



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Comments on the Review of the FinDev Canada Environmental and Social Risk Management Policy

15 December 2023

Introduction

1. OHCHR welcomes the opportunity to contribute to the review of FinDev’s Environmental and Social Risk Management Policy (“the E&S Policy”).
2. We note that FinDev uses the IFC Performance Standards (PS’s) as the main benchmark which is applied to clients to secure implementation of the E&S Policy (para. 2.2 of the Policy). At the same time, we note that the UN Guiding Principles on Business and Human Rights (UNGPs), along with the OECD MNE Guidelines, inform FinDev’s overall approach to the E&S Policy, and that one of the objectives of the present review is to reflect key developments in connection with the UNGPs and OECD MNE Guidelines (Stakeholder Discussion Paper). However the IFC PS and international business and human rights standards are not closely aligned. This raises a significant policy coherence challenge.
3. As documented in our Office’s [DFI Safeguard Policies Benchmarking Study](#) (2023), the IFC PS’s conflict with the standards of the UNGPs in various respects including, notably, in relation to: (a) the definition of human rights due diligence; (b) the expectation that risk-based due diligence will be carried out throughout the value chain; (c) remedy, and (d) how to exit projects responsibly.¹ We note that FinDev has adopted the standards in Export Development Canada’s previous Human Rights Policy (Stakeholder Discussion Paper, p.2). However the latter Policy itself does not fully align with the UNGPs, and its relationship with the E&S Policy, and contractual requirements for clients, does not seem clear.
4. In OHCHR’s view, the E&S Policy review offers a critical opportunity for FinDev to consolidate its various policies relevant to project E&S risk management, reconcile the tensions and contradictions between the IFC PS’s and international business and human rights standards, and align with emerging best practice among development finance institutions (DFIs). Our comments at this point are limited in scope, focusing upon a small number of threshold issues on which UNGPs alignment appears to be most needed and of greatest practical importance.² Our comments address three of the four themes for FinDev’s review: policy scope, human rights considerations, and emerging risk areas. The first two themes are closely related and are addressed together, below, under the heading “Policy scope (human rights)”. A list of recommendations is included in the [Annex](#).
5. Before proceeding further, it is important to recognize a number of important respects in which the EDC Human Rights Policy already appears to be substantially aligned with the UNGPs. While the latter Policy is only schematic in nature, its intention to align with the UNGPs seems particularly evident in relation to: (a) the policy commitment to respect human rights (2.1); (b) risk-based prioritization, based upon severity (2.2.1, and Section 3 of the E&S Policy); (c) building leverage, and exiting investments responsibly (2.2.3); and (d) enabling remediation (2.3, subject to the caveats and recommendations below). However, in OHCHR’s view, further clarity seems to be needed as to how the Human

¹ Lack of alignment is to be expected, to some extent, given that the IFC PS’s have not formally been updated since 2011 and hence fail to capture global experience in the implementation of the UNGPs. IFC has since been taking steps to address some of these gaps.

² While our comments here are framed by the UNGPs, we’d note that the OECD MNE Guidelines (2023 update) and Responsible Business Conduct (RBC) Due Diligence guidance are tightly aligned with the UNGPs.

Rights Policy relates to (conflicting) requirements of the E&S Policy, IFC PS's and contractual requirements for clients.

Policy scope (human rights)

6. As indicated above we warmly welcome FinDev's intention to align with the UNGPs and OECD MNE Guidelines. Question 1 in the Public Stakeholder Discussion Paper asks what standards beyond those already included in the E&S Policy should inform the scope of a revised E&S Policy. The UNGPs and OECD MNE Guidelines are already listed under the heading "good international practice" in the "Principles" section of the Policy (section 2). This memorandum does not suggest additional standards for inclusion, but rather, seeks to show why and how existing standards (the UNGPs) should be integrated more explicitly, consistently and effectively.
7. The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and are the most authoritative framework for enhancing standards and practices with regard to human rights risks related to business activities. The UNGPs reflect existing international law and hence should not be considered (merely) "good international practice" (cf. E&S Policy, para. 2.2). The UNGPs are being integrated to an increasing extent in other DFI sustainability frameworks and risk management policies, as well as investor and commercial banking risk management frameworks, the 4th revision of the Equator Principles, and regional and national regulation.³
8. Question 3 in the Public Stakeholder Discussion Paper invites comments on how clients' implementation challenges can be addressed. This is to a large extent a contextual question, difficult to address in the abstract. It is a question that pertains to FinDev as much as to clients.⁴ Even for the leading DFIs and companies, UNGPs implementation is almost invariably a work-in-progress. Subject to contextual specificities, results often depend upon clear and consistent organizational values and vision, strong leadership and communication, clear alignment of internal incentives towards sustainability objectives, proactiveness and innovation in building and exercising leverage, and effective governance, oversight and accountability mechanisms, in addition to adequate human and financial resources.⁵
9. Relatedly, question 3 also asks to what extent additional (human rights) requirements can realistically be reflected in standards, rather than other means such as capacity building or technical assistance. However we do not see "standards" and "capacity building" in binary terms or as alternatives. Nor do we see capacity gaps as the primary implementation

³ OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.4-9.

⁴ For a discussion of some of the main factors necessary for successful policy implementation in DFIs see OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.10-11. The track record of DFIs in building and exercising leverage seems to be a variable one. See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.48-58, and CAO, [Insights on Remedy: The Remedy Gap; Lessons from CAO Compliance and Beyond](#) (Apr. 12, 2023), p.16: "CAO's review of compliance cases processed since 2018 found that, for nearly 70 percent of these projects, IFC did not exhaust the leverage at its disposal to address outstanding E&S concerns." Moreover "in circumstances when IFC/MIGA considered a client's E&S actions inadequate, they made use of [disbursement-linked] contractual leverage in only 23 percent of cases."

⁵ *Id.*

obstacle in all cases, especially where human rights issues like freedom of association, reprisals and intimidation, gender-based violence and discrimination are concerned. The commitment gap is often equally problematic, which may require different (including diplomatic) tools, strategies and leverage options. The UNGPs are not insensitive to questions of context and capacity, however we take it as axiomatic that many of FinDev's clients would benefit from capacity building support and other complementary measures and incentives in order to fulfil the corporate responsibility to respect human rights, in line with the UNGPs.

Routine (not exceptional) "human rights due diligence"

10. One of the most obvious areas where the IFC PS's conflict with international business and human rights standards is in the definition of human rights due diligence. The IFC PS's contain no clear requirements in this regard; rather, PS 1, fn 12, invites clients to consider the possibility of carrying out human rights due diligence in "limited high risk circumstances."⁶ PS 1, fn 12 also implies that human rights due diligence is a one-time event rather than a process of identifying, addressing and accounting for human rights impacts throughout the value chain, embedded in an entity's E&S risk management system. PS 1, fn 12 seems to have been a dead letter in practice, however. This is hardly surprising given its optional nature, even in high-risk circumstances.
11. We note that the E&S Policy (Section 3: Implementation) appears to reflect a similar, attenuated, concept of human rights due diligence as that reflected in IFC PS 1, fn 12.⁷ However the EDC Human Rights Policy reflects a more holistic (though schematic) conception of human rights due diligence, applicable to FinDev, that is more in line with the UNGPs. Among other DFIs, Swedfund's framing of its own due diligence responsibilities is among the clearest:

*"[Swedfund is] committed to working actively to comply with the United Nations Guiding Principles on Business and Human Rights (UNGPs). We continuously develop and implement a human rights due diligence process to identify, prevent, mitigate, and account for how we address our impacts on human rights and engage and consult with potentially affected stakeholders. The human rights due diligence process is largely embedded in our existing environmental and social management system."*⁸
12. OHCHR would encourage FinDev to: (a) articulate its own human rights due diligence responsibilities in similar terms to those outlined above, and (b) require clients to implement human rights due diligence as a routine matter throughout the project cycle, rather than as a static exercise at a fixed point in time in exceptional circumstances.

⁶ IFC PS 1, fn 12: "In limited high-risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business." To similar effect, IDB ESPF fn 52, limits human rights due diligence to "significant risk" projects.

⁷ This concern stems from the reference in Section 3 of the E&S Policy to "additional due diligence" in the form of additional studies or enhanced stakeholder engagement being warranted where "potential severe human rights impacts are identified."

⁸ [Swedfund Policy for Sustainable Development](#), pp.2-3. On human rights due diligence more generally see OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.15-18 and 132-133.

Broadening the scope of due diligence

13. A second key respect in which the IFC PS's fall short of the UNGPs is in connection with the scope of due diligence. In this regard we note that the IFC PS's and other MDB standards typically limit the scope of due diligence to "primary suppliers," which is usually defined as: "... those suppliers who, on an ongoing basis, provide directly to the project goods or materials essential for the core functions of the project. Core functions of a project constitute those production and/or service processes essential for a specific project activity without which the project cannot continue."⁹
14. In OHCHR's view a more proactive approach would be strongly desirable if issues such as forced labour and child labour, often buried deep in supply chains, are to be more consistently identified and tackled. For example, under the definition of "primary supplier" above, if there was a supply chain disruption in relation to a given project, the client might disavow responsibility for E&S risks in relation to the (temporary) supplier, because the supply relationship was not an "ongoing" one. In OHCHR's view, consistent with the UNGPs, the scope of due diligence should cover all those impacts with which FinDev and its clients are involved (including those directly linked to their operations, products or services by its business relationships),¹⁰ downstream as well as upstream, including and beyond labour and biodiversity impacts, whether or not these relate to primary suppliers.
15. In OHCHR's view the "control" test in IFC PS 1 (para. 10) and other MDB definitions of "primary supplier" may also have an unintended effect of diminishing expectations and incentives for clients to proactively build and exercise leverage to ensure that more E&S risks and impacts are identified and addressed.¹¹ The client's existing control over other entities may certainly affect the extent to which they can effect change in those business relationships causing human rights harms but, under the UNGPs and OECD RBC guidance, it does not affect the scope of harms that clients (and FinDev) should be trying to address. Where it is necessary to prioritize actions to address harms, this should be determined by the severity (scale, scope and irremediability)¹² of risk, as the E&S Policy and EDC Human Rights Policy stipulate, not the client's existing control. Rather, consistent with the EDC Human Rights Policy and UNGPs, clients should be encouraged to lean into risk and

⁹ IFC, PS 1 (Jan. 1, 2012), para. 10. The latter paragraph also provides: "Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with primary supply chains, as defined in Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30)." To similar effect see World Bank, Guidance Note for Borrowers (ESS 1) (June 2018), para. 34.

¹⁰ UNGP, Principle 17. The commentary to UNGP 17 recognizes that where business enterprises have large numbers of entities in their value chains it may not be possible to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence. OHCHR, [Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), p.42.

¹¹ By contrast IFC PS 1 does include a requirement (of sorts) to build leverage in the context of supply chain risk management: "Where the client does not have control or influence over the management of certain environmental risks and impacts in its supply chain, an effective ESMS should identify the entities involved in the value chain and the roles they play, the corresponding risks they present to the client, and any opportunities to collaborate with these entities in order to help achieve environmental and social outcomes that are consistent with the Performance Standards." However collaboration is only one of many possible forms of leverage.

¹² UNGPs, Principle 24.

proactively seek avenues through which leverage could usefully be exercised across the scope of their business relationships, while avoiding any categorical cut-off point at the level of primary suppliers.¹³

[A proactive and robust approach to remediation](#)

16. A third critical area where the IFC PS fall short of the UNGPs is on the issue of remedy. The idea of “remedy” for E&S impacts is central to accountability, and to DFIs’ mandates to promote sustainable development and avoid harm to people and the environment. We note that the mitigation hierarchy in the IFC PS, reflected in most MDBs’ safeguard policies, is “to anticipate and avoid, and where avoidance is not possible, minimize” risks to people and the environment, and, “compensate/offset” residual risks to the extent “technically and financially feasible.” The limitations of this formulation, including the inappropriateness of “off-setting” human rights impacts, are discussed in the OHCHR’s [Remedy in Development Finance report](#) (2022) (pp.39-43).
17. In OHCHR’s view the E&S Policy review presents FinDev with an opportunity to establish itself among the DFI leaders in enabling remedy for project-affected populations, through a robust framework aligned with the UNGPs. The EDC Human Rights Policy (section 2.3) contains a number of important elements in this regard including, importantly, that EDC’s own responsibilities and potential contributions should be guided by its own involvement in impacts. However the latter Policy lacks the clarity and comprehensiveness of leading DFI E&S remedy frameworks, lacks detail necessary on the criteria that may guide a self-assessment of involvement in impacts, and lacks a guiding definition of remedy.
18. Under international human rights law, “remedy” is a holistic concept encompassing not only compensation (a standard component of DFI mitigation hierarchies), but also restitution, rehabilitation, satisfaction (including public accounting, aimed at restoring the dignity of those who have suffered human rights violations), and guarantees of non-repetition (including policy changes to prevent recurrence).¹⁴ Where projects are associated with serious abridgements of human rights, such as forced evictions, GBV or SEAH, or reprisals against environmental or human rights defenders, a combination of the above remedies will often be required in order to make people whole. OHCHR would recommend that this multi-faceted definition of remedy be included in the glossary of the E&S Policy, and that the mitigation hierarchy be amended as follows: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to *remedy* such impacts.”¹⁵ [Emphasis added].
19. Secondly, while “off-setting” is a well-known (but not uncontroversial) concept in the environmental context, the IFC PS’s and MDB standards generally fail to recognize the limitations of offsetting for social (including human rights) impacts. The distinction between environmental and social issues in this regard is reflected in the Preamble of the 4th revision of the Equator Principles which states: “Specifically, we believe that negative

¹³ For illustrative discussions on the ways in which banks and clients may build and exercise leverage on E&S issues in the finance value chain (including but not limited to contractual leverage), see the report of the [Dutch Banking Sector Agreement working group on enabling remediation](#) (2019) and OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Chap. III.

¹⁴ OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.11-12.

¹⁵ OHCHR’s [Remedy in Development Finance: Guidance and Practice](#) (2022) Chapter II, elaborates more extensively on this theme. The AfDB’s updated Integrated Safeguard System (2023), Operational Safeguard Standard 7 (“Vulnerable groups”), includes “remedy” in the mitigation hierarchy, although the term is not defined.

impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimised and mitigated, and where residual impacts remain, clients should provide *remedy* for human rights impacts or offset environmental impacts as appropriate.” [Emphasis added]. In line with the Equator Principles, we would recommend that a similar reference be included in the definition of “remedy” in FinDev’s E&S Policy, noting the inappropriateness of off-setting where social (including human rights) impacts are concerned.

20. Third, building on the EDC Human Rights Policy (section 2.3), we would recommend that the E&S Policy articulate with more clarity and detail how FinDev and clients are to assess their respective involvement in impacts. Under the UNGPs, OECD RBC guidance, and leading practice among DFIs, a party’s responsibilities in connection with adverse impacts should be determined in light of whether they may fairly be said to have “caused” or “contributed to” adverse impacts, or alternatively are “directly linked” to those impacts through their business relationships and financial products or services. This was also among the central recommendations of the 2020 IFC/MIGA External Review on E&S Accountability.¹⁶
21. “Linkage” situations (rather than “causing” or “contributing to” impacts) are the most common scenario in the context of development financing.¹⁷ Where adverse impacts are “linked” to FinDev’s operations, products or services by its business relationship with another entity, FinDev should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGP 13(b) and 19). As acknowledged earlier, EDC’s Human Rights Policy already reflects a forward-leaning posture on the issue of leverage. In this regard, we would note that the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and FinDev’s financial product or service. Rather, the link needs to be between the financial product or service provided by FinDev and the adverse impact itself.¹⁸
22. However, there may well be circumstances where FinDev by its own actions or omissions has “contributed” to harms together with an implementing organisation (such as where FinDev has not carried out adequate due diligence).¹⁹ In “contribution” situations, under the UNGPs and OECD RBC guidance, the financial institution should: (i) cease its own contribution; (ii) use its leverage with the implementing organisation to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between “contributing to” and having a “direct link” to an adverse human rights impact, and a financial institution’s involvement with an impact may shift over time, depending on

¹⁶ IFC/MIGA [External Review on E&S Accountability](#) (June 2020), paras. 306-339.

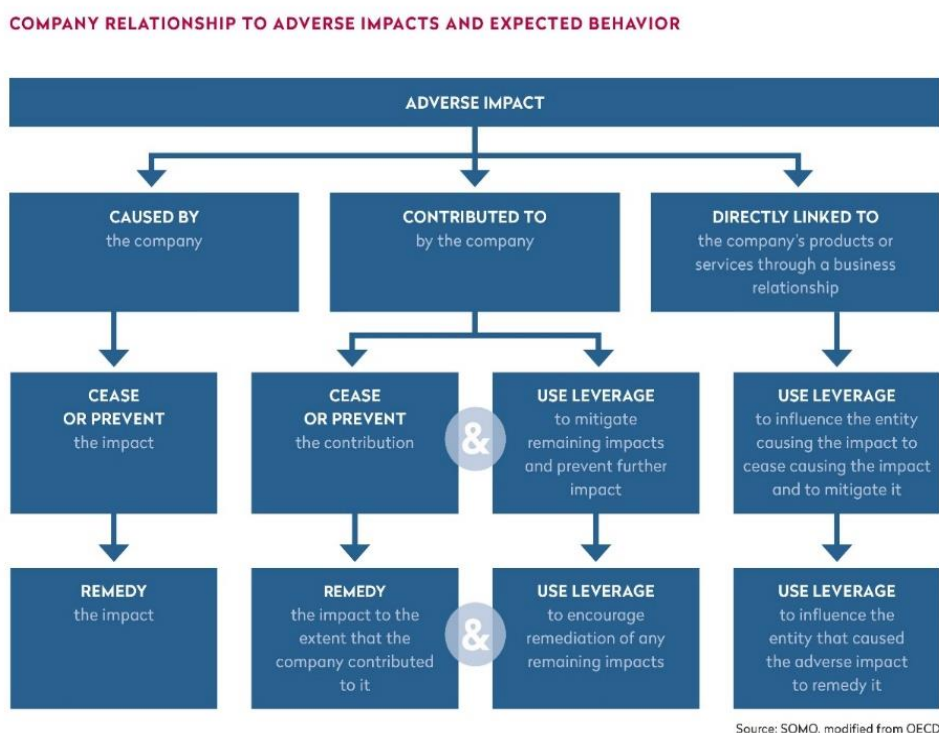
¹⁷ [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), p. 3.

¹⁸ [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-6. See also OECD (2018) [Due Diligence for Responsible Business Conduct](#), p. 71.

¹⁹ For a discussion of relevant factors determining “contribution” to harm see [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-10.

its own actions and omissions.²⁰ Figure 1 summarises these principles, applicable in principle to FinDev as well as clients.

Figure 1



23. “Contributing to remedy” means providing remediation appropriate to one’s share in the responsibility for the harm. Whether providing for or cooperating in remedy,²¹ the processes should be legitimate in the eyes of those who have suffered the harm and should follow basic requirements of fairness and due process. Cooperating in remediation does not necessarily mean that a bank should be expected to provide financial compensation to project-affected people, although there may well be circumstances where this is warranted.²² Other means of contribution may include engagement of expert studies, supporting the engagement of a facilitator and providing technical expertise. Ultimately, affected stakeholders should be meaningfully consulted about the type of remedy that would be appropriate in a given situation and the manner in which it should be delivered.²³

24. Among DFIs, Swedfund’s Sustainability Policy provides one of the clearest articulations of remedy expectations, closely aligned with the UNGPs:

“To fulfil our commitment to respect human rights, we aim to avoid causing or contributing to adverse human rights impacts resulting from our own activities and to address such impacts if they occur. Where we identify that we have caused or

²⁰ Id.

²¹ On the distinction between “providing for” and “cooperating in” remedy, see OHCHR, [Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), p. 64.

²² See e.g. OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Part IV, pp.82-88.

²³ A/HRC/44/32, annex, policy objective 12, para. 12.2; and A/HRC/44/32/Add.1, paras. 64–66.

contributed to adverse human rights impacts, we will provide for, or cooperate in, their remediation through legitimate processes.

We also aim to prevent or mitigate adverse human rights impacts that are directly linked to our operations by our business relationships. Where we identify adverse human right impacts that are directly linked to our operations through our business relationships, we will seek to work with our business partners to ensure that remediation occurs.²⁴

25. Other financing institutions' policies have been evolving in this direction as well. Examples include Finnfund's [Sustainability Policy](#) (Feb. 28, 2020) (s. 3.3.1), the [International Climate Initiative \(IKI\) Safeguards Policy](#) (valid Jan. 15, 2023) (pp.9-10), [guidance](#) produced by Legacy Landscapes Fund (LLF) for ESAPs in the conservation sector (page 4), and the [Grievance Mechanism Policy](#) (2022) of the Belgian Investment Company for Developing Countries (BIO) (p.6, "Remedy").²⁵ Best practice in commercial banking supports this trend. The [ANZ Human Rights Statement](#) (May 2022), pp.3-4, states: "We use risk-based due diligence to identify human rights risks and impacts associated with our business relationships. ... In line with the UNGPs we seek to cooperate in remediation through legitimate processes and, where reasonable, use leverage to encourage our Customers to prevent or mitigate any impacts." ANZ's [Grievance Mechanism Framework](#) states (para 23.3.2) that where ANZ has contributed to harms it will "remedy the impact appropriate to the Customer's own conduct and contribution" and (para 24) an independent mediator or expert may be engaged to help make determinations on ANZ's contribution to an impact. ANZ is also a notable instance where an enabling policy on remedy has successfully been put into practice, generating "win-win" outcomes for the bank and project-affected people.²⁶ The leadership of a commercial bank on this issue is all the more notable given its private character and lack of a sustainable development mandate.
26. Drawing from these examples, OHCHR recommends that the UNGPs "involvement framework" be reflected in the E&S Policy in order to ensure that FinDev's and clients' respective responsibilities are more clearly defined and tightly aligned with the UNGPs and

²⁴ [Swedfund Policy for Sustainable Development](#), pp.2-3. See also Swedfund's [Human Rights Guidance](#) (2020), para. 1.4, and Equator Principles [Guidance Note on Implementing Human Rights Assessments](#) (2020), p.18.

²⁵ BIO Grievance Mechanism Policy (2022), p.6: "In situations where BIO has caused the harm, for instance by failing to comply with its own policies and procedures such as the environmental and social due diligence or monitoring, BIO's Grievance Mechanism shall take the necessary steps, appropriate to the company's size and circumstances, to ensure the provision of remedy." The Legacy Landscapes Fund ESAP [guidance](#), produced with the support of KfW and SHIFT, is closely aligned with the UNGPs and provides helpful guidance and decision-making trees on assessing involvement in impacts and exercising leverage.

²⁶ See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Box 5, as well as the discussion of the World Bank's remediation of harms in connection with a major transport sector project in Uganda (Box 7). Other examples of where DFIs have contributed to remedy, in line with their involvement in harms, include the IFC in connection with a recent \$5.2M [settlement](#) for project-related harms in connection with an agribusiness investment in Honduras, OPIC in connection with harms from a mining investment in Bolivia (Box 5, [Remedy in Development Finance: Guidance and Practice](#)), and ADB and AusAID in connection with livelihood restoration and household debt relief measures connected with the Cambodia Railway Project. Technical cooperation funds are sometimes used for such purposes although, to OHCHR's knowledge, settlements often occur away from the public eye.

evolving regulatory frameworks, thereby stimulating more consistent and effective remedial responses.

27. Finally, on the subject of remedy, we note the reference in the E&S Policy (p.6) to FinDev’s intention to establish an independent complaints and accountability mechanism. We warmly welcome the fact that an Independent Accountability Mechanism has since been established and explicitly includes the objective of remedying harms associated with policy non-compliance ([IAM Policy & Procedures](#), sections 1.2.1, 3.2.1 and 3.2.7). We would respectfully recommend that the “guiding core principles” for the IAM (section 1.3.1) be more closely aligned with “effectiveness criteria” in principle 31 of the UNGPs, and that the IAM carry out and publish periodic self-assessments in line with the latter criteria,²⁷ validated through consultations with all relevant stakeholders.

Contextual risk assessment

28. Another area where the IFC PS’s are out of date with DFI best practice is in connection with contextual risk assessment. Human rights typically form an integral part of the context in which projects are implemented. Yet, for many DFIs, E&S risk management frameworks still focus almost exclusively on the physical project footprint. We note that IFC, IDB Invest, AfDB and other DFIs have been moving to plug the “contextual risk” gap,²⁸ however the relationship between contextual risk assessment and project E&S risk classification and management is not always made clear. By contrast, ADB’s draft Environmental and Social Framework²⁹ contains reasonably clear contextual risk assessment requirements, including in connection with human rights considerations, with explicit consequences for project E&S risk classification.
29. OHCHR recommends that contextual risk assessment, including human rights considerations, be included in FinDev’s new safeguards. Contextual risk assessment should be an ongoing requirement, undertaken by FinDev as well as clients, and the results should be integrated within FinDev’s project risk classification and due diligence as well as clients’ risk assessment and management obligations under the E&S Policy.

Responsible exit

30. We note the discussion of “exit” in Section 5 of the E&S Policy, which sets the expectation that FinDev should withdraw financing in the event of chronic underperformance by the client, and that high E&S risk classification may precipitate that withdrawal. We note the clear tension between this particular guidance, and the more forward-leaning posture of the UNGPs which encourage companies to build and exercise all feasible leverage options, engage with E&S risk, and assess human rights impacts of any decision to exit.³⁰

²⁷ For suggested tailoring of UNGP 31 to the mandates and functions of IAMs, see OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022). For a model self-assessment against those criteria see Green Climate Fund-Independent Redress Mechanism, [Self-Assessment Report](#) (March 2022).

²⁸ See e.g. AfDB, [Integrated Safeguard System](#) (2023), E&S Policy, para. 12, and Operational Standard 1, Annex I, E&S Operational Safeguard 1, Section F (“baseline data”) and Section G.

²⁹ ADB, draft [Environmental and Social Framework](#) (2023), Executive Summary, paras. 47, 62 & 93, and draft E&S Policy, paras. 21, 22, 25, 66 and 68. The role of contextual risk assessment is also spelled out for development policy financing, results-based lending and other specific financing instruments.

³⁰ UNGP 19, commentary.

31. We refer to the discussion in pp.89-93 of the [DFI Safeguard Policies Benchmarking Study](#) on this issue, and would respectfully recommend that the E&S Policy should outline the main elements of a “responsible exit framework” to guide actions across the project cycle, including:
- Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;
 - A clear requirement not to exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;
 - A commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;
 - A requirement that no community members or workers face risk of retaliation due to the exit; and
 - A commitment to seek a responsible replacement(s) for the DFI, or the client, as the case may be, on exit.

Explicit referencing of human rights instruments

32. We note that explicit references to human rights instruments, and specific grounding of E&S safeguards or performance standards in relevant human rights standards, is increasing in DFIs across the various regions.³¹ This is important in order to ensure that E&S requirements such as forced evictions, forced labour, FPIC and gender-based violence are interpreted consistently with international human rights standards, and conversely, that the latter standards are not unwittingly renegotiated or undermined through the process of incorporation within E&S risk frameworks.³²
33. We welcome the fact that the FinDev E&S Policy references three international human rights instruments that are considered relevant as “guidance for the application of this Policy” (E&S Policy, p.2), including UNDRIP and the Convention on the Elimination of All Forms of Discrimination against Women. While there is no doubting the relevance of these instruments, their explicit inclusion may have the unintended effect of excluding others, including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities. We would encourage FinDev to go further and ensure substantive alignment in connection with other key E&S issues addressed by UN human rights instruments, including the freedoms of association, assembly and expression, the prohibition against forced evictions, and addressing discrimination against persons with disabilities, migrants, racial or ethnic minorities, LGBTI persons and other relevant population groups.

³¹ OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.11-12 and 18-26.

³² Human rights cross-referencing and alignment should be undertaken in an intentional, substantive and rigorous fashion. Perceptions of window-dressing or rhetorical repackaging should be avoided.

34. Good practice in DFI safeguards increasingly requires the observance of all relevant sources of law, including international standards, prioritizing whichever standards are most stringent. We recognize that the “highest applicable standard” principle is reflected in the E&S Policy in the specific context of co-financing, however we would respectfully recommend that the principle be applied also to FinDev’s due diligence and the client’s E&S risk management requirements. This is particularly important in view of the potentially wide gaps between national and international standards on issues covering by DFI safeguards, particularly in connection with social issues.³³
35. Mindful of the limitations of the IFC PS’s in the respects just discussed, we would respectfully suggest that relevant international human rights standards be integrated throughout the E&S Policy and client E&S risk management requirements, in order to ensure that the E&S Policy fully reflects and keeps pace with evolving human rights norms. Any contradictions between E&S Policy requirements, international and national standards should be resolved in favour of the more stringent standard.

Emerging risk areas

Digitalization risks

36. We welcome the fact that FinDev has identified technology/digitalization as among the key themes that may warrant explicit treatment within the E&S Policy. Our Office’s [DFI Safeguard Policies Benchmarking Study](#) (pp.112-118) identified digital risks as among the main thematic gap areas across all bilateral and multilateral DFIs. In desk research for a follow-up project on Digital Risk and DFIs, we have noted that risks of digital technology continue to be overlooked, and “downstream” risk management (critical for addressing impacts on users and consumers of digital technology applications) is almost systematically lacking. To OHCHR’s knowledge, the ADB’s draft [Environmental and Social Framework](#) (2023) is the only MDB safeguard policy that explicitly recognizes risks of digitalization, albeit in a heavily attenuated fashion (ESP, para. 21(v)(h), providing that digital risks and data privacy are to be taken into account in project risk classification).
37. We would respectfully recommend that the E&S Policy explicitly include digital risks within its scope, building and elaborating upon the ADB precedent. In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.³⁴ In OHCHR’s view, digital risks should be integrated not only within project risk classification

³³ For example, in 2015, the AfDB carried out a detailed equivalence analysis between AfDB safeguards and six country systems. It concluded that (i) there was a strong correlation between each country’s level of governance and socio-economic development and the performance of the E&S country system; (ii) the degree of equivalence of country systems was particularly low for the policies on involuntary resettlement and working conditions; and (iii) there were no legal/regulatory provisions or local expertise on most social themes (gender, working conditions, vulnerable groups, etc.). African Development Bank Group (2015), [Assessment of the use of “Country Systems” for E&S safeguards, and their implications for AfDB-financed operations in Africa](#). See also University of Wyoming International Human Rights Law Clinic, [Social Trends Analysis for Selected Countries in Latin America and the Caribbean](#) (Apr. 20, 2020).

³⁴ OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.112-114 (Box 59).

requirements (as ADB proposes), but also should be reflected in the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.

Gender equality and LGBTI rights

38. We welcome FinDev's intention to consider gender-related risks among the key themes for explicit treatment within the E&S Policy. Gender equality is not only intrinsically important, but is a powerful development multiplier and central to the achievement of the SDGs. Globally, the loss of human capital wealth due to gender equality has been estimated at USD 160.2 trillion.³⁵ For the most unequal countries, according to the IMF, closing the gender gap could increase GDP by an average of 35 percent.³⁶ The G20 Principles on Quality Infrastructure Investment (QII) recommend that "the design, delivery and management of infrastructure should respect human rights", including women's rights.³⁷
39. However the discrimination experienced by women in the private and public spheres drives vulnerability and undercuts women's participation and equal access to the benefits of development projects. This is even more pertinent in the context of recovery from the COVID-19 pandemic, given the significant setbacks that have occurred across the Africa region in relation gender equality including a "shadow pandemic" of GBV.³⁸ Women and girls are often absent in designing, implementing and monitoring development projects, and when they are present, their voices do not always have same weight as those of men. Women are often first in line defending their homes from forced evictions and last in line for compensation. Women in rural areas or belonging to ethnic groups face multiple forms and layers of discrimination and marginalization, which are often exacerbated in the contexts of negative impacts of development projects.
40. The discriminatory impacts of unpaid care work,³⁹ exclusion from formal economy and social protection, denial of bodily autonomy and SRHR, barriers to participation (including through shrinking civic space), GBV and SEAH critically undermine women's economic participation. GBV (including from worker influx) remains a stubbornly common feature of development projects, exacerbated by the Covid-19 pandemic, and personal security risks limit the access by many women to transport, sanitation and other infrastructure and services. Displacement and dispossession may dramatically alter women's social and

³⁵ World Bank, [How Large is the Gender Dividend? Measuring Selected Impacts and Costs of Gender Inequality](#) (Feb. 2020).

³⁶ Kristalina Georgieva, [A New Bretton Woods Moment](#), Oct. 15, 2020.

³⁷ G20 QII Principle 5.2 (June 2019). Also, Principle 5.3 provides: "5.3. All workers should have equal opportunity to access jobs created by infrastructure investments, develop skills, be able to work in safe and healthy conditions, be compensated and treated fairly, with dignity and without discrimination. Particular consideration should be given to how infrastructure facilitates women's economic empowerment through equal access to jobs, including well-paying jobs, and opportunities created by infrastructure investments. Women's rights should be respected in labor market participation and workplace requirements, including skills training and occupational safety and health policies."

³⁸ UN Women & UNFPA, [Impact of Covid-19 on Gender Equality and Women's Empowerment in Eastern and Southern Africa](#) (Apr. 1, 2021).

³⁹ UN Women, [Whose Time to Care? Unpaid Care and Domestic Work during Covid-19](#) (Nov. 25, 2020).

economic roles and expose women and girls to higher risks of human trafficking or other exploitative practices as well as GBV.

41. Development projects should avoid exploiting unpaid and underpaid informal work of women, and instead, invest in care economy as productive investments. Free-riding women's unpaid and underpaid care work not only undermines women's enjoyment of human rights but also compromises the outcome of development projects. For example, countries in sub-Saharan Africa rely on over 900,000 community health workers to support their health systems, including in the pandemic response. Nearly 70 per cent of these workers are women, and some 86 per cent are unpaid, shouldering unmanageable caseloads while lacking basic health protection and training. Such exploitation of women's unpaid labour risks women's health and compromises the quality of health care services.
42. On the other hand, investing in care economy is likely to contribute to the economy and advance gender equality at the same time. For example, it is estimated that in South Africa, making childcare services universally available to all children under the age of 5 could create 2.3 million new jobs and raise female employment rates by 10 percentage points. New tax and social security revenue from these jobs would reduce the required fiscal outlay from 3.2 per cent to 2.1 per cent of GDP.⁴⁰
43. A self-standing environmental and social standard on gender equality should be included in the E&S Policy, in OHCHR's view, and should include the human rights of LGBTI persons. Acts of violence, discrimination and other human rights violations continue to be committed on individuals in all regions because of their actual or imputed sexual orientation or gender identity. Such violence includes 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity.⁴¹ These violations undercut a wide range of rights essential for participating in, contributing to and benefiting from development.
44. The World Bank's [mitigation](#) efforts in response to LGBTI discrimination in Uganda provides a reminder of the importance of addressing SOGIESC risks in a consistent and effective manner. These issues are intrinsically important, but also have macro-level impacts. The World Bank has documented high economic and social costs of exclusion of LGBT persons.⁴² Homophobia and transphobia can cost 1% or more of a country's GDP.⁴³ Studies show that discrimination against LGBTI people results in lost labour time, lost productivity, underinvestment in human capital, and the inefficient allocation of human

⁴⁰ UN Women, [Beyond COVID-19: A Feminist Plan for Sustainability and Social Justice](#), p.41.

⁴¹ For example, see African Commission on Human and Peoples' Rights, Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity - ACHPR/Res.275(LV)2014, 2014.

⁴² World Bank, [A Comparative Analysis of the Socioeconomic Dimensions of LGBTI Exclusion in Serbia](#) (2019), and World Bank, [Working Paper on the economic cost of stigma and the exclusion of LGBT people : a case study of India](#) (2014).

⁴³ Lee Badgett, *The Economic Case for LGBT Equality: Why Fair and Equal Treatment Benefits Us All* (Boston: Beacon Press, 2020).

resources.⁴⁴ Violence, stigmatization and discrimination against LGBTI people are rooted in negative gender stereotypes and perceptions that LGBTI people defy gender norms.

45. “Mainstreaming” gender equality and LGBTI rights within investment projects and DFI safeguard policies has generally not proven effective. Integrating protections of the rights of LGBTI people within a self-standing gender equality safeguard would elevate the intrinsic and economic importance of the human rights of women, girls and LGBTI people, reinforce an intersectional approach to addressing discrimination issues, and help to ensure that no one is left behind.

Conclusion

46. We hope that these comments, and the recommendations in the Annex, are useful to FinDev in finalizing the E&S Policy review. We appreciate your having reached out to us in connection with this review and are at your disposal for clarifications and any follow-up as needed.

OHCHR, 15 December 2023

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⁴⁴ Lee Badgett, Kees Waaldijk & Yana van der Meulen Rodgers, “The relationship between LGBT inclusion and economic development: Macro-level evidence,” Vol. 120 *World Development* (Aug. 2019), pp.1-14.

ANNEX

LIST OF RECOMMENDATIONS

OHCHR respectfully recommends the following:

A. Policy scope (human rights)

Consistent alignment with the UNGPs

1. *The revised E&S Policy should be harmonized with the UNGPs. There should be no inconsistencies between the E&S Policy, EDC Human Rights Policy and/or other relevant policies, on issues addressed by the UNGPs. Client contracts should reflect a clear and consistent set of requirements, aligned with the UNGPs.*

Routine (not exceptional) human rights due diligence

2. *FinDev should require human rights due diligence as a routine matter throughout the project cycle, rather than as a static exercise at a fixed point. Human rights due diligence should not be limited to high risk circumstances.*

Broadening the scope of due diligence

3. *The E&S Policy should clarify that FinDev should address all potential human rights impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, downstream as well as upstream, including and beyond labour and biodiversity impacts, and without any categorical limitation to “primary suppliers”.*

A proactive and robust approach to remediation

4. *The following definition of remedy should be included in the FinDev E&S Policy: “Restitution, rehabilitation, satisfaction, and guarantees of non-repetition.” Such a definition would reflect international human rights standards and equip FinDev and clients to address a broad range of adverse social (including human rights) impacts.*
5. *The mitigation hierarchy in the E&S Policy should be amended to: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts.” The inappropriateness of off-setting human rights impacts should explicitly be recognized.*
6. *Responsibilities to address adverse impacts should take into account the respective involvement of clients and FinDev in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*
7. *The E&S Policy should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by FinDev and clients to address human rights risks in which they are involved.*
8. *The “guiding core principles” for FinDev’s IAM (Policy & Procedures, section 1.3.1) should be more closely aligned with “effectiveness criteria” in principle 31 of the UNGPs. The IAM should carry out and publish periodic self-assessments in line with the latter criteria, validated through consultations with all relevant stakeholders.*

Contextual risk assessment

10. *Contextual risk assessment, including human rights considerations, should be included in the E&S Policy. Contextual risk assessment should be an ongoing requirement, and the results should be integrated within FinDev's project risk classification and due diligence as well as the client's risk assessment and management obligations.*

Responsible exit

11. *The E&S Policy should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:*
 - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
 - *A clear requirement not to exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;*
 - *A commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
 - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
 - *A commitment to seek a responsible replacement(s) for the DFI, or the client, as the case may be, on exit.*

Explicit referencing of human rights instruments

12. *Relevant international human rights standards should be integrated throughout the E&S Policy and client E&S risk management requirements, in order to ensure that the E&S Policy accurately reflects and keeps pace with evolving human rights norms. Any contradictions between E&S Policy requirements, international and national standards should be resolved in favour of the more stringent standard.*

B. Emerging risk areas

Digitalization risks

13. *The E&S Policy should explicitly include digital risks within its scope. In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.*
14. *Digital risks should be integrated within project risk classification requirements, the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.*

Gender equality and LGBTI rights

15. *The E&S Policy should include a self-standing environmental and social standard focused on gender equality, including the rights of women and girls and inclusion of LGBTI people, modelled upon IDB ESPF (ESPS 9), including robust protections against discrimination on the grounds of SOGIESC.*

16. *The E&S Policy should specify that conflicts between applicable international and national legal standards governing women's rights, gender equality issues, and the rights of LGBTI people should be resolved in favour of the more stringent standard.*

* * *