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OFFICE OF THE HIGH COMMISSIONER

Benchmarking Study of Development Finance Institutions' Safeguard Policies

CONSULTATION DRAFT

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Abbreviations

AfDB	African Development Bank
ADB	Asian Development Bank
AIIB	Asian Infrastructure Investment Bank
CAO	Compliance Adviser Ombudsman, independent accountability mechanism for IFC and MIGA, the private sector arms of the World Bank Group
CDC	CDC Group PLC
DEG	Deutsche Investitions- und Entwicklungsgesellschaft
DFI	Development Finance Institution
E&S	Environmental and Social
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
ESF	Environmental and Social Framework
ESG	Environmental, Social and Governance
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plans
ESMS	Environmental and Social Management Systems
EU	European Union
FI	Financial Institutions
FMO	Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden
GBV	Gender Based Violence
GCF	Green Climate Fund
HRIA	Human Rights Impact Assessment
IAM	Independent Accountability Mechanism
ICT	Information and Communications Technology
IDB	InterAmerican Development Bank
IFC	International Finance Corporation
LGBTI	Lesbian, gay, bisexual, transsexual, intersex
MDB	Multilateral Development Bank

MICI	Independent Consultation and Investigation Mechanism of the IDB
MIGA	Multilateral Investment Guarantee Agency
OECD Guidelines	OECD Guidelines on Multinational Enterprises
OHCHR	Office of the UN High Commissioner for Human Rights
OPIC	Overseas Private Investment Corporation
PPP	Public Private Partnerships
PR	Performance Requirements
PRI	Principles for Responsible Investment
PS	Performance Standards
RBC	Responsible Business Conduct
SDGs	Sustainable Development Goals
SEA	Sexual exploitation and abuse
SIA	Social Impact Assessment
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics
UNGPs	UN Guiding Principles on Business and Human Rights
VGGTs	Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests

EXECUTIVE SUMMARY

Bilateral and multilateral development finance institutions (DFIs) provide tens of billions of US dollars in development finance annually, at a conservative estimate.¹ Social and environmental safeguard policies (“safeguard policies”, or safeguards) provide essential guidelines and guardrails for investment project finance, applied to everything from hydro-dam construction through to extractives, agribusiness, infrastructure, finance sector support, social protection, digital tech and community development projects.

DFIs mandates, functions and operations may differ, however most are explicitly mandated to support sustainable development, poverty reduction and avoid harming people and the environment. The faithful implementation of safeguard policies can generate positive human rights outcomes on a large scale. Safeguard policy requirements are embedded in binding contractual covenants with clients and, for many DFIs, are overseen by independent accountability mechanisms. These policies also directly influence national laws and social and environmental policy frameworks in borrower countries around the globe.

Multilateral development banks (MDBs) play a particularly important normative role in this context. The IFC performance standards have served as the default E&S risk management framework for private sector DFIs, Equator banks and other financial institutions worldwide, and have also influenced recent revisions of sovereign lenders’ safeguards. MDB safeguard standards can also help to raise the bar and strengthen incentives for effective E&S risk management by DFIs in emerging economies, which represent a dramatically increasing proportion of financing for development.

The major MDBs have been updating their safeguard policies on a regular basis since the Sustainability Framework revision carried out by the International Finance Corporation (IFC) in the year 2012. Improvements can often be seen in terms of the scope, clarity and harmonisation of requirements, in line with increasing co-financing of investment projects, and in the sharper delineation of responsibilities between the bank and client.

However safeguard rigour and implementation vary considerably, depending upon the institution and context. Clarity and harmonisation are not always associated with stronger E&S standards. Questions have been raised, among other things, about how rigorous “upstream” E&S risk management can be maintained along with “adaptive” (downstream) risk management, the extent to which E&S objectives can be reconciled with the use of client frameworks, and how safeguards may effectively be applied to complex financing structures such as financial intermediary lending, budget support, blended finance and infrastructure funds.

Human rights requirements have not often been integrated in substantive, meaningful ways in DFIs’ safeguard policies. It has sometimes (wrongly) been assumed that human rights are only aspirational

¹ The lack of common definitions and consistent measurements of international development finance can lead to misleading estimates and comparisons. However, annual investments of a subset of 30 bilateral and multilateral DFIs reportedly grew from almost \$12 billion to \$87 billion between 2000 and 2017, a seven-fold increase (D. F. Runde & A. Milner, “Development finance institutions: plateaued growth, increasing need” (Center for Strategic and International Studies, 2019), p. 2). However, the aid landscape is changing. Between 2008 and 2019 financing from the China Development Bank and the Export-Import Bank of China, alone, reportedly amounted to \$462 billion: A. A. Malik & others, *Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects* (Williamsburg, AidData at William & Mary, 2021), p. 95. In contrast, in 2018, the estimated assets of “public development banks”, generally understood to be a broader category than DFIs, were \$11.2 trillion: R. Marodon, “Can development banks step up to the challenge of sustainable development”, International Research Initiative on PDBs and DFIs Working Groups, Working Paper No. 14 (2020), p. 7. For a discussion of definitional and data constraints, see J. Xu, X. Ren & X. Wu, “Mapping Development Finance Institutions Worldwide: Definitions, Rationales, and Varieties,” NSE Development Finance Research Report, No. 1 (Beijing, Peking University, 2019), pp. 4–5 and 36–61.

in nature, and it has not always been clear why or how human rights standards and principles relate to, or might improve, existing “social” assessment methods and risk management practices.² DFIs have sometimes argued that their or their clients’ existing approaches to E&S risk management address human rights concerns “implicitly,” although the basis for such justifications is not always clear. Given concerns and questions of this kind, this study seeks to describe as clearly as possible why and how the integration of international human rights standards and principles can inform the scope, depth and rigour of E&S risk assessment, and improve the quality of due diligence and risk management processes. Other closely related aims are to strengthen policy coherence in relation to how social issues are addressed within the scope of DFI safeguards, minimise risks of contradictory E&S regimes applicable to a given investment project, and minimise the scope for internationally agreed human rights standards inadvertently being renegotiated elsewhere.

The salience of this topic has been increasing dramatically in recent years. Human rights risks have been increasing significantly in many parts of the world, exacerbated by the Covid-19 pandemic, climate change and other environmental stresses, and security threats. At the same time, more and more DFIs are seeking to expand their footprints in frontier markets and fragile and conflict-affected settings. International frameworks for managing human rights risks and impacts of businesses have matured and are increasingly being incorporated within national and regional legal systems, with direct implications for DFIs and their clients, contractors and suppliers. More operationally-oriented human rights policy guidance is now readily available, addressing core project management functions and diverse sectoral specificities. Certain DFIs have begun to incorporate human rights in tangible and meaningful ways within their safeguard policies and accompanying guidance.

Building upon these trends, this study highlights key changes that can and, in OHCHR’s view, should be made to DFI safeguard policies and practices in order to encourage stronger alignment and policy coherence with respect to international human rights standards. The study is framed by the normative standards that underpin DFI mandates and by normative frameworks on responsible business conduct (RBC) for the private sector, in particular the UN Guiding Principles on Business and Human Rights (UNGPs) and the human rights chapter of the OECD Guidelines on Multinational Enterprises (OECD Guidelines) respectively.³ Strengthened integration of human rights aims to:

- reinforce DFIs’ mandates in supporting sustainable development financing operations, additionality and high standards, beyond short-run profitability goals;
- improve risk management by embracing a fuller scope of risks relevant to DFI-financed projects, sharpening risk prioritisation, deepening due diligence, encouraging DFIs and clients to explore all options to build leverage early, and strengthening remedy for adverse impacts;
- contribute to development outcomes by better managing adverse impacts and identifying opportunities to improve positive outcomes of projects;
- support clients in meeting the corporate responsibility to respect human rights through a clearer articulation of responsibilities and expectations; and
- improve relations between DFIs and their stakeholders, and DFI clients and their stakeholders, by demonstrating that both DFIs and their clients are committed to addressing this important category of risks about which communities are increasingly voicing concern.

² This question has sometimes been posed as “What is the value-added of human rights?” However as this paper outlines, the relevance of human rights to E&S risk management is not limited to their instrumental benefits alone. Moreover, given emerging regulatory developments, human rights are increasingly being approached as a legal compliance issue, and not an optional extra.

³ See [UN Guiding Principles on Business and Human Rights](#) (2011), the [OECD Guidelines for Multinational Enterprises](#) (updated 2011), and associated [guidance](#). The human rights chapter of the OECD Guidelines is aligned with the UNGPs. “Responsible business conduct (RBC)” is often used to cover a wider set of sustainability issues than just human rights. For example, the OECD Guidelines also cover environmental protection, corruption, consumer protection, disclosure, science and technology, competition and taxation. See also the [core UN human rights treaties](#) and [ILO conventions](#), which and principally addressed to and formally bind UN and ILO member States, but should be respected by international organizations, DFIs, clients and business enterprises.

The main focus of analysis in this study is direct investments (Part I), although brief consideration is also given to areas for potential Safeguard strengthening in connection with financial intermediary operations, development policy lending, use of country systems, and programming for results (or results-based lending) (Part II). The gap analysis for direct investments is organised by reference to standard due diligence functions in the project cycle: risk assessment/appraisal; project approval; and supervision. The emerging issues of remedy, and responsible exit, are addressed as part of supervision. Consideration is also given to the following issues or gaps which may warrant more explicit attention in Safeguards: (i) social dimensions of climate change; (ii) digital technology risks; (iii) the political economy of land transactions; and (iv) risks faced by users or consumers of products and services.

Key recommendations to DFIs are listed following accompanying argument in main body of the study, and are collated in Annex I. The recommendations do not purport to be comprehensive, but rather reflect OHCHR's sense of priorities from a human rights perspective, taking into account our consultations with DFIs and other stakeholders in connection with this study. Finally, Annex II provides a gap analysis of the IFC Performance Standards (PSs) from a human rights perspective, given the influential model that the latter standards have set globally to date.

DRAFT

PURPOSE OF THE STUDY

Since the International Finance Corporation's (IFC's) revision of its Sustainability Framework in 2012, numerous multilateral development banks (MDBs)⁴ and other development finance institutions (DFIs)⁵ have actively been updating their environmental and social (E&S) Safeguards. Notable examples include the World Bank (2016), Asian Infrastructure Investment Bank (AIIB) (2016 and 2019), European Bank for Reconstruction and Development (EBRD) (2014 and 2018), Inter-American Development Bank (IDB) (2020), and IDB Invest (2020) and the European Investment Bank (EIB) (2022). As of early 2022 revisions were underway at the African Development Bank (AfDB), Asian Development Bank (ADB) and Green Climate Fund (GCF). While each DFI is different, safeguard policies have many common purposes and features. The present study aims to contribute to future DFI Safeguard review processes, and will be updated periodically in light of evolving practice and lessons learned. While multilateral DFIs are the main focus of this study, bilateral DFI experience is also taken into account for comparative purposes.

Safeguard policies are applied to tens of billions of dollars of investment project financing annually from the MDBs and more established bilateral DFIs, alone. The safeguard policies of MDBs, in particular, exert strong normative influence on national laws and social and environmental risk management frameworks. The IFC's Performance Standards have been adopted by the ninety-seven Equator Principles financial institutions and many DFIs, export credit agencies and other financial institutions. MDBs' safeguards also set a benchmark for DFIs from emerging economies. The latter DFIs have grown dramatically in reach and influence; for example between 2008 and 2019 financing from the China Development Bank and the Export-Import Bank of China, alone, reportedly amounted to \$462 billion.⁶ The comparative weakness of the sustainability frameworks of many of the newer financing institutions is a matter of serious concern, and can create competitive (downward) pressures on safeguard standards globally.⁷ Hence the strength of safeguard policies of the MDBs and more established DFIs is of critical practical importance, and is the main focus of analysis here.

The study addresses both private and public sector financing institutions, with a particular emphasis on the former. A legal analysis of different DFIs' mandates is beyond the scope of this paper, however the study is framed by the normative standards that underpin DFI mandates and by normative

⁴ At least 28 multilateral development banks have been formed since 1944 (T. Pratt, "Angling for influence: institutional proliferation in development banking", *International Studies Quarterly*, vol. 65, No. 1 (2021), pp. 95–108, at p. 96. However, in the present paper, unless a contrary intention appears, the term "multilateral development banks" refers to the World Bank Group (including the International Bank for Reconstruction and Development (IBRD), the International Development Association, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA)), the African Development Bank (AfDB), the Inter-American Development Bank (IDB), the Asian Development Bank (ADB), the Asian Infrastructure Investment Bank (AIIB), the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB). This selection is justified by the assessment of OHCHR of these multilateral development banks' relative and cumulative financial and policy influence, geostrategic significance and available data and literature for evaluative purposes.

⁵ Development finance can be broadly defined as the use of public resources to facilitate investment and development in low- and middle-income countries. For an illustrative listing of 531 DFIs (according to a broad definition of the term), see J. Xu et al (2019), *supra*, pp. 4–5 and 36–61.

⁶ K. Gallagher & R. Ray, (Dec. 9, 2020), [China Takes the Lead in Development Finance](#), *Project Syndicate*; Ammar A. Malik and others, *Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects* (Williamsburg, AidData at William & Mary, 2021), p. 95.

⁷ See e.g. R. Ray, K. Gallagher & C. Sanborn (eds) (2020), *Development Banks and Sustainability in the Andean Amazon*. Routledge; Inclusive Development International, [Safeguarding People and the Environment in Chinese Investments: A Reference Guide for Advocates](#) (2nd ed. 2019); P. Garzón et al, (2021), [Banco de Desarrollo de China: Financiamiento, gobernanza y desafíos socio-ambientales para América Latina y el Caribe](#). *Latinoamérica Sustentable*; H. Yang et al (2021) "Risks to global biodiversity and indigenous lands from China's overseas development finance," Vol. 5 *Nature Ecology & Evolution*, pp. 1520–1529.

frameworks on responsible business conduct (RBC) for the private sector, in particular the UNGPs and OECD Guidelines. The UNGPs are addressed to States as well as business entities, and IDB's revised E&S Policy Framework (ESPF) illustrates their relevance to public sector as well as private sector financing institutions.⁸ Many DFIs have explicit policy commitments to support the achievement of the Sustainable Development Goals (SDGs)⁹ and, increasingly, to respect human rights. The explicit recognition in the 2030 Sustainable Development Agenda and Addis Ababa Agenda for Action of the inextricable linkages between human rights and sustainable development¹⁰ provides a strong foundation for this trend.

Box 1: Terminology Used in the Study

"Sustainability Policies" refers to the policies that apply to the DFI themselves, setting out their obligations, including those on due diligence.

"Performance Standards" refers to the requirements to be applied by clients.

"Safeguards" refers to the sustainability policies and performance standards together.

The study surveys sustainability policies that apply to the DFI themselves (Sustainability Policies) and performance standards or requirements that apply to their clients (Performance Standards) (collectively referred to as Safeguards) (See Box 1), benchmarked against international human rights standards including but not limited to the UNGPs and the OECD Guidelines. The study is by no means exhaustive but analyses some of the more promising trends, as well as gaps, in connection with the policies and practices of a number of the more influential and experienced DFIs.

Due to constraints of space, data and resources, the study does not address implementation practices or requirements such as budgetary and human resources, alignment of internal incentives and accountability arrangements. Good outcomes depend *both* on sound policy and implementation arrangements, hence, the latter would undoubtedly benefit from a separate comparative benchmarking exercise.

Box 2: Explanation Box – UN Guiding Principles on Business and Human Rights - Protect, Respect, Remedy Framework

The UNGPs are built on a "Protect, Respect, Remedy" conceptual framework:

⁸ The UNGPs apply to bilateral development banks and export credit agencies as state-owned enterprises (UNGP 4) and to States as members of multilateral institutions (UNGP 10). The UNGPs' guidance on due diligence emanated from practical experience and extensive multi-stakeholder consultations, and is equally relevant to public sector financing institutions and clients. See IDB ESPF (2020), para 1.3: "Respecting human rights. The IDB is committed to respecting internationally recognized human rights standards.4 To that end, in accordance with E&S 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." See also ESPS 1, para. 6, requiring borrowers to consider human rights impacts specifically, and fn 52: "It may be appropriate for the Borrower to include in its E&S risk and impact identification process a specific human rights due diligence in line with the UN Guiding Principles on Business and Human Rights."

⁹ But see European Think Tank Group, "[Financing the 2030 Agenda: An SDG alignment framework for Public Development Banks](#)," (Oct 15, 2021).

¹⁰ 2030 Agenda, Paras. 10, 18, 19 and 67; Addis Ababa Agenda For Action, UN Doc. A/RES/69/313, Para. 37. The recommendations in this paper also reinforce the 2030 agenda's further emphasis on the interlinkages among the environmental, social and economic dimensions of projects and for delivering on "do no harm" while strengthening a focus on positive impacts.

- **Pillar I: The “State Duty to Protect”** reflects the obligation of the State to protect human rights, including protecting people against abuses by third parties, among them businesses. It extends to States acting as members of multilateral institutions and in connection with State-owned enterprises (which may include DFIs and export credit agencies), public-private partnerships and procurement from the private sector.
- **Pillar II: The “corporate responsibility to respect”** human rights means that business should not have adverse impacts on human rights, at a minimum, and have a responsibility to respect human rights along their whole value chain.
- **Pillar III: “Access to Remedy”** that sets out a role for both states and businesses in providing for and cooperating in ensuring that victims of business-related human rights abuses have access to and receive effective remedies.

The UNGPs have been integrated within the OECD’s Guidelines on Multilateral Enterprises (MNEs) and responsible business conduct due diligence, and has been translated into specific guidance for the finance sector.¹¹

Finally, a focus on risk management at the *project* level (the subject of this study) does not necessarily shed light on how development *policies* may inadvertently increase vulnerabilities and create conditions for human rights violations beyond the scope of any single project.¹² Project-level analytics and safeguard policies cannot of themselves be expected to address more fundamental, structural obstacles to development. At the same time, it would be wrong to dismiss safeguard policies’ “do no harm” commitment as minimalist or reductionist. To the contrary, most safeguard policies aim to maximise positive impacts and sustainability, not just avoid harm. Moreover respecting human rights (the necessary implication of any “do no harm” commitment) can itself be “radically transformative and disruptive;” and creating shared value requires (at a minimum) legal compliance and mitigation of harms.¹³ Respecting human rights should therefore be seen as a foundation stone and a necessary, though insufficient, condition for sustainability.

¹¹ See <http://mneguidelines.oecd.org/MNEguidelines/>, and <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>. On the application of the UNGPs and OECD guidelines to the financial sector see OHCHR, “The application of the Guiding Principles on Business and Human Rights to minority shareholdings of institutional investors” (2013); advice to OECD on the application of the Guiding Principles to the financial sector (available at www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf); and “OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector” (2017); OECD, “Scope and application of ‘business relationships’ in the financial sector under the OECD Guidelines for Multinational Enterprises” (2014); OECD, “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship” (2014); and OECD, “Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector” (2014).

¹² For example “[f]ighting modern slavery through development interventions requires going beyond safeguarding against forced labor and trafficking risks during the delivery of development interventions. It requires thinking about how States’ development and economic policy choices increase or reduce their people’s exposure to modern slavery risks. It requires thinking about the developmental role of the State in protecting and maximizing people’s economic agency.” Cockayne, J. *Developing Freedom: The Sustainable Development Case for Ending Modern Slavery, Forced Labor and Human Trafficking* (United Nations University: New York, 2021), p.76. More generally see K. Schwab, [We must move on from neo-liberalism in the post-COVID era](#), Oct. 12. 2020; and for a critique of privatization as an ideology of governance see the Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/73/396 (Sept. 26, 2018), at <https://undocs.org/A/73/396>.

¹³ J. Ruggie, “Making globalization work for all: achieving the Sustainable Development Goals through business respect for human rights”, *Shift*, November 2016. See also M. E. Porter & M. R. Kramer, “Creating shared value: how to reinvent capitalism – and unleash a wave of innovation and growth”, *Harvard Business Review* (2011), p. 15: “Creating shared value presumes compliance with the law and ethical standards, as well as mitigating any harm caused by the business”.

1. CONTEXT FOR THE STUDY

One clear positive feature in the DFIs policy landscape is the increasing attention to human rights among both public and private sector financial institutions. Commercial banks and other private sector financial institutions have also been exploring how the UNGPs and OECD Guidelines relate to their financing instruments and accountability for E&S impacts.¹⁴ In some instances, and in some respects, commercial banking practice has been overtaking policy and practice even in the more established DFIs. For example in 2020, for the first time, the Equator Principles were updated independently of the IFC Performance Standards, due in part to the need to reflect emerging norms including the UNGPs.¹⁵ At the time of writing a number of commercial banks including ANZ and ABN AMRO had demonstrated impressive innovation in order to improve access to remedy for project-affected people, in line with the UNGPs.¹⁶ While commercial banking practice is far from consistent,¹⁷ a continuation of these trends may generate valuable learning and strengthen incentives for improved DFI performance.

At the same time, as indicated earlier, DFIs are facing competition from new funding sources, including from DFIs in countries with weaker traditions of transparency and accountability. Co-financing is dramatically increasing, along with harmonisation of safeguard standards. However harmonisation is a secondary virtue. Competition and cooperation can each generate perverse incentives to dilute safeguard standards. The increasing inclination of some DFIs to use national risk management frameworks, which are often considerably weaker than applicable international legal standards and the safeguards of leading DFIs, is one notable aspect of this problem.

DFIs also appear to be facing increasingly complex operational demands at country level. Responding rapidly and decisively to Covid-19 needs while simultaneously meeting E&S goals is foremost among these. Closely related to this is the increasing footprint of DFIs in fragile and conflict-affected situations. However these kinds of operational challenges should not be seen as irreconcilable with human rights. To the contrary, a human rights lens can add rigour and depth to risk management and help to ensure that all significant risks are addressed and that funds are channelled in a way that is most impactful for the people and the planet.

In the face of such complex operational demands, to the extent that project-related harms are not otherwise remedied, DFIs may face increasing legal liability risk exposure.¹⁸ While this is clearly a context-specific question, it is clear that human rights due diligence has a potentially important role to play in mitigating legal liability risks. Comparative jurisprudence shows that strong due diligence

¹⁴ See e.g. [Principles for Responsible Investment](#) (PRI), UNEP's [Finance Initiative](#); [Investor Alliance for Human Rights](#); and [Dutch Banking Sector Agreement](#).

¹⁵ 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 E&S Impact Assessment (principle 2).

¹⁶ In 2021 ANZ contributed directly to remediation in connection with project-related harms, in line with expectations under the UNGPs, and established an independent accountability mechanism in line with the effectiveness criteria for grievance mechanisms in UNGP 31. See <https://www.inclusivedevelopment.net/equator-banks/anz-payment-to-displaced-cambodian-families-brings-landmark-human-rights-case-to-a-close/>, and <https://www.inclusivedevelopment.net/equator-banks/anz-launches-human-rights-grievance-mechanism-in-a-first-for-the-global-banking-sector/>. ABN AMRO Bank has also taken steps towards establishing an independent bank-level GRM, through a possible ombudsman function, emanating from the bank's commitment to human rights. See ABN AMRO Bank, *Human Rights Report 2018: Putting People Centre Stage* (Amsterdam, 2019).

¹⁷ For a sobering overview see BankTrack (Dec. 2021), [Actions speak louder: Assessing bank responses to human rights violations](#).

¹⁸ One should not overstate DFIs' risk exposure however, given the many legal and practical barriers to claims (particularly international claims) for E&S harms vis-à-vis financiers of projects. For a discussion see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.20-21.

may operate as a defence to legal claims in such contexts,¹⁹ and may also mitigate against secondary liability (complicity) risks, sanctions and remedies.²⁰ An increasing range of countries are integrating or at least considering integrating RBC expectations, and in particular, human rights due diligence requirements, as a standard of conduct of businesses into their corporate regulatory regimes which will increasingly elevate human rights due diligence to a matter of legal compliance.²¹ This trend is likely to have direct implications for DFIs' own due diligence as well as that of their clients and suppliers.

2. WHAT IS DIFFERENT ABOUT HUMAN RIGHTS DUE DILIGENCE?

The term “due diligence” is used by many actors in many contexts, but the meaning of the term may differ. This section provides an overview of the due diligence concept and defines how the term is used in this study. There is a reasonable degree of alignment between due diligence as reflected in most MDBs' safeguard policies, and “human rights due diligence” under RBC standards. This section first discusses areas of convergence, and then considers what more may be needed to ensure that human rights issues are effectively addressed by DFIs and their clients.

Box 3: Explanation Box - The Corporate Responsibility to Respect and Human Rights Due Diligence

In order to meet their responsibility to respect human rights, the UNGPs call on business enterprises to have in place policies and processes appropriate to their size and circumstances, including:

- A publicly available **policy commitment** to meet their responsibility to respect human rights;
- A **human rights due diligence** process to identify, prevent, mitigate and account for how they address their impacts on human rights; and
- Processes to **enable the remediation** of any adverse human rights impacts they cause or to which they contribute.

- **Due diligence under a Safeguard system.** DFIs have obligations to carry out their own due diligence to assess E&S risks and impacts of projects that they finance, resulting from the project context, the project and client characteristics. DFIs typically carry out their due diligence through the following processes: (i) risk screening and classification, including contextual analysis; (ii) E&S due diligence, including review of the adequacy of a client's E&S assessments, an analysis of applicable laws and evidence of compliance, documentation disclosure and stakeholder engagement; (iii) supervision and oversight of a client's compliance with Safeguard requirements and contractual agreements throughout the project cycle; and (iv) disclosure of information.²² These obligations are typically set out in Sustainability Policies.

In addition, under a Safeguard system, clients have obligations to carry out their own due diligence to identify and manage E&S impacts of projects. These obligations are typically set out in Performance Standards. Based upon the IFC model, this usually includes an overarching Performance Standard which defines E&S risk management requirements of the client and

¹⁹ P. Birghoffer & others, *Lender Liability and Due Diligence for E&S Harm: A Comparative Analysis* (New York, New York University School of Law International Organizations Clinic, 2021). See also *E.G. Barber V. Nestlé USA* No. 8:15-Cv-1364 (C.D. Cal. Aug. 27, 2015); UN Doc. A/HRC/38/20/Add. 2, June 1, 2018, pp.6-7; and OHCHR (2022), *supra*, pp.20-21.

²⁰ UN Doc. A/HRC/38/20/Add. 2, June 1, 2018, pp.6-9.

²¹ See Clifford Chance & Global Business Initiative on Human Rights, [Business and Human Rights: Navigating a Changing Legal Landscape](#) (Jan. 2022); and Business and Human Rights Resource Center, <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/>.

²² IDB, [Modernization Of The E&S Policies Of The IDB – Policy Profile](#) (2019), para. 5.2.

requires the establishment of Environmental & Social Management Systems (ESMS). The remaining Performance Standards usually cover specific impacts that should be identified, addressed and managed as part of a client's ESMS throughout the life of the project.

- **Due diligence under the UNGPs/OECD Guidelines.** While States are the main addressees of international human rights law, private sector businesses have a “corporate responsibility to respect” human rights. In order to fulfil the latter responsibility, businesses should carry out “**human rights due diligence**,” which involves *identifying, assessing, managing and communicating* in relation to any adverse impacts by the business on human rights (See Box 6 on UNGPs/OECD Guidelines), with a focus on risks to people. Under the UNGPs and OECD Guidelines, the human rights due diligence process is complemented by the adoption of a *policy commitment* on human rights (and embedding those commitments into appropriate management systems) and *providing for or cooperating in remedy*. The corporate responsibility to respect applies to all businesses, including private and publicly listed companies, small and medium sized enterprises, state-owned enterprises (SOEs) and to the State when it acts as an economic actor.
- **Private sector businesses may also carry out corporate due diligence** and have done so since long before the UNGPs. But there are several important differences compared to human rights due diligence: (i) corporate due diligence is focused on identifying *risks to the business* and its financial viability; while human rights due diligence is about identifying the *risks and impacts of business operations on people*; and (ii) corporate due diligence often extends only to the initial identification and assessment of risks to the business, but not on-going risk management; human rights due diligence covers not only the identification of risks but also the management systems and steps to prevent, mitigate, track and report on human rights harms. It is a risk-based, on-going, dynamic and adaptive management process that is continuous throughout the project cycle.²³ Human rights due diligence therefore covers a broader range of management actions than standard corporate due diligence practices. Human rights due diligence can be viewed as a combination of standard (initial) corporate due diligence *and* the building of a robust management system necessary to manage impacts on an on-going basis.

3. WHY DFIS AND THEIR CLIENTS SHOULD CARRY OUT HUMAN RIGHTS DUE DILIGENCE

10 Reasons for DFIs to Carry Out Human Rights Due Diligence

1. DFIs have an important sustainability **mandate** in the financing ecosystem. The objectives and principles which guide DFI operations go beyond profitability, and include additionality and the application of E&S high standards.²⁴ In addition, most DFIs have made commitments to support the SDGs. Aligning and anchoring DFI policies in human rights standards, including the UNGPs and OECD Guidelines, can help fulfil DFIs’ mandates and sustainability goals.
2. Where neither DFIs nor their clients address human rights harms, they **externalise the burden of dealing with them to communities and workers**, which is **contrary to DFIs’ mandates**. HRDD also helps ensure that costs and benefits of a project are fully internalised within project budgeting, planning and implementation, thereby helping to ensure that **costs are fully understood, accounted for** and that risks and benefits are **appropriately allocated**.²⁵

²³ See in particular [OECD Due Diligence Guidance For Responsible Business Conduct](#) (2018), Chapter I – Overview Of Due Diligence For Responsible Business Conduct.

²⁴ See [MDB Principles to Support Sustainable Private Sector Operations](#) (2012).

²⁵ One recent study has shown that lost productivity costs due to temporary shutdowns or delays in the mining sector, following failure to manage social conflict, can result in USD 20 million per week in net present value terms. R. Davis. & D. Franks. (2014) [The costs of conflict with local communities in extractive industry](#). See also P. Stevens, J. Kooroshy, G. Lahn & B. Lee (2013) “[Conflict or Co-existence in Extractive Industries](#)” Chatham House – Royal Institute of International Affairs. For another illustration, in relation to the Dakota Access Pipeline (DAPL) in the United States, it has been estimated that “that

3. Without explicit human rights due diligence as defined by RBC standards, a potentially wide range of relevant human rights risks and impacts may be missed. Addressing all relevant risks may significantly **enhance development outcomes**.
4. Human rights due diligence is important for the same reason that any other kind of due diligence is important: because it useful in terms of **managing a DFI's own risk exposure**. Due diligence helps ensure that **all information relevant to risks is taken into account** in project preparation so that all potentially useful prevention and mitigation options are **considered at an early stage**. As DFIs **move from upfront compliance to more flexible timeframes** for clients to meet Safeguard requirements,²⁶ it is all the more important that DFIs have a good overview of all significant risks that may arise, and have an adequate basis for assessing the client's risk management capacity before signing off on funding.
5. As DFIs become involved in **increasingly complex financing structures**, such as those entailed in **blended finance mechanisms**, they will often be looked to for leadership on E&S issues. These more complex structures, with new types of private financial institutions and new clients, may further broaden a DFI's risk exposure. Being on top of the full range of risks will become increasingly important.
6. The rapidly expanding attention to RBC standards such as the UNGPs and OECD Guidelines, and their incorporation within national and regional legal systems, means that these issues are **becoming mainstream** rather than exceptional issues for businesses, including private sector financial institutions (FIs) and the governments that regulate them. The burgeoning attention to "environmental, social and governance" or "ESG" issues by financial regulators, the financial sector and their clients, attests to the growing centrality of these issues.²⁷ **DFI requirements may become misaligned if they lag** behind these important normative and regulatory developments affecting their clients. Developing experience and guidance would help ensure that **DFI advice is keeping pace** with rapidly evolving expectations on private sector clients to respect human rights.
7. Implementing HRDD would demonstrate responsiveness to the **increasing demands of external stakeholders**. Human rights are materially relevant, as certain DFI materiality matrices already bear out.²⁸
8. Systematic human rights due diligence may **strengthen MDBs' defences** in relation to any legal claims relating to or underpinned by those rights.²⁹
9. DFIs' Independent Accountability Mechanisms (IAMs) are increasingly **dealing with complaints framed in human rights language, law and concepts**. Even if not so framed, the subject matter of claims and Safeguards (on issues including resettlement, labor rights, stakeholder participation, and discrimination against women, persons with disabilities, indigenous peoples or other population groups) may be the subject of binding international legal obligations in the given context.

the costs incurred by Energy Transfer Partnership and other firms with an ownership stake in [DAPL] for the entire project are not less than \$7.5 billion, but could be higher depending on the terms of confidential contracts. The banks that financed DAPL incurred an additional \$4.4 billion in costs in the form of account closures, not including costs related to reputational damage. Further, at least \$38 million was also incurred by taxpayers and other local stakeholders." First Peoples Worldwide, [Social Cost and Material Loss: The Dakota Access Pipeline](#) (Nov. 2018).

²⁶ See for example, IDB, "[Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#)" (2019), para. 3.1.

²⁷ However for critique of ESG indexing and labelling schemes see D. Pred & N. Bugalski, [Why ESG investing is bad for human rights - & what we can do about it - Business & Human Rights Resource Centre \(business-humanrights.org\)](#) (Mar. 21, 2022).

²⁸ See for example, EIB [Sustainability Report](#), (2018), p. 11.

²⁹ See note 19 above and accompanying text.

10. Finally, incorporating human rights into updated Safeguards would **align DFIs with their peers** who are increasingly doing so – as highlighted in the many “emerging practices” featured in this study.

5 Reasons for DFI clients to Carry Out Human Rights Due Diligence

1. Human rights due diligence is important for the same reason that any other kind of due diligence is important: because it useful in terms of **managing the client’s own risk exposure**.
2. Aligning due diligence practices with international standards would ensure that the most significant (severe) impacts are **dealt with according to international standards**. Policy incoherence and confusion may otherwise be more likely to result.
3. **Business benefits** for clients include better management of reputational risks and liability exposure, and improving relations with stakeholders.
4. Human rights can be considered a **leading-edge indicator of how agile and proactive clients are** in identifying and managing emerging issues. Developing management systems that can identify and manage human rights risks sends an important **signal of client commitment** and can **strengthen client capacity to address other emerging challenges**.
5. Human rights due diligence is increasingly a matter of **regulatory compliance** as more and more countries adopt laws requiring such due diligence.³⁰

³⁰ See Clifford Chance & Global Business Initiative on Human Rights, [Business and Human Rights: Navigating a Changing Legal Landscape](#) (Jan. 2022); and Business and Human Rights Resource Centre, [Mandatory Human Rights Due Diligence](#).

PART I – DIRECT INVESTMENTS

The analysis below looks at DFI Safeguards systems through the following steps, examining whether Safeguards:

1. Include a clear policy commitment to human rights;
2. Cover human rights sufficiently in the risk assessment phase; and
3. Address human rights sufficiently during supervision of project implementation.

GAP 1: HUMAN RIGHTS POLICY COMMITMENTS IN DFI SUSTAINABILITY POLICIES

This section identifies gaps in existing DFI policies in relation to commitments to apply human rights norms, and notes examples of emerging DFI practice. Policy commitments provide an important signal from the DFI about its objectives and how they will be implemented, and are an anchoring point for the identification of internal responsibilities and due diligence procedures.

1. REFERENCES TO INTERNATIONAL HUMAN RIGHTS STANDARDS

As Safeguards are updated, DFIs are increasingly adopting explicit commitments to respect human rights including, in some cases, clear commitments to align their own policies and practices with human rights and avoid infringing on human rights. (See Box 4 on human rights commitments). This is an important and necessary step in laying the foundation for ensuring that human risks are identified and adverse impacts avoided and managed.

Box 4: Emerging DFI Practices - Explicit Commitment to Human Rights in DFI Safeguards

DFIs increasingly recognise their **own responsibilities** to integrate human rights in their own due diligence, as well as the human rights responsibilities of their clients:

- **IDB:** *“The IDB is committed to respecting internationally recognized human rights standards. To that end, in accordance with E&S 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.”³¹*
- **EBRD:** *“The EBRD is committed to the respect for human rights in projects financed by EBRD. EBRD will require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients. EBRD will continuously improve the projects it finances in accordance with good international practice and will seek to progressively strengthen processes to identify and address human rights risks during the appraisal and monitoring of projects.” The bank will also “not knowingly finance projects that would contravene national laws or country obligations under relevant international treaties”.³²*
- **FMO:** *“In line with the United Nations Guiding Principles on Business and Human Rights, FMO recognizes the responsibility of businesses to respect human rights, wherever they operate. FMO respects internationally recognized human rights standards and takes measures to avoid supporting activities that may cause or contribute to human rights violations and acknowledges*

³¹ IDB ESPF (2020), para 1.3. To the same effect see IDB Invest, [Sustainability Policy](#) (2020), para. 17.

³² EBRD, [Environmental and Social Policy](#), (2019), para. 2.3, provides: “The EBRD will not knowingly finance projects that would contravene national laws or country obligations under relevant international treaties, conventions and agreements, as identified during project appraisal.”

the responsibility of its clients to do the same. This means to avoid infringing the human rights of others and to address adverse impact these businesses may cause or contribute to.”³³

- **EIB:** *“The EIB shall not, to the best of its knowledge, finance projects that have the effect of limiting people’s individual and collective rights and freedoms or violating their human rights. In particular, in relation to EIB-financed projects, the Bank shall not tolerate any: i) forced evictions; ii) gender-based violence and harassment; and, iii) action that amounts to retaliation and harassment. It takes instances of intimidation or reprisals seriously and takes follow-up actions as and where appropriate. To this end, the EIB expects its promoters to meet their respective human rights duties and responsibilities [in line with the UNGPs].”³⁴*

Some DFIs have less specific, and more **aspirational statements** on human rights:

- **AfDB:** *“The AfDB, in accordance with its mandate ... views economic and social rights as an integral part of human rights, and accordingly affirms that it respects the principles and values of human rights as set out in the UN Charter and the African Charter of Human and Peoples’ Rights. These were among the principles that guided the development of the Integrated Safeguards System. The AfDB encourages member countries to observe international human rights norms, standards, and best practices on the basis of their commitments made under the International Human Rights Covenants and the African Charter of Human and Peoples’ Rights.”³⁵*
- **AIIB:** *“[T]he Bank seeks, through the Projects it finances, to be supportive of these human rights and to encourage respect for them, all in a manner consistent with its Articles of Agreement.”³⁶*
- **World Bank** *“In this regard the World Bank’s activities support the realization of human rights as expressed in the Universal Declaration of Human Rights. Through the projects it finances, and in a manner consistent with its Articles of Agreement, the World Bank seeks to avoid adverse impacts and will continue to support its member countries as they strive to progressively achieve their human rights commitments.”³⁷*

Many DFIs have confined the scope of human rights responsibilities **only to their clients**:

- **IFC:** *“IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfil human rights.”³⁸*

(i) While it is encouraging to see increasing references to human rights in Safeguards, **the variable scope and precision of the various formulations can pose challenges to implementation**. For example:

- A prohibition against “*knowingly*” financing projects that would contravene national human rights laws or relevant international treaties (wording used by EBRD, EIB and the AIIB Exclusion List) could create contradictory incentives and actually *discourage* proactive information gathering in practice. This is a constant tension in due diligence practice: incentivising rather than disincentivising the acquisition of knowledge about risks. This tension needs to be clearly

³³ FMO, [Sustainability Policy](#) (Dec. 2016), p.4.

³⁴ EIB, EIB, [Environmental and Social Policy](#) (2022), para. 4.5.

³⁵ AfDB, [African Development Bank Group’s Integrated Safeguards System: Policy Statement and Integrated Safeguards](#), (2013).

³⁶ AIIB ESF (amended May 2021), para. 13 (“Vision”).

³⁷ World Bank ESF, A Vision for Sustainable Development, para. 3.

³⁸ IFC, [Sustainability Policy](#), para. 12 (2012).

acknowledged and addressed at the highest level of DFI management, emphasising that thorough, robust due diligence improves risk management and sustainability, and will be rewarded.

- Commitments to not finance projects “*which result in*” an abridgement of human rights, rather than “*which may result,*” reflects an unrealistic assumption about the ability of DFIs to determine when violations have occurred in practice during the course of initial due diligence. It is also impractical from the perspective of timing, given that violations often only materialise during the implementation phase. A commitment to undertake “*all necessary measures to ensure that projects do not adversely impact human rights*” would avoid these pitfalls and comport with standard risk management concepts.
- (ii) There are a number of **potential adverse consequences** that may occur when DFIs **do not** make an explicit commitment to respect human rights **in line with and by reference to international human rights standards**:
- Many DFI safeguards contain a **patchwork of references**, implicit and explicit, to human rights. However, across the board, there are often many gaps and contradictions, which may present challenges to the faithful and consistent implementation of national human rights laws and borrowing countries’ treaty obligations, which may have taken years or even decades to negotiate. In OHCHR’s view it is **vital that DFIs avoid renegotiating and inadvertently undermining international human rights standards corresponding to the subject matter of safeguard policies**. Consistent adherence and cross-referencing to international human rights standards would reduce the scope for policy incoherence, inefficiencies and confusion.³⁹
 - More specific references to international and national human rights law relevant to investment projects would encourage more **consistency in decision-making**, stronger **legitimacy and justification** for hard choices and trade-offs, greater **policy coherence** at country level, and would help to ensure that DFI safeguard standards are **interpreted in line with applicable law**.
 - If human rights risks are **not highlighted explicitly in Safeguards, they will not be taken as seriously**: information specific to particular human rights risks will more likely be overlooked; implementation will be inconsistent; and expectations between lender and borrower will not be clear.
 - Tethering safeguard definitions and concepts directly to corresponding human rights and RBC norms will help to ensure that DFI policies **keep pace with the evolving interpretations of parent international norms** in practice. In addition, explicit referencing would also trigger reference to recommendations from UN and other human rights bodies⁴⁰ which provide country-specific and thematic analysis that can inform and strengthen DFI due diligence.
 - **Human rights impacts** often require specific **human rights remedial actions**. For example, the mitigation measures adopted in IFC’s investment in the Corporación Dinant project in Honduras (an agribusiness investment characterized by serious allegations of human rights abuses by the client’s private security forces) have included human rights training for security forces, investigation of alleged human rights abuses, and adherence to the Voluntary Principles on Security and Human Rights. The IDB Invest Action Plan in response to a MICI compliance investigation connected with the San Mateo and San Andrés hydro dams in Guatemala includes

³⁹ “It is a matter of [legitimate] concern if the staff of any agency rewrites international human rights standards to its own specifications, and then applies them in that form rather than in the form in which they were adopted. It is a matter of even more concern if that agency then examines the implementation of those standards through its own projects, as it understands them and without reference either to the original standards themselves or to the way they have been supervised by the international bodies established for that purpose.” L. Swepston, “ILO Supervision and the World Bank Inspection Panel,” in G. Alfredsson & R. Ring, *The Inspection Panel of the World Bank* (2001).

⁴⁰ OHCHR, [Remedy in Development Finance](#) (2022), Box 39, p.75.

victim support, developing a mechanism to prevent and address GBV in consultation with gender and human rights experts, capacity building on the Voluntary Principles on Security and Human Rights, and capacity building to address reprisals risks.⁴¹

(iii) There may often be **inconsistencies between Exclusion Lists and Safeguard Policies**.

The absence of more routine commitments to human rights at some DFIs is all the more surprising in light of the fact that many DFIs already include a range of human rights in their Exclusion Lists (See Box 5). Some lists include broader catch-all exclusions that allow the DFI flexibility to exclude projects where severe human rights issues emerge. However, unduly heavy reliance on Exclusion Lists means that, in some situations, opportunities to improve the human rights situation may be foreclosed. Complex issues like child labor are not always reducible to binary “yes/no” decision-making metrics, and projects addressing these issues may often benefit from constructive (critical) engagement and support.⁴² The UNGPs and RBC principles offer a nuanced framework to guide the difficult decisions that need to be taken by DFIs on whether and how to remain engaged in challenging investments. The factors to be taken into account include not only the severity of a particular human rights abuse, but also the capacity of involved actors to build and exercise leverage to improve the situation, alone or in concert with others, and the potential human rights impacts of exiting. Hence, in OHCHR’s view, while Exclusion Lists may and should have a role to play, expectations about the ability to identify these issues early in a project cycle should be kept in realistic measure. DFIs should rely on substantive human rights policy commitments and due diligence, and explore all opportunities for individual and collective leverage prior to entering and exiting investments.

Box 5: Emerging DFI Practices - Exclusions from Finance Based on Human Rights Grounds

- Projects which “result in limiting individual rights and freedom, or violation of human rights”, and “ethically or morally controversial projects” (EIB)
- Project does not respect human rights, including labor rights (DFC)
- Child labor (ADB, AIIB, AfDB, IFC, FMO, DFC)
- Forced labor (ADB, AIIB, AfDB, IFC, FMO, DFC)
- Various exclusions with respect to indigenous peoples (EBRD, IFC)
- Projects “unacceptable in environmental or social terms” (EIB)
- Projects involving the production of, or trade in, any product or activity deemed illegal under national laws or regulations of the country in which the project is located, or international conventions and agreements (AIIB) (ADB) (EBRD) (FMO)
- Projects or companies known to be in violation of local applicable law related to environment, health, safety, labor, and public disclosure (DFC)
- Projects or companies that provide significant, direct support to a government that engages in a consistent pattern of gross violations of internationally recognized Human Rights, as determined by the U.S. Department of State (DFC)
- Forced Evictions (EBRD)
- Resettlement of 5,000 or more persons (DFC)

⁴¹ [Management Action Plan](#) Addressing ICIM’s Compliance Review Report for Projects Generadora San Mateo S.A. And Generadora San Andrés S.A (MICI-CII-GU- 2018-0136).

⁴² For child labor risks, under ILO Conventions, one must take into account minimum ages and hazardous work permitted to children above the minimum age and under 18. These can vary from country to country within the parameters set by the ILO Conventions 138 and 182. This is not to say that the child labor prohibition cannot or should not be included in Exclusion Lists. However more detailed guidance is also needed in a performance standard.

2. REFERENCES TO NORMATIVE STANDARDS ON RESPONSIBLE BUSINESS CONDUCT

DFI Safeguards reflect considerable variation in the scope and specificity of commitments to responsible business conduct (RBC) standards, as embodied in the UNGPs and OECD Guidelines. Such references are increasing, and are not limited to private sector DFIs. The IDB's policy commitment concerning the UNGPs, while located in a footnote rather than the main text, usefully recognises that due diligence procedures embodied in the UNGPs are of equal applicability to sovereign lenders. (See Box 6 on RBC Standards). Finnfund's UNGPs policy commitments is among the most specific and operationally oriented, whereas others are often more declaratory or aspirational in nature.

Box 6: Emerging DFI Practices - Commitments and References to RBC Standards

- Finnfund “endeavours to actively and continuously identify, avoid, mitigate and manage potential and actual adverse human right impacts related to its transactions, and take actions to address them using the UN Guiding Principles for Business and Human Rights (UNGPs) as a practical framework.”⁴³
- FMO: “In line with the United Nations Guiding Principles on Business and Human Rights, FMO recognizes the responsibility of businesses to respect human rights, wherever they operate. FMO respects internationally recognized human rights standards and takes measures to avoid supporting activities that may cause or contribute to human rights violations and acknowledges the responsibility of its clients to do the same. This means to avoid infringing the human rights of others and to address adverse impact these businesses may cause or contribute to. ... FMO requires, that all clients comply with applicable environmental, social and human rights laws in their home and host countries. In addition, FMO upholds the following (inter)national standards, including in its own operations, as applicable” [including the UNGPs, OECD Guidelines, and ILO Declaration on Fundamental Principles and Rights at Work].
- BII's Policy on Responsible Investing (2022) includes the UNGPs as part of the reference framework in connection with Investee E&S requirements for labor and working conditions, supply chain risk management, and consumer protection. It also requires investees to “ensure that, where material human rights issues are identified (including in supply chains) the UNGPs are integrated into an Investee's management systems and appropriate capacity and governance oversight embedded in an Investee's operations.” (Annexes A and C respectively).
- IDB's Environmental and Social Policy Framework provides (fn 52) recognises the need to carry out human rights due diligence, but limits this responsibility to the borrower alone (not the Bank) and to “significant risk” projects.
- EIB's Environmental and Social Policy states that “..the EIB expects its promoters to meet their respective human rights duties and responsibilities in line with the [UNGPs]⁴⁴”, however the EIB Environmental and Social Standards do not clarify what this entails. There appears to be no recognition that the UNGPs apply to the EIB.
- IDB Invest's 2020 Environmental and Social Policy Implementation Manual (though not the Policy itself) references the UNGPs in connection with the client's (though not the Bank's) responsibility to address human rights impacts which they cause or to which they contribute or are linked.⁴⁵ However the guidance is not specifically aligned with the UNGPs, and the assumption in Performance Standard 1 (para. 3) appears to be that due diligence against the PS's will be sufficient to address human rights concerns.

⁴³ [Finnfund's Human Rights Statement](#) (1 Jan., 2019), p.1

⁴⁴ EIB, [Environmental and Social Policy](#) (2022), para. 4.5.

⁴⁵ IDB Invest, [Implementation Manual: Environmental and Social Sustainability Policy](#) (2020), pp.57-58 and 118-119.

- IFC Sustainability Policy and PS 1 refers to the need for businesses to respect human rights but a reference to the UNGPs is included only in the Guidance Note for PS 1. The scope for human rights due diligence is limited only to “special high risk circumstances.” (PS 1, fn 12).

3. REFERENCES TO INTERNATIONAL LAW OBLIGATIONS

Human rights apply universally in recognition of the inherent dignity and equal worth of every human being, and in service of the principle that people’s life chances should not be predetermined by their birth. There is strong grounding for human rights in international law, given that most states are party to several of the ten core UN human rights treaties⁴⁶ as well as ILO conventions. Many human rights are also grounded in customary international law, a source of law relying upon State practice.

RBC normative frameworks, including the UNGPs and OECD Guidelines, are clear that businesses are expected to respect human rights whether or not national laws fully reflect them. This is also the approach taken with respect to health and safety standards in applying the World Bank Group EHS Guidelines.⁴⁷ Safeguards can reinforce the importance of respecting international law obligations even in the absence of national implementing legislation. When Safeguards are unduly deferential to (weaker) national systems, projects are not likely to manage E&S risks effectively, and consequently, are not likely to yield the intended development outcomes.

There is a variety of practice among DFIs concerning the recognition of international law obligations within the country of operation:

- some fail to consider international law at all;
- some take into account conventions formally entered into by the host state;
- others only take into account “national laws implementing host country obligations under international law” (which overlooks the fact that international law often has direct effect, irrespective of implementing legislation, and that national laws are frequently below international standards);
- some take account of international law whether or not there is host state ratification for selected issues (See Box 7); and
- Others defer to national law, which can be problematic particularly insofar as discrimination and any particularly sensitive human rights issues are concerned.

Box 7: Emerging DFI Practices – References to International Law Obligations

- Compliance with “international treaties, conventions and instruments ratified by the EU”, national law and “country obligations under relevant international treaties.” (EIB, ESP, Preamble and para. 4.4).
- Compliance with “applicable international agreements and national legislation relating to gender empowerment and equality.” (IDB, ESPF, para. 1.3)
- Compliance with host country environmental, health, safety and social requirements. Where host country requirements differ from the Performance Standards, Industry Sector Guidelines, and internationally recognized worker rights, the project is expected to meet whichever are

⁴⁶ See <https://indicators.ohchr.org/>.

⁴⁷ World Bank Group, [General Environmental, Health, And Safety \(EHS\) Guidelines](#), (2007), Introduction: “When host country regulations differ from the levels and measures presented in the EHS guidelines, projects are expected to achieve whichever is more stringent.”

more stringent (DFC, ESPP, para. 4.11). High risk circumstances include “country contexts where national human rights laws do not meet international standards.” (DFC, ESPP, para. 2.5)

By contrast:

- References to “laws implementing host country obligations under international law” (ADB).
- References to compliance with national law (and by implication no requirement to comply with international law). (AfDB)
- Sometimes requirements of international law are confused or conflated with aspirational language or “international good practices.” (EIB)⁴⁸

Some DFIs cross reference specific international human rights treaties and standards that are relevant to the interpretation of particular terms and contexts. Without those references, Safeguard requirements may be interpreted inconsistently and arbitrarily, rather than in accordance with established meanings under human rights law. For example, in the 2006 IFC Performance Standards, IFC Performance Standard 5 used the term “adequate housing,” implicitly invoking the Right to Adequate Housing, but did not footnote or cross-reference the relevant human right standard. By contrast the EIB E&S Standards (2022) made an explicit link with the prohibition on forced evictions under international human rights law, purposefully drawing on the right to housing under the ICESCR.⁴⁹ Without an express link to that normative framework, staff and clients would not necessarily know that there is a well-defined meaning and guidance for interpreting the term.

Box 8: Emerging DFI Practices - References to Relevant International Human Rights Standards

- ILO Core Labor Standards (AfDB, EBRD, EIB, DCF, IDB, IDB Invest, FMO)
- Conventions on a range of environmental and social issues including access to information, participation and access to justice in environmental matters, labor rights, climate change, biodiversity, transboundary effects of industrial accidents and hazardous waste, cultural heritage, human trafficking, and UN Conventions concerning disability, racial discrimination, women’s rights and migrant workers (EIB)
- ILO standards on child labor (EBRD)
- UN Convention on the Rights of the Child (AfDB)
- Convention on the Elimination of Discrimination against Women (IDB, EIB)
- Applicable international law with respect to Indigenous Peoples (IDB, EIB)
- References to customary law (ADB with respect to indigenous peoples) and indigenous legal systems (IDB)

⁴⁸ EIB, [Environmental and Social Standards](#) (2022), Standard 7, requiring risk management “in line with the *spirit and principles* of CETS 210 - Council of Europe Convention on preventing and combating violence against women and domestic violence (coe.int).” [Emphasis added]. See also Standard 4 – Biodiversity and Ecosystem Services, fn 10: “These international good practices have been set out in the following international conventions related to the protection and conservation of biodiversity and ecosystems: The Convention on Biological Diversity including the Nagoya Protocol; the Convention on Wetlands of International Importance; the Berne Convention on the Conservation of European Wildlife and Natural Habitats; the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Convention on the Conservation of Migratory Species of Wild Animals.”

⁴⁹ EIB, [Environmental and Social Standards](#) (2022), Standard 6 – Involuntary Resettlement, paras. 48-50, nn. 16-17. To similar effect see EIB, [Environmental and Social Standards](#) (2018), ESS 6, p.42, para. 4.

- Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the “principles of the Universal Declaration of Human Rights” and the EU Global Human Rights Sanctions Regime (EIB)

4. EVOLVING SAFEGUARDS ARCHITECTURE – NEW STANDALONE POLICIES

a) *Stakeholder Engagement*

Active and inclusive stakeholder engagement is essential for the positive impact of investment projects and is based on a number of human rights, including the rights to freedom of expression, association, assembly and access to information, non-discrimination, minimum socio-economic rights guarantees, and protection against reprisals.

Recent DFI safeguard updates have begun to include a separate Performance Standard on stakeholder engagement. This emerging trend sends an important signal that stakeholders should have the capacity, freedom and opportunity to access and act upon project information and influence project design and implementation.⁵⁰ It may also be seen as a response to documented shortcomings in stakeholder engagement in practice, reflected in complaints to IAMs.⁵¹ Stand-alone stakeholder engagement Safeguards should ideally address the following issues:

- **Recognising workers and communities as rights holders in the process, not just “affected people”.** The right to participate in public affairs was recognised in the 1948 Universal Declaration of Human Rights and has been reaffirmed and reinforced in a wide range of international, regional and national human rights standards. Principle 10 of the Rio Declaration on Environment and Development reflects the rights of access to information, to public participation, and access to justice in environmental matters.⁵² Principle 10 has been associated with the early development of MDB Safeguards and helpfully reinforces the interlinkages between environmental protection and human rights.
- **Setting the scope for identifying and engaging stakeholders:** The definition of who is, and who is not, considered a stakeholder has important implications because it demarcates whose voice counts, whose rights are considered, and who may benefit from the project, and who does not. Clients may wish to define project-affected people (PAP) narrowly in order to simplify consultation processes, but this may prejudice the rights of those excluded, paper over adverse impacts, and result in grievances that threaten project implementation and must later be remedied. DFI Safeguards take different approaches to this issue: (i) some take a narrow approach, defining PAPs as only those “directly affected;” (ii) some vary the scope of people to be included at different stages of the engagement process, progressively narrowing the scope through project implementation; (iii) some narrow the list of PAPs covered through the definition of the area of influence;⁵³ and (iv) others take a more expansive view, defining PAPs in relation to direct and indirect impacts, a wider area of influence, and those affected by cumulative impacts. (See Box 9 on Project Affected People). The UNGPs expect businesses to engage with potentially affected

⁵⁰ IDB, [Meaningful Stakeholder Consultation](#) (July 2017). See also the [Environmental Democracy Index](#).

⁵¹ OHCHR, [Remedy in Development Finance](#) (2022), pp.31-33.

⁵² The rights reflected in Principle 10 have been enshrined in two legally binding regional conventions – The [Aarhus Convention](#) and the [Escazú Agreement](#).

⁵³ A “consistent theme across IAMs’ findings is that the ‘area of influence’ of the project had been underestimated.” V. Richard, “Independent accountability mechanisms as guardians of a kaleidoscopic legal accountability”, in *The Practice of Independent Accountability Mechanisms: Towards Good Governance in Development Finance*, O. McIntyre & S. Nanwani, eds. (Leiden, Brill, 2020), pp. 323-325.

groups and other relevant stakeholders.⁵⁴ They do not draw pre-determined boundaries around who is a stakeholder and who is not. Instead, the scope should be determined by potential adverse impacts, both from the company's own activities as well as those as a result of its business relationships.

- It is **difficult to construct an appropriate remedy for inappropriate stakeholder engagement**. It can be challenging to determine how to remedy a failure to carry out appropriate consultations in a manner that is both fair to the those left out while also considering the impact on the wider project. Stopping activities in order to re-start consultations may be an appropriate response in some instances, but may generate unacceptable trade-offs in others. This underscores the need to define the appropriate scope for stakeholder engagement in the first place.
- **Reliance on national law to guide participation can be highly problematic**, given that the gap between the protections afforded by national versus international law in many countries is widening. Numerous other national restrictions on freedom of expression, assembly, and association are resulting in decreasing civil society space and increasing threats to human rights defenders. This is likely to be an increasing challenge in DFI-funded projects, where transparency and participation requirements may be strongly resisted by clients. The lack of protection in most DFI Safeguards for discrimination based on political opinion (a prohibited ground of discrimination under international human rights law) can present an additional obstacle to participation.
- **Emphasising accessibility for all**. The new generation of Performance Standards provide the opportunity to stress the importance of accessible stakeholder engagement, including by using accessible formats for different physical, sensory, and/or cognitive needs.⁵⁵ This is one way that Safeguards can support the rights of persons with disabilities.
- **Incorporating requirements concerning non-retaliation**: In response to shrinking civic space and increased threats to environmental and human rights defenders, DFIs are increasingly integrating reprisals protections within their Safeguards. Regrettably, clients themselves are often directly or indirectly involved in acts of intimidation or reprisals against project stakeholders, hence it is important that DFIs: (i) incorporate into Sustainability Policies a commitment by the DFI not to tolerate such actions by, or on behalf of, a client; (ii) set out specific requirements in Performance Standards that clients prevent and address any reprisals risks; and (iii) include reprisals protections in legal agreements with the client, particularly in higher risk contexts.
- **Reinforcing the importance of engaging with community representatives**: Performance Standards should set forth clear requirements for clients to engage in good faith with community representatives. People raising concerns about projects are often stigmatised as “anti-development”, or un-representative, or the source of problems rather than solutions. Admittedly, it may not always be clear whose voices are the legitimate and authentic expression of community interests. However arbitrary constraints on participation and unduly strict standing rules can dramatically increase the serious barriers already faced by communities in voicing their concerns and pursuing their claims. In OHCHR's view, community representatives should be recognised and included, as a matter of principle, in all stakeholder engagement processes.
- **Blind spot concerning users**: Safeguards do not adequately address users or persons affected by products and services provided by projects. (See Part III below on Emerging Issues and Substantive Gaps).

⁵⁴ UNGP 18 calls for “meaningful consultation with potentially affected groups and other relevant stakeholders, appropriate to the size of the business and the nature and context of the operations” as part of “identifying and assessing human rights impacts with which they may be involved either through their own activities or as a result of their business relationship.”

⁵⁵ See e.g. IDB [ESS 10](#), para. 20; and EIB, [Environmental and Social Standards](#) (2022), Standard 2 – Stakeholder Engagement, para. 36(d).

Box 9: Emerging DFI Practices in Defining Project Affected People

DFC:

*“Stakeholder – Stakeholders are persons or groups who are **directly or indirectly affected** by a project, as well as those who may have interests in a project and/or the ability to influence its outcome, either positively or negatively. **Stakeholders** may include **Project Affected People** and their formal and informal representatives, national or local government authorities, politicians, religious leaders, civil society organizations and groups with special interests, the academic community, or other businesses.*

***Project Affected People** – Individuals, workers, groups or local communities, including within the supply chain, which are or could be affected by the project's Area of Influence, directly or indirectly, including as a result of cumulative impacts. Emphasis should be placed on those who are directly and adversely affected, disadvantaged or vulnerable.*

***Area of Influence** – Areas potentially affected by a project including (1) the primary project site(s) and related facilities that the Applicant develops or controls...; (2) associated facilities that are not funded as part of the project ...; (3) areas **and communities potentially affected by cumulative impacts** that result from the incremental impact on areas or resources used or directly impacted by the project, and from any existing, planned or reasonably defined developments at the time the risks and impacts identification process is conducted; and (4) **areas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location.** ... Any identifiable supply chain expansion of materials or resource development that is inherent to a project's success should be included within a project's Area of Influence.”*

Box 10: Emerging DFI Practices on Recognising Rights in Stakeholder Engagement

- **IBD:** “The IDB is committed to respecting the rights of access to information, participation, and justice regarding environmental issues, consistent with the principles the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters, or the Escazú Agreement.”
- **EIB:** “This Standard recognises the importance of stakeholder engagement, as a means to ensure respect for the rights to: (i) access to information; (ii) public participation in decision-making processes; and (iii) access to justiceThe engagement process shall be respectful of human rights, including the rights to privacy and data protection”⁵⁶

Box 11: Emerging DFI Practice on Stakeholder Engagement

Good practice elements concerning participation include the following:

- Specific **recognition** that the rights to information, participation and access to justice are an integral part of the process.
- A **participation plan**, including a documented record of stakeholder participation, supported by resources that support a systematic approach to stakeholder engagement across the project life cycle, starting at the earliest possible stage and reporting to stakeholders throughout the

⁵⁶ EIB, [Environmental and Social Standards](#) (2022), Standard 2 – Stakeholder Engagement, paras. 1 & 9.

project cycle, providing information on an updated basis. **Engagement adapts** to changing project needs throughout the duration of the implementation cycle.

- The form of the consultation is **tailored to the nature of the project, contextual risks, and present circumstances**, safeguarding participants' health and safety.
- **Broad community support** is obtained for all projects, and specific requirements are in place for **Free, Prior and Informed Consent (FPIC)** when indigenous people are involved.
- Stakeholders are thoroughly mapped **to identify the people who have human rights entitlements related to a project**. Those whose human rights are adversely or potentially affected are in a different category from those who are merely interested in a project. Government agencies, promoters and other parties (e.g. suppliers and contractors), have the obligation and responsibility to ensure that these rights are upheld.
- **Documentation is made available** for public consultation in appropriate form and accessible, timely and culturally appropriate fashion, translated as necessary.
- Information provided is **objective, balanced**, and provides a **fair representation of positive and negative information**, and does not conceal risks or negative impacts.
- Stakeholders are given **feedback** on the extent and manner in which their inputs and viewpoints were taken into account in the consultation process, and reasons are given as to why any material inputs were not reflected.
- **Representativeness and equitable participation** are ensured. This includes accessibility and inclusion of disadvantaged groups and other who may be discriminated against, respect for institutions and actors representing communities, and ensuring that the perspectives of women, LGBTI people, indigenous peoples, persons with disabilities and other relevant population groups are sought and taken into account.
- **The process is free** from manipulation, interference, discrimination, intimidation, coercion or reprisals.
- **Capacity building and/or other assistance** is provided in order to empower impacted individuals and communities, in particular those who are vulnerable and/or marginalised, to fully and effectively participate in engagement and consultation processes, as necessary.
- Stakeholders including communities and civil society organisations are involved in **compliance monitoring**, in cases where non-compliance has been identified.
- **Safeguards and client contracts require the establishment of, and client cooperation with, grievance mechanisms**. Such provisions send a clear message that addressing grievances starts with meaningful stakeholder engagement which, if done well, allows any concerns to be addressed early and for project design and operations to be adjusted as necessary.

b) Separate Policies on Specific Groups

Almost all DFI Safeguards include attention to marginalised or vulnerable groups to varying degrees, with requirements for differentiated engagement, analysis, and prevention and mitigation measures, in order to minimise negative impacts and encourage equitable access to development benefits.

However the term “vulnerable groups” is often used uncritically, as a characteristic inherent in particular populations groups, which may unwittingly deflect attention from the structural conditions

of discrimination and marginalisation that may create or exacerbate vulnerability. Moreover, by pre-determining groups who fall within this category, DFIs and their clients may more readily overlook those made more vulnerable as a result of particular situations, such as conflict or disasters (commonly referred to as situational vulnerability). More suitable terms may include “marginalised groups,” “discriminated groups,” “excluded groups,” or “groups at risk,” together with vulnerability.

A number of DFIs are engaging in a more substantive and granular way with what discrimination and “vulnerability” mean in particular contexts. (See Box 12).

Box 12: Emerging DFI Practices - Nuanced Approaches to Vulnerability and Specific Grounding in Non-Discrimination

EIB’s Safeguards refer not only to “vulnerable groups” but to people who are “vulnerable, marginalised, and/or discriminated-against.” EIB’s recognises that discrimination can cause vulnerability: “This Standard recognises that in some cases, certain individuals or groups are vulnerable, marginalised, systematically discriminated against or excluded on the basis of their socioeconomic characteristics. ... These persons and groups are not inherently more vulnerable than others but due to discriminatory practices and norms, and therefore a less enabling environment, they often face additional barriers that limit their opportunity or ability to equally participate in decision-making related to the project and enjoy project benefits. Indigenous Peoples and ethnic minorities in particular have identities and aspirations that are distinct from dominant groups in national societies and are often disadvantaged by traditional models of development. Moreover, gender-based discrimination affects all societies and cuts across all other types of discrimination, often exacerbating vulnerability, exclusion, and/or marginalisation.”⁵⁷

OHCHR also notes that there is a strong need for broader approaches to non-discrimination across the board, with specific acknowledgment that non-discrimination is more than just addressing vulnerability. The prohibition on discrimination runs across every major human rights convention and almost all human rights instruments. While vulnerability may arise as a result of particular personal characteristics or circumstances, discrimination is socially constructed and, frequently, politically motivated, grounded in or justified by reference to differing perspectives about individuals’ or groups’ comparative worth. Special measures and targeted investments may be needed in order to level the playing field and create a safe space for participation, where discrimination is at issue.

A failure to adequately address discrimination issues can fuel inequalities and impede the achievement of the SDGs and DFIs’ development mandates. Some Safeguards address non-discrimination only with respect to specific circumstances, such as hiring and job promotion and accessing project benefits, which are important, but there are many other contexts in which people can experience discrimination. Others require more comprehensive assessments of discrimination and prejudice (See Box 13).

Multilateral DFIs generally (and appropriately) have self-standing Performance Standards on indigenous peoples, in view of the particularly serious risks such peoples face in connection with many kinds of investment projects. This has been the case for some time. However the UN human rights treaties address other groups which have often attracted comparatively less attention from DFIs to date, including children, persons with disabilities, LGBTI people and migrant workers. Moreover, discrimination on the grounds of race and ethnicity is worsening in many countries, fuelled in some instances by the COVID-19 pandemic and xenophobic, nationalist political sentiment.

⁵⁷ EIB, [Social and Environmental Standards](#) (2022), Standard 7, paras. 1-3.

Discrimination on the basis of political opinion, a central aspect of anti-discrimination law and a pervasive and potentially serious constraint to participation, is also frequently overlooked.⁵⁸

Box 13: Emerging DFI Practices on Non-Discrimination

Clear focus on non-discrimination: IDB: *“The risks and impacts identification process will consider, among others: ... prejudice or discrimination against individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable ... gender-related risks, including gender-based exclusion, gender-based violence (sexual exploitation, human trafficking, and the spread of sexually transmitted diseases), and potential discrimination risks based on gender and sexual orientation, among others.”*⁵⁹ EIB’s Standard 7 aims to *“Ensure that projects respect the rights and interests of vulnerable, marginalised or discriminated-against persons and groups, and Indigenous Peoples, including the right to non-discrimination and the right to equal treatment between women, men, non-binary or gender non-conforming persons; ..”*⁶⁰

More complete attention to groups at risk of discrimination: IDB: *“This disadvantaged or vulnerable status may stem from disability, state of health, indigenous status, gender identity, sexual orientation, religion, race, color, ethnicity, age, language, political or other opinion, national or social origin, property, birth, economic disadvantage, or social condition.”*⁶¹ EIB: *“This Standard recognises that in some cases, certain individuals or groups are vulnerable, marginalised, systematically discriminated against or excluded on the basis of their socioeconomic characteristics. Such characteristics include, but are not limited to, sex, sexual orientation, gender, gender identity, caste, racial, ethnic, indigenous or social origin, genetic features, age, birth, disability, religion or belief, political or any other opinion, activism, membership of a national minority, affiliation to a union or any other form of workers’ organisation, property, nationality, language, marital or family status, health status, or migrant or economic status.”*⁶²

World Bank: The World Bank’s 2016 Non-Discrimination Directive guides actions of Bank staff, but does not contain binding requirements for clients. Nevertheless the Directive notes “the risk of prejudice or discrimination toward individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable.”⁶³

World Bank Guidance on Non-Discrimination

The World Bank has produced a range of operational guidance on non-discrimination issues including:

- World Bank, [Good Practice Note on Non-Discrimination: Sexual Orientation and Gender Identity \(SOGI\) \(2019\)](#)
- World Bank, [Technical Note on Addressing Racial Discrimination through the E&S Framework \(ESF\) \(2021\)](#)
- The World Bank [Non-Discrimination and Disability \(2018\)](#)

⁵⁸ Notable exceptions include IDB ESPF (2020), and the EIB’s Environmental and Social Standards (2022).

⁵⁹ IDB, [ESPS 1](#) (2020), para. 9.

⁶⁰ EIB, [Social and Environmental Standards](#) (2022), Standard 7, para. 7.

⁶¹ IDB [ESPE](#) (2020), p.22.

⁶² EIB, [Social and Environmental Standards](#) (2022), Standard 7, para. 2.

⁶³ World Bank, [Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups](#) (2016), para. 5(a).

Refugees: The EIB's Standard on Resettlement has broken new ground in addressing projects that may involve the involuntary resettlement of refugees and/or internally displaced persons.⁶⁴

More recently, some DFIs have begun adopting self-standing Safeguards on gender equality, sexual orientation and gender identity (SOGI). (See Box 14). This is a welcome and necessary development in OHCHR's view, given the entrenched nature of discrimination faced by women, girls and LGBTIQ+ people in all regions, the stigmatisation and denial faced by the latter groups in particular, the economic costs of discrimination, and the particular risks they face in connection with investment projects. More explicit attention is needed on the rights of intersex persons and discrimination on the grounds of gender expression and sex characteristics however. The World Bank has reported that LGBTI people suffer lower education outcomes and higher unemployment rates due to discrimination, bullying and violence, in addition to a lack of access to adequate housing and health services and financial services.⁶⁵ Situating SOGIESC within the context of a gender equality stand-alone Safeguard has an important substantive basis. Violence and discrimination against LGBTIQ+ people are rooted in negative gender stereotypes and perceptions that LGBTIQ+ people defy gender norms. LGBT persons face specific criminal sanctions, and LGBTIQ+ persons face targeted violence, discrimination and exclusion, that institutions have historically been reluctant to address, inter alia due to stigma and negative stereotypes.

Box 14: Separate Performance Standards and Guidance on Gender Equality & SOGI

- IDB and EBRD have separate Performance Standards on gender equality and SOGI. As of 2021 the IDB ESPF, including ESPS 9, appeared to be best practice among DFIs, both in terms of the comprehensiveness of the scope of ESPS 9 and the integration of gender equality and SOGI issues across the ESPF. ESPS 9 explicitly addresses unpaid care work, SGBV, intersectionality, narrowing existing inequalities and gaps (with a broad list of areas), disproportionate impacts on women and girls and LGBTIQ+ persons, child SEA, displacement/resettlement, labor rights and participation. It could be strengthened by better integrating sex characteristics and the rights of intersex persons.
- EIB's ESS 7 (2022) provides: "The promoter shall adopt a gender-responsive approach to the identification, management, and monitoring of environmental and social impacts and risks that takes into account the rights and interests of women and girls, men and boys, and non-binary and gender non-conforming persons, including specific attention to the differential burdens, barriers and impacts that they might experience, including gender-based violence and harassment."
- World Bank, [Good Practice Note on Non-Discrimination: Sexual Orientation and Gender Identity \(SOGI\)](#) (2019) and a [Discussion Paper on Sexual Orientation & Gender Identity in Contexts Affected by Fragility, Conflict and Violence](#) (March 2020). The World Bank's [Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups](#) (2016) directs Bank staff to address discrimination on the grounds of sexual orientation and gender identity.

⁶⁴ EIB, [Social and Environmental Standards](#) (2022), Standard 6, para. 11: "For cases where an EIB-financed project leads to the displacement of settlements of refugees and/or internally displaced persons, the involuntary resettlement process shall be adapted to be aligned with the [United Nations] Guiding Principles on Internal Displacement."

⁶⁵ See <https://www.worldbank.org/en/news/feature/2018/05/17/why-lgbti-inclusion-is-key-to-shared-prosperity>; and also Badgett, Waaldijk & van der Meulen Rodgers, [The Relationship between LGBT Inclusion and Economic Development: Macro-level evidence](#), 120 *World Development* (Aug. 2019), pp.1-14; and Cortez, Arzinos & De La Medina Soto, [Equality of Opportunity for Sexual and Gender Minorities](#) (World Bank, 2021). More generally see World Bank, [Sexual Orientation and Gender Identity \(worldbank.org\)](#).

Box 15: Emerging DFI Practices – Gender Based Violence (GBV)

- Based on lessons learned from gender based violence in several transport projects, including the [Uganda Transport Sector Development Project](#) and following its Global GBV Task Force’s [recommendations](#), the World Bank developed and launched a [GBV Good Practice Note](#) in October 2018, applying new standards in GBV risk identification, mitigation and response to all new operations in sustainable development and infrastructure sectors.
- World Bank Good Practice Note: [Addressing Sexual Exploitation and Abuse and Sexual Harassment \(SEA and SH\) in Investment Project Financing Involving Major Civil Works](#) (2020).
- Several DFIs now specifically include GBV issues as issues to be assessed and addressed as part of the project assessment (IDB, AIIB), in relation to security services (AIIB) in designing GRMs to ensure they are equipped to handle gender related concerns related to GBV (AIIB).
- CDC, EBRD, and IFC on [“Addressing Gender Based Violence and Harassment Emerging Good Practice for the Private Sector \(2020\).”](#)

5. RECOMMENDATIONS

- *Safeguard policies should contain a specific commitment that the DFI: (a) respects human rights in connection with the projects it finances, and (b) requires its clients to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused or contributed to by, or directly linked to, the business activities of clients.*
- *Safeguard policies should be consciously and rigorously aligned with requirements applicable to clients under relevant international human rights agreements. Doing so would promote certainty, consistency, policy coherence, and rigour in risk assessment and management.*
- *E&S risk management should be guided by all relevant sources of law, national and international, while adhering to the most stringent applicable standard. This is especially important when it comes to assessing issues like discrimination, labor rights, women’s rights, civil society space and stakeholder participation, where the protections afforded by national law in many countries may be particularly weak compared with international standards.*
- *The UN Guiding Principles on Business and Human Rights should be integrated explicitly within Safeguard policies in order to strengthen the framework for: (a) risk assessment; (b) ongoing, risk-based due diligence; (c) addressing supply chain risks; and (d) remedy.*
- *Safeguard policies should include a self-standing performance standard on gender equality, the human rights of women and girls, and the human rights of LGBTI people. This recommendation is justified on economic and principled grounds and would help to address the shortcomings in “mainstreaming” the rights of women, girls and LGBTI people in E&S risk management to date.*
- *Safeguard policies should include a self-standing performance standard on indigenous peoples’ rights. This recommendation is justified by the increasing challenges and threats faced by indigenous peoples at project level, their distinctive vulnerabilities, and their distinctive characteristics and rights under international law, including in relation to FPIC.*
- *Safeguard policies should include a self-standing performance standard on stakeholder engagement, including detailed requirements for Banks and clients on how to prevent and address reprisals risks. This recommendation is consistent with recent practice (e.g. World Bank, EBRD, IDB, EIB) and would address the increasing challenges to effective participation, shrinking civic space, and increasing threats and reprisals against project-affected people at country level.*

- *Safeguards should explicitly aim to address discrimination on grounds including gender, race, ethnicity, migrant status, disability, political opinion, sexual orientation, gender identity, gender expression and sex characteristics, in line with international human rights standards, and should avoid the implication that “vulnerability” is inherent to any population group.*

GAP 2: RISK ASSESSMENT/APPRaisal

This section looks at DFI Safeguards and practices regarding upfront risk assessment, often referred to as appraisal. It focuses on the role of the DFI, rather than clients, but addresses client due diligence where relevant.

1. RE-THINKING RISK MANAGEMENT

Where E&S risks and impacts are not adequately assessed and managed, they are externalised onto workers, local communities, local governments and the environment. (See Box 16). New ways of thinking may be required, as a foundation for strengthened practice. Two particular currents of thinking may be relevant in this regard.

Firstly, the UNGPs embody an approach to managing social risks that converges with (but is not identical to) thinking in other fields such as disaster risk reduction, managing the consequences of infrastructure failure, and the well-established field of impact assessment. These approaches signal a shift in thinking about risk management to “consequence-based decision-making,”⁶⁶ according to which decision-making about preventing unwanted impacts should be driven by the *severity* of the consequences.

E&S risk is commonly plotted on a two-dimensional risk matrix: one axis is *likelihood* and the other is the *severity* of impacts. In a typical risk matrix, a high likelihood but low consequence event is assigned the same level of risk as a low likelihood but high consequence event. This may seem to be a superficially appealing and symmetrical way to address risk, but it may fail to give adequate consideration to how severe impacts are actually experienced and it may inadvertently mask important information organisations and companies need to manage risk. Risks are typically escalated to more senior levels only if they meet a combination of likelihood and severity. This means that senior managers may never be presented with information concerning high consequence but low probability events. As a result, they may have little understanding of their own risk exposure to such high consequence events,⁶⁷ and of the potentially severe risks that their operations may pose to others.

The UNGPs emphasise the *severity* of impacts on human rights, in recognition of the moral significance and practical importance of human rights to affected people. The UNGPs connect the intrinsic and instrumental importance of human rights to the nuts and bolts of risk management systems. Other important trends are moving in the same direction: the recently adopted Global Tailings Review on mine tailings management,⁶⁸ disaster risk reduction policy developments,⁶⁹ even more traditional impact assessment practices are increasingly focused on identifying the potential consequences of a project, and less so on the likelihood of those events happening.

⁶⁶ Coined by A. Hopkins & D. Kemp in [Credibility Crisis – Brumadinho And The Politics Of Mining Industry Reform](#), Wolters Kluwer (2021).

⁶⁷ *Id.*, p. 96.

⁶⁸ See <https://globaltailingsreview.org/>.

⁶⁹ D. Kemp, Lessons for Mining from International Disaster Research in B. Oberle, D. Brereton & A. Mihaylova (eds.) (2020) [Towards Zero Harm: A Compendium of Papers Prepared for the Global Tailings Review](#). St Gallen, Switzerland: Global Tailings Review.

Secondly, while many DFIs have sophisticated systems to measure the development impact of their projects, there may nevertheless be weaknesses and gaps. For instance, reporting systems often measure limited dimensions of outcomes. In the case of employment, job creation may be captured, but there may be little or no data on whether jobs are “decent” in the sense understood in ILO conventions. Development impact measures may also be disconnected from Safeguard measures; in other words, positive impacts and negative impacts, which are logically inter-dependent, may be considered separately. From the perspective of project-affected people, what counts is the totality of the consequences, not whether a particular impact is in the positive or negative column.⁷⁰

Box 16: Externalities - Measuring the Hidden Costs to Society

A recent EIB Sustainability Report included a section on “Measuring the Hidden Costs to Society:”

“The markets do not fully factor social costs – such as the impact on natural resources or the environment – into product prices or investment decisions. This leaves it up to society to absorb the long-term external costs, such as carbon emissions or local air pollution. A project’s financial return may not adequately indicate the real impact of an investment on society. Addressing these externalities is the aim of our economic appraisal.

Different from a financial appraisal, the economic assessment allows the EIB to measure the costs and benefits generated by a project to society at large, taking into account the various resources used by the project (human, technological or natural). ... Based on our economic assessment, only projects that contribute positively to society are considered for EIB financing.”⁷¹

The remainder of this section looks at the implications of shifting to consequence-based decision-making through a human rights lens. In order to consider the consequences for people, the first step is knowing what the potential risks, impacts and consequences may be. Most people and organisations care about human rights; being able to re-assure people that attention to these issues is a routine part of due diligence can strengthen DFIs’ legitimacy and help establish foundations of trust with all stakeholders upon whom the success of investment projects depends.

2. STARTING POINT: INCORPORATING ATTENTION TO HUMAN RIGHTS INTO ROUTINE, EARLY DUE DILIGENCE

Despite the widespread applicability of human rights to projects and the dynamic nature of risk, DFI Safeguards sometimes treat human rights issues as an exceptional issue to be assessed only in “limited, high-risk circumstances”.⁷² Such a limitation seems to be based upon an assumption that severe human rights risks or impacts are usually evident and visible at the outset, triggering a higher project categorisation to ensure that appropriate resources and expertise are assigned. But there is a catch here (or more accurately, a “Catch-22”): identifying human rights risks requires due diligence, but the due diligence process itself is triggered only where there are known human rights risks or impacts. Other DFIs have limited E&S due diligence, including on human rights, to projects that require ESAs, which are typically large scale projects.⁷³ This seems to contravene established good practice wherein E&S due diligence is undertaken in proportion to the risks and impacts of the project.

However an increasing number of DFIs are committing to integrating human rights as a regular part of their due diligence and their client’s due diligence, including the management steps that are incorporated as part of due diligence (See Box 17). This aligns with growing practice in the private

⁷⁰ Danish Institute for Human Rights, [Human rights at Development Finance Institutions](#) (2021).

⁷¹ EIB, [Group Sustainability Report](#), (2020).

⁷² See e.g. IFC PS 1, footnote 12.

⁷³ See EIB ESP (Feb. 2022), para. 4.18; and Standard 1, paras. 7-8 and 14-23.

sector and regulatory developments concerning human rights due diligence in the EU and national legal systems. In OHCHR's view human rights should be treated alongside other E&S risks as a routine part of the due diligence process. This would ensure that important risks and impacts are identified upfront and managed throughout the project cycle. Early identification can then inform subsequent decisions by both the DFI and client about where to invest additional resources, what steps should be taken to manage the risks and impacts (to prevent, cease, mitigate or remedy) and when and how to use leverage with clients.

Box 17: Emerging DFI Practices - Integrating Human Rights into Routine Due Diligence

- **DFC:** *"The following general topics, when applicable, are examined during the E&S assessment review: Project-related social issues, including affected populations, housing, income, employment and working conditions, land use, visual impacts, noise and lighting impacts, as well as any fiscal, cultural, ethnic, religious, and Human Rights impacts."*
- **DFC:** *"An acceptable framework for an ESMS is one that provides for the effective management of the environmental and social risks and impacts associated with a project, including risks related to Labor Rights and Human Rights."*
- **IDB:** *"The IDB is elevating respect for human rights to the core of E&S risk management." And "The Borrower will consider risks and impacts related to human rights, gender, natural hazards, and climate change throughout the assessment process. Where appropriate, the Borrower will complement its E&S assessment with further studies focusing on those specific risks and impacts." Although this is then undermined by a footnote which states: "It may be appropriate for the Borrower to include in its E&S risk and impact identification process a specific human rights due diligence in line with the UN Guiding Principles on Business and Human Rights. A requirement for human rights due diligence is most likely to be appropriate where the nature of the project or its operating contexts pose significant risk to human rights, such as investments in security provision, in contexts where internally displaced persons exist, and in contexts of post- or ongoing conflict, among others."*
- **FMO's Sustainability Policy** states: *"The IFC Performance Standards guide FMO's human rights due diligence with respect to clients. FMO requires clients to assess the likelihood and severity of impact on human rights as part of their assessment of social and environmental impact, and to implement mitigation measures in line with the IFC Performance Standards."*

One way to make these kinds of requirements more concrete would be to require clients to document the absence of human rights risks and impacts, as the Equator Principles now requires (See Box 18). Due diligence processes typically record risks and impacts that are expected to happen, or do happen, but not necessarily those that were *not* found. Specifically documenting steps taken to identify human rights risks, the absence of risks, the absence of concerns expressed and how conclusions were drawn, in consultation with affected communities and other stakeholders, could contribute valuably to E&S risk management.

Box 18: Equator Principle Provisions on Documenting the Absence of Human Rights Risks & Impacts

*"The Assessment Documentation may include, where applicable, the following: consideration of actual or potential adverse Human Rights impacts **and if none were identified, an explanation of how the determination of the absence of Human Rights risks was reached, including***

which stakeholder groups and vulnerable populations (if present) were considered in their analysis” (emphasis added).⁷⁴

a) Incorporating Human Rights into Categorisation/Classification – Biases and Gaps

While the role of categorisation seems to be changing at least in some DFIs, it nonetheless continues to play an important role in triggering the type of E&S assessment that must be carried out, of assigning (or contributing to assigning) the appropriate level of resources and management attention to projects, and importantly, in triggering disclosure obligations. Many of the complaints to IAMs stem from failure to disclose information appropriately, hence it is important to critically assess the basis for categorisation/classification approaches.

i) Implicit Hierarchies in Categorisation – Environmental then Social

DFIs have increasingly moved to “integrated” Safeguards (i.e. one policy framework that incorporates both E&S issues), in order to more effectively address social and environmental issues together. This is appropriate and necessary given that many E&S impacts are mutually reinforcing and are closely connected with human rights impacts (See Part III on Emerging Issues and Substantive Gaps). However, in some respects, social issues and human rights still seem to be the poor cousins of environmental issues in practice:

- With some exceptions, **social issues (let alone human rights issues) rarely appear to be considered significant enough on their own to justify a higher risk classification** (“Category A” or equivalent) in DFI risk management systems.⁷⁵ Projects that do not involve large physical footprints or significant environmental impacts are often assumed not to have significant social impacts. Existing approaches to categorisation may miss the point that a “project with limited E&S impacts may still entail significant E&S risks in an environment of low borrower capacity to manage such impacts or in a situation with high risk of social conflicts.”⁷⁶
- Equally, with some exceptions, the **application of thresholds** to projects may mean that projects with serious human rights risks are not reviewed. For example, the EIB’s Environmental and Social Standards seem to set a very high threshold under which Safeguards are triggered only when significant impacts are expected. As an additional hurdle, Safeguard application is tied to an EIA requirement.⁷⁷ Within the EU, the Safeguards specifically reference the EIA Directive which concerns only environmental impacts. This seems to run counter to good DFI Safeguard practice wherein the assessment and management of risks and impacts are scaled to those risks and impacts. By contrast, other DFIs have gone the other way and made sure that projects with social risks are explicitly considered (See Box 19).
- Much of the prevailing practice on ESAs and social risk assessment more generally seems to view **risk through an unduly technocratic lens**, inadvertently excluding or minimising harms which may not easily be quantifiable or well articulated by communities.⁷⁸ DFIs may be more comfortable addressing impacts that can be scientifically measured, and sometimes appear to have operated on the assumption that human rights impacts cannot be measured with adequate rigor. But mixed method approaches and statistical methods have advanced considerably in the human rights field.

⁷⁴ Equator Principles 4 (2020), p. 18.

⁷⁵ For example, EBRD, [Environmental and Social Policy](#), (2019) includes an indicative list (though it is not clearly stated as an indicative list) what qualifies as a Category A (higher risk project). Only 2 out of the 28 types of projects included in the list refer to social risks and impacts.

⁷⁶ IDB Office of Evaluation and Oversight, [Environmental and Social Safeguards Evaluation](#), (March 2019), p. 22.

⁷⁷ See footnote 73 above and accompanying text.

⁷⁸ D. Kemp, S. Warden & J. Owen, [Differentiated Social Risk: Rebound Dynamics and Sustainability Performance in Mining](#), Vol. 50 *Resources Policy* (Dec. 2016), pp.19-26.

Human rights violations can often be identified clearly, such as in connection with forced evictions, gender-based violence, labor rights violations, discrimination, reprisals and poor consultation practices. In situations where human rights risks seem less clear-cut, assessments will be based upon good professional judgment, similar to the judgement required in assessing more diffuse environmental impacts, such as in the case of biodiversity.

- For larger-scale projects or projects with more widespread or severe impacts, an ESIA is usually required. There is often an **assumption that a social impact assessment (SIA) covers all key social issues, including human rights**. If done well, a good, solid SIA can be expected to cover many human rights issues. However, it all depends on the quality of the SIA, the skills and knowledge of those conducting it and whether they understand and incorporate human rights issues. Even a good quality SIA may not necessarily cover all human rights issues in the same way as an impact assessment which explicitly sets out to address human rights issues. (See Box 20).
- Certain IAMs tend to **receive more complaints about social issues** than environmental ones.⁷⁹ More research and testing would be needed to understand the reasons for this, but one plausible hypothesis may be that social issues are not sufficiently covered in policy or in practice and are thus not being adequately identified and managed up-front.

Box 19: Emerging DFI Practices – Categorisation

Recognising that Potentially Severe Human Rights Impacts Should Trigger a Higher Risk Rating

- US DFC: *“Below are aspects of projects that may lead to a categorization of heightened environmental or social risk (i.e., Category A or Special Consideration):*
 - *Projects that could result in the significant diminishment of priority ecosystem services or social values at a particular site are considered high risk. Ecosystem services are benefits that people obtain from ecosystems including food, freshwater, shelter, timber, surface water purification, carbon storage and sequestration, climate regulation, and protection from natural hazards.*
 - *Examples of social values include site attributes important for ethnic or religious reasons or attributes of cultural or historic significance. Examples of ecologically or socially sensitive locations are provided in Appendix A.*
 - *Projects that are in locations, industries, or sectors with historical issues related to adverse impacts on Project Affected People are considered high risk. Other circumstances that may be considered high risk include projects with demonstrated local opposition, environments of fragile security or history of security personnel abuses, legacy of gender or ethnic discrimination/violence, or country contexts where national Human Rights laws do not meet international standards.*
 - *Projects that are in locations, industries, or sectors with a documented history of Labor Rights issues are considered high risk. Examples of such high-risk projects may involve significant construction activities, manual harvesting of agricultural commodities, Extractive Industries, and industries which may present circumstances that make it difficult for Workers to exercise trade union rights, or have a higher likelihood of using forced (including trafficked) or child labor.”*
 - *“An additional classification of Special Consideration may apply to projects that have heightened potential for adverse project-related social risks related to the involvement of or*

⁷⁹ For example the IDB’s grievance mechanism, MICI, receives more social complaints than environmental ones. IDB Office of Evaluation and Oversight, [Environmental and Social Safeguards Evaluation](#), (March 2019), p. 16.

impact on Project Affected People including Workers.... Special Consideration projects potentially have heightened adverse project-related social risks associated with the involvement of or impact on Project Affected People including Workers. Projects may be classified as Special Consideration based on an assessment of the severity of possible social risks, and their relevance to a project. Key risk factors that are taken into consideration may include:

- *Industry or sector: labor-intensive industries or sectors that are statistically more likely to infringe upon Labor Rights.*
 - *Regional vulnerabilities: projects in countries (i) with a documented history of Labor Rights issues, (ii) having recently experienced conflict associated with Project Affected People, or (iii) with weak or compromised regulatory systems.*
 - *Presence of vulnerable groups: (i) utilization or reliance to a large degree on large pools of sub-contracted, unskilled, temporary, and/or migrant Workers, including within the supply chain; (ii) project risks or impacts that fall disproportionately on Project Affected People who, because of their particular circumstances, may be disadvantaged or vulnerable, or (iii) sectors in which there is a high risk for the use of forced labor or child labor.*
 - *Significant adverse impacts: (i) projects anticipated to have adverse impacts on a significant number of Workers, or (ii) projects that by their nature or footprint could cause or be anticipated to cause (or be complicit in) significant adverse Human Rights impacts.”*
- **AIIB: “Combined Review and Attention to Vulnerability.** *The Bank bases its categorization of the Project on a combined review of both E&S risks and impacts. In reviewing the social risks and impacts of the Project, it pays special attention to disproportionate gender impacts and the vulnerability of various types of potentially affected people.”*

Box 20: Explanation Box - Differences between Social Impact Assessments and Human Rights Impact Assessments

A human rights lens can strengthen SIAs by providing a normative framework that clarifies the scope of issues to address in the “social” risk category, as well as the scope of the client’s and financing institution’s respective responsibilities for any adverse impacts. The human rights framework also helps to ensure:

- Meaningful stakeholder engagement and a focus on related rights that are often not a specific focus – rights to freedom of expression, assembly and association, and to information;
- A focus on the most vulnerable and those experiencing discrimination, including the compounding effects of multiple marginalisation;
- A clear focus on prioritisation of the most severe impacts on people;
- A focus on contextual risks that can play an important role in undermining or supporting the enjoyment of human rights; and
- A focus on remedy, rather than treating impacts on rights as simply residual impacts.

ii) Role of causation in categorisation

DFIs have different approaches to the issue of causation, in connection with E&S risk categorisation. Some base categorisation on the basis of “causation”, for example: “[o]perations that can potentially

cause significant negative environmental or social impacts or have profound implications affecting natural resources.”⁸⁰ (Emphasis added). Such a formulation seems to set too high a threshold and may not take adequate account of how projects may *contribute* to (even if not “cause”) adverse impacts. Categorization triggers a number of important consequences, as highlighted above, hence unduly restrictive definitions should be avoided. A broader and more appropriate formulation would be: a “project is categorised A when it could result in potentially significant environmental and/or social impacts, including direct and cumulative environmental and social impacts.”⁸¹

b) Prioritising Severe Human Rights Risks in Risks Assessments

As highlighted earlier, the UNGPs are part of a shift towards consequence-based decision making, where the consequences of severe impacts on people and their rights take priority over the likelihood of those events materialising. Some DFIs are beginning to explicitly recognise this difference in their Safeguards (See Box 21).

Box 21: Emerging DFI Practices - Prioritising Human Rights Risks

DFC: “For existing projects (e.g., privatizations) the performance requirements must be attained within a reasonable period of time following the receipt of DFC support, with the exception of **Labor Rights** requirements, which must be met from the outset.”

The UNGPs provide a structured analytical framework for identifying severe risks to human rights based on three factors (See Box 22). The process of identifying the most severe risks is sometimes referred to as identifying “salient” human rights risks. This framework provides the basis for more rigorous, consistent risk assessments.

Box 22: Explanation Box – The UNGP’s Structured Approach to Addressing Severity

The UNGPs have three separate tests for identifying when an impact on human rights should be considered “severe” and therefore prioritised for action. Meeting any of the three tests alone is enough to make a human rights impact severe:

- **Scale** refers to the gravity of the adverse impact on any human right – i.e. could the action interfere in a significant way in the enjoyment of the right; or
- **Scope** concerns the reach of the impact -- i.e. the number of individuals that are or will be affected or the extent of the harm; or
- **Irremediable** means limits on the ability to restore the individuals to a situation equivalent to their situation before the adverse impact; for example from perspective of child rights, impacts on children can have long-term, irreversible consequences that might make an impact severe, even if adults are less affected.

While the UNGPs did not specifically draw on relevant concepts from environmental law, there are obvious analogues. In particular, the “precautionary principle” recognises that certain types of environmental harm, once suffered, can be irreparable. As a result, it has been argued that the “precautionary principle” has been incorporated into the legal obligation of due diligence as part of customary international law. Where severe risks exist, greater care *ex ante* and provisional measures to temporarily halt certain actions may be warranted.

⁸⁰ IDB, ESPF (2020), para. 3.16.

⁸¹ EBRD, ESP (2019), para. 4.2.

It is important to note that severe human rights impacts are not limited to impacts involving bodily harm. For example, impacts that deprive groups of their cultural rights, such as removing access to sacred sites, a concept already recognised in many DFI safeguards, is a potentially severe human rights impact. Equally, arbitrary restrictions on the freedom of expression can prohibit participation in project consultations which can lead to serious impacts on people and the planet.

c) Consider the Human Rights Implications of Environmental Impacts

Despite the proliferation of integrated Safeguards, the analysis of the interaction between environmental and human rights risks still appears to be embryonic. The procedural environmental rights set out in Principle 10 of the Rio Declaration, and the Aarhus and Escazú Conventions and other binding treaties,⁸² provide a starting point for integrated approaches. The recognition in 2021 of a human right to a healthy and sustainable environment,⁸³ together with the update of the Convention on Biological Diversity and the increasing attention to the link between climate change and human rights,⁸⁴ strengthen the foundations further.

Given the historical dominance of environmental issues over social issues in risk assessment, and given the potentially broad spectrum of social issues relevant to any given project, human rights risks can easily be de-prioritised. DFIs and clients frequently default to risks that are easiest to address, or those with which they are most familiar, or those that pose the greatest risk to the business (rather than people). Yet there are many good reasons to assess and address environmental and human rights impacts together, in an integrated fashion:

- **Conceptually**, there has been a proliferation of analysis from the human rights community on the links between human rights and the environment, and an increasing focus from within the environmental community on the rights dimensions of environmental protection.⁸⁵
- **Legally**, an ever-increasing range of countries are incorporating the right to a healthy environment into their constitutions.⁸⁶ This could have potentially important legal and practical implications, particularly for larger scale projects with significant environmental impacts. Some countries and regional organisations, notably the EU, are considering or have enacted legislation mandating companies to carry out environmental and human rights due diligence, which can be expected to stimulate more coherent and effective risk management approaches.
- **Operationally**, the growing focus on the human rights dimensions of climate change (the climate justice agenda),⁸⁷ and biodiversity and ecosystem services⁸⁸ (see Box 23) may inspire the development of more rigorous, synthetic analytical frameworks.⁸⁹ In addition, experience has shown that just because a project is “green” does not necessarily mean it has no negative social or human rights impacts.⁹⁰

⁸² See <https://www.unenvironment.org/civil-society-engagement/partnerships/principle-10>.

⁸³ See <https://news.un.org/en/story/2021/10/1103082>.

⁸⁴ See <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx>.

⁸⁵ See e.g. <http://environmentalrightsdatabase.org>.

⁸⁶ UNEP, *Environmental Rule of Law – First Global Report*, (2019).

⁸⁷ OHCHR, *Frequently Asked Questions on Human Rights and Climate Change* (2021). And see e.g. <https://www.business-humanrights.org/en/corporate-legal-accountability/special-issues/climate-change-litigation>.

⁸⁸ “Failing to protect biodiversity can be a human rights violation – UN experts” (Jun 25, 2019).

⁸⁹ See for example, Myanmar Centre for Responsible Business (MCRB), *Briefing Paper: Biodiversity, Human Rights and Business in Myanmar* (2018); and the adaption of the Intergovernmental Platform for Biodiversity and Ecosystem Services (IPBES) framework to address human rights: the Stockholm Resilience Centre, *Human Rights, Biodiversity and Sustainable Development Goals in the mining sector*, (2018).

⁹⁰ See for example a review of human rights impacts of a range of different types of renewable energy projects: <https://www.business-humanrights.org/en/renewable-energy-human-rights-analysis>.

- **Engagement with stakeholders:** the developments noted above are leading to a shift in discourse, tactics and alliances, with ever wider groups of stakeholders, including environmental groups, harnessing human rights concepts, strategies and partnerships in order to advance the environmental agenda.⁹¹

Box 23: Emerging DFI Practices - Recognising the Link between Human Rights and Environmental Issues

EIB: *“This Standard recognises ... that the degradation of ecosystems may have a disproportionate impact on poor rural households and vulnerable and indigenous communities who depend on ecosystem services for their livelihoods and well-being. It therefore promotes a holistic and human rights-responsive approach to the conservation and protection of biodiversity and ecosystems as well as to the sustainable use of natural resources.”*⁹²

DFC: *“Below are aspects of projects that may lead to a categorization of heightened environmental or social risk... Projects that could result in the significant diminishment of priority ecosystem services or social values at a particular site are considered high risk. Ecosystem services are benefits that people obtain from ecosystems including food, freshwater, shelter, timber, surface water purification, carbon storage and sequestration, climate regulation, and protection from natural hazards.”*

3. PROJECT CONTEXT

While contextual analysis has often formed part of DFIs’ due diligence, there has recently been a renewed focus on developing more structured approaches to contextual analysis including in connection with human rights issues.⁹³ A number of DFIs are beginning to take explicit account of the human rights situation in a given country/region through contextual risk assessments, given the functional importance of human rights context in relation to Safeguard policy objectives.

Human rights contextual analysis need to go well beyond the standings of countries in different composite indexes or ratings systems. Ratings systems may provide useful inputs, however more detailed risk information is needed including from specialised human rights bodies, which may also recommend steps that could be taken to prevent, mitigate and remedy human rights impacts.⁹⁴ DFIs’ existing contextual and country risk analyses should often be readily adaptable to these ends (See Box 24).

Box 24: MDBs’ Human Rights Assessment tools

Since 2019, IFC has been piloting the use of a Contextual Risk Framework which intends to provide a more systematic approach to screening, including integrating issues related to human rights and civil liberties.⁹⁵ In its Implementation Manual for its 2020 Sustainability Policy, IDB Invest defines contextual risk as: “situations such as pre-existing conditions of fragility, vulnerability or social exclusion of some groups, a history of human rights abuses, or weak governance such as high levels of corruption.” The EIB’s Environmental and Social Policy (para. 4.17) includes contextual risk

⁹¹ See e.g. FMO [Position Statement on Human Rights](#), (August 2017).

⁹² EIB [Social and Environmental Standards](#) (2022), Standard 4, para. 2.

⁹³ See e.g. IFC, Good Practice Note: [Contextual Risk Screening for Projects](#) (Draft, April 2022).

⁹⁴ OHCHR, [Comments on the Review and Update of the ADB Safeguard Policy Statement](#) (Apr. 2021), Annex II: Social risk information from UN human rights bodies.

⁹⁵ IFC, Good Practice Note: [Contextual Risk Screening for Projects](#) (Draft, April 2022).

assessment (including human rights considerations) in EIB's due diligence at pre-appraisal and appraisal, although this is only discretionary and guidance is not specific.

"Political" issues are functionally linked with economic development, and EBRD's mandate explicitly includes the promotion of multi-party democracy, pluralism and market economics. EBRD conducts political country-level assessments against fourteen criteria in four areas:

- Free Elections and Representative Government;
- Civil Society, Media and Participation;
- Rule of Law and Access to Justice;
- Civil and Political Rights.

The World Bank's Systematic Country Diagnostics (SCDs) frequently include analysis of human rights issues, for example, in the context of democratic governance, the security sector, civil society space, transitional justice, criminal justice, women's rights and discrimination, labor rights, property and land rights. Examples include SCDs from South Sudan, Colombia, Serbia, Myanmar (which cited UN reporting on discrimination and ethnic cleansing operations in 2017 against the Rohingya), Namibia and the DRC. Socio-economic rights are not usually analysed in human rights terms, however, beyond the examples given above.

Understanding whether the national policy and legal framework supports or inhibits the exercise of human rights is not often analysed as part of routine due diligence. Such due diligence is needed not only at the beginning of projects, but throughout the project cycle as part of routine monitoring. As DFIs develop their country analysis and contextual risk assessment tools, the question is then how these factors are translated into actionable steps or requirements of clients.

The selected examples below illustrate the kinds of human rights issues that in OHCHR's view, DFIs should consider including in their due diligence in connection with the project context.

a) The National Legal Framework

There are many well-known gaps between national legal frameworks and international human rights law, within the scope of issues covered by Safeguards. The most obvious examples tend to centre on power imbalances between governments and their populations, power imbalances between employers and workers, and the protection of marginalised and minority groups in society. These include freedoms of expression, assembly, association and collective bargaining, labor rights, non-discrimination including with respect to women and girls, indigenous peoples' rights, LGBTI peoples' rights, minorities and persons with disabilities (see below), and rights relating to social protection, housing and land tenure (see below).

Safeguards rarely contain clear and coherent requirements concerning the need to respect national and international laws on human rights issues. As noted earlier, under the UNGPs and the OECD Guidelines, businesses are expected to meet international human rights standards even where not required to do so under national law. Where national laws make it difficult to meet those responsibilities fully, businesses are expected to respect human rights to the greatest extent possible.⁹⁶ By identifying gaps or contradictions in national laws in advance, DFIs can helpfully support clients by flagging these issues and providing guidance and expertise, providing examples of good practice in meeting relevant international standards within the particular country context.

⁹⁶ UNGP 23, Commentary.

Box 25: Emerging DFI Practices on Assessing National Law

Reviewing National Laws

- **EBRD** regularly reviews national labor laws to identify gaps between national laws and the labor requirements in their Safeguards.
- **IFC** reportedly analyses gaps between national laws concerning consultation (including whether ‘consent’ is required and what groups are recognized as indigenous) under PS7.⁹⁷ IFC also makes it clear that banks and financial institutions should respect human rights of LGBTI people irrespective of national laws.⁹⁸

Requiring Compliance with the Highest Standards

- **DFC:** *“Applicants seeking DFC support must demonstrate compliance with host country environmental, health, safety and social requirements. Where host country requirements differ from the Performance Standards, Industry Sector Guidelines, and Internationally Recognized Worker Rights, the project is expected to meet whichever are more stringent.”*

b) The Enabling Environment for Stakeholder Participation

DFI financing is usually accompanied by a structured stakeholder engagement process. There is a rich body of international law available through international, regional and national human rights bodies which can usefully inform DFIs’ assessments of the climate for free expression, assembly and association and the prerequisites for stakeholder engagement in a given country. Assessing the enabling environment for public participation has not often been included in due diligence under existing Safeguards, however this appears to be changing with the introduction of specific Performance Standards by leading MDBs on stakeholder engagement. Many DFIs have to date treated stakeholder engagement as a process, albeit an important one, rather than a right, and without explicitly recognising that the process itself can create risks that need to be actively addressed as part of risk management.

Attacks, threats and killings of environmental and human rights defenders in the context of investment projects appear to be increasing in all regions. Environmental and human rights defenders are often branded as “anti-development,” “enemies of the state,” “criminals” or even “terrorists” and are increasingly subject to arrest, repression, violence, stigmatisation, criminalisation, labor retribution, and even death in connection with DFI-funded projects.⁹⁹ These factors obviously impact upon the safety and well-being of those involved, first and foremost; but they also may have longer-term implications for development and project outcomes.¹⁰⁰ The lack of meaningful consultation and engagement with local communities, and marginalised groups within them, has contributed to the increased threat environment faced by human rights defenders in development contexts.¹⁰¹

These dynamics are playing out in the context of shrinking civil society space, unprecedented threats against freedom of the press and freedom of expression world-wide,¹⁰² increased digital risks, and an increase in “SLAPP suits” (strategic lawsuits against public participation) which target those who

⁹⁷ Kendyl Salcito, [FPIC at the IFC: How Performance Standard 7 Could Better Protect Indigenous Peoples and Uphold Human Rights](#) (Oct. 2020).

⁹⁸ IFC, [Inclusive Banking: Emerging Practices to Advance the Economic Inclusion of LGBTI People](#) (2022), p.12.

⁹⁹ Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#), (May 2019).

¹⁰⁰ The experience of DFIs supporting the Agua Zarca dam and agribusiness in Honduras in recent years is illustrative.

¹⁰¹ Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#), (May 2019).

¹⁰² See e.g. Committee for the Protection of Journalists’ [global impunity index](#).

speak out.¹⁰³ Private sector companies are under increasing pressure to improve their own responses to human rights defenders as part of the corporate responsibility to respect human rights.¹⁰⁴

A number of DFIs and IAMs have published position statements prohibiting retaliation and are developing early warning systems, risk screening and other procedures to identify, prevent and address threats to defenders. (see Box 26 on Reprisals). In most cases, these policy statements have not been well integrated within Safeguards, although there are signs of change in this regard. It is vital that these risks be included within DFIs' contextual risk assessment procedures,¹⁰⁵ in order that these and other risks in the operating environment can inform categorization decisions.

Box 26: Emerging DFI Practices – Reprisals

- Several DFIs, including the World Bank, IFC, IDB, IDB Invest, EBRD, EIB, FMO and Finnfund have adopted policy positions or public statements on reprisals.
- IFC and IDB Invest have developed a good practice note on reprisals for the private sector, for the benefit of their clients. Some DFIs have begun work on internal guidance for their own staff.
- Several IAMs, including the World Bank's Inspection Panel, the ADB's Accountability Mechanism, the IFC's Compliance Advisor Ombudsman, the AIIB's Project Affected People's Mechanism, the EBRD Project Complaint Mechanism, the EIB's Complaints Mechanism, and the FMO-DEG-Proparco Independent Complaints Mechanism have developed statements and/or guidance on retaliation.
- The Independent Consultation and Investigation Mechanism (MICI) of the IDB, as chair of the Global IAM Network in 2019, developed a Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management.
- The World Bank has introduced a system for tracking and responding to reprisals, and its country office in DRC has collaborated with the United Nations to help mitigate reprisals risks in connection with a major transport project. IDB Invest has included capacity building on reprisals issues within the scope of its responsible exit action plan in connection with the San Andrés and San Mateo hydro-electric projects in Guatemala.

Box 27: Suggested DFI Actions to Improve the Enabling Environment for Participation and Protection against Reprisals

A recent CSO report looking at reprisals against communities, their representatives and defenders in DFI-funded projects recommended four interlinked strategies:¹⁰⁶

"1 Respect rights and avoid harm. Ensure that development activities respect human rights, including by undertaking robust human rights due diligence to avoid adverse impacts, screening

¹⁰³ As highlighted in the recent report UN Working Group on the issue of human rights and transnational corporations and other business enterprises, [Human rights and transnational corporations and other business enterprises - Note by the Secretary-General](#), A/72/162, 18 July 2017, para.35: "In 450 cases of attacks against human rights defenders tracked by the Business & Human Rights Resource Centre, judicial harassment has emerged as the most common tool of suppression (40 per cent of cases)." The report cited Business and Human Rights Resource Centre, "Corporate impunity is common & remedy for victims is rare: Corporate Legal Accountability Annual Briefing," (2016).

¹⁰⁴ See for example, Business & Human Rights Resource Centre & International Service for Human Rights, [Shared space under pressure: Business support for civic freedoms and human rights defenders](#), (2019).

¹⁰⁵ See e.g. IFC, Good Practice Note: [Contextual Risk Screening for Projects](#) (Draft, April 2022).

¹⁰⁶ Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#), (May 2019).

projects for reprisal risk prior to approval, developing protocols, contractual requirements, and other necessary leverage to identify, prevent, and mitigate risks for defenders, and condition investment decisions and disbursements on the ability to prevent abuses, ensure an enabling environment for defenders, and adequately address human rights impacts.

2 Ensure an enabling environment for participation. Ensure that communities, defenders, and other at-risk groups are able to access information and fully and effectively express their views on, protest, oppose, and participate in development decision-making and activities without fear, and that development projects secure and maintain the free prior and informed consent of indigenous peoples or good faith broad community support of other communities, beginning at the earliest stages of design and preparation.

3 Listen to defenders and monitor for risks. Maintain a direct feedback loop with communities, establish active oversight and systematic, independent and participatory monitoring systems for human rights impacts and reprisal risks, and ensure that communities, including defenders and other marginalized groups and individuals, have access without fear to effective grievance and independent accountability and reprisal response mechanisms.

4 Stand up for defenders under threat. Combat the stigmatization of defenders by vigorously reaffirming their critical role in sustainable development, and work with defenders under threat to develop and execute an effective plan of prevention and response that utilizes all necessary leverage with companies, authorities, financiers and relevant actors to safeguard defenders and their right to remain in their territories and communities and continue their defence efforts, to investigate and sanction abuses and prevent recurrence, and to provide effective remedy and accountability for harm.”

DFIs have not always had a strong track record of direct engagement with communities at project level, although they are obliged to supervise their clients’ stakeholder engagement practices. However, this situation may be changing. Some DFIs are establishing more accessible means through which stakeholders may contact the DFI directly, as part of efforts to strengthen DFIs’ own due diligence and supervision. (See Box 28).

Box 28: Emerging DFI Practices – Stakeholder Access to DFI Staff

EBRD established a Trade Union Communication Mechanism in order “to facilitate engagement between the EBRD and trades unions in the context of the projects it finances. Focusing on communication with global unions (the International Trade Union Confederation and the Global Union Federations) and their national and sectoral affiliates, it aims to systematise and accelerate communication relating to PR2 and PR4 (Health and Safety) compliance.”¹⁰⁷

IFC has established a E&S Policy and Risk Department (CES) “to enable more proactive and systematic engagement with affected communities and civil society organizations, and more frequent and comprehensive reporting to IFC’s Board and stakeholders.”¹⁰⁸

c) The Conflict Context

DFIs are financing projects in ever more fragile and conflict-affected and violent (FCV) environments.¹⁰⁹ In FCV settings, the political and human rights context within which projects or programmes will be developed present heightened risks that can materialize in unexpected and

¹⁰⁷ EBRD [Sustainability Report 2020](#), p.20.

¹⁰⁸ IFC Annual Report 2020, p.9.

¹⁰⁹ See for example CDC’s [targets for investing](#) and the World Bank’s strategy on [Fragility, Conflict and Violence](#).

damaging ways. The World Bank’s FCV Strategy 2020-2025 repeatedly notes how unaddressed grievances and perceptions of injustice may contribute to violent conflict and State fragility.¹¹⁰ Sophisticated tools are required in order to understand the drivers of violent conflict and how investment projects may exacerbate conflict. For example, a transport infrastructure project can easily become a driver of conflict if it is routed through a conflict area, heightening tension by bringing security forces into already contested areas. Projects may affect the use of contested land and resources or create conflicts by influencing who has access to transport infrastructure and who does not. Militarization and criminalization are relatively common secondary effects of development interventions.¹¹¹ Violence is often associated with human rights violations, and impunity in the face of human rights violations can lead to an escalating spiral of violence.

At a minimum, consistent with their “do no harm” mandates, DFIs should work to ensure that the projects that they finance address all foreseeable human rights impacts and do not exacerbate conflicts. However, the expansion by DFIs into FCV settings has not always been accompanied by Safeguard requirements for heightened due diligence.¹¹² (See Box 29) The World Bank Group FCV Strategy argues that in the face of higher risks there must be higher risk tolerance and Safeguard policy flexibility in FCV settings.¹¹³ The AIIB reserves the right to defer the application of its Safeguards in conflict situations,¹¹⁴ rather than applying heightened due diligence and enhanced supervision.

Box 29: Emerging DFI Practices - Attention to Conflict

- **WB/IDB:** *“The risks and impacts identification process will consider, among others: ... (vi) those related to community safety, including the safety of the project’s infrastructure, and threats to human security through the risk of escalation of personal or communal conflict and violence that could be caused or exacerbated by the project.... (viii) risks or impacts associated with land and natural resource tenure and use, including (as relevant) potential project impacts on local land use patterns and tenurial arrangements, land access and availability, food security and land values and any corresponding risks related to conflict or contestation over land and natural resources.”*
- **WB:** The ESF provides for the use of *“Social and conflict analysis .. an instrument that assesses the degree to which the project may (a) exacerbate existing tensions and inequality within society (both within the communities affected by the project and between these communities and others); (b) have a negative effect on stability and human security; (c) be negatively affected by existing tensions, conflict and instability, particularly in circumstances.”* ESS 1, Annex 1.
- **EIB:** Noted that it applied “new principles” on support to fragile regions to a number of investments signed in the second half of 2020. The EIB’s conflict sensitive approach aims to: reduce the risk of the conflict and fragility derailing the project avoid the risk of conflict being exacerbated by the project and contribute to conflict prevention and peacebuilding efforts through its investments. Conflict sensitivity refers to the awareness of risks related to conflict, but also of the impact the project can have on the conflict itself – both in positive and negative terms. To help its staff translate the principles of conflict sensitivity into action, it reportedly set up a Conflict Sensitivity Helpdesk run in collaboration with internationally renowned experts from two

¹¹⁰ 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.

¹¹¹ Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#), (May 2019) p. 20.

¹¹² See e.g., International Alert, [Human Rights Due Diligence In Conflict-Affected Settings Guidance For Extractives Industries](#) (2018).

¹¹³ [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.”

¹¹⁴ See AIIB ESF (2021), para. 53.1: “An example of when the bank may determine that a phased approach is warranted would be in a case where the client is deemed by the bank to be in urgent need of assistance because of a natural or man-made disaster or conflict.”

conflict-specialist organisations, [Saferworld](#) and [Swisspeace](#). The latter organisations help the EIB by assessing contextual risks and opportunities, and making recommendations for project adjustments, in order to make them more conflict sensitive.

- **DFC:** *“Where conditions exist for discrimination or community conflict, details should be provided, as well as management plans to mitigate impacts of the project on such conflicts...” And Projects that are in locations, industries, or sectors with historical issues related to adverse impacts on Project Affected People are considered high risk. Other circumstances that may be considered high risk include projects with demonstrated local opposition, environments of fragile security or history of security personnel abuses, legacy of gender or ethnic discrimination/violence, or country contexts where national Human Rights laws do not meet international standards may lead to a categorization of heightening environmental or social risk.”*
- **IFC** has set out its approach that includes being *“conflict sensitive every step of the way.”* In addition, with respect to Safeguards: *“[i]n the FCS context, IFC’s E&S standards are particularly important because substantial social and natural resource issues are often associated with conflicts, and governments in FCS often lack the capacity to address these issues. In many cases, IFC expends extensive resources to help its clients address E&S issues.”...early engagement on critical fragility issues such as integrity due diligence, E&S issues, conflict analysis; and carrying out governance, macro, and security assessments[.]*¹¹⁵

Even when there is no overt conflict, context analysis needs to be alert to other potential social conflicts or unrest around projects. What may start as relatively minor issue can escalate into more widespread discontent especially where there are no viable or accessible avenues for people to channel their grievances.¹¹⁶ This may have serious adverse consequences for stakeholders, the project and the DFI. (See Box 30).

Box 30: The Impact of Conflict on DFI Funded Transport Projects in Latin America

An IDB study in 2017 entitled “Lessons Learned from Four Decades of Infrastructure Project Related Conflicts in Latin America and the Caribbean” looked at 200 conflict-affected infrastructure projects across six sectors in the IDB portfolio. The study found that “firms that fail to consider conflicts proactively or choose to remain unresponsive to conflicts when they arise usually face substantial consequences and are more likely to see their projects cancelled or abandoned. ... In most cases, risk and conflict management systems are ignored while community engagement is regarded as a secondary requirement which needs to be fulfilled in order to comply with regulations. Their crucial function for preventing conflicts is often not seen.”

IDB, “Lessons Learned from Four Decades of Infrastructure Project Related Conflicts in Latin America and the Caribbean,” (2017) (Executive Summary)

¹¹⁵ IFC, [Generating Private Investment In Fragile And Conflict-Affected Areas](#), (2019), pp. 25-26. IFC goes on to note (p.30) that “to scale up quickly, practitioners often question the need to strictly apply ESG standards. implementing these standards can be difficult because of the complexity of many issues, the lack of necessary technology, and institutional shortcomings—all of which potentially slow job and income generation opportunities for populations at risk of conflict. But cutting corners on standards is likely to be short-sighted as these help to reduce project risks in the medium term, and minimize social harm, all of which lower the risk of future instability. However, meeting environmental, social, and governance standards in FCS is likely to take longer than in other settings, and requires flexibility with timing and additional support.”

¹¹⁶ OHCHR, [Remedy in Development Finance](#) (2022), pp. 9 and 14.

d) Vulnerability and Discrimination Context

Until recently, there does not appear to have been much attention paid to the broader context and political, cultural and social factors which cause or exacerbate discrimination. Safeguards and context analyses, in the general run of cases, have not often adequately recognised and addressed discrimination as a driver of vulnerability. Careful thought is needed to address challenges presented by deeply-rooted discrimination within project design, while recognising that such factors will usually be beyond the capacity of any individual project to address.¹¹⁷ The compounding impacts of inter-sectional discrimination, in particular, need to be tackled in a more deliberate and effective way than has been the case to date.

Even within a focus on a particular group, project due diligence may miss key impacts because the focus is on a narrow set of comparatively well-known issues. Gender-based violence is a good example. Despite the fact that almost all DFIs have gender strategies, and that Safeguards include women and girls among “vulnerable groups,” gender-based violence does not often seem to have been addressed in an effective or consistent way, with the exception of certain high-profile cases involving particularly serious abuses.¹¹⁸

4. THE PROJECT / PROGRAMME

DFIs and their clients carry out due diligence in relation to “the project.”¹¹⁹ Definitions of the “project” in DFI Safeguards may have the result of excluding potentially significant human rights impacts. The following limitations may be worth noting:

a) Business Model

Concerns have long been raised about DFIs financing projects: (i) involving under-capitalised subsidiaries with inherent risks of default that potentially leave behind uncompensated harms; (ii) being located in special economic zones that attract businesses with relatively weak E&S requirements; and (iii) involving use of tax havens. Business models are often built on approaches that by their nature are likely to involve increased likelihood of severe human rights impacts on workers and project affected people – such as relying on low paid labor and sourcing that low paid labor from labor brokers.¹²⁰ Critiques of these kinds of business models have strengthened with the increasing focus of investors and consumers on ESG objectives, climate change and human rights.¹²¹

b) Client’s Supply Chain and Other Business Relationships

Safeguards typically set assessment boundaries based on the physical footprint of a project, but may not look at the business relationship footprint of projects (with limited exceptions for certain labor issues, biodiversity and security forces).¹²² This approach seems increasingly out of step with business

¹¹⁷ For an illustrative discussion of actions that DFIs could take to address LGBTI discrimination in particular, see World Bank Blog, [Walking the talk on LGBTI inclusion](#), (May 17, 2019).

¹¹⁸ World Bank, [Good Practice Note: Addressing Gender Based Violence in Investment Project Financing involving Major Civil Works](#), (September 2018).

¹¹⁹ IFC Performance Standards define the project as the “defined set of business activities, including those where the specific physical elements, aspects and facilities likely to generate risks and impacts have yet to be identified. ... Where the project involves physical elements that are likely to generate impacts, E&S risks and impacts will be identified in the context of the project’s “area of influence”: PS 1, paras. 4, 8. The area of influence is further defined to include the area likely to be affected, associated facilities and cumulative impacts.

¹²⁰ See for example IFC, [Good Practice Note: Managing Risks Associated with Modern Slavery](#), (2018).

¹²¹ See for example, Shift, [Business Model Red Flags](#), and OHCHR, [Addressing Business Model Related Human Rights Risks](#) (July 2020).

¹²² Most safeguards on community security have a general reference to checking that security providers have not been involved in past abuses (without necessarily being specific about human rights abuses) See for example, IFC PS 4 on Community Health and Safety, para. 12-14 that says “make reasonable inquiries to ensure that those providing security are

practices of assessing and addressing the environmental, social and human rights practices in supply chains, as well as the requirements of RBC standards and emerging legislation on mandatory due diligence, including in supply chains.¹²³ Given the web of business relationships that bind many businesses together, it is no longer acceptable to say that responsibility ends at the factory gate.¹²⁴ The UNGPs and the OECD Guidelines reflect the expectation that businesses should assess and address human rights issues at both ends of their value chains. This is often a gap in Performance Standards.

In many DFI Safeguards, the boundaries of E&S risk management are defined by reference to the DFI's and/or client's existing "control" or influence over business relationships. But under RBC and human rights standards the determinative factor is *responsibility*: businesses have a responsibility to address adverse impacts with which the business is involved, and if they do not have the leverage to prompt business relationships to address those adverse impacts, they should seek to build leverage through available means from the outset and throughout the investment. A present lack of leverage does not absolve businesses of the responsibility to try to take all feasible remedial actions within the scope of their business relationships.

The web of a client's business relationships may link DFIs and DFI-financed projects to severe human rights abuses; but this also offers valuable (and in many cases untapped) opportunities to improve business practices via a client's business relationships, thus contributing to development impact.¹²⁵

Assessing human rights risks in business relationships need not be as daunting as it might first seem, and there is a considerable body of DFI practice to build on:

- **Some Performance Standards already cover business relationships:** Community Health, Safety and Security Performance Standards already cover relationships with security providers; Labor Performance Standards addresses requirements when working with labor brokers. Most DFI labor safeguards protect workers of contractors by cascading labor requirements down the contracting and sub-contracting chain. This is done mainly by incorporating the labor safeguards in procurement contracts. These examples demonstrate that existing Performance Standards already recognise the principle that risky business relationships should be within scope.
- **Some Performance Standards already have requirements concerning supply chains:** Performance Standards on Biodiversity Conservation and Labor already include some measure of supply chain analysis in order to understand the fuller picture of a project's impacts. There is well-established practice among DFIs of working with supply chains to improve working conditions and improving environmental practices in commodity supply chains.¹²⁶ BII's Policy on Responsible Investing (2022) includes the UNGPs as part of the reference framework in connection with Investee E&S requirements for supply chain risk management and requires investees to "ensure that, where material human rights issues are identified (including in supply chains) the UNGPs are integrated into an Investee's management systems and appropriate capacity and governance oversight embedded in an Investee's operations."

not implicated in past abuses" and IFC [Good Practice Handbook on the Use of Security Forces: Assessing and Managing Risks and Impacts](#) (2017) but this has very limited guidance on vetting private and public security forces (pp. 47 and 65).

¹²³ Business and Human Rights Resource Centre, [Mandatory Human Rights Due Diligence](#).

¹²⁴ For example, in the technology sector, a value chain approach from development, deployment to end-use is necessary, building on existing data protection provisions in digital tech DFI projects.

¹²⁵ The UNGPs and OECD guidelines use the concept of "direct linkage" to impacts. Despite the use of the word "direct", the concept refers to a wider set of business relationships including, but also beyond, business relationships with which a company has a direct, contractual relationship. Where the company is directly linked to human rights impacts through its business relationships it should exercise its leverage to influence its business relationships (or the chain of business relationships) to cease those adverse impacts, prevent future impacts and remedy those that have occurred.

¹²⁶ See e.g. <https://pressroom.ifc.org/all/pages/PressDetail.aspx?ID=17012> and https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_agrosupplychains.

- **Business relationships as a measure of development impact:** DFIs already recognise the importance of fostering business linkages between DFI-funded projects and local and national businesses, in order to enhance economic impacts beyond the project itself. These linkages are often included among the indicators of the DFI’s development impact but they can also be vectors of exploitation, particularly in higher risk sectors such as construction, which may involve extensive sub-contracting, including through labor contractors, and may be associated with risks of bonded and forced labor.¹²⁷ However if DFIs’ approaches to these issues were framed by the UNGPs, these linkages could become vectors for decent work.¹²⁸
- **DFIs’ approaches to FIs:** DFIs often recognise the concept of direct linkage, in a general sense, in terms of the requirements applied to financial intermediaries (FIs). Performance Standards for FIs usually impose requirements on on-lending, based on the recognition that there is a relationship between the DFI and potential harms emanating from an FI client’s on-lending operations. This is similar to applying requirements down supply chains, in the sense contemplated by the UNGPs and RBC standards.

Human rights risk profiles are determined by the characteristics, activities, products and production processes associated with a given sector and client, as is the case for environmental impacts. Products can also have distinctive human rights risk profiles related to inputs, production products or usage. There is a growing volume of sector-specific guidance from which DFIs can draw in order to inform their own due diligence and provide guidance to clients on conducting their human rights due diligence, within a project and across their business relationships.¹²⁹ Given the increasing number of countries adopting legal requirements concerning supply chain due diligence,¹³⁰ this will likely become a legal compliance issue and commercial imperative for an increasing range of DFIs’ private sector clients. In order to reflect the reality of today’s integrated global value chains¹³¹ and evolving social expectations and normative standards, the following actions are recommended:

- **Assess upstream impacts in supply chains** through multiple levels of the chain as necessary, where there is a potential for severe human rights impacts,¹³² and build and use DFI leverage. This recommendation builds on clear evidence that even in countries with relatively robust legal frameworks, human rights risks often exist within supply chains.¹³³ The risk-based approach on which RBC standards are based means that clients are not expected to address *all* issues in all business relationships; this would clearly be impossible for many businesses with large numbers of business relationships. Instead, DFIs and their clients should assess where severe risks lie within those relationships and prioritise action in relation to those, before addressing less severe risks.¹³⁴ (See Part I, Section 2(b) on Prioritisation). (See Box 31).¹³⁵

¹²⁷ Ergon Associates, [Managing Risks Associated with Modern Slavery: A Good Practice Note for the Private Sector](#), (2018), commissioned by CDC Group, IFC, EBRD and DFID.

¹²⁸ See Ergon Associates, [Managing Risks Associated with Modern Slavery A Good Practice Note for the Private Sector](#), (2018), commissioned by CDC Group, IFC, EBRD and DFID.

¹²⁹ See the due diligence guidance across various sectors developed by the OECD: <http://mneguidelines.oecd.org/Duediligence/>, and for illustrative purposes, <https://business-humanrights.be/>.

¹³⁰ Business and Human Rights Resource Centre, [Mandatory Human Rights Due Diligence](#).

¹³¹ World Bank, [World Development Report 2020: Trading for Development in the Age of Global Value Chains](#), arguing that all countries strengthen social and environmental protection, to ensure the benefits of Global Value Chain participation are shared and sustained.

¹³² See e.g. Ergon Associates, [Managing Risks Associated with Modern Slavery A Good Practice Note for the Private Sector](#), (2018), commissioned by CDC Group, IFC, EBRD and DFID.

¹³³ See e.g. the recent [Modern Slavery Acts](#) which requires companies to report on modern slavery risks in their supply chains, including in developed countries, and the EU Fundamental Rights Agency which reports on [severe labor exploitation in the EU](#). However, most of the focus on human rights risks in supply chains has been on suppliers based in developing countries.

¹³⁴ UNGPs, Principles 17 and 24.

¹³⁵ Cf: IDB, [Social Impact Assessment: Integrating Social Issues in Development Projects](#), (2018), p. 46, which cites the UNGPs but incorrectly equates risks of being “directly linked” simply to “context risks.”

- **Assessing downstream impacts from product or project use:** The use of project infrastructure and products¹³⁶ for risks of involvement in severe human rights abuses, should be within the scope of due diligence. For example, a government may use infrastructure or products for repression of local stakeholders.¹³⁷ (For further discussion see Part III, Section 4).
- **Assessing other business relationships:** While much of the focus in global value chains has been on upstream supply chains, reflected in Performance Standards' existing requirements, other business relationships can also pose human rights risks, such as relationships with security personnel. Revisions to the scope of Safeguards should not be restricted to upstream supply chains but should direct attention to consider other business relationships where there are severe human rights risks that are directly linked to projects (See Box 31).

Box 31: Emerging DFI Practices - Business Relationships

- FMO “also assesses decent working conditions **beyond the boundaries of the company** we directly finance, including the rights of contractors and workers in the supply chain. An initial analysis of the nature of the supply chain allows us to identify the most salient issues that need to be managed or mitigated.”
- DFC “In categorizing projects, direct, indirect, induced, **supply-chain related**, regional, trans-boundary and cumulative E&S impacts are considered.”
- CDC Group, IFC, EBRD and DFID published guidance on “**Managing Risks Associated with Modern Slavery: A Good Practice Note for the Private Sector.**”
- CDC developed “**Guidance on Investments In The Agricultural Value Chain: Expanding The Scope of Environment and Social Due Diligence - Improving risk management, creating value and achieving broader development outcomes,**” which focuses on business relationships with value chain actors upstream and downstream from primary production and the role these actors can play in enabling more sustainable production.
- The CAO’s **Advisory Memos on Supply Chain Business Opportunities and Risks**, noted: “While assessing supply chain risks is becoming good practice for businesses generally, IFC’s commitment to sustainability, its Performance Standards, and its responsibilities as a multilateral development organization mean that it must often go beyond the requirements used by other investors. Particularly when IFC is operating in contexts where the regulatory environment is challenging, or where clients have limited leverage to affect the sector through market power alone, it is important for IFC to identify the potential risks and provide early guidance on mitigation measures. It is also important for IFC to provide its clients with tools for how to address potential risks that may arise over the course of a project.”

¹³⁶ Using internet/social media services to facilitate human rights abuses is a good example.

¹³⁷ For example, ICT products may be used for surveillance of CSOs and political opposition. For a roadmap of serious human rights risks relevant to potential financiers of infrastructure projects or other development activities in Northern Rakhine State, Myanmar, including potential complicity in war crimes and genocide, 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).

c) Cumulative Impacts

A number of Performance Standards address cumulative impacts. However some focus on the cumulative impacts of other projects on the client's project, rather than the potential impact of the client's project on the local environment, local communities and local services.¹³⁸

A human rights lens puts the spotlight on cumulative impacts on people (individuals and communities), requiring examination of a potentially wide range of factors such as direct and indirect impacts on air quality, access to water or sanitation, land acquisition and livelihood changes. Ostensibly 'minor' impacts may become more serious where a new project places significant demands on existing services.¹³⁹ Cumulative impacts should be supported by scientific justification and the experience and expressed priorities of affected communities.¹⁴⁰

Managing cumulative impacts over time can be challenging in practice, given the potentially complex causal pathways and multiple issues and actors involved. There can also be difficult governance challenges in ensuring collective action among multiple actors needed to address cumulative impacts.¹⁴¹ The cumulative dimension of human rights impacts can be spread widely across institutions, society and the environment.¹⁴² For example, an influx of people seeking work in a given project area may overwhelm the capacity of child protection authorities to safeguard children from exploitation and violence, and schools may not be able to provide education. A failure to anticipate such impacts through properly scoped due diligence can lead, and has led, to severe human rights abuses.

d) Legacy Issues

"Legacy issues" in this report refers to pre-existing issues that existed prior to DFI financing, and need not necessarily be related to the DFI's client. Legacy issues have often been most visible in relation to acquisition by projects of land which had earlier been acquired in violation of human rights standards and remains the subject of unresolved grievances. Some Performance Standards require that assessments take into account the recent history of government land acquisitions, but typically only over a short time period prior to the project. Long-standing pollution may also give rise to legacy issues that need to be addressed at project level.

Clients and DFIs may resist addressing unresolved land expropriations or other legacy issues on the basis that such issues fall outside (or should be seen as falling outside) the scope of a project's responsibilities. However this is problematic from a human rights perspective because unresolved, uncompensated expropriations can have a profound, ongoing impacts on communities. (See Box 32). This, in turn, can impact negatively on projects. This problem, and the need to address it, have become increasingly visible since the adoption of the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs), a widely accepted normative framework in the field. The VGGT affirm the ongoing validity of socially legitimate tenure rights and call for their restitution. This sets an important benchmark for DFI Safeguards.¹⁴³ The human rights

¹³⁸ See e.g. IFC PS 1, para. 8 which states: "Cumulative impacts that result from the incremental impact, on areas or resources used or directly impacted by the project, from other existing, planned or reasonably defined developments at the time the risks and impacts identification process is conducted..."

¹³⁹ L. Cotula, T. Berger & B. Schwartz, [Are development finance institutions equipped to address land rights issues? A stocktake of practices in agriculture](#), LEGEND (2019).

¹⁴⁰ See IFC PS 1, para. 8, footnote 16: "Cumulative impacts are limited to those impacts generally recognized as important on the basis of scientific concerns and/or concerns from affected communities."

¹⁴¹ Franks, D., et al, "Cumulative Social Impacts," Chapter 12, in Frank Vanclay & Ana Maria Esteves (eds) [New Directions in Social Impact Assessment: Conceptual and Methodological Advances](#) (2011).

¹⁴² Myanmar Centre for Responsible Business, et al, [Myanmar Oil and Gas Sector Wide Impact Assessment](#), (2014), Chapter 5 on cumulative impacts.

¹⁴³ World Bank blog, [VGGT: The global guidelines to secure land rights for all](#) (Oct. 5, 2017).

framework¹⁴⁴ calls for continuing attention to impacts experienced by communities involved in complex land rights and land use challenges,¹⁴⁵ and avoids arbitrary cut off dates.

Box 32: Emerging DFI Practices - Addressing Land Rights, including legacy issues

A number of DFIs have built up expertise and guidance on land rights:

- **CDC and DEG have developed** a guidance note on managing legacy land issues in agribusiness investments, recognising that this is a common but challenging issue that needs to be addressed in line with the UNGPs.
- **CAO Advisory Series – Lessons Learned from CAO Cases on Land** notes that of more than 150 cases CAO has handled between 2000 - 2015, just over half have raised issues related to land, including land acquisition, land compensation, resettlement, land management, land contamination, and land productivity.
- **Interlaken Group** –an informal network of individual leaders from influential companies, CSOs, investors, governments, and international organizations prompted by IFC has issued guidance on Land Legacy Issues: Guidance on Corporate Responsibility
- **AfDB** published a volume of collected contributions on land in Africa – [Rethinking land reform in Africa: new ideas, opportunities and challenges](#) to stimulate progress in land reform policy through leadership and research.

e) [Indirect impacts](#)

Indirect impacts are those triggered by a project rather than being caused by the project itself. An example might be forest clearance from agricultural expansion, as a consequence of population and worker influx in connection with a project. From the perspective of project-affected people, whether an impact was direct or indirect is less important than the fact of the impact.

DFIs and their clients understandably need clarity in understanding the spatial and temporal boundaries of their obligations. When defining the boundaries, it is essential to include all impacts that are reasonably foreseeable. The IFC Performance Standards, for example, include within the scope of client responsibility unplanned but predictable events and “indirect projects impact on biodiversity or on ecosystem services upon which Affected Communities’ livelihoods are dependent.”¹⁴⁶

5. CLIENTS

a) [Client Capacity and Integrity](#)

Most DFIs carry out a range of client due diligence activities¹⁴⁷ including in relation to anti-money

¹⁴⁴ Windfuhr, M. [Safeguarding Human Rights in Land Related Investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework](#), (German Institute for Human Rights) (2017). While the IFC PS focus on addressing project-specific impacts, the VGGT take a more systemic perspective to land issues and governance.

¹⁴⁵ For example, the AAAAQ (‘availability, accessibility, acceptability, adaptability, and quality’) framework developed under the International Covenant on Economic, Social and Cultural Rights, Article 11 and [General Comment 12 on the Right to Adequate Food](#) (1999) could enhance DFIs’ and clients’ analyses of whether land acquisition (or project activities more generally) could have an impact on the right to food of local communities.

¹⁴⁶ IFC PS 1, Para. 8

¹⁴⁷ See e.g., EBRD on [client due diligence](#).

laundering and terrorism financing,¹⁴⁸ sanctioned firms and individuals,¹⁴⁹ anti-corruption and integrity,¹⁵⁰ offshore financial centres,¹⁵¹ and more generally in relation to a client's commitment and capacity to carry out E&S risk management.¹⁵² While it is very useful that Safeguards include specific requirements on assessing client capacity, there is often a lack of specificity about what should be assessed. Safeguards typically include general requirements such as "considers the commitment, capacity, and track record of the Borrower to manage the E&S impacts" without further details. DFI frameworks generally do not contain specific guidance about how to assess and measure client capacity, commitment and likely performance,¹⁵³ and there is little other procedural guidance on these issues in the public domain.

As the integration of human rights considerations into DFI Safeguard increases, in line with the increasing attention of businesses to these issues,¹⁵⁴ it will be important to assess client capacity and commitment on human rights. This could include:

- The client's **formal commitment to human rights**, expressed, for example through a policy commitment to respect human rights. Assessing the true extent of a client's commitment can be challenging but there are an increasing range of tools available for this purpose.¹⁵⁵
- The client's **human rights record** and their business relationships. The latter factors should become a routine part of due diligence, along with integrity due diligence.¹⁵⁶ Many ESG ratings agencies include a review of whether a company has been involved in controversies. This offers a quick but very limited approach to measuring this dimension.
- The ability of the client's **due diligence and management system** to address human rights risks and impacts.¹⁵⁷
- The client's **capacity to manage stakeholder engagement** (See Section 5(b) below).
- The client's **capacity to manage grievances** effectively.¹⁵⁸

b) Client Stakeholder Engagement

A 2019 review of risks to human rights defenders associated with DFI-funded projects re-emphasised the importance of meaningful participation: "[t]he process of engagement with local communities during the scoping, design and implementation of a development project is as important, if not more

¹⁴⁸ See e.g., EIB Group, [Anti-Money Laundering and Combating Financing of Terrorism Framework](#) (Dec. 2020).

¹⁴⁹ See e.g., [AfDB debarment and sanctions procedures and lists](#) of firms and individuals that been sanctioned for having engaged in fraudulent, corrupt, collusive, coercive or obstructive practices.

¹⁵⁰ See e.g. ADB's [anticorruption and integrity approach](#) and [IDB's transparency, accountability and anti-corruption](#) approach and mechanisms.

¹⁵¹ See [Due Diligence \(ifc.org\)](#).

¹⁵² See e.g., BII's ESG Toolkit section on "[Assessing commitment, capacity and track record](#)" that focuses on the internal processes, practices, capacity and accountabilities that underpin the successful assessment and management of E&S issues. CDC also has a [sector note on human rights](#) that briefly addresses human rights in business relationships.

¹⁵³ ADB Evaluation (2020), Annex I, para. 181.

¹⁵⁴ See e.g., [Corporate Human Rights Benchmark](#).

¹⁵⁵ See e.g., <https://shiftproject.org/resource/lg-indicators/about-lgis/>.

¹⁵⁶ See for example the very active survey of news reporting from around the world on company actions on human rights hosted by the [Business and Human Rights Resources Centre](#).

¹⁵⁷ See e.g., [Corporate Human Rights Benchmark](#).

¹⁵⁸ A 2019 review by the ADB accountability mechanism found that investment in the capacity of ADB and clients in consultation and participation practices, information systems and grievance redress mechanisms led to the improved management of even very large numbers of complaints at the project level. This in turn led to increased demand from clients for support of this kind. ADB, 2018 [Learning Report on Implementation of the Accountability Mechanism Policy](#) (Aug. 2019), p. 37; and OHCHR, [Remedy in Development Finance](#) (2022), p.56.

important, than the project's physical impact."¹⁵⁹ Yet stakeholder engagement continues to be a common subject of complaint to IAMs.

In CAO's 2019 annual report, 52 percent of cases involved complaints about stakeholder engagement.¹⁶⁰ A recent review of the IDB IAM (Independent Consultation and Investigation Mechanism (MICI)) found that "inadequate timelines for conducting consultations, limited information on the local cultural context, and restricted access to information for interested stakeholders during the consultation phase point out to the need for a more consistent application of meaningful stakeholder participation throughout the project cycle and the presence of quality and reliable local grievance mechanisms."¹⁶¹

In 2018 the ADB Accountability Mechanism¹⁶² noted that "[i]n virtually all cases, the complaints have alleged inadequate consultation and participation. This was also one of the findings in a thematic evaluation of ADB's safeguard implementation experience conducted by [ADB's Independent Evaluation Department] in 2016."¹⁶³ An independent, detailed review of DFI-funded projects in the Amazon region found that a lack of or ineffective stakeholder engagement was one of the three main reasons for project failure.¹⁶⁴ A 2021 review by Accountability Counsel found that "[a]n analysis of complaints in the Accountability Console reveals that the harms most consistently cited by communities across the world were related to inadequate or non-existent consultation, disclosure, and due diligence."¹⁶⁵

Clearly, more needs to be done to support and supervise client stakeholder engagement. Several DFIs have developed guidance recently to support their clients' work in this area (See Box 33). For DFIs, there are a number of steps that could be strengthened:

- Assessing the client's capacity and commitment to stakeholder engagement. This is particularly important in light of the rising trends on retaliation and the increasing evidence of clients' involvement or complicity in attacks. DFIs need to build strong non-retaliation requirements into Safeguards, backed up by detailed procedural guidance, clear contractual requirements, and sanctions.
- Many Safeguards already require stakeholder engagement plans, but further attention to implementation appears to be called for.
- Stakeholder engagement in relation to FI projects (See Part II, Gap 1: Gaps in Managing Financial Intermediaries.)
- Providing further support to clients in improving their grievance mechanisms, and importantly, highlighting the continuous feedback loops that need to be established between grievance mechanisms and management actions, to ensure that lessons are learned and implemented.

¹⁵⁹ Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#), (May 2019). p. 27.

¹⁶⁰ CAO, [2018 Year in Review](#), (2018), p. 22.

¹⁶¹ IDB, [Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#) (2019), para. 2.10.

¹⁶² ADB, [2018 Learning Report On Implementation Of The Accountability Mechanism Policy](#), (Aug. 2019), p. 24.

¹⁶³ ADB, [Real-Time Evaluation of ADB's Safeguard Implementation Experience Based On Selected Case Studies](#) (2016).

¹⁶⁴ R. Ray, K. Gallagher & C. Sanborn, [Standardizing Sustainable Development? Development Banks in the Andean Amazon](#), Boston University and University del Pacifico, (2018), p. 4: "Incorporating stakeholder engagement early in the project development process can help protect against environmental degradation. For example, projects that took place within regulatory frameworks that guaranteed access to prior consultation for affected indigenous communities were associated with significantly less deforestation than those projects that did not. However, projects that neglected to heed communities' needs were associated with greater environmental damage, serious social conflict, and the loss of millions of dollars of potential business for DFIs due to relationship and reputation damage."

¹⁶⁵ P. Goeking, [Understanding Community Harm Part 1: Consultation, Disclosure, and Due Diligence](#), Accountability Counsel Blog, (May 1, 2021).

- Prompting clients to consider how to constructively engage stakeholders in engaging or monitoring matters that concern them, such as by involving stakeholders in community monitoring.
- Defining appropriate remedies for poor stakeholder engagement. The prevalence of complaints and challenges of retrofitting participation within projects in the implementation phase call for creative thinking and urgent action. In some cases, halting the project may be required, notwithstanding the costs. But fresh thinking is needed on a wider range of potential remedies.

Box 33: Emerging DFI Practice - Guidance on Stakeholder Engagement

[Joint DFI Guidance on Stakeholder Engagement](#) (2019)

EIB [Guidance note for EIB Standard on Stakeholder Engagement in EIB Operations](#) (2020)

6. KEY RECOMMENDATIONS

- *Human rights should be treated alongside other E&S risks as a routine part of the due diligence process. This would ensure that important risks and impacts are identified upfront, and inform project risk assessment, and are managed effectively throughout the project cycle.*
- *Human rights due diligence should not be a one-time, static event, and should not be limited to special or “high risk” circumstances. Information and recommendations from UN, regional and national human rights bodies should inform routine human rights due diligence.*
- *DFIs should re-evaluate their own approaches and guidance for clients on risk prioritisation as part of the due diligence process to ensure that these processes: (i) are considering risks to people and their rights; and (ii) that the processes are re-adjusted to place greater emphasis on preventing negative impacts on people, even where those risks may be less likely.*
- *The scope of due diligence should be sufficiently broad so that the DFI can assess the extent to which a client’s business relationships may entail human rights risks in the client’s particular circumstances. Clients should use their leverage to influence their business relationships (prioritising higher risk relationships as needed) so that the project addresses the full scope of potential adverse impacts associated with the project and maximises opportunities to improve development outcomes.*
- *DFIs and their clients should address all potential and actual 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, starting with and prioritising the most severe based on scale, scope and remediability. DFIs’ and clients’ responsibilities should not be limited by their existing control or leverage, or to “primary suppliers” but instead focus on where the most severe risks are associated with the client’s business model, including upstream and downstream dimensions of its business model.*
- *Project E&S risk assessment should include cumulative impacts upon people and the environment, and legacy issues associated with land expropriation or other unaddressed grievances.*
- *Safeguards and exclusion lists should explicitly flag risks inherent to particular business models, such as those associated with undercapitalised subsidiaries, special economic zones, or tax havens or business models that rely on low wage labor, resources used by local communities or similar*

models that rely on low margins that may increase risks to people and resources rather than creating value.

- *DFIs should develop specific requirements and guidance on contextual risk assessment, drawing from human rights data sources and metrics. The scope of contextual risk assessment should include analysis of civic space, conflict risks and dynamics, patterns of discrimination against particular population groups, and reprisals risks. Safeguard policies should clarify the Bank's and client's roles and responsibilities in this regard, and specify how the findings from contextual risk assessment will be integrated within project E&S risk assessment, supervision, potential remedy actions and other relevant actions throughout the project cycle.*

GAP 3: PROJECT APPROVAL

Ideally, the DFI's and client's due diligence should together provide a reliable picture of potential risks and impacts of a project to be financed. The next step is in to design appropriate response measures, embed those responses within client contracts, and follow up with effective supervision to make sure that they are implemented. Performance Standards set out steps that clients should take to develop their E&S management systems and E&S Action Plans (ESAPs), and manage risks and impacts. This section addresses steps a DFI should take to respond to identified risks, drawing from concepts and experience in applying the UNGPs. The UNGPs operate on the premise, consistent with ordinary principles of justice, that the more a business (or organisation) contributes to (facilitates or enables) human rights harms, the more they should do to help resolve them.

1. CREATING LEVERAGE TO IMPROVE IMPLEMENTATION

“Leverage” can have many meanings but in the context of E&S due diligence it refers to the dynamic process of developing and exercising influence over parties to a transaction (or related to a transaction) to eliminate and address adverse impacts.¹⁶⁶ Leverage goes beyond the power of the purse and includes a range of resources, relationships, and influence that can be used to encourage or compel a specific action. DFIs typically a wide range of tools in their leverage toolbox – far more than commercial lenders – including normative influence through Safeguards and other standards, financial leverage, legal leverage, diplomatic or political leverage, convening power, technical expertise, technical assistance and development resources.¹⁶⁷

Under the UNGPs, DFIs have a responsibility to use their leverage to influence clients to eliminate and address adverse human rights impacts. This responsibility also has wider implications for the way DFIs appraise and supervise projects, for example: (i) making more in-depth and broader contextual assessments at the beginning of projects to better understand how the contextual risks may impact the project and vice-versa; (ii) identifying potential partners where more systemic risks are identified and where more leverage may be needed to address them; (iii) ensuring that high risk projects are assigned additional resources to be able to identify emerging risks early so that appropriate responses can be built into project budgets and legal agreements;¹⁶⁸ (iv) going beyond pro-forma, static supervision and instead taking an adaptive management approach that can re-adjust responses and resource allocations throughout project implementation; (v) being ready to work with other parties to

¹⁶⁶ For a more detailed discussion see, OHCHR, [Remedy in Development Finance: Guidance and Practice](#), (2022), pp. 50-58.

¹⁶⁷ *Id.*

¹⁶⁸ OPIC, Office of Accountability Review, [Buchanan Renewable Energy Project Liberia](#) (2014), p. 10. “Depending on project-specific conditions, OPIC might consider the following options: (i) More frequent and longer site visits by OPIC staff; (ii) Establishment of mechanisms to obtain real time feedback from affected stakeholders (e.g., based on recent advances in cell phone platforms); (iii) Use of qualified local civil society organizations (CSOs) as information channels; (iv) Early notification to both clients and affected stakeholders about the availability of OA services.”

bring influence to bear on a client to address and remedy adverse impacts, including through coalitions or by encouraging clients to work with third parties to enhance project development benefits; (vi) being ready to work with all parties in a transaction in order that each actor to be part of the solution,¹⁶⁹ and (vii) identifying patterns and trends that may signal more systemic issues that require a more strategic and/or collaborative approach.

A perceived lack of leverage at a given point in time is not a justification for avoiding due diligence; rather, it should be seen as a reason to do more due diligence in order to better understand how leverage can be built. Ultimately if sufficient leverage to prompt compliance cannot be built, projects may have to be excluded, subject to an assessment of the human rights implications and who may be likely to finance it instead, and under what conditions.

2. E&S ACTION PLANS

Safeguards lay out a range of assessment processes clients may need to carry out to assess E&S impacts – ESIA, audits, and increasingly human rights impact assessments (HRIAs). These processes should result in a specific action plan that sets out the actions to prevent or mitigate adverse impacts identified, who is responsible for taking those actions, and within what time frame. OHCHR recommends that such plans should:

- **Clarify that actions to respond to human rights concerns can and should be included in ESAPs.** This is a corollary of making human rights a routine part of due diligence.
- Ensure that actions emanating from an **HRIA are integrated into master ESAPs.** This would help to ensure that such actions are not overlooked or deprioritised, and helps to identify synergies with other relevant responses in the action plan.
- **Ensure that ESAP steps are reflected in the project budget.** This is one of the most fundamental requirements for effective ESAP implementation but does not yet appear to be routine practice.
- **Make compliance with ESAPs a legal requirement** through specific contractual covenants.
- **Strengthen the involvement of stakeholders in supervision.** (See Gap Area 4, on Supervision, below).

3. LEGAL AGREEMENTS

Appropriate legal covenants are a powerful tool in a DFI's leverage toolbox but, for many DFIs, the potential is not being realised. Specific legal covenants can provide clarity to the client and to DFI staff about what is required for E&S compliance, and a source of leverage to address non-compliance and remedy for project affected people. (See Box 34). In practice, however, loan covenants at some DFIs have become generic and *pro forma*, weakening the client's Safeguard risk monitoring obligations and limiting the effectiveness of this important opportunity to create leverage for positive results and remedy.¹⁷⁰

¹⁶⁹ *Id.* "OPIC should (i) explore opportunities on a project-specific basis to promote positive development outcomes through its and its clients' partnership with civil society organizations in host countries; (ii) Help clients vet candidate CSOs through embassy contacts and other local experts to ensure that CSOs have appropriate technical capacity and credibility for the role being considered; (iii) Encourage clients to make use of qualified CSOs to help them understand baseline local conditions and changes in such conditions; (iv) Encourage clients entering frontier or sensitive sectors to engage CSOs to serve as intermediaries with project-affected stakeholders, especially when there are vulnerable groups; (v) For projects with high environmental or social risks, encourage clients to engage an appropriately qualified CSO to serve as an independent monitor and reporter of environmental and social impacts."

¹⁷⁰ ADB [Evaluation](#) (2020) para. 206.

Box 34: Legal Covenants to Improve Management of E&S impacts

Loan covenants: DFIs should be encouraged to develop more specific covenants, including in relation to:

- Safeguard compliance
- Action Plans
- Commitment to address impacts
- Using Exclusion Lists as a basis of sanctions
- Notice of serious incidents
- Inspections of serious incidents
- Non-retaliation
- Passing on requirements to contractors and sub-contractors
- Public notification of non-compliance
- Third Party Beneficiary Rights
- Grievance mechanisms
- Mandatory disclosure of IAM and project grievance mechanism(s)
- Client participation in DFI/IAM and other grievance mechanism processes
- Passing on requirements upon the sale of the project
- Reserving reimbursement rights

Legal agreements covering equity, debt and other investments may not provide as obvious a set of levers as loan agreements, however creative avenues could be explored in connection with avenues such as:

- Shareholder provisions
- Management provisions
- Impact covenants
- Termination and responsible exit
- Opt-out provisions
- Cancellation of remaining contributions
- “Put options” in subscription agreements linked to non-compliance ¹⁷¹

DFIs have not made standard loan covenants publicly available, at least for private sector contracts, unlike the private sector Equator Principles association which has at least made an overview of loan covenants available. In addition, there is a lack of transparency of contracts with the private sector, even in the case of contracts relating to public services. IFC has required contract transparency for extractive industry projects (See Box 35) although this does not appear to have been followed by other DFIs nor made legally binding.

Box 35: DFI Practice - Contract Transparency for Extractive Contracts

Extractive Industry Projects

“50. IFC will ... require that, in the case of extractive industries projects it finances, the principal contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract, be public. IFC will allow the redaction

¹⁷¹ For a more detailed explanation of legal covenants, see OHCHR, [Remedy in Development Finance: Guidance and Practice](#), (2022), pp. 52-56.

of commercially sensitive information that is not essential to understand the terms and conditions under which the resource is developed.”¹⁷²

4. DISCLOSURE

Human rights and environmental law underscore the importance of access to information as an integral part of civic participation and good governance. The right of access to information is recognized in global and regional human rights instruments,¹⁷³ SDG 16, target 10, numerous national constitutional and legal frameworks, and global initiatives such as the Open Government Partnership.¹⁷⁴ Many DFIs have self-standing information and disclosure policies that apply to the institutions themselves, in parallel to information disclosure requirements in their safeguards that apply to clients at the project level. These typically cover both proactive dissemination of information and reactive responses to requests for information. (See Box 36).

However there are still weaknesses in various areas which undermine accountability. An independent aid transparency study in 2020 noted transparency gaps for many private sector DFIs in particular, including lack of finance and budget information at activity and organisation levels and a lack of performance-related data.¹⁷⁵ The challenges are magnified in FI projects (see Part II, Gap 1: Gaps in Managing Financial Intermediaries) as well as in projects with complex investment structures, multiple DFIs, and many sub-projects. Creating a single information point in these types of projects help to make information more accessible. Other commonly observed gaps include:

- **Lack of a clear, consolidated, specific list of documents to be disclosed.** DFIs generally include information disclosure and reporting requirements in different policies: in Sustainability Policies, the overarching Performance Standard on E&S assessment, in a separate Performance Standard on Stakeholder Engagement, as well as in the DFI’s Access to Information Policy. While clear stand-alone policies on Access to Information are necessary and welcome, the location of requirements within different policies can make it challenging for stakeholders to understand what the DFI has committed to and requires of its clients. Even for institutions with stand-alone stakeholder engagement requirements, there is not always a clear list of what documents stakeholders are entitled to see. More thorough cross-referencing between Safeguards and Access to Information Policies can be useful, along with a comprehensive list specifying what documents should be disclosed by category and type of project.
- **No clear commitment to make relevant studies available to stakeholders:** Safeguards often do not include requirements to make all relevant studies available to stakeholders. Some studies may be disclosed via the DFI’s website, but this still different to proactively making relevant studies and non-technical summaries available.
- **Shortcomings in relation to consultation:** Numerous Performance Standards specify that stakeholders should have access to mitigation plans, without clear consultation requirements concerning the formulation of those plans, or adequate consideration of whether the required steps are sufficient or other measures might be more effective.
- **Commercial confidentiality.** Safeguards often have broad exemptions for “business-sensitive” information or “legal” or “financial information” that may privilege business sensitivity over more

¹⁷² IFC, [E&S Sustainability Policy](#) (2012).

¹⁷³ Client Earth, Blog, [What can the Aarhus region learn from the Escazú Agreement?](#) (Aug. 22, 2018).

¹⁷⁴ The Access Info Europe and Center for Law and Democracy’s [Global Right to Information Rating](#) is an authoritative source in this field.

¹⁷⁵ [Publish What you Fund](#) (2020), pp.20-22.

fundamental human rights interests and transparency goals. This is a particular problem in private sector DFIs and may account to a significant extent for their lower transparency ratings than most sovereign lenders.¹⁷⁶ The recognition of access to information as a human right under international, regional and (increasingly) domestic law is of critical importance in framing the balance between commercial interests and the rights of project-affected communities. Broad exemptions for business information also run counter to emerging requirements for companies to report publicly on ESG and human rights issues, in response to demands from regulators, stock exchanges, investors and other stakeholders.¹⁷⁷ Information withheld on “commercial-in-confidence” grounds is frequently made available in subscription services, which effectively reduces a putative question of principle (“This information is inherently confidential”) to the more prosaic question of “Can you afford to pay”.

Box 36: Emerging DFI Practices - Access to Information

The public information policies of the IFC, EIB, and ADB recognise the **human right to access information**.

- ADB Public Communications Policy notes: “Freedom of information is recognised as a fundamental human right as set forth in the Covenant on Civil and Political Rights. Citizens are demanding greater transparency and holding governments and private sector corporations to higher standards of accountability.” (para. 17). “Right to access and impart information and ideas: recognizes the right of people to seek, receive, and impart information and ideas about ADB assisted activities.” (para iii, para 30, p.12)

Good practice requirements on access to information among DFIs include the following:

- **Statement of principles and applicable law** underlying the policy: recognition of the right to seek and receive information which may affect them and presumption of transparency with limited exemptions that are specific, linked to specific harms that are clearly specified, with requirements to justify any restrictions, recognition of a duty of proactive disclosure;
 - Recognition of **accountability to stakeholders** (including but not limited to shareholders);
 - **Specific recognition of contextual challenges** including shrinking civil society space, threats to human rights defenders, restrictions on freedom of the press;
 - **Proactive measures** to promote access to information, including dissemination of institutional information and project level information;
 - Listing of institutional and project information **routinely disclosed** with timeframes, including respectively (i) information disclosed to the Board, draft policies and strategies, budgets, (ii) advance notification of projects to be considered, project information and E&S information and documentation, project implementation and completion reports, project updates;
 - **Procedures on dealing with requests for access to information** - clear timeframes for responding to requests, narrow and specific reasons for denials and procedures for appeals, no requirement for justification of request for access to information at the project or institutional level, allowing anonymous requests, particularly in light of the increasing personal risks faced by many individuals in connection with development projects and

¹⁷⁶ [Publish What you Fund](#) (2020), pp.20-22.

¹⁷⁷ See for example the [EU Non-Financial Reporting Directive](#), [Global Reporting Initiative](#), [Sustainability Accounting](#), and the reporting initiatives listed in CCSI’s [Respecting the Human Rights of Communities: A Legal Risk Primer for Commercial Wind and Solar Power Development](#) (Mar. 2022), p.10.

business activity;

- **Positive overrides** (permitting information disclosure where a legitimate interest, such as where human rights are at stake, outweighs a protected interest), while also excluding other reasons for an override of the presumption of disclosure;
- Guidelines on **translations**, commitments to communications in the formats and languages accessible to communities and accessible-format access for persons with disabilities;
- Clear cross-referencing and **coordination with other relevant policies (including Safeguards)**, specifying which policy applies in case of conflict;
- Limitation of situations where **costs** can be imposed, with safeguards for those requesters below a specified income level;
- Presentation by the President to the Board of an **annual report on implementation** of the policy, including statistics on the number of requests received, the timeframe and nature of the DFIs' responses, and data on appeals as well as number and type of incidents of intimidation and/or reprisals and the nature of the DFI's responses;
- **Declassification** schedule for documents;
- **Two-tier** (including independent, external) **review mechanism**.

5. RECOMMENDATIONS

- *DFI safeguards should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by the DFI and clients to address human rights risks in which they are involved.*
- *Environmental and social action plans (ESAPs) should include requirements to address identified human rights concerns. ESAPs should be fully costed and reflected in the project budget, and safeguard policies should specify that compliance is a legal requirement.*
- *“Commercial in confidence” exceptions to information disclosure should be interpreted narrowly, subject to a public interest exception where potential human rights abuses are concerned. The presumption should be in favour of proactive disclosure, with any exemptions defined narrowly and justified on a case-by-case basis by reference to foreseeable harm to a legitimate, recognised interest.*

GAP 4: SUPERVISION

1. MONITORING

Supervision covers the bulk of the life cycle of a project and is where most risks materialise into impacts. Safeguards do not always contain sufficient detail in relation to supervision, monitoring and reporting. The shift of many DFIs towards “adaptive risk management” places a heavy premium on supervision and reporting. This can raise potentially difficult questions about how a DFI'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 on implementation are lacking.

The UNGPs and OECD RBC guidance place particular emphasis on tracking, informed by internal feedback as well as feedback from external stakeholders. DFI Safeguards may benefit from attention in the following areas:

- **Using qualitative and quantitative data and indicators to track performance:** Safeguards often do not impose sufficiently rigorous monitoring requirements. Given the significant advances in data collection, management and analysis since the first generation of MDB Safeguards, and given the operational challenges presented by the COVID-19 pandemic, it would seem timely for DFIs to examine whether their existing monitoring practices and data analytics are fit for purpose. In this regard, it should be noted that increased use of digital tools should be accompanied by appropriate human rights protections (See Part III, Section 2: Digital Rights).
- **Better linking development impact measurement systems and Safeguards systems:** A number of DFIs have developed sophisticated, evidence-based systems to measure the development impact of projects. This is very welcome however it is not always clear how development impact measurement initiatives are linked to Safeguard supervision.¹⁷⁸ Supporting positive development impact is unquestionably vital and central to DFI missions; however this cannot come at the expense of externalising the negative impacts of projects that are not measured. These two systems need to be integrated and viewed as a comprehensive whole in order to provide a holistic picture of the full impacts of a project, direct and indirect, positive and negative. To the extent that DFIs *are* in fact doing this, it does not seem to be effectively communicated to external stakeholders.
- **More focus on outcomes, beyond process.** In many Safeguards too much emphasis is placed on process requirements and action plans rather than results. For example, projects may report on the payment of compensation in resettlement operations but not whether replacement land was purchased or livelihoods restored; or on the existence but not the results of a consultation process; or the establishment of a grievance mechanism but not the kinds of grievances being filed or the actions taken on them.¹⁷⁹
- **Better explaining the linkages between Safeguards Performance and internal monitoring systems.** DFIs put in place a potentially wide range of internal monitoring and rating, evaluation and/or audit systems for the projects they support. But there is often inadequate information to help stakeholders understand the distinctive purposes of each and how they work together to improve project outcomes.
- **Better linking of stakeholder engagement, due diligence, monitoring and grievance mechanisms.** There is often inadequate understanding among stakeholders and staff alike on what the linkages are between the four functional areas above, and how they may interact and support each other to help achieve better project outcomes.

Box 37: Good Practice on Supervision

- Making assessment of effectiveness of ESMS a key objective of monitoring;
- Collaborating with other parties responsible for implementing mitigation measures;

¹⁷⁸ I. Tuta & S. Andreasen Lysgaard, [Human Rights at Development Finance Institutions: Connecting the dots between environmental and social risk management and development impact](#), Danish Institute for Human Rights (2021).

¹⁷⁹ ADB [Evaluation](#) (2020), paras. 195, 239.

- Documenting and disclosing monitoring results;
- Involving independent third parties in monitoring where projects are likely to have more significant impacts;
- Involving communities, or civil society organizations, to complement or verify project monitoring information;
- Requiring on-going stakeholder engagement throughout the implementation period, including feedback on E&S performance; and
- Requiring local disclosure of ESAPs/ESMPs and amended ESAPs/ESMPs.

2. REPORTING /COMMUNICATING WITH STAKEHOLDERS

The UNGPs call on businesses to communicate how they address their human rights impacts, in order that stakeholders may assess the adequacy of the business's response. There is a growing body of guidance¹⁸⁰ and practice, including among private sector FIs, concerning the preparation of formal human rights reports, and commercial banks have also begun to do so. While the UNGPs' formal reporting provisions are intended to address more serious human rights impacts, communication can take many other forms, including in-person meetings, dialogues, and less formal online reports.

Expectations concerning human rights reporting are also being shaped by the dramatically increasing focus on ESG issues by regulators, international organisations, investors and other stakeholders. While some initiatives (such as the Task Force on Climate Related Disclosures) focus solely on the financially material impact on companies and financial institutions of ESG issues, the European Union in particular has adopted a "double materiality" approach in its regulation. This looks at the financially material impact of ESG issues but also the impact of the company on the environment and on people. This second dimension of double materiality is aligned with Performance Standards.

In view of these trends, a growing number of companies are now reporting in some detail on their ESG impacts, from formal annual sustainability reports through to real-time monitoring. This type of reporting is usually intended for investors and general public rather than project-affected communities, who typically need more targeted information and reporting at the local level. But pressures for meaningful reporting are growing, and given the increasing pressures on regulators to address "greenwashing" risks, disclosures need to be credible, backed by effective E&S risk management systems. DFIs have an important role to play in helping clients meet these demands, which begins by ensuring that their own Safeguards are consistent with these market trends and regulatory requirements.

DFIs' Safeguards have reporting requirements of varying scope, detail and rigour. Some require periodic reports on issues of relevance to communities, while others have less specific reporting requirements and refer more generally to on-going stakeholder engagement obligations, unless specific, significant changes in the project may require an updated ESAP. Clearly, more detailed and regular risk-based reporting should be encouraged, for the sake of better E&S outcomes.

3. ENFORCEMENT & EXERCISING LEVERAGE

As mentioned earlier, where a DFI does not have leverage to influence a client to address an adverse impact, it is expected to be pro-active in creating it. Lenders and business enterprises sometimes take an unduly conservative or even defeatist approach to this question, and fail to see opportunities to

¹⁸⁰ See e.g. [UNGP Reporting Framework](#).

create broader coalitions to enhance their leverage. DFI co-financing is the most obvious example of building leverage with other lenders. DFIs have mobilised around the Operating Principles for Impact Management,¹⁸¹ highlighting their development impact. Similar proactiveness and creativity would help greatly in addressing negative E&S impacts of projects.

Loan agreements provide DFIs with contractual leverage to enforce their terms. Non-compliance triggers default clauses. DFIs generally seek to work with clients to address non-compliance and avoid early termination. However when all efforts have failed and enforcement action is warranted, it is vital to ensure not only remedy (repayment) for the DFI concerned, but also remedy for any project affected people harmed by non-compliance. Remedy for project-affected people should be embedded in contractual clauses and incorporated within client dialogues and corrective actions. (See Box 38).

Box 38: Emerging DFI Practices – Default Clauses

DFC: “For all projects, material misrepresentations or material non-compliance with contractual E&S provisions, including reporting requirements, may constitute an event of default under the terms of the applicable DFC Agreement. DFC determines what is material and whether a default is curable or incurable. DFC makes determinations as to materiality based, for example, on the severity of the environmental, health, safety or social, including labor, impacts or other result caused by the non-compliance and the nature and degree of such non-compliance by the Applicant.”

There is little evidence in the public domain about how default provisions are enforced. Anecdotally, it seems that E&S issues are not often considered sufficiently material to trigger default and associated remedial actions. DFIs have often been known to exit projects in response to emerging signs of serious E&S problems. Emerging policy developments on “responsible exit” may help to address these tendencies (see Section 5 below).

4. REMEDY

Under international human rights law, “remedy” is a holistic concept encompassing not only compensation (a standard component of DFI mitigation hierarchies), but also restitution, rehabilitation, satisfaction (including public accounting, aimed at restoring the dignity of those who have suffered human rights violations), and guarantees of non-repetition (including policy changes to prevent recurrence).¹⁸² In OHCHR’s view, a proactive and consistent approach to the question of remedy, integrated within DFIs’ 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.

DFIs have numerous tools in their toolbox to address remedy and have contributed valuably to remedy in many cases. For example, MDBs and numerous bilateral DFIs have long experience dealing with remedy in the context of resettlement. However, data on remedy outcomes are generally inadequate, and in situations in which serious grievances are concerned, timely and effective remediation frequently does not happen. Challenges to remedy include gaps and lack of clarity in DFI and IAM mandates, capacity and commitment gaps, disagreements among the parties about their respective responsibilities, shortcomings in transparency, and the absence, inaccessibility or ineffectiveness of GRMs. Inadequate due diligence, consultation and information disclosure are the

¹⁸¹ See <https://www.impactprinciples.org/>.

¹⁸² See OHCHR, [Remedy in Development Finance](#) (2022), pp.8-13.

most common focus areas of complaints to IAMs in practice and are closely associated with poor development outcomes.¹⁸³

Currently, Safeguards mostly lack a clear commitment to remedy. Instead they have mitigation hierarchies, but these are not equivalent to a clear commitments to remedying harm if it occurs (ie. the flip side of DFI's "do no harm" commitment). The mitigation hierarchies in DFI safeguards usually require *avoidance, minimisation, mitigation and compensation and/or off-setting* of risks and impacts, but not "remedy" explicitly.¹⁸⁴ Under many DFI mitigation hierarchies, even in the case of forced resettlement, unremediated impacts are permissible where redress is not considered to be "technically or financially feasible." 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. Moreover, Safeguards have generally made no distinction between "offsetting" when it comes to human rights risks and impacts, as distinct from environmental impacts (from where the off-setting concept term originated and may generally be more appropriate¹⁸⁵). There are lessons to be learned from the Equator Banks on this point. By contrast, the preamble of the 4th revision of the Equator Principles makes the following distinction: "Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimised and mitigated, and where residual impacts remain, clients should provide *remedy* for human rights impacts or offset environmental impacts as appropriate."¹⁸⁶ [*Emphasis added*].

As of 2022 the question of remedy appeared to be moving from the periphery to centre stage of DFI Safeguard policy discussions. The 2020 External Review on IFC/MIGA E&S Accountability¹⁸⁷ played a particularly important role in highlighting the remedy issue. The World Bank Group's FCV Strategy 2020-2025 recognizes that unaddressed grievances can fuel social conflict, undermine development outcomes, and deepen state fragility.¹⁸⁸ 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.¹⁸⁹ The World Bank's Guidance Note for borrowers on implementing ESS 1 specifically includes the responsibility to remedy,¹⁹⁰ as do the policies of the EBRD's Independent Project Accountability Mechanism and the updated (June 2021) Rules and Procedures of the AfDB's Independent Recourse Mechanism.¹⁹¹

DFIs have contributed directly to remedy in particular cases. But in the absence of a clear policy framework or criteria, this has occurred in a very inconsistent manner. In order to encourage more consistent practice, in line with the UNGPs' standards, DFIs' Safeguards should define their own and implementing organisations' remedial responsibilities in relation to their respective involvement in impacts (cause-contribute-direct linkage). "Linkage" (rather than "cause" or "contribute") situations

¹⁸³ For fuller analysis see OHCHR, [Remedy in Development Finance](#) (2022), pp.23-33.

¹⁸⁴ There are isolated exceptions to this rule. For example the child labor and forced labor provisions of the IDB ESPF (2020) and EIB ESS (2022) do mention taking appropriate steps to remedy identified cases, citing the 2014 Protocol to ILO Forced Labor Convention 29.

¹⁸⁵ Exceptions might include biodiversity and critical habitat off-sets, depending upon the circumstances.

¹⁸⁶ Equator Principles 4 (2020), Preamble.

¹⁸⁷ IFC/MIGA [External Review](#) report (2020)

¹⁸⁸ 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.

¹⁸⁹ G. Watkins et al, [Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean](#) (Sept 2017).

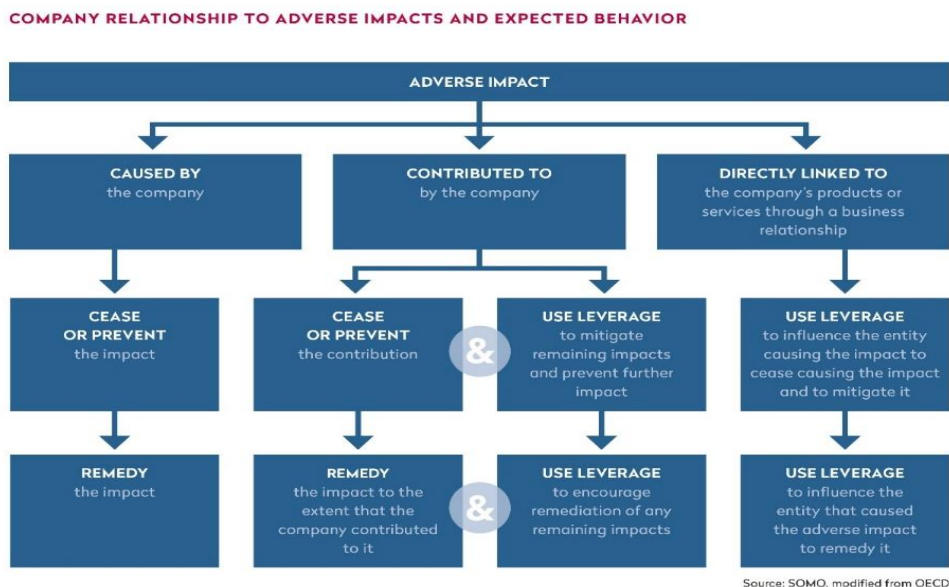
¹⁹⁰ World Bank, "Guidance note for borrowers – Environmental and Social Framework for IPF operations – ESS1", para. GN27.1(c).

¹⁹¹ AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 69 (b); and EBRD, "Project Accountability Policy" (London, 2019), para. 2.7 (a). Where the AfDB-IRM finds non-compliance, the management action plan must include "clear time-bound actions for returning the Bank to compliance and achieving remedy for affected populations."

are likely the most common in the context of development financing.¹⁹² Where adverse impacts are “linked” to a DFI’s operations, products or services by its business relationship with or through a client, the DFI should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts.¹⁹³ In this regard, the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and a DFI’s financial product or service. Rather, the link needs to be between the financial product or service provided by the DFI and the adverse impact itself.¹⁹⁴

There may well be circumstances where a DFI by its own actions or omissions has “contributed” to harms together with a client (which will be more likely where the DFI has failed to carry out adequate due diligence).¹⁹⁵ In such situations, the DFI’s Safeguard Policy should clearly state that the DFI will: (i) cease its own contribution; (ii) use its leverage with the client to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between “contributing to” and having a “direct link” to an adverse human rights impact, and a DFI’s involvement with an impact may shift over time, depending on its own actions and omissions.¹⁹⁶ Figure 1 summarises these principles, applicable to DFIs as well as their clients and investees.

Figure 1



¹⁹² [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), p. 3.

¹⁹³ UNGPs (UNGPs 13(b) and 19). For an illustration, under the EIB’s (former) 2018 safeguards: “The promoter is recommended to regularly carry out human rights due diligence in order to identify and assess any actual or potential adverse impact with which it may be involved (i.e. impacts that it may cause or contribute to as a result of its own activities or which may be directly linked to its operations, products or services by its business relationships). This is of special relevance in the case of business enterprises. As outlined in the UN Guiding Principles on Business and Human Rights, this process should: (a) draw on internal and/or independent external human rights expertise; and (b) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the of the business enterprise and the nature and context of the operation.” EIB, [Environmental and Social Standards \(2018\)](#), ESS 9, fn 45.

¹⁹⁴ [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-6. See also OECD (2018) [Due Diligence Guidance for Responsible Business Conduct](#), p. 71.

¹⁹⁵ For a discussion of relevant factors determining “contribution” to harm see [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-10.

¹⁹⁶ *Id.*

The External Review of E&S Accountability of the IFC and MIGA in 2020, framed by the UNGPs, noted that where IFC or MIGA contribute to harm they should also contribute to remedy.¹⁹⁷ The External Review and the 2019 report of the Dutch Banking Sector Agreement working group on enabling remediation¹⁹⁸ provide valuable guidance on when and how DFIs may (or should) contribute to remedy, and/or use their leverage to encourage remedy, in particular contexts. The explicit “do no harm” and sustainable development mandates of DFIs confer upon them particular responsibilities, as well as a greater range of opportunities and tools than those of commercial banks to address these issues. Remedial mechanisms could include the establishment of a fund through which the DFI could, in appropriate circumstances and proportionate measure, contribute to remedy where projects have caused or contributed to harms.

In addition to actions that the DFI and its clients could take, 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). This 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. DFIs should be encouraged to pay more attention to the remedy “ecosystem” within which claims relating to DFI-supported projects may be pursued. Analysis of the remedy ecosystem should be included within the DFI’s project-level due diligence and be a strengthened focus of technical guidance and support to clients.

5. RESPONSIBLE EXIT

The idea of “responsible exit” emerged from a growing awareness of the problems that may arise when insufficient attention is given to unresolved environmental and social issues that are still occurring as projects close down or when DFIs exit projects (whether as planned or earlier) without adequate consideration of unremediated harms. The term “responsible exit” encompasses a range of situations: routine exits at the end of a loan, to planned exits from equity investments at a designated time, to situations in which analyses of environmental and social impacts prompt DFIs to terminate their involvement early. DFIs have a critical role to play in this context. The “do no harm” mandate of DFIs means that, at a minimum, project-affected people should not be worse off as a result of DFI involvement and exit. The timing, manner and terms on which DFIs exit investments send important signals to others in the market.¹⁹⁹

The need to address environmental and social impacts after exit is reflected to varying degrees in general legal conditions for multilateral development bank sovereign financing²⁰⁰ and safeguards,²⁰¹

¹⁹⁷ IFC/MIGA [External Review](#) report (2020), Section 7.8, para. 325

¹⁹⁸ Dutch Banking Sector Agreement, Working Group on Enabling Remediation, [discussion paper](#) (Dec. 2019), pp.33-51.

¹⁹⁹ D. Rozas et al, “The art of the responsible exit in microfinance equity sales” (Washington, D.C., Consultative Group to Assist the Poor and Center for Financial Inclusion, 2014), p. 2.

²⁰⁰ The general rule seems to be that the obligations of the parties under the loan agreement (which include environmental and social obligations) terminate upon repayment of the withdrawn loan balance and other payments due. See, e.g., IBRD, “General conditions for IBRD financing: investment project financing” (2021), sect. 9.05; IDB, Loan Contract General Conditions (2021), article 11.04; and AfDB, “General conditions applicable to AfDB loan agreements and guarantee agreements (sovereign entities)” (undated), sect. 12.04.

²⁰¹ Certain multilateral development bank safeguards make clear that the client’s environmental and social obligations extend to closure or post-closure (e.g. EBRD Environmental and Social Standard 1, para. 4; and IFC Performance Standard 1, para. 4, respectively). See World Bank, The World Bank Environmental and Social Framework, para. 56: “A project will not be considered complete until the measures and actions set out in the legal agreement (including the ESCP) have been implemented. To the extent that the Bank evaluation at the time of project completion determines that such measures and actions have not been fully implemented, the Bank will determine whether further measures and actions, including continuing Bank monitoring and implementation support, will be required.” In similar terms, see IDB ESPF, para. 3.23. Other actions beyond continued monitoring and technical support may reportedly include extension of project closure and requirements for post-exit action plans. For an example, see World Bank, “Second progress report on the implementation of management’s action plan in response to the Inspection Panel investigation report (INSP/R2018-0002) on the Democratic

although there appears to be little publicly available information on how post-exit monitoring, technical support and action plans are implemented in practice. Responsible exit is the corollary of “responsible entry”, however, there appears to be a significant imbalance between the efforts expended by DFIs on upfront compliance and development impact when entering projects, compared with exit.²⁰² As will be discussed below, consideration of responsible exit should begin early, as part and parcel of responsible entry. The topic is discussed here under the “supervision” heading given that most attention to exit typically occurs as part of project supervision. But as with other dimensions of E&S risk management, the earlier that exiting is considered and planned for, the better.

While not yet reflected in most Safeguard policies (much less practice) the idea of responsible exit is gaining prominence as a consequence of the Covid-19 pandemic, which has reignited rethinking about DFIs’ responsibilities in the context of withdrawal or disinvestment in times of crisis. Moreover the climate change agenda has firmly linked the issue of equity to the issue of divestment through the concept of just transition (see Part III, Section 1 below). Other drivers of interest include: (i) increasing DFI investments in fragile, conflict affected and violent settings where risks of unremediated harms are particularly pronounced;²⁰³ (ii) high profile DFI exits where E&S issues were not effectively foreseen or addressed;²⁰⁴ (iii) project closure report evaluations which have raised questions about how Safeguard deficiencies have been addressed at closure; and (iv) complaints to IAMs about post-exit E&S risk management concerns.

The adoption by an increasing number of DFIs of the UNGPs as a relevant normative reference, along with the OECD Guidelines, may help to frame more principled and consistent approaches to exit. The UNGPs and OECD Guidelines establish clear expectations that human rights considerations should be taken into account prior to any decision to exit, and that exiting does not affect responsibilities to remedy any outstanding harms.

The main shortcomings in policy and practice on responsible exit across DFIs to date seem to be the following:

- **Lack of policy and procedures on responsible exit**

With certain exceptions, DFI Safeguards and Procedures do not generally provide guidance on the following dimensions of responsible exit: (i) planning or considering exit at the time of project approval; (ii) assessments of E&S impacts in anticipation of exit; (iii) ensuring there are no unremediated impacts on exit or putting in place steps to address unremediated impacts on exit; (iv) outlining the kinds of E&S conditions that should prompt early exit; (v) outlining the kinds of actions that could be taken outside of the transaction; and (vi) addressing reprisals in the context of exit. Safeguards typically provide that if identified non-compliance continues notwithstanding the DFI’s efforts to encourage the client to correct the course, the DFI may exercise its own contractual remedies. But this usually refers exclusively to repayment to the DFI, and does not often address Safeguard issues as part of termination or remedy to those affected by the project. Some Safeguards

Republic of Congo: second additional financing for the High-Priority Roads Reopening and Maintenance Project (P153836)” (2020), para. 7 (xxviii).

²⁰² For a more detailed discussion of responsible exit, see OHCHR, [Remedy in Development Finance](#) (2022), Chapter V.

²⁰³ While not specifically using the term “responsible exit,” the World Bank’s FCV Strategy for 2020-2025 helpfully notes that while IFC and MIGA’s leverage may be limited post-exit, they “will give due consideration to any potential adverse impacts on the community that are likely to subsist (from the project) at the time of exit.” World Bank Group Strategy For Fragility, Conflict, and Violence 2020–2025, para. 154.

²⁰⁴ The FMO and FINNFUND exit from the Agua Zarca Dam in Honduras is among the better known examples, where the project context included protracted violence against indigenous communities opposing the project and the killing in March 2016 of Lenca leader Berta Cáceres. The two DFIs conducted an independent investigation of the exit that included a review of what responsible exit would mean in the project context: Juan Dumas (Mar. 3, 2017), [A Responsible Exit from the Agua Zarca Project: Summary Of Recommendations](#), which includes (para. 1.4) an attempt to reconcile recommendations with international human rights standards. And see Bank Information Center, [How Were Communities Affected By The IFC’s Decision To Divest From The Kipoi Copper Mine?](#) (July 2021).

refer to closure and post-closure of a project but this concerns only the client's obligations and is typically limited to mining projects.²⁰⁵

Many DFIs also have in place processes to measure positive development impacts intended to benefit workers and communities. But few DFIs seem to have in place processes to ensure that development benefits are delivered even when the DFI exits. In addition, projected development benefits are usually based on the assumption that the project will be financially sustainable, and there is rarely any accountability for failure to deliver those benefits.

- **Remedy for DFIs but not project affected people**

As most DFIs do not make legal agreements available to the public, it is unclear whether standard covenants cover anything beyond contractual remedies for the DFI. When projects run into financial trouble, they are usually transferred to specialized DFI corporate recovery units which deal with distressed transactions, late payments, and restructuring.²⁰⁶ But the latter units do not usually operate with a high degree of transparency and it is hard to know to what extent E&S considerations are taking into account.

- **IAMs**

Some IAMs are able to receive complaints that arise after DFI exit, provided the complaint relates to issues arising during the DFI investment. (See Box 39) These situations may arise where the evidence of harm has taken time to surface. However, there have been very few such cases to date and, as noted in the 2020 External Review of IFC/MIGA E&S Accountability, it can be challenging to achieve satisfactory outcomes in these situations as the DFI's leverage over the client may have significantly diminished.²⁰⁷

Box 39: Emerging Practices – IAMs Mandate to Consider Complaints after DFI Exit

- The GCF and AfDB IAMs procedures permit complaints two years from the closure of the project or two years from when the complainant became aware of the harm, whichever is the later.²⁰⁸

Given the “do no harm” mandate of DFIs, a minimum expectation is that people should not be worse off as a result of a DFI's involvement in a project, or its exit. This normative premise, coupled with the reduction of DFIs' leverage post-exit, call for a more deliberate approach to planned and unplanned exits in advance, and integrating the responsible exit issue into project supervision.

DFIs should consider developing a **set of objectives for exits** that are incorporated into Safeguards, procedures, legal documentation and guidance. These could include:

- Avoid “cutting and running”, or prematurely disinvesting from challenging projects due to reputational or financial risks or concerns for the institution, without contributing to remediation and without a specific assessment of the human rights impacts of exit.
- Do not leave behind unremediated harms or, put positively, ensure as far as possible that all adverse impacts have been remedied.

²⁰⁵ See e.g, Swedish Environmental Protection Agency – UNDP Environmental Governance Programme (EGP), [Extracting Good Practices: A Guide For Governments And Partners To Integrate Environment And Human Rights Into The Governance Of The Mining Sector](#), (2018), Chapters 7-8.

²⁰⁶ See <https://www.eib.org/en/about/governance-and-structure/organisation/services/entity/tmr/index.htm>.

²⁰⁷ IFC CAO [External Review](#), p. 39.

²⁰⁸ By contrast the CAO's new procedures only permit complaints to be submitted up to 15 months after an IFC/MIGA exit, and then only in “exceptional circumstances.” IFC/MIGA IAM (CAO) Policy (2021), para. 49.

- Ensure that benefits and opportunities promised to workers and communities have been provided and that community benefits and other development opportunities will continue after the institution's exit.
- Ensure that complaints by affected people can be brought within a reasonable period (such as two years) after closure, or two years after the complainant became aware of the harm, whichever is later.
- Ensure that communities or workers are not at risk of retaliation due to exit.
- Take an active approach to seeking a responsible replacement(s) on exit, in line with appropriate policies and processes.
- Ensure as far as possible that the project continues to operate in an environmentally and socially responsible manner after the departure of the institution.

Box 40: Emerging DFI Practice - Responsible Exit

In March 2022 IDB Invest announced its decision to withdraw financing from the San Mateo and San Andrés hydroelectric projects in the Ixquis region of northern Guatemala. The Bank designed a responsible exit and institutional strengthening [action plan](#) to address non-compliance issues identified in a MICI compliance investigation. Under the Action Plan IDB Invest will create a transition plan translated into the native languages of the affected communities, as well as a gender-differentiated impact assessment, and an investment to promote financial inclusion and women's empowerment in the area. The action plan also addresses a number of structural issues and foreshadows a zero tolerance policy for gender-based violence which will be included in the contractual conditions of Bank operations.²⁰⁹

IDB: "A project's closure will not be reached until the measures and actions set out in the legal agreement (including the ESAP) have been implemented. To the extent that the Bank evaluation at the time of project's closure determines that such measures and actions have not been fully implemented, the IDB will determine whether further measures and actions, including continuing Bank monitoring and implementation support, are required and feasible."

IDB has provided guidance on addressing social impacts during the project completion phase.²¹⁰

IFC and EBRD both have long-standing guidance on retrenchment.

6. RECOMMENDATIONS

- *Safeguards should include an explicit commitment to remedy harms as a corollary of their "do no harm" mandates. Mitigation hierarches should explicitly include "remedy" and recognise that off-setting is inappropriate for human rights impacts. In OHCHR's view an appropriate formulation would be "prevent, minimize, mitigate and/or remedy."*

²⁰⁹ See <https://aida-americas.org/en/press/indigenous-victory-as-development-bank-withdraws-investment-and-drafts-exit-plan>.

²¹⁰ R. Kvam, [Social Impact Assessment: Integrating Social Issues in Development Projects](#), IDB (2018), pp. 82-83.

- *Safeguard policies should define the DFI's and client's/investee's responsibilities for remedy by reference to their respective involvement in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*
- *Remedy should be approached as an ordinary project contingency. Safeguard policies and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S impacts for higher risk projects. The DFI should set aside remedial funds as needed, taking into account its own involvement in E&S impacts, and with reimbursement rights vis-à-vis the client as appropriate.*
- *Safeguard policies and loan/investment agreements should explicitly include requirements concerning the disclosure to project-affected people of the DFI's IAM and any project-level GRM, and for active cooperation by the client with complaint processes.*
- *Where serious human rights impacts are in a client's supply chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate that they comply with Safeguard requirements or to eliminate such practices within a reasonable time frame.*
- *Analysis of the remedy ecosystem should be included within the DFI's project-level due diligence and be a strengthened focus of technical guidance and support to clients.*
- *Safeguards should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:*
 - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
 - *A clear requirement not to exit without first using all available leverage and exploring all viable mitigation options, and without assessing impacts of exit and consulting with all relevant stakeholders;*
 - *A commitment not to leave behind unremediated harms, including those arising from the exit;*
 - *A commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
 - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
 - *A commitment to seek a responsible replacement(s) for the DFI, or the client, as the case may be, on exit.*
- *Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.*
- *Safeguards should require public disclosure of termination provisions of loan agreements in order to help understand whether they require an assessment of unremediated environmental and social impacts as a condition of exit.*

GAP 1 – FINANCIAL INTERMEDIARIES

DFI financing through other private and public sector FIs²¹¹ has been rising quickly in recent years and sometimes exceeds 50% of the total investment portfolio.²¹² DFIs invest through FIs in order to support local SMEs and economic development. Local and regional FIs typically have a far broader and deeper reach into national and local economies than DFIs could ever achieve directly. DFIs' investments in FIs have become more complex over time and deploy a wide range of financing forms, including bond participations and underwriting, corporate loans, and guarantees or insurance.²¹³

The UNGPs apply to all businesses everywhere, including private sector FIs to whom DFIs lend or in which they invest. Each tier of a financial relationship has its own responsibilities and is at least “directly linked” to the next tier, in UNGPs terminology. Hence, each tier should create and use its leverage with the next tier to appropriately identify and address potential human rights impacts. Where severe impacts come to light along the finance relationship chain, even if several tiers down, leverage should be used to try to prevent and remedy human rights harms.

Similarly, many DFIs' FI Safeguard systems aim to ensure that potential harms of FI-funded sub-projects redound to and come within the scope of the DFI's due diligence responsibilities. DFIs' Safeguards usually: (i) recognise that responsibility for impacts does not stop at the DFI's doorstep but instead extends to the impacts created by using the financial services provided by the DFI; (ii) use a risk-based approach and therefore focus on higher risk FIs and sub-projects, and (iii) focus on the capacities and systems of FIs to manage impacts. DFI Safeguard requirements for FIs usually entail a focus on the FI's ESMS,²¹⁴ the application of the DFI's exclusion list, screening of higher risk sub-projects by the DFI, and the application of Performance Standards to higher risk sub-projects.

Coherence with the UNGPs is even more evident among the DFIs that take a portfolio approach to their FI lending, wherein the DFI applies its Safeguards and capacity building support across an FI's entire portfolio. In theory the latter approach offers leverage to improve FI practice across a far wider set of sub-projects than just those that may be targeted for on-lending or investment.²¹⁵ In contrast, other DFIs have been moving towards excluding the application of Safeguards to FI lending by explicitly ring-fencing the application of Safeguards to specific FI on-lending, and/or by applying thresholds that exclude ever more FI lending from Safeguard application. In such cases, DFIs explicitly assume responsibility only for relatively low-risk components of an FI's portfolio and leaving responsibility for higher risk projects to the FI, without guidance, support or supervision from the DFI. The culture of limiting the application of Safeguards in order to avoid risk or IAM procedures may not only cause a DFI to miss opportunities to improve FI capacity, but may be inconsistent with DFI mandates and call into question the value added of DFI involvement.

There are inevitably risks in FI portfolios, even in relation to SMEs in some sectors. For example, small tannery effluent can cause significant pollution, small scale factories might exploit slave labor, and microenterprise software developers can create programmes that may infringe the human rights of thousands. The DFI FI system as it stands generally operates on a binary approach, requiring

²¹¹ Such as private equity funds, banks, leasing companies, insurance companies and pension funds.

²¹² Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 5.

²¹³ Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 4.

²¹⁴ However according to the IDB Operations and Evaluation Department, the “FI has to demonstrate that it has appropriate E&S systems and procedures in place. Often this is done following approval; it is typically not a prerequisite for the approval of FI operations.” IDB Operations and Evaluation Department, [Evaluation of IDB's Work Through Financial Intermediaries](#) (2016), p. 2.

²¹⁵ Portfolio approaches are not necessarily a panacea, however. The impact (positive or negative) depends upon a range of variables including the rigour of the DFI's supervision.

observance of either: (i) national law plus Performance Standards in relation to labor for FI staff and Exclusion Lists; or (ii) the full suite of Performance Standards. This raises two concerns: firstly, that most of the FI lending may default to national law notwithstanding clear (and often widening) gaps between national legal systems compared to international human rights standards and the Performance Standards; and secondly, the system creates perverse incentives to exclude high risk projects from DFI support and scrutiny.

The scale and growing complexity of FI financing calls into question the existing (binary) approach to FI risk management, and suggests the need for a more graduated, robust system. FI disclosure requirements also seem to need strengthening.²¹⁶ These two issues (Safeguards and disclosure) could usefully be addressed together, in OHCHR's view. The central challenge is to ensure that DFI systems are appropriately set up to identify, supervise and support FIs in managing a potentially wide range of risks, and supporting their clients to manage those risks.

Other concerns with current FI risk management arrangements include:

- **Lack of specificity on human rights:** As noted throughout this study, the expectations on businesses to respect human rights are growing; and given the growing focus among financial regulators on sustainable finance, human rights are also increasingly the subject of financial regulation. DFI FI clients and sub-project clients who may be less familiar with these trends and regulations may not appreciate that general references to "E&S" are meant to cover human rights issues. FIs, much less their sub-projects, are unlikely to have the knowledge, capacity or awareness to address human rights if these are not specifically drawn to their attention. DFIs can provide capacity building support to their FI clients and sub-clients in order to help meet these evolving demands.
- **Gaps in scope of coverage.** Certain areas of finance may not be covered by Safeguards at all. Trade finance appears to be one of the larger gaps.²¹⁷
- **Lack of clarity in screening FI portfolios.** There appears to be limited public disclosure about DFIs' screening procedures and how far FI portfolios are analysed, when screening and categorising FIs.
- **Lack of clarity on requirements that apply to FIs.** FI requirements are not always clearly expressed in Safeguards, hence there may be confusion among FI clients and other stakeholders about which requirements apply. Some DFIs leave important clarifications to their procedures rather than their Safeguards,²¹⁸ while others have only general language without criteria so that the application becomes entirely discretionary for the DFI.
- **Lack of clarity or specificity on the timing for meeting requirements to develop and implement ESMS.** The ESMS is a linchpin of the FI system, hence it should be put in place immediately, or at least on a timebound target, while recognising that improvement and reinforcement of the system

²¹⁶ Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 26.

²¹⁷ It is often necessary to look different places to understand exactly which types of investments are not covered by safeguards and even then it may not be clear. For example, IFC's [Environmental and Social Review Procedures](#) (2016), para. 2.5, note the types of project for which due diligence is not required, but it is not clear whether Safeguards remain applicable.

²¹⁸ There are differences between the IFC Interpretation Note on Financial Intermediaries and its E&S Review Procedure. IFC has committed to the following changes with respect to its approach to FIs: "*Clarifying IFC application of E&S requirements for financial intermediaries (FIs)* – updating procedures to clarify the application of the Performance Standards to sub-projects by FI clients and IFC supervision of such sub-projects; introducing a web based E&S Management System (ESMS) diagnostic tool to help analyze ESMS's quality and identify gaps; implementing additional disclosure requirements; expanding FI monitoring capacity and enhanced supervision of FI projects (External Review, paras. 128, 129, 220)." [External Review: IFC/MIGA Update of Non-policy Actions](#) (undated).

may take time. Yet even among some of the leading DFIs, having a system in place does not appear to be a prerequisite for approval.²¹⁹

- **Focus on financial materiality rather than double materiality.** Safeguards are not always clear about the scope and type of DFI due diligence required for FIs, and at times not even on the objective of the due diligence. There may also be confusion about the focus of E&S due diligence. For example the IFC Interpretation Note on Financial Intermediaries seems to focus only on E&S risk to IFC and the FI, rather than on the impact of the project on the environment and people.²²⁰ If so, this implies the IFC is looking at only financial materiality rather than double materiality.
- **Lack of clarity and specificity on referrals for high-risk projects:** Given the limitations of Exclusion Lists, as discussed earlier, specific guidance on referrals for high-risk projects would be beneficial. Referral requirements seem to be of varying rigour and strength across DFIs at present: some include specific requirements in Safeguards, others have optional provisions or non-binding guidelines,²²¹ and others have no referral requirements at all. In OHCHR's view a minimum requirement, embedded in Safeguards and legal agreements, should be that high-risk projects are referred for review by the DFI. Clear criteria and illustrative examples of projects that are considered high risk and therefore subject to the DFI's pre-screening requirements would be helpful. In this regard, care should be taken that the high-risk categorisation is not limited to projects with significant environmental impacts only.
- **Layers of due diligence processes, rather than direct due diligence.** In OHCHR's understanding, it seems that the due diligence system for FI is based on a layering of multiple due diligence processes – a DFI carries out due diligence in relation to the FI's system, which carries out due diligence of the sub-project and the sub-project's due diligence. The layering typically stops at the DFI's review of the FI's due diligence. Requirements for the DFI to review sub-projects directly may be unclear. There may also be confusion in some cases about the intended focus of E&S due diligence for FIs; for example as mentioned earlier the IFC Interpretation Note on Financial Intermediaries appears to focus on E&S risk to IFC and FI, rather than on the impact of the project.²²²
- **Lack of disclosure of sub-projects to project affected people:** Information disclosure (or lack of it) concerning FI investments, including disclosure of the DFI's link to sub-projects, has been a consistent shortcoming. Without adequate information, locally affected people cannot engage the FI, the DFI, nor the IAM on the project, and their views and those of other concerned stakeholders may be screened out of decision-making.²²³ In OHCHR's view DFIs should require that FIs and their sub-projects disclose DFI funding in the sub-projects. Moreover, information about grievance redress (including the DFI's IAM) should be posted on the websites of the DFI, FI and sub-project, and made available in a manner that is visible and understandable to affected communities. The disclosure of relevant information also has implications for access to remedy, as without such information, communities may not know that they have alternative avenues to seek remedy for

²¹⁹ Supra, footnote 214 and accompanying text.

²²⁰ IFC [Interpretation Note Financial Intermediaries](#) (2018) paras. 10.

²²¹ See for example EIB, *Environmental, Climate and Social Guidelines on Hydropower Development (Hydropower Guidelines)* (2019). As noted by CEE Bankwatch, "the Guidelines contain very useful sections and requirements such as the referral of hydropower projects financed via financial intermediaries to the EIB for due diligence, public disclosure of hydropower projects by the financial intermediary, and the importance of a strategic approach to hydropower (i.e. that the impacts should be assessed first at the level of the river basin and only later at the project level)." However unlike safeguard policies, the Guidelines are not binding on EIB or its FI clients. CEE Bank Watch, et. al. [Why can a third of European Investment Bank lending evade the Bank's E&S rules? The EU's house bank must tighten its intermediated lending standards.](#) (Sept 2021).

²²² IFC [Interpretation Note Financial Intermediaries](#) (2018) paras. 10.

²²³ Oxfam (2018) [Open Books: How development finance institutions can be transparent in their financial intermediary lending and why they should be.](#)

sub-project impacts through the DFI's IAM. Despite the consistent demands along these lines, even some of the more recent Safeguards do not require such disclosure,²²⁴ while others are breaking new ground on disclosure. (See Box 41 on FI Disclosure).

Box 41: Current State of Practice on DFI FI Disclosure

This summarises several points from Publish What You Fund's multi-year analysis of DFI transparency, Working Paper on Financial Intermediaries, published in 2021:²²⁵

- Generally, **disclosure of E&S risks and accountability mechanisms is poor.**
- Information about **E&S risks and accountability at FI sub-projects is essentially non-existent.**
- Disturbingly, from a human rights point of view, the survey was **“unable to identify any assurance of community disclosure across the FIs in our landscape analysis.”**²²⁶
- **Transparency about the DFI's IAM was very limited.** Only four multilateral DFIs were found to disclose the presence of an IAM on each of their FI investment project pages but again, significantly, there was no assurance of community disclosure of IAMs across the FIs in the landscape analysis.

Emerging DFI Good Practice on Requirements for FI Disclosure

Green Climate Fund

- Requires the most comprehensive disclosure – it requires disclosure information on E&S impacts in advance of decisions by the FI to fund for all sub-projects.²²⁷
- IFC has committed to making the following disclosures:²²⁸
 - All sub-projects supported via its private equity fund clients;
 - A description of the FI's ESMS;
 - Specified FI investments must report publicly on an annual basis for high-risk (Category A) and selected medium-risk (Category B) sub-projects that meet certain thresholds. Information to be reported includes name, sector, location by city, and sector for sub projects funded by the proceeds from IFC's [investments].

EBRD

*FIs will also publicly disclose information on the E&S risks of any sub-project referred to EBRD in accordance with paragraph 15 of this PR and the proposed mitigation measures to address such risks, subject to applicable regulatory constraints, market sensitivities or consent of the sponsor of the sub-project.*²²⁹

²²⁴ For example EIB [Social and Environmental Standards](#) (2022), Standard 6 – Intermediated Finance, paras. 7-12, reflect relatively general requirements regarding information disclosure and EIB supervision, subject to broadly worded discretions. Paradoxically, and contrary to E&S risk management objectives, requirements for FI operations in non-EU countries are guided only by the variable (and often weak) content of national law, rather than EU or international law.

²²⁵ Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021).

²²⁶ *Id.*, p. 26.

²²⁷ CEE Bankwatch et. al. [Why can a third of European Investment Bank lending evade the Bank's E&S rules? The EU's house bank must tighten its intermediated lending standards.](#) (Sept 2021): “The Green Climate Fund is the clear leader in this field and requires the disclosure of all sub-projects.”

²²⁸ Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 40.

²²⁹ EBRD, PR 9.

AIIB

In the case of an FI Project, disclose E&S information as follows:

21.1 FI Policy Overview. Disclose an overview of the FI's E&S policy and of the ESMS, including information on the IAM applicable to the Project and activities;

21.2 Private Equity Funds. In the case of an FI project involving a private equity fund, disclose the name, location and sector of the Client's portfolio companies supported by the Bank's financing within 12 months following financial closure of the investment; and

21.3 Higher Risk Activity E&S Documentation.

(a) For each Category A activity supported by the Bank under an FI Project, disclose the draft E&S assessment reports and documents referred to above in Section 20.1, Draft E&S Documentation, at least sixty (60) calendar days prior to final approval of the activity for inclusion in the Project. The Bank's Management may decide, based on the specific nature and scope of the FI project and the E&S risks and impacts of the activity, that a longer or a shorter disclosure period is appropriate.

(b) Disclose annual E&S documentation for all other Higher Risk Activities financed by the Bank under the Project during the preceding 12 months, unless such disclosure is subject to regulatory constraints, market sensitivities or consent of the sponsor, in which case, disclose the reasons for nondisclosure.²³⁰

- **Engaging with stakeholders on monitoring:** FI clients are typically required to submit annual monitoring reports, but there may be little in FI Safeguards about how those monitoring reports are to be prepared. Moreover there are often no requirements to engage with stakeholders for inputs into the monitoring the report, without which detailed insights into many serious impacts is not possible, and there may be no specific linkages to grievance mechanisms. Higher risk sub-projects typically do require review by an independent third party, which is an important step forward, and newer Safeguards may require that the DFI and experts have access to sub-project sites. But specific requirements for experts to engage with stakeholders in preparing their reports are less common.
- **Improving monitoring including through “red-flags” or warning systems for higher risks:** A number of DFIs are developing more in-depth E&S rating systems to help them monitor E&S risks more effectively on an on-going basis. In OHCHR's view, these should be adapted to apply to FIs, if this is not already the case.
- **Link positive, development impact work to Safeguard approaches:** DFIs often have sophisticated systems to monitor the positive impacts of their on-lending. As noted above, these do not often seem to be connected to Safeguard work, and to that extent may generate an incomplete or unbalanced picture of E&S impacts.
- **Strengthening access to remedy in FI Sub-Projects.** DFIs' Safeguards are generally weak on grievance mechanism requirements for FIs,²³¹ particularly compared to relatively clear and robust requirements concerning operational level grievance mechanisms for direct investments. Recent Safeguards have reflected some improvements in this area.²³² The 2020 External Review of E&S

²³⁰ AIIB ESF (2021).

²³¹ One of the exceptions is IFC (November 2018) [Interpretation Note on Financial Intermediaries](#) following a CAO compliance review of IFC's FI policy and practices.

²³² See e.g. AIIB: “For FI Projects, establish: (a) procedures for employees (and contractors) to submit grievances, including anonymously; (b) a mechanism to address concerns of relevant Project stakeholders related to the FI's ESMS

Accountability of IFC/MIGA recommended that the IFC ensure that their clients “provide information to affected communities both about the client’s grievance mechanism and about CAO [IFC’s accountability mechanism]” including for “FI sub-projects.”²³³ These are vital analytical and operational gaps to fill if more claimants are to have access to remedy in practice. Normative developments and evolving commercial incentives may already be stimulating progress. For example, the Equator Principles Banks are reported to be considering establishing a grievance mechanism, as are a number of commercial banks, and accredited entities of the Green Climate Fund (which include commercial banks) are required to do so. ADB has carried out a groundbreaking initiative to provide guidance for FIs in the People’s Republic of China and certain other Asian countries (See Box 42). FIs may require guidance on the differences between grievance mechanisms and more traditional whistleblower hotlines and mechanisms dealing with corruption and legal compliance issues that they may already have in place.²³⁴

Box 42: Emerging DFI Practice on Grievance Redress Mechanisms

Green Climate Fund on GRMs

The GCF requires each “accredited entity” (financial institution) to have an institution-level GRM that complies with the UNGPs.²³⁵

ANZ and ABN AMRO

In November 2021 ANZ launched a Grievance Mechanism Framework to evaluate and respond to human rights-related complaints relating to its corporate lending customers.²³⁶ As of 2020 ABN AMRO was testing a grievance procedure aiming to enable remedy for people harmed by its corporate clients.

ADB project on an Accountability Mechanism Framework for FIs from the People’s Republic of China

The ADB’s IAM developed an “Accountability Mechanism Framework” (AMF) with other partners focused on enhancing E&S compliance and accountability for Asian FIs, particularly Chinese FIs, as well as Indian and Indonesian financial institutions.²³⁷ The ADB released two versions of the AMF: one for all FIs (“General AMF”)²³⁸ and one specifically for Chinese financial institutions (“Chinese AMF”).²³⁹ The reason for the different versions is not apparent from publicly available documentation. CSOs have pointed to gaps in the AMF while also noting that it represents “a strong step in the right direction” given the relative dearth of accountability mechanisms in Chinese commercial and state institutions despite their prominent role in international finance.²⁴⁰

implementation; and (c) a requirement that a GRM be established for Bank supported activities as described above in Sections 2.20, Project-level Grievance Redress Mechanisms, and 2.21 of this ESS 1.”

²³³ IFC CAO [External Review](#) (2020), p.100.

²³⁴ See e.g. <https://www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021/>.

²³⁵ GCF, ESP, para. 12(c). The GCF-IRM also has a mandate to build the capacity of the GRMs of Direct Access Entities (national and regional FIs).

²³⁶ See <https://www.anz.com.au/about-us/esg-priorities/fair-responsible-banking/human-rights/>.

²³⁷ See <https://www.devdiscourse.com/article/business/531149-adb-to-develop-accountability-mechanism-framework-to-manage-social-risks>; and <https://www.adb.org/projects/53140-001/main#project-pds>; and <https://www.adb.org/projects/53140-001/main#project-documents>.

²³⁸ See https://www.adb.org/sites/default/files/project-documents/53140/53140-001-tacr-en_0.pdf.

²³⁹ See <https://www.adb.org/sites/default/files/project-documents/53140/53140-001-tacr-en.pdf>.

²⁴⁰ See <https://www.accountabilitycounsel.org/2019/11/news-of-progress-in-the-movement-to-advance-accountability-for-chinese-overseas-finance/>.

Box 43: BankTrack & Oxfam Australia Guidance on developing effective grievance mechanisms in the banking sector

This guidance builds the business case for grievance mechanisms at FIs, surveys the current landscape, and sets out guidance for FIs on how to develop grievance mechanisms. It also sets out clear expectations from CSOs about how these mechanisms should be established and operated.²⁴¹ An FAQ addresses common questions arising in practice.²⁴²

RECOMMENDATIONS

- *Safeguard policies for FI operations should require:*
 - *disclosure of an overview of the FI’s E&S policy and of the ESMS;*
 - *compliance with international law, national law, and the DFI’s Safeguards, whichever sets the most stringent standards;*
 - *time-bound disclosure of the name, sector and location of DFI sub-projects on the DFI’s and client’s website, prior to the FI operation’s approval;*
 - *DFI approval of high-risk sub-projects, and referral of higher-risk projects for DFI due diligence and monitoring;*
 - *referral of serious E&S incidents (including potential human rights abuses) to the DFI within a fixed time limit (such as a maximum of 3 days);*
 - *clear supervision requirements for the DFI, including site visits and/or third party monitoring for high-risk sub-projects;*
 - *clear requirements regarding stakeholder consultation in connection with client monitoring reports for sub-projects;*
 - *the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and*
 - *disclosure at the project site of the DFI’s involvement in sub-projects, and of the existence of the DFI’s IAM and project-level GRM, ensuring that this information clearly visible and understandable to affected communities.*

GAP 2 – OTHER INSTRUMENTS

1. DEVELOPMENT POLICY FINANCING

DFIs typically have a range of instruments for lending to sovereign governments. For example the World Bank’s Development Policy Financing (DPF) provides credits, loans, grants or guarantees to a borrowing country through non-earmarked budget support. DPF provides finance directly to a

²⁴¹ See

https://www.banktrack.org/download/developing_effective_grievance_mechanisms_in_the_banking_sector/2018_pa_002_bank_report_faweb2_3.pdf.

²⁴² See https://www.banktrack.org/blog/frequently_asked_questions_about_banks_and_grievance_mechanism.

borrowing country's general budget conditioned on implementing specified policy or regulatory reforms (called "prior actions"). DPF, also called Development Policy Loans (DPLs), are a popular instrument with DFIs as well as client countries given their relative flexibility, quick disbursement into finance ministries, light administrative costs and the large volumes of financing involved. Subject to the considerations outlined below, DPLs may help to tackle systemic problems that lead to poor environmental or social outcomes at the investment project level.

DPLs are discussed here for three main reasons:

(i) DPLs can have significant impacts – positively and negatively – on human rights.

- DPLs may cover a wide range of sectoral reforms that directly impact human rights – health, education, justice, housing, food security, labor reforms, and so forth. The distributional impacts of DPLs may also (indirectly) affect many human rights, through changing access to services, impacts on social capital and cohesion, and as a result of deregulation, privatization, and other policy conditions.²⁴³ Fiscal consolidation and austerity measures linked to IFI conditionalities may increase inequalities and undermine other human rights.²⁴⁴
- If done well, the analytical work underpinning DPLs should identify problems such as those highlighted above and propose appropriate mitigation measures.²⁴⁵ But appropriate analysis is not always carried out, and human rights issues are not necessarily included. Analytical resources to help understand impacts of policy reforms tend to be under-utilised in practice and, with some exceptions,²⁴⁶ may not help to understand whether mitigation measures for those policy reforms are likely to be effective. Moreover existing policies do not always adequately address *ex post* monitoring or evaluation requirements, and hence social and environmental impacts may not be identified, mitigated and remedied after a policy action is implemented.
- DPLs or other budget support operations provided to governments involved in wide scale human rights abuses may inadvertently reward those reliably accused of human rights violations, perpetuate exclusionary policies, and deepen the cycle of violence (See Box 44).

Box 44: Case Example Budget Support to Myanmar 2020

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 to the present date, and other large-scale violations throughout the country following 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 2019 [report](#) of the UN Independent International Fact-Finding Mission on Myanmar (IFFM) 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,

²⁴³ See e.g. World Bank, Independent Evaluation Group (2015) [Managing E&S Risks in Development Policy Financing](#), p. 63: "Though the main effects of policy reforms will likely be positive, there is also the possibility of unintended negative effects, or "risks": a policy aimed at increasing investment in mining by adjusting royalty rates could lead to expanded mining with associated damage to landscapes and pollution of waterways; reduction of energy subsidies might place a financial burden on the poor. The significant E&S effects of policies can be indirect and long-term, as well as direct and short term." See also C. Mariotti, [The policy lending doctrine Development Policy Financing in the World Bank's Covid-19 response](#), EUROADAD (Sept 2021), p. 3.

²⁴⁴ See e.g. I. Ortiz et al., ['The Decade of Adjustment: A review of austerity trends 2010–2020 in 187 countries'](#), International Labor Organisation, 2015.

²⁴⁵ See e.g. World Bank and UNCEF, [Integrating a Child Focus into Poverty and Social Impact Analysis \(PSIA\)](#), (2011).

²⁴⁶ Notably, the ADB requests a matrix of social and environmental impacts and mitigation measures if a policy change is found to bring social or environmental risks.

insurance, tourism and banking – owned by two Tatmadaw conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), which in turn were owned and influenced by senior Tatmadaw leaders allegedly responsible for serious violations of international human rights and humanitarian law. The FFM underscored the importance of ensuring that external financing supports alternative SMEs unaffiliated with the two conglomerates and the Tatmadaw.

In September 2020 ADB approved a budget support operation, the COVID-19 Active Response and Expenditure Support program (CARES),²⁴⁷ for Myanmar. Support to SMEs was foreseen within this budget support operation, although safeguard measures to avoid supporting SMEs identified in the FFM's report were not apparent on the face of publicly available documentation. The project was allocated only a "C" safeguards rating, justified by the limited discernible impacts on resettlement or indigenous peoples. However it is not clear if or how this rating took into account wider contextual risks in the country or the potential for high-volume, fast-disbursing financing to facilitate gross human rights violations in this particular context. The extensive control of the Tatmadaw over the national economy, and the possibility of this kind of financing benefiting actors credibly implicated in the commission of international crimes, would also seem to have justified a different and more contextual approach to E&S risk assessment, and the highest possible E&S risk rating.

(ii) The systems in place to address the E&S impacts of DPLs are not as robust or effective as those for more traditional investment projects:

- With the exception of the ADB which applies its Safeguards to all lending,²⁴⁸ other DFIs do not generally apply their Safeguards to DPLs. Within existing DPL policies there seem to be some potentially significant gaps²⁴⁹ and less rigorous systems for reviewing the E&S impacts of these types of operations.
- In the absence of clear, specific Safeguard requirements for DPLs, E&S risk management is often left to national laws and policy frameworks which are often considerably weaker than the Safeguards of the leading DFIs.
- Given the complexity of DPLs, their associated reforms and attribution of results, it is challenging to understand the extent to which prevention and mitigation steps are effective.²⁵⁰

(iii) Accountability for DPLs:

- A lack of participation and accountability is a key concern, given the scope and relative speed of DPL financing operations and their potentially significant impact on a country's policy space.²⁵¹ The challenges to effective participation are compounded given the pervasive and potentially diffuse E&S impacts of this type of operation. Additional capacity building and technical support may be required to enable stakeholders to engage meaningfully in understanding and providing feedback in relation to potential reforms. An evaluation in 2018 of the Bank's work on citizen engagement found, in a sample of DPOs reviewed, that when consultation did occur it focused

²⁴⁷ ADB, [COVID-19 Active Response and Emergency Support Program](#) (Sept. 2020).

²⁴⁸ ADB Evaluation (2020), para. x.

²⁴⁹ See e.g. H. Himberg (May 2015), [Comparative Review of Multilateral Development Bank Safeguard Systems](#), pp.6-10; and IDB ESPF (2020), para. 4.8.

²⁵⁰ The World Bank conducted a [DPL retrospective in 2021](#) covering the period 2016-2021 and sought [stakeholder reflections on the retrospective](#).

²⁵¹ Bretton Woods Project, "Development Policy Finance: Critical concerns surrounding accountability and outcomes for people and the climate," (March 2021).

mostly on the given country's national development plan or poverty reduction strategy rather than the specific policy reforms at issue.²⁵²

- Given the lack of any grievance mechanism requirements, unlike the case of investment projects, there is no obvious channel through which stakeholders may raise concerns about DPLs. DPLs have sometimes been accompanied by project-level grievance mechanisms.²⁵³ However it is difficult to assess how widespread this practice is and what the impacts have been to date.
- Importantly, most IAMs are formally authorised to receive complaints about DPLs.²⁵⁴ However there can be numerous challenges in bringing complaints: (i) sophisticated conceptual and analytical work may be needed in order to understand whether policy reforms are likely to have a negative impact and whether mitigation steps proposed to address those impacts are likely to be effective; (ii) claims are likely to be based on anticipated harm, where the causal connection between policy and harm can be difficult to prove; and (iii) DPLs may disburse quickly, and sometimes in only one tranche, resulting in a short period of time between project approval and closure in which complaints may be filed.

2. USE OF COUNTRY SYSTEMS

One of the notable recent trends in development financing is the increasing use by DFIs of national E&S risk management frameworks (“country systems” or “borrower frameworks”), in whole or part, instead of the DFI’s own Safeguards. The logic of using national systems is intuitively compelling and forms part of a larger package of aid reforms embodied in the 2005 Paris Declaration on Aid Effectiveness and Global Partnership for Effective Development Co-operation (GPEDC).²⁵⁵ The Declaration commits donor countries to “[u]se country systems and procedures to the maximum extent possible, and where use of country systems is not feasible, establish additional safeguards and measures in ways that strengthen rather than undermine country systems and procedures.”²⁵⁶ But striking a prudent balance between “using” and “strengthening” country systems can be challenging in practice.

In assessing the feasibility of using country systems, DFIs usually compare the E&S regulatory framework of a member country with the requirements of the DFI’s own Safeguard requirements (equivalence), and assess the country’s implementation track record and capacity to apply the framework (acceptability).²⁵⁷ But DFIs do not necessarily assess equivalence by the same metric. For example, some DFIs (such as IDB) stipulate an ostensibly strong “functional equivalence” test,²⁵⁸ whereas others apply looser and more aspirational tests, such as requiring that the borrower’s framework “enable the project to achieve objectives materially consistent” with the DFI’s Safeguards.²⁵⁹

²⁵² World Bank Independent Evaluation Department, [Engaging Citizens for Better Development Results](#), (2018), p. 18.

²⁵³ See e.g. World Bank (2014) [Global Review of Grievance Redress Mechanisms in World Bank Projects](#), p.10.

²⁵⁴ For a striking example of the potential benefits of recourse to IAMs in this context see 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), an investigation which reportedly contributed greatly to the recognition and protection of indigenous peoples’ rights in the DRC.

²⁵⁵ See <https://www.oecd.org/dac/effectiveness/>.

²⁵⁶ *Id.*

²⁵⁷ ADB Evaluation Department (2014), [Safeguards Operational Review: ADB Processes, Portfolio, Country Systems, and Financial Intermediaries](#). The World Bank’s 2005 Operational Policy 4.00, on “Piloting the Use of Borrower Systems to Address E&S Safeguard Issues in Bank-Supported Projects” used this approach as has ADB.

²⁵⁸ IDB, ESPF (Sept. 2020), para 5.1: “The IDB may consider the use of the Borrower’s E&S 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).”

²⁵⁹ World Bank ESF Policy, para. 23.

There has been a clear tendency towards pragmatism²⁶⁰ insofar as the use of national E&S frameworks is concerned. Pragmatism is of course not inherently problematic, however the uncritical use of country systems may raise a range of human rights concerns:

- Country systems regulating social issues are often relatively weak and diffuse (see Box 45), and for many social (including human rights) issues, the *commitment* gap is often a larger problem than the *capacity* gap.
- It is unclear if or how far DFIs' country system assessments include analysis of available grievance redress mechanisms and regulatory requirements pertaining to remediation and enforcement of remedial outcomes.²⁶¹ To the extent that DFIs are overlooking these issues, they may be foregoing potentially important opportunities to help State-based judicial and non-judicial mechanisms better deal with grievances common to DFI-supported projects within their jurisdiction.
- An unduly transactional approach to strengthening country systems through individual investment projects may encourage a disproportionate and limited focus on project approval requirements at the expense of addressing longer-term, systemic accountability challenges.
- It is unclear who would be responsible and what the consequences would be if a country system gap analysis is wrong and no Safeguards are applicable.

Box 45: AfDB Equivalence Study Scores Low on Social Themes

In 2015, the AfDB carried out a detailed equivalence analysis between AfDB safeguards and six country systems. It concluded that (i) there was a strong correlation between each country's level of governance and socio-economic development and the performance of the E&S country system; (ii) the degree of equivalence of country systems was particularly low for the policies on involuntary resettlement and working conditions; and (iii) there were no legal/regulatory provisions or local expertise on most social themes (gender, working conditions, vulnerable groups, etc.).²⁶²

3. PROGRAMMING FOR RESULTS / RESULTS BASED LENDING

Results-based lending (RBL) or programming for results (P4R) provides funding to the public sector for results accomplished rather than on the basis of inputs. This is a type of performance-based financing where disbursements are linked to the achievement of results which are in turn measured by disbursement-linked indicators (DLIs). The objective is to focus on what is important and to provide governments flexibility in how they achieve those outcomes.

RBL and P4R can be important in incentivising and strengthen the efficiency and effectiveness of government-owned programs. These loans can strengthen country systems and stimulate sector-wide improvements and institutional development, and their effects can be positive and tangible. However, a number of concerns have been raised on procedural and substantive levels:

- (i) **Accountability:** Similar to DPLs, the quick disbursing nature of RBL/PFR loans makes it more challenging for affected stakeholders to even be aware of these operations, to understand them and

²⁶⁰ ADB Evaluation Department (2020), p.xxxvi, para. 13; and p.111, para. 309.

²⁶¹ There does seem to be some level of review in World Bank Programme for Results reviews, see <http://documents1.worldbank.org/curated/en/624411468140040506/pdf/951230BR0R2015020Box385454B000U0090.pdf>, p. 28-29.

²⁶² African Development Bank Group (2015), [Assessment of the use of "Country Systems" for E&S safeguards, and their implications for AfDB-financed operations in Africa](#). See also AfDB Independent Development Evaluation (Sept. 2019), supra, p.42. See also University of Wyoming International Human Rights Law Clinic, [Social Trends Analysis for Selected Countries in Latin America and the Caribbean](#) (Apr. 20, 2020).

to participate in consultations. And as with DPLs, windows to bring complaints to IAMs may be very short.

(ii) **Safeguards:** There have been debates about whether and how Safeguards should apply to this type of lending.²⁶³ The World Bank's P4R programme uses a country's own institutions and processes. P4R operations are meant to provide "assurance that Bank financing is used appropriately and that the program's environmental and social aspects are addressed."²⁶⁴ It specifically excludes from P4R lending activities that have potentially significant and irreversible impact on the environment and affected people. This has been critiqued by some as overly risk averse, resulting in missed opportunities to work with governments to improve systems.²⁶⁵

In contrast, ADB applies its Safeguards to its RBL operations. Recently updated procedures allow RBLs "unless they are likely to have significant adverse impacts that are sensitive, diverse, or unprecedented on the environment and/or affected people."²⁶⁶ Hence, like the World Bank, the ADB effectively excludes Category A projects from RBL, but unlike the World Bank, such operations are subject to a Safeguards review. DLIs are linked to "actions or process results that are essential for strengthening RBL program performance, such as actions to improve ... social and environmental systems."

ADB has indicated that it will strengthen its Safeguard assessment process "to include detailed consideration of broader programmatic, institutional, and contextual risks for the RBL program."²⁶⁷ This is an important commitment, given that programmatic areas – such as education, health, water, social protection, urban management, and housing – have direct human rights implications. For example the UN Special Rapporteur on the Right to Adequate Housing has drawn attention to concerns about impacts of DPLs on housing affordability, location, tenure security and the availability of services.²⁶⁸ The same concerns could apply to RBLs where attention to the different dimensions of the right to adequate housing in government programmes is lacking. Moreover, even if sub-projects under an RBL operation are relatively small-scale, their cumulative impacts may be large.²⁶⁹ Dedicated Safeguards expertise is needed in order to effectively address these challenges.²⁷⁰

4. RECOMMENDATIONS

- *DFI's Safeguards should specify 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 DFI's Safeguards.*

²⁶³ A. Gelb & N. Hashmi, [The Anatomy of Program-for-Results: An Approach to Results-Based Aid](#), (2014). Center for Global Development Working Paper No. 374.

²⁶⁴ See <https://pubdocs.worldbank.org/en/904551435264587829/PforR-brochure.pdf>.

²⁶⁵ De Nevers, [New Approach to Managing Environmental and Social Risks in World Bank Programs](#), Center for Global Development Blog (Aug 8, 2016).

²⁶⁶ ADB, [Operations Manual – Policies and Procedures](#) (2021), Section D18.

²⁶⁷ ADB, [Mainstreaming the Results-Based Lending for Programs](#) (2019).

²⁶⁸ UN Special Rapporteur on Adequate Housing, [Submission to the World Bank's Safeguard Review and Update Process \(Phase 1 – Public Consultation\)](#) (2013), p. 14.

²⁶⁹ ADB Independent Evaluation Department (2017) [Results-Based Lending at the Asian Development Bank: An Early Assessment](#).

²⁷⁰ ADB Evaluation (2020) para. 124: "To date most of the emphasis has been on supporting RBL preparation and relatively little attention has been paid to safeguards during implementation. However, implementation of RBL programs needs to be different from the compliance-based approach used in stand-alone projects. Field-level monitoring and an independent verification agency with safeguard expertise is essential for all RBL programs that trigger safeguards."

- *International human rights law and information from UN human rights bodies should guide DFIs' assessments of the functional equivalence of country and client social and environmental management systems. The latter assessments should be publicly disclosed.*
- *Development policy financing operations should be covered by Safeguards. E&S risk classification, assessment and management should be informed by contextual risk analysis, taking into account human rights information sources. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints.*
- *Results-based lending operations should be covered by Safeguards and informed by contextual risk analysis, taking into account human rights information sources, at all stages of the project cycle. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints. High risk operations should be excluded.*

DRAFT

This section highlights three emerging substantive issues that do not yet seem firmly to be on the DFI Safeguard agenda, and one topic that is rapidly moving to centre stage – climate change. This is obviously not a comprehensive list; for example as more DFIs move into financing the “Blue Economy,”²⁷¹ it may be worth exploring whether Safeguards are suited to address E&S risk management requirements in the marine environment. However the selection of issues in this Part reflects OHCHR’s sense of where needs and opportunities seem particularly clear and compelling.

1. THE SOCIAL DIMENSIONS OF CLIMATE CHANGE

DFIs have taken a wide range of initiatives to address the climate change crisis. Numerous DFIs have adopted climate change strategies, and in 2022 the EIB adopted a self-standing Social and Environmental standard on climate change.²⁷² Others might be expected to follow suit, in order to give prominence to the issue, in contrast to the limited visibility and requirements in most existing Safeguards.

Climate change is and will continue to have a profound impact on a range of human rights.²⁷³ The impact is often borne disproportionately by persons and communities already in disadvantageous situations owing to geography, poverty, gender, age, disability, or cultural or ethnic background, among others, and who have historically contributed the least to greenhouse gas emissions.²⁷⁴ As DFIs develop Safeguards addressing climate change issues, there are several points to consider:

- **Include consideration of the social impacts of climate change.** This should include direct impacts of climate change on people, as well as the impacts of mitigation and adaptation measures, to ensure that the latter measures are rights-respecting.
- **Acknowledge and commit to a just transition approach to addressing climate change.** In order to address climate change successfully, “net zero” transitions must be designed in a manner that is fair and seen to be fair, across regions, sectors, socioeconomic differences and generations. The “just transition” expresses the idea that people, and human rights, should be at the centre of the climate change transition. The just transition vision is a transformational one, aimed at creating opportunities as the world shifts to resource-efficient, inclusive economies through green technology, sustainable industry and transport, pollution reduction, and creating decent jobs in the process, and in doing so, addressing poverty and inequality. Several DFIs have already committed to take actions towards a just transition (See Box 46).²⁷⁵
- **Link Safeguard actions concerning climate change to requirements to address biodiversity, ecosystem services and pollution.** These “triple threats” to the environment should be linked in order to ensure that they are addressed coherently, given their cumulative impacts. From a human rights perspective it is important that impacts on ecosystem services, which are relied upon by so many local communities around the world, are an integral part of due diligence.

²⁷¹ See e.g. [joint ADB-EIB programme to support the blue economy](#).

²⁷² EIB, [Social and Environmental Standards](#) (2022), Standard 5 – Climate Change.

²⁷³ See <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/AboutClimateChangeHR.aspx>.

²⁷⁴ See <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/AboutClimateChangeHR.aspx>.

²⁷⁵ [MDB Just Transition High-Level Principles](#).

Box 46: DFI Principles on Just Transition

In advance of the Conference of the Parties to the UN Framework Convention on Climate Change in 2022, a group of multilateral DFIs developed a set of principles “to help guide MDB support for a just transition, and to ensure consistency, credibility, and transparency in their efforts.”²⁷⁶

Principle 1: aims to deliver climate objectives while enabling socio-economic outcomes, accelerating progress towards both the Paris Agreement and the SDGs;

Principle 2: focuses on moving away from GHG emissions-intensive economic activities;

Principle 3: builds on existing MDB policies and activities that aim to deliver long-term, structural economic transformation;

Principle 4: seeks to mitigate negative socio-economic impacts and increase opportunities associated with the transition to a net zero economy, support affected workers and communities, and enhance access to sustainable, inclusive and resilient livelihoods for all;

Principle 5: encourages transparent and inclusive planning, implementation and monitoring processes.

2. DIGITAL RIGHTS²⁷⁷

Digital technology is of critical importance in the global economy, and impacts upon people’s lives positively as well as negatively, in a growing number of ways.²⁷⁸ Digitalisation is becoming a central component of development, and it is critical to develop Safeguards which can identify and address the environmental, social and human rights impacts in this area.

The digital sector has mostly enjoyed a positive image to date, buoyed by narratives of digital “leapfrogging”, big data, digital inclusion and economic prosperity, and the power of data and digital technologies to transform lives. The presence of digital technologies in our lives is commonly portrayed as both desirable and inevitable. However the implications of digitalisation are not always easy to grasp,²⁷⁹ and digital transformations have brought a range of challenges ranging from governance, to use and misuse of new technologies.

There are several reasons why further attention to the impacts of the digital dimensions of DFI-funded projects is necessary: (i) numerous DFIs have adopted recent strategic objectives and plans on improving digital infrastructure and services indicating this will be an area of increasing focus; (ii) in addition to this specific sectoral focus, almost all projects now include some (and often significant) digital components.²⁸⁰ Digital technologies are particularly prevalent in projects in infrastructure, health, education, finance, and digital ID or public administration and rising in other sectors, such as agriculture; and (iii) DFIs are increasingly funding broad, system-level projects that extend across sectors (e.g., digitization of public administration) and funding of entire digital systems.

²⁷⁶ [MDB Just Transition High-Level Principles](#).

²⁷⁷ OHCHR expresses its thanks to Professors Grainne de Burca and Angelina Fisher and the NYU Law School’s International Organizations Clinic for the research and analysis underpinning this discussion. The Clinic’s research covered projects financed by ADB, AIIB, EBRD, EIB and IDB.

²⁷⁸ See generally OHCHR [Btech Project](#).

²⁷⁹ T. Dufva & M. Dufva, [Grasping the future of the digital society](#), Vol. 107 *Futures* (2019), pp.17-28.

²⁸⁰ See [Digital Development Overview: Development news, research, data | World Bank](#). Projects that do not initially appear to include a digital element or to raise digital concerns, like agricultural projects, may in fact entail significant digital risks. See e.g. [Emergency Locust Response Program](#), employing digital surveillance technologies to track the movement of locusts across four west African countries.

Because of their breadth, system-based projects give the public or private sector recipient broad discretion about how the project is implemented but also about how much information about the effects of the digitalisation is publicly disclosed. Such projects are likely to affect nearly every individual within the country, making everyone potentially vulnerable to some harm.²⁸¹ Such projects by their nature fundamentally alter the relationship between the state and the public and in doing so will impact their respective rights and obligations beyond those immediately impacted by the digitization of certain administrative functions.

Where DFIs have begun to explicitly identify risks specific to digital projects, they have so far tended to focus on privacy, data protection, and cyber security – but only in limited number of projects and on a relatively *ad hoc* basis. However, the risks associated with digitalization go far beyond these issues and can throw up a wide range of risks as noted in Box 47 below. The technologies themselves are often opaque regarding the type of data that is collected and how collection is done, how data is processed and analysed, and how it will be put to use, creating barriers to accountability and a potentially unreasonable burden of proof. While some impacts are obvious, such as when a government orders a shutdown of the internet, most impacts will be far less obvious, even to the well-informed.²⁸²

The lack of transparency in how and by whom digitalization is implemented and the opaque nature of technologies themselves (e.g., undisclosed algorithms, nontransparent data collection and use practices) mean that even grave potential harms are not always immediately evident or easy to identify. These impacts can go well beyond the project level, and may trigger broad chilling effects on the freedoms of speech and assembly as highlighted below. The list of impacts below is not exhaustive, but illustrates how a wide range of human rights can be impacted by projects already being financed by DFIs, across the different phases of the data cycle (collection, storage, use/reuse). The list does not include the types of environmental impacts that current Safeguards might identify (such as energy use and GHG emissions), but for demonstrative purposes focuses explicitly on human rights impacts.

Box 47: Human Rights Impacts in DFI Funded Projects with Digital Components

- Exclusion by sensors of particular population groups (such as fingerprint sensors failing to register manual laborers, or facial recognition biases according to skin colour), exclusion bias in data standards or formats (for example, data collection through binary “male/female” gender classifications) that determine access to public services.
- Collective violations of the right to 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.
- Exclusion from public services due to inability, inaccessibility of connecting to mobile services.
- Gender gaps in data collection.

²⁸¹ See Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), [Digital Welfare States and Human Rights](#), para. 42 U.N. Doc A/74/493, (Oct. 11, 2019) (identifying widespread errors in Australia’s “Robodebt” Program and similar harms in programs in the Netherlands, India, and Ireland). Widespread harm might also occur by the nature of disparities in “digital skills” where a large portion of the population lacks the skillset to engage with digital systems and services. *Id.* (para 47), highlighting that 22% of citizens in the United Kingdom lacked digital skills necessary for daily life, potentially inhibiting that population from utilizing a digital welfare system.

²⁸² For example, when information is intercepted that results in harm later on, such as arbitrary detention and/or torture following an unlawful arrest.

- Discriminatory biases built into algorithms, such as over-representation or underrepresentation and therefore invisibility of marginalized groups in certain data systems.
- Distortions, restrictions, and denial of freedom of expression through social media or speech-based platforms.
- Privacy breaches that in turn are an entry point for potential infringements of other human rights, as the data unlawfully obtained can reveal information that facilitates other human rights abuses, such as discrimination by gender or race, or even the imprisonment, torture or murder of dissidents or environmental or human rights defenders.
- Abuses of facial recognition and biometric technology.
- 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).
- Discrimination, exposure to harm, and function creep from digital ID systems.
- Real time government interception of data that is then misused for political purposes.
- Abridgement of freedom of expression due to internet shutdown (as recently seen in Myanmar and Kashmir).
- Access to data by unauthorized parties²⁸³, lack of sufficient protection against cyberattacks.²⁸⁴
- Interference with the safety operation, efficiency, security, and drivers' behaviors due to cybersecurity attacks against transportation systems.
- Denial of the right of individuals to access health care itself, if such access is mediated through a digital platform that malfunction or exclude those lacking the skills or appropriate equipment to access services.
- Allowing for use and reuse of data by different actors for different purposes than was consented to for the original project, including to trade data in the marketplace.²⁸⁵
- Automation will have a direct impact on the unemployment of large masses of workers which could have widespread implications in developing economies where DFIs are active. This requires further research and thorough consideration of potential social risks and prevention and mitigation steps.
- Increasing further censorship of the press, and suppression of critical voices who are seeking to uphold accountability and transparency.

The increasing prominence of digital technologies in a wide range of projects and the rising focus on funding digital infrastructure and services, including across whole systems, raises the question of how the environmental, social and particularly human rights impacts of these types of projects are assessed and monitored in DFI funded projects, and even more so in projects funded through FIs. It also raises profound questions about how clients and DFIs can be held accountable for potential

²⁸³ V. Hordern, "Data Protection Compliance in the Age of Digital Health," *Eur. J. Of Health L.* 23, 248, 250. (2016) at 261.

²⁸⁴ E. Vayena et al., "Digital Health: Meeting the Ethical and Policy Challenges," *Swiss Medical Weekly* 148, 3-4 (Jan. 16, 2018).

²⁸⁵ See e.g., B. Cyphers, [Google Says It Doesn't 'Sell' Your Data. Here's How The Company Shares, Monetizes, And Exploits It](#) (Mar. 19, 2020).

negative impacts. The role of Safeguard policies, therefore, while not the entire picture, assumes critical importance.

- **Current Safeguards are ill-suited to addressing digital technology challenges.** Safeguards emerged from controversies concerning projects with large physical footprints, such as dams, mines, and large-scale infrastructure, and generally still retain that orientation to this day. As a consequence, even the newest versions of Safeguards seem ill-suited to dealing with digital issues. They may be able to deal with the environmental footprint of digital infrastructure, for example; but even in this case it is far from clear that all important aspects, such as the energy and water demands of data centres, will be addressed.
- **The scope of potential impacts makes a project-level approach ill-suited to address digital technology challenges,** at least for some types of projects. The breadth and scale of the risks and harms associated with digital technologies, particularly those used to transform public systems, will require a different approach to due diligence and risk assessment. Recent patterns of digital development raise extensive, overarching concerns relating to the likelihood of active harm arising from the use and misuse of technology. But even beyond this level of analysis, there is need for deeper and more rigorous assessments of the respects in which digital “leapfrogging” actually does improve human wellbeing, and the respects in which it might not, and whether digital approaches are the most suitable in light of population needs, skills and available financing to maintain digital infrastructure once a DFI’s support has ended. Digitalisation may well be the answer in many, but not necessarily all, cases.
- **Current classification systems are ill-suited to assigning appropriate risk categorisation.** Under most existing Safeguard systems, projects with potentially significant human rights impacts across large sectors of the population (such as projects concerning digital ID) may well be classified as low risk projects because they do not have a significant environmental footprint. The tendency to categorise information and telecommunications technology (ICT) projects as low risk, Category C projects is evident even in some of the more recent Safeguards.²⁸⁶
- The **absence of specific standards** against which digital risks are assessed, the absence of any reference to international human rights standards, appears out of touch with the rising international attention to the importance of applying human rights safeguards in the digital space.²⁸⁷ In addition, there are numerous other sets of principles and guidelines that have been developed to help balance the “promise and perils” of new technologies,²⁸⁸ but the latter instruments do not appear to be reflected in Safeguards either.
- The absence of guidance on the **scope and types of risks** to be assessed, and importantly the **types of preventive and mitigation measures** that should be put in place, means that even if DFI staff and clients are motivated to address what is a very challenging and rapidly changing policy and regulatory environment, there may be comparatively little guidance to draw from.²⁸⁹
- There may often be shortfalls in **expertise on digital impacts** in E&S, finance and legal teams, and even in sectoral teams. Staff may inadvertently contribute to harms, and sometimes, widespread harms, through lack of awareness and/or attention to these issues.
- There is a **lack of publicly available information and consultation** on the human rights risks associated with digital technologies, and relatedly, lack of adequate accountability. As noted

²⁸⁶ See US DFC [Environmental and Social Policy and Procedures](#) (July 2020), Section 2.6, which classifies “telecommunications projects not involving new physical infrastructure” as Category C, showing that only the physical footprint of these projects are considered, not broader connectivity purposes and associated risks and impacts.

²⁸⁷ See e.g. the UN Secretary General’s [Digital Roadmap](#) on digital cooperation.

²⁸⁸ *Id.*

²⁸⁹ *Cf.* The World Bank developed a [toolkit](#) on cybercrime that specifically references human rights considerations.

above, some projects can have far-reaching consequences across entire populations, but such consequences do not always appear to be included in project descriptions, nor even basic information that might permit stakeholders to begin to understand the potential scope of projects with a digital footprint. Project descriptions are often not clear about the specifics of the project, the actors involved, or who will ultimately control any data that is collected, processed and analysed, and what decisions will be made based on it. This makes it impossible for those who may be affected to first understand if they are at risk, and then to understand whether proposed measures to prevent these risks are adequate.

- **Exclusion lists** do not appear to have been updated to take account of digital risks. By contrast, some cities are already beginning to place outright bans on the use of facial recognition technology.²⁹⁰
- Given the relative lack of clarity regarding the scope of many digital tech projects, **affected stakeholders may be completely excluded from Safeguard protection**. It seems particularly pressing to address this issue given the increasing volume of projects involving exclusive or significant digital services.
- There is currently **insufficient protection for stakeholders who use digital technologies to engage in consultations**. This is not a new problem: some of the earliest concerns about the use of digital technologies arose in the context of governments requesting access to the identities and data of political opponents and dissidents.²⁹¹ However, even though DFIs and IAMs have recently adopted statements, policy commitments and strengthened Safeguards on reprisals issues, the online dimension does not seem to be adequately addressed.
- **Few client grievance mechanisms** are well-suited to address grievances concerning human rights risks and impacts related to digital technologies. This is the case even for companies specifically in the digital technology sector, which have been under increasing scrutiny to address and provide remedies for harms.²⁹²
- Connected to the policy gaps mentioned above, **IAM staff generally lack expertise** to assess grievances concerning impacts related to digital technologies.

There is a range of initiatives underway to address these kinds of challenges. For example the Danish Institute of Human Rights has developed valuable guidance on how to assess human rights impacts of digital activities, relevant to DFIs as well as companies.²⁹³ GIZ, supported by the Danish Institute for Human Rights, has published a “Digital Rights Check for Development Finance,” aimed at DFI staff and clients involved in digital solutions.²⁹⁴ IFC has developed a draft Code of Conduct for Artificial Intelligence (AI), but this is not an official document of IFC or proposed new element of the IFC’s Sustainability Framework. It is expressly targeted to AI applications, which are increasingly important, but not various other types of projects that also entail digital risks and impacts.²⁹⁵ Nevertheless, the draft Code constitutes an interesting framework that could be strengthened to address significant

²⁹⁰ See e.g. K. Conger, R. Fausset, & S. F. Kovaleski, [San Francisco Bans Recognition Technology](#) (May 14, 2019); K. Clukey, [Social Networks Can’t Go Into Credit Decisions Under N.Y. Ban](#), *Bloomberg Law* (Nov. 25, 2019).

²⁹¹ For example, in 2007, US Congress investigated Yahoo!’s role in the arrest of journalist Shi Tao. Though it initially denied involvement, Yahoo! was found to have disclosed details to the Chinese government and set up a human rights fund trust fund in 2007 as part of a settlement to address its involvement. See [Yahoo! lawsuit \(re China\) - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

²⁹² OHCHR B-Tech project, Foundational Paper on [Access to remedy and the technology sector](#) (2021).

²⁹³ Danish Institute for Human Rights, [Guidance on Human Rights Impact Assessment of Digital Activities](#) (Nov. 2020).

²⁹⁴ See [DFI Tool Front Page - Digital Rights Check \(toolkit-digitalisierung.de\)](#)

²⁹⁵ See https://www.ifc.org/wps/wcm/connect/e0e928ba-e4a3-4e5d-af0f-4c4477ff22f0/EMCompass_Note_80-10.pdf?MOD=AJPERES&CVID=naqN4Mr.

human rights risks, including but not limited to the AI context, and may help to stimulate a broader digital risk management conversation among DFIs.

3. LAND TRANSACTIONS

DFIs' Safeguards have for a long time addressed involuntary land transactions and involuntary resettlement. Land is a vital asset, critical for human rights and sustainable development, and many DFI projects affect land access and land rights with potential impacts on a wide range of human rights.²⁹⁶ The multiple functions and uses of land as a source of food, water livelihoods and other resources, its importance for cultural and social identity, peace and economic security, and the impoverishment risks that often result from involuntary resettlement,²⁹⁷ underscore the need for broad-ranging and robust Safeguards. Resettlement has been a consistent focus of complaints to IAMS²⁹⁸ and source of social tension and violent conflict. This Section focuses on one particular gap in most DFIs' Safeguards, pertaining to land transactions. Annex II highlights additional gaps in IFC PS 5 on Land Acquisition and Involuntary Resettlement that may be relevant to other DFIs as well.

Presently, most Safeguards cover a limited set of land transactions and have not been updated to account for the changing dynamics and wider range of land transactions that may impact negatively on people's lives and rights. Even though most Safeguards dealing with land omit the adjective "involuntary" from the types of land transactions covered, they tend to cover only those land acquisitions or transactions occurring through expropriation or under the threat of expropriation (See Box 48). All other transactions, where the buyer cannot resort to expropriation, tend to be regarded as a "willing buyer-willing seller" situation. However this binary approach to land transactions masks the many other ways, short of expropriation, that governments or private sector actors may exert pressure to compel a sale. It may also mask vulnerabilities and discrimination faced by project affected peoples which, if taken into account, would call into question the "willing seller" assumption.

Safeguards do not generally require a sufficiently specific assessment of the "willingness" of sellers, or are at best unclear on this.²⁹⁹ Yet such assessments are surely vital in view of the growing competition over land and natural resources and the increasing prevalence of non-registered or informal interests in land, falling short of the illegality threshold. Land acquisitions, whether small or large-scale, have grown at an unprecedented rate in emerging markets, in response to global demand for food and other natural resources. Formal legal recognition and protection of land title is limited in many emerging markets. National legal systems frequently do not protect or recognise the full range of customary claims to land and resources and various different forms of tenure such as leasehold, access rights, herders rights, customary rights, indigenous people's rights.³⁰⁰ This results in significant, recurring challenges for communities as well as for companies seeking to manage land in a responsible way.³⁰¹ A number of DFIs have investigated and developed guidance on land transactions

²⁹⁶ See [OHCHR | OHCHR and land and human rights](#).

²⁹⁷ M. Cernea, [Impoverishment Risks and Reconstruction: A Model for Population Displacement and Resettlement](#) (2002).

²⁹⁸ According to the [Accountability Console](#) (a database of community complaints filed with DFIs' independent accountability mechanisms), as of December 2021, there were 341 complaints concerning displacement across the multilateral DFIs, out of a total of 1525 complaints.

²⁹⁹ EIB Standard 6 – Involuntary Resettlement (2022), para 8, notes: "This Standard does not apply to resettlement resulting from voluntary land transactions conducted with integrity, accountability, efficiency and transparency, and which are free of coercion, intimidation, fraud and/or malfeasance." However there appears to be no further requirements or guidance in the Standard about how these criteria will be assessed or addressed and what consequences should follow.

³⁰⁰ See, UNIDROIT and IFAD, [UNIDROIT / IFAD Legal Guide on Agricultural Land Investment Contracts](#) (2021).

³⁰¹ CAO Advisory Series: [Land](#) (2015).

outside the scope of current Safeguards,³⁰² and certain IAMs have published advisory notes or lessons learned reports on land issues based on their reviews of complaints.³⁰³

Since the adoption of the IFC PS in 2012, the normative landscape on land has changed. The adoption of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) is a particularly notable development.³⁰⁴ The VGGT is the first comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible land governance. IFC PS 5 converges to a significant extent with the VGGT,³⁰⁵ and both the IFC PS and the VGGT extend protection to land and natural resource claims without the need to demonstrate full ownership or formal recognised under national law.³⁰⁶ The VGGT and current understandings of tenure have moved beyond a binary, legal versus non-legal rights approach, to recognise that there can be a variety of legitimate tenure rights in any given situation that should be acknowledged, recognised and remedied.

OHCHR recognises that land is a challenging issue, often intertwined with politics and complex governance challenges including corruption. If DFI mandates and SDG 1³⁰⁷ are to be achieved, it is critical to acknowledge and address the political economy of land and the many obstacles faced by tenure rights holders that extend beyond expropriation. While recognising the very positive impacts of existing DFI Safeguards in this area to date, it would seem timely to open a discussion on extending Safeguards to a wider range of land transactions in DFI-funded projects. The following issues might be considered in this regard:

- Bring all land transactions within the scope of Safeguards, in DFI-funded projects.
- Require more nuanced and detailed land tenure assessments, based on the particular context and land economy, to identify the diversity of tenure rights, including traditional, customary and indigenous tenure rights, ownership rights and encourage wider recognition of legitimate tenure rights holders.

³⁰² See e.g. the IFC co-convened Interlaken Group, CDC and DEG, [A guidance note on managing legacy land issues in agribusiness investments](#), (2016).

³⁰³ See for example, CAO Advisory Series: [Land](#) (2015); and Inspection Panel, [Emerging Lessons Series No 1: Involuntary Resettlement](#) (2016).

³⁰⁴ The VGGT were endorsed unanimously in 2012 by the Committee on World Food Security (CFS), the leading United Nations body in matters of food security.

³⁰⁵ L. Cotula, T. Berger & B. Schwartz, [Are development finance institutions equipped to address land rights issues? A stocktake of practices in agriculture](#), LEGEND (2019).

³⁰⁶ But the approaches they take to doing so are different. The VGGT call for the recognition, respect and protection of all 'legitimate tenure rights' – that is, all land and resource rights that are perceived to be socially legitimate in a given context, even if those rights are not recognised by law. It is possible that the two approaches could result in similar outcomes but as the VGGT are broader, there may be differences. L. Cotula, [Land rights and investments: Why the IFC Performance Standards are not enough: A comparison with the Voluntary Guidelines on the Responsible Governance of Tenure.](#) LEGEND (2019). For example, references to state legal framework (PS 5, para. 17) could disadvantage minority groups whose claims to land may not be fully recognized by national law but are nevertheless legitimate in the given context. See also M. Windfuhr, [Safeguarding Human Rights in Land Related Investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework](#), German Institute for Human Rights (2017).

³⁰⁷ The aims of SDG 1 include income poverty eradication and strengthening secure tenure rights. Indicator 1.4.2, for Goal 1, is the "Proportion of total adult population with secure tenure rights to land, (a) with legally recognized documentation, and (b) who perceive their rights to land as secure, by sex and type of tenure." This indicator is also related to Goal 5, 5.a.1 (access to agricultural land) and 5.a.2 (legal framework for land governance). "Tenure security also matters for Goal 2, Target 2.3 (2.3.1 and 2.3.2 addressing smallholder farmers; Target 2.4 (2.4.1 on agricultural area), to Goal 11, to target 11.1 (access to affordable housing/upgrading slums) and target 11.3 (sustainable urbanization/settlement planning). Land tenure also influences land use and is thus key to achieving Goal 14 (b) to provide access to small-scale fishers and marine resources, and to Goal 15 on the sustainable use of land and natural resources. Similarly, land is a significant source of conflict, and thus also matters for Goal 16 for promoting peace and inclusive societies and institutions." See <https://unstats.un.org/sdgs/metadata/files/Metadata-01-04-02.pdf>, and in the context of gender equality see https://www.ohchr.org/sites/default/files/RealizingWomensRightstoLand_2ndedition.pdf.

- Consider the wider impacts of DFI transactions concerning customary land tenure systems, which may sometimes be temporary or rotational in nature. Customary landholders may become incentivized to retract allocation rights, and individualize and commodify tracts of land that have become associated with a monetary value, as a result of the DFI funded project.³⁰⁸
- Require procedural checks to ensure that transactions are validly negotiated, and that the right *not* to proceed with the transaction (when this is claimed) is respected. This would entail an assessment of parties' access to information, access to legal and technical support, reprisal risk checks,³⁰⁹ and the availability of effective grievance mechanisms. Many of these dimensions are already included in the World Bank ESSF 5, paragraph 6, footnote 168, an important building block for further discussion and progress on these issues.³¹⁰
- Provide for capacity building or legal and technical support to communities to strengthen independence in negotiations.
- Recognise that there may be a need for a sliding scale of requirements tailored to particular transactions and situations; for example, minimal checks would suffice where there is an active land market, and more detailed requirements should apply in situations of large-scale acquisitions in rural settings, and acquisitions from marginalised groups, which could also require third-party verification.

Box 48: Scope of Application of Safeguards

World Bank, ESS 5 – Land Acquisition, Restrictions on Land Use and Involuntary Resettlement

“4. This ESS applies to permanent or temporary physical and economic displacement resulting from the following types of land acquisition or restrictions on land use undertaken or imposed in connection with project implementation:

- (a) Land rights or land use rights acquired or restricted through expropriation or other compulsory procedures in accordance with national law;*
- (b) Land rights or land use rights acquired or restricted through negotiated settlements with property owners or those with legal rights to the land, if failure to reach settlement would have resulted in expropriation or other compulsory procedures;” ...*

6. This ESS does not apply to voluntary, legally recorded market transactions in which the seller is given a genuine opportunity to retain the land and to refuse to sell it, and is fully informed about available choices and their implications...”

The accompanying Guidance Note then clarifies that *“It is important to note that “negotiated settlement” is not the same as the voluntary market transactions, described in paragraph 6 of ESS5, to which ESS5 does not apply. For land acquisition to be considered a voluntary “willing buyer/willing seller” arrangement, the owners of the land must be able to refuse to sell, without the threat of compulsory acquisition.”*³¹¹

AIIB, Environmental and Social Standard 2: Land Acquisition and Involuntary Resettlement

6.1 “AIIB Acquisition of or restriction on land rights or land use rights through expropriation or other compulsory procedures under national law;

6.2 Acquisition of land rights or land use rights through negotiated settlements with property

³⁰⁸ N. Bugalski & D. Pred, [Safeguarding Tenure: Lessons From Cambodia And Papua New Guinea For The World Bank Safeguards Review](#) (2013).

³⁰⁹ See e.g. reprisal checks in the African Development Bank IAM's revised [Operating Rules and Procedures](#) (2021), para. 29

³¹⁰ [World Bank ESS5](#), footnote 168.

³¹¹ World Bank, [Guidance Note For Borrowers, ESS 5 – Land Acquisition, Restrictions On Land Use And Involuntary Resettlement](#) (June 2018), GN 4.7.

owners or those with legal rights to the land, if failure to reach settlement would have resulted in expropriation or other compulsory procedures[.]”

4. USERS OF PROJECT SERVICES AND PRODUCTS

Safeguards have generally not focused to any great extent on the users of products and services financed by DFIs. Definitions of “stakeholders” do not tend to specifically include users, customers or consumers. (See Box 49).

Box 49: Omission of “Users” from Definitions of Stakeholder

- **AIIB** does not include any definition of stakeholders.
- **IDB E&S Policy Framework, Glossary**, “Stakeholder refers to individuals, or groups, including local, downstream, and transboundary communities, who (i) are affected or likely to be affected by the project (“project-affected people”) and (ii) may have an interest in the project (“other stakeholders”).”
- **EBRD, Performance Requirement 10**, “The client will identify and document stakeholders, defined as the various individuals or groups who: (i) are affected or likely to be affected (directly or indirectly) by the project (affected parties), or (ii) may have an interest in the project (other interested parties).”

There are some exceptions however. Some of the more recent Safeguards contain requirements for the designing buildings for universal access, for the benefit of persons with disabilities.

Box 50: Emerging Practice – Universal Access for Users with Disabilities

IDB, E&S Performance Standard 4: “When new buildings and structures are accessed by members of the public, the Borrower will consider incremental risks of the public’s potential exposure to operational accidents and/or natural hazards, and will be consistent with the principles of universal access. Structural elements will be designed and constructed by competent professionals and certified or approved by competent authorities or professionals.”

Users of DFI-financed products and services include the following categories:

- **Consumers of products** made in the project. DFI Safeguards have commonly addressed occupational health and safety (OHS) of workers employed, and to some extent contracted workers and those in the supply chain of a DFI-funded project. But Safeguards have not generally addressed the health and safety of users and consumers of the products financed.³¹²
- **Consumers of services** offered by the project.
- **Digital consumers** are likely to overlap with the first two groups, and will become an increasingly important group. Digital transformations have moved ever more commerce online, ushering in a

³¹² See e.g. World Bank Group [Environmental, Health, and Safety General Guidelines](#) (2007), which Includes a welcome focus on worker health and safety and community health and safety, but not consumers.

whole new set of challenges to ensure that digital market places are safe for consumers, and are trusted and used. (See Part II, Section 2 above).

- **Consumers of financial services.** DFIs often have programmes on financial inclusion. Digital solutions form an increasingly important part of the financial inclusion agenda,³¹³ with the risk factors that this implies (See Part II, Section 2 above). Some DFIs have principles for consumers of financial services – particularly when providing micro finance. These cover consumer protection for the most vulnerable clients of financial institutions.³¹⁴
- **Users of public services.** There are many ways in which investment projects for basic services can impact negatively on human rights of users and consumers (see Box 51). The international human rights framework can guide project formulation and service delivery and help ensure that service users' human rights are respected.³¹⁵

Box 51: Impacts of Large Infrastructure Projects on Users, Consumers and Taxpayers

DFI Safeguards have traditionally focused on physical impacts on workers, communities and the environment at or around the project footprint, but less so the potentially complex infrastructure-related impacts on users of infrastructure, or in relation to taxpayers and the population at large. The question of user fees is a notable example, an issue central to socio-economic rights. Negative impacts can occur at the micro-level, where pricing of services or infrastructure use is unaffordable and/or discriminatory, or at the macro-level as a result of inappropriate (and sometimes ideologically driven) financing arrangements and/or perverse financial incentives. On the latter issue (finance risks), governments often grant upfront incentives to the private sector, such as subsidies or guaranteed fixed or minimum financial returns, for infrastructure contracts, as well as guarantees at the back end to private operators, without disclosing the contingent liabilities incurred. Unsolicited bids, which are not uncommon, may eliminate the potential efficiencies from competition altogether. Moreover, once concluded, Public Private Partnership (PPP) contracts frequently involve further renegotiations, which may result in rate increases that negatively affect service users.³¹⁶ An ideological commitment to PPPs is not supported by evidence³¹⁷ and can impact in profoundly negative ways for infrastructure users and taxpayers.

- **Individuals and microenterprises contractually bound by projects.** Projects financed by a DFI may rely on a wide range of individuals or microenterprises contracted by or purchasing from the project that provide income on which the project relies. Examples include small-holder farmers contracted as part of an agricultural project, small-scale vendors in water or electricity services projects, small-scale vendors selling ICT services such as SIM cards in ICT projects, and so forth.

The **lack of attention to users and consumers in Safeguards** raises a range of human rights concerns including:

- There is **no focal point** addressing these issues.
- As Safeguards do not generally pay attention to users/consumers, **there are no particular standards** for judging whether users are being treated fairly, being discriminated against, excluded from services, and so forth. Safeguards and legal agreements require at a minimum compliance with national law, but consumer protection laws may not exist, or may be weak or limited in scope, or may not cover groups such as those contracting with a client. There is a range

³¹³ See e.g. <https://events.development.asia/learning-events/3rd-asia-finance-forum-future-inclusive-finance>.

³¹⁴ [The-Client-Protection-Principles_EN.pdf \(cerise-spm.org\)](#).

³¹⁵ See e.g. OHCHR & Heinrich Boell Foundation, [The Other Infrastructure Gap: Sustainability](#) (2018).

³¹⁶ *Id.*

³¹⁷ See e.g. <https://chrgj.org/focus-areas/inequalities/human-rights-and-privatization-project/>.

of international consumer protection standards that may usefully be incorporated within Safeguards, such as the [United Nations Guidelines for Consumer Protection \(UNGCP\)](#), ISO standards, and the OECD Guidelines chapter on Consumer Interests.

- There may be **inadequate consideration of financial impact on users / consumers / contractors**. Projects funding particular public services are commonly accompanied by economic studies that look at users' ability to pay, as a main source of income for a project, modelling different pricing scenarios. Credit and legal assessments are usually used to review the client's business in order to understand risks of non-repayment to the DFI. However what may be missing is a review of legal or other risks to parties with whom a project contracts, such as microentrepreneurs, small scale farmers or other individuals, who may be adversely affected by early termination of a project. Reviews of this kind are surely needed if these parties are required to invest their own up-front funds in order to secure a contract with the client. Such reviews should address how risks of vulnerable entrepreneurs can be mitigated, particularly if the project is terminated early, leaving them with debt as well as the lack of any promised source of revenue through contracting with the project. This would be particularly important where the client is transacting with individuals who are not in a position to judge the risks for themselves. This is the counterfactual to measuring development benefits: ensuring that those intended to be the beneficiaries of DFI funded projects are not made worse off due to bankruptcy, early termination of a project or early DFI withdrawal. (See also the Responsible Exit discussion, Part I above).
- There is frequently a **lack of expertise** on these dimensions of transactions, given that they have not yet been given regular attention.
- There is frequently a **lack of contract transparency**, even for contracts for public services. IFC has encouraged transparency in relation to public service infrastructure projects (See Box 52) but this does not seem to have been followed by other DFIs, and does not appear to have been made legally binding or significantly improved contract transparency.

Box 52: Emerging DFI Practices - Public Services Contracts

The IFC Sustainability Policy (2012):

“Infrastructure Projects

53. When IFC invests in projects involving the final delivery of essential services, such as the retail distribution of water, electricity, piped gas, and telecommunications, to the general public under monopoly conditions, IFC encourages the public disclosure of information relating to household tariffs and tariff adjustment mechanisms, service standards, investment obligations, and the form and extent of any ongoing government support. If IFC is financing the privatization of such distribution services, IFC also encourages the public disclosure of concession fees or privatization proceeds. Such disclosures may be made by the responsible government entity (such as the relevant regulatory authority) or by the client.”³¹⁸

- There may be **shortcomings in how DFIs account for development impacts**. Development impacts typically focus on the positive impacts for society, which in principle includes users of products and services. Financial inclusion is a good example. However when accounting for positive development impacts, it is important to ensure that there are no accompanying negative impacts.

³¹⁸ IFC [Sustainability Policy](#) (2012), para. 53.

5. RECOMMENDATIONS

- *Safeguards should address the impacts of climate change on people, including the human rights impacts of climate change mitigation and adaptation measures.*
- *In digital tech projects or any project with digital dimensions, 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 projects are designed and implemented.*
- *Safeguards should address a wider range of land transactions than those occurring through expropriation or under the threat of expropriation. Any “willing buyer-willing seller” exceptions should be closely scrutinised and take into account asymmetrical power relationships and discrimination and vulnerabilities of prospective sellers.*
- *Land tenure assessments should address the full range of tenure rights applicable in a given context, including traditional, customary and indigenous tenure rights, as well as formal ownership rights, taking into account relevant international standards including the [Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#).*
- *Safeguard policies’ definitions of “stakeholder” should include users and consumers of products, facilities or services associated with the DFI-supported project. Safeguard requirements should address E&S risks of users and consumers, and should explicitly take into account relevant international consumer protection standards such as the [United Nations Guidelines for Consumer Protection \(UNGCP\)](#), ISO standards, and the OECD Guidelines chapter on Consumer Interests.*

ANNEX I – LIST OF KEY RECOMMENDATIONS

DIRECT INVESTMENTS:

Risk assessment

- *Safeguard policies should contain a specific commitment that the DFI: (a) respects human rights in connection with the projects it finances, and (b) requires its clients to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused or contributed to by, or directly linked to, the business activities of clients.*
- *Safeguard policies should be consciously and rigorously aligned with requirements applicable to clients under relevant international human rights agreements. Doing so would promote certainty, consistency, policy coherence, and rigour in risk assessment and management.*
- *E&S risk management should be guided by all relevant sources of law, national and international, while adhering to the most stringent applicable standard. This is especially important when it comes to assessing issues like discrimination, labor rights, women’s rights, civil society space and stakeholder participation, where the protections afforded by national law in many countries may be particularly weak compared with international standards.*
- *The UN Guiding Principles on Business and Human Rights should be integrated explicitly within Safeguard policies in order to strengthen the framework for: (a) risk assessment; (b) ongoing, risk-based due diligence; (c) addressing supply chain risks; and (d) remedy.*
- *Safeguard policies should include a self-standing performance standard on gender equality, the human rights of women and girls, and the human rights of LGBTI people. This recommendation is justified on economic and principled grounds and would help to address the shortcomings in “mainstreaming” the rights of women, girls and LGBTI people in E&S risk management to date.*
- *Safeguard policies should include a self-standing performance standard on indigenous peoples’ rights. This recommendation is justified by the increasing challenges and threats faced by indigenous peoples at project level, their distinctive vulnerabilities, and their distinctive characteristics and rights under international law, including in relation to FPIC.*
- *Safeguard policies should include a self-standing performance standard on stakeholder engagement, including detailed requirements for Banks and clients on how to prevent and address reprisals risks. This recommendation is consistent with recent practice (e.g. World Bank, EBRD, IDB, EIB) and would address the increasing challenges to effective participation, shrinking civic space, and increasing threats and reprisals against project-affected people at country level.*
- *Safeguards should explicitly aim to address discrimination on grounds including gender, race, ethnicity, migrant status, disability, political opinion, sexual orientation, gender identity, gender expression and sex characteristics, in line with international human rights standards, and should avoid the implication that “vulnerability” is inherent to any population group.*
- *Human rights should be treated alongside other E&S risks as a routine part of the due diligence process. This would ensure that important risks and impacts are identified upfront, and inform project risk assessment, and are managed effectively throughout the project cycle.*
- *Human rights due diligence should not be a one-time, static event, and should not be limited to special or “high risk” circumstances. Information and recommendations from UN, regional and national human rights bodies should inform routine human rights due diligence.*

- *DFIs should re-evaluate their own approaches and guidance for clients on risk prioritisation as part of the due diligence process to ensure that these processes: (i) are considering risks to people and their rights; and (ii) that the processes are re-adjusted to place greater emphasis on preventing negative impacts on people, even where those risks may be less likely.*
- *The scope of due diligence should be sufficiently broad so that the DFI can assess the extent to which a client's business relationships may entail human rights risks in the client's particular circumstances. Clients should use their leverage to influence their business relationships (prioritising higher risk relationships as needed) so that the project addresses the full scope of potential adverse impacts associated with the project and maximises opportunities to improve development outcomes.*
- *DFIs and their clients should address all potential and actual 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, starting with and prioritising the most severe based on scale, scope and remediability. DFIs' and clients' responsibilities should not be limited by their existing control or leverage, or to "primary suppliers" but instead focus on where the most severe risks are associated with the client's business model, including upstream and downstream dimensions of its business model.*
- *Project E&S risk assessment should include cumulative impacts upon people and the environment, and legacy issues associated with land expropriation or other unaddressed grievances.*
- *Safeguards and exclusion lists should explicitly flag risks inherent to particular business models, such as those associated with undercapitalised subsidiaries, special economic zones, or tax havens or business models that rely on low wage labor, resources used by local communities or similar models that rely on low margins that may increase risks to people and resources rather than creating value.*
- *DFIs should develop specific requirements and guidance on contextual risk assessment, drawing from human rights data sources and metrics. The scope of contextual risk assessment should include analysis of civic space, conflict risks and dynamics, patterns of discrimination against particular population groups, and reprisals risks. Safeguard policies should clarify the Bank's and client's roles and responsibilities in this regard, and specify how the findings from contextual risk assessment will be integrated within project E&S risk assessment, supervision, potential remedy actions and other relevant actions throughout the project cycle.*

Project approval

- *DFI safeguards should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by the DFI and clients to address human rights risks in which they are involved.*
- *Environmental and social action plans (ESAPs) should include requirements to address identified human rights concerns. ESAPs should be fully costed and reflected in the project budget, and safeguard policies should specify that compliance is a legal requirement.*
- *"Commercial in confidence" exceptions to information disclosure should be interpreted narrowly, subject to a public interest exception where potential human rights abuses are concerned. The presumption should be in favour of proactive disclosure, with any exemptions defined narrowly and justified on a case-by-case basis by reference to foreseeable harm to a legitimate, recognised interest.*

Supervision

- *Safeguards should include an explicit commitment to remedy harms as a corollary of their “do no harm” mandates. Mitigation hierarches should explicitly include “remedy” and recognise that off-setting is inappropriate for human rights impacts. In OHCHR’s view an appropriate formulation would be “prevent, minimize, mitigate and/or remedy.”*
- *Safeguard policies should define the DFI’s and client’s/investee’s responsibilities for remedy by reference to their respective involvement in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*
- *Remedy should be approached as an ordinary project contingency. Safeguard policies and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S impacts for higher risk projects. The DFI should set aside remedial funds as needed, taking into account its own involvement in E&S impacts, and with reimbursement rights vis-à-vis the client as appropriate.*
- *Safeguard policies and loan/investment agreements should explicitly include requirements concerning the disclosure to project-affected people of the DFI’s IAM and any project-level GRM, and for active cooperation by the client with complaint processes.*
- *Where serious human rights impacts are in a client’s supply chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate that they comply with Safeguard requirements or to eliminate such practices within a reasonable time frame.*
- *Analysis of the remedy ecosystem should be included within the DFI’s project-level due diligence and be a strengthened focus of technical guidance and support to clients.*
- *Safeguards should outline the main elements of a “responsible exit framework” to guide actions across the project cycle, including:*
 - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
 - *A clear requirement not to exit without first using all available leverage and exploring all viable mitigation options, and without assessing impacts of exit and consulting with all relevant stakeholders;*
 - *A commitment not to leave behind unremediated harms, including those arising from the exit;*
 - *A commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
 - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
 - *A commitment to seek a responsible replacement(s) for the DFI, or the client, as the case may be, on exit.*
- *Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.*

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

OTHER TYPES OF LENDING:

- *Safeguard policies for FI operations should require:*
 - *disclosure of an overview of the FI's E&S policy and of the ESMS;*
 - *compliance with international law, national law, and the DFI's Safeguards, whichever sets the most stringent standards;*
 - *time-bound disclosure of the name, sector and location of DFI sub-projects on the DFI's and client's website, prior to the FI operation's approval;*
 - *DFI approval of high-risk sub-projects, and referral of higher-risk projects for DFI due diligence and monitoring;*
 - *referral of serious E&S incidents (including potential human rights abuses) to the DFI within a fixed time limit (such as a maximum of 3 days);*
 - *clear supervision requirements for the DFI, including site visits and/or third party monitoring for high-risk sub-projects;*
 - *clear requirements regarding stakeholder consultation in connection with client monitoring reports for sub-projects;*
 - *the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and*
 - *disclosure at the project site of the DFI's involvement in sub-projects, and of the existence of the DFI's IAM and project-level GRM, ensuring that this information clearly visible and understandable to affected communities.*
- *DFI's Safeguards should specify 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 DFI's Safeguards.*
- *International human rights law and information from UN human rights bodies should guide DFIs' assessments of the functional equivalence of country and client social and environmental management systems. The latter assessments should be publicly disclosed.*
- *Development policy financing operations should be covered by Safeguards. E&S risk classification, assessment and management should be informed by contextual risk analysis, taking into account human rights information sources. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints.*
- *Results-based lending operations should be covered by Safeguards and informed by contextual risk analysis, taking into account human rights information sources, at all stages of the project cycle. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints. High risk operations should be excluded.*

EMERGING ISSUES AND SUBSTANTIVE GAPS:

- *Safeguards should address the impacts of climate change on people, including the human rights impacts of climate change mitigation and adaptation measures.*
 - *In digital tech projects or any project with digital dimensions, 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 projects are designed and implemented.*
 - *Safeguards should address a wider range of land transactions than those occurring through expropriation or under the threat of expropriation. Any “willing buyer-willing seller” exceptions should be closely scrutinised and take into account asymmetrical power relationships and discrimination and vulnerabilities of prospective sellers.*
 - *Land tenure assessments should address the full range of tenure rights applicable in a given context, including traditional, customary and indigenous tenure rights, as well as formal ownership rights, taking into account relevant international standards including the [Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#).*
 - *Safeguard policies’ definitions of “stakeholder” should include users and consumers of products, facilities or services associated with the DFI-supported project. Safeguard requirements should address E&S risks of users and consumers, and should explicitly take into account relevant international consumer protection standards such as the [United Nations Guidelines for Consumer Protection \(UNGCP\)](#), ISO standards, and the OECD Guidelines chapter on Consumer Interests.*
-