



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

# **Benchmarking Study of Development Finance Institutions' Safeguard Policies**

February 2023

**Benchmarking Study of Development Finance Institutions' Safeguard Policies**  
**Office of the United Nations High Commissioner for Human Rights (OHCHR)**

**Table of Contents**

ABBREVIATIONS.....	v
ACKNOWLEDGEMENTS .....	vii
I. EXECUTIVE SUMMARY .....	viii
II. INTRODUCTION.....	1
PURPOSE OF THE STUDY.....	1
NORMATIVE REFERENCES & TERMINOLOGY USED IN THE STUDY.....	2
CONTEXT FOR THE STUDY.....	4
SCOPE OF STUDY .....	9
III. WHAT IS DIFFERENT ABOUT HUMAN RIGHTS? .....	11
WHY IS IT IMPORTANT TO BE EXPLICIT ABOUT HUMAN RIGHTS?.....	11
WHAT IS THE DIFFERENCE BETWEEN "SOCIAL" AND "HUMAN RIGHTS" ISSUES? .....	12
WHAT IS DIFFERENT ABOUT HUMAN RIGHTS DUE DILIGENCE COMPARED TO OTHER TYPES OF DUE DILIGENCE?.....	15
WHY SHOULD DFIS AND THEIR CLIENTS CARRY OUT HUMAN RIGHTS DUE DILIGENCE? .....	16
IV. GAPS AND EMERGING GOOD PRACTICES IN DFI POLICIES .....	18
GAP 1: HUMAN RIGHTS POLICY COMMITMENTS IN DFI SUSTAINABILITY POLICIES ...	18
1. EXPLICIT VERSUS IMPLICIT REFERENCES TO INTERNATIONAL HUMAN RIGHTS STANDARDS .....	18
2. ALIGNMENT WITH NORMATIVE STANDARDS ON RESPONSIBLE BUSINESS CONDUCT .....	24
3. REFERENCES TO INTERNATIONAL LAW OBLIGATIONS .....	25
4. EVOLVING SAFEGUARDS POLICY ARCHITECTURE – NEW STANDALONE POLICIES DIRECTLY ADDRESSING HUMAN RIGHTS ISSUES.....	27
5. KEY RECOMMENDATIONS ON POLICY COMMITMENT .....	36
GAP 2: RISK ASSESSMENT/APPRaisal .....	37
1. RE-THINKING RISK MANAGEMENT .....	37
2. STARTING POINT: INCORPORATING ATTENTION TO HUMAN RIGHTS INTO ROUTINE, EARLY DUE DILIGENCE.....	39
3. INCORPORATING HUMAN RIGHTS INTO RISK CLASSIFICATION – BIASES AND GAPS .....	41
4. PRIORITIZING SEVERE HUMAN RIGHTS RISKS IN RISK ASSESSMENTS .....	46
5. ANALYZING THE PROJECT CONTEXT .....	48
6. DEFINING AND ASSESSING “THE PROJECT” .....	57
7. CLIENTS.....	66
8. KEY RECOMMENDATIONS ON APPRAISAL .....	69
GAP 3: PROJECT APPROVAL .....	70
1. CREATING AND EXERCISING LEVERAGE TO IMPROVE IMPLEMENTATION .....	70
2. ENVIRONMENTAL & SOCIAL ACTION PLANS.....	72
3. CONTRACTUAL AGREEMENTS.....	73
4. DISCLOSURE .....	74
5. KEY RECOMMENDATIONS ON PROJECT APPROVAL.....	78
GAP 4: SUPERVISION.....	79
1. MONITORING .....	79
2. EXERCISING LEVERAGE THROUGH DEFAULT CLAUSES.....	81

3.	REMEDY .....	83
4.	RESPONSIBLE EXIT .....	89
5.	KEY RECOMMENDATIONS ON SUPERVISION .....	93
GAP 5: FINANCIAL INTERMEDIARIES .....		95
1.	CONCERNS WITH EXISTING POLICIES AND PRACTICES .....	96
2.	EMERGING GOOD PRACTICES AND RECOMMENDATIONS.....	100
3.	KEY RECOMMENDATIONS FOR FI OPERATIONS .....	102
GAP 6: POLICY BASED LENDING INSTRUMENTS .....		103
1.	DEVELOPMENT POLICY FINANCING.....	103
2.	RESULTS BASED LENDING .....	106
3.	KEY RECOMMENDATIONS ON POLICY-BASED AND RESULTS-BASED LENDING.....	107
GAP 7: USE OF COUNTRY SYSTEMS.....		108
GAP 8: SUBSTANTIVE EMERGING GAPS IN SAFEGUARDS ARCHITECTURE .....		110
1.	THE SOCIAL DIMENSIONS OF CLIMATE CHANGE.....	110
2.	DIGITAL TECHNOLOGY.....	112
3.	LAND TRANSACTIONS .....	118
4.	USERS OF PROJECT SERVICES AND PRODUCTS.....	121
5.	KEY RECOMMENDATIONS TO ADDRESS SUBSTANTIVE GAPS .....	125
ANNEX – BENCHMARKING OF IFC PERFORMANCE STANDARDS AGAINST HUMAN RIGHTS STANDARDS.....		126
SUMMARY OF POSITIVE ASPECTS AND GAPS .....		126
DETAILED ANALYSIS.....		131
1.	COMPARING THE IFC PS TO THE UNGPS.....	131
2.	COMPARING THE IFC PS TO SELECTED INTERNATIONAL HUMAN RIGHTS STANDARDS - KEY SUBSTANTIVE GAPS .....	139
Box 1: Explanation Box – Normative Standards Referenced in the Study.....		3
Box 2: Explanation Box – Terminology Used in the Study.....		4
Box 3: Resource Box – Guidance on the Application of the UNGPs and OECD Guidelines to the Financial Sector.....		5
Box 4: Case Example – Avoiding Complicity in International Crimes – Myanmar .....		8
Box 5: Explanation Box – The Corporate Responsibility to Respect Human Rights.....		16
Box 6: Emerging Practices – Explicit Commitment to Respect Human Rights .....		20
Box 7: Emerging Practices – Explicit Cross-Referencing of Relevant International Human Rights Standards.....		22
Box 8: Emerging Practices – Exclusions Based on Human Rights Grounds .....		23
Box 9: Emerging Practices – Commitments and References to RBC Standards .....		24
Box 10: Emerging Practices – References to International Law Obligations .....		27
Box 11: Emerging Practices – Recognising Rights in Stakeholder Engagement.....		28
Box 12: Emerging Practices – Defining Project Affected People .....		30
Box 13: Emerging Practices – Stakeholder Engagement .....		31
Box 14: Emerging Practices – Avoiding Vulnerability as an Inherent Characteristic.....		33
Box 15: Emerging Practices – Non-Discrimination.....		34
Box 16: Emerging Practices – Gender Based Violence (GBV) and Sexual Exploitation, Sexual Abuse and Sexual Harassment (SEAH).....		35
Box 17: Emerging Practices – Separate E&S Standard on Gender Equality & SOGI .....		36
Box 18: Report Box – Externalities – Measuring the Hidden Costs to Society .....		39
Box 19: Emerging Practices – Integrating Human Rights into Routine Due Diligence.....		40
Box 20: Resource Box – Documenting the Absence of Human Rights Risks & Impacts – Equator Principles .....		41

Box 21: Explanation Box – Differences between Social Impact Assessments and Human Rights Impact Assessments .....	43
Box 22: Emerging Practices – Categorisation that Reflects Human Rights Considerations .....	44
Box 23: Emerging Practices – Recognising the Link between Human Rights and Environmental Issues .....	46
Box 24: Explanation Box – The UNGPs’ Structured Approach to Addressing Severity .....	47
Box 25: Emerging Practices – Prioritising Human Rights Risks.....	48
Box 26: Emerging Practices – Human Rights Assessment Tools .....	52
Box 27: Emerging Practices – Assessing National Law .....	53
Box 28: Emerging Practices – Reprisals .....	53
Box 29: Resource Box – Suggested DFI Actions to Improve the Enabling Environment for Participation and Protection against Reprisals.....	54
Box 30: Emerging Practices – Stakeholder Access to DFI Staff .....	55
Box 31: Emerging Practices – Attention to Conflict.....	56
Box 32: Resource Box – The Impact of Conflict on DFI Funded Transport Projects in Latin America .....	57
Box 33: Emerging Practices – Linkage and Leverage in Value Chain Risk Management .....	60
Box 34: Resource Box – Sectoral Due Diligence and Supply Chains.....	61
Box 35: Emerging Practices – Addressing Broader Value Chains.....	61
Box 36: Emerging Practices in the Private Sector – Addressing Downstream Risks.....	62
Box 37: Emerging Practices – Addressing Land Rights, Including Legacy Issues .....	64
Box 38: Emerging Practices – Guidance on Stakeholder Engagement.....	69
Box 39: Emerging Practices – Building and Exercising Leverage.....	71
Box 40: Emerging Practices – Contract Transparency for Extractive Contracts .....	74
Box 41: Emerging Practices – Recognising the Human Right to Access Information.....	76
Box 42: Resource Box – DFI Transparency Tool and Review of DFI ESG Disclosure Practices .....	78
Box 43: Resource Box – Exploring Linkages between Safeguards and Development Impact Measurement .....	80
Box 44: Emerging Practices – Supervision .....	81
Box 45: Emerging Practices – Special Operations E&S Specialists .....	82
Box 46: Emerging Practices – Default Clauses.....	82
Box 47: Resource Box – OHCHR Report on Remedy in Development Finance .....	83
Box 48: Emerging DFI and Commercial Banking Practices on Remedy.....	85
Box 49: Emerging Practices – IAM Mandates to Consider Complaints after DFI Exit .....	91
Box 50: Emerging Practices – DFI References to Exit.....	92
Box 51: Emerging Practices – Responsible Exit .....	93
Box 52: Resource Box – Publish What You Fund – Transparency of Financial Intermediaries..	99
Box 53: Emerging Practices – Requirements for FI Disclosure .....	100
Box 54: Emerging Practices - Grievance Redress Mechanisms.....	101
Box 55: Resource Box – BankTrack & Oxfam Australia Guidance on Effective Grievance Mechanisms in the Banking Sector .....	102
Box 56: Case Box – Budget Support to Myanmar in 2020.....	104
Box 57: Resource Box – Analyzing Country Legislation to Manage Social Risks of Investment Projects .....	110
Box 58: Emerging Practices - DFI Principles on Just Transition .....	111
Box 59: Resource Box – Human Rights Impacts in DFI Funded Projects with Digital Components .....	112
Box 60: Resource Box – Digital Rights Check for DFIs .....	118
Box 61: Emerging Practices – Recognising the Need to Address the "Voluntariness" of Voluntary Land Transactions.....	121

Box 62: Resource Box – OHCHR & Henrich Boell Foundation – The Other Infrastructure Gap: Sustainability .....	123
Box 63: Emerging Practice – Universal Access for Users with Disabilities .....	123
Box 64: Emerging Practices - Public Services Contracts.....	124
Box 65: Substantive Gaps in DFI Safeguards Highlighted in the Report .....	130
Figure 1: Typical Risk Matrix.....	38
Figure 2: Modified Risk Matrix.....	38
Figure 3: UNGP/OECD Concepts of “Involvement” in Adverse Impacts and Associated Responsibilities to Respond .....	87
Table 1: Human Rights Coverage .....	13

## ABBREVIATIONS

AfDB	African Development Bank
ADB	Asian Development Bank
AiIB	Asian Infrastructure Investment Bank
BII	British International Investment Corporation (formerly Commonwealth Development Corporation, or CDC)
CSO	Civil Society Organization
DEG	Deutsche Investitions- und Entwicklungsgesellschaft (German Investment Corporation, subsidiary of KfW)
DFC	United States International Development Finance Corporation (formerly OPIC)
DFI	Development Finance Institution
E&S	Environmental and Social
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
ESF	Environmental and Social Framework
ESG	Environmental, Social and Governance
ESIA	Environmental and Social Impact Assessment
ESAP	Environmental and Social Action Plan
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management System
EU	European Union
FI	Financial Intermediary
FMO	Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden (Dutch Entrepreneurial Development Bank)
GCF	Green Climate Fund
GBV	Gender Based Violence
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (German Agency for International Cooperation)
HRIA	Human Rights Impact Assessment
HRDD	Human Rights Due Diligence
IAM	Independent Accountability Mechanism
ICESCR	International Covenant on Economic, Social and Cultural Rights

IDB	Inter-American Development Bank
IDB Invest	IDB Invest (private sector financing arm of the IDB Group)
IFC	International Finance Corporation (private sector financing arm of the World Bank Group)
IKI	International Climate Initiative (of the Federal Government of Germany)
LGBTI	Lesbian, Gay, Bisexual, Transsexual, Intersex
KfW	Kreditanstalt für Wiederaufbau (KfW Development Bank)
MDB	Multilateral Development Bank
MIGA	Multilateral Investment Guarantee Agency (part of the World Bank Group)
OECD Guidelines	Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises
OHCHR	Office of the UN High Commissioner for Human Rights
PS	Performance Standards (of the IFC)
RBC	Responsible Business Conduct
SDGs	Sustainable Development Goals
SEA	Sexual Exploitation and Abuse
SIA	Social Impact Assessment
SOGIESC	Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNGPs	UN Guiding Principles on Business and Human Rights
VGGTs	Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests

## ACKNOWLEDGEMENTS

OHCHR is grateful to Margaret Wachenfeld of Themis Research for leading the research and preparation of this Study, and to the valuable comments on a June 2022 consultation draft and discussions with the African Development Bank, Asian Development Bank, Asian Infrastructure Investment Bank, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, European Bank for Reconstruction and Development, European Investment Bank, Finnfund, Inter-American Development Bank Group, International Climate Initiative of the German government, International Finance Corporation, Kreditanstalt für Wiederaufbau (KfW), Legacy Landscapes Fund, Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden (FMO), and members of the human rights working group of the European Development Finance Institutions (EDFIs).

OHCHR is grateful to the OECD's Responsible Business Conduct Center for co-hosting a consultation webinar in July 2022 in connection with this Study and OECD's RBC Guidance for Project and Asset Finance Transactions, and for comments from individuals including Daniel Adler, Stephanie Amoako, Rachel Bayly, Barbara Bijelic, Stefanie Brackmann, Daniel Bradlow, Ryan Brightwell, Natalie Bugalski, Oscar Carne, Lorenzo Cotula, Sebastien Cognet, Margaux Day, Gráinne de Burca, Francesca de Meillac, Tim de Meyer, Lalanath de Silva, Christian Donaldson, Bruce Dunn, Isabel Ebert, Angelina Fisher, Sylvie Fraboulet-Jussila, Kate Geary, Lisa Gross, Arntraud Hartmann, Ilka Herbinger, Maman-Sani Issa, Barbara Linder, Greg Lockard, Oliver Lorenz, Signe Andreasen Lysgaard, André Matsubara, Robert McCorquodale, Benjamin Michel, Takako Morita, Margaret Mottaz, Michelle Muhringer Shayer, Carmen Navarro, Patricia Nicolau, Alberto Ninio, Ashleigh Owens, Yasmine Pagni, Andrea Repetto Vargas, Laura Rojas, Mariana Ruiz Alvarado, Christel Saab, Rebeca Sanchez de Tagle White, Boris Schinke, Benjamin Shea, David Simpson, Ioana Tuta, Charlotte van Andel, Beatrijs van Manen, Margret Vidar, Wawa Wang, and Lene Wendland.

Finally, OHCHR gratefully acknowledges *pro bono* support provided by Clifford Chance and research on human rights risks of digital technology projects produced by the International Organizations Clinic of the New York University Law School.

This Study does not purport to reflect the views of any of the organizations or individuals mentioned above. OHCHR bears responsibility for any errors.



## I. EXECUTIVE SUMMARY

### BACKGROUND

Bilateral and multilateral development finance institutions (DFIs) provide hundreds of billions of US dollars in development finance annually.<sup>1</sup> Social and environmental requirements set out in policies and E&S standards (Safeguards) help ensure sustainability and project quality, and provide guardrails for the environment, workers and local communities that may be affected by DFI-financed projects.

DFIs mandates, functions and operations may differ, however most are explicitly mandated to support sustainable development or poverty reduction while avoiding harm to people and the environment. Many DFIs have made specific commitments to contributing to the achievement of the Sustainable Development Goals (SDGs). The faithful implementation of Safeguards supports these objectives and can generate positive human rights outcomes on a large scale.

However, human rights risks have been escalating in many parts of the world, raising the stakes and operational challenges for DFI-supported projects. These risks have been compounded by the COVID-19 pandemic, climate change and other environmental stresses, increasing authoritarianism and inequalities, and debt and food security crises. Intimidation and reprisals against project-affected people have increased dramatically. More and more DFIs are seeking to expand their footprints in frontier markets and fragile and conflict-affected settings where human rights risks are often the highest.

Strong Safeguards, sensitive to human rights considerations, are especially important in this context. The major multilateral development banks (MDBs) have been updating their Safeguards on a regular basis since 2012, when the International Finance Corporation (IFC) published its revised Sustainability Framework. The IFC Performance Standards have served as the default environmental and social (E&S) risk management framework for private sector focused DFIs, Equator Principle financial institutions and many other financial institutions worldwide, and have also influenced recent revisions of sovereign lenders' safeguards. Safeguard policies of the leading MDBs have helped to raise the bar for newer DFIs and have also exerted a positive influence on national E&S laws and risk management frameworks around the globe.

Human rights are universally adhered to and the subject of detailed regulation at global level, and to varying degrees at regional and national levels, overlapping extensively with the subject matter of DFIs' Safeguards. International frameworks for managing human rights risks and impacts are rapidly maturing, including in the business sector, and human rights requirements are increasingly

---

<sup>1</sup> It is difficult to be more precise than this. The lack of common definitions and consistent measurements of international development finance can lead to misleading estimates and comparisons. However, annual investments of a subset of 30 bilateral and multilateral DFIs reportedly grew from almost \$12 billion to \$87 billion between 2000 and 2017, a seven-fold increase: D. F. Runde & A. Milner, [Development finance institutions: plateaued growth, increasing need](#) (Center for Strategic and International Studies, 2019), p. 2. Aggregate financing has increased dramatically since 2020 in response to the COVID-19 crisis. Between 2008 and 2019 financing from the China Development Bank and the Export-Import Bank of China, alone, reportedly amounted to \$462 billion: A. A. Malik *et al.*, [Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects](#) (Williamsburg, AidData at William & Mary, 2021), p. 95. In contrast, in 2018, the estimated assets of "public development banks", generally understood to be a broader category than DFIs, were \$11.2 trillion: R. Marodon, [Can development banks step up to the challenge of sustainable development](#), International Research Initiative on PDBs and DFIs Working Groups, Working Paper No. 14 (2020), p. 7. For a discussion of definitional and data constraints, see J. Xu, X. Ren & X. Wu, [Mapping Development Finance Institutions Worldwide: Definitions, Rationales, and Varieties](#), NSE Development Finance Research Report, No. 1 (Beijing, Peking University, 2019), pp. 4–5 and 36–61.

being incorporated within financial regulations,<sup>2</sup> disclosure regulations,<sup>3</sup> corporate governance requirements, and mandatory human rights and environmental due diligence legislation.<sup>4</sup> Moreover, led by the EU, there is a growing range of ESG "taxonomies" which aim to steer capital flows towards sustainable investments.<sup>5</sup> For investments to be considered "sustainable" under the EU taxonomy, they must meet human rights "minimum safeguards."<sup>6</sup> The EU is also considering establishing a social taxonomy to steer capital flows towards projects with positive social and human rights impacts.<sup>7</sup>

An increasing number of DFIs – multilateral and bilateral – have been incorporating human rights in tangible and meaningful ways within their updated Safeguards and accompanying guidance, recognising their importance for E&S risk management purposes. Tighter alignment between DFI Safeguards and the UN Guiding Principles on Business and Human Rights (UNGPs) can help DFIs and their clients to satisfy Safeguard policy requirements and other evolving due diligence regulatory requirements simultaneously.

## OBJECTIVES OF THE STUDY

In line with the above trends, this Study highlights key changes that can and, in OHCHR's view, should be made to DFI Safeguard policies and practices in order to encourage stronger alignment and policy coherence with international human rights standards, and enable effective engagement with human rights risks. The Study is intended as a resource for bilateral and multilateral DFIs undertaking reviews of their Safeguard policies, and any other stakeholders interested in E&S risk management in the context of development finance.

It is sometimes thought (wrongly) that human rights are only aspirational in nature, or that the integration of human rights standards and principles in existing E&S frameworks may be duplicative or unfeasible. It is also sometimes argued that human rights issues may satisfactorily be addressed *implicitly*, through the application of DFIs' existing "social" standards, rather than explicitly. However as argued in this Study, explicit integration and alignment of E&S frameworks with human rights aim to bring the following benefits:

**Conceptually**, explicit human rights integration and alignment aim to:

- **Reinforce DFIs' mandates** in supporting sustainable development and the SDGs, contributing to better development outcomes by managing adverse impacts and identifying opportunities to improve positive outcomes of projects. Where neither DFIs nor their clients address human rights harms, burdens and costs are externalized to communities and workers. Conversely, addressing all relevant risks may significantly enhance development outcomes.
- **Strengthen legitimacy and justification** for prioritizing the most marginalized population groups, and addressing discrimination and social exclusion. Explicit integration and alignment send a clear message that the organization is committed to fairness with respect

---

<sup>2</sup> See for example the [EU Sustainable Finance Disclosure Regulation](#) (2022) which requires explicit attention to human rights and which applies to a wide range of financial institutions active in EU markets, and the draft [EU Corporate Sustainability Reporting Directive](#) (2021) that also includes proposed human rights disclosure requirements.

<sup>3</sup> GRI, UNEP & University of Stellenbosch Business School, [Carrots and Sticks: Global trends in disclosure as the ESG agenda goes mainstream](#) (2022).

<sup>4</sup> See Clifford Chance & Global Business Initiative on Human Rights, [Business and Human Rights: Navigating a Changing Legal Landscape](#) (Jan. 2022), and Business and Human Rights Resource Centre, [Mandatory Human Rights Due Diligence](#), which tracks global regulatory developments in this area.

<sup>5</sup> See e.g. IHRB, Clifford Chance, CDC, [Just Transactions - A White Paper On Just Transition in the Banking Sector](#), (Dec. 9, 2021), pp. 25-27. The minimum safeguards are defined by reference to the United Nations Guiding Principles on Business and Human Rights (UNGPs), OECD Guidelines, and ILO conventions.

<sup>6</sup> [Regulation \(EU\) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation \(EU\) 2019/2088](#).

<sup>7</sup> See [Platform on Sustainable Finance's report on social taxonomy](#) (2022).

to all those potentially affected by its operations, externalities will be accounted for, and that aggregate development progress should not be offset by negative impacts on marginalized groups.

- **Strengthen policy coherence.** All countries are party to at least one, and frequently several, of the core nine UN human rights treaties, in addition to ILO conventions. Regulatory regimes on E&S issues, Responsible Business Conduct and human rights are multiplying, generating overlapping and potentially conflicting requirements. Explicit attention to human rights minimizes the scope for internationally agreed human rights standards to be diluted or inadvertently renegotiated elsewhere, and provides a foundation and metric for policy coherence.
- **Support private sector clients** to meet the **corporate responsibility to respect human rights**, and support sovereign borrowers in implementing the full range of their human rights obligations.
- **Symbolize DFIs' commitment to accountability** to those who may be affected by its financing.

**Operationally**, explicit human rights integration and alignment aim to:

- **Improve risk management** and risk exposure by embracing a fuller scope of risks relevant to DFI-financed projects, strengthening due diligence, sharpening risk prioritization, and encouraging DFIs and clients to build and exercise leverage for better E&S outcomes.
- **Improve stakeholder relations** by demonstrating that both DFIs and their clients are committed to addressing human rights concerns, and that trade-offs between different interests will be managed transparently and fairly.
- **Encourage upwards harmonization of standards**, so that clients can have greater confidence that compliance with the DFIs' E&S standards will satisfy other (parallel) regulatory requirements and expectations.
- **Empower staff & clients** to take human rights issues into account, as relevant to their due diligence and risk management functions.
- **Enliven information flows** between DFIs and UN, ILO, regional and national human rights bodies, and facilitate access to **contextual information** necessary for project-level risk assessment and management.
- **Strengthen accountability** by aligning grievance processes and outcomes with international standards, encouraging a focus on remedy,<sup>8</sup> strengthening the effectiveness of grievance redress mechanisms, and strengthening equity among project stakeholders.

The Study seeks to describe as clearly as possible why and how the integration of international human rights standards can inform the scope, depth and rigor of DFI operational policies and procedures, organised by reference to a typical DFI project cycle: risk assessment/appraisal; project approval; and supervision. Given the constraints of space, the Study focuses mainly on direct investments but also briefly considers areas for potential Safeguard strengthening in connection with financial intermediary operations, development policy lending, use of country systems, and programming for results (or results-based lending) (Part IV, Gaps 5-7).

The Study is framed by the normative standards that underpin DFI mandates and by normative frameworks on Responsible Business Conduct (RBC) for the private sector. The latter frameworks (in particular the UNGPs and the human rights chapter of the OECD Guidelines on Multinational Enterprises (OECD Guidelines) respectively) (See Box 1) apply to the finance sector generally

---

<sup>8</sup> OHCHR, [Remedy-in-Development.pdf \(ohchr.org\)](https://www.ohchr.org/en/remedy-in-development) (2022).

and, as will shortly be discussed, are of equal relevance to sovereign and non-sovereign operations.

The Study seeks to provide practical guidance on the extent to which human rights issues are addressed in current DFI standards as well as where the most pressing gaps seem to be and how existing approaches might be strengthened. The Annex provides a focused, though synthetic, analysis of the IFC Performance Standards in view of their influence and uptake by DFIs and other finance sector actors. The Study includes specific analysis of a number of issues that are gaining prominence on the DFI Safeguard policy agenda, such as "remedy" and "responsible exit". It also considers a handful of issues which appear to warrant greater attention across the board, namely: (i) social dimensions of climate change; (ii) digital technology risks; (iii) the adequacy of safeguards in addressing land transactions beyond expropriation situations; and (iv) risks faced by users or consumers of products and services.

## CONTEXTUAL FACTORS AND CAVEATS

At the time of writing an ambitious reform agenda had been set in motion by shareholders of the World Bank Group, asking the Bank to produce proposals to more effectively address climate change and other global public goods.<sup>9</sup> Current reform proposals include reviewing the World Bank's capital adequacy requirements, dramatically scaling up finance for climate change mitigation and adaptation, and strengthening client country incentives. New project structures, including regional projects, have been mooted, which may require new approaches to E&S risk management.

In this context, and in prior MDB reform processes, there have been calls to "streamline" social and environmental safeguard policy requirements as part of an effort to scale up financing.<sup>10</sup> However any proposal to relax or weaken Safeguard requirements should be subjected to particularly close scrutiny, in OHCHR's view, for the sake of project quality, sustainability, and development impact. At the least, any streamlining should be accompanied by a robust remedy framework, to ensure that E&S risks are priced into projects and costs are not externalized onto vulnerable populations.

At the same time, newer lending modalities like development policy financing, results-based lending, capital market transactions, financial intermediary operations and emergency operations, have to some extent had the effect of limiting the scope and impact of Safeguards and their accountability infrastructure. Digital technology projects seem to have been excluded almost entirely. It doesn't matter how strong Safeguard requirements are if their scope of application is curtailed. Renewed energy and creativity are needed in order to ensure that Safeguards are both rigorous and adaptable to the demands of newer and more complex financing modalities and project structures.

In this regard one shouldn't lose sight of the fact that the establishment of Safeguard policies and independent accountability mechanisms in MDBs, and other DFIs thereafter, has been an historic achievement. The idea that individuals should have direct recourse to DFIs for project-related harms might not seem radical today, but in the early 1990s it was revolutionary. However the implementation of Safeguards and effective functioning of accountability mechanisms may run up against disbursement pressures, conflicting incentives and other powerful counter-currents within DFIs. Evidently, Safeguard policies and accountability systems cannot be taken for granted; to preserve and strengthen them will require vigilance, commitment and active stewardship.

The other important caveat to note at the outset is that this Study focuses mainly on Safeguard policy *formulation* rather than implementation. Good outcomes clearly depend *both* on rigorous, comprehensive policy requirements *and* robust implementation systems. Adequate client commitment and capacities are indispensable in this regard, supported and incentivized by DFIs through capacity building, technical assistance, financial incentives and other leverage tools.

---

<sup>9</sup> [World Bank Group Statement on Evolution Roadmap](#) (Jan. 13, 2023).

<sup>10</sup> See e.g. Suma Shakrabati & Chris Humphrey, [Rebooting the World Bank](#), *Project Syndicate* (Nov. 2022).

Further to the above, *within* any given DFI, prerequisites for effective implementation typically include: (a) strong leadership and consistent signals that sustainability and investment quality are dominant organizational objectives; (b) internal alignment of incentives, including integration of E&S outcomes in key performance indicators and ensuring that incentives for other priorities don't undermine E&S objectives; (c) adequate resources and capacities dedicated to E&S issues; (d) an effective system of accountability for E&S results; and (e) supportive internal governance procedures and structures, including clear E&S responsibilities and reporting lines.

## KEY FINDINGS AND THEMES EXPLORED IN THE STUDY

The research carried out for this Study reveals an increasing and welcome tendency among the leading multilateral and bilateral DFIs to cross-reference and align Safeguard requirements with applicable international human rights standards, and to expand the scope of Safeguards to encompass a wider range of human rights relevant to investment projects. The increasing adoption of stand-alone E&S standards on stakeholder engagement, increasing engagement with discrimination and reprisals issues, and increasing engagement on gender equality and GBV issues, are among the noteworthy developments in this regard.

Safeguards are also starting to reflect clear and explicit human rights policy commitments predicated upon the DFI's and client's responsibilities to respect human rights, although in some cases Safeguard policy commitments still seem vague, aspirational or non-operative in nature. The increasing use of contextual risk assessment, including human rights data and metrics, is a very positive development in OHCHR's view, subject to further specification in particular cases as to how the results of contextual risk assessment will inform project risk classification, assessment and management.

Nevertheless, there are clearly gaps in many areas, and issues on which further clarification is needed. The UNGPs and RBC norms are still relatively new to many DFIs, and their practical implications compared with established risk management practices are not always self-evident, and may need to be worked through in specific institutional and operational contexts. Some of the main gap areas and questions explored in the Study are:

### ➤ *RESPONSIBILITY AND RISK*

A fundamental issue explored in this Study is how DFIs' and clients' due diligence processes can be strengthened through closer alignment with the UNGPs and global RBC standards. The latter standards encourage DFIs and clients to "lean into" risk and undertake risk-based due diligence throughout the value chain. Risk prioritization is informed above all by the *severity* of risks (over and above likelihood), as well as an assessment of the extent to which the DFI or client caused, contributed or is directly linked to adverse impacts through its business relationships. DFIs and clients are encouraged to build and exercise all available forms of leverage to address negative impacts, and where a DFI or client has contributed to those impacts, it should also be expected to contribute to remedy.

DFI Safeguards are beginning to reflect certain of these precepts however very few are explicitly grounded in the recognition that a DFI's and client's E&S responsibilities should take into account the extent to which they have caused or contributed to negative impacts, or are linked to those impacts through business relationships ("cause-contribute-linkage", or what RBC standards refer to as the "involvement framework").

### ➤ *HUMAN RIGHTS DUE DILIGENCE*

One issue which would clearly benefit from conceptual clarification, based on consultations undertaken for this Study, is the concept of human rights due diligence (HRDD). Under the UNGPs and OECD Guidelines, HRDD is a broad concept and set of processes through which a business identifies, prevents, mitigates, tracks and accounts for its human rights impacts. The HRDD process stems from an explicit human rights policy commitment which is embedded in and implemented through appropriate management systems. HRDD is an ongoing, continuous requirement and may involve a bundle of different processes and the deployment of a range of

specific tools over time. Human rights impact assessments are among those tools, which may be implemented in a stand-alone fashion or integrated within existing instruments such as ESIA's.

By contrast, where HRDD is recognized in DFI safeguards, it is often equated with *human rights impact assessments*, alone, and may be limited to "high-risk circumstances."<sup>11</sup> Rarely is HRDD implemented as a central, routine aspect of risk management systems. In OHCHR's view, it is important that the conceptual confusion in this area be addressed, and that HRDD be implemented on a routine rather than exceptional basis. Without explicit and systematic flagging, or if considered relevant only in exceptional high-risk situations, human rights issues and information sources may more readily be overlooked, and project risk categorization, assessment and management may be undermined. As DFIs move from upfront compliance to adaptive risk management, it seems all the more important that DFIs have a good overview at the beginning of all significant risks that may arise, and have an adequate basis for assessing the client's risk management capacity before approving financing.

#### ➤ *SUPPLY CHAIN VERSUS VALUE CHAIN DUE DILIGENCE*

One of the main findings in the Study is that the scope of due diligence in DFI Safeguards is usually more limited than under the UNGPs and RBC standards. As indicated above, the UNGPs and RBC standards encourage risk-based due diligence throughout the value chain. However, with isolated exceptions, due diligence under DFI Safeguards tends to focus on "upstream" supply chain risk management, and then mainly on labor and biodiversity impacts, and "primary suppliers" as variously defined. This approach is sometimes said to have a virtue in clarity, however it is not obviously the most efficient approach, given that the initial tiers are not necessarily where the most salient risks are. Forced labor, for example, is often buried deep in supply chains. Impacts on users and consumers are almost systematically missed. Emerging practice in the private sector may provide inspiration for more comprehensive and effective value chain risk management in the development finance context.

#### ➤ *NATIONAL VERSUS INTERNATIONAL STANDARDS*

One of the more pressing issues discussed in this Study is how to deal with the growing gaps between national and international standards on many E&S issues, including many human rights issues, within the scope of Safeguards. Effective risk management requires the application of the most stringent applicable set of standards, however this principle is not consistently recognized in Safeguards and sits in tension with increasing expectations that country E&S systems be used in DFI-supported projects. OHCHR recognizes that this can be a difficult needle to thread, but that human rights "gaps" at national level often reflect a lack of commitment as much as capacity. With E&S objectives in mind, OHCHR suggests that a judicious approach to using national systems is warranted, and only where national E&S standards are substantially equivalent to the requirements of Safeguards and applicable international law.

#### ➤ *REMEDY*

One of the most persistent areas of confusion and contention revealed through consultations for this Study was on the subject of remedy for E&S, including human rights, harms. The subject of remedy has a long pedigree in the human rights field and was the subject of a separate OHCHR study published in 2022, [Remedy in Development Finance](#). There is a significant remedy gap in practice, particularly where serious harms are concerned. Yet remedy is still too often seen as a blame game between the DFI and client, or source of reputational risk, rather than a development opportunity or collective quest for better E&S outcomes. This creates a potentially serious moral

---

<sup>11</sup> See e.g. IFC Performance Standard 1, footnote 12, which confines HRDD to "limited high risk circumstances." The IDB's ESPF (2020) contains an improved formulation, albeit limited to the client (not IDB itself). IDB, ESPF 1, para. 6, requires borrowers to consider human rights impacts specifically, and fn 52 provides: "It may be appropriate for the Borrower to include in its E&S risk and impact identification process a specific human rights due diligence in line with the UN Guiding Principles on Business and Human Rights."

hazard problem wherein externalities and costs are borne overwhelmingly by communities and individuals who may have little if any say or control over the project.

There has been renewed attention to the issue of remedy among DFIs since the year 2020, prompted by policy developments at IFC/MIGA and successive MDB Safeguard policy and accountability review processes. This Study argues for a re-set of the remedy conversation, and for remedy to be approached more pragmatically and constructively as an ordinary project contingency. Structures, responsibilities and mechanisms for effective remediation should be built into the project and contractual conditions from the outset. Clients should be required to cooperate in and provide for remedy when they have caused or contributed to harms and to use leverage with their own business relationships, including their value chains, to cascade these requirements. DFIs should build and exercise all available forms of leverage to encourage clients to meet their remedy responsibilities, and should be prepared to contribute to remediation, together with the client and other responsible parties, appropriate to their share in the responsibility for harm. For higher risk projects, Safeguards and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S and human rights impacts.

#### ➤ *RESPONSIBLE EXIT*

Another issue which has been gaining increased attention, closely related to the issue of remedy, is the concept of "responsible exit." The idea of "responsible exit" emerged from problems associated with unremediated E&S and human rights issues occurring in the course of project closure or a DFI's exit, whether planned or unexpected. The term "responsible exit" applies to a range of situations: routine exits at the end of a loan, to planned exits from equity investments at a designated time, to situations in which analyses of adverse impacts prompt DFIs to terminate their involvement early.

Responsible exit is the corollary of "responsible entry." However, generally speaking, there appears to be a significant imbalance between the efforts expended by DFIs on upfront compliance and development impact when entering projects, compared with exit. The UNGPs and OECD Guidelines establish clear expectations that the human rights implications of exit should be taken into account prior to any decision to exit. OHCHR suggests that DFIs should consider developing a set of guiding principles for exits that are incorporated into Safeguards, procedures, legal documentation and guidance. In OHCHR's view, Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.

#### ➤ *DIGITAL TECHNOLOGY PROJECTS*

One relatively new and notable area where Safeguards seem to fall short is in connection with human rights risks of digital technology projects. Digital technology is of critical importance in the global economy, and impacts upon people's lives positively as well as negatively, in a growing number of ways. However the implications of digitalization are not always easy to grasp, and digital transformations can carry risks ranging from discrimination and function creep of digital ID systems, to exclusion bias in data standards or formats that determine access to public services, discriminatory impacts of algorithms, abuses of facial recognition and biometric technology, and abridgements of freedom of expression and association due to internet shutdowns.

Where DFIs have begun to explicitly identify risks specific to digital projects, they have so far tended to focus on privacy, data protection, and cyber security, although practice varies. It is critical to develop Safeguards which can identify and address the environmental, social and human rights impacts in this area, which may be more widespread and diffuse compared with those of traditional investment projects, and may materialize over a longer time horizon. Requirements for stakeholder engagement and remedy will require fresh and creative thinking. The UNGPs and RBC standards explicitly encourage risk-based due diligence throughout the value chain, downstream (to users and consumers) as well as upstream (supply chains), and may provide a framework for more effective risk management approaches in this area.

## LIST OF RECOMMENDATIONS

Recommendations to DFIs are listed at the end of each Part of this Study, and are aggregated below. The recommendations do not purport to be comprehensive, but rather reflect OHCHR's sense of priorities taking into account the consultations with DFIs and other stakeholders that fed into this Study.

### *POLICY COMMITMENT:*

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

### *PROJECT APPRAISAL:*

- *Human rights should be treated alongside other E&S risks as a routine part of the due diligence process. This would ensure that important risks and impacts are identified upfront, and inform project risk assessment, and are managed effectively throughout the project cycle.*
- *Human rights due diligence should not be a one-time, static event, and should not be limited to special or "high risk" circumstances. Information and recommendations from UN, regional and national human rights bodies should inform routine human rights due diligence.*



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

#### **PROJECT APPROVAL:**

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

## REMEDY:

- *Safeguards should include an explicit commitment to remedy harms as a corollary of their "do no harm" mandates. Mitigation hierarches should explicitly include "remedy" and recognize that off-setting is inappropriate for human rights impacts. In OHCHR's view an appropriate formulation would be "prevent, minimize, mitigate and/or remedy."*
- *Safeguard policies should define the DFI's and client's/investee's responsibilities for remedy by reference to their respective involvement in impacts (cause-contribute-direct linkage), as summarized in Figure 3 in this Study.*
- *Remedy should be approached as an ordinary project contingency. Safeguard policies and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S impacts for higher risk projects.*
- *Safeguard policies should set out clear criteria governing the circumstances in which the DFI will contribute financially to remedy, taking into account (i) the DFI's involvement in impacts; (ii) the urgency and extent of remedy needs; and (iii) the availability of alternative means of remedy. The DFI should set aside remedial funds to enable quick relief in such contingencies, with reimbursement rights vis-à-vis the client as appropriate.*
- *Safeguard policies and loan/investment agreements should explicitly include requirements concerning the disclosure to project-affected people of the DFI's IAM and any project-level grievance mechanism, and for active cooperation by the client with complaint processes.*
- *Where serious human rights impacts are in a client's value chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate that they comply with Safeguard requirements or to eliminate such practices within a reasonable time frame.*
- *Analysis of the remedy ecosystem should be included within the DFI's project-level due diligence and be a strengthened focus of technical guidance and support to clients.*

## RESPONSIBLE EXIT:

- *Safeguards should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:*
  - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
  - *A clear requirement not to exit without first using all available leverage 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.*
- *Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.*

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

#### **FINANCIAL INTERMEDIARY OPERATIONS:**

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

#### **USING COUNTRY E&S SYSTEMS:**

- *DFI's Safeguards should specify that country and client systems may be used in whole or part provided that this is likely to address the risks and impacts of the project and the client system's requirements are substantially equivalent to those of the DFI's Safeguards and in line with international environmental and human rights standards.*
- *International human rights law and information from UN human rights bodies should guide DFIs' assessments of the functional equivalence of country and client E&S systems. The latter assessments should be publicly disclosed.*

#### **DEVELOPMENT POLICY OPERATIONS:**

- *Development policy financing operations should be covered by Safeguards. E&S risk classification, assessment and management should be informed by contextual risk analysis, taking into account human rights information sources. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints.*

#### **RESULTS-BASED LENDING:**

- *Results-based lending operations should be covered by Safeguards and informed by contextual risk analysis, taking into account human rights information sources, at all stages of the project cycle. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility*

requirements should be flexible enough to accommodate complaints. High risk operations should be excluded.

#### EMERGING ISSUES AND SUBSTANTIVE GAPS:

- Safeguards should address the impacts of climate change on people, including the human rights impacts of climate change mitigation and adaptation measures.
  - In digital technology projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.
  - Safeguards should address a wider range of land transactions than those occurring through expropriation or under the threat of expropriation. Any "willing buyer-willing seller" exceptions should be closely scrutinized and take into account asymmetrical power relationships and discrimination and vulnerabilities of prospective sellers.
  - Land tenure assessments should address the full range of tenure rights applicable in a given context, including traditional, customary and indigenous tenure rights, as well as formal ownership rights, taking into account relevant international standards including the [Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#).
  - Safeguard policies' definitions of "stakeholder" should include users and consumers of products, facilities or services associated with the DFI-supported project. Safeguard requirements should address E&S risks of users and consumers, and should explicitly take into account relevant international consumer protection standards such as the [United Nations Guidelines for Consumer Protection \(UNGCP\)](#), ISO standards, and the OECD Guidelines chapter on Consumer Interests.
-

## II. INTRODUCTION

### PURPOSE OF THE STUDY

Since the International Finance Corporation (IFC) revised its Sustainability Framework in 2012, numerous multilateral development banks (MDBs)<sup>12</sup> and other development finance institutions (DFIs)<sup>13</sup> have periodically updated their environmental and social (E&S) Safeguards. Examples include the World Bank (2016), Asian Infrastructure Investment Bank (AIIB) (2016 and 2019 and 2021), European Bank for Reconstruction and Development (EBRD) (2014 and 2018), Inter-American Development Bank (IDB) (2020), IDB Invest (2020) and the European Investment Bank (EIB) (2022).

As of 2023 policy updates were underway at the African Development Bank (AfDB), Asian Development Bank (ADB), Green Climate Fund (GCF) and in prospect at the EBRD. While each DFI is different, Safeguard policies have many common purposes and features. The present Study aims to contribute to future DFI Safeguard review processes and will be updated periodically in light of evolving practice and lessons learned. While multilateral DFIs are the main focus of this study, bilateral DFI experience is also taken into account for comparative purposes.

Safeguards are applied to billions of dollars of financing annually from multilateral and bilateral DFIs. The Safeguard policies of MDBs, in particular, exert strong normative influence on national laws and on social and environmental risk management frameworks. The IFC's Performance Standards have been adopted by the 137 Equator Principles financial institutions<sup>14</sup> and many DFIs, export credit agencies and other financial institutions.

Established DFIs are facing competition from new funding sources, including from DFIs in countries with weaker traditions of transparency and accountability. The latter DFIs have grown dramatically in reach and influence; for example between 2008 and 2019 financing from the China Development Bank and the Export-Import Bank of China, alone, reportedly amounted to \$462 billion.<sup>15</sup> Co-financing is dramatically increasing. Competition and cooperation can be beneficial however they may also generate perverse incentives to dilute Safeguard standards. The comparative weakness of the sustainability frameworks of many of the newer financing institutions is a matter of

---

<sup>12</sup> At least 28 multilateral development banks have been formed since 1944. See T. Pratt, [Angling for influence: institutional proliferation in development banking](#), *International Studies Quarterly*, vol. 65, No. 1 (2021), pp. 95–108, at p. 96. However, in the present paper, unless a contrary intention appears, the term "multilateral development banks" refers to the World Bank Group (including the International Bank for Reconstruction and Development (IBRD), the International Development Association, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA)), the African Development Bank (AfDB), the Inter-American Development Bank (IDB), the Asian Development Bank (ADB), the Asian Infrastructure Investment Bank (AIIB), the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB). This selection is justified by the assessment of OHCHR of these multilateral development banks' relative and cumulative financial and policy influence, geostrategic significance and available data and literature for evaluative purposes.

<sup>13</sup> Development finance can be broadly defined as the use of public resources to facilitate investment and development in low- and middle-income countries. For a database of public development banks and development finance institutions around the world see [Public Development Banks and Development Financing Institutions Database \(pku.edu.cn\)](#). And for a typology, see J. Xu, R. Marodon, & X. Ru, [Mapping 500+ Development Banks - Qualification Criteria, Stylized Facts, and Development Trends](#), *New Structural Development Financing Research Report No. 2*. (2021).

<sup>14</sup> See [Members & Reporting - Equator Principles Association \(equator-principles.com\)](#).

<sup>15</sup> K. Gallagher & R. Ray, [China Takes the Lead in Development Finance](#), *Project Syndicate* (Dec. 9, 2020); A. A. Malik *et al*, [Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects](#), (2021), p. 95.

particular concern.<sup>16</sup> Hence the continuing leadership of the more established DFIs and MDBs is of critical practical importance and is the main focus of analysis here.

Safeguard policies generally reflect a baseline requirement to "do no harm,"<sup>17</sup> and beyond that, to maximize positive impacts and sustainability. Respecting human rights (the necessary implication of any "do no harm" commitment) can itself be transformative. Moreover, creating shared value requires, at a minimum, legal compliance and mitigation of harms.<sup>18</sup> Respecting human rights should therefore be seen as a foundation stone and a necessary, though insufficient, condition for sustainability.

It is important to note that this Study's focus on risk management at the *project* level does not necessarily shed light on how development *policies* may inadvertently increase vulnerabilities and create conditions for human rights violations beyond the scope of any single project.<sup>19</sup> Project-level analytics and Safeguard policies are not designed to address more fundamental, structural obstacles to development, although in certain conditions they may make important contributions towards doing so.<sup>20</sup>

## NORMATIVE REFERENCES & TERMINOLOGY USED IN THE STUDY

The study is framed by the normative standards that underpin DFI mandates and international human rights standards. Many DFIs have explicit policy commitments to support the achievement of the Sustainable Development Goals (SDGs)<sup>21</sup> and, increasingly, to respect human rights. The explicit recognition in the 2030 Sustainable Development Agenda and Addis Ababa Agenda for Action of the inextricable linkages

---

<sup>16</sup> See e.g. R. Ray, K. Gallagher & C. Sanborn, eds., [Development Banks and Sustainability in the Andean Amazon](#), (2021) *Routledge*; Inclusive Development International, [Safeguarding People and the Environment in Chinese Investments: A Reference Guide for Advocates](#) (2<sup>nd</sup> ed. 2019); P. Garzón *et al*, [Banco de Desarrollo de China: Financiamiento, gobernanza y desafíos socio-ambientales para América Latina y el Caribe](#) (2021) *Latinoamérica Sustentable*; H. Yang *et al*, [Risks to global biodiversity and indigenous lands from China's overseas development finance](#), Vol. 5 *Nature Ecology & Evolution*, (2021) pp. 1520–1529.

<sup>17</sup> In this Study the term "do no harm" is intended not as an absolute requirement, but rather, shorthand for the first step in most Safeguard policy mitigation hierarchies, which is to avoid harms as far as possible.

<sup>18</sup> J. Ruggie, [Making globalization work for all: achieving the Sustainable Development Goals through business respect for human rights](#), *Shift* (Nov. 2016). See also M. E. Porter & M. R. Kramer, [Creating shared value: how to reinvent capitalism – and unleash a wave of innovation and growth](#), *Harvard Business Review* (2011), p. 15: "Creating shared value presumes compliance with the law and ethical standards, as well as mitigating any harm caused by the business".

<sup>19</sup> For example "[f]ighting modern slavery through development interventions requires going beyond safeguarding against forced labor and trafficking risks during the delivery of development interventions. It requires thinking about how States' development and economic policy choices increase or reduce their people's exposure to modern slavery risks. It requires thinking about the developmental role of the State in protecting and maximizing people's economic agency." J. Cockayne, [Developing Freedom: The Sustainable Development Case for Ending Modern Slavery, Forced Labor and Human Trafficking](#) (United Nations University: New York, 2021), p.76. More generally see K. Schwab, [We must move on from neo-liberalism in the post-COVID era](#) (Oct. 12, 2020); and for a critique of privatization as an ideology of governance see the Report of the Special Rapporteur on extreme poverty and human rights, [UN Doc. A/73/396](#) (Sept. 26, 2018).

<sup>20</sup> It is beyond the scope of this Study to address this issue in detail however Safeguard policies and accompanying accountability processes have helped to address deeply rooted structural and ideological barriers to development in a number of cases including in connection with forced and child labor in the cotton sector in [Uzbekistan](#) and privatized education in [Africa](#).

<sup>21</sup> See European Think Tank Group, [Financing the 2030 Agenda: An SDG alignment framework for Public Development Banks](#), (Oct 15, 2021).

between human rights and sustainable development<sup>22</sup> provides a strong foundation for this trend.

The study is also draws on the normative frameworks on responsible business conduct (RBC) for the private sector, in particular the UNGPs and OECD Guidelines. The UNGPs are addressed to States as well as business entities, and the practice of numerous DFIs illustrates their usefulness and relevance to public sector as well as private sector financing institutions.

**Box 1: Explanation Box – Normative Standards Referenced in the Study**

**International Human Rights Standards**

This study focuses mainly on legally binding international human rights standards as reflected in the core 9 UN human rights treaties, as well as the ILO core labor conventions - [OHCHR Dashboard](#) and [Conventions and Recommendations \(ilo.org\)](#) respectively. All countries have ratified at least one of the core 9 UN human rights treaties and most have ratified several.

In addition, the Study draws on the two following sets of authoritative guidance specifically addressed to private sector operations but which have implications for development finance generally:

**The UN Guiding Principles on Business and Human Rights – Protect, Respect, Remedy Framework**

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

- **Pillar I: The "State Duty to Protect"** reflects the obligation of the State to protect human rights, including protecting people against abuses by third parties, among them businesses. It extends to States acting as members of multilateral institutions and in connection with State-owned enterprises (which may include DFIs and export credit agencies), public-private partnerships and procurement from the private sector.
- **Pillar II: The "corporate responsibility to respect"** human rights means that business should not have adverse impacts on human rights, at a minimum, and have a responsibility to respect human rights along their whole value chain. In order to meet their responsibility to respect human rights, the UNGPs call on business enterprises to have in place policies and processes appropriate to their size and circumstances, including:
  - A publicly available **policy commitment** to meet their responsibility to respect human rights;
  - **Human rights due diligence** processes to identify, prevent, mitigate and account for how they address their impacts on human rights; and
  - Processes to **enable the remediation** of any adverse human rights impacts they cause or to which they contribute.
- **Pillar III: "Access to Remedy"** sets out a role for both states and businesses in providing for and cooperating in ensuring that victims of business-related human rights abuses have access to and receive effective remedies.

<sup>22</sup> [2030 Agenda](#), Paras. 10, 18, 19 and 67; [Addis Ababa Agenda for Action](#), UN Doc. A/RES/69/313, Para. 37.

### ***The OECD Guidelines on Multinational Enterprises***

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. As of 2022, there were 50 countries adhering to the Guidelines, including from outside the OECD.<sup>23</sup> The OECD Guidelines provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards.

The OECD Guidelines' chapter on human rights is aligned with the UNGPs. The OECD Guidelines currently also include chapters covering other key areas of business responsibility, including labor rights, environment, bribery, consumer interests, as well as information disclosure, science and technology, competition, and taxation. OECD's responsible business conduct due diligence approach has been translated into specific guidance for the finance sector.<sup>24</sup> As of 2023 OECD was undertaking a stocktaking exercise in connection with Guidelines.<sup>25</sup>

The Study uses the terminology as set out in Box 2 below.

### ***Box 2: Explanation Box – Terminology Used in the Study***

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

**"Environmental & Social Standards"** (or E&S standards) refers to the requirements to be applied by clients. In this Study "E&S" or "environmental and social" is taken to include human rights considerations, thus favouring an integrative approach and underscoring the close connections between human rights and "S" (social) factors in particular.

**"Safeguards"** refers to the sustainability policies and E&S standards together.

## **CONTEXT FOR THE STUDY**

The human rights and development finance landscapes have been evolving rapidly in recent years, with increasing points of convergence. The UNGPs apply to bilateral development banks and export credit agencies as state-owned enterprises (UNGP 4) and to States as members of multilateral institutions (UNGP 10). The UNGPs' guidance on due diligence emanated from practical experience and extensive multi-stakeholder consultations and, as will be illustrated shortly, is relevant to public sector as well as private sector financing institutions and clients.<sup>26</sup> The UNGPs and OECD Guidelines have stimulated more actors in the finance sector to integrate human rights in their

<sup>23</sup> The list of adhering countries can be found at: [National Contact Points - Organisation for Economic Co-operation and Development \(oecd.org\)](https://www.oecd.org/development/national-contact-points/).

<sup>24</sup> See [OECD Guidelines for Multinational Enterprises](#) (2011), and [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018).

<sup>25</sup> See [Stocktaking Exercise of the OECD Guidelines for Multinational Enterprises](#).

<sup>26</sup> See IDB ESPF (2020), para 1.3: "Respecting human rights. The IDB is committed to respecting internationally recognized human rights standards. To that end, in accordance with E&S Performance Standard (ESPS) 1 of this Policy Framework, the IDB requires its Borrowers to respect human rights, avoid infringement on the human rights of others, and address risks to and impacts on human rights in the projects it supports." See also ESPS 1, para. 6, requiring borrowers to consider human rights impacts specifically, and fn 52: "It may be appropriate for the Borrower to include in its E&S risk and impact identification process a specific human rights due diligence in line with the UN Guiding Principles on Business and Human Rights."



corporate policies and operational policy frameworks. The growing emphasis on Environmental, Social and Governance (ESG) factors in finance and investment, and the close relationship between human rights and ESG criteria (especially "S"), have strengthened momentum in this direction.

Commercial banks and other private sector financial institutions have increasingly been exploring how the UNGPs and OECD Guidelines relate to their financing instruments, their existing E&S policies and accountability for impacts.<sup>27</sup> OHCHR and the OECD have issued guidance on how these standards apply to the financial sector (See Box 3). In certain respects, commercial banking practice has been overtaking policy and practice even in some of the more established DFIs. For example in 2020, for the first time, the Equator Principles were updated independently of the IFC Performance Standards, due in part to the need to reflect emerging norms including the UNGPs.<sup>28</sup> At the time of writing certain commercial banks had demonstrated impressive innovation in order to improve access to remedy for project-affected people, in line with the UNGPs.<sup>29</sup> While commercial banking practice is far from consistent,<sup>30</sup> a continuation of these trends may generate valuable learning and stimulate practice in development finance.

**Box 3: Resource Box – Guidance on the Application of the UNGPs and OECD Guidelines to the Financial Sector**

OHCHR has issued several authoritative interpretations on the application of the UNGPs to the financial sector<sup>31</sup>:

- [OHCHR response to request from BankTrack and OECD Watch for advice regarding the application of the UNGPs where private sector banks act as nominee shareholders](#) (2021)
- [OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector](#) (2017)

<sup>27</sup> See e.g. [Principles for Responsible Investment](#) (PRI), UNEP's [Finance Initiative; Investor Alliance for Human Rights](#); and [Dutch Banking Sector Agreement](#).

<sup>28</sup> Until 2020, the Equator Principles, like the IFC Performance Standards, only required a human rights impact assessment in "limited, high-risk circumstances". In contrast, the fourth revision of the Equator Principles (EP) in 2020 contains a new requirement that potential adverse impacts be assessed for every project regardless of whether the risk merits a full E&S Impact Assessment (Principle 2). However, the EPs only require publication of the full ESIA for Category A and, where appropriate, Category B projects. Where only the Assessment Documentation (as defined in Principle 2) is required, there is no requirement for the full ESIA to be published. Therefore projects that do not merit a full ESIA are still treated differently in terms of the level of human rights disclosure required. For a critique see BankTrack, [Trust us, we're Equator Banks](#) (2020).

<sup>29</sup> In 2021 ANZ contributed directly to remediation in connection with project-related harms, in line with expectations under the UNGPs, and established an independent accountability mechanism in line with the effectiveness criteria for grievance mechanisms in UNGP 31. See Inclusive Development International, [ANZ payment to displaced Cambodian Families brings landmark human rights case to a close](#) (Nov 3, 2021); and [ANZ launches human rights grievance mechanism in a first for the global banking sector](#) (Nov 3, 2021). ABN AMRO Bank has also taken steps towards establishing an independent bank-level GRM, through a possible ombudsman function, emanating from the bank's commitment to human rights. See ABN AMRO Bank, [Human Rights Report 2018: Putting People Centre Stage](#) (2019).

<sup>30</sup> For a sobering overview see BankTrack, [Actions speak louder: Assessing bank responses to human rights violations](#) (Dec 2021), and see BankTrack, [Global Human Rights Benchmark 2022](#).

<sup>31</sup> See also, OHCHR [Business and Human Rights: Financial Sector](#) and [UN Working Group on Business and Human Rights: Financial Sector](#).

- [OHCHR advice to the OECD on the application of the Guiding Principles to the financial sector](#) (2013)
- [OHCHR response to SOMO on the application of the UNGPs to minority shareholdings of institutional investors](#) (2013)

OECD has issued authoritative interpretations and due diligence guidance on the application of the OECD Guidelines to the financial sector:

- OECD, [Responsible Business Conduct Due Diligence for Project and Asset Finance Transactions](#) (2022)
- OECD, [Due Diligence for Responsible Corporate Lending and Securities Underwriting](#) (2019)
- OECD, [Responsible Business Conduct for Institutional Investors](#) (2017)
- OECD, [Expert letters and statements on the application of the OECD Guidelines and UN Guiding Principles in the context of the financial sector](#) (2014)
- OECD, [Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship](#) (2014)
- OECD, [Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises](#) (2014)

Other useful guidance on the application of these standards to the financial sector include:

- [Dutch Banking Sector Agreement on International Responsible Business Conduct](#). Between 2017-2019 a range of commercial banks (including Equator banks), the Dutch Banking Association (NVB), trade unions, CSOs, and the Dutch Government worked together to address human rights violations and published a number of publications on the application of the UNGPs and OECD Guidelines to the banking sector.

Competition between DFIs has been increasing, as has co-financing, including in connection with the COVID-19 response. An increasing number of DFIs are active in fragile and conflict-affected situations. Adherence to strong Safeguard requirements can be challenging in such circumstances, yet is all the more compelling if development finance is to have a positive impact and avoid unwittingly fuelling grievances, discrimination or other conflict drivers. A human rights lens can add rigor and depth to risk management and help to ensure that all significant risks are addressed and that funds are channelled in a way that is most impactful for the people and the planet.

In recent years there has also been an increasing focus on accountability in development finance. An increasing number of DFIs have established independent accountability mechanisms (IAMS), as has a wider range of development actors including development ministries and NGOs. Moreover an increasing number of countries are integrating or at least considering integrating RBC expectations, and in particular, human rights due diligence requirements,<sup>32</sup> as a standard of conduct of businesses into their corporate regulatory regimes, thereby making human rights due

<sup>32</sup> See for example in Japan, MEITI, [Business and Human Rights: Towards a Responsible Value Chain](#).

diligence a legal compliance issue.<sup>33</sup> Other countries have adopted legislation along these lines focused on modern slavery.<sup>34</sup> These trends are likely to have direct implications for the due diligence of DFIs, as well as that of their private sector co-financiers, clients and suppliers, to whom such legislation may apply directly or through demands from business partners.

It is well recognized that international organizations can both contribute to and be bound by international law, including international human rights law.<sup>35</sup> Relevant sources of obligation include treaties (including but not limited to international organizations' founding charters),<sup>36</sup> as well as customary international law (constituted by practice), and fundamental principles of international law known as *jus cogens*.<sup>37</sup> There is a large literature on this subject pertaining to MDBs, in particular, however the sources and scope of human rights obligations and the secondary rules governing attribution may not always be clear-cut. Moreover there is a lot of diversity in the mandates and operations of multilateral and bilateral DFIs: for example, the EIB is expressly subject to European human rights law,<sup>38</sup> the EBRD is explicitly mandated to promote multi-party democracy, and the legal obligations of bilateral DFIs may vary considerably according to their own constituent agreements and national legislation. Given this diversity and the constraints of space, the present study focuses on common features of the *operational policies and practices* of DFIs, rather than their international legal obligations. Care has been taken to avoid any conclusions or recommendations which depend upon the existence of obligations of any given DFI under international human rights law.

Discussions about DFI due diligence and accountability (and in particular, remedy) have often raised questions about DFIs' legal liability exposure. It is important to note, however, that there have been very few court cases involving DFIs for project-related harms given the often limited scope of lender liability laws, jurisdictional immunities (in some cases), and numerous legal and practical barriers to bringing such claims.<sup>39</sup> The few exceptions include a recent case against IFC that eventually failed on remand from

---

<sup>33</sup> See above footnote 4.

<sup>34</sup> See for example the [UK Modern Slavery Act](#), and [Australia Modern Slavery Act](#).

<sup>35</sup> See *Reparation for Injuries Suffered in the Service of the U.N.*, Order, 1948 I.C.J. 121 (Dec. 11); and *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20). International organizations' practice may contribute to the emergence of customary international law rules. For example the Standard Terms and Conditions for loan, guarantee and other financing agreements of the EBRD and the General Conditions for Sovereign-backed Loans of the AIIB both recognize that the sources of public international law that may be applicable in the event of disputes with a party to a financing agreement include "... forms of international custom, including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations." (Emphasis added). EBRD, Standard Terms and Conditions (Dec. 1, 2012), Sect. 8.04(b)(vi)(C); AIIB, General Conditions for Sovereign-Backed Loans (Nov. 29, 2018), Sect. 7.04(a)(VII)(C).

<sup>36</sup> It is sometimes claimed, in categorical terms, that human rights are excluded from the purview of MDBs given their economic development mandates and the prohibition, under their Charters, of basing decisions on "political" factors. However such disclaimers are often too broadly drawn and hard to reconcile with evidence and practice. Cf. World Bank, [Human Rights, Inclusion and Empowerment](#); and C. Stephens, [Why MDBs Should Include Human Rights in the Development Agenda](#) (May 25, 2017).

<sup>37</sup> *Jus cogens* norms are principles based on values considered to be so fundamental that they cannot be set aside. Commonly accepted examples include slavery and genocide.

<sup>38</sup> The [EIB Approach to Human Rights](#) (May 25, 2011).

<sup>39</sup> For a discussion see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.20-21.

the US Supreme Court<sup>40</sup> and two cases against FMO.<sup>41</sup> Therefore it is important to keep legal liability concerns in perspective. The External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness (hereinafter IFC/MIGA External Review) in 2020 warned against allowing the "litigation tail wag the dog of effective E&S risk management... IFC/MIGA should treat litigation risk as a secondary consideration, to be addressed through legal means only when litigation actually arises, rather than as an *ex ante* constraint on proactive efforts to avoid, mitigate, and compensate for E&S impacts."<sup>42</sup>

The approach of the IFC/MIGA External Review to this question is supported by comparative jurisprudence showing that strong due diligence may operate as a defence to legal claims in such contexts,<sup>43</sup> and may also mitigate against secondary liability (complicity) risks, sanctions and remedies.<sup>44</sup> In extreme circumstances, absent rigorous ongoing due diligence, DFIs could face accusations of complicity in serious human rights violations and even international crimes. (See Box 4).

**Box 4: Case Example – Avoiding Complicity in International Crimes – Myanmar**

In 2017, following an escalation of violent attacks on the Rohingya by the Myanmar military and a mass exodus of Rohingya into Bangladesh, the UN Human Rights Council established an Independent International Fact-Finding Mission on Myanmar (FFM). The FFM's mission was to establish the facts and circumstances of the alleged human rights violations and abuses by military and security forces in Myanmar. The FFM issued several reports, including one in 2019 on the military's extensive business ties.<sup>45</sup> The report called on international financial institutions, among others, to "[s]upport and encourage investment only in the non-Tatmadaw linked private sector." A range of other stakeholders have echoed these concerns.<sup>46</sup> In 2020, the World Bank Group committed to an independent audit of the IFC's entire portfolio in Myanmar in order to verify that no IFC direct investments, including in financial intermediaries, are owned or controlled by the Myanmar military, its senior generals, or their immediate family members. IFC also committed to enhanced E&S due diligence and human rights impact assessments for all Category A and B

<sup>40</sup> For an account of the lessons learned from the perspective of the claimants' representatives see M. Harrison & L. Bailey, [Ending 'Absolute Immunity' for the International Finance Corporation: The Legacy of \*Jam v IFC\*, \*Bretton Woods Project\*](#) (July 21, 2022).

<sup>41</sup> D. Solomon & L. Gottesdiener, [Family of slain Honduran activist seeks criminal probe into Dutch lender](#), (June 28, 2022).

<sup>42</sup> IFC/MIGA [External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness Report and Recommendations](#) (2020) [IFC/MIGA External Review]. See also Amy Howe, [Opinion analysis: Justices Hold that International Organizations do not have near-complete immunity](#), *Scotusblog* (Feb. 27, 2019), noting that the Supreme Court in the *Jam v. IFC* case "dismissed the IFC's concerns about a 'flood' of lawsuits in U.S. courts by foreign plaintiffs as 'inflated.'"

<sup>43</sup> P. Birghoffer *et al*, *Lender Liability and Due Diligence for E&S Harm: A Comparative Analysis* (New York, New York University School of Law International Organizations Clinic, 2021). See also *E.G. Barber V. Nestlé USA* No. 8:15-Cv-1364 (C.D. Cal. Aug. 27, 2015); [UN Doc. A/HRC/38/20/Add. 2](#), June 1, 2018, pp.6-7; and OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.20-21.

<sup>44</sup> [UN Doc. A/HRC/38/20/Add. 2](#) (June 1, 2018), pp.6-9.

<sup>45</sup> See FFM, [The economic interests of the Myanmar military - A/HRC/42/CRP.3](#) (12 Sept 2019). For an update see UN Human Rights Council, [Progress made and remaining challenges with regard to the recommendations of the independent international fact-finding mission on Myanmar](#) (Sept. 2022).

<sup>46</sup> For example, in consultations for the World Bank's 2019-2023 country partnership framework, local stakeholders in Yangon pressured the Bank to take the FFM report into account: "Participants sought clarity on how the World Bank will create an environment that encourages responsible private sector development, and deal with companies listed in the UN Fact finding Mission report. Emphasis was placed on incorporating meaningful human rights due diligence processes into private sector loan activities." World Bank Group, [Myanmar Country Partnership Framework July 2019-June 2023 Summaries of Consultation Discussions with Multi-Stakeholders](#) (2020), p.19.

investments in Myanmar, and to use the findings of the portfolio audit as the basis for a strategy to exit responsibly from any problematic projects.<sup>47</sup>

Pressures for more effective engagement with human rights concerns are increasingly coming from investors, regulators and ESG rating agencies,<sup>48</sup> among other external stakeholders.<sup>49</sup> For example, led by the EU, there is a growing range of ESG "taxonomies" which aim to steer capital flows towards sustainable investments and address concerns about firms "green-washing" their portfolios.<sup>50</sup> For investments to be considered "sustainable" under the EU taxonomy, they must meet a range of environmental criteria as well as "minimum safeguards" with respect to social and human rights impacts,<sup>51</sup> defined by reference to the UNGPs, OECD Guidelines, and ILO conventions. The EU is also considering establishing a social taxonomy to steer capital flows towards projects with positive social and human rights impacts.<sup>52</sup> Tighter alignment between DFI Safeguards and the UNGPs would therefore help DFIs and their clients to satisfy Safeguard policy and ESG taxonomy criteria, including their minimum human rights safeguards, simultaneously.

One final contextual issue worth noting here relates to recent initiatives, prompted by the climate and COVID-19 crises, to repurpose the World Bank and potentially other MDBs to more effectively address global public goods and trans-boundary threats to people and the planet.<sup>53</sup> Current reform proposals include reviewing the World Bank's capital adequacy requirements, dramatically scaling up finance for climate change mitigation and adaptation, and strengthening client country incentives. New project structures, including regional projects, have been mooted, which may require new approaches to E&S risk management. There have also been renewed calls to "streamline" social and environmental safeguard policy requirements, in order to accelerate implementation of scaled-up financing.<sup>54</sup> However any proposal to relax or weaken Safeguard requirements should be subjected to particularly close scrutiny, in OHCHR's view, for the sake of project quality, sustainability, and development impact. At the least, any streamlining should be accompanied by a robust remedy framework, to ensure that E&S risks are priced into projects and costs are not externalized onto vulnerable populations.

## SCOPE OF STUDY

This Study addresses both private and public sector financing institutions, bilateral and multilateral. The Study surveys Sustainability Policies that apply to the DFI themselves (Sustainability Policies) and performance standards or requirements that apply to their

<sup>47</sup> [Letter](#) from World Bank Group President David Malpass to the Hon. Steven T. Mnuchin, U.S. Treasury Secretary (Mar. 20, 2020).

<sup>48</sup> See e.g. [Background | African Development Bank - Building today, a better Africa tomorrow \(afdb.org\)](#).

<sup>49</sup> See e.g. UN Global Compact, Linklaters LLP, and UC Berkeley School of Law, [Guide for General Counsel on Corporate Sustainability, Version 2.0](#) (2019).

<sup>50</sup> See above footnote 5. The [Investopedia](#) definition of "green-washing" is: "The act of providing the public or investors with misleading or outright false information about the environmental impact of a company's products and operations."

<sup>51</sup> See above footnote 6.

<sup>52</sup> See above footnote 7.

<sup>53</sup> See [World Bank Group Statement on Evolution Roadmap](#); and [Boosting MDBs' investing capacity. \(2022\). An Independent Review of Multilateral Development Banks' Capital Adequacy Frameworks](#). See also [Reforming the World Bank and MDBs to Meet Shared Global Challenges \(cgdev.org\)](#).

<sup>54</sup> See e.g. Suma Shakrabati & Chris Humphrey, [Rebooting the World Bank](#), *Project Syndicate* (Nov. 2022).

clients (E&S standards). These are collectively referred to as Safeguards (See Box 2), benchmarked against international human rights standards including but not limited to the UNGPs and the OECD Guidelines (see Box 1). The Study was based upon a desk review and comparative research of DFI Safeguard policies, evaluations and secondary literature, and consultations with bilateral and multilateral DFIs, civil society organizations and other interested stakeholders between 2019 and 2022.<sup>55</sup>

The Study is by no means exhaustive but analyses some of the more promising trends, as well as gaps, in connection with the policies and practices of a number of the more influential and established DFIs. It also highlights emerging good practices among DFIs illustrating how Safeguards can be strengthened from a human rights perspective. Due to time and resource constraints, the Study has not attempted systematically to review the large volume of written procedures and interpretive guidance issued by DFIs to support the implementation of Safeguard policies. Nevertheless, the latter materials have been taken into account selectively, where feasible and useful, in order to help interpret particular Safeguard requirements and to highlight examples of how human rights can strengthen E&S risk management.

The most important caveat to note at the outset is that this Study focuses mainly on Safeguard policy *formulation* rather than implementation. Good outcomes clearly depend *both* on rigorous, comprehensive policy requirements *and* robust implementation systems. Adequate client commitment and capacities are indispensable in this regard, supported and incentivized by DFIs through capacity building, technical assistance, financial incentives and other leverage tools. Further to this, *within* any given DFI, prerequisites for effective implementation may include:

- **Leadership:** Senior management and governing bodies give clear and consistent signals that sustainability and investment quality are the dominant institutional objectives.
- **Alignment of incentives:** E&S outcomes are reflected in key performance indicators and results frameworks. Procedures are in place to incentivize attention to E&S issues, including in relation to staff promotion and other forms of recognition, and to ensure that incentives for other priorities do not undermine E&S objectives.
- **Resources and capacities:** E&S budget relative to the number of projects or volume of financing. Number and seniority of E&S staff, or ratio of E&S staff to volume of disbursements or commitments. E&S staffing includes adequate social specialists with specific expertise on issues such as stakeholder engagement, OHS, labor rights, indigenous peoples' rights, disability inclusion, gender and LGBTI rights. Non-E&S staff are routinely trained on the above issues.
- **Accountability:** Accountability for E&S results is reflected in workplans and performance appraisals at all levels, and effective accountability mechanisms are in place at institutional and project levels, consistent with the UNGPs (Principle 31).<sup>56</sup>
- **Governance:** E&S responsibilities are clearly defined at different levels of the organization. E&S capacities are deployed strategically vis-à-vis operational departments, and E&S staff have adequate decision-making authority,

---

<sup>55</sup> Most of the contributors are recognized in the Acknowledgements section of this Study. A number of others requested non-attribution.

<sup>56</sup> Under UNGP Principle 31 grievance mechanisms should be legitimate, accessible, predictable, transparent, equitable, rights-compatible, provide a source for continuous learning, and should be based on engagement and dialogue. For an application of these criteria in the context of DFIs' IAMs see OHCHR, [Remedy in Development Finance](#) (2022), Annex II.

objectivity and independence. E&S specialists are sufficiently empowered to support implementation of Safeguards supported by multiple reporting lines as needed. Clear procedures are in place to ensure cooperation and collaboration across teams and departments within each DFI, and also between the DFI and its IAM.

Benchmarking DFI implementation systems was not possible given the existing (broad) scope and length of this Study and the lack of publicly available and comparable data across a sufficiently wide set of institutions. Nevertheless, in OHCHR's view, it is important that such an exercise be undertaken as a complement to studies, such as the present one, which focus on policy formulation.

### III. WHAT IS DIFFERENT ABOUT HUMAN RIGHTS?

This Study proceeds from the premise that human rights are, or should be seen as, integral to environmental and social (E&S) due diligence and risk management. Yet for many (if not most) involved in DFI operations, human rights are a relatively new issue and their relationship with established E&S risk management practice is not always clear. The following discussion explains why a clearer understanding and more explicit, intentional approaches to human rights can be beneficial.

#### WHY IS IT IMPORTANT TO BE EXPLICIT ABOUT HUMAN RIGHTS?

The subject matter of most DFIs' Safeguards overlaps significantly with a range of internationally recognized human rights. It is often argued that human rights issues need only be addressed *implicitly*, through the application of DFIs' existing "social" standards, rather than explicitly. However explicit integration and alignment with human rights brings the following benefits:

**Conceptually**, explicit human rights integration and alignment aim to:

- **Reinforce DFIs' mandates** in supporting sustainable development and the SDGs,<sup>57</sup> contributing to better development outcomes by managing adverse impacts on people and identifying opportunities to improve positive outcomes of projects. Where neither DFIs nor their clients address human rights harms, burdens and costs are externalized to communities and workers. Conversely, addressing all relevant risks may significantly enhance development outcomes.
- **Strengthen legitimacy and justification** for prioritizing the most marginalized population groups, and addressing discrimination and social exclusion. Explicit integration and alignment send a clear message that the organization is committed to fairness with respect to all potentially affected by its operations, externalities will be accounted for, and that aggregate development progress should not be offset by negative impacts on marginalized groups.
- **Strengthen policy coherence.** All countries are party to at least one, and frequently several, of the core nine UN human rights treaties, in addition to ILO conventions. Regulatory regimes on E&S issues, Responsible Business Conduct and human rights are multiplying, generating overlapping and potentially conflicting requirements. Explicit attention to human rights minimizes the scope for internationally agreed human rights standards to be diluted or

<sup>57</sup> The [2030 Sustainable Development Agenda](#) and [Addis Ababa Agenda for Action](#) explicitly reinforce the linkages between human rights and sustainable development: 2030 Agenda, Paras. 10, 18, 19 and 67; Addis Ababa Agenda for Action, UN Doc. A/RES/69/313, Para. 37. The 2030 Agenda (para 18) specifically notes that "the Agenda is to be implemented in a manner that is consistent with the rights and obligations of States under international law." In the Addis Agenda, para. 37, member States make clear the relevance of the UNGPs in the context of development financing.

inadvertently renegotiated elsewhere, and provides a foundation stone and metric for policy coherence.

- **Support private sector clients** to meet the **corporate responsibility to respect human rights**, and support sovereign borrowers in implementing the full range of their human rights **obligations**.
- **Symbolize DFIs' commitment to accountability** to those who may be affected by its financing.

**Operationally**, explicit human rights integration and alignment aim to:

- **Improve risk management** and risk exposure by embracing a fuller scope of risks relevant to DFI-financed projects, strengthening due diligence, sharpening risk prioritization, and encouraging DFIs and clients to build and exercise leverage for better E&S outcomes.
- **Improve stakeholder relations** by demonstrating that both DFIs and their clients are committed to addressing human rights concerns, and that trade-offs between different interests will be managed transparently and fairly.
- **Anchor Safeguard definitions and concepts directly within applicable human rights standards**, thereby better reflecting country specificities and ensuring that DFI policies are interpreted in line with evolving international norms in practice.<sup>58</sup>
- **Encourage upwards harmonization of standards**, so that clients can have greater confidence that compliance with the DFIs' E&S standards will satisfy other (parallel) regulatory requirements and expectations.
- **Empower staff & clients** to take human rights issues into account, as relevant to their due diligence and risk management functions.
- **Enliven information flows** between DFIs and UN, ILO, regional and national human rights bodies, and facilitate access to **contextual information** necessary for project-level risk assessment and management.
- **Strengthen accountability** by aligning grievance processes and outcomes with international standards, encouraging a focus on remedy,<sup>59</sup> strengthening the effectiveness of grievance redress mechanisms, strengthening equity between the parties, and enabling access to contextual information relevant to the resolution of complaints.<sup>60</sup>

## WHAT IS THE DIFFERENCE BETWEEN "SOCIAL" AND "HUMAN RIGHTS" ISSUES?

The great majority of social issues are directly covered by human rights or underpinned by human rights standards. Explicit linkage to human rights provides an accountability

<sup>58</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Box 39, p.75.

<sup>59</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022).

<sup>60</sup> For example in considering a complaint of gender-based violence (GBV) in connection with the World Bank-supported Uganda Transport Sector Development Project, the Inspection Panel accessed information from UN human rights bodies concerning the prevalence of GBV in the given context, the problem of impunity, and the reasons for which GBV allegations frequently go unreported. See [Insights of the World Bank Inspection Panel: Responding to Project Gender-Based Violence Complaints Through an Independent Accountability Mechanism](#), *Emerging Lessons Series No. 6* (Dec. 2020), pp.32-33 and 48-49.



architecture and clarity and consistency of meaning that may otherwise be lacking.<sup>61</sup> Table 1, below, sets out an illustrative list of issues commonly addressed by DFI Safeguards, and a number of international human rights instruments and monitoring bodies to which they relate.<sup>62</sup> The table is not comprehensive and does not include regional or national human rights systems, however it highlights the importance of ensuring that Safeguard policy requirements are consciously and rigorously aligned with corresponding human rights standards.

<b>Table 1: Human Rights Coverage</b>		
<b>Issues</b>	<b>Instruments</b>	<b>Monitoring mechanisms</b>
Non-discrimination Vulnerable groups	UDHR ICCPR ICESCR ICERD CEDAW CRC CRPD MWC	CEDAW Committee ICERD Committee CRPD Committee CRC Committee SR on racism SR on minorities SR on indigenous peoples SR on disability SR on older persons WG on discrimination against women SR on violence against women SR on extreme poverty and human rights Independent expert on SOGI
Labor rights	ILO Core Conventions (Nos. 29, 87, 98, 100, 11, 105, 138, 182) ICESCR CRC	ILO supervisory bodies CESCR CRC Committee
Climate change Water use Toxic waste	ICESCR	CESCR SR on climate change SR on the environment SR on water and sanitation SR on toxic waste
Community health Accessibility	ICESCR CRPD	CESCR CRPD Committee SR on health SR on disability

<sup>61</sup> F. Reynolds & J. Ruggie, [What Institutional Investors Need to Know about the S in ESG](#) (Oct 22, 2020), *PRI*, and Margaret Wachenfeld, "Strengthening the 'S' in ESG: What New Developments in Human Rights and Business Bring to the Table for Investors," in Karen Wendt (ed.), *Responsible Investment Banking: Risk Management Frameworks, Sustainable Financial Innovation and Softlaw Standards* (2015).

<sup>62</sup> *Acronyms*: UDHR: Universal Declaration of Human Rights; ICCPR: International Covenant on Civil and Political Rights; ICESCR: International Covenant on Economic, Social and Cultural Rights; CEDAW: Convention on the Elimination of All Forms of Discrimination against Women; ICERD: International Convention on the Elimination of all Forms of Racial Discrimination; CESCR: Committee on Economic, Social and Cultural Rights; CRC: Convention on the Rights of the Child; CRPD: Convention on the Rights of Persons with Disabilities; MWC: Migrant Workers' Convention; UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples; SR: Special Rapporteur [Special Procedures of the UN Human Rights Council]; WG: Working Group [Special Procedures of the UN Human Rights Council]. For a full listing of thematic Special Procedures see [Special procedures Country visits \(ohchr.org\)](#).

<b>Table 1: Human Rights Coverage</b>		
<b>Issues</b>	<b>Instruments</b>	<b>Monitoring mechanisms</b>
Security personnel	Voluntary Principles on Security and Human Rights	WG on mercenaries
Land rights Forced evictions	ICESCR	CESCR SR on housing SR on extreme poverty and human rights
Natural resource management	ICESCR	CESCR SR on the environment SR on climate change
Rights of indigenous peoples	ICERD UNDRIP ILO Conventions 107 & 169	SR on indigenous peoples ILO Committee of Experts CERD Committee
Cultural heritage	UNESCO World Heritage and Intangible Heritage Conventions ICESCR	UNESCO supervisory bodies CESCR SR on cultural rights
Participation Consultation Accountability	ICCPR CEDAW CRC CRPD UNDRIP	Human Rights Committee SR on freedom of expression SR on peaceful assembly & association SR on human rights defenders WG on arbitrary detention

It is sometimes thought that international human rights standards may be insufficiently clear or precise to be included within investment project E&S risk management frameworks. However a range of human rights standards are routinely integrated in Safeguards already, including the ILO Minimum Age and Forced Labor Conventions (No. 138 and 29 respectively), freedom of association, Free, Prior and Informed Consent (FPIC) for indigenous peoples, the prohibition on forced evictions (the terms of which are very precise),<sup>63</sup> and increasingly, gender-based violence. UN human rights bodies regularly publish formal interpretations which clarify the content of human rights obligations<sup>64</sup> and country reports which can provide vital inputs for project due diligence and risk management.<sup>65</sup>

Human rights relate to environmental issues, as well as social issues. Principle 10 of the Rio Declaration embodies a synthesis between human rights and environmental issues, as do the Aarhus and Escazú conventions in Europe and Latin America.<sup>66</sup> On

<sup>63</sup> Committee on Economic, Social and Cultural Rights, [General Comment No. 7](#) (Article 11(1) of the Covenant): The Right to Adequate Housing: Forced Evictions (1997), para. 15.

<sup>64</sup> See e.g. Committee on Economic, Social and Cultural Rights, [General Comment No. 15](#) (Articles 11 and 12 of the Covenant): The Right to Water (2002).

<sup>65</sup> See e.g. Box 4 above; and UN Doc. [A/HRC/41/39/Add.2](#) (2019), including analysis relevant to stakeholder engagement and hydro-dam development in Lao PDR.

<sup>66</sup> For a discussion see [Aarhus and Escazú: The two sides of the Atlantic in the field of public participation in environmental matters – GNHRE](#).

28 July 2022 the United Nations General Assembly recognized that a clean, healthy and sustainable environment is a universal human right.<sup>67</sup> The UN Human Rights Council established Special Rapporteurs for the environment and human rights, and for promoting and protecting human rights in the context of climate change, in 2012 and 2021 respectively.

## WHAT IS DIFFERENT ABOUT HUMAN RIGHTS DUE DILIGENCE COMPARED TO OTHER TYPES OF DUE DILIGENCE?

While the term "due diligence" is used by many actors in many contexts, the meanings ascribed to the term may differ quite markedly. Despite some conceptual confusion (to be discussed below), there are a number of commonalities between due diligence as reflected in most MDBs' Safeguards and "human rights due diligence" (HRDD) under the UNGPs and RBC standards. The discussion below, and in the Annex, highlights the commonalities as well as a number of key differences.

- **Due diligence under a Safeguard system.** DFIs have obligations to carry out their own due diligence to assess E&S risks and impacts of projects that they finance, resulting from the project context, the project and client characteristics. DFIs typically carry out their due diligence through the following processes: (i) risk screening and classification, including contextual analysis; (ii) E&S due diligence, including review of the adequacy of a client's assessments of E&S impacts and proposed mitigation measures, review of the client's Environmental & Social Management Systems (ESMS) and approach to screening and managing E&S risks, and analyzing applicable laws and evidence of compliance, documentation disclosure and stakeholder engagement; (iii) supervision and oversight of a client's compliance with Safeguard requirements and contractual agreements throughout the project cycle; and (iv) disclosure of information.<sup>68</sup> These obligations are typically set out in Sustainability Policies.

In addition, under a Safeguard system, clients have obligations to carry out their own due diligence to identify and manage E&S impacts of their operations and, as relevant, their business relationships, such as suppliers. These obligations are typically set out in E&S standards including, in many cases, an overarching standard which requires the client to establish an ESMS. The remaining E&S standards usually cover specific impacts that should be identified, addressed and managed as part of a client's ESMS throughout the life of the project.

- **Due diligence under the UNGPs/OECD Guidelines.** While States are the main addressees of international human rights law, DFIs are increasingly accepting that they have a responsibility to respect, or avoid infringing, human rights. In order to fulfil the latter responsibility, DFIs and their clients should carry out HRDD which involves identifying, preventing, mitigating and accounting for how they address adverse impacts. (See Box 1).

The focus of HRDD is on risks to people rather than risks to the business. Under the UNGPs and OECD Guidelines, the HRDD process is anchored in an explicit human rights policy commitment which is embedded in and implemented through appropriate management systems. HRDD is an ongoing, continuous requirement and may involve a bundle of different processes and the deployment of a range of specific tools over time. Human rights impact assessments are one such tool which may be implemented in a stand-alone fashion or integrated within existing instruments such as ESIA's.

<sup>67</sup> UN Doc. [A/RES/76/300](#) (July 26, 2022).

<sup>68</sup> See e.g. IDB, [Modernization of the E&S Policies of the IDB – Policy Profile](#), (2019), para. 5.2.

By contrast, where HRDD is recognized in DFI safeguards, it is often equated with *human rights impact assessments*, alone, or may be limited to "high-risk circumstances."<sup>69</sup> Rarely is HRDD implemented as a central, routine aspect of risk management systems. The potential value of HRDD to inform risk classification at the outset, and dynamically thereafter throughout the project cycle, is often missed.

**Box 5: Explanation Box – The Corporate Responsibility to Respect Human Rights**

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

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

- **Corporate due diligence** is a long-standing practice; there are a number of important differences compared to human rights due diligence:

<u>Corporate Due Diligence</u>		<u>Human Rights Due Diligence</u>
Focused on risks to the business	v.	Focused on the impacts of the business on people
Focused on initial identification of risks	v.	Focused on the entire management system cycle – identification, steps to prevent, mitigate, track and communicate on human rights harms. On-going, dynamic and adaptive risk management throughout the entire project cycle.

**WHY SHOULD DFIS AND THEIR CLIENTS CARRY OUT HUMAN RIGHTS DUE DILIGENCE?**

The following are the main reasons for which human rights due diligence (HRDD), aligned with the UNGPs, is important in the context of development finance:

1. HRDD is important for the same reason that any other kind of due diligence is: because it is **useful in terms of managing a DFI's own risk exposure**. Due diligence helps ensure that all information relevant to risks is taken into account at an early stage. As DFIs move from upfront compliance to adaptive risk management,<sup>70</sup> it is all the more important that DFIs have a good overview at the beginning of all significant risks that may arise, and have an adequate basis for assessing the client's risk management capacity before approving financing.

<sup>69</sup> See footnote 11 above and accompanying text.

<sup>70</sup> See for example, IDB, [Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#), (2019), para. 3.1.

2. From a risk management point of view, it is important that **human rights are considered on a routine rather than exceptional basis**. Without explicit and systematic flagging, or if considered relevant only in exceptional high risk situations, human rights issues and information sources will be overlooked, and project risk categorization, assessment and management may be undermined.
3. In principle, **human rights apply to all types and categories of projects** (A, B, C and FI). However under many DFI Safeguards, E&S standards are often restricted to higher risk categories (A and B/B+), and lower risk projects are governed only by the variable requirements of national law. Consistent benchmarking against international human rights standards would strengthen rigor and contribute to more consistent expectations and development outcomes.
4. Explicit HRDD would help DFIs and their clients **keep pace with evolving RBC expectations, ESG requirements<sup>71</sup> and associated regularly developments** in national and regional legal systems, including financial regulations,<sup>72</sup> disclosure regulations,<sup>73</sup> corporate governance requirements, and mandatory human rights and environmental due diligence legislation.<sup>74</sup> Where the UNGPs are explicitly integrated within DFI Safeguards, clients can be more confident that complying with Safeguards means they will comply with all of these other policy and regulatory demands.
5. HRDD helps ensure that costs and benefits of a project are fully internalized within project budgeting, planning and implementation, thereby helping to ensure that **costs are fully understood, accounted for** and that risks and benefits are **appropriately allocated**. As documented in several recent studies, failure to take account of human rights can entail significant economic costs,<sup>75</sup> in addition to reputational costs and harms to communities.
6. As DFIs become involved in **increasingly complex financing structures**, such as those entailed in **blended finance mechanisms**, they will increasingly be looked to for leadership on E&S issues. These more complex structures, with new types of private financial institutions and new clients, may further broaden a DFI's risk exposure. Understanding the full range of applicable risks will become increasingly important.
7. Being clear that human rights are a routine part of the investment cycle would **demonstrate responsiveness to the increasing demands of external stakeholders**. Human rights are materially relevant, as certain DFI materiality

<sup>71</sup> See for example, IFC, [IFC ESG Guidebook](#) (2021). However for critique of ESG indexing and labelling schemes see D. Pred & N. Bugalski, [Why ESG investing is bad for human rights - & what we can do about it](#), (Mar. 21, 2022).

<sup>72</sup> See above footnote 2.

<sup>73</sup> See above footnote 3.

<sup>74</sup> See above footnote 4.

<sup>75</sup> One study has shown that lost productivity costs due to temporary shutdowns or delays in the mining sector, following failure to manage social conflict, can result in USD 20 million per week in net present value terms. R. Davis, & D. Franks, [Costs of Company-Community Conflict in the Extractive Sector](#), (2014). See also P. Stevens, J. Kooroshy, G. Lahn & B. Lee, [Conflict or Co-existence in Extractive Industries](#), Chatham House – Royal Institute of International Affairs (2013). For another illustration, in relation to the Dakota Access Pipeline (DAPL) in the United States, it has been estimated that "that the costs incurred by Energy Transfer Partnership and other firms with an ownership stake in [DAPL] for the entire project are not less than \$7.5 billion, but could be higher depending on the terms of confidential contracts. The banks that financed DAPL incurred an additional \$4.4 billion in costs in the form of account closures, not including costs related to reputational damage. Further, at least \$38 million was also incurred by taxpayers and other local stakeholders." First Peoples Worldwide, [Social Cost and Material Loss: The Dakota Access Pipeline](#) (Nov. 2018).

matrices already bear out.<sup>76</sup> DFIs' Independent Accountability Mechanisms (IAMs) are increasingly dealing with complaints framed in human rights language, law and concepts.

8. Even where regulatory compliance is not at issue, DFIs may suffer **reputational risks** if involved in severe human rights impacts. Systematic HRDD may **strengthen MDBs' defences in relation to any legal claims** relating to or underpinned by those rights.<sup>77</sup>
9. Human rights can be considered a **leading-edge indicator of how agile and proactive clients are** in identifying and managing emerging issues. Developing management systems that can identify and manage human rights risks sends an important **signal of client commitment** and can **strengthen client capacity to address other emerging challenges**.

#### IV. GAPS AND EMERGING GOOD PRACTICES IN DFI POLICIES

The analysis below is structured in accordance with a typical investment project cycle and examines the extent to which existing Safeguards:

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

##### GAP 1: HUMAN RIGHTS POLICY COMMITMENTS IN DFI SUSTAINABILITY POLICIES

This section identifies gaps in existing DFI policies in relation to commitments to respect human rights, and notes examples of emerging good practice. A clear human rights policy commitment sends an important signal about the seriousness with which a given DFI views its own human rights responsibilities, and provides a foundation stone and point of reference for embedding human rights considerations within the project cycle and risk management systems.

#### 1. EXPLICIT VERSUS IMPLICIT REFERENCES TO INTERNATIONAL HUMAN RIGHTS STANDARDS

A growing number of DFIs have included an explicit human rights policy commitment within their Safeguards, as illustrated below, communicating clearly that international human rights standards should be respected. In other cases Safeguards may include commitments in more aspirational terms, such as a vision statement, or alternatively in generic terms (such as underscoring the importance of principles loosely related to human rights, such as inclusion or equity) or may limit the human rights policy commitment to particular population groups such as indigenous peoples.

<sup>76</sup> See for example, EIB, [Sustainability Report](#), (2018), p. 11.

<sup>77</sup> See the discussion above nn. 39-44 and accompanying text.

a) Concerns with Existing Policies and Practices

- (i) The absence of explicit references to human rights can have several adverse consequences:
- E&S standards **often apply only to higher risk (Category A and B+/B) projects**, not to B and/or C projects which are subject only to national law. However international human rights standards are relevant to all projects. If there are gaps between national law and international standards, then logically the higher standard should apply. This is becoming of increasing concern in light of the tendency by some DFIs to classify digital projects as "C," and therefore exempt from performance standards and the DFI's own due diligence. An explicit recognition that human rights apply to all projects would help to fill this gap.
  - Many DFI safeguards contain a **patchwork of references**, implicit and explicit, with respect to human rights. However, across the board, there are often gaps or contradictions, which may present challenges to the faithful and consistent implementation of national human rights laws and borrowing countries' treaty obligations. In OHCHR's view it is vital that DFIs avoid inadvertently renegotiating and potentially undermining international human rights standards corresponding to the subject matter of Safeguards.<sup>78</sup>
- (ii) While it is encouraging to see increasing references to human rights in Safeguards, **the variable scope and precision of the various formulations can pose challenges to implementation**. For example:
- A **prohibition against "knowingly" financing projects** that would contravene national human rights laws or relevant international treaties (wording used by EBRD, EIB and the AIIB Exclusion List) could create conflicting incentives and actually *discourage* proactive information gathering in practice. This is a constant tension in due diligence practice: incentivising rather than disincentivising the acquisition of knowledge about risks. In OHCHR's view, this tension needs to be clearly acknowledged and addressed at the highest level of DFI management, emphasising that thorough, robust due diligence improves risk management and sustainability, and will be rewarded.
  - **Commitments to not finance projects "which result in" an abridgement of human rights**, rather than "which *may* result," seems to reflect an unrealistic assumption about the ability of DFIs to determine when violations have occurred in practice during the course of initial due diligence. It also seems impractical from the perspective of timing, given that violations often only materialize during the implementation phase. A commitment to undertake "all possible measures" to avoid human rights violations would help to address this problem, in line with established risk management concepts.
- (iii) **Human rights are sometimes included in Exclusion Lists but not in the Sustainability Policies or E&S standards themselves**. The lack of a clear human rights policy commitment in a Sustainability Policy can seem all the more surprising when human rights are included in the Exclusion List (See Box 8). However, complex issues like child labor may not always be reducible to a

---

<sup>78</sup> "It is a matter of [legitimate] concern if the staff of any agency rewrites international human rights standards to its own specifications, and then applies them in that form rather than in the form in which they were adopted. It is a matter of even more concern if that agency then examines the implementation of those standards through its own projects, as it understands them and without reference either to the original standards themselves or to the way they have been supervised by the international bodies established for that purpose." L. Swepston, "ILO Supervision and the World Bank Inspection Panel," in G. Alfredsson & R. Ring, *The Inspection Panel of the World Bank* (2001).

binary "stay or go" judgement call. The UNGPs encourage banks and clients alike to "lean into" risk and consciously build leverage. Projects addressing child labor and other complex problems may often benefit from constructive (critical) engagement and support.<sup>79</sup> Exclusion Lists signal the seriousness of a DFI's concern about particular risks, however it may not always be possible to identify such risks early in the project cycle. In OHCHR's view, such concerns should be reflected in Safeguard policies' substantive human rights policy commitments and due diligence, encouraging all opportunities for individual and collective leverage prior to entering and exiting investments.

**b) Emerging Good Practices and Recommendations**

As indicated earlier, DFIs are increasingly adopting explicit commitments to respect human rights including, in some cases, clear commitments to align their own policies and practices with human rights standards and avoid infringing human rights, and ensuring that the client does likewise. (See Box 6).

**Box 6: Emerging Practices – Explicit Commitment to Respect Human Rights**

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

- **IDB:** "The IDB is committed to respecting internationally recognized human rights standards. To that end, in accordance with E&S Performance Standard (ESPS) 1 of this Policy Framework, the IDB requires its Borrowers to respect human rights, avoid infringement on the human rights of others, and address risks to and impacts on human rights in the projects it supports."<sup>80</sup>
- **EBRD:** "The EBRD is committed to the respect for human rights in projects financed by EBRD. EBRD will require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients. EBRD will continuously improve the projects it finances in accordance with good international practice and will seek to progressively strengthen processes to identify and address human rights risks during the appraisal and monitoring of projects." The bank will also "not knowingly finance projects that would contravene national laws or country obligations under relevant international treaties".<sup>81</sup>
- **FMO:** "In line with the United Nations Guiding Principles on Business and Human Rights, FMO recognizes the responsibility of businesses to respect human rights, wherever they operate. FMO respects internationally recognized human rights standards and takes measures to avoid supporting activities that may cause or contribute to human rights violations and acknowledges the responsibility of its clients to do the same. This means to

<sup>79</sup> For child labor risks, under ILO Conventions, one must take into account minimum ages and hazardous work permitted to children above the minimum age and under 18. These can vary from country to country within the parameters set by the ILO Conventions 138 and 182. This is not to say that the child labor prohibition cannot or should not be included in Exclusion Lists. However more detailed guidance is also needed in E&S standards. UNGP Principle 19 outlines a process of reasoning to guide difficult decisions about whether to remain engaged and seek to exercise leverage, or exit.

<sup>80</sup> IDB, [Environmental and Social Policy Framework](#) (2020), para 1.3. To the same effect see IDB Invest, [Sustainability Policy](#) (2020), para. 17.

<sup>81</sup> EBRD, [Environmental and Social Policy](#) (2019), para. 2.3, provides: "The EBRD will not knowingly finance projects that would contravene national laws or country obligations under relevant international treaties, conventions and agreements, as identified during project appraisal."



avoid infringing the human rights of others and to address adverse impact these businesses may cause or contribute to."<sup>82</sup>

- **EIB:** " Only supporting operations that do not significantly harm the environment, do not impinge on the sustainable use of natural and living resources and respect human rights .... The EIB shall not, to the best of its knowledge, finance projects that have the effect of limiting people's individual and collective rights and freedoms or violating their human rights. In particular, in relation to EIB-financed projects, the Bank shall not tolerate any: i) forced evictions; ii) gender- based violence and harassment; and, iii) action that amounts to retaliation and harassment. It takes instances of intimidation or reprisals seriously and takes follow-up actions as and where appropriate. To this end, the EIB expects its promoters to meet their respective human rights duties and responsibilities [in line with the UNGPs]."<sup>83</sup>
- **GCF:** "Human rights. All activities supported by GCF will be designed and implemented in a manner that will promote, protect and fulfil universal respect for, and observance of, human rights for all recognized by the United Nations. GCF will require the application of robust environmental and social due diligence so that the supported activities do not cause, promote, contribute to, perpetuate, or exacerbate adverse human rights impacts;"<sup>84</sup>
- **EDFI:** "EDFI Principles for Responsible Financing of Sustainable Development commit members to uphold "all internationally recognized human rights, as defined in the International Bill of Human Rights and in line with the understanding of the United Nations ('UN') Guiding Principles on Business and Human Rights".<sup>85</sup>
- While not a DFI in a formal sense the Safeguards of the **International Climate Initiative (IKI)** of the government of Germany state: Section 1.3: "Project activities must comply with existing law, including national law and/or obligations of the country under international treaties and agreements. The highest standard applies, i.e. if the safeguards standards exceed those under national law, the former are applicable." Section 1.4: "The responsible ministries and ZUG are required to uphold human rights in the context of supported projects. The responsible ministries and ZUG oblige implementing organizations to observe human rights in their project activities, to avoid violating others' human rights, and to address detrimental risks and effects on human rights deriving from project activities."<sup>86</sup>

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

- **AfDB:** "The AfDB, in accordance with its mandate ... views economic and social rights as an integral part of human rights, and accordingly affirms that it respects the principles and values of human rights as set out in the UN Charter and the African Charter of Human and Peoples' Rights. These were among the principles that guided the development of the Integrated Safeguards System. The AfDB encourages member countries to observe international human rights norms, standards, and best practices on the basis

<sup>82</sup> FMO, [Sustainability Policy](#) (2022), p.7.

<sup>83</sup> EIB, [Environmental and Social Policy](#) (2022), para. 3.2, 4.5.

<sup>84</sup> GCF, [Environmental and Social Policy](#) (2021), para. IV (r).

<sup>85</sup> EDFI, [EDFI Principles for Responsible Financing of Sustainable Development](#) (2019).

<sup>86</sup> [Safeguards Policy of the International Climate Initiative](#) (valid Jan. 15, 2023), Sections 1.3 and 1.4. See also Section 1.1.

of their commitments made under the International Human Rights Covenants and the African Charter of Human and Peoples' Rights."<sup>87</sup>

- **AfDB:** "[T]he Bank seeks, through the Projects it finances, to be supportive of these human rights and to encourage respect for them, all in a manner consistent with its Articles of Agreement."<sup>88</sup>
- **World Bank:** "In this regard the World Bank's activities support the realization of human rights as expressed in the Universal Declaration of Human Rights. Through the projects it finances, and in a manner consistent with its Articles of Agreement, the World Bank seeks to avoid adverse impacts and will continue to support its member countries as they strive to progressively achieve their human rights commitments."<sup>89</sup>

A number of DFIs appear to limit the scope of human rights policy commitments **only to their clients:**

- **IFC:** "IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfil human rights."<sup>90</sup>
- **IDB Invest:** "IDB Invest requires its clients to have in place an approach to assess potential human rights risks and impacts, respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts in IDB Invest-supported project."<sup>91</sup>

Some DFIs helpfully cross reference specific international human rights treaties and standards that are relevant to the interpretation of particular terms and Safeguard requirements. For example the EIB E&S Standards (2022) explicitly cite the prohibition on forced evictions under international human rights law, purposefully drawing on the right to housing under the ICESCR.<sup>92</sup> Without such linkages, inconsistent interpretations and policy incoherence may result.

**Box 7: Emerging Practices – Explicit Cross-Referencing of Relevant International Human Rights Standards**

- International Bill of Human Rights (IDB Invest, FMO, EIB, IKI)
- ILO Core Labor Standards (AfDB, DCF, EBRD, EIB, FMO, IDB, IDB Invest, IFC, IKI)
- ILO standards on child labor (EBRD, IFC, IKI)
- UN Convention on the Rights of the Child (AfDB, IDB, IFC, IKI)
- UN Convention on the Rights of Persons with Disabilities (EIB, IDB, IDB Invest, IKI)

<sup>87</sup> AfDB, [African Development Bank Group's Integrated Safeguards System: Policy Statement and Integrated Safeguards](#) (2013).

<sup>88</sup> AfDB, [Environmental and Social Framework](#) (amended May 2021), para. 13 ("Vision").

<sup>89</sup> World Bank, [Environmental and Social Framework](#), A Vision for Sustainable Development, para. 3.

<sup>90</sup> IFC, [Sustainability Policy](#) (2012), para. 12.

<sup>91</sup> IDB Invest, [Environmental and Social Sustainability Policy \(2020\)](#), para. 17.

<sup>92</sup> EIB, [Environmental and Social Standards](#) (2022), Standard 6 – Involuntary Resettlement, paras. 48-50, nn. 16-17. To similar effect see EIB, [Environmental and Social Standards](#) (2018), ESS 6, p.42, para. 4.

- UN Convention on the Elimination of Discrimination against Women (EIB, IDB, IDB Invest, IKI)
- UN Convention on the Elimination of Racial Discrimination (EIB, IKI)
- UN Convention on Migrant Workers (EIB, IKI)
- UN Convention on Cultural Heritage (EIB)
- Applicable international law with respect to Indigenous Peoples (IDB, EIB, ADB)
- Aarhus Convention (EIB),<sup>93</sup> Escazú agreement (IDB)
- References to customary law (ADB and IKI with respect to indigenous peoples) and indigenous legal systems (IDB)
- Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the "principles of the Universal Declaration of Human Rights" and the EU Global Human Rights Sanctions Regime (EIB)

**Box 8: Emerging Practices – Exclusions Based on Human Rights Grounds**

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

<sup>93</sup> This appears only to be an aspirational reference. EIB's Stakeholder Engagement standard expresses alignment only with the "spirit and principles" of the Aarhus Convention, rather than their substantive requirements. EIB, [Environmental and Social Standards](#) (2022), Standard 2 – Stakeholder Engagement, footnote 1.

- Manufacturing, sale or use of racist, ableist, sexist, homophobic or transphobic or other antidemocratic media (IKI)

## 2. ALIGNMENT WITH NORMATIVE STANDARDS ON RESPONSIBLE BUSINESS CONDUCT

### a) Concerns with Existing Policies and Practices

DFI Safeguards reflect considerable variation in the scope and specificity of commitments to responsible business conduct (RBC) standards, as embodied in the UNGPs and OECD Guidelines. Without such references, and without conscious alignment, staff and clients will not know the extent to which the DFI's standards reflect emerging legal requirements and RBC standards.

### b) Emerging Good Practices and Recommendations

References to RBC standards are increasing and are not limited to private sector DFIs. The IDB's policy commitment concerning the UNGPs, while located in a footnote rather than the main text, usefully recognizes that due diligence procedures embodied in the UNGPs are of equal applicability to sovereign lenders. Finnfund's, FMO's and IKI's commitments and guidance pertaining to RBC standards and the UNGPs, and recent ESAP guidance of the Legacy Landscape Fund, produced with contributions from KfW, are among the more specific and operationally oriented. (See Boxes 9 and 33)

#### **Box 9: Emerging Practices – Commitments and References to RBC Standards**

- **FinnFund** "endeavours to actively and continuously identify, avoid, mitigate and manage potential and actual adverse human right impacts related to its transactions, and take actions to address them using the UN Guiding Principles for Business and Human Rights (UNGPs) as a practical framework."<sup>94</sup>
- **FMO**: "In line with the United Nations Guiding Principles on Business and Human Rights, FMO recognizes the responsibility of businesses to respect human rights, wherever they operate. FMO respects internationally recognized human rights standards and takes measures to avoid supporting activities that may cause or contribute to human rights violations and acknowledges the responsibility of its clients to do the same. This means to avoid infringing the human rights of others and to address adverse impact these businesses may cause or contribute to. ... FMO requires that all clients comply with applicable environmental, social and human rights laws in their home and host countries. In addition, FMO upholds the following (inter)national standards, including in its own operations, as applicable" [*including the UNGPs, OECD Guidelines, and ILO Declaration on Fundamental Principles and Rights at Work*].
- **BII's** Policy on Responsible Investing (2022) includes the UNGPs as part of the reference framework in connection with Investee E&S requirements for labor and working conditions, supply chain risk management, and consumer protection. It also requires investees to "ensure that, where material human rights issues are identified (including in supply chains) the UNGPs are integrated into an Investee's management systems and appropriate capacity and governance oversight embedded in an Investee's operations." (Annexes A and C respectively).

<sup>94</sup> Finnfund, [Human Rights Statement](#) (2019), p.1.

- **IKI's** Safeguards specify: "In accordance with the UNGPs, the due diligence process distinguishes respective actors in line with the level of involvement in the 'responsibility chain' in possible adverse impacts on the environment and people. A distinction is made between three levels of involvement [*cause, contribute, and direct linkage, in line with the UNGPs*]. An actor's due diligence obligations differ in line with the level at which the actor is involved in the occurrence of damage. ... As the providers of the funding, the responsible ministries and ZUG are involved in potential adverse impacts primarily at the level of "direct link" and to a lesser extent at the level of the contribution. This is because the responsible ministries and ZUG maintain business relations with implementing organizations which can cause damage or contribute to damage via their activities or omissions in the context of a supported project. They can contribute to possible adverse impacts if they fail to comply with their due diligence obligations as they review and monitor the safeguard standards throughout the project cycle."<sup>95</sup>
- **EIB's** Environmental and Social Policy states that "the EIB expects its promoters to meet their respective human rights duties and responsibilities in line with the [UNGP]."<sup>96</sup>
- **IDB Invest's** 2020 Environmental and Social Policy Implementation Manual (though not the Policy itself) references the UNGPs in connection with the client's responsibility to address human rights impacts which they cause or to which they contribute or are linked.<sup>97</sup>
- In 2022 **IDB** published a Technical Note [Managing Human Rights Risks in IDB Projects: Requirements of the IDB's ESPF](#) which, among other things, notes that the UNGPs can help the Borrower to assess human rights risks in all its business relationships.
- **IFC** Sustainability Policy and PS 1 refers to the need for businesses to respect human rights but a reference to the UNGPs is included only in the Guidance Note for PS 1. In contrast to the UNGPs and RBC standards, however, as highlighted earlier, the scope for human rights due diligence is limited only to "special high risk circumstances." (PS 1, fn 12).

---

### 3. REFERENCES TO INTERNATIONAL LAW OBLIGATIONS

As indicated earlier, most states are party to several of the nine core UN human rights treaties<sup>98</sup> as well as ILO conventions. ILO member States are considered to have obligations to promote and realize the fundamental principles on rights at work even if they have not ratified the underlying conventions.<sup>99</sup> In addition, many human rights are supported by customary international law, a source of law grounded in State practice.

<sup>95</sup> [Safeguards Policy of the International Climate Initiative](#) (valid Jan. 15, 2023), pp.9-10.

<sup>96</sup> EIB, [Environmental and Social Policy](#) (2022), para. 4.5.

<sup>97</sup> IDB Invest, [Implementation Manual: Environmental and Social Sustainability Policy](#) (2020), pp.57-58 and 118-119.

<sup>98</sup> See OHCHR's human rights treaties [dashboard](#). The latter dashboard refers to 18 instruments, which includes optional protocols to the nine core treaties.

<sup>99</sup> The [ILO Declaration on Fundamental Principles and Rights at Work](#), amended in June 2022, declares that "all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective

It is important to remember that Safeguards were originally established to set common, minimum standards because of concerns that national laws did not sufficiently prevent environmental and social harms. Similarly, as indicated earlier, national law very often conflicts with international human rights standards. This is not surprising, given the explicit aim of human rights law (and, increasingly, DFI Safeguards) to address imbalances of power and ensure that even the most vulnerable have a basic level of protection. Common gap areas in relation to issues covered by Safeguards include:

- Freedoms of expression, assembly, association, without which people cannot participate in project formulation or implementation;
- Labor rights including freedom of association, collective bargaining, and the right to a living wage;
- Rights to non-discrimination including with respect to women and girls, LGBTI peoples' rights, and rights of persons with disabilities and older persons;
- Rights of minority populations and indigenous peoples; and
- Rights relating to land tenure, housing, property ownership and resettlement.

RBC normative frameworks, including the UNGPs and OECD Guidelines, reflect the clear expectation that businesses should respect human rights irrespective of gaps in national law. This is also the approach taken with respect to health and safety standards under the World Bank Group EHS Guidelines.<sup>100</sup> International human rights law does not always require implementing legislation, however Safeguards can reinforce the importance of respecting international law obligations especially in situations where legislative protection is weak or absent.

#### **a) Concerns with Existing Policies and Practices**

When Safeguards are unduly deferential to (weaker) national systems, projects are not likely to manage E&S and human rights risks effectively, and consequently, are not likely to yield the intended development outcomes. Current practice regarding the recognition of international law obligations is inconsistent:

- Some Safeguards **fail to consider international law at all**, deferring to national law, which can be problematic particularly where discrimination and other potentially sensitive human rights issues are concerned;
- Others may confuse or conflate international law obligations with **aspirational language** or "international good practices;"<sup>101</sup>
- Some Safeguards only **take into account "national laws implementing host country obligations under international law"** which overlooks the fact that

---

recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; (d) the elimination of discrimination in respect of employment and occupation; and (e) a safe and healthy working environment."

<sup>100</sup> World Bank Group, [General Environmental, Health, and Safety \(EHS\) Guidelines](#) (2007), Introduction: "When host country regulations differ from the levels and measures presented in the EHS guidelines, projects are expected to achieve whichever is more stringent."

<sup>101</sup> EIB, [Environmental and Social Standards](#) (2022), Standard 7, requires risk management "*in line with the spirit and principles*" of CETS 210 - Council of Europe Convention on preventing and combating violence against women and domestic violence (coe.int). [Emphasis added]. See also Standard 4 – Biodiversity and Ecosystem Services, fn 10: "These international good practices have been set out in the following international conventions related to the protection and conservation of biodiversity and ecosystems: The Convention on Biological Diversity including the Nagoya Protocol; the Convention on Wetlands of International Importance; the Berne Convention on the Conservation of European Wildlife and Natural Habitats; the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Convention on the Conservation of Migratory Species of Wild Animals."

international law may often have direct effect, without need for implementing legislation, and that national laws are frequently below international standards.

**b) Emerging Good Practices and Recommendations**

Emerging practice increasingly encourages explicit referencing and alignment of Safeguards with international human rights standards, and requires observance of the strongest applicable source of law (international or domestic). Where the domestic context makes it impossible to fully respect international human rights, business enterprises are expected to respect human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.<sup>102</sup> This is not a novel proposition, as was noted earlier, as the leading MDBs have consistently strived to set rigorous Safeguard requirements in connection with resettlement, E&S assessment, indigenous peoples' rights and increasingly, discrimination issues, beyond the requirements of many if not most legal systems.

**Box 10: Emerging Practices – References to International Law Obligations**

- Compliance with "international treaties, conventions and instruments ratified by the EU", national law and "country obligations under relevant international treaties." (EIB, ESP, Preamble and para. 4.4).
- GCF will not support activities that "do not comply with applicable laws, including national laws and/or obligations of the country directly applicable to the activities under relevant international treaties and agreements, whichever is the higher standard;" (GCF, ESP para. IV(n))
- Compliance with "applicable international agreements and national legislation relating to gender empowerment and equality." (IDB, ESPF, para. 1.3)
- Where host country requirements differ from the E&S standards, Industry Sector Guidelines, and internationally recognized worker rights, the project is expected to meet whichever are more stringent (DFC, ESPP, para. 4.11). High risk circumstances include "country contexts where national human rights laws do not meet international standards." (DFC, ESPP, para. 2.5)
- Project activities "must comply with existing law, including national law and/or obligations of the country under international treaties and agreements. The highest standard applies, i.e. if the safeguards standards exceed those under national law, the former are applicable." (IKI Safeguards, p.8)
- The client's environmental and social management system includes national laws "as well as the international agreements to which the relevant Member is a party." (AIIB ESF (2022), para. 59(1))

---

**4. EVOLVING SAFEGUARDS POLICY ARCHITECTURE – NEW STANDALONE POLICIES DIRECTLY ADDRESSING HUMAN RIGHTS ISSUES**

This section highlights the emerging trend in DFI Safeguards to include stand-alone E&S standards on particular human rights issues. In OHCHR's view this is a welcome development as it elevates attention to the issue in question and affords scope for detailed requirements to address it, while ensuring that the issue in question is given due attention in other performance standards as well.

---

<sup>102</sup> [UNGPs](#), Principle 23.

a) [Stakeholder Engagement](#)

i) [Concerns with Existing Policies and Practices](#)

Complaints to IAMS have consistently documented shortcomings in stakeholder engagement.<sup>103</sup> It can be challenging to determine how to remedy a failure to carry out appropriate consultations in a manner that is both fair to those left out while also considering the impact on the wider project. Stopping activities in order to re-start consultations may be an appropriate response in some instances, but perhaps not others. This underscores the need to define the appropriate scope for stakeholder engagement at the outset, and update this through project implementation.

ii) [Emerging Good Practices and Recommendations](#)

Active and inclusive stakeholder engagement is essential for the positive impact of investment projects and is predicated upon a range of human rights guarantees, including the rights to freedom of expression, association, assembly and access to information, non-discrimination, minimum socio-economic rights guarantees, and protection against reprisals. The UNGPs highlight the importance of meaningful consultation while the OECD Guidelines refer to meaningful stakeholder engagement.<sup>104</sup>

Recent DFI Safeguard updates have begun to include a separate E&S standard on stakeholder engagement, helping to ensure that stakeholders have the capacity, freedom and opportunity to access and act upon project information and influence project design and implementation.<sup>105</sup> In OHCHR's view stakeholder engagement should include the following elements:

- **Recognising workers and communities as rights holders in the process, not just "affected people"**. The right to participate in public affairs was recognized in the 1948 Universal Declaration of Human Rights and has been reaffirmed and reinforced in a wide range of international, regional and national human rights standards, including Principle 10 of the Rio Declaration and subsequent international conventions on these rights.<sup>106</sup> Several DFIs have recognized these rights in their Safeguards (See Box 11).

**Box 11: Emerging Practices – Recognising Rights in Stakeholder Engagement**

- **IDB**: "The IDB is committed to respecting the rights of access to information, participation, and justice regarding environmental issues, consistent with the principles the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters, or the Escazú Agreement."
- **EIB**: "This Standard recognizes the importance of stakeholder engagement, as a means to ensure respect for the rights to: (i) access to information; (ii) public participation in decision- making processes; and (iii) access to

<sup>103</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.31-33.

<sup>104</sup> See e.g. [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#) (2017).

<sup>105</sup> IDB, [Meaningful Stakeholder Consultation](#) (July 2017). See also the [Environmental Democracy Index](#).

<sup>106</sup> Principle 10 has been incorporated into two legally binding regional conventions, the [Aarhus Convention](#) and the [Escazú Agreement](#).



justice ....The engagement process shall be respectful of human rights, including the rights to privacy and data protection ...."<sup>107</sup>

- **EBRD:** "On environmental matters in particular, the Bank supports the approach of the UNECE Aarhus Convention, which identifies the environment as a public good. The Convention affirms the public's right to be informed as to the state of that environment and what emissions and discharges are being released into it; the right to meaningful consultation on proposed projects or programmes that might affect the environment; and the right to complain if they believe that the environment is not being adequately taken into account."<sup>108</sup>

- **Expanding the scope for identifying and engaging stakeholders:** The definition of who is, and who is not, considered a stakeholder has important implications because it demarcates whose voice counts, whose rights are considered, and who may or may not benefit from the project. Clients may wish to define project-affected people (PAP) narrowly in order to simplify consultation processes, but this may prejudice the rights of those excluded, conceal adverse impacts, and result in grievances that threaten project implementation and must later be remedied. DFI Safeguards take varying approaches to this issue: (i) some take a narrow approach, defining PAPs as only those "directly affected;" (ii) some appear to vary the scope of people to be included at different stages of the engagement process, progressively narrowing the scope through project implementation; (iii) some effectively restrict the scope of PAPs through the definition of the area of influence;<sup>109</sup> (iv) some limit their stakeholder engagement requirements to those affected by adverse impacts of projects with physical footprints.<sup>110</sup> Restrictions of the latter kind may exclude a wide range of projects from stakeholder engagement requirements, including digital technology projects, and fail to address impacts on users and consumers. (See Part IV, Gap 8, Sections 2 and 4 below).

The UNGPs expect businesses to engage with potentially affected groups and other relevant stakeholders.<sup>111</sup> They do not draw pre-determined boundaries around who is a stakeholder and who is not. Instead, the scope should be determined by potential adverse impacts, both from the client's own activities as well as those connected with its business relationships. Certain recent Safeguards are taking this broader approach, defining PAPs in relation to direct and indirect impacts, a wider area of influence, and those affected by cumulative impacts. (See Box 12).

<sup>107</sup> EIB, [Environmental and Social Standards](#) (2022), Standard 2 – Stakeholder Engagement, paras. 1 & 9.

<sup>108</sup> EBRD, [Performance Requirement 10](#) (2018), para. 2.

<sup>109</sup> A "consistent theme across IAMs' findings is that the 'area of influence' of the project had been underestimated." V. Richard, "Independent accountability mechanisms as guardians of a kaleidoscopic legal accountability", in O. McIntyre & S. Nanwani, eds., *The Practice of Independent Accountability Mechanisms: Towards Good Governance in Development Finance* (Leiden, Brill, 2020), pp. 323-325.

<sup>110</sup> See e.g. IFC PS 1, para 26.

<sup>111</sup> UNGP 18 calls for "meaningful consultation with potentially affected groups and other relevant stakeholders, appropriate to the size of the business and the nature and context of the operations" as part of "identifying and assessing human rights impacts with which they may be involved either through their own activities or as a result of their business relationship."

### **Box 12: Emerging Practices – Defining Project Affected People**

- **DFC: "Stakeholder – Stakeholders** are persons or groups who are **directly or indirectly affected** by a project, as well as those who may have interests in a project and/or the ability to influence its outcome, either positively or negatively. **Stakeholders** may include **Project Affected People** and their formal and informal representatives, national or local government authorities, politicians, religious leaders, civil society organizations and groups with special interests, the academic community, or other businesses.
  - **Project Affected People** – Individuals, workers, groups or local communities, including within the supply chain, which are or could be affected by the project's Area of Influence, directly or indirectly, including as a result of cumulative impacts. Emphasis should be placed on those who are directly and adversely affected, disadvantaged or vulnerable.
  - **Area of Influence** – Areas potentially affected by a project including (1) the primary project site(s) and related facilities that the Applicant develops or controls...; (2) associated facilities that are not funded as part of the project ...; (3) **areas and communities potentially affected by cumulative impacts** that result from the incremental impact on areas or resources used or directly impacted by the project, and from any existing, planned or reasonably defined developments at the time the risks and impacts identification process is conducted; and (4) **areas and communities potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location.** ... Any identifiable supply chain expansion of materials or resource development that is inherent to a project's success should be included within a project's Area of Influence."
- 
- **Setting standards independent of national law:** As was noted earlier, for many countries and issues covered by Safeguards, the gap between the protections afforded by national and international law is widening. Authoritarian governance is on the rise in many countries, and is often fuelled by racist, xenophobic or ethno-nationalist sentiment and associated with restrictions on freedom of expression, assembly, and association, increasing inequalities, decreased civil society space and increased threats to human rights defenders. In such conditions, stakeholder engagement becomes an even greater challenge, and adherence to international human rights standards and prerequisites to participation becomes particularly important.
  - **Conducting a specific assessment of civic space:** There is a range of tools available which may help to identify when more specific civic space assessments<sup>112</sup> are warranted, and to assess the impact of the constraints faced by PAPs and other stakeholders and what specific mitigation measures may be needed.
  - **Incorporating requirements concerning non-retaliation:** In response to shrinking civic space and increased threats to environmental and human rights defenders, DFIs are increasingly integrating reprisals protections within their Safeguards. Regrettably, clients themselves are often directly or indirectly involved in acts of intimidation or reprisals against project stakeholders, hence it is important that DFIs: (i) incorporate into Sustainability Policies a commitment by the DFI not to tolerate such actions by, or on behalf of, a client; (ii) set out

<sup>112</sup> See e.g. Oxfam, [Civic Space Monitoring Tool: Understanding what is happening in civic space at a local and national level](#) (2019).

specific requirements in E&S standards that clients must prevent and address any reprisals risks; and (iii) include reprisals protections in legal agreements with the client, particularly in higher risk contexts.

- **Emphasising accessibility for all:** The new generation of E&S standards stress the importance of accessible stakeholder engagement and the deployment of accessible formats for different physical, sensory, and/or cognitive needs.<sup>113</sup> This is essential if the rights of persons with disabilities are to be ensured. Accessibility also requires identifying barriers and addressing discrimination on the grounds of gender and SOGIESC, as recognized in the IDB's Safeguards.<sup>114</sup>
- **Reinforcing the importance of engaging with community representatives:** E&S standards should set forth clear requirements for clients to engage in good faith with community representatives. People raising concerns about projects are often stigmatized as "anti-development", or un-representative, or as the source of problems rather than solutions. Admittedly, it may not always be obvious whose voices legitimately express community interests, however this should be addressed on a case-by-case basis rather than through arbitrary constraints on participation or unduly strict standing rules. Moreover, in view of the increasing threats and reprisals risks faced by many communities, Safeguards should explicitly accommodate – and not arbitrarily restrict – the right to representation by international NGOs.

### **Box 13: Emerging Practices – Stakeholder Engagement**

**Additional good practice elements** across DFI practice include the following:

- Specific **recognition** that the rights to information, participation and access to justice are an integral part of the process.
- Specific **recognition** that the engagement process should be **respectful of human rights**, including the rights to privacy and data protection.
- A **participation plan**, including a documented record of stakeholder participation, with resources that support a systematic approach to stakeholder engagement across the project life cycle, starting at the earliest possible stage and reporting to stakeholders throughout the project cycle, providing information on an updated basis. **Engagement adapts** to changing project needs throughout the duration of project implementation.
- The form of the consultation is tailored to the nature of the project, contextual risks, and present circumstances, safeguarding participants' health and safety.
- **Broad community support** is obtained for all projects, and specific requirements are in place for Free, Prior and Informed Consent (FPIC) where indigenous people are concerned.
- Stakeholders are thoroughly mapped **to identify the people whose human rights are at issue in relation to a given project**. Those whose human rights are adversely or potentially affected are in a different category from those who are merely interested in a project. Government agencies,

<sup>113</sup> See e.g. World Bank, [Environmental and Social Framework](#), ESS 10 (2016), para. 20; IDB [Environmental and Social Policy Framework, ESS 10](#), (2020) para. 20; and EIB, [Environmental and Social Standards](#) (2022), Standard 2 – Stakeholder Engagement, para. 36(d).

<sup>114</sup> IDB, [Environmental and Social Policy Framework, ESS 9](#) (2020), para. 20.

promoters and other parties (such as suppliers and contractors), have the obligation and responsibility to ensure that these rights are upheld.

- **Documentation is made available** for public consultation in an appropriate form and accessible, timely and culturally appropriate fashion, translated as necessary.
- Information provided is **objective, balanced**, and provides a **fair representation of positive and negative information**, and does not conceal risks or negative impacts.
- Stakeholders are given **feedback** on the extent and manner in which their inputs and viewpoints were taken into account in the consultation process, and reasons are given as to why any material inputs were not reflected.
- **Representativeness and equitable participation** are ensured. This includes accessibility and inclusion of disadvantaged groups and other who may be discriminated against, respect for institutions and actors representing communities, and ensuring that the perspectives of women, LGBTI people, indigenous peoples, persons with disabilities and other relevant population groups are sought and taken into account.
- Recognition that community **representatives**, including, potentially, international representatives, may be needed and can play a significant role in making participation possible.
- **The process is free** from manipulation, interference, discrimination, intimidation, coercion or reprisals.
- **Capacity building and/or other assistance** is provided in order to empower impacted individuals and communities, in particular those who are vulnerable and/or marginalized, to fully and effectively participate in engagement and consultation processes.
- Stakeholders including communities and civil society organizations are involved **in compliance monitoring**, in cases where non-compliance has been identified.
- **Safeguards and client contracts require the establishment of, and client cooperation with, grievance mechanisms.** Such provisions send a clear message that addressing grievances starts with meaningful stakeholder engagement which, if done well, allows any concerns to be addressed early and for project design and operations to be adjusted as necessary.

#### ***b) Separate Policies on Specific Groups***

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

#### ***i) Concerns with Existing Policies and Practices***

The increasing attention to vulnerability is timely and welcome however the term "vulnerable groups" may sometimes be used uncritically, as if vulnerability were a characteristic inherent in particular populations groups. This may unwittingly deflect attention from the structural conditions of discrimination and marginalization which may cause or exacerbate vulnerability. Moreover, by pre-determining groups which fall within this category, DFIs and their clients might overlook those made vulnerable by

external circumstances such as conflict or natural disasters (commonly referred to as situational vulnerability). A more suitable term might be "vulnerable or marginalized groups." (See Box 14).

OHCHR also notes that there is a strong need for broader approaches to non-discrimination across the board, with specific acknowledgment that non-discrimination involves more than addressing vulnerability. The prohibition on discrimination runs across every major human rights convention and almost all human rights instruments. While vulnerability may arise as a result of particular personal characteristics or circumstances, discrimination is socially constructed and, frequently, politically motivated. Special measures are often needed in order to level the playing field and create a safe space for participation, where discrimination is at issue.

A failure to adequately address discrimination issues can fuel inequalities and impede the achievement of the SDGs and DFIs' development mandates. Some Safeguards address non-discrimination only with respect to specific circumstances, such as hiring and job promotion and accessing project benefits, which are important, but there are many other contexts in which people experience discrimination. Other Safeguards take a more comprehensive approach. (See Box 15).

Multilateral DFIs generally have self-standing E&S standards on indigenous peoples, in view of the particularly serious risks such peoples face in connection with many kinds of investment projects. However the rights of children, persons with disabilities, LGBTI people and migrant workers often do not receive due attention. Moreover, discrimination on the grounds of race and ethnicity is worsening in many countries, fuelled in many instances by the COVID-19 pandemic, economic and environmental stresses, and xenophobic, nationalist political sentiment. Discrimination on the basis of political opinion, a central aspect of anti-discrimination law and a pervasive and potentially serious constraint to participation, is also frequently overlooked.<sup>115</sup>

#### *i) Emerging Good Practices and Recommendations*

A number of DFIs are engaging in a substantive and detailed way with what discrimination and "vulnerability" mean in particular contexts. (See Boxes 14 and 15).

#### **Box 14: Emerging Practices – Avoiding Vulnerability as an Inherent Characteristic**

EIB's Safeguards refer to "people who are "vulnerable, marginalized, and/or discriminated- against." EIB's recognizes that discrimination can cause vulnerability: "This Standard recognizes that in some cases, certain individuals or groups are vulnerable, marginalized, systematically discriminated against or excluded on the basis of their socioeconomic characteristics. ... These persons and groups are not inherently more vulnerable than others but due to discriminatory practices and norms, and therefore a less enabling environment, they often face additional barriers that limit their opportunity or ability to equally participate in decision-making related to the project and enjoy project benefits. Indigenous Peoples and ethnic minorities in particular have identities and aspirations that are distinct from dominant groups in national societies and are often disadvantaged by traditional models of development. Moreover, gender-based discrimination affects all societies and cuts across all other types of discrimination, often exacerbating vulnerability, exclusion, and/or marginalization."<sup>116</sup>

<sup>115</sup> Notable exceptions include IDB, [Environmental and Social Policy Framework](#) (2020), and the EIB [Environmental and Social Sustainability Framework](#) (2022).

<sup>116</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 7, paras. 1-3.

### **Box 15: Emerging Practices – Non-Discrimination**

#### **Clear focus on non-discrimination:**

**IDB:** "The risks and impacts identification process will consider, among others: ... prejudice or discrimination against individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable ... gender-related risks, including gender-based exclusion, gender-based violence (sexual exploitation, human trafficking, and the spread of sexually transmitted diseases), and potential discrimination risks based on gender and sexual orientation, among others."<sup>117</sup>

**EIB's Standard 7** aims to "Ensure that projects respect the rights and interests of vulnerable, marginalized or discriminated-against persons and groups, and Indigenous Peoples, including the right to non-discrimination and the right to equal treatment between women, men, non-binary or gender non-conforming persons."<sup>118</sup>

#### **More complete attention to groups at risk of discrimination:**

**IDB:** "This disadvantaged or vulnerable status may stem from disability, state of health, indigenous status, gender identity, sexual orientation, religion, race, color, ethnicity, age, language, political or other opinion, national or social origin, property, birth, economic disadvantage, or social condition."<sup>119</sup>

**EIB:** "This Standard recognizes that in some cases, certain individuals or groups are vulnerable, marginalized, systematically discriminated against or excluded on the basis of their socioeconomic characteristics. Such characteristics include, but are not limited to, sex, sexual orientation, gender, gender identity, caste, racial, ethnic, indigenous or social origin, genetic features, age, birth, disability, religion or belief, political or any other opinion, activism, membership of a national minority, affiliation to a union or any other form of workers' organization, property, nationality, language, marital or family status, health status, or migrant or economic status."<sup>120</sup> Moreover, the EIB's Standard on Resettlement seems to have broken new ground in addressing projects that may involve the involuntary resettlement of refugees and/or internally displaced persons.<sup>121</sup>

The **World Bank** published a [Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups](#) (2016) (although this is addressed to Bank staff rather than clients), and has produced a range of guidance on non-discrimination including: [Non-Discrimination and Disability](#) (2018); [Good Practice Note on Non-Discrimination: Sexual Orientation and Gender Identity \(SOGI\)](#) (2019), and [Technical Note on Addressing Racial Discrimination through the E&S Framework \(ESF\)](#) (2021).

More recently, attention to GBV and SEA has been increasing (Box 16), and some DFIs have begun adopting self-standing Safeguards on gender equality, sexual orientation and gender identity (SOGI). (See Box 17). This is a welcome and necessary development in OHCHR's view, given the entrenched nature of discrimination faced by

<sup>117</sup> IDB, [Environmental and Social Policy Framework](#) (2020), para. 9.

<sup>118</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 7, para. 7.

<sup>119</sup> IDB [Environmental and Social Policy Framework](#) (2020), p.22.

<sup>120</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 7, para. 2.

<sup>121</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 6, para. 11: "For cases where an EIB-financed project leads to the displacement of settlements of refugees and/or internally displaced persons, the involuntary resettlement process shall be adapted to be aligned with the [United Nations] Guiding Principles on Internal Displacement."

women, girls and LGBTI people in all regions, the stigmatization and denial faced by the latter groups in particular, the economic costs of discrimination, and the particular risks they face in connection with investment projects. More explicit attention is needed on the rights of intersex persons and discrimination on the grounds of gender expression and sex characteristics however.

The World Bank has reported that LGBTI people suffer lower education outcomes and higher unemployment rates due to discrimination, bullying and violence, in addition to a lack of access to adequate housing and health services and financial services.<sup>122</sup> Situating SOGIESC within the context of a gender equality stand-alone Safeguard has an important substantive basis. Violence and discrimination against LGBTI people are rooted in negative gender stereotypes and perceptions that LGBTI people defy gender norms. LGBTI persons face specific criminal sanctions, targeted violence, discrimination and patterns of exclusion that institutions have historically been reluctant to address, driven by stigma and negative stereotypes.

**Box 16: Emerging Practices – Gender Based Violence (GBV) and Sexual Exploitation, Sexual Abuse and Sexual Harassment (SEAH)**

- Based on lessons learned from gender based violence in several transport projects, including the [Uganda Transport Sector Development Project](#) and following its Global GBV Task Force's [recommendations](#), the World Bank developed and launched a [GBV Good Practice Note](#) in October 2018, applying new standards in GBV risk identification, mitigation and response to all new operations in sustainable development and infrastructure sectors.
- A specific multilateral DFI working group was created in 2020 to exchange experiences, share knowledge and discuss effective solutions to avoid risks of GBV and harassment in financed projects. The group meets regularly and has created a platform (hosted by the World Bank) that will consolidate information and best practices.
- Several DFIs now specifically include GBV issues as issues to be assessed and addressed as part of the project assessment (AIIB, EIB, IDB, IDB Invest, IFC), as prohibitions for investees (BII), in relation to security services (AIIB, IFC), in designing and equipping GRMs to handle gender related and GBV concerns (AIIB, IFC), and in procedures for handling these issues in projects (AfDB).
- The GCF has extensive provisions on sexual exploitation, sexual abuse and sexual harassment in its revised Environmental and Social Policy, including requirements for specific due diligence on these issues and "survivor-centred and gender-responsive grievance redress mechanisms".
- Guidance and good practice include: World Bank Good Practice Note: [Addressing Sexual Exploitation and Abuse and Sexual Harassment \(SEA and SH\) in Investment Project Financing Involving Major Civil Works](#) (2020); CDC (now BII), EBRD, and IFC on [Addressing Gender Based Violence and Harassment Emerging Good Practice for the Private Sector](#) (2020); IDB Invest, [Gender Risk Assessment Tool](#) (2020) and [Preventing Sexual Exploitation A Practical Guide To The Private Sector](#) (2021); IFC and EDC, [Supporting Companies to Develop and Manage Community-Based Grievance](#)

<sup>122</sup> See World Bank, [Why LGBTQI Inclusion is Key to Shared Prosperity](#), (May 17, 2018); L. Badgett, K. Waaldijk & Y. van der Meulen Rodgers, [The Relationship between LGBT Inclusion and Economic Development: Macro-level evidence](#), 120 *World Development* (Aug. 2019), pp.1-14; and C. Cortez, J. Arzinos & C. De La Medina Soto, [Equality of Opportunity for Sexual and Gender Minorities](#) (World Bank, 2021). More generally see World Bank, [Sexual Orientation and Gender Identity](#) ([worldbank.org](#)).

[and Feedback Mechanisms Regarding Sexual Exploitation, Abuse and Harassment](#) (2022).

**Box 17: Emerging Practices – Separate E&S Standard on Gender Equality & SOGI**

- **IDB** has a separate Environmental and Social Performance Standard (ESPS) on gender equality and SOGI. As of 2022 the IDB ESPF, including ESPS 9, appeared to be best practice among DFIs, both in terms of the comprehensiveness of the scope of ESPS 9 and the integration of gender equality and SOGI issues across the ESPF. ESPS 9 explicitly addresses unpaid care work, GBV, intersectionality, narrowing existing inequalities and gaps (with a broad list of areas), disproportionate impacts on women and girls and LGBTI persons, child SEA, displacement/resettlement, labor rights and participation. It could be strengthened by better integrating sex characteristics and the rights of intersex persons. The IDB's Sustainability Policy mentions the recognition of diverse sexual orientation and gender identities as a potential cause for discrimination and exclusion from project (or additional vulnerability).
- **EIB's** ESS 7 (2022) provides: "The promoter shall adopt a gender-responsive approach to the identification, management, and monitoring of environmental and social impacts and risks that takes into account the rights and interests of women and girls, men and boys, and non-binary and gender non-conforming persons, including specific attention to the differential burdens, barriers and impacts that they might experience, including gender-based violence and harassment."

---

## 5. KEY RECOMMENDATIONS ON POLICY COMMITMENT

- ***Safeguard policies should contain a specific commitment that the DFI: (a) respects human rights in connection with the projects it finances, and (b) requires its clients to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused or contributed to by, or directly linked to, the business activities of clients.***
- ***Safeguard policies should consciously be aligned with requirements applicable to clients under relevant international human rights agreements. Doing so would promote certainty, consistency, policy coherence, and rigor in risk assessment and management.***
- ***E&S risk management should be guided by all relevant sources of law, national and international, while adhering to the most stringent applicable standard. This is especially important when it comes to assessing issues like discrimination, labor rights, women's rights, civil society space and stakeholder participation, where the protections afforded by national law in many countries may be particularly weak compared with international standards.***
- ***The UN Guiding Principles on Business and Human Rights should be integrated explicitly within Safeguard policies in order to strengthen the framework for: (a) risk assessment; (b) ongoing, risk-based due***



**diligence; (c) addressing risks throughout the value chain; and (d) remedy.**

- **Safeguard policies should include a self-standing E&S standard on gender equality, the human rights of women and girls, and the human rights of LGBTI people. This recommendation is justified on economic and principled grounds and would help to address the shortcomings in "mainstreaming" the rights of women, girls and LGBTI people in E&S risk management to date.**
- **Safeguard policies should include a self-standing performance standard on stakeholder engagement, including detailed requirements for Banks and clients on how to prevent and address reprisals risks. This recommendation is consistent with recent practice (e.g. World Bank, EBRD, IDB, EIB) and would address the increasing challenges to effective participation, shrinking civic space, and increasing threats and reprisals against project-affected people at country level.**
- **Safeguards should explicitly aim to address discrimination on grounds including gender, race, age, ethnicity, migrant status, disability, political opinion, sexual orientation, gender identity, gender expression and sex characteristics, in line with international human rights standards, and should avoid the implication that "vulnerability" is inherent to any population group.**

## **GAP 2: RISK ASSESSMENT/APPRaisal**

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

### **1. RE-THINKING RISK MANAGEMENT**

Where E&S risks and impacts are not adequately assessed and managed, they are more likely to be externalized onto workers, communities, local governments and the environment. (See Box 18). Two recent currents of thinking may provide inspiration and impetus for improved E&S risk management processes in the development finance context.

The first of these is the shift in risk management thinking to "consequence-based decision-making,"<sup>123</sup> according to which decision-making should be driven by the *severity* of the consequences. The UNGPs embody an approach to managing social risks that converges with (but is not identical to) risk management approaches in other fields such as disaster risk reduction<sup>124</sup> and impact assessment more generally.

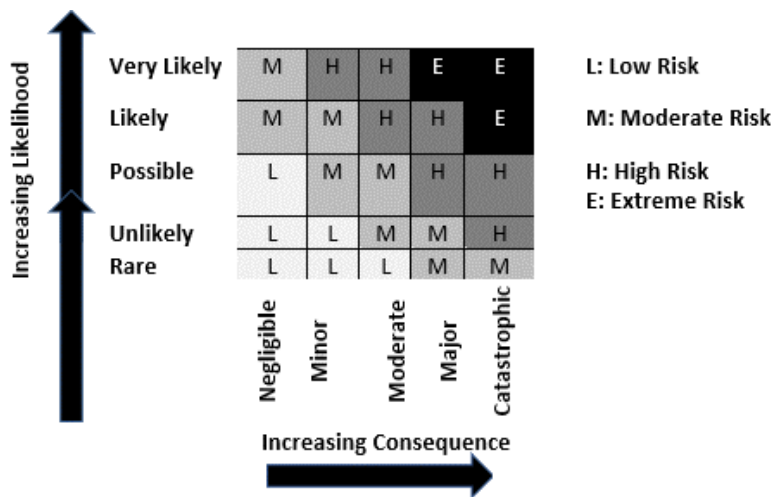
<sup>123</sup> Coined by A. Hopkins & D. Kemp in [Credibility Crisis – Brumadinho And The Politics Of Mining Industry Reform](#) (Wolters Kluwer, 2021), chapter 10. The authors provide a useful graphic that describes how a typical risk matrix can be adjusted to become a "decision-escalation matrix" that drives the appropriate level of decision-making based on consequences, rather than on the typical risk matrix where both risks and likelihood drive decision-making.

<sup>124</sup> D. Kemp, "Lessons for Mining from International Disaster Research," in B. Oberle, D. Brereton & A. Mihaylova, eds., [Towards Zero Harm: A Compendium of Papers Prepared for the Global Tailings Review](#) (St Gallen, Switzerland: 2020): Global Tailings Review.

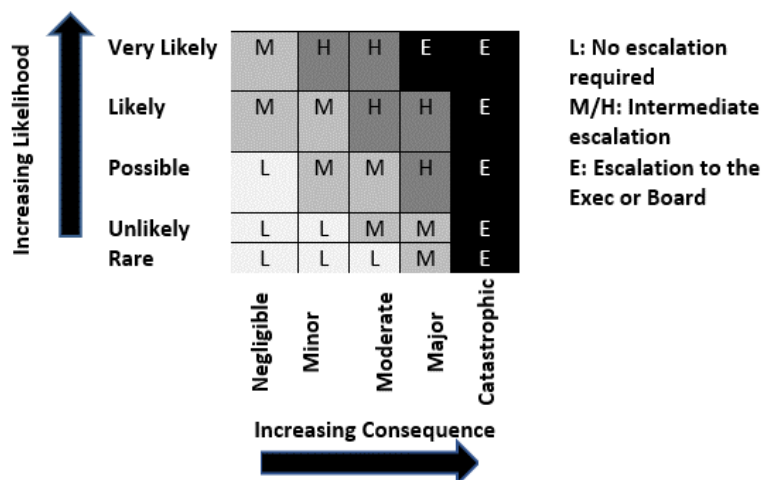
Under existing DFI practice, E&S risk is often plotted along two axes: *likelihood* and *severity* of impacts. In a typical risk matrix, a high likelihood but low consequence event is assigned the same level of risk as a low likelihood but high consequence event. The symmetry of this approach may seem intuitively compelling however, in practice, risks may only be escalated to more senior levels only if they meet a combination of likelihood and severity. High consequence/low probability events may not meet the threshold. As a result, banks and clients may have an inadequate understanding of their own risk exposure to high consequence events and potentially serious consequences that their operations may present to others.

Under a consequence-based decision-making approach, by contrast, severe impacts are escalated for consideration and action even where they may be less likely. The UNGPs reflect this approach – where severe consequences to people are expected, a more robust response is required to avoid those impacts, even if their likelihood is not considered to be great. In so doing, the UNGPs connect the intrinsic and instrumental importance of human rights to the nuts and bolts of risk management systems.

**Figure 1: Typical Risk Matrix<sup>125</sup>**



**Figure 2: Modified Risk Matrix**



Secondly, with the rise of impact investing, there is growing momentum towards more integrated and holistic approaches to managing and measuring the totality of impacts of

<sup>125</sup> Reproduced with permission from A. Hopkins & D. Kemp in [Credibility Crisis – Brumadinho And The Politics Of Mining Industry Reform](#) (Wolters Kluwer, 2021), pp. 96-97. The graphics reproduced above describe how a typical risk matrix can be adjusted to become a "decision-escalation matrix" which drives the appropriate level of decision-making based on an assessment of consequences, rather than on the typical risk matrix which weighs likelihood and severity equally.

an investment – positive *and* negative. Impact investing has brought an increased focus on measuring and accounting for the positive impacts of investments. DFIs often have sophisticated (positive) impact measurement systems. But reporting systems may measure limited dimensions of outcomes, such as the number of jobs created, but not whether jobs are "decent". Development impact measures may also be disconnected from Safeguard measures and may be managed separately. From the perspective of project-affected people, however, what counts is the *totality* of the consequences, not whether a particular impact is in the positive or negative column.<sup>126</sup>

**Box 18: Report Box – Externalities – Measuring the Hidden Costs to Society**

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

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

Different from a financial appraisal, the economic assessment allows the EIB to measure the costs and benefits generated by a project to society at large, taking into account the various resources used by the project (human, technological or natural). ... Based on our economic assessment, only projects that contribute positively to society are considered for EIB financing."<sup>127</sup>

The remainder of this section looks at the implications of shifting to consequence-based decision-making through a human rights lens. In order to consider the consequences for people, the first step is knowing what the potential risks, impacts and consequences may be.

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

As outlined earlier, DFIs are increasingly expressing a commitment to respect human rights. Being able to assure people that attention to these issues is a routine part of due diligence can strengthen DFIs' legitimacy and help establish foundations of trust with all stakeholders upon whom the success of investment projects depends.

### **a) *Concerns with Existing Policies and Practices***

Human rights due diligence (HRDD) is still an emerging topic in DFI Safeguards, and there appear to be numerous shortcomings in policy and practice. For instance, as highlighted earlier, DFI Safeguards sometimes treat human rights issues as an exceptional issue to be assessed only in "limited, high-risk circumstances".<sup>128</sup> This approach seems to be based upon the assumption that severe human rights risks or impacts will be visible at the outset. If so, this gives rise to a "Catch-22" dilemma: how can human rights risks be adequately identified when the due diligence process *itself* is triggered only in high-risk circumstances? Moreover, where human rights due diligence is restricted to exceptional circumstances, DFIs may be more likely to miss human

<sup>126</sup> I. Tuta & S. Andreassen Lysgaard, [Human rights at Development Finance Institutions](#), Danish Institute for Human Rights (2021).

<sup>127</sup> EIB, [Group Sustainability Report](#) (2020).

<sup>128</sup> See above footnote 11 and accompanying text.

rights risks in connection with Category B and C projects, digital technology projects, and routine recruitment practices associated with modern slavery, among others.

Early and systematic HRDD also lays the groundwork for steps that typically come later in the project cycle, including responsible exit and remedying harms. The latter issues are addressed later in this study (Part IV, Gap 4 on Supervision). Recognising and building frameworks for responsible exit and remedy up-front in the project cycle will enable clients and DFIs to address these issues more consistently and effectively when the need arises.

#### ***b) Emerging Good Practices and Recommendations***

An increasing number of DFIs have committed to integrating human rights as a regular part of their due diligence and their client's due diligence (See Box 19). Important synergies can be achieved through integrating human rights into other due diligence and impact assessment processes (such as ESIA's, Strategic Environmental Assessments, and Gender Impact Assessments), provided that all relevant human rights issues are addressed (UNGPs, Principle 18) and teams have the necessary expertise and experience.

#### ***Box 19: Emerging Practices – Integrating Human Rights into Routine Due Diligence***

**Finnfund** has among the clearest articulations of HRDD, explicitly aligned with the UNGPs, and specifies that this is a core part of the risk management system:

- "Finnfund uses the [UN Guiding Principles on Human Rights](#) (UNGPs) as the framework for the management of potential adverse human rights impacts and has embedded a human right perspective into [its investment process](#) from initial due diligence to the exit including environmental and social risk management. .... It is important to note, that in this article, likewise within the UNGP framework, the term *human rights due diligence* refers to the management system of potential human rights impacts during the entire investment period. While traditionally, in the field of financing, the meaning of due diligence is limited to only one phase of the investment process, i.e. the analysis done prior to the investment decision[.] ... The main aim of our human rights due diligence is to:
  - identify and prioritize the investments with potential human rights-related risks for which our processes need to go beyond the normal IFC PS and ILO CLS framework; and
  - implement processes for identifying, assessing, monitoring and addressing the potential human rights impacts caused by Finnfund's investments."

Other formulations include the following:

- **EIB:** "This Standard promotes an integrated approach to impact assessment and risk management by ensuring that environmental, climate, social and human rights considerations are addressed and taken into account in the decision-making processes... The assessment of any social aspects is fully embedded in this process and should include considerations of potential human rights risks."<sup>129</sup>
- **DFC:** "The following general topics, when applicable, are examined during the E&S assessment review: Project-related social issues, including affected

<sup>129</sup> EIB, [Environmental and Social Standards](#) (2022), Standard 1, para. 1, 3(c), 7.

populations, housing, income, employment and working conditions, land use, visual impacts, noise and lighting impacts, as well as any fiscal, cultural, ethnic, religious, and Human Rights impacts. .... An acceptable framework for an ESMS is one that provides for the effective management of the environmental and social risks and impacts associated with a project, including risks related to Labor Rights and Human Rights."

- **IDB:** "The IDB is elevating respect for human rights to the core of E&S risk management. ... The Borrower will consider risks and impacts related to human rights, gender, natural hazards, and climate change throughout the assessment process. Where appropriate, the Borrower will complement its E&S assessment with further studies focusing on those specific risks and impacts."<sup>130</sup>

One way to make these kinds of requirements more concrete would be to require clients to document the *absence* of human rights risks and impacts, taking inspiration from the revised Equator Principles (See Box 20). Due diligence processes typically record risks and impacts that are expected to happen, or do happen, but not necessarily those that were *not* found. Specifically documenting steps taken to identify human rights risks, the absence of risks, the absence of expressed concerns and how conclusions were drawn, in consultation with affected communities and other stakeholders, could contribute valuably to E&S risk management.

**Box 20: Resource Box – Documenting the Absence of Human Rights Risks & Impacts – Equator Principles**

"The Assessment Documentation may include, where applicable, the following: consideration of actual or potential adverse Human Rights impacts **and if none were identified, an explanation of how the determination of the absence of Human Rights risks was reached**, including which stakeholder groups and vulnerable populations (if present) were considered in their analysis" (emphasis added).<sup>131</sup>

---

### 3. INCORPORATING HUMAN RIGHTS INTO RISK CLASSIFICATION – BIASES AND GAPS

Risk classification plays an important role in triggering the type of E&S assessment that must be carried out, informing decisions concerning the allocation of resources and management attention to projects, and importantly, in triggering disclosure obligations. Many IAM complaints involve claims of poor information disclosure,<sup>132</sup> hence it is important to critically assess the basis for current approaches to risk classification.

---

<sup>130</sup> However ESPS 1, footnote 52 provides: "It may be appropriate for the Borrower to include in its E&S risk and impact identification process a specific human rights due diligence in line with the UN Guiding Principles on Business and Human Rights. A requirement for human rights due diligence is most likely to be appropriate where the nature of the project or its operating contexts pose significant risk to human rights, such as investments in security provision, in contexts where internally displaced persons exist, and in contexts of post- or ongoing conflict, among others." This formulation is less restricting than "limited, high risk circumstances" (IFC PS 1, fn 12) but still appears to fall short of requiring human rights due diligence as a routine matter.

<sup>131</sup> [Equator Principles 4](#) (2020), pp. 32-33.

<sup>132</sup> The [Accountability Console](#) (a database of 1614 complaints filed with IAMs), as of October 2022, showed that "consultation and disclosure" was the most frequently cited topic of complaint.

a) Concerns with Existing Policies and Practices

i) Gaps, Biases and Implicit Hierarchies

DFIs have increasingly moved to "integrated" Safeguards, or in other words, a single policy framework that attempts to address social and environmental issues together. This seems appropriate and necessary given the inter-connectedness between many E&S impacts in practice, and their close association with human rights impacts.

However, in some respects, there seems to be an implicit hierarchy wherein environmental issues are given more prominence over social issues. Given the historical dominance of environmental issues in risk management, and the close association of human rights with "social" issues, human rights risks can easily be de-prioritized. DFIs or clients may default to risks which appear familiar or easier to address, or which pose the most obvious risk to the business (rather than people). The increasing, and well justified, focus on climate change and biodiversity may have accentuated these tendencies. Related aspects of this problem include the following:

- With some exceptions, **social issues (let alone human rights issues) rarely appear to be considered significant enough on their own to justify a higher risk classification** ("Category A" or equivalent) in DFI risk management systems.<sup>133</sup> Projects that do not involve a large physical footprint or significant environmental impacts are often assumed not to have significant social impacts. Existing approaches to categorization may overlook the possibility that projects with limited E&S impacts may still entail significant E&S risks in weak governance environments or fragile states.<sup>134</sup> Some DFIs have sought to address this issue. (See Box 22).
- The **application of thresholds** to projects may mean that projects with serious human rights risks are not reviewed. For example, the EIB's Environmental and Social Standards seem to set a high threshold, applying to all projects "likely to have significant environmental, climate and/or social impacts and risks."<sup>135</sup> On its face, this seems to imply that the ESS's only apply to projects which would be classified as Category A, or high risk, under other DFIs' Safeguards. This impression is reinforced by multiple references to EIAs and ESIA's, which are typically required only for projects with larger footprints, as the basis for the application of the standards.<sup>136</sup> However the Environmental and Social Policy seems to contradict this interpretation, in that it highlights three categories of projects: high, medium and low risk.<sup>137</sup> It does not seem clear how these provisions are to be reconciled.
- Much of the prevailing practice on ESIA's and social risk assessment more generally seems to view risk through an **unduly technocratic lens**, inadvertently excluding or minimising harms which may not easily be

---

<sup>133</sup> For example, EBRD, [Environmental and Social Policy](#) (2019) includes an indicative list (though it is not clearly stated as an indicative list) as to what qualifies as a Category A (higher risk project). Only 2 out of the 28 types of projects included in the list refer to social risks and impacts.

<sup>134</sup> To this effect see IDB Office of Evaluation and Oversight, [Environmental and Social Safeguards Evaluation](#) (March 2019), p. 22.

<sup>135</sup> EIB, [Environmental and Social Standards](#) (2022), Standard 1, para. 4.

<sup>136</sup> See e.g. EIB, [Environmental and Social Standards](#) (2022), Standard 6, para. 5: "This Standard applies to a specific project when its relevance is determined during the environmental impact assessment/environmental and social impact assessment (EIA/ESIA) process (as outlined in Standard 1)."

<sup>137</sup> EIB, [Environmental and Social Policy](#) (2022), para. 4.18.

quantifiable or well articulated by communities.<sup>138</sup> DFIs or clients may be more comfortable addressing impacts that are relatively tangible and more easily measurable, and sometimes appear to have operated on the assumption that human rights impacts cannot be measured with adequate rigor. But mixed method approaches and statistical methods have advanced considerably in the human rights field. Human rights violations can often be identified clearly, such as in connection with forced evictions, gender-based violence, labor rights violations, discrimination, reprisals and poor consultation practices. In situations where human rights risks seem less clear-cut, assessments will be based upon good professional judgment, similar to the judgement required in assessing more diffuse environmental impacts, such as in the case of biodiversity.

*ii) Assumptions that "Social" Automatically Covers Human Rights*

- For larger-scale projects or projects with more widespread or severe impacts, an ESIA is usually required. There is often an **assumption that a social impact assessment (SIA) covers all key social issues, including human rights**. If done well, a SIA can be expected to cover many relevant human rights issues. However, it all depends on the quality of the SIA and the skills and knowledge of those conducting it. Even a good quality SIA may not necessarily cover all human rights issues in the same way as an impact assessment which explicitly sets out to do so. (See Box 21).

**Box 21: Explanation Box – Differences between Social Impact Assessments and Human Rights Impact Assessments**

The human rights framework:

- Provides a normative framework that clarifies the scope of issues to address in the “social” risk category;
- Clarifies the scope of the client’s and financing institution’s respective responsibilities for any adverse impacts including through their business relationships;
- Encourages meaningful stakeholder engagement and a focus on related rights that are sometimes overlooked, including the rights to freedom of expression, assembly and association, and to information;
- Compels a focus on the most vulnerable and those experiencing discrimination, including the compounding effects of multiple marginalization;
- Encourages prioritization of the most severe impacts on people;
- Includes a focus on contextual risks that can play an important role in undermining or supporting the enjoyment of human rights; and
- Encourages a focus on remedy, rather than treating impacts on rights as simply residual impacts.

- Certain **IAMs** tend to **receive more complaints about social issues** than environmental ones.<sup>139</sup> Where social issues are inadequately addressed in

<sup>138</sup> D. Kemp, S. Warden & J. Owen, [Differentiated Social Risk: Rebound Dynamics and Sustainability Performance in Mining](#), Vol. 50 *Resources Policy* (Dec. 2016), pp.19-26.

<sup>139</sup> This is the case for the IDB Group’s grievance mechanism, MICI, for example. IDB Office of Evaluation and Oversight, [Environmental and Social Safeguards Evaluation](#) (March 2019), p. xvi.

policy or in practice, it follows that there may be a greater likelihood of adverse social impacts, and consequently more complaints on these issues.

*iii) Linking Categorization Exclusively to Causation*

Some DFIs base categorization on "causation," for example: "[o]perations that can potentially cause significant negative environmental or social impacts or have profound implications affecting natural resources."<sup>140</sup> Such a formulation may set too high a threshold and may not take adequate account of how projects may *contribute to* (rather than cause) adverse impacts, or be *directly linked* to impacts through business relationships. Categorization triggers a number of important consequences, as highlighted above, hence unduly restrictive definitions should be avoided.

*b) Emerging Good Practices and Recommendations*

Some DFIs explicitly consider human rights in their categorization and risk rating process. (See Box 22).

**Box 22: Emerging Practices – Categorization that Reflects Human Rights Considerations**

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

- US DFC: "Below are aspects of projects that may lead to a categorization of heightened environmental or social risk (i.e., Category A or Special Consideration):
  - . . . . .
  - Projects that are in locations, industries, or sectors with historical issues related to adverse impacts on Project Affected People are considered high risk. Other circumstances that may be considered high risk include projects with demonstrated local opposition, environments of fragile security or history of security personnel abuses, legacy of gender or ethnic discrimination/violence, or **country contexts where national Human Rights laws do not meet international standards.**
  - Projects that are in locations, industries, or sectors with a documented history of **Labor Rights** issues are considered high risk. Examples of such high-risk projects may involve significant construction activities, manual harvesting of agricultural commodities, Extractive Industries, and industries which may present **circumstances that make it difficult for Workers to exercise trade union rights, or have a higher likelihood of using forced (including trafficked) or child labor.**"
  - "An additional classification of Special Consideration may apply to projects that have heightened potential for adverse project-related **social risks** related to the involvement of or impact on Project Affected People including Workers.... Special Consideration projects potentially have heightened adverse project-related social risks associated with the involvement of or impact on Project Affected People including Workers. **Projects may be classified as Special Consideration based on an assessment of the severity of**

<sup>140</sup> IDB, [Environmental and Social Policy Framework](#) (2020), para. 3.16.



**possible social risks**, and their relevance to a project. Key risk factors that are taken into consideration may include:

- Industry or sector: labor-intensive industries or sectors that are statistically more likely to infringe upon **Labor Rights**.
- Regional vulnerabilities: projects in countries (i) with a documented history of Labor Rights issues, (ii) having recently experienced conflict associated with Project Affected People, or (iii) with weak or compromised regulatory systems.
- Presence of vulnerable groups: (i) utilization or reliance to a large degree on large pools of sub-contracted, unskilled, temporary, and/or migrant Workers, including within the supply chain; (ii) project risks or impacts that fall disproportionately on Project Affected People who, because of their particular circumstances, may be **disadvantaged or vulnerable**, or (iii) sectors in which there is a high risk for the use of forced labor or child labor.
- Significant adverse impacts: (i) projects anticipated to have adverse impacts on a significant number of Workers, or (ii) projects that by their nature or footprint could cause or be anticipated to cause (or be complicit in) significant adverse Human Rights impacts."<sup>141</sup>

There are many good reasons for DFIs to strengthen the assessment and management of environmental and human rights impacts together, in an integrated fashion:

- **Conceptually**, there has been a proliferation of analysis from the human rights community on the links between human rights and the environment, and an increasing focus from within the environmental community on the rights dimensions of environmental protection.<sup>142</sup>
- **Legally**, an ever-increasing range of countries are incorporating the right to a healthy environment into their constitutions.<sup>143</sup> The procedural environmental rights set out in Principle 10 of the Rio Declaration, and the Aarhus and Escazú Conventions and other binding treaties,<sup>144</sup> provide a starting point for integrated approaches. The recognition in 2022 of a human right to a healthy and sustainable environment,<sup>145</sup> together with the update of the Convention on Biological Diversity<sup>146</sup> and the increasing attention to the link between climate change and human rights,<sup>147</sup> strengthen the substantive interlinkages between environmental degradation and the enjoyment of human rights. This could have potentially important legal and practical implications, particularly for larger scale projects with significant environmental impacts. Moreover as indicated earlier,

<sup>141</sup> DFC, [Environmental and Social Policy and Procedures](#) (2020), pp. 4-6.

<sup>142</sup> See e.g. [Environmental Rights Database](#).

<sup>143</sup> UNEP, [Environmental Rule of Law – First Global Report](#) (2019).

<sup>144</sup> See UNEP, [Principle 10](#).

<sup>145</sup> See UN News, [UN General Assembly declares access to a clean and healthy environment a universal human right](#) (July 28, 2022).

<sup>146</sup> See [Biodiversity and Human Rights | OHCHR](#).

<sup>147</sup> See [OHCHR and climate change | OHCHR](#).

emerging due diligence regulatory initiatives at regional and national levels aim to foster more coherent, integrated risk management approaches.

- **Operationally**, the growing focus on the human rights dimensions of climate change (the climate justice agenda),<sup>148</sup> and biodiversity and ecosystem services<sup>149</sup> (see Box 23) may inspire the development of more rigorous, integrated analytical frameworks.<sup>150</sup> Whether or not a given project is "green" may reveal very little about social or human rights impacts.<sup>151</sup> Separating environmental and social analysis may also lead to poor project outcomes. For example, there is growing realization that forcibly excluding people from protected areas does not necessarily guarantee the protection of species.
- **Engagement with stakeholders:** the above developments are associated with a shift in discourse, tactics and alliances, with ever wider groups of stakeholders, including environmental groups, harnessing human rights concepts, strategies and partnerships in order to advance the environmental agenda.<sup>152</sup>

**Box 23: Emerging Practices – Recognising the Link between Human Rights and Environmental Issues**

**EIB:** "This Standard recognizes ... that the degradation of ecosystems may have a disproportionate impact on poor rural households and vulnerable and indigenous communities who depend on ecosystem services for their livelihoods and well-being. It therefore promotes a holistic and human rights-responsive approach to the conservation and protection of biodiversity and ecosystems as well as to the sustainable use of natural resources."<sup>153</sup>

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

---

#### 4. PRIORITIZING SEVERE HUMAN RIGHTS RISKS IN RISK ASSESSMENTS

As discussed earlier, the UNGPs are part of a shift towards consequence-based decision making, where the consequences of severe impacts on people and their rights take priority over the likelihood of those events materialising. The UNGPs provide a

---

<sup>148</sup> OHCHR, [Frequently Asked Questions on Human Rights and Climate Change](#) (2021). And see [Corporate Legal Accountability - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

<sup>149</sup> [Failing to protect biodiversity can be a human rights violation – UN experts](#) (Jun 25, 2019).

<sup>150</sup> See for example, Myanmar Centre for Responsible Business (MCRB), [Briefing Paper: Biodiversity, Human Rights and Business in Myanmar](#) (2018); and the adaption of the Intergovernmental Platform for Biodiversity and Ecosystem Services (IPBES) framework to address human rights: Stockholm Resilience Centre, [Human Rights, Biodiversity and Sustainable Development Goals in the mining sector](#) (2018).

<sup>151</sup> For a review of human rights impacts of a range of different types of renewable energy projects, see: [Renewable Energy - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

<sup>152</sup> See e.g. FMO, [Position Statement on Human Rights](#) (Aug. 2017).

<sup>153</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 4, para. 2.

structured analytical framework for identifying severe risks to human rights based on three factors: scale, scope and remediability (See Box 24). The process of identifying the most severe risks is sometimes referred to as identifying "salient" human rights risks. This framework provides the basis for more rigorous, consistent risk assessments.

While the UNGPs did not specifically draw on relevant concepts from environmental law, there are obvious analogues. In particular, the "precautionary principle" recognizes that certain types of environmental harm, once suffered, can be irreparable. As a result, it has been argued that the precautionary principle has been incorporated into the legal obligation of due diligence as part of customary international law. Where severe risks exist, greater *ex ante* care and provisional measures to temporarily halt certain actions may be warranted. Together, environmental law and human rights law reinforce the importance of taking forward-looking, preventive approaches that are based on a structured analysis of potential consequences, and then acting to prevent negative impacts as a priority.<sup>154</sup>

It is important to note that severe human rights impacts are not limited to impacts involving *physical* harm. For example, impacts that deprive groups of their cultural rights, such as removing access to sacred sites, a concept already recognized in many DFI safeguards, is a potentially severe human rights impact. Arbitrary restrictions on the freedom of expression can prohibit participation in project consultations which can lead to serious impacts on people and the environment. Those who have suffered physically from sexual harassment or abuse frequently experience psychological trauma.

**Box 24: Explanation Box – The UNGPs’ Structured Approach to Addressing Severity**

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

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

**a) Concerns with Existing Policies and Practices**

The main objective of E&S risk management is to ensure that the efforts put into identifying and managing risks is commensurate with the severity and likelihood of the adverse impact. From a human rights perspective, as discussed earlier, the focus is on risks to people, not to the business, with severity as the primary driver. However not all DFI Safeguards are clear about whether the risks to be identified are those pertaining to the project, the client or the DFI, rather than to people and planet.

<sup>154</sup> IHRB, [Briefing: Connecting the Climate Change and BHR Agendas](#) (2020), pp. 4-5.

## b) Emerging Good Practices and Recommendations

Certain DFIs have recognized that the severity of human rights risks should be prioritized in project risk assessment. (See Box 25).

### **Box 25: Emerging Practices – Prioritizing Human Rights Risks**

**Finnfund:** "The scope and depth of Finnfund's assessment of potential human rights impacts is always determined on a case-by-case basis depending on the results of the first screening, the context and **severity of potential negative human rights impacts** and sector specific risks of the activity to be financed."<sup>155</sup>

---

## 5. ANALYZING THE PROJECT CONTEXT

Contextual analysis provides DFIs with an understanding of the political and social conditions in which a project will be implemented. Recently, among DFIs, there has been a renewed focus on developing more structured approaches to contextual analysis including in connection with human rights issues.<sup>156</sup> As the 2022 EDFI statement on human rights notes, "EDFI members must be prepared to work in countries and communities where respect for human rights remains imperfect, and to ensure that their operations and those of their clients take due account of their human rights commitments and promote human rights improvements."<sup>157</sup>

### a) Concerns with Existing Policies and Practices

Human rights contextual analysis needs to go well beyond the standings of countries in different composite indexes or ratings systems. Ratings systems may provide useful inputs, however more detailed risk information is needed. The examples below illustrate the kinds of human rights issues that could be included within the scope of project context due diligence. But identifying these risks is not enough – the aim of contextual risks analysis should be to help determine how these risks will impact project-affected people and what prevention and mitigation measures, commensurate with risk, are warranted. Existing guidance seems to be stronger on risk identification than management, at the present.

#### i) The National Legal Framework

Understanding the extent to which the national policy and legal framework supports or inhibits the exercise of human rights is not often analysed as part of routine due diligence, yet there are many well-known gaps between national legal frameworks and international human rights law within the scope of issues covered by Safeguards. Such gaps often reflect power imbalances between governments and their populations, between employers and workers, and between majority populations and marginalized or minority groups in society. Even where national law seems to be aligned with international human rights law in formal terms, information from the UN human rights system can help DFIs identify and understand gaps in *implementation*.

---

<sup>155</sup> Finnfund, [Human Rights Management System – Our Work in Practice](#). See also Dutch Banking Sector Agreement mapping of human rights impacts in various value chains: [Banking | IRBC Agreements \(imvoconvenanten.nl\)](#).

<sup>156</sup> See e.g. IFC, Good Practice Note, [Contextual Risk Screening for Projects](#) (Draft, April 2022); IDB, [Managing Human Rights Risks in IDB Projects: Requirements of the IDB's Environmental and Social Policy Framework](#) (May 2022), pp.24-25 & 51-52.

<sup>157</sup> EDFI, [Summary on investments and human rights](#).

Common gap areas include freedoms of expression, assembly, association and collective bargaining, other labor rights including the right to a living wage, rights relating to social protection, housing and land tenure, and the rights of women and girls, LGBTI people, persons with disabilities, indigenous peoples and minorities. Rights violations in these and other areas can have major economic costs, for the economy as well as for individual projects, as evidence increasingly bears out.<sup>158</sup> By identifying legal gaps in advance, DFIs can support clients with guidance and expertise, and provide examples of good practice in meeting relevant international standards within the particular country context.

As noted earlier, under the UNGPs and the OECD Guidelines, businesses are expected to meet international human rights standards even where national law does not require this. Where national laws make it difficult to meet those responsibilities fully, businesses are expected to respect human rights to the greatest extent possible.<sup>159</sup> Certain DFI Safeguards reflect this understanding in relation to particular issues,<sup>160</sup> though more consistency is needed.

## ii) [The Enabling Environment for Stakeholder Participation](#)

Attacks, threats and killings of environmental and human rights defenders in the context of investment projects appear to be increasing in all regions. Environmental and human rights defenders are often branded as "anti-development," "enemies of the state," "criminals" or even "terrorists" and are increasingly subject to arrest, intimidation, violence, stigmatization, criminalization, labor retribution, torture and killing in connection with DFI-funded projects.<sup>161</sup> These factors obviously impact upon the safety and well-being of those involved, first and foremost; but they also may have longer-term implications for development and project outcomes. The lack of meaningful consultation and engagement with local communities, and marginalized groups within them, has contributed to the increased threat environment faced by human rights defenders in development contexts.<sup>162</sup>

These dynamics are playing out in the context of shrinking civil society space, unprecedented threats against freedom of the press and freedom of expression worldwide,<sup>163</sup> increased digital risks, and an increase in "SLAPP suits" (strategic lawsuits against public participation) which target those who speak out.<sup>164</sup> Businesses are under

---

<sup>158</sup> For a sampling of the literature on select human rights issues see World Bank, [Women, Business and Law](#); World Bank, [Why LGBTIQI Inclusion is Key to Shared Prosperity](#) (May 17, 2018); L. Badgett, K. Waaldijk & Y. van der Meulen Rodgers, [The Relationship between LGBT Inclusion and Economic Development: Macro-level evidence](#), 120 *World Development* (Aug. 2019), pp.1-14; J. Isham, D. Kaufmann & L. Pritchett, [Civil Liberties, Democracy, and the Performance of Government Projects](#), *World Bank Economic Review*, Vol. 11 (1997); A. G. Berg & J. D. Ostry, [Inequality and Unsustainable Growth: Two Sides of the Same Coin?](#), IMF Staff Discussion Note, SDN 11/08, (Apr. 8, 2011); R. Davis & D. M. Franks, [The Cost of Company-Community Conflict in the Extractive Sector](#) (2014); and F. Stewart (ed), [Horizontal Inequalities and Conflict: Understanding Group Violence in Multi- Ethnic Societies](#) (Palgrave Macmillan, 2008).

<sup>159</sup> [UNGP 23](#), Commentary.

<sup>160</sup> See e.g. World Bank, [Environmental and Social Framework](#) (2016), ESSF 2, para. 16 and IADB, [Environmental and Social Policy Framework](#) (2020), ESPS 2, para. 14 and ESPS 7 on Indigenous Peoples which require FPIC even in the absence of national requirements.

<sup>161</sup> Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#) (May 2019).

<sup>162</sup> Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#) (May 2019).

<sup>163</sup> See e.g. Committee for the Protection of Journalists' [Global Impunity Index](#).

<sup>164</sup> As highlighted in the report UN Working Group on the issue of human rights and transnational corporations and other business enterprises, [Human rights and transnational corporations and other business enterprises - Note by the Secretary-General](#), A/72/162, 18 July 2017, para.35: "In 450 cases

increasing pressure to improve their own responses to human rights defenders as part of the corporate responsibility to respect human rights.<sup>165</sup>

There is a rich body of information from international, regional and national human rights bodies which may contribute usefully to DFIs' assessments of the climate for free expression, assembly and association and the prerequisites for stakeholder engagement in a given country. Stakeholder engagement practices across DFIs appear to be uneven at best, and are often the subject of complaints to IAMs. Participation is not often understood as a human right, and it is not always appreciated that the stakeholder engagement process itself can create risks that need to be actively addressed as part of risk management.

### *iii) The Conflict Context*

DFIs are financing projects in ever more fragile and conflict-affected and violent (FCV) environments.<sup>166</sup> In FCV settings, the political and human rights context entail heightened risks that can materialize in unexpected and damaging ways. For example, a transport infrastructure project can easily become a driver of conflict if it is routed through a conflict area, heightening tension by bringing security forces into already contested areas. Projects may affect the use of contested land and resources or create conflicts by influencing who has access to transport infrastructure and who does not. Militarization and criminalization are relatively common secondary effects of development interventions.<sup>167</sup> Legacy issues (see Part IV, sub-section 4(iv) below) can be the source of or contribute to conflict and can be particularly important to address, even where they are not connected to the existing project or client.

The World Bank's FCV Strategy 2020-2025 repeatedly notes how unaddressed grievances and perceptions of injustice may contribute to violent conflict and State fragility.<sup>168</sup> Violence is often associated with human rights violations, and impunity in the face of human rights violations can lead to an escalating spiral of violence. The World Bank's 2017 World Development Report analyses the multiple ways in which human rights violations may interact with fragile governance and undermine the rule of law, such as through exclusion and disenfranchisement.<sup>169</sup> Conversely, encouraging adherence to international human rights and environmental standards and creating opportunities to address perceived grievances in a peaceful and rights-respecting way can contribute valuably to good governance and conflict resolution.<sup>170</sup>

In line with their "do no harm" mandates, DFIs should work to ensure that the projects that they finance do not exacerbate conflicts. This logically includes addressing underlying human rights factors associated with conflict. However, the expansion by

---

of attacks against human rights defenders tracked by the Business & Human Rights Resource Centre, judicial harassment has emerged as the most common tool of suppression (40 per cent of cases)."

<sup>165</sup> See e.g. Business & Human Rights Resource Centre & International Service for Human Rights, [Shared space under pressure: Business support for civic freedoms and human rights defenders](#) (2019).

<sup>166</sup> See for example BII's [targets for investing](#) and the World Bank Group, [Strategy For Fragility, Conflict, And Violence 2020– 2025](#) (Feb. 2020).

<sup>167</sup> Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#) (May 2019) p. 20.

<sup>168</sup> World Bank Group [Strategy For Fragility, Conflict, And Violence 2020–2025](#) (Feb. 2020) ("World Bank Group FCV Strategy") at pp. viii-ix, 2-3, And Paras. 8, 12-13, 48, 53, 87, 97, 99, 126-8, 148, 164, 172, 230 and Annex 2.

<sup>169</sup> World Bank, [World Development Report 2017: Governance and the Law](#).

<sup>170</sup> For a useful 1-page summary, see N. Kemper, [World Development Report 2017: Governance and the Law](#), *KfW Development Research Brief* (2017); and also G. Sholz, [The security sector: a key factor in development and yet a challenge to development cooperation](#), *KfW Development Research Brief* (2017).

DFIs into FCV settings has not always been accompanied by requirements for heightened due diligence.<sup>171</sup> The World Bank Group FCV Strategy argues that in the face of higher risks there must be higher risk tolerance and Safeguard policy flexibility in FCV settings.<sup>172</sup> Finding the right balance is critical, however: stronger not weaker Safeguards are surely needed in such situations, while accounting for capacity constraints.<sup>173</sup>

Specialized conflict analysis and tools are required in order to understand the drivers of violent conflict and how investment projects may exacerbate or mediate conflict. There has long been attention to these issues in the public sector as well as certain private sector contexts, notably the extractive sector.<sup>174</sup> The UNGPs reflect the expectation that companies operating in conflict or high-risk areas conduct heightened due diligence, enhancing the frequency and thoroughness of human rights due diligence procedures and integrating conflict analysis.<sup>175</sup> Adherence to both human rights law and international humanitarian law is relevant in this regard.

### ***b) Emerging Good Practices and Recommendations***

As indicated earlier MDBs are increasingly adopting stand-alone Safeguards on stakeholder engagement. A solid understanding of the enabling environment for effective stakeholder engagement is critical. Civic space assessments, integrated within country and contextual analysis, can help to create baselines to identify trends, identify and mitigate retaliation risk, and generate a clearer understanding of the human rights consequences of operating within the given context.<sup>176</sup>

A number of DFIs are beginning to take explicit account of the human rights issues and data in contextual risk assessments. (See Box 26). Information and expertise from specialized human rights bodies can help to identify measures to prevent, mitigate and remedy human rights impacts.<sup>177</sup> It is important that contextual risk assessments fully inform project risk classifications, risk assessment and mitigation measures, if results are to be optimized.

---

<sup>171</sup> For example the AIIB reserves the right to defer the application of its Safeguards in conflict situations. See AIIB, [Environmental and Social Framework](#) (2021), para. 53.1: "An example of when the bank may determine that a phased approach is warranted would be in a case where the client is deemed by the bank to be in urgent need of assistance because of a natural or man-made disaster or conflict."

<sup>172</sup> [World Bank Group FCV Strategy](#), pp. 10, 11 and 20. At 11: "there must be a recognition that some risks may materialize during the life of a project that cannot be fully avoided or mitigated."

<sup>173</sup> In OHCHR's view, an appropriate balance is reflected in IFC, [Generating Private Investment In Fragile And Conflict- Affected Areas](#) (2019), p.30: "To scale up quickly, practitioners often question the need to strictly apply ESG standards. Implementing these standards can be difficult because of the complexity of many issues, the lack of necessary technology, and institutional shortcomings—all of which potentially slow job and income generation opportunities for populations at risk of conflict. But cutting corners on standards is likely to be short-sighted as these help to reduce project risks in the medium term, and minimize social harm, all of which lower the risk of future instability. However, meeting environmental, social, and governance standards in FCS is likely to take longer than in other settings, and requires flexibility with timing and additional support."

<sup>174</sup> Early OECD work on due diligence grew out of its work on "conflict minerals." See also ICRC-DCAF [Addressing Security and Human Rights Challenges in Complex Environments Toolkit](#) and International Alert, [Human Rights Due Diligence In Conflict- Affected Settings Guidance For Extractives Industries](#) (2018).

<sup>175</sup> See for example UN Working Group on Business and Human Rights, [Business, Human Rights And Conflict-Affected Regions: Towards Heightened Action \(A/75/212\)](#) and UNDP, [Heightened Human Rights Due Diligence for Business in Conflict- Affected Contexts](#) (2022).

<sup>176</sup> For arguments to this effect see Oxfam, [Civic Space: The missing element in the World Bank's Country Engagement Approach](#) (2022).

<sup>177</sup> OHCHR, [Comments on the Review and Update of the ADB Safeguard Policy Statement](#) (Apr. 2021), Annex II: Social risk information from UN human rights bodies.

### **Box 26: Emerging Practices – Human Rights Assessment Tools**

**IFC:** Since 2019, IFC has been piloting the use of a Contextual Risk Framework which intends to provide a more systematic approach to screening, including integrating issues related to human rights and civil liberties.<sup>178</sup>

**IDB:** In its Implementation Manual for its 2020 Sustainability Policy, IDB Invest defines contextual risk as: "situations such as pre-existing conditions of fragility, vulnerability or social exclusion of some groups, a history of human rights abuses, or weak governance such as high levels of corruption." IDB's supplementary guidance on the implementation of the ESPF helpfully specifies that contextual risk assessment should include human rights considerations and data sources, and should be integrated in project risk assessment, due diligence and mitigation measures.<sup>179</sup>

**EIB:** Environmental and Social Policy (para. 4.17) includes contextual risk assessment, which includes human rights considerations, in EIB's due diligence at pre-appraisal and appraisal.

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

- Free Elections and Representative Government;
- Civil Society, Media and Participation;
- Rule of Law and Access to Justice;
- Civil and Political Rights.<sup>180</sup>

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

#### ***j) The National Legal Framework***

Some DFIs have publicly disclosed the approach that they take to reviewing national laws, but these seem to be the exceptions to the rule. The increased focus of DFI Safeguards on contextual risk, discrimination, structural injustices and resulting vulnerabilities should be accompanied by transparent and rigorous analysis of national laws, but the extent to which this is being done is not clear.

<sup>178</sup> IFC, Good Practice Note, [Contextual Risk Screening for Projects](#) (Draft, April 2022).

<sup>179</sup> IDB, [Managing Human Rights Risks in IDB Projects: Requirements of the IDB's Environmental and Social Policy Framework](#) (May 2022), pp.21-25 & 51-52.

<sup>180</sup> EBRD, [Procedures to Implement the Political Aspects of the Mandate of the European Bank for Reconstruction and Development](#) and their addendum [The Bank's Response to Compliance Challenges with the Political Principles in Article 1](#).



### **Box 27: Emerging Practices – Assessing National Law**

#### **Reviewing National Laws**

- **EBRD** regularly reviews national labor laws to identify gaps between national laws and the labor requirements in their Safeguards.
- **IFC** analyses gaps between national laws concerning consultation, including whether 'consent' is required and what groups are recognized as indigenous, under PS7.<sup>181</sup> IFC also makes it clear that banks and financial institutions should respect human rights of LGBTI people irrespective of national laws.<sup>182</sup>

#### **Requiring Compliance with the Highest Standards**

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

### *ii) The Enabling Environment for Stakeholder Participation*

An increasing number of DFIs and IAMs have published position statements prohibiting retaliation and are developing early warning systems, risk screening and other procedures to identify, prevent and address threats to defenders. (See Box 28). In most cases, these policy statements have not been well integrated within Safeguard policies or reflected in practice,<sup>183</sup> although there are signs of change in this regard. It is vital that reprisals risks be included within DFIs' contextual risk assessment procedures, enabling an assessment of the root causes of reprisals in a specific context, and that these risks inform categorization decisions and due diligence and risk management actions.

### **Box 28: Emerging Practices – Reprisals**

- EIB has included specific references to human rights defenders and environmental activists and rights of stakeholders to engage with EIB and its counterparties "freely and without fear or coercion, with no tolerance for reprisals, intimidations, threats, harassment, violence or any other abuse of the rights of individuals."<sup>184</sup>
- Several DFIs, including the **World Bank, IFC, IDB, IDB Invest, EBRD, EIB, FMO and Finnfund** have adopted policy positions or "zero tolerance" public statements on reprisals.
- **AIIB** incorporated requirements in relation to retaliation into the latest version of its E&S Framework.

<sup>181</sup> Kendyl Salcito, [FPIC at the IFC: How Performance Standard 7 Could Better Protect Indigenous Peoples and Uphold Human Rights](#) (Oct. 2020).

<sup>182</sup> IFC, [Inclusive Banking: Emerging Practices to Advance the Economic Inclusion of LGBTI People](#) (2022), p.12.

<sup>183</sup> See e.g. Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#) (May 2019); Coalition for Human Rights in Development, [Wearing Blinders: How development banks are ignoring reprisal risks](#) (2022), pp.51-53; and Oxfam, Blog, [What does it mean for the World Bank to take a stand against reprisals?](#) (Sept. 29, 2020).

<sup>184</sup> EIB group, [Environmental and Social Policy](#) (2022), Preamble.

- **IFC and IDB Invest** have developed a good practice note on reprisals for the private sector, for the benefit of their clients. Some DFIs have begun work on internal guidance for their own staff. In 2022 IDB launched a guidance note on reprisal risk management.<sup>185</sup>
- Several **IAMs**, including the World Bank's Inspection Panel, the ADB's Accountability Mechanism, the IFC's Compliance Advisor Ombudsman, the AIIB's Project Affected People's Mechanism, the EBRD Project Complaint Mechanism, the EIB's Complaints Mechanism, and the FMO-DEG-Proparco Independent Complaints Mechanism have published statements and/or developed guidance on retaliation.
- The Independent Consultation and Investigation Mechanism (MICI) of the IDB, as chair of the Global **IAM Network** in 2019, developed a Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management.<sup>186</sup>
- The **World Bank's** action plan in response an Inspection Panel investigation of the ProRoutes transport project in DRC includes provision for Bank monitoring of reprisals risks and communicating concerns to national authorities.<sup>187</sup>
- **IDB Invest** has included capacity building on reprisals issues within the scope of its responsible exit and institutional strengthening plan in connection with the San Andrés and San Mateo hydro-electric projects in Guatemala.<sup>188</sup>

**Box 29: Resource Box – Suggested DFI Actions to Improve the Enabling Environment for Participation and Protection against Reprisals**

A 2019 CSO report looking at reprisals against communities, their representatives and defenders in DFI-funded projects recommended the following:<sup>189</sup>

1. **“Respect rights and avoid harm.** Ensure that development activities respect human rights, including by undertaking robust human rights due diligence to avoid adverse impacts, screening projects for reprisal risk prior to approval, developing protocols, contractual requirements, and other necessary leverage to identify, prevent, and mitigate risks for defenders, and condition investment decisions and disbursements on the ability to prevent abuses, ensure an enabling environment for defenders, and adequately address human rights impacts.
2. **Ensure an enabling environment for participation.** Ensure that communities, defenders, and other at-risk groups are able to access information and fully and effectively express their views on, protest, oppose, and participate in

<sup>185</sup> IDB, [Reprisal Risk Management](#) (2022).

<sup>186</sup> The guide is available at [MICI publications | IADB](#).

<sup>187</sup> See [World Bank Board Approves Action Plan for Democratic Republic of Congo Inspection Panel Case](#).

<sup>188</sup> MICI, [Management Action Plan Addressing ICIM's Compliance Review Report For Projects Generadora San Mateo S.A. And Generadora San Andrés S.A \(Mici-Cii-Gu- 2018-0136\)](#).

<sup>189</sup> Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#), (May 2019). For more detailed recommendations see *Uncalculated Risks*, pp.99-101, and Coalition for Human Rights in Development, [Wearing Blinders: How development banks are ignoring reprisal risks](#), (2022), pp.51-53. See also Oxfam, Blog, [What does it mean for the World Bank to take a stand against reprisals?](#) (Sept. 29, 2020).

development decision-making and activities without fear, and that development projects secure and maintain the free prior and informed consent of indigenous peoples or good faith broad community support of other communities, beginning at the earliest stages of design and preparation.

3. **Listen to defenders and monitor for risks.** Maintain a direct feedback loop with communities, establish active oversight and systematic, independent and participatory monitoring systems for human rights impacts and reprisal risks, and ensure that communities, including defenders and other marginalized groups and individuals, have access without fear to effective grievance and independent accountability and reprisal response mechanisms.
4. **Stand up for defenders under threat.** Combat the stigmatization of defenders by vigorously reaffirming their critical role in sustainable development, and work with defenders under threat to develop and execute an effective plan of prevention and response that utilizes all necessary leverage with companies, authorities, financiers and relevant actors to safeguard defenders and their right to remain in their territories and communities and continue their defence efforts, to investigate and sanction abuses and prevent recurrence, and to provide effective remedy and accountability for harm."

Not all DFIs have had a strong track record of direct engagement with communities at project level, although they are obliged to supervise their clients' stakeholder engagement practices. However there are signs of change. Some DFIs are establishing more accessible means through which stakeholders may contact the DFI directly, as part of efforts to strengthen DFIs' own due diligence and supervision. (See Box 30).

### **Box 30: Emerging Practices – Stakeholder Access to DFI Staff**

**EBRD** established a Trade Union Communication Mechanism in order "to facilitate engagement between the EBRD and trades unions in the context of the projects it finances. Focusing on communication with global unions (the International Trade Union Confederation and the Global Union Federations) and their national and sectoral affiliates, it aims to systematize and accelerate communication relating to PR2 and PR4 (Health and Safety) compliance."<sup>190</sup>

**IFC** has established a E&S Policy and Risk Department (CES) which includes a dedicated Stakeholder Grievance Response Team "to enable more proactive and systematic engagement with affected communities and civil society organizations, and more frequent and comprehensive reporting to IFC's Board and stakeholders."<sup>191</sup>

**IDB Invest and IDB** launched institutional grievance mechanisms in the end of 2020 and early 2021, respectively. These mechanisms allow for communities and interested parties to contact project teams and express concerns and/or complaints about ESG issues related to projects financed or being considered for financing by the Group. The mechanisms seek engagement and productive dialogue, aiming at avoiding impacts and preventing escalation of problems.<sup>192</sup>

<sup>190</sup> EBRD, [Sustainability Report 2020](#), p.20.

<sup>191</sup> IFC, [Annual Report 2020](#), p.9.

<sup>192</sup> [IDB Invest Grievance Mechanism](#); [IDB Grievance Mechanism](#).

### iii) Conflict Context

DFIs are adopting more specific approaches and tools to address conflict (See Box 31). This is an important area for sharing of methodologies, practical experiences and lessons learned in preventing and mitigating conflict risk, given the increasing footprint of many DFIs in FCV contexts, and in addressing challenges like foreign occupation.<sup>193</sup>

#### **Box 31: Emerging Practices – Attention to Conflict**

- **IDB:** "The risks and impacts identification process will consider, among others: ... (vi) those related to community safety, including the safety of the project's infrastructure, and threats to human security through the risk of escalation of personal or communal conflict and violence that could be caused or exacerbated by the project.... (viii) risks or impacts associated with land and natural resource tenure and use, including (as relevant) potential project impacts on local land use patterns and tenurial arrangements, land access and availability, food security and land values and any corresponding risks related to conflict or contestation over land and natural resources." ESPS 1, para. 9.
- **WB:** The ESF provides for the use of "Social and conflict analysis . an instrument that assesses the degree to which the project may (a) exacerbate existing tensions and inequality within society (both within the communities affected by the project and between these communities and others); (b) have a negative effect on stability and human security; (c) be negatively affected by existing tensions, conflict and instability, particularly in circumstances." ESS 1, Annex 1.
- **EIB:** Noted that it applied "new principles" on support to fragile regions to a number of investments signed in the second half of 2020. The EIB's conflict sensitive approach aims to: reduce the risk of the conflict and fragility derailing the project avoid the risk of conflict being exacerbated by the project and contribute to conflict prevention and peacebuilding efforts through its investments. Conflict sensitivity refers to the awareness of risks related to conflict, as well as the impact the project can have on the conflict itself – both in positive and negative terms. To help its staff translate the principles of conflict sensitivity into action, EIB reportedly set up a Conflict Sensitivity Helpdesk run in collaboration with experts from two conflict-specialist organizations, [Saferworld](#) and [Swisspeace](#). The latter organizations help the EIB by assessing contextual risks and opportunities, and making recommendations for project adjustments, in order to make them more conflict sensitive.
- **DFC:** "Where conditions exist for discrimination or community conflict, details should be provided, as well as management plans to mitigate impacts of the project on such conflicts." And Projects that are in locations, industries, or sectors with historical issues related to adverse impacts on Project Affected People are considered high risk. Other circumstances that may be considered high risk include projects with demonstrated local opposition, environments of fragile security or history of security personnel abuses, legacy of gender or ethnic discrimination/violence, or country contexts where national Human Rights laws do not meet international standards may lead to a categorization of heightening environmental or social risk."

<sup>193</sup> A compelling illustration, by way of analogy, can be seen in efforts by business enterprises to respond responsibly to the Russian invasion of Ukraine: [Russian invasion of Ukraine: Analysis of companies' human rights due diligence - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

- **IFC** states that its approach is "conflict sensitive every step of the way." This is a key aspect of the Contextual Risk Framework.<sup>194</sup> In addition, with respect to Safeguards: "[i]n the FCS context, IFC's E&S standards are particularly important because substantial social and natural resource issues are often associated with conflicts, and governments in FCS often lack the capacity to address these issues." IFC states that "[i]n many cases, IFC expends extensive resources to help its clients address E&S issues" and seeks to engage early on integrity due diligence, E&S issues, conflict analysis; and carrying out governance, macro, and security assessments.<sup>195</sup>
- **IDB Invest:** As recommended by MICI, IDB Invest is developing a tool to track violence in Latin America and the Caribbean that contributes to an enhanced contextual risk assessment of IDB Invest financed projects during project formulation and supervision.<sup>196</sup>

Even when there is no overt violent conflict, one must be sensitive to other potential social conflicts or unrest around projects. What may start as relatively minor issue can escalate into more widespread discontent especially where there are no viable or accessible avenues for people to channel their grievances.<sup>197</sup> This may have serious adverse consequences for stakeholders, the project and the DFI. (See Box 32).

**Box 32: Resource Box – The Impact of Conflict on DFI Funded Transport Projects in Latin America**

An IDB study in 2017 entitled "Lessons Learned from Four Decades of Infrastructure Project Related Conflicts in Latin America and the Caribbean" looked at 200 conflict-affected infrastructure projects across six sectors in the IDB portfolio. The study found that "firms that fail to consider conflicts proactively or choose to remain unresponsive to conflicts when they arise usually face substantial consequences and are more likely to see their projects cancelled or abandoned. ... In most cases, risk and conflict management systems are ignored while community engagement is regarded as a secondary requirement which needs to be fulfilled in order to comply with regulations. Their crucial function for preventing conflicts is often not seen."<sup>198</sup>

## 6. DEFINING AND ASSESSING "THE PROJECT"

DFIs and their clients carry out due diligence in relation to "the project"<sup>199</sup> however, as indicated earlier, the extent to which human rights impacts are addressed may vary.

<sup>194</sup> IFC, Good Practice Note, [Contextual Risk Screening for Projects](#) (Draft, April 2022).

<sup>195</sup> IFC, [Generating Private Investment In Fragile And Conflict-Affected Areas](#) (2019), pp. 25-26, and p.30.

<sup>196</sup> MICI, [Management Action Plan Addressing ICIM's Compliance Review Report For Projects Generadora San Mateo S.A. And Generadora San Andrés S.A \(Mici-Cii-Gu- 2018-0136\)](#).

<sup>197</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp. 9 and 14.

<sup>198</sup> IDB, [Lessons Learned from Four Decades of Infrastructure Project Related Conflicts in Latin America and the Caribbean](#), (2017) (Executive Summary). See also footnote 75 above and accompanying text.

<sup>199</sup> For example, the IFC Performance Standards define the project as the "defined set of business activities, including those where the specific physical elements, aspects and facilities likely to generate risks and impacts have yet to be identified. ... Where the project involves physical elements that are likely to generate impacts, E&S risks and impacts will be identified in the context of the project's "area of influence." IFC [Performance Standard 1](#), paras. 4, 8. The area of influence is further defined to include the area likely to be affected, associated facilities and cumulative impacts.

## **a) Concerns with Existing Policies and Practices**

The following are some of the main limitations in existing approaches, the effect of which may be to exclude or limit consideration of human rights impacts.

### **i) Business Models and their Implications**

Exactly where considerations of business models should fit into DFI risk assessment processes is unclear, though presumably this should happen early in the decision-making process. Business model risks are not usually addressed in Safeguards, or at least, not explicitly. Certain business model issues may be covered in Exclusion Lists, although the latter lists usually focus more on specific operational practices rather than the business model itself. Sector strategies may involve consideration of business models in some areas, such as in relation to climate change. To the extent that business model choices drive strategic choices and influence day-to-day business practices, they would seem to warrant closer attention and be the subject of more explicit guidance for DFIs.

Concerns have long been raised about certain types of corporate structures in DFIs financing projects, such as: (i) under-capitalized subsidiaries with inherent risks of default that may potentially result in uncompensated harms; and (ii) the use of tax havens and other illicit or unduly aggressive tax minimization strategies. There are also long-standing concerns about use of special economic zones that attract businesses with relatively weak E&S requirements.

With the increasing focus of investors and consumers on ESG, climate change and human rights objectives, business models with inherent human rights risks are coming under the spotlight.<sup>200</sup> These include business models which: (i) rely on low-paid labor sourced from labor brokers;<sup>201</sup> (ii) rely on high-speed, low-cost delivery; (iii) rely on depletion of natural resources;<sup>202</sup> (iv) are built on the "gig economy" where workers have little protection;<sup>203</sup> (v) rely on workers in precarious labor; (vi) rely on technology that undermines privacy, fosters discrimination or impacts other human rights;<sup>204</sup> (vii) shift responsibility for E&S impacts to those least able to address them; and (viii) specifically seek markets with limited regulation and/or capacity to enforce to establish operations.

### **ii) Scope: Client's Full Value Chain and Other Business Relationships**

Perhaps one of the most notable gaps between typical DFI Safeguards and RBC standards concerns the scope of due diligence. Safeguards typically limit assessment to "the project" and to specific business relationships the client can "control." These relationships are usually in the upper tiers of the supply chain<sup>205</sup> and concern a limited

---

<sup>200</sup> For example Shift's [Business Model Red Flags](#) groups red flags around business models into 3 categories: the value proposition, the value chain, and the cost structure and revenue model. OHCHR, [Addressing Business Model Related Human Rights Risks](#) (July 2020), addresses technology companies.

<sup>201</sup> See e.g. Ergon Associates, [Managing Risks Associated with Modern Slavery A Good Practice Note for the Private Sector](#) (2018), commissioned by CDC Group, IFC, EBRD and DFID.

<sup>202</sup> See e.g. [Natural Resources - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

<sup>203</sup> See e.g. [Gig Economy - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

<sup>204</sup> See e.g., Ranking Digital Rights, [It's Not Just the Content, It's the Business Model: Democracy's Online Speech Challenge](#) (2020); and Amnesty International, [Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights](#) (2019).

<sup>205</sup> See e.g., EIB, [Environmental and Social Standards](#) (2022), Standard 8, para. 6, footnote 11 which states: "Primary suppliers are those suppliers who provide directly to the project goods or materials essential for the core functions of the project." Cf. IFC updated its Guidance Notes in 2021 to clarify

set of risks, mainly labor and biodiversity.<sup>206</sup> It is sometimes suggested that these boundaries are necessary for the sake of clarity, from clients' perspectives, and reflect the realities of DFIs' and clients' limited influence in supply chains. However in OHCHR's view, the objective of clarity should not compromise ambition or foreclose opportunities to encourage sustainable value chains.

In contrast, the concept of "business relationships" in the UNGPs and the OECD Guidelines reflects the larger and more complex realities of globalized, interconnected global value chains.<sup>207</sup> A business may not be in a position to control all the goods and services on which it relies from its business relationships, however the UNGPs and the OECD Guidelines expect that a business should assess and address human rights impacts with which the business is "involved," not just those it controls. This includes impacts that are "directly linked" <sup>208</sup> to the business' operations, products or services by business relationships – such as those in their supply chains – but also other parts of the value chain, including through the use of the business' products and services by consumers, or by off-takers who contract to buy and use products, and so forth. Were due diligence responsibilities limited by the business' existing control, this may incentivize passivity, discourage proactive due diligence, foreclose potential leverage options, and undermine sustainability objectives.

There is no hard and fast rule about far up and down value chains due diligence should extend. Due diligence is based on a risk-based approach, hence its scope depends on where the severest risks are. Early work on supply chain due diligence focused on "conflict minerals,"<sup>209</sup> which encouraged the users of minerals originating in contexts of severe human rights abuses such as torture, killing and GBV, to identify their linkages to those practices and use their leverage to help address them. Abuses of this kind were often not in the first, second or even third tier of supply chains, but were so severe that the practicality of getting started on due diligence was not the driving force – the severity of abuses were.

DFIs and clients obviously cannot be expected to address *all* issues in *all* business relationships. Rather, the expectation in the UNGPs and RBC standards is that DFIs and their clients should assess where severe risks lie within those relationships and prioritize action in relation to those, before addressing less severe risks.<sup>210</sup> (See Part IV, Section 4 on prioritization). (See Boxes 24 & 25).<sup>211</sup> Where those severe risks lie is a matter of due diligence: human rights risk profiles are determined by the inputs, characteristics, activities, products and production processes associated with a given sector and client, as is the case for environmental impacts.

---

that "primary suppliers" can exist in several tiers of the supply chain. [IFC Guidance Note 1](#), para G53, footnote GN9.

<sup>206</sup> See the Annex for a more detailed analysis.

<sup>207</sup> See e.g. World Bank, [World Development Report 2020: Trading for Development in the Age of Global Value Chains](#), arguing that all countries strengthen social and environmental protection, to ensure the benefits of Global Value Chain participation are shared and sustained.

<sup>208</sup> Despite the use of the word "direct", the concept refers to a wider set of business relationships including, but also beyond, business relationships with which a company has a direct, contractual relationship. Where the company is directly linked to human rights impacts through its business relationships it should exercise its leverage to influence its business relationships (or the chain of business relationships) to cease those adverse impacts, prevent future impacts and remedy those that have occurred. Moreover where companies have through action or omission *contributed* to harms, they should also be prepared to contribute to remedy.

<sup>209</sup> See [Guidelines for MNEs - Organisation for Economic Co-operation and Development \(oecd.org\)](#).

<sup>210</sup> [UNGP](#)s, Principles 17 and 24.

<sup>211</sup> Cf: IDB, [Social Impact Assessment: Integrating Social Issues in Development Projects](#) (2018), p. 46, which cites the UNGPs but incorrectly equates risks of being "directly linked" to "context risks."

Legacy Landscape Fund's ESAP guidance in the conservation sector, produced with contributions from KfW, constitutes best-practice insofar as value chain due diligence, aligned with the UNGPs, is concerned. (See Box 33). There is also a growing volume of sector-specific guidance outside of the development finance context (see Box 34) from which DFIs could draw in order to inform their own due diligence within a given project and across their business relationships.<sup>212</sup>

**Box 33: Emerging Practices – Linkage and Leverage in Value Chain Risk Management**

Guidance produced by [Legacy Landscapes Fund](#) (LLF) for ESAPs in the conservation sector set out clear requirements for risk-based Environmental and Social Due Diligence (ESDD). The guidance, produced with contributions from KfW, uses the UNGPs, and in particular its “involvement framework”, as an applicable lens for guiding risk assessments and understanding the responsibility of LLF and its grantees for impacts on people and subsequent action, including remedy.

The guidelines state (p.4): “The UNGP establish that the scope of a business’s responsibility for impacts extends throughout its value chain. This responsibility exists regardless of how many intermediary steps there might be in the value chain, regardless of whether the company has influence or control over those actors, and even in situations where the company is not aware of the identity of parties in its supply chain. Under the UNGP, ‘responsibility’ is not a statement of fault or liability for harm. Rather, ‘responsibility’ involves a recognition of a connection between a company’s operations, products or services, and an adverse impact – regardless of the role the company may have played in that impact – and the corresponding social expectation that the company should take appropriate action in response, depending on the particular role it plays. The UNGP provide guidance on how responsibility in form of an existing connection between a company and an adverse impact can be established.

LLF acknowledges, that the [Legacy Landscape, or LL] programs proposed for LLF grant funding are often set up in a way where the proposing grantees may only have limited control and influence over either their co-management partner or other third parties operating in the LL program area. Therefore, it is essential to establish responsibilities for actual and potential adverse E&S and human rights impacts in line with the UNGP.... LLF requires its grantees to apply leverage constantly where feasible, to avoid and mitigate actual and potential E&S and human rights impacts. This includes using leverage during the implementation of all ESMS listed standards and guidance documents.”

Under the guidance (p.5), “linkage is established through a direct connection between the grantee’s operations, products, or services by its business relationship with another entity causing the harm.” The guidance (pp.5-9) contains guiding questions and a decision-tree that aims to navigate its grantees through the UNGPs’ “involvement framework” and for ultimately establishing the level connection to certain human rights or other E&S impacts, with particular emphasis on the continuum between contribution and direct linkage situations.

<sup>212</sup> See the due diligence guidance across various sectors developed by the OECD: [Due Diligence - Organisation for Economic Co-operation and Development \(oecd.org\)](#), and see the various guidance gathered at: [Toolbox Human Rights \(business-humanrights.be\)](#).



### **Box 34: Resource Box – Sectoral Due Diligence and Supply Chains**

The OECD has produced due diligence guidelines for the extractives, agriculture, minerals, and garment and footwear sectors.<sup>213</sup>

Commercial banks and partners in the Dutch Banking Sector agreement produced useful analyses of human rights risks in connection with the gold, oil and gas, palm oil and cocoa value chains, and recommendations on building and exercise leverage and enabling remedy.<sup>214</sup>

The European Commission has published guides on implementing the UNGPs in the [ICT](#) and [oil and gas](#) sectors, among others.

CDC has published "Guidance on Investments in the Agricultural Value Chain: Expanding the Scope of Environment and Social Due Diligence - Improving risk management, creating value and achieving broader development outcomes," which focuses on business relationships with value chain actors upstream and downstream from primary production and the role these actors can play in enabling more sustainable production.

In 2022 the Japanese government published [guidance](#) on Respecting Human Rights in Responsible Supply Chains. The Chinese Chamber of Commerce on Metals Minerals and Chemicals Importers and Exporters has published [guidelines](#) on mineral supply chain due diligence based on the UNGPs and OECD MNE guidelines, and guidance on Social Responsibility on Outbound Mining Investments, in which companies are asked (s. 3.4.1) to align their operations with the UNGPs.

Emerging mandatory due diligence legislation<sup>215</sup> and supply chain sustainability initiatives,<sup>216</sup> like the UNGPs and OECD MNE guidelines, are generally broad in scope, reflecting the complexities and interconnectedness of global business relationships, products and services. Impacts in these webs of relationships should be addressed through actions by all parties involved, each exercising their own responsibility and leverage as far as possible, taking into account their own involvement in impacts. This approach does not seem to be well reflected in many DFI policies and practices to date, although (see Box 35) there are emerging practices from which to draw.

### **Box 35: Emerging Practices – Addressing Broader Value Chains**

- **Some E&S standards already cover business relationships:** Community Health, Safety and Security standards cover relationships with security providers, and labor E&S standards encompass relationships with labor brokers. Most DFI labor safeguards protect workers of contractors by cascading labor requirements down the contracting and sub-contracting chain. This is done mainly by incorporating the labor safeguards in procurement contracts. These examples exemplify the principle that risky business relationships should be within scope.
- **Some E&S standards already have requirements concerning supply chains:** E&S standards on Biodiversity Conservation and Labor already include some measure of supply chain analysis in order to understand the fuller picture of a project's impacts. There is well-established practice among

<sup>213</sup> [Due Diligence - Organisation for Economic Co-operation and Development \(oecd.org\)](#).

<sup>214</sup> [Publications | IRBC Agreements \(imvoconvenanten.nl\)](#).

<sup>215</sup> See above footnote 4.

<sup>216</sup> OECD, [Note for Policy Makers: The Role of Sustainability Initiatives in Mandatory Due Diligence](#) (June 2022).

DFIs of working with supply chains to improve working conditions and improving environmental practices in commodity supply chains.<sup>217</sup>

- **Business relationships are a vector for development impact:** DFIs already recognize the importance of fostering business linkages between DFI-funded projects and local and national businesses, in order to enhance economic impacts beyond the project itself. These linkages are often reflected in the indicators of the DFI's development impact. However these relationships can also be vectors of exploitation, particularly in higher risk sectors such as construction which may involve extensive sub-contracting, including through labor contractors, and may be associated with risks of bonded and forced labor. Increasingly, DFIs are working to make sure these linkages become vectors for decent work.<sup>218</sup>
- **BI's Policy on Responsible Investing (2022)** includes the UNGPs as part of the reference framework in connection with investee E&S requirements for supply chain risk management and requires investees to "ensure that, where material human rights issues are identified (including in supply chains) the UNGPs are integrated into an Investee's management systems and appropriate capacity and governance oversight embedded in an Investee's operations."
- **FMO** "also assesses decent working conditions **beyond the boundaries of the company** we directly finance, including the rights of contractors and workers in the supply chain. An initial analysis of the nature of the supply chain allows us to identify the most salient issues that need to be managed or mitigated."
- **DFC** "In categorizing projects, direct, indirect, induced, **supply-chain related**, regional, trans-boundary and cumulative E&S impacts are considered."

### **Box 36: Emerging Practices in the Private Sector – Addressing Downstream Risks**

In 2023, at the conclusion of a peer learning process, the Global Business Initiative on Human Rights published a report [Effective downstream human rights due diligence: Key questions for companies](#). The report offers an overview of the expectations contained in international standards pertaining to downstream human rights due diligence, and provides some initial questions for companies moving in this direction. The key questions cover the identification of risks from a company's products, services and business model, as well as end-user, customer and other downstream business partner risks. The report offers initial insights on how companies can take action to prevent and mitigate downstream risks, and reinforces the importance of tracking effectiveness and communicating as part of the due diligence process. Also in 2023, the Danish Institute for Human Rights published [Due Diligence in the Downstream Value Chain](#), featuring six case studies showing how corporations are implementing downstream due diligence in practice, in sectors including shipping, renewable energy, ICT and health services.

<sup>217</sup> See e.g. IFC, [IFC Partners with ILO to Launch Better Work Program in Bangladesh, Improve Worker Safety](#) (Oct. 22 2013); and IFC, [Good Practice Handbook: Assessing and Managing Environmental and Social Risks in an Agro-Commodity Supply Chain](#) (2013).

<sup>218</sup> See Ergon Associates, [Managing Risks Associated with Modern Slavery A Good Practice Note for the Private Sector](#), (2018), commissioned by CDC Group, IFC, EBRD and DFID.

### iii) Cumulative Impacts

A number of E&S standards address cumulative impacts however, where this is so, the focus is usually on impacts on resources or land used by projects, rather than on local communities and local services.<sup>219</sup> A human rights lens puts the spotlight on cumulative impacts on people (individuals and communities). This prompts examination of a potentially wide range of factors associated with projects in a given area that may impact cumulatively and undermine the enjoyment of human rights, such as direct and indirect impacts on air quality, access to water or sanitation, land acquisition and livelihood changes.

A human rights lens also helps to identify situations where ostensibly 'minor' impacts may escalate, such as where a new project places significant demands on existing services needed to deliver on human rights.<sup>220</sup> For example, an influx of people seeking work in a given project area may overwhelm the capacity of child protection authorities to safeguard children from exploitation and violence, and schools may not be able to meet education demands. A failure to anticipate such impacts through properly scoped due diligence can lead to severe human rights abuses in practice.

Managing cumulative impacts over time can be challenging in practice, given the potentially complex causal pathways and multiple issues and actors involved. The cumulative dimension of human rights impacts can be spread widely across institutions, society and the environment.<sup>221</sup> This is particularly the case where the impacts result from geographically dispersed projects that nonetheless have cumulative impacts on ecosystems, such as where a series of hydropower dams are under development. There can also be difficult governance challenges in ensuring collective action among multiple actors needed to address cumulative impacts.<sup>222</sup>

### iv) Legacy Issues

"Legacy issues" in this report refers to issues that existed prior to a given DFI's financing or refinancing, and need not necessarily be related to the DFI's client. Legacy issues have often been most visible in relation to projects involving the acquisition of land which had earlier been acquired in violation of human rights standards and remains the subject of unresolved grievances. Some E&S standards require that assessments take into account the recent history of government land acquisitions, but this may be only for a short period prior to the project. Other issues, such as long-standing pollution, may also give rise to legacy issues that need to be addressed at project level. Addressing legacy issues is especially important in FCV settings, to defuse grievances and break the cycle of violence.

Clients and DFIs may resist addressing unresolved land expropriations or other legacy issues on the basis that such issues fall outside the scope of a project's responsibilities. However this is problematic from a human rights perspective because unresolved, uncompensated expropriations can have a profound, ongoing impacts on

---

<sup>219</sup> See e.g, IFC [Performance Standard 1](#), para. 8 which states: "Cumulative impacts that result from the incremental impact, on areas or resources used or directly impacted by the project, from other existing, planned or reasonably defined developments at the time the risks and impacts identification process is conducted..." Although note footnote 16: "Cumulative impacts are limited to those impacts generally recognized as important on the basis of scientific concerns and/or concerns from affected communities."

<sup>220</sup> L. Cotula, T. Berger & B. Schwartz, [Are development finance institutions equipped to address land rights issues? A stocktake of practices in agriculture](#), LEGEND (2019).

<sup>221</sup> Myanmar Centre for Responsible Business, *et al*, [Myanmar Oil and Gas Sector Wide Impact Assessment](#) (2014), Chapter 5 on cumulative impacts.

<sup>222</sup> D. Franks, *et al*, "Cumulative Social Impacts," Chapter 12, in F. Vanclay & A.M. Esteves, eds., [New Directions in Social Impact Assessment: Conceptual and Methodological Advances](#) (Edward Elgar, 2011).

communities. (See Box 37). This, in turn, can impact negatively on projects. This problem, and the need to address it, have become increasingly visible since the adoption of the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs), a widely accepted normative framework in this field. The VGGT affirm the ongoing validity of legitimate tenure rights and call for their restitution. This sets an important benchmark for DFI Safeguards.<sup>223</sup> The human rights framework calls for continuing attention to impacts experienced by communities involved in complex land rights and land use challenges and avoids arbitrary cut off dates.<sup>224</sup>

**Box 37: Emerging Practices – Addressing Land Rights, Including Legacy Issues**

A number of DFIs have published policies or guidance on land rights:

- **Legacy impacts**, such as access and use restrictions, forced evictions, FPIC violations or human rights violations conducted by law enforcement personnel, are often a challenge when engaging in the financing of existing Protected Areas. [Guidance](#) produced by **Legacy Landscapes Fund** for ESAPs in the conservation sector (pp.8 and 14), with contributions from KfW, explicitly takes into account legacy impacts in helping to determine whether a grantee may be connected to these in form of direct linkage, which would require the use of leverage to address past injustices and to enable relevant parties to provide remedy.
- **AIIB** “In certain situations, the Bank may require the Client to address Involuntary Resettlement undertaken earlier than during this three-year period, especially where ongoing legacy issues over such actions remain unresolved.” (ESF para 32.5)
- **CDC and DEG** have published a guidance note on managing legacy land issues in agribusiness investments, recognising that this is a common but challenging issue that needs to be addressed in line with the UNGPs.
- **IFC/MIGA Compliance Advisor Ombudsman (CAO) Advisory Series – Lessons Learned from CAO Cases on Land** notes that of more than 150 cases CAO has handled between 2000 and 2015, just over half have raised issues related to land, including land acquisition, land compensation, resettlement, land management, land contamination, and land productivity.
- **Interlaken Group**, an informal network of individual leaders from influential companies, CSOs, investors, governments, and international organizations: [Land Legacy Issues: Guidance on Corporate Responsibility](#).
- **AfDB** published a volume of collected contributions, [Rethinking land reform in Africa: new ideas, opportunities and challenges](#), in order to stimulate progress in land reform policy in Africa.

<sup>223</sup> World Bank blog, [VGGT: The global guidelines to secure land rights for all](#) (Oct. 5, 2017).

<sup>224</sup> M. Windfuhr, [Safeguarding Human Rights in Land Related Investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework](#), *German Institute for Human Rights* (2017). While the IFC PS focus on addressing project-specific impacts, the VGGT take a more systemic perspective to land issues and governance.

## v) Indirect impacts

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

DFIs and their clients understandably seek clarity in understanding the spatial and temporal boundaries of their obligations. When defining the boundaries, it is essential to include all impacts that are reasonably foreseeable. The IFC Performance Standards, for example, include within the scope of client responsibility unplanned but predictable events and "indirect project impacts on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent."<sup>225</sup>

Risks and impacts of measures to offset direct project impacts should also be within scope. Offsetting projects, such as carbon or biodiversity offsets, can themselves have direct adverse impacts on people and the environment. Offsetting of biodiversity impacts (as with human rights impacts) has been questioned as a matter of principle. While there are fewer categorical objections to carbon offsets, there have been calls to: (i) make offsetting a last, rather than first, choice in mitigating GHG emissions, (ii) ensure that the claimed offset reductions or benefits are actually delivered, credible and achievable within planetary boundaries;<sup>226</sup> and (iii) ensure that carbon offsetting projects do not have negative impacts on people or planet.<sup>227</sup>

## b) Emerging Good Practices and Recommendations

There are increasing expectations that DFI Safeguard policies should reflect a more holistic view of the products and services that are connected to a project, than has been the case until the present. In OHCHR's view this should include:

- **Assessing upstream impacts in supply chains**, through multiple levels of the chain as necessary, where there is potential for severe human rights impacts,<sup>228</sup> and build and use DFI leverage, individually and collectively. Even in countries with relatively robust legal frameworks, serious human rights risks may be found in supply chains.<sup>229</sup>
- **Assessing downstream impacts from product or project use:** This includes looking at risks to project users (for further discussion see Part IV, Gap 8, Section 4), risks from offtake agreements, and assessing whether product use is aligned with the DFIs Safeguards and human rights. Assessing downstream impacts should also include assessments of the use of project infrastructure and products for risks of involvement in severe human rights abuses.<sup>230</sup>

---

<sup>225</sup> IFC [Performance Standard 1](#), Para. 8

<sup>226</sup> Oxfam, [Tightening the Net: Net zero climate targets – implications for land and food equity](#) (2021).

<sup>227</sup> A. Savaresi & J. Setzer, [Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation](#) (Feb. 18, 2021).

<sup>228</sup> See e.g. Ergon Associates, [Managing Risks Associated with Modern Slavery A Good Practice Note for the Private Sector](#) (2018), commissioned by CDC Group, IFC, EBRD and DFID.

<sup>229</sup> See e.g. [Modern Slavery legislation](#) which requires companies to report on modern slavery risks in their supply chains, including in developed countries, and the EU Fundamental Rights Agency which reports on [severe labor exploitation in the EU](#).

<sup>230</sup> For example, ICT products may be used for surveillance of CSOs and political opposition, and physical infrastructure may be built on contested land or sites where serious human rights violations have occurred, impeding investigations and accountability. For a roadmap of serious human rights risks relevant to potential financiers of infrastructure projects or other development activities in Northern Rakhine State, Myanmar, including potential complicity in war crimes and genocide, see the

- **Assessing other business relationships:** While much of the focus in global value chains has been on upstream supply chain risks, reflected in E&S standards' existing requirements, there is increasing recognition that other business relationships can also pose serious human rights risks, such as relationships with security personnel and use of recruitment agencies. In OHCHR's view, Safeguard review processes should consider other business relationships in the larger value chain where there are severe human rights risks that are directly linked to projects. (See Boxes 33-36).

---

## 7. CLIENTS

### a) Concerns with Existing Policies and Practices

#### i) Client Capacity and Integrity

Most DFIs carry out a range of due diligence checks on clients<sup>231</sup> including in relation to anti-money laundering and terrorism financing,<sup>232</sup> sanctioned firms and individuals,<sup>233</sup> anti-corruption and integrity,<sup>234</sup> and offshore financial centres.<sup>235</sup> These are typically carried out under specific integrity or corporate governance policies and procedures, by teams different from those dealing with E&S Safeguards. In OHCHR's view, there may be opportunities for DFIs to build more coherent internal risk management systems, incorporating examination of the client's commitments and capacities ("integrity due diligence") along with standard project-level E&S risk factors.

While Safeguards typically do include specific requirements on assessing client capacity, there is often a lack of specificity about what should be assessed. A standard formulation would be a requirement to assess the "commitment, capacity, and track record of the Borrower to manage the E&S impacts," without much further detail. DFI Safeguard frameworks generally do not contain specific guidance about how to assess and measure client capacity, commitment and likely performance,<sup>236</sup> and there seems to be little other procedural guidance on these issues in the public domain.

#### ii) Client Stakeholder Engagement

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

---

[Report of the Independent International Fact-Finding Mission on Myanmar](#), UN Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), paras. 98, 110-11, 407, 413, 429, 476, 1181-12, 1216-19, 1224-29 and 1618, (on the risks of infrastructure development intentionally obstructing evidence of international crimes) 1239-44, 1295, 1425, 1565 and 1668 (calling for human rights due diligence by all development actors).

<sup>231</sup> See e.g. EBRD on [client due diligence](#).

<sup>232</sup> See e.g. EIB Group, [Anti-Money Laundering and Combating Financing of Terrorism Framework](#) (Dec. 2020).

<sup>233</sup> See e.g. [AfDB debarment and sanctions procedures and lists](#) of firms and individuals that been sanctioned for having engaged in fraudulent, corrupt, collusive, coercive or obstructive practices.

<sup>234</sup> See e.g. ADB's [anticorruption and integrity approach](#) and [IDB's transparency, accountability and anti-corruption](#) approach and mechanisms.

<sup>235</sup> See IFC [Due Diligence](#).

<sup>236</sup> ADB Evaluation, [Effectiveness of the 2009 Safeguard Policy Statement](#) (2020), Annex I, para. 181. Cf. BII's ESG Toolkit section on [Assessing commitment, capacity and track record](#), which focuses on the internal processes, practices, capacity and accountabilities that underpin the successful assessment and management of E&S issues. BII also has a [sector note on human rights](#) that briefly addresses human rights in business relationships.

important, than the project's physical impact."<sup>237</sup> Yet stakeholder engagement continues to be a common subject of complaint to IAMs.

In CAO's 2019 annual report, 52 percent of cases involved complaints about stakeholder engagement.<sup>238</sup> A 2019 review of the IDB-MICI found that "inadequate timelines for conducting consultations, limited information on the local cultural context, and restricted access to information for interested stakeholders during the consultation phase point out to the need for a more consistent application of meaningful stakeholder participation throughout the project cycle and the presence of quality and reliable local grievance mechanisms."<sup>239</sup>

In 2018 the ADB Accountability Mechanism<sup>240</sup> noted that "[i]n virtually all cases, the complaints have alleged inadequate consultation and participation. This was also one of the findings in a thematic evaluation of ADB's safeguard implementation experience conducted by [ADB's Independent Evaluation Department] in 2016."<sup>241</sup> An independent, detailed review of DFI-funded projects in the Amazon region found that a lack of or ineffective stakeholder engagement was one of the three main reasons for project failure.<sup>242</sup> A 2021 review by Accountability Counsel found that "[a]n analysis of complaints in the Accountability Console reveals that the harms most consistently cited by communities across the world were related to inadequate or non-existent consultation, disclosure, and due diligence."<sup>243</sup>

## ***b) Emerging Good Practices and Recommendations***

### ***i) Client Capacity and Integrity***

As human rights considerations are increasingly integrated within DFI Safeguard policies, it will be important to assess client capacity and commitment on human rights and integrate the findings into risk classification and management systems. Clients with low capacity and/or commitment, particularly in challenging operational contexts, should be allocated a higher risk rating. Issues to be addressed may include:

- The client's **formal commitment to human rights**, expressed, for example through a policy commitment to respect human rights. Assessing the true extent of a client's commitment can be challenging but there are an increasing range of tools available for this purpose.<sup>244</sup> For sovereign borrowers, the country's record

---

<sup>237</sup> Coalition for Human Rights in Development, [Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#) (May 2019). p. 27.

<sup>238</sup> CAO, [2019 Year in Review](#) (2019), p. 22.

<sup>239</sup> IDB, [Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#) (2019), para. 2.10.

<sup>240</sup> ADB, [2018 Learning Report On Implementation Of The Accountability Mechanism Policy](#) (Aug. 2019), p. 24.

<sup>241</sup> ADB, [Real-Time Evaluation of ADB's Safeguard Implementation Experience Based On Selected Case Studies](#) (2016).

<sup>242</sup> R. Ray, K. Gallagher & C. Sanborn, [Standardizing Sustainable Development? Development Banks in the Andean Amazon](#), Boston University and University del Pacifico, (2018), p. 4: "Incorporating stakeholder engagement early in the project development process can help protect against environmental degradation. For example, projects that took place within regulatory frameworks that guaranteed access to prior consultation for affected indigenous communities were associated with significantly less deforestation than those projects that did not. However, projects that neglected to heed communities' needs were associated with greater environmental damage, serious social conflict, and the loss of millions of dollars of potential business for DFIs due to relationship and reputation damage."

<sup>243</sup> P. Goeking, [Understanding Community Harm Part 1: Consultation, Disclosure, and Due Diligence](#), Accountability Counsel Blog, (May 1, 2021).

<sup>244</sup> See e.g. Shift, [Leadership and Governance Indicators of a Rights Respecting Culture](#).

of adherence to UN human rights treaties and cooperation with UN human rights mechanisms would be important.<sup>245</sup>

- The client's **human rights record** and business relationships. The latter factors should become a routine part of due diligence, along with integrity due diligence.<sup>246</sup> Many ESG ratings agencies include a review of whether a company has been involved in controversies, although this is clearly insufficient of itself.
- The ability of the client's **due diligence and management system** to address human rights risks and impacts.<sup>247</sup>
- The client's **capacity to manage stakeholder engagement** (see sub-section (ii) below).
- The client's **capacity to manage grievances** effectively.<sup>248</sup>
- Resources and support needed to **build a client's capacity**, through technical assistance or other types of support, where the DFI has identified that client capacity is weak.

## *ii) Client Stakeholder Engagement*

A number of DFIs have developed guidance to support their clients' stakeholder engagement practices. (See Box 38). Further steps to support such efforts may include:

- **Assessing the client's commitment to stakeholder engagement.** This is particularly important in light of the increasing reprisals risks and evidence of clients' involvement or complicity in attacks. In the face of these threats, DFIs should build strong non-retaliation requirements into Safeguards, backed up by detailed procedural guidance, clear contractual requirements, and sanctions.
- More actively supporting stakeholder engagement **in relation to FI projects**.
- Providing further support to clients in **improving their grievance mechanisms** and strengthening feedback loops between grievance mechanisms and management actions, to ensure that lessons are learned and implemented.
- Prompting clients to consider how to constructively engage stakeholders in **monitoring** project implementation and other issues that concern them. New data driven approaches, including monitoring via mobile phones, may be useful to explore where this is not already being done.
- Defining **appropriate remedies for poor stakeholder engagement**. Retrofitting participation in projects can be challenging, or impractical, as previously noted. In some cases, halting the project may be required, notwithstanding the costs. Fresh thinking is needed on how to approach the issue of remedy in this context.

---

<sup>245</sup> See [OHCHR | Human rights indicators](#).

<sup>246</sup> See e.g. the survey of news reporting on company actions on human rights issues posted on the [Business and Human Rights Resources Centre](#).

<sup>247</sup> See e.g. [Corporate Human Rights Benchmark](#).

<sup>248</sup> A 2019 review by the ADB Accountability Mechanism found that investment in the capacity of ADB and clients in consultation and participation practices, information systems and grievance redress mechanisms led to the improved management of even very large numbers of complaints at the project level. This in turn led to increased demand from clients for support of this kind. ADB, 2018 [Learning Report on Implementation of the Accountability Mechanism Policy](#) (Aug. 2019), p. 37; and OHCHR, [Remedy in Development Finance](#) (2022), p. 56.



**Box 38: Emerging Practices – Guidance on Stakeholder Engagement**

- [Joint DFI Guidance on Stakeholder Engagement](#) (2019).
- EIB [Guidance note for EIB Standard on Stakeholder Engagement in EIB Operations](#) (2020).

---

**8. KEY RECOMMENDATIONS ON APPRAISAL**

- ***Human rights should be treated alongside other E&S risks as a routine part of the due diligence process. This would ensure that important risks and impacts are identified upfront, and inform project risk assessment, and are managed effectively throughout the project cycle.***
- ***Human rights due diligence should not be a one-time, static event, and should not be limited to special or "high risk" circumstances. Information and recommendations from UN, regional and national human rights bodies should inform routine human rights due diligence.***
- ***DFIs should re-evaluate their own approaches and guidance for clients on risk prioritization as part of the due diligence process to ensure that these processes: (i) are considering risks to people and their rights; and (ii) are re-adjusted to place greater emphasis on preventing negative impacts on people, even where those risks may be less likely.***
- ***The scope of due diligence should be sufficiently broad so that the DFI can assess the extent to which the client's business relationships may entail human rights risks in the client's particular circumstances.***
- ***DFIs' and clients' responsibilities should not be limited by their existing control or leverage, or to "primary suppliers," but instead focus on where the most severe risks are in the value chain, downstream as well as upstream.***
- ***DFIs and their clients should address potential and actual human rights impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, starting with and prioritizing the most severe based on scale, scope and remediability.***
- ***Project E&S risk assessment should include cumulative impacts upon people and the environment, and legacy issues associated with land expropriation or other unaddressed grievances.***
- ***Safeguards and exclusion lists should explicitly flag risks inherent to particular business models, such as those associated with undercapitalized subsidiaries, special economic zones, or tax havens or business models that rely on low wage labor, resources used by local communities or similar models that rely on low margins that may increase risks to people and resources rather than creating value.***
- ***DFIs should develop specific requirements and guidance on contextual risk assessment, drawing from human rights data sources and metrics. The scope of contextual risk assessment should include analysis of civic space, conflict risks and dynamics, patterns of discrimination against particular population groups, and reprisals risks. Safeguard***

***policies should clarify the Bank's and client's roles and responsibilities in this regard, and specify how the findings from contextual risk assessment will be integrated within project E&S risk assessment, supervision, potential remedy actions and other relevant actions throughout the project cycle.***

### **GAP 3: PROJECT APPROVAL**

A DFI's and client's due diligence should together provide a reliable picture of potential risks and impacts of a project to be financed. The next step is to design appropriate response measures, embed those responses within client contracts, and follow up with effective supervision to make sure that they are implemented. E&S standards set out steps that clients should take to develop their E&S management systems and E&S Action Plans (ESAPs), and successfully manage risks and impacts.

This section addresses steps a DFI may consider taking to respond to identified risks, drawing from concepts and experience in applying the UNGPs. The UNGPs operate on the premise, consistent with ordinary principles of justice, that the more a DFI or client contributes to (facilitates or enables) human rights harms, the more they should do to help mitigate or remedy them.

---

## **1. CREATING AND EXERCISING LEVERAGE TO IMPROVE IMPLEMENTATION**

"Leverage" can mean many things, but in the context of E&S due diligence it refers to the dynamic process of developing and exercising influence over parties to a transaction (or related to a transaction) to address adverse impacts.<sup>249</sup>

### ***a) Concerns with Existing Policies and Practices***

To an impartial observer, DFIs sometimes project an unduly restrictive vision of their own leverage, limited to the loan balance or content of contractual agreements. However DFIs (especially MDBs) may have a wide range of tools in their leverage toolbox – far more than commercial lenders – including normative influence, relationship leverage, financial leverage, contractual leverage, diplomatic or political leverage, convening power, technical expertise, technical assistance and development resources.<sup>250</sup> There may also be opportunities for collective leverage with other DFIs or third parties. Leverage should be built over the course of a client relationship, rather than simply at the start of a given transaction. If a DFI has no leverage with a client after years of a financing relationship, this surely raises a question about how well the DFI has been doing its job.

### ***b) Emerging Good Practices and Recommendations***

A perceived lack of leverage at a given point in time is not a justification for avoiding due diligence; rather, it should be seen as a reason to do more due diligence in order to better understand how leverage can be built over time. The responsibility of DFIs to use their leverage to influence clients to eliminate and address adverse impacts,

---

<sup>249</sup> For a more detailed discussion see, OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp. 50-58; Shift, [Using Leverage to Drive Better Outcomes for People](#) (2021); and Dutch Banking Sector Agreement, [Increasing Leverage report](#) (2019).

<sup>250</sup> *Id.* See also EBRD, [The Bank's Response to Compliance Challenges with the Political Principles in Article 1](#).

including adverse human rights impacts, has broader implications for the way DFIs appraise and supervise projects. The actions open to DFIs include:

- Undertaking more in-depth and broader contextual assessments at the beginning of projects in order to better understand how the contextual risks may impact the project and people, and reflecting the outcomes in the project risk classification, DFI supervision, and client support;
- Ensuring that high risk projects are assigned additional resources to be able to identify emerging risks early, so that appropriate responses can be built into project budgets and contractual agreements;<sup>251</sup>
- Identifying potential partners to work with clients where severe or systemic risks are identified and where additional leverage may be needed to address them;
- Implementing an adaptive risk management approach (rather than proforma, static risk categorization and supervision) under which supervision, support and risk mitigation measures and resource allocations can be adjusted in a dynamic fashion throughout project implementation as needs require;
- Being ready to work with all parties in a transaction in order that each actor may be part of the solution;<sup>252</sup>
- Being ready to work with other parties to bring influence to bear on a client to address and remedy adverse impacts, including through syndications, coalitions or by encouraging clients to work with third parties to enhance project development benefits;
- Identifying patterns and trends across the portfolio that may signal more systemic issues that require a more strategic and/or collaborative approach; and
- Putting a sharper spotlight on negative impacts within the framework of collaborative initiatives to promote positive development impacts.<sup>253</sup>

**Box 39: Emerging Practices – Building and Exercising Leverage**

[Guidance](#) produced by Legacy Landscapes Fund for ESAPs in the conservation sector (pp.14-18), with contributions from KfW, includes a Decision Tree to help

<sup>251</sup> For examples of other measures see OPIC, Office of Accountability Review, [Buchanan Renewable Energy Project Liberia](#) (2014), p. 10. "Depending on project-specific conditions, OPIC might consider the following options: (i) More frequent and longer site visits by OPIC staff; (ii) Establishment of mechanisms to obtain real time feedback from affected stakeholders (e.g., based on recent advances in cell phone platforms); (iii) Use of qualified local civil society organizations (CSOs) as information channels; (iv) Early notification to both clients and affected stakeholders about the availability of OA services."

<sup>252</sup> On the possible roles for CSOs in this regard see OPIC, *Id*: "OPIC should (i) explore opportunities on a project-specific basis to promote positive development outcomes through its and its clients' partnership with civil society organizations in host countries; (ii) Help clients vet candidate CSOs through embassy contacts and other local experts to ensure that CSOs have appropriate technical capacity and credibility for the role being considered; (iii) Encourage clients to make use of qualified CSOs to help them understand baseline local conditions and changes in such conditions; (iv) Encourage clients entering frontier or sensitive sectors to engage CSOs to serve as intermediaries with project-affected stakeholders, especially when there are vulnerable groups; (v) For projects with high environmental or social risks, encourage clients to engage an appropriately qualified CSO to serve as an independent monitor and reporter of environmental and social impacts."

<sup>253</sup> I. Tuta & S. Andreasen Lysgaard, [Human rights at development finance institutions: connecting the dots between environmental and social risk management and development impact](#), Danish Institute for Human Rights (2021). A large number of DFIs have endorsed a set of Operating Principles for Impact Management, highlighting their development impact. See [Invest for Impact | Operating Principles for Impact Management \(impactprinciples.org\)](#). Similar collective action and commitment would be useful to help address negative E&S impacts of projects.

grantees determine what kinds of leverage options may be feasible, taking into account the grantees' connection to impacts. There are guiding questions to help assess relationship leverage, partner capacity, collaborative leverage, expertise, financial leverage, and influence over third parties. And the Guidance includes a list of Possible Actions for Building Leverage. The guidance states that: "If the consultant deems there is a lack of leverage that the grantee has on a third party that is causing or may cause a human rights violation or other E&S risk, the consultant will conclude that the grantee should build leverage, if possible. There may be ways for the grantee to increase leverage, e.g., by capacity-building, monitoring and evaluation, contractual requirements relating to due diligence by potential funded programs or other incentives to the related entity, or collaborating with other actors."

---

## 2. ENVIRONMENTAL & SOCIAL ACTION PLANS

### a) Concerns with Existing Policies and Practices

Safeguards lay out a range of assessment processes clients may need to carry out to assess E&S impacts, such as ESIAAs, audits, and increasingly human rights impact assessments (HRIAs). These processes should result in a specific action plan (an E&S Action Plan or ESAP) that sets out the actions to prevent or mitigate adverse impacts identified, who is responsible for taking those actions, and within what time frame. However human rights issues are not always clearly identified and addressed, stakeholder involvement is not always well specified or implemented, and the ESAP itself is not always fully costed and reflected in project budgets.

### b) Good Practices and Recommendations

OHCHR recommends that such plans should:

- Clarify that **actions to respond to human rights concerns** can and should be included in ESAPs. This is a corollary of making human rights a routine part of due diligence.
- **Clarify that stakeholders should be involved in developing ESAPs.** Numerous E&S standards specify that stakeholders should have access to mitigation plans, but often without clear consultation requirements concerning the formulation of those plans, or involvement in supervision to assess whether the required steps are sufficient.
- Ensure that actions emanating from an **HRIA are integrated into master ESAPs.** This would help to ensure that such actions are not overlooked or deprioritized, and would help to identify synergies with other relevant responses in the action plan.
- **Ensure that ESAP steps are reflected in the project budget.** This is one of the most fundamental requirements for effective ESAP implementation but does not yet appear to be routine practice.
- Strengthen the **involvement of stakeholders** in supervision of ESAP implementation.

---

### 3. CONTRACTUAL AGREEMENTS

#### a) Concerns with Existing Policies and Practices

Loan and investment agreements are powerful tools in a DFI's leverage toolbox but, for many DFIs, the potential is not being realized. Specific contractual clauses on E&S and human rights can provide clarity for the client and DFI staff about what compliance requires, and a source of leverage to address non-compliance and remedy for project affected people.

DFIs have not made standard provisions publicly available, at least for private sector contracts, unlike the Equator Principles association which has at least published an overview.<sup>254</sup> In addition, there is a lack of transparency of contracts with the private sector, even in the case of contracts relating to public services. Hence it is difficult to know where the gaps are, in the formulation and implementation of contractual clauses.

There may also be a risk that the standardization of contractual language addressing safeguard requirements may sometimes displace a concern for specificity, should the loan covenants rather than more detailed safeguard planning documents become the focus of supervision in practice.<sup>255</sup>

#### b) Emerging Good Practices and Recommendations

DFIs should be encouraged to develop more specific covenants, conditions of disbursements, representations and warranties, in order to build leverage with clients to address E&S and human rights issues.

**In loan agreements**, contractual provisions could address:

- Safeguard compliance;
- Financing and implementation of Action Plans;
- Commitment to address impacts;
- Using Exclusion Lists as a basis for sanctions;
- Serious incident notification and inspection;
- Non-retaliation;
- Passing on requirements to contractors and sub-contractors;
- Public notification of non-compliance;

---

<sup>254</sup> See EP, [Equator Principles 4, Principle 8](#) (2020); and EP, [Guidance For EPFIs on Incorporating Environmental and Social Considerations Into Loan Documentation](#) (December 2020). The American Bar Association's [Model Contractual Clauses to Protect Workers in International Supply Chains](#) is relevant, by analogy, framed by the UNGPs.

<sup>255</sup> Loan covenants are the minimum safeguard requirements and each project, depending on the complexity and needs, can include additional project specific covenants. However see ADB Independent Evaluation Department, [Effectiveness of the 2009 Safeguard Policy Statement](#) (2020), para. 206: "...[T]he practice of loan covenants have become increasingly becoming generic, reducing client safeguard risk monitoring capability, with general template statements (e.g., safeguard action plans fully resourced and implemented) replacing detailed requirements (e.g., conduct detailed assessment of forest resources). Monitoring of the detailed conditions that are expressed in safeguard action plans during regular review missions can be weakened if progress on loan covenants is the focus of supervision ..."

- Third Party Beneficiary Rights;
- Establishment of effective grievance mechanisms;
- Mandatory disclosure of IAM and project grievance mechanism(s);
- Client participation in DFI/IAM and other grievance mechanism processes;
- Passing on requirements upon the sale of the project; and
- Reserving reimbursement rights.

**In equity, debt and other investments**, which may not provide as obvious a set of levers as loan agreements, creative avenues could be explored in connection with:

- Shareholder provisions;
- Management provisions;
- Impact covenants;
- Requirements relating to termination and responsible exit;
- Opt-out provisions;
- Conditions governing the cancellation of remaining contributions; and
- "Put options" in subscription agreements linked to non-compliance.<sup>256</sup>

With respect to disclosure, IFC has required contract transparency for extractive industry projects (see Box 40) although this does not appear to have been followed by other DFIs nor made legally binding.

**Box 40: Emerging Practices – Contract Transparency for Extractive Contracts**

"50. IFC will ... require that, in the case of extractive industries projects it finances, the principal contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract, be public. IFC will allow the redaction of commercially sensitive information that is not essential to understand the terms and conditions under which the resource is developed."<sup>257</sup>

---

#### 4. DISCLOSURE

Human rights and environmental law underscore the importance of access to information as an integral part of civic participation and good governance. The right of access to information is recognized in global and regional human rights instruments,<sup>258</sup> SDG 16 (target 10), numerous national constitutional and legal frameworks, and global initiatives such as the Open Government Partnership.<sup>259</sup> Many DFIs have self-standing information and disclosure policies that apply to the institutions themselves, in parallel

<sup>256</sup> For more detailed discussion see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp. 52-56.

<sup>257</sup> IFC, [E&S Sustainability Policy](#) (2012).

<sup>258</sup> Client Earth, Blog, [What can the Aarhus region learn from the Escazú Agreement?](#) (Aug. 22, 2018).

<sup>259</sup> The Access Info Europe and Center for Law and Democracy's [Global Right to Information Rating](#) is an authoritative source in this field.

with information disclosure requirements in their Safeguards that apply to clients at the project level. These typically cover both proactive dissemination of information and (reactive) responses to requests for information.

**a) Concerns with Existing Policies and Practices**

The leading MDBs generally have robust and comprehensive public information policies, subject to the comments below, although, across all DFIs, policies and disclosure practices are uneven. An independent aid transparency study in 2020 noted transparency gaps for many private sector DFIs in particular, including lack of finance and budget information at activity and organization levels and a lack of performance-related data.<sup>260</sup> The challenges are magnified in FI projects and projects with complex investment structures, involving multiple DFIs and/or with many sub-projects. Creating a single accessible information point would help in such cases. Other commonly observed gaps include:

- **Lack of a consolidated, specific list of documents to be disclosed.** DFIs generally include information disclosure and reporting requirements in different policies: in Sustainability Policies, the overarching standard on E&S assessment, E&S standards on Stakeholder Engagement, and in the DFI's Access to Information Policy. Even for DFIs with stand-alone stakeholder engagement standards, there is not always a clear list of what documents stakeholders are entitled to see. More thorough cross-referencing between Safeguards and Access to Information Policies could be useful, along with a comprehensive list specifying what documents should be disclosed by category and type of project.
- **No clear commitment to make relevant studies available to stakeholders:** Safeguards often do not include requirements to make all relevant studies available to stakeholders. Some studies may be disclosed via the DFI's website, but this is still different from requiring that the client and the DFI make the full studies and any relevant non-technical summaries available. DFIs and clients may have concerns about the timing or impact of the release of certain studies; for example for fear of raising unrealistic expectations concerning compensation, or out of a concern that the study may exacerbate conflicts within the community. However from a human rights perspective a presumption of full disclosure is warranted, with specific and narrowly defined exceptions based on accepted categories of harm.
- **Commercial confidentiality or ability to pay?** Safeguards often have broad exemptions for "business-sensitive" or legal or financial information that prioritize commercial interests over more fundamental human rights values and transparency goals. This seems to be a particular challenge in private sector DFIs and may account for these institutions' relatively low transparency ratings, compared with most sovereign lenders.<sup>261</sup> The recognition of access to information as a human right under international, regional and (increasingly) domestic law is of critical importance in framing the balance between commercial interests and the rights of project-affected communities. Broad exemptions for business information also run counter to emerging requirements for companies to report publicly on ESG and human rights issues, in response to demands from regulators, stock exchanges, investors and other stakeholders.<sup>262</sup> Information withheld from public disclosure on "commercial-in-

---

<sup>260</sup> [Publish What you Fund, Aid Transparency Index](#) (2020), pp.20-22.

<sup>261</sup> *Id.*

<sup>262</sup> See for example the EU's [Proposal for a Corporate Sustainability Reporting Directive \(CSRD\)](#); [Global Reporting Initiative](#); [International Sustainability Standards Board \(ISSB\)'s two proposed sustainability disclosure standards](#); and the reporting initiatives listed in CCSI's [Respecting the Human Rights of](#)

confidence" grounds is frequently made available in subscription services,<sup>263</sup> which effectively reduces a putative question of principle ("This information is inherently confidential") to a more prosaic question of "Can you afford to pay?" The OECD guidance on corporate lending notes that clients can waive the right to confidentiality<sup>264</sup> and suggests that banks could systematically seek consent from clients to disclose certain information. This might serve as inspiration for DFI practice.<sup>265</sup>

- **Lack of implementation.** Reviews by various IAMS over time have consistently found that consultation, participation and information disclosures remain a key source of complaints. For example, a World Bank Inspection Panel review found that of 120 requests for inspection, 106 included complaints about consultation, participation and information disclosure.<sup>266</sup> Publish What You Fund's review (Box 42 below) argues that "DFIs' policies pertaining to the disclosure of ESG risks and accountability are broadly quite transparent and well developed, but the practices undertaken by DFIs rarely match their policy obligations."<sup>267</sup>

#### ***b) Emerging Good Practices and Recommendations***

A number of DFIs have specifically recognized the human right to access to information (Box 41).

#### ***Box 41: Emerging Practices – Recognising the Human Right to Access Information***

- **ADB's** former Public Communications Policy (2011) noted: "Freedom of information is recognized as a fundamental human right as set forth in the Covenant on Civil and Political Rights. Citizens are demanding greater transparency and holding governments and private sector corporations to higher standards of accountability. Many countries have incorporated freedom of information in their constitutions. In recent years, this trend has gained in force, such that freedom of information is no longer seen as a lofty goal to be aspired to, but a right to be enforced." (para. 17). "Right to access and impart information and ideas: recognizes the right of people to seek, receive, and impart information and ideas about ADB assisted activities." (para iii, para 30, p.12)

---

[Communities: A Legal Risk Primer for Commercial Wind and Solar Power Development](#), (Mar. 2022), p.10.

<sup>263</sup> See Oxfam, [Open Books: How development finance institutions can be transparent in their financial intermediary lending, and why they should be](#) (2018), citing Thomson Reuters Eikon and Bloomberg databases.

<sup>264</sup> OECD, [Due Diligence for Responsible Corporate Lending and Securities Underwriting](#) (2019), Box 1.1 – A Bank's Duty of Client Confidentiality. For a critical counterpoint see BankTrack, ["We are unable to comment on specific customers"](#) (2019).

<sup>265</sup> C. Kenny, [Transparency at Development Finance Institutions: Moving to Better Practice](#) (2020).

<sup>266</sup> Inspection Panel, [Emerging Lessons Learned Series No 4: Consultation, Participation & Disclosure of Information](#) (2017); and Publish What You Fund, [ESG and Accountability to Communities DFI Transparency Workstream 3 Working Paper](#) (2021), noting that "[c]omplaints related to information disclosure feature commonly in IAMS cases, indicating that numerous cases could have been avoided had these requirements been fully met."

<sup>267</sup> Publish What You Fund, [ESG and Accountability to Communities: DFI Transparency Workstream 3 Working Paper](#) (2021), p. 41.



- **IDB Invest's** Access to Information Policy makes "explicit reference to the recognition and exercise of the right to access information as a fundamental human right."<sup>268</sup>
- **EIB:** "The EIB upholds human rights, including the rights to access to information, to participation, and to remedy."<sup>269</sup>

As noted in Publish What You Fund's detailed review of ESG disclosure among DFIs, study, "[s]ignificantly, we identified systematic disclosure from at least one DFI for every aspect of global disclosure that we assessed. This suggests that all the aspects of disclosure we assessed could potentially be disclosed by the other DFIs."<sup>270</sup> Good practice on disclosure should include:

- **Statement of principles and applicable law** underlying the policy: recognition of the right to seek and receive information which may affect them and presumption of transparency with limited exemptions that are specific, linked to specific harms that are clearly specified, with requirements to justify any restrictions, recognition of a duty of proactive disclosure, and presumption in favour of disclosure;
- Recognition of **accountability to stakeholders** (including but not limited to shareholders);
- **Specific recognition of contextual challenges** including shrinking civil society space, threats to human rights defenders, restrictions on freedom of the press, association and assembly;
- **Proactive measures** to promote access to information, including dissemination of institutional information and project level information throughout the project cycle;
- Listing of institutional and project information **routinely disclosed** with timeframes, including respectively (i) information disclosed to the Board, draft policies and strategies, budgets, (ii) advance notification of projects to be considered, project information and E&S information and documentation, project implementation and completion reports, and project updates;
- Providing **access to full studies (impact assessments and action plans)** in addition to non-technical summaries. Summaries often do not offer the details needed to understand the project and context, or the scope and depth of the activities in the action plan;
- **Procedures on dealing with requests for access to information** including clear timeframes for responding to requests, clear and specific reasons for denials and procedures for appeals, no requirement for justification of request for access to information at the project or institutional level, and permitting scope for anonymous requests, particularly in light of the increasing personal risks faced by project stakeholders in many contexts;
- **Positive overrides** which compel information disclosure to be disclosed where there is a legitimate interest, such as where human rights issues are at stake,

<sup>268</sup> IDB Invest, (Blog) [IDB Invest Renews Its Commitment To Stand Up For Human Rights](#) (Dec. 10, 2020).

<sup>269</sup> EIB Group, [Transparency Policy](#) (2021), section 7.4.

<sup>270</sup> Publish What You Fund, [ESG and Accountability to Communities: DFI Transparency Workstream 3 Working Paper](#) (2021), p. 41.

irrespective of whether the information is otherwise subject to a protected interest;

- **Guidelines on translations**, and commitments to communication in the formats and languages accessible to specific communities and persons with disabilities;
- Clear cross-referencing and **coordination with other relevant policies (including Safeguards)**, specifying which policy applies in case of conflict;
- Limitation of situations where **costs** can be imposed, with specific provisions in place to enable access to requesters below a specified income level;
- Presentation by the President to the Board of an **annual report on implementation** of the policy, including statistics on the number of requests received, the timeframe and nature of the DFIs' responses, and data on appeals as well as number and type of incidents of intimidation and/or reprisals and the nature of the DFI's responses;
- **Declassification** schedule for documents; and
- **Two-tier** (including independent, external) **review mechanism/appeals**.

**Box 42: Resource Box – DFI Transparency Tool and Review of DFI ESG Disclosure Practices**

Publish What You Fund has developed a DFI Transparency Tool<sup>271</sup> that also includes a specific tool on FI disclosure. The tool is intended to improve the systematic and timely disclosure of relevant information by development finance institutions (DFIs). The tool provides detailed, granular guidance to DFIs on the information they should disclose to improve their transparency. It includes, but is not limited to, disclosures on various dimensions of E&S accountability. The same organization also published a detailed review of DFI disclosure on ESG and accountability to communities, highlighting various gaps and good practices.<sup>272</sup>

---

## 5. KEY RECOMMENDATIONS ON PROJECT APPROVAL

- ***DFI safeguards should spell out different kinds of leverage (including commercial, contractual, convening and normative leverage, and capacity building) that may be built and deployed by the DFI and clients to address human rights risks in which they are involved.***
- ***Environmental and social action plans (ESAPs) should include requirements to address identified human rights concerns. ESAPs should be fully costed and reflected in the project budget, and safeguard policies and contracts should specify that compliance is a legal requirement.***
- ***DFIs should systematically seek clients' approval to disclose information that may otherwise be considered commercially sensitive, where disclosure would serve E&S risk management purposes.***

---

<sup>271</sup> See [DFI Transparency Tool - Publish What You Fund](#).

<sup>272</sup> Publish What You Fund, [ESG and Accountability to Communities: DFI Transparency Workstream 3 Working Paper](#) (2021).

- ***"Commercial in confidence" exceptions to information disclosure should be interpreted narrowly, subject to a public interest exception where potential human rights abuses are concerned. The presumption should be in favour of proactive disclosure, with any exemptions defined narrowly and justified on a case-by-case basis by reference to foreseeable harm to a legitimate, recognized interest.***

## **GAP 4: SUPERVISION**

This section looks at DFI Safeguards and practices regarding supervision. It focuses on the role of the DFI, rather than clients, but addresses client due diligence where relevant. Supervision covers the bulk of the life cycle of a project and is where most risks materialize into impacts yet, arguably, it often seems to attract less attention in policy and practice than the appraisal stage.

---

### **1. MONITORING**

#### ***a) Concerns with Existing Policies and Practices***

The shift of many DFIs towards "adaptive risk management" places a heavy premium on supervision, monitoring and reporting, areas where Safeguards do not always contain the level of detail needed for effective E&S risk management. As risk management moves downstream, there are also potentially challenging questions about how a DFI's leverage and incentives to encourage Safeguard compliance change throughout project implementation. This is an especially significant factor where the client's traditions of transparency and accountability are relatively weak, or where political will or implementation capacities are lacking.

The question of how long a client should be permitted to achieve compliance is also a challenging one. Some DFIs stipulate a timeframe "acceptable to the Bank", while others have a reasonableness standard. Numerous DFIs have some type of "environmental and social risk rating" system to help assess clients' E&S performance, which may be a good starting point. However DFIs need to be careful that issues do not drag out over years without crystallising into corrective actions and, as necessary, remedy.

Most monitoring reports are not public, or if they are, they may omit important details concerning field visits, gaps identified and recommendations to address those gaps. Where they are disclosed, DFIs' monitoring reports often focus on key positive development objective indicators to track and report disbursements, but may not always go into detail on measures to address negative E&S impacts. A DFI's field notes could also provide valuable information on implementation but to OHCHR's knowledge these are not usually made public.

#### ***b) Emerging Good Practices and Recommendations***

The UNGPs and OECD RBC guidance place particular emphasis on tracking performance, informed by internal feedback as well as feedback from external stakeholders. The objective of tracking is to understand if measures are effective, and if not, to adjust them as necessary, thus creating a continuous feedback loop into due diligence processes. In OHCHR's view DFI Safeguards may benefit from attention in the following areas:

- It is critical that **monitoring reports include proper reporting against specific indicators tracking E&S and human rights outputs and outcomes**. This would make it possible to assess trends in compliance and in meeting outcomes overtime, and to understand what actions have or have not been taken.
- **Monitoring reports should be published on project disclosure portals.**
- **Qualitative and quantitative data and indicators should be used to track E&S performance.** Given the significant advances in data collection, management and analytics since the first generation of MDB Safeguards, and given the operational challenges presented by the COVID-19 pandemic, it may be timely for DFIs to examine whether their existing monitoring practices and data analytics are fit for purpose. In this regard, it should be noted that increased use of digital monitoring tools should be accompanied by appropriate human rights protections (see Part IV, Gap 8, Section 2).
- **Development impact measurement systems should be better linked to Safeguards systems.** A number of DFIs have developed sophisticated, evidence-based systems to measure the development impact of projects. However, as indicated earlier, it is not always clear how development impact measurement initiatives are linked to Safeguard supervision.<sup>273</sup> (See Box 43). Being able to articulate one's positive development impact is important; however the picture is incomplete without addressing negative externalities and impacts. The extent to which DFIs are already integrating their development impact and E&S Safeguards measurement is not clear. In OHCHR's view E&S outputs and outcomes should be tracked, measured, and reported in every investment, in addition to reporting on the key development objectives of the project.

**Box 43: Resource Box – Exploring Linkages between Safeguards and Development Impact Measurement**

The Danish Institute for Human Rights' discussion paper, [Human Rights at Development Finance Institutions: Connecting the dots between environmental and social risk management and development impact](#), (2021) suggests that many DFIs have approached development impact and E&S assessment in too disjointed a fashion to date. The discussion paper suggests four pathways DFIs can follow to better connect the dots between the two internal functions, and includes the following recommendations:

- (i) Development impact frameworks should be recalibrated as holistic frameworks that capture both positive and negative impacts;
- (ii) Development impact frameworks should include metrics that measure the DFIs' E&S risk management efforts and that highlight meaningful changes and transformations in the business practices of clients in relation to the human rights contextual risks in the country/sector;
- (iii) Both the E&S and development impact teams should show stronger awareness of human rights norms when DFIs invest in essential services in healthcare, water, education and housing. This includes demonstrating that adverse impacts are avoided, and that the accessibility, availability, acceptability and quality of these services are improved; and
- (iv) DFIs should improve their E&S risk and impact data by using contextual data on human rights and applying human rights principles in their data collection, such as the disaggregation of data on their beneficiaries.

<sup>273</sup> See footnote 126 above and accompanying text.

- **More focus is needed on outcomes.** In many Safeguards too much emphasis appears to be placed on process requirements, outputs and action plans rather than results. For example, projects may report on the payment of compensation in resettlement operations but not whether replacement land was purchased or livelihoods restored; or on the existence but not the results of a consultation process; or the establishment of a grievance mechanism but not the kinds of grievances being filed or the actions taken on them.<sup>274</sup>
- **The linkages between Safeguards Performance and internal monitoring systems could be clarified.** DFIs put in place a potentially wide range of internal monitoring and rating, evaluation and/or audit systems for the projects they support. But there is often inadequate information to help stakeholders understand the distinctive purposes of each and how they work together to improve project outcomes.
- **Specific disclosures should be made when categorization is changed.** This would provide affected stakeholders with notice and give confidence that increased risks and impacts are being addressed.
- **There is a need to better link stakeholder engagement, due diligence, monitoring and grievance mechanisms.** There is often inadequate understanding among stakeholders and staff alike on what the linkages are between the four functional areas above, and how they may interact and support each other to help achieve better project outcomes.

#### ***Box 44: Emerging Practices – Supervision***

Good supervision practice may include the following:

- Make assessment of effectiveness of ESMS a key objective of monitoring;
- Collaborate with other parties responsible for implementing mitigation measures;
- Document and disclose monitoring results;
- Involve independent third parties in monitoring where projects are likely to have more significant impacts;
- Engage communities, and/or civil society organizations, to complement or verify project monitoring information;
- Require ongoing stakeholder engagement throughout project implementation, including feedback on E&S performance; and
- Require local disclosure of ESAPs/ESMPs and amended ESAPs/ESMPs.

## **2. EXERCISING LEVERAGE THROUGH DEFAULT CLAUSES**

### ***a) Concerns with Existing Policies and Practices***

As discussed earlier, where a DFI does not have leverage to influence a client to address an adverse impact at a given moment in time, it should look for opportunities to create leverage. Loan agreements provide DFIs with contractual leverage to enforce

<sup>274</sup> See e.g. ADB Evaluation, [Effectiveness of the 2009 Safeguard Policy Statement](#) (2020), paras. 195, 239.

their terms. Non-compliance can trigger default clauses. However, anecdotally, it seems that E&S or human rights issues are not always considered sufficiently material to trigger default and associated remedial actions. Instead, DFIs have often been known to exit projects in response to emerging signs of serious E&S or human rights problems. Emerging policy developments on "responsible exit" are intended to address this problem (see Section 4 below).

A further problem is that default clauses typically provide for repayment to the DFI but not necessarily to those harmed by the project. When projects run into financial trouble, they are usually transferred to specialized DFI special operations or corporate recovery units which deal with distressed transactions, late payments, and restructuring.<sup>275</sup> But these units do not usually operate with a high degree of transparency and it is hard to know the extent to which E&S or human rights considerations are taken into account.

#### ***b) Emerging Good Practices and Recommendations***

DFIs generally seek to work with clients to address non-compliance and avoid early termination, which helps to bring specific attention and resources to addressing severe risks. Bankruptcies can have devastating impacts not only for the company and its business partners, but also for workers, particularly vulnerable workers who would have trouble finding replacement work, and surrounding communities which rely on the business operations.

##### ***Box 45: Emerging Practices – Special Operations E&S Specialists***

Financial distress is often correlated with declining E&S performance, or may even be the cause of it. Given that E&S and human rights impacts are often implicated in client work-out situations, at least one DFI has added E&S specialists to the special operations teams whose aim is to minimize negative E&S impacts derived from the various potential distress scenarios (litigation, bankruptcy and restructuring).

##### ***Box 46: Emerging Practices – Default Clauses***

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

DFIs can and have used commercial incentives to build leverage for enforcement, such as linking compliance with prospects for future business with the DFI. Such examples could provide the basis for clearer rules and enhanced leverage to help ensure more consistent compliance by clients, including financial intermediaries, with the DFI's Safeguards and relevant findings of IAMs.<sup>276</sup>

<sup>275</sup> See [Portfolio Management and Monitoring Directorate \(eib.org\)](https://www.eib.org/Portfolios/Portfolio-Management-and-Monitoring-Directorate).

<sup>276</sup> See Oxfam, [Open Books: How development finance institutions can be transparent in their financial intermediary lending, and why they should be](#) (2018). IAMs generally focus on Safeguard policy compliance by the DFI, not the client, however Management Action Plans responding to DFI findings may encompass a range of client actions.

- **Repeat business with the DFI:** EBRD specifically considers a client's previous record of addressing E&S issues during refinancing.
- **Disbarment from public procurement** is a powerful incentive used by DFIs to ensure compliance with anti-corruption and integrity requirements.
- **Exclusion from doing further business with the DFI on the basis of human rights abuses:** The World Bank excludes contractors who fail to adhere to the Bank's policies on preventing gender-based violence from bidding on its projects for a two-year period.<sup>277</sup>

---

### 3. REMEDY

There is a significant gap between harms and remedy in practice,<sup>278</sup> and DFIs are giving increasing attention to this issue. The UNGPs dedicates one of its three "pillars" to remedy and in doing so draws attention to the importance of reparation to those harmed.<sup>279</sup> Under international human rights law, "remedy" is a comprehensive 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>280</sup>

In OHCHR's view, a proactive and consistent approach to the question of remedy, integrated within DFIs' Safeguards, contractual conditions and policy dialogues, can strengthen legitimacy, build trust with communities, and strengthen norms and expectations for the provision of remedy by the client, State and other responsible actors within and beyond the scope of a given project.

#### **Box 47: Resource Box – OHCHR Report on Remedy in Development Finance**

The OHCHR report "*Remedy in Development Finance: Guidance and Practice*,"<sup>281</sup> published in February 2022 takes a detailed look at the state of play on remedy in policy and practice at DFIs. The study recognizes that despite best efforts, DFI-supported investment projects are often associated with adverse social and environmental impacts. Many kinds of environmental and social issues are addressed on a day-to-day basis with the support of supervision and technical assistance from DFIs, and others may be addressed by IAMS, project-level grievance redress mechanisms (GRMs) or other remedial mechanisms. But performance across DFIs varies considerably, and for more serious environmental and social concerns, remedy gaps remain. The report provides detailed recommendations on improving access to and delivery of remedy to project affected people, complementary to the recommendations in the present Study.

#### **a) Concerns with Existing Policies and Practices**

DFIs have numerous tools in their toolbox to address remedy and have contributed valuably to remedy in many cases. For example, MDBs and numerous bilateral DFIs have long experience dealing with remedy in the context of resettlement. However,

<sup>277</sup> A. Saldinger, [World Bank updates procurement policy to enforce gender-based violence rules](#), Devex (Dec. 1, 2020).

<sup>278</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Chapter III (B).

<sup>279</sup> UN Doc. [A/72/162](#) (July 19, 2017), para 19.

<sup>280</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.8-13.

<sup>281</sup> OHCHR, [Remedy in Development Finance](#) (2022).

data on remedy outcomes are often inadequate, and in situations in which serious grievances are concerned, timely and effective remediation frequently does not happen. A recent IDB study analyzing 40 years of infrastructure projects in Latin America concluded that despite a range of warning signs, and despite decades of experience, there has been inadequate attention to the question of remedy, with significant costs for communities, clients and DFIs.<sup>282</sup> The World Bank Group's FCV Strategy 2020-2025 goes further, recognising that unaddressed grievances can fuel social conflict, undermine development outcomes, and deepen state fragility.<sup>283</sup>

Barriers to more explicit and effective approaches to remedy as outlined in the OHCHR Remedy report include:

- **Lack of adequate appreciation** that remedy is indispensable to DFIs' mandates to "do no harm", and to sustainability commitments.
- **Misconceptions**<sup>284</sup> about the issue of remedy being a blame game rather than a constructive, collective quest for better E&S outcomes; questionable assumptions about the costs and benefits of DFIs playing a more proactive role; and fears that the DFI will be asked to step into the shoes of the client ("moral hazard" concerns) or may be exposed to increased legal liability exposure.
- **Lack of specific commitment to remedy** in most DFI Safeguard policies. Even in the case of involuntary resettlement, unremediated impacts are permissible where redress is not considered to be "*technically or financially feasible*." Very few DFI Safeguards (Sustainability Policy or E&S standards) have yet recognized that there should be an effective remedy for adverse human rights impacts associated with a project, irrespective of whether it is covered by Safeguard policies.<sup>285</sup>
- **Lack of a sufficiently comprehensive definition of remedy.** Mitigation hierarchies in DFI Safeguards to date have usually required *avoidance, minimization, mitigation and compensation and/or off-setting* of risks and impacts. This falls short of the comprehensive definition of remedy outlined above. Moreover while compensation is an important form of remedy, it is not the only kind of reparation that should be on offer, nor is it always the most appropriate form of remedy. Inadequate due diligence, consultation and information disclosure are the most common focus areas of complaints to IAMs in practice and are closely associated with poor development outcomes.<sup>286</sup> Compensation alone will be unlikely to remedy these types of concerns – other types of reparative actions are likely to be necessary. Other types of harms require other types of reparations: for example the GCF Safeguards specifically include appropriate medical care, psychosocial support, legal support, community driven protection measures, and reintegration for those harmed by sexual abuse, recognising the limitations of compensation (alone) for these kinds of harms.<sup>287</sup>

---

<sup>282</sup> G. Watkins *et al*, [Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean](#) (Sept 2017).

<sup>283</sup> See footnote 168, above, and accompanying text.

<sup>284</sup> See e.g. Shift, [Financial Institutions and Remedy: Myths and Misconceptions](#) (2021).

<sup>285</sup> There are isolated exceptions to this rule. For example the child labor and forced labor provisions of the IDB [Environmental and Social Policy Framework](#) (2020) and EIB [Environmental and Social Sustainability Framework](#) (2022) do mention taking appropriate steps to remedy identified cases, citing the 2014 Protocol to ILO Forced Labor Convention 29.

<sup>286</sup> For fuller analysis see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.23-33.

<sup>287</sup> GCF, [Environmental and Social Policy](#) (2021), para. 19(ii).



- **No prohibition on "offsetting" human rights impacts.** With few exceptions, Safeguards generally made no distinction between "offsetting" when it comes to human rights risks and impacts, as distinct from environmental impacts from where the off-setting concept originated.<sup>288</sup> The Equator Principles have been amended to address this problem. (See Box 48).
- **Failure by DFIs to build and exercise leverage.** As discussed above, DFIs, particularly the leading MDBs, have a range of potentially effective leverage options, alone and collectively with others, the exercise of which may encourage the client to provide or contribute to remedy. Contractual leverage is an obvious but arguably under-utilized means of influence. Other examples may include commercial leverage, convening power, normative influence, multi-stakeholder initiatives, relationship leverage and capacity building support. However the various options do not always seem to be thoroughly mapped and exercised in practice.<sup>289</sup>

#### ***b) Good Practices and Recommendations***

There are indications that the concept of remedy is gaining acceptance and becoming more explicitly integrated in DFI policies and practices (see Box 48). The 2020 *External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness* (IFC/MIGA External Review)<sup>290</sup> played a particularly important role in highlighting the remedy issue. Recent accountability policy reviews in leading MDBs explicitly encourage remedy (not merely procedural compliance by the Bank), certain DFI Safeguards have begun to do so, and more and more institutions are establishing independent accountability mechanisms modelled on those of DFIs.

#### ***Box 48: Emerging DFI and Commercial Banking Practices on Remedy***

- **Finnfund** "In case actual adverse impacts on human rights have occurred in connection with investee activities, Finnfund takes steps and uses its leverage to have these impacts addressed by the investee and promotes effective access to remedy for those who have been harmed. In alignment with the UN Guiding Principles [on Business and Human Rights], Finnfund's degree of connection to the impact and its possibilities to exercise and increase its leverage on the investees are taken into account. Remedies can take different form depending on the situation."<sup>291</sup>
- **EIB** "Mitigation hierarchy: Measures taken to avoid and prevent any significant adverse effects on affected people, communities and workers, as well as on the environment. Where avoidance is not possible, implement measures to reduce, remediate such adverse effects on the environment and remedy such adverse effects on affected communities; as a last resort compensation should be implemented for any potential residual effects after full implementation of avoidance, minimization, remediation and remedy actions. The human rights mitigation hierarchy is premised on the principles of protect, respect and remedy."<sup>292</sup>

<sup>288</sup> Off-setting has sometimes also been questioned in connection with biodiversity and critical habitat impacts.

<sup>289</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Chap. III.

<sup>290</sup> IFC/MIGA, [External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness Report and Recommendations](#) (2020).

<sup>291</sup> Finnfund, [Sustainability Policy](#) (Feb. 28, 2020), s. 3.3.1.

<sup>292</sup> EIB, [Environmental and Social Policy](#) (2022), para. 3.2, footnote 32.

- **EIB** "Applying the mitigation hierarchy through the identification of measures to avoid, prevent and reduce any significant adverse effects and, if required, remedy/compensate any residual effects on project-affected people, communities and workers, as well as on the environment;"<sup>293</sup>
- **GCF** "The mitigation hierarchy aims to .... Where avoidance, minimization or mitigation measures are not available or sufficient, and where there is sufficient evidence to justify and support viability, design and implement measures that provide remedy and restoration before adequate and equitable compensation of any residual risks and impacts;" .... "Where the accredited entities fail to comply with the safeguards requirements, GCF will work with the accredited entities to develop and implement timebound corrective actions that will bring the activities back into compliance. GCF will also work with the accredited entities and the affected people to develop and implement measures to remedy the harms that occurred."<sup>294</sup>
- In 2023 **IFC/MIGA** began public consultations on a new [Approach to Remedial Action](#) and [Responsible Exit Principles](#), and the CAO was publishing a series of [Advisory Notes](#) to inform the process.
- **AfDB's** guidance accompanying its Integrated Safeguards System integrates remedy requirements to affected people in the loan agreement.<sup>295</sup>
- **World Bank's** Guidance Note for borrowers on implementing ESS 1 specifically includes the responsibility to remedy.<sup>296</sup>
- **EBRD's Independent Project Accountability Mechanism Policy** includes remedy.<sup>297</sup>
- **AfDB's Independent Recourse Mechanism** procedures provide that where the AfDB-IRM finds non-compliance, the management action plan must include "clear time-bound actions for returning the Bank to compliance and achieving remedy for affected populations."<sup>298</sup> The CAO policy (2021) has provisions to similar effect.
- The **IDB ESPF** (2020) and **EIB ESS** (2022) refer to the need to take appropriate steps to remedy identified cases child labor and forced labor, citing the 2014 Protocol to ILO Convention No. 29 on Forced Labor.

<sup>293</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 1, para. 3(b).

<sup>294</sup> Green Climate Fund, [Environmental and Social Policy](#) (2021), paras. 8(f) and 13. Moreover GCF is required (para. 12(c)) to ensure that "accredited entities establish activity-specific grievance redress mechanisms as appropriate, cooperate with, and inform all stakeholders of, and provide access to the independent Redress Mechanism, and fully implement remedial actions stipulated by the Board on the recommendation of the independent Redress Mechanism in response to complaints received by the independent Redress Mechanism."

<sup>295</sup> AfDB, [Integrated Safeguard System Guidance Materials Vol. 1: General Guidance on the Implementation of OS 1](#) (Dec. 2015), p.33, materially: "The project loan agreement should include the monitoring, supervision and reporting measures stipulated in the ESMP. It may also include ... provisions for correction of lapses in compliance and remediation of impacts."

<sup>296</sup> World Bank, [Guidance note for borrowers – Environmental and Social Framework for IPF operations – ESS1](#), para. GN27.1(c).

<sup>297</sup> EBRD, [Project Accountability Policy](#) (2019), para. 2.7 (a).

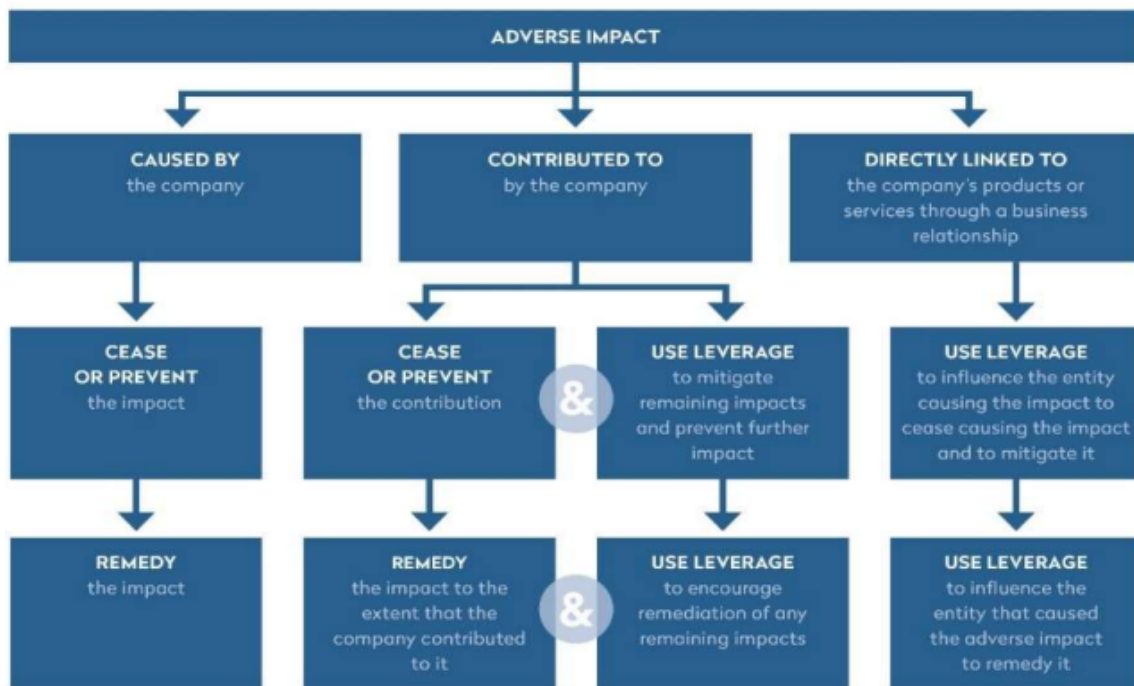
<sup>298</sup> AfDB Independent Recourse Mechanism, [Operating Rules and Procedures](#), para. 69 (b).

- The mitigation hierarchy in the Safeguards of Germany's **International Climate Initiative (IKI)** explicitly reflect the expectation that, where avoidance and mitigation are not possible, negative impacts should be remedied.<sup>299</sup>
- **Equator Principles 4** preamble makes the following distinction: "Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimized and mitigated, and where residual impacts remain, *clients should provide remedy for human rights impacts or offset environmental impacts as appropriate.*"<sup>300</sup> [Emphasis added]

The IFC/MIGA External Review usefully discussed both the DFI's and the client's roles and responsibilities to address adverse impacts, utilizing the concept of "involvement" (cause-contribute-direct linkage) in adverse impacts in the UNGPs and OECD RBC guidance. Under the latter instruments, a DFI's relationship to an impact (whether a DFI causes, contributes or is directly linked) determines the DFI's responsibility and role in remedying the impact. This does not displace the client's primary responsibilities for implementing projects and contributing to remedy in proportion to its own involvement in the given harms. Figure 3 summarizes these principles, although for present purposes the term "companies" should be substituted with "DFIs" and "clients".

**Figure 3: UNGP/OECD Concepts of “Involvement” in Adverse Impacts and Associated Responsibilities to Respond**

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



Source: SOMO, modified from OECD

<sup>299</sup> See [IKI Safeguards](#), Section 1.3 (d) and (k) and Sections 2.2, 6.2.1 and 6.2.2, although footnote 7 limits financial compensation by the German government (just one dimension of remedy, but a potentially important one) to situations where there is a legal obligation to do so.

<sup>300</sup> [Equator Principles 4](#) (2020), Preamble.

For DFIs and other financing institutions, "linkage" (rather than "causing" or "contributing") situations are likely to be the most common relationship to harm.<sup>301</sup> Guidance from the OECD on the application of the OECD Guidelines in the context of corporate lending identified three factors which may help to assess whether a bank is "contributing," or only "directly linked," to any given harm: (i) the foreseeability of impacts; (ii) the use of proceeds; and (iii) the quality of the bank's due diligence.<sup>302</sup> More recent OECD guidance on project finance suggests that the first two factors are likely to be met more easily in project finance transactions compared to general corporate lending transactions. Hence, assessing the adequacy of RBC due diligence with respect to project finance transactions becomes an especially important factor in determining a bank's relationship to impacts.<sup>303</sup>

Where adverse impacts are "directly linked" to a DFI's operations, products or services by its business relationship with or through a client, the DFI should build and use various forms of leverage to encourage the client to prevent or mitigate the adverse impacts and to remedy the harms.<sup>304</sup> In this regard, the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact at a client and a DFI's financial product or service. Rather, the link needs to be between the financial product or service provided by the DFI and the adverse impact itself.<sup>305</sup> And, consistent with ordinary principles of justice, where a DFI or any other actor contributes to harms it should also contribute to remedy.<sup>306</sup>

DFIs can strengthen their approach to remedy through the following means:

- **Update E&S standards to require clients to cooperate in and provide for remedy** when they have caused or contributed to harms and to use leverage with their own business relationships, including their value chains, to cascade these requirements.<sup>307</sup>
- **Update Sustainability Policies to reflect DFI responsibilities:** DFI's Sustainability Policies should be updated to require clients to routinely address and remedy harms, and require the DFI to: (i) use its leverage with the client to

<sup>301</sup> [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), p. 3. In practice, there is a continuum between "contributing to" and having a "direct link" to an adverse human rights impact, and a DFI's involvement with an impact may shift over time, depending on its own actions and omissions.

<sup>302</sup> See OECD, [Due Diligence for Responsible Corporate Lending and Underwriting](#) (2019), Section 2.1.2 *How can a bank assess its involvement with an adverse impact?*, and OECD, [Responsible Business Conduct Due Diligence on Project and Asset Finance Transactions](#) (2022).

<sup>303</sup> For discussion of other relevant factors 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>304</sup> UNGPs (Principles 13(b) and 19). For a clear illustration of this logic see Box 33 above. Also, relevantly, the EIB's former (2018) safeguards stipulated: "The promoter is recommended to regularly carry out human rights due diligence in order to identify and assess any actual or potential adverse impact with which it may be involved (i.e. impacts that it may cause or contribute to as a result of its own activities or which may be directly linked to its operations, products or services by its business relationships). This is of special relevance in the case of business enterprises. As outlined in the UN Guiding Principles on Business and Human Rights, this process should: (a) draw on internal and/or independent external human rights expertise; and (b) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the of the business enterprise and the nature and context of the operation." EIB, [Environmental and Social Standards \(2018\)](#), ESS 9, fn 45.

<sup>305</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 [Due Diligence Guidance for Responsible Business Conduct](#) (2018), p. 71.

<sup>306</sup> This proposition is reflected in the UNGPs and OECD RBC guidance. See also IFC/MIGA [External Review](#), Section 7.8, para. 325; and Dutch Banking Sector Agreement, Working Group on Enabling Remediation, [discussion paper](#) (Dec. 2019).

<sup>307</sup> See EIB, [Environmental and Social Standards](#) (2022), Standard 2, paras. 21-22.

meet remedial requirements; (ii) cease its own contributions to harms (if any); and (iii) actively contribute to remediation, together with the client and other responsible parties, appropriate to its share in the responsibility for the harm.

- **Update Procedures to reflect all available leverage tools:** There are many ways that DFIs can use their leverage to enable remedy, as was discussed earlier, beyond those typically available to commercial banks.<sup>308</sup> It would be useful for these to be enumerated in Procedures or guidance notes.
- **Require client contingency arrangements in high-risk projects:** Remedy should be approached as an ordinary project contingency, rather than an exceptional event or source of stigma. For higher risk projects, Safeguards and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S and human rights impacts.
- **Establish DFI remedial mechanisms** through which the DFI could, in appropriate circumstances and proportionate measure, contribute to remedy where they have contributed to harms, alongside clients. Ring-fenced funds can provide quick relief to project-affected people subject to the DFI's reimbursement rights *vis-à-vis* the client as appropriate, and promote more consistent remedy practices.<sup>309</sup> Technical assistance funds may also be used more frequently to support corrective actions.
- **Require disclosure of and cooperation with project-level grievance mechanisms and the DFI's IAM** as contractual requirements.<sup>310</sup>
- Ensure that Safeguard policy requirements for project-level grievance mechanisms fully reflect the **UNGPs' "effectiveness criteria"** for non-judicial grievance mechanisms.<sup>311</sup>
- **Expand the scope of due diligence to include the remedy ecosystem:** Remedying harms associated with a DFI-funded project may implicate a range of different judicial and non-judicial mechanisms and processes within a given project and country. Analysis of the remedy ecosystem should be included within the DFI's project-level due diligence and be a strengthened focus of technical guidance and support to clients.<sup>312</sup>

---

#### 4. RESPONSIBLE EXIT

The idea of "responsible exit" emerged from problems associated with unremediated E&S and human rights issues occurring in the course of project closure or a DFI's exit, whether planned or unexpected. The term "responsible exit" applies to a range of situations: routine exits at the end of a loan, to planned exits from equity investments at

---

<sup>308</sup> See Dutch Banking Sector Agreement, Working Group on Enabling Remediation, [discussion paper](#) (Dec. 2019); and Shift, [Financial Institutions and Remedy: Myths and Misconceptions](#) (2021).

<sup>309</sup> For fuller analysis see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp. 81-89.

<sup>310</sup> See e.g. EIB, [Environmental and Social Standards](#) (2022), Standard 2, para. 33.

<sup>311</sup> UNGP 31. See generally [OHCHR | OHCHR Accountability and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse](#).

<sup>312</sup> See D. Post & S. Agarwal, [Feedback Matters: Designing Effective Grievance Redress Mechanisms for Bank-Financed Projects, Part 2. The Practice of Grievance Redress](#) (2012) p. 3: "Step 1: Survey existing formal and informal in-country GRMs and build on them."

a designated time, to situations in which analyses of adverse impacts prompt DFIs to terminate their involvement early.

Responsible exit is the corollary of "responsible entry", however, there appears to be a significant imbalance between the efforts expended by DFIs on upfront compliance and development impact when entering projects, compared with exit.<sup>313</sup> The topic is discussed here under the "supervision" heading given that most attention to exit typically occurs as part of project supervision. But as with other dimensions of E&S risk management, the earlier that exiting is considered and planned for, the better. The timing, manner and terms on which DFIs exit investments send important signals to others in the market.<sup>314</sup>

#### **a) Concerns with Existing Policies and Practices**

Apparent shortcomings in policy and practice on responsible exit across DFIs to date<sup>315</sup> include the following:

- **Lack of policy and procedures on responsible exit:** With certain exceptions, DFI Safeguards and Procedures do not often provide guidance on the following dimensions of responsible exit: (i) planning or considering exit at the time of project approval; (ii) assessments of E&S impacts in anticipation of exit; (iii) ensuring there are no unremediated impacts on exit or putting in place steps to address unremediated impacts on exit; (iv) outlining actions that could be taken by the DFI individually and collectively with parties outside of the transaction to address unremediated harms; or (v) addressing reprisals in the context of exit. Some Safeguards refer to closure and post-closure obligations associated with a project but this is often limited to the client's obligations, and to mining projects.<sup>316</sup>
- **Remedy for DFIs but not project affected people:** Safeguards usually provide that if identified non-compliance continues notwithstanding the DFI's best efforts, the DFI may exercise its own contractual remedies. But this usually refers exclusively to repayment to the DFI, and may not address Safeguard issues, including remedy to project-affected people, as part of termination. As client legal agreements are usually not made public, the extent to which standard covenants cover anything beyond contractual remedies for the DFI is unclear.

#### **b) Emerging Good Practices and Recommendations**

The COVID-19 pandemic appears to be stimulating renewed thinking about DFIs' responsibilities in the context of withdrawal or disinvestment in times of crisis. Moreover the climate change agenda has firmly linked the issue of equity to the issue of divestment through the concept of the "just transition." Other drivers of interest include: (i) increasing DFI investments in fragile, conflict affected and violent settings where risks of unremediated harms are particularly pronounced;<sup>317</sup> (ii) high profile DFI exits

---

<sup>313</sup> For a more detailed discussion of responsible exit, see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Chapter V.

<sup>314</sup> D. Rozas *et al*, [The art of the responsible exit in microfinance equity sales](#) (Washington, D.C., Consultative Group to Assist the Poor and Center for Financial Inclusion, 2014), p. 2.

<sup>315</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Chapter V.

<sup>316</sup> See e.g. Swedish Environmental Protection Agency – UNDP Environmental Governance Programme (EGP), [Extracting Good Practices: A Guide for Governments and Partners to Integrate Environment and Human Rights Into the Governance of the Mining Sector](#) (2018), Chapters 7-8.

<sup>317</sup> While not specifically using the term "responsible exit," the World Bank's FCV Strategy for 2020-2025 helpfully notes that while IFC and MIGA's leverage may be limited post-exit, they "will give due consideration to any potential adverse impacts on the community that are likely to subsist (from the

where E&S issues were not apparently foreseen or adequately addressed;<sup>318</sup> (iii) project closure report evaluations which have raised questions about how Safeguard deficiencies have been addressed at closure; and (iv) complaints to IAMs about post-exit E&S risk management concerns.

Some IAMs are able to receive complaints that arise after DFI exit, provided the complaint relates to issues arising during the DFI investment. (See Box 49). This kind of flexibility is vital given the time that it may take for harms to surface. However, there have been very few such cases to date and, as noted in the 2020 IFC/MIGA External Review, it can be challenging to achieve satisfactory outcomes in these situations as the DFI's leverage over the client may have significantly diminished.<sup>319</sup>

**Box 49: Emerging Practices – IAM Mandates to Consider Complaints after DFI Exit**

- The AfDB-IRM and GCF-IRM procedures permit complaints two years from the closure of the project or two years from when the complainant became aware of the harm, whichever is the later.
- The CAO's revised procedures permit complaints to be submitted up to 15 months after an IFC/MIGA exit, and then only in "exceptional circumstances."<sup>320</sup>

The need to address environmental and social impacts after exit is reflected to varying degrees in general legal conditions for MDB sovereign financing<sup>321</sup> and E&S standards for clients,<sup>322</sup> although there appears to be little publicly available information on how post-exit monitoring, technical support and action plans are implemented in practice.

---

project) at the time of exit." World Bank Group [Strategy For Fragility, Conflict, and Violence 2020–2025](#), para. 154.

<sup>318</sup> The FMO and Finnfund exit from the Agua Zarca hydropower project in Honduras is among the better known examples, where the project context included protracted violence against indigenous communities opposing the project and the killing in March 2016 of Lenca leader Berta Cáceres. The two DFIs conducted an independent investigation of the exit that included a review of what responsible exit would mean in the project context: Juan Dumas (Mar. 3, 2017), [A Responsible Exit from the Agua Zarca Project: Summary Of Recommendations](#), which includes (para. 1.4) an attempt to reconcile recommendations with international human rights standards. More generally see K. Gallagher & C. Juaneda, [Does Divestment by MDBs Leave Communities in the Lurch? When exiting investments, MDBs must address negative impacts of projects on communities](#) (2022).

<sup>319</sup> IFC/MIGA [External Review](#), p. 39.

<sup>320</sup> [CAO Policy](#) (2021), para. 49.

<sup>321</sup> The general rule seems to be that the obligations of the parties under the loan agreement (which include environmental and social obligations) terminate upon repayment of the withdrawn loan balance and other payments due. See e.g. IBRD, [General conditions for IBRD financing: investment project financing](#) (2021), sect. 9.05; IDB, [Loan Contract General Conditions](#) (2021), article 11.04; and AfDB, [General conditions applicable to AfDB loan agreements and guarantee agreements \(sovereign entities\)](#) (undated), sect. 12.04.

<sup>322</sup> Certain multilateral development bank safeguards make clear that the client's environmental and social obligations extend to closure or post-closure. See e.g. World Bank, "Second progress report on the implementation of management's action plan in response to the Inspection Panel investigation report (INSP/R2018-0002) on the Democratic Republic of Congo: second additional financing for the High-Priority Roads Reopening and Maintenance Project (P153836)" (2020), para. 7 (xxviii).

### **Box 50: Emerging Practices – DFI References to Exit**

- **EBRD** "This PR applies to all projects financed by the EBRD as established in the Environmental and Social Policy. The client will, as part of its environmental and social assessment process, identify the relevant requirements of this PR, and how they will be addressed and managed through the project design, construction, operations, and decommissioning or closure and reinstatement." [PR 1](#), para. 4
- **World Bank** "A project will not be considered complete until the measures and actions set out in the legal agreement (including the ESCP) have been implemented. To the extent that the Bank evaluation at the time of project completion determines that such measures and actions have not been fully implemented, the Bank will determine whether further measures and actions, including continuing Bank monitoring and implementation support, will be required." [ESSF](#), para. 56. Other actions beyond continued monitoring and technical support may reportedly include extension of project closure and requirements for post-exit action plans.
- **IDB** "A project's closure will not be reached until the measures and actions set out in the legal agreement (including the ESAP) have been implemented. To the extent that the Bank evaluation at the time of project's closure determines that such measures and actions have not been fully implemented, the IDB will determine whether further measures and actions, including continuing Bank monitoring and implementation support, are required and feasible."

The increasing adoption of the UNGPs by DFIs may encourage more consistent and effective approaches to exit. The UNGPs and OECD Guidelines establish clear expectations that the human rights implications of exit should be taken into account prior to any decision to exit. Exiting does not affect responsibilities to remedy any outstanding harms. This normative premise, coupled with the reduction of DFIs' leverage post-exit, imply the need for a more deliberate approach to planned and unplanned exits in advance, and integrating the responsible exit issue into project supervision.

OHCHR suggests that DFIs should consider developing a **set of guiding principles for exits** that are incorporated into Safeguards, procedures, legal documentation and guidance. The principles could include:

- **Avoid "cutting and running"**, or prematurely divesting from challenging projects due to reputational or financial risk concerns, without contributing to remediation and without a specific assessment of the human rights impacts of exit. This is particularly the case if a complaint has been filed with an IAM which, regrettably, has sometimes been known to trigger client pre-payment or DFI exit. At a minimum, there should be a presumption that the DFI should not exit during an IAM complaint, absent exceptional circumstances justified to the Board. Client prepayment in such circumstances should be discouraged through penalties and restrictions on repeat business.
- **Do not leave behind unremediated harms** or, more positively, ensure as far as possible that all adverse impacts have been remedied.
- Ensure that **benefits and opportunities due to workers and communities have been provided** and that community benefits and other development opportunities will continue after the institution's exit. On-going technical assistance from the DFI may facilitate this objective.



- Ensure that **complaints** by affected people can be brought within a reasonable period (such as two years) after closure, or two years after the complainant became aware of the harm, whichever is later.
- Ensure that communities or workers are not at **risk of retaliation due to exit**.
- Take an active approach to seeking a **responsible replacement(s)** on exit, in line with appropriate policies and processes.
- Ensure as far as possible that the **project continues to operate in an environmentally and socially responsible manner after the departure** of the institution, in particular through continued monitoring of the operation of the client's ESMS during the period of a DFI's investment in order to embed the approach in the client's E&S risk management system.
- Consider deploying **pre-payment penalty receipts to compensate unremediated impacts**, where a client exits early.

**Box 51: Emerging Practices – Responsible Exit**

- In October 2021, **IDB Invest** and the developers of the San Mateo and San Andrés hydroelectric projects in the Ixquis region of northern Guatemala signed settlement agreements whereby IDB Invest exited its financing of the projects. Notwithstanding this, IDB Invest committed to implement an action plan<sup>323</sup> addressing the findings of a compliance review of both projects, carried out by IDB's Independent Consultation and Investigation Mechanism (MICI). Under the Action Plan IDB Invest will create a transition plan, as well as a gender-differentiated impact assessment, and also invest in a program to promote financial inclusion and women's empowerment in the area. The plan also includes partnering with other international agencies in promoting capacity building initiatives on security and human rights protection, with emphasis on protection against reprisals, for relevant stakeholders from the public and private sectors in Guatemala.
- **IDB** has provided guidance on addressing social impacts during the project completion phase.<sup>324</sup>
- **IFC and EBRD** both have long-standing guidance on retrenchment which could be activated before exit in relevant cases.<sup>325</sup>

---

## 5. KEY RECOMMENDATIONS ON SUPERVISION

- ***Safeguards should include an explicit commitment to remedy harms as a corollary of their "do no harm" mandates. Mitigation hierarches should explicitly include "remedy" and recognize that off-setting is inappropriate for human rights impacts. In OHCHR's view an***

<sup>323</sup> See <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1567711961-1922>.

<sup>324</sup> R. Kvam, [Social Impact Assessment: Integrating Social Issues in Development Projects](#), IDB (2018), pp. 82-83.

<sup>325</sup> IFC, [Good Practice Note: Managing Retrenchment](#) (2005); EBRD, [Retrenchment Guidance](#) (Apr. 2010).

**appropriate formulation would be "prevent, minimize, mitigate and/or remedy."**

- **Safeguard policies should define the DFI's and client's/investee's responsibilities for remedy by reference to their respective involvement in impacts (cause-contribute-direct linkage), as summarized in Figure 3 in this Study.**
- **Remedy should be approached as an ordinary project contingency. Safeguard policies and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S impacts for higher risk projects.**
- **Safeguard policies should set out clear criteria governing the circumstances in which the DFI will contribute financially to remedy, taking into account (i) the DFI's involvement in impacts; (ii) the urgency and extent of remedy needs; and (iii) the availability of alternative means of remedy. The DFI should set aside remedial funds to enable quick relief in such contingencies, with reimbursement rights vis-à-vis the client as appropriate.**
- **Safeguard policies and loan/investment agreements should explicitly include requirements concerning the disclosure to project-affected people of the DFI's IAM and any project-level grievance mechanism, and for active cooperation by the client with complaint processes.**
- **Where serious human rights impacts are in a client's value chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate that they comply with Safeguard requirements or to eliminate such practices within a reasonable time frame.**
- **Analysis of the remedy ecosystem should be included within the DFI's project-level due diligence and be a strengthened focus of technical guidance and support to clients.**
- **Safeguards should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:**
  - **Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;**
  - **A clear requirement not to exit without first using all available leverage 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.**
- **Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from**

***exit, involving all responsible parties and reflecting broad consultations.***

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

## **GAP 5: FINANCIAL INTERMEDIARIES**

DFI financing through private and public sector financial intermediaries (FIs) has been rising rapidly in recent years and in some cases exceeds 50% of a DFI's total investment portfolio.<sup>326</sup> FIs are usually commercial banks and private equity funds, but may also include a range of other institutions such as mortgage lenders, leasing companies, pension funds and insurance companies. Significantly, unlike DFIs, FIs have a for-profit mission and not a development mandate. DFIs invest through FIs in order to support SMEs and foster economic development. Local and regional FIs typically have a far broader and deeper reach into national and local economies than DFIs could ever achieve directly. However, DFIs' investments in FIs have become more complex over time and reflect a wide range of financing forms, including bond participations and underwriting, corporate loans, and guarantees or insurance.<sup>327</sup>

FI portfolios inevitably entail risks, even in relation to SMEs in some sectors. For example, small tannery effluent can cause significant pollution, small scale factories might exploit forced labor or modern slavery, and microenterprise software developers may affect the human rights of thousands. FI loans and investments are of course not limited to SMEs, and the larger and more complex portfolios can entail larger risks.

Many DFIs' FI Safeguard systems aim to ensure that potential harms of FI-funded sub-projects redound to and come within the scope of the DFI's due diligence responsibilities. DFIs' Safeguards usually: (i) recognize that responsibility for impacts does not stop at the DFI's doorstep but instead extends to the impacts created by using the financial services provided by the DFI; (ii) use a risk-based approach with a focus on higher risk FIs and sub-projects, and (iii) focus on the capacities and systems of FIs to manage impacts among their clients. DFI Safeguard requirements for FIs usually entail a focus on the FI's ESMS,<sup>328</sup> the application of the DFI's exclusion list, screening of higher risk sub-projects by the DFI, and the application of E&S standards to higher risk sub-projects.

This overall approach has parallels to the UNGPs which also recognize that human rights impacts of a business are intertwined with impacts in its value chain. For financial institutions – DFIs and commercial banks alike – this means impacts associated with financing provided to clients and further down the financing chain. While each actor in each tier of a financial relationship has its own human rights responsibilities, it will also at least be "directly linked" (in the UNGPs terminology) to human rights impacts arising from the use of funds. Hence, each actor in each tier should build and use its leverage with the next tier to appropriately identify and address potential human rights impacts. Where severe impacts come to light along the finance relationship chain, even if

<sup>326</sup> Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 5.

<sup>327</sup> Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 4.

<sup>328</sup> However according to the IDB Operations and Evaluation Department, the "FI has to demonstrate that it has appropriate E&S systems and procedures in place. Often this is done following approval; it is typically not a prerequisite for the approval of FI operations." IDB Operations and Evaluation Department, [Evaluation of IDB's Work Through Financial Intermediaries](#) (2016), p. 2.

several tiers down, leverage should be used to try to prevent and remedy human rights harms.

---

## 1. CONCERNS WITH EXISTING POLICIES AND PRACTICES

The scale and growing complexity of FI financing calls into question existing approaches to FI risk management. The central challenge is to ensure that DFI systems are appropriately set up to identify, supervise and support FIs in managing a potentially wide range of risks, and supporting their clients to manage those risks.

### *a) Ring Fencing Results in Missed Opportunities and Undermines Accountability*

DFI FI systems as they stand now generally operate on a binary approach, requiring observance of either: (a) national law plus Exclusion Lists, along with E&S standards in relation to labor for FI staff; or (b) the full suite of E&S standards for higher risk sub-projects. This raises two main concerns: (i) most FI lending may default to national legal systems even if these are weaker than international human rights standards and Safeguard requirements (which is commonly the case); and (ii) the system can create perverse incentives to exclude high risk projects from DFI support and scrutiny.

Some DFIs explicitly ring-fencing the application of Safeguards to specific FI on-lending, or by applying thresholds that exclude ever more FI lending from Safeguard application. In some cases, this means that a DFI explicitly finances and supervises only relatively low-risk components of an FI's portfolio and leaves responsibility for higher risk projects to the FI, without guidance, support or supervision from the DFI.

OHCHR recognises that there are differences of opinion on ringfencing, and that in certain circumstances DFIs may wish to avoid controversial projects or sectors, such as those associated with high carbon emissions or other sources of reputational risk. However ring-fencing by definition curtails the ability of a DFI to use its leverage and technical assistance to improve E&S performance across the portfolio.<sup>329</sup> Unduly rigid ring-fencing may also be inconsistent with DFIs' sustainability mandates and raise questions about the value added of the DFI's involvement.

In contrast, some DFIs take a portfolio approach to their FI lending, which means that the DFI applies its Safeguards and capacity building support across an FI's entire portfolio. In theory the portfolio approach entails the use of the DFI's leverage to improve FI practice across a far wider set of sub-projects than just those that may be targeted for on-lending or investment.<sup>330</sup>

### *b) Gaps in Coverage*

- **Gaps in scope of coverage.** Trade finance seems to be a gap area in some cases, and while specific E&S assessment tools have been developed in this field, Safeguard risk management and accountability functions may not be

---

<sup>329</sup> Note the IFC [Sustainability Policy](#) (2012), para. 29, which states that "In cases of business activities with defined use of proceeds and a clearly defined environmental and social footprint, IFC's requirements regarding environmental and social risk management will apply to the business activities financed from funds provided by IFC. However, IFC will encourage its clients to manage environmental and social risks consistently in all their operations."

<sup>330</sup> Portfolio approaches are not necessarily a panacea, however. The impact (positive or negative) depends upon a range of variables including the rigor of the DFI's supervision.

reflected.<sup>331</sup> Capital market transactions may also be excluded from Safeguards in some cases.<sup>332</sup> The objectives of E&S sustainability and accountability would likely be better served by Safeguards of broad scope, with necessary adaptations to specific sectors and types of investment.

- **Lack of specificity on human rights:** As noted throughout this study, the expectations on businesses to respect human rights are growing, and human rights are increasingly the subject of financial regulation.<sup>333</sup> DFI FI clients and sub-project clients may not necessarily be familiar with these trends and regulatory developments and may not appreciate that general references to "E&S" are meant to cover human rights issues. These issues will often specifically need to be drawn to their attention, with specialized expertise and capacity building support from DFIs.
- **Gaps in assessment methods:** DFIs often have sophisticated systems to monitor the positive impacts of their on-lending. As noted earlier, however, these often do not seem to be connected to negative impacts covered by Safeguards, resulting in an incomplete or unbalanced picture of an FI's E&S impacts.
- **Engaging stakeholders in monitoring:** FI clients are typically required to submit annual monitoring reports, but there may be little in FI Safeguards about how monitoring reports are to be prepared. Moreover there are often no requirements to engage with stakeholders for inputs into the monitoring report, without which detailed insights into many serious impacts will not be possible, and there may be no specific linkages to grievance mechanisms. Higher risk sub-projects commonly (and appropriately) do require review by an independent third party, and more recent Safeguards may require that the DFI and experts have access to sub-project sites. However specific requirements for experts to engage with stakeholders in preparing their reports appear to be less common.
- **Gaps in access to remedy in FI Sub-Projects.** DFIs' Safeguards are generally weak on grievance mechanism requirements for FIs,<sup>334</sup> particularly compared to relatively clear and robust requirements concerning grievance mechanisms for direct investments. This is an important gap to fill if more claimants are to have access to remedy in practice.

### **c) Lack Of Clarity about How the FI System Works**

- **Lack of clarity on requirements that apply to FIs.** FI requirements are not always clearly expressed in Safeguards, hence there may be confusion among

---

<sup>331</sup> See for example IFC's [Global Map of Supply Chain Risks in Agro-Commodity Production](#) which enables users to conduct rapid environmental and social due diligence associated with trade and short-term finance.

<sup>332</sup> See AIIB [Environmental and Social Framework](#) (2021) and Inclusive Development International Blog, [The AIIB should include private capital in its environmental framework](#) (May 11, 2021) noting the capital market transactions are exempt from the application of Safeguards and from the Bank's accountability mechanism. The authors argue that ESG frameworks cannot be compared to Safeguards, and call on the Bank to adapt the ESF to capital market transactions as it does for FI lending, rather than waiving application altogether, and to publicly disclose those transactions. For an example of a DFI Safeguard policy which includes capital market transactions, see EIB, [Environmental and Social Policy](#) (2022), para. 4.22.

<sup>333</sup> For example the [EU Sustainable Finance Disclosure Regulation](#) (SFDR) is the first financial law in the EU to include specific requirements on human rights. See footnotes 2 to 7 above and accompanying text.

<sup>334</sup> One of the exceptions is IFC (November 2018) [Interpretation Note on Financial Intermediaries](#) following a CAO compliance review of IFC's FI policy and practices.

FI clients and other stakeholders about which requirements apply. Some DFIs leave important clarifications to their procedures rather than their Safeguards,<sup>335</sup> while others have only general language without criteria, resulting in unduly broad discretion and inconsistent practice.

- **Lack of clarity or specificity on when the client should develop and implement an ESMS.** The ESMS is a linchpin of the FI system, hence it should ideally be put in place immediately, or at least in accordance with a specified timeframe, while recognising that improvement and reinforcement of the system may take time. Yet for many DFIs, having a system in place is not necessarily a prerequisite for approval. Some DFIs consider it part of their development mandate to take on FIs with low capacity but which can convincingly demonstrate a commitment to improvement.
- **Lack of clarity in screening FI portfolios.** There appears to be limited public disclosure about DFIs' procedures for screening FI's portfolios for risk classification purposes.
- **Layers of due diligence processes, rather than direct due diligence.** In OHCHR's understanding, it seems that the due diligence system for FI operations is typically based on a layering of multiple due diligence processes: a DFI carries out due diligence in relation to the FI's ESMS, and the FI carries out due diligence of the sub-project and the sub-project's due diligence. The layering usually stops at the DFI's review of the FI's due diligence. Requirements for the DFI to review sub-projects directly are not always clear.
- **Focus on financial materiality rather than double materiality.** Safeguards are not always clear about the objectives of due diligence. For example the IFC Interpretation Note on Financial Intermediaries, on its face, seems to focus only on the impact of E&S risks to the financial returns to IFC and the FI, rather than the impact of the project on the environment and people.<sup>336</sup> Whether *both* kinds of impacts (so-called "double materiality") should be considered is a topical issue in the finance sector, and there is a growing body of opinion among regulators that both dimensions are necessary if the full impacts are to be properly assessed.<sup>337</sup> A double materiality approach would be consistent with DFIs' mandates and commitments to ensuring their financing contributes to the SDGs.
- **Lack of clarity and specificity on referrals for high-risk projects:** Given the limitations of Exclusion Lists, as discussed earlier, specific guidance on referrals for high-risk projects would seem to be beneficial. Referral requirements seem to be of varying rigor and strength across DFIs at present: some include specific requirements in Safeguards, others have optional provisions or non-binding

---

<sup>335</sup> There are differences between the IFC Interpretation Note on Financial Intermediaries and its E&S Review Procedure. IFC has committed to the following changes with respect to its approach to FIs: "Clarifying IFC application of E&S requirements for financial intermediaries (FIs) – updating procedures to clarify the application of the Performance Standards to sub- projects by FI clients and IFC supervision of such sub-projects; introducing a web based E&S Management System (ESMS) diagnostic tool to help analyze ESMS's quality and identify gaps; implementing additional disclosure requirements; expanding FI monitoring capacity and enhanced supervision of FI projects (IFC/MIGA External Review, paras. 128, 129, 220)." IFC, [External Review: IFC/MIGA Update of Non-policy Actions](#) (undated).

<sup>336</sup> IFC [Interpretation Note Financial Intermediaries](#) (2018) paras. 10. Notwithstanding this wording, OHCHR understands that both types of impacts are considered in practice.

<sup>337</sup> See e.g. Deloitte blog, [J. Sayer, The Challenge of Double Materiality: Sustainability Reporting at a Crossroads, Eco-Business \(Jan. 13, 2022\)](#).

guidelines,<sup>338</sup> and others have no referral requirements at all. In OHCHR's view a minimum requirement, embedded in Safeguards and legal agreements, should be that high-risk projects are referred for review by the DFI, accompanied by the right to conduct site visits if necessary both for initial due diligence and monitoring. Clear criteria and illustrative examples of projects that are considered high risk and therefore subject to the DFI's pre-screening requirements would be helpful. In this regard, care should be taken that the high-risk categorization is not limited to projects with significant environmental impacts only.

**d) Lack of Disclosure**

- **Lack of disclosure of FI sub-projects to project affected people:** Lack of adequate information disclosure concerning FI investments, including disclosure of the DFI's link to sub-projects, has been a consistent problem in practice.<sup>339</sup> Without adequate information, affected people cannot engage the FI, the DFI, nor the IAM in relation to the project, and their views and those of other concerned stakeholders may be excluded from decision-making.<sup>340</sup> A number of DFIs are making progress in connection with sub-project disclosure (Box 53), however despite consistent demands even some of the more recent Safeguards do not require such disclosure.<sup>341</sup>

**Box 52: Resource Box – Publish What You Fund – Transparency of Financial Intermediaries**

Findings of the above report, published in 2021, included the following:<sup>342</sup>

- Generally, disclosure of E&S risks and accountability mechanisms is poor.
- Information about E&S risks and accountability at FI sub-projects is essentially non-existent.
- Disturbingly, from a human rights point of view, the survey was **"unable to identify any assurance of community disclosure** across the FIs in our landscape analysis."<sup>343</sup>
- **Transparency about the DFI's IAM was very limited.** Only four multilateral DFIs were found to disclose the presence of an IAM on each of their FI

<sup>338</sup> See e.g. EIB, Environmental, Climate and Social Guidelines on Hydropower Development (Hydropower Guidelines) (2019). As noted by CEE Bankwatch, "the Guidelines contain very useful sections and requirements such as the referral of hydropower projects financed via financial intermediaries to the EIB for due diligence, public disclosure of hydropower projects by the financial intermediary, and the importance of a strategic approach to hydropower (i.e. that the impacts should be assessed first at the level of the river basin and only later at the project level)." However unlike Safeguard policies, the Guidelines are not binding on EIB or its FI clients. CEE Bank Watch, *et. al*, [Why can a third of European Investment Bank lending evade the Bank's E&S rules? The EU's house bank must tighten its intermediated lending standards](#) (Sept 2021).

<sup>339</sup> Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 26.

<sup>340</sup> Oxfam, [Open Books: How development finance institutions can be transparent in their financial intermediary lending and why they should be](#) (2018).

<sup>341</sup> For example EIB [Social and Environmental Standards](#) (2022), Standard 6 – Intermediated Finance, paras. 7-12, reflect relatively general requirements regarding information disclosure and EIB supervision, subject to broadly worded discretions. Paradoxically, requirements for FI operations in non-EU countries are guided only by the variable (and often weak) content of national law, rather than EU or international law.

<sup>342</sup> Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021).

<sup>343</sup> *Id*, p. 26.

investment project pages but again, significantly, there was no assurance of community disclosure of IAMs across the FIs in the landscape analysis.

## 2. EMERGING GOOD PRACTICES AND RECOMMENDATIONS

### a) Disclosure

In OHCHR's view DFIs should require that FIs and their sub-projects disclose the DFI's involvement and contact information at the sub-project site. Moreover, information about grievance redress, including about accessing the DFI's IAM, should be posted on the websites of the DFI, FI and sub-project, and should be made available in a manner that is visible and understandable to affected communities. The disclosure of relevant information also has implications for access to remedy, as without such information, communities may not know that they have alternative avenues to seek remedy for sub-project impacts through the DFI's IAM.

#### **Box 53: Emerging Practices – Requirements for FI Disclosure**

The **Green Climate Fund** is ahead of most DFIs in requiring prior disclosure of information on E&S impacts for all FI sub-project financing decisions.<sup>344</sup>

**IFC** has committed to making the following disclosures:<sup>345</sup>

- All sub-projects supported via its private equity fund clients;
- A description of the FI's ESMS;
- Specified FI investments must report publicly on an annual basis for high-risk (Category A) and selected medium-risk (Category B) sub-projects that meet certain thresholds. Information to be reported includes name, sector, location by city, and sector for sub projects funded by the proceeds from IFC's investments.

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

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

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

21.3 Higher Risk Activity E&S Documentation.

(a) For each Category A activity supported by the Bank under an FI Project, disclose the draft E&S assessment reports and documents referred to above in Section 20.1, Draft E&S Documentation, at least sixty (60) calendar days prior to final approval of the activity for inclusion in the Project. The Bank's Management may decide, based

<sup>344</sup> CEE Bankwatch *et al*, [Why can a third of European Investment Bank lending evade the Bank's E&S rules? The EU's house bank must tighten its intermediated lending standards](#) (Sept 2021): "The Green Climate Fund is the clear leader in this field and requires the disclosure of all sub-projects."

<sup>345</sup> Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 40.



on the specific nature and scope of the FI project and the E&S risks and impacts of the activity, that a longer or a shorter disclosure period is appropriate.

(b) Disclose annual E&S documentation for all other Higher Risk Activities financed by the Bank under the Project during the preceding 12 months, unless such disclosure is subject to regulatory constraints, market sensitivities or consent of the sponsor, in which case, disclose the reasons for nondisclosure.<sup>346</sup>

**DFC:** "The Corporation will assist the IAM in carrying out its outreach efforts, including requiring clients and sub-clients (for financial intermediary projects) to disclose the existence of the IAM to project-affected communities in a culturally appropriate, gender sensitive, and accessible manner. The existence of the IAM and how to contact it will be included in appropriate project documents." Para. 5.<sup>347</sup>

### **b) Monitoring**

- **Improving monitoring including through "red-flags" or warning systems for higher risks:** A number of DFIs are developing more in-depth E&S rating systems to help them monitor E&S risks more effectively on an ongoing basis. In OHCHR's view, these should be adapted to apply to FIs, to the extent that this is not already being done.

### **c) Access to Remedy**

- A number of promising developments are featured below (Box 54). FIs may require guidance on the differences between grievance mechanisms and more traditional whistleblower hotlines and mechanisms dealing with corruption and legal compliance issues, which may already be in place.<sup>348</sup>

#### **Box 54: Emerging Practices - Grievance Redress Mechanisms**

**IFC/MIGA External Review** recommended that the IFC ensure that their clients "provide information to affected communities both about the client's grievance mechanism and about CAO [IFC's accountability mechanism]" including for "FI sub-projects."<sup>349</sup>

**Green Climate Fund** requires each "accredited entity" (financial institution) to have an institution- level GRM that complies with the UNGPs.<sup>350</sup>

**AIIB:** "For FI Projects, establish: (a) a mechanism to address concerns of relevant Project stakeholders related to the FI's ESMS implementation; and (b) a requirement that a GRM be established for Bank-supported activities ."<sup>351</sup>

**Commercial Banks:** In November 2021 ANZ launched a Grievance Mechanism Framework to evaluate and respond to human rights-related complaints relating to its

<sup>346</sup> AIIB, [Environmental and Social Framework](#) (2021).

<sup>347</sup> DFC, [Board resolution establishing its Office of Accountability](#) (2020).

<sup>348</sup> See e.g. [Better protection of whistle-blowers: new EU-wide rules to kick in in 2021 - Consilium](#) ([europa.eu](#)).

<sup>349</sup> IFC/MIGA [External Review](#) (2020), p. 84.

<sup>350</sup> GCF, [Environmental and Social Policy](#), para. 12(c). The GCF-IRM also has a mandate to build the capacity of the GRMs of Direct Access Entities (national and regional FIs) and provides training courses to its FIs. See [Strengthening Grievance Redress Mechanisms – Launch of the IRM's Online Training Modules](#) (2 Sept 2020).

<sup>351</sup> AIIB, [Environmental and Social Framework](#) (2021), para. 25.

corporate lending customers.<sup>352</sup> As of 2020 ABN AMRO was testing a grievance procedure aiming to enable remedy for people harmed by its corporate clients.

**ADB project on an Accountability Mechanism Framework for FIs from the People's Republic of China:** The ADB's IAM developed an "Accountability Mechanism Framework" (AMF) with other partners focused on enhancing E&S compliance and accountability for Asian FIs, particularly Chinese FIs, as well as Indian and Indonesian financial institutions.<sup>353</sup> The ADB released two versions of the AMF: one for all FIs ("General AMF") and one specifically for Chinese financial institutions ("Chinese AMF").<sup>354</sup> The reason for the different versions is not apparent from publicly available documentation. Some commentators have pointed to gaps in the AMF while also noting that it represents "a strong step in the right direction" given the relative dearth of accountability mechanisms in Chinese commercial and state institutions despite their prominent role in international finance.<sup>355</sup>

**Box 55: Resource Box – BankTrack & Oxfam Australia Guidance on Effective Grievance Mechanisms in the Banking Sector**

This guidance builds the business case for grievance mechanisms at FIs, surveys the current landscape, and sets out guidance for FIs on how to develop grievance mechanisms. It also sets out clear expectations from CSOs about how these mechanisms should be established and operated.<sup>356</sup> An FAQ addresses common questions that arise in practice.<sup>357</sup>

---

### 3. KEY RECOMMENDATIONS FOR FI OPERATIONS

***Safeguard policies for FI operations should require:***

- ***disclosure of an overview of the FI's E&S policy and of the ESMS;***
- ***compliance with international law, national law, and the DFI's Safeguards, whichever sets the most stringent standards;***
- ***time-bound disclosure of the name, sector and location of DFI sub-projects on the DFI's and client's website, prior to the FI operation's approval;***

<sup>352</sup> See [Our approach to human rights | ANZ](#). This followed a complaint to the OECD's National Contact Point which eventually led to ANZ's response. [EC and IDI vs. Australia and New Zealand Banking Group - OECD Watch](#) (2018).

<sup>353</sup> See DevDiscourse, [ADB to Develop Accountability Mechanism Framework to Manage Social Risks](#) (21 May 2019); and [53140-001: Developing an Accountability Mechanism Framework for Financial Intermediaries | Asian Development Bank \(adb.org\)](#).

<sup>354</sup> See [53140-001: Developing an Accountability Mechanism Framework for Financial Intermediaries \(adb.org\)](#).

<sup>355</sup> See Accountability Counsel, [News of Progress in the Movement to Advance Accountability for Chinese Overseas Finance](#) (6 Nov 2019).

<sup>356</sup> See BankTrack & Oxfam Australia, [Developing Effective Grievance Mechanisms in the Banking Sector](#) (2018).

<sup>357</sup> See BankTrack, [Seven Frequently Asked Questions from Banks on Grievance Mechanisms](#) (2018).

- ***DFI approval of high-risk sub-projects, and referral of higher-risk projects for DFI due diligence and monitoring;***
- ***referral of serious E&S incidents (including potential human rights abuses) to the DFI within a fixed time limit (such as a maximum of 3 days);***
- ***clear supervision requirements for the DFI, including site visits and/or third party monitoring for high-risk sub-projects;***
- ***clear requirements regarding stakeholder consultation in connection with client monitoring reports for sub-projects;***
- ***the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and***
- ***disclosure at the project site of the DFI's involvement in sub-projects, and of the existence of the DFI's IAM and project-level grievance mechanism, ensuring that this information clearly visible and understandable to affected communities.***

## **GAP 6: POLICY BASED LENDING INSTRUMENTS**

### **1. DEVELOPMENT POLICY FINANCING**

DFIs typically have a range of instruments for lending to sovereign governments. The World Bank's Development Policy Financing (DPF) provides credits, loans, grants or guarantees to a borrowing country through non-earmarked budget support, subject to the prior implementation of specified policy or regulatory reforms (called "prior actions"). DPF, also called Development Policy Lending (DPLs) or Policy Based Lending (PBLs), is a popular instrument with DFIs as well as client countries given its relative flexibility, quick disbursement into finance ministries, light administrative costs and the large volumes of financing involved. Subject to the concerns outlined below, DPLs may help to address systemic problems that lead to poor environmental or social outcomes at the investment project level.

#### **a) *Concerns with Existing Policies and Practices***

DPLs are discussed here for three main reasons:

- (i) **DPLs can have significant impacts – positive and negative – on human rights.**
  - DPLs may cover a wide range of sectoral reforms that directly impact human rights – health, education, justice, housing, food security, labor reforms, and so forth. The distributional impacts of DPLs may also (indirectly) affect many human rights, through changing access to services, impacts on social capital

and cohesion, and as a result of deregulation, privatization, and other policy conditions.<sup>358</sup>

- If done well, the analytical work underpinning DPLs should identify problems such as those highlighted above and propose appropriate mitigation measures.<sup>359</sup> But appropriate analysis is not always carried out, and human rights issues rarely seem to be included. Analytical resources to help understand impacts of policy reforms tend to be under-utilized in practice and, with some exceptions,<sup>360</sup> may not help to understand whether mitigation measures for those policy reforms are likely to be effective in practice. Moreover existing policies do not always adequately address *ex post* monitoring or evaluation requirements, and hence social and environmental impacts may not be identified, mitigated and remedied after a policy action is implemented.
- DPLs or other budget support operations provided to governments involved in wide scale human rights abuses may inadvertently reward those reliably accused of human rights violations, perpetuate exclusionary policies, and deepen the cycle of violence (See Box 56).

#### **Box 56: Case Box – Budget Support to Myanmar in 2020**

MDBs have been active in Myanmar since the reopening of the economy in 2012. However gross human rights violations in northern Rakhine State from 2017 to the present date, and alleged crimes against humanity and war crimes following the February 2021 military coup, have had significant (macro-critical) impacts on investor behaviour, third country sanctions policies, and development financing and procurement decisions, and call for heightened due diligence.

The September 2019 [report](#) of the UN Independent International Fact-Finding Mission on Myanmar (FFM) on "the economic interests of the Myanmar military" identified 133 businesses and affiliates across diverse sectors of the economy – from construction and gem extraction to manufacturing, insurance, tourism and banking – owned by two Tatmadaw conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), which in turn were owned and influenced by senior Tatmadaw leaders allegedly responsible for serious violations of international human rights and humanitarian law. The FFM underscored the importance of ensuring that external financing supports alternative SMEs unaffiliated with the two conglomerates and the Tatmadaw.

In September 2020 ADB approved a budget support operation, the COVID-19 Active Response and Expenditure Support program (CARES),<sup>361</sup> for Myanmar. The CARES Program for Myanmar was provided under ADB's COVID-19 Pandemic Response Option (CPRO) under the Countercyclical Support Facility, which is a targeted COVID-19 pandemic specific intervention with features modified from those

<sup>358</sup> See e.g. World Bank, Independent Evaluation Group (2015) [Managing E&S Risks in Development Policy Financing](#), p. 63: "Though the main effects of policy reforms will likely be positive, there is also the possibility of unintended negative effects, or "risks": a policy aimed at increasing investment in mining by adjusting royalty rates could lead to expanded mining with associated damage to landscapes and pollution of waterways; reduction of energy subsidies might place a financial burden on the poor. The significant E&S effects of policies can be indirect and long-term, as well as direct and short term." See also C. Mariotti, [The policy lending doctrine Development Policy Financing in the World Bank's COVID-19 response](#), EURODAD (Sept. 2021), p. 3.

<sup>359</sup> See e.g. World Bank & UNCEF, [Integrating a Child Focus into Poverty and Social Impact Analysis \(PSIA\)](#) (2011).

<sup>360</sup> For example, the ADB requests a matrix of social and environmental impacts and mitigation measures if a policy change is found to bring social or environmental risks.

<sup>361</sup> ADB, [COVID-19 Active Response and Emergency Support Program](#) (Sept. 2020).

applicable to a standard policy based lending. Support to SMEs was foreseen within this budget support operation. However under CPRO, safeguard impacts are evaluated based on the proposed government's COVID-19 pandemic response plan, with the focus on addressing the direct impacts of the COVID-19 pandemic, and are not based on specific activities, investments or expenditures, including the envisaged support to SMEs. Hence, the project was allocated only a "C" safeguards rating.

In this context, in OHCHR's view, it is important to consider how financing might benefit military-controlled companies identified in the FFM's report, in addition to the wider contextual risks in the country and the potential for high-volume, fast-disbursing financing to facilitate gross human rights violations. The extensive control of the Tatamadow over the national economy, and the possibility for financing of this kind to benefit actors credibly implicated in the commission of international crimes, would appear to warrant heightened due diligence and more contextual approach to E&S risk assessment.

As of January 2023, in the course of its review of its 2009 Safeguard Policy Statement, ADB was considering including a wider contextual risk analysis as part of safeguard impact assessment, which may factor in issues related to human rights in contexts such as these.

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

- With the exception of the ADB which applies its Safeguards to all lending,<sup>362</sup> other DFIs do not generally apply their Safeguards to DPLs. Within existing DPL policies there seem to be some potentially significant gaps<sup>363</sup> and less rigorous systems for reviewing the E&S impacts of these types of operations.
- In the absence of clear, specific Safeguard requirements for DPLs, E&S risk management is often left to national laws and policy frameworks which are often considerably weaker than the Safeguards of the leading DFIs.
- Given the complexity of DPLs, their associated reforms and monitoring and attribution of results, it is challenging to understand the extent to which prevention and mitigation steps have been effective.

**(iii) Accountability for DPLs:**

- A lack of participation and accountability is a key concern in connection with DPLs, given their scope and relative speed of disbursement and their potentially significant impact on a country's policy space.<sup>364</sup> The challenges to effective participation are compounded given the potentially diffuse E&S impacts of this type of operation. Additional capacity building and technical support may be required to enable stakeholders to engage meaningfully in understanding and providing feedback in relation to potential reforms. An evaluation in 2018 of the Bank's work on citizen engagement found, in a sample of DPO's reviewed, that when consultation did occur it focused mostly on the given country's national

<sup>362</sup> ADB Independent Evaluation Department, [Effectiveness of the 2009 Safeguard Policy Statement](#) (2020 (2020)), para. x. However the Myanmar example, discussed above (Box 56) raises questions about the robustness of ADB's approach.

<sup>363</sup> See e.g. H. Himberg, [Comparative Review of Multilateral Development Bank Safeguard Systems](#) (May 2015) pp.6-10; and IDB, [Environmental and Social Policy Framework](#) (2020), para. 4.8. The World Bank conducted a [DPL retrospective in 2021](#) covering the period 2016-2021 and sought [stakeholder reflections on the retrospective](#).

<sup>364</sup> Bretton Woods Project, [Development Policy Finance: Critical concerns surrounding accountability and outcomes for people and the climate](#) (March 2021).

development plan or poverty reduction strategy rather than the specific policy reforms at issue.<sup>365</sup>

- DPLs have sometimes been accompanied by project-level grievance mechanisms,<sup>366</sup> although these seem to be the exception to the rule and it is difficult to assess their impacts. There seem to be no specific policy requirements for grievance mechanisms for DPLs hence, unlike the case of investment projects, there may be fewer channels through which stakeholders may raise their concerns.
- IAMs, in some instances, are specifically authorised to receive complaints about DPLs.<sup>367</sup> However there can be numerous challenges in bringing complaints: (i) sophisticated conceptual and analytical work may be needed in order to understand whether policy reforms are likely to have a negative impact and whether mitigation steps proposed to address those impacts are likely to be effective; (ii) claims are likely to be based on anticipated harm, where the causal connection between policy and harm can be difficult to prove; and (iii) DPLs may disburse quickly, and sometimes in only one tranche, resulting in a short period of time in which complaints may be filed.

---

## 2. RESULTS BASED LENDING

Results-based lending (RBL) or programming for results (P4R) provides funding to the public sector for results accomplished rather than inputs delivered. Results are measured by disbursement-linked indicators (DLIs). The objective is to focus on outcomes and provide governments flexibility in how these are to be achieved. Subject to the concerns outlined below, RBL and P4R can be important in strengthening country systems and stimulating sector-wide improvements and institutional development.

### *a) Concerns with Existing Policies and Practices*

A number of **concerns** have been raised about RBL/PFR operations on procedural and substantive grounds:

- **Accountability:** Similar to DPLs, the quick disbursing nature of RBL/PFR loans makes it more challenging for affected stakeholders to be aware of and understand these operations, and to participate in consultations. As with DPLs, windows to bring complaints to IAMs may be very short.
- **Safeguards:** The question of if or how Safeguards should apply to this type of lending has been a matter of debate.<sup>368</sup> The World Bank's P4R programme uses a country's own institutions and processes. P4R operations are intended to provide "assurance that Bank financing is used appropriately and that the

---

<sup>365</sup> World Bank Independent Evaluation Department, [Engaging Citizens for Better Development Results](#) (2018), p. 18.

<sup>366</sup> See e.g. World Bank, [Global Review of Grievance Redress Mechanisms in World Bank Projects](#) (2014), p.10.

<sup>367</sup> For a striking example of the potential benefits of recourse to IAMs in this context see World Bank Inspection Panel, Investigation Report (Aug. 31, 2007), Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC), an investigation which reportedly contributed greatly to the recognition and protection of indigenous peoples' rights in the DRC.

<sup>368</sup> A. Gelb & N. Hashmi, [The Anatomy of Program-for-Results: An Approach to Results-Based Aid](#) (2014). Center for Global Development Working Paper No. 374.

program's environmental and social aspects are addressed."<sup>369</sup> It is common practice among MDBs to exclude from the scope of results-based lending activities that have potentially significant and irreversible impacts on the environment and affected people.<sup>370</sup> In ADB's case, such operations are subject to a Safeguards review. DLIs are linked to "actions or process results that are essential for strengthening RBL program performance, such as actions to improve ... social and environmental systems."

ADB has indicated that it will strengthen its Safeguard assessment process "to include detailed consideration of broader programmatic, institutional, and contextual risks for the RBL program."<sup>371</sup> This is an important commitment, given that programmatic areas – such as education, health, water, social protection, urban management, and housing – have direct human rights implications. For example the UN Special Rapporteur on the Right to Adequate Housing has drawn attention to concerns about impacts of DPLs on housing affordability, location, tenure security and the availability of services.<sup>372</sup> Moreover, even if sub-projects under an RBL operation are relatively small-scale, their cumulative impacts may be significant.<sup>373</sup> Dedicated Safeguards expertise would seem to be needed in order to effectively address these challenges.<sup>374</sup>

---

### 3. KEY RECOMMENDATIONS ON POLICY-BASED AND RESULTS-BASED LENDING

- ***DFI's Safeguards should specify that country and client systems may be used in whole or part provided that this is likely to address the risks and impacts of the project and the client system's requirements are substantially equivalent to those of the DFI's Safeguards and in line with international environmental and human rights standards.***
- ***International human rights law and information from UN human rights bodies should guide DFIs' assessments of the functional equivalence of country and client social and environmental management systems. The latter assessments should be publicly disclosed.***
- ***Development policy financing operations should be covered by Safeguards. E&S risk classification, assessment and management should be informed by contextual risk analysis, taking into account human rights information sources. Safeguard policies should specify appropriate consultation and accountability requirements connected***

<sup>369</sup> See [PforRbrochure.pdf \(worldbank.org\)](#).

<sup>370</sup> Examples include the World Bank, IDB and ADB, [Operations Manual – Policies and Procedures](#) (2021), Section D18. However some have criticized this approach as overly risk averse, resulting in missed opportunities to work with governments to improve systems. M. De Nevers, [New Approach to Managing Environmental and Social Risks in World Bank Programs](#), Center for Global Development Blog (Aug. 8, 2016).

<sup>371</sup> ADB, [Mainstreaming the Results-Based Lending for Programs](#) (2019).

<sup>372</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>373</sup> ADB Independent Evaluation Department, [Results-Based Lending at the Asian Development Bank: An Early Assessment](#) (2017).

<sup>374</sup> ADB Evaluation, [Effectiveness of the 2009 Safeguard Policy Statement](#) (2020) para. 124: "To date most of the emphasis has been on supporting RBL preparation and relatively little attention has been paid to safeguards during implementation. However, implementation of RBL programs needs to be different from the compliance-based approach used in stand-alone projects. Field-level monitoring and an independent verification agency with safeguard expertise is essential for all RBL programs that trigger safeguards."

***with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints.***

- ***Results-based lending operations should be covered by Safeguards and informed by contextual risk analysis, taking into account human rights information sources, at all stages of the project cycle. Safeguard policies should specify appropriate consultation and accountability requirements connected with these operations, and IAM admissibility requirements should be flexible enough to accommodate complaints. High risk operations should be excluded.***

## **GAP 7: USE OF COUNTRY SYSTEMS**

One of the notable recent trends in development financing is the increasing use by DFIs of national E&S risk management frameworks ("country systems" or "borrower frameworks"), in whole or part, instead of the DFI's own Safeguards. The logic of using national systems is intuitively compelling and forms part of a larger package of aid reforms embodied in the 2005 Paris Declaration on Aid Effectiveness and subsequent Global Partnership for Effective Development Co-operation.<sup>375</sup> The Declaration commits donor countries to "[u]se country systems and procedures to the maximum extent possible, and where use of country systems is not feasible, establish additional safeguards and measures in ways that strengthen rather than undermine country systems and procedures."<sup>376</sup> But striking a prudent balance between "using" and "strengthening" country systems can be challenging in practice.

In assessing the feasibility of using country systems, DFIs usually compare the E&S regulatory framework of a member country with the DFI's own Safeguard requirements (equivalence), and assess the country's implementation track record and capacity to apply the framework (acceptability).<sup>377</sup> But DFIs do not necessarily assess equivalence by the same metric. For example, some DFIs (such as IDB) stipulate an ostensible "functional equivalence" test,<sup>378</sup> whereas others require only that the borrower's framework "enable the project to achieve objectives materially consistent" with the DFI's Safeguards.<sup>379</sup> In either case, assessing equivalence by reference to "objectives" seems to be an inherently speculative exercise; in OHCHR's view, equivalence should be assessed in relation to the E&S standards themselves, rather than aspirational objectives.

### **a) *Concerns with Existing Policies and Practices***

There has been a clear tendency towards pragmatism insofar as the use of national E&S frameworks is concerned.<sup>380</sup> Pragmatism is of course not inherently troubling,

<sup>375</sup> See [Effective development co-operation - OECD](#).

<sup>376</sup> *Id.*

<sup>377</sup> ADB Evaluation Department, [Safeguards Operational Review: ADB Processes, Portfolio, Country Systems, and Financial Intermediaries](#) (2014). The World Bank's 2005 Operational Policy 4.00, on "Piloting the Use of Borrower Systems to Address E&S Safeguard Issues in Bank-Supported Projects" used this approach as has ADB.

<sup>378</sup> IDB, [Environmental and Social Policy Framework](#) (Sept. 2020), para 5.1: "The IDB may consider the use of the Borrower's E&S Framework relevant to the project, provided this is likely to address the risks and impacts of the project and will enable the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functional equivalence)."

<sup>379</sup> World Bank [Environmental and Social Framework](#), para. 9.

<sup>380</sup> ADB Evaluation, [Effectiveness of the 2009 Safeguard Policy Statement](#) (2020), p.xxxvi, para. 13; and p.111, para. 309.



however the uncritical use of country systems may raise a range of human rights **concerns**:

- **Country systems regulating social issues are often relatively weak.** For example in 2015 the AfDB carried out a detailed equivalence analysis between AfDB safeguards and six country systems. It concluded that (i) there was a strong correlation between each country's level of governance and socio-economic development and the performance of its E&S system; (ii) the degree of equivalence of country systems was particularly low for the policies on involuntary resettlement and working conditions; and (iii) there were no legal/regulatory provisions or local expertise on most social themes (gender, working conditions, vulnerable groups, etc).<sup>381</sup>
- For many social (including human rights) issues, the **commitment gap is often a larger problem than the capacity gap**. Human rights issues are embedded in power dynamics between people, government authorities, corporations and other stakeholders. Assessing and working to fill capacity gaps can be challenging. Identifying and addressing commitment gaps can be harder still.
- It is **unclear** if or how far DFIs' country system assessments include analysis of available **grievance redress mechanisms** and regulatory requirements pertaining to remediation and enforcement of remedial outcomes.<sup>382</sup> To the extent that DFIs are overlooking these issues, they may be foregoing potentially important opportunities to help State-based judicial and non-judicial mechanisms better deal with grievances common to DFI-supported projects within their jurisdiction.
- An **unduly transactional approach** to strengthening country systems through individual investment projects may lead to a disproportionate and limited focus on project approval requirements at the expense of addressing longer-term, systemic accountability challenges.
- It is unclear who would be responsible and what the consequences would be if a country system gap analysis is wrong and no Safeguards are applicable.

---

<sup>381</sup> African Development Bank Group, [Assessment of the use of "Country Systems" for E&S safeguards, and their implications for AfDB-financed operations in Africa](#) (2015). See also AfDB Independent Development Evaluation (Sept. 2019), *supra*, p.42; and University of Wyoming International Human Rights Law Clinic, [Social Trends Analysis for Selected Countries in Latin America and the Caribbean](#) (Apr. 20, 2020).

<sup>382</sup> There does seem to be some level of review in World Bank Program for Results reviews. See e.g. World Bank, [Program for Results: Two Year Review](#) (Mar. 17, 2015), pp. 28-29.

### **Box 57: Resource Box – Analyzing Country Legislation to Manage Social Risks of Investment Projects**

In 2022 the Community Insights Group published a report for the World Bank on country legislation to manage social risks of investment projects.<sup>383</sup> The report analyzed five countries: India, Thailand, Colombia, Canada and Australia, and focused on regulatory consistency and institutional coordination, mandatory requirements for broad coverage of social issues, public engagement and access to information, and mitigation and enhancement measures. The longlisting of candidate countries took into account recent legislative developments on business and human rights.<sup>384</sup> There was a reasonable comparability across the five countries under review; however FPIC recognition was uneven, Thailand (alone) had no specific requirements for assessing vulnerable groups or gender, and India was the only country which legislated to provide financial assistance and employment offers as part of mitigation actions for loss of livelihoods.

## **GAP 8: SUBSTANTIVE EMERGING GAPS IN SAFEGUARDS ARCHITECTURE**

This section highlights three emerging substantive issues that do not yet seem to be firmly implanted on the DFI Safeguard agenda, and another topic, climate change, which is rapidly moving to center stage. This is obviously not a comprehensive list; for example as more DFIs move into financing the "Blue Economy,"<sup>385</sup> it may be worth considering the extent to which Safeguards are adapted to addressing E&S risk management issues in the marine environment.

### **1. THE SOCIAL DIMENSIONS OF CLIMATE CHANGE**

#### ***a) Concerns with Existing Policies and Practices***

Climate change has already had a profound impact on a range of human rights.<sup>386</sup> The impact is often borne disproportionately by persons and communities already in vulnerable situations or facing discrimination on the grounds of geography, poverty, gender, age, disability, or cultural or ethnic background, among other factors, and who have historically contributed the least to greenhouse gas emissions.<sup>387</sup>

DFIs have taken a wide range of initiatives to address the climate change crisis but are under pressure to do more. Numerous DFIs have adopted climate change strategies, and in 2022 the EIB adopted a self-standing Environmental and Social Standard on climate change.<sup>388</sup> Others might be expected to follow suit, in order to give prominence

<sup>383</sup> CIG, [Country Legislation to Manage Social Risks of Investment Projects: Prepared for the World Bank](#) (June 22, 2022), [Country legislation to manage social risks of investment projects • Community Insights Group](#).

<sup>384</sup> On the subject of judicial remedy, the study noted that France's law on the Duty of Vigilance (2017) requires private companies to submit a vigilance plan, which must be publicly available, which provides an overview of human rights risk mapping, evaluation procedures, and any mitigation actions undertaken. Third parties may apply to court for an injunction to compel a company to implement its vigilance plan, and to seek damages where the non-compliance has caused loss.

<sup>385</sup> For example see the [joint ADB-EIB programme to support the blue economy](#).

<sup>386</sup> See [The impacts of climate change on the effective enjoyment of human rights | OHCHR](#).

<sup>387</sup> *Id.*

<sup>388</sup> EIB, [Social and Environmental Standards](#) (2022), Standard 5 – Climate Change.

to the issue, in contrast to the limited visibility and requirements pertaining to climate change in most existing Safeguards.

### ***b) Recommendations***

As DFIs develop Safeguards addressing climate change issues, there are several points to consider:

- **Include consideration of the social impacts of climate change.** This should include direct impacts of climate change on people, as well as the impacts of mitigation and adaptation measures, to ensure that the latter measures are rights-respecting.
- **Commit to a just transition.** In order to address climate change successfully, "net zero" transitions must be designed in a manner that is fair and seen to be fair, across regions, sectors, socioeconomic differences and generations. The "just transition" concept expresses the principle that people, and human rights, should be at the centre of the climate change transition. The just transition vision is a transformational one, aimed at creating opportunities as the world shifts to resource-efficient, inclusive economies through green technology, sustainable industry and transport, pollution reduction, and creating decent jobs in the process, and in doing so, addressing poverty and inequality. Several DFIs have already made explicit commitments along these lines. (See Box 58).<sup>389</sup>
- **Link Safeguard actions concerning climate change to requirements to address biodiversity, ecosystem services and pollution.** These "triple threats" to the environment should be linked in order to ensure that they are addressed coherently, given their cumulative impacts. From a human rights perspective it is important that impacts on ecosystem services are an integral part of due diligence.

#### ***Box 58: Emerging Practices - DFI Principles on Just Transition***

In advance of the Conference of the Parties to the UN Framework Convention on Climate Change in 2022, a group of multilateral DFIs developed a set of **Just Transition Principles** "to help guide MDB support for a just transition, and to ensure consistency, credibility, and transparency in their efforts."<sup>390</sup>

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

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

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

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

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

<sup>389</sup> [MDB Just Transition High-Level Principles.](#)

<sup>390</sup> [MDB Just Transition High-Level Principles.](#)

---

## 2. DIGITAL TECHNOLOGY

Digital technology is of critical importance in the global economy, and impacts upon people's lives positively as well as negatively, in a growing number of ways.<sup>391</sup>

Digitalization is becoming a central component of development, and it is critical to develop Safeguards which can identify and address the environmental, social and human rights impacts in this area.

The digital sector has enjoyed a mostly positive image to date, propelled by narratives of digital "leapfrogging", big data, digital inclusion and economic prosperity, and the power of data and digital technologies to transform lives. The presence of digital technologies in our lives is commonly portrayed as both desirable and inevitable. However the implications of digitalization are not always easy to grasp,<sup>392</sup> and digital transformations have brought a range of challenges ranging from governance, to use and misuse of new technologies that are becoming increasingly evident.

Where DFIs have begun to explicitly identify risks specific to digital projects, they have so far tended to focus on privacy, data protection, and cyber security, but seemingly on a relatively *ad hoc* basis. Among DFIs, there appear to have been scattered approaches to address different dimensions, but no overarching approaches to digital risks in projects, programmes and FIs financed.<sup>393</sup> For example, IFC has developed a draft Code of Conduct for Artificial Intelligence (AI), but this is not an official document of IFC nor a proposed new element of the IFC's Sustainability Framework. It is expressly targeted to AI applications, which are increasingly important, but not various other types of projects that also entail digital risks and impacts.<sup>394</sup>

### a) Concerns with Existing Policies and Practices

Digital dimensions of projects can generate a range of risks in relation to a wide range of human rights,<sup>395</sup> as noted in Box 59 below. The list of impacts below is not exhaustive, but illustrates the breadth of human rights that can be and are impacted by projects already being financed by DFIs, across the different phases of the data cycle (collection, storage, use/reuse). The list does not include the types of environmental impacts that current Safeguards might identify, such as energy use, water use, GHG emissions and e-waste disposal.

**Box 59: Resource Box – Human Rights Impacts in DFI Funded Projects with Digital Components**

- Discrimination, exposure to harm, and function creep from digital ID systems.<sup>396</sup>

---

<sup>391</sup> See generally OHCHR, [B-Tech Project](#).

<sup>392</sup> T. Dufva & M. Dufva, [Grasping the future of the digital society](#), Vol. 107 *Futures* (2019), pp.17-28.

<sup>393</sup> Some DFIs have policies on how their institutions process personal data, which is important, but they apply to the bank rather than clients. See for example, AIIB, [Policy on Personal Data Privacy](#) (2021).

<sup>394</sup> See G. Meyers & K. Nejkov, [Developing Artificial Intelligence Sustainably: Toward a Practical Code of Conduct for Disruptive Technologies](#), EMC Compass (March 2020).

<sup>395</sup> OHCHR expresses its thanks to Professors Graíne de Burca and Angelina Fisher and the NYU Law School's International Organizations Clinic for research and analysis underpinning this discussion. The Clinic's research covered projects financed by ADB, AIIB, EBRD, EIB and IDB.

<sup>396</sup> On the human rights risks of foundational digital ID systems in particular see NYU School of Law, Center for Human Rights and Global Justice, [Paving a Digital Road to Hell? A Primer on the Role of the World Bank and Global Networks in Promoting Digital ID](#) (June 2022).

- Exclusion by sensors of particular population groups (such as fingerprint sensors failing to register manual laborers, or facial recognition biases according to skin colour), exclusion bias in data standards or formats (for example, data collection through binary "male/female" gender classifications) that determine access to public services.
- Collective violations of the right to privacy (in addition to individual privacy) such as when sensor data is collated and used in ways that communities are not aware or would not approve of.
- Exclusion from public services due to inability, inaccessibility of connecting to mobile services.
- Gender gaps in data collection.
- Discriminatory biases built into algorithms, such as over-representation or underrepresentation and therefore invisibility of marginalized groups in certain data systems.
- Distortions, restrictions, and denial of freedom of expression through social media or speech-based platforms.
- Privacy breaches that in turn are an entry point for potential infringements of other human rights, as the data unlawfully obtained can reveal information that facilitates other human rights abuses, such as discrimination by gender or race, or even the imprisonment, torture or murder of dissidents or environmental or human rights defenders identified through digital surveillance.
- Abuses of facial recognition and biometric technology.
- Inaccuracy, discrimination and lack of agency arising from data sharing and combination for individual rating or assessment systems (e.g. credit checks, student grade systems, or health assessments).
- Real time government interception of data that is then misused for political purposes.
- Abridgement of freedom of expression due to internet shutdowns.
- Access to data by unauthorized parties<sup>397</sup>, lack of sufficient protection against cyberattacks.<sup>398</sup>
- Interference with the safety operation, efficiency, security, and drivers' behaviors due to cybersecurity attacks against transportation systems.
- Denial of the right of individuals to access health care itself, if such access is mediated through a digital platform that malfunctions or excludes those lacking the skills or appropriate equipment to access services, or excludes coverage on gender or cultural grounds.<sup>399</sup>

<sup>397</sup> V. Hordern, "Data Protection Compliance in the Age of Digital Health," *Eur. J. Of Health L.* 23, 248, 250 (2016) at 261.

<sup>398</sup> E. Vayena et al., "Digital Health: Meeting the Ethical and Policy Challenges," *Swiss Medical Weekly* 148, 3-4 (Jan. 16, 2018).

<sup>399</sup> NYU Law School, International Organizations Clinic, Memo to ADB, Digital Risk Case Study-Tonga: e-Government through Digital Health (2021), 55pp.

- Allowing for use and reuse of data by different actors for purposes different to those agreed to in the original project, including trading data in the marketplace.<sup>400</sup>
- Automation will have a direct impact on the unemployment of large masses of workers which could have widespread implications in developing economies where DFIs are active.
- Increasing further censorship of the press, and suppression of critical voices who are seeking to uphold accountability and transparency.
- Technology-facilitated GBV.

There are several reasons why further attention to the impacts of the digital dimensions of DFI-funded projects has become urgent.

**(i) Acknowledgment of digital risks is lacking:**

- **DFI digital strategies are not reflecting the risks involved:** Several DFIs have adopted strategic objectives and plans on improving digital infrastructure and digital services, indicating that this will be an area of increasing focus. Yet some of these plans do not acknowledge the digital risks involved at all, and others do so only briefly<sup>401</sup> or treat them as a reputational risk.<sup>402</sup> On the face of things, it is not clear that human rights considerations are being taken seriously in this context.
- **DFIs are funding policies that may ingrain digital risks and abuses for generations to come:** Some DFIs are increasingly involved in supporting member governments in developing regulatory frameworks for digital technologies. However given the increasing restrictions on digital rights,<sup>403</sup> including censorship, surveillance and restrictions on access, DFIs are likely to be under increasing pressure from some sovereign borrowers to accept, if not endorse, regulatory systems that limit or abridge the rights to freedom of expression, association and assembly and other vital human rights. Without clear policies and principles to guide regulatory work, DFI staff may inadvertently facilitate digital authoritarianism, contrary to international human rights law.
- **Systemic impacts of projects do not appear to be adequately considered:** In addition to policy work, DFIs are increasingly funding broad, system-level projects that extend across sectors, such as digitization of public administration, and funding of entire digital systems. Because of their breadth, system-based projects give the public or private sector recipient broad discretion about how the project will be implemented as well as how much information about the effects of digitalization will be disclosed to the public. Such projects may affect nearly every individual within the country, making everyone potentially vulnerable to some kind of harm.<sup>404</sup> Such projects by their nature fundamentally

<sup>400</sup> See e.g., B. Cyphers, [Google Says It Doesn't 'Sell' Your Data. Here's How The Company Shares, Monetizes, And Exploits It](#), (Mar. 19, 2020).

<sup>401</sup> See for example, EBRD, [The EBRD's approach to accelerating the digital transition, 2021-25](#) (2021).

<sup>402</sup> AIIB, [Digital Infrastructure Sector Strategy](#) (2020).

<sup>403</sup> See for example, Freedom House, [Freedom on the Net](#) (2021).

<sup>404</sup> See Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), [Digital Welfare States and Human Rights](#), para. 42 U.N. Doc A/74/493, (Oct. 11, 2019) (identifying widespread errors in Australia's "Robodebt" Program and similar harms in programs in the Netherlands, India, and Ireland). Widespread harm might also occur by the nature of disparities in "digital skills" where a large portion of the population lacks the skillset to engage with digital systems and services. *Id.* (para 47), highlighting

alter the relationship between the state and the public, and in doing so, may exert systemic and enduring impacts even beyond the effects of the digitization of discrete administrative functions.

The technologies themselves are often opaque regarding the type of data that is collected and how collection is done, how data is processed and analysed, and how it will be put to use, creating barriers to accountability and a potentially unreasonable burden of proof. Most impacts will not be obvious, even to the well-informed.<sup>405</sup> The lack of transparency in how and by whom digitalization is implemented and the opaque nature of technologies themselves (such as undisclosed algorithms, and non-transparent data collection and utilization) mean that even grave potential harms are not always immediately evident or easy to identify. These impacts can go well beyond the project level, and may trigger wider chilling effects on the freedoms of speech and assembly as highlighted below.

- **It is often assumed, without questioning, that digital is always the best option:** A strong sense of optimism seems to permeate most DFI digital strategies, implying that digital is invariably the best option. But this is not necessarily so. For example, while a digital health project may sound attractive on its face, in a lower income country with low digital skill levels, inadequate resources to maintain and service digital infrastructure once a DFI's support has ended, or limited contractual rights to do so, health funding may be more wisely spent on lower tech options such as improved primary health facilities. In-depth *ex ante* analysis is needed to determine what the best option is in any specific context.
  - **Digital components are increasingly integrated into a wide range of projects without necessarily considering the digital risks:** In addition to their digital technology projects, many other kinds of investment projects now include some (and often significant) digital components.<sup>406</sup> Digital technologies are particularly prevalent in projects in infrastructure, health, education, finance, and digital ID or public administration, and seem to be rising in other sectors, such as agriculture. Project teams in the latter areas also need policies, procedures and expertise to ensure they are identifying, assessing and working with clients to prevent and mitigate digital risks.
- (ii) **Current Safeguards, Procedures and Staffing are Not Appropriate to Addressing Risks**
- **Current Safeguards are ill-suited to addressing digital technology challenges.** Safeguards emerged from experience concerning projects with tangible physical footprints, such as dams, mines, and large-scale infrastructure, and to a great extent still reflect that legacy today. As a consequence, even the newest versions of Safeguards seem ill-suited to addressing E&S issues in digital projects. Safeguards may be able to deal with the environmental footprint of digital infrastructure, but likely not the energy and water demands of data

---

that 22% of citizens in the United Kingdom lacked digital skills necessary for daily life, potentially inhibiting that population from utilizing a digital welfare system.

<sup>405</sup> For example, information may be intercepted and result in harm later on, such as arbitrary detention and/or torture following an unlawful arrest.

<sup>406</sup> See [Digital Development Overview: Development news, research, data | World Bank](#). Projects that do not initially appear to include a digital element or to raise digital concerns, like agricultural projects, may in fact entail significant digital risks. See e.g. [Emergency Locust Response Program](#), employing digital surveillance technologies to track the movement of locusts across four west African countries.

centres and less tangible risks like threats to freedom of expression or inherent biases in source code.

- **Exclusion lists** do not appear to have been updated to take account of digital risks. By contrast, some cities are already beginning to place outright bans on the use of facial recognition technology.<sup>407</sup>
- **Current classification systems are ill-suited to assigning appropriate risk categorization.** Under most existing Safeguard systems, projects with potentially significant human rights impacts across large sectors of the population (such as projects concerning digital ID) may well be classified as low risk projects because they do not have a significant environmental footprint. The tendency to categorize information and telecommunications technology (ICT) projects as low risk, Category C projects is evident even in some of the more recent Safeguards.<sup>408</sup>
- The **absence of specific standards** against which digital risks are assessed, and the absence of any reference to international human rights standards, appears out of touch with the rising international attention to the importance of applying human rights safeguards in the digital space. There are numerous sets of principles and guidelines that have been developed to help balance the promise and perils of new technologies,<sup>409</sup> which could usefully be integrated into Safeguards.
- The **absence of guidance** on the **scope and types of risks** to be assessed, and importantly the **types of preventive and mitigation measures** that should be put in place, means that even if DFI staff and clients are motivated to address what is a very challenging and rapidly changing policy and regulatory environment, there may be comparatively little guidance to draw from.<sup>410</sup>
- The **temporal and spatial scope and scale of risks** associated with digital technologies, particularly those involved in the transformation of public administration systems, require a different approach to due diligence and risk assessment. Recent patterns of digital development raise serious concerns relating to the nature and scale of harms arising from the use and misuse of technology. Foundational digital ID systems have attracted particular criticism in this regard,<sup>411</sup> as have technologies based upon artificial intelligence. DFIs need specific policies about the types and uses of these technologies that they will and will not fund. Use of technologies in countries practicing intrusive surveillance and censorship should trigger rigorous reviews of regulatory gaps

---

<sup>407</sup> See e.g. K. Conger, R. Fausset, & S. F. Kovaleski, [San Francisco Bans Recognition Technology](#), (May 14, 2019); K. Clukey, [Social Networks Can't Go Into Credit Decisions Under N.Y. Ban](#), *Bloomberg Law* (Nov. 25, 2019).

<sup>408</sup> See US DFC [Environmental and Social Policy and Procedures](#) (July 2020), Section 2.6, which classifies "telecommunications projects not involving new physical infrastructure" as Category C, suggesting a focus only on the physical footprint of these projects rather than their broader connectivity purposes and associated risks and impacts.

<sup>409</sup> See e.g. the UN Secretary General's [Roadmap on Digital Cooperation](#) (2020); OHCHR, [B-Tech Project](#) portal; DIHR, [Guidance on Human Rights Impact Assessment of Digital Activities](#) (2020); DIHR, [Digital Rights Check for Development Finance](#); UN Secretary-General's [Guidance on Human Rights Due Diligence for Digital Technology Use](#) (2023); and see generally United Nations, [Human Rights and Digital Technology: Resource Hub](#).

<sup>410</sup> Cf. The World Bank developed a [handbook](#) on cybercrime that specifically references human rights considerations.

<sup>411</sup> NYU School of Law, Center for Human Rights and Global Justice, [Paving a Digital Road to Hell? A Primer on the Role of the World Bank and Global Networks in Promoting Digital ID](#) (June 2022).



and contextual risks. Even at the project level, new tools such as privacy impact assessments will be needed.

- There may often be shortfalls in **expertise on digital impacts** in E&S, finance and legal teams, and even in sectoral teams. Staff may inadvertently contribute to harms, and sometimes, widespread harms, through lack of awareness and/or attention to these issues.

(i) **A lack of accountability for digital harms**

- There appears to be a **lack of publicly disclosed information about digital dimensions** of projects. As noted above, some projects can have far-reaching consequences across entire populations, but such consequences do not always appear to be included in project descriptions, nor even basic information that might permit stakeholders to begin to understand the potential scope of projects with a digital footprint. Project descriptions are often not clear about the specifics of the project, the actors involved, or who will ultimately control any data that is collected, processed and analysed, and what decisions will be made on the basis of that data. This makes it impossible for those who may be affected to first understand if they are at risk, and then to understand whether proposed measures to prevent these risks are adequate.
- Given the relative lack of clarity regarding the scope of many digital tech projects, **affected stakeholders may be completely excluded from consultations and from Safeguard protection**. Even to the extent that consultation occurs, there is currently **insufficient protection for stakeholders who use digital technologies to engage in those consultations**. This is not a new problem: some of the earliest concerns about the use of digital technologies arose in the context of governments requesting access to the identities and data of political opponents and dissidents.<sup>412</sup> However, even though DFIs and IAMS have recently adopted statements, policy commitments and strengthened Safeguards on reprisals issues, the online dimension does not yet seem to be adequately addressed.
- The increasing prominence of digital technologies in a wide range of projects, and the increasing focus on funding digital infrastructure and services, including across whole systems, raises the question of how the environmental, social and particularly human rights impacts of these types of projects are **assessed, prevented, mitigated and monitored in DFI funded projects**. The challenges seem greater still in connection with projects funded through FIs. If human rights risks are not being explicitly considered, captured in ESAPs and disclosed, it also raises profound questions about how clients and DFIs can be **held accountable for potential negative impacts**.
- **Few client grievance mechanisms** are well-suited to address grievances concerning human rights risks and impacts related to digital technologies. This is the case even for companies specifically in the digital technology sector, which have been under increasing scrutiny to address and provide remedies for harms.<sup>413</sup>

---

<sup>412</sup> For example, in 2007, US Congress investigated Yahoo!'s role in the arrest of journalist Shi Tao. Though it initially denied involvement, Yahoo! was found to have disclosed details to the Chinese government and set up a human rights fund trust fund in 2007 as part of a settlement to address its involvement. See [Yahoo! lawsuit \(re China\) - Business & Human Rights Resource Centre \(business-humanrights.org\)](#).

<sup>413</sup> OHCHR B-Tech project, Foundational Paper on [Access to remedy and the technology sector](#) (2021).

- Further to the policy gaps mentioned above, **IAM staff generally lack expertise** to assess grievances concerning impacts related to digital technologies.

#### ***b) Emerging Good Practices and Recommendations***

It is difficult to find much in the way of "good practice," insofar as DFI Safeguards for digital risks are concerned, although there is an emerging body of operationally relevant guidance material to draw from (Box 60). This would seem to be a particularly pressing gap to fill, in OHCHR's view, including on the important issues of *downstream* due diligence and of *remedy* for the (sometimes) diffuse and delayed human rights impacts of digital risk projects. In terms of Safeguards architecture, a stand-alone Safeguard on digital risks might be considered, at least in the short term, pending the consolidation of effective risk management approaches in this area.

#### ***Box 60: Resource Box – Digital Rights Check for DFIs***

The Danish Institute of Human Rights, supported by GIZ, has developed a "Digital Rights Check for Development Finance," a practical resource designed to help DFIs and their clients assess and address human rights impacts of digital activities.<sup>414</sup>

### **3. LAND TRANSACTIONS**

DFIs' Safeguards have for a long time addressed involuntary land transactions and involuntary resettlement. Land is a vital asset, critical for human rights and sustainable development, and many DFI projects affect land access and land rights with potential impacts on a wide range of human rights.<sup>415</sup> The multiple functions and uses of land as a source of food, water livelihoods and other resources, its importance for cultural and social identity, peace and economic security, and the impoverishment risks that often result from involuntary resettlement,<sup>416</sup> underscore the need for broad-ranging and robust Safeguards. Resettlement has been a consistent focus of complaints to IAMs<sup>417</sup> and a source of social tension and violent conflict. This Section focuses on one particular gap in most DFIs' Safeguards, pertaining to land transactions. The analysis in the Annex highlights additional gaps in IFC PS 5 on Land Acquisition and Involuntary Resettlement that may be relevant to other DFIs as well.

#### ***a) Concerns with Existing Policies and Practices***

Presently, most Safeguards cover a limited set of land transactions and have not been expanded in scope to account for the changing dynamics and wider range of land transactions that may impact negatively on people's lives and rights. Even though most Safeguards dealing with land omit the adjective "involuntary" from the types of land transactions covered, they tend to cover only those land acquisitions or transactions occurring through expropriation or under the threat of expropriation. All other transactions, where the buyer cannot resort to expropriation, tend to be regarded as a "willing buyer-willing seller" situation.<sup>418</sup> However this binary approach to land

<sup>414</sup> DIHR, [Digital Rights Check for Development Finance](#). See also the references at footnote 409, above.

<sup>415</sup> On the human rights dimensions of land see [OHCHR | OHCHR and land and human rights](#).

<sup>416</sup> M. Cernea, [Impoverishment Risks and Reconstruction: A Model for Population Displacement and Resettlement](#) (2002).

<sup>417</sup> According to the [Accountability Console](#) (a database of community complaints filed with DFIs' independent accountability mechanisms), as of December 2021, there were 341 complaints concerning displacement across the multilateral DFIs, out of a total of 1525 complaints.

<sup>418</sup> See World Bank, [Guidance Note For Borrowers, ESS 5 – Land Acquisition, Restrictions On Land Use And Involuntary Resettlement](#) (June 2018): "It is important to note that "negotiated settlement" is not

transactions masks the many other ways, short of expropriation, that governments or private sector actors may exert pressure to compel a sale. It may also mask vulnerabilities and discrimination faced by project affected peoples which, were they taken into account, may call into question the "willing seller" assumption. Safeguards do not generally require a sufficiently specific assessment of the "willingness" of sellers, or may be unclear on this.

Yet such assessments are surely vital in view of the growing competition over land and natural resources and the prevalence of non-registered or informal interests in land, falling short of the illegality threshold. Land acquisitions, whether small or large-scale, have grown at an unprecedented rate in emerging markets, in response to global demand for food and other natural resources. Formal legal recognition and protection of land title is limited in many emerging markets. National legal systems frequently do not protect or recognize the full range of customary claims to land and resources and various different forms of tenure such as leasehold, access rights, herders rights, customary rights, indigenous people's rights.<sup>419</sup> This results in significant, recurring challenges for communities as well as for companies seeking to manage land in a responsible way.<sup>420</sup> A number of DFIs have investigated and developed guidance on land transactions outside the scope of current Safeguards,<sup>421</sup> and certain IAMs have published advisory notes or lessons learned reports on land issues based on their reviews of complaints.<sup>422</sup>

Since the adoption of the IFC PS in 2012, the normative landscape on land has evolved quite significantly. The adoption of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) is a particularly notable development in this regard.<sup>423</sup> The VGGT is the first comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible land governance. IFC PS 5 converges to a significant extent with the VGGT,<sup>424</sup> and both the IFC PS and the VGGT extend protection to land and natural resource claims without the need to demonstrate full ownership or formal recognized under national law.<sup>425</sup> The VGGT and current

---

the same as the voluntary market transactions, described in paragraph 6 of ESS5, to which ESS5 does not apply. For land acquisition to be considered a voluntary "willing buyer/willing seller" arrangement, the owners of the land must be able to refuse to sell, without the threat of compulsory acquisition." GN 4.7.

<sup>419</sup> See UNIDROIT & IFAD, [UNIDROIT / IFAD Legal Guide on Agricultural Land Investment Contracts](#) (2021).

<sup>420</sup> CAO Advisory Series: [Land](#) (2015).

<sup>421</sup> See e.g. the IFC co-convener [Interlaken Group](#), CDC and DEG, [A guidance note on managing legacy land issues in agribusiness investments](#) (2016).

<sup>422</sup> See for example, CAO Advisory Series: [Land](#) (2015); and Inspection Panel, [Emerging Lessons Series No 1: Involuntary Resettlement](#) (2016).

<sup>423</sup> The VGGT were endorsed unanimously in 2012 by the Committee on World Food Security (CFS), the leading United Nations body on matters of food security.

<sup>424</sup> L. Cotula, T. Berger & B. Schwartz, [Are development finance institutions equipped to address land rights issues? A stocktake of practices in agriculture](#), LEGEND (2019).

<sup>425</sup> However the approaches they take to doing so are different. The VGGT call for the recognition, respect and protection of all 'legitimate tenure rights' – that is, all land and resource rights that are perceived to be socially legitimate in a given context, even if those rights are not recognized by law. It is possible that the two approaches could result in similar outcomes but as the VGGT are broader, there may be differences. L. Cotula, [Land rights and investments: Why the IFC Performance Standards are not enough: A comparison with the Voluntary Guidelines on the Responsible Governance of Tenure](#), LEGEND (2019). For example, references to state legal frameworks (PS 5, para. 17) could disadvantage minority groups whose claims to land may not be fully recognized by national law but are nevertheless legitimate in the given context. See also M. Windfuhr, [Safeguarding Human Rights in Land Related Investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework](#), *German Institute for Human Rights* (2017).

understandings of tenure have moved beyond a binary, legal versus non-legal rights approach, to recognize that there can be a variety of legitimate tenure rights in any given situation that should be acknowledged and recognized, and as appropriate, remedied.

### ***b) Emerging Good Practices and Recommendations***

OHCHR recognizes that land is a challenging issue, often intertwined with politics, natural resource conflicts, environmental stresses, and complex governance challenges including corruption. If DFI mandates and SDG 1<sup>426</sup> are to be achieved, it is critical to acknowledge and address the political economy of land and the many obstacles faced by tenure rights holders that extend beyond expropriation. While recognising the very positive impacts of existing DFI Safeguards in this area to date, it would seem timely to consider extending the scope of Safeguards to a wider range of land transactions in DFI-funded projects. The following measures might be considered in this regard:

- **Bring all transactions involving land and affecting access to natural resources within the scope of Safeguards**, in addition to those involving state backed expropriation. This should also include more specific consideration of legacy transactions. Consider the linkages and coherence among different Safeguards that affect access to and tenure over land and natural resources; for example, not only Safeguards on land acquisition and resettlement, but also those on biodiversity and sustainable management of living resources, indigenous peoples and community health and safety.
- **Require more nuanced and detailed land tenure assessments**, based on the particular context and land economy, to identify the diversity of tenure rights, including traditional, customary and indigenous tenure rights, and ownership rights across the continuum of tenure forms. Particular attention should be paid to projects that could directly or indirectly weaken, restrict or infringe the tenure rights and arrangements of people and communities with land and natural resource-based livelihoods, including smallholder food producers, fisher folk, herders and forest dwellers.<sup>427</sup>
- **Consider the wider impacts of DFI transactions concerning customary land tenure systems**, which may sometimes be temporary or rotational in nature. Customary landholders may become incentivized to retract allocation rights, and individualize and commodify tracts of land that have acquired a high monetary value as a result of the DFI funded project, which may undermine

---

<sup>426</sup> The aims of SDG 1 include income poverty eradication and strengthening secure tenure rights. Indicator 1.4.2, for Goal 1, is the "Proportion of total adult population with secure tenure rights to land, (a) with legally recognized documentation, and (b) who perceive their rights to land as secure, by sex and type of tenure." This indicator is also related to Goal 5, 5.a.1 (access to agricultural land) and 5.a.2 (legal framework for land governance). "Tenure security also matters for Goal 2, Target 2.3 (2.3.1 and 2.3.2 addressing smallholder farmers; Target 2.4 (2.4.1 on agricultural area), to Goal 11, to target 11.1 (access to affordable housing/upgrading slums) and target 11.3 (sustainable urbanization/settlement planning). Land tenure also influences land use and is thus key to achieving Goal 14 (b) to provide access to small-scale fishers and marine resources, and to Goal 15 on the sustainable use of land and natural resources. Similarly, land is a significant source of conflict, and thus also matters for Goal 16 for promoting peace and inclusive societies and institutions." See [Metadata-01-04-02.pdf \(un.org\)](#), and in the context of gender equality see [RealizingWomensRightstoLand\\_2ndedition.pdf \(ohchr.org\)](#).

<sup>427</sup> Oxfam & Inclusive Development International, [A Proposal for New World Bank Safeguards on Tenure of Land, Housing and Natural Resources](#) (2013).

customary tenure arrangements, threaten food security and increase inequalities in access to land and resources.<sup>428</sup>

- **Require procedural checks** in relation to the "willing buyer willing seller" assumption. This would help to ensure that transactions are validly negotiated, and that the right *not* to proceed with the transaction (when this is claimed) is respected. This would entail an assessment of parties' access to information, access to legal and technical support, reprisal risk checks,<sup>429</sup> and the availability of effective grievance mechanisms. Many of these dimensions are already included in the World Bank's ESSF 5, which in OHCHR's view may serve as a precedent and stimulus for wider progress on these issues.<sup>430</sup>
- **Recognize that there may be a need for a sliding scale of requirements tailored to particular transactions and situations**; for example, minimal checks would suffice where there is an active land market, and more detailed requirements should apply in situations of large-scale acquisitions in rural settings, and in relation to acquisitions from marginalized groups, which could also require third-party verification.
- Provide for **capacity building or legal and technical support** to communities to strengthen independence in negotiations.

**Box 61: Emerging Practices – Recognising the Need to Address the "Voluntariness" of Voluntary Land Transactions**

EIB Standard 6 – Involuntary Resettlement (2022), para 8, notes: "This Standard does not apply to resettlement resulting from voluntary land transactions conducted with integrity, accountability, efficiency and transparency, and which are free of coercion, intimidation, fraud and/or malfeasance."<sup>431</sup> For projects outside the EU, the EIB Standard usefully requires projects to "comply with any obligations arising from the applicable national legislation and international human rights instruments."

---

## 4. USERS OF PROJECT SERVICES AND PRODUCTS

### a) Concerns with Existing Policies and Practices

The UNGPs and RBC standards call for risk-based due diligence throughout the value chain, not only the (upstream) supply chain. However Safeguards have generally not focused to any great extent on the users of products and services financed by DFIs. Definitions of "stakeholders" do not tend to specifically include users, customers or consumers.<sup>432</sup>

---

<sup>428</sup> N. Bugalski & D. Pred, [Safeguarding Tenure: Lessons From Cambodia And Papua New Guinea For The World Bank Safeguards Review](#), (2013).

<sup>429</sup> See e.g. reprisal checks in the African Development Bank IAM's revised [Operating Rules and Procedures](#) (2021), para. 29.

<sup>430</sup> [World Bank Environmental and Social Framework, ESS 5](#), para. 6 and footnote 168.

<sup>431</sup> [Environmental and Social Standards](#) (2022), Standard 6, para. 15.

<sup>432</sup> See for example, IDB [Environmental and Social Policy Framework](#), Glossary: "Stakeholder refers to individuals, or groups, including local, downstream, and transboundary communities, who (i) are affected or likely to be affected by the project ("project-affected people") and (ii) may have an interest in the project ("other stakeholders")."

- (i) As a result, there are potentially a **wide range of users** of DFI-financed products and services who are **not being adequately considered** in DFI financing. These include the following categories:
- **Consumers of products** made within the scope of the project. DFI Safeguards have commonly addressed occupational health and safety (OHS) of workers employed, and to some extent contracted workers and workers in the supply chain of a DFI-funded project. But Safeguards have not generally addressed the health and safety of users and consumers of the products financed.<sup>433</sup>
  - **Consumers of services** offered by the project. **Digital consumers**, in particular, will become an increasingly important stakeholder group. Digital transformations have moved ever more commerce online, ushering in a whole new set of challenges to ensure that digital market places are safe for consumers, and are trusted and used.
  - **Consumers of financial services.** DFIs often have programmes on financial inclusion. Digital solutions form an increasingly important part of the financial inclusion agenda,<sup>434</sup> with the risk factors that this implies.
  - **Users of public services, including health, education, social security, infrastructure and transport.** There are many ways in which investment projects for basic services can impact negatively on human rights of users and consumers (see Box 62).
  - **Individuals and microenterprises contractually bound by projects.** Projects financed by a DFI may rely on a wide range of individuals or microenterprises contracted by or purchasing from the project that provide income on which the project relies. Examples include small-holder farmers contracted as part of an agricultural project, small-scale vendors in water or electricity services projects, small-scale vendors selling ICT services such as SIM cards in ICT projects, and so forth.
- (ii) The **lack of attention to users and consumers in Safeguards** raises a range of human rights concerns including:
- **There are no specific standards** for judging whether users are being treated fairly, being discriminated against, or excluded from services. Safeguards and legal agreements require at a minimum compliance with national law, but national law may not cover consumer protection laws, or may be weak or limited in scope, or may not cover affected population groups or those contracting with the client.
  - There may be **inadequate consideration of financial impact on users, consumers and contractors.** Funding for public services is commonly accompanied by economic studies that look at users' ability to pay, as a main source of income for a project, modelling different pricing scenarios. Credit and legal assessments are usually used to review the client's business in order to understand risks of non-repayment to the DFI. However what may be missing is a review of legal or other risks to parties with whom a project contracts, such as microentrepreneurs, small scale farmers or other individuals, who may be adversely affected by early termination of a project.

---

<sup>433</sup> See e.g. World Bank Group [Environmental, Health, and Safety General Guidelines](#) (2007), which includes a welcome focus on worker health and safety and community health and safety, but not on consumer safety.

<sup>434</sup> See e.g. ADB, [Third Asia Finance Forum: The Future of Inclusive Finance](#) (Nov. 4-7, 2019).

**Box 62: Resource Box – OHCHR & Henrich Boell Foundation – [The Other Infrastructure Gap: Sustainability](#)**

DFI Safeguards have traditionally focused on physical impacts on workers, communities and the environment at or around the project footprint, but less so the potentially complex infrastructure-related impacts on users of infrastructure, or in relation to taxpayers and the population at large. The question of user fees is a notable example, an issue central to socio-economic rights. Negative impacts can occur at the micro-level, where pricing of services or infrastructure use is unaffordable or discriminatory, or at the macro-level as a result of inappropriate (and sometimes ideologically driven) financing arrangements or perverse financial incentives. Governments often grant upfront incentives to the private sector, such as subsidies or guaranteed fixed or minimum financial returns, for infrastructure contracts, as well as guarantees at the back end to private operators, without disclosing the contingent liabilities incurred. Unsolicited bids, which are not uncommon, may eliminate potential efficiencies from competition altogether. Moreover, once concluded, Public Private Partnership (PPP) contracts frequently involve further renegotiations, which may result in rate increases that negatively affect service users.<sup>435</sup> An ideological commitment to PPPs is not supported by evidence<sup>436</sup> and can impact in profoundly negative ways for infrastructure users and taxpayers.

- There is frequently a **lack of expertise** on these dimensions of transactions, given that they have not yet been given regular attention.
- There is frequently a **lack of contract transparency**, even for contracts for public services.
- There may be **shortcomings in how DFIs account for development impacts**. Development impacts typically focus on the positive impacts for society, such as kilometres of track laid rather than consumers served.

**b) [Emerging Good Practices and Recommendations](#)**

There do appear to be a number of good practices to build upon, with the goal of ensuring that users and consumers' rights are included within the scope of Safeguards.

- **Access rights for persons with disabilities:** Some Safeguards contain requirements to design buildings for universal access, for the benefit of persons with disabilities.

**Box 63: Emerging Practices – Universal Access for Users with Disabilities**

**IFC PS4 & IDB, E&S E&S standard 4:** "When new buildings and structures are accessed by members of the public, the Borrower will consider incremental risks of the public's potential exposure to operational accidents and/or natural hazards, and will be consistent with the principles of universal access. Structural elements will be designed and constructed by competent professionals and certified or approved by competent authorities or professionals."

<sup>435</sup> *Id.*

<sup>436</sup> See e.g. New York University School of Law, Center for Human Rights and Global Justice, [Human Rights and Privatization Project](#).

- Some DFIs have **principles for consumers of financial services**, particularly when providing micro finance. These cover consumer protection for the most vulnerable clients of financial institutions.<sup>437</sup>
- IFC has encouraged **contract transparency** for public service infrastructure projects (See Box 64). However, this does not seem to have been followed by other DFIs, nor does it appear to have been made legally binding or significantly improved contract transparency. In OHCHR's view, public service contracts should be disclosed as a matter of default, with very limited exceptions for the excision of commercially sensitive information.

**Box 64: Emerging Practices - Public Services Contracts**

The IFC Sustainability Policy (2012): "Infrastructure Projects 53. When IFC invests in projects involving the final delivery of essential services, such as the retail distribution of water, electricity, piped gas, and telecommunications, to the general public under monopoly conditions, IFC encourages the public disclosure of information relating to household tariffs and tariff adjustment mechanisms, service standards, investment obligations, and the form and extent of any ongoing government support. If IFC is financing the privatization of such distribution services, IFC also encourages the public disclosure of concession fees or privatization proceeds. Such disclosures may be made by the responsible government entity (such as the relevant regulatory authority) or by the client."<sup>438</sup>

Growing attention to consumer protection and to the human rights of downstream users in global value chains<sup>439</sup> should strengthen the case for their inclusion in future Safeguard revisions, through means such as the following:

- Incorporating **international consumer protection standards**, such as the [United Nations Guidelines for Consumer Protection \(UNGCP\)](#), ISO standards, and the OECD Guidelines chapter on Consumer Interests.
- Incorporating the **full range of users** of goods and services into relevant definitions, requirements and processes covered by Safeguards.
- Requiring that any **financial intermediary** providing financial services to the public should comply with basic **consumer protection rules**.
- Reinforcing attention to access to not only buildings but other infrastructure used by the public, as well as access to services for **persons with disabilities**.
- Developing analytical tools to **review risks to micro- and small-scale entrepreneurs** who invest their own funds in order to secure a contract with the client. Such reviews should address how risks of vulnerable entrepreneurs can be mitigated, particularly if the project is terminated early, leaving them with debt as well as the lack of any promised source of revenue through contracting with the project. This would be particularly important where the client is transacting with individuals who are not in a position to judge the risks for themselves. This is a corollary to measuring development benefits; that is to say, ensuring that those intended to be the beneficiaries of DFI funded projects are not made worse off due to bankruptcy, early termination of a project or early DFI withdrawal.

<sup>437</sup> [Launching The Client Protection Pathway Cerise \(cerise-spm.org\)](#).

<sup>438</sup> IFC [Sustainability Policy](#) (2012), para. 53.

<sup>439</sup> See OHCHR, [Mandating Downstream Human Rights Due Diligence](#) (Sept. 13, 2022), and Boxes 33-36 in this Study.



- Provide **support to smallholder farmers and other microentrepreneurs** in negotiating the terms of contracts and the processes for monitoring compliance by companies with their contractual obligations.<sup>440</sup>

---

## 5. KEY RECOMMENDATIONS TO ADDRESS SUBSTANTIVE GAPS

- ***Safeguards should address the impacts of climate change on people, including the human rights impacts of climate change mitigation and adaptation measures.***
- ***In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.***
- ***Safeguards should address a wider range of land transactions than those occurring through expropriation or under the threat of expropriation. Any "willing buyer-willing seller" exceptions should be closely scrutinised and take into account asymmetrical power relationships and discrimination and vulnerabilities of prospective sellers.***
- ***Land tenure assessments should address the full range of tenure rights applicable in a given context, including traditional, customary and indigenous tenure rights, as well as formal ownership rights, taking into account relevant international standards including the [Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#).***
- ***Safeguard policies' definitions of "stakeholder" should include users and consumers of products, facilities or services associated with the DFI-supported project. Safeguard requirements should address E&S risks of users and consumers, and should explicitly take into account relevant international consumer protection standards such as the [United Nations Guidelines for Consumer Protection \(UNGCP\)](#), ISO standards, and the [OECD Guidelines chapter on Consumer Interests](#).***

---

<sup>440</sup> N. Bugalski & D. Pred, [Safeguarding Tenure: Lessons From Cambodia And Papua New Guinea For The World Bank Safeguards Review](#) (2013), p. 15

## ANNEX – BENCHMARKING OF IFC PERFORMANCE STANDARDS AGAINST HUMAN RIGHTS STANDARDS<sup>441</sup>

**Background:** The IFC Performance Standards (PS) are used by IFC as well as many DFIs (multilateral and bilateral), OECD Export Credit Agencies (ECAs), and Equator Principle financial institutions. Many more financial institutions (FIs) and organizations use the PS informally.<sup>442</sup> The IFC PS were well ahead of market expectations and global standards for the private sector at the time of their first adoption in 2006 and when updated in 2012. However a lot has happened since then.

**Purpose:** The 2012 update of IFC PS occurred at same time as the UN Guiding Principles on Business and Human Rights (UNGPs) were adopted. The intervening ten years have brought much more experience, policy guidance and further normative and regulatory developments at global and national levels, along with strengthened expectations that FIs (including DFIs) should respect human rights. Hence it seems timely to consider the extent to which the PS align with human rights standards, including but not limited to the UNGPs, and where potential gaps or weaknesses may be.

This Annex provides a focused analysis of the extent to which human rights standards have explicitly been integrated in the IFC PS, or are otherwise substantively aligned with human rights. As with the main body of the Study, the analysis below is not exhaustive but reflects OHCHR's sense of the issues and areas where strengthening of PS policies and practice may be most needed and make the greatest practical contribution to risk management and improving project outcomes.

The analysis is intended to help DFIs using the IFC PS to understand areas of alignment as well as gaps with human rights standards, and thereby strengthen their own policies, due diligence and E&S risk management procedures. At least indirectly, it is hoped that the analysis might contribute to the development of a coherent overall body of standards to which DFIs' clients are subject.

**Methodology:** The analysis focuses on a textual review of the IFC PS which contain requirements for clients, rather than IFC's responsibilities which are covered in the Sustainability Policy. Due to resource constraints, it does not include a review of the IFC Guidance Notes (GN) except in specific instances where particular provisions either help to interpret ambiguities in the PS or reveal how the PS are applied in practice.<sup>443</sup>

### SUMMARY OF POSITIVE ASPECTS AND GAPS

The first iteration of the IFC PS was adopted in 2006, and was updated in 2012. The latter update was accompanied by a number of human rights analyses including a comparison of the PS with the UNGPs.<sup>444</sup> The IFC PS address human rights issues in a number of ways, to a greater extent than a simple word-search for the term "human

<sup>441</sup> OHCHR gratefully acknowledges conversations with IFC and inputs to this analysis from the Danish Institute for Human Rights (DIHR) and OECD's Responsible Business Conduct Center.

<sup>442</sup> For example, the [Blue Economy Finance Principles](#) build on the IFC Performance Standards.

<sup>443</sup> The Guidance Notes that accompany each IFC PS provide clarifications and additional guidance on the interpretation and application of the PS. The [IFC Guidance Notes](#) total 273 pages.

<sup>444</sup> See [The International Bill of Rights and the IFC Sustainability Framework](#) (2012) and [UN Guiding Principles on Business and Human Rights and IFC Sustainability Framework](#) (2012). The latter analyses are focused on general thematic coverage and exploration of analogous risk management concepts, and do not purport to be rigorous gap analyses against international human rights standards and the UNGPs.

rights" would indicate. The PS address E&S risks and impacts on a range of issues, many of which correspond to human rights protected under international law.

#### **a) Positive Dimensions**

The positive aspects of the PS in OHCHR's view include the following, subject to the important caveat that even if the PS address E&S issues corresponding to particular human rights, they do not necessarily do so accurately or comprehensively. The fact that a PS deals with the *subject matter* of a given human right does not necessarily mean that the *content* is aligned or that the full scope of the human right is covered (as will be elaborated on in the detailed analysis section below).

Subject to the above caveat, areas of thematic overlap between the PS and human rights include the following:

- PS 1 notes in the Introduction that "businesses should respect human rights" and that "[e]ach of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations."
- PS 1 requires clients to put in place policies and environmental and social management systems (ESMS). Given that the development of the UNGPs was informed by international practices concerning ESMSs, there are clear parallels between PS 1 and the UNGPs.<sup>445</sup>
- PS 1 requires clients to put in place a grievance mechanism that does not interfere with access to judicial or administrative remedies.
- PS 1 requires ongoing stakeholder engagement commensurate to a project's risks and impacts, and subsequent PS include more specific requirements concerning stakeholder engagement.
- PS 2 addresses certain human rights of workers (labor rights).
- PS 4 covers various dimensions of community health, safety and security.
- PS 7 addresses Indigenous Peoples and their rights.

In addition, IFC has developed guidance notes and statements on a range of important human rights issues, including managing risks of security forces,<sup>446</sup> modern slavery<sup>447</sup> and gender-based violence,<sup>448</sup> and has adopted a Position Statement<sup>449</sup> and, with IDB Invest, a Good Practice Note on retaliation.<sup>450</sup>

#### **b) Gaps**

In OHCHR's view, the IFC PS provide a solid foundation for addressing human rights concerns in project risk management in line with business and human rights standards

---

<sup>445</sup> It may be interesting to note that the original (2006) version of the IFC PS contained this requirement, prior to the development of the UNGPs, based on long-standing environmental and social impact management practice. The UNGPs drew upon this body of practice.

<sup>446</sup> IFC, [Good Practice Handbook on the Use of Security Forces: Assessing and Managing Risks and Impacts](#) (2017).

<sup>447</sup> IFC, IFC, CDC, EBRD *et al.*, [Good Practice Note on Managing Risks Associated with Modern Slavery](#) (2018).

<sup>448</sup> IFC, EBRD, CDC, [Addressing Gender-Based Violence and Harassment: Emerging Good Practice for the Private Sector](#) (undated).

<sup>449</sup> [IFC Position Statement on Retaliation Against Civil Society and Project Stakeholders](#) (2018).

<sup>450</sup> IFC, IDB Invest, [Good Practice Note for the Private Sector: Addressing Risks of Retaliation Against Project Stakeholders](#) (2021).

but do not do so comprehensively. OHCHR would invite consideration of the following factors:

Compared to the UNGPs:

- The PS do not *require* clients to respect human rights, nor do they define or require human rights due diligence by clients. They do refer to the responsibility of businesses to respect human rights but this is not accompanied by a reference to the UNGPs, hence it is not clear what that responsibility entails.
- The suggestion that specific human rights due diligence (HRDD) "may be appropriate" in "limited, high-risk circumstances" (which are not defined)<sup>451</sup> implies that HRDD is a one-time action, or a stand-alone human rights impact assessment, and need not be carried out routinely throughout the project cycle, geared to risks and impacts. HRDD under the UNGPs is a broader concept involving *assessing* impacts, *acting* on the findings, *tracking* responses and *communicating* how impacts are addressed. The expectation in the UNGPs is that HRDD processes should be a core part of risk management systems, not limited to high-risk scenarios.
- One of the biggest gaps in OHCHR's view concerns the scope of application of the PS and due diligence more generally. The scope of issues that should be covered as part of an ESMS is more limited in the PS than the UNGPs in the following ways: (i) The PS are addressed to the project<sup>452</sup> rather than the corporate entity.<sup>453</sup> By contrast, the UNGPs apply to a business as a whole. (ii) PS 1 applies to the project "area of influence."<sup>454</sup> By contrast, the UNGPs do not seek to define spatial boundaries but instead tie HRDD to risks and impacts with which a business may be involved. (iii) Within the project area of influence, the client is required to address risks and impacts "in a manner commensurate with the client's control and influence over the third parties."<sup>455</sup> The UNGPs do acknowledge that the effectiveness of mitigation actions will vary according to a business' leverage, but under the UNGPs leverage does *not* operate as a threshold criterion to determine when action is required. Rather, businesses are expected to identify and prioritize business relationships where human rights risks and impacts are most severe, and build leverage (influence) as necessary to address them. (iv) The PS refer to "third parties" which do not seem to be clearly defined.<sup>456</sup> By contrast the UNGPs apply to "business relationships" of all types, not just those in primary supply chains or geographic proximity to the project. (v) The PS appear mainly to apply to risks and impacts from physical elements.<sup>457</sup> However the UNGPs apply to any kind of human rights impacts, including those resulting from non-physical risks and impacts, such as in the digital space.
- The gaps also extend to the scope of application of the PS and due diligence more generally with respect to supply chains. The PS limit coverage to: (i) Only

---

<sup>451</sup> PS 1, para. 7, footnote 12: "In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business."

<sup>452</sup> PS 1, para. 4.

<sup>453</sup> See PS 1 Overview, para. 4; but compare PS 1, para. 6 footnote 9.

<sup>454</sup> PS 1, para. 8.

<sup>455</sup> PS 1, para. 9. See also PS 1, para. 2 which gives non-exhaustive examples of "*third parties*" and notes that contractors are not considered third parties.

<sup>456</sup> PS 1, para. 2.

<sup>457</sup> PS 1, para. 8.

where the client "*can reasonably exercise control*."<sup>458</sup> As noted above the UNGPs do not tie responsibility for identifying and addressing human rights risks and impacts to a company's existing level of control, but instead encourages businesses to seek to build and exercise leverage. (ii) The scope of supply chain due diligence is limited in the PS mainly to issues of labor (PS 2) and biodiversity (PS 6).<sup>459</sup> By contrast the UNGPs encourage businesses to consider all relevant human rights issues within their preliminary scoping, and not just labor and biodiversity. (iii) The PS refer to "*primary supply chains*." The UNGPs apply across the whole value chain, including upstream supply chains and downstream users and consumers, including off-takes, not just primary suppliers. In 2021 a footnote was added to the Guidance Note for PS 1 to clarify that "primary suppliers" should no longer be limited to the first tier of the supply chain. However scope is still limited to those "*who on an ongoing basis forms part of the supply chain of goods or materials essential for the core business processes of the project*."<sup>460</sup> By contrast the UNGPs expect businesses to identify and address where human rights risks and impacts are the most severe among their business relationships, not just in those relationships that are "*essential*" to the business, and to take into account their own involvement in those impacts (cause-contribute-linkage).

- The PS require the client to have grievance mechanisms but do not reflect a robust or comprehensive conception of remedy suitable for addressing more serious human rights impacts associated with IFC-supported projects.<sup>461</sup> The mitigation hierarchy addresses compensation as one form of reparation but does not recognize the inappropriateness of "off-setting" human rights impacts.
- Key UNGPs concepts pertaining to risk assessment (prioritizing severity), responsibility for impacts (including linkage to business relationships, and contribution to impacts and remedy), and leverage, do not appear to be well reflected in the PS.

Compared to international human rights standards:

- The acknowledgment that the PS will allow clients to address "many" human rights issues, and that each PS has "elements related to human rights dimensions," implies that human rights coverage in the PS is incomplete. Moreover, the fact that a PS deals with subject matter covered by an internationally recognized human rights does not necessarily mean substantive alignment of standards, or that all relevant dimensions of the right will be covered.

---

<sup>458</sup> PS 1, para. 10. "Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with primary supply chains, as defined in Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30)." IFC has noted that this is addressed on a case-by-case basis, mapping the supply chain, and updated as necessary.

<sup>459</sup> PS 1, para. 10.

<sup>460</sup> [GN 1](#), para G53, footnote GN9, "A primary supplier is a supplier who on an ongoing basis forms part of the supply chain of goods or materials essential for the core business processes of the project. A primary supplier may supply its goods or materials directly to the project (a Tier I primary supplier), to the Tier I primary supplier (a Tier II primary supplier) or may be at a deeper tier of the primary supply chain. [Introduced June 14, 2021]."

<sup>461</sup> Under UNGP Principle 25, consistent with international human rights law, remedy "may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition."

- Human rights are not explicitly listed in the descriptions of environmental and social risks and impacts.
- With a few exceptions, international human rights standards are not referenced explicitly in the PS as benchmarks for environmental and social due diligence expectations and processes,<sup>462</sup> although the Sustainability Policy<sup>463</sup> and several Guidance Notes do so. While there is overlap between many issues classified as "social" and human rights, it is important to identify human rights issues and standards explicitly, given the specific definitions and accountability attaching to human rights law under international law. Inadvertent renegotiation of international standards should be avoided. Clients are increasingly subject to multiple E&S requirements, including DFI Safeguards and national and regional RBC and sustainability regulations, and in OHCHR's view, for the reasons outlined in Section III of this Study, these should ideally be consistent and aligned with the UNGPs.
- A range of human rights issues have come more into focus since the adoption of the PS, including challenges faced by environmental and human rights defenders, GBV, and the rights of LGBTI people, which are not specifically addressed in the PS, as well as the problem of intersectional discrimination. Other areas of human rights law, including with respect to persons with disabilities, children and migrant workers, which are addressed briefly in the PS, have matured since 2012. There is also an increasing international jurisprudence on indigenous peoples' rights.

**Box 65: Substantive Gaps in DFI Safeguards Highlighted in the Report**

There are several substantive human rights issues that increasingly arise in a wide range of projects but are not specifically addressed in the PS, nor, necessarily, more recent Safeguards of other DFIs. This is inevitable to a degree, given the increasing attention to human rights in business since the adoption of the UNGPs in 2011, and rapidly evolving client needs, stakeholder expectations, regulatory developments and operational demands. The main report (Chapter IV, Gap 8) addresses these additional substantive gaps in more detail but they listed again here given their relevance to the IFC PS:

- Human rights impacts of climate change (just transition);
- Digital rights;
- Rights in connection with land transactions falling outside the "willing buy-willing seller" scenario; and
- Users of products and services.

<sup>462</sup> The exceptions are the reference to the ILO conventions in IFC PS 2, a reference to human rights principles pertaining to security in IFC PS 4, and references to the rights of indigenous peoples in PS 7.

<sup>463</sup> The IFC Sustainability Policy states "IFC recognizes the responsibility of business to respect human rights." ... Footnote 4 states: "For purposes of this policy, IFC will be guided by the International Bill of Human Rights and the eight core conventions of the International Labor Organization."

### 1. COMPARING THE IFC PS TO THE UNGPS

The PS require clients to adopt an overarching policy setting out E&S objectives and to establish an environmental and social management system (ESMS). In principle these measures should provide a solid basis for addressing human rights, however there appear to be a number of important gaps, highlighted below.

#### *a) Policy Commitment (IFC PS 1 Para. 6)*

##### **Positive aspects of PS 1**

- Requires clients to establish an overarching policy defining the E&S objectives and this may include international obligations, standards, codes of practice, and so forth.
- Sets out the expectation that "[b]usiness should respect human rights" but does not connect this to actual requirements.

##### **Weaknesses or gaps**

- Does not require that the client's policy statement include an express commitment to respect human rights, nor explicitly require that clients respect human rights, including in the absence of national law,<sup>464</sup> nor does it require clients to apply the more stringent human rights standard when national law deviates from international standards, as it does for the application of EHS Guidelines.<sup>465</sup>
- Applies at project level only, not the corporate level, although clients are encouraged to apply their ESMS across all their activities. (PS Overview, para 4).<sup>466</sup>

#### *b) UNGP Embedding Policy Commitments into Management Systems (IFC PS 1 Paras. 5-24)*

##### **Positive aspects of PS 1**

- Reflects, as the UNGPs do, good international practice on environmental and social due diligence (E&S DD) and ESMS and incorporate similar steps as those set out in the UNGPs for HRDD.
- Requires clients to carry out due diligence that "will enable the client to address many relevant human rights issues in its project" (PS 1 para. 3), subject to caveats expressed earlier about the limitations of subject matter alignment.

<sup>464</sup> Including when human rights treaty obligations agreed to by a government are not incorporated into national law or are not implemented.

<sup>465</sup> See World Bank Group, [Environmental, Health, and Safety General Guidelines](#) (2007): "When host country regulations differ from the levels and measures presented in the EHS Guidelines, projects are expected to achieve whichever is more stringent." (Introduction)

<sup>466</sup> But compare PS 1 para. 6, footnote 9 which states, "This requirement is a stand-alone, project-specific policy and is not intended to affect (or require alteration of) existing policies the client may have defined for non-related projects, business activities, or higher-level corporate activities."

- Requires establishment of an ESMS (PS 1 paras.13-16), backed by appropriate organisational capacity and competency (PS 1 paras. 17-19).
- Notes that the ESMS is considered a "dynamic and continuous process" (PS 1 para. 1).
- Does not set a threshold for the application of the PS,<sup>467</sup> and covers the project lifecycle.

### **Weaknesses or gaps**

- Does not require all clients to routinely carry out HRDD, but encourages it only in "limited, high risk circumstances." (PS 1 para. 7, fn 12). HRDD appears to be understood as a stand-alone human rights impact assessment, rather than an ongoing system to identify, prevent/mitigate, track and account for human rights risks.
- Is focused only at the project level and does not include the company level.
- Does not explicitly reference international human rights standards as benchmarks for E&S due diligence, with some specific exceptions.<sup>468</sup>
- Does not explicitly include human rights in the descriptions of E&S risks and impacts.
- Does not refer to addressing E&S or human rights impacts when exiting from projects.

#### ***c) Human Rights Due Diligence***

##### ***i) Identification and Assessment of Actual or Potential Impacts (IFC PS 1 Paras. 7-12)***

### **Positive aspects of PS 1**

- Requires clients to establish and maintain processes for identifying risks and impacts guided by type, scale and location of project. (PS 1 para. 7)
- Requires consideration of "all relevant environmental and social risks and impacts of the project" including the issues identified in the PS, cumulative impacts, impacts in the project area of influence and impacts that have not yet materialized. (PS 1 para. 7)
- Requires early engagement with Affected Communities<sup>469</sup> in the identification of risks and impacts, which continues on an ongoing basis as risks and impacts arise. (PS 1 para. 30)

### **Weaknesses or gaps**

#### **Scope**

- No cross-cutting requirement on clients to carry out routine HRDD as part of their E&S assessment and management process. Only *encourages* HRDD, and then only in high-risk circumstances. This, when combined with the lack of an explicit reference to human rights as part of E&S risks and impacts, undermines

<sup>467</sup> Cf the Equator Principles which set financial thresholds for the application of the EP.

<sup>468</sup> Human rights standards are referred to explicitly in PS 1, 2, 4 and 7.

<sup>469</sup> Note however that "Affected Communities" are defined as "local communities *directly* affected by the project." (emphasis added). PS 1, para 1.



the expectation (as reflected in the UNGPs) that businesses should carry out HRDD routinely and that human rights are relevant to all projects.

- Significantly more limited scope to identify and assess issues than the UNGPs. (See below under (e)(i) "Scope of Responsibility").
- No specific requirement for clients to assess their own "involvement" in adverse impacts, in contrast to the UNGPs which encourage businesses to understand their own involvement (cause-contribution-direct linkage) in connection with adverse impacts. (PS 1 para. 19).
- Limited recognition of legacy issues and how these should be identified or dealt with.<sup>470</sup>

*ii) Preventing and Mitigating Adverse Human Rights Impacts (IFC PS 1 Paras.13-21)*

**Positive aspects of PS 1**

- Environmental and Social Management Plans (ESMPs) and Action Plans (ESAPs) are required for every project. The ESMS may also take place in coordination with other parties. (PS 1 para. 16)
- Prioritizes avoidance as the first step in the hierarchy. (PS 1 paras. 14-15)
- Addresses emergency preparedness. (PS 1 paras. 20-21)

**Weaknesses or gaps**

- The mitigation hierarchy provides only for compensation or offsets, not other types of reparations or remedy more generally in the case of human rights impacts (for example, apologies or other form of public accounting, restitution of land, and/or provision of rehabilitation services such as health or psychosocial services, guarantees of non-repetition, in line with complainants' expressed needs). Offsets are not appropriate for human rights impacts; that is to say, it is not appropriate to trade off impacts on a person (or group of persons) for positive benefits to others.
- The "technically and financially feasible" qualifier in the mitigation hierarchy, on its face, seems to imply a high tolerance level for unremediated impacts on stakeholders, absent a robust remedy framework elsewhere. There does not seem to be adequate guidance on how to address residual impacts on workers or affected communities, in a manner compatible with their human rights.
- Limited requirements on addressing impacts that are directly linked through business relationships. Requirements only apply when the clients are able to exercise control over business relationships. No reference to the need to build and exercise leverage.
- Missing reference to severity as the main factor to consider when prioritizing action.
- Although ESMS is supposed to be a continuous process, if human rights are not included in ESAPs, they are unlikely to be identified at the outset and assessed on an ongoing basis.

---

<sup>470</sup> There is limited reference to this issue in PS 3, PS 5 and PS 6.

- As the emergency preparedness requirements presumably cover significant adverse harm, it should follow that there should also be requirements to specifically remedy those significant adverse harms.

**iii) Tracking Effectiveness of Responses (IFC PS 1 Paras. 22-24)**

**Positive aspects of PS 1**

- ESMPs and ESAPs must be responsive to changes in project circumstances, and include references to performance indicators and acceptance criteria that can be tracked. (PS 1 para. 16)
- Monitoring must assess the effectiveness of steps taken and adjust the ESMS through corrective and preventive actions as necessary. (PS 1 paras. 23-24)
- Requires documentation of monitoring results. (PS 1 para. 23)
- Involvement of external parties in monitoring where necessary; encourages (but does not require) community monitoring. (PS 1 para. 22)

**Weaknesses or gaps**

- Monitoring is couched in terms of monitoring the effectiveness of the ESMS rather than broader impacts of the project or the effectiveness of responses to impacts.<sup>471</sup>
- As human rights are treated as relevant only in high-risk circumstances, the monitoring may miss important human rights impacts.

**iv) Communicating Requirements (IFC PS 1 Para.36)**

**Positive aspects of PS 1**

- Periodic reports published to inform affected communities about the progress of implementation of ESAP and any potentially impacts and concerns, proportionate to the concerns of the affected communities, but not less often than annually. (PS1 para. 36)
- Disclosure as part of consultations should be in a culturally appropriate language and format (PS 1 para. 30) (although these requirements do not re-appear in the section on communication (PS 1 para. 36).

**Weaknesses or gaps**

- No requirement within PS 1 to consider whether information disclosed poses risks to affected stakeholders, personnel.

**v) Stakeholder Engagement Requirements (IFC PS 1 Paras. 25-36)**

**Positive aspects of PS 1**

- Recognizes the importance of stakeholder engagement. (PS 1 para.25)
- Requirements on disclosure and participation should be appropriately scaled to risks and impacts with formal plan (PS 1 paras. 25-26), with more in-depth

---

<sup>471</sup> However the GN for PS 1 provides further guidance on the scope and steps of monitoring. See PS1 GN, GN70, GN 83, GN86.

process when potentially more significant impacts are anticipated (PS 1 para. 31)

- Differentiated measures for disadvantaged or vulnerable people. (PS 1 para. 27)

### Weaknesses or gaps

- Does not reflect more recent approaches of MDBs which dedicate a stand-alone PS to stakeholder engagement, or set out more detail on stakeholder engagement requirements and plans, or require that all projects must at least engage in stakeholder identification.
- No specific recognition of the rights to freedom of expression,<sup>472</sup> assembly and association (apart from the labor context (PS 2, para. 13 and 14)), and the role that these rights play in making stakeholder engagement possible and meaningful.
- No requirements concerning the protection of stakeholders and non-retaliation.<sup>473</sup>
- Participation: No provisions relating to building the capacities of vulnerable individuals and groups to participate. Unclear provisions on whether Affected Communities are identified only after the client has identified potential risks and impacts, in which case Affected Communities would not be involved in identifying risks and impacts, which could lead to gaps.<sup>474</sup> No requirement to involve stakeholders in the design of management action plans.<sup>475</sup> No requirement in the PS to reflect back to Affected Communities how their views were or were not taken into account.<sup>476</sup> No requirement in the PS to seek feedback on the effectiveness of prevention and mitigation measures.<sup>477</sup>
- Disclosure: Prevention and mitigation steps are only encouraged to be shared and not necessarily as part of Action Plans.
- Scope: Affected Communities are those *directly* affected by a project; stakeholders are a wider group including those directly affected and those who have an interest in the project. Those indirectly affected have access to information that the client is willing to disclose and that is disclosed by IFC. However the PS does not require that they have a right to participation in consultations.

---

<sup>472</sup> However see PS1, GN105 "The client should allow critics to express their views, and enable various groups to speak out freely with equal opportunity, so as to facilitate a full debate involving all viewpoints."

<sup>473</sup> These rights are dealt with more explicitly in subsequent IFC guidance dealing with reprisals and contextual risk assessments, but are not reflected in the PS. See, IDB Invest, IFC [Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders](#) (2021).

<sup>474</sup> Cf [PS1](#), para. 30 where the client has already identified project risks and impacts and [PS1, GN105](#) which calls for consultation early in the scoping process.

<sup>475</sup> See [PS 1, GN69](#) and GN112 which provides some limited further guidance.

<sup>476</sup> However this is covered in [PS1, GN103](#), "The client should inform in a timely manner the Affected Communities about the result of the consultation process and how their suggestions and concerns have been considered."

<sup>477</sup> However, this is covered in [PS1, GN94](#): "Clients should use the appropriate stakeholders engagement practices (...) to disclose information and receive feedback on the effectiveness of the implementation of the mitigation measures (...)."

- Uncertain coverage of stakeholders involved in digital projects. Stakeholder engagement seems to be focused mainly on projects with physical risks and impacts.
- PS 4 does not require consultation with communities on security practices, although this could be incorporated as part of general consultations.

#### **d) Remedy Requirements**

##### **Positive aspects of PS 1**

- Requires dynamic monitoring and responsive preventive and correction actions by the client. (PS 1 paras.21-23)
- Requires operational level grievance mechanisms that do not restrict access to judicial or administrative mechanisms (and did so long before the UNGPs were adopted). (PS 1 para.35)

##### **Weaknesses or gaps<sup>478</sup>**

- While the PS includes several process steps in connection with remedy (as noted above), it does not reflect a substantive right to a remedy. Does not set a general objective of remedy, and does not include remedy as the final step in the mitigation hierarchy.<sup>479</sup>
- Provides for compensation (which may be necessary and appropriate in many contexts), however it fails to specify that *offsets* are inappropriate for human rights impacts, and may well also be questionable in connection with certain environmental impacts as well such as biodiversity. It doesn't include other substantive elements that may be needed to make people whole: 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>480</sup>
- Does not refer to the UNGPs "effectiveness criteria" for client grievance mechanisms. Partially reflects some of the effectiveness criteria (accessibility, predictability, transparency) but does not reflect other effectiveness criteria at all (ie. "based on engagement and dialogue", consulting the target stakeholder groups on the design and performance of the mechanism; and legitimacy, equitability, rights-compatibility, source of continuous learning).

#### **e) Incomplete Treatment of UNGP Concepts**

##### **i) Scope of Responsibility**

##### **Positive aspects of PS 1**

- Recognizes that clients may need to collaborate with third parties in order to achieve outcomes consistent with the PS. (PS 1 para. 2)

<sup>478</sup> For a more detailed discussion, see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022).

<sup>479</sup> Note that the updated Equator Principles (2020) provide "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 minimized and mitigated, and where residual impacts remain, clients should provide remedy for human rights impacts or offset environmental impacts as appropriate."

<sup>480</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.8-13.

- With respect to third parties, a client is instructed to consider the risks they present to the client, as well as the opportunities to collaborate to achieve environmental and social outcomes consistent with the PS. (PS 1 para. 2). Recognizes that client should address risks and impacts resulting from the action of third parties (PS 1 para. 9), but with limitations (see below).

### Weaknesses or gaps

- Incomplete coverage of the ways in which a client can be involved in impacts. The PS do use the terms "cause" and "contribute"<sup>481</sup> (PS 1 para. 3), but not the UNGPs concept of "directly linked," which refers to human rights impacts that are directly linked to a client's operations, products or services via a business relationship.
- One of the biggest gaps concerns the scope of application of the PS and due diligence more generally. The scope of issues that should be covered as part of an ESMS is more limited in the PS than the UNGPs in the following ways: (i) The PS are addressed to the project<sup>482</sup> rather than the corporate entity.<sup>483</sup> However the UNGPs apply to a business as a whole. (ii) PS 1 applies to the project "*area of influence*."<sup>484</sup> By contrast the UNGPs do not set spatial boundaries but instead tie HRDD to where risks and impacts with which a business may be involved appear. (iii) Within the project area of influence, the client is required to address risks and impacts "in a manner commensurate with the client's control and influence over the third parties."<sup>485</sup> The UNGPs do recognize that responsive actions will vary according to a business' leverage, however they do not use control or influence as a threshold test of when action is required. Rather, under the UNGPs, businesses are expected to identify and prioritize business relationships where human rights risks and impacts are most severe and build leverage (influence) as necessary to address these. (iv) The PS refer to "third parties" which are not clearly defined.<sup>486</sup> The UNGPs apply to "business relationships" of all types, not just those in primary supply chains or in the geographic area of the project. (v) The PS appear to apply to only risks and impacts from physical elements of the project.<sup>487</sup> By contrast, the UNGPs apply to any kind of human rights impacts, including those resulting from non-physical risks and impacts, such as in the digital space.
- In contrast to the PS, the UNGPs guide risk management throughout the value chain, not limited to (upstream) supply chains. Moreover the PS limit the scope of supply chain risk management to: (i) Situations where the client "can reasonably exercise control."<sup>488</sup> By contrast, the UNGPs do not tie responsibility for identifying and addressing human rights risks and impacts to control, but

---

<sup>481</sup> PS 1 para. 3 says: "Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to."

<sup>482</sup> PS 1, para. 4.

<sup>483</sup> See PS 1 overview para. 4, but compare PS 1 para. 6 footnote 9.

<sup>484</sup> PS 1, para. 8.

<sup>485</sup> PS 1, para. 9. See also PS 1 para. 2 which gives non-exhaustive examples of "third parties" and notes that contractors are not considered third parties.

<sup>486</sup> PS 1, para. 2.

<sup>487</sup> PS 1, para. 8.

<sup>488</sup> PS 1, para. 10. "Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with primary supply chains, as defined in Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30)." In conversations with OHCHR, IFC has clarified that this is addressed on a case-by-case basis, mapping the supply chain, which is updated as necessary.

instead encourage business to seek to build leverage, as noted above. (ii) The PS limit supply chain risk management mainly to issues of labor (PS 2) and biodiversity (PS 6).<sup>489</sup> By contrast, the UNGPs encourage businesses to consider all relevant human rights issues as part of preliminary scoping, and not just labor and biodiversity. (iii) The PS refer to "*primary supply chains*." The UNGPs apply across the whole value chain, including upstream supply chains and downstream users and consumers, including off-takes, not just primary suppliers. In 2021 a footnote was added to the Guidance Note for PS 1 to clarify that "primary suppliers" should no longer be limited to the first tier of the supply chain. However the scope is still limited to those "who on an ongoing basis forms part of the supply chain of goods or materials essential for the core business processes of the project."<sup>490</sup> By contrast the UNGPs expect businesses to identify and address where human rights risks and impacts are the most severe among their business relationships, not just in those relationships that are "*essential*" to the business, and to take into account their own involvement in those impacts (cause-contribute-linkage).

## *ii) Leverage*

### **Positive aspects of PS 1**

- Recognizes that client may need to collaborate with third parties to achieve outcomes consistent with the PS. (PS 1 para. 2)
- Within the area of influence, requires clients to collaborate with third parties in establishing and monitoring mitigation measures. (PS 1 para. 22)

### **Weaknesses or gaps**

- With respect to primary supply chains the PS limits actions to "*considering*" risks and impacts associated with primary supply chains and only where the client can "*reasonably exercise control*." (PS 1 para. 10).
- Lack of consistency about whether "*control and influence*" or "*control or influence*" over supply chain is required. The latter would be a stronger requirement (PS 1 para. 9).<sup>491</sup>
- Does not specifically prompt clients to act alone or together with others to *create* leverage, in order to encourage those with whom they have business relationships to respect human rights.

## *iii) Severity of risk*

### **Positive aspects of PS 1**

- Effort and resources allocated to identify risks and impacts are guided by the type, scale and location of project (PS 1 paras. 7, 15), and risk management effort should be commensurate with the risks and impacts. (PS 1 paras. 15).

---

<sup>489</sup> PS 1, para. 10.

<sup>490</sup> [GN 1](#), para G53, footnote GN9, "A primary supplier is a supplier who on an ongoing basis forms part of the supply chain of goods or materials essential for the core business processes of the project. A primary supplier may supply its goods or materials directly to the project (a Tier I primary supplier), to the Tier I primary supplier (a Tier II primary supplier) or may be at a deeper tier of the primary supply chain. [Introduced June 14, 2021]."

<sup>491</sup> PS 1, para. 9 refers to "*control and influence*". PS 1, paras. 2 and 14 refer to "*control or influence*."

## Weaknesses or gaps

- Does refer to severity (PS 1 para. 1, footnote 2), but unlike in the UNGPs, there are no criteria specified to help assess severity (such as the UNGPs criteria of "scale, scope and/or remediability"), nor is it clear how significance/severity is to be assessed, such as through the use of qualitative and quantitative data, consultation and engagement, and so forth.
- Risk is defined as a combination of probability and severity of "certain hazard occurrences" (PS 1 para. 1, footnote 2). However the term "hazard" is most commonly associated with natural disasters or environmental or workplace risks, and hence does not seem appropriate to describe human rights risks and impacts.
- Does not reflect the UNGPs concept that *severity* of human rights impacts should take precedence, even if they are less probable/likely.

---

## 2. COMPARING THE IFC PS TO SELECTED INTERNATIONAL HUMAN RIGHTS STANDARDS - KEY SUBSTANTIVE GAPS

This section highlights key substantive human rights gaps in the IFC PS. The main UN and ILO standards are listed in Table 1. The analysis below does not purport to be exhaustive either in terms of the topics covered in the list below, or in relation to other subjects relevant to investment project risk management.

### a) Non-Discrimination

#### Positive aspects of IFC PS

- PS 1<sup>492</sup> and other PS address vulnerability and vulnerable groups, including the need to adopt differentiated measures to ensure that adverse impacts do not fall disproportionately on these groups.
- Non-discrimination and equal opportunity are addressed in the context of the employment, and compliance with the intent of PS 2 is encouraged even where national law is inconsistent. (PS 2 paras. 15-17).
- With respect to children, there are provisions on child labor and consulting youth. (PS 2 paras. 21, 27 and PS 1 para.30, fn 27)
- With respect to migrant workers, the PS requires substantially equivalent terms and conditions for directly employed migrant workers (PS 2 para. 11) and non-discrimination for migrant workers. (PS 2 para. 15)

#### Weaknesses or gaps

- Limited scope of commitment to non-discrimination, and equal opportunity only with respect to employment. It is not stated clearly that groups at risk have the right to non-discrimination and equal opportunity more generally.<sup>493</sup>

---

<sup>492</sup> PS 1, para 12.

<sup>493</sup> More recent MDB Safeguards tend to reflect non-discrimination objectives up-front, and contain more extensive non-discrimination requirements guided by categories of discrimination prohibited by international human rights law. The IDB's [Environmental and Social Policy Framework](#) (2020) is a good illustration. The WB [Environmental and Social Framework](#) (2016) mentions non-discrimination as an objective (Overview, para 4) and in the vision (Vision, para 3), but guidance is in a non-binding Directive rather than the text of the Safeguards.

- Does not cover end-users, and so does not address discrimination in the delivery of services such as patients in healthcare investments, residents in housing projects or users of digital services.
- There are no other references to impacts on children or youth outside the employment context, for example in considering the impact of resettlement on children's access to education.
- Persons with disabilities are only referred to in footnotes and as one of many vulnerable groups. (PS 1 para. 12, fn 18, PS 2 para. 15, fn 9)<sup>494</sup>
- There are no references to intersectionality, or in other words, the compounding effects of multiple layers of discrimination.

### **b) Gender Equality and LGBTI Rights**

#### **Positive aspects of IFC PS**

- Gender is treated as a cross-cutting issue (PS 1, Overview para.4).
- There is specific attention to women at several points in the PS, in connection with stakeholder engagement (PS 1, para. 31, fn 27), employment (PS 2 para.15, fn 13, para.15), resettlement (PS 5, fn 16, 17) and indigenous peoples (PS 7, para. 14).
- Covers harassment, intimidation and/or exploitation "especially in regards to women" in the workplace (PS 2, para 15).

#### **Weaknesses or gaps**

- Overall, references to gender and women's perspectives, needs and rights are reflected in footnotes and guidance notes,<sup>495</sup> compared with IDB, for example, which has a stand-alone Environmental and Social Performance Standard on gender equality (ESPS 9) (see Box 17). Gender and the rights of women and girls are not mentioned in the context of other key topics, such as grievance resolution, security arrangements, cultural heritage, or livelihoods.
- Discrimination on the grounds of SOGIESC is missing (although, in PS 2 fn 9, sexual orientation is included).
- Coverage of GBV is limited to sexual harassment in the workplace (PS 2), though guidance on addressing GBV is included in more recent Good Practice Notes.<sup>496</sup>

### **c) Indigenous Peoples**

#### **Positive aspects of PS 7**

- Separate PS that recognizes the human rights of Indigenous Peoples.
- Requires free, prior, informed consent (FPIC) in particular circumstances. (PS 7, paras. 13-17)

<sup>494</sup> See also [PS1, GN49 and PS4, GN10](#), which specifically refers to the UN Convention on Rights of Persons with Disabilities.

<sup>495</sup> See [PS1, GN50; PS1, GN96; PS2, GN76; PS4, GN27](#).

<sup>496</sup> See IFC [good practice notes and sector guides](#) on GBV.



- Requires a specific time-bound plan to address adverse impacts in certain circumstances, such as an Indigenous Peoples Plan. (PS 7, para. 9)
- Notes the importance of involvement of Indigenous Peoples' representative bodies and organizations and sufficient time for decision-making processes. (PS 7, para. 10)

### **Weaknesses or gaps**

- No discussion/reflection of the weaknesses in national legal protections for Indigenous Peoples rights in many countries.
- No reference to relevant human rights standards (in particular United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) or ILO Convention 169 on Indigenous and Tribal Peoples Convention, 1989 (C169)) to anchor the PS in its international normative context.<sup>497</sup>
- Decontextualizes the issues covered from the broader framework of Indigenous Peoples rights, especially the right to decide their own priorities for development which is recognized as an overarching principle in UNDRIP and C169.
- Potential Inconsistency with C 169 in the criteria for identification of Indigenous Peoples. PS7 adds criteria such as language which are not included in C169 and may in practice be applied to limit the identification of Indigenous Peoples.<sup>498</sup>
- Does not recognize FPIC as a right but rather as a step to proceed with projects related to land and access to natural and cultural resources. There also seems to be lack of clarity and internal inconsistency in PS 7's FPIC provisions.<sup>499</sup> PS 7 restricts FPIC to a consultation process at a particular point in time. However, the right to FPIC under UNDRIP<sup>500</sup> is both a substantive and a process right, and an ongoing process,<sup>501</sup> and is not intended as a right to be consulted (and to consent, or not) at one specific point in the design of a project.
- Stakeholder engagement outside of FPIC situations is in accordance with PS 1, but PS 1 requires stakeholder engagement with Affected Communities only where there are "physical elements, aspects and/or facilities that are likely to generate adverse environmental and social impacts to Affected Communities" (PS 1 para. 26). UNDRIP does not have these limitations - participation, consultation and cooperation is called for in relation to all issues affecting Indigenous Peoples.

---

<sup>497</sup> See however, [PS7, GN1](#) which refers to and recognizes human rights instruments on indigenous peoples.

<sup>498</sup> "Language" was deliberately left out of ILO C169, Article 1, as many people have lost their languages due to historical processes of marginalization/discrimination. Use of this criterion may exclude a number of groups from coverage.

<sup>499</sup> Compare paras. 13-14 where FPIC is only referred to in the title with para. 15 that states, "the client will not proceed with the project unless FPIC has been obtained as described above." In addition, the wording appears vague on certain issues such as whether economic (as well as physical) displacement is included within the scope of "relocation" and what constitutes a significant or "material" impact on a groups' cultural heritage.

<sup>500</sup> Or the right to be consulted in good faith with the objective of achieving agreement or consent to the proposed measures (C169).

<sup>501</sup> See also [PS7, GN4](#).

- Ties land rights and cultural heritage to national law, and yet the limitations of national law were among the main aims that international Indigenous Peoples rights protections were designed to address.<sup>502</sup>
- Notes the importance of involvement of Indigenous Peoples representative bodies and organizations and sufficient time for decision-making processes (PS 7 para. 10), but there is no reference to the identification and mitigation of power imbalances.
- Does not require the client to retain external, independent, Indigenous Peoples rights expertise to assess whether FPIC has been achieved in specific circumstances; requires the client to retain external expertise only in relation to identification of risks and impacts (PS 7 para. 11).<sup>503</sup> The client itself should not make determinations of FPIC. No clear benchmarks to evaluate how consultation processes and agreements are implemented by clients, or are received by Indigenous Peoples.<sup>504</sup>
- Does not include prohibitions on involvement in projects involving individual titling of Indigenous Peoples land.<sup>505</sup>

#### d) Labor Rights

##### **Positive aspects of PS 2**

- Specific reference to fundamental rights of workers and noting that the requirements have been in part guided by reference to the ILO core labor conventions, plus the UN Convention on the Rights of the Child and the UN Migrant Workers Convention (PS 2 paras. 1-2), although the PS does not cross-reference the Conventions when defining and addressing specific topics (such as child labor or forced labor). (PS 2 paras. 1-2)
- Requires employers to provide documented information to workers on their rights. (PS 2, para. 9)
- Covers more than directly employed workers – also covers contracted and supply chain workers though to a more limited extent. (PS 2 paras. 5-7 and 24-29)
- Includes requirements and quality standards for accommodation services and requires that these arrangements do not restrict workers' freedom of movement or accommodation. (PS 2, para. 12)
- Covers a range of circumstances with respect to national laws on the formation of trade unions, and requires that clients not discourage workers from organising, nor subject them to retaliation or discrimination, and requires client engagement with workers' organizations. (PS 2, para. 14)

---

<sup>502</sup> PS7 seems ambiguous about requiring compliance with national law on the one hand, and whilst on the other hand recognising that indigenous peoples may not have formal land titles under national law but that the use of their land can often be substantiated.

<sup>503</sup> However in accompanying guidance IFC has clarified that experts should be retained for more than just the identification of risks and impacts. See [PS7, GN6, GN12, GN42](#).

<sup>504</sup> K. Salcito, [FPIC at the IFC](#) (Oct. 2020).

<sup>505</sup> By way of contrast see IDB, [Environmental and Social Policy Framework](#) (2020), ESPS 7, para. 17.

- Requires substantially equivalent terms and conditions for migrant workers (PS 2 para. 11) and non-discrimination for migrant workers who are directly employed. (PS 2 para. 15)<sup>506</sup>
- Requires non-discrimination even when national laws are silent or inconsistent (PS 2 para. 16). Requires non-discrimination on the basis of personal characteristics including gender, race, nationality, ethnic, social and indigenous origin, religion or belief, disability, age or sexual orientation. (PS 2, para 15, ftn 9).
- Addresses retrenchment, which may provide a starting point for discussing just transition in the context of climate change. (PS 2 paras. 18-19)
- Prohibits child labor and forced labor, including prohibitions on employing trafficked persons. (PS 2 para. 13)
- Requires that clients provide safe and healthy work environments. (PS 2, para. 23)
- Includes the only provision in the PS that specifically refers to remedy. (PS 2 para. 27)

### **Weaknesses or gaps**

- While it is helpful that the PS requires employers to provide documented information to workers on their rights (PS 2, para. 9), it does not require a written contract.<sup>507</sup>
- No reference to assessing gaps between minimum wage, wages offered and living wage or to requiring payment of living wages.
- Limitations in the scope of workers in the client's supply chain who must be considered in the application of the PS (PS 2 para. 4 and footnote 4). Limits the issues relevant to workers in supply chains (only with respect to "high risks of child labor or forced labor" or "high risk of significant safety issues" or "life threatening situations") (PS 2 para. 27). Other labor rights issues should be included, with specific requirements including in relation to the subject matter of IFC's guidance on modern slavery.
- Does not require "substantially equivalent terms" for migrant workers in other situations where they are likely to be even more vulnerable, such as when engaged by third parties or in supply chains.
- Does not recognize the potential need to shift suppliers if necessary to those that can demonstrate compliance with the PS (PS 2 para. 27). However as indicated earlier the definition of "primary suppliers" is very limited compared with the scope of "business relationships" in the UNGPs (which covers more than supply chains, a wider set of businesses that would be considered "suppliers" and more tiers of relationships), and compared to existing business practice on assessing and addressing risks to workers in supply chains. Sets a high bar for action – "control" or "ability to influence" – without asking clients to explore all available means to increase their influence or leverage.

---

<sup>506</sup> However the GN clarify that this should cover migrant workers engaged directly or through a third party. [PS2, GN28](#).

<sup>507</sup> A stipulation of this kind is found in [PS2, GN 14](#), but in OHCHR's view this should ideally be the subject of a clear requirement in the PS itself.

- Limited provisions on forced labor, which could be strengthened by including further requirements on fair recruitment processes, prohibiting payment of recruitment fees by workers (the "employer pays principle") and incorporating the issues covered in the ILO Forced Labor Protocol of 2014 on prevention, protection and remediation of forced or compulsory labor.
- Limited provisions on occupational safety and health that could be updated in line with the addition of OSH conventions to the ILO Fundamental Principles and Rights at Work in 2022. This includes the right of workers to remove themselves from a situation which may reasonably present an imminent and serious danger to their life or health, without reprisals. (PS 2 para. 23)
- Limited provisions on harassment at work that could be expanded along the lines of and with reference to ILO Convention 190 on violence and harassment at work. (PS 2 para. 15)

#### e) Land & Resettlement

(See also Part IV, Gap 8, Section 3 above)

#### **Positive aspects of PS 5**

- Has set a global standard on involuntary land acquisition and resettlement for the private sector that provides basic requirements often not covered in national law.
- Recognizes a range of land owners and users, including those who do not hold formal land title; references different types of property interests and ownership, and references women's ownership rights.
- Sets an objective of improving or at least restoring livelihoods as part of resettlement.
- Provides for land-based replacement where livelihoods are land-based (subject to the proviso "where feasible"), and otherwise sets compensation levels at full replacement costs rather than according to government determined rates.
- Addresses economic displacement and compensation for lost assets; acknowledges that any asset on the land should be compensated, even for informal tenure holders with no legitimate claim to tenure.
- Specifically incorporates important human rights dimensions of the right to housing by requiring security of tenure and "adequate housing;" however it could be clarified that "adequate" should be interpreted consistently with the right to adequate housing.<sup>508</sup>
- Requires supplementary measures in the cases of sub-standard government-led resettlement.

#### **Weaknesses or gaps**

- Does not provide any checks on the "public purpose" trigger for expropriation. The PS should require independent judgment about whether a project is in the public interest, and if not, request modifications or different procedures failing which IFC would withhold funding. OHCHR recognizes that this may be challenging in some private sector operations, but also notes that many DFIs operate across public and private spheres. Strengthening the PS in this respect would send a clear signal to governments about the need for any expropriations

<sup>508</sup> OHCHR & UN Habitat, [The Right to Adequate Housing, Fact Sheet No. 21](#) (2014), p. 23.

to be based upon transparent and objective justifications of public benefits. It would also set the expectation that commercial ventures should acquire land through negotiated arrangements with tenure rights holders, and should not rely on the state's coercive powers of expropriation.<sup>509</sup>

- Although the PS very importantly includes a prohibition on forced evictions, it generally accepts the national legal framework regulating evictions, even if the law does not include "adequate safeguards for forcibly evicted persons."<sup>510</sup> The PS should require that any forced evictions are carried out in accordance with international human rights standards - with general principles of reasonableness and proportionality and "appropriate procedural protection and due process ... which cover (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts."<sup>511</sup>
- Does not cover two issues flagged in Section x above: (a) cumulative impacts of land acquisition on communities on a DFI-funded project (such as impacts on livelihoods, food security or small holder farmers, which will increasingly be exacerbated by climate change impacts); and (b) legacy land transactions.<sup>512</sup>
- Is not sufficiently explicit in recognising and compensating for informal sources of livelihoods.
- Does not require the availability of specific services as part of resettlement requirements (including social services such as health and education), materials, facilities, infrastructure and access to employment.<sup>513</sup>

---

<sup>509</sup> L. Cotula, [Land rights and investments: Why the IFC Performance Standards are not enough: A comparison with the Voluntary Guidelines on the Responsible Governance of Tenure](#), LEGEND, (2019). See also UN Special Rapporteur on Adequate Housing, [Submission to the World Bank's Safeguard Review and Update Process \(Phase 1 – Public Consultation\)](#) (2013), p. 6.

<sup>510</sup> Cf. World Bank, [Environmental and Social Framework](#) (2016), p. 104: "... appropriate forms of legal and other protection, including all applicable procedures and principles in the ESS ... and is conducted in a manner consistent with basic principles of due process (including provision of adequate advance notice, meaningful opportunities to lodge grievances and appeals, and avoidance of unnecessary, disproportionate or excessive use of force."

<sup>511</sup> UN Committee on Economic, Social and Cultural Rights, [General comment No. 7: The right to adequate housing \(art. 11 \(1\) of the Covenant\): Forced evictions](#), (1997).

<sup>512</sup> IFC initiated and led the [Interlaken Group](#) and has developed guidance on private sector land acquisition. Several DFIs including IFC have developed guidance for the private sector on legacy land issues, recognising the challenges and complexities involved.

<sup>513</sup> However, the GN clarifies that a resettlement action plan should cover services. See [PS5, GN 39](#), GN44s and Annexes A and B.

- Does not require disclosure of underlying investor–state concession contracts or investor-state land acquisition contracts or investor–community contracts concerning land.<sup>514</sup>
- 

---

<sup>514</sup> L. Cotula, T. Berger and B. Schwartz, [Are development finance institutions equipped to address land rights issues? A stocktake of practices in agriculture](#), LEGEND (2019).