. 4.2.1 and 4.3.2.

[23] Information Paper, para. 10, and draft Stakeholder Engagement Plan (Apr. 7, 2021), p.10.

the questions raised in the IED SPS evaluation concerning the application of safeguards to Multi-Tranche Financing Facilities (MFFs) and Result-based Lending (RBLs) (paras. 243-244 and 247-250, respectively), lessons from RBL implementation elsewhere,[24] and to recent challenges regarding the application of the SPS to budget support and development policy lending in the FCAS contexts. For example, ADB's recent COVID-19 Active Response and Expenditure Support program (CARES)[25] in Myanmar was allocated a "C" safeguards rating, in view of limited discernible impacts on resettlement or indigenous peoples. OHCHR recognizes the complexity of operations in contexts of this kind and the important steps taken by ADB to anticipate a broad range of risks in that particular case. However the military coup of 1 February 2021 has accentuated the need to take contextual risk information (including human rights information) into account in determining risk ratings and to help ensure as far as possible that external financing does not benefit companies associated with, owned or controlled by the military.[26] Integrating contextual information of this kind, in turn, may led to more rigorous mitigation and remedial measures (including operational and reputational risk management), and more extensive examination of project alternatives (including, plausibly, avoiding budget support operations) in complex cases of this kind.[27]

Similar considerations apply to financial intermediary (FI) lending[28] and FCAS operations, in OHCHR's view. We note the IED's observation that contextual risk analysis "has not generally been considered in MFI safeguards frameworks, which have been primarily concerned with impacts a project may be responsible for, directly or indirectly..." and that consequently, there has been "little evidence of adapting the SPS requirements to FCAS [FCV] country contexts."[29] In FCAS contexts, it is sometimes argued that, in the face of higher risks, there should be higher risk tolerance and safeguard policy flexibility.[30] However a licence for additional risk-taking and safeguard flexibility may be counter-productive if the conditions and limits are not carefully defined, and may eclipse more pressing requirements such as enhanced due diligence[31] (including human rights due diligence), technical support, and remedy.[32] In OHCHR's view, a stronger focus on contextual risk analysis, human rights

[24] See e.g. World Bank Independent Evaluation Group (IEG), Program for Results: An Early Stage Assessment of the Process and Effects of a New Lending Instrument (2016), pp.31-35, identifying challenges regarding lack of monitoring and reporting on E&S outcomes, and deficiencies in contextual risk and political economy analysis.
[25] COVID-19 Active Response and Emergency Support Program (Sept. 2020), at https://www.adb.org/projects/54255-001/main.
[26] See text box, p.7 "The need for human rights due diligence – case study in Myanmar", above.
[27] To similar effect see, Overseas Private Investment Corporation Office of Accountability (2014) "Buchanan Renewables," at https://www.dfc.gov/sites/default/files/2019-08/OA_Buchanan_Report.pdf.
[28] See e.g. IFC, Interpretation Note on Financial Intermediaries (Jan. 1, 2012; last updated Nov. 2018), IN8, fn 9.
[29] IED SPS evaluation, para. 171 and Annex I, para 138.
[30] See e.g. World Bank Group FCV Strategy, pp. 10, 11 and 20. At 11: "there must be a recognition that some risks may materialize during the life of a project that cannot be fully avoided or mitigated."
[31] Killick, N (2011) "From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries," Institute for Human Rights and Business. Available at https://www.ihrb.org/focus-areas/commodities/commentary-red-green-flags-corporate-responsibility.
[32] On remedy, see Section F below.

due diligence and remedy can help MDBs walk the fine line between remaining constructively engaged in FCAS settings and ensuring that harms are not disproportionately externalised to vulnerable and marginalised communities.

We note that RBL operations appear to raise similar issues insofar as the need for political economy and contextual risk analysis are concerned, in addition to challenges of relying upon national laws and safeguard frameworks (addressed in Section C below). RBL, DPL and budget support operations also raise challenges with respect to public participation and accountability, given the intangible nature of the scope and impacts of this type of operation. Unlike in the case of investment policy financing, there are no requirements for a programme-specific grievance mechanism, hence there is no obvious channel through which stakeholders may raise concerns on an on-going basis. The extent to which the national and local grievance redress system is analysed in the context of RBL operations is not clear. As for DPLs and budget support operations, the quick-disbursing nature of these instruments and the limited scope for public involvement in the design phase all but preclude complaints in practice.[33] Claims are likely to be based on anticipated harm, where the causal connection between policy and harm can be difficult to prove.

Finally, we note the SPS gaps and challenges in addressing E&S risks in connection with corporate finance and equity investments (IED SPS evaluation, para. 253), the potential default to framework approaches to risk management in this context,[34] and potential challenges to accountability. In this regard we note the IFC's requirements governing investments in market instruments and publicly traded equity investments[35] to the effect that alternative means of monitoring should be consistent with IFC Performance Standards and should not be excluded from independent compliance review. The EBRD ESF is to similar effect, benchmarking ES risk management against the Bank's Performance Requirements (PRs) themselves, with the following additional requirements: (a) after subscription, the Bank will require clients to comply with the PRs; and (b) high risk projects or projects categorized "A" will not be financed through capital market instruments.

OHCHR recommends that:

- *RBL operations, budget support and development policy lending should be included within the scope of background study on new financing instruments and modalities, and should include an explicit focus on accountability and remedy.*

[33] A well-known exception is World Bank Inspection Panel, Investigation Report (Aug. 31, 2007), 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), a report which contributed greatly to the recognition and protection of indigenous peoples' rights in the DRC.

[34] This issue has arisen in connection with the AIIB's ESF review, for example.

[35] IFC ESRPM, para. 2.16.

- *Contextual risk analysis, taking into account human rights information sources, should inform ADB's RBL, budget support, DPL, FI and FCAS operations;*
- *In FCAS contexts, the ADB's safeguards should continue to apply without restriction, in furtherance of accountability and learning objectives;*
- *The ADB's approach to risk management in corporate finance and equity investment take account of the IFC's and EBRD's policies and practice, including on the issue of accountability.*

C. Using versus strengthening country safeguard systems

OHCHR notes the IED's extensive analysis of the limited impacts of the SPS's framework for strengthening and using Country Safeguard Systems (CSSs) and the ADB's intention to approach the use of CSSs (at national, sub-national/sectoral or authority level) more "pragmatically" in future, and move away from the strict "equivalence" requirement of CSS's vis-à-vis the ADB's safeguards.

OHCHR strongly supports the objective of progressively strengthening country and client social and environmental systems to the extent possible, and to using the latter systems where to do so would not undermine human rights or social and environmental risk management objectives in relation to a given project. A commitment to strengthening, rather than necessarily using, country and client systems seems appropriate in view of the deteriorating indicators on many of the social issues relevant to investment project risk management in the region, which are often caused by discrimination or lack of political will as much as capacity constraints.[36]

A notable example of competitive deregulatory pressures and weakening of national ES systems in a major ADB client country is the recently promulgated Job Creation Act (Nov. 2, 2020) in Indonesia. This Act revises more than 70 laws impacting investment and industry, taxation, health, land, limited liability companies, environment and human resources. While the Act does have some positive features from a human rights perspective, such as the establishment of unemployment insurance, the law reportedly eliminates key environmental impact requirements, undercuts or threatens a range of worker protections (including with respect to workplace discrimination, workers employed in MSMEs, wages, working time, outsourcing, and termination of employment), and makes it more difficult for communities to mount legal challenges against projects which violate environmental regulations.[37] In

[36] University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Asia-Pacific Region (2021).
[37] Arlina Ashad, "Indonesian President Joko signs contentious omnibus bill into law," *Straits Times* (Nov. 3, 2020), available at https://www.straitstimes.com/asia/se-asia/indonesia-president-jokowi-signs-contentious-omnibus-bill-into-law; Nithin Coca, "Does Indonesia's job creation law miss the mark on the environment?" *Devex* (Nov. 25, 2020), at https://www.devex.com/news/does-indonesia-s-job-creation-law-miss-the-mark-on-

October 2020 a group of international investors representing US$4.1T in assets under management objected to the draft law on environmental and social grounds, warned of its potential contravention of the UN Guiding Principles on Business and Human Rights and other relevant standards, and argued that "[r]obust policies to protect forests and human rights are key solutions to managing these risks and contribute to efficient and sustainable financial markets in the longer term."[38] Since its promulgation, the law has reportedly provoked nationwide protests and a constitutional court challenge, for alleged violations of constitutional provisions on social justice.[39]

MDB safeguards reflect different requirements regarding the assessment and use of CSS's, and some only require that CSS's be consistent with the (broadly worded) *objectives* (rather than content) of MDB safeguards. We would recommend a more rigorous "functional equivalence" test, taking into account MDB best practice,[40] recognizing that national legal and policy frameworks on E&S issues have been weakening in many countries and in many respects, and that "national ownership", while an important objective in principle, should not prejudice more fundamental E&S risk management and sustainability objectives.

OHCHR recommends that:

- *Country and client systems may be used in whole or part provided that this is likely to address the risks and impacts of the project and the client system's requirements are at least as strong as those of the ESP and ESSs.*
- *International human rights law and information from UN human rights bodies (Annex II) should guide ADB's assessments of the functional equivalence of country and client social and environmental management systems.*

D. Up-front compliance v. downstream risk management

OHCHR recognizes the need for strengthened, adaptable risk management throughout the project cycle, and that due diligence is not a one-time event. By the same token, we note the positive evidence in other MDBs of rigorous up-front risk and compliance assessments

environment-98626; ILO, Memorandum of Technical Comments on the Draft Omnibus Law on Job Creation (Ruu Cipta Kerja) of the Republic of Indonesia (May 2020).

[38] Open Letter on the Omnibus Bill on Job Creation (undated), available at https://www.greencentury.com/wp-content/uploads/2020/10/Indonesian-Omnibus-Investor-Letter.pdf.

[39] Labor Law Los Angeles, "Indonesia signs a new labor law amid nationwide protests (Mar. 8, 2021), at https://laborlawlosangeles.com/indonesia-signs-a-new-labor-law-amid-nationwide-protests/.

[40] For example IDB ESPF, para. 5.1 provides: "The IDB may consider the use of the Borrower's Environmental and Social Framework relevant to the project, provided this is likely to address the risks and impacts of the project and will enable the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functional equivalence)."

particularly for high-risk projects.[41] Project-level case studies carried out by OHCHR[42] illustrate the challenges of open-ended compliance, or the flexibility of DFIs to assess, determine, and disclose relevant information about or enforce safeguard compliance over the period of project implementation. Yet, we note the recent tendency among MDBs to shift from *ex ante* compliance to more flexible and aspirational environmental and social action plans, framework approaches, and "adaptive risk management". This is clearly a strong message in the IED's SPS corporate evaluation as well.

However we note that 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.

We note that MDB safeguard frameworks differ in their definition of the timeframe within which compliance is expected, and whether a subjective ("acceptable") or objective ("reasonable") timeframe should apply. In OHCHR's view, an objective, rigorous and auditable standard, such as "reasonable manner and timeframe," would best serve risk management and sustainability objectives. We also note the SPS's clear requirement concerning the disclosure of draft EIA and other safeguard documentation 120 days prior to Board approval, and would strongly encourage ADB to preserve this important requirement in its updated safeguards, with adaptation (60 days) for PSOs in line with MDB best practice.

OHCHR recommends that:

- *ADB ensure that (necessary) investments in adaptive risk management do not displace priority for ensuring ex ante compliance with the Bank's safeguards, particularly for higher risk projects;*
- *The ADB's new safeguards should require compliance within a "reasonable manner and time frame;"*
- *Any deferral of compliance be ruled out for Category A projects;*
- *Timeframes for information disclosure should be clear and binding and aligned more closely with international best practice including, for Category A projects, disclosure of draft EIA and other safeguard documentation 60 days (for non-sovereign operations) and 120 days (for sovereign operations) prior to Board approval.*

[41] World Bank, Independent Evaluation Group, Safeguards and Sustainability Policies in a Changing World (2011), Chapter 4, pp.65-82, available at http://documents.worldbank.org/curated/en/742801468177840668/pdf/638960PUB0Safe00Box0361531B0PUBLIC0.pdf.

[42] Annex I, and other case studies on file.

E. Stakeholder engagement and reprisals

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

We welcome the fact that "stakeholder engagement" is explicitly included within the ADB's proposed "thematic and cross-cutting issues" Background Study (Information Paper, para. 8), and that the IED SPS evaluation (para. 264) noted the increasing adoption by MDBs of self-standing safeguard requirements on this issue. However we note that reprisals risks and responses are not addressed in the IED SPS evaluation or ADB Information Paper, notwithstanding the increasing threats faced by project-affected people in many countries in the region. Reprisals risks and stakeholder engagement challenges more generally have been exacerbated in the COVID-19 context.[43] Most MDBs and IAMs have developed, or are developing, policies and specific procedures to help identify and address reprisals risks. In OHCHR's view, the SPS review offers ADB a timely opportunity to update its own policies and procedures in this area.

Consistent with emerging practice in other MDBs and DFIs, including the World Bank Group, IDB Group and EBRD, we would strongly encourage ADB to include a self-standing safeguard (or performance standard, whatever terminology is adopted) on stakeholder engagement, in recognition of the heightened challenges, the documented shortcomings concerning consultation to date (particularly in the implementation phase),[44] and the fundamental importance of stakeholder engagement for good project design, effective risk management, and positive development outcomes. Within a new stakeholder engagement standard, or separately, we would also recommend that ADB publish a "zero tolerance" statement against reprisals, along with detailed operational procedures to clarify its own responsibilities and those of its clients to prevent and respond to threats and reprisals, and how the ADB's leverage may be exercised to minimize and respond to reprisals risks, alone and with other

[43] See e.g. Letter from EIB to Mark Fodor, Coordinator, Defenders in Development Campaign, "Change in reprisals risk under government responses to COVID-19" (May 7, 2020), available at https://media.business-humanrights.org/media/documents/files/documents/2020-05-07_RESPONSE_COVID-19_and_reprisals_risks_EIB_response_002.pdf.

[44] IED SPS evaluation, p.18, and paras. 54, 58-59, 71-72, 118, 122-23, 151, 171, 205, 221, 232, 248 and 264.

partners and actors. The IAMs Reprisals Toolkit (2019)[45] and guidance for clients issued jointly by the IFC and IDB Invest[46] may offer inspiration in this regard.

OHCHR recommends that:

- *ADB adopt an explicit safeguard or performance standard on stakeholder engagement modelled on that of the EBRD and IDB ESS 10.*
- *ADB integrate within its new safeguards clear requirements on assessing reprisals risks and preventing and responding to reprisals against project-affected people, and publish detailed procedures on these issues, taking into account experiences in the World Bank Group, IDB Group, EBRD, EIB and the IAMs global network.*
- *ADB, CRP and SPF systematically collect and publish data on reprisals in connection with ADB-supported projects and accountability mechanism procedures, including the nature and impact of response measures.*

F. A more proactive and consistent approach to remedy

OHCHR notes the SPS/SR 2's robust requirements regarding livelihood restoration and improvement and ADB's reportedly strong safeguard performance regarding compensation for involuntary resettlement impacts relative to other social impacts, in line with ADB's comparative advantages.[47] We also note the IED's analysis and recommendations on project level grievance mechanisms (GRMs), the ADB's 2018 joint learning report on accountability,[48] and that the 7 April 2021 draft Stakeholder Engagement plan includes a proposed background study on GRMS and lessons learned from ADB's Accountability Mechanism. These are important elements of a robust accountability infrastructure and remedy ecosystem. However the IED SPS evaluation contained only passing (though useful)[49] mention of how ADB and other DFIs can exercise leverage to remediate harms, and no discussion at all about the responsibilities of ADB as financier or the circumstances and means through which it could enable and (as appropriate) contribute to remedy.[50]

In OHCHR's view, the SPS revision presents the ADB with a unique opportunity to set a new benchmark among MDBs on strengthening remedy for adverse impacts. The increased

[45] See MICI, Guide for IAMs on Measures to Address the Risk of Reprisals in Complaints Management (2019), http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/$file/guide_for_iams_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf.

[46] IDB Invest and IFC, Good Practice Note for the Private Sector: Addressing Risks of Retaliation against Project Stakeholders (March 2021), available at https://www.ifc.org/wps/wcm/connect/93aac0e9-0230-4afe-98df-a916b27b440f/IDB+Invest+and+IFC+Reprisals+GPN.pdf?MOD=AJPERES&CVID=nxFSsgS.

[47] IED SPS evaluation, paras. 105-108 and 123.

[48] Information Paper, fn 7.

[49] IED SPS evaluation, para. 98.

[50] These issues are addressed more comprehensively in OHCHR, Remedy in Development Finance (forthcoming 2021).

vulnerabilities, inequalities, fragility and human rights violations accompanying the COVID-19 pandemic have brought the question of remedy to center stage. The World Bank Group's FCV Strategy 2020-2025 recognizes that unaddressed grievances can fuel social conflict, undermine development outcomes, and deepen state fragility.[51] A recent IDB study analyzing 40 years of infrastructure projects in Latin America concluded that despite a range of warning signs, and despite decades of experience, there has been inadequate attention to the question of remedy, with significant costs for communities, clients and DFIs.[52] Communities and workers may perceive risks around a project to be even higher than they might otherwise be if they feel they have no control over how their labour or resources will be used and have no credible access to remedy.[53] From this perspective, the mere fact of signaling a serious approach to remedy can reduce risks for a project. Yet, these lessons are not consistently applied in practice, and the *preventive* function of remedial mechanisms often appears to be under-appreciated.

MDBs, including the ADB, have long experience dealing with remedy in the context of resettlement. Yet under MDB mitigation hierarchies, even in the case of forced resettlement, violations are permissible where redress is not considered to be "technically or financially feasible" (although the SPS only deploys the latter criterion once, in connection with climate change impacts).[54] Under international law, as recognized in the Equator Principles and EIB safeguards,[55] there is no such thing as a "human rights off-set." However no DFI safeguard policy yet recognizes, explicitly, that there should be an effective remedy for all adverse human rights impacts associated with a project, irrespective of whether it is covered by safeguard policies. In our view, explicit recognition of this principle within the revised ADB safeguards could set an important marker for DFI sustainability frameworks globally.

We note the numerous critical findings on project-level GRMs reported by the IED and in other evaluations,[56] and that such mechanisms are not necessarily designed or required to address and remedy human rights harms including gender-based violence (GBV) and sexual

[51] World Bank Group, FCV Strategy 2020-2025 (Feb. 2020), paras. 2,6, 12-13, 53, 87, 97, 99, 126, 128, 148, 164, 172, Annex 2, *at* http://documents1.worldbank.org/curated/en/844591582815510521/pdf/World-Bank-Group-Strategy-for-Fragility-Conflict-and-Violence-2020-2025.pdf.

[52] Graham Watkins et al, Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean (Sept 2017), available at https://publications.iadb.org/en/lessons-four-decades-infrastructure-project-related-conflicts-latin-america-and-caribbean.

[53] Kemp, D, Warden, S., Owen, J., "Differentiated social risk: Rebound dynamics and sustainability performance in mining," Resources Policy 50 (2016) 19-26.

[54] SPS, App. 1, para. 39.

[55] Equator Principles (July 2020), p.3; and EIB Environmental and Social Standards (2019), Glossary, "Mitigation Hierachy (Human Rights)," https://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf.

[56] IED SPS evaluation, paras 60, 73-75, 118, and 232-239; and World Bank, Global Review of Grievance Redress Mechanisms in World Bank Projects, Guidance Note 90388 (2013), pp.15-16, available at https://openknowledge.worldbank.org/bitstream/handle/10986/20117/903880WP0Box380edressMechanismsinWB.pdf?sequence=1&isAllowed=y.

exploitation and abuse (SEA). Moreover, very few DFI safeguard policies (even the most recent) specifically reflect the UNGPs' "effectiveness criteria" for grievance mechanisms in their safeguard requirements, including the criterion of involving stakeholders in the design and performance of the mechanism, which is fundamental to building trust.[57]

Remedying harms associated with a DFI-funded project may require a range of different mechanisms and avenues – within the project and within the country (via judicial and non-judicial mechanisms) – but this also seems to remain underexplored in DFI guidance to clients. In OHCHR's view, it is important for the rights-holders (affected people) themselves to be able to exercise free and informed choice in relation to accountability mechanisms. We would recommend that ADB pay more attention to the remedy "ecosystem"[58] that clients are required to address, that this should be part of the bank's due diligence within projects and when country support and technical assistance is provided, and that support to judicial and non-judicial mechanisms to address grievances of the kinds associated with ADB financed projects should be strengthened.

The recent External Review of ES Accountability of the IFC and MIGA ("External Review"), framed by the UNGPs, noted (Section 7.8, para. 325) that where IFC or MIGA contribute to harm they should also contribute to remedy. The External Review and the example of the Dutch Banking Sector Agreement's recent paper on enabling remediation[59] could guide the ADB's reflections on when and how it may contribute to remedy, or use its leverage to enable remedy, in particular contexts. Given MDBs' explicit "do no harm" and sustainable development mandates, they have wider responsibilities but also wider opportunities and tools than those of commercial banks to address these issues. Remedial mechanisms could include the establishment of a fund through which the ADB could, in appropriate circumstances and proportionate measure, contribute to remedy where projects its funds have caused or contributed to harms. In OHCHR's view, a more proactive and consistent approach to the question of remedy, integrated within the ADB's revised safeguards, contractual conditions and policy dialogues, can strengthen legitimacy, build trust with communities, and strengthen norms and expectations for the provision of remedy by the client, State and other responsible actors within and beyond the scope of a given project.

OHCHR recommends that:

- *ADB commission a background paper and convene a dedicated public consultation on enabling and contributing to remedy.*

[57] The "effectiveness criteria" set out in UNGP 31 identify characteristics of such a mechanism that help make it effective; each is accompanied by a longer description: (i) legitimate; (ii) accessible; (iii) predictable; (iv) equitable; (v) transparent; (vi) rights-compatible; (vii) a source of continuous learning; and (viii) based on engagement and dialogue. To these could also be added a specific criterion on ensuring no retaliation.
[58] David Kovick, Rethinking remedy and responsibility in the financial sector (May 2019), at https://shiftproject.org/rethinking-remedy-and-responsibility-in-the-financial-sector/.
[59] See https://www.imvoconvenanten.nl/en/banking/news/recommendations-remediation.

- *The mitigation hierarchy should be changed to provide for remediation as a last step across all safeguard standards.*
- *ADB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.*
- *The revised safeguards should provide ADB with the right not only to exercise its contractual remedies in the event of the client's non-compliance, but also (i) provide for or enable remedy to project-affected communities in connection with adverse impacts, taking into account severity (scale, scope, irremediability) and the Bank's own involvement in impacts, (ii) provide technical advice to clients and affected communities on remedy, and (iii) recognize and address un-met grievances as sustainable development opportunities.*
- *Consistent with Section 7.8 of the report for the External Review of the ES Accountability of the IFC and MIGA (paras. 329-339), the ADB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by ADB contributions to the extent of the bank's own involvement in any adverse impacts.*

G. Comments on specific issues

Safeguards for infrastructure projects

OHCHR notes the important role foreseen for ADB in global infrastructure development in the bank's Agenda 2030, and the increasing importance of ES safeguards in a competitive financing environment.[60] The IED SPS evaluation noted (p.xiv) that infrastructure development has caused displacement, which can lead to impoverishment and social upheaval. The IED SPS evaluation also noted (p.xx) an "apparent preference for avoidance and a narrow focus on immediate safeguard impacts, that can miss out on potential associated facilities and cumulative impacts and contribute to better outcomes."

The G20 Principles for Quality Infrastructure Investment contain a commitment that the "design, delivery and management of infrastructure should respect human rights."[61] Our Office's research on mega-infrastructure projects in the transport, energy and water sectors reveals human rights risk factors at the macro- level, including fiscal impacts, financialization and climate risks, in addition to more classical (physical) safeguard issues within the project

[60] IED SPS evaluation, para. 4.
[61] G20 Principles for Quality Infrastructure Investment 2019, available at https://www.mof.go.jp/english/international_policy/convention/g20/annex6_1.pdf, principle 5.2.

area of influence.[62] Fiscal risks and contingent liabilities are particularly salient in connection with infrastructure Public-Private-Partnerships (PPPs), which are part of ADB's support for the SDGs,[63] given the mixed motives and implementation challenges for PPPs in many sectors and national contexts.[64]

OHCHR recommends that:

- *ADB's revised safeguards and accompanying guidance material: (i) address human rights risk factors in connection with infrastructure projects not only at the project footprint and within the project area of influence, but also macro-level (fiscal, financialization and climate impacts); and (ii) avoid assuming that the PPP modality or private service provision should be the default.*

Supply chain risks

We note ADB's intention to include primary supply chain risks within the scope of the SPS review[65] and the IED's recommendation in this regard.[66] There was no substantive discussion of this issue in the IED SPS evaluation, however we note the tendency of some other MDBs to limit the scope of the client's E&S responsibilities to "primary" supply chains, to the extent that the client can reasonably exercise control.[67] We note that the term "primary supplier" is defined narrowly in certain other MDB safeguards, but that the boundaries are not clear and significant risks may inadvertently be excluded,[68] and that this approach may confuse the question of *responsibility* (for risks and impacts) with *leverage* (to address impacts). We also note the more rigorous approach to supply chain risks in relation to forced and child labour issues (compared with other social issues) in some MDB safeguards, as well as the

[62] OHCHR and Heinrich Boell Foundation, The Other Infrastructure Gap: Sustainability (2018), available at https://www.ohchr.org/Documents/Publications/TheOtherInfrastructureGap_FullLength.pdf. See also Benjamin Hunter & Susan Murray, "Deconstructing the Financialization of Health Care," 50(5) *Development & Change* 1263-1287 (2019).

[63] ADB's Support for the Sustainable Development Goals (March 2021), pp.53 and 62, at https://www.adb.org/sites/default/files/institutional-document/684471/adb-support-sdgs-2030-agenda.pdf.

[64] OHCHR and Heinrich Boell Foundation (2018), *supra*, at pp.32-44 and 116-120.

[65] Information Paper, para. 8.

[66] IED SPS evaluation, para. 234: "There are also other related topics that potentially need to be integrated such as human rights observance, disabilities and supply chains." And to similar effect, para. 308, Id.

[67] 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.

[68] See e.g. World Bank, Id., fn 34: "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." Hence, for example, if there was a supply chain disruption in an ADB-supported project, the client might disavow responsibility for E&S risks in relation to the (temporary) supplier, because the supply relationship is not "ongoing." The terms "directly," "essential" and "core functions" are also open to interpretation.

strengthening national legislative regimes governing human rights due diligence[69] and increasingly rigorous approach taken by courts to supply chain E&S risks in certain jurisdictions.[70] Given these factors, and guided by normative frameworks governing human rights impacts of businesses, OHCHR recommends that the scope of due diligence should cover all those impacts with which ADB is involved (including those directly linked to their operations, products or services by their business relationships),[71] whether or not these relate to primary suppliers. The extent of leverage that ADB has over other entities may affect the extent to which it can effect change in those business relationships causing human rights harms, but it does not affect the scope of harms ADB should be trying to address. Where it is necessary for ADB to prioritize actions to address harms, this should be determined by the severity (scale, scope and irremediability)[72] of risk, not the extent of leverage or control.

Under the UNGPs an enterprise may "cause" or "contribute to" human rights impacts, or may be "directly linked" to impacts through its business relationships, such as impacts on contractors, sub-contractors and those throughout supply chains.[73] A situation of "direct linkage" may also occur where ADB or other lenders have provided finance to the enterprise which, in the context of using this finance, acts in such a way that it causes (or is at risk of causing) an adverse impact. However, the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and the bank's financial product or service. Rather, the link needs to be between the financial product or

[69] See https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/.
[70] See e.g. *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors.* (Respondents) [2019] UKSC 20; *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191; and *Hamida Begum (on behalf of MD Khalil Mollah) v Maran (UK) Limited* [2021] EWCA Civ 326. This line of cases affirmed the jurisdiction of English courts to hear claims brought by non-UK claimants against UK companies and their non-UK subsidiaries for acts taking place abroad. In the latter (most recent) case the UK Court of Appeal found that a shipping company in England selling a vessel for dismantling in Bangladesh could owe a duty of care to shipbreaking workers working in unsafe conditions, even where there are multiple third parties involved in the transaction. The Court stated that British company could, and should, have insisted on the sale of the ship to a "green" shipbreaking yard, where proper working practices were in place. Complex supply chains have enabled companies to cut labour costs and avoid legal liability, however this decision may give pause to companies seeking to distance themselves from human rights and environmental abuses in their supply chains. Under this decision, the involvement of a third party, or even the third party's control over the unsafe conditions, does not negate a duty of care where the violations are entirely predictable.
[71] 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, available at https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.
[72] UNGPs, Principle 24, available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.
[73] UNGPs, Principle 13(b).

service provided by the bank and the adverse impact itself.[74] We note EIB's adaptation of this framework in articulating expectations for supply chain risk management on occupational, health and safety issues.[75] Under the EIB's 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."[76]

In circumstances where the client (or ADB, through its financial relationship to its client and its client's adverse impacts) is "directly linked" to identified harms, it should build and use whatever forms of leverage it can to prevent or mitigate the adverse impact. In ADB's case this may include encouraging or pressuring the client to actively engage in remediation of the harm.[77] While the bank will not be required itself to provide for remediation, it may take a role in doing so. However where the bank by its own actions or omissions has "contributed" to harms together with a client (which will be more likely where it has failed to carry out adequate due diligence)[78] it should: (i) cease or prevent its own contribution; (ii) use its leverage with the client to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between "contributing to" and having a "direct link" to an adverse human rights impact, and a financial institution's involvement with an impact may shift over time, depending on its own actions and omissions.[79]

Finally, under some MDB safeguards, 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

[74] OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), pp.5-6, available at https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf. See also OECD (2018) "Due Diligence for Responsible Business Conduct", p. 71. Available at https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm.

[75] EIB, Environmental and Social Standards (2018), ESS 9, para. 15: "Whilst recognising the difficult challenges associated with enforcing these standards along supply chains, the EIB nonetheless expects promoters to demonstrate satisfactory practices in this respect by appropriate due diligence in the selection of the contractors and suppliers." Available at https://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf.

[76] Id., fn 45.

[77] UNGPs, Principles 13, 19 and 22.

[78] For a discussion of relevant factors determining "contribution" to harm see OHCHR banking sector advice (June 2017), supra, pp.7-10.

[79] On the question of how banks can determine their responsibilities in this regard, see OHCHR, Id.

their supply chains to suppliers that can demonstrate that they comply with the Safeguard requirements[80] or to eliminate such practices within a reasonable time frame according to Good Industry Practice (GIP).[81] OHCHR suggests that these important requirements be included in ADB's updated safeguards in respect of all serious adverse human rights impacts (not limited to forced or child labour issues).

OHCHR recommends that:

- *The ADB's preparatory work on supply chain risks should take into account global normative frameworks on business and human rights, and should avoid any categorical distinctions between "primary" and non-primary suppliers or tiers in the supply chain;*
- *The ADB and its 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;*
- *The ADB's preparatory work on supply chain risks should map different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by ADB and its clients to address human rights risks in which they are involved;*
- *When it's necessary to prioritize actions, ADB and its 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 that they comply with the Safeguard requirements or to eliminate such practices within a reasonable time frame.*

Responsible exit

We note that there is little if any discussion in the IED SPS evaluation or background documentation for the SPS review 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 FMO and IFC. 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.[82] Data on this issue is scarce: most recent DFI Safeguard evaluations have neglected E&S issues at closure, and for the most part, exits occur completely out of the public eye. This seems to be a particularly significant gap in the context of ADB's planned expansion of PSO's, given the shorter project cycles than those pertaining to sovereign lending operations and the fact that exits may occur on shorter time frames.

[80] IFC PS 2, para. 29.
[81] EBRD PR 2, para. 26.
[82] 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. Available at https://ieg.worldbank.org/sites/default/files/Data/Evaluation/files/rap2018-appendixes.pdf#page=174.

Lack of attention to this issue may be attributable, at least in part, to assumptions about diminished leverage. But if so, this overlooks the many ways in which DFIs 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 banks 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,[83] along with capacity support for the client where needed.

OHCHR recommends that:

- *The preparatory work for the SPS review should include examination and proposals for dealing with E&S issues post-exit ("responsible exit").*
- *Any decisions by the Bank to exercise its contractual remedies under its revised safeguards should take into account the potential human rights impacts of divestment on project-affected communities.*

"Vulnerable groups"

We welcome the ADB's planned background study on "vulnerable groups," and note the increasing body of practice in other MDBs in integrating non-discrimination issues within safeguard policies.[84] We warmly welcome the ADB's intention to address discrimination and access barriers faced by lesbian, gay, bisexual, transgender and intersex (LGBTI) people in the region, which have significant economic[85] as well as human rights implications and have been accentuated during the COVID-19 pandemic.[86] We also welcome the ADB's intention to consider disability discrimination and access issues in the context of the SPS review and its important institutional commitments and programs in this area. The UN Convention on the Rights of Persons with Disabilities has been almost universally ratified in the Asia-Pacific region and provides a firm basis for strong ADB safeguard requirements in this area.[87] We also

[83] OHCHR, Remedy in Development Finance (forthcoming 2021), Parts III and IV.
[84] See e.g. World Bank ESF (2016), Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups; and World Bank Technical Note on Addressing Racial Discrimination through the ESF (Mar. 2021), which includes discrimination against ethnic minorities. Available at https://thedocs.worldbank.org/en/doc/c253db890a556b2c75d0d390b0f09e3b-0290032021/original/Technical-Note-on-Racial-Discrimination-and-ESF-v2.pdf.
[85] See e.g. https://www.worldbank.org/en/news/feature/2016/05/17/to-fight-poverty-we-need-to-fight-homophobia-and-transphobia.
[86] Jean Chong, "How Covid-19 affects LGBTIQ people in the Asia region," *Asia Times* (May 20, 2020), at https://asiatimes.com/2020/05/how-covid-19-affects-lgbtiq-people-in-asia/; and UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, An LGBT-inclusive response to COVID-19, at https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19LGBTInclusiveResponse.aspx.
[87] See https://indicators.ohchr.org/. The exceptions as of April 2021 were: Bhutan, Solomon Islands, Tajikistan and Tongo (signed, but not ratified) and Niue and Timor Leste (no signature).

note that discrimination on the grounds of race and ethnicity is worsening in many countries in the region, fueled in some instances by the COVID-19 pandemic and xenophobic, nationalist political sentiment, which calls for fine-grained analytics and strong due diligence and safeguard requirements.

We note that the Information Paper (para. 8) frames this topic as "vulnerable groups", which is a well-recognized and appropriate frame of analysis in the context of disaster relief and resilience. However for more general risk management purposes, an exclusive focus on "vulnerability" (as distinct from marginalization) may inadvertently foreclose inquiry into human agency, discrimination and structural explanations for social exclusion. For this reason, the term "vulnerable and marginalized" may provide a more suitable framing for ADB's background study. The EBRD's definition of "vulnerable people" is sensitive to this concern and reflects a broad range of characteristics which, alone or in combination, may exclude people from development benefits or expose them to particular risks or threats.[88] The EBRD's conception also includes discrimination on the grounds of political opinion, reflecting the increasingly evident reality that political opinion can exclude or expose people to risks independently of ethnicity, geography, social background or other characteristics.[89] The Cambodia Railway and Lao PDR case studies below (Annex I, pp.40-41, 44-45 and 54-58) provide examples of the salience and independent operation of discrimination on the grounds of political opinion insofar as investment project risk management is concerned.

OHCHR recommends that:

- *Preparatory work on vulnerable groups be framed within a human rights perspective, thereby addressing discrimination and marginalization, as well as vulnerability;*
- *Preparatory work for the SPS review should include a particularly strong focus on discrimination on the grounds of gender, race, ethnicity, migrant status, disability,*

[88] EBRD, ESF (2019), p. 4: Vulnerable people means "[P]eople or groups of people who may be more adversely affected by project impacts than others by virtue of characteristics such as their gender, gender identity, sexual orientation, religion, ethnicity, indigenous status, age (including children, youths and the elderly), physical or mental disability, literacy, political views, or social status. Vulnerable individuals and/or groups may also include, but are not limited to, people in vulnerable situations, such as people living below the poverty line, the landless, single-headed households, natural resource dependent communities, migrant workers, refugees, internally displaced people, or other displaced persons who may not be protected through national legislation and/or public international law."

[89] MDB's Articles of Association, based on those of the IBRD, typically exclude consideration of "political" considerations, in the sense of favouring particular forms of government over others. A nexus to economic development must be shown. Where groups of people are excluded or victimised as a consequence of their political views, however, economic implications are often direct and obvious. See e.g. OHCHR, Frequently Asked Questions on Human Rights MDBs, pp.1-3, at https://www.ohchr.org/Documents/Issues/Development/DFI/FAQonMultilateralDevelopmentBanksandHumanRights.pdf; and more generally, Christopher Stephens, "Why MDBs should include human rights in the development agenda," Asian Development Blog (May 25, 2017), at https://blogs.adb.org/blog/why-mdbs-should-include-human-rights-development-agenda.

political opinion, sexual orientation, gender identity, gender expression and sex characteristics.[90]

Indigenous peoples

OHCHR notes that the majority of the world's indigenous peoples live in the Asian region, and are often the most marginalized and vulnerable populations in connection with development projects. We recognize that the SPS (Safeguard Requirement 3), at the time of its adoption, set important standards on indigenous peoples' rights, including in relation to "meaningful consultation", consent, and the objective of respecting indigenous peoples' human rights.[91] However we note the significant advances in the definition and articulation of indigenous peoples' rights under international law since then, as well as the significant implementation challenges faced by ADB in implementing Safeguard Requirement 3 in practice.[92]

We note that indigenous peoples' rights, including the principle of "free, prior and informed consent", will be the subject of a background study for the SPS review. We note the confusion surrounding the interpretation and implementation of the FPIC principle and would encourage ADB to take into consideration the definition of FPIC under the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which has been endorsed by all but two countries in the Asian region,[93] and the authoritative interpretation of the UN Expert Mechanism on Indigenous Peoples (EMRIP).[94]

OHCHR recommends that:

- *ADB's background study on indigenous peoples should be framed by reference to Borrowers' international legal obligations under relevant human rights instruments, and in light of the 2007 UN Declaration the Rights of Indigenous Peoples;*
- *ADB's new safeguards should contain a definition of FPIC 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 a number of cases actual consent is actually required. The pursuit of FPIC denotes a right of indigenous peoples to influence the outcome of decision-making processes. 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), and "informed" (objective, clear, accurate).*

[90] We note that the acronym "LGBTI" is not self-explanatory and in some countries in the region it may be more straightforward to speak of grounds of discrimination such as sexual orientation, gender identity and sex characteristics. We also note in a number of countries in the region people identify with other terms, including "hijra", and face discrimination on the basis of their gender identity and expression, but don't necessarily identify as transgender. It would be useful to explore these issues in some depth as part of the ADB's SPS preparatory work for the planned background study.

[91] SPS, Annex 3, paras. 10-11 and 30-36.

[92] IED SPS evaluation (2020), including the problems of risk aversion and ring-fencing.

[93] No country in the region voted against UNDRIP, although Bangladesh and Bhutan abstained.

[94] EMRIP report, UN Doc. A/HRC/39/62.

- *ADB's new safeguards should include a requirement that "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."*
- *ADB's new safeguards should specify that FPIC is required in the following situations: (a) relocation of indigenous peoples (art. 10 of the UNDRIP), (b) storage of hazardous wastes on indigenous peoples' lands (art. 29 of UNDRIP), (c) where extractives projects are undertaken within indigenous peoples' territory, and (d) in other instances where a measure or project is likely to have a substantial negative impact on indigenous peoples' lives, lands, territories or resources.*[95]

Gender equality

We note ADB's extensive experience in connection with gender equality and development issues and the broad scope of ADB's Gender Equality and Women's Empowerment Operational Plan 2019-2024.[96] The latter plan includes explicit attention to women's human rights (particularly sexual and reproductive health and rights (SRHR) and gender-based violence (GBV))[97] and strengthening the gender components of ADB's safeguards.[98] We note ADB's work to operationalize the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and its recognition of the responsibilities of development partners to respect human rights and support gender equality and women's empowerment,[99] and the extensive formal recognition of women's human rights across the region.[100]

We also note the widening gaps between international and national laws on women's rights in the region[101] and the various implementation challenges confronted by ADB in connection

[95]Human Rights Committee, Länsman et al. v. Finland (CCPR/C/52/D/511/1992) and Poma Poma v. Peru (CCPR/C/95/D/1457/2006).

[96] ADB, Gender and Development Policy (1998); ADB, Operations Manual Section C2: Gender and Development (2006); and ADB, Gender Equality and Women's Empowerment Operational Plan 2019-2024, at https://www.adb.org/sites/default/files/institutional-document/495956/strategy-2030-op2-gender-equality.pdf.

[97] Id., paras. 14, 34(ii), 38, 42.

[98] Id, App. 1, p.31.

[99] ADB, Guidance Note, Gender and the Law: Temporary Special Measures to Promote Gender Equality (June 2012), pp.9-16, at https://www.adb.org/sites/default/files/institutional-document/33634/files/guidance-note-gender-and-law.pdf.

[100] Id., pp.6-16, and ADB, IED Evaluation Study, ADB's Support to Gender and Development, Phase II: Results from Country Studies (Dec. 2010), App. 2.

[101] University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Asia-Pacific Region (2021). See also UNFPA, State of the World Population 2021, available at https://www.unfpa.org/sites/default/files/pub-pdf/SoWP2021_Report_-_EN_web.3.21_0.pdf, noting (pp.48-49) that the Philippines and Thailand are among the countries where marriage may be considered a legal "cure" for rape by allowing perpetrators to marry their victims and avoid any penalties for their crimes. Afghanistan is among the countries which permits non-consensual virginity testing and, along with Viet Nam,

with gender mainstreaming, including (as of 2010) with respect to the strength of gender analysis, tracking of gender results, disconnects between analysis and programming, and trade-offs arising from the streamlining of the ADB's business processes.[102] We welcome ADB's intention to align the thematic coverage of its safeguards with those of other MDBs, and the fact that background studies are planned on "gender diversity and inclusion" and "sexual exploitation, abuse and harassment" (SEAH).

Gender equality is intrinsically important and a powerful development multiplier, as ADB policy recognizes. For the most unequal countries, according to the IMF, closing the gender gap could increase GDP by an average of 35 percent.[103] However the 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 region in relation gender equality.[104] Women and girls are often absent in designing, implementing and monitoring development projects, 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 or business projects. The discriminatory impacts of unpaid care work,[105] denial of bodily autonomy and SRHR, barriers to participation (including through shrinking civic space), GBV and SEAH critically undermine women's economic participation. GBV (including from worker influx) remains a stubbornly common feature of development projects, and personal security risks 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 or other exploitative practices as well as GBV.

These realities are implicitly acknowledged in the recent G20 Principles on Quality Infrastructure Investment (QII) which recommend that "the design, delivery and management

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Nepal and the Maldives, have notably weak legal protections for access to reproductive health care, education and information (SDG indicator 5.6.2) (Id., pp. 58-61 and 94-99).

[102] IED Evaluation Study, Id., pp.v-vii.

[103] Kristalina Georgieva, A New Bretton Woods Moment, Oct. 15, 2020, at https://www.imf.org/en/News/Articles/2020/10/15/sp101520-a-new-bretton-woods-moment?utm_medium=email&utm_source=govdelivery.

[104] UN Women, The First 100 Days of COVID-19 in Asia and the Pacific: A Gender Lens, at https://asiapacific.unwomen.org/en/digital-library/publications/2020/04/the-first-100-days-of-the-covid-19-outbreak-in-asia-and-the-pacific; and "UN Women and ADB join forces to set up Covid-19 gender-sensitive responses (Sept. 2020), at https://asiapacific.unwomen.org/en/news-and-events/stories/2020/09/un-women-and-asian-development-bank-join-forces-to-step-up-covid-19-gender-sensitive-responses.

[105] See https://ilostat.ilo.org/millions-of-hours-spent-daily-on-unpaid-work-evidence-from-asia-and-the-pacific/; and https://data.unwomen.org/publications/whose-time-care-unpaid-care-and-domestic-work-during-covid-19.

of infrastructure should respect human rights", including women's rights.[106] In view of the above factors, we would encourage ADB to ensure that the scope of its planned consultations is framed explicitly by a human rights perspective, and is broad enough to capture political as well as economic, social and cultural barriers to the enjoyment of women's human rights in the region (including, but not limited to, gender diversity and inclusion and SEAH). We would also encourage ADB to consider including a self-standing standard on gender equality in its revised safeguards, drawing from best practice embodied in the Inter-American Development Bank's ESPF (ESPS 9),[107] while ensuring that any conflicts between applicable international and national legal standards governing women's rights and gender equality are resolved in favour of the more stringent standard.

OHCHR recommends that:

- *ADB's planned background study on "gender diversity and inclusion" and "sexual exploitation, abuse and harassment" should be informed and framed by human rights law and broad enough to capture the full spectrum of human rights challenges faced by women and girls in the region, including in relation to their economic security, bodily autonomy, and respect for sexual and reproductive health and rights (SRHR).*
- *ADB's planned background study on "gender diversity and inclusion" and "sexual exploitation, abuse and harassment" should include analysis of gender discriminatory laws in the region,[108] temporary special measures to achieve substantive gender equality,[109] and the gender-based violence, discrimination and harmful gender stereotypes faced by lesbian, gay, bisexual, trans and intersex (LGBTI) people.*
- *ADB should consider including a self-standing safeguard on gender equality in its new safeguards, drawing from best practice in the IDB ESPF (ESPS 9), while ensuring that conflicts between applicable international and national legal standards governing women's rights and gender equality issues are resolved in favour of the more stringent standard.*

Digital technology

We note with interest ADB's ICT strategy[110] and the increasing needs of ADB's clients in connection with ICT policies and strategies, ICT infrastructure, and sector-related e-services and applications. We note the increasing support and investments of other MDBs in digital

[106] G20 QII Principle 5.2 (June 2019).
[107] Available at https://www.iadb.org/en/mpas.
[108] See e.g. https://wbl.worldbank.org/en/wbl.
[109] See ADB, Guidance Note, Gender and the Law: Temporary Special Measures to Promote Gender Equality (June 2012); General Recommendation No. 25 (2004), on article 4, para. 1, of Convention on the Elimination of all forms of Discrimination Against Women, on temporary special measures, at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3733_E.pdf ; UN Working Group on Business and Human Rights, Gender Dimensions of the Guiding Principles on Business and Human Rights (2019), p.9, at https://www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf.
[110] ADB, Toward e-Development in Asia and the Pacific (2003).

technology, and the mainstreaming of digital technology in health, education, and other infrastructure projects.[111] 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[112]), and we note ADB's sober assessment of its internal expertise on risk elements.[113] 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 (as recently seen in Myanmar and Kashmir);
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.[114]

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[111] ADB, Background Report, Road to 2030: Information and Communications Technology in ADB's Corporate Strategy and Operations (2016), p.19.
[112] Sarah George, "World's largest ICT companies failing to tackle human rights abuses in supply chains" (Jun. 12, 2020) at https://www.edie.net/news/7/World-s-largest-ICT-companies-failing-to-tackle-human-rights-abuses-in-supply-chains/. The above report found that ICT companies in the Asian region scored the lowest out of all regions 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.
[113] Id., para. 48.
[114] New York University, International Organizations Clinic, Digital Due Diligence and Multilateral Development Banks (March 2021).

OHCHR recommends that:

- *ADB should include digital technology safeguard risks within the scope of the preparatory work for the SPS review.*
- *Digital tech projects and the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which digital tech projects are designed and implemented.*

Summary of recommendations

OHCHR respectfully recommends that:

1. ADB commission a background paper and convene a dedicated public consultation on the safeguard components of human rights.
2. A policy commitment should be included within the ADB's revised safeguards along the following lines: "The ADB is committed to respecting internationally recognized human rights standards. To that end, in accordance with its safeguards, the ADB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports."
3. Human rights due diligence should be an explicit requirement in the ADB's revised safeguards, and should not be limited to special or high-risk circumstances. Specific due diligence procedures should be elaborated in line with the UN Guiding Principles on Business and Human Rights (UNGPs).
4. In line with the UNGPs: (i) the risk classification provisions in the ADB's revised safeguards should prioritize the severity (scale, scope and irremediability) of impacts; (ii) the revised ADB safeguards should specify that the extent of the ADB's due diligence and client's risk management responsibilities should vary in accordance with the severity (scale, scope and irremediability) and their own involvement in adverse impacts; (iii) the revised safeguards should require the client to build and use all potential sources of leverage in the project's area of influence; and (iv) the UNGPs' effectiveness criteria for GRMs should be integrated.
5. International human rights law and information from UN human rights bodies (Annex II) should guide: (i) ADB's risk classification and due diligence, (ii) social and environmental assessments, (iii) assessments of the robustness of client risk management systems (equivalence assessments), (iv) contextual risk analysis and Strategic Environmental Assessments, and (v) assessments of country/implementing authorities' implementation practice, track record, capacities and commitment.
6. The above assessments should be informed by all applicable bodies of law, whichever sets the highest standard.
7. RBL operations, budget support and development policy lending should be included within the scope of background study on new financing instruments and modalities, and should include an explicit focus on accountability and remedy.
8. Contextual risk analysis, taking into account human rights information sources, should inform ADB's RBL, budget support, DPL, FI and FCAS operations.
9. In FCAS contexts, the ADB's safeguards should continue to apply without restriction, in furtherance of accountability and learning objectives.
10. The ADB's approach to risk management in corporate finance and equity investment should take account of the IFC's and EBRD's policies and practice, including on the issue of accountability.

11. Country and client systems may be used in whole or part provided that this is likely to address the risks and impacts of the project and the client system's requirements are at least as strong as those of the ESP and ESSs.
12. International human rights law and information from UN human rights bodies (Annex II) should guide ADB's assessments of the functional equivalence of country and client social and environmental management systems.
13. ADB should ensure that (necessary) investments in adaptive risk management do not displace priority for ensuring ex ante compliance with the Bank's safeguards, particularly for higher risk projects.
14. The ADB's new safeguards should require compliance within a "reasonable manner and time frame."
15. Any deferral of compliance should be ruled out for Category A projects;
16. Timeframes for information disclosure should be clear and binding and aligned more closely with international best practice including, for Category A projects, disclosure of draft EIA and other safeguard documentation 60 days (for non-sovereign operations) and 120 days (for sovereign operations) prior to Board approval.
17. ADB should adopt an explicit safeguard or performance standard on stakeholder engagement modelled on that of the EBRD and IDB ESS 10.
18. ADB should integrate within its new safeguards clear requirements on assessing reprisals risks and preventing and responding to reprisals against project-affected people, and publish detailed procedures on these issues, taking into account experiences in the World Bank Group, IDB Group, EBRD, EIB and the IAMs global network.
19. ADB, CRP and SPF should systematically collect and publish data on reprisals in connection with ADB-supported projects and accountability mechanism procedures, including the nature and impact of response measures.
20. ADB should commission a background paper and convene a dedicated public consultation on enabling and contributing to remedy.
21. The mitigation hierarchy should be changed to provide for remediation as a last step across all safeguard standards.
22. ADB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.
23. The revised safeguards should provide ADB with the right not only to exercise its contractual remedies in the event of the client's non-compliance, but also (i) provide for or enable remedy to project-affected communities in connection with adverse impacts, taking into account severity (scale, scope, irremediability) and the Bank's own involvement in impacts, (ii) provide technical advice to clients and affected

communities on remedy, and (iii) recognize and address un-met grievances as sustainable development opportunities.

24. Consistent with Section 7.8 of the report for the External Review of the ES Accountability of the IFC and MIGA (paras. 329-339), the ADB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by ADB contributions to the extent of the bank's own involvement in any adverse impacts.
25. ADB's revised safeguards and accompanying guidance material should: (i) address human rights risk factors in connection with infrastructure projects not only at the project footprint and within the project area of influence, but also macro-level (fiscal, financialization and climate impacts); and (ii) avoid assuming that the PPP modality or private service provision should be the default.
26. The ADB's preparatory work on supply chain risks should take into account global normative frameworks on business and human rights, and should avoid any categorical distinctions between "primary" and non-primary suppliers or tiers in the supply chain.
27. The ADB and its 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.
28. The ADB's preparatory work on supply chain risks should map different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by ADB and its clients to address human rights risks in which they are involved.
29. When it's necessary to prioritize actions, ADB and its clients should start with the most severe risks and impacts, taking into account their scale, scope and irremediability.
30. 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 the Safeguard requirements or to eliminate such practices within a reasonable time frame.
31. The preparatory work for the SPS review should include examination and proposals for dealing with E&S issues post-exit ("responsible exit").
32. Any decisions by the Bank to exercise its contractual remedies under its revised safeguards should take into account the potential human rights impacts of divestment on project-affected communities.
33. Preparatory work on vulnerable groups should be framed within a human rights perspective, thereby addressing discrimination and marginalization, as well as vulnerability.
34. Preparatory work for the SPS review should include a particularly strong focus on discrimination on the grounds of gender, race, ethnicity, migrant status, disability, political opinion, sexual orientation, gender identity, gender expression and sex characteristics.

35. ADB's background study on indigenous peoples should be framed by reference to Borrowers' international legal obligations under relevant human rights instruments, and in light of the 2007 UN Declaration the Rights of Indigenous Peoples.
36. ADB's new safeguards should contain a definition of FPIC 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 a number of cases actual consent is actually required. The pursuit of FPIC denotes a right of indigenous peoples to influence the outcome of decision-making processes. 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), and "informed" (objective, clear, accurate).
37. ADB's new safeguards should include a requirement that "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."
38. ADB's new safeguards should specify that FPIC is required in the following situations: (a) relocation of indigenous peoples (art. 10 of the UNDRIP), (b) storage of hazardous wastes on indigenous peoples' lands (art. 29 of UNDRIP), (c) where extractives projects are undertaken within indigenous peoples' territory, and (d) in other instances where a measure or project is likely to have a substantial negative impact on indigenous peoples' lives, lands, territories or resources.
39. ADB's planned background study on "gender diversity and inclusion" and "sexual exploitation, abuse and harassment" should be informed and framed by human rights law and broad enough to capture the full spectrum of human rights challenges faced by women and girls in the region, including in relation to their economic security, bodily autonomy, and respect for sexual and reproductive health and rights (SRHR).
40. ADB's planned background study on "gender diversity and inclusion" and "sexual exploitation, abuse and harassment" should include analysis of gender discriminatory laws in the region, temporary special measures to achieve substantive gender equality, and the gender-based violence, discrimination and harmful gender stereotypes faced by lesbian, gay, bisexual, trans and intersex (LGBTI) people.
41. ADB should consider including a self-standing safeguard on gender equality in its new safeguards, drawing from best practice in the IDB ESPF (ESPS 9), while ensuring that conflicts between applicable international and national legal standards governing women's rights and gender equality issues are resolved in favour of the more stringent standard.
42. ADB should include digital technology safeguard risks within the scope of the preparatory work for the SPS review.
43. Digital tech projects and the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations,

but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which digital tech projects are designed and implemented.

Annex I
Case Studies on the Contributions of Human Rights to Investment Project Due Diligence and Risk Management
Cambodia Railway Project & Nam Theun 2 Hydropower Project, Lao PDR

Introduction

The objective of these draft case studies is to demonstrate the potential importance and usefulness of information and recommendations from the UN human rights system (which, together with information from regional and national human rights bodies is defined as "human rights risk information" in Annex II) to investment project due diligence and social and environmental risk assessment and management.

The draft case studies do not purport to be comprehensive or definitive. They were selected in order to show the salience and practical utility of human rights risk information in different countries and project contexts. The draft studies are based on publicly available information, (confidential) key informant interviews, and OHCHR's own monitoring and reporting in the countries concerned. Factual propositions and conclusions, particularly those emerging from counterfactual analysis, are nuanced or qualified, as appropriate.

The Cambodia Railway Project is the first case study discussed, followed by the Nam Theun 2 hydropower project in Lao PDR. The facts of each case are summarized, relevant sources of human rights risk information are identified, and a number of propositions are offered as to how shortcomings in design and implementation may have been addressed or mitigated through taking available human rights risk information into account. This note then discusses the costs of integrating human rights information, relative to potential benefits, and concludes that in the general run of cases the latter would significantly outweigh the former.

As indicated earlier in this memorandum, the case studies provide context for and support OHCHR's recommendations concerning: (1) the need for explicit and rigorous human rights due diligence; (2) the need to strike a judicious balance between strengthening, versus using, borrower frameworks and/or country safeguards systems; (3) the importance of explicitly referencing international human rights law and applying the most stringent applicable source of law to social risk assessment and management; (4) the need to balance downstream ("adaptive") risk management with continued, rigorous up-front requirements; (5) the need for robust performance standards for stakeholder engagement, and a self-standing policy and procedures to deal with reprisals against project-affected individuals; and (6) the need for a more proactive and consistent approach to remediating adverse impacts.

Cambodia Railway Project

Summary

In 2006, the ADB co-financed a major railway rehabilitation project in Cambodia which reportedly displaced over 4,000 families. Against a backdrop of poor land governance, tenure insecurity and intimidation and reprisals against communities affected by similar projects, a CRP investigation report in 2014 identified several shortcomings in project design and implementation, including lack of adequate consultation and compensation for affected families, and loss of property, livelihoods, and incomes."[115] The present note suggests that had full account been taken of available information from UN human rights bodies from the outset, some of these harms may have been more effectively mitigated or avoided.

Project context and human rights impacts

In December 2006 the ADB provided $73M, with additional financing in 2009 of $68.6M, in support of the Greater Mekong Subregion Rehabilitation of the Railway in Cambodia project, intended to rehabilitate existing track and reestablish Cambodia's rail connection with Thailand.[116] Co-financers included the government of Australia and the OPEC Fund for International Development. With the exception of resettlement, the Project was implemented through Cambodia's Department of the Ministry of Public Works and Transport. Resettlement was implemented by the Inter-ministerial Resettlement Committee (IRC) through the Resettlement Department under the Ministry of Economy and Finance.

The two-year railway upgrade was implemented through a public private partnership granting a concession to a private railway operator for a 33-year period. The project financed the rebuilding of the 642-kilometer railway line connecting the port city of Sihanoukville in the south, via the capital of Phnom Penh, with additional government funding to rebuild the railway from the capital to the northern city of Poipet at the Thai border. Since the railway had fallen into disuse, a significant number of people had settled into the railway right-of-way. The project cleared a 7-meter wide corridor centered on the middle of the railway track, which affected the homes and businesses of over 3,000 households including relocation of than a thousand households.[117] A consultation process for resettlement site selection and

[115] ADB Compliance Review Panel, Final Report on Compliance Review Panel Request No. 2012/2 on the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia (Asian Development Bank Loan 2288 and Asian Development Bank Loan 2602/Grant 0187 [Supplementary]) [hereinafter "Compliance Review Report"], para. 259.

[116] ADB, Loan Agreement for GMS Rehabilitation of the Railway in Cambodia between the Kingdom of Cambodia and Asian Development Bank, ADB project 37269-013, 37269-023 (5 March 2007). A supplementary project (Loan 2602, $42 million) to establish a new freight and rolling-stock maintenance facility at Samrong Estate, about 10 kilometers west of Phnom Penh, was approved on 15 December 2009.

[117] The original ADB Resettlement Plan calculated that the railway rehabilitation project would affect 2,629 families of which 1,235 households would require resettlement. ADB Summary Resettlement Plan, para. 2, reproduced in ADB Report and Recommendation of the President to the Board of Directors: Proposed Loan and Administration of Loan Kingdom of Cambodia: Greater Mekong Subregion: Rehabilitation of the Railway in

land acquisition reportedly included a participatory strategy for active participation by affected households and business owners.[118] The project was given a Category A risk rating. Some of the Phnom Penh families evicted by the project to date have ended up in one of five resettlement sites, including Sihanoukville and Trapaing Anhchanh, 5-6 hours away from Phnom Penh and some 20-30 km from the original site. Other families were resettled at the site in Battambang province, which is 294 km to the northwest of the city. The Poipet resettlement households are located in Banteay Meanchey Province, 411.3 km from Phnom Penh, where the Meanchey Dump Site is situated. With fewer job opportunities, inadequate basic infrastructure and late compensation, many of these families were forced to take on debt to build new homes and meet basic needs. Other refused to move and sought increased compensation or alternative resettlement options.[119]

The SPS, Annex 1 (para. 5), provides that the client's environmental assessment should take into account national laws "including host country obligations under international law." This requirement is mirrored elsewhere in the SPS (paras. 75, Annex 2, para. 15, and Annex 3, para. 13), although other provisions require compliance with national laws "including those laws implementing host country obligations under international law" (paras. 47, and Appendix 4, para. 17(ii)). The former formulation, on its face, appears to be more receptive to international law as a self-standing source of obligation and guidance. International treaties are a direct part of national law in Cambodia, which courts are formally required to take into account.[120] The government of Cambodia is party to a range of international human rights treaties of direct relevance to resettlement, stakeholder engagement and grievance redress. The ADB's responsibilities under the SPS (para. 71) include carrying out its own due diligence, reviewing the client's social and environmental assessment, helping build client capacity, and supervising implementation.

ADB Policy on Involuntary Resettlement provides that the client must provide sufficient compensation and assistance to ensure that displaced people are made at least as well-off

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Cambodia Project, Sri Lanka Project Number: 37269 (November 2006), Appendix 12, at 47. A resettlement plan prepared subsequently by the Government of Cambodia indicated that the project affected 2,629 households of which only 822 were fully affected and required relocation. The rest were reportedly partially affected. See Kingdom of Cambodia-Ministry of Public Works and Transport, GMS Rehabilitation of the Railway in Cambodia ADB – TA: 6251 REG Resettlement Plan (October 2006), at 2-3. These estimates were subsequently amended to 1,165 affected households, of which 310 would require relocation. *See* Kingdom of Cambodia—Ministry of Public Works and Transport, ADB Loan No 2288-Cam (SF) GMS: Rehabilitation of the Railway in Cambodia Updated Resettlement Plan for the Northern Line and the Missing Link (Final, July 2008) at 7.

[118] ADB, Proposed Loan and Administration of Loan Kingdom of Cambodia: Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project, Project Number: 37269 November 2006, Appendix 11, p. 44; (hereinafter "Loan Document" Project Data Sheet: CAM: GMS Rehabilitation of the Railway in Cambodia Project, Project No. 37269-013 (2006) (hereinafter "Project Data Sheet").

[119] Natalie Bugalski and Jocelyn Medallo, *Derailed: A Study on the Resettlement Process and Impacts of the Rehabilitation of the Cambodian Highway,* Bridges Across Borders Cambodia (13 February 2012). See Peter Zsobmor, "ADB Rejects Latest Complaint From Poor Railway Families," *The Cambodian Daily*, Nov. 26, 2015, at https://www.cambodiadaily.com/news/adb-rejects-latest-complaint-from-poor-railway-families-101314/.

[120] U.N. Doc. E/C.12/KHM/CO/1, para. 4.

after resettlement as compared to their previous living standards.[121] Cambodia, however, has a particularly poor track record in this area, and a previous transport infrastructure project supported by the ADB (Highway One) had also been associated with large-scale forced displacement, loss of livelihoods and critical debt burdens for many people.[122] A sampling of information and recommendations from UN human rights bodies prior to the inception of the project shows not only the weaknesses of national law compared with corresponding international treaty standards, but also the gaps in the implementation of relevant laws.

The design of the Cambodia railway rehabilitation project coincided with the official mission to the country by the then UN Special Rapporteur on the right to adequate housing, Miloon Khotari, in 2005. The Special Rapporteur noted that the challenges in relation to the rights to adequate housing were of "enormous proportions."[123] The Special Rapporteur's report focused in particular on the problems in the implementation of the country's 2001 Land Law, including the lack of legal certainty in relation to the housing situation of families living on State property. According to the Special Rapporteur, the "legislative vacuum and absence of guarantees in relation to involuntary resettlement" had led to an alarming rise in forced evictions, relocations and displacements of households in the period 2000-2005.[124] In this regard, the Special Rapporteur expressed particular concern about families being resettled in locations lacking infrastructure and access to basic social services.[125]

During the decade prior to the railway rehabilitation project, forced evictions and land confiscation ranked among Cambodia's most pervasive human rights problems. According to one estimate, approximately 830,000 people have been forcibly evicted due to land seizures, violent attacks and other forms of intimidation in the country in recent decades.[126] According to the UN Committee on Economic, Social and Cultural Rights, over 100,000 people were evicted between 2000 and 2009 in Phnom Penh alone, and a further 150,000 Cambodians were estimated to be living under the threat of forced eviction.[127] At the same time, rural landlessness nearly doubled in the decade prior to 2007 (13% to 25%).

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[121] ADB Safeguard Policy Statement. Safeguard Requirements 2: Involuntary Resettlement (2009), paras. 1-3, 7-14.
[122] ADB, Final Report of the Special Project Facilitator on the Phnom Penh to Ho Chi Minh City Highway Project in Cambodia, ADB Loan 1659-CAM (SF) (15 December 1998), at 3.
[123] Report of the Special Rapporteur on the right to adequate housing, Miloon Kothari. Addendum. Mission to Cambodia. UN Doc. E/CN.4/2006/41/Add.3 (21 March 2006) [hereinafter "Kothari Report"], para. 83.
[124] Ibid paras. 26-29, 34 and 44-61.
[125] Ibid para. 34.
[126] Global Witness, Hostile Takeover (July 7, 2016), at https://www.globalwitness.org/en/reports/hostile-takeover/.
[127] E/C.12/KMH/CO/1, para. 30. See Land and Housing Working Group (Cambodia), "Land and Housing Rights in Cambodia," Parallel Report 2009, Submitted to the United Nations Committee on Economic, Social and Cultural Rights Concerning Article 11 (1) Right to Adequate Housing of the Covenant on Economic, Social and Cultural Rights for consideration at its 42nd session, 4-22 May 2009 (April 2009), paras. 12, 27.

UN human rights mechanisms have noted a consistent pattern of violations relating to forced evictions in Cambodia: systematic lack of due process and procedural protections; inadequate compensation; lack of effective remedies; excessive use of force; and harassment, intimidation and criminalization of NGOs and lawyers working on this issue.[128] The Committee on Economic, Social and Cultural Rights noted the increase in evictions due to increased public works, city beautification projects, private urban development, land speculation, and the granting of concessions over large tracts of land to private companies.[129] UN human rights bodies have noted that economic land concessions and illegal sales have been a major source of human rights abuses in the country,[130] with a disproportionate impact on women[131] and indigenous peoples.[132]

UN human rights mechanisms have continued to report on attacks against villagers, criminalization of local leaders, acts of intimidation against NGOs,[133] and threats and intimidation against affected Cambodian families during resettlement, as well as inadequate compensation.[134] Attacks on protesters against large infrastructure projects are part of more fundamental threats to freedom of expression, assembly and association, and are of direct

[128] UN Committee on Economic, Social and Cultural Rights, UN Special Rapporteur on the right to adequate housing, UN Special Representative on the situation of human rights in Cambodia, reported in the UN compilation report to the first Universal Periodic Review of Cambodia, U.N. Doc. A/HRC/WG.6/6/KHM/2 (Sept. 18, 2009), para. 57.

[129] U.N. Doc. A/HRC/WG.6/6/KHM/2 (Sept. 18, 2009), para. 30. See also E/CN.4/2006/41/Add.3, para.61.

[130] See e.g Report of the Special Rapporteur on the situation of human rights in Cambodia, Peter Leuprecht, U.N. Doc. E/CN.4/2004/105 (Dec. 19, 2003), paras. 41-47 and 71-77; Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi. Addendum: A human rights analysis of economic and other land concessions in Cambodia, A/HRC/21/63/Add.1 (Sept. 24, 2012); Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi, UN Doc. A/HRC/27/70 (Aug. 15, 2014), paras. 12-14.

[131] Committee on the Elimination of Discrimination against Women. Concluding observations on the combined fourth and fifth periodic reports of Cambodia. UN Doc. CEDAW/C/KHM/CO/4-5 (Oct. 29, 2013), paragraph 43(b) (noting that forced eviction in the country "is not a gender-neutral phenomenon, but it disproportionately affects women").

[132] Kothari Report, paras. 67-71.

[133] Letter from the Special Rapporteur on the situation of human rights in Cambodia and from the Special Rapporteur on the right to adequate housing to the Permanent Mission of the Kingdom of Cambodia to the United Nations, Ref. No. AL Housing (2000-9) G/SO 216/1 KHM 4/2011 (June 17, 2011); Letter from the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the right to adequate housing, and the Special Rapporteur on human rights defenders, Ref. No. UA Housing (2000-9) G/SO 216/1 G/SO 214 (107-9) KHM 6/2011 (Sept. 22, 2011); Letter from the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the right to adequate housing, the Special Rapporteur on freedom of opinion and expression, the Special Rapporteur on peaceful assembly and of association, and the Special Rapporteur on the situation of human rights defenders, Ref. No. AL Housing (2000-9) G/SO 214 (67-17) Assembly & Association (2010-1) G/SO 214 (107-9) KHM 5/2011 (Sept. 26, 2011); Letter from the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the freedom of opinion and expression, the Special Rapporteur on the right to adequate housing, the Special Rapporteur on freedom of peaceful assembly and association, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on human rights defenders, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on violence against women, Ref. No.: AL Housing (2000-9) G/SO 216/1 Assembly & Association (2010-1) Health (2002-7) G/SO 214 (67-17) KHM 2/2012 (Apr. 20, 2012).

[134] Bugalski & Medallo, supra, pp.18-20.

relevance to development, as the UN Special Rapporteur on the situation of human rights in Cambodia has remarked:

> *There has been regression in the area of political rights and enjoyment of fundamental freedoms. The dissolution of [Cambodia National Rescue Party] CNRP and the imprisonment of its President, Kem Sokha, the banning of 118 CNRP officials from political activity for five years and the reallocation of CNRP seats to unelected representatives have seriously strained political rights. Developments in law, policy and practice, including amendment of the Constitution to introduce a lèse-majesté law, have targeted critical and dissenting voices and significantly curtailed fundamental freedoms. These developments are grave. For economic development to be sustainable, the indivisibility of rights dictates that respect for civil and political rights should accompany improvements in economic and social rights.*[135]

CRP report

On 28 August 2012, a request was filed for a compliance investigation of the project. The CRP's report in 2014 identified a number of shortcomings in relation to consultation, compensation (including with respect to timing and adequacy, non-indexation for inflation), and sequencing of income and livelihood restoration programs.[136] Inadequate basic services at relocation sites reportedly contributed to the deaths of two young children who drowned while attempting to access water elsewhere, and of another child who was killed by a car when walking from his school to his relocated house.[137]

According to the Panel, "inadequate attention to addressing the resettlement, public communications and disclosure requirements of [ADB's] policies…ha[d] led to significant yet avoidable adverse social impact on mostly poor and vulnerable people."[138] The Panel argued that resettlement and disclosure issues should be given higher priority[139] and recommended, among other things:

- establishing a $3 – $4 million compensation deficit payment scheme;
- improving facilities at resettlement sites;
- improving the functioning of the grievance redress mechanism (GRM);
- capacity-building for the Cambodian authorities responsible for resettlement;
- establishing a debt workout scheme for highly indebted households;

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[135] Human Rights Council, "Report of the Special Rapporteur on the situation of human rights in Cambodia" (Aug. 18, 2018), UN Doc. A/HRC/39/73, para. 89. See also Global Witness, 'Deadly Environment: The dramatic rise in killings of environmental and land defenders' (Apr. 2014) at www.globalwitness.org/sites/default/files/deadly%20environment%20embargoed.pdf; Cambodian Center for Human Rights, "CCHR Briefing Note – September 2015 Cambodia: Democracy Under Threat," at http://cchrcambodia.org/admin/media/analysis/analysis/english/2015_09_24_CCHR_Briefing_Note_Cambodia_Democracy_Under_Threat_ENG.pdf.

[136] CRP Compliance Review Report, *supra*, pp. vi-vii, paras. 49-60 and 91-106.

[137] Ibid, paras. 107-116.

[138] Ibid, p. viii.

[139] Ibid, paras. 259-260.

- extending and expanding the income restoration program (EIRP).[140]

Recent progress on corrective actions

Management's action plan was submitted to the Board in April 2014, following acceptance by the Board of a majority of the CRP's findings. As of March 2020, the CRP reported that four of the six recommendations made by CRP had been implemented.[141]

On recommendation 1 (compensation deficit payment): the CRP determined that this recommendation had been implemented, on the basis that AH's in all five resettlement sites had received land certificates issued by local authorities which the AHs had been able to use to sell their land or use it as collateral, and AH's in Battambang had received official land title certificates.[142] The CRP found that recommendation 2 (improving services) had been implemented, although significant concerns remained concerning waste disposal and networked water supply in the resettlement sites, and there was slow progress in transferring responsibility to municipal authorities. The CRP encouraged ADB Management to communicate to the Government the value of local authorities engaging in processes of further development and maintenance of critical infrastructure at all five resettlement sites so as to ensure sustained, affordable and inclusive operations.[143]

Recommendation 3 (grievance redress mechanism, or GRM) was closed following the CRP's fourth monitoring report in 2019, at which point the CRP was unable to affirm the continued existence (let alone effectiveness) of a project GRM. In March 2020 the CRP noted the difficulties of obtaining further evidence in view of the project's closure and suggested that ADB Management regularly engage with Government and affected persons to ensure that a GRM is functioning and that affected persons can credibly address any complaints they might submit.[144]

The CRP found that recommendation 5 (debt workout) had "partially" been implemented. It reported that significant relief had been provided but "debt accumulated by AHs to finance construction of homes equivalent to those that they occupied prior to resettlement was not eligible for debt workout." The CRP nevertheless considered that "Recommendation 5 should be closed, since data gathered during the fifth monitoring period indicates that outstanding loans by AHs cannot be attributed to debt incurred by AHs to construct houses equivalent to

[140] Ibid.
[141] CRP, Fifth Annual Monitoring Report to the Board of Directors on the Implementation of Remedial Actions for the Greater Mekong Subregion: Rehabilitation of the Railway Project in the Kingdom of Cambodia (ADB Loan 2288 and ADB Loan 2602/Grant 0187 [Supplementary], (Feb. 25, 2019) at https://lnadbg4.adb.org/dir0035p.nsf/attachments/CRP-Cambodia-5thMonitoringReport-Final.pdf/$FILE/CRP-Cambodia-5thMonitoringReport-Final.pdf.
[142] Ibid, p.5
[143] Ibid, pp.6-7.
[144] Ibid, p.8.

their pre-resettlement homes."[145] The need for more rigor in vetting official information on indebtedness of AH's was highlighted by the CRP in its lessons-learned study for this project.[146]

Insofar as income restoration is concerned (recommendation 6), the CRP noted that average incomes of AH's continued to rise, and that positive outcomes had been recorded for the vocational training program delivered under the ADB's Technical Assistance. However, an independent evaluation of the work of ADB's consultant (Cufa) concluded that the self-help groups formed under the expanded income restoration plan (EIRP) were only partially sustainable, which reflected deficiencies in the Management Action Plan. The CRP suggested that ADB Management take the lessons of this experience into account in connection with future income and livelihood restoration activities.[147]

In December 2019 OHCHR's Cambodia country office reported that people affected by the project in Poipet, a resettlement site in Phnom Penh's Trapaing Anhchanh and a number of AHs in Battambang, had not been able to receive their land titles despite repeated petitions that they had filed at provincial and national levels.[148] A number of AH's have received land receipts but have expressed concerns that, unlike land title, land receipts do not provide full protection for their tenure security. AH's in Trapaing Anhchanh have acknowledged that the inter-ministerial resettlement committee (IRC) have visited the resettlement site on a number of occasions but have never met or sought the views of the AH's directly.

In relation to the GRM, OHCHR has received information that in Poipet, as of April 2021, a group of 78 families of AHs who had previously submitted their grievance through the GRM were still waiting for their cases to be settled. However authorities have advised that the case has already been closed and that only a few families may receive the compensation. Their representative, whose case has been under judicial supervision for protesting against the authorities in 2015, informed OHCHR that he submitted a request to receive compensation (a land and relocation package) via the Provincial Resettlement sub-Committee (PRSC) in March 2021. But the city governor has not replied, and the representative has expressed his intention to protest further on behalf of his community. These affected families also engaged in protests against municipal authorities asking for compensation, though these have been limited since the judicial supervision proceedings against their representative.

Regarding income restoration, in Battambang, 25 AHs claimed that they benefitted from a USD 10,000 loan from the project's Social Development Fund in September 2012 and USD

[145] Ibid, p.9.
[146] CRP, Lessons Learned from Compliance Reviews of the ADB (2004-2020): Rehabilitation of the Railway Project in the Kingdom of Cambodia (2021), pp.10-11.
[147] Ibid, para. 45.
[148] Internal communication from OHCHR Cambodia country office dated 24 December 2019.

8,000 from the Safety and Emergency Fund. In December 2019, OHCHR Cambodia received information from community representatives that between 80 to 90% of AHs had taken loans from moneylenders or micro-finance institutions, using their land receipts as collateral. While the self-help group of the project in Poipet provided each AH in that area USD 450 in 2016, the group has reportedly ceased to exist as the AHs along the northern line failed to pay back the loan. Approximately half of the AHs have reportedly migrated to work in Thailand or move to live in rental accommodation in the city centre in order to find work.

The AHs in Phnom Penh's Trapaing Anchanh resettlement site reported that they had not been provided with income restoration or any support for their livelihoods, but only received material support from World Vision (sewing machines for 20 families) upon their request, as well as a small business support project which will conclude later in 20121. AH's are still demanding more compensation from the IRC and requesting decent work, improved living conditions and land title. The community's living conditions have reportedly been poor for 10 years, compared with the pre-project situation.[149]

The COVID-19 pandemic and government response measures (including curfew and lockdowns) have seriously affected AH's in Poipet, as well as Battambang and Phnom Penh's Trapaing Anchanh resettlement site, who survive from day to day on precarious earnings in the informal sector. Many affected people in Poipet earn their living from selling food to people who cross the border to work in Thailand, and are now experiencing food insecurity as the border is almost completely closed due to the COVID-19 pandemic. A significant number of affected people have reportedly sold their motorcycles and bicycles to buy food, whilst many women are struggling financially as a result of COVID-19 related job losses.

For Trapaing Anchanh, the pandemic has caused heavily indebted AHs to suffer food shortages. Without necessary support from the local authorities or the government since the onset of the pandemic, most children have been denied access to education as their families cannot afford online study. This is also the case in Battamang and Poipet, where only 4-5% of the children from AHs have reportedly been able to afford on-line learning following school closures. The situation in Trapaing Anchanh worsened in February 2021 when the village was locked down for 3 weeks when individuals in two families tested positive for COVID-19. Until now, AHs in Trapaing Anchanh have not had access to reliable information on COVID-19 vaccination, and hence vaccine hesitancy is common. The district authority offered rice and food to the affected families and other AHs in the village, some were denied this, and officials were accused of bias against particular AHs. Discrimination also seems to have been a problem in Poipet, where COVID-19 relief has reportedly been denied in retaliation against the community's past protest actions, and the community is reportedly considered an "opposition party."

[149] Ibid.

On a more general level, apart from COVID-19 impacts, the human rights situation in Cambodia has been deteriorating since 2015, and a number of critics of the ruling party have been arbitrarily arrested.[150] In September of 2017, Equitable Cambodia, one of the requesters in the CRP compliance review, was ordered to suspend its operations for 30 days following alleged breaches of the Law on Associations and NGOs and its own by-laws. Its offices were not reopened until March 2018.[151] Since August 2019, at least 106 persons associated with the Cambodia National Rescue Party (CNRP) have been charged with plotting against the State, incitement to commit a felony, or with discrediting judicial decisions on account of their political activity. Executive branch interference with the judiciary also appears to have increased, and OHCHR continues receiving reports from civil society organizations (CSOs) and human rights defenders of increasing concern about their safety and security and of CSO activities being heavily surveilled or interfered with by local authorities. These and other ongoing constraints on the freedoms of expression, peaceful association and assembly in Cambodia underscore the increasingly serious challenges faced by project-affected peoples in participating freely and having their views reflected in development projects and planning and claiming their fair share of development benefits.[152] These factors are also important prerequisites for the accessibility, legitimacy and effectiveness of GRMs.

Counterfactual analysis

Any counterfactual analysis must necessarily be approached with caution and humility, given the methodological limitations and speculation involved. Nevertheless, given the volume and depth of international and domestic human rights reporting on issues directly relevant to the Cambodia Railway Project, this note suggests that fuller and earlier consideration of available human rights information may have helped to improve project design, strengthen risk mitigation, and maximize development outcomes, and identifies specific mechanisms through which the latter outcomes may have been brought about.

As is suggested in more detail below, closer attention to available human rights risk information in Cambodia may have enabled better planning and resource allocation decisions from the beginning of the project, and may have strengthened the basis for triggering safeguard requirements that the CRP subsequently found were lacking in the design and implementation of resettlement activities. The implementation of the applicable safeguards

[150] Human Rights Council, "Report of the Special Rapporteur on the situation of human rights in Cambodia" (Aug. 18, 2018), UN Doc. A/HRC/39/73, para. 89.
[151] Leonie Kijewski and Niem Cheng, "Equitable Cambodia allowed to reopen," *The Phnom Penh Post* (Feb. 26, 2018).
[152] For indications of the worsening human rights situation see https://www.refworld.org/docid/5a993932a.html. Constraints to stakeholder engagement in the specific context of the Cambodia Railway project are discussed in CRP (2021), *supra*, paras. 4.2.3, 4.2.4, 4.2.5, and 4.4.1.

policies, in turn, could have helped to prevent or mitigate the adverse impacts of the alleged human rights violations associated with the project.[153]

Human rights information relevant to the project, as outlined in Section B, may reasonably have been expected to prompt a thorough assessment of the magnitude and probability of adverse social impacts of resettlement in Cambodia, as well as of the challenges confronting stakeholder engagement, effective grievance redress, and the borrower's commitment, track record and capacity to assess and manage social and environmental risks. A more robust contextual and institutional capacity analysis, taking available human rights information into account, and an explicit comparison of applicable municipal laws with corresponding international human rights standards, may also have usefully informed the ADB's assessment of the role that it could play in helping to fill capacity gaps prior to the initiation of the project. One of the options for proceeding with any further social impact assessment for the railway project, given the seriousness of contextual human rights risks in the land sector, would have been to establish an expert advisory committee of social specialists to guide the assessment and consultation process. The ADB involuntary resettlement policy requires borrowers to appoint an independent advisory panel of experts not affiliated with the project during the preparation and implementation of highly complex and sensitive projects.[154] Independent advisory panels can be used to document negotiated settlements, thereby helping to offset asymmetries in bargaining power between the parties.[155] The appointment of such a panel at the outset may have strengthened ADB's capacities, leverage and oversight of the resettlement schemes, including in relation to compensation, a gap identified by the CRP.[156]

As indicated in Section B above, UN human rights bodies have reported consistently on the climate of increasingly intimidation and threats faced by land campaigners and communities resisting forced evictions.[157] This is consistent with evidence of the closing of civil society space generally in Cambodia (and many other countries) and severely constrains the ability of project-affected people to voice their opinions publicly and self-organize which, in turn, undermines data collection and feedback loops to project design and implementation. It is not clear from publicly available information whether or the extent to which UN analysis and reporting on these issues was taking into account. However greater attention to these issues could plausibly have helped to highlight the need for an updated resettlement plan following the baseline measurement survey, closer monitoring and more rigorous reporting on resettlement, more systematic (disaggregated) data collection requirements, greater investment in capacity building for the GRM, and more rigorous supervision of resettlement including through independent monitoring.

[153] Compliance Review Report, *supra*, para. 254 & Appendix 4.
[154] ADB Performance Requirement 2: Involuntary Resettlement, para. 24.
[155] Ibid para. 25.
[156] "Example of a compensation deficit payment scheme compliance," reproduced in Compliance Review Report, *supra*, Appendix 5, at pp 130ff, paras. 1-4.
[157] See e.g. Kothari Report, paras. 33, 38, 48 and 48.

Nam Theun 2 hydroelectric project, Lao PDR

Summary

The US$1.3 billion, 1070 megawatt, Nam Theun 2 Hydropower Project (NT2), built on one of the largest tributaries of the Mekong River inside Lao PDR, is the largest hydropower plant in Lao PDR in terms of generating capacity.[158] NT2 was intended to be a showcase for sustainable hydropower, despite questions concerning resettlement of indigenous peoples, compensation, and biodiversity impacts. Downstream impacts of the trans-basin diversion of water under the NT2 in Xe Bang Fai River Basin, an area with more than 150,000 people, appear to have been underestimated in project design.

Deficiencies in transparency, the absence of meaningful consent, and apparent shortcomings in social impact assessment and accountability have arguably undermined the image of NT2 as a model for hydropower development. Available human rights risk information during project conception and implementation illustrate the severe restrictions on the freedoms of expression and association in Lao PDR, which may have contributed to self-censorship of project affected groups and discouraged critical feedback in relation to the environmental and social mitigation program. The extent to which ADB factored human rights risk information into its own due diligence is not clear from publicly available documentation. However full consideration of this body of information may have strengthened due diligence and social risk assessment and mitigated negative impacts on displaced populations and downstream villages.

The shortcomings documented in the present case assume particular relevance given the many other dams planned or under construction in the country. The collapse in July 2018 of the US$1 billion Xe Pian-Xe Namnoy dam, another "build-own-operate-transfer" project, killed more than 70 people in Lao PDR and left thousands homeless in both Lao PDR and Cambodia. NT2 and Xe Pian-Xe Namnoy are of course very different projects, however both projects illustrate the major human rights risks that large hydro dams may bring[159] and the importance of integrating human rights considerations explicitly within project due diligence and risk management.

[158] The $USD 3.8 billion Xayaboury Hydropower Project, the first run-of-river dam to be built in the lower Mekong basin, with a capacity of 1,285MW, will shortly overtake NT2. See http://www.internationalrivers.org/node/2284.

[159] For a more comprehensive conceptual framework for analysing the human rights risks of mega-infrastructure projects, including with respect to finance and investment policy, see OHCHR and Heinrich Boell Foundation, The Other Infrastructure Gap: Sustainability: Human Rights and Environmental Dimensions (2018), available at https://www.ohchr.org/documents/Publications/TheOtherInfrastructureGap_FullLength.pdf.

Project context and human rights impacts

The 1070 megawatt Nam Theun 2 Hydropower Project (NT2) in central Laos is a $1.3 billion project that began construction in 2005 and commenced full operations in March 2010. The trans-basin NT2 dam is built on one of the largest tributaries of the Mekong River inside Lao PDR and is the largest hydropower plant in Lao PDR in terms of generating capacity. NT2 is the most complex hydropower project in Laos, with a 450-square kilometer reservoir on the Nakai Plateau, a 39-meter-high dam northwest of the plateau, and a 27-kilometer channel from the regulating pond to the Xe Bang Fai River Basin, a downstream tributary of the Mekong River.

The NT2 power company (NTPC) is owned by a consortium comprising Electricity de France International (EdFI) (35%), Electricity Generating Company (EGCO) of Thailand (25%), Italian Thai Development Company Limited (ITD) of Thailand (15%), and the Government of Lao PDR (GoL) (25%). The plant is contracted to sell 90% of its electricity to Thailand,[160] generating an estimated $USD 2 billion in revenue over a 25 year "build-own-operate-transfer" concession. NT2 forms part of the government's strategy of promoting national development through the sale of hydro-electricity to its neighbors through a regional energy market.[161] Revenues are reportedly intended to contribute to economic development and reduce poverty in Lao PDR, particularly in the area affected by the dam.

ADB supported NT2 in several ways:

- a $USD 20 million public sector loan to the GoL to help fund its purchase of equity in NTPC,[162]
- a $50 million private sector loan directly to NTPC,[163]
- a $50 million political risk guarantee to NTPC, and
- ADB provided two technical assistance (TA) grants to the GoL to prepare the project. The first $USD 700,000 grant was approved in November 2003[164] and the second $USD 1 million was approved in April 2004.[165]

[160] ADB NT2 project page data. It is estimated that NT2 revenue will contribute about 5% of the GoL's total revenue through the 25 year concession period after debt servicing.

[161] Courtney Weatherby and Brian Eyler (2017) "*Letters from the Mekong: Mekong Power Shift: Emerging Trends in the GMS Power Sector*," The Stimson Center. With a current production capacity of 6,218 MW by 2017, Laos has MOUs to supply 9,000 MW to Thailand, 5,000 MW to Vietnam, and 1,500 MW to Cambodia starting in 2025.

[162] See https://www.adb.org/projects/37734-013/main#project-pds.

[163] Ibid.

[164] ADB, PPTA No. 4213 - GMS Nam Theun 2 Hydropower Development Project Technical Assistance, Sovereign (Public) Project No. 37734-012.

[165] ADB NT2 project data page.

In close collaboration with the World Bank[166] as the other primary public co-financing agency for the project, ADB committed to make NT2 a demonstration of "environmentally and socially sustainable hydropower."[167] Given the complexity of the resettlement and biodiversity impacts, ADB helped NTPC conduct baseline studies to support an ambitious environmental and social mitigation program (ESP). The ESP involved three main components:

- $USD 85 million for resettling 1374 families to the Nakai plateau. Of the 8,000 jobs created during the construction phase, 60% were local. The project also upgraded 280 km of national and local roads.
- A separate $USD 16 million development program for downstream affected villages (Nam Theun-Nam Kading and Xe Bank Fai).
- The project contributed $USD 1 million per year for the protection of the 4,000 km2 national protected area within the watershed through 2035.

ADB's technical support helped the NTPC undertake the first phase of the preparatory work for the project, including (i) preparation of a cumulative impact assessment study; (ii) strengthening government institutional capacity to implement hydropower development projects effectively, particularly social and environmental impact mitigation and project management; (iii) building government capacity for effective communication with all stakeholders; (iv) identifying compensatory components for the NT2 project submergence area; and (v) facilitating coordination with civil society through domestic and international nongovernment organizations.

The second ADB grant supported (i) incorporation of the findings of the Phase I technical assistance; (ii) confirmation of specific aspects of the economic and financial viability and integrating the results of the social and environmental benefit-cost analysis; (iii) assessment of the macroeconomic impacts of the NT2 Project; (iv) implementation of a short-and medium-term capacity building program for effective mitigation of social and environmental impacts; (v) supporting the Lao Government's initiatives for communication with the project-affected people; (vi) facilitation of project coordination and management; and (vii) facilitation of effective consultation/participation with various stakeholders including local and international non-government agencies.

ADB has been a strong promoter of power interconnectivity in the Greater Mekong Sub-region (GMS), investing extensively in other dam and transmission line projects.[168] However

[166] The World Bank provided financial support that included a partial risk guarantee of up to $50 million, a $20 million grant, and a political risk guarantee up to $200 million.
[167] ADB NT2 project data page.
[168] Asian Development Bank. Greater Mekong Sub region Economic Cooperation Program: Regional Investment Framework Pipeline of Potential Projects (2013-2022) (Dec. 2013), p. 30; and ADB, Lao People's Democratic Republic Energy Sector Assessment, Strategy and Roadmap (Nov. 2019), available at https://www.adb.org/sites/default/files/institutional-document/547396/lao-pdr-energy-assessment-2019.pdf.

this endeavor is not without challenges. For example, the lack of investment capital within Lao PDR risks putting the country disproportionately at the service of foreign investors. The build-own-operate-transfer model provides a relatively small share of benefits to the country, with the majority of benefits accruing to the owners. This kind of dependency relationship can increase the challenges of addressing the social and environmental impacts of large dams. A further challenge is that, as of 2018, electricity from China was $USD 0.02 per kwh cheaper than electricity produced in Laos, raising questions about whether Laos would be able to sell all of the hydro-electricity that it plans to bring online.[169]

NT2 was classified as a category A project,[170] triggering ADB safeguard policies on Involuntary Resettlement (1995) and Operations Manual (OM) F2, ADB Policy on Indigenous Peoples (1998) and OM F3, and ADB Policy on Gender and Development (1998) and OM C2.[171] ADB did not, and still does not, have a safeguard policy on stakeholder engagement, however there was ample publicly available information at all material times of serious restrictions on the freedoms of opinion, expression, association and peaceful assembly in Lao PDR,[172] relevant to project assessments of the feasibility and quality of stakeholder engagement and grievance redress.

The ADB policy on involuntary resettlement (1995) governed relocation, compensation and rehabilitation, drawing on the experiences of many donors in implementing and evaluating resettlement programs. The policy emphasized avoidance of resettlement wherever feasible and minimization of resettlement when it is unavoidable. It prescribed that all losses of assets, livelihood and income should be compensated in full, and specifies that a lack of formal legal title to land and access to resources should not be a bar to full compensation.[173] Moreover, the policy stated that where it was not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in the planning and implementation of resettlement programmes.

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[169] Weatherby and Eyler (2018), *supra*, p. 37.

[170] ADB (March 2005) Report and Recommendation of the President to the Board of Directors on a Proposed Loan to the Lao People's Democratic Republic tor The Greater Mekong Subregion: Nam Theun 2 Hydroelectric Project, Report No. RRP: LAO 37734.

[171] Since NT2 was approved before the 2009 update of the SDS, all safeguard policy references are to prior ADB policies.

[172] Sources include the Asian Forum on Human Rights and Development, US State Department annual human rights reports, Amnesty International, Human Rights Watch, International Federation for Human Rights, International Rivers, and Freedom House, e.g. https://freedomhouse.org/report/freedom-world/2003/laos. See also Mekong Watch (2001) at http://www.mekongwatch.org/english/country/laos/index.html.

[173] For example, the ADB Operations Manual: Bank Policy states, in paragraph 4 (iii), provides: "Replacing what is lost. If individuals or a community must lose all or part of their lands, assets, means of livelihood … they will be compensated and assisted through replacement of land, housing, infrastructure, resources income sources and services, in cash and kind, so that their economic and social circumstances will be at least restored to pre project levels."

Laos has among the most ethnically diverse populations on mainland Southeast Asia, with 49 ethnic groups and at least 240 subgroups identified.[174] The pre-resettlement project assessments determined that three distinct ethnic minorities – the Brou (32.7%), the Tai Bo (31.8%) and the Vietic speaking Ahoe (2.9%) – constituted over two thirds of the resettler population (67.4%).[175] The ADB's policy on indigenous peoples (1998) aimed to ensure that indigenous peoples, referred to in Lao PDR as "ethnic groups" or "ethnic communities," could have opportunities to participate in and benefit equally from development. It required that projects avoid negatively affecting ethnic minorities and, where negative impacts nevertheless occurred, it required adequate and appropriate compensation. Open and transparent consultations were intended to be an integral part of this process, however the policy stopped short of requiring consent: "Initiatives should be conceived, planned, and implemented, to the maximum extent possible, with the informed consent of affected communities, and include respect for indigenous peoples' dignity, human rights, and cultural uniqueness."[176] The Policy called for a specific indigenous peoples plan that addresses indigenous concerns in a time-bound and adequately budgeted manner.[177]

NT2 Social Impacts:

Approximately 6,200 indigenous people living on the Nakai Plateau were resettled to make way for the reservoir. More than 150,000 people downstream, who depend on the Xe Bang Fai and Nam Theun rivers for their livelihoods, have also been directly affected by the project, due to destruction of fisheries, flooding of riverbank gardens and negative impacts on water quality and quantity.

ADB has stated that it promoted the informed participation of the Government, civil society, and other stakeholders in an open and inclusive manner.[178] Throughout implementation, consultations have been carried out with project-affected people in the major impact zones including Nakai Plateau, project land areas, and downstream Xe Bang Fai, among other areas. Information on compensation, resettlement plans and livelihood options were presented to the project-affected people by trained community and district facilitators through appropriate media including radio broadcasts in minority languages, visual materials together with verbal explanations, site visits to proposed and pilot resettlement areas, and open discussions. The project design was adjusted to accommodate concerns of the project-

[174] U.S. Agency for International Development, Post-Approval Field Review Report: Nam Theun 2 Hydropower Project, Mission report (Feb. 5-26, 2017).
[175] NTPC 2005 Nam Theun 2 Hydroelectric Project: Social Development Plan. Volume 4: Project Lands: Resettlement Plans, Nam Theun 2 Power Company, Ch 5, p. 6, at http://www.namtheun2.com/reports/social-development-plan-volume-1/social-development-plan-volume-4.html.
[176] ADB Policy on Indigenous Peoples (April 1998), para. 31, emphasis added.
[177] Ibid, para. 37-40.
[178] ADB project data sheet: https://www.adb.org/projects/37910-014/main#project-pds.

affected people, such as location of the plateau resettlement area, village layout, housing design, and types of crops under the livelihood program as well as livelihood options for project lands and downstream areas.

The ESP supported the resettlement process between 2006 and 2017, and responsibilities were recently transferred to the GoL.[179] Positive outcomes reportedly include improved housing, roads, health and education services, and higher income levels.[180] Most resettled families reported high levels of satisfaction with the program results.[181]

However other assessments portray a more complex picture. Research in affected villages shows that while resettled families have better infrastructure, including access to electricity, roads, and schools, many families continue to struggle due to loss of livelihoods and the means to provide for themselves. Restoring livelihoods to just above the poverty or subsistence level is not sufficient, from the perspective of many of those resettled, and improved infrastructure has not necessarily translated into a sustainable future.[182]

Reported shortcomings in the resettlement program include:[183]

- Land allocations were significantly less than the pre-project situation (0.66 ha plot per family) with uneven irrigation options.[184]
- Resettled families were forced to grow mainly vegetables to sell in poor market conditions. Families were originally guaranteed 10,000 hectares of production forest, but the area has since been reduced by at least 40 percent as a result of illegal logging. Families were also promised fish in the new reservoir, but the company cleared only a minimal amount of vegetation from the area.[185]
- Communities on the Nakai Plateau reported problems in relation to each of the livelihood pillars of the Resettlement Implementation Period (RIP), a component of the ESP, including agricultural programs such as cash cropping and livestock, fisheries, and off-farm and tourism related livelihoods.

[179] ADB and World Bank ESP progress reports.
[180] See NTPC (2005) and GIZ, Compensation and Livelihood Restoration at Nam Theun 2 Hydropower Project (2014) (hereinafter GTZ (2014)), esp at pp.124-129. Pre-project livelihoods were precarious, with a baseline assessment indicating that only 17% of families could produce sufficient amounts of rice for the year, and half experienced shortages during dry season.
[181] March 2017 Nakai Socio Economic Survey.
[182] See https://www.internationalrivers.org/resources/report-l-nam-theun-2-world-bank-withdrawal-leaves-major-concerns-over-project-outcomes, and GIZ (2014).
[183] Based on POE reports, USAID monitoring missions, GIZ (2014), and research, site visits, and interviews by Mekong Watch and International Rivers.
[184] GIZ (2014) p. 76.
[185] Lao Movement for Human Rights, International Federation for Human Rights, " Laos: an overview of human rights violations: A briefing Paper prepared for the 9th Asia-Europe Meeting Summit of Heads of State and Government (ASEM9), Vientiane, Laos (Nov. 5-6, 2012), pg 13. See www.mldh-lao.org.

The NT2 project may not have provided ethnic minorities with all the protections and opportunities necessary under ADB safeguard policies. No specific ethnic minority development plan appears to have been designed, and the ESP reportedly provided for a relatively narrow assessment of lost cultural assets. By not fully permitting indigenous peoples to determine the meaning and value of culturally important places or practices, the value of intangible cultural assets is reduced or lost by resettlement, thereby limiting the scope and range of mitigation options. This is not merely an issue of inadequate compensation, but of how to address potential psycho-social impacts associated with the loss of a cultural identity. Negative impacts may exacerbate socio-economic disparities between ethnic minorities and others in the project affected area.[186]

The effect of illegal activities on the short-run increases in income raises questions about the long-term sustainability of economic gains. In addition, the lack of information, transparency and knowledge about the closure of the RIP as reported by villagers, and the implications this may have for ongoing livelihood support, have reportedly contributed to feelings of fear and anxiety about the future.[187]

The absence of a functioning grievance mechanism consistent with international standards set[188] is also problematic. The ADB 2017 monitoring report indicated that new community GRM trainings were scheduled but that households were not aware of the project grievance mechanism and that no GRM performance information was provided. Yet, the action was reportedly deemed completed.[189] The fact that compensation processes were extremely lengthy and came to a close nearly 10 years after initial baseline value assessment, made it nearly impossible to defend a complaint regarding inaccurate assessment for assets, particularly in respect of inundated land and assets.[190]

Negative impacts on downstream communities appear to have been underestimated, especially in the Xai Bang Fai river system. The planning for the Downstream Program began in 2005, and the Downstream Implementation Plan was released in 2009. The program was intended to compensate 155,000 people in 159 villages, including 56 hinterland villages. The original concession agreement allocated $16 mn to satisfy needs of downstream

[186] See Ginger Gibson and the Mikisew Cree First Nation, Culture and Rights Impact Assessment: A Survey of the Field. The Firelight Group (May 2017).

[187] These concerns were noted beginning in the *23rd Report of the International Environmental and Social Panel of Experts (POE)* (Dec. 29, 2014), p. 12, at http://documents.worldbank.org/curated/en/152281467991954642/pdf/96161-WP-P049290-P076445-PUBLIC-Box391439B-POE-23-Report-Final.pdf.

[188] UNGPs, Principles 29-31.

[189] ADB NRT2 E&S Annual Report, Section 1.4.9, p. 11. Village grievance committees were established to address 16 reported cases of domestic violence (section 2.7.8, p. 95).

[190] Mekong Watch (2010) and GIZ (2014), p. 75.

communities, whereas no budget limitations were set for NTPC to fulfill the concession agreement obligations for resettlement in the plateau.

Even with an extension, resources for the Downstream Compensation Program were reportedly inadequate to address actual impacts. Information submitted to the UN Human Rights Council in 2007 alleged that "villagers in the Downstream Channel of the Nam Theun 2 Dam received inadequate and inconsistent or uneven cash compensation for their loss of their rice fields. Some families are already suffering rice shortages due to the lack of adequate compensation."[191]

Sediment trapped by the dam has reportedly undermined the geological integrity and agricultural yields of the downstream basin. The dam has also reportedly affected fish migration through the Mekong system, limiting an important source of protein in downstream communities' diets. These impacts may be felt not only in the Xe Pang Fai and Nam Theun river basins, but may extend to Cambodia and Vietnam's Mekong delta.[192] Reductions in fish catch and loss of riverbank gardens were reportedly not fully compensated on the basis of "like for like" asset replacement, and women were reportedly affected disproportionately.

Inadequate training before providing access to credit through the Village Development Fund may have led to unduly risky development ventures, and in turn, significant indebtedness. While many if not most downstream families feel may be worse off after NT2, there appears to have been little follow-up by the GoL after the program abruptly ended in 2013.

The challenges confronting large infrastructure projects like Nam Theun 2 can be amplified in contexts like Lao PDR, where traditions of transparency, participation and accountability are relatively weak.[193] NT2 consultations do not appear to have yielded adequate information on revenue allocations, action plan progress, and other important issues, and there does not appear to be any early warning system for villagers in the event of potential danger or collapse

[191] Written statement submitted by the Society for Threatened Peoples, UN Doc. A/HRC/4/NGO/27 (Mar. 2007).

[192] Ziv, G., E. Baran, I. Rodríguez-Iturbe, and S.A. Levin, "Trading-off Fish Biodiversity, Food Security and Hydropower in the Mekong River Basin." *Proceedings of the National Academy of Sciences,* Vol.109, no. 15 (Jan. 2012), http://www.pnas.org/content/109 (/15): /5609-5614;.full.pdf; Baird, Ian G. *The Don Sahong Dam: Potential Impacts on Regional Fish Migrations, Livelihoods and Human Health*. University of Victoria (Aug. 2009), at http://www.polisproject.org/PDFs/Baird%202009_Don%20Sahong.pdf; Orr, Stuart, Jamie Pittock, Ashok Chapagain, and David Dumaresq, "Dams on the Mekong River: Lost fish protein and the implications for land and water resources", *Global Environmental Change*, Vol. 22, Issue 4 (Oct. 2012): 925–932, at https://doi.org/10.1016/j.gloenvcha.2012.06.002.

[193] For a fuller discussion of the contributions of transparency and accountability to mega-infrastructure project design and implementation, see OHCHR and Heinrich Boell Foundation (2018), The Other Infrastructure Gap: Sustainability, *supra*.

of the dam.[194] There also does not seem to be evidence of independent and effective grievance redress for project related complaints, and structural weaknesses in the formal justice system limit the prospects and other avenues for remedy.[195] A report by the UN Special Rapporteur on indigenous peoples in 2003 on large dam projects provided an inventory of human rights risks faced by indigenous peoples, relevant to the design of projects such as NT2.[196]

Moreover, the effectiveness of consultation is potentially limited by the obstacles to freedom of expression in Laos, including the lack of independent media, strict regulation of non-governmental organizations, and social media. Reporting from the UN human rights system on Lao PDR in recent years brings to light a range of serious human rights shortcomings, including arbitrary detention, discrimination against women, forced disappearances, torture, constraints on freedom of expression and peaceful assembly (effectively silencing voices critical of the government), curtailment of the freedom of assembly and right to participate in public affairs, forced evictions of ethnic minorities in relation to hydropower and other development projects, and a range of concerns relating to NT2 specifically.[197]

In April 2006, communications were brought to the UN Special Rapporteurs on indigenous peoples and the right to food, alleging a broad range of concerns about NT2 including adequacy of consultation, deficiencies concerning Nakai Plateau resettlement, the Project (construction) Lands Compensation, and the Xe Bang Fai Downstream Program, the poor past track record of livelihood and resettlement programs, the lack of any mechanism for investigating human rights violations associated with dam impacts, adverse impacts on water

[194] Tom Fawthrop, "Laos dam disaster may not be its last," *The Diplomat* (Aug. 2, 2018). https://thediplomat.com/2018/08/laos-dam-disaster-may-not-be-its-last/.
[195] Human Rights Committee, Concluding Observations on the Initial Report of Lao PDR, UN Doc. CCPR/C/LAO/1 (Nov. 23, 2018) esp at paras. 29-30.
[196] UN Doc. E/CN.4/2003/90 (Jan. 21, 2003). The main problems identified in the Special Rapporteur's global survey were loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.
[197] See generally https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/LAIndex.aspx, including Human Rights Council Working Group on the Universal Periodic Review, Compilation prepared by OHCHR, UN Doc. A/HRC/WG.6/8/LAO/2 (Feb. 12, 2010); Summary prepared by OHCHR, UN Doc. A/HRC/WG.6/8/LAO/3 (Jan. 8, 2010), including para. 43 on Nam Theun 2; Committee on the Elimination of Racial Discrimination, CERD/C/LAO/CO/16-18 (Apr. 13, 2012), esp paras. 17-18, and Human Rights Committee, Concluding Observations on the Initial Report of Lao PDR, UN Doc. CCPR/C/LAO/1 (Nov. 23, 2018) at paras. 39-40, on consultation and forced relocation of ethnic groups in the context of hydro dams and other development projects; and Committee on the Elimination of Discrimination against Women, Concluding Observations on the combined eighth and ninth periodic reports of Lao PDR, UN Doc. CEDAW/C/LAO/CO/8-9 (Nov. 14, 2018); background information for the January 2020 Universal Periodic Review cycle available at https://www.ohchr.org/EN/HRBodies/UPR/Pages/LAindex.aspx, and Manushya Foundation and Asian Indigenous Peoples Forum, Joint Submission to the 35th Session of the UPR Working Group (July 21, 2019).

quality due to biomass, and deficiencies with respect to transparency and compensation.[198] Further allegations along similar lines were submitted to the UN Special Rapporteurs in October 2006 and October 2007, generating a detailed exchange of views with the GoL but, apparently, little common ground on the underlying factual assertions.[199]

Reporting from the UN human rights system has systematically highlighted the ongoing gaps between national and international law on human rights issues relevant to development projects. For example, article 44 of Lao PDR's amended Constitution of 2003 permits freedom of expression and other basic civil liberties. However the penal code forbids criticisms of the government, the State and the policy of the ruling party, or to engage in acts of propaganda with the aim of weakening the State. It is forbidden to listen to, to be in possession of, or to read documents criticizing the government.[200] Civil society activists have been abducted by intelligence agencies and "disappeared," including the well-known case of Sombath Somphone.[201] In September 2019 a prominent Lao human rights defender, Od Sayavong, went missing in Thailand months after meeting the UN Special Rapporteur on Extreme Poverty, who was shortly to visit Lao PDR.[202] Mr Sayavong has not been seen since. In November 2019 Ms. Houayheuang Xayabouly, also known as Mouay, was sentenced to five years in prison and a fine of 20 million Kip (about $2000) for "defaming the country" in a Facebook post criticizing the government's response to floods in the Southern provinces.[203] She currently remains in detention. A group of UN Special Procedures published allegation letters regarding Mr Sayavong's and Mr Somphone's cases in December 2020 and February 2021 respectively.[204] Three human rights defenders arrested in 2016 for their human rights work and environmental rights campaigns and sentenced to long term detention, remain in prison, with little apparent prospect of having their sentences reduced. The chilling effects of such repressive practices are obvious, and are antithetical to both human rights and sustainable development.

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[198] UN Doc. A/HRC/4/32.Add 1 (Mar. 19, 2007), paras. 272-297. The GoL's responses included the claim (at para. 292) that "the moving households did not express any discontent, rather they expressed their eagerness and enthusiasm to move to their new places of settlement", which does not square with information from other sources.

[199] UN Doc. A/HRC/9/9/Add. 1 (Aug. 15, 2008), paras. 257-269; and UN Doc. A/HRC/12/34/Add.1 (Sept. 18, 2009), paras. 191-206, at https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34-Add1.pdf.

[200] Human Rights Committee, Concluding Observations on the Initial Report of Lao PDR, UN Doc. CCPR/C/LAO/1 (Nov. 23, 2018) at paras. 33-34.

[201] Ibid, paras. 19-20.

[202] Press release, Thailand/Lao PDR: UN human rights experts concerned by disappearance of Lao human rights defender (Oct. 1, 2019), at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25087&LangID=E.

[203] Lao Woman Gets Five Years for Criticising Government on Facebook, Radio Free Asia (Nov. 25, 2019), at https://www.rfa.org/english/news/laos/mouay-sentence-11252019151738.html.

[204] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25648, and https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26000.

The closure of civil society space and suppression of dissenting voices present fundamental obstacles to meaningful stakeholder engagement, and allow projects like NT2 to proceed without adequate public scrutiny and integration of the full range of needs and perspectives necessary for project sustainability.[205] In August 2007, Mekong Watch asked Laos' Water Resources and Environment Agency and the project implementer to disclose the EIA/SIA report for the Xekatam Hydropower project in southern Laos. The request was initially turned down, with only a summary EIA/SIA sent over a year later. Some of the information in the disclosed document, including names of affected villages and the number of relocated households, was redacted. Similar problems have been apparent with other hydro projects. In May 2014, a public consultation on the Nam Ngiep 1 Hydropower project was held in Vientiane, but invitations to the meeting were limited to "agencies with registered offices in Lao PDR," thereby ruling out a potentially wide range of other interested and affected stakeholders.[206]

Mekong Watch reports further that when asked by ADB to find out if broad community support was obtained for another hydropower project in Laos, a social specialist of the project's independent advisory panel reported back, saying:

> *Yes, for two reasons…Lao people support GoL's policies. This is a national principle/philosophy. The people of the Lao PDR are socialized to sacrifice, accept and listen to their government. This can be seen during discussions with them regarding the NNP1 [Nam Ngiep 1 hydropower] project. [Project affected peoples] PAP always say that the project is a good one and they agree with the GoL…*[207]

The shortcomings documented above were amplified in the report of the UN Special Rapporteur on extreme poverty following his visit to Lao PDR in March 2019. The Special Rapporteur's visit occurred not long after the collapse of the Xe Pian-Xe Namnoy dam in July 2018. The Special Rapporteur made a number of critical observations on the state of human rights in Lao PDR and called for a comprehensive review of the hydropower sector. Prompted by the Xe Pian-Xe Namnoy situation, he remarked: "I visited people relocated after the dam collapse who are living in harsh conditions and with no assurances of a decent existence in the future, contrary to the rosy picture painted by the Government. I am deeply concerned by reports of continued delays in support and the lease of land set aside for survivors to a corporation." He called for enhanced transparency in the hydro sector and for the

[205] Shoemaker, Bruce, Ian Baird, and Kanokwan Manorom. "NT2: World Bank's Narrative of Success Falls Apart." *International Rivers Review* (Dec. 2014).

[206] Questioning the "Model for Poverty Reduction and Sustainable Development": The Asian Development Bank and Japan's Involvement in Laos' Nam Theun 2 Dam, (Apr. 2017) Mekong Watch, at http://www.mekongwatch.org/PDF/NT2andADB_Eng_April2017.pdf.

[207] Ibid, citing p. 14, in Zola, Anthony. *4th Independent Advisory Panel Report on Nam Ngiep 1 Hydropower Project* (Jan. 19, 2015), p. 39, at https://www.adb.org/sites/default/files/project-document/156438/41924-014-esmr-05.pdf.

government to treat civil society as a partner, suggesting that such measures would "help address corruption and ensure that Lao people are not impoverished by the exploitation of their natural resources but rather have a voice in addressing the country's many challenges. Repressive policies are costly and self-defeating, and the Government should eliminate severe restrictions on civil society activities and movement."[208]

The human rights violations documented by the Special Rapporteur appear to have been exacerbated by the COVID-19 pandemic. As of 2021, civic space remains highly restricted, with social media platforms being asked to register with the government in an effort to control "fake news," resulting in individuals being even further controlled online. Disappearance cases continue to be reported, especially of human rights defenders and members of ethnic minorities, which of course has a chilling effect on civil society and communities, resulting in nobody being willing to speak up on human rights violation.

Following his analysis of the hydropower sector in Lao PDR, and of underlying constraints to transparency, accountability, and public participation, the Special Rapporteur on human rights and extreme poverty recommended that: "The international actors that remain optimistic about the hydropower sector should justify the sustainability of specific projects, in the absence of a thorough cumulative, rather than one-off, assessment of the environmental and social impacts of all existing and planned projects. The World Bank should consider how the hydropower sector will in fact contribute to poverty reduction, in the light of low revenue generation, lack of transparency, limited regulatory monitoring and enforcement capacity, minimal job creation and flagging investment in social services."[209]

As the ADB withdraws from direct monitoring and oversight of the resettlement conditions, the key to accountability is likely to be the collective organizational capacity of the affected communities themselves. However, on information available to OHCHR, the ESP does not appear to have invested adequately in the collective organizational strength of resettler groups and downstream villages in order that the latter may claim their fair share of national resources. In 2015, the POE made the striking observation, "that with the partial exception of the Ahoe, virtually no 'Ethnic Minority Development Plans' have been developed, let alone

[208] See https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24710&LangID=E. The Special Rapporteur's report is available at UN Doc. A/HRC/41/39/Add.2 (June 20, 2019).
[209] UN Doc. A/HRC/41/39/Add.2 (June 20, 2019), para. 43. A large body of additional information and analyses on human rights in Lao PDR, including in relation to NT2 and hydropower development, was submitted to the UN in advance of the third Universal Periodic Review of Lao PDR by the UN Human Rights Council in January 2020. See UN Doc. A/HRC/WG.6/35/LAO.3 (Nov. 5, 2019) available at https://undocs.org/A/HRC/WG.6/35/LAO/3, and in particular Manushya Foundation & Asian Indigenous Peoples' Pact, Joint Submission to the UN Universal Periodic Review of Lao PDR (July 21, 2019), available at https://a9e7bfc1-cab8-4cb9-9c9e-dc0cee58a9bd.filesusr.com/ugd/a0db76_e031040b4a0f4c439b483637fc43c43a.pdf.

implemented, nor appropriate GoL and Nakai Resettlement Office staff training undertaken."[210]

Moreover, the ten-year period for direct ADB accompaniment may well turn out to be too short a period to fully assure that GoL and village institutions have the capacity to support continued livelihood development in a culturally appropriate and sustainable manner. In 2017, the POE commented that the realization of unfulfilled results from the mitigation action plan will rest on an "act of faith" as the ADB transfers responsibility to the GoL.[211] The complex challenges of both the upstream and downstream communities, not all of which have been addressed by NT2 mitigation, may have benefited from more active and sustained support. The ADB has also noted social and environmental impacts as a constraint to further hydro dam development in the country.[212]

Environmental impacts:

While the present case study focuses mainly on social impacts, directly connected to human rights laws, these cannot be considered in isolation from environmental impacts. NT2 reportedly impacted negatively on one of the most important conservation areas in mainland Southeast Asia - the Nakai Plateau. Biodiversity offsets do not appear to have been successful. Due in part to the limited livelihoods opportunities for resettled households and the new roads built for the dam, many have had to resort to logging rare hardwoods and trade in threatened wildlife. The Watershed Management Protection Agency (WMPA) does not appear to have fulfilled its original objective of conserving biodiversity within the NNT NPA.[213] Corruption and mismanagement of the protected area by the WMPA have led to calls for a complete dismantling and restructuring of the institution. One assessment of the community forestry pillar of the RIP concluded:

> *It has been a saga of conflicting philosophies and interests, of foot dragging by agencies which felt threatened by the new institution [Village Forestry Association], as well as mediocre planning and excessive taxation of a compensation exercise for the resettled communities. A lack of dynamism and transparency in management has also contributed to a loss of trust in the sector among villagers and a plundering of timber resources by unchecked outside interests and sometimes the resettled villagers themselves.*[214]

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[210] U.S. Agency for International Development, Post-Approval Field Review Report: Nam Theun 2 Hydropower Project, Mission report (Feb. 5-26, 2017), fn 86.
[211] POE 2017, cited in U.S. Agency for International Development, Post-Approval Field Review Report: Nam Theun 2 Hydropower Project, Mission report (Feb. 5-26, 2017).
[212] ADB, Lao People's Democratic Republic Energy Sector Assessment, Strategy and Roadmap (Nov. 2019), p.6, *supra*.
[213] U.S. Agency for International Development, Post-Approval Field Review Report: Nam Theun 2 Hydropower Project, Mission report (Feb. 5-26, 2017), pp. 29-30.
[214] GIZ (2014) p. 84, citing POE 20th report.

In 2014, Professor Thayer Scudder, a resettlement expert and member of the POE, concluded that "Nam Theun 2 confirmed my longstanding suspicion that the task of building a large dam is just too complex and too damaging to priceless natural resources."[215]

Economic impacts:

Proponents of NT2 have highlighted the significant electricity revenues would bring to the economy of Lao PDR, a quarter of whose 5.8 million people live below the poverty line. The projected government revenue in 2010 from NT2 was estimated to be an average around $80m per annum over the 25-year concession period, intended to boost spending in education, health and rural infrastructure projects.[216]

Lao PDR halved its national poverty rate within a decade, from 46% in 1992 to 23% in 2015.[217] Household welfare also improved in terms of ownership of assets, housing conditions and access to services. However, the poverty rate in rural areas is nearly 3 times that of the urban areas.[218] Many people escaping poverty (by the official definition) have remained in precarious conditions close to the poverty line. The impact of the COVID-19 pandemic on Laos' economy has been devastating, exacerbating debt distress risks and raising further questions about the government's reliance upon hydropower as a strategic lynchpin for national development.[219]

In May 2002, the World Bank helped the GoL to set up a new Poverty Reduction Fund to encourage investment in rural infrastructure. The idea was that NT2 revenues would go through the fund for health, education, agriculture, and rural infrastructure. However according to one account, "there was to be no independent financial oversight or separate bank accounts to ensure that profits actually went to poverty alleviation and environmental programs. The Bank did not require the use of any external independent financial auditors.

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[215] See Jacques Leslie, "Large Dams Just Aren't Worth the Cost," *New York Times* (Aug. 22, 2014).

[216] ADB, NT2 project data sheet.

[217] ADB, "Poverty in Lao PDR," at https://www.adb.org/countries/lao-pdr/poverty.

[218] World Bank, "Drivers of Poverty Reduction in Lao PDR" (2015).

[219] Eyler, B., "Laos suspends new dams as tragedy raises wider fears," *The China Dialogue* (Sept. 8, 2018). The country was supposed to be graduation from LDC in 2021, but this has been postponed now to 2026 due to the negative economic performance in 2020. See also Maria Siow, "If Laos fell into a China debt trap, would it make a noise?", *South China Morning Post* (Feb. 20, 2021), at https://www.scmp.com/week-asia/politics/article/3122409/if-laos-fell-chinese-debt-trap-would-it-make-noise; Kearrin Simms, "Lao sets its own debt trap," *East Asia Forum* (Oct. 31, 2020), at https://www.eastasiaforum.org/2020/10/31/laos-set-its-own-debt-trap/; and UN Lao PDR, Socio-Economic Response Framework to COVID-19 (2020), pp.17-19, at https://laopdr.un.org/sites/default/files/2020-12/UN%20Lao%20PDR_Socio-Economic%20Response%20to%20COVID-19_Draft%20as%20of%2029%20September.pdf.

Instead the revenue to the Laotian government from the dam funds would be treated just like any other government income."[220]

In 2016, in response to an NGO inquiry, ADB and World Bank stated that "obligations for public disclosure of NT2-related revenue management, expenditure and audit reports have not yet been met."[221] The banks noted that "neither the required financial statements of NT2 revenues nor audits of the program have been made available by the GoL ….. In sum, whether or not NT2 has had a significant, positive impact on poverty reduction in Laos remains unknown, although there is considerable anecdotal evidence that it has been much less successful than anticipated …. NT2 is contributing only a small fraction of what was initially projected …"[222]

Recent progress and corrective actions

The ADB and World Bank have invested significantly in building ES capacities in Lao PDR. The second World Bank Lao Environment and Social Project (LENS2) was approved in 2015 with US $15 million additional funding.[223] This project aims to strengthen overall government capacity in environmental assessment and management, while continuing to improve the management of National Protected Areas and reduce the trade in illegal wildlife in eight provinces (including the proposed Nakai NT national park). For ADB, Laos is part of a regional ADB technical assistance initiative to strengthen safeguards management in Southeast Asia.[224] The challenges being addressed in the latter project are similar to some of those observed in NT2:

"Implementation issues have been identified which frequently lead to project delays, including: (i) delayed finalization of safeguards documents after completion of engineering designs; (ii) a lack of or untimely preparation and finalization of corrective actions; (iii) delayed payment of compensation and assistance to displaced persons; (iv) insufficient meaningful consultations with affected persons and communities; and (v) inefficient grievance redress mechanisms. The principal challenge is the weak institutional capacity of government agencies to undertake resettlement programs and complex environmental assessments,

[220] Shoemaker, B. and Robichaud, W. (Eds). 2018. *Dead in the water: global lessons from the World Bank's model hydropower project in Laos*, University of Wisconsin Press, p. 208.
[221] World Bank and ADB Response to Mekong Watch dated December 16, 2016, at http://www.mekongwatch.org/PDF/NT2response16Dec2016.pdf.
[222] Ibid, pp. 209-211.
[223] World Bank, Second Lao Environment and Social Project, PAD, 2015. The first Lao Environment and Social (LENS) Project was designed by the World Bank as a complementary program to prevent NT2 from being an isolated, stand alone "enclave" project, but rather, to extend environmental and social standards beyond the NT2 project area. There are three main components of LENS one of which is the Environmental Protection Fund (EPF). The EPF was established in 2005 with US $5 million from AsDB as an endowment and US $4 million from WB for its operations. The original LENS project ran between 2005 and 2013.
[224] ADB, "Regional: Strengthening Safeguards Management in Southeast Asia," Project 52059-001, for $1.5 mn, approved Nov. 18, 2018, https://www.adb.org/projects/52059-001/main#project-pds.

during both project preparation and implementation. Inadequate technical skills and lack of oversight and monitoring of safeguards during project implementation often leads to delays and cost overruns. Poor safeguards planning and implementation can often be linked to (i) treatment of safeguards as an external or secondary factor in project development; (ii) the priority given to civil works schedules; and (iii) inadequate executing agency staffing, combined with high turnover of trained safeguards staff. In these circumstances, safeguards planning and execution are not systematic, slowly executed, or a source of complaints."[225]

In July 2018, at the GoL's request, the POE recommended immediate closure of NT2's RIP, stating that "[t]he provisions of the Concession Agreement relating to the closure have been met to our satisfaction."[226] However the POE's recommendation to close the RIP appears to have relied heavily on process indicators rather than observable outcomes. Many conditions for the closure of RIP were achieved provisionally, or were achieved "in planning", or were otherwise heavily qualified. Worryingly, in a context characterized by discrimination against ethnic minorities, the RIP's closure was agreed to by the POE without assessment of any of the five "ethnic groups" indicators.[227] USAIDS's project audit of NT2 in 2017 made a number of critical observations on resettlement conditions (including lack of transparency and lack of clarity about criteria for sustainable resettlement) and the situation of ethnic minorities in particular.[228] These observations have been supported by more recent independent accounts.[229]

On 4 March 2021, the Lao PDR government promulgated a decree aimed at minimizing harms from hydropower projects. Among other requirements, the decree requires hydropower operators to alert authorities once dam reservoirs achieve full capacity or when downstream river levels drop to a critical level, and hydropower plant operators are required to provide solutions and pay compensation for loss of property in the event of damages caused by water

[225] ADB, Technical Assistance Report, Project No. 52059-001, Strengthening Safeguard Management in Southeast Asia (Nov. 2018), at https://www.adb.org/sites/default/files/project-documents/52059/52059-001-tar-en.pdf.
[226] Nam Theun 2 Multipurpose Hydro Project, Panel of Experts report No. 28 (July 2018), Annex A, p. 25.
[227] Id., pp.31-32.
[228] USAID, Post-Approval Field Review Report, Nam Theun 2 Hydropower Project; World Bank and ADB (2017), pp. 3-8.
[229] See e.g. International Rivers, Submission to the United Nations Special Rapporteur on Extreme Poverty and Human Rights (Feb. 2019), available at https://www.ohchr.org/Documents/Issues/EPoverty/Lao/InternationalRivers.pdf. For critical analyses of the GoL's August 2018 Law on Resettlement and Vocation, which may dramatically increase the risks and challenges faced by indigenous peoples, minorities and others in the context of development-induced displacement, see Mekong Watch, Human Rights Concerns Re: Law on Resettlement and Vocation in Lao PDR (2018).

storage or discharge.[230] However the prospects for enforcement of the degree are not clear.[231]

Wider influence of NT2 in hydropower sector of the Mekong Region

About 140 dams are planned to be built in the Lower Mekong basin, including two on the mainstream of the river in Laos that are under construction and two in advanced preparation or planning.[232] The collapse of the Xe Pian-Xe Namnoy dam killed at least 70 people and left thousands homeless in Laos and Cambodia. The Laos government has conceded that poor construction played a role in the collapse. One expert has observed, "The Korean dam company [SK Engineering and Construction] knew the partially built saddle dam was at risk to intense weather patterns during the monsoon season."[233] It was reported that days before the disaster there was already evidence that the saddle dam was structurally weakening.[234] However, discretion given to the dam company reportedly led to changes in the design of the dam to win bonuses for completing construction ahead of schedule.[235]

It has been suggested that unverified claims about NT2's success have been among the drivers of the dam-building frenzy in Laos, and that the Xe Pian-Xe Namnoy disaster is symptomatic of larger mismanagement problems within the hydro-power sector.[236] After the Xe Pian-Xe Namnoy collapse, Laos announced that all new proposed dams would be halted pending a review of all existing hydropower facilities. Yet shortly following this announcement, consultations began on a new, highly controversial Mekong mainstream project, the Pak Lay dam.[237] With serious constraints on civil society space, and correspondingly, weak grassroots demand for more transparency and accountability, there seems to be a serious risk that lessons from the past may be repeated in the future.

Counterfactual analysis

The social and environmental risks of NT2 were acknowledged to be significant from the outset, as reflected in the Category A classification, requiring consideration of all relevant

[230] Latsamy Phonevillay, Lao Issues New Decree on Dam Management, *The Laotian Times* (Feb. 26, 2021), at https://laotiantimes.com/2021/02/26/laos-issues-new-decree-on-dam-management/.
[231] "Lao issues new degree on dams aimed at minimizing harm," Reuters (Feb. 25, 2021), at https://www.reuters.com/business/environment/laos-issues-new-decree-dams-aimed-minimising-harm-2021-02-25/.
[232] Almost one third of these dams are already completed, and another third currently under construction.
[233] Jim Pollard, "New questions asked about Laos dam toll, builder's role" *Asia Times* (Oct. 19, 2018).
[234] Mekong expert Brian Eyler, director of the U.S.-based Stimson Center's Southeast Asia program. See Eyler, Dam breach in Laos is a man-made disaster, *East by Southeast* (July 27, 2018), at http://www.eastbysoutheast.com/dam-breach-in-laos-is-a-man-made-disaster/.
[235] Jim Pollard, New questions asked about Laos dam toll, builders role," *Asia Times* (Oct. 19, 2018), at http://www.atimes.com/article/korean-builder-changed-design-prior-to-dam-disaster-in-laos/.
[236] David Boyle, Water Experts Question World Bank's Role in Laos Dam, *VOA News* (Oct. 18, 2018), at https://www.voanews.com/a/water-experts-question-world-bank-s-role-in-laos-dam/4620467.html.
[237] Andrew Nachemson, Laos to go ahead with Luang Prabang dam despite warnings, *Aljazeera* (Sept. 24, 2019), at https://www.aljazeera.com/news/2019/09/laos-luang-prabang-dam-project-warnings-190924102523452.html.

information sources. However, based upon publicly available information, it is not clear whether available human rights risk information was taken into account. In OHCHR's view, the design and implementation of an effective ESP in a case such as TN2, including the siting and sizing options of the dam itself, can benefit in numerous ways from the incorporation of information from UN human rights mechanisms and consultation with human rights experts.

The engagement by Lao PDR with the UN human rights system did not begin in anything more than a token way until the 1990s, initially covering only a limited range of issues and reporting mechanisms. More routine and comprehensive UN reporting has been underway since 2010.[238] However there was ample publicly available information at all material times of serious restrictions on the freedoms of opinion, expression, association and peaceful assembly in Lao PDR.[239] Full consideration of all available human rights information may have stimulated a more robust approach to public consultations in the project's design phase. A more broadly consultative and rigorous safeguard gap analysis and ESP design may have identified critical corrective actions to close the compliance gaps, particularly for affected populations downstream, and may have triggered greater scrutiny of governance deficits in the project region and of the GoL's risk management systems. Attention to these risks may have lessened the cost now faced by Laos of restoring lost confidence in public and private institutions responsible for guaranteeing the safety and security of people potentially affected by new hydropower.

These conclusions are of course speculative to a degree. However human rights risk information from the UN system and other independent sources can strengthen due diligence and risk assessment and management in large hydro projects like NT2 in a number of ways:

1. Providing the basis for a more robust assessment of the ESP (in the present case, the Environmental and Social Risk Management Program for NTPC and related regulatory institutions of Laos, such as the WPMA). This may contribute to a more complete assessment of social risks, including the tangible and intangible cultural heritage of indigenous peoples, and in turn, to a more ambitious and robust action plan, involving (among other things) the potential postponement of lending until key compliance gaps have been closed;
2. Project approval would be contingent on more rigorous project appraisal and due diligence prior to approval, genuine consent of key affected populations, and a more encompassing resettlement and redevelopment program, consistent with legally binding international standards governing tenure security and resettlement.

[238] While more project-relevant information has been available from the UN human rights system in recent years, Lao PDR's reports under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Racial Discrimination were (as of April 2021) overdue by 12 years and 6 years, respectively.
[239] *Supra* pp. 54-58.

Resettlement programs would be more likely to recognise the full cultural impacts for resettled indigenous peoples, and be based on their free, prior and informed consent (FPIC), and better support transitions to alternative livelihoods;

3. For downstream communities, the ESP would be more likely to provide an adequate package of support and compensation for lost assets and livelihoods;
4. The ESP may more effectively empower representative organisations of resettler and downstream communities to compete for their fair share of project benefits and have a meaningful voice in the management of social and environmental impacts;
5. The Board, when reviewing the proposed project, would have a more comprehensive set of data and analysis on which to base its cost-benefit analysis;
6. Preconditions for effective grievance redress would be better understood, in a given context, and criteria for effectiveness of grievance redress mechanisms would be aligned with international human rights standards;
7. The project may benefit from stronger project supervision, including from human rights experts, on issues ranging from stakeholder engagement to resettlement and the rights of indigenous peoples and ethnic minorities; and
8. The project may benefit from more transparent reporting which, in turn, may help to ensure against delays or non-compliance in the implementation of the ESP. Improved performance of emblematic projects like NT2 may, in turn, strengthen norms for accountable hydropower planning and thereby help prevent disasters such as the Xe Pian-Xe Namnoy dam collapse.

Annex II
Social risk information from UN human rights bodies

Relevant sources of risk information for investment projects include the following international (UN) human rights mechanisms:

1. **Universal Periodic Review (UPR):** The UPR is a peer review process voluntarily undertaken by all countries on a 4-5 year cycle in the UN Human Rights Council, a subsidiary inter-governmental body of the UN General Assembly. Official information, UN data and reports, and information from NGOs and other stakeholders are submitted as part of the data base for the review.[240] Moreover a UN "compilation report" is published for each country's review, containing a summary of recommendations issued by all UN human rights bodies for the country concerned, on issues relevant to contextual risk assessments as well as specific MDB safeguard policy requirements. Reports submitted to the UN for UPR reviews may contain analysis and recommendation of direct relevance to investment project risk management.[241]

2. **Treaty bodies:** Human rights treaty bodies are 18-24 member expert committees which review countries' implementation of their legal obligations under the international human rights treaties they have ratified. They deal with issues such as the rights of women children, migrant workers, persons with disabilities, racial discrimination (including against indigenous peoples and minorities), civil and political rights (including personal security, freedom of expressions and association and related participation rights), economic and social rights (including forced evictions and resettlement, labour rights, health, water and sanitation), among others.[242] These treaties are widely ratified in Asia and by ADB shareholder members, and with one exception[243] the Convention on the Rights of the Child is universally ratified.

3. **Special Procedures** are independent individuals and/or working groups, appointed by member States in the UN Human Rights Council, mandated to analyze and report on human rights situations in particular countries and/or thematic issues (like the right to food, health, housing, the environment, rights of indigenous peoples, violence against women, freedom of expression, human rights defenders, toxic waste, arbitrary

[240] All documentation regarding the UPR is publicly available and searchable by country *at* http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx.
[241] For example, a significant body of information and analyses on hydropower development was submitted to the UN in advance of the third Universal Periodic Review of Lao PDR by the UN Human Rights Council in January 2020. See UN Doc. A/HRC/WG.6/35/LAO.3 (Nov. 5, 2019) available at https://undocs.org/A/HRC/WG.6/35/LAO/3, and in particular Manushya Foundation & Asian Indigenous Peoples' Pact, Joint Submission to the UN Universal Periodic Review of Lao PDR (July 21, 2019), available at https://a9e7bfc1-cab8-4cb9-9c9e-dc0cee58a9bd.filesusr.com/ugd/a0db76_e031040b4a0f4c439b483637fc43c43a.pdf.
[242] See http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.
[243] The United States of America has signed but not ratified the UN Convention on the Rights of the Child.

detention, and many others).[244] Special Procedures are increasingly focusing on human rights implications of large investment projects, such as recently in Lao PDR (Special Rapporteur on extreme poverty and human rights, in relation to hydro-dam development), and provide information and recommendations on contextual risks and constraints to public participation and stakeholder engagement (for example, Cambodia,[245] Lao PDR,[246] Philippines[247] and Myanmar).[248]

4. **OHCHR, UN field presences and other UN bodies.** As part of annual reporting to UN bodies, or at the direct request of those bodies, OHCHR and other UN entities with presence in the field routinely produce reports on country situations. Such reports are also increasingly prepared by *ad hoc* independent expert bodies commissioned by the UN, such as commissions of inquiry. For example, recent reporting of the Independent Fact-Finding Mission for Myanmar, operating under the authority of the U.N. Human Rights Council, contains extensive analysis and recommendations of direct relevance to investment project due diligence and social and environmental risk assessment.[249] Protection measures ordered by the International Court of Justice in the claim brought by The Gambia against Myanmar under the Genocide Convention include an order not to disturb evidence relevant to criminal prosecutions, which has direct relevance to any person or organization supporting infrastructure development in Northern Rakhine State.[250]

The UPR and Special Procedures can produce information and recommendations relevant to social and environmental risk assessment even where the country concerned is not party to the relevant treaty. For example, the Special Rapporteur on the right to water and sanitation may visit a country and make recommendations relevant to investment project risk assessment even where the country has not ratified the International Covenant on Economic, Social and Cultural Rights. More generally, the UPR reviews of the UN Human Rights Council

[244] *See* http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.
[245] *See* https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/KH/Pages/SRCambodia.aspx.
[246] See "UN expert calls for reform of poverty-driving policies in Lao PDR", at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24710&LangID=E. The Special Rapporteur's report is available at UN Doc. A/HRC/41/39/Add.2 (June 20, 2019).
[247] *See* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24538&LangID=E.
[248] *See* https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx.
[249] *See* the Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), paras. 98, 110-11, 407, 413, 429, 476, 1181-12, 1216-19, 1224-29 and 1618, (on the risks of infrastructure development intentionally obstructing evidence of international crimes) 1239-44, 1295, 1425, 1565 and 1668 (calling for human rights due diligence by all development actors); *and* Independent International Fact-Finding Mission on Myanmar, Report on Economic Interests of the Tatmadaw (Aug. 2019) at https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx. See also p.7 above.
[250] The ICJ's decision is available at https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf. The Court's decision drew extensively from the UN Fact-Finding Mission's reporting. In its September 2018 report to the UN Human Rights Council, the Fact Finding Mission had documented how infrastructure projects and associated land clearances in Northern Rakhine State were (intentionally, as alleged) eliminating evidence relevant to future international criminal prosecutions.

are based, in part, on the Universal Declaration of Human Rights, which covers all rights: civil, social, cultural, economic and political. Information relevant to social and environmental risk assessment may also come from individual complaint procedures under the various UN human rights mechanisms.

Other relevant sources of risk information include the ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, responsible for monitoring the ILO core conventions and other international labour standards.[251] Regional human rights systems, in particular those in the African,[252] American[253] and European regions,[254] may also generate project-relevant social and environmental risk information, although the Asean Intergovernmental Commission on Human Rights is relatively new and lacks robust country reporting procedures.

Beyond the UN and ILO systems, human rights risk information is available from many other sources including the media, subscription databases, research institutes, analytics consultancy firms, national and international NGOs and other civil society organizations, and communities themselves. NGOs frequently perform a vital role in bringing to light potential human rights risks associated with investment projects and often help affected communities to access grievance redress mechanisms (including project level mechanisms, national grievance redress systems, and MDBs' mechanisms).[255] National Human Rights Institutions (NHRIs) may also make important contributions to monitoring the human rights situations in a given country or region, and could provide expertise to independent advisory panels or otherwise be valuable partners in social and environmental risk assessment and mitigation. There is a high number of "A" rated NHRI's in the Asia/Pacific region, a rating which connotes a relatively high degree of independence, pluralism and accountability.[256]

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[251] *See* http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm.
[252] *See* http://www.au.int/en/organs/cj.
[253] *See* http://www.oas.org/en/topics/human_rights.asp.
[254] *See* http://www.echr.coe.int/Pages/home.aspx?p=home&c=.
[255] Beyond the NGO sources referred to in these case studies, an extensive list of international NGOs working in the field of human rights is *available at* https://www1.umn.edu/humanrts/links/ngolinks.html.
[256] See https://ganhri.org/accreditation/. As of April 2021 the "A" rated NHRIs in the region were Afghanistan, Australia, India, Indonesia, Mongolia, Nepal, New Zealand, the Philippines, the Republic of Korea, Samoa, Sri Lanka and Timor Leste. "B" rated NHRI's were in Bangladesh, the Maldives, Myanmar and Thailand. See https://ganhri.org/membership/.

Annex III
Benefits and costs of integrating human rights risk information

The SPS review will be informed by cost-benefit analysis of comparative safeguard policy approaches.[257] While the evidence is not definitive, available evaluations support the proposition that the benefits of effective safeguard implementation outweigh the costs. ADB's Independent Evaluation Department (IED), for example, has concluded that "safeguards implementation creates a positive net value, which tends to be higher for ADB's standards."[258] As put by the former Director General of the IED, "for an individual project, the cost may seem unnecessarily high if safeguards prompt excessive scrutiny. But damages avoided (i.e. the benefits of having the system) across projects can more than offset the cost of having safeguards in place."[259] However, the balance of benefits and costs from well-designed and managed resettlement frequently go unmonitored, and are therefore largely unknown.[260]

The value of rigorous and comprehensive up-front risk assessment, relative to cost, has been confirmed in safeguard evaluations in other MDBs. The World Bank's IEG has assessed that the benefits of safeguard policies, including up-front requirements for higher risk projects, outweigh the costs,[261] and a 2015 IDB study found that safeguard compliance (an estimated 1 percent of project costs on average) did not have an independent impact on the length of the project cycle.[262] Moreover, the likely effectiveness of earlier corrective measures is higher as they precede and therefore have greater impact on implementation, backed by the leverage of having been built into the project agreement's disbursement structure and non-compliance covenants at the outset.

The benefits of incorporating human rights risk information, specifically, relative to the cost of accessing it, are difficult to model and quantify in the abstract. However the costs of accessing human rights risk information are negligible. Much of this information is freely

[257] ADB, Management Response to the IED's Corporate Evaluation of the 2009 Safeguard Policy Statement (May 2020), para. 12.
[258] ADB Independent Evaluation Department (IED) Real-Time Evaluation of ADB's Safeguard Implementation Experience Based on Selected Case Studies, 2016, pgs. xv-xvi.
[259] Vinod Thomas, "Top 5 surprising independent evaluation results," Asian Development Blog (Jan. 4, 2016), at, http://blogs.adb.org/blog/top-5-surprising-independent-evaluation-results. See also World Bank Independent Evaluation Group Safeguards and Sustainability Policies in a Changing World (2010), p.78; Watkins, Graham, et al (2017) Lessons from four decades of infrastructure project related conflicts in Latin America and the Caribbean. Inter-American Development Bank.
[260] World Bank Press Release: "World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems" (Mar. 4, 2015) at http://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems.
[261] World Bank, Independent Evaluation Group, Safeguards and Sustainability Policies in a Changing World (2010).
[262] Boston University, Greening Development Finance in the Americas (2015), p.29 at https://pdfs.semanticscholar.org/aa00/56e1d5f0edae6485ccbe5b4f62042a7c4cb2.pdf.

available on-line (see Annex II). Doing so may trigger additional mechanisms (such as the creation of an independent advisory panel, or incorporation of human rights expertise within third party monitoring arrangements) or qualitatively different processes (such as enhanced social analysis or consultation requirements) which involve additional costs at the outset. However these kinds of costs may turn out to be negligible compared with the costs of not doing so.

A more tangible sense of potential costs and benefits can be gleaned from analyses of the costs of poor stakeholder engagement, grievance redress and social conflict in the infrastructure and extractives sectors. If stakeholder engagement is to be effective, it must be free and without coercion or reprisals, it must be inclusive (that is to say, reflecting inputs and preferences of those most vulnerable or marginalized, including those experiencing discrimination on the grounds of race, sex, ethnicity, political or other opinion, or national or social origin, or other status), and it must provide the basis for informed decision-making.[263] Effective grievance redress, similarly, requires an environment in which complaints can be raised freely and without fear of reprisals. Grievance mechanisms should, among other things, be independent, accessible, equitable and rights-respecting.[264] In other words, by necessary implication, effective stakeholder engagement and grievance redress require the observance of a wide range of internationally recognized human rights, including civil, political, economic, social and cultural rights. Cost-benefit analyses of stakeholder engagement and grievance redress may therefore, indirectly and imperfectly, help to model potential costs and benefits of integrating a number of important human rights variables in project design and due diligence relevant to most if not all development projects (particularly large development projects).

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.[265] An IDB evaluation, *Lessons from 4 Decades of Infrastructure Project Related Conflicts*, found that infrastructure investments that suffered from "deficient planning, reduced access to resources, lack of community benefits, and lack of adequate consultation were the most prominent conflict drivers. In many cases, conflicts escalated because grievances and community concerns accumulated, going unresolved for many years." [266] These costs cannot be equated merely with lost revenue or sunk investment due to higher risk of delay, cost overruns or cancelation, which are often passed on to the public. The more enduring costs relate to the lost livelihoods,

[263] See e.g. World Bank ESS 10, and EBRD ESS 10.
[264] UN Guiding Principles on Business and Human Rights (2011), principles 29-31.
[265] Watkins et al (2017), *supra*; Boston University, Global Development Policy Center (2018), Standardizing Sustainable Development? Development Banks in the Amazon, available at https://www.bu.edu/gdp/files/2018/04/Development-Banks-in-the-Andean-Amazon.pdf.
[266] Watkins, et al (2017), Ibid.

physical and mental health, dignity, security and quality of life which may undermine the social contract and fuel conflict, poverty and exclusion.

The IDB study found that project delays (81% of cases) and cost overruns (58% of cases) were the most common consequences of social conflict at the project level. The average delay from all projects listed in the available literature was approximately 5 years. Similarly, the average publicly reported cost overrun from sampled projects was US$1,170 million, or 69.2% of average original budget.[267] These kinds of losses are consistent with findings about the costs of failed stakeholder engagement in the extractives sector and, recently, in connection with the Dakota Access Pipeline in the USA,[268] as well as more general findings of the World Bank and UN on how unaddressed grievances may fuel violence and state fragility.[269]

The IDB study noted that costs of failed stakeholder engagement may transcend individual projects and may impose a reputation cost surcharge for future (similar) investments for years to come. The IDB study finds that "communities strongly oppose projects that they believe might cause damage similar to the damage of comparable projects elsewhere, even in other countries or continents… that 28% of projects faced historically motivated community opposition."[270] With these findings in mind, and with the Xe Pian-Xe Namnoy dam collapse in recent memory, one cannot discount the potentially negative ongoing impacts of NT2 on hydro dam development in Lao PDR and the Southeast Asian region.

While NT2 has generated revenue for investors and has been celebrated for being completed under original project cost estimates, it is difficult to assess its financial success (or otherwise) to date given the client's continuing lack of transparency and public accountability for project expenditures and revenues. However the costs of poor stakeholder engagement, resettlement and environmental management may well become more apparent over time. The reputational risk of being perceived as incapable of guaranteeing the safety or security of affected populations may affect not only GoL, but potentially all project partners.

The social and environmental management program for NT2 has been estimated at approximately $120-$130 million, which is less than 15% of the original project cost and less

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[267] Id., p. 15.

[268] First Peoples Worldwide/University of Colorado, Social Cost and Material Loss: the Dakota Access Pipeline (2018), available at https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf, noting that investors lost $7.5B and banks financing the pipelie incurred an additional $4.4B in costs in the form of account closures, not including costs related to reputational damage; and Rachel Davis & Daniel Franks, Cost of Company-Community Conflict in the Extractive Sector (2014), available at https://www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/, noting lost production costs of up to $20M for major mining projects between $3-5B capital valuation.

[269] World Bank and United Nations, Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (2018), especially at pp.125-130.

[270] Watkins et al, *supra*, p. 11.

than 10% of the projected revenue. The implementation of robust human rights due diligence, as recommended in this memorandum, would not have increased these costs significantly. The actual costs of designing, negotiating and ensuring compliance in implementing safeguard policies are generally manageable if they are a normal part of project preparation, rather than retrofitted *post hoc* after serious or irreparable damage has already been done.

In the case of the Cambodia Railway Project, the costs of nearly a decade in which the railway was not operating, including lost revenue, tax payments and debt servicing commitments, may reduce the overall profitability of the project by a significant margin.[271] These losses and the observed hesitation of other investors[272] may not exclusively be due to shortcomings in assessing and managing resettlement risk, but appear to be contributing factors nevertheless.

Moreover, in the Cambodia Railway case, delays in consulting, planning, providing essential services and adequately compensating resettled people have likely increased the overall costs of those aspects of the respective resettlement plan significantly. Shortcomings in planning in this case appears to have necessitated the repetition of certain activities, and the eventual compensation awards were comparatively high due to indexing for inflation. The costs of implementing the remedial action plan (and supervising implementation) over the last five years are also presumably very significant.

With these factors in mind, notwithstanding the inherent limitations of counterfactual analysis, it is strongly arguable that the potential benefits of integrating and acting upon available human rights risk information at the project design stage of both the Cambodia Railway and NT2 projects far outweighs the costs of not doing so.

[271] The actual concession contract is not publicly available, but Public Private Partnership (PPP) arrangements often guarantee the concession owner a minimum flow of income provided by the state in the early years of operation irrespective of actual use.

[272] George Styllis, "Cambodia's rail back on track after four decades of woe," *Nikkei Asian Review* (June 4, 2018). In 2014, Toll Group, the Australian logistics company that was jointly involved in the railway project with the primary concession holder, Royal Group, sold its entire 55% stake to its partner, citing setbacks, delays and a lack of revenue.