



UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER

# **Comments on the Asian Development Bank (ADB) draft Environmental and Social Policy**

29 April 2024

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## Introduction

1. OHCHR welcomes the opportunity to comment on the ADB’s draft Environmental and Social Framework (ESF), and for the numerous opportunities to contribute to ADB’s consultation processes since 2022. We have greatly valued our constructive engagement and the time made available by ADB’s safeguards team for this purpose. We would particularly like to recognize the time and effort expended by Bruce Dunn and Takako Morita to travel to Geneva in January 2023 for consultations with OHCHR, ILO and OECD.
2. We note that the proposed structure of the draft ESF is harmonized to a considerable degree with the safeguard policies of other leading MDBs, and that the substantive requirements for ADB and clients are also broadly similar (and in many cases, the same). We welcome the fact that a number of OHCHR’s previous recommendations appear to be reflected in the draft ESF, but are concerned that in certain important respects the ESF falls short of “best practice” in development finance institutions (DFI) sustainability frameworks and international business and human rights standards.

## Positive elements

3. The first and most obvious positive feature of the draft ESF in OHCHR’s view is its relatively broad coverage of social issues, in line with international human rights treaties to which the great majority of ADB shareholders have subscribed, and in line with best practice in MDB sustainability frameworks. We note in particular the new stakeholder engagement requirements in ESS 10, which include explicit attention to reprisals, although further specification and strengthening is required, in OHCHR’s view, as discussed further below, particularly on the question of ADB’s own responsibilities and responses. We also note the

inclusion of new SEAH requirements and the recognition, in ESS 5, of the need to strive for a higher level of protection of women's rights than the level guaranteed by national law.<sup>1</sup> However in other respects the treatment of gender does not appear especially robust, and gender terminology differs throughout the document which may generate confusion and inconsistent practice. Our Office maintains the view that gender equality and SOGIESC warrant dedicated attention within a stand-alone Environmental and Social Standard, in addition to being integrated throughout the ESF, and considers IDB's ESPF to constitute best practice in this regard.<sup>2</sup>

4. In a similar vein, we welcome the broad definition of "disadvantaged or vulnerable" groups (Definitions, p.134), which includes discrimination on grounds of ethnicity and SOGI (Intro, paras. 36, para 52, fn 25), and the fact that "vulnerability" is included in social risks (Policy, para.30(ii)). Importantly, we welcome the fact that under the Policy (para. 52) the design of mitigation measures for vulnerable groups should take into account "information relevant to host country obligations under applicable international agreements" (para. 21(v)(i)). We also welcome the new requirements for contextual risk assessment, explicitly linked to project risk assessment, including for DPLs (Policy 21(v) and 22(i)), and the relevance in this regard of "information relevant to host country obligations under applicable international agreements." This is a leading practice among DFIs, in OHCHR's review.<sup>3</sup>
5. On the critical issue of "remedy", OHCHR welcomes the fact that "off-setting" is removed from what would otherwise be the standard MDB risk mitigation hierarchy (ESS 1, II. (b), consistent with the glossary, p.139, which discusses offsets solely in terms of biodiversity impacts). We take this as an acknowledgement of the inappropriateness of off-setting for many social risks and impacts and would urge ADB to ensure that this is also reflected in draft ESS 1, para. 30. OHCHR also warmly welcomes the critical requirement in ESS 1, para. 29 that E&S costs should be internalized within the project: "The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project's costs." Consistent with best practice in other MDBs, in the specific context of resettlement (ESS 5), we also welcome the explicit requirements for contingency funds and budgeting for corrective actions (ESS 5, paras. 30 & 36).<sup>4</sup> As

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<sup>1</sup> E.g. ESS 5, para 42 provides: "When the host country's applicable laws and tenure systems do not recognize the rights of women to hold or exchange property, provision will be made to ensure, to the extent possible, that women can gain security of tenure."

<sup>2</sup> We note that ADB's [Summary of Analytical Study on Gender and Safeguards](#) (May 2022), para. 32, expresses a similar view: "[A]mongst all MFIs, IDB has the most comprehensive coverage with explicit mention of gender considerations across various standards in addition to a standalone standard on gender."

<sup>3</sup> We note that contextual risk assessment is contemplated for the annex to the ESF containing "E&S Requirements for Financing Modalities and Products", e.g. paras 22, 26, 29, 36. However as discussed in para. 9 of this memo, the status of the memo seems unclear, as does the extent to which its content is intended to be subject to Board oversight and independent accountability.

<sup>4</sup> ESS 5, para. 30: "The budget will contain adequate contingencies to finance corrective actions as well as the planning and mitigation of unanticipated impacts, if any. ... For projects using a [Land Acquisition Framework], a borrower/client will prepare an estimated tentative budget based on scoping of anticipated [Land Acquisition/Land Use Restriction] risks and impacts and with sufficient contingency, ...." And see ESS 5, para. 36 which contains an explicit requirement to cost corrective action plans.

discussed below, it would be important to ensure that contingency funds are in place to address other kinds of impacts as well, in higher-risk projects.

6. Other positive features, in OHCHR's view, include the fact that a stand-alone ESS is proposed for climate change risks (ESS 9), subject to the critical comments of other stakeholders.<sup>5</sup> We also welcome the placeholder in the ESF on digitalization risks,<sup>6</sup> although as discussed below more detailed requirements will be needed if the ESF is to equip ADB and its clients to more successfully identify and address the potentially wide range of digital risks applicable to ADB-financed projects. OHCHR also notes a number of positive features pertaining to FI operations in the "Financing Modalities and Products" annex (also referred to as "ADB Management document"), including the referral and screening procedure for higher-risk sub-projects and the grievance mechanism requirement,<sup>7</sup> although we would encourage ADB to clarify the status of the annex and its relationship to the more schematic requirements concerning FI operations in the Policy and ESS 1 (see further para 9 below).

### Suggested areas for strengthening

7. Beyond the issues outlined above, OHCHR would urge that the draft ESF be strengthened in a number of important respects, in order to achieve its stated aims and reflect best practice in E&S risk management among DFIs. Many of these issues have been raised by OHCHR previously however the recommendations in this memo have been updated to reflect intervening consultations and research and respond to the specific terms of the draft ESF.
8. Firstly, as a general matter, we note that the draft ESF contains a great many broad discretions and/or under-specified requirements, which may generate confusion, inconsistent practice, and undermine sustainability and accountability objectives. We do not attempt a full account of this here however some of the more significant examples include: (a) the requirement that the ESSs be implemented "within a timeframe acceptable to the Bank"<sup>8</sup> (rather than a more objective and auditable "reasonableness" requirement such as that in the IFC Performance Standards); (b) under-specification of timeframes for disclosure of documentation of different kinds, such as E&S assessments and monitoring reports;<sup>9</sup> (c) requirements that clients achieve "objectives materially consistent with the

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<sup>5</sup> [Letter](#) from 17 civil society organizations to the ADB President on 14 March 2024, arguing, among other things, that the ESF should explicitly prohibit financing of and/or guarantees or insurance for all upstream, midstream and downstream fossil fuel projects.

<sup>6</sup> Intro, para. 47(iii) in the contextual risk definition; and Policy, para. 21(v)(h), and ESS 1, para 24(ii). However the term "digital risk" is not defined in the ESF and the reference in ESS 1, para 24(ii) is limited to privacy risks. Hence under the draft ESF digital risks, whatever this is intended to encompass, is mostly confined to contextual risk assessment and does not address the many possible scenarios in which an ADB-financed project may be the source of digital risk.

<sup>7</sup> ESF Annex, E&S Requirements for Financing Modalities and Products, paras. 52, 53, 55, 64 and 68.

<sup>8</sup> E&S Policy, para. 13.

<sup>9</sup> The SPS' requirement for public disclosure of draft E&S documentation for category A projects at least 120 days prior to project approval has been replaced by "prior to appraisal", with significant discretion for later disclosure (Policy, para. 49, & ESS 1, paras. 53 & 54). The frequency of monitoring reports is rarely specified, with the exception of FI's and corporate finance (ESS 1, paras. 66 & 67): "The extent and frequency of monitoring report will be proportionate to the E&S risks and impacts of the activities and

ESS's," rather than implement the ESS's actual requirements;<sup>10</sup> and, perhaps most strikingly of all, (d) an apparent waiver of the ESF in (broadly-defined) emergency or FCAS contexts (discussed in more detail below at p.22).

9. Another structural question, in OHCHR's view, concerns the status of the "Financing Modalities and Products" annex, which contains more detailed requirements than those in Policy and ESS 1 on a range of important operational modalities including policy-based lending, program-for-results, corporate lending and FI operations. As presented in the W-paper, it does not seem clear what the status of the "Financing Modalities and Products" annex (or "ADB Management document") is, or what its relationship with the corresponding subject matter in the ESP and ESS 1 is intended to be.<sup>11</sup> The W-paper gives no reason as to why the content of the ADB Management document will not be subject to formal Board review and approval, along with the ESF. Whether any or all of the content of the ADB Management document will eventually form part of the ESF, and will be contractually binding upon clients and subject to independent accountability, does not seem clear.<sup>12</sup> It would seem critical to clarify this important premise, in OHCHR's view, in order to enable a clear, consistent and effective approach to E&S risk management across ADB's portfolio.
10. Beyond these structural questions, the more specific issues that we wish to highlight are: (a) the need for risk-based due diligence throughout the value chain; (b) the need for a more robust and effective approach to remedying adverse impacts; (c) the need for a more explicit framework to guide ADB in exiting projects in a responsible fashion ("responsible exit"); (d) the need for a more detailed and robust framework for managing risks of digital projects; (e) the need to reflect applicable requirements of international law more consistently and accurately; (f) the need to avoid categorical E&S carve-outs in emergency and FCAS settings; (g) the need for a clearer and more robust approach to addressing intimidation and reprisals risks; (h) the need for enhanced rigour when seeking to use the borrower's E&S system, and (i) the need to strengthen requirements for policy-based lending. A list of recommendations is included in the Annex.
11. The analysis and recommendations below, if implemented, would also further alignment between ADB's safeguards and global human rights standards and emerging regulatory

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transactions supported by ADB financing but will be at least annually." Other exceptions are ESS 3, para. 13(iii) and ESS 5, para. 34(i).

<sup>10</sup> Such as in the case of common approaches and policy-based lending.

<sup>11</sup> Para. 62 of the draft Policy states: "For financing modalities and products that are developed by ADB post-effectiveness of the ESF, the application of the requirements of the E&S Policy and the ESSs will be guided by paras 62-70, and the ADB Management document will be updated to include the detailed E&S requirements specific to such new financing modalities and products, as appropriate."

<sup>12</sup> OHCHR's comments (and admittedly, confusion) on this issue pertain to paras. 43, 54, 80 and 97 of the Introduction to the W-paper, para. 62 of the Policy, para. 60 of ESS 1, and the cover page and para. 2 of the "Financing Modalities and Products" annex. The content of the ADB Management document is sometimes described in the W-paper as "requirements," but also "approaches", without accounting for the difference. The W-paper states that the annex will be approved by ADB Management, not the Board, which seems to give rise to questions about its contractual status *vis-à-vis* clients.

requirements for responsible business conduct.<sup>13</sup> [The UN Guiding Principles on Business and Human Rights \(UNGPs\)](#) have particular significance in this regard. The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and are the most authoritative framework for enhancing standards and practices with regard to human rights risks related to business activities. The UNGPs reflect existing international law as well as good practice in risk management. Many other standards and developments are aligned with or based on the UNGPs' framework, including the OECD Guidelines for Multinational Enterprises, the ILO MNE Declaration, ISO 26000, and the Equator Principles. The recent approval of the EU Corporate Sustainability Due Diligence Directive is another notable development in this regard.<sup>14</sup>

12. Numerous implementation initiatives for the UNGPs are underway in Asia, such as through National Action Plans on Business and Human Rights, draft mandatory human rights and environmental due diligence legislation in the Republic of Korea modelled on the UNGPs and OECD MNE Guidelines,<sup>15</sup> guidance from countries including China and Japan, and projects between UN offices and countries and companies in the region. Relevant practice in Asia includes [guidance](#) in September 2022 from the Japanese government on Respecting Human Rights in Responsible Supply Chains, [guidance](#) from the Chinese Chamber of Commerce on Metals Minerals and Chemicals Importers and Exporters,<sup>16</sup> and mineral supply chain due diligence [guidelines](#) in China based on the UNGPs and OECD MNE guidelines.
13. Additionally, an increasing number of DFIs have reflected the UNGPs within their safeguard policies and associated procedural guidance to varying degrees. Examples include IDB, IDB Invest, FMO (including in relation to FI operations), British International Investment, FinDev (Canada), Swedfund, Finfund, and the [safeguards](#) of the German government's International Climate Initiative (IKI). Hence, to the extent that the ADB's ESF aligns with the UNGPs, clients can be confident that complying with ADB's requirements means they will comply with all of these other policy and regulatory demands (and vice versa).

### Managing risks in value chains

14. We refer to our earlier analysis and recommendations on supply chain due diligence at pp.19-22 of our April 2021 [submission](#) in response to the SPS review. We note that the draft ESF limits the scope of due diligence to "primary suppliers," upstream, and to forced and child labour, "serious safety issues" and biodiversity impacts.<sup>17</sup> Primary suppliers are

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<sup>13</sup> On the relevance of the UN Guiding Principles on Business and Human Rights ([UNGPs](#)) in the context of DFI operational policies see OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.4-9.

<sup>14</sup> See e.g. [Third Time's a Charm: EU Moves to Approve the Sustainability Due Diligence Directive | Insights | Jones Day](#).

<sup>15</sup> Herbert Smith Freehills, [South Korea tables mandatory human rights and environmental due diligence law](#) (Sept. 14, 2023).

<sup>16</sup> Materially, the guidance states that Chinese mining companies should "observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project."

<sup>17</sup> ESS 2, para. 37 & ESS 6, para. 45. We note that a somewhat higher level of ambition is reflected in the Introduction, para. 62, which states: "Where significant risks are identified through project screening and assessment—or through contextual risk analysis—ADB will require extended due diligence at higher levels of the supply chain, including suppliers and workers engaged by primary suppliers." Para 69 of the Introduction (on Biodiversity and Sustainable Natural Resource Management), ESS 2 (para. 37) and ESS 6 (para. 34) contain similar references. However in OHCHR's understanding the ESS's will take precedence

defined in ESS 2, para. 3(iii) as: “suppliers who provide directly to a project goods or materials essential for production and/or service processes that are necessary for a specific project activity and without which a project cannot continue.” This definition seems marginally stronger than other MDB definitions in one respect, in that there is no requirement that goods, materials or services be supplied to the project on an “ongoing” basis. However the requirements for “direct” provision of goods or materials “essential” for production, and/or “necessary” service processes “without which a project cannot continue” are similar to other MDB requirements and seem unduly restrictive, in OHCHR’s view. The ESF cannot claim to be “risk-based” if a boundary is erected around the 1<sup>st</sup> or 2<sup>nd</sup> tier of suppliers. Many salient and serious (but potentially manageable) risks lie beyond this, while allowing for necessary prioritization in accordance with severity. Limiting one’s focus to primary suppliers can be inefficient as well as ineffective, if that is not where the most salient risks are.

15. More fundamentally, whatever the actual scope of risks and impacts associated with the project, the E&S risk management responsibilities are expressed to apply only to “upstream” suppliers, not to users or consumers or other stakeholders elsewhere in the value chain. There seems to be one small exception to this rule, in ESS 4, section J, concerning consumer protection, where downstream risk assessment is contemplated, although this is limited to health & safety impacts. In OHCHR’s view it is essential that impacts on users, consumers and other relevant stakeholders be included in a more comprehensive fashion, according to risk. This is not just a question of aligning with international business and human rights standards: the simple reality is that not all salient risks lie upstream. An increasing number of companies are effectively carrying out “downstream” due diligence in various sectors,<sup>18</sup> demonstrating feasibility, and there is ample finance sector experience to draw upon in the AML/KYC context.<sup>19</sup> The effective management of digital risks, in particular, is impossible without an explicit and intentional “downstream” focus on users and others who may be impacted in potentially profound and irremediable ways by DFI-supported digital projects.<sup>20</sup> The discussion in ADB’s digital risk [primer](#) (chapter 5) of how (not whether) to address third-party risks supports this view.

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over the Introduction, in terms of the E&S risk management requirements to be reflected in client contracts.

<sup>18</sup> See e.g. OHCHR B-Tech, [The Feasibility of Mandating Downstream Human Rights Due Diligence: Reflections from technology company practices](#) (Sept. 2022); Hogan & Reyes, [Downstream Human Rights Due Diligence: Informing Debate Through Insights from Business Practice](#), *Business & Human Rights Journal* (2023), pp.1-7; OECD Watch *et al*, [Downstream due diligence: Setting the record straight](#) (Dec. 2022); Danish Institute for Human Rights, [Due diligence in the downstream value chain: Case studies of current company practice](#) (Oct. 12, 2023); and Global Business Initiative, [Effective downstream human rights due diligence: Key questions for companies](#) (Feb. 14, 2023). Moreover in June 2023 the OECD released updated [Guidelines for Multinational Enterprises](#) which, among other things, reinforced the applicability of downstream (as well as upstream) due diligence expectations.

<sup>19</sup> Anti-Money Laundering/Know Your Customer. On the growing movement and motivating factors towards downstream due diligence generally see BSR, [Human Rights Due Diligence of Products and Services](#) (July 15, 2021).

<sup>20</sup> OHCHR, Policy Brief: DFIs & Digital Risks (consultation draft, March 2024).

16. Relatedly, there appears to be a serious incentives problem embedded in the draft ESF's proposed supply chain risk management framework: ESS 2 (paras. 37 and 39) limits the scope of the client's risk management responsibilities to its present sphere of control or influence.<sup>21</sup> In so doing, this may have an unintended effect of diminishing expectations and incentives for clients to proactively build and exercise leverage to ensure that salient E&S risks and impacts are identified and addressed.
17. OHCHR recognizes that the client's existing control over other entities will certainly affect the extent to which they can effect change in those business relationships causing human rights harms. Nevertheless, under international standards for business and human rights, this should not affect the scope of harms that clients and DFIs should be trying to address. Where it is necessary to prioritize actions to address harms, this should be determined by the severity (scale, scope and irremediability)<sup>22</sup> of risk, not the client's existing control. Rather, under international standards for business and human rights, clients should be encouraged to lean into risk and proactively explore all feasible avenues through which leverage could usefully be exercised across the scope of their business relationships. ESS 2, para. 39, would at least require the client to demonstrate its lack of influence, where it claims that this is the case,<sup>23</sup> but this is not likely to address the incentives problem referred to above and is not the same as an explicit, proactive requirement to build all available forms of leverage.<sup>24</sup>
18. In OHCHR's view a more robust and proactive approach would be strongly desirable if issues such as forced labour and child labour, often buried deep in supply chains, are to be more consistently identified and tackled. In OHCHR's view, consistent with international business and human rights standards, the scope of due diligence should cover all those impacts with which ADB and its clients are involved (including those directly linked to their

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<sup>21</sup> ESS 2, para. 39: "The ability of a borrower/client to address risks in paras 37 and 38 will depend on the borrower's/client's level of control or influence over its primary suppliers." This is a common constraint in other MDBs' safeguard policies as well, e.g. IFC, PS 1 (Jan. 1, 2012), para. 10; Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30)," and World Bank, Guidance Note for Borrowers (ESS 1) (June 2018), para. 34.

<sup>22</sup> UNGPs, Principle 24.

<sup>23</sup> ESS 2, para. 39: "The borrower/client will be required to demonstrate the extent to which it cannot exercise control or influence over a primary supplier by providing details of the considerations for such determination, which may include legal, regulatory, and institutional factors."

<sup>24</sup> By contrast IFC PS 1 does include an attenuated requirement to build leverage in the context of supply chain risk management: "Where the client does not have control or influence over the management of certain environmental risks and impacts in its supply chain, an effective ESMS should identify the entities involved in the value chain and the roles they play, the corresponding risks they present to the client, and any opportunities to collaborate with these entities in order to help achieve environmental and social outcomes that are consistent with the Performance Standards." However collaboration is only one of many possible forms of leverage. For a fuller discussion on the ways in which banks and clients may build and exercise leverage on E&S issues in the value chain (including but not limited to contractual leverage), see the report of the [Dutch Banking Sector Agreement working group on enabling remediation](#) (2019); OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Chap. III, and IFC/CAO, [The Remedy Gap: Lessons from CAO Compliance and Beyond](#) (Apr. 2023). The latter (CAO) report also notes at p.5 that: "In 70 percent (9 of 16) CAO compliance cases since 2018, IFC did not exhaust available leverage to address outstanding E&S compliance issues." The under-utilization of available leverage options seems to be a problem across many DFIs, in OHCHR's understanding.



operations, products or services by its business relationships),<sup>25</sup> downstream as well as upstream, including and beyond forced and child labour and biodiversity impacts, whether or not these relate to primary suppliers.

19. OHCHR would particularly recommend the explicit inclusion of SEAH in the ESF's value chain risk management requirements, given the precarious nature of women's work in global supply chains (particular for apparel and agriculture), the high prevalence and under-reporting of SEAH, and the rapid increase in the availability of tools and technologies to facilitate supply chain analysis.<sup>26</sup> The issue of SEAH is of course already high on ADB's agenda and is reflected in other ways in the draft ESF. MDBs regularly exchange information and good practices on supply chains and SEAH risks.<sup>27</sup> The Covid-19 pandemic has illuminated in a vivid and compelling way the problems of E&S risk management in supply chains, and has stimulated a range of innovative responses, including from ADB.<sup>28</sup> Supply chain mapping techniques have been improving dramatically through digital technologies.<sup>29</sup> These demands and developments call for a re-set of expectations, in OHCHR's view, and for more forward-looking, fit-for-purpose standards to drive sustainability in value chains over the life of ADB's ESF. This is not the moment for ADB to be harmonizing downwards with the legacy standards of other MDBs, in OHCHR's view.

**OHCHR recommends that:**

- *The ESF should clarify that clients should address all potential E&S (including 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, downstream as well as upstream, without any categorical limitation to "primary suppliers".*

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<sup>25</sup> UNGP, Principle 17. The commentary to UNGP 17 recognizes that where business enterprises have large numbers of entities in their value chains it may not be possible to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence. OHCHR, [Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), p.42.

<sup>26</sup> See e.g. ILO-ITC, *Gender based violence in global supply chains: Resource kit*, at [Briefing 3 2.pdf \(itcilo.org\)](#); OHCHR notes that SEAH is included in the definition of hazardous child labour, and to that extent is included within the scope of the "primary supplier" risk management requirements of draft ESS 2 (paras. 21 and 37). SEAH is also covered by ESS 2, para. 15. However as OHCHR reads the relevant ESS's, the larger problem of SEAH (of women as well as girls) in value chains beyond the child labour context is not addressed.

<sup>27</sup> ADB, W-Paper (Oct. 2023), para. 37.

<sup>28</sup> See e.g. [ADB Innovation Talks Series: Supply Chain Mapping Tool | Asian Development Bank](#): "If we are going to successfully tackle issues like fixing the environment, stamping out child and forced labor, or making the workplace more gender-friendly, we need to do it through supply chains."

<sup>29</sup> *Id.* See also Diginex, [Leveraging Technology to Uncover Gender Based Violence in Supply Chains](#) (June 15, 2023); and [Deep-Tier Supply Chain Finance \(adb.org\)](#), noting (among numerous other examples) an inclusive finance platform in China (JDH platform, operated by JDH Information Tech (Zhuhai) Co. Ltd) which penetrates to level 9 suppliers.

- *Risk-based risk management throughout the value chain should be prioritized according to risk, and should include but not be limited to forced and child labour, SEAH and biodiversity issues.*

### A proactive and robust approach to remediation

20. We refer to the recommendations on remedy in our April 2021 [submission](#), pp.15-18, and the subsequent discussions between ADB and OHCHR on this issue. The idea of “remedy” for E&S impacts is central to accountability, and to DFIs’ mandates to promote sustainable development and avoid harm to people and the environment. As indicated in our introductory remarks above, we welcome the recognition in ESS 1, para. 29 of the basic principle that E&S costs should be internalized within the project. We welcome the removal of “off-setting” in the mitigation hierarchy (ESS 1, II. (b)) and glossary, and would urge ADB to ensure that this is also reflected in draft ESS 1, para. 30. We welcome the provisions in ESS 5 concerning contingency funds in the resettlement context and would recommend that such arrangements be in place for all higher-risk projects, whether or not resettlement is implicated.
21. However, contrary to leading practice among DFIs and commercial banks, we note that the remedy framework in the draft ESF still does not reflect a robust and comprehensive approach to remedy predicated upon building and exercising all available forms of leverage, and on an assessment of the client’s, ADB’s and other relevant parties’ involvement in (or contributions to) E&S impacts. There is no operative definition of remedy, and there are no suggested criteria to guide the ADB’s assessment of its own involvement in impacts.
22. 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).<sup>30</sup> Where projects are associated with serious abridgements of human rights, such as forced evictions, GBV or SEAH, or reprisals against environmental or human rights defenders, a combination of the above remedies will often be required in order to make people whole. OHCHR would recommend that this multi-faceted definition of remedy be included in the glossary of the E&S Policy, and that the mitigation hierarchy be amended as follows: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to *remedy* such impacts.”<sup>31</sup> [Emphasis added].

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<sup>30</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.11-12.

<sup>31</sup> In this regard the Preamble of the 4<sup>th</sup> revision of the Equator Principles states: “Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimised and mitigated, and where residual impacts remain, clients should provide *remedy* for human rights impacts or offset environmental impacts as appropriate.” [Emphasis added]. The AfDB’s updated Integrated Safeguard System (2023), Operational Safeguard Standard 7 (“Vulnerable groups”), includes “remedy” in the mitigation hierarchy, although the term is not defined. OHCHR’s [Remedy in Development Finance: Guidance and Practice](#) (2022) Chapter II, elaborates more extensively on this theme.

23. Secondly, building upon our Office’s earlier recommendations, we would recommend that the ESF articulate how ADB and clients are to assess their respective involvement in E&S impacts. Under the UNGPs, OECD RBC guidance, and leading practice among DFIs, a party’s responsibilities in connection with adverse impacts should be determined in light of whether they may fairly be said to have “caused” or “contributed to” adverse impacts, or alternatively are “directly linked” to those impacts through their business relationships and financial products or services. This was also among the central recommendations of the 2020 IFC/MIGA External Review on E&S Accountability.<sup>32</sup>
24. “Linkage” situations (rather than “causing” or “contributing to” impacts) are the most common scenario in the context of development financing.<sup>33</sup> Where adverse impacts are “linked” to ADB’s operations, products or services by its business relationship with another entity, ADB should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGPs 13(b) and 19). In this regard, we would note that the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and ADB’s financial product or service. Rather, the link needs to be between the financial product or service provided by ADB and the adverse impact itself.<sup>34</sup>
25. However, there may well be circumstances where a lender by its own actions or omissions has “contributed” to harms together with an implementing organization, such as where the lender has not carried out adequate due diligence.<sup>35</sup> In “contribution” situations, under the UNGPs and OECD RBC guidance, a lender should: (i) cease its own contribution; (ii) use its leverage with the implementing organization 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. Moreover, a financial institution’s involvement with an impact may shift over time, depending on its own actions and omissions.<sup>36</sup> [Figure 1](#) summarises these principles, applicable in principle to lenders as well as clients:

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<sup>32</sup> IFC/MIGA [External Review on E&S Accountability](#) (June 2020), paras. 306-339, discussed at p.17 of our April 2021 [submission](#) on the ADB SPS review.

<sup>33</sup> [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), p.3.

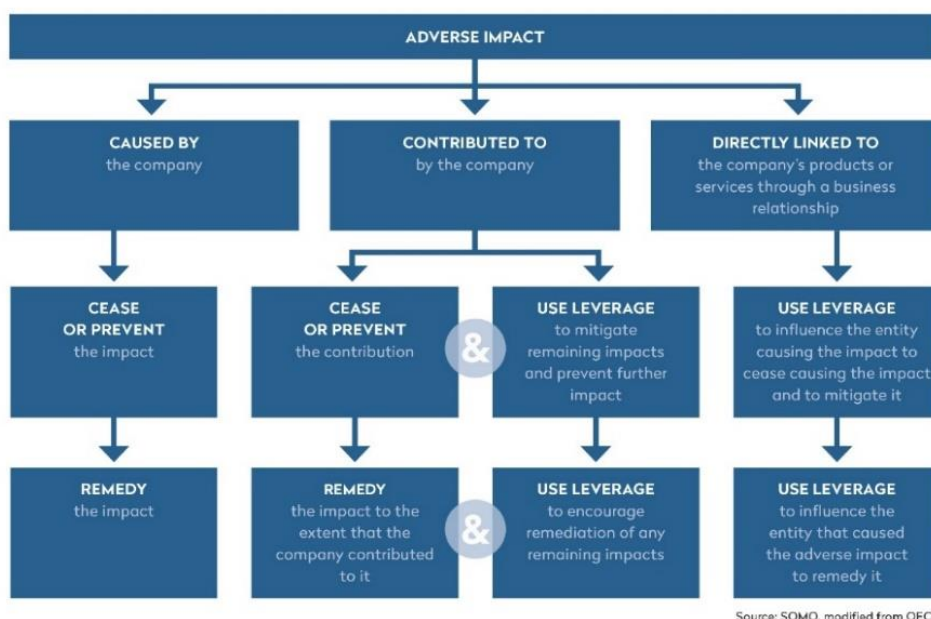
<sup>34</sup> [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-6. See also OECD (2018) [Due Diligence for Responsible Business Conduct](#), p.71.

<sup>35</sup> 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.

<sup>36</sup> *Id.*

**Figure 1**

**COMPANY RELATIONSHIP TO ADVERSE IMPACTS AND EXPECTED BEHAVIOR**



26. “Contributing to remedy” means providing remediation appropriate to one’s share in the responsibility for the harm. Whether providing for or cooperating in remedy,<sup>37</sup> the processes should be legitimate in the eyes of those who have suffered the harm and should follow basic requirements of fairness and due process. Cooperating in remediation does not necessarily mean that a lender should be expected to provide financial compensation to project-affected people, although there may well be circumstances where this is warranted.<sup>38</sup> Other means of contribution may include the engagement of expert studies, supporting the engagement of a facilitator and providing technical expertise. Ultimately, affected stakeholders should be meaningfully consulted about the type of remedy that would be appropriate in a given situation and the manner in which it should be delivered.<sup>39</sup>
27. It is sometimes thought that lenders should not contribute directly to remedy, even if they have contributed to the adverse impacts, because to do so would either discincentivize client remedial actions (the “moral hazard” problem) and/or increase litigation risk for the lender. But neither concern holds up to scrutiny, at least as a categorical proposition.

<sup>37</sup> On the distinction between “providing for” and “cooperating in” remedy, see OHCHR, [Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), p.64.

<sup>38</sup> See e.g. OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Part IV, pp.82-88. On the importance of and suggested parameters for financial compensation for victims of GBV see UN Women, UNFPA, WHO, UNDP & UNODC, [Essential Services Package for Women and Girls Subject to Violence](#) (2015), Module 3, p.26; and the [Guidance Note of the UN Secretary General on Reparations for Conflict-Related Sexual Violence](#) (June 2014), pp.16-17.

<sup>39</sup> A/HRC/44/32, annex, policy objective 12, para. 12.2; and A/HRC/44/32/Add.1, paras. 64–66.

28. On the “moral hazard” problem, firstly: we could well appreciate that clients may be disincentivized to take a proactive approach to remedy if or to the extent that ADB were to contribute whenever the client opted not to. But lenders and clients have fundamentally different roles. The former will never stand in the shoes of the latter. ADB has contributed directly to remedy in particular cases albeit without the benefit of clear policy.<sup>40</sup> Clear decision-making criteria and contractual conditions, including in relation to contingency funds for remedy and reimbursement rights to the lender, can keep concerns about moral hazard in proportion.<sup>41</sup> Conversely, the lack of any framework to guide ADB’s contributions generates inconsistency and disincentivizes ADB engagement with E&S risk. In any case the most pressing moral hazard concern on the present state of affairs is undoubtedly the continuing externalization of E&S costs upon project-affected people who are least responsible or able to influence the project. The recognition in ESS 1, para. 29 that E&S costs should be internalized within the project provides the foundation for a more structured, robust and equitable approach to this question, in OHCHR’s view.
29. Concerns about litigation risk, similarly, are often overstated given the broad scope and construction of most jurisdictional immunities of MDBs, the many legal and practical barriers to litigating claims (particularly, international claims), and the narrow scope for lender liability claims in many jurisdictions, even against commercial banks, much less MDBs. A recent study commissioned by OHCHR of lender liability regimes pertaining to commercial banking in the United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as in the European Union and Hong Kong, China, among several other jurisdictions, suggests that: (a) lender liability for environmental and social impacts is limited in the jurisdictions surveyed; and (b) broader proactive due diligence will not be likely to increase liability risks and in fact may reduce them.<sup>42</sup>
30. In any case, theoretical concerns about moral hazard and litigation risk need to be seen in the light of DFI policy and practice, which are evolving in the direction of more proactive and effective approaches. Among DFIs, Swedfund’s Sustainability Policy provides one of the clearest articulations of remedy expectations, closely aligned with the UNGPs:

*“To fulfil our commitment to respect human rights, we aim to avoid causing or contributing to adverse human rights impacts resulting from our own activities and to address such impacts if they occur. Where we identify that we have caused or contributed to adverse human rights impacts, we will provide for, or cooperate in, their remediation through legitimate processes.*

*We also aim to prevent or mitigate adverse human rights impacts that are directly linked to our operations by our business relationships. Where we identify adverse human right impacts that are directly linked to our operations through*

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<sup>40</sup> See para. 34 below.

<sup>41</sup> Contractual conditions might include, for example, reimbursement rights to ADB in circumstances where it chose to step in early and remediate potentially serious impacts, without having contributed to those impacts itself.

<sup>42</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.20-21; and Fisher & de Búrca, [Opinion: Challenging the World Bank Group’s stance on remedying harm](#), *Devex* (June 13, 2023).

*our business relationships, we will seek to work with our business partners to ensure that remediation occurs.*<sup>43</sup>”

31. Other financing institutions’ policies have been evolving in this direction as well. Examples include Finnfund’s [Sustainability Policy](#) (Feb. 28, 2020) (s. 3.3.1), the [International Climate Initiative \(IKI\) Safeguards Policy](#) (valid Jan. 15, 2023) (pp.9-10), [guidance](#) produced by Legacy Landscapes Fund (LLF) for ESAPs in the conservation sector (page 4), and the [Grievance Mechanism Policy](#) (2022) of the Belgian Investment Company for Developing Countries (BIO) (p.6, “Remedy”).<sup>44</sup>
32. Best practice in commercial banking supports this trend. The [ANZ Human Rights Statement](#) (May 2022), pp.3-4, states: “We use risk-based due diligence to identify human rights risks and impacts associated with our business relationships. ... In line with the UNGPs we seek to cooperate in remediation through legitimate processes and, where reasonable, use leverage to encourage our Customers to prevent or mitigate any impacts.”<sup>45</sup> ANZ is also a notable instance where an enabling policy on remedy has successfully been put into practice (see further below), generating “win-win” outcomes for the bank and project-affected people.<sup>46</sup>
33. Another commercial bank whose remedy policy appears to be moving ahead of that of the MDBs is Westpac bank, which has committed to “[p]roviding for, or cooperating in, the remediation of adverse human rights impacts where we identify that we have caused or contributed to these impacts. Where we have not caused or contributed to an adverse impact, but are directly linked to it, we recognise we may [nevertheless] be able to play a role in remedy.”<sup>47</sup> The leadership of commercial banks on this issue is all the more notable given their private character and lack of a sustainable development mandate.
34. There is also a growing body of experience showing how DFIs may contribute directly to remedy in practice, without triggering unmanageable moral hazard or litigation risk concerns. While only the tip of the iceberg, and while clearer policy frameworks and more consistent practice would certainly be desirable, illustrative examples from different DFIs, geographies and sectors include:

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<sup>43</sup> [Swedfund Policy for Sustainable Development](#), pp.2-3. See also Swedfund’s [Human Rights Guidance](#) (2020), para. 1.4, and Equator Principles [Guidance Note on Implementing Human Rights Assessments](#) (2020), p.18.

<sup>44</sup> BIO Grievance Mechanism Policy (2022), p.6: “In situations where BIO has caused the harm, for instance by failing to comply with its own policies and procedures such as the environmental and social due diligence or monitoring, BIO’s Grievance Mechanism shall take the necessary steps, appropriate to the company’s size and circumstances, to ensure the provision of remedy.” The Legacy Landscapes Fund ESAP [guidance](#), produced with the support of KfW and SHIFT, is closely aligned with the UNGPs and provides helpful guidance and decision-making trees on assessing involvement in impacts and exercising leverage.

<sup>45</sup> Moreover ANZ’s [Grievance Mechanism Framework](#) states (para 23.3.2) that where ANZ has contributed to harms it will “remedy the impact appropriate to the Customer’s own conduct and contribution” and (para 24) an independent mediator or expert may be engaged to help make determinations on ANZ’s contribution to an impact.

<sup>46</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Box 5.

<sup>47</sup> See [Westpac Human Rights Position Statement and Action Plan](#) (June 2023).

- In March 2024 IFC agreed to directly fund a remediation program for survivors of child sexual abuse for a period of 3 years, following non-compliance findings by its Compliance Advisor Ombudsman;<sup>48</sup>
- IFC Asset Management Company has agreed to finance \$5.2M for community services as part of a settlement of a legal claim brought by communities in Honduras adversely impacted by an IFC-financed agribusiness project<sup>49</sup>;
- World Bank, Uganda Transport Sector Development Project, involving a wide range of actions including mobilization of \$1.67M from the Bank's rapid social response trust fund and technical assistance to the Uganda National Roads Authority (see Box 7 of the OHCHR [Remedy report](#) 2022);
- World Bank, Albania Coastal Management project: [World Bank: Albania Project Mistakes Appalling – Eurasia](#), where the World Bank's contributions reportedly included payment of legal aid and assistance packages for those affected by housing demolitions;
- ADB and AusAID support for livelihoods and debt relief in connection with the Cambodia Railway Project;<sup>50</sup>
- ADB's financing of a \$200k mitigation plan in connection with the North-South Corridor (Kvesheti-Kobi) Road Project in Georgia;<sup>51</sup> and
- OPIC's financing of an indigenous peoples' development plan in connection with a mining venture in Bolivia, following non-compliance findings by its Office of Accountability (Box 5 of the OHCHR [Remedy report](#) 2022).

35. Drawing from evolving policy and practice, OHCHR recommends that the ESF reflect a robust and comprehensive remedy framework according to which responsibilities to address adverse impacts take into account the respective involvement of clients and ADB in impacts (cause-contribute-direct linkage), thereby helping to align ADB's and the clients' incentives with the ESF's objectives, keep pace with best practice, and contribute to more consistent and effective remedial responses.

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<sup>48</sup> See [IFC Board Approves Action Plan in Response to CAO Investigation Related to IFC's Investment in Bridge International Academies in Kenya](#). One notable weakness in the remediation proposal at the time of writing was the apparent omission of the possibility of financial compensation for victims (as opposed to financial assistance to access services made more widely available). On the importance and parameters for financial compensation in this context, as part of a wider suite of remedy options, see UN Women, UNFPA, WHO, UNDP and UNODC, : [Essential Services Package for Women and Girls Subject to Violence \(unfpa.org\)](#), Module 3, p.26; and [Guidance Note of the UN Secretary General on Reparations for Conflict-related Sexual Violence](#) (June 2014), pp.16-17.

<sup>49</sup> See [Honduran farmers, IFC settle suit alleging violence linked to investment | Devex](#) (Dec. 2023).

<sup>50</sup> ADB is reported to have provided technical assistance for an enhanced livelihood program while AusAID contributed to household debt relief, following non-compliance findings of a Compliance Review Panel investigation report.

<sup>51</sup> ADB, [Proposed Remedial Action Plan](#), Georgia: North-South Corridor (Kvesheti-Kobi) Road Project (April 2023) at p.8: "Implementation of the RAP and the mitigation action plan is expected to cost about \$200,000 and will be financed by ADB loan proceeds and existing technical assistance resources. The RAP includes the actions and timelines to bring the project back into compliance with ADB policies and procedures and/or mitigate any harm, as appropriate."

## **OHCHR recommends that:**

- *The following definition of remedy should be included in the Definitions section of the ESF: “Restitution, rehabilitation, satisfaction, and guarantees of non-repetition.” Such a definition would reflect international human rights standards and equip ADB and clients to address a broad range of adverse social (including human rights) impacts;*
- *The mitigation hierarchy in the ESF should be amended to: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts.” The inappropriateness of off-setting human rights impacts should explicitly be recognized in draft ESS 1, para. 30.*
- *The “technically or financially feasible” criterion in ESS 1, para. 30 should be deleted. Such a provision creates perverse incentives. Projects with significant residual impacts, without any prospect of remedy, should not be financed.*
- *Responsibilities to address adverse impacts should take into account the respective involvement of clients and ADB in impacts (cause-contribute-direct linkage), as summarized in [Figure 1](#) above.*
- *The ESF should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by ADB and clients to address human rights risks in which they are involved. An examination all available forms of leverage should be part of project Appraisal.*
- *The following sentence should be integrated within para. 36 of the Policy: “The ESCP/ESAP will include a budget for capital and recurrent costs.” This would help to clarify requirements and give effect to the commitment expressed in ESS 1, para. 29, that all E&S costs should be internalized within the project.<sup>52</sup>*
- *ADB’s monitoring requirements (Policy, paras. 56-59) should include the following requirements: (a) the client must report serious E&S incidents to ADB within a specified deadline; and (b) ADB has the right to carry out, or require the client to carry out, an audit or assessment where there is evidence of a serious departure from the ESCP/ESAP and/or the ESSs, the costs of which should be borne by the client.*
- *ADB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.*
- *Consistent with Section 7.8 of the report for the [External Review of the ES Accountability of the IFC and MIGA](#) (paras. 329-339), the ADB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by ADB contributions to the extent of the bank’s own involvement in any adverse impacts. A decision by ADB to contribute financially to remediation, in line with its own contribution to harms, is separate from and should not be seen as an admission of legal liability.*

## **Responsible exit**

36. We refer to our April 2021 submission (p.22) and to the discussion in pp.89-93 of OHCHR’s [DFI Safeguard Policies Benchmarking Study](#) (2023). We note the continuing imbalance, generally, between the efforts expended by DFIs on up-front compliance and development

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<sup>52</sup> ESS 1, para. 29: “The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project’s costs.”



impact when entering projects, compared with exit. We note that numerous DFIs (including IFC, IDB Invest and certain EDFIs) have been moving to address this significant gap in operational policy and practice, but that the draft ADB ESF contains little guidance in this respect. We note that UN and OECD standards on responsible business conduct encourage companies to build and exercise all feasible leverage options, engage with E&S risk, and assess human rights impacts of any decision to exit.<sup>53</sup>

37. It seems particularly important to address the “responsible exit” gap, in OHCHR’s view, particularly in the context of ADB’s planned expansion of private sector operations. The latter operations have shorter project cycles than those pertaining to sovereign lending operations, and exits may occur on shorter time frames.

**OHCHR recommends that:**

- *The ESF 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 to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;*
  - *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.*<sup>54</sup>

**Digitalization risks**

38. OHCHR notes that ADB’s Strategy 2030 has identified “*promoting innovative technology*” as one of the guiding principles for ADB operations.<sup>55</sup> We also note the detailed and valuable analysis of the impacts of digital technologies on human rights in ADB’s [Managing Digital Risks: A Primer](#) (Dec. 2023),<sup>56</sup> a leading resource in this field, and ADB’s recommendations on addressing risks to consumers of Fintech.<sup>57</sup> There is clearly a growing awareness of the environmental and social (including human rights) risks of digital technologies, and of particular challenges in the Asian region.<sup>58</sup> The central question is, how can the ESF most effectively address these risks?

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<sup>53</sup> UNGP 19, commentary.

<sup>54</sup> For an excellent analysis supportive of these recommendations, albeit targeted to IFC, see IFC/CAO, [Responsible Exit: Insights from CAO Cases](#) (Dec. 2023).

<sup>55</sup> ADB, [Strategy 2030 Digital Technology Directional Guide: Supporting Inclusive Digital Transformation for Asia and the Pacific](#) (2022), p. i.

<sup>56</sup> ADB, [Managing Digital Risks: A Primer](#) (Dec. 2023), pp.144-156.

<sup>57</sup> ADB, [Managing Fintech Risks: Policy and Regulatory Implications](#), ADB Brief No. 245 (May 2023), pp.7 & 10-11.

<sup>58</sup> See e.g. Sarah George, [World’s largest ICT companies failing to tackle human rights abuses in supply chains](#) (Jun. 12, 2020), assessing human rights risks in global ICT supply chains. The report found that ICT

39. Between October 2023 to January 2024, OHCHR assessed 3,450 digitalization projects, and/or projects with digital components, in nine MDBs, including 527 ADB projects, in four sectors: ICT, health, finance and public administration. The research noted that the digital footprint of the surveyed MDBs is large, and growing, but digital risks are not adequately being identified and addressed at the project level.<sup>59</sup> In ADB's case, within a sample of 182 projects assessed by OHCHR to have a relatively clear digital component, only one was assigned an "A" rating, and seven were rated "B."<sup>60</sup> Yet digital risks can be diverse, pervasive and severe, as outlined in our Office's [submission](#) on April 2021 (p.29), and go well beyond abridgements of the right to privacy.
40. Digital risks, including their human rights implications, have been well-recognized by ADB. ADB's *Managing Digital Risks* primer notes that: "Digital risks to projects can take many forms and typically have a technical underpinning. If these risks are not evaluated and communicated at the design stage, they will likely be left unaddressed throughout the project life cycle."<sup>61</sup> ADB notes further that "MDBs would be well advised to incorporate human rights risk factors associated with the data cycle (collection, storage, use, and re-use) into their risk assessments to ensure the protection of vulnerable groups."<sup>62</sup> This applies to all users of digital goods and services as well.
41. OHCHR welcomes the placeholder in the draft ESF for privacy and digital risks (Intro, para. 47(iii) and Policy, para. 21(v)(h), as part of contextual risks, and ESS 1, para 24(ii)) which is limited to privacy risks. However the ESF does not define the term "digital risk" and, with the exception of privacy risks, the effect of the above-mentioned provisions is to confine digital risks to contextual risk assessment. Hence the draft ESF does not address the many possible scenarios in which an ADB-financed project may be the source of digital risk.
42. In light of the foregoing, OHCHR would respectfully recommend that the ESF's "Definitions" section (pp.132-) include a clear and comprehensive definition of "digital risks", in line with the scope of this concept discussed in ADBs' digital risk [primer](#) (chapters 3-9). We would respectfully recommend that the ESF recognize that 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

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companies in the Asian region scored the lowest out of all regions on a bundle of indicators relating to commitments; governance; traceability and risk assessments; purchasing practices; recruitment practices; monitoring; ensuring worker voice and remediation when breaches occur.

<sup>59</sup> The database and methodology note are available on request.

<sup>60</sup> The "A" rating was for resettlement impacts of an e-health project. Finance and ICT sector projects had one "B" project each within the given sample. Across all MDBs surveyed, ICT sector projects were more likely to trigger safeguards given physical impacts of ICT infrastructure rather than digital risk concerns.

<sup>61</sup> ADB, [Managing Digital Risks: A Primer](#) (Dec. 2023), p. 74: "As a result, organizations did not build the necessary de-risking processes and safeguards into their procurement, assistance, or investment operations."

<sup>62</sup> ADB, [Managing Digital Risks: A Primer](#) (Dec. 2023), p. xvii.

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.<sup>63</sup>

43. In OHCHR's view "digital risks", broadly defined, should not only be part of the definition of contextual risk in the ESP's risk classification requirements (Intro, para. 47(iii) and Policy, para. 21(v)(h)) but should also be reflected in the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy. Moreover, given the comparatively long period of time over which digital risks may materialize, the admissibility threshold for complaints to the Accountability Mechanism and other relevant mechanisms needs to be more flexible.
44. In OHCHR's view, a self-standing ESS would offer the optimal and most effective means of addressing digital risks. Digital innovations, and their associated risks, are cross-cutting, complex, rapidly evolving and in some cases far broader than any other type of impact covered by existing Safeguards. That means they need to be addressed through a more detailed and nuanced set of requirements that go well beyond simply adding references to privacy and/or data protection as risks to be addressed in existing E&S safeguard requirements. Identifying and addressing these risks will require bespoke approaches that are often fundamentally different from existing approaches set out in E&S safeguards. The insightful analysis of digital risk management challenges contained in ADB's digital risk [primer](#) supports this recommendation, in our view.
45. It is sometimes suggested that the novel and dynamic nature of many digital risks may actually militate *against* the inclusion of these risks in safeguard policies, and that other kinds of policy guidance such as policy notes, good practice notes and/or programming guides would enable more flexible responses tailored to specific emerging challenges. However in OHCHR's view the ESF and "softer" forms of guidance should be seen as complementary rather than in opposition. The ESF should be the central focus given that this will be the main framework for managing E&S risks in ADB-supported projects, backed by dedicated E&S expertise and resources. The ESF will be approved by the Board and its requirements will be integrated within client contracts and subject to independent accountability. The incentives for implementation of ESF requirements are greater than those for other kinds of guidance. If a full range of digital risks are not explicitly integrated in the ESF, practice will be inconsistent and the goals of accountability and sustainability will be undermined.

**OHCHR recommends that:**

- *The ESF should include a stand-alone ESS on digital risk.*
- *The ESF's "Definitions" section (pp.132-) should include a clear and comprehensive definition of "digital risks", in line with the scope of this concept discussed in ADBs'*

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<sup>63</sup> OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.112-114 (Box 59). To similar effect see ADB, [Managing Digital Risk: A Primer](#) (Dec. 2023), chapter 8.

digital risk [primer](#) (chapters 3-9). In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific requirements 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.

- “Digital risks”, broadly defined, should not only be part of the definition of contextual risk in the ESP’s risk classification requirements (Intro, para. 47(iii) and Policy, para. 21(v)(h)) but should also be reflected in the definition of the project should be integrated within project risk classification requirements, the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client’s Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.

## Respecting international law

46. Good practice in DFI safeguards increasingly requires the observance of all relevant sources of law, including international standards, prioritizing whichever standards are most stringent. This is particularly important in view of the potentially wide gaps between national and international standards on issues covering by DFI safeguards, particularly in connection with social issues.<sup>64</sup> However we note that the draft ESF proposes to retain a formulation which confuses the sources of applicable law: para. 13 of the Policy, repeated elsewhere, would set E&S requirements against the “host country’s applicable laws, including those laws implementing host country obligations under international laws.”
47. OHCHR has already addressed the confusion inherent in the latter formulation (April 2021 [submission](#), pp.6-7). A national law is a national law, whether or not it purports to implement international obligations. National laws do not always specify whether or not they purport to implement international law, and even where they do, they may not reflect international requirements fully. Moreover, depending upon the client country’s constitution, international treaties may have domestic effect without need for legislation. In OHCHR’s view the highest applicable source of law should be respected, and the term “applicable law” should be defined in the ESF to include all sources of law relevant to project E&S risk management: national and international.<sup>65</sup> The logic of the latter proposition is reflected in the draft ESF’s approach to addressing the right of women to security of tenure (ESS 5, para. 42<sup>66</sup>) but, regrettably, not in relation to other population groups or social risk issues.

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<sup>64</sup> See e.g. University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Asia-Pacific Region (2021). More comprehensive country-specific analysis and recommendations from the various UN human rights bodies are available through the “Country” tab at OHCHR’s home page: [UN Human Rights Office \(ohchr.org\)](https://www.ohchr.org/).

<sup>65</sup> For an example from commercial banking practice, see Westpac’s human rights Position Statement: “If there is a direct conflict between an applicable domestic law and international human rights standards, we will look at ways to respect international human rights to the extent possible.”

<sup>66</sup> ESS 5, para. 42: “When the host country’s applicable laws and tenure systems do not recognize the rights of women to hold or exchange property, provision will be made to ensure, to the extent possible, that women can gain security of tenure.”

48. Incoherence is also reflected in the very selective referencing of international human rights instruments pertaining to the subject matter of the ESF, notwithstanding their legally binding nature. We note that explicit references to human rights instruments, and specific grounding of E&S safeguards or performance standards in relevant human rights standards, is increasing in DFIs across the various regions.<sup>67</sup> This is important in order to ensure that E&S requirements such as forced evictions, forced labour, FPIC and gender-based violence are interpreted consistently with international human rights standards, and conversely, that the latter standards are not unwittingly renegotiated or undermined through the process of incorporation within E&S risk frameworks.<sup>68</sup>
49. It is important and useful, as noted earlier, that the Policy (para 21(v)(i)) stipulates that international agreements should inform contextual risk assessments. Moreover, international conventions are to be taken into account in connection with the identification of gap-filling measures in connection with Project Impact Assessments for Indigenous Peoples (ESS 7, Annex 1). And under ESS 2, para. 23, the minimum age of child labour is expressed to be governed by the “host country’s applicable laws ... consistent with the applicable international convention”, which is presumably an implicit reference to ILO Convention No. 138 (1973, Minimum Age Convention). However these partial references to applicable international human rights standards pale by comparison to the numerous specific references to environmental conventions throughout the ESF.
50. We would respectfully suggest that relevant international human rights standards be integrated more systematically throughout the E&S Policy and client E&S risk management requirements, in order to ensure that the E&S Policy fully reflects and keeps pace with evolving human rights norms. Any contradictions between E&S Policy requirements, international and national standards should be resolved in favour of the more stringent standard.

**OHCHR recommends that:**

- *The Policy should contain an explicit human rights policy commitment in line with that of leading practice in other MDBs: “The ADB is committed to respecting internationally recognized human rights standards. To that end, in accordance with its safeguards, the ADB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports”.<sup>69</sup>*
- *The Definitions section of the ESF should contain a definition of “applicable law”, which includes international and national E&S standards relevant to the project. The phrase “host country’s applicable laws, including those laws implementing host country*

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<sup>67</sup> OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.11-12 and 18-26.

<sup>68</sup> Human rights cross-referencing and alignment should be undertaken in an intentional, substantive and rigorous fashion. Perceptions of window-dressing or rhetorical repackaging should be avoided.

<sup>69</sup> This wording draws from IDB ESPF (2021), para. 2.1, which also cites a range of relevant international human rights instruments. The human rights policy commitment in EBRD ESP (2019), para. 2.4, carried forward to the draft updated ESP (2024), is in similar terms. The policy statement in draft ADB ESF (Vision, para. 44) seems non-committal and aspirational, by contrast, and is located in the Vision rather than Policy which presumably reduces its practical significance.

*obligations under international laws” should be deleted from wherever it appears in the ESF, given the confusion it generates about the relationship between national and international law.*

- *Relevant international human rights standards should be integrated throughout the E&S Policy and client E&S risk management requirements, in order to ensure that the E&S Policy fully reflects and keeps pace with evolving human rights norms. Any contradictions between E&S Policy requirements, international and national standards should be resolved in favour of the more stringent standard.*
- *In addition to contextual risk analysis,<sup>70</sup> international human rights law and information from UN human rights bodies (Annex II of OHCHR’s April 2021 [submission](#)) should guide: (i) ADB’s risk classification and due diligence, (ii) social and environmental assessments, (iii) assessments of the robustness of client risk management systems (equivalence assessments), (iv) contextual risk analysis and Strategic Environmental Assessments, and (v) assessments of country/implementing authorities’ implementation practice, track record, capacities and commitment.*

### Proposed carve-out for fragile and conflict situations (FCAS) and emergencies

51. OHCHR notes the loose requirements and broad discretions which are proposed to govern E&S risk assessment and management in FCAS contexts and emergencies. In particular we note that under ESS 1, para. 45 “the borrower/client will address key risks and impacts and propose management measures, *to the extent possible*” [emphasis added]. Moreover, draft para. 65 of the Policy and ESS 1, para. 62 would permit financing of projects without E&S risk assessments where “details are not yet available.” Risk management would instead proceed under agreed (but unspecified) “risk management principles,” initially, and an ESMF. The term “emergency” is defined in very broad terms in the draft ESF (“Definitions”) and does not take into account situations where actions or omissions of the client government have caused or are perpetuating the emergency.
52. These provisions may set up perverse incentives, in OHCHR’s view, for any client seeking to avoid E&S risk management obligations. Similar concerns apply in connection with ESS 1, para. 45 (for FCAS), which makes no distinction as to the various causes of fragility,<sup>71</sup> and to the provisions relating to Emergency Assistance Loans in the “Financing Modalities and Products” annex (Section B), whatever the status of this annex may be.<sup>72</sup>

#### **OHCHR recommends that:**

- *In order to limit perverse incentives, paragraph 45 of the Policy should be deleted, and references to emergencies in the Policy (para. 65) and ESS 1 (para. 62) should either be deleted or limited to a clearly defined set of genuinely compelling “emergency” situations not of the client government’s making.*

### Assessing, preventing and responding to reprisals risks

53. Project-related reprisals risks have been increasing in recent years in line with shrinking civic space and erosion of democratic governance in many countries in the region.

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<sup>70</sup> ESP, para. 21(v)(i).

<sup>71</sup> The term FCAS does not appear to be defined in the draft ESF, however in practice it may be necessary to distinguish between endogenous causal factors (for example, situations where fragility been substantially caused by government policy) and exogenous factors (such as in the context of environmental shocks).

<sup>72</sup> See para. 9 above.

Militarization of projects and the mobilization of military and police forces to evict and restrict the freedom of expression also seem to be magnifying personal security risks to local communities.<sup>73</sup> These trends are regrettably not unique to the Asia-Pacific region, and most MDBs have published “zero tolerance” commitments to address reprisals and some have developed internal guidance, often following the lead of their independent accountability mechanisms.

54. OHCHR notes, positively, the new stakeholder engagement requirements in ESS 10, which include explicit attention to reprisals. We note that the term “reprisals” is defined on p.141 and appears in the Policy (para. 5, zero-tolerance statement) and ESS’s 2 and 7, in addition to ESS 10. However the draft ESF’s framework for protection against reprisals seems to be very limited and focused exclusively upon the client. It is hard to see how such a framework could be effective in practice, in OHCHR’s view. The main substantive requirements in the ESF are that stakeholder engagement and grievance mechanisms should be free of reprisals. However clients are frequently the source of reprisals risk, and project-level grievance mechanisms may be as well. There appears to be nothing in the ESF on ADB’s role and responsibilities to build and exercise leverage to ensure that reprisals risks are assessed, prevented and addressed throughout the project cycle. In the absence of such requirements, the zero-tolerance statement in para. 5 of the Policy seems highly aspirational, in OHCHR’s view.

**OHCHR recommends that:**

- *The ESP should contain clear requirements for ADB to assess, prevent and respond to reprisals risks throughout the project cycle.*
- *ADB should publish detailed procedures on how it should fulfil the above requirements,<sup>74</sup> including parameters and data sources for retaliation risk assessment and an outline of the various forms of leverage (contractual and non-contractual) that may be deployed to prevent and respond to reprisals.*
- *Paragraph 21(v) of the Policy should be amended to include “civic space and freedoms of expression, association and assembly” as contextual factors in project risk classification.*
- *Paragraph 24 of ESS 1 should be amended to include civic space and reprisals risk within the scope of E&S risk assessment.*
- *ADB and its Accountability Mechanism should systematically collect and publish aggregate data and trends analysis on reprisals in connection with ADB-supported projects and Accountability Mechanism procedures, including information on the nature and impact of response measures.*

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<sup>73</sup> See e.g. Dwyer et al, “The security exception: Development and militarization in Lao’s protected areas,” Vol. 69 *GeoForum* 207-217 (Feb. 2016); and Indonesia: UN experts alarmed by reports of increasing militarization and intimidation around Mandalika project, [press release](#) (Mar. 1, 2023).

<sup>74</sup> Certain MDBs, such as EBRD, have developed internal guidance on these issues. Other materials to draw upon include the IAM Network’s [Guide for Independent Accountability Mechanisms to Address Risk of Reprisals in Complaint Management](#) (2019), with necessary adaptations for the parent banks.

## Strengthening & use of the borrower's E&S system

55. National legal and policy frameworks on E&S issues have been weakening in many countries and in many respects. “National ownership”, while an important objective in principle, should not prejudice more fundamental E&S risk management and sustainability objectives, in OHCHR’s view.
56. We refer to our previous recommendations on this issue at pp.11-12 of our April 2021 [submission](#). We note, positively, the requirements in paras. 33-34 of the draft Policy concerning the preparation and publication of equivalence assessments, including the proactive information gathering requirements in para. 34 and the requirement for Board approval, and the requirement in ESS 1, para. 57 that the client must furnish all information reasonably requested by ADB for this purpose.
57. However we note that the draft ESF would permit the use of client E&S systems where to do so would enable the project to “achieve objectives materially consistent with the ESS’s”<sup>75</sup> (although presumably this is intended to mean “objectives materially consistent with those of the ESS’s”). This is an unclear and highly aspirational test, on its face. Consistent with our previous recommendations, we would recommend a more rigorous “functional equivalence” test, taking into account MDB best practice,<sup>76</sup> and reflecting the need for equivalence assessments to take into account the actual E&S standards to be used (not only aspirational objectives).

### **OHCHR recommends that:**

- *In order to promote rigour and consistent practice, ADB should replace its proposed equivalence test in the Policy, paras. 41 & 43; ESS 1, para. 57 (“objectives materially consistent with the ESSs”) with a more rigorous “functional equivalence” standard, in line with MDB best practice: “ADB may consider the use of the Borrower’s E&S system relevant to the project, provided that the Borrower’s E&S standards are substantially equivalent to those of the ESS’s and that the Borrower’s E&S system will be likely to address the risks and impacts of the project and will enable the project to achieve outcomes equivalent to those achieved with the application of the ESF.”*

## Policy-based lending

58. We refer to our previous recommendations on this issue at p.7 of our April 2021 [submission](#). We note, positively, the fact that contextual risk assessment should guide PBL (Policy, para. 66). However we note with concern that risk management is proposed to focus exclusively on risks and impacts of the “policy actions” for PBL,<sup>77</sup> rather than impacts

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<sup>75</sup> Policy, paras. 41 & 43; ESS 1, para. 57.

<sup>76</sup> For example IDB ESPF, para. 5.1 provides: “The IDB may consider the use of the Borrower’s Environmental and Social Framework relevant to the project, provided this is likely to address the risks and impacts of the project and will enable the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functional equivalence).”

<sup>77</sup> Policy, para. 66, and “Environmental and Social Requirements for Financing Modalities and Products” (Sept 2023 Consultation Draft), paras. 22-23. OHCHR interprets “policy actions” in accordance with the definition in fn 30 of ADB’s [Operations Manual](#) (June 30, 2023): “All conventional PBL types and PBGs will use a policy matrix (in the PDMF), which presents crucial reforms (policy actions) and addresses constraints in the program’s problem analysis diagram (problem tree). The policy matrix presents conditions that need to be satisfied and actions that need to be taken before the release of each



of the actual financing at country level, and risk mitigation need only aim to “achieve objectives materially consistent with the relevant ESS’s.” The latter standard is vague and aspirational and will surely not encourage rigorous risk management or consistent practice, in OHCHR’s view.

59. PBLs may have significant and widespread human rights risks and impacts, well beyond the scope of the relevant policy actions. For example, the UN Special Rapporteur on the Right to Adequate Housing has drawn attention to concerns about impacts of development policy lending on housing affordability, location, tenure security and the availability of services.<sup>78</sup> Impacts of development policy operations in the land and natural resources sector have been well studied in various national contexts,<sup>79</sup> as have impacts in the energy sector.<sup>80</sup> The need for parsimony in the deployment of DPLs was clearly articulated by the World Bank Inspection Panel in connection with its investigation of a development policy operation in the DRC, where the Panel concluded that the selection of the DPL financing modality effectively precluded the assessment of (otherwise predictable) impacts of forestry sector reforms on indigenous peoples:

*“The Panel also notes its concern that Development Policy Lending is being used for supporting activities which in earlier times have been financed as projects. This effectively bypasses the environmental and social safeguard policies that apply to projects. The Panel understands that Development Policy Lending may sometimes be the preferred instrument. However, since DPLs are usually disbursed in a single tranche, it is difficult to ensure that attention is paid to environmental and social issues. Moreover, in the case of DRC and increasingly most other DPLs in Africa with forest components, the Bank determines that there are no significant environmental and social effects, or alternatively that any effects would be positive. The Panel is concerned that these determinations are cursory with little time available to assess the proposed endeavor and with an implicit assumption that technical assistance programs affect only the targeted government program. Activities such as support for a forest concession program have very broad and very significant social and environmental effects in the country that cannot be ignored and need to be assessed.”<sup>81</sup>*

60. Given the fungibility of financing, DPLs may trigger serious fiduciary concerns in weak governance contexts. High-volume fast-disbursing operations like PBLs have potentially destabilizing effects and may fuel serious human rights violations, especially in FCAS

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tranche in a single-tranche or multitranches stand-alone PBL, subprograms for a programmatic approach, .. etc.”

<sup>78</sup> UN Special Rapporteur on Adequate Housing, Submission to the World Bank’s Safeguard Review and Update Process (Phase 1 – Public Consultation) (2013), p. 14.

<sup>79</sup> See e.g. [Executive Summary](#) of World Bank Inspection Panel investigation in relation to Forest Sector Operations in the Democratic Republic of the Congo (2008); and Bank Information Center & Asociación Ambiente y Sociedad, [The World Bank and Colombia’s Territorial Development Policy Financing: whose land is it anyway?](#) (Apr. 2018).

<sup>80</sup> Bretton Woods Project, [Gambling with the planet’s future? World Bank Development Policy Finance, “green” conditionality, and the push for a private-led energy transition](#) (Apr. 2024).

<sup>81</sup> World Bank Inspection Panel, footnote 79 above, p. xxviii.

settings. Policy based financing at scale in conflict-affected states provides fiscal space to finance armed conflict. In the example discussed in our April 2021 [submission](#) (p.7), policy based lending may even raise the risk of complicity by a lender in international crimes. The quick disbursing nature of PBLs makes it more challenging for affected stakeholders to be aware of these operations, to understand them and to participate in consultations. Deficiencies in transparency and accountability have been widely noted,<sup>82</sup> and the windows to bring complaints to IAMs may be very short.

61. The above factors warrant the selective application of PBL and more rigorous, systematic application of E&S safeguards, in OHCHR's view, focused as far as possible on actual impacts of the financed program, in addition to impacts of policy actions. Paragraph 24 of the "Financing Modalities and Products" annex usefully provides that if any "strategic, geographic, and/or sector-wide E&S risks related to the scope and nature of a policy-based loan operation are identified by a borrower or ADB," additional assessment and risk management measures will be required. However more specific, rigorous requirements would seem to be desirable in OHCHR's view. The World Bank has relatively detailed requirements for *ex ante* analysis and consultation for development policy financing (World Bank, OP/BP 8.60, paras. 6-9 & 12-14) although implementation is a more challenging question.<sup>83</sup>
62. Inspiration may be drawn from the AfDB ESP (2023), para. 44, which has a relatively short framework for PBLs (called programme-based operations, or PBOs) which, while schematic in nature, seeks to apply the actual requirements of the Operational Standards (not merely their objectives) to the programme itself (not merely the policy actions required by AfDB), with necessary adaptations: "Where the Bank provides support for programme-based operations (PBOs), the E&S provisions of this ISS apply. Specifically, the Bank will identify in consort (sic) with the Borrower how the specific provisions of the OSs may be applied appropriately at the programme and sector level, taking into account that such operations do not have the same granularity of E&S risks and impacts that are manifest in investment for project financing."

**OHCHR recommends that:**

- *For the sake of clarity and accountability, all requirements in the "Financing Modalities and Products" annex (or ADB Management document) should be integrated within the ESF.*
- *In line with ADB's Articles of Agreement,<sup>84</sup> and given the inherent challenges in effectively managing E&S risks in PBLs, the ESF should explicitly note the exceptional nature of this kind of operation.*
- *PBLs should be subject to the actual requirements of the ESS's, and should not merely aim to "achieve objectives materially consistent" with the ESSs.*
- *As far as practicable, E&S risk management requirements should apply to the policies and programme supported by the DPL, as well as the actions in the policy matrix.*

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<sup>82</sup> See e.g. Bretton Woods Project, above note 80, p.9; Bretton Woods Project, [What is World Bank Development Policy Financing?](#) (Mar. 23, 2021).

<sup>83</sup> *Id.*

<sup>84</sup> ADB's [Articles of Agreement](#) provide, Article 14(i), that "The operations of the Bank shall provide principally for the financing of specific projects[.]"

- *The ESF should contain more detailed requirements regarding the analytical underpinnings of DPLs, poverty and social impact analysis, transparency and participation.<sup>85</sup>*
- *Analytical work for PBLs should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts. A description of grievance redress mechanisms, including the ADB-AM, should be made publicly available in stakeholder consultations associated with PBLs.*

## Conclusion

63. We hope that these comments, and the recommendations in the Annex, are useful to ADB in finalizing the ESF. We reiterate our appreciation for our constructive and ongoing engagement with ADB on these issues, and are at your disposal for clarifications and any follow-up as needed.

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<sup>85</sup> The World Bank's [OP/BP 8.60](#) (2017) may provide inspiration in these respects.

## ANNEX - LIST OF RECOMMENDATIONS

OHCHR respectfully recommends the following:

### Risk-based value chain due diligence

1. *The ESF should clarify that clients should address all potential E&S (including 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, downstream as well as upstream, without any categorical limitation to “primary suppliers”.*
2. *Risk-based risk management throughout the value chain should be prioritized according to risk, and should include but not be limited to forced and child labour, SEAH and biodiversity issues.*

### A proactive and robust approach to remediation

3. *The following definition of remedy should be included in the Definitions section of the ESF: “Restitution, rehabilitation, satisfaction, and guarantees of non-repetition.” Such a definition would reflect international human rights standards and equip ADB and clients to address a broad range of adverse social (including human rights) impacts.*
4. *The mitigation hierarchy in the ESF should be amended to: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts.” The inappropriateness of off-setting human rights impacts should explicitly be recognized in draft ESS 1, para. 30.*
5. *The “technically or financially feasible” criterion in ESS 1, para. 30 should be deleted. Such a provision creates perverse incentives. Projects with significant residual impacts, without any prospect of remedy, should not proceed.*
6. *Responsibilities to address adverse impacts should take into account the respective involvement of clients and ADB in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*
7. *The ESF should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by ADB and clients to address human rights risks in which they are involved. An examination all available forms of leverage should be part of project Appraisal.*
8. *The following sentence should be integrated within para. 36 of the Policy: “The ESCP/ESAP will include an indicative budget for capital and recurrent costs.” This would help to clarify requirements and give effect to the commitment expressed in ESS 1, para. 29, that all E&S costs should be internalized within the project.<sup>86</sup>*
9. *ADB’s monitoring requirements (Policy, paras. 56-59) should include the following requirements: (a) the client must report serious E&S incidents to ADB within a specified*

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<sup>86</sup> ESS 1, para. 29: “The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project’s costs.”

deadline; and (b) ADB has the right to carry out, or require the client to carry out, an audit or assessment where there is evidence of a serious departure from the ESCP/ESAP and/or the ESSs, the costs of which should be borne by the client.

10. ADB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.
11. ADB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by ADB contributions to the extent of the bank's own involvement in any adverse impacts. A decision by ADB to contribute financially to remediation, in line with its own contribution to harms, is separate from and should not be seen as an admission of legal liability.

#### Responsible exit

12. The ESF 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 to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;
  - 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 ADB, or the client, as the case may be, on exit.

#### Digitalization risks

13. The ESF should include a stand-alone ESS on digital risk.
14. The ESF's "Definitions" section (pp.132-) should include a clear and comprehensive definition of "digital risks", in line with the scope of this concept discussed in ADBs' digital risk [primer](#) (chapters 3-9). In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific requirements 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.

15. “Digital risks”, broadly defined, should not only be part of the definition of contextual risk in the ESP’s risk classification requirements (Intro, para. 47(iii) and Policy, para. 21(v)(h)) but should also be reflected in the definition of the project should be integrated within project risk classification requirements, the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client’s Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.

#### Respecting international law

16. The Policy should contain an explicit human rights policy commitment in line with that of leading practice in other MDBs: “The ADB is committed to respecting internationally recognized human rights standards. To that end, in accordance with its safeguards, the ADB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports”.
17. The Definitions section of the ESF should contain a definition of “applicable law”, which includes international and national E&S standards relevant to the project. The phrase “host country’s applicable laws, including those laws implementing host country obligations under international laws” should be deleted from wherever it appears in the ESF, given the confusion it generates about the relationship between national and international law.
18. Relevant international human rights standards should be integrated throughout the ESP and ESS’s, in order to ensure that the ESF accurately reflects and keeps pace with evolving human rights norms. Any contradictions between ESF requirements, international and national standards should be resolved in favour of the more stringent standard.
19. In addition to contextual risk analysis,<sup>87</sup> international human rights law and information from UN human rights bodies (Annex II of OHCHR’s April 2021 [submission](#)) should guide: (i) ADB’s risk classification and due diligence, (ii) social and environmental assessments, (iii) assessments of the robustness of client risk management systems (equivalence assessments), (iv) contextual risk analysis and Strategic Environmental Assessments, and (v) assessments of country/implementing authorities’ implementation practice, track record, capacities and commitment.

#### Proposed carve-out for FCAS and emergencies

20. In order to limit perverse incentives, paragraph 45 of the Policy should be deleted, and references to emergencies in the Policy (para. 65) and ESS 1 (para. 62) should either be deleted or limited to a clearly defined set of genuinely compelling “emergency” situations not of the client government’s making.

#### Assessing, preventing and responding to reprisals risks

21. The ESP should contain clear requirements for ADB to assess, prevent and respond to reprisals risks throughout the project cycle.

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<sup>87</sup> ESP, para. 21(v)(i).

22. *ADB should publish detailed procedures on how it should fulfil the above requirements, including parameters and data sources for retaliation risk assessment and an outline of the various forms of leverage (contractual and non-contractual) that may be deployed to prevent and respond to reprisals.*
23. *Paragraph 21(v) of the Policy should be amended to include “civic space and freedoms of expression, association and assembly” as contextual factors in project risk classification.*
24. *Paragraph 24 of ESS 1 should be amended to include civic space and reprisals risk within the scope of E&S risk assessment.*
25. *ADB and its Accountability Mechanism should systematically collect and publish aggregate data and trends analysis on reprisals in connection with ADB-supported projects and Accountability Mechanism procedures, including information on the nature and impact of response measures.*

#### Strengthening & using borrower E&S systems

26. *In order to promote rigour and consistent practice, ADB should replace its proposed E&S systems equivalence test in the Policy (paras. 41 & 43) and ESS 1 (para. 57) (“objectives materially consistent with the ESSs”) with a more rigorous “functional equivalence” standard, in line with MDB best practice: “ADB may consider the use of the Borrower’s E&S system relevant to the project, provided that the Borrower’s E&S standards are substantially equivalent to those of the ESS’s and that the Borrower’s E&S system will be likely to address the risks and impacts of the project and will enable the project to achieve outcomes equivalent to those achieved with the application of the ESF.”*

#### Policy-based lending

27. *For the sake of clarity and accountability, all requirements in the “Financing Modalities and Products” annex (or ADB Management document) should be integrated within the ESF.*
28. *In line with ADB’s Articles of Agreement,<sup>88</sup> and given the inherent challenges in effectively managing E&S risks in PBLs, the ESF should explicitly note the exceptional nature of this kind of operation.*
29. *PBLs should be subject to the actual requirements of the ESS’s, and should not merely aim to “achieve objectives materially consistent” with the ESSs.*
30. *As far as practicable, E&S risk management requirements should apply to the policies and programme supported by the DPL, as well as the actions in the policy matrix.*
31. *The ESF should contain more detailed requirements regarding the analytical underpinnings of DPLs, poverty and social impact analysis, transparency and participation.*

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<sup>88</sup> ADB’s [Articles of Agreement](#) provide, Article 14(i), that “The operations of the Bank shall provide principally for the financing of specific projects[.]”

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

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