

# Benchmarking Study of Development Finance Institutions' Safeguards and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights

Office of the United Nations High Commissioner for Human Rights (OHCHR)\*

20 September 2019

|  |           |
|--|-----------|
| <b>Executive Summary .....</b>   | <b>i</b>  |
| <b>1. Introduction .....</b>   | <b>1</b>  |
| 1.1. Methodology .....   | 4         |
| 1.2. Why Human Rights Due Diligence .....  | 5         |
| <b>2. Four Key Gap Areas and Emerging Practice at DFIs on Human Rights .....</b>       | <b>7</b>  |
| 2.1. Gap Area 1: Policy Commitment to Human Rights .....                               | 7         |
| 2.1.1. International human rights standards .....                                      | 8         |
| 2.1.2. References to RBC standards .....   | 12        |
| 2.1.3. International law obligations .....   | 13        |
| 2.2. Gap Area 2: Coverage of Human Rights in Risk Assessments and Risk Management .... | 14        |
| 2.2.1. The Project Context .....   | 15        |
| 2.2.1.1. The enabling environment for stakeholder participation .....                  | 15        |
| 2.2.1.2. The conflict context .....  | 18        |
| 2.2.1.3. Vulnerability and discrimination .....  | 19        |
| 2.2.2. Client and its Business Relationships .....                                     | 22        |
| 2.2.3. Project Operations and Footprint .....  | 26        |
| 2.2.4. Risk Screening and Categorisation – Biases and Gaps .....                       | 28        |
| 2.2.4.1. Implicit hierarchies .....  | 28        |
| 2.2.4.2. Human rights implications of environmental impacts .....                      | 30        |
| 2.2.4.3. Newly emerging sectors with significant human rights implications .....       | 31        |
| 2.3. Gap Area 3: Due Diligence Processes .....   | 32        |
| 2.3.1. Incorporating attention to human rights into routine due diligence .....        | 32        |
| 2.3.2. Prioritising severe human rights risks .....                                    | 33        |
| 2.3.3. Involvement in human rights impacts .....                                       | 35        |
| 2.3.4. Exercising leverage .....   | 37        |
| 2.3.5. Stakeholder Engagement .....  | 39        |
| 2.3.6. Responsible Exit .....  | 42        |
| 2.4. Gap Area 4: Accountability with a Focus on Remedy and Transparency .....          | 43        |
| 2.4.1. Remedy .....  | 43        |
| 2.4.1.1. Remedy at the Project Level .....   | 44        |
| 2.4.1.2. Remedy at the DFI level .....   | 46        |
| 2.4.2. Transparency & Access to Information .....                                      | 48        |
| <b>3. Concluding remarks .....</b>   | <b>50</b> |

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|---|----|
| Box 1: Explanation Box - The Corporate Responsibility to Respect and Human Rights Due Diligence.....                                  | 5  |
| Box 2: Emerging DFI Practices - Explicit References to Human Rights in DFI Safeguards .....   | 8  |
| Box 3: Emerging DFI Practices - DFI Exclusions from Finance Based on Human Rights Grounds .....                                       | 10 |
| Box 4: Emerging DFI Practices - References and Commitments to RBC Standards.....  | 12 |
| Box 5: Emerging DFI Practices – Selected References to International Law Obligations.....   | 13 |
| Box 6: Emerging DFI Practices – Reprisals .....   | 16 |
| Box 7: Report Box - Suggested DFI Actions to Improve the Enabling Environment for Participation and Protection against Reprisals..... | 17 |
| Box 8: Emerging DFI Practices - Attention to Conflict .....   | 18 |
| Box 9: Report Box: The Impact of Conflict on DFI Funded Transport Projects in Latin America .....                                     | 19 |
| Box 10: Emerging DFI Practices - Gender Based Violence (GBV).....   | 20 |
| Box 11: Emerging DFI Practices - Nuanced Approaches to Vulnerability and Specific Grounding in Non-Discrimination .....               | 20 |
| Box 12: Emerging DFI Practices - Business Relationships .....   | 25 |
| Box 13: Emerging DFI Practices - Guidance on Land Rights .....  | 27 |
| Box 14: Emerging DFI Practices – Recognising that Potentially Severe Human Rights Impacts Should Trigger a Higher Risk Rating .....   | 28 |
| Box 15: Explanation Box - Differences between Social Impact Assessments and Human Rights Impact Assessments.....                      | 29 |
| Box 16: Emerging DFI Practices - Recognising the Link between Human Rights and Environmental Issues.....                              | 31 |
| Box 17: Emerging DFI Practices – Policy Guidance but No ICT Safeguards .....  | 31 |
| Box 18: Emerging DFI Practices - Integrating Human Rights into Routine Due Diligence.....   | 33 |
| Box 19: Explanation – UNGP’s Structured Analysis to Addressing Severity .....   | 34 |
| Box 20: Emerging DFI Practices - Prioritising Human Rights Risks .....  | 35 |
| Box 21: Explanation Box – UNGP’s Analytical Framework to Assess Involvement with a Human Rights Impact.....                           | 36 |
| Box 22: Emerging DFI Practices - Developing and Exercising Leverage.....  | 38 |
| Box 23: Emerging DFI Practices with respect to Stakeholder Engagement .....   | 40 |
| Box 24: Emerging DFI Practices - Responsible Exit .....   | 42 |
| Box 25: Emerging DFI Practices - Remedies.....  | 45 |
| Box 26: Emerging DFI Practices – Independent Accountability Mechanisms .....  | 46 |
| Box 27: Emerging DFI Practices - Access to Information .....  | 48 |

## **ABBREVIATIONS**

|                 |  |
|-----------------|--|
| AfDB            | African Development Bank   |
| ADB             | Asian Development Bank   |
| CAO             | Compliance Adviser/Ombudsman, independent accountability mechanism for IFC and MIGA, the private sector arms of the World Bank Group |
| CDC             | CDC Group PLC  |
| DEG             | Deutsche Investitions- und Entwicklungsgesellschaft  |
| DFI             | Development Finance Institution  |
| EIB             | European Investment Bank   |
| ESF             | Environmental and Social Framework   |
| ESG             | Environmental, Social and Governance   |
| ESIA            | Environmental and Social Impact Assessment   |
| ESMP            | Environmental and Social Management Plans  |
| ESMS            | Environmental and Social Management Systems  |
| EU              | European Union   |
| FI              | Financial Institutions   |
| FMO             | Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden  |
| GBV             | Gender Based Violence  |
| HRIA            | Human Rights Impact Assessment   |
| IAMs            | International Accountability Mechanisms  |
| ICT             | Information and Communications Technology  |
| IDB             | InterAmerican Development Bank   |
| IFC             | International Finance Corporation  |
| MDBs            | Multilateral Development Banks   |
| MICI            | Independent Consultation and Investigation Mechanism   |
| OECD Guidelines | OECD Guidelines on Multinational Enterprises   |
| OHCHR           | Office of the UN High Commissioner for Human Rights  |
| OPIC            | Overseas Private Investment Corporation  |
| PPP             | Project finance or Public-Private-Partnerships   |
| PR              | Performance Requirements   |
| PRI             | Principles for Responsible Investment  |
| PS              | Performance Standards  |
| RBC             | Responsible Business Conduct   |
| SDGs            | Sustainable Development Goals  |
| SIA             | Social Impact Assessment   |
| SLAPP           | Strategic Lawsuit Against Public Participation   |
| UNGPs           | UN Guiding Principles on Business and Human Rights   |
| VGGTs           | Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests  |

## **Executive Summary**

Development Finance Institutions (DFIs) have been actively developing and updating environmental and social safeguard, or sustainability, policies in recent years, and reviews are currently underway at several of the major multilateral development banks (MDBs). This provides the opportunity for DFIs to align their policies and practices with recent global normative standards on human rights and responsible business conduct (RBC) – notably the UN Guiding Principles on Business and Human Rights (UNGPs) and the Organisation for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises (OECD Guidelines). In so doing, consistent with evolving stakeholder expectations, DFIs may be better placed to support their private sector clients in respecting human rights and obtaining and maintaining their social licence to operate, and may contribute more directly and effectively to the achievement of the Sustainable Development Goals (SDGs).

This study by the Office of the UN High Commissioner for Human Rights (OHCHR) aims to contribute to these updating efforts, particularly with respect to safeguards covering the financing of private sector operations. While MDBs are the main focus of this study, selected bilateral DFIs are also considered for comparative purposes; unless a contrary intention appears, the term “DFIs” should be taken as including MDBs. The objective of the study is to demonstrate that strengthened commitments to human rights, implemented through rigorous due diligence processes and effective approaches to remedy that are aligned with the UNGPs and the OECD Guidelines, will contribute usefully to DFIs’ mandated goals, policy development and practice. Due diligence is an integral part of a DFIs’ approach to project effectiveness, reflected in DFI sustainability frameworks, safeguard policies and accompanying performance standards (referred to collectively as “safeguard policies” except where it is useful to distinguish accompanying performance standards).

Due diligence processes under the UNGPs and the OECD Guidelines are intended to help business entities manage adverse impacts on human rights through actions to prevent and mitigate such impacts and, where necessary, remedy them. The study highlights key changes that can and, in OHCHR’s view, should be made to DFI policies and practices to achieve stronger alignment and help to achieve the following outcomes: (i) reinforcing DFIs’ mandates in supporting sustainable private sector operations, in particular, the principles of additionality and high standards, beyond profitability goals; (ii) improving risk management by embracing a fuller scope of risks relevant to DFI-financed projects; (iii) contributing to development outcomes by better managing adverse impacts and identifying opportunities to improve positive outcomes of projects; (iv) supporting clients in meeting the corporate responsibility to respect human rights through a clearer articulation of responsibilities and expectations supported by capacity building; and (v) improving relations between DFIs and their stakeholders, and DFI clients and their stakeholders, by demonstrating that both DFIs and their clients are committed to addressing this important category of risks about which communities are increasingly voicing concern.

This study surveys existing safeguards and due diligence frameworks of the more experienced DFIs, benchmarked against the UNGPs and the OECD Guidelines. The survey is by no means comprehensive, however it is offered as a resource to institutions and individuals interested in DFI safeguard policy revision processes. It aims to encourage strengthened policy coherence among DFI

due diligence frameworks in line with these new normative standards for RBC that, in turn, reinforce DFI missions and may more directly and effectively support the achievement of the SDGs. The survey highlights apparent gap areas in existing DFI policies and practices when financing private sector projects, as well as emerging and innovative practices among DFIs which demonstrate the feasibility and utility of incorporating a human rights perspective. In so doing, the study seeks to address frequent misconceptions about human rights and how they apply in the DFI context.

The **Gap Analysis** is grouped into the following four areas. The main gap areas noted by the study, and the principal areas of inconsistent practice, are:

1. **Commitments to human rights normative standards** revealed a variety of policy approaches, often as a result (at least in part) of the timing of the most recent safeguard update. Older safeguards do not reflect recent adoptions of the relevant global normative frameworks and their growing relevance and acceptance, whereas newer safeguards often do. These gaps result in a **lack of alignment** with evolving international standards and a **lack of clarity and coherence**.
2. The **coverage of human rights in risk assessments and management** was examined at **three levels: project context, project operator and its business relationships, and project operations/footprint**. The analysis suggests that there is a long way to go to sufficiently capture potential adverse impacts on human rights in due diligence at each level. Recent DFI statements on protection of human rights and environmental defenders involved in DFI-financed projects indicate that DFIs have begun to recognise and respond to some **contextual human rights risks** that can have profound impacts on stakeholder and projects alike, but many gaps remain. One of the biggest gaps identified is the limited scope of due diligence around **clients** that fail to address the **client's business relationships** (such as suppliers) where there may be adverse human rights impacts that are directly linked to the client's products, goods, services operations. The UNGPs do not ask DFIs or clients to address the human rights of anyone and everyone – their baseline responsibility relates specifically to the people whose human rights are affected in connection with DFIs' and clients' own operations, products and services, but in a world of globalised value chains, it is no longer tenable to argue that impacts stop at the client's factory gate. **Existing biases** towards large footprint projects and environmental impacts means that DFIs have not been responsive to the need to develop safeguards for new sectors like ICT and digital applications and the new types of risks that these create.
- The **due diligence processes** gap analysis focused on the alignment of existing DFI due diligence processes with the core concepts introduced by the UNGPs (rather than looking at alignment across each step of a typical DFI due diligence process). In particular, while some DFIs now treat human rights as a risk to be considered as **part of routine due diligence**, others continue to treat them as a specific, niche concern in particular (higher risk) situations. Significant gaps include structured processes to **prioritise human rights risks and focus on more severe human rights risks and impacts first**, to ensure that human rights risks do not get lost because they are unknown or considered too challenging to address. The exercise of "**leverage**" in its UNGPs form, which is to say, using influence to persuade business relationships to eliminate and remedy adverse impacts that are directly linked to a client's operations, products or services, is constrained by existing safeguards language and mindsets that link client responsibility for action only to those situations where they exercise control over their business relationships. In contrast, under the UNGPs, business relationships are encouraged to be seen as active vectors of influence to improve human rights (and other sustainability) practices, thereby enhancing

development impact. Another concern are the consistent findings across a range of inputs (studies, IAMs, CSO complaints) regarding ineffective **stakeholder engagement**, overlooking the fact that participation is a human right under numerous legally binding international instruments. The freedoms of expression, assembly and association are prerequisites for meaningful **stakeholder engagement**, yet the gulf between the protections afforded by international law versus national law in many countries is widening. This is likely to be an increasing challenge in DFI-funded projects given the fundamental importance attached to transparency and participation by those affected by projects, on the one hand, and potential counter-pressures from government and clients on the other.

3. The **accountability** gap analysis focused on **remedy and transparency**.

- The UNGPs include a particular focus on remedy that is relevant to both a DFI and its client – and the interaction between them. **Safeguards rarely include an overall, specific commitment to remedying adverse impacts of projects** – either by the client or the DFI -- but rather address it through specific performance standards, such as on resettlement. Clients are required to develop grievance mechanisms in order to hear and resolve concerns about project performance but only a few of the newest safeguards require those grievance mechanisms to apply the **UNGPs “effectiveness criteria”** for grievance mechanisms. Some safeguards may be directing, or at least permitting, inappropriate responses to human rights impacts, such as by including offsetting in the mitigation hierarchy. And when safeguard policies are not explicit about human rights, client grievance mechanisms may not be open, suitable, capable or willing to address them and they (and International Accountability Mechanisms (IAMs)) **may not be addressing claims in the same language and using the same human rights concepts** as claimants, which may itself be a source of frustration. DFIs have their **own role in remedy that remains underexplored** despite the suite of mechanisms commonly at their disposal. There is **potentially uneasy tension and confusion about responsibility** for adverse impacts among the mix of grievance mechanisms – IAMs, MDB grievance redress services, whistle-blower services and project level grievance mechanisms – that can lead to a lack of clarity about responsibilities and gaps, where everyone but no one is responsible. To the extent that DFIs and their IAMs fall short of claimants’ and communities’ expectations, one may expect to see increasing pressure for remedy through different avenues including **litigation** in national courts.
- On **transparency**, access to information plays a critical role in accountability and will remain a core issue for DFI stakeholders. The fact that it is recognised 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 communities potentially affected by DFI-supported projects. **Sweeping exemptions for business sensitive information** in safeguards or access to information policies are increasingly out of step with right to information and corporate disclosure developments.

The study’s **main recommendations** are:

1. **Policy Commitment**

- DFI’s safeguard policy frameworks should integrate an explicit **commitment to respect human rights**, including a **specific reference to applying the UNGPs**, with each of the DFI’s and client’s respective responsibilities to respect human rights clearly articulated, recognising that each has their own responsibilities. OHCHR recommends that DFIs commit to take all necessary measures to ensure that the projects that it supports do not result in a violation of internationally

recognised human rights. Performance standards should be explicitly aligned with the UNGPs, the content of relevant international human rights standards, and OECD RBC guidance on due diligence.

## 2. Scope of Risk Assessment and Management

- Safeguard revisions should clearly articulate that **human rights are relevant to all areas of DFI due diligence – project context, client due diligence and project operations and footprint** – and should be included as part of the **routine steps** undertaken to identify and assess risks and, subsequently, to manage risks and impacts. It is through well-structured and implemented due diligence processes that DFIs manage their own risk exposure and that of their clients, and improve the development impact of projects.
- With respect to **project context due diligence**, more detailed requirements should be set out in safeguard policies (supplemented by guidance) to guide assessments of the enabling environment for the enjoyment of human rights, or lack thereof, and the implications the project, but also for workers and affected communities and, where relevant, consumers.
- OHCHR recommends that **client due diligence** should consider a client's human rights commitments, track record and capacities. To align with the innovations introduced in the UNGPs and the OECD Guidelines, which reflect growing business practice, due diligence requirements should also cover the client's **business relationships**, focusing on relationships where there may be human rights risks, particularly those with more severe risks, to address development impact in a manner that reflects the reality of the web of business relationships that are critical even to small businesses in today's economy.
- With respect to the **project footprint and operations**, growing experience shows that project due diligence may take too narrow a focus, failing to address the lived reality of communities on the ground who may be struggling with the legacies of past actions or the cumulative impacts of multiple projects that no one takes responsibility for. These issues and guidance on dealing with them need to be clearly integrated within the scope of project due diligence.
- DFIs need to be alert to potential **blind spots** in their due diligence architecture and approach, and the challenge of keeping pace with newer types of projects being financed and the challenges they create. The ramping up of financing of the ICT sector, and the increasing uptake of digital approaches with potentially profound impacts on privacy, expression and personal security, means this is an area where a new generation of safeguards are needed.

## 3. Building on the UNGPs & OECD Guidelines Due Diligence Concepts in Identifying & Managing Human Rights Risks and Impacts

- The UNGPs and OECD Guidelines and existing DFI practices are **risk-based** and recognise that it is often necessary to prioritise among risks identified so that the more severe risks are dealt with as a matter of priority. DFIs should ensure that human rights are clearly considered and included in any prioritisation processes and OHCHR recommends they adopt and use the UNGPs structured framework for **prioritizing among human rights risks**, where relevant and necessary.
- The UNGPs also articulate a clear “**involvement framework**” in order to identify a business' relationship to an adverse impact, and importantly, the type of action expected in response. DFIs can usefully build on this framework to ensure that appropriate responses to adverse human rights impacts are built into relevant action plans.

- DFIs and their clients are encouraged to develop clear guidance on different options for exercising **leverage over business relationships**, to ensure that they have access to a full range of options for avoiding harms and promoting sustainable development.
- OHCHR recommends strengthening both **safeguards policy and practice on stakeholder engagement**, recognising its fundamental importance to project affected people on the one hand, and project outcomes on the other.
- **Project exits** in contested circumstances is a matter of increasing importance in the DFI policy agenda. OHCHR recommends that DFIs consider the human rights impacts on exit as well as entry to a project, noting they can draw on the relevant guidance in the RBC normative standards.

#### 4. **Accountability – Remedy and Transparency**

- On remedy, adjustments are needed to ensure that human rights harms are covered by safeguard requirements and that appropriate types of remedies for human rights impacts are used. DFIs are encouraged to use the “effectiveness criteria” of the UNGPs to ensure that clients’ grievance mechanisms are effective in providing remedy in practice and not just in form. More broadly, due diligence should cover the entire remedy ecosystem, as necessary, in order to visualise, advise and potentially support other relevant mechanisms that project-affected people can use. More significantly, at a time when DFI accountability is under scrutiny, it would seem to be timely for DFIs to consider new, more **comprehensive remedy commitments in safeguard policies**, to strengthen the conceptual and procedural links within their own internal remedy ecosystems, and to consider **potentially new mechanisms** to cover situations where clients manifestly fail to remedy severe harms to people or the environment.
- OHCHR recommends that existing exemptions from **disclosure** for business related information be replaced by **targeted exemptions** justified on a case-by-case basis by reference to compelling evidence of potential harm to a legitimate, recognised interest. In OHCHR’s view there are clear opportunities for DFIs to leverage innovations in data collection, management and presentation to provide better and more meaningful access to information to stakeholders.



## 1. Introduction

Development Finance Institutions (DFIs) have been actively revising and updating environmental and social safeguards in recent years. Reviews and revisions are underway at several of the major multilateral development banks (MDBs), namely the African Development Bank (AfDB), Asian Development Bank (ADB) and the Inter-American Development Bank (IDB) and IDB Invest.<sup>1</sup> The present study aims to contribute to these and other DFI safeguard policy update processes. While MDBs are the main focus of this study, bilateral DFIs are also considered for comparative purposes. In this study, unless the contrary intention appears, the term “DFIs” should be taken as including MDBs.

The commitment of DFIs to support the achievement of the Sustainable Development Goals (SDGs) is a very welcome one. This study builds on the explicit recognition in the 2030 Agenda for Sustainable Development of the inextricable linkages between human rights and sustainable development and that human rights are relevant across all SDGs.<sup>2</sup> For the private sector, commitments to respect human rights are reflected in the 2030 Agenda, the 2015 Addis Ababa Agenda for Action,<sup>3</sup> and in normative standards on human rights and responsible business conduct (RBC) from OHCHR and the OECD – the UN Guiding Principles on Business and Human Rights (UNGPs) and the human rights chapter of the OECD Guidelines on Multinational Enterprises (OECD Guidelines) respectively.<sup>4</sup>

The UNGPs are built on the Protect, Respect, Remedy Framework<sup>5</sup> that recognises and reminds states that under international law, they have an obligation to respect, protect and fulfil human

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<sup>1</sup> Among the multilateral development banks (MDBs), the International Bank for Reconstruction and Development (IBRD – World Bank) developed a new [Environmental and Social Framework](#) in 2016. The European Bank for Reconstruction and Development (EBRD) adopted a new [Environmental & Social Policy](#) in April 2019, the European Investment Bank (EIB) updated its [Environmental and Social Standards](#) in 2018, the Asian Infrastructure Investment Bank amended its [Environmental and Social Framework](#) in February 2019. There are independent evaluations of safeguard policies and their application underway at the [African Development Bank](#) (AfDB) and the [Asian Development Bank](#) (ADB), while the [InterAmerican Development Bank](#) (IDB) completed an evaluation in March 2019 and is currently engaged in public consultations on the review of its safeguard policies, along with those of its private sector financing arm, IDB Invest. Some of the bilateral development banks (BDB) and export credit agencies (ECA) have also been active in updating policies in line with national timeframes. In addition, though not DFIs, it is worth noting that the [Equator Principles](#), that are based on the IFC Performance Standards are being updated in 2019 for the fourth time, though this time independently of an IFC update of the underlying Performance Standards that were last updated in 2012. The Equator Principles are applied by 97 private sector financial institutions that often co-fund projects with DFIs.

<sup>2</sup> [Transforming Our World: The 2030 Agenda for Sustainable Development](#), UN Doc. A/RES/70/1, paras. 10, 18 & 19. The recommendations in this paper also reinforce the 2030 Agenda’s further emphasis on the interlinkages among the environmental, social and economic dimensions of projects and for delivering on “do no harm” while strengthening a focus on positive impacts.

<sup>3</sup> 2030 Agenda, para. 67; Addis Ababa Agenda for Action, UN Doc. A/RES/69/313, para. 37.

<sup>4</sup> The [UN Guiding Principles on Business and Human Rights](#) (2011) and the [OECD Guidelines for Multinational Enterprises](#) (updated 2011). The human rights chapter of the OECD Guidelines is aligned with the UNGPs. “Responsible business conduct (RBC)” is often used to cover a wider set of sustainability issues than just human rights. For example, the OECD Guidelines also cover environmental protection, corruption, consumer protection, disclosure, science and technology, competition and taxation.

<sup>5</sup> UNGPs, *Idem*.

rights. This includes “the state duty to protect human rights,” from abuses by third parties, including businesses. The “corporate responsibility to respect human rights” means that business should not have adverse impacts<sup>6</sup> on human rights, at a minimum. Those expectations apply to all businesses, everywhere. Finally, the Framework 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>7</sup>

It is not the intent of this study to develop a legal analysis of whether or the extent to which the UNGPs and OECD Guidelines apply to MDBs. It is clear that they do apply to bilateral development banks and export credit agencies as state-owned enterprises.<sup>8</sup> But rather than taking a legalistic approach to the issue, the objective of the study is to demonstrate that strengthened commitments to human rights, implemented through rigorous due diligence processes and effective approaches to remedy that are aligned with the UNGPs and the OECD Guidelines, will contribute usefully to DFIs’ mandated goals, policy and practice. Due diligence is already an integral part of a DFIs’ approach to project effectiveness, reflected in DFI sustainability frameworks, safeguard policies and accompanying performance standards (referred to collectively as “safeguard policies” except where it is useful to distinguish accompanying performance standards). Due diligence is also a requirement for businesses and other private sector entities under the UNGPs and the OECD Guidelines as a process to manage their adverse impacts on human rights through actions to prevent and mitigate such impacts and where necessary, remedy them.

The study highlights key changes that can and, in OHCHR’s view, should be made to DFI policies and practices to achieve stronger alignment to these normative standards and in doing so, to achieve the following outcomes: (i) reinforcing DFIs’ mandates in supporting sustainable private sector operations, additionality and high standards, beyond profitability goals;<sup>9</sup> (ii) improving risk management by embracing a fuller scope of risks relevant to DFI-financed projects; (iii) contributing to development outcomes by better managing adverse impacts and identifying opportunities to improve positive outcomes of projects; (iv) supporting clients in meeting the corporate responsibility to respect human rights through a clearer articulation of responsibilities and expectations supported by capacity building; and (v) improving relations between DFIs and their stakeholders, and DFI clients and their stakeholders, by demonstrating that both DFIs and their clients are committed to addressing this important category of risks about which communities are increasingly voicing concern.

Given the increasing focus of MDBs on private sector financing, this paper focuses particularly on DFI financing of private sector projects and the relevance and application of the UNDGs and RBC normative frameworks to DFIs and their clients. While recognising that these frameworks call on businesses to respect human rights as a minimum baseline requirement, businesses obviously have

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<sup>6</sup> There are various other ways this is often expressed: as abusing or infringing on human rights or a “do no harm” approach.

<sup>7</sup> 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.

<sup>8</sup> UNGPs, Principle 4.

<sup>9</sup> See, “[MDB Principles to Support Sustainable Private Sector Operations](#),” (2012).

important opportunities to support and actively promote human rights as well, as envisaged in the SDGs, Addis Ababa Agenda for Action, and DFI safeguards and mandates which foresee a positive role for private sector development. DFIs can and do also play a role in going beyond a risk management, or “do no harm” approach, in protecting and fulfilling rights as well. The UNGPs, and this study, are very relevant to public sector financing as well. Challenges are nevertheless presented by the ever-increasing range and complexity of financing schemes, such as blended finance, which may blur the lines of responsibility. Strengthening the roles of all parties in these schemes in accordance with a consistent, common standard (the UNGPs), will help to ensure that human rights are respected in any financing arrangement or context.

This study also recognises that DFI safeguard updates are occurring amid challenging circumstances and conflicting currents in global development policy. Competition from new funding sources, including from newer DFIs that are still developing the rigor and scope of their environmental and social safeguards. When safeguards are poorly implemented and/or unduly deferential to (weaker) national systems, projects are not likely to manage environmental and social risks effectively, and consequently, are not likely to yield the intended development outcomes. DFIs must balance their operational requirements for more and faster funding to meet the SDGs while simultaneously meeting environmental and social goals. These are not mutually exclusive objectives. A human rights lens can provide an additional insurance policy that no major risks are overlooked and that funds are channelled in a way that is most impactful for the people and the planet. This is the lesson that private sector financial institutions (FIs) have been addressing when exploring how the UNGPs and OECD Guidelines apply to them in the context of financing.

Various groups of banks and investors have been addressing the UNGPs and the OECD Guidelines,<sup>10</sup> and OHCHR<sup>11</sup> and the OECD<sup>12</sup> have also issued guidance on the application of the normative standards to the financial sector. DFIs should at least be aware of the increasing expectations – and acceptance – among FIs that they also have human rights responsibilities, and should strive for (upwards) harmonisation of their own safeguard policies with those of co-financing institutions. DFIs can potentially draw on the existing guidance from OHCHR and the OECD to strengthen their approach to human rights and human rights due diligence.

Within this complex operating context, DFIs also appear to be facing increasingly risk of legal liability for project-related harms.<sup>13</sup> While it is difficult (as of September 2019) to quantify the extent of this

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<sup>10</sup> See for example the [Dutch Banking Sector Covenant](#), and the extensive discussions and disagreements about the [Thun Group of banks discussion papers on human rights](#).

<sup>11</sup> OHCHR, [The application of the UNGPs to minority shareholdings of institutional investors](#) (2013), [Advice to the OECD on the application of the Guiding Principles to the financial sector](#) (2013), 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>12</sup> <http://mneguidelines.oecd.org/rbc-financial-sector.htm>

<sup>13</sup> Much of the current conversation centers on the US and the recent Supreme Court decision in *Jam v. IFC*, which overturned long-standing assumptions about the breadth of the IFC’s jurisdictional immunity. However concerns about opening the floodgates may be overstated. For example see Kristina Daugirdas, [“What Comes Next: After Supreme Court Reduced Obstacles to Suing International Organizations,”](#) JUST SECURITY (Mar. 13, 2019), (noting potential challenges faced by the plaintiffs in satisfying the “commercial activities” exception, demonstrating a sufficient nexus to the United

risk, human rights due diligence has a potentially important role to play in mitigating it. Comparative jurisprudence shows that strong due diligence may operate as a defence to legal claims<sup>14</sup> and may also mitigate against secondary liability (complicity) risks, sanctions and remedies.<sup>15</sup> Explicit commitments and implementation of the UN and OECD RBC instruments have been used by the private actors as a shield in litigation.<sup>16</sup> An increasing range of countries are integrating or at least considering integrating RBC expectations, and in particular, human rights due diligence requirements, as a standard of conduct of businesses into their corporate regulatory regimes.<sup>17</sup>

### **1.1. Methodology**

This study surveys existing DFI safeguards and their due diligence frameworks, benchmarked against the UNGPs and the OECD Guidelines.<sup>18</sup> It is offered as a resource to institutions and individuals interested in DFI safeguard policy revision processes. It aims to encourage strengthened policy coherence among DFI due diligence frameworks in line with global standards for responsible business conduct (RBC), in support of DFI-mandated goals and the SDGs. The survey analyses gaps in DFI policies and practices when financing private sector projects, and also highlights emerging and innovative practices aligned with the UNGPs and OECD Guidelines. In so doing, the study seeks to address common misconceptions about human rights and how they apply in the DFI context, and demonstrate how human rights due diligence can be applied by DFIs in a practical and effective way.

The study does not involve a detailed comparison of all safeguards or their accompanying performance standards at all DFIs, given time and resource constraints, but draws from a selective review of the policies and practices of a number of the more experienced DFIs.<sup>19</sup> It seeks to highlight particular themes, drawing on safeguard policies, public disclosure policies, IAM policies, evaluations and literature. It does not address budgetary or other capacity requirements for effectively implementing safeguard requirements, and does not look at policies for on-lending to other financial institutions, though these would be useful topics for further research.

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States, and overcoming a forum non conveniens objection); and Green Climate Fund-Independent Redress Mechanism, Opinion – [Jam v. IFC: What does it mean for Accountability? To sue or not to sue: that is the question](#), (Mar. 29, 2019), (noting practical as well as legal barriers to litigating extra-territorial tortious claims).

<sup>14</sup> See e.g. *Barber v. Nestlé USA* No. 8:15-cv-1364 (C.D. Cal. Aug. 27, 2015), where Nestlé successfully defended the claim by reference to its human rights due diligence processes. See generally OHCHR, [Improving accountability and access to remedy for victims of business-related human rights abuse: the relevance of human rights due diligence to determinations of corporate liability](#), UN Doc. A/HRC/38/20/Add. 2, June 1, 2018, at pp.6-7.

<sup>15</sup> OHCHR, *Id.*, at 6-9.

<sup>16</sup> British Institute of International and Comparative Law and Norton Rose Fulbright, [“Making Sense of Managing Human Rights in Supply Chains,”](#) (2018).

<sup>17</sup> See the Business and Human Rights Resource Centre, microsite on [Mandatory Human Rights Due Diligence](#)

<sup>18</sup> And informed by the [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018).

<sup>19</sup> Several more comprehensive comparisons are available at a more general level. See for example, the table of comparison in IDB, [“Modernization of the Environmental and Social Policies of the IDB – Policy Profile”](#) (2019), Grupo Regional sobre Financiamiento e Infraestructura (GREFI), [“Análisis comparativo de los marcos normativos ambientales, sociales y de acceso a la información de las instituciones financieras tradicionales, emergentes y chinas con presencia en América Latina,”](#) (2018), Himberg, H. [Comparative Review of Multilateral Development Bank Safeguard Systems](#) (May 2015).

## 1.2. **Why Human Rights Due Diligence**

Safeguards at DFIs are implemented through “due diligence” processes to assess environmental and social risks and impacts associated with the project context, the project and the client. DFIs typically carry out their due diligence through the following processes: (i) risk screening and classification, including contextual analysis; (ii) environmental and social due diligence, including review of the adequacy of a client’s environmental and social assessments, its analysis of applicable laws and evidence of compliance, documentation disclosure and stakeholder engagement; (iii) supervision and oversight of a client’s compliance with requirements and contractual agreements throughout the project cycle; and (iv) disclosure of information.<sup>20</sup> Due diligence as generally understood in this context is principally an obligation of conduct: it is a matter of knowing all relevant risks and managing them. It is not about adjudication or enforcement.

Likewise, the corporate responsibility to respect human rights is implemented by carrying out “human rights due diligence,” to identify, manage and communicate about adverse impacts on human rights (See Box 1). Under the UNGPs the human rights due diligence process is complemented by the steps of adopting a policy commitment to human rights and providing for or cooperating in remedy. The corporate responsibility to respect applies to all businesses, including private and publicly listed companies, small and medium sized enterprises, state-owned enterprises (SOEs) and to the state when it acts as an economic actor, such as through an export credit agency. Like safeguards due diligence, and unlike traditional transactional due diligence, the human rights due diligence concept covers not only the identification of risks but also the management systems and steps to prevent, mitigate, track and report on human rights harms. It is a risk-based, on-going, dynamic and adaptive management process that is continuous throughout the project cycle.<sup>21</sup>

### **Box 1: Explanation Box - The Corporate Responsibility to Respect and Human Rights Due Diligence**

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

- (a) A policy commitment to meet their responsibility to respect human rights
- (b) A human rights due diligence process to (i) identify and assess; (ii) prevent and mitigate; (iii) track implementation and results; and (iv) communicate about how they address their impacts on human rights
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute<sup>22</sup>

There are obvious similarities and overlaps between existing safeguard due diligence practices for managing environmental and social issues and human rights due diligence. Helpfully, the starting points are aligned (i.e. in managing impacts on people and the environment) and the processes are similar, which means in many cases explicit attention to human rights can be integrated into existing

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<sup>20</sup> IDB, “[Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#)” (2019), para. 5.2.

<sup>21</sup> See in particular, [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018), Chapter I – Overview of Due Diligence for Responsible Business Conduct.

<sup>22</sup> UNGPs, Principle 15.

approaches on a routine basis. (See Section 2.3.1) This provides an important starting point for the discussion of what more is needed to ensure that human rights are appropriately covered by DFIs and their clients. The reasons for doing so include the following:

For the **DFIs themselves**:

- DFIs have an important **mandate** in the financing ecosystem – the objectives, and principles which guide MDB operations in providing financing to the private sector go beyond profitability, and include additionality and the application of high standards.<sup>23</sup> In addition, most DFIs have made commitments to support the SDGs. Aligning and anchoring DFI policies (including but not limited to due diligence policies) in human rights can help fulfil their mandate and commitments.
- Human rights due diligence is important for the same reason that any other kind of due diligence is important: 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** in project preparation so that all potentially useful prevention and mitigation options are considered.
- As DFIs move from upfront compliance to more flexible timeframes for clients to meet safeguard requirements,<sup>24</sup> it is all the more important that DFIs have a **good overview of all significant risks “coming down the pike”** and are assured of a client's capacity to manage them before signing off on funding.
- As DFIs become involved in **increasingly complex financing structures, such as through blended finance mechanisms**, they will often be looked to as the lead on environmental and social issues. These more complex structures, with new types of private financial institutions and new clients, may further broaden a DFI's risk exposure. Being on top of the full range of risks will become increasingly important.
- DFIs have always played a role in **supporting clients in meeting international standards**. Developing experience and guidance would help ensure that DFI **advice is keeping pace** with rapidly evolving expectations on private sector clients to respect human rights.
- Implementing human rights specific due diligence would **meet the increasing demands of stakeholders**. Human rights are materially relevant, as some recent DFI materiality matrices bear out.<sup>25</sup>
- DFIs' International Accountability Mechanisms (**IAMs**) are increasingly dealing with complaints framed in human rights language, law and concepts. Even where this is not the case, the subject matter of claims and safeguard standards (on issues including resettlement, labour rights, stakeholder participation, and discrimination against women, persons with disabilities, indigenous peoples or other population groups) may be the subject of binding international legal obligations in the given context. Greater awareness by IAMs of international and national human rights law relevant to investment projects would encourage more **consistency in decision-making**, stronger **legitimacy and justification** for hard choices, greater **policy coherence** at country level, and would help to ensure that DFI safeguard standards are **interpreted in line with applicable law**.

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<sup>23</sup> See, “[MDB Principles to Support Sustainable Private Sector Operations](#),” (2012).

<sup>24</sup> See for example, IDB, “[Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#)” (2019), para. 3.1.

<sup>25</sup> See for example, EIB “[Sustainability Report](#),” (2018), p. 11.



- Systematic human rights due diligence and effective, independent accountability mechanisms would **strengthen MDBs' defences** in relation to any legal claims relating to or underpinned by those rights.
- Finally, incorporating human rights into updated safeguards would **align DFIs with their peers** who are increasingly doing so, as highlighted in the many “emerging practice” boxes throughout the study.

For **DFI clients**:

- Human rights due diligence is important for the same reason that any other kind of due diligence is important: because it is useful in terms of **managing the client's own risk exposure**.
- Aligning due diligence practices with international standards would ensure that the most significant (severe) impacts are **dealt with according to international standards**.
- This in turn is likely to have a range of **business benefits** for clients (reduced reputational risks, liability exposure, and so forth) and to improve relations with stakeholders.
- Human rights can be considered a **leading-edge indicator of how nimble and proactive clients are** in identifying and managing emerging issues. Developing management systems that can identify and manage emerging issues like human rights should strengthen **client capacity and resilience in addressing challenges**.

## 2. Four Key Gap Areas and Emerging Practice at DFIs on Human Rights

This section of the study highlights **four key gap areas** in current DFI due diligence procedures and practices, in relation to human rights:

- **Area 1: Policy commitments** addressing human rights
- **Area 2: Scope of coverage of human rights in risk assessments and risk management**
- **Area 3: Due diligence processes**
- **Area 4: Accountability** with a focus on **remedy and transparency**

It also highlights **emerging DFI practices** that can be built upon by other DFIs updating their policies and practices. As indicated earlier, this review is selective, not comprehensive.<sup>26</sup> It seeks to highlight particular themes on which the UNGPs provide specific guidance, drawing on safeguard policies, access to information policies, IAM policies, evaluations and literature, and the experiences of a number of the more established DFIs. It does not address budgetary or other capacity requirements for effectively implementing safeguard requirements.

### 2.1. Gap Area 1: Policy Commitment to Human Rights

This section identifies gaps in existing DFI policies in relation to commitments to apply human rights norms, and notes examples of emerging practice that are beginning to fill these gaps. Policy

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<sup>26</sup> Several more comprehensive comparisons are available at a more general level. See for example, the table of comparison in IDB, “[Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#)” (2019), Grupo Regional sobre Financiamiento e Infraestructura (GREFI), “[Análisis comparativo de los marcos normativos ambientales, sociales y de acceso a la información de las instituciones financieras tradicionales, emergentes y chinas con presencia en América Latina](#),” (2018), and Himberg, H. [Comparative Review of Multilateral Development Bank Safeguard Systems](#) (May 2015).

commitments are important because they provide an important signal from the DFI about its objectives and how they will be implemented, and an anchoring point for the identification of internal responsibilities and due diligence procedures.

### 2.1.1. International human rights standards

Emerging practice among DFIs is to include an explicit commitment to human rights including, in some cases, a clear commitment to align their policies and practices with human rights and avoid causing or contributing to human rights violations. (See Box 2 on human rights commitments). This is an important and necessary step in laying the foundation for ensuring that human risks are identified and adverse impacts avoided in the context of private sector operations through robust due diligence.

#### **Box 2: Emerging DFI Practices - Explicit References to Human Rights in DFI Safeguards**

Several DFIs have begun to incorporate explicit references to human rights into their overarching safeguard policy and via additional, scattered references across numerous specific safeguard policies, such as on environmental and social assessment, labour, land acquisition and indigenous peoples.

Some DFIs recognise their **own responsibilities** to apply human rights in their own due diligence:

- OPIC: is required by policy to ensure that its projects “avoid prejudice and discrimination and respect human rights,”<sup>27</sup>
- EIB: “[t]he Bank will not finance projects which result in a violation of human rights.”<sup>28</sup>

Some DFIs recognise **their own responsibilities and those of their clients**:

- 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.”<sup>29</sup> The bank will also avoid *knowingly* contributing to breaches of human rights.<sup>30</sup> (emphasis added)
- EIB: is committed to “Promoting the principles of environmental and social assessment, through the application of the mitigation hierarchy, with the aim of achieving a high level of protection of the environment, human health, rights and well-being;” and “Strengthening the environmental and social assessment process by enhancing coherence and synergies (in the

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<sup>27</sup> OPIC, “[Environmental and Social Policy Statement](#),” (2017), para. 1.3.

<sup>28</sup> EIB, [Statement of Environmental and Social Principles and Standards](#) (2009), para. 6.

<sup>29</sup> EBRD, “[Environmental and Social Policy](#),” (2019) para. 2.4.

<sup>30</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.”



EU) and alignment (outside the EU) with other EU legislation, policies, and applicable international conventions, thereby ensuring that broader key environmental and social issues, such as ... human rights, gender and conflict are considered accordingly as part of comprehensive assessment and decision-making processes;”<sup>31</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.”<sup>32</sup> “FMO takes measures through the due diligence process to avoid supporting activities that may contribute to or cause human rights violations, and we acknowledge the responsibility of our business clients to respect human rights.”<sup>33</sup>

Some DFIs have more of an **aspirational rather than operational statements** on human rights:

- World Bank ESF, A Vision for Sustainable Development, para. 3: “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.”
- AfDB: “The AfDB, in accordance with its mandate ... views economic and social rights as an integral part of human rights, and accordingly affirms that it respects the principles and values of human rights as set out in the UN Charter and the African Charter of Human and Peoples’ Rights. These were among the principles that guided the development of the Integrated Safeguards System. The AfDB encourages member countries to observe international human rights norms, standards, and best practices on the basis of their commitments made under the International Human Rights Covenants and the African Charter of Human and Peoples’ Rights.”<sup>34</sup>
- IDB Invest, “IDB Invest reaffirms its commitment to good international practice in the context of all social aspects of the projects it finances, including human rights.”<sup>35</sup>

Some DFIs have ring-fenced **human rights as responsibilities only for clients**:

- IFC: the IFC Sustainability Policy “recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights.”<sup>36</sup>

While it is encouraging to see increasing references to human rights in safeguard policies, the formulation of some current commitments can present challenges in implementation. They also re-emphasise the importance of thorough, early due-diligence. For example:

- A prohibition on not “knowingly” financing projects that would contravene national human rights laws or relevant international treaties (such as that of the EBRD) could create perverse 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

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<sup>31</sup> EIB, “[Environmental and Social Standards](#),” (2018), Standard 1, para. 4.

<sup>32</sup> FMO “[Sustainability Policy](#),” (2016), p. 3.

<sup>33</sup> FMO, “[Position Statement on Human Rights](#)” (2017).

<sup>34</sup> AfDB, “[African Development Bank Group’s Integrated Safeguards System: Policy Statement and Integrated Safeguards](#),” (2013).

<sup>35</sup> IDB, “[IDB Invest reaffirms its commitment to human rights](#).” (undated)

<sup>36</sup> IFC, “[Sustainability Policy](#),” para. 12 (2012).

knowledge about risks. This tension needs to be clearly acknowledged and addressed at the highest level of a DFI's implementation procedures, emphasising that thorough, robust due diligence is advantageous in improving risk management.

- Commitments to not finance projects “which result” in a violation of human rights, rather than “which *may* result”, reflects an unrealistic assumption about the ability of DFIs to determine when violations have occurred in practice during the course of initial due diligence. It is also impractical from the perspective of timing, given that violations often only materialise during the implementation phase. A commitment to undertake “all necessary measures to ensure that projects do not violate human rights” would avoid these pitfalls and accord with standard risk management concepts.

The absence of more routine commitments to human rights at some DFIs is all the more surprising in light of the fact that many DFIs already include a range of human rights in their Exclusion Lists (See Box 3 on Exclusion Lists). Some lists include broader catch-all exclusions that allow the DFI flexibility to exclude projects where severe human rights issues emerge. However, unduly heavy reliance on exclusion lists means that projects that could benefit from dedicated resources and expertise to improve the human rights situation may be denied them. Complex issues like child labour are not always reducible to binary “yes/no” decision-making metrics, and projects addressing these issues may often benefit from constructive (critical) engagement and support. Hence, in OHCHR's view, while exclusion lists may and should have a role to play, expectations should be kept realistic and they should be seen as complementing – not replacing – substantive human rights policy commitments and due diligence.

**Box 3: Emerging DFI Practices - DFI Exclusions from Finance Based on Human Rights Grounds<sup>37</sup>**

- Harmful or exploitative forms of child labour (ADB, AfDB, IDB, IFC, OPIC, FMO)
- Harmful or exploitative forms of forced labour (ADB, AfDB, IDB, IFC, OPIC, FMO)
- Discriminatory labour practices (IDB)
- Labour practices that prevent employees from freely exercising their right to association and collective bargaining (IDB)
- Non-compliance with workers' fundamental principles and rights at work (IDB)
- Various exclusions with respect to indigenous peoples (EBRD, IDB, IFC)
- Projects resulting in limiting peoples' individual rights and freedom in violation of human rights and ethically or morally controversial projects (EIB)
- Projects “unacceptable in environmental or social terms” (IDB, 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) (FMO)
- Projects or companies known to be in violation of local applicable law related to environment, health, safety, labour, and public disclosure (OPIC)

<sup>37</sup> Himberg, H., “[Comparative Review of Multilateral Development Bank Safeguard Systems](#),” (2015)

- 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 (OPIC)

Finally, there are a number of potential adverse consequences when DFIs do not make an explicit commitment to respect human rights:

- There may be a wide range of relevant human rights risks and impacts that DFIs and their clients are **missing** which would have enhanced project impacts and policy outcomes (as highlighted in examples throughout this study).<sup>38</sup> Where neither DFIs nor their clients address these harms, they **externalise the burden of dealing with them to communities and workers**.
- The rapidly expanding attention to human rights in RBC standards such as the UNGPs and OECD Guidelines means that these issues are becoming **mainstream** rather than exceptional issues for businesses and the governments that regulate them. DFI requirements may become misaligned if they lag behind these important normative and regulatory developments affecting their clients.
- Many DFI safeguards provide a **patchwork of references**, implicit and explicit, to human rights. However, across the board, there are many gaps and contradictions, which may present challenges to the faithful and consistent implementation of national human rights laws and borrowing countries' treaty obligations at country level. In OHCHR's view it is vital that DFIs **avoid renegotiating and inadvertently undermining international human rights standards** corresponding to the subject matter of safeguard policies. **Consistent adherence and cross-referencing to international human rights standards would reduce policy incoherence, inefficiencies and confusion.**
- The patchwork of references may also create **confusion for staff and clients**. If human rights risks are not highlighted explicitly in safeguard policies, they will not be taken as seriously: information specific to particular human rights risks will more likely be overlooked;<sup>39</sup> implementation will be inconsistent; and expectations between lender and borrower will not be clear.
- Tethering safeguard definitions and concepts directly to parent human rights and RBC norms will help to ensure that DFI policies **keep pace with the evolving interpretations of parent norms** in practice. In addition, explicit referencing would also trigger reference to recommendations from UN and other human rights bodies, that draw on their extensive expertise in relation to country-specific or thematic-specific analysis that can inform and strengthen DFI due diligence.

<sup>38</sup> One recent study has shown that lost productivity costs due to temporary shutdowns or delays in the mining sector, following failure to manage social conflict, can result in USD 20 million per week in net present value terms. Rachel Davis. & Daniel Franks. (2014) "[The costs of conflict with local communities in extractive industry](#),"; Paul Stevens, Jaakko Kooroshy, Glada Lahn & Bernice Lee (2013) "[Conflict and Coexistence in the Extractive Industries](#)," Chatham House – Royal Institute of International Affairs. See also that estimated that "that the costs incurred by Energy Transfer Partnership and other firms with an ownership stake in Dakota Access Pipeline (DAPL) in the US 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).

<sup>39</sup> For example, already in the 2006 IFC Performance Standards, IFC Performance Standard 5 used the term "adequate housing", purposefully drawing on the right to housing under the ICESCR. However, without an express link to that normative framework, staff and clients may not have recognised that "adequate" has a detailed meaning and criteria, developed under the ICESCR, that would be useful in implementation of the Performance Standard. The EIB Environmental and Social Standards (2018) now makes an explicit link between adequate housing and the normative human rights standard on which it is based. EIB, "[Environmental and Social Standards](#)," (2018), Standard 6, para. 45.

- Many DFIs already rely on and incorporate human rights standards in their **exclusion lists**. A more explicit reliance on human rights standards for projects that are financed (and not excluded) would provide greater clarity in designing better prevention and mitigation actions. **Human rights responses** are likely to be the **most appropriate response for human rights impacts**. For example, the mitigation measures adopted in IFC's investment in the Corporación Dinant project in Honduras (an agribusiness investment characterized by serious allegations of human rights abuses by the client's private security forces) have included human rights training for security forces, investigation of alleged human rights abuses, and adherence to the Voluntary Principles on Security and Human Rights. Human rights specialists have also been engaged by MDBs in human rights screening and training in the context of large infrastructure projects in fragile and conflict-affected states, and monitoring labour conditions of remedial action plans.
- **Recommendations:** *Upcoming revisions to DFI safeguard policies should include clear and explicit commitments to respecting human rights, to carrying out human rights due diligence, and requiring their clients to respect human rights and carry out human rights due diligence. OHCHR recommends that DFIs commit to take all necessary measures to ensure that the projects that it supports do not result in a violation of internationally recognised human rights. Performance standards should be explicitly aligned with the UNGPs, the content of relevant international human rights standards, and OECD RBC guidance on due diligence. An explicit policy commitment of this kind sets the "tone from the top" and makes it clear that human rights are relevant to improving private sector operations and obtaining and maintaining their social license to operate, in line with growing normative expectations. Exclusion Lists serve an important signalling function about the kinds of risks and impacts are not acceptable, and should include avoidance of projects which involve forced or child labour or other serious violations of human rights. Such Lists should be seen as complementary to clear human rights policy commitments and robust, continuous, human rights due diligence.*

### 2.1.2. References to RBC standards

There is considerable variation in the breadth and scope of commitments to RBC standards. What is noteworthy is that such references are increasingly included in DFI safeguards. (See Box 4 on RBC Standards)

#### **Box 4: Emerging DFI Practices - References and Commitments to RBC Standards**

- EIB PS 6 on Involuntary Resettlement, PS 8 on Labour Standards, and PS 9 on Occupational and Public Health, Safety and Security include references to applying the PS in line with the UNGPs.
- 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.

- CDC’s Code of Responsible Investment “reflects international standards and practices including ... the UN Guiding Principles on Business and Human Rights.” It “promotes” the OECD Guidelines (and other international standards) (Schedule 5).<sup>40</sup>
- FMO “upholds the following (inter)national standards, including in its own operations, as applicable... UNGPs and OECD Guidelines.”<sup>41</sup>
- 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>42</sup>

- **Recommendation:** *The UNGPs and the OECD Guidelines should specifically be referenced within DFI safeguard policies, in order to clarify expectations, ensure that DFI policies are consistent with international standards and good practice, and support staff and clients in applying safeguard standards and due diligence in practice.*

### 2.1.3. International law obligations

There is a variety of practice among DFIs on the recognition of international law obligations of the country of operation: some fail to consider international law at all; some take into account conventions formally entered into by the host state; others only take into account “national laws implementing host country obligations under international law” (which overlooks the fact that international law often has direct effect, irrespective of implementing legislation, and that national laws are frequently below international standards); and some take account of international law whether or not there is host state ratification for selected issues (See Box 5 on International Law).

This is an important issue insofar as human rights are concerned, because unlike many other areas of international law, human rights apply to each and every human being whether or not a host state has adopted a human rights convention and whether or not this is recognized in national law. Even where human rights treaties have been adhered to, implementation, including harmonisation of national law with international requirements, is always a work in progress. The RBC normative frameworks, including the UNGPs and OECD Guidelines, are clear that businesses are expected to respect human rights whether or not national laws fully reflect them.

#### **Box 5: Emerging DFI Practices – Selected References to International Law Obligations**

- References to compliance with national law (and by implication no references to complying with international law) (AfDB);
- References to those laws implementing host country obligations under international law (ADB);

<sup>40</sup> CDC, “[Code of Responsible Investing](#)” (2017).

<sup>41</sup> FMO, “[Sustainability Policy](#),” (2016), Section 4.

<sup>42</sup> FinnFund, “[Human Rights Statement](#),” (2019).

- References to international conventions to which the host country is a party (without further referring to national implementing laws) (EIB)<sup>43</sup> (IDB)<sup>44</sup> (IFC)<sup>45</sup> (EBRD)<sup>46</sup> (IIC).<sup>47</sup> For an example of the latter (IIC) provides that E&S documentation will address, where applicable, the “[p]rotection of human rights by acting with due diligence to prevent, mitigate and manage adverse human rights impacts,” and “[r]equirements under ... applicable international treaties and agreements” (in addition to national law);
- Selected cases of requiring compliance to national or international standards whichever is higher (which is the optimal formulation for risk management purposes);
  - International labour standards on employment of children (EBRD)<sup>48</sup>;
- References to compliance with selected international conventions whether or not the host government is a party;
  - ILO Core Labour Standards (AfDB), (EBRD), (EIB);<sup>49</sup>
  - Selected environmental and cultural heritage conventions (EIB);<sup>50</sup>
  - UNICEF (sic) Convention on the Rights of the Child (AfDB);
- References to customary law (ADB with respect to indigenous peoples);
- References to specific human rights standards within its environmental and social standards:
  - UN Declaration on the Rights of Indigenous Peoples,<sup>51</sup> UNGPs<sup>52</sup> Migrant Workers Convention.<sup>53</sup> (EIB)

- **Recommendation:** *DFI safeguards, like the RBC standards, should take the highest applicable standard into account on any given issue, for effective risk management purposes. This is especially important when it comes to assessing issues like discrimination, labour rights, civil society space and stakeholder participation, where the gap between the protections afforded by national and international law in many countries is wide, or may be widening.*

## 2.2. Area 2: Gaps in Coverage of Human Rights in Risk Assessments and Risk Management

The first step in any due diligence process is to identify and understand risks – and then to manage them. This section has been separated from the remaining discussion of due diligence processes in Section 2.3 given the breadth of issues covered. The section identifies potential blindspots on human rights in DFI coverage of human rights issues at three levels:

- The project context

<sup>43</sup> EIB, “Environmental and Social Standards,” (2018), Standard 1, Requirements, General

<sup>44</sup> IDB, “Environment and Safeguards Compliance Policy,” Section B2.

<sup>45</sup> IFC, “Performance Standard 1,” (2012).

<sup>46</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.” Note that this is a subjective standard rather than an objective “reasonableness” test and might create perverse incentives which undermine information gathering and robust due diligence

<sup>47</sup> International Investment Corporation (IIC, the predecessor to IDB Invest), Environmental and Social Sustainability Policy (Annex), available at <https://www.iic.org/environmental-and-social-sustainability-policy.pdf>.

<sup>48</sup> EBRD, “Environmental and Social Policy,” (2019), Standard 3, para. 11.

<sup>49</sup> EIB, “Environmental and Social Standards,” (2018), Standard 8, para. 4.

<sup>50</sup> EIB, “Environmental and Social Standards,” (2018), Standard 1, 5 and 6.

<sup>51</sup> EIB, “Environmental and Social Standards,” (2018), Standard 7, para. 24.

<sup>52</sup> EIB, “Environmental and Social Standards,” (2018), Standard 8.

<sup>53</sup> Id.

- The client and its business relationships
- The project footprint

The section ends with a brief discussion on apparent biases in screening and risk categorisation which may result in social issues, and human rights issues more particularly, receiving inadequate attention.

### **2.2.1. The Project Context**

A number of DFIs are beginning to take explicit account of the human rights situation in the broader project context through contextual risk assessments. Due diligence investigation of the project context should not be limited to the consideration of where a country stands in one or more human rights rankings. The human rights context in which projects will operate can have important implications for meeting numerous safeguard standards. Understanding whether the policy and legal framework supports or inhibits the exercise of human rights, power imbalances, political dynamics, and human rights track records of relevant government agencies and actors, is all useful information that is too rarely analysed as part of routine due diligence. Such due diligence is needed not only at the beginning of projects, but throughout the cycle as part of routine monitoring.

The selected examples below provide just a sampling of the kinds of human rights issues that, in OHCHR's view, DFIs should consider including in their due diligence on the project context; it is by no means an exhaustive list of issues that should more routinely be considered.

#### *2.2.1.1. The enabling environment for stakeholder participation*

DFI financing is usually accompanied by a structured stakeholder engagement process. There is a rich body of international law available through international, regional and national human rights bodies which can usefully inform DFIs' assessments of the climate for free expression, assembly and association and the prerequisites for stakeholder engagement in a given country. However, assessing the enabling environment for public participation in the project is often not covered in existing safeguards due diligence. Many DFIs have to date treated stakeholder engagement as a process, albeit an important one, rather than a right, and without explicitly recognising that the process itself can create risks that need to be addressed as an active dimension of risk management.

Attacks, threats and killings of environmental and human rights defenders supporting the rights of communities to participate in consultations, and seeking alternative project design, compensation or termination of DFI-financed projects, appear to be increasing in all regions. Environmental and human rights defenders are often branded as "anti-development," "enemies of the state," "criminals" or even "terrorists" and are increasingly subject to arrest, repression, violence, stigmatisation, criminalisation, labour retribution, and even death in connection with DFI-funded



projects.<sup>54</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.<sup>55</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 world-wide,<sup>56</sup> and an increase in “SLAPP suits” (strategic lawsuits against public participation) that target those who speak out with litigation in order to drain opponents’ finances and constrain free speech.<sup>57</sup> Private sector companies are under increasing pressure to improve their own responses to human rights defenders as an integral dimension of the corporate responsibility to respect human rights.<sup>58</sup>

A number of DFIs and their IAMs are putting in place position statements prohibiting retaliation and are developing early warning systems and risk screenings to identify threats to defenders. Currently, with some notable exceptions, these are mostly operating as stand-alone statements of intention and are not always well integrated within safeguard policies or accompanied by more detailed operational procedures.<sup>59</sup> (see Box 6 on Reprisals).

#### **Box 6: Emerging DFI Practices – Reprisals**

- Several DFIs, including FMO,<sup>60</sup> IFC,<sup>61</sup> Finnfund,<sup>62</sup> IDB Invest,<sup>63</sup> and EBRD<sup>64</sup> have recently adopted policy positions or public statements on reprisals, and some have developed more detailed procedures to guide their preventive and remedial actions.
- Several IAMs, including the World Bank’s Inspection Panel,<sup>65</sup> the ADB’s Accountability Mechanism,<sup>66</sup> the IFC’s Compliance Advisor Ombudsman,<sup>67</sup> the AIIB’s Project Affected People’s Mechanism,<sup>68</sup> and the EBRD Project Complaint Mechanism have developed guidance on retaliation and several

<sup>54</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>55</sup> The experience of DFIs supporting the Agua Zarca dam and agribusiness in Honduras in recent years is illustrative.

<sup>56</sup> See e.g. Committee for the Protection of Journalists’ [global impunity index](#).

<sup>57</sup> As highlighted in the recent report UN Working Group on the issue of human rights and transnational corporations and other business enterprises “[Human rights and transnational corporations and other business enterprises - Note by the Secretary-General](#),” A/72/162, 18 July 2017, para.35, “In 450 cases of attacks against human rights defenders tracked by the Business & Human Rights Resource Centre, judicial harassment has emerged as the most common tool of suppression (40 per cent of cases).”, citing Business and Human Rights Resource Centre, “Corporate impunity is common & remedy for victims is rare: Corporate Legal Accountability Annual Briefing” (2016), <http://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps>

<sup>58</sup> See for example, Business & Human Rights Resource Centre & International Service for Human Rights, “[Shared space under pressure: Business support for civic freedoms and human rights defenders](#),” (2019).

<sup>59</sup> FMO, “[Human Rights: An integral part of our investment approach – Human Rights Report](#),” (October 2017 – September 2018).

<sup>60</sup> FMO, “[Position Statement on Human Rights](#),” (August 2017).

<sup>61</sup> IFC “[Position Statement on Retaliation Against Civil Society and Project Stakeholders](#),” (October 2018),

<sup>62</sup> Finnfund, “[Human Rights Statement](#),” (2019).

<sup>63</sup> IDB Invest, “[IDB Reaffirms its Commitment to Human Rights](#)” (2018).

<sup>64</sup> EBRD, “[Retaliation against Civil Society and Project Stakeholders](#),” (February 2019),

<sup>65</sup> World Bank Inspection Panel, “[Guidelines to Reduce Retaliation Risks and Respond to Retaliation During the Panel Process](#),” (2016),

<sup>66</sup> ADB, [Guidelines for the Protection of Key Stakeholders during the Accountability Mechanism Process](#), (May 2018)

<sup>67</sup> CAO, “[Approach to Responding to Concerns of Threats and Incidents of Reprisals](#),” (2017).

<sup>68</sup> AIIB, “[Policy on the Project-affected People’s Mechanism](#),” (Dec 2018)



others are working on similar approaches. The Independent Consultation and Investigation Mechanism (MICI) of the IDB, as chair of the IAM Network, developed a Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management.<sup>69</sup>

- The World Bank's country office in DRC has taken a number of important measures in collaboration with the United Nations to help mitigate reprisals risks in connection with a major transport project.<sup>70</sup>

- **Recommendation:** *Due diligence should cover the enabling environment for stakeholder participation, considering the space for dialogue and power dynamics at the project level as well as at the national level. Project context assessments should include threat assessments and required responses to threats and reprisals against those affected by DFI-funded projects and their representatives, including commitments not to bring lawsuits for defamation or other grounds to pressure complainants to drop complaints. (See Box 7 on Suggested Actions).*

**Box 7: Report Box - Suggested DFI Actions to Improve the Enabling Environment for Participation and Protection against Reprisals**

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

**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 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

<sup>69</sup> IDB MICI, "Guide for IAMs to address the risk of reprisals in complaint management: a toolkit," (2019).

<sup>70</sup> <https://www.worldbank.org/en/news/factsheet/2017/12/11/democratic-republic-of-congo-high-priority-reopening-and-maintenance-of-roads-project-second-additional-financing-proroutes-af2>

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 defense efforts, to investigate and sanction abuses and prevent recurrence, and to provide effective remedy and accountability for harm.<sup>71</sup>

#### *2.2.1.2. The conflict context*

DFIs are financing projects in ever more fragile and conflict-affected environments.<sup>72</sup> This in turn requires more sophisticated tools in order to understand the drivers of “Big C” conflicts (violent conflict) and how investment projects may help, or alternatively hinder. (See Box 8 on conflicts). 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, including their linkages to potential human rights violations, need to be considered in project assessments as they are relatively common secondary effects of development interventions.<sup>73</sup> Impunity for conflict-related human rights violations may trigger a worsening spiral of violence. In spite of these factors, the expansion by DFIs’ into fragile and conflict-affected areas to date does not always seem to have been accompanied by a strong understanding of the relationships between Big C conflicts and human rights.

Even when there are no “Big C” conflicts, context analysis needs to be alert to “little c” social conflicts, such as social concerns or unrest around projects. What may start as relatively minor issue can escalate into more widespread discontent especially where the “remedy ecosystem” is not functioning. This may have serious adverse consequences for stakeholders, the project and the DFI. (See Box 9 on social conflicts in infrastructure projects). Widespread discontent may in turn result in widespread human rights impacts on stakeholders and poor development outcomes.

#### **Box 8: Emerging DFI Practices - Attention to Conflict**

IFC: The Guidance Note to IFC PS 4 on Community Health, Safety and Security provides that “for larger operations or those in unstable environments, the review will be a more complex and thorough risks and impacts identification process that may need to consider political, economic, legal, military, and social developments, any patterns and causes of violence and potential for future conflicts.”

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<sup>71</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>72</sup> See for example CDC’s [targets for investing](#) and the World Bank’s consultation on a new strategy on [Fragility, Conflict and Violence](#).

<sup>73</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.

The IFC recently developed a “Good Practice Handbook: Use of Security Forces: Assessing and Managing Risks and Impacts,”<sup>74</sup> however this guidance addresses only the relatively narrow dimension of use of security forces.

**Box 9: Report 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.”

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

- **Recommendations:** *Project context analysis should seek to identify interlinkages between conflict scenarios and human rights risks and violations so that these can be prevented and mitigated early in project design. A human rights-sensitive context analysis would consider pathways of escalation of conflict, as well as pathways to de-escalation including, importantly, pathways to remedy, by including an assessment of the remedy ecosystem (See Section 2.4.1 below on remedy).*

**2.2.1.3. Vulnerability and discrimination**

Almost all DFI safeguards include attention to marginalised or vulnerable groups to varying degrees. DFI safeguard provisions typically recognise a range of characteristics that can trigger discriminatory actions or policies and/or make people vulnerable. Many safeguard policies contain specific requirements for differentiated engagement, analysis, and prevention and mitigation measures in order to ensure that those who are experiencing discrimination or who are vulnerable do not experience negative impacts disproportionately. However, there may be little attention paid to the broader context which creates and perpetuates vulnerability – for example whether local laws provide protection, or whether laws (of whatever kind) are enforced in practice.

In addition, many safeguards seem to take quite an uncritical or categorical approach to vulnerability, treating whole groups – such as women – across the board as vulnerable, without examining the factors that make individuals and/or groups vulnerable. A number of DFIs are starting to parse through what “vulnerability” means within a particular context. (See Box 11 on Discrimination). Even within a focus on a particular group, however, project due diligence may miss key impacts through a focus on a narrow set of comparatively well-known issues. Women’s rights

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<sup>74</sup> [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_handbook\\_securityforces](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_securityforces)

are an example. Despite the fact that almost all DFIs have gender strategies, and that all safeguards include women and girls among “vulnerable groups”, here does not seem to have been adequate attention to gender-based violence until quite recently, prompted by high-profile cases where human rights violations were particularly serious.<sup>75</sup> (See Box 10 on gender based violence).

**Box 10: Emerging DFI Practices - Gender Based Violence (GBV)**

Based on lessons learned from gender based violence in several transport projects, including the [Uganda Transport Sector Development Project](#) and following the 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.

Related to this problem, safeguard policies and context analyses do not yet seem to adequately recognise and address discrimination in society as a driver of vulnerability. The prohibition on discrimination runs across every major human rights convention and almost all human rights instruments. Whereas vulnerability may arise as a result of particular personal characteristics or circumstances, discrimination is socially constructed and, frequently, politically motivated, grounded in or justified by reference to differing perspectives about individuals’ or groups’ comparative worth. It often takes careful thought and design to address deeply-rooted discrimination within the confines of project design, but it should also trigger reflection on what broader actions through other avenues can be used to address these key concerns in the wider project context.<sup>76</sup> Some safeguards address the issue with respect to specific circumstances, such as in hiring and job promotion,<sup>77</sup> which is important, but in OHCHR’s view there is a strong need for broader approaches to non-discrimination across the board. Some (but not all) DFIs have begun to expand the list of individuals or groups that should attract particular attention in due diligence analyses because they are subject to discrimination, although some grounds of discrimination recognised (and prohibited) in human rights treaties, including sexual orientation and political opinion, are often missing. (See Box 11 on Vulnerability and Discrimination).

**Box 11: Emerging DFI Practices - Nuanced Approaches to Vulnerability and Specific Grounding in Non-Discrimination<sup>78</sup>**

- EIB recognises that it is not just whole groups but instead situations or characteristics that make people vulnerable. “Vulnerability is not inherent and does not occur in a vacuum. Women for instance are not inherently more vulnerable than men; but discrimination,

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<sup>75</sup> World Bank, “[Good Practice Note: Addressing Gender Based Violence in Investment Project Financing involving Major Civil Works](#),” (September 2018).

<sup>76</sup> See for example, the different approaches highlighted in, World Bank Blog, “[Walking the talk on LGBTI inclusion](#),” (May 17, 2019)

<sup>77</sup> OHCHR, Response to FMO “[OHCHR welcomes FMO’s commitment to non-discrimination and equality in its hiring and employment practices and suggests that this commitment explicitly be reflected in its project due diligence and clients’ risk management responsibilities](#),” (2016).

<sup>78</sup> The AIIB also requires that “As necessary, incorporate measures to ensure that any discrimination is mitigated to the extent possible,” “[Environmental and Social Framework](#),” (2016, Amended 2019) PS 1, para. 33.

entrenched social roles and attitudes, poverty and lack of access to decision-making can weaken their resilience and render them vulnerable to adverse project impacts. Vulnerability is thus context-specific and is to be understood through the interplay of three factors: (1) exposure to risk and adverse impacts; (2) sensitivity to those risks and impacts; and (3) adaptive capacity.”<sup>79</sup> “In addition, EIB’s approach is grounded in human rights, specifically mentioning the right to non-discrimination, the right to equal treatment between women and men and the rights of indigenous peoples. It also notes that the need for specific measures is particularly critical in situations where discrimination is systemic and entrenched, governance is poor or protection of the rights of vulnerable groups is weak, in particular in potential conflict or post-conflict zones.”<sup>80</sup>

- The World Bank’s Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups<sup>81</sup> accompanying its 2016 Environmental and Social Framework, provides an expanded and updated list of population groups warranting explicit attention in the context of social and environmental due diligence and risk management based upon their respective exposure to and experiences of discrimination. The Directive notes in particular the “risk of prejudice or discrimination toward individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable.” It includes discrimination on the grounds of sexual orientation and gender identity, noting the potentially significant costs of exclusion of LGBTI people to a country’s economy and society as a whole,<sup>82</sup> in addition to impacts on individuals and families. Unlike some other MDBs, however, discrimination on the grounds of political opinion was not included.

- **Recommendation:** *Understanding the wider context of discrimination and the vulnerability it can create provides important contextual information for all projects. OHCHR recommends that this should become a routine part of due diligence, thereby triggering consideration of wider measures to address systemic discrimination, as well as project-specific measures. OHCHR notes that the gap between the protections afforded by national and international law in many countries appears to be widening, and recommends that DFI safeguard policies recognise the grounds of discrimination prohibited under international law, including discrimination against LGBTI persons and discrimination on the ground of political opinion, and take note of the potentially compounding effects of discrimination on multiple grounds (for example, indigenous women).*

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<sup>79</sup> EIB, “[Environmental and Social Standards](#),” (2018), Standard 7, para. 1.

<sup>80</sup> EIB, “[Environmental and Social Standards](#),” (2018), Standard 7, para. 17-18.

<sup>81</sup> World Bank, “[Directive Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups](#),” (2016).

<sup>82</sup> World Bank Blog, “[Why LGBTI Inclusion Is Key to Shared Prosperity](#),” (17 May 2018).

### 2.2.2. Client and its Business Relationships

Most DFIs carry out a range of client due diligence activities<sup>83</sup> including in relation to anti-money laundering and terrorism financing,<sup>84</sup> sanctioned firms and individuals,<sup>85</sup> anti-corruption and integrity,<sup>86</sup> and more generally in relation to a client's commitment and capacity to carry out environmental and social risk management.<sup>87</sup> As DFIs continue to integrate human rights considerations into their safeguards,<sup>88</sup> and given the increased attention to company actions in relation to human rights, assessing the human rights records of clients (and their business relationships) should become a routine part of client due diligence.<sup>89</sup> This could be integrated into a range of existing due diligence processes.

In addition, safeguard policies typically focus on the physical footprint of a project (including associated facilities) in setting assessment boundaries, but do not necessarily look at the business relationship footprint of projects (with limited exceptions for labour and biodiversity conservation and security forces).<sup>90</sup> This approach seems increasingly out of step with business practices of assessing and addressing the environmental, social and human rights practices in supply chains and the requirements of RBC standards. Given the increasing interlinkages among companies in global value chains, the UNGPs and the OECD Guidelines reflect the expectation that businesses should assess and address human rights issues at both ends of their value chains. The web of a client's business relationships may link DFIs and DFI-financed projects to severe human rights abuses; but this also offers valuable (and in many cases untapped) opportunities to improve practices via a client's relationships.<sup>91</sup>

Assessing human rights risks in business relationships need not be as daunting as it might seem at first glance and there are multiple dimensions of DFI practice to build on: (i) Performance Standards

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<sup>83</sup> See for example, EBRD on [client due diligence](#).

<sup>84</sup> See for example, EIB Group, "[Anti-Money Laundering and Combating Financing of Terrorism Framework](#)," (2018)

<sup>85</sup> See for example, [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>86</sup> See for example ADB's [anticorruption and integrity approach](#) and [IDB's transparency, accountability and anti-corruption approach and mechanisms](#).

<sup>87</sup> See for example, CDC's ESG Toolkit section on "[Assessing commitment, capacity and track record](#)" that focuses on the internal processes, practices, capacity and accountabilities that underpin the successful assessment and management of E&S issues. CDC also has a [sector note on human rights](#) that briefly addresses human rights in business relationships.

<sup>88</sup> See for example FMO, "[How We Invest](#)."

<sup>89</sup> See for example the very active survey of news reporting from around the world on company actions on human rights hosted by the [Business and Human Rights Resources Centre](#).

<sup>90</sup> Most safeguards on community security have a general reference to checking that security providers have not been involved in past abuses (without necessarily being specific about human rights abuses) See for example, IFC PS 4 on "[Community Health, Safety and Security](#)," para. 12-14 that says "make reasonable inquiries to ensure that those providing security are not implicated in past abuses" and IFC "[Good Practice Handbook on the Use of Security Forces: Assessing and Managing Risks and Impacts](#)," (2017) but this has very limited guidance on vetting private and public security forces (pp. 47 and 65).

<sup>91</sup> This is the UNGPs and OECD concept of "direct linkage." 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 there are adverse human rights impacts at business relationships that are providing products or services for a company's own operations, products or services, there is a "direct linkage" to use the UNGPs terminology. And where there is direct linkage, a company 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.



on Community Health, Safety and Security already cover relationships with security providers; some Performance Standards on Labour address requirements when working with labour brokers. These two examples demonstrate that existing safeguard policies already incorporate the principle that risky business relationships are within scope. (ii) Performance Standards on Biodiversity Conservation and Labour already include some dimension of looking down supply chains to understand the fuller picture of a project's impacts and there is a well-established practice of working with supply chains to improve human rights performance. (iii) DFIs already recognise the importance of business linkages between DFI-funded projects and local and national businesses to enhance project economic impacts beyond the project itself. These can be vectors to stimulate the local economy but can also be vectors of exploitation, particularly in higher risk sectors such as construction, which may involve extensive sub-contracting, including through labour contractors, and may be associated with risks of bonded and forced labour.<sup>92</sup> Drawing from the principles and analytical approach reflected in the UNGPs, these linkages could become vectors for decent work.<sup>93</sup> (iv) DFIs also recognise the concept of direct linkage in some form but not in those terms via specific requirements applied to financial intermediaries (FIs). The safeguard requirements for FIs impose requirements on on-lending, based on the recognition that there is a relationship between the DFI and potential harms linked to an FI client's operations. This study has not examined policies on FIs in any depth, however the latter policies may provide a useful model and analogy for the UNGP's business relationship concept.

- DFIs should **assess upstream impacts in supply chains** through multiple levels of the chain as necessary where there is a potential for severe human rights impacts,<sup>94</sup> and use their leverage to address severe human rights impacts that are directly linked to their products, services or operations. This proposition builds on clear evidence that even in countries with developed legal frameworks, human rights risks often exist within their supply chains.<sup>95</sup> A recent review of supply chain risks by the CAO found that IFC staff were interpreting the IFC Performance Standards (PS) to mean that if "a client ... does not have control over its supply chain it would not need to analyse and manage its supply chains."<sup>96</sup> Instead the CAO specifically drew on the UNGPs to highlight that "[o]n the basis of PS1, the client can, and should, be required to reorganize its supply chains toward more control, and

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<sup>92</sup> 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>93</sup> However this dimension was not picked up in the recent EDFI guidance note on decent work, which included only one reference to the UNGPs. Ergon Associates, EDFI, FMO, "[Decent Work and Development Finance](#)," (2019).

<sup>94</sup> See for example, 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>95</sup> See for example the recent "[Modern Slavery Acts](#)" that require companies to report on modern slavery risks in their supply chains, including in developed countries and see the EU Fundamental Rights Agency Reports on [severe labour exploitation in the EU](#). However, most of the focus on human rights risks in supply chains has been on suppliers based in developing countries. See for example the various examples of guidance from OECD to address risks in supply chains:

<sup>96</sup> IFC PS 1: para 9 states, "In the event of risks and impacts in the project's area of influence resulting from a third party's actions, the client will address those risks and impacts in a manner commensurate with the client's control and influence over the third parties and with due regard to conflict of interest." Para 10 states, "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 PS 2 and PS 6."

less risk, over time. This potential need for clients to develop less risky supply chains is well-articulated in PS2 and PS6, ... and is similarly recognized by other frameworks, such as the UN Guiding Principles.... It is clear that having no control or leverage today does not exempt clients from the obligation to control their supply chains in the near future.... IFC should therefore work with its clients to build the capacity needed to create better supply chains. There is also the potential for IFC to work effectively as a broker, linking low-capacity clients to organizations, platforms, and initiatives with relevant knowledge and influence....<sup>97</sup> The risk-based approach on which RBC standards are based means that clients are not expected to address *all* issues in all business relationships; this would clearly be impossible for many businesses with large numbers of business relationships. Instead, DFIs and their clients should assess where severe risks lie within those relationships and prioritise action in relation to those before addressing less severe risks.<sup>98</sup> (See Section 2.3.2 on Prioritisation). (See Box 12 on Business Relationships).<sup>99</sup>

- **Assessing downstream impacts from product or project use:** The use of project infrastructure and products<sup>100</sup> with respect to risks of involvement in severe human rights abuses, should be within scope for due diligence. For example, a government may use infrastructure or products<sup>101</sup> for active repression of local stakeholders.<sup>102</sup>
- **Other business relationships:** While much of the focus is on upstream supply chains, and a growing focus on the downstream use of products, which should expand with the increasing financing of the ICT sector, other business relationships can pose significant human rights risks.
- **Financing through financial intermediaries:** As noted above, the typical DFI approach to FI financing is already built on the general concept that that the potential harms of FI-funded projects – that are beyond the DFI’s first tier, direct relationship with its FI client -- redound to and come within the responsibility of the DFI and are therefore covered by particular safeguards and accompanying due diligence. This is analogous to the UNGPs business relationship approach and so provide a solid and credible argument for extending the concept. This study did not

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<sup>97</sup> CAO, “[Advisory Memos on Supply Chain Business Opportunities and Risks](#),” (2018), p. 11. EBRD PR 2 on Labour and Working Conditions similarly provides, “26. Additionally, where there is a risk of harm to workers of a primary supplier, the client will require the relevant primary supplier to introduce procedures and other control measures to prevent or reduce the risk of harm to worker health and safety. Such procedures and control measures will be reviewed by the client periodically to ascertain their effectiveness. 27. The ability of the client to fully address these risks will depend upon the client’s level of management control or influence over its primary suppliers. Where remedy is not possible, the client will reorient the affected primary suppliers over a reasonable timeframe agreed with the EBRD to suppliers that can demonstrate that they are complying with this PR.”

<sup>98</sup> UNGP, Principles 17 and 24.

<sup>99</sup> Some indications that some are: IDB, “[Social Impact Assessment: Integrating Social Issues in Development Projects](#),” (2018), p. 46. But note that the IDB guidance incorrectly equates risks of being directly linked simply to “context risks” rather than understanding these as risks that private sector operators should address.

<sup>100</sup> Using internet/social media services to facilitate human rights abuses is a good example.

<sup>101</sup> For example, using ICT products for surveillance of CSOs and political opponents.

<sup>102</sup> For a roadmap of genocide risks relevant to potential financiers of infrastructure projects or other development activities in Northern Rakhine State, Myanmar, see the [Report of the Independent International Fact-Finding Mission on Myanmar](#), UN Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), paras. 98, 110-11, 407, 413, 429, 476, 1181-12, 1216-19, 1224-29 and 1618, (on the risks of infrastructure development intentionally obstructing evidence of international crimes) 1239-44, 1295, 1425, 1565 and 1668 (calling for human rights due diligence by all development actors).



analyse FI safeguards in any depth but notes that these should also be aligned with the recommendations in this paper.

**Box 12: Emerging DFI Practices - Business Relationships**

- FMO “also assesses decent working conditions **beyond the boundaries of the company** we directly finance, including the rights of contractors and workers in the supply chain. An initial analysis of the nature of the supply chain allows us to identify the most salient issues that need to be managed or mitigated.”<sup>103</sup>
- EIB: “The promoter is recommended to regularly carry out 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**).”
- CDC Group, IFC, EBRD and DFID commissioned guidance on “**Managing Risks Associated with Modern Slavery A Good Practice Note for the Private Sector**.”<sup>104</sup>
- The CAO’s office **Advisory Memos on Supply Chain Business Opportunities and Risks**, noted that “While assessing supply chain risks is becoming good practice for businesses generally, IFC’s commitment to sustainability, its Performance Standards, and its responsibilities as a multilateral development organization mean that it must often go beyond the requirements used by other investors. Particularly when IFC is operating in contexts where the regulatory environment is challenging, or where clients have limited leverage to affect the sector through market power alone, it is important for IFC to identify the potential risks and provide early guidance on mitigation measures. It is also important for IFC to provide its clients with tools for how to address potential risks that may arise over the course of a project. ...A client’s lack of supply chain control can be a major source of E&S risk and can reduce potential development impact, either because of a failure to reach suppliers where IFC’s influence can make a difference, or by supporting market systems that run contrary to IFC’s goals for environmental and social sustainability. IFC clients’ supply chain risks are highly dependent on the degree to which they can exert effective influence over their suppliers to ensure that unacceptable practices are being prevented... Supply chain risk management may therefore require reorganization of supply chains, which may be a challenging but necessary element of IFC engagement to reach its goals of improving the E&S performance of its clients.”<sup>105</sup>
- CDC developed “**Guidance on Investments In The Agricultural Value Chain: Expanding The Scope of Environment and Social Due Diligence - Improving risk management, creating value and achieving broader development outcomes**”<sup>106</sup> – which focuses on business relationship with value chain actors upstream or downstream from primary production and the role they can play in enabling more sustainable production.

<sup>103</sup> FMO, “[Human Rights Progress Report](#),” (2017-2018).

<sup>104</sup> 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>105</sup> CAO, “[Advisory Memos on Supply Chain Business Opportunities and Risks](#),” (2018), p. 11.

<sup>106</sup> <https://toolkit.cdcgroup.com/reference-materials/>

**Recommendation:** *Recognising that existing, specific safeguards already cover an expanded scope of business relationships that are recognised as posing potentially severe human rights risks, the routine scope of due diligence should be expanded to enable DFI's to assess the extent to which a client's business relationships may pose similar human rights risks in the client's particular circumstances. This would build on the UNGPs and OECD risk-based approach and would encourage a focus, where needed, on higher risk relationships. The main objective is to prompt clients to use their leverage (see Section 2.3.4 below on leverage) to influence their business relationships (or the chain of business relationships) so that the project addresses the full scope of potential adverse impacts associated with the project and maximises opportunities to improve development impacts.*

### 2.2.3. Project Operations and Footprint

Sectors typically have their own prevalent human rights risks that are a result of the characteristics of the sector, its activities, products and production processes, as is the case for environmental impacts. Similarly, products can also have distinctive human rights risk profiles related to inputs, production products or usage. These are increasingly being highlighted in sector specific guidance that can provide useful information for human rights due diligence.<sup>107</sup> In addition, due diligence should address human rights issues that arise from the client's specific operations, and there is an increasing range of guidance and tools to support this.<sup>108</sup>

The present section focuses on a few examples of the limitations of the boundaries that DFI safeguards sometimes draw around projects through specific criteria that are centred on the project footprint. One obvious example is the exclusion of safeguards in relation to associated facilities.<sup>109</sup> Such boundaries may be unduly narrow and may result in significant human rights risks or impacts being missed. The provisions of most Performance Standards on assessment and particularly on land acquisition are often too targeted and too limited to deal with these broader circumstances. Other examples include:

- **Failure to consider the human rights dimensions of cumulative impacts:** Cumulative impacts are challenging to identify and manage. It is not just the challenge of managing the impacts themselves, which unfold over time and across multiple actors, it is also the governance challenge of ensuring collective action among multiple actors.<sup>110</sup> The cumulative dimension of human rights impacts can be spread widely across institutions, society and the environment.<sup>111</sup> For example, an influx of people seeking work in the area of a project may overwhelm the capacity of child protection authorities to safeguard children from exploitation and violence, and schools may not be able to provide education. A failure to anticipate such impacts through

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<sup>107</sup> See for example the due diligence guidance across various sectors developed by the OECD: <http://mneguidelines.oecd.org/duediligence/>

<sup>108</sup> See for example <https://business-humanrights.be/>

<sup>109</sup> See for example, EBRD, “[Environmental and Social Policy](#),” (2019), Project Requirements (PR) 1, para. 6 that requires that “The client will ensure that the environmental and/or social risks and impacts arising from associated facilities are managed and mitigated in accordance with applicable law, GIP and the *objectives* of the PRs” but not the specific requirements of the PR (emphasis added).

<sup>110</sup> Daniel M. Franks, David Brereton and Chris J. Moran, “Cumulative Social Impacts,” Chapter 12 in , Frank Vanclay & Ana Maria Esteves (eds) “[New Directions in Social Impact Assessment: Conceptual and Methodological Advances](#)”(2011).

<sup>111</sup> Myanmar Centre for Responsible Business, et al, “[Myanmar Oil and Gas Sector Wide Impact Assessment](#),” (2014), Chapter 5 on cumulative impacts.

properly scoped due diligence can and has led to severe human rights abuses. (See Box 10 on GBV).

- **Failure to address legacy issues around projects.** Legacy issues have often been most visible around **land acquisition or use of land for projects** where earlier acquisition or resettlement has not been carried out in accordance with human rights standards. There may be resistance to addressing legacies of earlier, unresolved land expropriations within the project context as this is often considered to 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 impact on communities. (See Box 13 on Land Rights). 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 widely accepted normative framework in the field (the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs)), which set an important benchmark for DFI safeguards.<sup>112</sup> A human rights lens brings a sharp focus on impacts on communities facing complex land rights and land use challenges in difficult contexts with minimal capacity and resources.<sup>113</sup>

#### **Box 13: Emerging DFI Practices - Guidance on Land Rights**

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

- **CDC and DEG have developed** a guidance note on managing legacy land issues in agribusiness investments, recognising that this is a common but challenging issue that needs to be addressed in line with the UNGPs.<sup>114</sup>
- **CAO Advisory Series – Lessons Learned from CAO Cases on Land**<sup>115</sup> that notes that of the over 150 cases CAO has handled between 2000 - 2015, just over half have raised issues related to land, including land acquisition, land compensation, resettlement, land management, land contamination, and land productivity.

- **Recommendations:** *Recognising that DFIs and their clients seek certainty in understanding the spatial and temporal boundaries of their obligations, due diligence should take the situation of the people in the project area as a starting point. These are issues where clients and DFIs may need to use various tools in their toolboxes to address effectively, in collaboration with other parties.*

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<sup>112</sup> Windfuhr, M. "Safeguarding Human Rights in Land Related Investments: Comparison of the Voluntary Guidelines Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework," (German Institute for Human Rights) (2017). While the IFC-PS focus on addressing project-specific impacts, the VGGT take a more systemic perspective to land issues and governance.

<sup>113</sup> See For example, to enhance the analysis of whether land acquisition (or project activities more generally) could have an impact on the right to food of local communities, companies could draw on the AAAAQ ('availability, accessibility, acceptability, adaptability, and quality') framework developed under the International Covenant on Economic, Social and Cultural Rights, Article 11 and [General Comment 12 on the Right to Adequate Food](#) (1999). This would provide a more structured framework for analysis to consider the different dimensions of the right that could be impacted by project activities.

<sup>114</sup> CDC and DEG, "A guidance note on managing legacy land issues in agribusiness investments," (2016)

<sup>115</sup> [http://www.cao-ombudsman.org/howwework/advisor/documents/CAO\\_AdvisorySeries\\_LANDr4.pdf](http://www.cao-ombudsman.org/howwework/advisor/documents/CAO_AdvisorySeries_LANDr4.pdf)

## 2.2.4. Risk Screening and Categorisation – Biases and Gaps

### 2.2.4.1. Implicit hierarchies

DFIs have increasingly moved to “integrated” safeguards (i.e. one policy framework that incorporates both environmental and social issues),<sup>116</sup> in order to strengthen consideration of social issues in an integrated fashion with environmental concerns. This is an appropriate approach considering that many environmental and social impacts are mutually reinforcing and have human rights impacts (See Section 2.2.4.2 on human rights and environmental impacts). However there are indications that social issues and human rights remain relatively neglected:

- With some exceptions, social issues (let alone human rights issues) are **rarely considered significant enough on their own to justify higher risk classification** (“Category A” or equivalent) in DFI risk management systems.<sup>117</sup> (See Box 14 on Triggers). Projects that do not involve large physical footprints or significant environmental impacts are often, it would seem, automatically assumed not to have significant social impacts. Existing approaches to categorisation may miss the point that a “project with limited E&S impacts may still entail significant E&S risks in an environment of low borrower capacity to manage such impacts or in a situation with high risk of social conflicts.”<sup>118</sup>
- Equally, the application of **thresholds** to projects may mean that projects with serious human rights risks are not reviewed.

#### **Box 14: Emerging DFI Practices – Recognising that Potentially Severe Human Rights Impacts Should Trigger a Higher Risk Rating**

OPIC “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 are below international standards. Projects that are in locations, industries, or sectors with a documented history of Labour Rights issues are considered high risk. Special Consideration projects are considered to have heightened potential for adverse project-related social risks associated with the involvement of or impact on Project Affected People including Workers.”<sup>119</sup>

- Much of the prevailing practice on environmental and social impact assessment (ESIA) seems to view **risks through an unduly scientific-technocratic lens**, which may give insufficient

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<sup>116</sup>IDB is the exception here as noted in the recent evaluation.

<sup>117</sup> For example, EBRD’s new EBRD, “[Environmental and Social Policy](#),” (2019) includes an indicative list (though it is not clearly stated as an indicative list) what qualifies as a Category A (higher risk project). Only 2 out of the 28 types of projects included in the list refer to social risks and impacts.

<sup>118</sup> IDB Office of Evaluation and Oversight, “[Environmental and Social Safeguards Evaluation](#),” (March 2019), p. 22

<sup>119</sup> OPIC, “[Environmental and Social Policy Statement](#),” (2017).

consideration to potential harms experienced by communities, especially where these are not easily quantifiable or well-articulated.<sup>120</sup> DFIs may be more comfortable addressing impacts that can be scientifically measured, and sometimes appear to have operated on the assumption that human rights impacts cannot be measured with adequate rigor. But many human rights are structured around constituent parts that can be tested and measured to determine if they have been violated (for example labor rights, forced evictions, lack of consultations, gender-based violence). In practice, many violations can be quite clear; in other cases, professional judgment will be needed in order to make social risk determinations, similar to the judgement required in assessments of more diffuse environmental impacts, such as in the case of biodiversity.

- For larger-scale projects or projects with more widespread or severe impacts, ESIA is usually required. There is often an **assumption that a social impact assessment (SIA) covers all key social issues, including human rights**. If done well, a good, solid SIA will cover many human rights issues. However, it depends on the quality of the SIA, and even a good quality SIA will not necessarily cover all human rights issues in the same way as an impact assessment which explicitly sets out to address human rights issues. (See Box 15 on SIAs).
- Human rights issues and social issues are making their way onto **exclusion lists**, but still at a slower rate than environmental issues.
- At least some **IAMs** (for which analysis is available) tend to **receive more social complaints** than environmental ones.<sup>121</sup> More research and testing would be needed to understand why, but one tenable hypothesis is that social issues are not sufficiently covered in policy or in practice and are thus not being specifically identified and managed upfront.

In addition, what is often missing is an explicit process to prioritise the most significant (severe) impacts from among the full range of impacts. Recognising that there may often be a wide range of impacts to manage, RBC due diligence includes a structured prioritisation approach where necessary (See Section 2.3.2 on prioritisation).

**Box 15: Explanation Box - Differences between Social Impact Assessments and Human Rights Impact Assessments**

- Meaningful stakeholder engagement
- Focus on the most vulnerable

A human rights lens adds (among other attributes):<sup>122</sup>

- A normative framework that clarifies the scope of issues to address in the “social” risk category, as well as the scope of the client’s and financing institution’s respective responsibilities for any adverse impacts

<sup>120</sup> Kemp, D, Warden, S., Owen, J., “Differentiated social risk: Rebound dynamics and sustainability performance in mining,” [Resources Policy 50 \(2016\) 19–26](#)

<sup>121</sup> For example the IDB’s grievance mechanism, MICI, receives more social complaints than environmental ones. IDB Office of Evaluation and Oversight, “[Environmental and Social Safeguards Evaluation](#),” (March 2019), p. 16.

<sup>122</sup> There is growing literature examining the differences between the two approaches. See for example, Ana Maria Esteves, Gabriela Factor, Frank Vanclay, Nora Götzmann, Sergio Moreira “Adapting social impact assessment to

***A good, quality SIA should address a number of points that are also at the core of human rights due diligence:***

- More precise definition of what those social issues are as human rights are defined in constituent parts, often accompanied by detailed explanations of how rights apply in particular circumstances, supported by indicators and other guidance tools<sup>123</sup>
- Clear focus on prioritisation of the most severe impacts on people
- Focus on contextual risks that can play an important role in undermining or supporting the enjoyment of human rights
- Focus on remedy, rather than treating impacts on rights as simply residual impacts

#### *2.2.4.2. Human rights implications of environmental impacts*

Despite the increasingly common approach of integrated safeguards, the analysis of the interaction between environmental and human rights risks still appears to be embryonic. This should include but go beyond the important, relatively well-established, procedural environmental rights set out in Principle 10 of the Rio Declaration, and the Aarhus and Escazú Conventions and other binding treaties.<sup>124</sup>

- **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>125</sup>
- **Legally**, an ever-increasing range of countries are incorporating the right to a healthy environment into their constitutions.<sup>126</sup> This could have potentially important legal and practical implications, particularly for larger scale projects with significant environmental impacts.
- **Operationally**, the growing focus on the human rights dimensions of climate change (the climate justice agenda),<sup>127</sup> and biodiversity and ecosystem services<sup>128</sup> (see Box 16 on environment) may provide inspiration for the development of more rigorous, synthetic analytical frameworks.<sup>129</sup> In

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address a project's human rights," Environmental Impact Assessment Review 67 (2017) 73-87, Danish Institute for Human Rights, "[Human Rights Impact Assessment Guidance and Toolbox](#). (2016) and Deanna Kemp and Frank Vanclay, "[Human rights and impact assessment: clarifying the connections in practice](#)," Journal of Impact Assessment and Project Appraisal, Vol. 31 (2013), Coalition on Human Rights in Development, "[Human Rights Due Diligence for DFIs](#)." See also Nordic Trust Fund World Bank, "[Study on Human Rights Impact Assessments: A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development](#)," (2013).

<sup>123</sup> The content of rights are spelled out in jurisprudence (including "general comments") and country-specific recommendations from expert bodies ("treaty bodies") charged with monitoring implementation of human rights treaties, in recommendations and reports from "special procedures" on thematic or country-specific issues, and country recommendations under the Universal Periodic Review (UPR) process of the UN Human Rights Council. See: <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>. Regional and national human rights systems should also be considered.

<sup>124</sup> See <https://www.unenvironment.org/civil-society-engagement/partnerships/principle-10>

<sup>125</sup> See for example, [UN Special Rapporteur on Human Rights and the Environment](#) and [UNEP Human Rights and the Environment](#) and <http://environmentalrightsdatabase.org>

<sup>126</sup> UNEP, "[Environmental Rule of Law – First Global Report](#)," (2019).

<sup>127</sup> OHCHR, Henrich Boll Stiftung, Climate Change and Human Rights (forthcoming) and see for example: <https://www.business-humanrights.org/en/corporate-legal-accountability/special-issues/climate-change-litigation>

<sup>128</sup> UN Experts, "[Failing to protect biodiversity can be a human rights violation – UN experts](#)" (25.06.2019)

<sup>129</sup> See for example, Myanmar Centre for Responsible Business (MCRB), "[Briefing Paper: Biodiversity, Human Rights and Business in Myanmar](#)," (2018). And see for example the adaption of the Intergovernmental Platform for Biodiversity and



addition, experience has shown that just because a project is “green” does not necessarily mean it has no negative social and human rights impacts.<sup>130</sup>

- **Engagement with stakeholders** - the above developments are leading to a shift in discourse, tactics and alliances, with ever wider groups of stakeholders, including environmental groups, harnessing human rights concepts, strategies and partnerships in order to advance the environmental agenda.<sup>131</sup>

**Box 16: Emerging DFI Practices - Recognising the Link between Human Rights and Environmental Issues**

- EIB specifically recognizes the linkages: “EIB aims to ensure that the capacity of ecosystems to supply their associated services is maintained and that people are able to continue to access the services on which they depend for their livelihoods and wellbeing when projects are developed. *This is particularly important in cases where ecosystem services are critical to the provision of human rights, where they are essential to support life or livelihoods and where they have strong cultural significance to indigenous or traditional cultures.*” (emphasis added)<sup>132</sup>

**2.2.4.3. Newly emerging sectors with significant human rights implications**

Safeguard policies emerged from concerns, and at time crises, associated with projects with large physical footprints. As a consequence, even the newest versions of safeguards do not appear to be well suited to deal with the burgeoning Information and Communications Technology (ICT) sector within DFIs portfolios. Project teams may need additional, more detailed guidance on how to address complex challenges such as how to balance privacy rights with government surveillance, when advising on regulatory frameworks in the ICT sector or financing ICT infrastructure and services. Relatedly, there does not appear to be adequate guidance on how to deal with the right to privacy or freedom of expression across a whole range of projects that are increasingly integrating aspects of digitalisation such as artificial intelligence, big data, and so forth. Moreover, projects that could have significant human rights impacts across large sectors of the population (such as projects on digital ID) may be classified as Category C projects because they do not have a significant environmental footprint. Equally problematic, there may be insufficient protections in place for stakeholders who use the internet to engage in consultations. (See Box 17 on ICT).

**Box 17: Emerging DFI Practices – Policy Guidance but No ICT Safeguards**

There do not (yet) appear to be any specific safeguard requirements addressing human rights challenges in the digital age. However, there is an emerging range of policy guidance and programming tools on particular issues including, for example, the World Bank Toolkit on cybercrime that specifically references human rights considerations.<sup>133</sup>

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Ecosystem Services(IPBES) framework to address human rights here: the Stockholm Resilience Centre, “[Human Rights, Biodiversity and Sustainable Development Goals in the mining sector](#),” (2018).

<sup>130</sup> See for example a review of human rights impacts of a range of different types of renewable energy projects: <https://www.business-humanrights.org/en/renewable-energy-human-rights-analysis>

<sup>131</sup> Some DFIs do: FMO “[Position Statement on Human Rights](#),” (August 2017)

<sup>132</sup> EIB, “[Environmental and Social Standards](#),” (2018), Standard 3, para. 31.

<sup>133</sup> <http://www.combattingcybercrime.org>

- **Recommendation:** *DFIs should review their risk screening and categorisation processes to assess whether social and human rights impacts are allocated equal consideration with environmental impacts, particularly in light of client capacity to manage them or within broader contexts of heightened social conflict where human rights may already be under threat. In addition, DFIs should be prepared to address potential blindspots in their safeguard frameworks, in light of newly emerging technologies and sectors.*

### **2.3. Area 3: Gaps in Due Diligence Processes**

This section discusses apparent gaps and corresponding changes that could be made to improve attention to human rights issues in due diligence processes. It does not go into detail into each step of the human rights due diligence process that are set out in the UNGPs and OECD Guidelines: (i) identify and assess adverse human rights risks and impact; (ii) cease, prevent and mitigate adverse impacts; (iii) track implementation and results; and (iv) communicate how human rights impacts are addressed.<sup>134</sup> The latter are classic management steps that are familiar to DFIs and that have (some) parallels in DFI risk assessment and supervision processes. Instead, this section picks up the core innovations to the process that are unique to human rights and are reflected in the UNGPs and OECD Guidelines, but which may not be strongly reflected in many DFIs' existing processes.

#### **2.3.1. Incorporating attention to human rights into routine due diligence**

Numerous DFI safeguards treat human rights issues as an exceptional issue to be assessed only in specific, high-risk circumstances.<sup>135</sup> This means either that: (i) the human rights risks or impacts are presumably so severe that they are visible and well known, in which case, this should already have triggered a higher project categorisation to ensure that appropriate resources and expertise are assigned; or (ii) it is a "catch 22" situation where it is not possible to know if there are key human rights risks without due diligence, but the due diligence process is triggered only where there are known human rights risks or impacts.

Human rights should be treated alongside other environmental and social risks as a routine part of the due diligence process, to ensure that important risks and impacts are identified upfront and managed throughout the project cycle (See Box 18 on Integration).<sup>136</sup> The discussion in Section 2.2 above already addressed the broader scope of potential human rights risks that should become a routine part of assessments. Early identification can then inform subsequent decisions about where to invest additional resources, what steps should be taken to manage the risks and impacts (to prevent, cease, mitigate or remedy) and when and how to use leverage with clients. DFIs can access what are often detailed risk information and relevant recommendations generated by specialised human rights bodies when deciding on the level of risk relating to particular countries and circumstances and what should be done to prevent and mitigate those risks and remedy any human rights impacts that do occur.<sup>137</sup> Most people and organisations care about human rights; being able

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<sup>134</sup> For a full explanation, see See OHCHR [The Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012) and [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018).

<sup>135</sup> Except where safeguards already address specific human rights issues in the policies/performance standards – such as with respect to indigenous peoples, labour, etc.

<sup>136</sup> OHCHR submissions for the EBRD's draft Environmental and Social Policy (March 2019)

<sup>137</sup> OHCHR, [Comments and recommendations in relation to the World Bank's draft Environmental and Social Framework](#) (March 2016).



to re-assure people that attention to these issues is a routine part of due diligence can serve as an early bridge-building exercise with stakeholders.

**Box 18: Emerging DFI Practices - Integrating Human Rights into Routine Due Diligence**

- EIB: “Specific attention should be given to integrating the impacts on human rights, biodiversity, climate change, cultural heritage, and disaster risks into the overall ESIA.” EIB reserves the right to require a stand-alone HRIA. ESIAAs are required when “significant and material impacts and risks on the environment, human health and well-being and interfere with human rights” are likely.<sup>138</sup>

- **Recommendation:** Human rights should be treated alongside other environmental and social risks as a routine part of the due diligence process, to ensure that important risks and impacts are identified upfront and managed throughout the project cycle.<sup>139</sup> Information and recommendations from UN, regional and national human rights bodies should inform routine human rights due diligence.

### 2.3.2. Prioritising severe human rights risks

As integrating human rights into the due diligence process becomes more routine, DFIs and their clients are likely to uncover a wider range of human rights risks and impacts. As with other aspect of its risk management system, a client needs to develop a systematic approach to identifying, assessing and managing such risks. Human rights can be integrated into enterprise risk management systems or environmental and social management systems (ESMS) and management plans (ESMP), provided the focus remains on managing impacts on people rather than (only) managing impacts to the business. Because attention to environmental issues often predominate (as noted in Section 2.2.4.2 above), and because there are often a large number of issues for clients to address through an ESMP, human rights risks can easily be de-prioritised. If clients have to make choices because of resource constraints, they may default to prioritising either those risks that are easiest to address, those with which they are most familiar, or those that pose the greatest risk to the business, rather than focusing on severe impacts to people.

A human rights or RBC risk-based approach explicitly recognises that there may be a wide range of issues to address, that it may not be possible from a practical point of view to address them all simultaneously, and that it may be necessary to prioritise responses. But the approach embodied in the UNGPs and OECD RBC guidance is clear: the focus should be on responding to severe risks to people and their rights, even if the risks are low probability. This prompts a different approach to risk prioritisation than other approaches which prioritise based on severity (or significance) *and* likelihood. Some DFIs are beginning to explicitly recognise this difference in their safeguard policies (See Box 20 on Prioritisation).

The UNGPs provide a very structured analytical framework for identifying the severe risks based on three factors (See Box 19 on Severity), that can help prioritise the order in which they are

<sup>138</sup> EIB, “Environmental and Social Standards,” (2018), Standard 1, Requirements, General.

<sup>139</sup> OHCHR submissions for the EBRD’s draft Environmental and Social Policy (March 2019)

addressed, where they cannot be addressed in parallel. It is important to note that severe impacts are not limited only to impacts involving bodily harm; they are threats to rights, so impacts that deprive groups of their cultural rights, such as removing access to sacred sites – a concept already recognised in many DFI safeguards – can be understood as a potentially severe human rights impact. Equally, restrictions on the freedom of expression that prohibit participation in project consultations which impact on a community can be considered a severe human right impact, whereas reasonable restrictions on when and where protests can be held, without actually blocking them, would not.

Using a structured approach such as in the UNGPs may facilitate the integration of human rights priorities into an overall risk management analysis by providing more precise analysis and potential quantification. What action a client should be expected to take in response to severe human rights impacts depends on its level of involvement in the potential or actual impact and on its leverage or potential leverage (See Section 2.3.3 on involvement in the impact).

**Box 19: Explanation Box – UNGP’s Structured Analysis to Addressing Severity**

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

- (i) **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
- (ii) **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
- (iii) **Irremediable** means limits on the ability to restore the individuals to a situation equivalent to their situation before the adverse impact – i.e. from perspective of child rights, impacts on children can have long-term, irreversible consequences that might make an impact severe, even if adults are less affected.

While the UNGPs did not specifically draw on relevant concepts from environmental law, there are obvious analogues. In particular, the “precautionary principle” recognises that certain types of environmental harm, once suffered, can be irreparable. As a result, certain justices of the International Court of Justice have argued that the “precautionary principle” has been incorporated into the legal obligation of due diligence as part of customary international law.<sup>140</sup> Even if not yet fully accepted as a part of customary international law, where such severe risks

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<sup>140</sup> “[W]hile the principle of prevention assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm.” *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)* and of *Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica)*, Judgment, para. 55 (Dec. 16, 2015) (separate Opinion by Trindade, J.), <http://www.icj-cij.org/docket/files/152/18856.pdf>. And at para. 19 (“Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages.”); *id.* at para. 59 (“Discussing provisional measures to “contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency.”).

exist, greater care *ex ante* and provisional measures to temporarily halt certain actions may be warranted.<sup>141</sup>

**Box 20: Emerging DFI Practices - Prioritising Human Rights Risks**

- **EIB** is one of the few DFIs to articulate the specific differences involved in prioritising human rights risks: **“Mitigation Hierarchy (Human Rights):** Contrary to an environmental mitigation hierarchy, a human rights mitigation hierarchy is premised on the principle of remedy rather than compensation. A focus on the materiality of risk to affected persons, to be henceforth acknowledged as rights-holders, constitutes a cornerstone principle that calls for sound and meaningful stakeholder engagement and guaranteed access to remedy. It is guided by considerations of likelihood, severity and frequency of human rights impacts anticipated, thereby ordering the prioritisation of mitigation measures accordingly. In-depth assessment of the likelihood and severity of identified impacts is necessitated, so as to “prioritise actions to address actual and potential adverse human rights impacts (by) first seek(ing) to prevent and mitigate those that are most severe” (UNGP 24). The likelihood that potential human rights impacts may occur is often based on (i) the country context related to specific rights and (ii) specific business relationships that pose particular risks to human rights. Severity, on the other hand, is to be appraised on the basis of the gravity of the impact that might occur (scale), the scope of the impact and the remediability of said impact (namely, the possibility that those impacted may be restored to a situation at least the same as/equivalent to their situation prior to the impact).”<sup>142</sup>
- **OPIC:** “For existing projects (e.g., privatizations), the performance requirements must be attained within a reasonable period of time following the receipt of OPIC support, with the exception of Labour Rights requirements, which must be met from the outset.”<sup>143</sup>
- **Recommendations:** *DFIs should re-evaluate their own approaches and guidance for clients on risk prioritisation as part of the due diligence process to ensure that these processes: (i) are considering risks to people and their rights; and (ii) that the processes are re-adjusted to place greater emphasis on preventing negative impacts on people, even where those risks may be less likely.*

### 2.3.3. Involvement in human rights impacts

Integrating human rights into routine due diligence processes requires identifying human rights risks and impacts then assessing the client’s relationship to and responsibility for potential impacts (risks) or actual impacts. The UNGPs introduced a three-layered analytical “involvement framework” to: (i) assess a business’ relationship with a human rights impact; and (ii) then to set differentiated responses depending on the level of involvement (See Box 21 on Involvement). The greater the client’s involvement is in a human rights impact, the more it is expected to do to address it. What

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<sup>141</sup> See *id.* at para. 19 (“Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages.”); *id.* at para. 59 (“Discussing provisional measures to “contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency.”).

<sup>142</sup> EIB, “[Environmental and Social Standards](#),” (2018), p. 4.

<sup>143</sup> OPIC, “[Environmental and Social Policy Statement](#),” (2017), Section 4.10.

the framework also makes clear is that business impacts do not stop at the project boundary (See Section 2.2.2 on Business Relationships). And as noted above, among all the impacts to be addressed, priority should be given to potential or actual severe impacts.

As to the DFI's potential involvement in human rights impacts through its financing, DFIs, like other FIs, would be considered at least "directly linked" to adverse human rights impacts in the projects they finance, if not "contributing" to the adverse impacts.<sup>144</sup> (See Box 21 on Involvement for an explanation). In both cases, a DFI would be expected to use, and as necessary increase, its leverage with clients to address the adverse impact (See Section 2.3.4 below on leverage). Responsibility cannot be shifted from one entity to another (i.e, the fact that the client also has a responsibility to respect human rights does not mean that the DFI has no responsibility if adverse impacts occur as a result of clients' operations). Instead, as noted, the DFI has a responsibility to use its leverage.

**Box 21: Explanation Box – UNGP's Analytical Framework to Assess Involvement with a Human Rights Impact<sup>145</sup>**

**(i) Cause:** An enterprise (in this case a DFI client) "causes" an adverse impact if the enterprise's activities on their own are sufficient to result in the adverse impact. "Activities" can include both actions and omissions. This is most likely to occur in the context of activities associated with its own operations.

- **Expected response:** **Cease** its activities causing the adverse impact, **prevent** further adverse impacts and **remedy** those adverse impacts that did occur

**(ii) Contribute:** An enterprise "contributes to" an impact if its activities, in combination with the activities of other enterprises or entities cause the impact, or if the activities of the enterprise cause, facilitate or incentivise another entity to cause an adverse impact. The mere existence of a business relationship or activities which create the general conditions in which it is possible for adverse impacts to occur does not necessarily represent a relationship of contribution – instead the activity in question should [substantially] increase the risk of adverse impact. The following factors can be taken into account in the analysis: (i) the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring; (ii) the extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability; and (iii) the degree to which any of enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring.

- **Expected response:** **Cease** its activities contributing to the adverse impact, **prevent** further contributions to the adverse impacts, **use its leverage** to influence the other entity contributing to the adverse impact to cease its contribution and **together, remedy** those adverse impacts that did occur.

<sup>144</sup> OHCHR, [The application of the UNGPs to minority shareholdings of institutional investors](#) (2013), [Advice to the OECD on the application of the Guiding Principles to the financial sector](#) (2013), 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>145</sup> Drawing in particular on OECD, ["OECD Due Diligence Guidance for Responsible Business Conduct,"](#) (2018), Q29.

(iii) **Directly linked:** “Linkage” is defined by the relationship between the adverse impact and the enterprise’s products, services or operations through another entity (i.e. business relationship). In other words, a business relationship causes adverse impacts in connection with products (or parts) or services provided to the enterprise or participates in the enterprise’s operations. The business relationship does not need to be in a direct contractual relationship for the adverse impact to be directly linked to the enterprise. The most common example is supply chains – where the enterprise is expected to take action to address potential human rights impacts down its supply chain caused by its suppliers (See Section 2.2.2 on Business Relationships).

- **Expected response:** Use its **leverage** to influence the other entity causing the adverse impact to cease its activities causing the adverse impact, prevent further adverse impacts and remedy those adverse impacts that did occur.

- **Recommendations:** OHCHR recommends that DFIs use the “involvement framework” to identify a client’s relationship to the impact, and importantly, the expected response from the client that could be built into the ESMP or other response/action plans.

#### 2.3.4. Exercising leverage

“Leverage” means one thing to bankers but something quite different in due diligence – it is about the dynamic process of continuing to develop and exercise influence over parties to a transaction (or related to a transaction) to eliminate and address adverse impacts (See Box 22 on Leverage). Contrary to the approach taken in many DFI safeguard policies where control over business relationships is the starting point (see Section 2.2.2 above on business relationships), the RBC/human rights approach is not determined by the question of whether there is control or influence or an ability to exercise leverage.<sup>146</sup> Instead it is anchored in the concept of responsibility – i.e. businesses have a responsibility to exercise leverage to address adverse impacts and if they don’t have leverage, they should seek to build it through available means. Not having leverage does not absolve businesses of the responsibility to try to take action with respect to their business relationships. Given the web of business relationships that bind many businesses together, it is no longer acceptable to say that responsibility ends at the factory gate. As noted in Section 2.2.2 above, clients should be expected to use their leverage with their business relationships, such as down their supply chains, to address adverse human rights impacts that are directly linked to their operations, products or services.

DFIs, like other FIs, also have responsibilities to use their leverage to influence clients to eliminate adverse impacts. Though the most obvious source of leverage for a DFI is its investment or loan and the covenants that go with it, leverage goes beyond the “power of the purse” and includes a range of resources, relationships, and influence that can be used to encourage or compel a specific action. DFIs’ leverage toolbox includes normative influence, financial leverage, legal leverage, diplomatic or political leverage, convening power, technical expertise and development resources.<sup>147</sup> However

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<sup>146</sup> As noted in Section 2.2.2 above on business relationships, if this is the starting point, then the conclusion which follows is that where there is little control, there is no expectation to do anything. This is counterintuitive to DFIs’ mandates to maximise the development impact of projects, even in the most challenging situations.

<sup>147</sup> Coalition for Human Rights in Development, “[Uncalculated Risks: Threats and attacks against human rights defenders and the role of development financiers](#),” (May 2019).

lenders and business enterprises sometimes take an unduly defeatist approach to this question, and fail to see opportunities to create broader coalitions to enhance their leverage. In contrast, investors appear to have a comparatively greater body of experience in collaborating to influence companies to improve their environmental and social practices – such as collaborative approaches on shareholder resolutions at annual general meetings, joint approaches through engagement on specific issues, developing multi-stakeholder initiatives to address key issues.<sup>148</sup> DFIs could draw from some of these experiences and lessons learned when considering how to build and exercise leverage. Where a DFI does not have leverage, it is expected to be pro-active in creating it or potentially excluding a project if the project context is so challenging that safeguards could not be met and it is not able to build wider leverage. But a perceived lack of leverage at a given point in time is not a justification for avoiding due diligence – it is instead a reason to do more due diligence to understand how leverage can be built.

### **Box 22: Emerging DFI Practices - Developing and Exercising Leverage**

The OECD Guidance on Responsible Business Conduct Due Diligence<sup>149</sup> highlights a number of different approaches to creating leverage:

- Introduce RBC and due diligence expectations into commercial contracts.
- Establish commercial incentives linked to RBC criteria.
- Establish longer-term relationships with its suppliers or business relationships that are built on improving RBC performance.
- Join geographic or issue-specific initiatives that seek to prevent and mitigate adverse impacts in the areas identified (e.g. country, commodity or sector roundtables, multi-stakeholder initiatives and on-the-ground programmes).
- Minority investors writing a joint letter to an investee company signalling expectations.

- **Recommendation:** *The responsibility to exercise leverage has implications for a DFI's role in a number of ways: (i) making more in-depth and broader contextual assessments at the beginning of projects to better understand how the contextual risks may impact the project and vice-versa and to identify potential partners where more systemic risks are identified and where more leverage may be needed to address them; (ii) ensuring that high risk projects are assigned additional resources and more specific monitoring is carried out to be able to identify emerging risks early;<sup>150</sup> (iii) using the full suite of tools available to exercise leverage over clients, and potentially other parties, to address adverse impacts; (iv) being ready to work with other parties to bring influence to bear on a client to address and remedy adverse impacts, including through coalitions or by encouraging clients to work with CSOs to enhance project development*

<sup>148</sup>See for example the [PRI-Church of England Pension Fund](#) initiative to respond to mine safety after the tailings dams collapses at two mines owned by Vale in Brazil and see other PRI [collaborative initiatives on human rights](#).

<sup>149</sup> OECD, [Due Diligence Guidance for Responsible Business Conduct](#) (2018), Q36-37.

<sup>150</sup> 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."



*benefits;<sup>151</sup> and (v) being ready to go beyond more static supervision and instead taking an adaptive management approach. In addition, there is a need for guidance on expectations on clients when it comes to exercising leverage over their business relationships, and as noted in Box 22 above, being ready to work with business relationships and on their business model where more leverage is needed to ensure that their value chains can meet safeguard requirements, including on human rights.*

### **2.3.5. Stakeholder Engagement**

Active and inclusive stakeholder engagement is a core dimension of a human rights-based approach to development and is based on a number of human rights, including the rights to freedom of expression, association, assembly and access to information. Principle 10 of the Rio Convention on environmental rights includes the right to access environmental information and the right to public participation in environmental matters, reinforcing the interlinkages between environment and human rights.<sup>152</sup> All DFIs have requirements concerning stakeholder participation and a few (including the World Bank, EIB and EBRD) have self-standing performance standards on this subject. This signals the importance of stakeholders having the capacity, freedom and opportunity to access and act upon project information and influence project design and implementation.<sup>153</sup> (See Box 23 on Stakeholder Engagement).

Yet, stakeholder engagement continues to be an area where project implementation regularly falls short. Fully half of all CAO cases in 2018 involved complaints about stakeholder engagement.<sup>154</sup> A recent review of the IDB IAM (Independent Consultation and Investigation Mechanism (MICI)) reveals 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>155</sup> A recent detailed review of DFI-funded projects in the Amazon region

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<sup>151</sup> 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>152</sup> The [Aarhus Convention](#) and the [Escazú Agreement](#). The EIB’s policy references the Aarhus Convention; the upcoming revision of the IDB safeguards would be an opportunity to include references to the Latin American regional convention on environmental rights – the Escazú Agreement. The Aarhus Convention’s provisions have been interpreted through extensive EU and national as well as jurisprudence, a “compliance committee,” and extensive guidance materials – all of which could provide useful further guidance on key challenges and additional measures to provide for more effective implementation in the context of updates of DFI safeguards. <https://aarhusclearinghouse.unece.org/>

<sup>153</sup> IDB, “[Meaningful stakeholder consultation: IDB series on environmental and social risk and opportunity](#),” (2017). See also the [Environmental Democracy Index](#).

<sup>154</sup> CAO, “[2018 Year in Review](#),” (2018), p. 22.

<sup>155</sup> IDB, “IDB, “[Modernization of the Environmental and Social Policies of the IDB – Policy Profile](#)” (2019), para. 2.10. A more detailed review of cases from IAMs could reveal more detailed and interesting information on trends on participation.



found that a lack of or ineffective stakeholder engagement was one of the three main reasons for project failure.<sup>156</sup>

These challenges need to be seen in the context of increasing threats and violence to human rights defenders and the communities they represent in contesting DFI funded projects. (See Section 2.2.1.1 on enabling environment for stakeholder engagement). A recent review of risks to human rights defenders associated with DFI-funded projects re-emphasised the importance of meaningful participation in these challenging contexts: “[t]he process of engagement with local communities during the scoping, design and implementation of a development project is as important, if not more important, than the project’s physical impact.”<sup>157</sup> The latter report highlighted that the lack of meaningful consultation and engagement with local communities, and marginalized groups within them, were among the root causes of threats for human rights defenders in development contexts. Where opposition to a project is ignored, or worse, repressed or criminalised, there is obviously no possibility for meaningful stakeholder engagement – instead the engagement process itself may create risks for communities and those who work with them.

These challenges also need to be seen in the context of a lack of protection in DFI safeguards for discrimination based on “political opinion” (an internationally recognised basis under the international human rights framework) which can present a serious obstacle to participation.<sup>158</sup>

Added to this, the fact that many safeguards are limited to compliance with national laws can be highly problematic when it comes to assessing issues like restrictions based on political opinion, discrimination, civil society space, human rights defenders and human rights guarantees undergirding free and informed participation, where the gulf between the protections afforded by national versus international law in many countries is widening. This is likely to be an increasing challenge in DFI-funded projects given the fundamental importance attached to transparency and participation by those affected by projects on the one hand and potential counter-pressures from government and clients on the other.

#### **Box 23: Emerging DFI Practices with respect to Stakeholder Engagement**

**Good practice requirements** on participation among DFIs include requirements for:<sup>159</sup>

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<sup>156</sup>Ray, R., Gallagher, K., Sanborn, C., “[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>157</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>158</sup> EBRD, “[Environmental and Social Policy](#),” (2019) p.2 definition of “vulnerable people”; and EIB, “[Environmental and Social Standards](#),” (2018), Standard 6, para. 25; Standard 7, paras 4 (fn 21, citing the International Covenant on Civil and Political Rights 1966), 7, 9, 20(c) and 27; and IDB Invest, Annex 1, Exclusion List, fn 54.

<sup>159</sup> This also draws on World Bank Inspection Panel, “[Emerging Lessons Series No. 4: Consultation, Participation & Disclosure of Information](#),” (Oct 2017) and see IDB, “[Meaningful stakeholder consultation: IDB series on environmental and social risk and opportunity](#),” (2017).

- A **participation plan**, including a documented record of stakeholder participation, supported by resources that establishes a systematic approach to stakeholder engagement across the project life cycle, starting at the earliest possible stage
- Overarching **objective** of obtaining **broad community support** for all projects
- **Mapping** the different types of stakeholders **to identify the people who have human rights entitlements related to a project**, as well as for identifying the entities accountable for these entitlements. Government agencies, promoters and other parties (e.g. suppliers and contractors), as duty bearers, have the obligation and responsibility to ensure that these rights are upheld
- Making **documentation available** for public consultation, including with respect to timely prior disclosure, translation, culturally appropriate, accessibility, and objectivity
- Incorporating the **points of view of communities** in matters that directly affect them, responses to **feedback** obtained during consultations, with reasoning about what information was taken into account or if not, why it was not
- **Representativeness and equitable participation**, the accessibility and inclusion of disadvantaged groups and other who may be discriminated against, respect for institutions and actors representing communities, ensuring that womens' perspectives are obtained and taken into account
- Specific requirements for **Free, Prior and Informed Consent (FPIC)** when indigenous people are involved
- **Freedom from manipulation**, interference, discrimination, intimidation, coercion or reprisals<sup>160</sup>
- **Stakeholder feedback** during **implementation and monitoring**
- Potential for third-party or multi-stakeholder **monitoring**
- Consultations that **adapt** to changing project needs throughout the duration of the implementation cycle
- Access to different **grievance mechanisms** and dispute resolution mechanisms
- **Reporting** to stakeholders throughout the project cycle, and providing information on an updated basis
- **Targeted capacity building and/or other assistance** to empower impacted individuals and communities, in particular those who are vulnerable and/or marginalised, to fully and effectively participate in engagement and consultation processes, as necessary

- **Recommendations:** *Given the importance of meaningful stakeholder engagement to effective development outcomes and as an important enabling right that facilitates the exercise of other rights, DFIs should be strengthening their safeguard provisions and practices (throughout the project cycle, including during supervision) on stakeholder engagement in line with the emerging practices set out in Box 23 above, complemented by specific recognition of vulnerability resulting from discrimination based on political opinion and with reinforced due diligence in relation to the risks faced by human rights defenders (See Section 2.2.1.1 on enabling environment for participation and Box 7 on suggested actions on reprisals).*

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<sup>160</sup> See also Box 7 on reprisals.

### 2.3.6. Responsible Exit

So far, few if any DFI safeguards address the conditions of exit from a project or client, other than for specific decommissioning risks. Legal contracts provide for exit for material failure to comply, but not the additional considerations that should be weighed when considering whether or how to withdraw from a given project or the client relationship. Exits have an important wider signalling power:<sup>161</sup> they involve the withdrawal of funds that might otherwise support poor practices and perpetuate negative impacts, and they can contribute to lessons learning exercises. However, exits may also impact negatively on those left behind after the withdrawal. (See Box 24 on Responsible Exit). As highlighted in a recent review concerning risks to human rights defenders in DFI projects, leaving quietly “can actually elevate the risk for defenders who may be blamed for the loss of financing.”<sup>162</sup>

Exits from controversial projects present clear challenges – staying the course means continuing to be involved in a project with potentially severe negative impacts. Leaving will usually mean losing leverage to influence the situation, including leverage to ensure that remedy is provided. There is well-established guidance on how to consider the impacts of retrenchments on workers, but apparently little if any guidance on exits more generally, which is a particularly problem in relation to higher-risk projects where (unplanned, potentially unaccountable) exit is most likely to occur in practice.<sup>163</sup>

#### **Box 24: Emerging DFI Practices - Responsible Exit**

FMO and FINNFUND and the Central American Bank for Economic Integration (CABEI), financed the construction and operation of a 21.3 MW run-of-river hydropower plant in Honduras, the Agua Zarca Dam. The project involved protracted violence against indigenous communities opposing the project and the killing in March 2016 of Lenca leader Berta Cáceres.

FMO and Finnfund issued a public statement announcing their decision to seek a responsible exit from the project and engaged an independent consultant to conduct an inclusive consultation process to determine what a responsible exit from the project should look like. As a starting point the DFIs set out their position that a responsible exit is one that:

- at least, avoids additional escalation of disputes in the area and, at best, offers a path for peaceful coexistence of communities;
- meets some of the development needs of communities in the area, regardless of whether they've supported or opposed the Project; and
- respects existing contractual obligations.

<sup>161</sup> <https://www.worldbank.org/en/country/uganda/brief/uganda-transport-sector-development-project-fact-sheet>

<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> IFC, “[Good Practice Note: Managing Retrenchment](#),” (2005).

The independent consultant engaged by the two DFIs delivered a report that is publicly available.<sup>164</sup> It appears to be the first example of a publicly available attempt to address principles for a responsible exit. The conditions concerning participation in the investment and withdrawal have nonetheless attracted criticism from some stakeholders.<sup>165</sup>

- **Recommendations:** *Leaving a controversial investment without a thorough investigation and public accounting of the role of the financing institution and the client, may conflict with the requirements for remedying harms, preventing recurrence, and ensuring accountability. DFIs should consider publishing and adhering to criteria governing their exit from projects where the severity of human rights risks or impacts so warrants, and build leverage by including these in their standard contract conditions. This can build on the guidance in the UNGPs and the OECD Guidelines that specifically instruct companies disengaging from business relationships to consider the human rights impact of the withdrawal.*<sup>166</sup>

## 2.4. Area 4: Gaps in Accountability with a Focus on Remedy and Transparency

Accountability is the cornerstone of the human rights framework. Human rights provides a clear rationale for strengthening accountability at DFIs in general, and for reinforcing the rights-compatibility of DFI accountability mechanisms and approaches. Two important components of accountability – the right to an effective remedy and access to information -- are highlighted below.

### 2.4.1. Remedy

The UNGPs have a strong focus on remedy for human rights harms. They emphasise the government's role in the wider remedy ecosystem in establishing judicial and non-judicial mechanisms and the role of businesses in providing for or cooperating in remediation as a core part of the corporate responsibility to respect. This recognises that the right to an effective remedy is a human right in itself with clear substantive content under international human rights law.<sup>167</sup>

Remedy is both a process and an outcome that can take various forms including compensation, restitution, apology, and guarantee of non-repetition. It is important to note that offsetting is not an appropriate remedy for human rights harms, even though safeguards typically include offsetting among the compensation hierarchy.<sup>168</sup>

<sup>164</sup> <https://www.fmo.nl/agua-zarca>

<sup>165</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>166</sup> Somo, "[Should I stay or should I go? Exploring the role of disengagement in human rights due diligence](#)," (2016).

<sup>167</sup> See "Human rights and transnational corporations and other business enterprises - Note by the Secretary-General," A/72/162, 18 July 2017 and e.g. [Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), U.N. Doc. A/RES/60/147, Dec. 16, 2005; [International Covenant on Civil and Political Rights](#) 1966, article 2(3)(a), and Human Rights Committee, [General Comment no. 31](#), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) paras. 14-20; [International Covenant on Economic, Social and Cultural Rights](#) 1966, article 2, and [Committee on Economic, Social and Cultural Rights, General Comment No. 3](#), U.N. Doc. E/1991/23, annex III at 86 (1991), at paras. 5-7.

<sup>168</sup> Note that offsetting may work for climate change, but it does not human rights; harm to one person or group cannot be offset by good deeds vis-à-vis another. EIB safeguards recognise that there is no such thing as a human rights off-set: "Contrary to an environmental mitigation hierarchy, a human rights mitigation hierarchy is premised on the principle of remedy rather than compensation."

Communities, individuals, workers, organisations are increasingly expressing their claims and objections in human rights terms. Human rights connect directly with the subject matter of DFI safeguard policies and other operational policies and have an empowering quality that other types of claims lack. The denial of a human right has specific consequences for accountability.<sup>169</sup> The failure by a DFI to recognise and use the same terminology can itself be itself a source of frustration for stakeholders and may create unnecessary friction that distracts from the shared objective of addressing grievances and resolving disputes.

In light of the increasing uptake of the UNGPs (including their focus on remedy), and given that IAMs ultimately cannot compel resolution of a dispute about harms by the client or the DFI, there may be increasing pressure on the question of remedy through different avenues in the future, including but not limited to litigation involving the DFI.<sup>170</sup> This parallels the increasing scope and types of legal claims that have recently been brought against businesses for human rights harms.<sup>171</sup> It therefore appears timely for DFIs to take a fresh look at remedy.

#### *2.4.1.1. Remedy at the Project Level*

Safeguards typically include a range of selected provisions on remedy for specific, negative impacts (harms), (for example labour, involuntary resettlement and security providers, and for certain environmental impacts), but not an overarching recognition that there should be effective remedies for all adverse human rights impacts associated with a project.

Remedies are frequently provided in practice in DFI-supported projects when things go badly wrong, but this tends to happen in a reactive, unplanned and inconsistent way. A recent IDB study analysing 40 years of infrastructure projects in Latin America concluded that despite a whole range of warning signs, and despite decades of experience, neither clients nor DFIs have been putting sufficient emphasis into addressing issues seriously when concerns are manifested – even though these scenarios repeatedly have serious consequences for communities, clients and DFIs. (See Box 9 on social conflicts). Communities and workers may perceive risks around a project to be even higher than they might otherwise be if they feel they have no control over how their labour or resources will be used and have no credible access to recourse.<sup>172</sup> From this perspective, the mere fact of signalling a serious approach to recourse can reduce risks for a project. Yet the evidence seems clear that this does not happen often enough.

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<sup>169</sup> See e.g. Varun Gauri & Daniel Brinks eds., *Courting Social Justice* (Cambridge University Press 2008); Beth Simmons, *Mobilising for Human Rights* (Cambridge University Press 2009).

<sup>170</sup> Note that the litigation followed a CAO compliance review and monitoring report finding that the IFC had still not taken meaningful steps to remedy the harm caused. Green Climate Fund-Independent Redress Mechanism, Opinion – *Jam v. IFC: What does it mean for Accountability? To sue or not to sue: that is the question*, (Mar. 29, 2019).

<sup>171</sup> See <https://www.business-humanrights.org/en/corporate-legal-accountability>

<sup>172</sup> Kemp, D, Warden, S., Owen, J., “Differentiated social risk: Rebound dynamics and sustainability performance in mining,” *Resources Policy* 50 (2016) 19–26.

Moreover, while most DFIs have requirements for clients to put in place operational level grievance mechanisms,<sup>173</sup> these are not necessarily designed or required to address and remedy human rights harms. Few DFI safeguard policies (even among the most recent policies) specifically reflect the UNGPs' "effectiveness criteria"<sup>174</sup> for grievance mechanisms in their safeguard requirements, including the important criterion of involving stakeholders in the design and operation of the mechanism that is a fundamental step in building trust in the mechanism.<sup>175</sup> (See Box 25 on Remedies). Remedying harms associated with a DFI-funded project may require a range of different mechanisms and avenues – within the project and within the country (via judicial and non-judicial mechanisms) – but the remedy ecosystem seems to remain underexplored in DFI guidance to clients.

#### **Box 25: Emerging DFI Practices - Remedies**

EIB: "A *Grievance Mechanism* constitutes the system introduced by the promoter that affords all stakeholders, in particular impacted individuals and communities, the ability to provide feedback, channel their concerns and, thereby, access information and, where relevant, seek recourse and remedy. Such mechanism ought to be effective, by way of being verifiably legitimate; accessible; predictable; equitable; transparent; compatible with human rights; based on engagement and dialogue; and, a source of learning for all stakeholders involved, including the promoter."<sup>176</sup> EIB notes that these are the effectiveness criteria for grievance mechanisms of the UNGPs.

- **Recommendations:** *There are a number of different ways that remedies could be strengthened within DFI policy and practice, beginning with ensuring that human rights harms are covered by safeguard requirements and that appropriate types of remedies for human rights impacts are used. Assessing the strength of a given country's "remedy ecosystem" – i.e. whether there are effective avenues for redress locally or nationally for project impacts – should become a routine part of the contextual due diligence, with a specific examination of the roles of the client and the DFI in participating or contributing to them.<sup>177</sup> Using the UNGPs "effectiveness criteria" to test client grievance mechanisms would encourage an examination not only of whether a given client has a grievance mechanism in place, but critically, whether it is effective in practice.*

<sup>173</sup>For workers, in case of resettlement, and more generally. For example, IFC developed an early guidance note in 2009 on grievance mechanisms ("[Good Practice Note: Addressing Grievances from Project-Affected Communities. Guidance For Projects And Companies On Designing Grievance Mechanisms](#)") and the IFC CAO developed a toolkit ([Grievance Mechanism Toolkit](#)).

<sup>174</sup> The "effectiveness criteria" set out in UNGP 31 identify characteristics of such a mechanism that help make it effective; each is accompanied by a longer description: (i) legitimate; (ii) accessible; (iii) predictable; (iv) equitable; (v) transparent; (vi) rights-compatible; (vii) a source of continuous learning; and (viii) based on engagement and dialogue. To these could also be added a specific criterion on ensuring no retaliation. For example, EBRD, "[Environmental and Social Policy](#)," PR 10 (April 2019) makes no explicit or implicit reference to the UNGPs and has quite standard provisions on grievance mechanisms.

<sup>175</sup> 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.

<sup>176</sup> EIB, "[Environmental and Social Standards](#)," (2018), Standard 10, para. 8

<sup>177</sup> See for example, Dutch Banking Sector Agreements, "[Discussion Paper, Working Group Enabling Remediation](#)," May 2019.



*With increasing demands and pressures on accountability, DFIs may wish to consider developing new models or mechanisms for remedy where clients manifestly fail to remedy harms to people (or the environment). This could draw on experiences from elsewhere, such as pre-established funds that ensure that sufficient financial resources are ring-fenced early on for damages occurring throughout the project cycle (as exist for example for environmental pollution or mine closures<sup>178</sup>), no fault liability funds, insurance, or enhanced step-in rights that allow the DFI (or a group of DFIs or an associated mechanism) to step into non-performing or badly performing projects to take corrective actions and address concerns and claims from stakeholders, but that is pre-funded by a percentage deducted from financing in specified countries, sectors or via a trust fund.*

#### 2.4.1.2. Remedy at the DFI level

DFIs have their own role in remedy that remains underexplored. Remedy is a relevant consideration in all cases in which a DFI is connected to a negative impact, across all forms of responsibility. DFIs have roles to play and a range of tools that can be used to support the appropriate remediation of adverse impacts, working together with clients and others as necessary in the larger remedy ecosystem. The interaction between the responsibility of DFIs and their clients to provide for or cooperate in remedy, and the interactions between their mechanisms, would benefit from further discussion and clarification, building on discussions in the IAM Network and among private sector banks, bearing in mind the significant public sector role of DFIs and the implications of this for its role in remedy.<sup>179</sup>

Some DFIs have a suite of remedy mechanisms. There is a potentially uneasy tension and confusion about responsibility for adverse impacts when many grievance mechanisms are involved, including IAMs, MDB grievance redress services, whistle-blower services and project level grievance mechanisms. . This may lead to a lack of clarity about responsibilities and gaps and a feeling that “if everyone is responsible, nobody is.” There may be a need for an overarching review of grievance mechanism architecture – i.e. looking at the DFI’s own remedy ecosystem – in order to understand whether and how the pieces fit together and help provide access and effective remedy to those affected by DFI projects. IAMs have begun to explore what the UNGPs “effectiveness criteria” mean for their work through the IAM Network and as part of their processes of updating their procedures. There has been variable progress in recognising and operationalising all of the effectiveness criteria, however.<sup>180</sup> Whether other DFI grievance mechanisms have begun to do so is unclear.

#### **Box 26: Emerging DFI Practices – Independent Accountability Mechanisms**

Some recent, emerging good practices include:

<sup>178</sup> Intergovernmental Forum on Mining, Minerals and Sustainable Development, “Mining Policy Framework - Post-Mining Transition Section,” (2013), pp. 13-15.

<sup>179</sup> See in particular, Dutch Banking Sector Agreements, “[Discussion Paper, Working Group Enabling Remediation](#),” May 2019.

<sup>180</sup> A coalition of CSOs conducted an in-depth review of the IAMs, including in comparison to the UNGPs effectiveness criteria. Somo, “[Glass Half Full? The State of Accountability in Development Finance](#),” (2016).



- **Specific objective of providing remedy:** identifying and redressing harm for affected communities;
- Authorising a **wide range of remedies**, including but not limited to compensation;
- A **no-tolerance position on retaliation** against anyone who may file a complaint or otherwise engage with the mechanism;
- **Simplifying** accessibility requirements and ensuring that complainants are **free to select** compliance review, or dispute resolution/mediation, according to their needs;
- Eliminating unreasonable barriers to access by removing the bar against complaints that may be associated with **parallel proceedings**;
- Ensuring accountability throughout the entire project cycle by revising eligibility requirements to allow for **pre-approval and post-exit complaints**;
- Effectively promoting awareness of the mechanism by requiring **client disclosure of IAM's existence** to local communities;
- Consideration of complaints to the IAM before making any **repeat or additional investments** in a client;
- Require the DFI to consult, in-person, with complainants when developing an **Action Plan** and include in its final Action Plan how it has responded to feedback provided by complainants;
- **Monitoring of cases by the IAM** until all instances of non-compliance have been remedied;
- **Reporting by the IAM independently to the DFI board** on implementation or non-compliance;
- **Independence** through a direct reporting line to the Board, a process for selecting the IAM head that includes external stakeholder participation, full-time IAM staff selected by the IAM head and an executive-level position for the IAM head.

- **Recommendations:** *At a time of increasing demand and pressures on DFI accountability, it would seem to be timely for DFIs to consider new, more comprehensive remedy commitments in safeguard policies and to strengthen linkages within their own internal remedy ecosystems. Given the increasing focus on access to remedy and actual provision of remedy, OHCHR recommends that future IAM reviews should build on strengthened approaches among peers (as set out in Box 26) and draw on lessons learned from other initiatives and mechanisms. This could include relevant lessons from OHCHR's "Accountability and Remedy Project" which is reviewing lessons learned and providing recommendations on access to remedy for business related human rights impacts among state-based and non-state based remedial mechanisms.<sup>181</sup> Consideration could also be given to relevant lessons learned exercises of the OECD's National Contact Point system<sup>182</sup>*

<sup>181</sup> See <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRAccountabilityandremedyproject.aspx> and <https://www.business-humanrights.org/en/ohchr-accountability-and-remedy-project>

<sup>182</sup> See <http://mneguidelines.oecd.org/Progress-Report-on-NCPs-for-Responsible-Business-Conduct-2019.htm> and OECD guidance documents on the application of the OECD Guidelines to various sectors all include a section on remedy. See: <http://mneguidelines.oecd.org/duediligence/>

*and lessons learned from the implementation of the Aarhus Convention's and Escazú Agreement's provisions on access to justice in environmental matters.*<sup>183</sup>

#### **2.4.2. Transparency & Access to Information**

The right of access to information is recognized in global and regional human rights instruments, Principle 10 environmental rights to information, SDG 16, target 10,<sup>184</sup> many constitutional provisions, and global initiatives such as the Open Government Partnership.<sup>185</sup> Many DFIs have self-standing information and disclosure policies that apply to the institutions themselves, in parallel to information disclosure requirements in their safeguards that apply to clients at the project level. These typically cover both proactive dissemination of information and reactive responses to requests for information. (See Box 27 on Access to Information).

Existing safeguards often have broad exemptions for “business-sensitive” information or “legal” or “financial information” that may privilege business sensitivity over the more fundamental goal of transparency. The fact that access to information is recognised 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 communities potentially affected by DFI-supported projects. These broad exemptions for business information also run counter to current trends requiring or at least encouraging companies to put more information into the public domain, particularly in relation to environmental, social and governance (ESG) issues, in response to demands from regulators, investors and other stakeholders.<sup>186</sup>

#### **Box 27: Emerging DFI Practices - Access to Information**

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

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

**Good practice requirements** on access to information among DFIs include requirements for:

- **Statement of principles** 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;

<sup>183</sup> Client Earth, Blog, “[What can the Aarhus region learn from the Escazú Agreement?](#)” (22 Aug 2018).

<sup>184</sup> Target 10 states: “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.”

<sup>185</sup> The Access Info Europe and Center for Law and Democracy’s [Global Right to Information Rating](#) is an authoritative source in this field.

<sup>186</sup> See for example the [EU Non-Financial Reporting Directive](#), [Global Reporting Initiative](#), [Sustainability Accounting Standards Board](#).

- Recognition of **accountability to stakeholders** (including but not limited to shareholders);
- **Specific recognition of contextual challenges** including shrinking civil society space, threats to human rights defenders, restrictions on freedom of the press;
- **Proactive measures** to promote access to information, including dissemination of institutional information and project level information;
- Listing of institutional and project information **routinely disclosed** with timeframes, including respectively (i) information disclosed to the Board, draft policies and strategies, budgets, (ii) advance notification of projects to be considered, project information and environmental and social information and documentation, project implementation and completion reports, project updates;
- **Procedures on dealing with requests for access to information** - clear timeframes for responding to requests, narrow and specific reasons for denials and procedures for appeals, no requirement for justification of request for access to information at the project or institutional level, allowing anonymous requests, particularly in light of the increasing personal risks faced by many individuals in connection with development projects and business activity;
- **Positive overrides** (permitting information disclosure where a legitimate interest, such as where human rights are at stake, outweighs a protected interest), while also excluding other reasons for an override of the presumption of disclosure;
- Guidelines on **translations**, commitments to communications in the formats and languages accessible to communities and accessible-format access for persons with disabilities;
- Clear cross-referencing and **coordination with all other safeguard policies**, specifying which policy applies in case of conflict;
- Limitation of situations where **costs** can be imposed, with safeguards for those requesters below a specified income level;
- Presentation by the President to the Board of an **annual report on implementation** of the policy, including statistics on the number of requests received, the timeframe and nature of the DFIs' responses, and data on appeals as well as number and type of incidents of intimidation and/or reprisals and the nature of the DFI's responses;
- **Declassification** schedule for documents;
- **Two-tier** (including independent, external) **review mechanism**.

- **Recommendations:** *Future safeguard updates will take place in the context of the increasing, explicit recognition of the right to information and the vital role it plays in fostering transparency, sound decision-making, accountability, minimisation of corruption and good governance. They will also take place in a context of big data where the demand for access to meaningful, machine readable information to enable meaningful analysis is likely to increase. DFIs should leverage innovations in data collection, management and presentation to provide better and more meaningful access to information. While recognising that there are legitimate needs to safeguard truly confidential business information, the presumption should be in favour of proactive disclosure, with any exemptions defined narrowly and justified on a case-by-case basis by reference to foreseeable harm to a legitimate, recognised interest.*

### **3. Concluding remarks**

The adoption of the UNGPs and the OECD Guidelines have brought increased attention to the role of the private sector in development and its impact on human rights. This has added to the already considerable and consistent attention to human rights in connection with DFI-financed projects. The 2030 Agenda, SDGs and Addis Ababa Agenda for Action reinforce the importance of human rights and their practical relevance to DFIs' mandates and operational policies.

While practice is uneven, a number of DFIs appear to have moved quickly in a range of areas to embrace these developments as opportunities. Demonstrating to stakeholders that their dignity and human rights are taken seriously can help to build more trusting, constructive relationships, enhance reputation, establish and maintain a social license to operate, and improve risk management and development outcomes.

This study has shown that there are a wide range of emerging practices across DFIs – at policy and operational level and in guidance -- that help to demystify human rights issues and show how the latter issues can be addressed within the scope of DFIs' due diligence procedures. A range of evident gaps has also been identified. OHCHR hopes that this study will contribute usefully to DFI safeguard policy review processes, for the sake of policy coherence, accountability, and enhanced development impact.

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