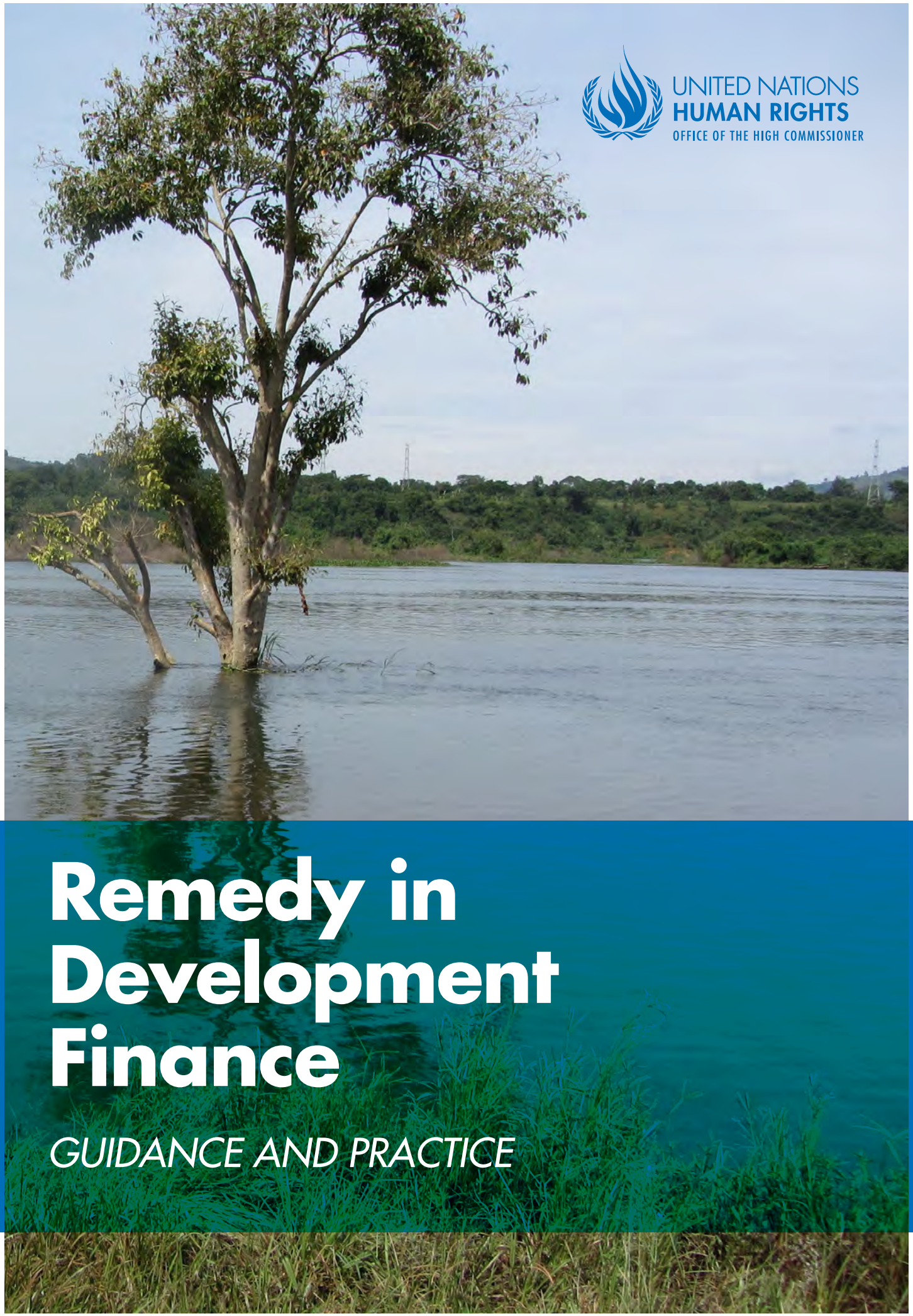


UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Remedy in Development Finance

GUIDANCE AND PRACTICE

Remedy in Development Finance

GUIDANCE AND PRACTICE

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

New York and Geneva, 2022

© 2022 United Nations
All rights reserved worldwide

Requests to reproduce excerpts or to photocopy should be addressed to the Copyright Clearance Center at copyright.com.

All other queries on rights and licences, including subsidiary rights, should be addressed to:
United Nations Publications, 300 East 42nd Street, S-09FW001, New York, NY 10017, United States of America.

Email: Permissions@un.org; website: Shop.un.org

United Nations publication, issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR).

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The views and positions of organizations and companies cited in this publication do not necessarily reflect those of the United Nations and/or OHCHR.

HR/PUB/22/1
ISBN: 978-92-1-154244-8
eISBN: 978-92-1-001397-0
Sales No.: E.22.XIV.7

Cover photo credit: IRM/AfDB

This publication was designed by Erica Weathers Design, with the financial support of the Independent Project Accountability Mechanism of the European Bank for Reconstruction and Development.

Contents

ACKNOWLEDGEMENTS vi

FOREWORD vii

ABBREVIATIONS AND ACRONYMS ix

EXECUTIVE SUMMARY 1

INTRODUCTION 8
A. Background and purpose of the present publication 8
B. Right to a remedy 11
C. What is the same and what is different about remedies from a human rights perspective? 13
D. Why is remedy important in the context of development finance institutions? 14
1. Sustainable Development Goals and "do no harm" 14
2. Supporting operations in fragile and conflict-affected situations and allowing appropriate risk-taking 14
3. Prevention of conflict and harms 14
4. Feedback loops for improved performance 14
5. Wider community benefits 15
6. Complex financing structures 15
7. Evolving norms, legal frameworks and social expectations 15
8. Legal liability issues 20
E. Conclusions on rights and remedy 21

I. STATE OF PLAY ON REMEDY IN DEVELOPMENT FINANCE INSTITUTIONS 22
A. Typology of concerns in projects funded by development finance institutions 24
1. Lack of clarity in institutional mandates 26
2. Organizational culture and incentives 26
3. Lack of clarity in operational policies and inconsistent policy interpretations 27
4. Transparency gaps 27
5. Ring-fencing of risk and responsibility 28
6. Challenges in high-risk sectors and fragile and conflict-affected situations 29
7. Access to and effectiveness of complaint mechanisms 30
B. Types of complaints arising in practice 31
C. Conclusions on the state of play 33

II. SAFEGUARD POLICIES AND REMEDY 34
A. Gaps in safeguard policies in relation to remedy 36
1. No specific commitment to remedy all adverse impacts 36
2. Problems concerning the scope of risk assessment and prioritization 36
3. Lack of adequate focus on outcomes 38
4. Inadequate consideration of contextual risks 38
5. Weak risk management in development policy financing 38
6. Inadequate attention to client performance in managing risk and grievances 39
7. Gaps in mitigation hierarchies 39
8. Inconsistent safeguard provisions on remedy 42
9. Gaps in safeguard provisions on grievance redress mechanisms 43
10. Gaps in addressing complaints related to digital impacts 44
11. Exclusion lists 45
B. Valuing remedy – rethinking costs and benefits 45
C. Conclusions and recommendations on safeguards 46

III. ENABLING REMEDY 48
A. Building and using leverage for remedy 50
1. Creating leverage through financial/commercial incentives and disincentives 52
2. Creating legal leverage to address remedy 52
3. Creating leverage through capacity-building 56
4. Creating leverage through normative influence 57
5. Creating leverage through shareholder actions 57
6. Creating leverage through collective action 58

B. Strengthening independent accountability mechanisms 59
1. Remedial role and impact of independent accountability mechanisms 59
2. Mandates of independent accountability mechanisms – implications for strengthening remedy 62
3. Strengthening assessments of independent accountability mechanisms using the Guiding Principles on Business and Human Rights' effectiveness criteria 65
C. Improving client grievance redress mechanisms 66
1. Supporting clients in developing effective grievance redress mechanisms 67
2. Assessing client willingness and capacity to deliver on remedy, including through grievance redress mechanisms 70
3. Supporting clients in addressing human rights concerns through their grievance redress mechanisms 70
4. Assessing and supervising the effectiveness of grievance redress mechanisms in practice 71
5. Strengthening requirements, capacity and attention to grievance redress mechanisms among financial intermediary clients 71
D. Working with clients once an impact has occurred 72
E. Improving interactions with national, State-based remedy mechanisms and other mechanisms in the remedy mechanism ecosystem 74
1. Safeguard provisions on interactions with State-based mechanisms 74
2. Supporting and improving interactions within the remedy ecosystem 74
3. Interacting with State-based mechanisms on particularly severe or sensitive human rights issues 76
F. Using country safeguard systems and building safeguard capacities 77
G. Conclusions and recommendations on enabling remedy 78

IV. CONTRIBUTING TO REMEDY 81
A. Differentiating the involvement of development finance institutions in harms 83
B. Remedy funding mechanisms 86
C. Choice of funding mechanism 88
1. A standing fund 88
2. Escrow 88
3. Trust fund 89
4. Contingency funds 89
5. Insurance 89
6. Guarantees and letters of credit 89
D. Conclusions and recommendations on contributing to remedy 89

V. RESPONSIBLE EXIT 91
A. State of play 93
B. Improving current practice – a responsible exit framework 95
1. Pre-investment 96
2. At the time of investment – legal agreements 98
3. During investment 100
C. Routine exits 100
1. Assessing the impacts of exit 100
2. Addressing the role of development finance institutions in connection with any outstanding unremediated harms 102
3. Developing a responsible exit action plan to address the impacts of exit and unremediated harms 102
D. Early, unforeseen exits 104
E. Addressing exit in different types of financing instruments 105
1. Exits from equity investments 105
2. Exits in lending operations 107
3. Purchase and sale agreements with new investors/new lenders 107
F. Responsible exit in the context of climate change 107
G. Conclusions and recommendations on responsible exit 107

VI. LOOKING AHEAD 109
Suggested priority actions 110
1. Communicate internally on remedy 110
2. Update policies and systems 111
3. Build capacities 111

ANNEXES 112
I. RECOMMENDATIONS 112
II. INDEPENDENT ACCOUNTABILTY MECHANISM ASSESSMENT TOOL – BENCHMARKING AGAINST THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS' EFFECTIVENESS CRITERIA 116
III. MECHANISMS OF DEVELOPMENT FINANCE INSTITUTIONS THAT CAN CONTRIBUTE TO REMEDY 126

Acknowledgements

This publication draws from research and consultations carried out between 2019 and 2021, including consultation meetings convened between June and September 2020 with bilateral and multilateral development finance institutions and independent accountability mechanisms from the American, Asian, European and African regions, independent experts, international organizations and civil society organizations working in the accountability field. The Office of the United Nations High Commissioner for Human Rights (OHCHR) assumes overall responsibility for the content and recommendations in this publication. The views and opinions in this publication do not necessarily reflect the official policy or position of any of the contributors listed in these acknowledgements.

OHCHR is grateful to the World Bank Inspection Panel, the Green Climate Fund Independent Redress Mechanism and the European Bank for Reconstruction and Development Independent Project Accountability Mechanism for co-convening the regional consultation meetings, and to the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank, the African Development Bank Independent Recourse Mechanism and the Independent Accountability Mechanisms Network for hosting a one-day consultation on remedy in the context of the OHCHR Accountability and Remedy Project in Abidjan, Côte d'Ivoire, in June 2019. OHCHR is also grateful to the European Bank for Reconstruction and Development Independent Project Accountability Mechanism for financing the layout costs of this publication.

OHCHR gratefully acknowledges the participation and substantive contributions of a range of bilateral and multilateral development finance institutions in the consultations carried out in connection with the preparation of this report, including the African Development Bank, the Asian Infrastructure Investment Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the Entrepreneurial Development Bank of the Netherlands, the Green Climate Fund, Inter-American Development Bank, IDB Invest and the Japan Bank for International Cooperation, independent accountability mechanisms, the International Labour Organization and the many important individual contributions, including from Daniel Adler, Gaston Ain, Motoko Aizawa, Signe Andreasen Lysgaard, Irum Ashan, Frederic Bambara, Gina Barbieri, Olivia Belanger, Elana Berger, Gregory Berry, Barbara Bijelic, Daniel Bradlow, Linda Broekhuizen, Tihana Bule, Alastair Clark, Sladjana Cosic, Margaux Day, Gráinne de Burca, Tim de Feyter, Lalanath de Silva, Sonja Derkum, Ajay Deshpande, David Fairman, Ousmane Fall, Angelina Fisher, Julia Gallu, Kate Geary, Kris Genovese, Elisea Gozun, Nicolas Hachez, Arntraud Hartmann, Rayyan Hassan, Eva Heiss, Isaya Higa, David Hunter, Maman-Sani Issa, Edith Birung Kahubire, Grace Kimani, Sushma Kotagiri, David Kovick, Ayako Kubodera, Miaomiao Li, Gina Llewelyn, Victoria Márquez-Mees, Coralie Martin, Fidanka McGrath, Brian McWalters, Roberta Mhango, Josefina Miranda, Meg Mottaz, Suresh Nanwani, Ashleigh Owens, Christine Reddell, Andrea Repetto, Jolie Schwarz, Serge Selwan, David Simpson, Katarina Sydow, Ioana Tuta, Beatrijs van Manen, Arantxa Villanueva, Wawa Wang, Halina Ward and Peter Woicke.

Finally, OHCHR expresses its gratitude to: (a) Margaret Wachenfeld (Themis Research); (b) Richard Bissell and Susan Park for peer reviewing a final draft; (c) Accountability Counsel for free access to its Accountability Console Database; (d) Clifford Chance International Law Firm for pro bono research in 2020 on remedy funds; (e) the New York University School of Law International Organizations Clinic for its study on lender liability and due diligence for environmental and social harm; and (f) Olivia Belanger, Kathleen Elliott and Samantha Spence for analytical work on independent accountability mechanisms cases carried out in 2020 under the supervision of Lisa Laplante, Director of the Center for International Law and Policy at New England Law Boston.

Foreword

The year 2021 was in many respects a dismal one, in a world wracked by the coronavirus disease (COVID-19) pandemic, climate change and other complex crises. Economic and social inequalities are widening and authoritarianism is increasing. The pandemic has left us exposed, vulnerable, divided and weakened. In short, there are many wrongs to remedy.

But the past year also offered glimmers of hope on the issue of remedy, the subject of this publication.

First, over the past year we have been celebrating the fifteenth anniversary of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The Basic Principles affirm the right to a remedy for violations of international human rights law and identify numerous forms that remedy may take. Anniversary events have borne testimony to the transformative power of recognition and reparation, and the potentially powerful contributions of remedy to development.

Second, the year 2021 saw the entry into force of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement). Together with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), the Escazú Agreement reflects the growing acceptance of the rights to participation and remedy in environmental matters and, critically, provides specific protections for environmental and human rights defenders.

Third, in its resolution 48/13, the Human Rights Council recognized that having a clean, healthy and sustainable environment is a human right. This right is already recognized and protected in the African and Latin American regional human rights systems and many national systems. However, international recognition elevates the importance of this right and lays the foundation for future claims to remedy. Development finance institutions, through their financing, technical assistance and normative roles, will play vital roles in making this right a reality in people's lives.

Finally, the year 2021 saw the dissemination/implementation phase of the OHCHR Accountability and Remedy Project, which is carried out under successive mandates of the Human Rights Council. Drawing from six years of consultations across the globe, the project delivers credible and workable recommendations for enhancing accountability and access to remedy in cases of business-related human rights abuse. Recommendations address State-based as well as non-State-based accountability mechanisms, and reflected outcomes of a dedicated consultation in June 2019 with the global network of independent accountability mechanisms. The implementation phase is now under way.

The issue of remedy is not only a central concern of OHCHR, but a priority for me personally. As a physician in Chile, I worked with an organization that supported the education, health and social needs of children of parents who had been victims of the dictatorship. This experience demonstrated not only the intergenerational impact of human rights abuses, but also of the power

of reparations, which have helped survivors, families and communities heal and become part of wider society, with dignity.

Nothing signals more strongly the value of a human person than the principle that harms to that person should entail consequences. Harms will never entirely be prevented but remedy, approached holistically, can make people whole. Regrettably, however, there is a wide gulf between our theoretical and legal commitments to human rights and remedy, and implementation on the ground. States of course bear primary responsibility for human rights under international law, but many other actors are involved in building an enabling environment in which human rights can be realized and remedy is possible.

Bilateral and multilateral development finance institutions are playing increasingly important roles in this regard. There are many differences among the mandates and operations of such institutions but all share common objectives of avoiding harm and promoting sustainable development. The principle of remedy is central to these objectives. I warmly welcome the strengthening engagement of development finance institutions with the issue of remedy, the increasing integration of international human rights standards within their operational policies and the vital resources, innovation and technical know-how that they bring, which is indispensable for realizing remedy in so many contexts.

The idea of remedy can sometimes seem like a residual question, like cleaning up a mess after the damage is done, or shutting the gate after the horse has bolted. But a key message from this publication is that more explicit and early attention to remedy, strong due diligence, building leverage and planning for remedy as an ordinary project contingency can help to reset expectations on remedy and avoid harms in the first place.

The issue of remedy in the development finance context is sometimes thought to be a new one. However, development finance institutions have long experience in assessing and remediating adverse impacts in connection with the environment, resettlement and other issues. Independent accountability mechanisms, a landmark feature of international law, have multiplied in recent years, led by multilateral development banks. For these reasons, this publication takes particular care not to reinvent the wheel. Rather, building upon the existing practice of development finance institutions, we hope the publication will help to demystify the concept of remedy and encourage its more consistent and effective implementation, within the larger remedy ecosystem in the context of development finance.

This publication is addressed to a broad audience of bilateral and multilateral development finance institutions and their accountability mechanisms. While they have many common features, there are also many differences and different starting points. Nevertheless, I hope that the analysis and recommendations in this publication, drawn from extensive consultations over the past two years, will help all concerned actors to prevent and address harms, advance sustainable development and make more people whole.



Michelle Bachelet
United Nations
High Commissioner for Human Rights

Abbreviations and Acronyms

ADB	Asian Development Bank
AfDB	African Development Bank
AIIB	Asian Infrastructure Investment Bank
CAO	Compliance Advisor Ombudsman (for IFC/MIGA)
CDC	Commonwealth Development Corporation (United Kingdom of Great Britain and Northern Ireland)
DEG	German development bank
DFI	development finance institution
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
FMO	Entrepreneurial Development Bank of the Netherlands
GCF	Green Climate Fund
GRM	grievance redress mechanism
IAM	independent accountability mechanism
IBRD	International Bank for Reconstruction and Development
IDA	International Development Association
IDB	Inter-American Development Bank
IFC	International Finance Corporation
ILO	International Labour Organization
MIGA	Multilateral Investment Guarantee Agency
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPIC	Overseas Private Investment Corporation, which transformed into the International Development Finance Corporation (United States of America)



UN Photo/MMS

Executive Summary

Bilateral and multilateral development finance institutions (DFIs) are critical actors in development and, through financing, technical assistance and their normative roles, make important contributions to the Sustainable Development Goals and human rights. Most DFIs are explicitly mandated to support sustainable development, poverty reduction and avoid harming people and the environment. Clients are primarily responsible for project implementation, including remedying adverse environmental and social impacts. However, DFIs have a range of mechanisms, including environmental and social safeguard policies and independent accountability mechanisms (IAMs), to promote sustainable impacts, improve feedback loops, address grievances and avoid social and environmental harms. Many DFIs provide technical assistance and capacity-building to clients in these areas.

A. THE REMEDY GAP

Despite best efforts, DFI-supported investment projects are often associated with adverse social and environmental impacts. Many kinds of environmental and social issues are addressed on a day-to day-basis with the support of supervision and technical assistance from DFIs, and others may be addressed by IAMs, project-level grievance redress mechanisms (GRMs) or other remedial mechanisms. The performance across DFIs varies considerably in this regard, however, and more systematic data collection and disclosure on environmental and social results is needed. On the available evidence, for more serious environmental and social concerns, people are often left without an effective remedy. Evaluations and DFI project completion reports sampled for this publication reveal a mixed picture regarding the quality and consistency of project supervision and environmental and social outcomes. IAMs and project-level GRMs have variable mandates and capacities, limited tools and leverage, and are often, in practice, the last line of defence. IAMs see only a very small percentage (as little as 1 to 3 per cent) of a given DFI project portfolio, and evaluations of GRMs are mixed at best. Moreover, significant portions of such portfolios (such as development policy operations and results-based lending) may be subject to weaker safeguard and remedy requirements. Complex financing structures, including financial intermediary lending, create additional challenges.

B. PURPOSES OF THE PRESENT PUBLICATION

The present publication documents a range of positive practices by DFIs on remedy. The topic of remedy is gaining increased attention in development finance, driven by sustainability concerns, operational demands and evolving norms and social expectations. However, across the board, the question of remedy appears to be undermined by conceptual confusion, mixed incentives and sometimes questionable assumptions concerning the potential legal and financial exposure of DFIs. The remedy issue is often associated with finger-pointing, blame-shifting and risk aversion, which can stigmatize the issue and discourage innovation and proactive contingency planning. Cost-benefit analyses of remedy tend to be skewed towards short-run efficiency or financial costs without sufficient regard being paid to the cost of not addressing remedy, nor, conversely, to the larger benefits of remedy for development. Human rights are increasingly (explicitly) being reflected in DFI safeguard policies, but the practical contributions of the international human rights framework to remedy are still poorly understood.

Accordingly, the purposes of this publication are:

- To demystify and normalize the concept of "remedy" and generate wider understanding of the importance of the right to an effective remedy and access to remedy, informed by international human rights standards.

- To stimulate fresh and innovative thinking on the responsibilities of DFIs, recognizing their public mandates and the ways in which they may be involved in project-related harms, so that the environmental, social and human rights externalities of projects do not fall on those least able to bear them.
- To flesh out the concept of a "remedy ecosystem" in the context of development financing, and unpack the responsibilities of different parties in the financing value chain to provide for or cooperate in remediation to address adverse human rights impacts.

C. REMEDY IS A HUMAN RIGHT

Remedy is a human right under international law. Conceptually, remedy is about both the processes involved in providing remedies and the outcomes of the process, including the reparations provided. Remedies play a number of roles: (a) redress, making victims "whole" and returning them to the status quo ante; (b) prevention, pre-empting future abuses; and (c) deterrence, discouraging others from causing harms. Reparations to redress harms may take many forms,



World Bank Inspection Panel

- To take stock of the policies and practice of DFIs concerning remedy for harms, analyse gaps and opportunities, and illustrate practical actions that DFIs and their IAMs could take to give effect to their responsibilities and improve access to remedy in practice.
- To offer recommendations to policymakers and practitioners on how to strengthen access to remedy for project-affected people and help such persons make informed choices about potentially fruitful avenues for redress (see annex I).

including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. These forms are most effective in combination. Financial compensation has been a strong focus of thinking about remedy at DFIs, although, in particular for more serious social harms and longer-term projects, restoring some level of trust among parties can be an important part of the reparations process.

The term "remedy" is sometimes used interchangeably with "remediate"; however, the former term more directly embodies the three elements mentioned

above, enjoys firmer grounding and clearer meaning in international law, and is the term used in this publication. Normative frameworks addressing the environmental and social impacts of the private sector, including the Guiding Principles on Business and Human Rights and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, are increasingly being integrated into the operational policies of DFIs, as well as national legal systems and the risk management policies of businesses. With their grounding in private sector experience, the Guiding Principles on Business and Human Rights can help orient DFIs, clients and other stakeholders to implement more just, consistent and effective approaches to remedy in practice.

D. DEVELOPMENT FINANCE INSTITUTIONS HAVE A LOT OF EXPERIENCE TO BUILD ON

DFIs seeking to strengthen their approaches to remedy do not need to reinvent the wheel. The mandates of DFIs to do no harm, compensation and livelihood restoration principles, and commitments not to externalize the costs of development at the expense of people or the environment are closely aligned with human rights principles and can be seen as the foundations of a more encompassing and robust approach to remedy. The track records, capacities, policies and practices of bilateral and multilateral DFIs on remedy vary considerably. However, many of the more established DFIs, particularly multilateral development banks, have extensive experience in assessing, mitigating and addressing a range of project-related harms, most notably in connection with resettlement, as well as labour rights and environmental impacts. In addition, multilateral development banks were early leaders in setting up mechanisms to address complaints of project-related harms. The central challenge, therefore, is not to construct something entirely new, but rather to build upon and extend what is already there.

E. REMEDY SHOULD BE APPROACHED AS AN ORDINARY PROJECT CONTINGENCY

The point of departure for any DFI seeking to strengthen its approach to remedy should be the recognition that there is no such thing as a perfect project. Despite best efforts, harms may occur. Accordingly, while adhering to the highest possible safeguard standards, DFIs should plan for things to go wrong. Experience in the contexts of environmental harm, resettlement and occupational health and safety can help to normalize the possibility of project-related harms and build effective systems to address them, predicated upon (a) risk assessment, (b) review and analysis of root causes, (c) action plans to address harms and avoid repetition and (d) insurance or other appropriate compensation arrangements. Building remediation structures around the project from the outset and applying contingency planning can help to address risk aversion, overcome punitive connotations associated with remedy and increase the chances that those adversely affected by the project will be made whole.

F. REMEDY IS ESPECIALLY IMPORTANT IN FRAGILE AND CONFLICT-AFFECTED SETTINGS

The subject of remedy has assumed particular importance in light of the increasing footprint of DFIs in fragile and conflict-affected settings. Evidence shows that unaddressed grievances and perceptions of injustice may contribute to violent conflict and State fragility. Effective remedy is an increasingly vital ingredient for successful financing operations and facilitates appropriate risk-taking in fragile and conflict-affected settings. Preventive approaches are clearly critical in this context, which can be promoted through robust and comprehensive safeguards and transparency requirements, explicit human rights due diligence and enhanced early warning and rapid response capacities, while empowering IAMs to operate independently, effectively and early.

G. DEVELOPMENT FINANCE INSTITUTIONS HAVE IMPORTANT ROLES TO PLAY IN "ENABLING" REMEDY

DFIs have many tools and techniques through which they may build and exercise leverage with clients, and as appropriate other actors, to enable remedy in practice. The more familiar tools include commercial and legal leverage (including covenants in legal agreements on safeguard compliance, remedy, non-retaliation and related matters), as well as normative influence, diplomatic or political leverage, convening power, technical expertise and development resources, and support for GRMs within the client and larger remedy ecosystem. The term "enabling" (rather than providing) remedy is not intended as a means of avoiding more controversial questions, and does not displace the responsibilities of DFIs to contribute more substantively to remedy in appropriate circumstances. However, "enabling" remedy is often a missing piece in the remedy conversation and, linked to the larger "remedy ecosystem", helps to encourage a focus on how all involved actors can contribute to more effective solutions and outcomes, according to their respective roles, capacities, comparative advantages and responsibilities.

H. SAFEGUARD POLICIES SHOULD BE STRENGTHENED TO ENABLE REMEDY

The safeguard policies of DFIs reflect standards and responsibilities for remedy and provide important anchoring points for legal, normative and other forms of leverage. The safeguards of DFIs increasingly reflect a broad definition of social risk, although they rarely, if ever, contain a clear requirement, in line with their "do no harm" policy commitments, that all negative impacts should be remedied. Institutional commitments to sustainability, poverty reduction or the Sustainable Development Goals are important, but should be seen as complementary to, and not detract from, the core commitment to do no harm. If commitments to remedy (including but not limited to financial compensation) are part of contingency planning from the beginning of the project cycle, this would promote more timely and granular inquiries into: (a) the likelihood and severity (scale, scope and remediability) of potential impacts; (b) the scope and effectiveness of available remedial mechanisms (including national GRMs, insurance arrangements and ring-fenced funds); (c) what remedy gaps may be foreseen; and (d) the roles that the client and bank, as appropriate, may play in filling those gaps.

However, mitigation hierarchies in safeguard policies do not generally provide an adequate basis for contingency planning on remedy issues. Under most safeguards, which are based largely on experience in the environmental field, compensation is the final tier of the mitigation hierarchy and is limited to addressing residual impacts. Other reforms to safeguard policy mitigation hierarchies that may be needed from a remedy perspective include providing for a broad range of reparations (including but not limited to financial compensation), requiring remedy for human rights impacts and avoiding human rights "offsets". Safeguard policy definitions of the project's "area of influence" may also require attention from the perspective of remedy, along with their "technical and financial feasibility" limitations on mitigation actions.

I. MORE ATTENTION IS NEEDED ON HOW TO EXIT PROJECTS RESPONSIBLY

Another factor that may put remedy out of reach is the lack of clear requirements in many safeguard policies concerning how to deal with unresolved environmental and social issues towards project closure or when DFIs exit projects (on a planned or unplanned basis) without adequately considering unremediated harms. To date, in many DFIs, there seems to have been an imbalance between the efforts expended on upfront compliance and development impact when entering projects, compared with exit. This may be a particular challenge in the context of private sector operations, given the shorter project cycles than those pertaining to sovereign lending operations and the fact that exits may occur on shorter time frames. Client contracts and multilateral development bank safeguards commonly make provision for continued fulfilment of environmental and social requirements beyond project closure, but safeguard requirements in this regard (where they exist) are generally sparse and there seems to be little publicly available data on how post-closure supervision and post-exit action plans are carried out. DFIs can build and exercise leverage through a thoroughly consulted action plan that covers remedial measures, backed by explicit remediation requirements in safeguards and legal agreements. Other options may include working with syndicated banks or other investors in the client company to pressure the client to take action, engaging with national authorities, providing incentives for bringing the project into compliance (such as tying compliance to the prospect of repeat loans), extending closing dates and providing extended capacity support for the client, where needed.

J. INDEPENDENT ACCOUNTABILITY MECHANISMS CAN PLAY IMPORTANT ROLES IN ENABLING REMEDY

Notwithstanding the challenges facing them, IAMs have developed creative means of addressing grievances and, if appropriately mandated and resourced, such means can play vital roles in enabling remedy in practice. Beyond addressing complaints, IAMs can contribute to improved understanding of operational policies and organizational impacts, promote more consistent policy implementation, transparency and lessons learned, mitigate the reputational and fiduciary risks of DFIs and help to build legitimacy and trust with all stakeholders on whom the institution's development mission depends. There are many barriers to the effectiveness of IAMs in practice, however, including limitations as regards mandates (including insufficient recognition that the objective of IAM processes should be to remedy harms linked to the non-compliance of a DFI), problems associated with accessibility, structural weaknesses (including a lack of adequate independence in some cases), physical security threats faced by potential complainants and the troubling fact that IAMs are still not made widely known to project-affected people. Annex II contains a proposed self-assessment checklist for the effectiveness of IAMs, informed by the effectiveness criteria of the Guiding Principles on Business and Human Rights, in order to encourage stronger performance over time.

K. DEVELOPMENT FINANCE INSTITUTIONS SHOULD ALSO CONTRIBUTE DIRECTLY TO REMEDY IN APPROPRIATE CIRCUMSTANCES

The corollary of "enabling" remedy is "contributing" to remedy. According to ordinary principles of justice, and under international human rights standards, any contribution to harm should entail a proportionate contribution to remedy. The Guiding Principles on Business and Human Rights provide a widely accepted and nuanced framework for assessing the remedial responsibilities of DFIs and clients, taking into account their respective involvement in negative impacts. When determining the possible contributions of DFIs to remedy, in the view of the Office of the United Nations High Commissioner for Human Rights (OHCHR), it would also be relevant to take into account their development mandates, any significant barriers to accessing remedy in the given context, the complexity of the investment structure and operating context, and any legacy issues.

There are numerous possible funding mechanisms for remedy, the pros and cons of which need to be worked out individually in context. Ring-fenced funds can provide accessible, rapid and reliable reparations and deserve priority consideration. Other potentially effective remedy funding mechanisms include escrow accounts, trust funds, insurance schemes, guarantees and letters of credit. The creativity shown by DFIs in response to the coronavirus disease (COVID-19) pandemic, the extensive experience of DFIs in establishing and managing trust funds, and emblematic examples such as the World Bank's response to gender-based violence and other harms in the Uganda Transport Sector Development Project (box 7), could inspire creative and more effective approaches to remedy across the board, encouraging the deployment of trust funds, project contingency funds, technical assistance and innovative financing as needs require.

L. CONCERNS ABOUT THE LEGAL LIABILITY OF DEVELOPMENT FINANCE INSTITUTIONS SHOULD BE KEPT IN PERSPECTIVE

Recent litigation against DFIs in courts in the United States of America (notably, *Jam v. International Finance Corporation*) may have contributed to an unduly defensive mindset and fears in some quarters that proactive due diligence and remedial actions by DFIs might paradoxically increase their own legal liability risks. However, in the view of OHCHR, these concerns may readily be overstated given the broad scope and construction of most jurisdictional immunities of DFIs, the many legal and practical barriers to litigating claims (particularly, international claims), and the narrow scope for lender liability claims in many jurisdictions, even against commercial banks, much less DFIs. A recent study commissioned by OHCHR of lender liability regimes pertaining to commercial banking in the United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as in the European Union and Hong Kong, China, among several other jurisdictions, suggests that: (a) lender liability for environmental and social impacts is limited in the jurisdictions surveyed; and (b) broader proactive due diligence will not be likely to increase liability risks and in fact may reduce them.

M. CONCERNS ABOUT "MORAL HAZARD" SHOULD BE UNDERSTOOD FROM THE PERSPECTIVE OF RIGHTS HOLDERS

Concerns have also arisen about perverse incentives or moral hazard, to the extent that the contributions of DFIs to remedy might inadvertently shift the focus too far away from clients' responsibilities for project implementation. However, it is worth noting that concerns of this kind, and the possibility that insurance coverage may weaken incentives for clients to protect against routine environmental risks, appear not to have diminished the role of environmental risk insurance in project finance. The more pressing risk of moral hazard, in the view of OHCHR, lies in the present situation wherein clients and financers of projects are all too often insulated from responsibility for human rights impacts, the costs of which are instead externalized to people (and, often, the poorest and most marginalized), who are unable to assert their rights. The carefully calibrated articulation of responsibilities for harm and remedy contained in the Guiding Principles on Business and Human Rights, if utilized more consistently by DFIs, may help to alleviate such concerns and enable all involved parties to strike an appropriate balance.

N. LEADERSHIP IS INDISPENSABLE

As serious as the obstacles sometimes appear, the rekindling of the remedy conversation among DFIs in the early 2020s may be a sign of shifting attitudes. Just as the "C word" (for corruption) moved from taboo to the mainstream in the World Bank in the 1990s, the "R word" (for remedy) may now be gaining firmer footing. Central to such a shift will be strong leadership, clear communication and the need to see complaints not as a source of reputational risk to the institution, but as a source of learning and a prerequisite for improved performance and accountability. Similarly, strong leadership and clear communication are needed to offset the dominant incentives within many DFIs wherein success is often measured more by loan volume or short-

run financial returns than investment quality and social and environmental sustainability. Remedy needs to be more widely seen and accepted as a routine part of the project life cycle rather than an indicator of failure. DFIs leading on the issue of remedy may feel that they face a "first mover" dilemma: how can innovation and a forward-leaning approach to remedy be incentivized and commercially viable, in an environment in which competitors' and clients' standards and practices on remedy are often weak? But this may be a false dilemma, particularly for multilateral development banks, which have consistently and appropriately set new standards and shaped new global norms, public expectations and national legal and policy frameworks on environmental and social risk management and accountability issues. Innovation and leadership are part of the DNA of DFIs and essential to their reputations, comparative advantages and continuing influence.

O. *SUGGESTED PRIORITY ACTIONS*

A comprehensive set of recommendations is contained in annex I, addressed to DFIs, their shareholders and IAMs. The following priority actions are recommended as starting points for DFIs seeking to strengthen their approach to remedy, mindful of their different capacities, functions and operating contexts.

1. Development finance institutions should communicate internally on remedy

DFIs should communicate clearly, from board and senior management levels to staff, that:

- Remedy is central to their "do no harm" and sustainability objectives and development effectiveness.
- Informed risk-taking, with rigorous due diligence and attention to remedy, will be supported in order to encourage innovation and help achieve the mandated goals of DFIs.
- Harms from DFI-funded projects cannot always be prevented, but should not be externalized onto those whom DFIs seek to support through development.
- Positive environmental and social outcomes are the dominant organizational objective.
- Full transparency is essential for accountability and remedy.
- Remedy should not be seen as a "blame game" but rather an ordinary project contingency and a central part of a collective effort to make a positive difference in people's lives.

2. Update policies and systems

DFIs should:

- Carry out a rigorous and publicly disclosed evaluations of the remedy mechanisms available through the institution (including but not limited to IAMs) and its clients (including GRMs) to assess whether its remedy system is working as effectively and efficiently as it can.
- Update safeguard policies to clarify the expectation that all adverse impacts should be remedied and revise mitigation hierarchies to provide for remedy when other actions to prevent or mitigate harms are insufficient.
- Based on the public evaluations mentioned above, develop a remedy framework for the institution that includes: (a) a vision of how the remedy mechanisms of the institution may operate within the larger remedy ecosystem; (b) a comprehensive mapping of different forms of leverage that could be exercised by the institution to help enable remedy; (c) an assessment of circumstances and criteria according to which the institution should contribute directly to remedy, in accordance with the parties' respective contributions to harm; and (d) provision for ring-fenced funds, insurance instruments and other potentially viable financing mechanisms.
- Within the scope of the above framework, develop a responsible exit policy framework to minimize and address residual impacts (chap. V below).
- Recognizing that trends and patterns of grievances can help identify systemic problems that may require more systemic solutions: (a) provide full time-bound disclosure of documentation on the environmental and social impacts of projects and on remedial outcomes to promote lessons learned; and (b) interpret any exceptions to information disclosure, including on commercial grounds, narrowly, subject to overriding public interest and human rights considerations.
- Establish and maintain an effective IAM, in line with the criteria in principle 31 of the Guiding Principles on Business and Human Rights (see annex II), authorize and enable IAMs to address harms linked to policy non-compliance (not procedural compliance alone), and require clients to make the mechanism known to project-affected people.

3. Build capacities

DFIs should build internal DFI capacities on environmental and social, human rights and accountability issues, and align internal incentives and staff members' accountabilities with environmental and social objectives. In particular, they should strengthen mandates and capacities to identify and address grievances early, before they are aggravated or escalate.

"Nothing is more powerful than an idea whose time has come."

VICTOR HUGO[1]

Introduction

KEY MESSAGES

- Remedy is at the core of human rights and ensures that rights have real meaning in practice. If a human right is breached, the rights holder should be able to seek remedies from those responsible.
- Reparations to redress harms may take many forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. These forms are most effective in combination.
- Development finance institutions (DFIs) contribute in vital ways to human rights and the Sustainable Development Goals and can play an important part in the larger remedy "ecosystem". However, the practices of DFIs are uneven and undermined by conceptual confusion, risk aversion, mixed incentives and, sometimes, questionable assumptions concerning the institution's own potential legal and financial liabilities.
- There is no such thing as a perfect project. Even with best efforts, things can go wrong. DFIs have extensive experience in connection with remedy in certain contexts, including in relation to resettlement and environmental impacts, which can be adapted and expanded to address other social harms.
- Reconceiving remedy as a core part of delivering on the Sustainable Development Goals, and approaching it as an ordinary contingency planning issue, may help to transcend assumptions about remedy being a zero-sum game between claimants and clients, or exclusively as a legal liability, reputational or monetary compensation issue.
- Stronger commitment to and innovation on remedy would help DFIs to avoid harms, achieve their mandates and operational objectives (including in fragile and conflict-affected settings), minimize reputational risks, meet evolving public expectations and norms concerning responsible business conduct and maintain their leadership positions in the fields of sustainable finance and investment.

A. BACKGROUND AND PURPOSE OF THE PRESENT PUBLICATION

Development finance can be broadly defined as the use of public resources to facilitate investment and development in low- and middle-income countries. Bilateral and multilateral DFIs provide capital for development projects and thereby help achieve the Sustainable Development Goals and human rights. DFIs promote foreign direct investment through a range of financing tools, including loans, guarantees, political risk insurance and equity investments. Although definitions and estimates differ, at a conservative estimate, DFIs provide tens of billions of United States dollars in development finance annually.[2] DFIs have a dual identity as lender and development agency, using public funds to deliver on public policy objectives, increasingly alongside commercial lenders. The role and influence of DFIs and, in particular, the multilateral development banks,[3] has grown in importance since the onset of the coronavirus disease (COVID-19) pandemic in the year 2020. So has the topic of remedy, in view of the increased operational challenges and weakened governance institutions in fragile and conflict-affected settings.

DFIs contribute positively to human rights in many ways. Sometimes projects are directly related to support the Government to meet their human rights obligations, such as financing the improvement of health systems, water management, public education and justice sector reforms. Other projects enable human rights indirectly,

such as energy or communication infrastructure projects that provide lighting in schools and homes allowing students to study in the evenings, governance projects strengthening public financial management or digital identification projects that enable access to services. Positive impacts in any area depend to a great extent upon the quality and rigour of the lender's due diligence and the faithful implementation by the client of robust social and environmental risk assessment and management policies (otherwise known as safeguard policies or safeguards).

However, even well-designed investment projects may go wrong, causing harm to people or the environment. Unaddressed grievances may cause project failure and, as the World Bank has noted, contribute to violent conflict and State fragility.[4] Remedying harms – or, in other words, restoring the situation of aggrieved persons to at least the situation that they would have been in had the harms not occurred – is both a moral and development concern. Accordingly, DFIs have developed a range of institutional mechanisms, policies and procedures, including independent accountability mechanisms (IAMs), to help address grievances within the larger remedy "ecosystem"[5] and provide feedback loops to improve institutional performance, accountability and development results.



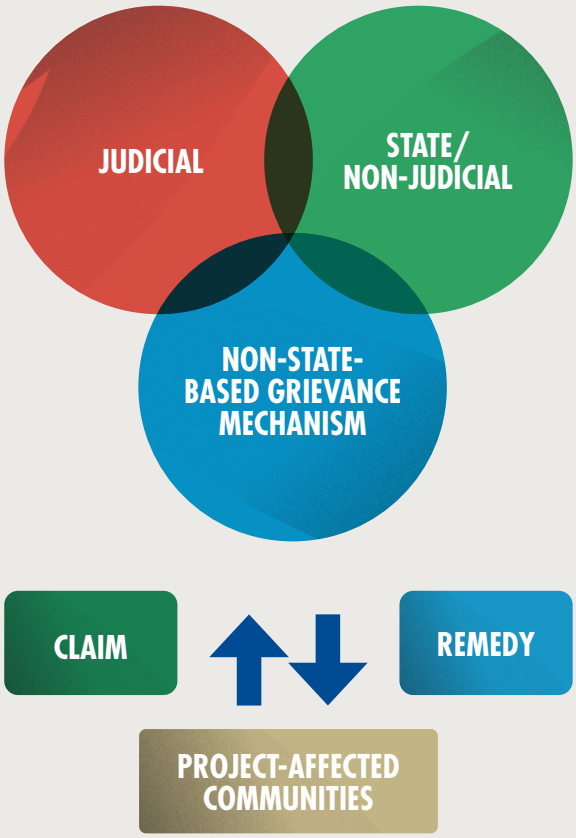
Felix Davey/CAO

FIGURE 1 REMEDY ECOSYSTEM

JUDICIAL – national and local courts (civil and criminal jurisdictions); regional courts (e.g. European, African and Inter-American human rights systems)

STATE-BASED/NON-JUDICIAL – sectoral ministries; regulatory authorities; ombudspersons; national human rights institutions; government oversight bodies; inspectorates; environmental protection agencies; consumer protection bodies; public health and safety bodies; professional standards bodies; Organization for Economic Cooperation and Development (OECD) national contact points; privacy and data protection bodies

NON-STATE-BASED GRMS – regional and international human rights bodies (including United Nations and International Labour Organization (ILO) systems); project-level or company-level GRMs; multi-stakeholder initiatives; global framework agreements between companies and global trade unions, collective bargaining agreements, and enterprise supply GRMs, informal justice sector (linked to the formal justice sector and State regulation in many cases) and community GRMs; and DFIs (see annex III) and IAMs (compliance review and dispute resolution)



DFIs, particularly the multilateral development banks, have extensive experience in assessing, mitigating and addressing a range of project-related harms, including in connection with resettlement, indigenous peoples and labour issues. Many useful lessons can be drawn from this experience and applied to remedying other social harms. However, the topic of remedy per se is still treated as a relatively new one for many DFIs, undermined by conceptual confusion, risk aversion, mixed incentives and, sometimes, questionable assumptions concerning the bank's own potential legal and financial liabilities (discussed further below). There is a lot of work to be done to transcend the punitive assumptions and associations with remedy and approach the issue from the standpoint of contingency planning.

One of the most persistent areas of confusion in this context is to understand the boundaries of responsibility between the client and the bank for project-related harms and remedy. DFIs are not themselves involved in the establishment and operation of projects and are usually at least one step removed from human rights impacts. However, DFIs may contribute to harms, by action or omission, and may have significant leverage over client behaviour and project outcomes in particular cases, as will be shown in the present publication. The impacts of projects are influenced, among other things, by the strength of safeguards and accountability mechanisms, the legal conditions for financing and the rigour of the due diligence and supervision of DFIs. According to ordinary principles of justice and under international human rights law, any contribution to harm should entail proportionate responsibility for remedy. Translating this principle into an agreed responsibilities framework for DFIs could unblock a systemic constraint on remedy in practice.

DFIs have not only an important role to play in addressing remedy with their clients but also through broader actions in countries of operation to encourage, support and, more specifically, strengthen avenues of access to remedy. The term "remedy ecosystem" implies the existence of multiple remedial avenues, but in practice few if any may be accessible or effective in any given context. As the High Commissioner for Human Rights observed: "there is an immense discrepancy between the ethical and legal imperative of reparations and the practical reality. Particularly in conflict and post-conflict settings, where institutions are non-existent or weak, victims are often left with next to nothing."[6]

That means that client-level grievance redress mechanisms (GRMs) and IAMs become all the more important and calls for consideration of the broader roles and avenues DFIs may have to help strengthen access to remedy at the country level.

Accordingly, the purposes of the present publication are:

- To demystify and normalize the concept of "remedy" and generate wider understanding of the importance of the right to an effective remedy and access to remedy, informed by international human rights standards.
- To stimulate fresh and innovative thinking on the responsibilities of DFIs, recognizing their public mandates and the ways in which they may be involved in project-related harms, so that the environmental, social and human rights externalities of projects do not fall on those least able to bear them.
- To flesh out the concept of a "remedy ecosystem" in the context of development financing, and unpack the responsibilities of different parties in the financing value chain to provide for or cooperate in remediation to address adverse human rights impacts.
- To take stock of the policies and practice of DFIs concerning remedy for harms, analyse gaps and opportunities, and illustrate practical actions that DFIs and their IAMs could take to give effect to their responsibilities and improve access to remedy in practice.
- To offer recommendations to policymakers and practitioners on how to strengthen access to remedy for project-affected people and help such people make informed choices about potentially fruitful avenues for redress. Recommendations are extracted, reorganized along functional lines and collated in annex I.

Before proceeding further, three brief caveats are warranted: first, the scope of "remedy" in the context of DFI-supported projects is potentially very broad. Many kinds of project-related problems and harms are routinely addressed through the day-to-day monitoring and supervision of DFIs, although their policies, capacities and practices differ and publicly available data do not always afford an adequate basis for evaluation. In the present report, there is a focus on relatively serious environmental and social risks and impacts that are (or could be expected to be) escalated to IAMs, project-level GRMs or local or national redress mechanisms, particularly risks and impacts with obvious human rights implications.[7] The definition of "remedy" in the next section reflects that level of seriousness. This choice necessarily constrains the conclusions that can be drawn in this report about the environmental and social performance of DFIs more generally. However, the more limited scope permits a sharper focus on a core set of remedy issues that can more feasibly be addressed within the constraints of this publication and that, arguably, can be taken as a litmus test of the broader commitment of DFIs to remedy.

Second, in this publication there is no wish to add to the literature on the proper scope of the obligations of DFIs under international human rights law, either in relation to remedy or more generally. Constitutional provisions and sources of human rights law applicable to DFIs differ significantly and would require more detailed treatment than is possible here. For similar reasons, debates on lender liability and the jurisdictional immunities of DFIs are addressed only briefly. Concerns about the latter issues within DFIs may readily be overstated and, if taken out of proportion to the larger operating context, may undermine the effective discharge of DFI mandates and work against incentives and creativity needed for DFIs to engage with risk and enable or contribute more effectively to remedy in practice.

Third, in this publication there is no discussion of "contractual remedies" (legal remedies available to DFIs in the event of client default) in any depth, beyond the context of leverage in enabling remediation for project-affected people (chap. III, sect. A). Contractual remedies operate between the institution and the client and are not the same thing as human rights remedies, as will be shown below. Fourth, due to constraints of data and space, in this publication the focus is almost exclusively on remedy in the context of investment project financing, encompassed by the safeguard policies and existing accountability mechanisms of DFIs. The challenges of remedy in the context of policy-based lending and complex financing structures are serious and deserve more detailed consideration than is possible here, but it is hoped that this publication will help to stimulate that discussion.

B. RIGHT TO A REMEDY

Remedy is at the core of human rights, and ensures that rights have real meaning in practice.[8] If a human right is breached, the holder or holders of the right should be able to seek remedies from those responsible. Human rights expert bodies have generated extensive guidance on what constitutes an effective remedy under international human rights law.[9] The right to remedy is connected with principles of sustainability and equity that are at the heart of DFI mandates and missions. DFIs have potentially vital roles to play in enabling remedy within and beyond the scope of investment projects (see chap. III). The OHCHR Accountability and Remedy Project (box 2 below) provides extensive guidance for States, businesses, DFIs and other actors on effective judicial, non-judicial and non-State-based GRMs, in the context of human rights abuses related to business activity.

Conceptually, remedy is about both the processes involved in providing remedies and the outcomes of the process, including the reparations provided. Both dimensions are recognized as important to the ultimate goal of redress. Remedies play a number of roles: (a) redress, making victims "whole" and returning them to the status quo ante; (b) prevention, pre-empting future abuses; and (c) deterrence, discouraging others from causing harms. The term "remedy" is sometimes used interchangeably with "remediate", however, the former term more directly embodies the first element mentioned above (restoring the status quo ante), rather than ameliorating, and is the term preferred here. Effective remedies should include all three elements wherever possible.

REMEDY AS JUSTICE

"Reparations can take many forms, specific to culture, community and context. … they must be driven by a recognition of responsibility and an honest and true acknowledgement that rights have been violated. Any measure falling short of these baseline standards will not truly be experienced as justice, and it will never be able to fully repair the harm which has been suffered."

MICHELLE BACHELET, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS[13]

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter "Basic Principles on Remedy") define "harm" in broad terms as including "physical or mental injury, emotional suffering, economic loss, or substantial impairment of [individuals'] fundamental rights".[10] The Basic Principles on Remedy note the importance of judicial and non-judicial mechanisms and the requirement of effective access, involving the provision of assistance and the protection of the privacy and safety of claimants.[11] Mindful of the adage that "justice delayed is justice denied", remedies should also be prompt.[12] The Basic Principles on Remedy also underscore the need for accessibility, including whether remedial mechanisms are known to claimants and are available without undue expense or technical support.

Functionally, reparations for harms can take several forms, alone or in combination,[14] depending upon the nature of the harm suffered and the wishes of those adversely impacted:

- Restitution seeks to avoid particular people gaining unjustly at the expense of others and restore the affected persons or groups to the original position before the abuses occurred.[15] This may mean "to take something from the wrongdoer to which the victim is entitled and restore it to the victim"[16] and can include restitution of confiscated property, of lost jobs, pensions and other lost benefits.
- Compensation covers any economically assessable losses and both material and moral harms: (a) physical and mental harms; (b) lost opportunities, including employment, education and social benefits; (c) material harms and loss of earnings, earning potential or entitlements in the formal and informal economy and compensation for unpaid work; (d) moral harms; and (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[17] Compensation is the most common form of remedy, but its prevalence should not exclude consideration of other kinds of redress.[18] For example, in situations in which human rights violations are concerned or the responsible party is deliberately delaying redress, it will often be necessary to combine compensation with "satisfaction" (including cessation, public apology and potentially legal sanctions) and guarantees of non-repetition.
- Rehabilitation includes processes and services to allow victims of serious human rights violations to reconstruct their lives and restore their health or reputations after a serious attack on their physical or mental integrity.[19] This form of remedy may be relevant in cases such as those involving gender-based violence or threats against those who protest against DFI projects.
- Satisfaction can take multiple forms, from cessation of a continuing human rights abuse to ascertaining truth, public apology and civil, administrative or criminal sanctions against those responsible.[20] In addition to an acceptance of wrongdoing, an apology is a way of showing respect and empathy for victims.
- Guarantees of non-repetition are a useful forward-looking dimension of remedy, encouraging learning and strengthening of administrative systems to avoid similar harms in the future, but do not include redress for harms that have already been suffered and therefore should be used in combination with other forms of reparations.

Finally, the Basic Principles on Remedy note that access to information about rights and the mechanisms to address them is the starting point for participating in and obtaining reparations. This triumvirate (access to information, the right to participation and access to justice) is also reflected in principle 10 of the Rio Declaration on Environment and Development,[21] which to varying degrees influenced the development of DFI sustainability and safeguard policies.

C. WHAT IS THE SAME AND WHAT IS DIFFERENT ABOUT REMEDIES FROM A HUMAN RIGHTS PERSPECTIVE?

A human rights understanding of "remedy" has a lot in common with good development practice. For example, according to the human rights understanding of the term, as in development practice, remedy should be people-centred, drawing on the experiences, perspectives, interests and opinions of the rights holders. This helps to ensure that remedial mechanisms and their processes are well-designed, accessible and effective. Other common principles include a focus on transparency, proactive information disclosure, accessibility and universal access.

THE TRANSFORMATIVE POWER OF REPARATIONS

"Recognition and assistance can be truly transformative for the person, facilitating their own recovery but also acting as a gateway for meaningful participation of individuals and communities in other transitional justice and reform processes. Reparations also function as an enabler to participate in society on an equal footing, making them a crucial driver to realize the SDGs.

I have personally witnessed this in my home country, Chile … [where] the power of reparations … helped survivors, families and communities heal and become part of wider society, with dignity."

MICHELLE BACHELET, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS[22]

The following elements are central, even if not always unique, to a human rights understanding of remedy:[23]

- **The individual as a rights holder.** Remedial mechanisms should not treat rights holders merely as charitable recipients of remedy. Instead, because they are rights holders, victims have the right to and should participate in the design and implementation of remedy systems. Human rights also mean that those responsible for harm should be held accountable.
- **Rights-compatible outcomes.** Outcomes should be judged by and with reference to the rights and perspectives of victims. The key constitutive element of effectiveness (adequate, effective and prompt) should be assessed from the perspective of those harmed.[24]
- **Range of reparations.** A combination of reparation types will often be necessary to address harms done. Remedies for human rights abuses serve interrelated purposes as noted above and should combine preventive, restorative and deterrent elements where possible. Given the irreparable nature of many human rights violations, "satisfaction" measures, beginning with an apology, can be particularly important and can contribute to rehabilitation and non-repetition. Material and symbolic reparations should be seen as complementary.[25]
- No offsets. Unlike in environmental law, there is no such thing as a "human rights offset". Conceptually and morally, child labour in one location cannot be offset by setting up a school in another location,[26] just as underpaying workers in one location is not offset by paying workers fully and promptly in another. The principle of "no human rights offset" gained salience in the context of corporate social responsibility debates in the early 2000s and has since been reflected in the Equator Principles and the European Investment Bank (EIB) safeguards (see box 18 below).[27]
- Addressing power imbalances. The remedy process should take proactive measures to redress asymmetrical relationships resulting from power imbalance between the affected rights holders and those who are involved in the harm. An inclusive and empowering process of providing a remedy can itself help to reduce structural obstacles and power imbalances.
- **Addressing discrimination.** Access to effective remedies should be available without discrimination, with specific action to make sure there is access to effective remedies for those who may be at heightened risk of vulnerability or marginalization. Different people experience impacts differently and require targeted reparations to address the harm suffered. Particular attention is needed to address the compounding effects of intersectional discrimination, for example, discrimination against indigenous or minority women.
- **Access to information.** Access to information is a requirement under human rights law. Rights holders should have access to information about their rights, the responsibilities of other actors in relation to those rights, all available remedial mechanisms, including their inter-relationships and respective strengths, weaknesses and any trade-offs between them.
- **Retaliation.** Affected rights holders should have no fear of victimization or retaliation[28] in the process of seeking remedies.

D. WHY IS REMEDY IMPORTANT IN THE CONTEXT OF DEVELOPMENT FINANCE INSTITUTIONS?

Before addressing the role that DFIs can and do play in remedy, it is important to set out why it is relevant to DFIs and their missions. The reasons relate to the sustainable development and "do no harm" mandates of DFIs, operational and policy implementation concerns (including but not limited to fragile and conflict-affected settings), the need to keep pace with evolving social expectations and relevant normative developments and the need to manage reputational and legal liability risks.

1. Sustainable Development Goals and "do no harm"

First, and most fundamentally, remedy is the functional corollary of the "do no harm" mandates of DFIs, going to the heart of their missions (see chap. I, sect. A.1 on DFI mandates). The requirement to "do no harm" does not stop at prevention, but also logically requires remedying any harms done. Relatedly, many if not most DFIs have committed themselves to supporting the achievement of the Sustainable Development Goals, including the imperative of "leaving no one behind". Reconceiving remedy as a core part of delivering on the Sustainable Development Goals may help to transcend assumptions about remedy being a zero-sum game between claimants and clients, or exclusively as a legal liability, reputational or monetary compensation issue. The approach taken in many multilateral development banks' resettlement safeguards, which aim for improvements in living standards beyond compensation as part of the remedy process for involuntary resettlement, may serve as a marker and inspiration for more proactive approaches to remedying other adverse impacts.

2. Supporting operations in fragile and conflict-affected situations and allowing appropriate risk-taking

Second, effective remedy is an increasingly vital ingredient for successful financing operations and supports appropriate risk-taking in fragile and conflict-affected settings. The World Bank Group Strategy for Fragility, Conflict and Violence 2020–2025 repeatedly notes how unaddressed grievances and perceptions of injustice may contribute to violent conflict and State fragility.[29] In fragile and conflict-affected settings, the political and human rights context within which projects or programmes will be developed present heightened risks that can materialize in unexpected and damaging ways.[30] But these factors do not yet seem to have been adequately reflected in the operational policies of DFIs and no publicly available multilateral development bank strategy on fragile and conflict-affected situations contains adequate guidance on remedy. The recent evaluation carried out by ADB of its 2009 Safeguard Policy Statement noted that contextual risk analysis "has not generally been considered in MFI safeguards frameworks, which have been primarily concerned with impacts a project may be responsible for, directly or indirectly …" and that, consequently, there had been "little evidence of [ADB] adapting the [Safeguard Policy Statement] requirements to [fragile and conflict-affected] country contexts".[31] The World Bank Group argues in its Strategy for Fragility, Conflict and Violence 2020–2025 that, in the face of higher risks, there must be higher risk tolerance and safeguard policy flexibility in fragile and conflict-affected settings.[32] However, a licence for risk-taking and safeguard flexibility may be counterproductive if the conditions and limits are not carefully defined and may eclipse more pressing requirements, such as enhanced due diligence[33] (including human rights due diligence) and technical support. Under the Environmental and Social Framework of the Asian Infrastructure Investment Bank (AIIB), in conflict settings, safeguard requirements, worryingly, seem to be able to be deferred entirely.[34]

3. Prevention of conflict and harms

Remedy serves a vital preventive, as well as corrective, function, but this too is insufficiently reflected in practice. A recent study by the Inter-American Development Bank (IDB) analysing 40 years of infrastructure projects in Latin America concluded that, despite a range of warning signs and decades of experience, neither clients nor DFIs have been putting sufficient emphasis on addressing concerns seriously even when manifested over long time frames, even though these scenarios have repeatedly had serious consequences for communities, clients and DFIs.[35] Communities and workers may perceive risks in relation to a project to be even higher than they might otherwise be if they feel that they have no control over how their labour or resources will be used and have no credible access to redress.[36] Conversely, clear and proactive approaches to remedy at the outset can save all parties costly legal battles after the damage is done. With these perspectives in mind, early and visible commitments to and frameworks for remedy can have significant economic and conflict prevention benefits, in fragile and conflict-affected settings and otherwise.

4. Feedback loops for improved performance

A fourth reason why remedy is important in the context of development finance is that effective GRMs, at all levels, can provide critical feedback loops to improve project performance. There seems to be significant room for improvement in this regard, however. An independent

evaluation of IAMs in 2016 found that: "The frequency with which IAMs find the same policy violations in their investigations demonstrates that DFIs are not sufficiently and systemically learning lessons from IAMs' cases to improve the implementation of their policies."[37]

5. Wider community benefits

Fifth, a proactive and robust approach to remedy can contribute to broader social welfare. For example, recognition of past harms ("satisfaction") can help communities and businesses or State agencies to think about a shared future and discuss in a more constructive way what that may look like.[38] Solidarity combined with recognition of harms suffered can have great value for participants, reinforce trust in commitments of non-repetition and improve prospects for peaceful coexistence. New developments, such as applying the criminal law concept of restorative justice to address environmental harms,[39] support the point that remedy should not be seen in static or zero-sum terms but should be seen as an opportunity to forge win-win coalitions and make enduring contributions to development.

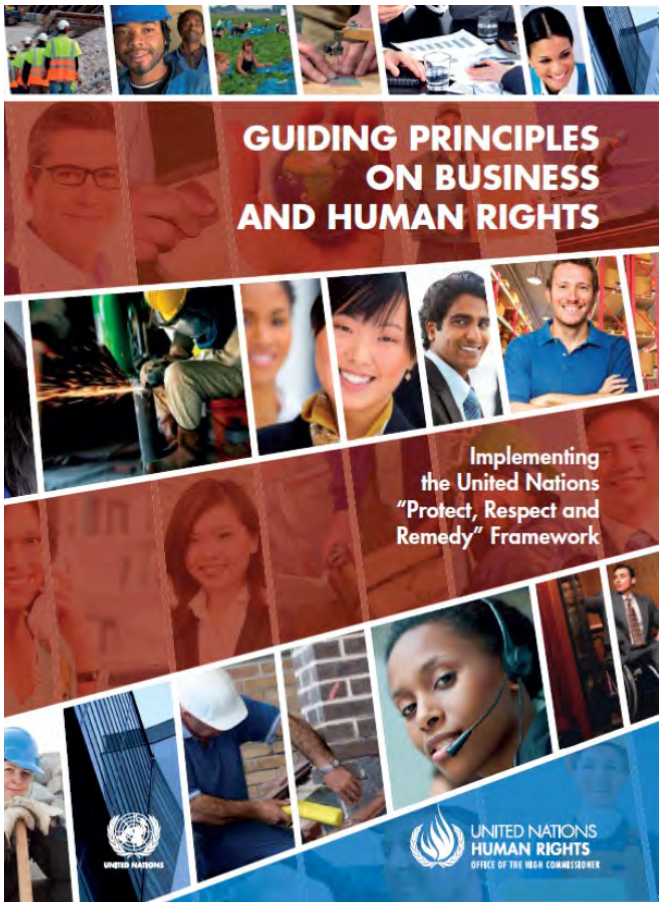
6. Complex financing structures

A sixth factor justifying the importance of remedy in the present context is the increasing complexity of development financing structures, which may obfuscate accountability for adverse impacts and put remedy further out of reach for affected people. For example, financial intermediary lending (lending to financial institutions to support private sector growth) has grown exponentially in recent years, accompanied by support for clients' environmental and social systems.[40] However, funding through financial intermediary structures has raised a range of concerns about the transparency of what is being funded, due diligence and supervision of the capacity of financial intermediaries to manage the risks and impacts of subprojects.[41] A recent evaluation by ADB found that: "Projects implemented through financial intermediaries have remained the weakest performers on safeguards. … Further, FI projects and finance sector projects have performed less well, despite the low-risk portfolio. Similar risks also apply to increasingly important private sector operations in private equity funds and general corporate finance."[42] An AfDB evaluation in 2019 reflected similar challenges.[43]

Infrastructure investment funds, public-private partnerships and other blended finance mechanisms present additional challenges, given the complexities of the financing structures and multiple parties involved.[44] Development policy operations and budget support operations, instruments of choice for DFIs and Governments, especially in crisis contexts, raise particularly vexing challenges for social and environmental accountability given the diffuse and less tangible nature of the risks and impacts involved. Innovation in financial engineering needs to be matched with innovation in remedial responses, to ensure that the road to remedy is not blocked by complex financial structures, opaque contractual provisions and dated safeguard requirements focused disproportionately on physical impacts at or around the project footprint.

7. Evolving norms, legal frameworks and social expectations

Seventh, the increasing attention to remedy in development finance is also being driven by evolving social expectations, investor-driven trends towards sustainability[45] and policy developments concerning human rights and responsible business conduct.



Communities, individuals, workers and organizations are increasingly expressing their claims and aspirations in human rights terms, and the reticence of some DFIs to respond in these terms may be a source of frustration and friction, deflecting attention from the shared objective of redressing grievances. The right to an effective remedy is part of international human rights law, reflected in numerous treaties[46] and national legal systems.

The Guiding Principles on Business and Human Rights[47] were unanimously endorsed by the 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 Guiding Principles and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises,[48] which were updated in 2011 to include a human rights chapter aligned with the Guiding Principles on Business and Human Rights, put the topic of "business and human rights" on the agenda for Governments, businesses, civil society, international organizations and increasingly for DFIs. The Guiding Principles on Business and Human Rights have prompted renewed focus on the right to remedy in the context of commercial financial activities and provided a relevant framework to stimulate the thinking of DFIs as well.[49] As an instrument, the Guiding Principles on Business and Human Rights are not legally binding; however, they are based upon the international law obligations of States and encapsulate international law standards applicable to business activity, and reflect and reinforce evolving national legal requirements including (increasingly) mandatory human rights due diligence laws.[50] The Guiding Principles on Business and Human Rights apply to all States and to all economic actors, including those with State connections, such as State-owned enterprises, State-owned financial institutions and DFIs.

The Guiding Principles on Business and Human Rights reflect the expectation that economic actors should respect human rights. The corporate responsibility to respect human rights calls on business to avoid "adverse human rights impacts" (also referred to as "negative human rights impacts" or "human rights abuses"),[51] in particular by carrying out human rights due diligence.[52]

The corporate responsibility to respect is predicated upon a graduated approach to remediation, depending upon the level of an enterprise's "involvement" in a given impact. Where an enterprise has identified that it has "caused" or "contributed to" negative human rights impacts, it has a responsibility to be actively engaged in the remediation of those impacts, alone or in cooperation with others. The Guiding Principles on Business and Human Rights also recognize the notion of "directly linked" as a third category of "involvement". Where an adverse human rights impact is directly linked to a business' operations, products and services through its business relationships, the business is not expected itself to provide for remediation, although it may choose to do so. However, the minimum expectation is that a business should use (and try to increase) its "leverage" in the situation to prevent or mitigate the impact. The Guiding

1 BOX 1 THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Pillar I – State duty to protect human rights

- States have an obligation to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Pillar II – Corporate responsibility to respect human rights

- Business enterprises should respect human rights, which means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. In order to meet this responsibility, business enterprises should (a) have a policy commitment to meet their responsibility to respect human rights; (b) carry out a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and (c) have processes to enable the remediation of any adverse human rights impacts that they cause or to which they contribute.
- Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Pillar III – Access to remedy (with a role for both the State and business)

- States have an obligation to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when abuses occur within their territory and/or jurisdiction those affected have access to effective remedy through judicial mechanisms, as well as non-judicial mechanisms in appropriate cases.
- Non-State-based GRMs should also be available. In particular, business enterprises should establish or participate in effective operational-level GRMs for individuals and communities who may be adversely impacted, to make it possible for grievances to be addressed early and remediated directly.

Principles thus expect that where there is linkage to a problem, businesses use their relationships and their leverage to address the problem.

As noted above, the Guiding Principles on Business and Human Rights apply to all business enterprises regardless of their size, sector, location, ownership and structure, and thus these principles apply to financial institutions. Policy guidance from OHCHR and OECD illustrate how a financing relationship can be considered a "business relationship" within the meaning of the Guiding Principles and how financial institutions can cause adverse impacts and contribute or be directly linked to adverse impacts of the clients that they finance.[53] (The application of the Guiding Principles to DFIs is discussed in more detail in chap. IV, sect. A below.)

2 BOX 2 ACCOUNTABILITY AND REMEDY PROJECT OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Since 2014, and under multiple mandates from the Human Rights Council,[54] OHCHR has conducted its Accountability and Remedy Project with the aim of delivering credible and workable recommendations for enhancing accountability and access to remedy in cases of business-related human rights abuse.[55] The first three phases of the project were devoted to enhancing the effectiveness of the three categories of GRMs referred to in the Guiding Principles on Business and Human Rights:

(a) State-based judicial mechanisms;

(b) State-based non-judicial GRMs;

(c) Non-State-based GRMs.

All phases of the project are relevant in the context of the development finance remedial "ecosystem", in particular the third phase, which had a focus on GRMs and IAMs, and which benefited from many discussions with DFI and IAM staff, including through the Independent Accountability Mechanisms Network,[56] as well as project-affected people and their representatives. The report on the third phase of the project presented to the Human Rights Council contains numerous recommendations (in the annex) for enhancing the effectiveness of GRMs and IAMs (including, specifically, on how to meet the Guiding Principles on Business and Human Rights' effectiveness criteria).[57] These recommendations are based upon good practice and lessons learned during the course of the third phase of the project and are designed to be adaptable to a range of different legal systems and contexts.

3 BOX 3 RESPONSIBILITIES OF FINANCIAL INSTITUTIONS FOR ADVERSE IMPACTS – EXPERIENCE UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Soon after the adoption of the Guiding Principles on Business and Human Rights and the update of the OECD Guidelines for Multinational Enterprises, a complaint was made in 2013 to the national contact point of Norway (such a body is established to further implementation of the OECD Guidelines at country level),[58] involving the Norwegian sovereign wealth fund. This was one of the earliest cases on the application of the human rights concepts of the OECD Guidelines – and, by implication, the Guiding Principles on Business and Human Rights – to a financial institution. The case involved an investment made by Norges Bank Investment Management in a project in India and included a detailed review of how the human rights concepts of the OECD Guidelines apply to minority investors.[59] The case led to the development by OECD of guidance for institutional investors on due diligence.[60]

In 2020, the national contact point for the Netherlands declared admissible a complaint filed by Friends of the Earth against ING Bank regarding human rights and environmental abuses at palm oil plantations run by companies financed by the bank. The case is particularly significant because it was one of the first to argue that a financial sector actor (in this case ING Bank) should be considered to have "contributed to" (rather than the lower threshold of being "directly linked" to) abuses at palm oil plantations, because of its financing of palm oil companies and its failure to conduct effective due diligence to prevent or mitigate the impacts.[61]

At the November 2020 Finance in Common Summit in Paris, the world's 450 public development banks committed to share best practices and apply internationally accepted norms, including the Guiding Principles on Business and Human Rights.[62] DFIs have begun to integrate the Guiding Principles within their safeguard policies and operational guidance, as box 4 illustrates. The Guiding Principles are influencing thinking on remedy among IAMs[63] and are being integrated within IAM procedures.[64] The 2020 external review of the International Finance Corporation (IFC)/ Multilateral Investment Guarantee Agency (MIGA) framed its discussion of remedy explicitly against the Guiding Principles, predicated upon the logic that where a DFI contributes to harm, it should also contribute to remedy.[65] Building on this momentum, the Guiding Principles can stimulate further thinking among DFIs about their own roles in relation to remedy and encourage them to: (a) ensure that their due diligence is broad enough to identify and address human rights impacts; (b) consciously build and actively exercise their leverage with their clients to try to prevent negative human rights impacts and to address and remedy them where they occur (see chap. III); (c) work together with their clients and others to enable remedy (see chap. III); (d) consider their role in contributing to and potentially providing remedy, as appropriate, in light of their mandates and other relevant factors (see chap. IV); and (e) use the Guiding Principles' effectiveness criteria (Guiding Principles, principle 31) as a framework for assessing whether IAMs and the GRMs of clients are being used as effectively as possible (see annex II below).

The emergence of the Guiding Principles on Business and Human Rights and responsible business conduct concepts more generally is associated with the increasing attention being given to environmental, social and governance issues and evolving norms and practices concerning risk management in the financial sector. For example, in 2020, for the first time, the Equator Principles were updated independently of the IFC Performance Standards, due in part to the need to reflect emerging norms, including the Guiding Principles on Business and Human Rights.[72] As at 2021, there were 125 financial institutions from 37 countries that had signed up to the Equator Principles, including DFIs and multilateral development bank clients, covering over 70 per cent of international project finance transactions in emerging markets. The preamble of the Equator Principles states: "If [negative] 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. In this regard, when financing Projects: we will fulfil our responsibility to respect Human Rights

4 BOX 4 GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN THE SAFEGUARDS OF DEVELOPMENT FINANCE INSTITUTIONS

DFIs are increasingly integrating the Guiding Principles on Business and Human Rights within their safeguards. Among the new generation of multilateral development bank safeguard policies, IDB and IDB Invest require their clients to have in place an approach to assess potential human rights risks and impacts, "respect human rights, avoid infringement on the human rights of others, and address risks to and impacts on human rights in the projects it supports".[66] The European Bank for Reconstruction and Development (EBRD) and the Entrepreneurial Development Bank of the Netherlands (FMO) have similar requirements.[67] The sustainability policy of FMO specifies that FMO itself, not only the client, upholds the Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises in relation to its own operations. The Environmental and Social Standards of EIB anchor the promoter's due diligence obligations in the Guiding Principles' involvement framework for impacts ("cause, contribute, linkage", discussed in chap. IV below) and reflect the Guiding Principles' guidance concerning stakeholder engagement, risk prioritization and remedy.[68]

The *IDB Invest Implementation Manual: Environmental and Social Sustainability Policy* (2020) is framed by relevant international human rights norms and standards, including the Guiding Principles on Business and Human Rights (e.g. part III, sect. 4.1, and part II, sect. 3). In the *Implementation Manual*, the Guiding Principles guide risk prioritization, due diligence and determining responsibility for adverse impacts. One limitation derived from IFC Performance Standard 1 is that human rights due diligence is recommended only in "limited high risk circumstances".[69] The IDB formulation is more encompassing, encouraging human rights due diligence "in line with the Guiding Principles on Business and Human Rights" where the project or context "pose significant risk to human rights".[70] However, in the view of OHCHR, the preferable and more prudential approach, in line with the Equator Principles,[71] would be to encourage human rights due diligence as a routine, central and ongoing part of risk management from the beginning of the project cycle.

in line with the *United Nations Guiding Principles on Business and Human Rights* … by carrying out human rights due diligence." In addition to requiring an assessment of potential human rights risks for all projects, guided by the Guiding Principles, higher risk projects must have effective GRMs that reflect the Guiding Principles' effectiveness criteria.[73]

Banks and other financial institutions are under increasing scrutiny over their responses to adverse human rights impacts, triggering a range of benchmarking and monitoring initiatives.[74] Numerous commercial banks have adopted human rights policies,[75] some with explicit references to the Guiding Principles on Business and Human Rights and commitments to exercise their leverage and contribute to remedy in appropriate circumstances.[76] The Green Climate Fund (GCF) requires accredited entities, which include a number of large private financial institutions, including HSBC, BNP Paribas, XacBank in Mongolia, MUFG bank in Japan and Deutsche Bank, to establish grievance and redress mechanisms at corporate and project levels.[77] Parties to the Dutch Banking Sector Agreement recently concluded an agreement on the application of human rights in the sector and elaborated practical guidance on enabling remediation, framed by the Guiding Principles and the OECD Guidelines for Multinational Enterprises.[78]

5

BOX 5
ANZ BANK AND THE OVERSEAS PRIVATE INVESTMENT CORPORATION – EXAMPLES OF BANKS PROVIDING REMEDY FOR HARMS

In 2018, in response to a complaint involving ANZ Bank, the national contact point of Australia determined that the bank had acted in a manner inconsistent with the OECD Guidelines for Multinational Enterprises in providing a loan to Phnom Penh Sugar. The complaint was filed on behalf of 681 families who had been forcibly displaced and dispossessed of their land, productive resources and, in some cases, houses, to make way for a Phnom Penh Sugar plantation and refinery that was partially financed by ANZ Bank. The complaint alleged that ANZ Bank contributed to these abuses through its actions and omissions, and failed to take reasonable measures to prevent or remedy them and, in doing so, it breached the OECD Guidelines. The complaint argued that ANZ Bank contributed directly to Phnom Phen Sugar's illegal actions and profited from those actions, so it had an ongoing responsibility to provide reparations to those affected. The national contact point's newly installed Independent Examiner facilitated a conciliation meeting between the parties, which resulted in an agreement in February 2020. The agreement is confidential but the broad terms, as published in a joint statement of the parties, include the following:

(a) A contribution by ANZ Bank of the gross profit that it earned from the loan to help alleviate the hardship faced by the affected communities and support their efforts towards rehabilitation;

(b) A commitment by ANZ Bank to review and strengthen its human rights policies, including its customer social and environmental screening processes, and establish a specific GRM accessible to affected communities that meets international human rights standards of effectiveness.[79]

In another case, in 2004, the Overseas Private Investment Corporation (OPIC) provided $54 million in political risk insurance to Coeur d'Alene Mines Corporation of Idaho for the operation of the San Bartolomé silver and tin mine in the Cerro Rico in the Plurinational State of Bolivia. In February 2009, in response to a complaint, the OPIC Office of Accountability found that OPIC had been non-compliant in relation to resettlement (compensation for relocation) and indigenous peoples' policy requirements. In response, OPIC committed to "diligently pursuing the equitable resolution of social conflicts related to the project" and decided to co-finance an Indigenous Development Plan along with the OPIC co-sponsor, Coeur D'Alene Mines Corporation. The sponsor reported periodically to OPIC management on the implementation of the plan thereafter.[80]

The ANZ case is particularly interesting not only because the bank agreed to provide financial compensation to those harmed, but also because it did so long after the financial relationship with its client had closed. However, it should be noted that the remedial responses in both cases were ad hoc in nature, and were not the product of the application of an institutional policy for remedy. An explicit remedy policy would set clear expectations and promote consistent practice.

The United Nations-backed Principles for Responsible Investment[81] and the United Nations Environment Programme's Finance Initiative[82] have also explored the application of the Guiding Principles on Business and Human Rights to the financial sector. A recently adopted European Union financial regulation requires investors and other financial institutions to disclose their due diligence policies and principal adverse impacts of investments, including specifically on human rights.[83] For an investment to qualify as sustainable under the European Union taxonomy regulation, it must also show that it meets minimum social safeguards, namely the Guiding Principles and the OECD Guidelines for Multinational Enterprises.[84] These policy and regulatory developments have potentially important implications for remedy, and suggest that many financial institutions that have not begun to integrate consideration of human rights impacts into their operations may soon be required to do so. DFIs that fail to anticipate and contribute to these developments may experience losses in financial returns and lose their leadership profile, sustainable investment opportunities and reputational capital.[85]

8. Legal liability issues

A final reason for renewed consideration of remedy has arisen from concerns expressed by various DFIs about their legal liability exposure. In the absence of other viable remedial mechanisms, project-affected people are increasingly bringing claims against international financial institutions in domestic courts.[86] The case of *Jam v. IFC*,[87] filed in 2015, has attracted particular attention. The case involved the IFC-ADB co-financed coal-fired Tata Power Mundra Plant in Gujarat, India. A group of fishers and farmers affected by the project first made a complaint to CAO in June 2011, which completed a compliance audit that resulted in an action plan from IFC in 2013. A monitoring report by CAO in January 2015 reported continuing shortcomings and "the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts."[88] However, with no remedy in sight, the complainants filed suit in the federal court in Washington, D.C., in April 2015.

Domestic legal actions against international organizations frequently give rise to questions about immunities from suit or the lack thereof. The scope of immunities of DFIs is typically governed by both international and domestic law, including the constitutional framework of the institution and applicable provisions of host country agreements. These elements, and their combined effect in law, fall to tribunals of competent jurisdiction to determine. In the *Jam* case, as a matter of United States law, the United States Supreme Court concluded that, in the particular circumstances of IFC, the latter organization did not enjoy absolute immunity from suit in the United States courts, but rather enjoyed a level of immunity equivalent to that now held by foreign Governments under United States law. The Supreme Court's decision has been welcomed in many quarters as a harbinger of strengthened accountability and stimulus for DFIs to invest more resources in due diligence, harm prevention and more proactive approaches to remedy. But the decision has also raised fears of a dramatic expansion of litigation against DFIs.

From the perspective of OHCHR, the latter concern seems potentially overstated, given the many practical and legal hurdles claimants face in bringing suit for the forms of conduct typically at issue. In July 2021, in proceedings on remand, the United States Court of Appeals for the District of Columbia Circuit decided that the factual basis of the legal action in the *Jam* case was injurious conduct occurring in India and that there was an insufficient connection to the United States. The United States courts therefore lacked subject-matter jurisdiction to address the merits of that particular claim.[89] Subject to the final outcome of the *Jam* case and related proceedings, and depending upon the constitution of the particular DFI and national context, legal hurdles that a successful plaintiff may need to clear in such cases include the substantive complexity of tort law claims in the context of financing relationships, *forum non conveniens* doctrines, political question doctrines, territorial nexus requirements, proof that harms complained of relate to "commercial activity" and overcoming the restrictive scope of lender liability laws in many jurisdictions (see box 6), among other issues.[90]

Human rights law, and in particular the right to a remedy, have been playing an increasingly important role in the determination of immunities disputes in these kinds of cases. The European Court of Human Rights has held that the right of access to courts might be restricted to protect the independent functioning of international organizations, but only in situations in which the complainants in question have "reasonable alternative means" to bring their claims.[91] This reasoning has been reflected in court decisions in other jurisdictions in which international organizations' immunities have been contested.[92] A range of alternative means of remedy have been proposed in the development financing context, including establishing a "super IAM" for multilateral development banks.[93] Pending further debate on such proposals, the strengthening and closer alignment of IAMs with the Guiding Principles on Business and Human Rights' effectiveness criteria (annex II),[94] and ensuring that IAM processes more explicitly and effectively lead to remedy, may alleviate concerns about excessive legal liability exposure and enhance the scope for win-win outcomes in practice.[95]

6

BOX 6
LENDER LIABILITY AND DUE DILIGENCE

DFIs have sometimes expressed concerns that their proactive environmental and social due diligence practices and/or willingness to contribute to remedy may in fact expose them to increased legal liability risks. There is very little jurisprudence directly on the potential legal liability exposure of DFIs; however, a study in 2021 of commercial lender liability regimes in the United Kingdom and the United States, as well as in the European Union and Hong Kong, China, among several other jurisdictions, suggests that: (a) lender liability for environmental and social impacts is limited in the jurisdictions surveyed; and (b) broader proactive due diligence would not be likely to increase liability risks and in fact may reduce them.[96]

In 2019, the former Chief Executive Officer of IFC, Philippe le Houérou, remarked: "We must nurture a culture in which we react proactively to fix problems. We will be more transparent about what went wrong in the first place. When we make a mistake, we will own it, and we will do our best to rectify the problem. I pledge that we will learn faster from failure."[97] In a similar vein, the external review of IFC/MIGA remarked that uncertainty associated with the *Jam* litigation was "incidental to a broader shift in sensitivity to the imperative of identifying and mitigating E&S risks (and where appropriate, remedying consequential harms). As institutions, IFC/MIGA/CAO should not let the litigation tail wag the dog of effective E&S risk management."[98] In the view of OHCHR, the above comments help to put concerns about litigation risk in perspective and set the kind of tone that may encourage more proactive and effective approaches to remedy by DFIs across the board.

E. CONCLUSIONS ON RIGHTS AND REMEDY

The idea of remedy has a clear definition and long pedigree in the human rights field and has been gaining increasing traction in the development field. Remedy can take many forms and, theoretically, can make important contributions to the sustainable development mandates and operational objectives of DFIs. The human rights conception of remedy has a lot in common with good development practice and places particular importance on human agency, transparency, limiting offsets and addressing discrimination and power imbalances, among a handful of other factors. Normative developments in the business and human rights field have stimulated a range of important initiatives concerning remedy in the finance sector and social expectations are rising.

However, the topic of remedy is still treated as a relatively new one for many DFIs and practice is uneven at best. There are many reasons for this state of affairs, as will be discussed in more detail in the next chapter, and progress has not been helped by overly defensive reactions in some quarters to the *Jam* case in the United States. Litigation risk against DFIs is context-dependent but in general terms, in the view of OHCHR, is best addressed through rigorous due diligence, a greater focus on prevention,[99] more effective IAMs and more proactive involvement by DFIs in remedy.

I. STATE OF PLAY ON REMEDY IN DEVELOPMENT FINANCE INSTITUTIONS



World Bank Inspection Panel

KEY MESSAGES

- DFIs have numerous tools in their toolbox and have contributed valuably to remedy in many cases. However, data on remedy outcomes are generally inadequate, and in situations in which serious grievances are concerned, timely and effective remediation frequently does not happen.
- Challenges to remedy include gaps and lack of clarity in DFI and IAM mandates, capacity and commitment gaps, disagreements among the parties about their respective responsibilities, shortcomings in transparency, and the absence, inaccessibility or ineffectiveness of GRMs.
- Inadequate due diligence, consultation and information disclosure are the most common causes of complaint to IAMs in practice and are closely associated with poor development outcomes.
- DFIs often have a range of institutional GRMs that serve different purposes (including IAMs to address environmental and social harms, whistle-blower lines for corruption and grievance redress services). Comprehensive public reviews of the GRM architecture of DFIs could improve interlinkages and efficiency and enhance access to remedy for project-affected people.

DFIs have a wide range of policy requirements and processes to guide and support clients to redress harms arising in connection with investment projects. The functioning of these processes will be discussed in more detail later in the publication, including the following elements:

- Applying a mitigation hierarchy that requires clients to compensate for harms in situations in which they are not able to prevent or mitigate them.
- Carrying out, and ensuring that clients carry out, rigorous due diligence in order to identify risks and develop plans to prevent, mitigate and, if necessary, compensate for impacts.
- Requiring clients to take corrective action to address harms, which can include specific remedies for specific people.
- Requiring clients to establish GRMs at the project level as a first line of action on remedy.
- Putting in place institutional GRMs in DFIs, including, most importantly, IAMs.

DFIs have contributed to effective remedy in numerous contexts (see, e.g., boxes 5 and 7). Routine project monitoring and supervision may address a potentially wide range of environmental and social concerns.[100] For relatively serious cases with potential human rights implications, IAM processes have led to a wide range of positive responses and impacts in practice, including better consultation, full compensation for harms, improved social services, independent monitoring of remedial action plans, accelerated compensation procedures for those most at risk,[101] enhanced GRMs, improved livelihood support programmes targeting vulnerable groups, return of land, suspension of project construction to allow suitable arrangements for resettlement, strengthened client capacity to manage complaints[102] and setting up biodiversity offsets, among many other actions.[103] However, practice is uneven, and timely and effective remediation frequently does not happen.[104]

In order to understand more clearly the state of play on remedy in development finance, it is important to have a more concrete idea about where the boundaries of achievement and major shortcomings in the performance of DFIs currently are. The discussion below offers an overview of the kinds of concerns that have arisen in connection with DFI-supported projects and contributed to adverse human rights impacts in practice. Then, we consider the main issues arising from complaints to IAMs, based on reports from the global Independent Accountability Mechanisms Network and civil society organizations. These overviews provide a foundation for the analysis in the remainder of the publication on how barriers to remedy can be overcome, and how leverage can be exercised to enable remedy more consistently and effectively in practice.

A. TYPOLOGY OF CONCERNS IN PROJECTS FUNDED BY DEVELOPMENT FINANCE INSTITUTIONS

Before analysing shortcomings, it is instructive to think about what good practice looks like. The World Bank's remedial action plan for gender-based violence in Uganda (see box 7 below) provides a striking illustration of the potential scope and strength of the remedial responses of DFIs in practice, spanning recognition (through public statements at the highest level of the Bank, accepting responsibility and proposing solutions), compensation, rehabilitation and support for structural change within the Bank and at country level. The case also highlighted the critical roles that IAMs and civil society play in identifying problems and solutions, supporting and monitoring the implementation of remedial action plans and supporting people to claim and access remedy.[105]

The Uganda action plan was the product of strong civil society mobilization and media attention, which are not present in the ordinary run of cases. As important as this case is as an example of remedy, it is important to remember that some harms, such as physical and psychosocial trauma from gender-based violence, are often irremediable. This case also underscores the importance of ensuring that non-repetition is an integral part of remedy, through the integration of lessons learned into practice, so that future harms of a similar kind are prevented.[106]



UN Photo/Marie Frechon

BOX 7
WORLD BANK AND GENDER-BASED VIOLENCE IN UGANDA – A COMPREHENSIVE APPROACH TO REMEDY

The World Bank-supported Uganda Transport Sector Development Project[107] gave rise to numerous serious human rights concerns, including sexual assault of women and girls, school dropouts following pregnancies, the spread of HIV/AIDS, sexual harassment of women employees and child labour, among others. Following an investigation by the World Bank's IAM, the Inspection Panel,[108] the Bank cancelled the project and suspended all lending to Uganda pending reform of the country's systems for implementing the Bank's environmental and social safeguards. The Bank's management report and recommendations recognized multiple failures that had contributed to adverse impacts on local communities and lessons were documented subsequently by the Bank and the Inspection Panel.[109] The project offers important learning on how to address human rights risks in complex operating contexts and, in situations in which such risks are not identified and addressed, how DFIs can contribute to remedy. The remedial measures were wide-ranging and included:

- Mobilization of $1 million from the Bank's rapid social response trust fund to support the implementation of the Government's early childhood protection response programme, to support survivors of sexual abuse in the road subsector in Uganda, including psychosocial, medical, education, legal and livelihood support services, and strengthening GRMs.[110]

- Mobilization of an additional $670,000 from the same trust fund for the Supporting Children's Opportunities through Protection and Empowerment Project, which supported improved child protection efforts in the two districts in which the Transport Sector Development Project had originally been implemented.[111] (The Bank also subsequently approved a $40 million loan by the International Development Association (IDA) to the Government to implement a project addressing gender-based violence across the country but Parliament refused to approve it.[112]

- The establishment of a global gender-based violence task force to strengthen the Bank's capacity to identify risks pre-emptively, conduct more robust gender assessments, improve approaches to raising awareness about gender-based violence, equip task teams to take more assertive action to prevent gender-based violence and develop a good practice note on gender-based violence.[113]

- Numerous investigations and reviews, including of child protection in the entire portfolio, a review of best practices in dealing with labour influx, and encouragement by the Bank that all allegations of sexual misconduct be investigated and prosecuted, retaliation against complainants be prohibited, and that the Government adhere to international social and environmental standards.

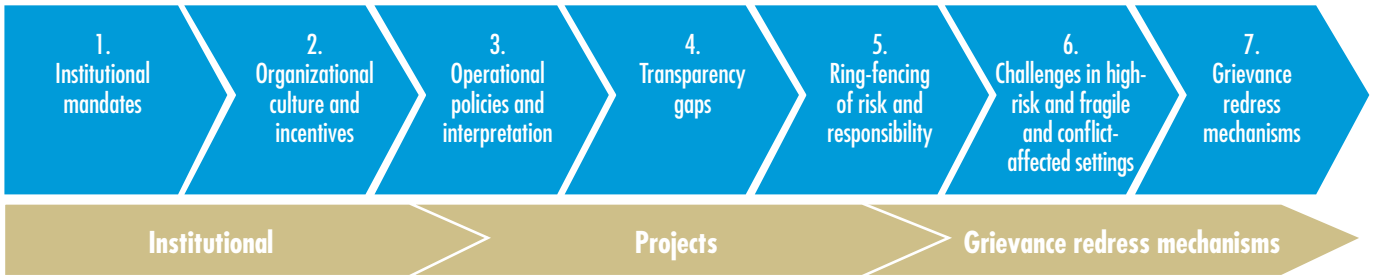
- Technical assistance to the Uganda National Roads Authority, the implementing agency for the project, helping it establish itself as a leader in addressing sexual exploitation and abuse and environmental and social issues generally. This has reportedly had positive impacts beyond Bank-supported projects, so that projects implemented by the Road Authority financed with funds from other donors are also implemented at a higher standard.

- Revision of standard bidding documents to include particular conditions of contract relating to the prevention of sexual harassment and child labour, the promotion of community engagement, and adequate grievance redress and bidder requirements to disclose any suspension or termination of earlier projects due to environmental or social safeguard non-compliance, including sexual exploitation and abuse.

- Piloting an environmental and social performance bond for its civil works that could be cashed by the contracting entity should a contractor fail to remedy cases of environmental and social non-compliance. The bond would normally not exceed 10 per cent of the contract amount, and be cashable based on failure to comply with the engineer's notice to correct defects. However, the use of this mechanism is at the borrower's discretion and the extent to which it has been implemented is unclear.[114]

- Exclusion of contractors who fail to adhere to the Bank's policies on preventing gender-based violence from bidding on its projects for a two-year period.[115] This sets an important precedent of extending the sanctions regime (currently for anti-corruption) to other egregious behaviour. There is ongoing discussion about establishing a sanctions regime excluding companies from bidding if they have been involved in other severe violations of environmental and social standards.

Just as there are many ways in which DFI-supported projects can improve environmental and social conditions, there are also many ways in which they may contribute to social and environmental harms and present obstacles to remedy in practice, including gaps and lack of clarity in DFI and IAM mandates, risk aversion, capacity constraints and disagreements among DFIs, IAMs and clients about their respective responsibilities. Clients may be unwilling or unable to take corrective action, their GRM may be non-functional or the concerned DFI may be unwilling or unable to commit to and implement measures that address complainants' grievances even in situations in which its IAM has made non-compliance findings in relation to the harms complained of.[116] In order to help contextualize and analyse remedial responses, it is useful to look at documented shortcomings at key points along the DFI value chain, from institutional mandates and incentive structures through to operational policies and GRMs.



1. Lack of clarity in institutional mandates

DFI mandates define institutional objectives and guide operations. There is legitimate diversity in such mandates although most if not all support sustainable development or poverty reduction in one form or another, and many express a threshold commitment to "do no harm" (see box 8). "Do no harm" commitments are typically expressed in sustainability policies or frameworks that apply to the institution itself. However, institutional commitments to sustainability, poverty reduction or the Sustainable Development Goals should be seen as complementary to, and not detract from, the commitment to do no harm. As was noted in the external review of IFC/MIGA: "It must be understood that even investments/projects/guarantees that appear to have overall highly developmental outcomes will be regarded as failures when local communities do not benefit from them, or, even worse, suffer harm from them."[117]

Moreover, the logical counterpart of the "do no harm" principle – the recognition that all harms should be remedied – is rarely if ever clearly articulated in DFI mandates. Where "do no harm" commitments are not accompanied by actionable requirements and adequate guidance, impacts are externalized, often to those most marginalized. As has been noted elsewhere, "this situation violates classical market theory by allocating risk to those in the market least able to bear it".[118] In 2000, the World Commission on Dams drew a distinction between "voluntary risk takers" (those who voluntary take on risks and have risk management systems in place for this purpose) and "involuntary risk bearers", who have no choice but to bear risks and are obliged to bear the consequences.[119] This is a particularly salient distinction to bear in mind in the present context, grounding the right to remedy within considerations of agency and morality.

2. Organizational culture and incentives

Organizational culture is the collection of values, underlying beliefs and practices that drive organizational behaviour.[123] Cultural changes in institutions are difficult to achieve, but when a tipping point is reached the changes can be profound. The World Bank's anti-corruption drive is a good example. Former World Bank Group president Wolfensohn famously (and frequently) remarked that when he arrived at the Bank in 1995, no one would even use the "C word" (for corruption). However, by the time of his departure in 2005,

8 BOX 8
EXAMPLES OF THE MANDATES OF DEVELOPMENT FINANCE INSTITUTIONS TO "DO NO HARM"

"Central to IFC's development mission are its efforts to carry out investment and advisory activities with the intent to 'do no harm' to people and the environment, to enhance the sustainability of private sector operations and the markets they work in, and to achieve positive development outcomes. IFC is committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that renewable natural resources are managed sustainably."[120] "IFC strives for positive development outcomes in the activities it supports in developing countries. … IFC believes that an important component of achieving positive development outcomes is the environmental and social sustainability of these activities."[121]

"The IDB is committed to the objective of 'do no harm' to people and the environment for the projects it supports by promoting the establishment of clear provisions for effectively managing project-related environmental and social risks and impacts, and when feasible, facilitating the enhancement of social and environmental sustainability beyond the mitigation of adverse risks and impacts."[122]

combating corruption was accepted as a core part of the Bank's work and it has remained so.

The remedy conversation is not new to DFIs although, in the context of social safeguards, it has mostly been focused on resettlement and to some extent labour issues. By analogy with the World Bank's anti-corruption agenda, the rekindling of a broader conversation on remedy among DFIs now may be a sign of shifting attitudes. Central to such a shift will be strong leadership, clear communication and the need to see complaints not simply as a source of reputational risk to the institution, but as a source of learning and a prerequisite for improved performance and accountability. Similarly, strong leadership and clear communication are needed to offset the dominant incentives within many DFIs wherein success is often measured more by loan volume or short-run financial returns rather than whether investments minimize environmental and social impacts and are sustainable.[124] Incentives should be provided to DFI staff and management to focus on sustainability of investments in line with DFI safeguard policies, and managers and staff should also be rewarded (or, at least, not penalized) for not proceeding with investments that entail unacceptably high environmental and social costs.[125]

Connected to, and reflecting, the incentives problem is the question of what counts as success. There has been a lot of investment in how to measure the positive impacts of DFI-supported projects on people and the environment,[126] but considerably less when it comes to measuring the value of avoided negative impacts and, conversely, the positive benefit of complying with safeguards. Development impact metrics may measure the number of jobs created, for example, but not necessarily whether they were decent jobs free of labour rights violations reflected in safeguards.[127] Even in areas in which the avoided risks may be easier to identify and quantify, such as in the context of resettlement, it seems that this is not often done in practice.[128] In a similar vein, the 2020 evaluation of the effectiveness of the 2009 ADB Safeguard Policy Statement found that "only 65% of project reports provided evidence of environmental and social outcomes having been achieved through risk reduction and satisfactory implementation of mitigation and compensation".[129] The few attempts to quantify the cost of social conflict around projects suggest that costs may be very significant.[130] However, their impact upon the ordinary run of cost-benefit analyses is not clear.

3. Lack of clarity in operational policies and inconsistent policy interpretations

An increasing number of safeguard policies address human rights risks and requirements specifically[131] (see box 4 above, on the new IDB safeguards). However, there are often significant policy gaps, weak commitments and ambiguities affecting access to remedy, and insufficient guidance on how to balance operational flexibility with consistency and predictability.[132] For example, the requirements to remediate to the extent "financially feasible" or "appropriate" can lead to a wide range of outcomes for similarly situated complainants.[133] The scope of covered social risks is sometimes limited[134] and unduly restrictive interpretations of a project's "area of influence" or "associated facilities" or "cumulative impacts" may unjustifiably exclude project-affected people from safeguard consultation and protection and exclude higher-risk components from the project's scope.[135]

The transition from compliance-based approaches to more flexible, downstream risk management entails particular challenges, as noted by the ADB Independent Evaluation Department: "moving from a procedurally focused framework to one that emphasizes progressive realization of higher-level principles and objectives will not make safeguards management simpler. It will depend more on judgment, not only of staff and management among lenders and borrowers, but also of the accountability mechanisms as they redefine what compliance means in practice."[136] Downstream, progressive risk management requires particularly strong investment in project monitoring and supervision, yet these are among the more common shortcomings in the safeguard performance of multilateral development banks to date.[137] With respect to remedy, this trend raises the concern that the appropriate time to consider remedy may be postponed indefinitely; negative impacts may be seen as part of ongoing implementation, and thus never crystallize as human rights violations warranting immediate remedial action. These and other apparent shortcomings are discussed in more depth in chapter II.

4. Transparency gaps

Transparency is the starting point and foundation stone for accountability and remedy.[138] Early disclosure plays an important role in remedy because it enables the identification of risks and project-affected people, improves project design, informs remediation options and helps equalize power imbalances.[139]

9

BOX 9
INTERNATIONAL ACCOUNTABILITY PROJECT AND THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW "EARLY WARNING SYSTEM" FOR COMMUNITIES

Using DFI planning information in Asia and Africa, local communities and the organizations that support them use an early warning system founded by the International Accountability Project and the Center for International Environmental Law. The system enables access to verified information about proposed projects from 13 DFIs that are considered likely to affect the environment and human rights. The system makes detailed data visible and usable and is intended to help improve project design and anticipate problems, before communities are in a situation of crisis. It stimulates advance community engagement and work upstream with the relevant DFIs prior to the commencement of projects.[140]

Shortcomings in consultation and disclosure of information are a common cause of complaints to IAMs.[141] The lack of any contractual requirement for clients to disclose the existence of IAMs to affected communities, and the lack of DFI verification requirements in this regard, mean that many problems are likely not being identified and addressed.[142] While DFIs may perform better than many other organizations on transparency, there is considerable variation among them, and between bilateral and multilateral DFIs more generally. For example, a recent review of the transparency policies and practices of 20 DFIs found that: "Only half of the bilateral DFIs … routinely disclose the E&S risk categorisation of their investments/projects … only two … provide a publicly available summary of the E&S risks of their investments on a project basis [and] … only two disclose E&S assessments or plans".[143] By contrast, 7 of the 11 multilateral DFIs under review disclosed environmental and social risk categorization, and summaries of environmental and social risks are more commonly disclosed. Disclosure of environmental and social assessments was also better among multilateral DFIs: five reportedly disclosed such information systematically, three did so "in some but not all cases", while one did not do so at all.[144] The variable availability and accessibility of project-related documentation precludes systematic analysis of remedial action plans.[145] Many IAMs report annually on outcomes, but practice is uneven and rarely does one see detailed analysis of remedy themes. Given these factors, it is not surprising that our understanding of the role of DFIs in relation to remedy is so fragmented and embryonic.

Disclosure policies typically do not include disclosure requirements concerning actions taken to address non-compliance. DFIs generally do not provide any indication in publicly accessible project documentation of whether the project in question has been subject to a complaint to a IAM, nor do they generally provide a direct link to management responses (management action plans) to IAM findings of non-compliance in compliance reviews. Some IAM sites provide ready access to management action plans,[146] while others do not. Management action plans and the monitoring thereof are intended to help DFIs and clients correct course and achieve safeguard compliance and hence, in the view of OHCHR, they should routinely be published as a core part of the project documentation.

There also appears to be variation in disclosure for public sector versus private sector projects.[147] Public sector projects are usually based on longer term time frames with multiple avenues for public input, whereas private sector clients typically operate on shorter time frames and seek financing later in the project cycle. Commercial confidentiality may be a particular concern for private sector companies and publicly traded companies may be subject to legal restrictions on the content and timing of disclosure. However, blanket exemptions are difficult to defend given the amount of information routinely made available by companies to subscription services.[148] Recent commercial banking transparency initiatives and the recent commitment by IFC to disclose further information on financial intermediary projects send signals that attitudes, practices and legal interpretations may evolve and are not immutable.[149]

5. Ring-fencing of risk and responsibility

An evaluation in 2020 of the ADB safeguards called attention to a practice wherein the institution assumed responsibility only for relatively low-risk components of a larger development scheme, leaving responsibility for related activities to development partners with weaker safeguard requirements or capacities (see box 10 below). This kind of practice has arisen in numerous DFIs and appears to relate to questionable interpretations of the terms "associated facilities" and "cumulative impacts", which determine the scope of application of DFI safeguards. The culture of limiting the application of safeguards in order to avoid risk or IAM procedures may not only cause a DFI to miss opportunities to improve projects,[150] but may lead to inconsistent outcomes that may exacerbate conflicts on the ground between those who benefit from the application of safeguards and those who do not.

10 BOX 10 EXAMPLES OF RING-FENCING OF RISK AND RESPONSIBILITY OF PROJECTS FUNDED BY DEVELOPMENT FINANCE INSTITUTIONS

A recent evaluation of ADB safeguards noted the following examples of ring-fencing within projects to avoid the application of its safeguards.

"The Sustainable Highlands Highway Investment Program and Highlands Region Road Improvement Investment Program selected sections of the highway and rural roads in areas where resettlement was minimal, leaving the urban or more densely populated road sections such as the roads in Mount Hagen city (which adjoin the project roads) to other development partners (e.g. Exim Bank of China) and to contractors that did not have to abide by the safeguard requirements of ADB. Selecting less complicated segments for ADB financing, limits complexities of applying safeguards but also reduces the value of ADB's contribution and delays development effectiveness until the higher-risk urban portions have been completed, which in effect makes them linked or associated facilities."[151]

"A housing MFF [multitranche financing facility] in Uzbekistan illustrates how safeguards have been avoided and minimized in order to avoid addressing the environmental and social issues within ADB projects. The project was categorized C for environment and resettlement. To ensure compliance with this risk category, any housing sites identified with possible environmental impacts were ineligible for ADB financing under the MFF. Those sites were funded by the government with its own resources. Since the government program as a whole had potentially higher safeguard risks, the exclusion criteria resulted in a missed opportunity to build safeguard capacity within Uzbekistan's implementing agencies. Furthermore, the narrow interpretation of safeguards under the MFF meant that, while the individual houses were technically well built, little attention was paid to developing these housing enclaves as a community. Broader social and environmental effects (e.g. cumulative effects such as the need for sewage, or for playgrounds or community centers) were not included in the design, even though in a few cases settlements of up to 1,000 houses were ultimately developed at individual locations, generating substantial cumulative impacts."[152]

6. Challenges in high-risk sectors and fragile and conflict-affected situations

Due diligence is intended to identify and address risks shaped by the particular project's operating context. Across all IAMs, infrastructure projects have given rise to the most claims to date,[153] given recurring concerns relating to resettlement,[154] land access and use, and stakeholder engagement.[155] National laws governing these issues are frequently weaker than multilateral development bank standards, and an evaluation of ADB safeguards in 2020 noted that: "Modifications to national regulations in some [client countries], motivated by governments' desire to expedite infrastructure development, has [*sic*] undermined the strengthening of national systems."[156] Repeated harms of this kind have on occasion triggered industry initiatives or sector-wide regulatory responses, such as the World Commission on Dams, the Extractive Industries Review and the palm oil review, as well as policy instruments, such as exclusion lists and more detailed safeguard requirements. The fact that serious harms in these sectors continue with such frequency strengthens the argument for new, more proactive and innovative approaches to remedy.

The barriers to remedy are particularly high in fragile and conflict-affected situations, exacerbated by the COVID-19 pandemic, as was noted previously. The application of safeguard policies in emergency settings differs across multilateral development banks and even in situations in which ordinary safeguards do apply, they may fail to factor in contextual (including human rights and conflict-related) risks.[157] Under the World Bank Group Strategy for Fragility, Conflict and Violence 2020–2025, IFC and MIGA "will give due consideration to any potential adverse impacts on the community that are likely to subsist (from the project) at the time of exit", but States (perhaps controversially) that project failures in fragile and conflict-affected settings "should be handled as much with a learning perspective as with an accountability lens".[158] Authoritarianism and oppression have increased in many countries, along with harassment and threats against environmental and human rights defenders. Restrictions on movement present increased challenges for complainants and have sometimes been invoked by Governments, disingenuously, to avoid or abridge public consultation processes. Anonymity can be especially important for complainants in such contexts, along with closer collaboration by DFIs with complainants' representatives and civil society organizations, and flexibility in IAM procedures.

7. Access to and effectiveness of complaint mechanisms

Access to effective GRMs remains one of the biggest concerns of project-affected communities. "Access" depends on a range of factors such as transparency of project information, timeliness of responses, eligibility requirements to have complaints heard, resource constraints, and retaliation policies and protections. Project-level GRMs are intended to offer complainants low-cost, accessible remedy options, but these mechanisms are not always operational or effective. Access to IAMs varies as discussed in chapter III (sect. B) and annex II. Concerns have been documented about the high rate of attrition at each stage of IAM processes[159] and increasing intimidation, harassment and reprisals faced by complainants. To address these issues, there is a need for further capacity-building for clients on their GRMs, improved access and a clearer, contextualized understanding of the comparative strengths, weaknesses and interrelationships between different components of the remedy ecosystem, and more dedicated support for judicial and non-judicial remedy systems at the country level.

DFIs have a range of other means and mechanisms to address project-related grievances as well, from board members to evaluation and audit departments, grievance redress services and administrative tribunals (see annex III). However, there is rarely a single entry point for complaints: there may be one window for procurement complaints, one for access to information, another for whistle-blowers, another for environmental and social harms, and so forth, without adequate cross-referencing or internal coherence. Each typically has its own scope, forms and procedures that may not be adequately communicated to complainants, and the various mechanisms may not provide equivalent levels of due process and protection. Taken with other GRMs at the project and national levels, this may lead to confusion in complainants' minds and perhaps also a feeling that "if everyone is responsible, nobody is".

In order to address these concerns, DFIs should consider reviewing their overall GRM architecture in order to understand whether and how the pieces fit together, to improve access and remedy for project-affected people. DFI-wide referral procedures for informal and formal complaints would be useful, along with tracking mechanisms, given the many channels through which complaints may arrive (e.g. through the project team on the ground, the civil society organization liaison department, board members and so forth). Civil society organization liaison teams may be the default entry point, or alternatively early warning/rapid response teams, but in either case they must be given the mandate, authority and resources to engage effectively with operational teams. Experiences in establishing such teams in multilateral development banks have been mixed, however, and will not likely succeed if the dominant incentives of operations or investment teams are to avoid risk and push large projects to closure.

A number of DFIs track complaints that IAMs have deemed ineligible but that nonetheless raise substantive issues relevant to DFI operations, which is a good practice on which to build (see box 11 below). Greater attention could also be given to learning lessons across various kinds of internal mechanisms; for example, on how reprisals protection is approached by IAMs and integrity departments and to benchmarking the effectiveness of GRMs in accordance with the Guiding Principles on Business and Human Rights (see annex II). This is part of a larger lessons learning agenda being addressed by IAMs in different ways,[160] but which, in the view of OHCHR, deserves higher priority within DFIs.

11 BOX 11
GOOD PRACTICE – TRACKING INELIGIBLE COMPLAINTS

Rather than losing track of ineligible complaints altogether, the ADB Compliance Review Panel (its IAM) records the measures taken to address the concern(s) raised by complainants and the lessons the institution has learned and will apply in the future. At the end of the process of addressing the ineligible complaints forwarded to the operations departments by the mechanism, the operations department produces a report summarizing the complaint, issues, actions taken to address the problems or issues, decisions or agreements by parties concerned, results and lessons.[161]

12 BOX 12
GOOD PRACTICE – GUIDANCE AND TOOLS ON PROTECTING COMPLAINANTS

- Tove Holmström (for the Independent Consultation and Investigation Mechanism), *Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management: A Practical Toolkit* (Washington, D.C., IDB, 2019).
- Coalition for Human Rights in Development, *Uncalculated Risks: Threats and Attacks against Human Rights Defenders and the Role of Development Financiers* (2019).
- Bennett Freeman and others (for Business & Human Rights Resource Centre and International Service for Human Rights), *Shared Space under Pressure: Business Support for Civic Freedoms and Human Rights Defenders – Guidance for Companies* (2018).[162]

Finally, complainants have also expressed concerns that the non-binding nature of the recommendations of IAMs weakens the incentives for implementation and presents a barrier to remedy. Binding and enforceable recommendations, it is argued, may bring significant benefits for the institutional integrity of DFIs, legitimacy and consistency in decision-making. IAM procedures (imposed by DFI executive boards) generally include due process requirements, such as fair hearings, the right to present evidence, evidentiary standards, timelines for concluding various stages of the process and the ability to comment on reports.

This is not a straightforward question. A counter-argument, from a good governance point of view, is that it should be up to DFI boards to accept or reject IAM recommendations given the latter's direct "duty of care" to stakeholders and oversight responsibilities. However, DFI boards are by definition political bodies and are less constrained by due process requirements and generally do not give reasons for disagreeing with IAM recommendations. Too often, boards have been known to reject or alter IAM recommendations on the basis of "political" or extraneous considerations, which may undermine the institution's legitimacy and the predictability and integrity of decision-making.[163] Absent more far-reaching structural changes to DFI boards, more specific guidelines for board decisions would be useful, as GCF has proposed.[164]

On this issue, it is worth noting that other parts of DFI accountability architectures do sometimes have enforcement power. For example, administrative tribunals are independent mechanisms that issue final decisions that bind DFIs. Integrity departments may disbar companies and individuals from doing business with DFIs for a specified period and do so in a public way, listing disbarred entities on their website.[165] An agreement in 2010 on mutual enforcement of disbarment decisions among ADB, AfDB, IDB, EBRD and the World Bank Group provides an interesting of example of DFIs exercising leverage collectively to address risks and harms from corruption.[166] Integrity departments may also require restitution of funds for corruption,[167] which may be an interesting precedent when thinking about remedy and the powers of IAMs. Complainants have also expressed frustration at the lack of any formal appeals process for non-compliance with IAM recommendations. Appeals processes available under the access to information policies of some multilateral development banks may serve as inspiration in this regard.

However, in approaching this question, it is important to consider the kinds of recommendations IAMs are competent to make. The roles and skill sets of IAMs are different to those of operational teams. IAMs are not involved in operations and may not understand all operational details, although they may indeed come to know some of the project detail better than operations teams by the time a compliance investigation has reached a conclusion. In the view of OHCHR, binding and enforceable decision-making by IAMs may strengthen accountability, integrity and institutional legitimacy, but in drawing the boundaries one should be careful to avoid any implication that IAMs should step into the shoes of DFI management or project teams.

B. TYPES OF COMPLAINTS ARISING IN PRACTICE

It is difficult to understand the full spectrum of concerns of communities and workers about DFI-funded projects in practice, given shortcomings in data collection and reporting on complaints and environmental and social outcomes, the underutilization of GRMs, and personal security risks and other barriers to freedom of expression in many national contexts. The analysis below focuses upon complaints filed with IAMs, although this cannot be taken as a proxy for the full range of project-related concerns.[168] Figure II shows the subject matter of recorded complaints (1,395 in total) filed with 19 IAMs until 14 April 2021, using a tagging system developed by the Accountability Console.[169] Figures III and IV list the main concerns reflected in reports produced by a group of civil society organizations[170] and the global Independent Accountability Mechanisms Network, dated 2016 and 2012 respectively.

These compilations only look at cases referred to IAMs; their methodology and focus are not identical and their coverage of "social" issues is limited by the scope of the various DFI safeguards. They do not consider concerns raised through other avenues, including DFI country teams directly, project-level GRMs, board members, local and national governments, other IAMs, or judicial or non-judicial mechanisms. Subject to these caveats, nevertheless, the three analyses show that inadequate due diligence and consultation[171] have been the main concern of most complainants to date, along with the substantive adverse social and environmental impacts caused.[172] Similarly, a recent independent study of 394 IAM complaints between 1994 and 2018 showed that 49 per cent of complaints alleged inadequate information disclosure and/or lack of consent, and that two of the three most common areas of non-compliance were in relation to environmental and social impact assessment and information disclosure.[173]

The individual assessments of IAMs support these findings. In 2017 the World Bank's Inspection Panel noted that of the 120 requests for inspection that it had received since its inception in 1993, 106 involved the interconnected issues of consultation, participation and disclosure of information.[174] The ADB Accountability Mechanism has noted that: "In virtually all cases, the complaints have alleged inadequate consultation and participation. This was also one of the findings in a thematic evaluation study of ADB's safeguard implementation experience conducted by [its Independent Evaluation Department] in 2016."[175] Similarly, the EBRD accountability mechanism has found that most complaints relate to the identification, assessment and management of environmental and social impacts at an early stage of project design, along with poor information disclosure.[176]

Figure II

Classification of concerns raised in complaints to independent accountability mechanisms – all complaints (March 2020)[177]

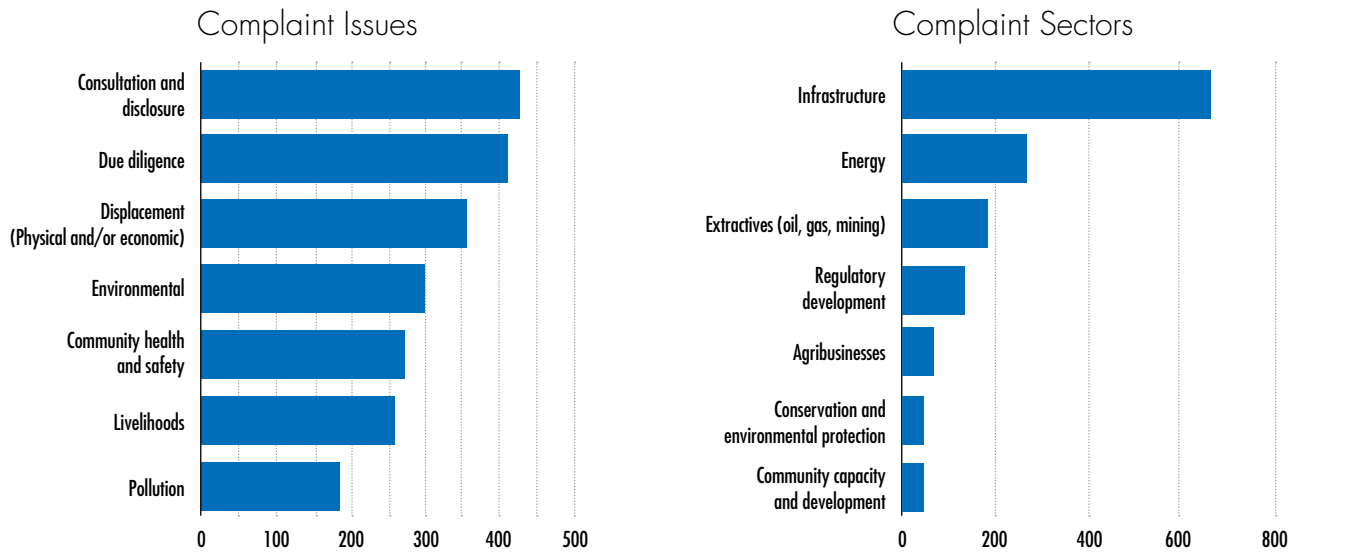


Figure III

Classification of concerns raised in complaints to independent accountability mechanisms, as identified in *Glass Half Full? The State of Accountability in Development Finance* (www.somo.nl/glass-half-full-2)

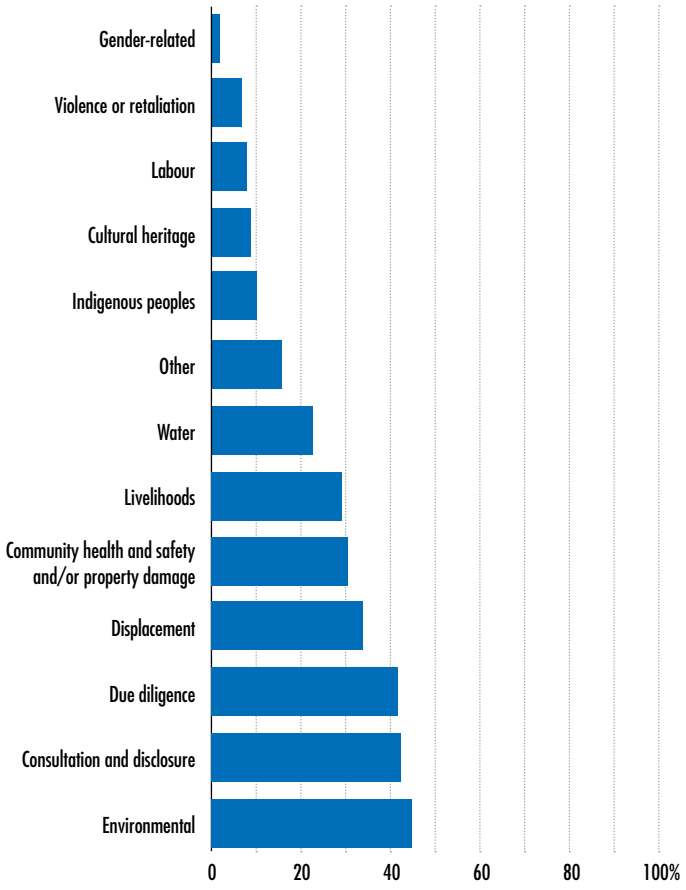
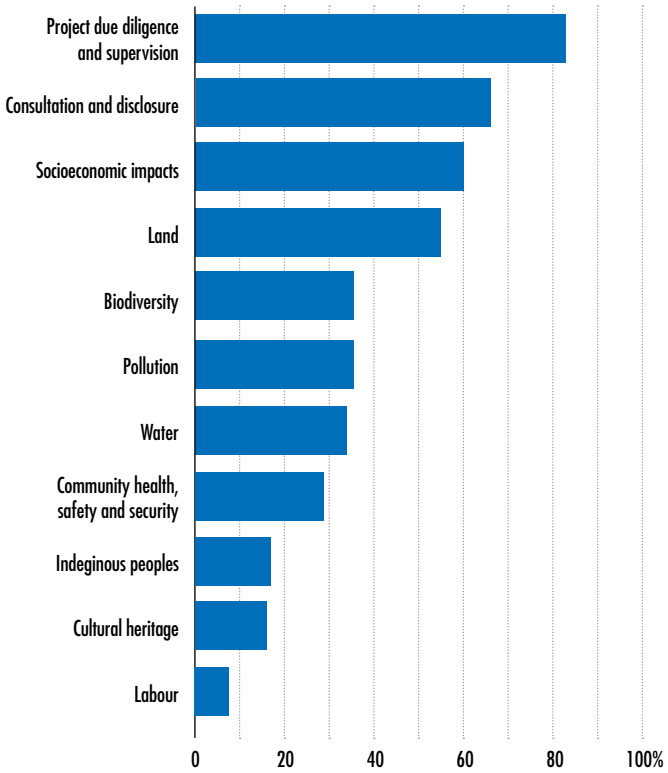


Figure IV

Classification of concerns raised in complaints to independent accountability mechanisms, as identified by the Independent Accountability Mechanisms Network (2012)[178]



Stakeholder engagement is fundamental to remedy for a range of reasons: (a) active, free and meaningful participation is a human right; (b) participation signals to stakeholders that their concerns are being taken seriously, and therein has symbolic as well as practical importance; (c) early participation helps identify concerns at the design stage and thus serves a conflict prevention role, helping to avoid escalation and irremediable impacts, and (if needed) enables the identification of project alternatives; (d) participation has important implications for who is and who is not covered by planning and thus helps to define the scope of remedial actions that must be taken later on; (e) it is difficult to remedy a failure to carry out consultations, apart from stopping activities in order to start consultations, which can be expensive and impractical and generate frustration and grievances; and (f) participation is the starting point for addressing grievances, as reflected in self-standing stakeholder engagement standards in newer safeguards (see box 13).[179]

C. CONCLUSIONS ON THE STATE OF PLAY

DFIs have numerous tools in their toolbox and have contributed valuably to remedy in many cases. However, data on remedy outcomes is generally inadequate and in situations in which serious grievances are concerned, timely and effective remediation frequently does not happen. Challenges to remedy include gaps and lack of clarity in DFI and IAM mandates, capacity and commitment gaps, disagreements among the parties about their respective responsibilities, shortcomings in transparency and the absence, inaccessibility or ineffectiveness of GRMs.

Addressing the concerns of communities and workers is as much about process (due diligence, consultation, information disclosure) as it is about substantive outcomes. This should be good news for DFIs as these factors are more readily within their control. Admittedly, achieving consistently better outcomes requires attention to a range of DFI-specific factors, including strong leadership, organizational culture change, critical thinking about business models, policy and procedural changes and capacity-building within DFIs and clients, among others. But, as the track record of complaints to DFIs bears out, improving due diligence, consultation and information disclosure are essential to achieving better remedy outcomes in practice.

From the point of view of remedy, it is also important to know what has been promised during the course of public consultations. DFIs should ask that their clients provide a clear list of commitments made during consultation processes, which could be reflected in third-party beneficiary clauses in legal agreements (see chap. III, sect. A.2(a) and box 22 below). Practice needs to move beyond simply assessing whether a client has carried out necessary consultation, to whether the consultations have been effective in responding to stakeholders' concerns.

13 BOX 13 STAKEHOLDER ENGAGEMENT IN MULTILATERAL DEVELOPMENT BANK SAFEGUARDS

The latest generation of multilateral development bank safeguard policies generally contain explicit, self-standing standards on stakeholder engagement. Examples are EBRD, EIB, IDB, IDB Invest and the World Bank. On 10 December 2020, Human Rights Day, EIB published a new guidance note on stakeholder engagement in EIB operations.[180] Informed by the Guiding Principles on Business and Human Rights, the EIB guidance note contains a categorical requirement for consultation with communities in the design of GRMs in projects in all risk categories (rather than being limited to high-risk projects), a strict requirement that remedies be based upon dialogue with claimants and provisions on disability inclusion, indigenous peoples' rights and protection against reprisals.

II. SAFEGUARD POLICIES AND REMEDY



Joe Athialy/Rewa Images

KEY MESSAGES

- The safeguard policies of DFIs play a critical role in enabling, or restricting, access to remedy in practice. However, shortcomings in these policies may include: the lack of a clear requirement that all adverse impacts from a project should be remedied; restricted scope of remedy; insufficient focus on outcomes in delivering remedy; inadequate consideration of contextual risks; and gaps in relation to GRMs.

- There is a tendency in safeguards to conflate "do no harm" requirements with aspirational sustainability commitments. However, respecting human rights, or "doing no harm", is a foundation stone for sustainability and can itself be transformative.

- There are particularly significant remedy gaps that need to be addressed in connection with more complex financing structures, such as financial intermediary lending, infrastructure funds, development policy lending and budget support operations.

- DFI mitigation hierarchies generally give more or less equal weight to the severity and likelihood of impacts, however, for human rights risks, severity is the most important factor. Other possible gaps or weaknesses in mitigation hierarchies include the assumption that human rights impacts (unlike environmental impacts) may be offset.

- The framing of mitigation hierarchies in multilateral development bank safeguards may have skewed the remedy conversation disproportionately towards the issue of financial compensation. While undoubtedly important, other potentially important remedy options (restitution, rehabilitation, satisfaction and guarantees of non-repetition) should also be considered, alone or in combination.

- Costs of enabling or providing remedy often seem to be thought of within a narrow conceptual frame, without sufficient regard to costs of not doing so and, conversely, to the benefits of remedy for development. Recent evaluations support the proposition that the benefits of effective safeguard implementation outweigh the costs.

Within DFIs, responsibilities for enabling or contributing to remedy are defined principally by the institution's safeguard and internal accountability policies and procedures, including those relating to its IAM. Given the central role that safeguard policies play, the present chapter contains an examination of the particular features of these policies and how they may enable or restrict remedy in practice, identifying promising practices as well as gaps. These building blocks provide the basis for more detailed discussion and recommendations later in the publication.

Safeguard policies in DFIs, and in particular the multilateral development banks, are increasingly taking the following form: (a) a sustainability policy that applies to the institution, setting out its obligations regarding environmental and social risk assessment, due diligence, project supervision, accountability and related matters; and (b) contractually binding environmental and social performance standards applicable to the client, comprising procedural and substantive risk management obligations.

Safeguard policy requirements vary in depth, precision and the degree of flexibility afforded to DFIs and clients, however, it is generally appreciated that – other things being equal – greater precision promotes better outcomes.[181] As indicated earlier, the present publication refers to clients' environmental and social performance requirements by their original name – "safeguards" – in recognition of their core purpose, which is to protect people and the environment from harm.

A. GAPS IN SAFEGUARD POLICIES IN RELATION TO REMEDY

There are several problematic features, or omissions, in many DFI safeguards from the standpoint of remedy, when viewed from a human rights perspective. The problems discussed below relate mainly to the content and specificity of safeguard requirements affecting risk identification and remedy, rather than implementation and oversight systems, although it is recognized that content and implementation are interdependent in practice.

1. No specific commitment to remedy all adverse impacts

Firstly, safeguards do not generally include a specific commitment that all adverse impacts should be remedied, nor (with the exception of EIB) human rights impacts specifically. The different parts of safeguards that address remedy are not generally linked to an overarching commitment, nor to each other, for example, linking remedy to GRMs. Relatedly, there is generally no requirement in DFI safeguards to document the absence of human rights impacts (in situations in which that is the case). This is no mere rhetorical matter. While documenting adverse human rights impacts is obviously the paramount concern, a legally binding and auditable requirement to certify that no adverse human rights impacts were found (in situations in which that is the case) is critical for accountability. DFIs should be encouraged to specifically document the steps taken to identify human rights risks (whether or not specified in safeguard policies), and justify conclusions about the absence of such risks, and explain how these conclusions were reached. The July 2020 update of the Equator Principles (see box 14) may provide inspiration for DFI safeguard policies in this regard.

2. Problems concerning the scope of risk assessment and prioritization

The scope of harm specified in many safeguards rarely embraces more than a handful of salient human rights concerns. For many DFIs, the scope of due diligence, management systems, environmental and social action plans, corrective action plans, adaptive management plans, and management action plans in response to IAM compliance findings are all specifically tied to the scope of issues set out in the safeguards. Safeguards frequently have a "catch all" performance standard addressing social and environmental risks generally, but issues that are not the specific subject of safeguards are less likely to be identified and addressed in practice. By contrast, as reflected in the Guiding Principles on Business and Human Rights, clients should remedy any and all human rights impacts caused or contributed to, not just those specifically highlighted in safeguards.

14 BOX 14
PROVISIONS OF THE EQUATOR PRINCIPLES ON DOCUMENTING THE ABSENCE OF HUMAN RIGHTS IMPACTS

"The Assessment Documentation may include, where applicable, the following: … consideration of actual or potential adverse Human Rights impacts *and if none were identified, an explanation of how the determination of the absence of Human Rights risks was reached, including which stakeholder groups and vulnerable populations (if present) were considered in their analysis*" (emphasis added).[182]

15 BOX 15
EXAMPLES OF NEGLECTED HUMAN RIGHTS RISKS

Among the most notable safeguard gaps currently is the failure to take adequate account of the multifaceted human rights risks associated with the digital revolution.[183] Another commonly overlooked issue concerns the practice of charging workers a fee in order to obtain a job (recruitment fees), which increases the risks of trafficking in persons and debt bondage.[184] Another neglected issue is worker camps, which may give rise to particularly serious occupational health and safety problems. Most safeguard policies on occupational health and safety focus only on workplace safety and avoiding accidents at construction sites, but not on housing sites.[185] Discrimination issues have also been overlooked to a great extent, although this appears to be changing. The World Bank's non-discrimination directive and its technical note on addressing racial discrimination through the Environmental and Social Framework offer inspiration in this regard.[186] IDB and IDB Invest safeguards further recognize the need to address discrimination on the grounds of political or other opinion,[187] which can be a critical constraint in practice, and the IDB safeguards have a separate standard addressing discrimination on the grounds of gender, sexual orientation and gender identity.


Inclusive Development International

Relatedly, while most safeguards cover both environmental and social issues, these issues may not be assessed and addressed in an integrated fashion. The 2020 evaluation of ADB safeguards noted that "there is still limited experience and expertise in the area of integrated environmental and social assessment. While the principle of it is generally accepted and understood, practice on the ground remains a challenge."[188] Environmental teams and social teams are typically different, and may even operate on different time frames in assessing projects, and interact with different stakeholders. Yet the triggers for human rights concerns are often potential or actual environmental impacts, hence understanding the relationships between these risk factors and treating them in a more integrated manner can help to avoid adverse human rights impacts.

Safeguard policies may also have inconsistent approaches to weighing and prioritizing different risks. The 2020 evaluation of ADB safeguards noted that: "While all safeguards frameworks reviewed for this report are concerned with risk of adverse environmental or social impacts, it is worth noting that other than listing a series of topics that are likely to constitute risk, there is little attempt at defining the nature of risk, how to prioritize among different types of risks, or providing guidance on how to sequence risk mitigation measures."[189] This is a particular concern from a human rights perspective, where the severity of human rights impacts should result in prioritizing potential human rights impacts, even if there is a lower likelihood of the risk emerging (see box 16 below).

16

BOX 16
RISK ASSESSMENT – PRIORITIZING THE SEVERITY OF IMPACTS ON HUMAN RIGHTS

The commentary to the Guiding Principles on Business and Human Rights defines "severe human rights impacts" by reference to their:

- Scale: the gravity of the impact on a person's human rights.
- Scope: the number of individuals that are or will be affected.
- Irremediability: any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before an adverse impact.[190]

It is not necessary that an impact have more than one of these characteristics to be reasonably considered "severe", although it is often the case that the greater the scale or the scope of an impact, the less it is "remediable".

3. Lack of adequate focus on outcomes

In many safeguard policies, too much emphasis is placed on process requirements and action plans rather than results. For example, projects may report on the payment of compensation but not on whether replacement land was purchased or livelihoods restored, or on the existence but not the results of a consultation process, or the establishment of a GRM but not the kinds of grievances being filed or the actions taken on them.[191] End-of-project substantive outcome evaluations are rare, as are benchmark social surveys (outside the resettlement context), and internal monitoring reports are generally not made public. Public availability of data of this kind would allow a better understanding of how to improve the substantive outcomes of projects, countering incentives for "tick the box" procedural compliance.

Ideally, substantive outcome reports should feed into internal performance reviews of staff, so encouraging a stronger focus on environmental and social results rather than procedural compliance at design stage. IAMs, similarly, have drawn attention to the tendency of some DFIs to focus on technical rather than structural issues and impacts.[192] Moreover, longer term or cumulative impacts of infrastructure projects on people and the environment tend to receive less attention in planning and supervision than immediate impacts, and tend to occur later in the project cycle when attention and leverage for effective remediation may be lower.

This is not an either/or question. Good results depend on the consistent application of clear, strong procedural requirements. However, a greater focus on outcomes would entail more robust attention to whether negative impacts had been remediated, including through more meaningful engagement with those affected. It may also encourage a greater focus on ensuring that financial and human resources are available to deal with long-term impacts.

4. Inadequate consideration of contextual risks

Safeguard policies are mostly concerned with physical risks at the project footprint and, with some exceptions, do not adequately address contextual risks.[193] Projects may operate in highly complex operating environments, exacerbated by the COVID-19 pandemic and the increasing push by DFIs into frontier markets and fragile and conflict-affected settings. Contextual risks may include conflict risk factors, political risks, entrenched discrimination and serious human rights violations.

To illustrate the problem, in 2020, ADB provided $250 million in budget support for the COVID-19 response of the Government of Myanmar.[194] It apparently did so notwithstanding detailed reporting from the United Nations human rights system between 2018 and 2020 on gross human rights violations against ethnic minority populations (including, potentially, genocide against the Rohingya), war crimes and risks that development finance and international investment may support military-backed companies, fuel further conflict and obstruct prosecutions in international criminal tribunals.[195] The operation in question was rated "C" under the 2009 ADB Safeguard Policy Statement (low risk), on the basis of low resettlement risks and foreseeable impacts upon indigenous peoples.

ADB was clearly aware of the conflict and human rights dynamics in Myanmar[196] and thus implemented a range of important mitigation measures in connection with this operation. However, there does not appear to have been any public accounting for how complicity risks were avoided. The military coup of February 2021[197] put these issues in particularly sharp relief. Integrating and elevating contextual and human rights risks may encourage more appropriate risk classifications by DFIs, more rigorous and better tailored mitigation and remedial measures and more serious examination of project alternatives (including, plausibly, avoiding budget support operations) in complex cases of this kind.[198]

5. Weak risk management in development policy financing

The Myanmar example in the preceding section illuminates larger questions about remedy in the context of budget support and development policy lending operations. Such operations involve the relatively quick disbursement of large volumes of financing into finance ministries in exchange for legal or policy reforms (called "prior actions"), including public financial management or sectoral policy reforms. Development policy lending operations are a popular instrument with DFIs and client countries given their relative flexibility, light administrative costs and the large volumes of financing involved. They can impact positively on human rights, either directly through support to health, justice, education, housing or other sectors, or indirectly through improved public financial management, industry regulation and growth effects. An advantage of development policy lending operations over other forms of financing is that they can help tackle systemic problems that lead to poor environmental or social outcomes at project level.

However, negative human rights impacts and externalities may also occur, for example, when the distributional impacts of deregulation, privatization, fiscal policy measures or sectoral reforms are not taken into account.[199] And, as the case of Myanmar illustrates, general development policy lending operations provided to countries in which human rights violations are pervasive (involving, in the case of Myanmar, credible allegations of war crimes, crimes against humanity and genocide) may directly or indirectly support the perpetrators of those alleged crimes and fuel impunity and violent conflict. Analytical work should pick up these issues and propose appropriate mitigation, although this does not appear to be done adequately in practice.[200]

Multilateral development banks have developed different approaches to addressing environmental and

social risks in development policy lending operations.[201] ADB applies its safeguards to all lending instruments, including development policy lending operations, but even then, as the case of Myanmar illustrates, there are serious questions about the suitability and rigour of its approach. Other public sector financing institutions appear to have weaker formal requirements in their environmental and social requirements for development policy lending operations and less clear requirements for reviewing their environmental and social impacts.[202] In the absence of clear, specific safeguard requirements, those affected are often left to the vagaries of national laws and policy frameworks, which are often considerably weaker than those of the leading multilateral development banks.[203] Moreover, existing policies do not seem to adequately address ex post monitoring or evaluation requirements and thus, after a policy action is implemented, social and environmental impacts may not be identified, mitigated and remedied.[204]

Accountability for development policy lending operations also appears to be problematic. The track record of public participation in development policy lending negotiations is poor, given the intangible nature of the scope and impacts of this type of operation. Most IAMs are formally authorized to receive complaints about development policy lending operations, however, the quick-disbursing nature of these instruments and the limited scope for public involvement in the design phase all but preclude complaints in practice.[205] Claims are likely to be based on anticipated harm, where the causal connection between policy and harm can be difficult to prove. Analytical resources to help understand the impacts of policy reforms tend to be underutilized in practice and, with some exceptions,[206] may not help to understand whether mitigation measures for those policy reforms are likely to be effective.

6. Inadequate attention to client performance in managing risk and grievances

Assessing the capacity, commitment and track record of clients in managing risk and grievances is as important as assessing the risks themselves. A more challenging operating environment requires stronger capacity, commitment and track record in managing risks and grievances on the part of clients and contractors. Currently, environmental and social action plans are often too loosely defined and play into a dynamic in which client commitment and capacity to deliver are not tested and clients are incentivized to over-promise. Action plans should contain specific contractual requirements concerning management systems and capacity. This should be cascaded down to subcontractors, to create contractual leverage,[207] complemented by increased supervision and technical support as needed. Increased supervision and support seem particularly important in view of the shift of many DFIs towards "adaptive risk management", which – if not implemented appropriately – may entail shortcuts to upfront risk management and capacity assessments.

7. Gaps in mitigation hierarchies

All safeguards have some version of a mitigation hierarchy, under which risks should be avoided, minimized, mitigated and, as needed, compensated or offset (see box 17). Mitigation hierarchies have a long history in environmental regulation[208] and until recently have been applied to social impact assessments without significant adjustment.[209]

Mitigation hierarchies in multilateral development bank safeguards, which have been in existence for nearly 30 years, are not always well suited to dealing with human rights harms. There are several reasons, as set out below, why it would be timely to update mitigation hierarchies to reflect human rights considerations.

17 BOX 17
EXAMPLES OF MITIGATION HIERARCHIES

IFC Performance Standards: "Adoption of a mitigation hierarchy to anticipate and avoid, or where avoidance is not possible, minimize, or compensate/offset for risks and impacts to workers, Affected Communities, and the environment is widely regarded as a good international industry practice approach to managing environmental and social risks and impacts."[210] Under most DFI safeguards, residual impacts (that is to say, significant adverse impacts remaining after minimization and mitigation actions) will be compensated or offset "where technically and financially feasible".[211]

Interestingly, on the issue of remedy, the Word Bank, in its guidance note for borrowers on Environmental and Social Standards 1, states: "The mitigation hierarchy represents a systematic and sequenced approach to managing the potential risks and impacts of the project and includes actions for: (a) avoiding adverse risks and impacts and enhancing positive impacts and benefits to communities and the physical environment, to the greatest extent feasible; (b) minimizing adverse risks and impacts that cannot be avoided; (c) *remedying* or mitigating the residual adverse risks and impacts to an acceptable level; and (d) compensating or offsetting for those residual risks and impacts that cannot be remedied"[212] (emphasis added). No further specific guidance on remedy is provided, however.

(a) Avoiding human rights "offsets"
To begin with, as mentioned earlier, offsetting is not appropriate when harms to people are concerned, as distinct from many environmental issues. Such trade-offs are unacceptable from a human rights perspective without transparent and objective justification in light of potential concerns about the extent of the potential financial exposure of DFIs. Mitigation hierarchies, accordingly, should be updated to provide for remedy (not only offsetting or compensation) for impacts to people in situations in which avoidance and mitigation are not effective.

18

BOX 18
SPECIFIC MITIGATION HIERARCHIES FOR HUMAN RIGHTS IN THE ENVIRONMENTAL AND SOCIAL STANDARDS OF THE EUROPEAN INVESTMENT BANK AND THE EQUATOR PRINCIPLES

European Investment Bank
The EIB defines an environmental and social impact assessment as: "The process of identifying, predicting, evaluating a project's positive and negative environmental and social impacts on the biophysical and human environment as well as identifying ways of avoiding, minimising, mitigating and compensating, including *offsetting in the case of the environment and remedying in the case of social impacts*, by applying the mitigation hierarchy" (emphasis added). The EIB safeguards also state: "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' [United Nations Guiding Principles on Business and Human Rights, principle 24]."[213]

Equator Principles
"Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable they should be minimised and mitigated, and where residual impacts remain, clients should provide remedy for human rights impacts or offset environmental impacts as appropriate."[214]

all human rights considerations and without providing remedy for those negatively affected, through appropriate processes and reparations options. EIB appears to be the only DFI that has explicitly noted the inappropriateness of human rights offsets in its safeguards, although the Equator Principles do so too (see box 18).

(b) Getting beyond the compensation default
The preponderant focus upon compensation in DFI mitigation hierarchies may inadvertently displace other potentially important reparation options discussed earlier (including restitution, rehabilitation, satisfaction and guarantees of non-repetition), alone or in combination. This, in turn, constrains wider policy discussions on remedy and may fuel perceptions of remedy to a zero-sum game and exclude more productive conversations on how to construct a shared approach to reparations. Without questioning the importance of monetary compensation in many (if not most) cases, broadening the remedial horizons, and looking at how DFIs can enable (chap. III) as well as provide remedy, may encourage more constructive conversations and put in context

(c) The need to prioritize severity of risks
As previously mentioned (see box 16 and sect. 2 above), while typical mitigation hierarchies give more or less equal weight to severity and likelihood of impacts, for human rights risks, severity is the most important factor. In other words, a severe human rights impact should be prioritized, even if it is considered to be of lower likelihood, exactly because of the threat it poses to people. This requires a new approach to addressing human rights that is so far only reflected in the EIB safeguards, which include a separate mitigation hierarchy for human rights and specifically make this distinction (see box 18).

(d) Separating "do no harm" from aspirational sustainability objectives
The "offsetting" problem in mitigation hierarchies connects with, and may stem from, a tendency to conflate core "do no harm" requirements within the larger "sustainability" discourse in safeguard policy frameworks. DFI safeguard policies, including with respect to indigenous peoples, do not generally draw a clear distinction between addressing negative impacts

and providing positive benefits, but instead tend to mix them together.[215] This is potentially problematic, because without explicit consideration of negative impacts, there is a risk of simply offsetting negative impacts through discretionary corporate social responsibility programmes rather than mandatory compliance measures, obscuring the recognition of specific harms and the need for redress.[216]

The mixing of aspirational sustainability language with risk management requirements may, ironically, be increasing as more private sector clients seek to demonstrate that they are supporting the Sustainable Development Goals. From the perspective of many DFIs this trend may be associated with "compliance fatigue" and an associated desire to make and be seen to be making positive, transformational contributions to development rather than (merely) avoiding negative impacts. However, the latter motivation is predicated on a false dichotomy: respecting human rights can itself be "radically transformative and disruptive" and creating shared value requires (at a minimum) legal compliance and mitigation of harms.[217] Hence, while positive achievement of the Sustainable Development Goals is to be encouraged, it should not come at the expense of first addressing negative impacts on people and the environment, and should explicitly recognize the potentially transformative impacts of respecting human rights throughout the value chain.[218]

(e) Rethinking "feasibility"

Feasibility considerations may also require rethinking from a human rights perspective. Most multilateral development bank safeguards refer to compensation or offsets wherever "technically and financially feasible".[222] The desire to limit potentially adverse environmental and social impacts and mitigation costs to "acceptable levels"[223] is understandable, but acceptability is value-laden and subjective. Allowing a cap on compensation for commercial reasons, without more specific balancing of impacts on people, is problematic from a human rights perspective.[224] As formulated, the feasibility test sends a signal to DFI staff and clients that commercial considerations can trump remedy when needed, leaving unremediated harms even within the explicit scope of safeguards' subject matter.

(f) Planning for remedy in environmental and social action plans

Further clarification also seems to be needed about requirements for environmental and social action plans to include plans to provide remediation, in situations in which avoidance and mitigation have not worked. Environmental and social action plans often plan for remedy in relation to expected impacts such as resettlement, but rarely in relation to the unexpected failure of a mitigation measure. Making remedy part

19 BOX 19

CLARIFYING THE DISTINCTION BETWEEN REMEDYING NEGATIVE IMPACTS AND PROVIDING POSITIVE BENEFITS

European Investment Bank

"Opportunities to achieve additional environmental and social benefits of the project including, where relevant, community development programmes, noting clearly that any positive contributions are made in addition to impact management and do not offset any adverse social and human right impacts identified."[219]

Asian Development Bank

"The aspirational language on benefits and opportunities is frequently mingled with risk management requirements in the safeguards policies. While it is positive to promote environmental and social sustainability and development opportunities, it might lead to confusion or conflation of requirements if the 'do good' and 'do no harm' aspects are intermingled — unless net positive gain is an explicit policy requirement. 'Net positive' gain is likely to be problematic from a baseline and benchmark perspective, unlike application of a risk management hierarchy: How much improvement is acceptable? What should the target be, and what would compliance with requirements look like? For clarity's sake, and to avoid conflating requirements and recommendations, development objectives might be better addressed in sectoral or thematic corporate strategies than in safeguards policies."[220]

"RESPECTING HUMAN RIGHTS" AS A CONTRIBUTION TO SUSTAINABILITY

"For businesses, the most powerful contribution to sustainable development is to embed respect for human rights in their activities and across their value chains, addressing harm done to people and focusing on the potential and actual impacts — as opposed to starting at the other end, where there are the greatest opportunities for positive contribution. In other words, *businesses need to realize and accept that not having negative impacts is a minimum expectation and a positive contribution to the [Sustainable Development Goals].*"[221]

of the contingency plan from the beginning would help to "normalize" the issue of remedy and address it as a planning issue rather than a punitive one. For example, nobody ever plans for workers to be injured, but if they are: is the national worker's compensation scheme enough? Should the client or DFI provide additional rehabilitation and livelihood support? How should recurrences be prevented? Should the client or DFI insure for this? Some DFI safeguards have clear requirements in this regard,[225] but many others do not and some skip this rung of the mitigation ladder altogether,[226] which may send an unhelpful message that remediation does not need to be planned for or addressed.

(g) Differentiated remedies

Finally, differentiated remedies for vulnerable groups could also be clearer. Most if not all DFI safeguards address differentiated impacts on vulnerable populations and the need to ensure that all may benefit from projects,[227] but with the exception of safeguards for indigenous peoples, it is rarely acknowledged that remedies may need to be differentiated as well.

8. Inconsistent safeguard provisions on remedy

As noted above, safeguards typically do not include a general commitment to remediation apart from what is included (or not) in mitigation hierarchies. The term "remedy" itself may sometimes be resisted and be invoked more readily with respect to contractors and business relationships in the supply chain, rather than clients.[228] Safeguards do not often clearly address wider impacts and externalities of projects and programmes; for example, changes in the price of land surrounding a project may render insignificant any direct gains or losses from the project for project-affected peoples, but are not always adequately reflected.[229] Nor, with some exceptions, do safeguards seem to deal effectively with legacy impacts.[230]

Safeguards typically set out different standards on remedy depending on the issue. While some degree of issue-specific differentiation is understandable, the result is a patchwork quilt in which different issues entail different redress requirements and some require none at all, without apparent justification. In some cases, straightforward compensation is mandated (such as for occupational health and safety), whereas in other areas reparations are unclear or altogether absent.

Resettlement standards, which frequently exceed the scope and strength of national laws, typically cover a range of remedies in situations in which displacement cannot be avoided. Resettlement safeguards typically provide for: (a) a choice of remedies; (b) the option of like-for-like replacement (often with the caveat "where feasible"); (c) monetary compensation where this is appropriate (full replacement cost and other assistance so that affected people can restore or improve their living conditions); (d) livelihood restoration; and (e) requirements concerning dialogue and transparency.



Felix Dovey/CAO

IFC Performance Standard 5 also provides for putting compensation funds into an escrow account, where the funds cannot be paid out immediately.

Forced labour and child labour are usually included in safeguard exclusion lists and are often the only human rights impacts that a client is specifically directed to "remedy".[231] "Remedy" language is usually lacking for the other two labour rights issues (non-discrimination and freedom of association/collective bargaining) that make up the four core labour standards of the International Labour Organization (ILO), and other social issues, although EBRD requires financial compensation for any persons suffering injury or ill-health that is caused by project activities.[232]

Interestingly, in situations in which forced or child labour impacts are in a client's supply chain and "remedy is not possible", clients can be required to shift their supply chains to suppliers that can demonstrate that they comply with the safeguard requirements[233] or to eliminate such practices within a reasonable time frame according to good industry practice.[234] Such approaches could usefully be replicated for other serious adverse human rights impacts as well, although remediation should be guided by international human rights law and principles, first and foremost, with good industry practice as a supplementary guide. The due diligence of DFIs also needs to extend beyond "primary suppliers", without which serious human rights risks such as modern slavery and trafficking in persons – which are typically found beyond the first tier of the supply chain – are to be identified and addressed.

Indigenous peoples' safeguards usually refer explicitly to human rights and are often the only safeguard that refers to "due process" in designing compensation and "fair and equitable" benefits. They also typically provide for a balancing of respect for the laws, institutions and customs of communities, while also seeking to ensure that all members of the community, particularly those who are disadvantaged within traditional societies, benefit equally. These provisions are aligned with and positively reinforce the human rights principle of equality and non-discrimination, and respect for traditional cultures and decision-making processes.[235] However, remedy provisions are often inadequate considering the culturally specific nature of indigenous peoples' rights and interests, as they may require only financial compensation rather than a wider suite of preventive and remedial measures.[236]

The due process theme is particularly strong in the EIB safeguards, reflecting the additional layer of European Union law binding upon the institution. EIB safeguards specifically require all operations to comply with national legislation and regulations as well as any obligations under relevant international conventions and multilateral agreements to which the host country is a party, as well as with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[237] While the Convention is framed (as is principle 10 of the Rio Declaration on Environment and Development on which it is based) in terms of "access to justice", it also requires substantive remedy for environmental harms: States "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".[238] This means that remedies should compensate past harms, prevent future harms and/or provide for restoration.[239] The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), similarly, provides a framework for strengthening access to remedy among DFIs in the Latin American and Caribbean region.[240]

Finally, there appears to be a major gap in safeguards on community health, safety and security, in respect of major accident hazards. Safeguards often require at least compensation for injury or ill-health caused by projects, however, there is no similar provision when it comes to injury or ill-health caused by major accidents, even though the risk of severe harms is clearly established.[241] The EBRD Performance Requirements refer to the European Union's Seveso III Directive on major-accident hazards but do not include an equivalent to the Directive's remedial and restoration measures.[242] A similar gap is apparent in the World Bank Group's Environmental, Health and Safety Guidelines in the sections on hazardous materials management.[243] By way of contrast, under many national law regimes, these types of inherently dangerous activities, products or substances would usually be subject to a strict liability regime, under which the company must rectify harms regardless of due diligence or fault.[244] DFI safeguards do not generally require that clients have in place sufficient contingency or insurance arrangements in case of major hazards; such arrangements may be effected as part of the loan agreement but, in the view of OHCHR, there should also be a specific safeguards requirement, given in particular the increasing likelihood of major environmental disasters from climate change.

9. Gaps in safeguard provisions on grievance redress mechanisms

Safeguards typically include requirements that clients establish mechanisms to address grievances. The practice of DFIs in this respect influenced later thinking on GRMs for the private sector under the Guiding Principles on Business and Human Rights. The requirement for GRMs is sometimes part of DFI stakeholder engagement standards, which conveys the important message that addressing grievances starts with

meaningful stakeholder engagement and addressing concerns early in project design. Safeguards typically also require specific notification to stakeholders about the existence of a client GRM, although, regrettably, there is rarely a similar requirement to disclose the existence of IAMs.[245]

Some safeguards helpfully clarify that GRMs should be able to provide remedy or "promot[e] the affected persons' access to remedy",[246] in relation to a broadly defined range of project impacts. Most contain accessibility requirements in varying degrees of detail, protections against intimidation or reprisals and avoiding unwarranted exclusions of complaints that are the subject of parallel proceedings in national courts or elsewhere. Many provide for confidential complaints and some permit anonymous complaints.[247] A few safeguards highlight the importance of a complainant's satisfaction with the outcome, although, currently, only the EIB safeguards require that the resolution of the grievance be confirmed by documenting the satisfaction of the stakeholder/aggrieved party. The World Bank goes further in offering mediation and an appeals process in situations in which users are not satisfied.

In a positive vein, many safeguards contain requirements that GRMs be culturally appropriate and responsive to the needs of project-affected people and take account of customary dispute settlement mechanisms where appropriate. A few safeguards usefully require transparency about outcomes, subject to any overriding personal security concerns and some require clients to report regularly to the public on the implementation of GRMs. Currently, however, only the EIB safeguards specifically reference the Guiding Principles on Business and Human Rights' effectiveness criteria with respect to client GRMs. Other apparent gaps include:

- **Focus on process rather than outcome.** Safeguard grievance redress provisions tend to be very process based, without adequate linkages among GRMs, the mitigation hierarchy and commitments made under environmental and social action plans. Some IAMs helpfully specify that outcomes should be consistent with international law (which includes human rights),[248] however, there is no requirement that outcomes at least meet any remediation commitments reflected in the environmental and social action plans.
- **Missing focus on harm to people and the environment.** Some DFIs usefully specify that the client's GRM should aim to provide prompt remediation for those who believe that they have been harmed by a client's actions. However, sometimes, safeguards tie GRMs to the environmental and social performance of projects,[249] which misstates the fundamental point of such a mechanism, which is (or should be) to address harms to people and the environment.
- **Limited scope of grievances.** Some safeguards helpfully specify that GRMs should be able to remedy any undesirable or unforeseen impacts arising from the execution of the project.[250] However, in other cases, remedy is confined only to impacts listed in safeguards or identified as part of the due diligence or assessment process, which may be unduly restrictive from a human rights perspective.
- **Confusion caused by multiple GRMs.** Safeguards often have provision for numerous GRMs, with potentially different requirements and framing. For example, there may be a GRM of general application, one for workers, one for non-employee workers, one that can handle concerns about security, one for resettlement, one for indigenous peoples, one for sexual harassment[251] and one for collective dismissals.[252] Tailored approaches can be useful, providing that the mechanisms operate under a consistent set of principles. However, further technical guidance for clients may be needed on the pros and cons of multiple versus consolidated mechanisms, coordination arrangements or referrals between mechanisms,[253] and the implications of setting up an organization-wide mechanism compared with a project-level GRM.
- **Gaps concerning supply chains and other business relationships.** With certain exceptions,[254] safeguards do not require that clients review GRMs in their supply chains or that clients' GRMs should be open to all those affected by the client, including through the client's business relationships. This seems to be a major gap compared with private sector practice, the OECD Guidelines for Multinational Enterprises and the Guiding Principles on Business and Human Rights, which call for consideration of human rights impacts in supply chains and other business relationships.
- **GRMs for financial intermediaries.** There are inconsistent requirements across DFIs regarding GRMs. For example, with limited exceptions, IFC requires financial intermediary clients to establish (only) an "external communications mechanism" rather than a GRM, on the apparent basis that the latter would exceed existing market practices.[255] By contrast, GCF requires each "accredited entity" (financial intermediary) to have an institution-level GRM that complies with the Guiding Principles on Business and Human Rights.[256] This is an area in which clearer guidance and more consistent practice in line with the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises would be beneficial.

10. Gaps in addressing complaints related to digital impacts

DFI safeguards have only recently begun expanding to include digital technology risks and even then rarely beyond privacy concerns.[257] At the macro level, the

reactive, issue-specific and incident-driven nature of regulation in the technology sector is giving rise to fragmented remedy ecosystems that are particularly difficult for claimants to navigate.[258] Within DFI safeguards, the scope for complaints pertaining to digital rights is largely untested and stakeholder engagement and GRMs have mostly focused on physical impacts in or around the project footprint. Given the major shift to digital products and services and the associated risks to privacy and a potentially wide range of other human rights,[259] GRMs should explicitly be mandated and equipped to deal with these concerns.

11. Exclusion lists

Many DFIs use exclusion lists to identify projects or sectors that they do not finance given the extreme risks involved, guided by moral and international legal boundaries.[260] Many of the lists exclude the financing of particularly severe negative human rights impacts (notably, forced evictions and forced and child labour).[261] However, with the notable exception of forced labour and child labour, which are often subject to explicit safeguards, DFIs do not generally seem to provide adequate guidance on how to respond and remedy a situation in which such impacts arise within the scope of a project. To add to the policy incoherence, DFIs sometimes require a stronger response to these kinds of human rights harms by contractors than they do from their direct clients (see sect. A.8 above).

In line with their approach to serious labour rights risks, DFIs should make it clear to their clients that all contraventions of international human rights law arising in connection with projects should be remediated. DFIs may also consider updating exclusion lists to include particular project or transaction structures or business models that, experience shows, may be particularly likely to cause serious, unremediated harms, including: (a) using underfunded special purpose vehicles or subsidiaries engaged in hazardous activities; (b) projects using tax havens; and (c) special economic zones that waive labour standards, taxation, social protection and other vital regulatory requirements.

B. VALUING REMEDY – RETHINKING COSTS AND BENEFITS

In development finance, as discussed earlier, discussions on remedy are often focused on the issue of compensation and, at least implicitly, reflect the zero-sum logic that, if compensation is paid, the client or DFI by definition loses. Remedy is rarely seen as an obligation and legitimate compliance cost under safeguards and human rights law, a contribution to sustainability and as part of a broader continuum of stakeholder engagement. The political economy context of the remedy conversation is also troubling, wherein claimants are increasingly prone to being vilified as "anti-development", "money-grabbers" or even "eco-terrorists", rather than advocates for inclusive development.

Costs of enabling or providing remediation tend to be thought of within a very narrow conceptual frame, without sufficient regard to the costs of not doing so, nor, conversely, to the benefits of remedy for development. The implicit costs that DFIs and their clients may overlook include: staff time spent in internal deliberations on how to address the concerns of project-affected people (which can sometimes far outweigh the cost of remediation itself); time and human and financial resources invested in litigation; reputational costs and loss of market position; and, potentially, cost overruns or project failure associated with unaddressed grievances and social conflict (see box 20). Neglected benefits may include administrative cost savings, reduced reputational and legal risk, increased legitimacy and brand name benefits, and more effective contributions to community trust, conflict prevention and sustainability.

There also appears to be a double standard between social and environmental issues, insofar as remedy and risk management are concerned. DFI safeguard systems originated in early environmental impact assessment practice and environmental science, whereas most of the social safeguards of DFIs are relatively recent. Most category "A" (high risk) projects earn their classification due to environmental, not social, risks. This may translate into more ready acceptance of resource-intensive environmental studies and actions than would be considered acceptable when the focus is on social issues (communities and workers). It may be illuminating to compare the amounts spent on studies and response actions across DFIs on environmental versus social issues, respectively, as the basis for more detailed analysis of this question.

On a more general level, the necessary investments in early remedial responses may be displaced to some extent by downward pressure on the administrative budgets of DFIs, competitive pressures from newer DFIs with weaker requirements and a refocusing by many DFIs from upfront compliance towards downstream risk management. However, recent evaluations support the proposition that the benefits of effective safeguard implementation outweigh the costs. The ADB Independent Evaluation Department, for example, has concluded that "safeguards implementation creates a positive net value, which tends to be higher for ADB's standards".[262] The World Bank Independent Evaluation Group has assessed that the benefits of safeguard policies, including upfront requirements for higher risk projects, outweigh the costs[263] and a 2015 IDB study found that safeguard compliance (an estimated 1 per cent of project costs on average) did not have an independent

impact on the length of the project cycle.[264] Moreover, the likely effectiveness of early corrective measures is higher as they have a greater impact on implementation and are typically backed by the leverage of having been built into the project's disbursement structure and non-compliance covenants at the outset.

These lessons do not seem to be well reflected in DFI practice at the present time. Even in the case of resettlement, for which there is long-standing practice, the balance of benefits and costs from well-designed and managed resettlement are frequently not monitored and are therefore largely unknown.[265] Developing clearer distinctions between negative and positive impacts in safeguards could lead to better approaches in valuing the negative impacts avoided, in addition to valuing positive impacts. This, in turn, could help to justify the upfront project costs that are required in order to address concerns early, thereby avoiding larger back-end negative impacts and lengthy remediation.

C. CONCLUSIONS AND RECOMMENDATIONS ON SAFEGUARDS

DFI safeguard policies play a critical role in enabling, or restricting, access to remedy in practice. In this chapter, the focus has been mainly on a comparative textual analysis of safeguards, rather than prerequisites for successful implementation, although it is recognized that content and implementation are interdependent and equally important: the faithful implementation of weak, unclear safeguards can be just as counterproductive as the weak implementation of more rigorous standards.

Safeguard policies emerged principally from environmental risk management practice, which has influenced and in some ways constrained the approach of safeguard policies in remedying social impacts. Assumptions about compensation and offsetting, in particular, do not necessarily translate well from environmental to human rights practice. While the new generation of DFI safeguard policies has usefully expanded the scope of social safeguards, shortcomings concerning the mitigation hierarchy and remedy often remain. Addressing these gaps will help DFIs to enable remedy more consistently in practice.

20 BOX 20 VALUING AVOIDED IMPACTS

Recent evaluations by IDB and other organizations have found that the lack of community consultation and transparency have caused social conflict and been major factors in the failure of infrastructure projects in Latin America.[266] An IDB evaluation, *Lessons from 4 Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean*, found that infrastructure investments that suffered from "deficient planning, reduced access to resources, lack of community benefits, and lack of adequate consultation were the most prominent conflict drivers. In many cases, conflicts escalated because grievances and community concerns accumulated, going unresolved for many years."[267]

These costs cannot be equated merely with lost revenue or sunk investment due to the higher risk of delay, cost overruns or cancelation, which are often passed on to the public. The more enduring costs relate to the lost livelihoods, physical and mental health, dignity, security and quality of life, which may undermine the social contract and fuel conflict, poverty and exclusion. The IDB study found that project delays (81 per cent of cases) and cost overruns (58 per cent of cases) were the most common consequences of social conflict at the project level. The average delay from all projects listed in the available literature was approximately five years. Similarly, the average publicly reported cost overrun from sampled projects was $1,170 million or 69.2 per cent of the average original budget.

These kinds of losses are consistent with findings about the costs of failed stakeholder engagement in the extractives sector,[268] as demonstrated convincingly in connection with the Dakota Access Pipeline in the United States.[269] The costs incurred by the owners and operators of failing to take account of indigenous peoples' rights in the early planning of the Pipeline have been estimated at $7.5 billion, but could be higher depending on the terms of confidential contracts. Banks that financed the Pipeline have reportedly incurred an additional $4.4 billion in costs in the form of account closures, not including costs related to reputational harms. Furthermore, losses of at least $38 million have reportedly been incurred by taxpayers and other local stakeholders. It has been noted that "social costs accumulate not only to investors but also to local communities, to states, to taxpayers, and to tribal governments. … Many times, these communities are those with the fewest resources."[270]

Recommendations to strengthen standards

It is recommended that DFIs:

- Ensure that safeguards specify that IAMs should seek to address and remedy harms, in addition to (and related to) the environmental and social performance of DFIs.
- Integrate the Guiding Principles on Business and Human Rights within their safeguard policies in order to harmonize upwards, and strengthen: (a) social risk assessment and prioritization; (b) human rights due diligence; (c) approaches to remedy; and (d) GRMs.
- Ensure that safeguards clearly differentiate between risk assessment and management ("do no harm") objectives, on the one hand, and sustainability objectives, on the other.
- Define the project's "area of influence" broadly, by reference to project impacts in the short, medium and long term.
- Define "associated facilities" and "cumulative impacts" broadly and avoid artificially ring-fencing project-related risks and responsibilities.
- Amend mitigation hierarchies in order to:
  - Incorporate a clear requirement that adverse impacts, including adverse human rights impacts, should be remedied.
  - Ensure that human rights impacts are not subject to offsetting.
  - Provide a broader range of reparations (i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), rather than compensation and offsetting alone.
  - Ensure that the "technical or financial feasibility" criterion does not trump human rights considerations.
- Specify that the client's environmental and social commitments extend for a reasonable period of time (such as two years) beyond project closure and that contingency funds be set aside for the purpose of remedy, backed by legally binding performance covenants.
- Require contingency planning for remedy and that environmental and social action plans include provisions on remedy, including and beyond the resettlement context.
- Require documentation of the absence of human rights impacts, in situations in which this is the case, and the reasons justifying such a conclusion.
- Update exclusion lists to include prohibitions concerning a wider range of serious human rights violations (including and beyond forced labour), as well as particular project or transaction structures (such as special economic zones and projects using tax havens) that may be associated with serious human rights risks.
- For serious human rights violations associated with a project (including but not limited to forced and child labour):
  - Require the rapid remediation of impacts and make this a point of escalation with the client and within DFI senior management and the board.
  - In situations in which human rights risks in supply chains are particularly high or may be irremediable, require clients to shift their supply chains to suppliers that can demonstrate safeguard compliance.

III. ENABLING REMEDY



World Bank Inspection Panel

KEY MESSAGES

- The ideas of enabling remedy and looking at the responsibilities of DFIs as part of a larger remedy ecosystem help to focus the remedy question on the outcomes for affected people, rather than (or in addition to) narrower questions of legal responsibility for impacts.

- DFIs have numerous avenues to build and use leverage to strengthen remedy through commercial, legal, normative, convening, innovation, capacity-building, shareholder actions, collective action and support for GRMs within the client and the larger remedy ecosystem.

- IAMs are an integral part of delivering on the "do no harm" mandate and sustainability objectives of DFIs and can build legitimacy and trust with all stakeholders on whom the institutions' development missions depend. Through their compliance review, dispute resolution and advisory functions, IAMs can help to remedy project-related harms, promote accountability and institutional learning, promote more consistent policy implementation and help DFIs mitigate reputational and fiduciary risks.

- The full potential of IAMs is not currently being realized. Available data suggest that the prospects for remedy may be greater for dispute resolution than compliance review cases, however, more systematic data collection and research are needed.

- The mandates of IAMs differ significantly and many do not link their functions explicitly to remedy. Other mandate weaknesses may include inadequate independence of IAMs, limited scope for stakeholder contributions to the formulation of management action plans, the failure of such plans to adequately address identified harms and constraints on IAM monitoring and follow-up.

- Evaluations of GRMs are mixed, at best, and their requirements for financial intermediaries are particularly weak. DFIs and IAMs can help to build clients' and other stakeholders' capacities concerning the establishment and operation of GRMs, guided by the Guiding Principles on Business and Human Rights' effectiveness criteria.

- DFIs can play a vital role in strengthening countries' environmental and social regulatory and risk management systems. This should include strengthening countries' regulatory frameworks and capacities to manage grievances and encouraging closer alignment between national laws and international human rights and responsible business conduct standards.

Having considered the meaning of remedy, the origins and kinds of human rights harms that occur in practice and the role of safeguard policies, the present chapter contains an examination of how DFIs and their accountability mechanisms can enable remedy in practice. This idea comes from the Guiding Principles on Business and Human Rights, which state that businesses should have "processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".[271]

Read broadly, the idea of enabling remedy refers to how DFIs can shape expectations and use their own requirements and other tools and incentives with clients and others so that remedy is delivered in practice. There are many tools and means through which DFIs can enable remedy, as will shortly be seen, from their safeguard policies through to public communication, modelling behaviour, establishing effective IAMs and consciously building commercial, contractual and other forms of leverage.

Recent conversations within the framework of the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights focused on enabling remedy as a means of exploring the different but complementary roles that all responsible actors within the remedy ecosystem may play to ensure that remedy is delivered in practice.[272] The Dutch Banking Sector Agreement's recommendations were cited in the external review of IFC/MIGA and provide a useful basis for further elaboration by DFIs.

A. BUILDING AND USING LEVERAGE FOR REMEDY

DFIs have a wide range of tools – far more than commercial lenders – that can be used to build and exercise their leverage within their client and third-party relationships to encourage respect for human rights, enable remedy and promote sustainable development. The term "leverage" in the present publication, and in the Guiding Principles on Business and Human Rights, refers to the use of different tools and approaches to influence the actions of an entity responsible for adverse human rights impacts, such as DFI clients and other third parties.[274] (It does not refer to financial leveraging techniques in investment practice.) The leverage options of DFIs include normative influence, financial leverage through projects, legal leverage, diplomatic and political leverage, convening power, technical expertise and development resources.

To the external observer, DFIs sometimes project an unduly conservative approach or narrow vision of their own leverage, determined solely by the loan balance or content of legal agreements. However, with foresight and creativity, DFIs can deploy a potentially wide range of tools in order to build leverage over the course of a client relationship, rather than simply at the start of a given transaction.[275] DFIs can also build and use leverage beyond specific client relationships in order to address the root causes of harms. Advance planning to deploy a range of leverage approaches is particularly important in higher risk settings in which there may be more severe impacts and weaker capacities or commitment to address grievances and harms.

21 BOX 21
WHY A REMEDY ECOSYSTEM?

"A remedy eco-system approach is intended to bring the focus to outcomes for affected people, rather than focusing narrowly or solely on the question of who is responsible for providing remedy and whether or not grievance mechanisms exist.

The eco-system approach seeks to recognize that:

- Enabling remedy may require action by all parties that have caused, contributed to or are directly linked to the harm.
- Ensuring grievance mechanisms are present is not likely to be sufficient to enable remedy in practice in many cases, nor does it necessarily meet the remedy responsibilities of parties by itself.
- There is a difference between having a grievance mechanism and enabling remedy in practice. Grievance mechanisms are formal processes that, when working effectively, can enable remedy. But remedy is the act of making affected stakeholders whole again.
- When impacts occur, parties connected to that impact have a responsibility to take action to address those impacts, including by focusing on remedy, whether or not those grievance mechanisms are present, effective or utilized.
- Affected stakeholders may in many cases need different forms of support to access and participate effectively in processes to enable remedy.
- A variety of actors, including businesses connected to the impact, governments, civil society organizations and trade unions may have various complementary and supporting roles to play to enable remedy in practice."[273]

In short, the idea of enabling remedy broadens the conversation from "who is on the hook for damages?" to how all responsible actors can be part of the solution. This is a role that DFIs are particularly well suited to play, given their development mandates, financing and technical assistance instruments and, in many cases, normative and convening power. The opportunities for DFIs in this regard, discussed below, include the following:

- Building and using leverage to strengthen remedy through the many leverage tools that they have in their toolboxes.
- Working with clients to strengthen their GRMs.
- Strengthening remedy ecosystems, particularly at the national level.
- Supporting new approaches to ensure that remedies are delivered, including through new funding mechanisms.

Table 1
Summary of leverage options for development finance institutions

With clients				With others	
Commercial leverage	**Legal leverage within investment agreements**	**Legal leverage in agreements covering debt, equity and other (non-loan) investments**	**Leverage through capacity-building**	**Leverage through normative and convening power, and political influence**	**Development resources and expertise**
Commercial incentives/ disincentives in deal	Requirements to comply with safeguards and respect human rights in legal agreements and action plans, cascaded down to contractors and subcontractors	Shareholder provisions (e.g. requiring the DFI to vote to require corrective action plans)	Capacity-building through assessment and supervision processes	Using convening power to bring parties (including government) together to address issues	Providing advisory services
Incentive of repeat business	Exclusion lists, including serious human rights violations, as a basis for sanctions	Management provisions (where the DFI appoints managers in an investee company)	Capacity-building of client's suppliers or contractors or related third parties	Developing new safeguard/sustainability standards and policy guidance, or prompting other actors to develop new normative standards	Providing technical assistance
Terminating or threat of terminating relationship	Legal requirement to disclosure existence of IAM and enhanced requirements for grievance redress in higher risk projects	Covenants concerning environmental and social impact and/or remedy in managers' contracts	Capacity-building for project-affected people	Carrying out specific actions or providing support to address the root causes, such as investigative reports	
Requirements for performance bonds or other funds to provide financial security for remedy	Requirement to notify DFI of human rights violations, triggering right of DFI to inspect, investigate or take other appropriate action	Opt-out provisions enabling the DFI to exit responsibly from non-compliant investee company or fund	Independent investigation panels	Using political and diplomatic connections with Governments to prompt them to address environmental and social and remedy issues	
Sanctions/exclusion from bidding	Third-party beneficiary rights	"Put options" in subscription agreements linked to environmental and social non-compliance	Capacity-building at the system level by supporting sectoral and/ or multi-stakeholder initiatives and/or policy dialogues with Governments	Providing protective measures to support complainants and civil society organizations	

1. Creating leverage through financial/ commercial incentives and disincentives

As financial institutions, DFIs agree on supporting projects or programmes through loans, investments, a combination of types of financing, individually or with other financial intermediaries. DFIs have a range of tools at their disposal to create financial incentives and disincentives to prompt compliance with safeguards and encourage attention to remedy. The nature of the borrower or investee (public or private) will help to determine what types of incentives or disincentives are likely to be most effective. Commercial incentives and disincentives include:

- **Excluding high-risk deal structures.** Reconsider financing undercapitalized subsidiaries with inherent risks of default, resulting in uncompensated harms; and require contingency arrangements or other parent guarantees as a condition of financing.
- **Repeat projects.** Require a review of the client's record of compliance and providing remedy as a condition of new loans or investment, and require that clients have addressed any outstanding grievances before they are eligible for repeat funding.[276] Require additional safeguard measures for sensitive projects that have previously attracted complaints.
- **Providing specific incentives.** Provide performance-related incentives linked to the achievement of safeguard outcomes, in order to stimulate a more explicit focus on outcomes.
- **Sanctions/bidding exclusions.** Exclude companies from bidding on DFI-funded projects if they have been involved in severe human rights harms. This has already been used in the case of companies involved in gender-based violence incidents (see box 7 above).

2. Creating legal leverage to address remedy

The legal agreements of DFIs are tailored to the type of financing involved: loans, equity investments, guarantees and so forth. If other financial institutions are involved, a range of additional agreements may come into play, including syndication agreements. Depending on the complexity of the project or programme, there may be a wide range of legal agreements into which requirements to address and remediate human rights impacts could be woven, including insurance agreements. The following section focuses briefly only on potential provisions that could be integrated into core agreements.

(a) Creating leverage through loan agreements with clients

Loan agreements provide obvious and potentially effective means to incorporate requirements concerning safeguard compliance and remedy. Some of these requirements may already be standard practice, but as DFIs do not generally disclose standard form legal agreements or specific legal agreements it is difficult to know.[277] DFIs can increase leverage for remedy in loan agreements through the following means.

(i) Loan covenants

In practice, loan covenants at some DFIs have become generic and pro forma, weakening the client's safeguard risk monitoring obligations and limiting the effectiveness of this important opportunity to create leverage for positive results and remedy.[278] DFIs should be encouraged to develop more specific covenants, including in relation to:

- **Safeguard compliance.** General covenants on safeguard compliance are important, particularly in situations in which impact assessment documentation is insufficient to cover all issues or new issues arise.
- **Action plans.** Some projects require specific action plans detailing the measures that must be taken to address identified safeguard risks. Those plans should be specific, measurable, attainable, realistic and time-bound. Action plans can create leverage to require compliance and remediation in relation to adverse human rights impacts from projects as needed. Compliance with these action plans should be covenanted as part of the legal agreement, together with other covenants connected with safeguard compliance.
- **Commitment to address impacts.** Legal agreements could include standard clauses requiring a client to take specific prevention and mitigation measures to address specific (severe) human rights risks identified through the due diligence process, should they occur, including agreed processes for enabling or providing remedy, if not already covered in specific action plans.
- **GRMs.** Safeguards typically require the establishment of GRMs, and safeguard compliance is usually addressed in covenants. In higher risk projects, it may be appropriate to include additional, specific covenants concerning the establishment and operation of GRMs and cooperation with other (external) grievance mechanisms. Stronger reporting requirements for GRMs would encourage more clients to reflect on the effectiveness of their mechanism and more routinely furnish information on grievances, response actions, trends, and outcomes to DFIs and the public.
- **Mandatory disclosure of IAMs.** Safeguards should require all clients and financial intermediary subclients to disclose the existence of IAMs to project-affected communities and the possibility of submitting complaints to them. The United States International Development Finance Corporation's IAM constitutes good practice in this regard: "The IAM will ensure that project-affected stakeholders have information about how to access its services and complaint process. The Corporation will assist the IAM in carrying out its outreach efforts, including requiring clients and sub-clients (for financial

intermediary projects) to disclose the existence of the IAM to project-affected communities in a culturally appropriate, gender sensitive, and accessible manner. The existence of the IAM and how to contact it will be included in appropriate project documents."[279]

- **Using exclusion lists as a basis of sanctions.** Most DFIs have exclusion lists or lists of activities that they will not fund if those activities are identified during initial due diligence (see chap. II, sects. A.8 and A.10). What is less clear is what happens if prohibited activities are discovered within the scope of the client's activities or in its supply chain during operations. To the extent that activities on exclusion lists violate international law, they could justifiably be the basis for penalties or other sanctions if they are identified during operations and are not addressed and remedied swiftly.
- **Notice of serious incidents.** Standard form legal agreements typically include requirements to notify DFIs in the case of more severe environmental and health and safety incidents. This notification requirement could be expanded to cover a wider set of human rights harms beyond health and safety, such as security incidents with security forces, gender-based violence, issues on exclusion lists (such as forced evictions and forced and child labour) and evidence of intimidation or reprisals, referring serious incidents to national authorities as necessary and appropriate.
- **Inspections of serious incidents.** Legal agreements can contain inspection clauses that are triggered in response to complaints about serious incidents, allowing DFIs to carry out or commission their own investigations. This can be useful in helping DFIs to gain access to project-affected people and other relevant stakeholders on the ground.[280]
- **Non-retaliation.** A number of DFIs have published zero-tolerance commitments concerning threats or attacks against project-affected people and their representatives. Particularly in higher risk sectors or countries, there should be specific covenants setting out the actions that clients should take to prevent and respond to intimidation and reprisals and the consequences of any failure to do so.[281]
- **Client participation in DFI/IAM processes.** DFIs can require the good faith participation of clients in complaints brought to them or their IAMs that involve the clients. This could include: permitting visits to the site and premises where the business/programme is conducted; granting access to records; and guaranteeing access to those employees, agents, contractors and subcontractors of the client who have or may have knowledge of relevant information. Care should be taken to ensure that any non-disclosure agreement negotiated with clients exempts IAM requirements.[282]
- **Passing on requirements to contractors and subcontractors.** Legal agreements should require the client to pass on (cascade down) the requirements, or at least the relevant safeguard requirements, to its contractors and subcontractors. Cascading requirements down the chain helps to clarify expectations and provides the legal means of enforcement.
- **Passing on requirements upon the sale of the project.** In appropriate circumstances, legal agreements can require the client to make continued compliance with its safeguards a condition of sale of the project unless and until all non-compliance is remediated (see chap. V on responsible exit below).
- **Reserving reimbursement rights.** DFIs could require that any contributions to remedy made by them on behalf of clients due to the latter's unwillingness or inability to do so should be reimbursed to the DFI, although there should be no reimbursements to DFIs for their own contribution to the harm.
- **Public notification of non-compliance.** Agreements should reserve the right for DFIs to inform local authorities and/or the public in situations in which they deem that a client's non-compliance and potential harms to people or the environment are serious and the client has not taken appropriate mitigation or remedial actions.
- **Third-party beneficiary rights.** Although workers and communities are ostensibly protected by the application of safeguards by clients, they are not parties to the contracts between DFIs and clients.[283] DFI loan contracts typically do not yet include enforceable rights for third-party beneficiaries. To the extent that they do not do so, one might expect to see more project-affected people compelled to seek legal recourse through alternative means, including the court system. In order to enhance access to remedy, loan or other agreements could:
  - Include a third-party beneficiary clause in favour of beneficiaries' rights in relation to investment projects. This could include referring, for example, to community benefits set out in a community development agreement in a mining or agricultural project, consumer rights under a concession agreement or remedial measures under a resettlement action plan or indigenous peoples' development plan (see box 22 on third-party beneficiary rights).
  - Require that clients enter into an agreement with representatives of the affected community, to ensure the legal enforceability of any valid claims for project-related harms. Community development agreements are frequently used in the extractives sector to provide the affected communities with the benefits of economic and social development, including funding obligations in that connection. Close to 40 jurisdictions mandate community development guarantees of this kind in mining laws

(though not necessarily community development agreements).[284] There is no reason in principle why similar arrangements could not be used in other sectors to ensure that communities are able to enforce commitments concerning community development and related matters. These could also play a role in responsible exit (see chap. V below), given that direct agreements of this kind would survive the exit of a DFI.

- Fill any gaps in actions not covered in project agreements or regulatory actions – for example, loan agreements could require a resettlement action plan that provides remedies for communities, should such plans not already be required by the national authorities prior to the involvement of DFIs.

(ii) Conditions of disbursement

Loans are typically disbursed in tranches over time. Each disbursement provides the opportunity to revisit existing requirements. It also provides a point of leverage for DFIs, therefore structuring agreements with multiple disbursement points offers a means of extending the leverage of DFIs over time. Loan agreements also typically set out "conditions of disbursement" that must be met before further funds are disbursed to the client. These conditions can also include specific requirements to address potential human rights issues such as to finalize steps in an environmental and social action plan, complete corrective actions that have come due and resolve (or take demonstrable steps towards resolution of) any significant grievances that have arisen prior to the disbursement.

22 BOX 22 THIRD-PARTY BENEFICIARY RIGHTS

On the subject of third-party beneficiary rights, the 2020 external review of IFC/MIGA environmental and social accountability noted that: "In other contexts (such as racial inequality, fair housing, and shareholder rights) courts have allowed third parties to enforce contracts. Leaving aside the issue of sovereign immunity, under US law such claims typically hinge on the third party's ability to demonstrate (1) that a binding contract between other parties exists; (2) that the contract is intended for the third party's benefit; and (3) that the benefit is sufficiently immediate, rather than incidental, to indicate the contracting parties' assumption of a duty to compensate if the benefit is lost. Likewise, Canadian case law 'suggests that, when justice requires it, a third party may enforce a contract made for that party's benefit.'"[285]

- **Additional requirements in the case of high-risk projects.** Legal agreements may require a range of additional requirements for high-risk projects: for example, providing for alternative mechanisms for corrective action and remedy where appropriate, such as independent panels or other third-party mechanisms; and including specific requirements on remedy for project-affected people, including through third-party beneficiary clauses (see box 22).
- **Waivers.** Waivers may be needed when more time is required to remediate harms. Particularly in some types of project finance transactions, there may be deadlines that, if surpassed, trigger significant financial penalties. This may create perverse incentives from the standpoint of remedy, given the extended timeline that may be required to resolve severe impacts. Loan agreements should include provision for the delay or waiver of penalties in situations in which a given deadline has been missed due to good faith steps taken to provide remedy, such as extending resettlement actions.

(iii) Conditions of termination

Loan agreements provide for conditions of termination and commonly confer on the lender broad discretions to decide when these conditions are triggered and how their own contractual remedies will be exercised. Termination conditions may include requirements to address ongoing non-compliance with safeguards, following service of a notice(s) of non-compliance and a failure to cure. Loan agreements could include more specific termination clauses tied to the occurrence of severe human rights harms if not remediated within a specified period of time (or potential harms of this kind if not prevented within a specified period), or involvement in criminal behaviour linked to human rights harms, such as forced labour, trafficking or sexual exploitation (see chap. V for a more detailed discussion on responsible exit).

23 BOX 23 PROMISING PRACTICE – SUSPENSION CLAUSES FOR HUMAN RIGHTS VIOLATIONS

EIB contractual clauses allow for suspension of contracts in case of violations of human rights. The European Parliament has asked EIB "to make full use of contractual clauses enabling it to suspend disbursements in cases of projects' non-compliance with environmental, social, human rights, tax and transparency standards."[286]

(iv) Requirements concerning contract transparency

It appears that only IFC has requirements concerning contract transparency and these are currently limited to contractual disclosure for extractive projects, although disclosure of contracts for certain infrastructure projects is also encouraged.[287] Disclosing all or key parts of contracts would make it possible for communities to monitor contractual compliance directly, alleviating some of the burden on DFIs, civil society organizations and other relevant institutions in this regard.

24 BOX 24 CONTRACT TRANSPARENCY AS A STEP TOWARDS SUPPORTING REMEDY

A recent review of transparency at DFIs argued that as DFIs are owned by Governments, "they should follow principles for government contract transparency. That means that publication should be by default and exceptions should be in the public interest. With regard to the project agreements and related documents signed by DFIs, the principle that contracts signed by government agencies are public documents that can be published is already enshrined in law in many cases around the world, and there is an increasing move to proactive publication. Few DFI projects should raise legitimate national-security and privacy concerns regarding publication, although such issues should be addressed by DFIs working with project host governments. This leaves the issue of commercial confidentiality, which is the most commonly raised objection to greater transparency by DFIs. Redactions on the basis of commercial sensitivity should only be justified where the public interest in withholding information is greater than the public interest in having that information published. That means the assessment as to whether to publish information should take into account both any commercial harm to the contractor and the broader benefits of transparency to markets and public trust."[288] Alternatives to redaction include disclosing anonymized or aggregated information.[289]

(v) Contract renewals

Contract renewals provide an opportunity to renew or update requirements and to insist on the completion of outstanding remedial actions as a condition of renewal.

(b) Legal agreements covering equity, debt and other investments

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

- **Shareholder provisions.** DFIs could consider adding to existing environmental and social requirements concerning positions and voting to be taken as shareholders in a company. Under such provisions, DFIs could be required to vote for corrective action plans or for investee companies to follow up on corrective actions and to ensure that remediation is provided in situations in which the investee company has caused or contributed to the adverse impacts.
- **Management provisions.** If DFIs appoint managers in investee companies, they could add to existing environmental and social requirements regarding positions and voting to be taken as part of the management board, requiring corrective action plans or that investee companies follow up on corrective actions and that remediation be provided in situations in which the investee companies have caused or contributed to adverse impacts.
- **Impact covenants.** DFIs could link the payment of managers' performance bonuses to environmental and social impact and remedy metrics (in the case of an equity investment), to reduce interest rates or waive certain debt covenants (in the case of debt instruments).[290]

The metrics in each case could include a requirement to demonstrate the absence of unremediated harms.

- **Termination and responsible exit.** DFIs could consider tightening up termination provisions to align with the shareholder/management provisions suggested above and to reflect these requirements on exiting the investment (see chap. V below).

- **Opt-out provisions.** Such provisions would permit DFIs to opt out of investments made by investee companies or funds that are high risk or unlikely to be able to meet safeguards requirements.
- **Cancellation of remaining contributions.** In situations in which funds/partnerships/investee companies have repeatedly and consistently failed to meet safeguards requirements and there are unremediated adverse impacts, DFIs could assert the right to cancel their remaining contributions.
- **"Put options" in subscription agreements linked to non-compliance.** In particularly high-risk cases in which there may be both severe impacts and concerns about the project company's ability or commitment to remedy, a "put option"[291] that is exercisable in case of specific environmental and social non-compliance could help to build leverage for remedy. The put to the parent company would require the parent company to step in and remediate non-compliance in case the project company cannot or will not do so.

(c) Creating leverage through syndication agreements

DFIs should ensure that leverage actions such as those referred to above are included as a standard feature of syndicate financing arrangements, in addition to their own lending activities.

(d) Exercising legal leverage through termination or threat of termination

It is unusual for DFI-supported projects to be terminated for non-compliance with safeguards, although the reasons for termination are rarely made public, which makes evaluation difficult. Reputational concerns are a more common cause for the withdrawal of DFIs, but whatever the cause, unremediated harms often result. Decisions on whether to disengage are inherently complex. However, subject to certain red lines, remaining in the project and providing support to correct the situation may often help to enable remedy in practice. The disengagement dilemma and applicable criteria are discussed in more detail in chapter V below.

(e) Other types of agreements, particularly insurance agreements

Other types of agreement, particularly insurance agreements, may contain provisions that could be used or expanded in order to build leverage for remedy, such as provisions in insurance contracts permitting cancellation of coverage due to legal violations. Such provisions could be more specifically tied to specific human rights violations, such as involvement in forced labour or forced evictions. If a client were involved in these actions, the threat of cancellation of insurance coverage for the project may provide very significant leverage for the concerned DFI to insist on early remediation.

3. Creating leverage through capacity-building

Poor performance does not always stem from capacity constraints. However, capacity-building on environmental and social issues is undoubtedly an area of pressing need, particularly in light of shifts in DFI safeguards towards adaptive risk management and an increasing willingness to use national environmental and social systems. Unlike many commercial financial institutions, DFIs typically have a range of tools at their disposal to support capacity-building for clients and other relevant stakeholders.

(a) At client level

Most safeguards require an assessment of client capacity to implement them and many DFIs have provisions for capacity-building with varying levels of detail on their intended approaches, methodologies, target groups and on how capacity-building contributes to longer term sustainability objectives. These measures include:

- **General environmental and social support and capacity-building.** Several DFIs have made specific commitments to help build clients environmental and social capacity. For example, EBRD safeguards provide that the Bank will "build partnerships with clients to assist them in adding value to their activities, improve long-term sustainability and strengthen their environmental and social management capacity".[292] IFC provides specific support and training to financial institutions on environmental and social management.[293] Support of this kind by DFIs could be expanded to include more specific capacity-building on identifying, addressing and remediating human rights harms.
- **More supervision and support.** For higher risk projects, there is typically more supervision and support, which may include specific capacity-building to support the implementation of safeguards.[294] Particularly in fragile and conflict-affected settings, a high degree of conflict-sensitivity training is needed, as well as sophistication in dealing with grievances, intimidation and reprisals.
- **Support for client capacity on stakeholder engagement and the functioning of client GRMs.** Such support should be a strengthened focus. A recent review by the ADB Accountability Mechanism found that investment in the capacity of ADB and clients in consultation and participation practices, information systems and GRMs led to the improved management of even very large numbers of complaints at the project level. This in turn led to increased demand from clients for support of this kind.[295]
- **Support for the capacity-building of project-affected people.** The ADB Accountability Mechanism review also identified an increase in demand for support for project-affected people to enable them to understand their remedial options when approaching authorities about problematic projects.[296] DFI capacity-building can

and should also be extended to project-affected people to help them to engage in consultations and address grievances. This could include providing funding to third parties, including civil society organizations, to provide ongoing support to local communities to address issues at an early stage in the project cycle, rather than waiting for concerns to escalate into more serious grievances.

• **Funding for expert studies/facilitation of meetings.** The convening power of DFIs can be used in order to access external expertise and help clients and project-affected people to resolve concerns.

(b) At the systemic level – supporting regional, sectoral and multi-stakeholder initiatives

While of less direct and immediate benefit to those affected by a particular project, there are many steps that DFIs could take to build leverage and create incentives for more effective remedial responses at a sectoral, industry, national or transnational level, such as:

• **Building or supporting coalitions and regional or sectoral multi-stakeholder initiatives.** DFIs could offer support to such coalitions and initiatives to address the root causes of systemic impacts on human rights that require input and action from a broader set of actors. Particular discernment is certainly needed, given the mixed quality and impacts of multi-stakeholder initiatives, although some – like the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council – have individual complaint mechanisms.

• **Engaging with the Government to address laws or policies that are not aligned with human rights as part of private sector development work.** The leading multilateral development banks have generally set high benchmarks for environmental and social risk management and it is rare to find national laws that are fully aligned with multilateral development banks' standards. Conversely, and all too commonly, national laws can themselves be the source of human rights risks and adverse impacts. In light of this fact, DFIs should consider developing criteria to trigger engagement by DFIs with Governments to strengthen or repeal laws associated with severe human rights violations, including in relation to labour issues (often with respect to trade unions in particular), land and resettlement, equality, civic space and stakeholder engagement, in line with international human rights and the standards of responsible business conduct. This could become a more central and routine part of DFI support for Governments to strengthen the "upstream" legal framework for private sector development.

• **Developing innovative financing options for remedy.** DFIs have been at the forefront of developing innovative funding structures to address climate and biodiversity issues, among others. Innovation of this kind could also be applied to develop financing mechanisms to help address systemic human rights concerns, such as in connection with modern slavery,[297] and to provide remediation in situations discussed in chapter IV below. A number of DFIs have claimed the "impact investing" label for their own investment activities. More specific linkages with impact investors focused on the types of social issues that arise repeatedly in complaints (chapter I above) could make a powerful contribution to prevention.

4. Creating leverage through normative influence

DFIs can exercise normative influence in connection with remedy in a range of ways, including through the development and implementation of their operational and accountability policies, policy guidance activities, involvement in global development policy debates, research, benchmarking and regulatory initiatives. All such activities can have a positive or negative impact on remedy. Moreover, in situations in which a leading DFI expresses justifiable concerns about human rights issues connected with their mandated activities, it can help to change norms and build leverage and incentives for more effective responses. The World Bank's advocacy on issues concerning gender-based violence in Uganda is a good example (see box 7 above).

Safeguard policies, as discussed earlier, are used as a reference point for a broad set of actors and have exercised significant direct influence on the evolution of environmental and social legal and policy frameworks at country level. Through the Equator Principles, the requirements of safeguard policies effectively become legally binding upon a much wider set of actors, beyond DFIs and their clients. Numerous industry associations and other actors have also made compliance with some or all safeguard policy requirements part of their own mandatory standards. Through these means, safeguard policies have significant potential to stimulate closer alignment between human rights and national laws, client risk management and accountability frameworks. By way of illustration, the fact that the mitigation hierarchy of EIB explicitly provides for remedy for human rights impacts (reflected also in the Equator Principles), as discussed earlier, may be a catalyst for positive legal and policy change on remedy in the business sector and at country level. DFI guidance on human rights-related issues, similarly, influence a far wider range of actors beyond clients.

5. Creating leverage through shareholder actions

Individual shareholders of DFIs can sometimes exert effective leverage for remedy. For example, leverage through the appropriations process of the United States Congress and threats to withdraw military aid to Guatemala were instrumental in encouraging the Government of Guatemala to agree to a $154.5 million

reparations plan in response to forced evictions and the massacre of indigenous peoples connected with the World Bank- and IDB-supported Chixoy hydroelectric dam in the 1980s.[298] At the time of writing, however, implementation of the reparations plan was still pending.

6. Creating leverage through collective action

DFIs can work together and with other actors to address systemic issues affecting access to remedy that would be too challenging for clients or any single DFI to address on its own. For example, as discussed earlier, project structuring and details of loan agreements (including penalty clauses for delays, confidentiality clauses and restrictions on financial disbursements) may inadvertently create perverse incentives and inhibit more proactive and effective approaches to remedy in practice. A collaborative undertaking among DFIs to examine and address their legal documentation would be beneficial, given the competitive implications involved.

Similarly, collective action would also be useful to enable the design of simple and effective remedial mechanisms for large-scale and complex financing structures, such as infrastructure investment funds, which can be opaque and unaccountable in practice (see Introduction, sect. D).

25

BOX 25

EXERCISING LEVERAGE FOR POSITIVE OUTCOMES: CAMBODIA LAND MANAGEMENT AND ADMINISTRATION PROJECT

The Cambodia Land Management and Administration Project involved a programme of actions designed to improve land tenure security and promote the development of efficient land markets in Cambodia. In response to a complaint, the World Bank Inspection Panel found that Cambodian families in the Boeung Kak Lake area of Phnom Penh had been denied due process and forcibly evicted in violation of the Bank's resettlement safeguards.[299] World Bank management developed an action plan in response,[300] but when it was not able to secure the cooperation of the Government in implementing its action plan, it declared a moratorium on new lending to the country.[301] Shortly after the Bank's announcement, the Prime Minister of Cambodia issued a decree granting title to more than 700 families remaining at the site. In the context of land disputes and evictions in Cambodia, this was a significant result.

Some 61 remaining families were excluded from the deal, however, and since 2008 nearly 3,500 families have reportedly been displaced from Boeung Kak Lake after accepting inadequate compensation under extreme duress. Hence, as part of the Consolidated Appropriations Act, 2014, the United States Congress required the United States Executive Director at the World Bank to report to Congress on the steps being taken by the Bank to provide "appropriate redress" to the Boeung Kak Lake community, including secure tenure for the 61 families who were excluded from receiving land titles and livelihood programmes for those forcibly evicted.[302] This case illustrates that, even after project closure and/or temporary withdrawal of a DFI from a country, leverage can still be exercised.



IRM/GCF

26 BOX 26
EXAMPLE OF COLLECTIVE ACTION BY DEVELOPMENT FINANCE INSTITUTIONS

The Agreement for Mutual Enforcement of Disbarment Decisions among ADB, AfDB, EBRD, IDB and the World Bank Group provides a noteworthy example of DFIs leveraging their collective power to address corruption, a harm common to all.

B. STRENGTHENING INDEPENDENT ACCOUNTABILITY MECHANISMS

The creation of the World Bank Inspection Panel in 1993 was a watershed moment in international development, administrative law and the law of international organizations,[303] affording individuals a direct channel for complaints to DFIs for the first time. Many other DFIs have since followed suit. IAMs have a potentially vital role in enabling remedy, without detracting from the primary roles and responsibilities of their parent institutions and their clients. This section first examines the existing roles and track records of IAMs in enabling remedy to date; it then focuses on a number of key determinants and constraints. It concludes by examining how the "effectiveness criteria" for GRMs in principle 31 of the Guiding Principles on Business and Human Rights can strengthen the assessments and contributions of IAMs in the future. More detailed discussion and suggested indicators for the latter purpose are contained in annex II.

1. Remedial role and impact of independent accountability mechanisms

Although the breadth of IAM mandates vary, their central objective is to promote accountability for the environmental and social performance of the parent DFI and thereby promote accountability for and remediate project-related harms. IAMs typically have two main project or programme-related functions – compliance review and dispute resolution – although some also have an additional advisory function, under which they provide guidance on overall policies, sectors, trends and systemic risk issues, and an outreach function, under which they disseminate information to civil society and potentially affected people. Indirectly, IAMs may make significant contributions to sustainable development. At the core of all IAM mandates is the "do no harm" principle, which is a foundation stone for sustainable development. IAMs support the voice, empowerment and participation rights of people directly affected by projects, bringing inputs, knowledge and feedback loops that may not otherwise be available, to the benefit of equity and sustainability.[304]

The compliance review function involves investigations to determine whether DFI staff acted in compliance with the operational policies and procedures of DFIs in respect of the design, implementation or supervision of DFI-supported projects.[305] The two main considerations guiding compliance reviews are whether: (a) the institution acted in compliance with its safeguard policy requirements, in substance and spirit; (b) in case of non-compliance, the identified breaches caused harm to project-affected people. The focus of the inquiry is the institution's own compliance, not that of the client. Compliance review findings are applicable to all people affected by the project, whether or not they were party to the complaint.[306] Even in situations in which complaints are deemed ineligible by IAMs, the fact of a complaint can call attention to a problem and stimulate solutions.[307]

The dispute resolution function helps to resolve project-related concerns in a more flexible and informal way, aiming to find mutually agreed solutions.[308] Claims can usually be brought by people affected or likely to be affected by a project, thereby enabling preventive responses.[309] Unlike in compliance review cases, clients are parties to dispute resolution. Subject to mutual agreement of the parties, dispute resolution encourages dialogue and the identification of solutions and is less concerned with the identification of fault.[310] Dispute resolution tools include fact-finding, mediation, consultation and negotiation.[311] There is considerable room for creativity in this regard, although there may be more uncontrolled variables involved than in compliance reviews[312] and any resulting solution applies only to the parties to the dispute.

There is a wide spectrum of views concerning the appropriate role of IAMs, as well as DFIs themselves, in connection with remedy. Mandates of IAMs differ in important respects, as will be seen. Some DFIs appear to take the view that remediation obligations are for clients alone, that complainants should not be involved in compliance proceedings and that the roles of IAMs should not unduly interfere with the commercial concerns or management prerogatives of DFIs. Even among IAMs, perspectives are not uniform. While most would endorse the role of IAMs in enabling remedy, many consider that they do so only in relation to the dispute resolution (not compliance review) function.

BOX 27
GOOD PRACTICE – THE DISPUTE RESOLUTION PRINCIPLES OF THE COMPLIANCE ADVISOR OMBUDSMAN

An important part of building trust and common understanding is agreeing upon common parameters anchored in principle and experience. The CAO dispute resolution principles, set out below, explicitly take into account the Guiding Principles on Business and Human Rights:[313]

- **Ownership and self-determination by the parties.** The parties need to agree on the purpose, principles, scope and structure of the dispute resolution process.

- **Independence.** CAO teams operate as independent neutrals, which means they must at all times act in an impartial manner, avoid conduct that gives the appearance of partiality and be committed to serve all parties equally in the dispute resolution process.

- **Representation.** The parties need to be adequately represented in the process, with each party identifying for itself credible and legitimate representatives. With respect to the parties bringing the complaint (the complainants), CAO seeks to work directly with the project-affected individual(s) or community.

- **Cultural appropriateness.** The dispute resolution process should take into account local practices, culture, and traditions. It should also be accessible to all relevant parties. When parties from different cultural, educational, religious, professional or other backgrounds come together, the structure of engagement needs to accommodate all parties' needs.

- **Predictability and flexibility.** The dispute resolution process should provide sufficient structure to create predictability and an efficient and focused process, while remaining flexible and adaptable to the parties' changing needs and priorities.

- **Empowerment of the parties.** All party representatives should feel able and prepared to participate in the process on as equal a footing as possible. Achieving this goal often entails some capacity-building or preparation with parties before beginning the process.

- **Inclusivity.** Even where the concerns were not raised by marginalized groups or minorities, ways should be found to include such groups and accommodate their concerns and input in the process, either directly or through representative structures or other process elements (such as women-only groups) that meet to discuss relevant questions and feed into the process. Such groups may be differentially affected by the issues raised in the complaint and have different concerns and may propose different solutions. Including them can enrich the process and lead to more sustainable results.

While the flexibility of dispute resolution processes is a virtue, the consensual nature of problem-solving often entails difficult compromises about what can be achieved and may result in significant harms being left unaddressed. In situations in which the latter harms constitute human rights violations, this can raise difficult moral and legal questions and may leave underlying causes of harms unaddressed. Human rights are inalienable and should not be bartered away, particularly in the context of asymmetrical power relationships between the client and complainant. At the same time, in many situations, complainants may legitimately feel that partial redress is their only feasible option.[314]

Some IAMs, such as CAO and the AfDB Independent Recourse Mechanism, specifically require that dispute resolution outcomes be consistent with international law,[315] but few if any have produced guidance on how to ensure this result in practice. Problem-solving under dispute resolution processes may also encounter challenges in resolving overlapping or conflicting rights claims, for example in situations in which land restitution conflicts with the livelihood rights of the current occupiers. The non-binding character of dispute resolution outcomes and their avoidance of questions of fault and responsibility may also create uncertainty in practice.

The compliance function faces challenges too. First, the terms of IAM mandates may seriously curtail the abilities of IAMs to enable remedy. IAM mandates are usually limited to assessing the environmental and social compliance of DFIs, with restrictions on the scope of their recommendations and their ability to monitor the outcomes of management action plans.[316] Second, management action plans themselves are, moreover, often not fully responsive to project-related harms. Complainants are often not consulted in the formulation of such plans and DFI executive boards often do not exercise sufficiently robust oversight to ensure that the

plans are fully responsive to non-compliance findings. The limited scope of reparations can also be problematic; at the time of writing, the GCF Independent Redress Mechanism and the AfDB Independent Recourse Mechanism were the only IAMs explicitly mandated to recommend reparations in the form of financial compensation[317] (and the GCF Independent Redress Mechanism was the only IAM with the word "redress" in its title).

Despite these and other constraints, IAMs can fulfil a number of other important functions beyond the scope of individual complaints. At the most immediate level, IAMs contribute to improved understanding of operational policies and organizational impacts, and promote more consistent policy implementation, transparency and lessons learned, thereby helping DFIs to avoid repetition of harms.[318] At a more systemic level, IAMs support the overarching risk management objectives of DFIs, provide independent checks and balances for the boards and management of DFIs relating to the situation on the ground for the projects that they finance, mitigate reputational and fiduciary risks and help to build legitimacy and trust with all stakeholders on whom the institution's development mission depends.[319]

While not explicitly "human rights" institutions, IAMs can contribute to remedying human rights harms and, indirectly, to the implementation of human rights standards applicable to DFI operations. The latter effect has been enhanced in recent years by the expansion of the scope of DFI "social" safeguard standards, the tighter alignment between those standards and corresponding international human rights standards and the increasing adoption by DFIs of explicit commitments to respect human rights and implement human rights due diligence (IDB and EIB being among the most notable recent examples, as previously discussed). IAM procedures and interpretations may also reflect and shape the progressive development of due process and human rights requirements under international human rights law.[320]

However, notwithstanding the increasing volume of IAM evaluations, data on complaints are not routinely collected and publicly reported and it is difficult to gauge the contribution of IAMs to remedy. To begin with, only a very small percentage of projects are the subject of complaints to IAMs, that is between 1 and 3 per cent of projects in some DFIs.[321] Of course, it does not follow from this that the remaining 97 to 99 per cent of projects are necessarily problem free, or that grievances are being resolved instead through client GRMs or national systems.[322] The absence of complaints, of itself, reveals relatively little. Other possible explanations for the paucity of complaints include a lack of awareness by communities of the existence of IAMs, lack of trust, accessibility problems, lack of resources and capacities, fear of retaliation and lack of confidence that the client or DFI will respond to their concerns. Pending more systematic research, and while acknowledging considerable variation among DFIs, it seems that harms addressed through IAM processes may be the tip of the iceberg and that a large proportion of project-related harms are not being adequately identified and addressed.[323]

Even in situations in which complaints reach IAMs and are the subject of compliance findings, effective remedy rarely follows. For example, according to CAO, of the 16 cases since the year 2008 for which data are available, only 13 per cent of monitored projects demonstrated satisfactory remedial actions, 37 per cent of projects were partly unsatisfactory and 50 per cent of projects were unsatisfactory. Moreover, as at 2019, 50 per cent of all projects for which the CAO compliance monitoring process had been closed remained in "substantial non-compliance".[324] In the case of IDB, an independent evaluation in 2021 found that none of the six compliance review cases handled by the Independent Consultation and Investigation Mechanism had produced concrete results for requesters despite findings of non-compliance and harm.[325] Dispute resolution cases have fared better, as one might expect given that dispute resolution proceedings are predicated upon some degree of comity and common ground between the parties. An independent review in 2020 of 394 complaints across all IAMs found that 56 per cent of claims that made it to the "facilitating settlement" phase ended up with an agreement between the parties.[326] In 2021, CAO reported that nearly half of dispute resolution cases between 2008 and 2021 had fully settled and nearly 60 per cent of cases had achieved either full or partial settlement.[327] In 2021, the IDB Office of Evaluation and Oversight reported that agreements and positive outcomes had been reached in six of the seven dispute resolution cases facilitated by the Independent Consultation and Investigation Mechanism between 2017 and 2019.[328] As regards the AfDB Independent Review Mechanism, as of July 2020, findings on the effectiveness of the dispute resolution and compliance review functions were mixed but tentative, pending final evaluation in 2021.[329]

Between September 2020 and January 2021, OHCHR carried out an analysis of 257 eligible compliance review cases brought to the mechanisms of the major DFIs that had been either closed or were in post-closure monitoring, on the basis of data made available through the Accountability Console Database.[330] The research found that only a small minority of compliance review cases could clearly be associated with tangible reparation for complainants.[331] There are some important caveats, however: substantive outcomes are difficult to determine in the absence of contextual knowledge and a significant percentage of cases could not confidently be determined

based on the reported data. Subject to these constraints, however, the review provides qualified support for findings by CAO, the IDB Office of Evaluation and Oversight and others regarding the challenges faced by compliance review procedures to date in enabling remedy. This is not a criticism of the compliance function per se, which over the relatively short history of IAMs has focused largely on procedural compliance of projects. Rather, it is an argument to connect the compliance function and remedial action plans more directly and effectively to remedy.[332]

2. Mandates of independent accountability mechanisms – implications for strengthening remedy

The strength and independence of IAMs varies considerably and recent trends have not all been positive. The "elephant in the room" in IAM accountability conversations is the uncomfortable fact that, while compliance reviews are focused on the environmental and social performance of DFIs, it is the client that bears primary responsibility for project implementation, project-related harms and remedial actions.[333] This disconnect is the result of a political compromise built into the operating procedures of the first IAM to be established, the Word Bank's Inspection Panel, reflecting sovereignty concerns of borrowing country board members. This feature (or constraint) was carried over to other IAMs as they emerged, including those in private sector financing institutions in which the scope for good faith sovereignty objections is reduced. The GCF Independent Redress Mechanism's updated terms of reference attempt to address this concern by requiring the Mechanism to examine whether the "project" (not the DFI or client) is in compliance and, in situations in which non-compliance is found, the Mechanism can recommend remedial actions that include those to be undertaken by the secretariat (management) and the client.[334]

Certain IAMs have explicit mandates to address harms consequent upon the non-compliance of DFIs (see box 28). Dispute resolution processes, with some exceptions, do not generally require a linkage to non-compliance with safeguards, nor clear proof of an actual or potential harm. This affords a useful measure of proactiveness and flexibility to address a broad range of harms connected with the project. The connection between compliance review and remedying harms, similarly, seems intuitively obvious: if complainants do not get some form of reparation, why would they go to all the trouble of bringing a complaint? Yet, some have argued that the compliance function should be limited to institutional learning rather than remedying harms on the ground. The external review of IFC/MIGA dismissed the latter argument, taking into account functional logic, the Guiding Principles on Business and Human Rights and the comparative experience of other IAMs. The external review noted the "common understanding that the role of IAMs is to help assure (through action by the IFI and the borrower) that non-compliance and related harm are remedied".[335] Further clarity in the terms of IAM mandates could help to put this matter beyond doubt.

The independence of an IAM strongly determines the extent to which it may enable remedy in practice. Most IAMs conduct a preliminary assessment to establish whether there is sufficient evidence of non-compliance and related harm to justify a compliance review process or sufficient grounds to proceed with dispute resolution. In several cases, IAMs enjoy broad scope of action and may initiate compliance investigations without board approval, while some may self-initiate compliance reviews in the absence of a complaint (see box 29 below).[337] Independence of this kind enables IAMs to more effectively address emerging trends and particularly serious or emblematic cases, including in contexts in which communities have not yet mobilized or, as is increasingly the case, retaliation risks limit or preclude complaints altogether.

28

BOX 28
GOOD PRACTICE – EXPLICIT MANDATES OF THE INDEPENDENT ACCOUNTABILITY MECHANISMS OF THE AFRICAN DEVELOPMENT BANK AND THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT TO REMEDY HARMS

In situations in which the AfDB Independent Recourse Mechanism finds non-compliance, the management action plan must include "clear time-bound actions for returning the Bank to compliance and achieving remedy for affected populations".

EBRD Independent Project Accountability Mechanism: "The purpose of the Compliance Review is to determine whether the Bank, through its action or inactions, has failed to comply with the Environmental and Social Policy … in respect to an approved Project. … If EBRD is found to be non-compliant, further objectives of this stage are to: (i) recommend Project-specific actions to bring the Bank into compliance in respect of the Project, and address the harm or potential harm associated with the findings of non-compliance;".[336]

Other IAMs, including the World Bank Inspection Panel, the ADB Compliance Review Panel and the AIIB Project-affected People's Mechanism and the IDB Independent Consultation and Investigation Mechanism require board authorization before carrying out a compliance review. This can present a significant barrier to remedy in practice, given the potential conflict of interests of board members who are usually not required to recuse themselves from decisions pertaining to their own country. Certain IAMs are addressing the latter problem by developing procedures requiring recusal of board members in such situations.

to measures that should be adopted to address non-compliance and related harm. The AfDB Independent Recourse Mechanism, CAO, the EBRD Independent Project Accountability Mechanism, the GCF Independent Redress Mechanism and the Independent Complaints Mechanism of DEG, FMO and Proparco have the authority to issue recommendations for actions to correct non-compliance and related harm. The policy of the EIB Group Complaints Mechanism provides for a different approach: the Mechanism specifies in its compliance reports recommendations for corrective actions and then agrees with management what actions

29

BOX 29
GOOD PRACTICES CONCERNING THE INDEPENDENCE OF INDEPENDENT ACCOUNTABILITY MECHANISMS TO INVESTIGATE

CAO, the EBRD Independent Project Accountability Mechanism, the EIB Group Complaints Mechanism, the GCF Independent Redress Mechanism, the AfDB Independent Recourse Mechanism and the Independent Complaints Mechanism of DEG (German development bank), FMO and Proparco are empowered to decide whether to investigate complaints without the need for board approval.

CAO, the AfDB Independent Recourse Mechanism, the GCF Independent Redress Mechanism, and the United Nations Development Programme's Social and Environmental Compliance Unit and the State Secretariat for Economic Affairs of Switzerland can self-initiate compliance investigations, in the absence of a complaint from project-affected people or other relevant parties.

Another mandate-related constraint is that many IAMs are also precluded from accepting complaints prior to board approval of the project, which can severely curtail preventive responses. The logic of early access is self-evident: design changes are usually more feasible at earlier stages of projects, and mitigation actions less costly, prior to land acquisition and other significant implementation activities.[338] It is sometimes argued that providing access to IAMs prior to board approval can undermine confidence in the project sponsor; but even to the extent that this is so, early IAM access can help to signal potentially serious problems, provide a channel for early and effective resolution and strengthen incentives for good project design at the outset.

The failure of management action plans to sufficiently address all non-compliance and related harms can also be a problem, as mentioned earlier. Such plans are the sole responsibility of management but some IAMs have the right to make recommendations in relation

need to be taken. In the case of ADB, the Compliance Review Panel reviews and comments on the management action plan (remedial action plan in the case of ADB) developed by management and the client before it is finalized and considered by the board. Complainants, by contrast, are infrequently consulted in the development of management action plans or participate in monitoring. Such shortcomings are problematic from a human rights perspective and can undermine the relevance, legitimacy and impact of remedial actions.

In the view of OHCHR: (a) IAMs should be authorized to include in their investigation reports recommendations on what should be included in management action plans; (b) management should be required to consult with IAMs on the content of such plans during their preparation; and (c) IAMs should be authorized to present their views on draft plans to the board prior to their approval, so that the views of IAMs can be taken into account when approving such plans.

30 BOX 30 GOOD PRACTICE – RECOMMENDING A WIDE RANGE OF REPARATIONS

Several IAMs are authorized to identify actions to address harms or potential harms associated with their findings of non-compliance, in addition to policy and procedural changes to avoid future repetition. The GCF Independent Redress Mechanism and the AfDB Independent Recourse Mechanism are explicitly authorized to recommend redress in the form of financial compensation.[339]

Compliance review reports of the AfDB Independent Recourse Mechanism may include operational actions to address harm and potential harm associated with non-compliance, and may recommend that "redress be provided to those harmed, which may include financial and/or non-financial considerations, as the case may be".[340]

The GCF Independent Redress Mechanism can recommend remedial action as appropriate in compliance proceedings and in situations in which the decision of the board incorporates the development of a remedial action plan, the GCF secretariat develops a remedial action plan that can include providing redress as reflected in the decision of the board.[341]

Most IAMs have a mandate to monitor the implementation of management action plans, but the scope and duration of monitoring may differ. The problems in this regard include: (a) the scope of monitoring may be restricted to whether DFI staff have implemented the management action plan but not whether such a plan itself is adequate to address the identified harms or whether harms have been remedied; (b) IAMs may be limited to reviewing progress reports produced by management, rather than carrying out site visits and interviews of DFI staff and management, complainants and other stakeholders; (c) the time frames for monitoring may be as short as one or two years, which may weaken the incentive of DFIs and clients to stay the course and bring projects into compliance; (d) IAMs may lack a mandate to recommend the necessary changes in management action plans in line with changed circumstances; (e) there may be limited scope to engage the Board on monitoring reports; and (f) IAMs may be authorized to report to boards on continued non-compliance, but not recommend appropriate remedial actions.

These kinds of shortcomings have important implications for the delivery of reparations agreed upon as part of dispute resolution processes or compliance reviews. For complainants, this is the last step in what can be a very long road to remedy. If this last stage is procedurally flawed, or the board does not follow up on IAM recommendations, the purposes and legitimacy of the complaint system may be undermined and grievances may be inflamed or channelled to the formal court system or political arena. This should be as much of a concern for DFI management and shareholders, as for complainants, given the reputational risks involved.

Finally, as discussed earlier, the impact of IAM recommendations and the ability of IAMs to enable remedy may be constrained by their (currently) non-binding nature.[342] This sets up an odd contradiction with other DFI mechanisms that issue decisions that can and do bind the institutions, such as administrative tribunals that address personnel complaints, integrity institutions that address corruption, binding arbitrations that are regularly agreed to by DFIs in goods and service contracts and, increasingly, information appeal decisions (see annex III). While enforcement of itself is not a panacea, the lack of binding effect may make remedy more vulnerable to the vagaries of the conflicting internal incentive systems and organizational cultures of DFIs and boards, and client pressure. In the next iteration of IAM reviews, it is the view of OHCHR that consideration should be given to making IAM recommendations in compliance reviews binding on DFI management.


World Bank Inspection Panel

3. Strengthening assessments of independent accountability mechanisms using the Guiding Principles on Business and Human Rights' effectiveness criteria

The IAM system emerged from humble origins and has evolved impressively during the last 30 years. But progress is reversible and the future is far from clear. As was remarked in the year 2020: "While some [IAM] reforms have been progressive, others have been regressive. … While some of these are likely to increase the effectiveness of the IAMs, through strengthening their foundational principles, others are likely to undo some of these efforts. … In this sense, IAMs are at a crossroad and it behooves their parent institutions to act with vision and care."[343]

IAM reform processes are institution-specific but occur in a cross-referential and iterative fashion. Efforts to reform the system, promote accountability and prevent backsliding would be helped by the development of a common assessment framework for their effectiveness. As was discussed earlier, the Guiding Principles on Business and Human Rights have exerted a strong influence on global normative frameworks relevant to development finance and are increasingly being integrated into DFI safeguard policies and IAM procedural guidance. The Guiding Principles have influenced discussions on remedy among IAMs and project-level GRMs, and certain IAMs have recommended that their parent DFIs refer to the Guiding Principles' effectiveness criteria (contained in principle 31) when designing and evaluating project-level GRMs.[344]

Under principle 31, GRMs should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue (see box 31 below).[345] IAMs are non-judicial mechanisms to which principle 31 of the Guiding Principles on Business and Human Rights applies, and many IAMs have developed similar self-assessment criteria but with inconsistent metrics. OHCHR suggests that principle 31 be adopted by all IAMs as a common metric for self-assessment and evaluation, guided by the suggested indicators in annex II, and that peer review processes such as those adopted by OECD national contact points and national human rights institutions be considered.[346] No single set of criteria can possibly capture all relevant issues, however, the consistent use of common metrics will furnish a more accurate picture of progress and challenges, including systemic issues common to all IAMs, and may thereby help to enable remedy in practice.

31

BOX 31

GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS' EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE REDRESS MECHANISMS[347]

Effectiveness criteria	Key attributes
Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes	Trustworthy Accountable
Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access	Known Variety of access points Assistance to overcome barriers
Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcomes available and means of monitoring implementation	Clear procedures Clear time frames
Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms	Fair access to information, advice and expertise Fair treatment
Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake	Keeping parties informed about progress of cases Providing information about the process to build confidence
Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights	Outcomes and remedies accord with international standards and are adequate, effective and prompt Outcomes and remedies do not contribute to (further) human rights harms Outcomes and remedies are implemented in practice No prejudice to legal recourse
A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms	Identification of lessons for improving the mechanism and preventing future harm
Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances	Consulting "users" (including internal users) on design and performance Decisions arrived at through dialogue with those affected

C. IMPROVING CLIENT GRIEVANCE REDRESS MECHANISMS

Evaluations of GRMs to date are mixed at best. For example, a World Bank review in 2014 found that "grievance mechanisms exist on paper but not always in practice" and that almost half of GRMs in operation either received no complaints or had no data on complaints.[348] In 2019, an ADB evaluation found: "In most of the [accountability mechanism] cases over the last 3 years, the GRMs were not functioning well or were absent. … those interviewed generally concurred that many project GRMs are superficial or nominal – existing on paper but not yet operationalized – and often not integrated into locally recognized systems of judicial or administrative recourse."[349] In 2020, the external review of IFC/MIGA found: "A more detailed information-gathering exercise is needed to understand how GMs are working in the field; what factors are contributing to the effectiveness or ineffectiveness of GMs; and specifically, the impact of IFC/MIGA support and supervision to the effectiveness of GMs."[350] The external review of IFC/MIGA also found that annual monitoring reports provided by clients did not systematically

reflectdetailedinformation about community awareness of and access to the project-level GRM, or on the disposition of cases by such mechanisms, further noting that: "This is unfortunate as many E&S practitioners in the different IFIs highlight that certain risks are difficult to identify during appraisal but become apparent during supervision."[351]

Nevertheless, given the lack of viable alternatives in many contexts and the very small percentage of concerns that reach IAMs, the role and potential importance of GRMs should be acknowledged and supported. The continuing increase in large-scale infrastructure projects, increased financial intermediary operations and the increasing tendency to defer safeguard compliance "downstream" during project implementation may increase the number of potentially affected people who are excluded from consultations at an early stage in project preparation. This in turn may give rise to a growing number of complaints during the coming years.[352] With these factors in mind, it is important that GRMs are well designed, appropriately mandated and resourced, and given all the support that they need to function effectively.

1. Supporting clients in developing effective grievance redress mechanisms

DFIs and IAMs have developed a range of guidance materials for clients concerning the establishment and operation of GRMs (see box 34 below) and several offer training programmes (see box 33), although supply falls well short of demand. DFIs can also support clients in engaging external consultants to design GRMs for more complex or large-scale projects and grievances, or may help with the establishment of independent panels in particularly high-risk cases.

When assessing the design and operation of a client's GRM as part of their due diligence, DFIs are encouraged to use the Guiding Principles on Business and Human Rights' effectiveness criteria (discussed in the preceding section, box 31 and annex II).[354] IAMs have begun to make recommendations to their parent banks along these lines.[355] Indicators to assess how GRMs deal with retaliation risks are especially important given the increasing scope and severity of threats and retaliatory actions faced by complainants in practice, particularly in relation to agribusiness, forestry, extractives, energy and large infrastructure projects. "Accessibility" is

32 BOX 32
UNDERSTANDING THE RANGE OF GRIEVANCE HANDLING PROCESSES

Compliance There are a number of different ways in which grievances can be handled and examined. They vary in terms of the formality of the process, the resources needed and the type of outcomes achieved and can be broadly categorized as:

"1. Information facilitation: the gathering of information on grievances, with any further action on that information largely left to its end-users.

2. Negotiation: direct dialogue between the parties to the grievance with the aim of resolving the grievance through mutual agreement.

3. Mediation/conciliation: direct or indirect dialogue between the parties assisted by an external, neutral/objective facilitator with the aim of resolving the grievance through mutual agreement. The facilitator may take a more or less active and intrusive role in the dialogue process.

4. Arbitration: a process by which neutral arbitrators selected by the parties to a dispute hear the positions of the parties, conduct some form of questioning or wider investigation and arrive at a judgment on the course of action to be taken in settling the grievance or dispute, often, though not always, with binding effect on the parties.

5. Investigation: a process of gathering information and views about a grievance or disputed situation in order to produce an assessment of the facts.

6. Adjudication: the formation of a judgment on the rights and wrongs of parties in a situation of dispute and on any remedies needed, which may be binding on the parties or lead to some form of sanction. Usually the culmination of an investigation, adjudication is distinct from arbitration in that it does not require agreement by the parties on who will adjudicate, nor does it involve a formal process of hearings."[353]

also a critical criterion, including whether clients have adequately informed people about the existence of GRMs and whether there are patterns of discrimination and exclusion that impede access. As the IFC/MIGA external review report noted: "In complex communities, local power dynamics can lead to the exclusion of certain groups so that use of local leaders to disseminate information (a frequently used and often reliable approach) can lead to marginalized groups not gaining access."[356]

The following considerations may also be relevant to the due diligence reviews of GRMs carried out by DFIs and are relevant to meeting the Guiding Principles on Business and Human Rights' effectiveness criteria in practice, drawing from evaluations and reviews carried out by DFIs and IAMs:

- **Context specificity.** GRMs need to be tailored to the operating context and type and seriousness of issues that they will be expected to address. Certain types of projects tend to have a higher likelihood of grievances, such as projects involving resettlement or other land interests, projects affecting water quality and quantity, projects involving labour influxes and so forth. DFIs are increasingly financing projects in fragile and conflict-affected and high-risk contexts, which puts increased pressure on GRMs and calls for particular care in ensuring that these mechanisms are sufficiently robust and have the mandates, resources and expertise to deal with a large and complex caseload. In such contexts, local facilitators who understand the local context, local attitudes and understand the links to the local and national grievance systems can play a critical role. For example in the Uganda Transport Sector Development Project (see box 7 above) the World Bank found that the project's grievance redress committees focused largely on compensation for lost assets and was not adequately set up with the appropriate representation or procedures to handle sensitive issues, such as gender-based violence and child protection, that are characteristic of projects involving labour influxes.[357]
- **Severity of human rights impacts.** Safeguards generally note that GRMs should be "proportionate to risk". When it comes to human rights impacts, however, the "severity" of the risk is paramount and is measured by three separate and independent factors (see box 16 on severity). Even smaller projects can have severe human rights impacts either because of the scale of the impact (e.g. severely endangering lives or livelihoods, or freedom of expression or privacy, such as in the case of many digital identification projects) or because of the irremediability or irreversibility of an impact, such as in the case of gender-based violence, the torture or killing of human rights defenders or stunting or lost educational opportunities for children.
- **Appropriate mandate and resources.** GRMs need to have the mandate and authority to address the types of grievances that they may be confronted with, including the authority to influence project design and implementation in response to grievances. GRMs should be able to provide for as wide a range of reparations as possible (see box 30 above). A clear structure of formal accountability helps to demonstrate to internal and external stakeholders that stakeholders' rights and remedy are taken seriously.
- **Appropriate approaches and tools.** GRMs should be designed in close consultation with stakeholders from the outset. This is not only a human rights imperative, but helps to anticipate the kinds of issues that are likely to arise in practice. GRMs design can include a combination of approaches with different pathways and outcomes. For example, if investigations or mediation are required, the mechanism could be designed to refer these functions to independent third parties. This may be particularly important in complex and contested cases and can help to build trust in the mechanism. In situations in which widespread or severe human rights impacts and complaints are anticipated, consideration could be given to establishing a dispute settlement board.[358] Such boards are usually set up to resolve disputes among the parties to a contract, rather than between a company or government agency and workers or local communities. But as they are created by contract, there is nothing to prevent a dispute settlement board from being established with a mandate to settle disputes between a client and local communities. This would require adapting the typical rules for the boards and deciding in advance how remedies recommended by the dispute board would be enforced. High-level independent panels[359] and independent or semi-independent investigations[360] may be necessary in complex cases.
- **Appropriate institutional arrangements.** The organizational and physical location of a GRM are also important considerations, taking into account the context. For example, if a project covers a large area, such as a national programme with various subcomponents in different locations, it may be necessary to have several points of contact rather than a single point of contact in the capital or at the project headquarters.[361] And if there are several field locations, an additional office in headquarters may be needed to ensure consistency and coordination across GRMs.
- **Appropriate timing.** Particularly in complex or high-risk situations, GRMs should be established early during the preparation phase, since stakeholder concerns may emerge early in the project cycle.[362] Early access can help address concerns in a timely and effective manner, at lower cost to all parties.
- **Appropriate scope of coverage.** As noted earlier, safeguards may require a range of GRMs. However,

their scope of coverage is not always clear: for example, in the context of labour safeguards, some DFIs require that directly contracted workers must have access to GRMs, but supply chain workers are usually excluded. As part of the corporate responsibility to respect human rights, the scope of human rights due diligence under the Guiding Principles on Business and Human Rights includes impacts that are "directly linked" to an enterprise through its business relationships, such as impacts on contractors, subcontractors and those throughout supply chains. Businesses are increasingly responding to these expectations and either require contractors or suppliers to establish a GRM or alternatively allow workers in the supply chain access to their own mechanism.[363]

- **GRMs within the larger remedy ecosystem.** A global review of World Bank projects in 2014 found the existing grievance redress ecosystem at country level was not often adequately analysed, and yet it plays a potentially important role in handling grievances that GRMs cannot or should not (see section E.2 below).[364]

33

BOX 33

GOOD PRACTICE – SUPPORT FROM THE GREEN CLIMATE FUND INDEPENDENT REDRESS MECHANISM FOR FINANCIAL INTERMEDIARIES' GRIEVANCE REDRESS MECHANISMS

The GCF Independent Redress Mechanism is mandated to build the GRMs of the Fund's direct access entities, which are subnational, national or regional financial institutions that can then on lend or invest GCF funds. Through specific online modules and guided online live sessions, the Independent Redress Mechanism offers a free hands-on training for the entities' GRMs. It also provides technical assistance in the strengthening of mandates and procedures of entities' GRMs, and deep-dive mediation training for those who complete the basic GRM course. Through these and other efforts, the Mechanism aims to build a community of practice by fostering exchange and sharing knowledge among accountability practitioners.

34

BOX 34

GUIDANCE AND TOOLS ON GRIEVANCE REDRESS MECHANISMS

- As part of the third phase of its Accountability and Remedy Project, OHCHR analysed and made recommendations for enhancing the effectiveness of GRMs and IAMs, including with respect to meeting the Guiding Principles on Business and Human Rights' effectiveness criteria.[365]
- IFC and CAO have developed toolkits on GRMs, including explanations, tools and resources and a series of case studies.[366]
- IFC has developed guidance on GRMs in particular contexts, including those pertaining to security forces[367] and modern slavery.[368]
- ADB has developed specific guidance on GRMs for transport projects in Sri Lanka.[369]
- EBRD has developed guidance on labour GRMs.[370]
- In its paper on remediation, the Working Group on enabling remediation, which was established under the Dutch Banking Sector Agreement, sets out a series of questions to analyse client GRMs based on the Guiding Principles on Business and Human Rights.[371]
- Laura Curtze and Steve Gibbons, "Access to remedy – operational grievance mechanisms: an issues paper for ETI" (London, Ergon Associates, 2017).
- International Commission of Jurists, *Effective Operational-level Grievance Mechanisms* (Geneva, 2019).

35

BOX 35

RECOMMENDATIONS ON GRIEVANCE REDRESS MECHANISMS CONTAINED IN THE EXTERNAL REVIEW OF THE INTERNATIONAL FINANCE CORPORATION AND THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

In the 2020 external review of IFC/MIGA, the Review Team highlighted the need to strengthen the work of IFC/MIGA on clients' GRMs (referred to as "GMs" in the review): "IFC/MIGA should hire or contract E&S staff with expertise in GM design and operation to ensure adequate support for every region and sector in IFC/MIGA portfolios. Adequate support would mean that:

- For every investment with an identified affected community, the client would be supported in establishing or strengthening an appropriate GM.
- There would be rigorous assessment of the adequacy of the GM as part of due diligence.
- Clients could receive clear guidance on additional policies, procedures, staffing, and/or outreach necessary to satisfy the IFC/MIGA grievance mechanism requirement, with requirements included in covenants for higher-risk investments.
- IFC/MIGA E&S staff with expertise in GMs would engage in ongoing supervision of the investment, assessing GM effectiveness by reviewing documentation of GM cases; interviewing GM staff and other client representatives expected to interact with affected communities, along with members of affected communities; and reviewing complaints about the investment channelled to other mechanisms.
- In instances in which supervision reveals limitations in the effectiveness of the GM, IFC/MIGA could specify remedial actions in a time-bound action plan, offering support where appropriate, and indicating what consequences would ensue if the actions needed to strengthen the GM were not taken in a timely fashion.
- Given its expertise, CAO should assist IFC and MIGA in building client GM capacity, using its Grievance Mechanism Toolkit and the expertise of CAO's staff and mediator network. CAO's involvement should be under the auspices of CAO's Advisory function, to maintain the separation of this activity from any project-specific issues that could become the focus of a CAO complaint. Roles and resources would also need to be allocated by mutual agreement among CAO, IFC and MIGA."[372]

2. Assessing client willingness and capacity to deliver on remedy, including through grievance redress mechanisms

The due diligence of DFIs on remedy issues requires more than checking whether a client has established a GRM. It also requires an assessment of the client's understanding, capability and commitment to meet expectations on remedy, and whether clients might benefit from further capacity-building, advisory services or other support in this area. Particular attention should be given to clients in higher risk circumstances and those with lower capacity, in this regard.

For public sector clients, the initial assessment of DFIs should also consider the extent to which national administrative systems, including ombudspersons and department or industry authorities, could substitute for programme or project-specific GRMs. However, as noted by EBRD: "Experience demonstrates … that the efficiency of these systems may not meet the Bank's expectations and requirements for a timely resolution of grievances. In such cases, the Bank requires that a project-specific grievance management mechanism be established, unless adequate evidence can be provided by the relevant government that existing mechanisms provide effective and timely grievance resolutions."[373] A rigorous assessment of the national remedy system, including on complementarities and interactions between GRMs and State-based mechanisms, should therefore be a critical part of the due diligence of DFIs (see sect. E.2 below).

3. Supporting clients in addressing human rights concerns through their grievance redress mechanisms

Irrespective of the content of safeguard policies, project-affected people are increasingly expressing their concerns in human rights terms. DFIs can play a useful role in supporting clients to understand and respond to these trends in the design and operation of GRMs. Failure to do so, by contrast, may cause unnecessary frustration or friction and distract from grievance resolution objectives. DFIs could consider the following actions:

- Help clients understand that GRMs are a benefit to both clients and communities and workers, rather than a bureaucratic requirement to access DFI financing.

- Help clients understand that, even when communities frame their concerns in human rights terms, this does not mean that they must be resolved through judicial processes or that it is about finding fault and assigning blame. Rather, human rights grievances can often be resolved through GRM processes of dialogue, mediation and mutual problem-solving.
- Support clients to design GRMs that are equipped to address human rights concerns, to the extent possible and, in doing so, help to build confidence and trust in such mechanisms. This includes supporting clients to design and operate GRMs in a way that meets the Guiding Principles on Business and Human Rights' effectiveness criteria.
- Demystify and help clients become more conversant with human rights terminology and concepts, understanding the role that their GRMs play in meeting the responsibility to respect human rights.
- Help clients understand what is different about managing grievances from a human rights perspective (see Introduction, sect. C above). This includes:
    - Understanding that human rights are grounded in the dignity of each and every person, and that GRMs can provide a place for people to be heard in a way that treats them with respect and fairness.
    - Observing good processes and, in particular, understanding the importance of involving project-affected people at all stages of the remedy process, including but not limited to discussions on reparations.
    - Understanding the linkages of many concerns to human rights, for example: environmental pollution affects the rights to health and adequate standards of living; health and safety issues affect the rights to life and health; and measures to put down protests may affect the right to life and the freedoms of expression, association and assembly. GRM staff should be trained in understanding and identifying these and other human rights linkages.
    - Understanding that the concerns of communities are not just about wishes or aspirations, but are about human rights and corresponding obligations. This means that human rights grievances may require more serious attention, particularly in high-risk contexts.
    - Understanding that when impacts are severe that they may need to be handled by a State-based or independent mechanism (see sect. E.3 below).
- Help clients understand that different mechanisms they may have in place to address other types of concerns – corruption, consumer complaints and whistle-blower protection – may need to be adjusted to address human rights grievances or, more likely, should be seen as a complement (not a substitute) for remedial mechanisms with human rights competences.
- Support appropriate approaches to deal with severe human rights impacts. In many cases, as noted above, this will require referral to the appropriate national authorities. However, in other cases, independent specialists, international organizations and NGOs can help in dealing with particular issues, such as gender-based violence, labour rights and discrimination.

4. Assessing and supervising the effectiveness of grievance redress mechanisms in practice

As discussed above, while their track record to date is mixed, a well-designed GRM can have a number of developmental and operational benefits, including improving project outcomes at lower cost, facilitating project supervision through stakeholder feedback, identifying systemic issues and strengthening local ownership and accountability.[374] Specific reporting requirements in loan covenants on high-risk incidents and the functioning of GRMs would fill a pressing information gap and provide an opportunity for reflection by clients and DFIs about the effectiveness of GRMs in practice.

The supervision obligations of DFIs should be specified as clearly as possible, including whether outcomes have been reached, implemented and monitored, through desk research and interviews with GRM staff, client representatives and affected communities. Supervision cannot be tied exclusively to a project's risk classification, given the fluidity of risk even in low-risk projects. In situations in which serious issues are flagged, further DFI supervision may be needed, irrespective of project classification (see sect. D below).

Supervision should also operate on the assumption that "no news is not necessarily good news". A dearth of complaints may indicate that concerns are being addressed, but it may also indicate that the mechanism is not known, not trusted or not functioning well, and that more specific investigation into the effectiveness of the mechanism is needed.[375] Disproportionate re-routing of complaints from a GRM to other mechanisms may be another indicator of a mechanism's poor performance.

5. Strengthening requirements, capacity and attention to grievance redress mechanisms among financial intermediary clients

DFI safeguards are generally weak on GRM requirements for financial intermediaries,[376] a problem which is compounded by weaknesses in the subproject disclosure requirements of the financial intermediaries.[377] These are vital analytical and operational gaps to fill if more claimants are to have access to remedy in practice, although normative developments and evolving commercial incentives (see Introduction, sect. D) may already be stimulating progress. For example, the

Equator Principles Association is reported to be considering establishing a GRM and certain commercial banks (notably ANZ and ABN AMRO) are in the process of doing so, and accredited entities of GCF are required to do so. Civil society organizations have expressed clear expectations in this regard and have actively supported an ADB initiative to provide guidance for financial intermediaries in China (see box 37).

Financial intermediaries will likely also need further guidance on the differences between GRMs and more traditional whistle-blower hotlines and mechanisms dealing with corruption and legal compliance issues.[378] While whistle-blower hotlines can offer a useful point of access to raise grievances, there may be many access barriers in practice, including how the mechanism is labelled, the mandate and technical capacities of staff handling complaints, tensions between compliance investigation and grievance redress functions and inherent limitations concerning complaints raising serious human rights issues. As with GRMs generally, guidance for financial intermediaries on how their GRMs may be integrated within a larger remedy ecosystem would be useful.

D. WORKING WITH CLIENTS ONCE AN IMPACT HAS OCCURRED

DFIs are not generally able to follow complaints with clients on a routine basis, but will (and should) more likely do so in higher risk projects and in situations in which particularly severe concerns or impacts have been flagged. Practice in this respect can be strengthened in situations in which legal agreements specifically require the client to alert DFIs to incidents and grievances alleging severe harms. In situations in which supervision or intervention after notice reveals limitations in the effectiveness of GRMs, DFIs could specify remedial actions in a time-bound action plan, offer support where appropriate and advise the client on the consequences that would ensue if the actions needed to strengthen the grievance redress mechanism are not taken in a timely fashion.

The Dutch Banking Sector Working Group on enabling remediation identified a number of practical steps banks could take in following up on particular incidents or impacts that come to the attention of DFIs, whether through direct contact from clients or through supervision, or indirectly through civil society organizations or IAMs (see box 38 below).

36

BOX 36
BANKTRACK AND OXFAM AUSTRALIA GUIDANCE ON DEVELOPING EFFECTIVE GRIEVANCE REDRESS MECHANISMS IN THE BANKING SECTOR

This guidance builds the business case for GRMs at financial intermediaries, surveys the current landscape and sets out guidance for financial intermediaries on how to develop such mechanisms. It also sets out clear expectations from civil society organizations about how these mechanisms should be established and operated.[379] A section on frequently asked questions addresses common questions and sources of confusion.[380]

37

BOX 37
ASIAN DEVELOPMENT BANK PROJECT ON AN ACCOUNTABILITY MECHANISM FRAMEWORK FOR FINANCIAL INTERMEDIARIES FROM CHINA

Given the increased financing routed through financial intermediaries and the need for proper environmental and social accountability in this context, the ADB Compliance Review Panel developed an accountability mechanism framework with other partners for financial intermediaries focused on enhancing environmental and social compliance and accountability for Asian financial intermediaries, particularly Chinese financial intermediaries, as well as Indian and Indonesian financial institutions.[381] Workshops were attended by several hundred bankers and Chinese regulators. The accountability mechanism framework may serve as a template for institutions that are considering how to implement an environmental and social accountability system, including procedures for due diligence, consultation, project-level GRMs, and information disclosure. The framework specifies procedures for creating national and institutional-level accountability mechanisms, also called independent redress mechanisms. ADB released two versions of the framework: one for all financial intermediaries[382] and one specifically for Chinese financial institutions.[383] The reason for the different versions is not apparent from publicly available documentation. Civil society organizations have pointed to gaps in the framework while also noting that it represents "a strong step in the right direction" given the relative dearth of accountability mechanisms in Chinese commercial and State institutions despite their prominent role in international finance.[384]

38

BOX 38
ROLES AND TOOLS TO SUPPORT REMEDY AFTER IMPACTS OCCUR[385]

Roles banks can play after impacts occur:

(a) Clarifying the facts: identifying which stakeholders suffered what harm, from which business activities and what the underlying root causes of the harm were.

(b) Focusing client attention on remedy: raising the issue of remedy with the client, helping the client to understand its responsibility for remedy and the meaning of remedy as needed, and ensuring that remedy for negatively affected individuals and groups is a priority for the client.

(c) Ensuring affected stakeholder voice in remedy conversations: assessing the role of affected stakeholders in remedy processes and ensuring that rights-holder perspectives are central in the remedy conversations.

(d) Ensuring quality of process: paying special attention to remedy processes to ensure effectiveness.

(e) Monitoring implementation of remedy outcomes: holding companies accountable for remedy actions that might be agreed to, to ensure that remedy is delivered in practice.

(f) Contributing resources for remedy: where the bank has itself contributed to the harm, it would be expected to provide for or cooperate in the remediation.

(g) Urging the client to cooperate in good faith with any ongoing, external processes: if a client is subject to external third-party processes, the bank could apply leverage to its client to cooperate in good faith with those processes.

Tools banks can use after impacts occur:

(a) Power of the question: asking clients about impacts and approaches to remedy can itself be a powerful tool. Often, questions from investors and financiers can play a significant role in strengthening the internal leverage of those responsible for human rights or social impacts within companies.

(b) Asking for substantiation: asking clients for details about the processes that they followed in providing remedy and evidence they can show that certain key parameters were met.

(c) Asking the affected stakeholders: asking stakeholders what kinds of remedy they are seeking and whether they are satisfied with the company's process.

(d) Triangulating with other parties: testing the bank's own assessment, and the perspectives of companies and stakeholders, with third parties, including local NGOs, embassies and other partners.

(e) Independent verification: (proposing that the client) hire a third-party consultant to engage directly onsite with the client and/or affected stakeholders to assess the situation and monitor process, progress and implementation.

(f) Process support: facilitating the involvement of a neutral third party or mediator, by requiring the company to hire one, by recommending one or by funding one.

(g) Collaborate: seek to increase leverage by collaborating with other interested actors as needed, including other lenders, investors, pension funds, NGOs, government actors and business partners.

(h) Potential for divestment: where parties are unwilling to play appropriate roles in remedy in good faith, disengagement – and the threat of disengagement – can be a powerful form of leverage in some cases. Divestment can be a part of remedy in some cases, if the decision is made in consultation with affected stakeholders and made public. Where banks do choose to divest, they should recognize that if they have contributed to the impact, they will continue to have a responsibility to contribute to remedy.

E. IMPROVING INTERACTIONS WITH NATIONAL, STATE-BASED REMEDY MECHANISMS AND OTHER MECHANISMS IN THE REMEDY MECHANISM ECOSYSTEM

In an ideal world, project-affected people would have a number of potential viable pathways for remedy and a choice among mechanisms best suited to addressing their concerns. In practice, however, as mentioned at the outset, the remedy ecosystem is often a barren place, offering few if any viable choices to claimants. This places additional pressure on ensuring that the accountability mechanisms of DFIs and clients operate to maximum effectiveness, commensurate with their respective responsibilities and involvement in any adverse impacts. It also translates into a vital capacity-building agenda for DFIs, as previously mentioned, which includes helping clients and potentially other stakeholders understand the strengths and weaknesses of the remedy landscape and whether and how the various pieces fit together.

Even in the best of worlds, clients and their GRMs may need to interact with local administrative and judicial authorities in order to address many kinds of grievances, such as on land issues and those concerning modern slavery and trafficking in persons, among others. If a client GRM is not set up to provide reparations or if it is not trusted to do so, access to State-based and other relevant mechanisms becomes especially crucial.[386] Helping clients to map and understand the remedy ecosystem at local, national and international levels, including strengths, weaknesses and potential interrelationships, can help clients optimize the operation of their GRMs and make useful connections with other mechanisms.[387]

1. Safeguard provisions on interactions with State-based mechanisms

DFI safeguards include a range of requirements to report to and/or interact with national authorities. For example, the EIB safeguards require that GRMs "should not impede access to independent judicial or administrative remedies outside any project specific context; quite the contrary, it should complement and facilitate access to independent bodies (e.g. Ombudsman)."[388] Safeguards also contain reporting requirements to national authorities on issues including forced labour,[389] security and other unlawful or abusive acts,[390] theft and trafficking of moveable cultural heritage,[391] health and safety incidents as required by national law[392] and inadmissible complaints.[393]

Some safeguards usefully require clients to inform affected communities of their right to independent judicial recourse in the event that grievances cannot satisfactorily be resolved by GRMs,[394] and some specifically address linkages to the wider national system of remedies, including courts[395] or mediation mechanisms, in situations in which grievances cannot otherwise be resolved through GRMs. Provisions such as this could usefully be expanded to include a prohibition on lobbying Governments to limit or restrict access to judicial or administrative remedy in connection with safeguard-related issues. Specific guidance is also needed on retaliation risks, which can be a particular problem when GRMs interact with State-based mechanisms.[396]

2. Supporting and improving interactions within the remedy ecosystem

States typically have a range of administrative and judicial mechanisms that could, and sometimes should, handle complaints related to safeguard issues.[397] State-based non-judicial mechanisms can take many different forms and can be found at all levels of government: local, regional and national. They include labour inspectorates; employment tribunals; consumer protection bodies (often tailored to different business sectors); environmental tribunals; privacy and data protection bodies; State ombudsman services; public health and safety bodies; professional standards bodies; State-based mediation and alternative dispute resolution services; national human rights institutions and OECD national contact points for responsible business conduct.[398]

These mechanisms may have different strengths and weaknesses. For example, national human rights institutions frequently combine complaint-handling and investigation functions (potentially addressing public and private sector projects) with mediation and public reporting functions, addressing project-specific and systemic issues. Some even have power to compel reparations. Community and informal justice mechanisms may offer efficiencies and provide contextually relevant solutions, although care must be taken to ensure that traditional structures do not unwittingly reinforce discriminatory social norms. OECD national contact points, where they exist,[399] address disputes about whether businesses have appropriately applied the OECD Guidelines for Multinational Enterprises to their operations and business relationships, and have successfully mediated disputes involving DFI clients (see box 5 above, ANZ Bank in Cambodia). As cases involving the financial sector based in OECD countries are increasing,[400] national contact points may also consider complaints involving DFI co-financiers.

While local and national mechanisms usually offer the best prospects for remedy, international mechanisms may also play a useful role. For example, certain global trade unions have begun to negotiate global agreements with companies that have their own dispute resolution

process, including binding arbitration panels, which may influence the way project-level GRMs address worker issues.[401] Multi-stakeholder initiatives typically bring together combinations of businesses, civil society groups, government institutions and trade unions, often to address issues in particular sectors, but they can also be geographic specific.[402] Some multi-stakeholder initiatives (but not all) have their own GRMs, although their effectiveness to date is open to question.[403] Nevertheless, a well-functioning multi-stakeholder GRM may offer an alternative to a project-level mechanism and there have been a few cases in which the former have functioned alongside IAMs, with the consent of the complainants, each addressing different parts of a grievance. The United Nations and regional human rights systems may also play a range of important roles in helping people access remedy for project-related harms (see box 39).

A thorough mapping of the remedy ecosystem in the local area, regionally and, as necessary, nationally and internationally, can help clients to:

- Understand the constraints on the type of remediation its GRM alone can offer and where co-operation with another authority, such as the land administration, may be required.
- Identify when cooperation with other mechanisms may be required by national law, such as labour inspectorates or data protection authorities.
- Identify where to refer particularly severe harms, such as situations in which crimes are involved or the client may have a conflict of interest.
- Be able to refer complaints to appropriate authorities or other GRMs when the grievance redress mechanism is not able to address the grievance, as required by certain DFI safeguards.[413]
- Identify national authorities and other institutions that are better suited to address particular kinds of harm,

39 BOX 39 UNITED NATIONS, INTERNATIONAL LABOUR ORGANIZATION AND REGIONAL HUMAN RIGHTS SYSTEMS

The Human Rights Council is a 47-member intergovernmental body, subordinate to the General Assembly, responsible for the promotion and protection of human rights around the globe. Of particular relevance for present purposes is the Council's universal periodic review system, which examines each country's human rights progress every four to five years, as well as independent investigation and confidential complaint handling mechanisms.[404]

Human rights treaty bodies are committees composed of between 18 and 24 experts that review countries' implementation of their legal obligations under the international human rights treaties that they have ratified and under which the committees are frequently authorized to receive and respond to individual complaints. The treaty bodies deal with a wide range of issues relevant to DFI-supported investment projects, including the rights of women, children, migrant workers, persons with disabilities, racial discrimination (including against indigenous peoples and minorities), participation rights, forced evictions and resettlement issues, labour rights, health, water and sanitation, among others.[405]

The special procedures of the Human Rights Council are independent individuals and/or working groups appointed by the Council's member States. They are mandated to analyse and report on human rights situations in particular countries and/or thematic issues (such as the right to food, health, housing and a healthy environment, the rights of indigenous peoples, violence against women, freedom of expression, human rights defenders, toxic waste, arbitrary detention, business and human rights, and many others).[406] Special procedures are generally authorized to receive and respond to individual complaints and are increasingly focusing on the human rights implications of large investment projects, as well as on contextual risk factors, discrimination issues and constraints to public participation and stakeholder engagement.

ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, are responsible for monitoring the ILO core conventions and other international labour standards.[407] ILO standards contain specific measures on access to justice, dispute settlement and GRMs,[408] and ILO supervisory mechanisms regularly take up these issues in various contexts. The ILO has also played an important role in third-party monitoring and supporting remediation in multilateral development bank-supported projects at country level.

Regional human rights regimes with monitoring and complaint procedures have been established within the framework of regional organizations. The better established regional human rights systems are those in the African,[409] American[410] and European regions.[411] The protection orders of the Inter-American Commission on Human Rights' ("precautionary measures") have had life-saving impacts for project-affected people in numerous cases.[412]

such as child protection agencies or authorities dealing with gender-based violence.

- Identify possible sources of risk to people seeking remedies for harm or to people engaging with or working with a GRM (such as witnesses, advisers or translators), particularly as regards risks of retaliation or intimidation.
- Improve the grievance redress mechanism's contextual understanding of complaints and enhance its effectiveness by interacting with other actors, such as national human rights institutions and the United Nations and regional human rights systems, which may have insights into the history of grievances and may help to address the root causes.
- Identify other mechanisms that can act as an appeals or recourse mechanism in situations in which the complainant remains dissatisfied with the outcome of a complaint[414] or that can assist with appropriate monitoring to ensure that remediation outcomes are implemented effectively, and develop appropriate referral and cooperation protocols.
- Enhance the sustainability of a GRM by better linking it to the national system.
- Engage with relevant local or national authorities to explain the role and functioning of the client's GRM and build support for its operation.
- Understand shortcomings with existing State-based mechanisms of which GRMs and complainants should be aware and which may limit the scope for referrals, such as corruption or involvement by authorities in attacks or threats against complainants.

Many DFIs have separate work programmes on strengthening the rule of law and judicial and administrative systems in countries.[415] For example, the World Bank's Justice in Sectors Programme is designed to strengthen national regulatory frameworks and justice institutions, and has reportedly helped client countries achieve more efficient outcomes not just in the justice sector but also in all sectors including health, tax, extractive industries and land administration.[416]

DFIs also commonly have programmes to strengthen country safeguard systems, although it is unclear whether country system assessments systematically assess the efficiency and effectiveness of existing remedial mechanisms for the types of harms covered by safeguards.[417] If not, this may constitute a significant gap in the country systems approach and a missed opportunity to help State-based judicial and non-judicial mechanisms better deal with grievances common to DFI-supported projects within their jurisdiction.

In projects with public sector organizations, one option is to set up a project-specific GRM and another is to rely on State-based mechanisms. While it may seem politically expedient and convenient to refer all claims to State-based mechanisms, careful judgment is needed while taking into account the political economy context, relevant mechanisms' track records in providing remedy, their credibility with stakeholders, users' experiences (particularly as regards accessibility and responsiveness to the needs of different groups) and capacity constraints. "Simply using existing systems however, does not automatically strengthen them", as the World Bank has noted (see box 40 below).

40 BOX 40
GRIEVANCE REDRESS MECHANISMS IN PUBLIC SECTOR PROJECTS

An evaluation of ADB safeguards in 2020 noted: "There has been some progress in establishing grievance redress mechanisms but many of these do not work effectively as they are not aligned with existing government channels for grievances."[418] A 2014 World Bank review of GRMs noted that: "When linked to existing country institutions, GRMs can have lasting impact that continues even once Bank engagement ends. Building and strengthening existing country systems for managing grievances allows for greater impact, improved sustainability and an increase in potential value to the Borrower and beneficiaries. Simply using existing systems however, does not automatically strengthen them. The decision to use a local or national GRM structure to capture concerns on a Bank project requires a credibility assessment and, in certain instances, targeted capacity building. The goal is to create stronger, more credible institutions capable of managing risks and conflicts in many different areas. … Project design documents emphasize reliance on a country's existing grievance systems but do not explicitly identify the strengths and weaknesses of those systems. Assessing credibility to the users is not something the Bank has articulated or attempted to document in a systematic way."[419]

3. Interacting with State-based mechanisms on particularly severe or sensitive human rights issues

In principle, in line with DFI safeguard provisions and international law,[420] harms that may also constitute criminal offences, such as killings, severe health and safety impacts, security incidents, gender-based violence, forced labour and trafficking in persons, should be referred to the responsible government authorities for official investigation and, as appropriate,

prosecution.[421] Large-scale or wide-impact disasters such as hydroelectric dam accidents, major pollution incidents or building collapses will often require the creation of specific investigation and reparation mechanisms with the necessary technical and operational expertise.[422]

It may not always be appropriate for GRMs to refer complaints to national authorities; for example, the concerned authorities may be unable or unwilling to effectively investigate or may themselves be implicated in violations or abuse.[423] Retaliation risks may be particularly pronounced in this context.[424] But even where referrals are appropriately made, project-based GRMs should still conduct their own internal investigations in order to identify systemic issues within the organization that may need to be addressed in order to prevent any reoccurrence of such serious issues in the future and for internal disciplinary reasons as appropriate. Care should be taken to protect the identity and safety of any victims, associated family members and their representatives[425] and ensure that the investigations of GRMs do not prejudice or preclude official criminal or civil investigations and that evidence is appropriately recorded and potential crime scenes safeguarded.[426]

GRMs should also consider whether relief or remedy can be provided to victims either on an expedited or interim basis, to the extent of clients' capacities and responsibilities for impacts, given the potential length of formal investigations and the fact that criminal investigations may result in punishment of perpetrators but provide no material relief for victims. Any putative waiver of the rights of the victim to further remedies in such cases would be problematic under international human rights law.[427]

F. USING COUNTRY SAFEGUARD SYSTEMS AND BUILDING SAFEGUARD CAPACITIES

One of the notable recent trends in development financing is the increasing use by DFIs of national environmental and social risk management frameworks ("country systems" or "borrower frameworks"), in whole or part, in lieu of the institution's own safeguards. The logic of using national systems is intuitively compelling and forms part of a larger package of aid reforms embodied in the Paris Declaration on Aid Effectiveness in 2005 and the Global Partnership for Effective Development Cooperation.[428] The Declaration commits donor countries to "use country systems and procedures to the maximum extent possible. Where use of country systems is not feasible, establish additional safeguards and measures in ways that strengthen rather than undermine country systems and procedures."[429] But striking a prudent balance between "using" and "strengthening" country systems can be challenging in practice.



World Bank Inspection Panel

The responsibilities of DFIs and clients to respect human rights applies irrespective of the extent to which States honour and fulfil their own obligations. In assessing the feasibility of using country systems, DFIs usually compare the environmental and social regulatory framework of a member country with the requirements of the institution's own safeguard requirements (equivalence), and assesses the country's implementation track record and capacity to apply the framework (acceptability).[430] However, DFIs do not necessarily assess equivalence by the same metric. For example, some DFIs (such as IDB) stipulate a reasonably strict "functional equivalence" test,[431] whereas others apply looser and more aspirational tests, such as requiring that the borrower's framework "enable the project to achieve objectives materially consistent" with the institution's safeguards.[432]

There has been a tendency towards increasing pragmatism[433] insofar as the use of national environmental and social frameworks is concerned, which raises several concerns from a remedy point of view. First, national legal and regulatory provisions are often weak on social and environmental issues (see box 41 below) and for many social (including human rights) issues, the commitment gap is often a larger problem than the capacity gap. Second, it is unclear the extent to which the assessments of DFIs focus on regulatory requirements on remediation and capacity to enforce remedial outcomes within and outside sectoral agencies. This should be a core part of country system assessments, in the view of OHCHR. Third, an unduly transactional approach to strengthening country systems through individual investment projects may encourage a disproportionate and limited focus on project approval requirements at the expense of addressing longer term, systemic accountability challenges. Finally, results-based lending (also increasing in popularity) also relies on country systems and disbursement-linked indicators, with less attention on a country's application of DFI safeguards. The latter programmes mostly seem to involve dispersed subprojects with small-scale safeguard impacts, but cumulatively the impacts may be very large.[434] Existing safeguards do not appear to be adequately addressing these challenges.[435]

G. CONCLUSIONS AND RECOMMENDATIONS ON ENABLING REMEDY

Discussions on remedy in development finance have often been reactive and defensive in tenor and narrowly framed around the question of relative responsibility between DFIs and clients for monetary compensation. This unfortunate legacy has stifled the remedy conversation and discouraged more proactive and innovative approaches. The idea of enabling remedy may help to break down some of these barriers and encourage broader inquiries into how all responsible actors can be part of the solution.

The idea of "leverage," grounded in the Guiding Principles on Business and Human Rights and emerging practices among commercial banks, is central to the inquiry into how DFIs many enable remedy in practice. DFIs sometimes seem to approach this question in a modest or even defeatist way, predicated on a narrow vision of what leverage may entail. However, leverage for remedy can be built and exercised by DFIs individually and collectively through a wide range of tools and approaches, as has been seen. This should be seen as complementary to, and should not displace, the responsibilities of DFIs to contribute to remedy in proportion to their involvement in impacts, which will be considered in more detail in the next chapter of this publication.

41 BOX 41 AFRICAN DEVELOPMENT BANK EQUIVALENCE STUDY SCORES LOW ON SOCIAL THEMES

In 2015, AfDB carried out a detailed equivalence analysis of AfDB safeguards and six country systems. It concluded that (a) there was a strong correlation between each country's level of governance and socioeconomic development and the performance of the country's environmental safeguards system; (b) the degree of equivalence of country systems was particularly low for policies on, among others, involuntary resettlement and working conditions; and (c) there were no legal/regulatory provisions or local expertise on most social themes (gender, working conditions, vulnerable groups etc.). National laws and implementation practices on social issues frequently fall short of international standards in other regions as well.[436]

Recommendations on enabling remedy

Building and exercising leverage

It is recommended that DFIs:

- Build and exercise all available leverage to strengthen remedy through commercial and legal means, normative and convening roles, innovation, capacity-building, shareholder actions, collective action and by supporting GRMs within the client and the larger remedy ecosystem.
- Increase leverage for remedy in loan agreements through:
  - Loan covenants (on issues including safeguard compliance and action plans, commitments to notify DFIs of human rights violations and address impacts, GRMs, non-retaliation, cascading safeguard and remedy requirements to subcontractors, passing on requirements after the exit of DFIs and third-party beneficiary rights).
  - Conditions of disbursement.
  - Conditions of termination and/or suspension of disbursements on human rights grounds.
  - Requirements concerning contract transparency.
  - Contract renewals.
- Explicitly include violations of international human rights law within project exclusion lists, and use these as the basis for penalties or other appropriate sanctions during project implementation if violations and associated harms arise and are not addressed quickly.
- Ensure that clients are obliged under standard form legal agreements to notify DFIs of serious human rights issues arising during project implementation and permit DFIs to carry out or commission investigations and refer serious incidents to the appropriate authorities as required.
- Increase leverage through legal agreements pertaining to equity, debt and other investments, including through shareholder provisions, management provisions, impact covenants, termination provisions and "put options" in subscription agreements exercisable in cases of serious non-compliance.
- Ensure that contractual requirements for grievance management are cascaded to sub-contractors, complemented by increased supervision and technical support as needed.

Independent accountability mechanisms

It is recommended that DFIs:

- Take all necessary measures to ensure that the existence of IAMs is made widely known among project-affected populations in a manner understandable to local communities, provide systematic verification that IAMs have been disclosed, encourage clients to work constructively in connection with IAM proceedings and include requirements to the above ends in legal agreements and project documents.
- Specify that remedy should be an outcome of compliance reviews and dispute resolution, and that management action plans should address harms related to identified non-compliance.
- Authorize IAMs to include in their investigation reports recommendations on what should be included in management action plans.
- Ensure that management action plans draw from a broad range of reparations options (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), in consultation with the complainant(s), and that IAMs are specifically authorized to recommend reparations in the form of financial compensation.
- Authorize IAMs to carry out compliance reviews without requiring board approval.
- Consult with IAMs on the content of management action plans during their preparation.
- Authorize IAMs to present their views on the draft management action plan to the board prior to its approval, so that boards can take the views of IAMs into account when approving such plans.
- Authorize IAMs to monitor the implementation of management action plans and (subject to confidentiality) dispute resolution agreements and report on the extent to which project-related harms have been remedied.
- Allow complaints to be filed with IAMs prior to board approval, in order to allow early resolution of problems.
- Allow complaints to be filed with IAMs during a reasonable period of time (such as two years) after project closure or two years after the complainant became aware of the harm, whichever is later.
- Allow a fully informed choice by complainants and fluidity between compliance reviews and dispute resolution, in order to provide the flexibility needed to enable remedy in practice.
- Consider authorizing IAMs to issue binding recommendations to both DFIs and clients.
- Track all complaints received by IAMs, including ineligible complaints, in order to contribute to the institutional learning objectives of DFIs.
- In consultation with other DFIs, establish robust and transparent frameworks for IAM collaboration in handling complaints connected with co-financed projects and, in situations in which DFIs have conflicting safeguard requirements, ensure that the most stringent applicable standards are applied.

It is recommended that IAMs:

- Carry out and publish regular self-assessments of their effectiveness using the Guiding Principles on Business and Human Rights' effectiveness criteria and suggested indicators (annex II).
- Establish a peer review mechanism to encourage more consistent performance against the Guiding Principles on Business and Human Rights' effectiveness criteria, drawing upon the experience of OECD national contact points and the peer review and accreditation processes of national human rights institutions.

Grievance redress mechanisms

It is recommended that DFIs:

- Highlight the multiple roles that GRMs play in:
  - Informing decision-making.
  - Providing early warning and timely resolution of concerns, thereby avoiding escalation of problems into social conflict and potential project delays.
  - Serving as an accountability and remedy mechanism.
  - Improving due diligence and learning through identifying trends and themes arising in connection with grievances.
- Review their overall GRM architecture, assess the relative accessibility and effectiveness of the various components taking into account the effectiveness criteria in annex II, and communicate the results publicly.
- Require full transparency and early consultation with communities and workers in connection with: (a) the design and functioning of the GRM; (b) the choice of remedy, and (iii) quality and impact of remedial outcomes.
- Ensure that project-affected people are able to exercise an informed choice about what GRMs (including from among IAMs in co-financed projects) and procedures (conflict resolution and/or dispute resolution) to utilize, without prejudice to other judicial or administrative mechanisms in parallel.
- Require clients to inform affected communities about the remedy mechanisms available in addition to IAMs and GRMs, and prohibit clients from obstructing or lobbying Governments to restrict access to remedy.
- Ensure that GRMs have the mandate and flexibility to address a full range of reparations, alone or in combination, as the case requires, and that outcomes are non-discriminatory (e.g. do not privilege men over women), prompt, adequate and effective to address the given harms.
- Require that grievance redress processes seek to redress imbalances in power, including through:
  - Encouragement of (local and international) representation of claimants.
  - Special measures to support marginalized or vulnerable persons (including by making information available in appropriate languages and formats, building the capacities of claimants and advising on sources of technical, financial or other support).
  - A presumption of the legitimacy of complaints.
  - Fair and reasonable rules regarding the burden of proof.
- Require clients to report periodically and publicly on the effectiveness and outcomes of their GRMs.
- Clarify and strengthen requirements regarding financial intermediaries' GRMs in line with the Guiding Principles on Business and Human Rights' effectiveness criteria.
- Ensure that basic due process principles and fairness are integrated within the requirements of safeguard policies for grievance redress processes, including requirements relating to:
  - The provision of reasoned decisions.
  - The production, access and control of information pertaining to the claims.
  - The structural independence of GRMs from the clients' operations.
  - Separation of investigations and dispute resolution functions.
- Develop specific assessment/diagnostic tools and guidance for DFI staff concerning the design and operation of an effective GRM, addressing the following questions:
  - **Functions.** Does the mechanism have the appropriate: (a) mandate and authority to address and resolve concerns raised by stakeholders and to influence project design and implementation decisions; (b) staffing; (c) processes; (d) budget; and (e) oversight?
  - **Effectiveness.** Does the mechanism meet the effectiveness criteria and indicators in annex II?
  - **Interactions with other mechanisms.** Particularly in situations in which the mechanism is operating in fragile and conflict-affected contexts or otherwise dealing with potentially serious issues, is there a clear framework governing interactions with and referrals to other mechanisms in the national and international remedy ecosystem?
  - **Protection of complainants.** Given closing civil space and the increasing risks and threats faced by complainants and communities, do GRMs have clear policies and robust, comprehensive procedures to prevent and respond to intimidation and reprisals?

IV. CONTRIBUTING TO REMEDY



Felix Dovey/CAO

KEY MESSAGES

- In situations in which DFIs, by action or omission, have contributed to harm, they should also contribute to remedy. Alternatively, in situations in which DFIs have not contributed to harm but they are directly linked to adverse impacts through their business relationships, they should build and use their leverage to encourage remedy by those directly responsible.

- The Guiding Principles on Business and Human Rights, which are increasingly being integrated within the financial sector and DFI safeguards and policy guidance, offer a nuanced and differentiated framework of responsibility for impacts and contribution to remedy, consistent with international law and the ordinary principles of justice.

- When considering contributing to remedy, DFIs should take into account not only their involvement and that of clients in the given harms, but also (a) the development mandate of DFIs; (b) other factors that can significantly impede access to remedy; (c) the complexity of the investment structure and operating context; and (d) any legacy issues (see table 2 below).

- Reparations to redress harms may take many forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Options for setting aside funds for remediation include stand-alone funds, escrow accounts, trust funds, insurance schemes, guarantees and letters of credit. Each has advantages and disadvantages that need to be worked out carefully in context, within the larger scheme of potential remedial (including non-financial) options.

- Ring-fenced funds are more likely to provide accessible, rapid and reliable reparations and therefore deserve priority consideration in the remedial toolkits of DFIs.

- The idea of contributing to remedy may trigger concerns about moral hazard and increasing the legal liability of DFIs. However, such concerns may readily be overstated. Taking into account comparative experience in commercial banking, proactive approaches to remedy may in fact reduce legal liability exposure, in addition to the development and reputational benefits involved.

Having considered the roles that DFIs could play in enabling remedy, this chapter discusses steps that DFIs should and could take in directly contributing to remedy. The question of building and exercising leverage is central to both. DFI practice is uneven (at best) insofar as contribution to remedy is concerned, although the Uganda Transport Sector Development Project (see box 7) illustrates what can be achieved when incentives are aligned with remedial imperatives. This chapter first discusses principles and criteria to be taken into account when determining the involvement of DFIs in impacts and remedy, and then looks in more detail at ways that remedy could be delivered in practice, through remedy funds, insurance schemes and other potentially viable mechanisms.

DFIs have sometimes expressed concern that an overly forward-leaning posture on remedy may inadvertently increase their legal liability exposure. However, as indicated earlier, such concerns are easily overstated given the broad scope and construction of the jurisdictional immunities of most DFIs, the many legal and practical barriers to litigating claims (particularly international claims) and the narrow scope for lender liability claims connected with commercial banking in many jurisdictions (see box 6 above). Commercial banks that co-finance alongside DFIs, such as the Equator

Banks that apply the IFC Performance Standards, are of course not immune from suit, which calls into question any assumption that legal liability threats are commercially unmanageable. Moreover, as noted earlier, addressing environmental and social issues early may reduce legal liability exposure. The fact that commercial banks and the Equator Principles Association are beginning to establish GRMs further supports the conclusion that legal exposure of this kind is compatible with commercial incentives and public expectations.

Concerns have also arisen about perverse incentives or moral hazard, to the extent that the contributions of DFIs to remedy might inadvertently shift focus too far away from the client's responsibilities for project implementation. The nuanced framing of responsibilities for impacts and remedy in the Guiding Principles on Business and Human Rights (sect. A below) may help to address such concerns. The analogy of insurance for environmental risks in project finance, which remains widely used despite perverse incentives risks, may also be apt. One rarely hears objections to insurance being paid out from project budgets to compensate third parties for environmental harms and, subject to technical questions discussed below, there seems to be no good reason of principle why social harms should be treated differently. The larger and more compelling moral hazard risk would appear rather to lie in the present situation wherein clients and financers of projects are all too often insulated from responsibility for human rights impacts, the costs of which are instead externalized to people (and, often, the poorest and most marginalized) who had little or no control over the project and are scarcely able to assert their rights.

A. DIFFERENTIATING THE INVOLVEMENT OF DEVELOPMENT FINANCE INSTITUTIONS IN HARMS

As noted earlier, the Guiding Principles on Business and Human Rights are the most authoritative framework for enhancing standards and practices with regard to human rights risks relating to business activities. The Guiding Principles have exerted a strong influence on normative frameworks relevant to development finance, including the Equator Principles and the OECD Guidelines for Multinational Enterprises, and are increasingly being integrated into DFI safeguard policies and IAM procedural guidance.

The Guiding Principles on Business and Human Rights embody the existing principles and requirements of international human rights law and the responsibilities of private sector financial institutions[437] and DFIs. While financial institutions can contract away liabilities, contracts for services and so forth, the responsibility to respect human rights remains. This may help to explain why an increasing number of private sector banks are taking the framework so seriously.

Under the Guiding Principles on Business and Human Rights, consistent with the ordinary principles of justice, the involvement of DFIs in harm should determine their involvement in remedy. It is rare (though not impossible) for DFIs to "cause" adverse human rights impacts in relation to development projects, as they do not implement the projects that they finance.[438] More commonly, DFIs may find themselves "contributing" to harms (which is more likely in the absence of strong due diligence) or, alternatively, being "directly linked" to harms by virtue of their financing relationships.

Involvement of development finance institutions in harms

"A bank can contribute to an adverse impact through its own activities (actions or omissions) – either directly alongside other entities, or through some outside entity, such as a client. Contribution implies an element of 'causality', for example that the bank's actions and decisions influenced the client in such a way as to make the adverse human rights impact more likely. This element of causality may in practice exclude activities that have only a 'trivial or minor' effect on the client, which may thus not be considered as 'contribution'. For example, a bank that provides financing to a client for an infrastructure project that entails clear risks of forced displacements may be considered to have facilitated – and thus contributed to – any displacements that occur, if the bank knew or should have known that risks of displacement were present, yet it took no steps to seek to get its client to prevent or mitigate them.

In practice, many of the impacts associated with a bank's financial products and services may fall into the 'direct linkage' category. 'Direct linkage' refers to situations where a bank has not caused or contributed to an adverse human rights impact, but there is nevertheless a direct link between the operations, products or services of the bank and an adverse human rights impact, through the bank's business relationships. A situation of 'direct linkage' may occur where a bank has provided finance to a client and the client, in the context of using this finance, acts in such a way that it causes (or is at risk of causing) an adverse impact. Providing a financial product or service creates a business relationship between the bank and the client for the purposes of the Guiding Principles on Business and Human Rights. However, the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and the bank's financial product or service. For UNGP 13(b) to apply, the link needs to be between the financial product or service provided by the bank and the adverse impact itself."[439]

In many circumstances, under the Guiding Principles on Business and Human Rights, a financial institution may be considered to be "directly linked" to harm through its financial relationship to its client and its client's adverse impacts.[440] In these cases, the institution has the responsibility to build and use whatever forms of leverage it can to prevent or mitigate the adverse impact, which in some cases could involve putting pressure on a client to actively engage in remediation of the harm (see chap. III, sect. A above). While DFIs will not be required themselves to provide for remediation, they may take a role in doing so.

However, in situations in which a financial institution by its own actions or omissions has contributed to harms together with a client (which will be more likely in situations in which it has failed to carry out adequate due diligence),[441] it should: (a) cease or prevent its own contribution; (b) use its leverage with the client to mitigate any remaining impact to the greatest extent possible; and (c) 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 its own actions and omissions.[442]

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.[445]

This framework is beginning to influence DFI policies and remedy considerations. Notably, the external review of IFC/MIGA recognized that IFC and MIGA have responsibilities to contribute to remedy in situations in which their non-compliance has contributed to harm. In this regard, the external review concluded that "a finding of non-compliance by CAO would be sufficient to establish some degree of contribution by IFC/MIGA, though the extent of IFC/MIGA contribution relative to that of the client (and other actors) could still be open to interpretation".[447] Findings of this kind by IAMs can offer a relatively clear-cut basis for determining the "contribution" of the respective DFI to harm and remedy.

Beyond IAM non-compliance findings, the external review argued that the contribution of IFC/MIGA to harms may be determined by CAO dispute resolution cases or management itself.[448] This is an important elaboration given the very low percentage of projects that are brought to IAMs and comports with the expectation, reflected in the Guiding Principles on Business and Human Rights, that DFIs have their own

42 BOX 42 CONTRIBUTIONS OR LINKAGES TO HARM AND ASSOCIATED RESPONSIBILITIES FOR REMEDIAL ACTION[446]

Relationship of DFI to harm (assuming client caused or contributed to harm)

	DFI "contribution" to harm	DFI "direct linkage" to harm
DFI	Contribute to remedy	Use leverage to prompt remedial action by client/others
Client	Contribute to remedy	Provide or contribute to remedy

"Contributing to remedy" means providing remediation appropriate to one's share in the responsibility for the harm. Whether providing for or cooperating in remedy,[443] 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 the financial institution should be expected to provide financial compensation to project-affected people, although there may well be a compelling case to do so (see table 2 below).[444] Other means of contribution may include engagement of expert studies, supporting the engagement of a facilitator and providing technical expertise. Ultimately, affected stakeholders

responsibility to identify or acknowledge situations in which they may have contributed to harm. The external review called for IFC/MIGA to develop a remedy framework that would develop and deepen these concepts further.

The distinction between "contribution" and "direct linkage" lies along a continuum and is highly context specific. The nature of an institution's involvement in the impacts may shift over time and is not dependent on its leverage over the client (although the nature of the leverage will obviously have a great bearing on the institution's response options). The various factors that may determine the nature of a bank's involvement in impacts are summarized in box 43 below.

43 BOX 43
FACTORS INFLUENCING THE NATURE OF A BANK'S INVOLVEMENT IN AN ADVERSE HUMAN RIGHTS IMPACT[449]

"In practice, there is a continuum between 'contributing to' and having a 'direct link' to an adverse human rights impact: a bank's involvement with an impact may shift over time, depending on its own actions and omissions. For example, if a bank identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a client relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact – such as bringing up the issue with the client's leadership or board, persuading other banks to join in raising the issue with the client, making further financing contingent upon correcting the situation, etc. – it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of 'contributing'."

It is not possible to provide an exhaustive ex ante checklist of factors that determine which category applies in a given situation, but relevant factors include whether a bank is incentivizing or making it more likely that somebody else will cause harm (which is necessarily a "contribution" scenario). For example, "a bank that advises a client on cost-cutting on an infrastructure project, despite such cost-cutting measures making it significantly more likely that livelihoods of nearby communities would be destroyed, may be seen to be contributing to harm caused by the client." A "contribution" situation may also arise in scenarios in which a bank is facilitating harm, for example, if the bank "knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks." A critical factor is the quality of the bank's risk management systems and human rights due diligence processes. Dialogue with stakeholders or, if necessary, through external processes may help in identifying more specific dimensions of what is expected in particular circumstances.[450]

The Dutch Banking Sector Agreement Working Group on enabling remediation developed a further list of factors to help assess the adequacy of a financial institution's due diligence and, consequently, its contribution to harm and remedy:

- Initial knowledge: what the financial institution knew (or reasonably should have known) about the client, country context, industry, specific risks and impacts and planned mitigation measures.
- Engagement on risks: what conversations did the financial institution have with the client and/or other stakeholders as part of its due diligence process?
- Transparency by the client: if the client is a repeat client, has the client proactively discussed or brought environmental and social issues to the financial institution's attention? Is there a reasonable expectation that it would do so again?
- Incorporating binding expectations in contracts: to what extent did the financial institution communicate expectations and build leverage by including applicable environmental and social or human rights standards, monitoring mechanisms and other expectations in pre-commitment and/or final (loan) agreements?
- Engagement after the impact: what steps did the financial institution take once the impact occurred to use or build leverage to seek to influence the behaviour of the client?
- Quality of third-party risk assessment: where the financial institution is relying upon a third-party financial institution's risk assessment, what steps did the financial institution take to ensure it could credibly rely upon that assessment?[451]

By contrast, the division of responsibility between a financial institution and its client has attracted less discussion. Where DFIs have built their leverage with their clients at an early stage, they can expect to have a broader range of options to prompt client action. The form of leverage (e.g. technical support or commercial or legal actions) is a context-specific question, as are the particularities of the client relationship and the larger country context. Working with a client to develop an action plan to address unremediated harms should usually be the first step, which, in turn, would provide a basis for discussing the possible contributions that the concerned DFI could make.

The division of responsibility among co-financing institutions can also be a challenging question, on which policy guidance is limited. A range of factors may come into play, including the relative responsibilities of DFIs for impacts, financial stakes and influence, expertise, client relationships and the provisions of any syndication or participation agreements. As the remedy discussion evolves among commercial banks and DFIs, one would expect that syndication agreements will more regularly include provision for financial contributions to remedy among lenders, for example, through set asides or deductions from repayments.

B. REMEDY FUNDING MECHANISMS

As indicated earlier, compensation is one of many potentially relevant reparation options from a human rights perspective. Discussions on DFI remedy funds have had a somewhat circular history to date, although there has been renewed momentum since 2019 following both the *Jam* case litigation and the external review of IFC/MIGA.[452] In principle, a DFI remedy fund can facilitate rapid and reliable reparations, minimizing the negative externalities of projects on the poorest and most marginalized and help to ensure that remedy is delivered in practice. The case for DFIs to establish remedy funds or similar mechanisms has strengthened in proportion to their increasing influence and impacts, particularly in crisis situations, and the expansion of operations that stretch the scope of existing DFI safeguards or that offer no obvious route to remedy (see the Introduction above).

Emerging practice is fragmented but offers some encouraging signs. For example, the World Bank has piloted an environmental and social performance bond for its civil works that could be cashed by the contracting entity in situations in which the contractor fails to remedy cases of environmental and social non-compliance.[453] The Norwegian Investment Fund (Norfund) has a formal policy commitment to contribute towards mitigation of adverse impacts and some private banks have made statements to this effect. In certain cases, private banks[454] and bilateral DFIs have made contributions to remediation of harm. Integrity departments can require restitution of funds for corruption[455] and the COVID-19 crisis has prompted significant new financing from DFIs to remedy large-scale social impacts such as widespread job losses.

The external review of IFC/MIGA recommended that two complementary mechanisms should be established to fund remedial actions: (a) contingent liability funds from the client that could be accessed in response to the client's failure to meet the IFC Performance Standards in high-risk projects; and (b) funds contributed by IFC/MIGA in situations in which IFC/MIGA contributed to environmental and social harms. The latter funds would be activated in situations in which: (a) DFIs had provided poor advice on compliance; or (b) DFIs had accepted substandard environmental and social impact assessments and associated mitigation plans; or (c) DFIs had failed to alert, support or supervise the client's non-compliance; or (d) the relationship had ended, the client had repaid the loan and/or the client had gone into bankruptcy.

Table 2
Typology of circumstances that could trigger access to a remedy funding mechanism

1. Circumstances flagged in the external review of IFC/MIGA Client contribution to harm, including in the following circumstances:	
A. Client non-performance, prepayment or bankruptcy	
Description of the situation	**Justification**
• Client non-implementation of agreed remedies following IAM procedure – the "last mile" problem. This case arises from a lack of will to deliver remedy, a lack of funds or a change of heart or circumstances that results in complainants not receiving reparations after going through IAM processes. • Client refusal/non-compliance • Client lack of resources • Client prepayment • Client bankruptcy	These circumstances happen regularly and foreseeably. This supports the need for a planned response, not a reactive or ad hoc one. The impacts on communities and workers may otherwise be unremediated.
Suggested response: in higher risk projects, as part of the legal agreements, clients should be required to provide contingency funding to address these situations and to spend the funds on remediation and to provide access to DFIs to spend the funds in situations in which the client is not willing to do so. If this is done, DFI funds expended on the client's behalf should be recouped from the client. Where DFIs contributed to the harm, they should contribute to the remedy as well.	
B. Harm that materializes after project closure	
Description of the situation	**Justification**
Harm that materializes after project closure	This builds on existing practice at numerous IAMs that already address issues after project closure.[456]
Suggested response: consistent with existing (but not widespread) practice, IAMs should permit claims to be brought after project closure. In situations in which DFIs contributed to the harm, they should contribute to the remedy as well.	

2. Additional circumstances that should be considered for accessing a remedy funding mechanism

Type I: Complex investment structures

Description of the situation	Justification
• Complex structuring with multiple funders, including those broken up into different segments with different actors responsible for different segments. • COVID-19 pooled funds often contain different components, such as infrastructure, insurance, environmental and resettlement issues, some or all of which can have a significant impacts on local communities. In countries in which the Government has taken multiple loans within a larger pooled fund, it is impossible to track funds on a particular project to a particular DFI.	Complex project/programme arrangements can make it impossible for communities to disentangle and identify which project/programme proponent or funder(s) are responsible for harms.

Suggested response: innovation and intellectual leadership is needed to design new approaches to project structuring in order to ensure that there is one centralized and accessible GRM with financial resources to address adverse impacts covering the scope and life cycle of the entire project. This is likely to require changes in legal agreements, as well as a pooled funding structure containing contributions from both project proponents and the different DFIs/financial institutions.

Type II: Complex operating environments with high threat levels

Description of the situation	Justification
• Fragile and conflict-affected settings: the gravity of harms that may already be present in fragile and conflict-affected settings increases the risk that more severe impacts may be associated with DFI-funded projects. Greater risk-taking should be accompanied by greater commitment to remedy and enhanced response capabilities, including to deliver remedial action rapidly.[457]	Violent conflict and State fragility can be exacerbated by project activities, which justifies setting up mechanisms in advance that can deliver prompt and adequate remedies for severe harms.

Suggested response: in fragile and conflict-affected settings, it may be appropriate to require clients to set aside contingency financing for remedy. DFI policies on investing in fragile and conflict-affected settings have explicitly recognized that additional financial resources will be required to support these investments. Financial provisions for rapid access to remedy should be seen as a logical and legitimate part of the additional provisioning from DFIs.

Type III: Unexpected cases of severe harms

Description of the situation	Justification
• Natural disasters: with rising global temperatures, natural disasters will increase in frequency and severity. • Severe, unanticipated harms may materialize after assessments and action plans have been put in place, exemplified by the COVID-19 pandemic.	Unexpected cases of severe harms will often be covered by insurance, although this is rarely if ever specified in safeguards. Such cases can overwhelm clients and leave communities with longer term, unremediated impacts. If new fast-dispersing mechanisms are established, these situations should be considered as well. The COVID-19 responses of DFIs demonstrate that funds to address widespread impacts can be mobilized quickly.

Suggested response: rapid disbursement of funds in response to widespread impacts can be recouped from insurance or other funding arrangements for the disaster response.

Type IV: Legacy issues

Description of the situation	Justification
• Significant legacy issues that materialize in projects: these are often, but not always, about land use or acquisition.[458] Left unaddressed, legacy issues can sometimes overwhelm a project and create a reservoir of unaddressed grievances.[459] These factors often arise in higher risk or fragile and conflict-affected settings.	DFIs already have resettlement safeguards that include impacts from past land acquisition practices, which could provide inspiration and guidance for dealing with other legacy issues. Such situations arise with regularity and are foreseeable, and would benefit from more specific guidance and examples of good practice. Harms may (often) be beyond a client's capacity to deal with, even though client actions may knowingly or unwittingly exacerbate or entrench previous human rights impacts and violations. Addressing legacy human rights impacts is becoming a routine part of human rights impact assessment practice.[460]

Suggested response: access to additional resources through a remedy fund should take into consideration the role of the client or existing project in creating the legacy impacts in question or whether the new project is stepping into an area with legacy issues.

Type V: DFIs exit projects early before harms are remedied

Description of the situation	Justification
Early departure of DFIs before harms are remedied.	DFIs regularly exit projects early, leaving behind unremediated harms or creating further harms through their departure that are not addressed. A planned response to such eventualities is needed.

Response: see chap. V below.

However, there may be additional circumstances in which a DFI remedy fund is justified in order to address foreseeable but otherwise unremediated harms. Table 2 below offers a basic typology of justifications for a remedy fund or similar mechanism designed to deliver remedy on a more consistent, transparent and efficient basis. The suggested typology does not seek to distinguish levels and types of DFI involvement in harms. In some cases, DFIs may have contributed to harm, in which case an expectation of contribution to remedy would follow. In other cases, the justification for a remedy funding mechanism may be grounded in an institution's mandate. The point of this typology is to enhance conceptual clarity and stimulate creative and practical thinking about circumstances in which financial mechanisms to support the delivery of remedy should be considered.

C. CHOICE OF FUNDING MECHANISM

There are a number of potential remedy financing models that could be considered, depending upon the context, as set out below. Each model has advantages and disadvantages that should be weighed in the selection process. While the mechanisms are presented below as a menu of options, certain elements (such as ring-fenced funds for remedy in high-risk projects) should be in place by default and made mandatory in DFI safeguards and loan agreements. As will be seen, a mechanism that ring-fences assets, as a pooled fund or on a project-by-project basis at the start of a project or investment, provides greater certainty that there will be funds available that can be accessed in a timely and efficient manner in the event of harm, and therefore deserves priority consideration. Setting aside funds at the beginning of the project, when the leverage of DFIs is greatest, can also help to avoid the "blame game" and mitigate risks arising from a client's insolvency. This by no means precludes the possibility of striking the right division of responsibility later, after affected people have received reparations, and indeed potentially even affords DFIs more flexibility to reach an agreeable determination with the client.

1. A standing fund

Basic description. A standing fund is the simplest idea, drawn from a fixed percentage of the revenues of DFIs. In high-risk sectors or contexts, alternatively, a pooled fund between a DFI and all clients or types of clients or projects may be appropriate. Pooled funds could incentivize contributing members to reduce risks in situations in which contributions are determined by members' risk profiles. Alternatively, a multi-donor remedy trust fund could be established, operating alongside and providing additional funding for DFI operations.[461] DFIs have extensive experience in establishing and operating such funds.

Considerations. As simple an idea as it is, careful thinking is required on eligibility criteria, how the fund would be governed and administered and whether it would operate based on a finding of responsibility for harm, or instead be triggered by the occurrence of an event or other relevant factors on a no-fault basis.

2. Escrow

Basic description. An escrow is a financial instrument wherein monies are deposited in a ring-fenced bank account and may be withdrawn in defined events or circumstances. The escrow account can be funded upfront with ongoing contributions or by means of a percentage of distributions or in the event of a default. The escrow agreement specifies the circumstances in which funds can be withdrawn. DFI safeguards already include requirements for clients to deposit compensation funds in interest-bearing accounts on an exceptional basis as a means of addressing resettlement disputes, hence there is ample precedent and practice from which to draw.[462] The external review of IFC/MIGA recommended that funds should be accessible for two years after the conclusion of specified project activities with potential environmental and social risks, in order to minimize moral hazard risks and increase the likelihood that remedial actions will be carried out.[463]

Considerations. A bank holding the escrow account would expect the escrow agreement to clearly specify the triggers for releasing the funds from the escrow account. Defining clear triggers to address social harms in diverse circumstances may be challenging in practice.

3. Trust fund

Basic description. Commercial trust funds are used to establish a legal entity to hold assets for a person or organization. Third-party beneficiaries receive trust fund assets in connection with events and purposes stipulated in the funding documentation. Trust fund structures of this kind are used in the oil and gas industry, particularly in the context of joint operating agreements. For example, the Association of International Petroleum Negotiators' Model Joint Operating Agreement provides for the establishment of a decommissioning trust fund, which can be drawn down in the event that a party fails to meet decommissioning costs associated with the joint venture. As indicated earlier (see box 7 above), the World Bank's rapid social response trust fund provided $1 million to support the implementation of the early child protection response programme of the Government of Uganda, in response to harms from the Uganda Transport Sector Development Project.

Considerations. Trust fund remedy mechanisms can be appropriate and useful in rectifying environmental damage, but may be less straightforward in situations in which there are other kinds of harms (including potentially a range of human rights harms) and for which beneficiaries cannot clearly be identified at the time of the establishment of the trust. However, these challenges can be alleviated considerably by requiring clients to carry out ex ante human rights impact assessments.

4. Contingency funds

Basic description. In project finance transactions, operators may be required to put aside contingency fees, which usually constitute a very small percentage of the project budget. A set-aside for potential environmental and social claims may require a large contingency budget, which increases overall interest payable and lending costs. In connection with the Uganda Transport Sector Development Project, as discussed earlier (see box 7 above), the World Bank piloted an environmental and social performance bond for its civil works that could be cashed by the contracting entity in situations in which contractors failed to remedy environmental and social non-compliance, as notified by engineering reports. In the mining sector, funds are frequently set aside for mine reclamation and are secured by a surety bond or performance bond. However, this is a different situation as it involves reclamation of the company's own operations rather than creating a pool of funds for as yet unknown third parties.

Considerations. Typically, larger potential liabilities would be more appropriately covered through insurance rather than setting aside large contingencies. However, as emerging experience shows, the challenges in this regard do not appear to be insurmountable.

5. Insurance

Basic description. Insurance is ordinarily available on a project-by-project basis for DFI-funded projects. It does not involve setting aside money in advance. Various types of insurance products are available on the market, including for environment liability and third-party liability. The project company, as the policyholder, takes out the insurance policies that transfer risk to the insurer for loses or liabilities incurred by the project company. The project company pays a premium to the insurer and the insurer pays out on the occurrence of a "covered policy event". A policy event, subject to the policy terms, is defined by reference to the insured having incurred liability to a third party. This will generally require a judgment or determination of liability between the project company and the third party. The determination of this liability is established using the mechanism specified in the contract for the resolution of disputes under the policy, which may range from local courts in the jurisdiction of the project company to international commercial arbitration.

Considerations. While insurance is a well-known mechanism which, through premium pricing, incentivizes the borrower to reduce the risk of incurring liabilities, it may also have disadvantages. The process of claiming under a policy can be protracted, particularly if (as is often the case) liability is challenged by the insurer, and may delay remedy. Claimants may have to bear the expense and burden of proving human rights impacts in a court or before an arbitral tribunal.[464]

6. Guarantees and letters of credit

Basic description. Guarantees and letters of credit are used by DFIs to manage liabilities and breaches flowing between the commercial parties. The most common use of these instruments is to provide financial security for a contingent claim of liquidated damages.

Considerations. In principle, a guarantee or letter of credit could be used to cover funds for remedy in non-project-specific situations. A DFI guarantee for unmitigated human rights impacts that are not addressed by the environmental and social action plans would incentivize DFIs to exercise strong due diligence and supervision of such plans. However, DFIs may be reluctant and careful drafting would be required in order to reflect the respective contributions of clients and DFIs to harm and remedy. Guarantees and letters of credit can be expensive: the requirement for cash collateral means that the money is tied up and cannot otherwise be used by the company or the project. If another entity, such as the parent company or the DFI itself is backing the letter of credit, the entity's balance sheet would take on a contingent liability equivalent to the amount of the letters of credit, which, depending upon the circumstances and amount, may not be commercially viable.

D. CONCLUSIONS AND RECOMMENDATIONS ON CONTRIBUTING TO REMEDY

The conversation on contributing to remedy among DFIs has not been especially productive to date. However, there has been renewed momentum since the *Jam* case and the external review of IFC/MIGA and a range of promising practices within DFIs and the commercial banking sector that may inspire more proactive approaches in future. There are strong moral and ethical reasons for DFIs to contribute more consistently to remedy in appropriate cases, together with the client and other relevant parties. There is also a strong development case, potential reputational advantages and efficiency gains through more productive allocation of the human and financial resources of DFIs and clients.

There is a range of funding mechanisms that DFIs could set up to contribute to remedy in practice,

44 BOX 44 EXAMPLES OF OTHER REMEDY FUNDS

■ Funds set up after large-scale disasters. The funds set up after the Rana Plaza collapse in Bangladesh and Brumadinho dam collapse in Brazil are examples of funds for human rights harms, although they were set up after the fact, when the nature and scale of harms were known. The International Accord for Health and Safety in the Textile and Garment Industry contains provisions for the resolution of disputes by the Permanent Court of Arbitration,[465] a provision that can help to empower claimants and increase the likelihood of remedy and may be worth considering in DFI remedy frameworks.

■ Funds to address widespread environmental harms. There are many different types of contingency funds established to address widespread environmental harms, such as oil pollution.

■ Multi-donor trust funds set up to address severe human rights impacts. To draw analogy from the criminal justice context, the International Criminal Court has a trust fund for victims relying on voluntary contributions to ensure that victims' rights to reparations and assistance are realized in the international criminal justice system in cases of convicted persons, responsible for harm suffered by victims, who are unable themselves to satisfy the reparations awarded by courts.

including stand-alone remedy funds, escrow accounts, trust funds, insurance schemes, guarantees and letters of credit. Each has advantages and disadvantages that need to be worked out carefully in context, within the larger scheme of potential remedial (including non-financial) options. Ring-fenced funds are more likely to provide accessible, rapid and reliable reparations and therefore deserve priority consideration.

The discussion about the potential contribution of DFIs to remedy has not been helped by questionable assumptions concerning the extent of their legal liability and financial exposure, and contentious interpretations of moral hazard. Nevertheless, the increased energy and focus of the remedy conversation since 2019 and the increasingly detailed proposals for remedy that have been put forward may stimulate more consistent and effective remedial responses or, at least, make it harder to justify inaction.

It is recommended that DFIs:

- Publicly commit to contributing to remedy in situations in which they have contributed to the harm.
- Be guided by the Guiding Principles on Business and Human Rights when determining involvement in harms and proportionate responsibility for remedy.
- In determining their own possible contributions to remedy, take into account not only their involvement and that of their clients in the given harms, but also:
  - Their development mandates.
  - Other factors that can significantly impede access to remedy.
  - The complexity of the investment structure and operating context.
  - Any legacy issues.
- Set aside ring-fenced funds for accessible, rapid and reliable reparations.
- Consider all relevant forms of reparation (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), and all potentially effective remedy funding mechanisms including escrow accounts, trust funds, insurance schemes, guarantees and letters of credit.

V. RESPONSIBLE EXIT



UN Photo/Mark Garten

KEY MESSAGES

- To date, in many DFIs, there seems to have been an imbalance between the efforts expended on upfront compliance and development impacts when entering projects, compared with those on exiting. DFI safeguards are often weak in this area. This may be a particular challenge in the context of private sector operations given the shorter maturities and project cycles involved.

- There is a pressing need to build the knowledge base on the environmental and social impacts of various exiting scenarios and to develop better policies and tools to address exit risks and consequences. Increased data collection appears to be needed on how post-exit supervision, environmental and social action plans and related measures are being implemented in practice.

- Loan agreements should contain more detailed environmental and social requirements on exit, including clear criteria for the selection of future lenders or buyers, and early client prepayment should be tied to setting aside funds for remedy.

- Other options to build post-exit leverage may include working with syndicated banks or other investors in the client company to pressure the client to take action, engaging with national authorities, providing incentives for bringing the project into compliance (such as tying compliance to the prospect of repeat loans), extending closing dates, requiring post-exit action plans and providing extended capacity support for the client where needed.

- A responsible exit action plan, involving all responsible parties and reflecting consultations with all relevant stakeholders, should address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit.

The idea of "responsible exit" emerged from a growing awareness of the problems that may arise when insufficient attention is given to unresolved environmental and social issues that are still occurring as projects close down or when DFIs exit projects (whether as planned or earlier) without adequate consideration of unremediated harms. The term "responsible exit" encompasses a range of situations: routine exits at the end of a loan, to planned exits from equity investments at a designated time, to situations in which analyses of environmental and social impacts prompt DFIs to terminate their involvement early. DFIs have a critical role to play in this context. The "do no harm" mandate of DFIs means that, at a minimum, project-affected people should not be worse off as a result of DFI involvement and exit. The timing, manner and terms on which DFIs exit investments send important signals to others in the market.[466]

The need to address environmental and social impacts after exit is reflected to varying degrees in general legal conditions for multilateral development bank sovereign financing[467] and safeguards,[468] although there appears to be little publicly available information on how post-exit monitoring, technical support and action plans are implemented in practice. Responsible exit is the corollary of "responsible entry", however, there appears to be a significant imbalance between the efforts expended by DFIs on upfront compliance and development impact when entering projects, compared with exit, and a relative lack of specific policy guidance.[469]

Importantly, as of 2021, IFC and MIGA had embarked upon a process to define an approach to "responsible exit" and identify procedural enhancements that may be needed in light of their own operational experience.[470] The results of their deliberations will undoubtedly set an important

precedent for DFIs globally. However, data on this issue are scarce: most recent DFI safeguard evaluations have neglected environmental and social issues at closure and, for the most part, exits occur out of the public eye. This constitutes a potentially significant gap in remedy, particularly for many DFIs funding private sector projects that may have shorter project cycles than those pertaining to sovereign lending operations and where exits may occur on shorter time frames.

While exiting may sometimes be inevitable, staying the course creates opportunities for DFIs to use their leverage to influence the situation and help ensure that remedy is provided as needed. Exiting responsibly is predicated upon DFIs building and exercising all available leverage, ideally through a thoroughly consulted action plan that covers remedial measures as necessary, backed by explicit remediation requirements in safeguards and legal agreements. Beyond legal agreements, options to build leverage may include working with syndicated banks or other investors in the client company to pressure the client to take action, engaging with national authorities, providing incentives for bringing the project into compliance (such as tying environmental and social compliance to the prospect of repeat loans), and other measures discussed in chapter III, section A, along with capacity support for the client where needed.

This chapter first reviews emerging practice on responsible exit, such as it is, framed against DFI safeguard policy requirements and relevant global normative frameworks. It then explores how practice could be improved through the implementation of a responsible exit framework covering the full project cycle, from pre-investment through to exit, including planned and early exits. It concludes with a few brief remarks on responsible exit in the context of climate change.

A. STATE OF PLAY

The "responsible exit" topic has gained increased recognition in recent years in light of normative developments reflected in the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises (see box 45 below), which expect that human rights considerations be taken into account prior to any decision to exit and specify that exiting does not affect responsibilities for remedy. In

BOX 45
45 GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON DISENGAGEMENT

Both the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises address disengagement/termination. The Guiding Principles refer to "ending the relationship" while the OECD Guidelines refer to "disengagement".[471]

As stated in the commentary to principle 19 of the Guiding Principles: "If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related client, or collaborating with other actors. … There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so. … the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection."

The concept of leverage is thus a crucial factor when it comes to both mitigation efforts and the decision to disengage from a business relationship.[472] Both the Guiding Principles and the OECD Guidelines recognize that, in situations in which the relationship is "crucial", ending it will be more challenging. But it is rare that a relationship with a client is ever "crucial" to a DFI; more commonly, it is the other way around, that the funding relationship is crucial to the client, including the possibility that without the institution's funding the project may not go ahead. In such circumstances, DFIs have significant leverage to encourage clients to take action to address adverse impacts.

On the question of remedy, if DFIs have contributed to adverse impacts together with their clients, exiting relationships does not extinguish the responsibility to contribute to remedying the adverse impacts; hence, the emphasis on not leaving behind unremediated impacts. In addition, if disengagement itself causes adverse impacts, DFIs would be responsible for remediating those impacts to the extent of their contributions.

46 BOX 46 EMERGING PRACTICE – RESPONSIBLE EXIT

FMO, the Finnish Fund for Industrial Cooperation (Finnfund) and the Central American Bank for Economic Integration financed the construction and operation of a 21.3 MW run-of-river hydropower plant in Honduras, the Agua Zarca dam. The project context included 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.[473] As a starting point the DFIs set out their position that a responsible exit is one that:

- Avoids, at least, 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 supported or opposed the project.
- Respects existing contractual obligations.

While not without criticism, the independent consultant's report appears to be the first publicly available example of an attempt to address principles for a "responsible exit". However, it should also be noted that, in July 2018, a law suit was filed against FMO in the courts of the Netherlands by Berta Cáceres' family and affected communities alleging that FMO had been negligent and bore indirect responsibility for Cáceres' killing. FMO has maintained that it acted in good faith.[474]

situations in which a financial institution contributes to harm it is expected to contribute to remediating that harm. That expectation of contribution to remedy does not stop upon exit. Were it otherwise, this would create a perverse incentive to exit problematic projects simply to avoid remediation. Instead, remediation should be addressed as part of the exit or thereafter.

The responsible exit discussion has also been prompted by a number of high-profile DFI disinvestments. The Agua Zarca dam case in Honduras is among the earliest and best known examples of the responsible exit idea being implemented in practice, provoked by public outrage following the murder in March 2016 of the Lenca indigenous leader Berta Cáceres (see box 46). However, surprisingly there seem to be few other clear or convincing examples. IAMs have frequently raised concerns relating to environmental and social risk management and mitigation after exit, and the climate change discussion and DFI commitments to scale down fossil fuel investments have given increased visibility to this issue. But these factors do not yet seem to have resulted in clearer and more consistent DFI policy guidance or practice.

The increasing footprint of DFIs in fragile and conflict-affected and other high-risk settings, given the higher risks of project failure and the temptation to exit when things go wrong, should catalyse greater attention on "responsible exits". While not specifically using the term "responsible exit", the World Bank Group Strategy for Fragility, Conflict and Violence 2020–2025 helpfully notes that, while the leverage of IFC and MIGA may be limited post-exit, "they will give due consideration to any potential adverse impacts on the community that are likely to subsist (from the project) at the time of exit".[475] However, as indicated earlier, DFI safeguards do not generally provide detailed guidance on post-exit environmental and social supervision, leverage options, implementation support and action plans.[476] Even in situations in which safeguards require the management of environmental and social performance throughout the project life cycle, it is not always clear whether this extends to the lifetime of the project or, alternatively, only as long as the institution is invested.

Similar gaps are apparent in safeguard procedures, templates for monitoring clients' environmental and social performance leading up to and following exit[477] and more general policy guidance. CDC, DEG and KfW have published guidance at the opposite end of the project timeline, on how to deal with legacy land issues when entering into new projects, but not how to deal with legacy issues after DFIs have exited.[478] Guidance is available on how to consider the impacts of retrenchments on workers, but there is little other guidance on the social impacts of exits. Loan agreements are key determinants of the leverage and planning for responsible exit of DFIs, however, it is difficult to analyse practice in this area in view of the lack of transparency of many standard DFI contractual provisions.

Time limits for complaints to IAMs are also a critical issue in the present context, in relation to harms that occur after DFIs exit but which were caused or set in motion prior to exit. Unduly short time limits can create injustice for complainants and preclude possibilities for remedying harm in situations in which DFIs are involved in adverse impacts. IAM procedures set different limits, however, the GCF Independent Redress Mechanism's and AfDB Independent Recourse Mechanism's procedures constitute best practice in permitting complaints up to two years after the closure of the project or two years from when the complainant became aware of the harm, whichever is the later.[479]

DFIs often have systems in place to measure positive development impacts but rarely does this extend to measuring development benefits occurring after exit or loan repayment. The financial sustainability of projects is obviously a critical concern, but if not approached appropriately, it may easily displace accountability for development results in practice (see box 47).

payments, and restructuring),[482] while some specify that their principal objective is to ensure cost recovery for the institution.[483] Given the limited public disclosure in relation to these operations generally, it is not surprising that there is little available information on whether or how environmental and social conditions are considered. In one case, an IAM noted that the environmental and social department of its parent DFI was not even notified when a client's operations were sent to recovery.[484]

In view of these significant gaps in information, policy and practice, it is important to consider how the potential environmental and social impacts of exit could be integrated within project due diligence from the earliest stages of the project cycle. The following questions can guide the development of a responsible exit framework, as elaborated in the discussion below.

47 BOX 47
ASSESSING SOCIAL AND ENVIRONMENTAL RISK ON EXIT

In 2008, OPIC approved loans totalling $127 million for Buchanan Renewables biofuel and energy ventures in Liberia. In late 2013, OPIC received allegations of serious labour and human rights abuses in connection with the project and, in 2014, the OPIC Office of Accountability carried out a wide-ranging review of project-specific concerns as well as the adequacy of the Corporation's policy structure. The review report analysed the human rights allegations at issue, noted the emergence of the Guiding Principles on Business and Human Rights and human rights due diligence in the financial sector, and criticised (among other things) the Corporation's disproportionate focus on credit risk, rather than development risk, on exit.[480]

In July 2021, following a complaint filed with the Australian OECD national contact point, the mining conglomerate Rio Tinto publicly committed to fund an independent environmental and human rights impact assessment of its former Panguna mine in Bougainville. During its operation from 1972 to 1989, over a billion tonnes of waste tailings from the mine were reportedly released directly into the Jaba and Kawerong Rivers, causing enduring damage to the environment, lives and livelihoods. The impact assessment process is intended to provide the basis for remediation discussions among the company, community representatives and other stakeholders. Although this assessment is occurring late (after the company's exit), Rio Tinto's chief executive has stated that the company is "committed to identifying and assessing any involvement we may have had in adverse impacts in line with our external human rights and environmental commitments and internal policies and standards".[481]

DFIs have other processes in place that deal with exit, but not necessarily responsible exit from an environmental and social or sustainability perspective. Credit processes are primarily geared to protecting DFIs financially, so that they and other banks are repaid. When projects run into financial trouble, they are usually referred to a specialized corporate recovery unit. However, there is very little publicly available information concerning the operations of these units. In many cases, public information does not extend much beyond a statement of the unit's main functions (such as dealing with distressed transactions, late

B. IMPROVING CURRENT PRACTICE – A RESPONSIBLE EXIT FRAMEWORK

It is unclear how much structured thinking has been given to environmental and social mitigation and the longer term impacts of exiting on project stakeholders, outside of the corporate recovery of DFIs or their workout departments.[485] An essential first step is to gain a better understanding of different exit scenarios, their respective impacts, and potential tools to address exit risks and consequences.

Evaluations departments could play a valuable role in

Guiding questions on responsible exit

- What kind of an assessment should be done to assess the potential environmental and social impacts of exit? Should this be done routinely for all projects, for higher risk projects or only for early exit?
- What provisions can be built into loan/investment agreements to provide the appropriate leverage to address environmental and social impacts on exit?
- When should the environmental and social conditions in a project prompt early termination?
- What kind of an assessment should be made of environmental and social issues on exit – routine, early and when there are particular environmental and social challenges?
- What are the responsibilities of DFIs for unremediated environmental and social impacts upon exit?
- What kind of actions can be taken to deal with unremediated environmental and social impacts?
- What conditions can be placed on clients post-exit? On new purchasers?
- What steps outside of the transaction can DFIs take?
- What actions can be taken to identify and address potential risks for communities and environmental and human rights defenders related to exit?

reviewing DFI exit from different kinds of projects (loans, equity investments, financial intermediaries and so forth) and circumstances (high risk versus low risk) and across geographies and sectors, to help to build an overall picture of how routine and non-routine exits are being addressed or could be addressed in different types of investments. IAMs might consider issuing advisory opinions on these issues based on project experiences to date.

Subject to the outcomes of such a stocktaking exercise, DFIs may wish to consider developing a responsible exit framework addressing different project contexts and exit scenarios. A framework of this kind should aim to set clear expectations among all parties, strengthen legitimacy, minimize unintended adverse consequences on exit, address responsibilities to remedy residual impacts and promote more consistent practice. Such a framework could be based upon the following principles:

- Avoid "cutting and running", or prematurely disinvesting from challenging projects due to reputational or financial risks or concerns for the institution, without contributing to remediation and without a specific assessment of the human rights impacts of exit.
- Do not leave behind unremediated harms or, put positively, ensure as far as possible that all adverse impacts have been mitigated so that there is no net loss among affected populations.
- Ensure that benefits and opportunities promised to workers and communities have been provided and that community benefits and other development opportunities will continue after the institution's exit.
- Ensure that complaints by affected people can be brought within a reasonable period (such as two years) after closure, or two years after the complainant became aware of the harm, whichever is later.
- Ensure that communities or workers are not at risk of retaliation due to exit.
- Take an active approach to seeking a responsible replacement(s) on exit, in line with appropriate policies and processes.
- Ensure as far as possible that the project continues to operate in an environmentally and socially responsible manner after the departure of the institution.

Procedures and guidance on responsible exit should cover the full project cycle from pre-investment through to exit, including planned exits and early exits, as outlined below.

1. Pre-investment

- **Consider the type of investment and options available.** The type of investment (loans or private equity, private debt and alternative structures) should influence the approach and steps that DFIs may take to address responsible exit:
  - For loans, the main leverage point would likely be to build "responsible exit" requirements into the loan agreement.
  - Equity investments, private debt and alternative structures require consideration of expected financial returns, holding periods and company ownership. The level of control over many choices related to exit depends on the institution's degree of ownership and decision-making power in a company, which should be considered at an early stage of project structuring and documentation.[486] Leverage can be built further, and post-exit environmental and social risks mitigated, by identifying and bringing in co-investors who share the institution's mission, vision and approach to environmental and social issues.
- **Make environmental and social assessments of termination a routine part of environmental and social due diligence with attendant changes in risk ratings as necessary.** Environmental and social due diligence should include an assessment of the potential severity of impacts of unfulfilled environmental and social action plans in situations in which DFIs exit early or clients are no longer able or willing to complete the actions in such plans. In situations in which such risks are assessed to be

severe, this should be reflected in higher risk ratings for the project and a potential setting aside of funds upfront, or other project structuring mechanisms, to ensure that early termination or exit does not leave unremediated harms. Set-aside funding mechanisms may be warranted in situations such as:

- Larger scale displacements.
- Fossil fuel investments (should any still remain).
- Where vulnerable groups may lose access to essential services, such as health, social protection, education or water and sanitation services.
- Mega-infrastructure, resource extraction or other particularly controversial projects, particularly in contexts of restricted civic space in which the risks of retaliation following early termination might be high.
- Fragile and conflict-affected settings, following the example of IFC, which has indicated that it will consider impacts at the time of exit in such settings.[486]
- New types of legal or credit assessments. As noted above, credit and legal assessments are usually used to review clients' businesses in order to understand the risks of non-repayment to DFIs, rather than the risks to workers or communities or even to those with whom clients contract. DFI legal departments may consider carrying out assessments analogous to "consumer rights" reviews, which already occur in certain health, education or other projects in which consumer services provide a core income stream for the project. The focus of the review would be on whether there are legal or other risks to parties with whom a project contracts that may be severely affected by early termination of a project. Examples include smallholder farmers contracted as part of an agricultural project, small-scale vendors in water or electricity services projects, small-scale vendors selling information and communications technology services (ICT), such as SIM cards, in ICT projects, and so forth. At a minimum, there should be a review of risks to these stakeholders if they are required to invest their own upfront funds in order to secure a contract with the client and how those risks could be prevented or mitigated as part of the project structuring, including in case of early termination. This would be particularly important in situations in which the client is transacting with vulnerable communities who are not in a position to judge the risks for themselves.



Joe Athialy/Rewa Images

This can be seen as the counterfactual to measuring development benefits: ensuring that those intended to be the beneficiaries of DFI-funded projects are not made worse off due to early termination of a project or early DFI withdrawal.

- **Assess bankruptcy/foreclosure procedures from the perspective of workers, families and communities.** When conducting reviews of national law in connection with particular projects, DFIs should be encouraged to assess foreclosures and bankruptcy procedures from the perspective of project-affected people who may be left with unremediated claims. Workers' unpaid claims (to wages, sickness benefits, injuries, pensions and so forth) may have priority in bankruptcy proceedings, but it is unlikely that community claims will be considered.

2. At the time of investment – legal agreements

- **Include more detailed provisions on cure, termination and conditions for renewal in loan agreements.** In addition, provisions on identifying, addressing and monitoring potential adverse impacts should be included, together with clear provisions governing the disengagement process if adverse impacts are not addressed.
- **Tie early client prepayment to a set-aside of funds for remedy.** This would be similar to a prepayment financial penalty common in commercial lending contracts. A financial prepayment penalty could be used to cover the costs of outstanding remediation.
- **Hardwire the company's mission into shareholder agreements.** This would help give DFIs "confidence that the mission and character of the company will be preserved in the face of investor turnover or dilution".[488] Shareholder agreements are a place to codify the mission and social commitments of DFIs. Such provisions can send an important signal to other potential investors interested in environmental and social performance and a warning to those who are not.
- **Require clients to continue safeguard compliance after DFIs have exited.** DFIs have a range of tools to encourage continued responsible environmental and social practices in operations, even after exit, including technical support to strengthen clients' environmental and social management systems, policy dialogue on the business case for doing so, continuing supervision, and post-exit action plans. General conditions for certain multilateral development banks' loans require continued performance of the legal agreement (including environmental and social requirements) until repayment, as was mentioned earlier, and there may be other useful legal tools to deploy. Some DFIs already use their leverage in transactions to require clients to apply DFI safeguards to the remainder of the operations of clients even when not financed by those DFIs. They may also require that compliance requirements are cascaded down a client's supply chain and to main contractors. In addition, contracts may include provisions in favour of DFIs that outlast contracts, called "survival clauses". The latter clauses could include a continuing requirement to comply with safeguards after the exit. Subject to the question of enforceability, a provision of this kind could be particularly important in markets in which the scope for exit and the range of potential buyers are limited.
- **Make the delivery of a development benefits action plan a compliance requirement.** DFIs typically assess the projected development impacts of projects. This could be expanded to include a separate analysis of the positive and negative impacts of every project on the local host community. This separate, locally focused analysis would not require new data collection but would offer a more contextualized and transparent way of looking at positive and negative local impacts. An assessment of this kind could provide a clearer picture of trade-offs, particularly for local communities, and may be translated into a few core actions within an environmental and social action plan or other action plan that is then covenanted as part of the legal agreement. A development benefit impact assessment and action plan could thereby potentially confer legal rights upon project beneficiaries in cases of early termination of the project or bankruptcy. It would also, importantly, provide the basis for a more concrete discussion of whether development benefits have been met as part of the negotiations concerning exit.
- **Develop clear, transparent and consistent criteria for the selection of future lenders or buyers.** The consideration of who will replace DFIs in projects is relevant, in particular, in early exits, but also in routine exits. This is an issue, like others, that is better planned for in advance, built into legal agreements and discussed with clients. This should be part of the overall objectives and included in the responsible exit framework, providing early, clear signals to the client and the market. A two-stage process could be envisaged. First, apply screening criteria to ascertain the extent to which a future buyer shares a commitment to the DFI mission and can be trusted to "stay the course" and contribute to environmental and social objectives over time.[489] Two sets of criteria may be useful in this regard:
    - o General criteria to help determine whether the potential buyer has policy commitments, procedures, management systems and a track record that align with the institution's vision and approach to environmental and social issues. These criteria could draw from screening criteria used in the context of responsible business practices in concessions[490] or anti-corruption,[491] and could include an assessment of the buyer's rationale for the purchase and its strategic plans and alignment with the institution's mission and project strategy.

48

BOX 48
ADDRESSING ENVIRONMENTAL AND SOCIAL ISSUES AS A CONDITION FOR NEW PROJECTS OR BUYERS

Under its loan disbursement guidelines for non-sovereign operations, EBRD may set corrective measures for addressing environmental and social non-compliance as conditions precedent for disbursements or as covenants under the financing agreements for a new project.[492]

On 27 September 2021, the OECD national contact point for Norway accepted a complaint from 475 civil society organizations alleging that a Norwegian telecommunications company, Telenor, had failed to adequately consult or carry out appropriate due diligence before selling its Myanmar-based subsidiary to an entity known as the M1 Group, which the independent international fact-finding mission on Myanmar had identified as having commercial ties to the Myanmar military. The military has reportedly forced telecommunications providers to install intercept spyware, facilitating surveillance and putting many users at risk. Telenor cited this among its reasons to exit. Telenor has been requested, among other things, to halt the sale, find a more responsible buyer and establish a fund to assist (former) customers who may be targeted by the regime using Telenor's user data.[493]

In March 2021, in an important legal development with potentially significant environmental and social implications in the maritime sector, the Court of Appeal in England and Wales held that a London-based shipping company selling a vessel for dismantling in Bangladesh could owe a legal duty of care to shipbreaking workers outside the United Kingdom even though multiple third parties were involved in the transaction. In its decision, the Court of Appeal noted provisions in the contract of sale that required safe demolition and found that the shipping company "could, and should, have insisted on the sale to a so-called 'green' yard, where proper working practices were in place".[494]



Inclusive Development International

- Context/project-specific criteria that are relevant to addressing issues in the particular context and in particular ensuring that the new investor/buyer will support continued remediation of any outstanding harms.

Second, a final selection is made based on the most attractive price.

3. During investment

DFIs can exit confidently to the extent that they are able to leave behind a project or a programme that has appropriate purposes and operating standards "baked in" to the way the project operates. DFIs can use their influence as an investor or lender in order to embed impact within an investee's policies, processes and organizational culture.[495] Doing so would help to ensure that there are no unremediated impacts on exit and that the investee company will be more likely to continue responsible practices.

C. ROUTINE EXITS

Exits are either routine, planned exits or unplanned early exits that are triggered by an external event. There are common elements in both situations, as well as some differences, insofar as responsible exit is concerned.

For routine exits, the desirable approach varies depending on whether projects are likely to terminate or be significantly reduced if DFIs withdraw funding or, alternatively, whether they will continue with new partners and, if so, what the approach of the new partners is likely to be.

1. Assessing the impacts of exit

DFIs may not always consider the implications of their own exit from projects on the same footing as the impacts of project closure, however, similar impact assessment principles apply to both. For example, as noted in the IDB guidance on social impact assessment, "it is important to plan for proper completion of a project. Frequently, the end of what has been defined as a project is really a transition, such as from the construction of new infrastructure (which may take a few years) to operation of the infrastructure (which may go on for decades)."[496] The guidance goes on to note that a social impact assessment should be conducted at project completion. The extent to which this is being done by DFIs in practice is unclear. Advance planning can help DFIs complete and exit projects within the expected time frame, rather than delaying exit. The assessment should identify:

- Potential adverse human rights impacts resulting from exit (see box 51 below on potential impacts) and actions that can be taken to prevent or mitigate those impacts.
- Any unremediated adverse impacts that have not yet been addressed, including through the project's GRM, IAM or other relevant mechanisms.
- Whether planned benefits and opportunities have been delivered.
- Whether and how benefits relied on by the local community or workers will be continued after exit.

49

BOX 49
GUIDANCE FROM THE INTER-AMERICAN DEVELOPMENT BANK ON PROJECT COMPLETION

The following table appears in Reidar Kvam, *Social Impact Assessment: Integrating Social Issues in Development Projects* (IDB, 2018), p. 83.

A summary of some SIA related aspects during the project completion stage is provided in the table below.

SIA IN THE PROJECT COMPLETION STAGE

- Consider changes in workforce (e.g. reduction of need for laborers as project shifts from construction to operation), community impacts, changes to benefits and services, transition of responsibility (e.g. from project to local authorities), and impacts on communities.
- Closure may entail dramatic changes, and should be consulted with local communities and other stakeholders. Consider for example site rehabilitation, community involvement in longer term environmental management, etc.
- Consider whether additional support may be needed to mitigate adverse impacts beyond project closing, e.g. livelihood restoration in cases of involuntary resettlement, which may take a long time to achieve.
- Confirm that grievances have been appropriately addressed, and that project outcomes have been documented and communicated.

Main Steps (continued from project implementation stage)		Borrower/Implementing Agency Responsibility	IDB Responsibility
15.	Consultation on closure with affected stakeholders	Undertake consultations.	Advise and assist as needed. Verify quality and transparency of process.
16.	Plan(s) for transition and closure	Prepare plan, incorporating consultation feedback.	Advise and assist as needed. Verify quality and relevance of plan(s).
17.	Orderly transition and transfer of responsibilities as needed	Handover and support to relevant agencies and authorities during transition and closure.	Advise and assist as needed. Verify content and quality, and viability of future arrangements including community benefits, employment opportunities, and risk management if needed.
18.	Implementation Completion Report	As required.	As required.

A joint guidance note for multilateral development banks on stakeholder engagement notes that: "Completion and closing of a project may involve significant and in some cases difficult transitions for local communities and other stakeholders. Benefits provided by the project, such as employment or procurement of local goods, or even provision of basic services, may cease without any guarantee that other institutions will step in and continue to provide support. Large infrastructure projects, and projects in the extractive sectors such as mining, oil and gas, may have created strong local dependency on the project. It is important to be aware of this, and to establish a closure strategy at an early date. There needs to be a high degree of transparency around this, and local stakeholders should be kept informed and consulted on transition arrangements and end-of project impacts. Ideally, the project should be able to document and communicate clearly to its stakeholders that the following three key elements of managing social risks and opportunities have been addressed successfully:

i. That at the end of the project, all adverse impacts have been mitigated so that there is no net loss among affected populations;
ii. Evidence of benefits and opportunities the project has provided or contributed to; and
iii. That consideration is given to how project-related community benefits and other development opportunities can remain sustainable beyond the lifetime of the project."[497]

2. Addressing the role of development finance institutions in connection with any outstanding unremediated harms

In situations in which DFIs have contributed to harms (see chap. IV, sect. A above), they should take particular care not to leave behind unremediated harms. As noted, the normative expectation that should be reflected in a responsible exit framework is that exit does not extinguish responsibility for remediation. This is one of the circumstances that in principle could justify access to a remedy fund in situations in which no other options are available (see chap. IV, table 2, above). Numerous IAMs permit complaints that materialize after DFIs are no longer involved in projects, the logic of which applies by analogy.

3. Developing a responsible exit action plan to address the impacts of exit and unremediated impacts

This is no doubt the most challenging step and is likely to be more successful if developed early with the client. Lessons can be drawn from experience in retrenchment (see box 52 on retrenchment below) and other project completion approaches. Local communities, workers, contractors and suppliers, and relevant government authorities should be consulted to help identify all relevant impacts and design appropriate responses.

BOX 50

FACTORS TO CONSIDER IN ADDRESSING UNREMEDIATED HARMS IN A RESPONSIBLE EXIT ACTION PLAN

- **Severity.** DFIs should consider the severity of impacts (which the Guiding Principles on Business and Human Rights criteria of scale, scope and irremediability help to assess), which in turn informs judgment on the speed with which a client should address the given issues.

- **Complexity of addressing the unremediated harms and a client's capacity to do so.** In situations in which the issues are complex or the client lacks the capacity to address them, a responsible exit action plan should include further capacity support. For example, in the case of severe pollution, a client might require both technical and financial support over a suitable period of time to decontaminate the project site and provide alternative access to resources for local communities.

- **Context.** Exiting in higher-risk contexts (including many fragile and conflict-affected settings) can raise particular challenges and calls for creative thinking, deft and strategic engagement with national authorities and particularly close consultation with affected stakeholders to understand their preferences and suggestions for action. DFIs may also be able to engage other actors involved with similar issues in the country, such as the United Nations, other Governments or multi-stakeholder initiatives, for support in addressing unremediated harms.

- **Government relationship.** Exiting may give rise to longer term issues for the relationships of DFIs with national authorities, especially in situations in which the Government is the borrower.

- **Market reactions.** A DFI exit may send negative signals to other players in the market, which may have wider sectoral implications.

51 BOX 51
POTENTIAL IMPACTS OF EXIT ON PEOPLE

- Loss of employment or deterioration in conditions of work. Actions should be taken to minimize the loss of jobs for workers (see also box 52 below on retrenchment).
- Loss of livelihoods.
- Loss of services (such as the health services the company is providing).
- Loss of community benefits.
- Increased food insecurity.
- Changes in service business model. In situations in which the business model is designed to serve a specific target market, such as low-income individuals, or to provide products or services to a certain population, exit can result in changes in pricing or the target segment shifting to higher-income or less-disadvantaged populations, among other possible adverse effects.
- Loss of responsible operating practices once clients are no longer required to apply safeguards.
- Loss of tax revenues, social security benefits and other potential local economic impacts.
- Loss of local contracting opportunities.
- Loss of access to or involvement of Government and loss of opportunities for meaningful stakeholder engagement.
- Increased insecurity for community leaders and environmental or human rights defenders, and increased retaliation against workers or community members blamed for the withdrawal (see box 53 below).

52 BOX 52
LESSONS LEARNED FROM RETRENCHMENT

Retrenchment refers to the large-scale termination or redeployment of workers. DFI exits may be prompted by client failure and may result in retrenchment of workers. The way that retrenchment issues are dealt with can help in thinking through broader considerations and principles to be taken into account when considering the human rights impacts of an exit.[498] Appropriate retrenchment involves advanced planning, in collaboration with workers, government partners at various levels, firms, unions and NGOs, guided by the principles of consultation, non-discrimination, transparency, and minimizing negative impacts. Operational tools include:

- Conducting social and community impact assessment of retrenchment, covering the effects on the wider community, including loss of tax revenue and social services, secondary effects on the economy, lost incomes, lost facilities, lost remittances, population decline, the impact of severance payments on local communities and separate consideration of impacts on vulnerable community members.
- Providing a package of reparations for workers, in addition to compensation, such as training, reskilling and help in finding new employment.
- Developing a community development plan, including support for small and medium-sized enterprises.
- Extending training, assistance to small and medium-sized enterprises, outplacement services and transitional support to the wider community.
- Making company facilities and infrastructure available to the community.
- Working with local/regional government, unions and NGOs.
- Providing appeals and grievance processes.[499]

D. EARLY, UNFORESEEN EXITS

If a DFI and other actors in a syndication are not able to prompt action by a client to address the adverse impacts after concerted attempts, the next step is to consider whether exit is the next best option. The Guiding Principles on Business and Human Rights call for a quicker response in situations in which adverse impacts are more severe and the client has not taken action to respond. The severity criterion is context specific and could include situations in which: (a) enabling rights[500] are severely affected; (b) rights have been repeatedly violated and/or purposefully violated; or (c) continued engagement poses a significant risk of exacerbating the adverse impact.[501]

Publicly announced exits can have an important wider signalling power: they involve the withdrawal of funds that might otherwise support poor practices and perpetuate negative impacts, and they can contribute to lessons learning. However, 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. Rather, as indicated earlier, early termination and exit from a project prompted by client non-compliance or a particularly severe incident should be a last choice option in all but exceptional circumstances (see box 45 above).

When considering whether to exit early, all available avenues for leverage (individual and collective, contractual and non-contractual) should be exercised, to minimize the scope for unremediated harms. In situations in which early discharge by the client is the reason for early exit, provision in the contract for a financial prepayment penalty could be used to cover the costs of outstanding remediation. In situations in which the exit is prompted by the client's bankruptcy, the bank will frequently have had notice of this, through non-repayment of the loan, and hence may have the time and opportunity to plan the exit. However, unlike the case of lenders, project-affected communities have little if any prospects to recover their losses in bankruptcy proceedings, with limited exceptions such as claims for outstanding payments in resettlement situations. Workers typically do have legal standing in bankruptcy but often only if they are employees. Hence, to the extent that the client outsources its labour, there is greater scope for unremediated impacts.

In early exit situations, as for any other situation, a responsible exit action plan should be developed, addressing the impacts that prompted the exit as well as any potential impacts resulting from it. The plan should address steps to prevent or mitigate the negative impacts of exit, with DFIs (and other syndication partners) contributing to remediation as appropriate. Thorough consultation with workers and communities is particularly important in this context, to ensure that exit conditions and remediation actions are appropriate and to justify the institution's decision on whether to stay or go. The consultation process should seek to pick up the potential risks of retaliation for those speaking out against the project and for exit, as well as being sensitive to risks posed by consultation itself (see box 53 on retaliation).

In situations in which an early exit takes place in particularly challenging circumstances, DFIs might consider commissioning an independent review of the potential impacts of exit, including recommendations on appropriate conditions for exit. Such circumstances may include: (a) particularly controversial investments, for example in a situation in which a project is subject to significant local opposition or national debate; (b) projects that would provide particularly significant benefits for the public (such as jobs or services); (c) projects in situations in which there are tensions between the project sponsors and local communities; (d) projects in challenging operating environments, particularly fragile and conflict-affected settings in which exit or the termination or alteration of a project could exacerbate existing tensions and conflicts.

53 BOX 53 PAYING ATTENTION TO POTENTIAL RETALIATION FOR EXIT

Numerous DFIs have adopted "zero tolerance" statements or other policy commitments on reprisals or retaliation in connection with DFI-funded projects, covering threats, intimidation, harassment or violence against those who voice their opinions. Some have developed contextual risk screening procedures to identify operating contexts that are high risk for retaliation and violence. But there appears to be little guidance on addressing these issues in the context of exits.

A report by civil society organizations in 2019 on human rights defenders noted: "In many of our case studies, DFIs eventually terminated or sold off the investment, however without a thorough investigation and accounting of the role of the institution and the client, and without a public statement condemning the abuse or upholding the rights of the defenders (Mareña, Santa Rita, Agua Zarca). These 'quiet exits' do not serve to remedy harm, prevent recurrence, or advance accountability. Indeed, the exit of a given DFI from an investment, without any accountability for human rights abuses or compliance failures, can actually elevate the risk for defenders who may be blamed for the loss of financing."[502]

The report recognized that some reprisal situations will require a non-publicized response, either for effectiveness or for the defenders' own security, but that this should not be the default option.

54 BOX 54 LEARN LESSONS FROM EXIT IN THE CONTEXT OF PANDEMICS

COVID-19 is not the first example of potential economic collapse associated with a pandemic. The Ebola outbreak in West Africa saw several European DFIs depart from the region, leaving projects because of the situation, with new private investors entering the market with lower safeguard standards.

The COVID-19 crisis has had a profound impact on human rights. It has prompted many companies temporarily or permanently to disengage from business relationships, including supply chains in developing countries, with potentially profound impacts on workers and communities. As a report by civil society organizations in 2020 noted, "the adverse human rights impacts resulting from these disengagement decisions are just as real, if not aggravated, by parallel pressure throughout the labour market and insufficient access to social protection and health care systems. In this situation, the normative framework calls for a heightened due diligence process focusing on the most vulnerable workers and communities: identification, prevention and mitigation of human rights risks to the greatest extent possible, including those risks resulting from disengagement. Finally, companies need to communicate and account for actions taken. … Measure to mitigate adverse impacts include providing reasonable notice to suppliers, workers and their representatives, and relevant government entities of the pending disengagement, continuing with and providing advance payments to suppliers for orders already made before slowly reducing orders, reducing or easing payment terms, and ensuring continued income and health benefits to workers during the pandemic. Companies should also collaborate with other companies, suppliers and state entities where needed to address challenges such as ensuring safe housing for workers previously housed in company facilities."[503]

E. ADDRESSING EXIT IN DIFFERENT TYPES OF FINANCING INSTRUMENTS

Different financing instruments have different implications for the timing and manner of exit of a DFI. This section briefly addresses some of the considerations that DFIs may need to take into account when exiting from equity investments, lending operations, and purchase and sale agreements with new investors or lenders.

1. Exits from equity investments

It is already routine practice for some DFIs to take a more considered and structured approach to exit in equity and debt investments (see box 55 below) and integrate a lessons-learning element within the process. Practice in this area may provide inspiration for other financial products, although there are also cautionary tales (see box 57 below). There is typically more flexibility in exits from equity investments compared with loans, where exit happens more or less automatically on loan repayment. Several factors should be taken into account:

- **Planning the exit before entering.** As noted above, the best time to plan for exit is from the beginning, in order to be able to understand and mitigate the potential adverse impacts of exit over time. Most available guidance on this point focuses explicitly on impact investing, that is to say, investments designed to produce positive environmental and social outcomes alongside financial returns (see boxes 55 and 56). This is very much how DFIs are increasingly defining their missions and operational objectives. As part of the planning process, consideration should be given to how to support the organization left behind to continue to have positive development benefits.
- **Timing.** Timing is a critical variable given the relative flexibility available to DFIs on when to exit equity investments. Questions to be considered include: (a) are DFIs exiting at a time when there are still major unaddressed impacts in projects, for example, in the middle of a resettlement or in the middle of major changes in the workforce, without sufficient assurances regarding remediation? (b) are DFIs leaving behind a weakened business that may have long-term consequences, such as loss of jobs or cessation of critical basic services such as health services? If so, it may be preferable to exit on a longer timeline or more flexible terms.
- **Price.** DFIs may wish to consider whether unreasonably high valuations of its shares in a project may attract unsuitable buyers interested in the price rather than the sustainability of the business or incentivize poor environmental and social performance by the institutions themselves, or by others seeking to capitalize on the apparent high profits in the sector.[504]
- **Context.** In situations in which the operating context has changed significantly for the worse, such as in a disaster, a pandemic or an upsurge in violent conflict, the financial incentive to exit a worsening market should be balanced against a longer term mandate to stay the course, rather than abandoning clients, their workers and communities.

55 BOX 55
RESPONSIBLE EXIT PRINCIPLE IN THE INTERNATIONAL FINANCE CORPORATION'S OPERATING PRINCIPLES FOR IMPACT MANAGEMENT[505]

"PRINCIPLE 7:
Conduct exits considering the effect on sustained impact
When conducting an exit, the Manager shall, in good faith and consistent with its fiduciary concerns, consider the effect which the timing, structure, and process of its exit will have on the sustainability of the impact.

PRINCIPLE 8:
Review, document, and improve decisions and processes based on the achievement of impact and lessons learned.
The Manager shall review and document the impact performance of each investment, compare the expected and actual impact, and other positive and negative impacts, and use these findings to improve operational and strategic investment decisions, as well as management processes."

56 BOX 56
LEARNING ABOUT RESPONSIBLE EXIT FROM IMPACT INVESTING MANAGEMENT

The European Venture Philanthropy Association's practical guide to impactful exits emphasizes the three main considerations to determine an investee's exit readiness: (a) social impact achieved; (b) financial sustainability; and (c) organizational resilience. The goal, it notes, is to plan, monitor and execute the investment and the exit with the final aim of leaving behind an investment that has a stronger business model and organizational structure and that is capable of attracting and managing the resources necessary to pursue its social goal(s) in the long term.[506]

57 BOX 57
LEVERAGE AND REMEDY IN EQUITY INVESTMENTS – SWEDFUND AND THE EXIT OF THE ENTREPRENEURIAL DEVELOPMENT BANK OF THE NETHERLANDS FROM ADDAX BIOENERGY, SIERRA LEONE

Swedfund and FMO joined Addax Bioenergy, a large-scale agriculture project in Liberia, as minority shareholders in 2011 and they originally held 8 and 17 per cent of the company's shares, respectively. Their holdings fell to 1 and 8 per cent, respectively, following share issues in 2014. A cornerstone of the Addax Bioenergy project, the Farmer Development Programme, was unexpectedly scaled down in 2015, at which point Swedfund and FMO sold their shares. Reportedly, neither Swedfund nor FMO carried out human rights due diligence prior to exit, the project stalled and a new majority shareholder was not found until nine months later. Negative impacts of the project on food security and communities' livelihoods have been reported, caused by the loss of land and natural resources, impacts on local water sources, the insecurity of short-term employment and a lack of free, prior and informed consent of local communities at the outset.

Swedfund and FMO stated that their main reason for withdrawing was their diminished shareholdings and leverage. However, it has been argued that: "As DFIs provided credibility to the company's sustainability profile, the leverage of Swedfund and FMO was not limited to their role as minority shareholders. Even when their shareholding was reduced, it seems reasonable to assume that they still had some power to influence how the human rights situation was handled. Swedfund and FMO should have done more to make sure that mitigation measures were upheld until a new investor was found. If needed they should have contributed to the financing of such mitigation measures together with other involved parties. … If the project stalls again and there is no commercial viability of the project, [environmental and social] risks are likely to worsen and the mitigation programs therefore need to have their funding secured. Ideally, in the future, such mitigation measures should not be financed from a project's revenue or profits, but financed at the inception of the project by diverting a fair amount from the investment capital, as conceptually a form of insurance."[507]

2. Exits in lending operations

Such exits typically occur on the basis of repayment schedules that are set out at the beginning of loans, which are known well in advance. In principle, this should afford ample opportunity for advance planning to address exit issues.

3. Purchase and sale agreements with new investors/new lenders

If another party buys out the interest of a DFI and there is a purchase and sale agreement (rather than the institution exiting due to repayment of the loan or the sale of shares on the open market), the institution should explore all available means to increase its leverage. An institution could request that the agreement include the following conditions:

- Covenants on continued compliance with the DFI safeguards and a commitment to support the client's environmental and social management systems and GRM.
- Covenants assuring the provision of remediation for any outstanding unremediated harms.
- Specific financial incentives (such as a specific price reduction) or penalties (accelerated payment schedule) connected with the covenanted commitments, to make it clear that these are clear and legally binding elements in the sales and purchase negotiations.
- Additional measures such as technical assistance.

F. RESPONSIBLE EXIT IN THE CONTEXT OF CLIMATE CHANGE

As more and more DFIs commit to phase-out investments in coal and other high-carbon investments, they will need to consider whether divesting those assets by selling them on to another operator is compatible with the idea of a "responsible exit" or, alternatively, whether the asset should simply be closed. The concept of a "just transition" is intended to ensure that workers and communities do not become "stranded communities" or "stranded workers", by analogy with the concept of stranded assets in the extractives sector. The Paris Agreement on climate change recognizes that human rights and social justice are core aspects of climate-resilient development pathways and that energy transitions should be deliberated, among and within countries and communities, without making the poor and disadvantaged worse off.[508] Any divestment from these sectors should take explicit account of and provide for transitioning of affected workers and communities to new opportunities and livelihoods.

G. CONCLUSIONS AND RECOMMENDATIONS ON RESPONSIBLE EXIT

The "responsible exit" concept is the corollary of "responsible entry" into projects. The responsible exit concept is intended to address problems that may arise when insufficient attention is given to unresolved environmental and social issues that are still occurring towards project closure or when DFIs exit projects (whether as a planned or early exit) without adequate consideration of unremediated harms. The idea of exiting responsibly from projects is not new, however, attention to this issue has been accentuated by demands faced by DFIs in fragile and conflict-affected settings, normative developments in the business and human rights field and, increasingly, in response to climate change demands. However, on the available data, practice seems uneven at best, and opportunities to build and exercise leverage for remedy in exit situations are being missed. Safeguard policies and procedures are generally weak in this area, as are the standard templates used by DFIs for monitoring clients' environmental and social performance leading up to and following exit.[509] Public sector financing institutions frequently have general conditions of contract that require observance of safeguard commitments beyond project closure, until loan repayment, but it is not clear how these are implemented. This would appear to be an important area for more systematic data collection, disclosure and research, in order to enable more project-affected people to access remedy in practice.

It is recommended that DFIs:

- Carry out a stocktaking of their exit practices from different kinds of projects (loans, equity investments and financial intermediaries) and circumstances (high risk versus low risk) and across geographies and sectors, to help build an overall picture of how routine and non-routine exits are presently being addressed and what the environmental and social implications are.
- Carry out more extensive evaluations of environmental and social impacts of project closure, more systematic reviews of supervision reports on outstanding safeguard issues not resolved by the time of project closure, in order to build the evidence base and inform policy.
- Build and use all available leverage, including through legal agreements, post-exit action plans, capacity-building support, extension of project closure, linking continued environmental and social compliance to the prospect of repeat loans, engaging with national authorities and working with syndicated banks or other investors in the client company to pressure the client to take action.

- Integrate more detailed environmental and social requirements concerning exit within loan agreements, including clear criteria for the selection of future lender(s) or buyer(s), and requirements that early client prepayment should be tied to a set-aside of funds for remedy.
- Develop a responsible exit framework applicable across the full project cycle in order to clarify expectations, strengthen legitimacy, minimize unintended consequences, promote consistency and help remedy residual impacts, guided by the following principles:
  - Integrate potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle.
  - Do not "cut and run", without first using all available leverage and exploring all viable mitigation options, and without conducting a human rights impact assessment and consulting with all relevant stakeholders.
  - Do not leave behind unremediated harms, including those arising from the exit.
  - Seek to ensure that project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit.
  - Ensure that no community members or workers face risk of retaliation due to the exit.
  - Proactively seek responsible replacements for DFIs on exit.
- Require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.
- Publicly disclose termination provisions of DFI loan agreements in order to help understand whether they require any assessment of unremediated environmental and social impacts as a condition of exit.

VI. LOOKING AHEAD



Felix Dovey/CAO

At the time of writing, the issue of remedy in development finance was delicately poised. On the one hand, leading DFIs and IAMs have been working impressively under difficult constraints to ensure that unintended harms are remediated. Empirical evidence increasingly bears out the instrumental importance and benefits, as against the costs, of remedy for sustainable development. Norms concerning human rights due diligence, remedy and responsible business conduct have been evolving in positive directions, as has practice in the commercial banking sector, with potentially positive ripple effects for remedy in development finance.

The remedy conversation among DFIs has ebbed and flowed since the creation of the World Bank Inspection Panel in the early 1990s, a milestone event in accountability in development finance. The remedy agenda appears to have revived somewhat in the early 2020s, driven by public demand and accountability review processes at some of the leading multilateral development banks. The present publication has sought to catch the winds of DFI accountability debates and suggest strategic avenues and priorities for strengthening the contributions of DFIs and IAMs to remedy. DFIs have shown remarkable capacity for adaptation and innovation in a wide range of fields in the past, from the development of new financial instruments (including with respect to climate finance) and investment products through to communications and digital technology solutions, data analytics and accountability reforms. Similar commitment, resources and innovation are urgently needed now, to make remedy a reality in more peoples' lives.

Just as the "C word" (for "Corruption") moved from taboo to the mainstream at the World Bank in the 1990s, the "R word" may now be gaining firmer footing. Central to such a shift will be strong leadership, clear communication and the need to see complaints not simply as a source of reputational risk to the institution, but as a source of learning and a prerequisite for improved performance and accountability. Similarly, strong leadership and clear communication are needed to offset the dominant incentives within many DFIs wherein success is still often measured more by loan volume or short-run financial returns, than investment quality and social and environmental sustainability.

The point of departure for any DFI seeking to strengthen its approach to remedy should be the recognition that there is no such thing as a perfect project. Despite best efforts, harms may occur. Accordingly, while adhering to the highest possible safeguard standards, DFIs should plan for things to go wrong. Experience in the contexts of resettlement, occupational health and safety, and environmental impacts can help to normalize the possibility of project-related harms and build effective systems to address them. Building remediation structures around the project from the outset, and applying contingency planning, can help to address risk aversion, transcend punitive connotations associated with remedy and increase the chances that those adversely affected by the project will be made whole.

DFIs leading on the issue of remedy may feel that they face a "first mover" dilemma: how can innovation and a forward-leaning approach to remedy be incentivized and commercially viable in an environment in which competitors' and clients' standards and practices on remedy are often weak? But this may be a false dilemma, particularly for multilateral development banks, which have consistently and appropriately set new standards and shaped new global norms, public expectations and national legal and policy frameworks on environmental and social risk management and accountability issues.

Innovation and leadership are part of the DNA of DFIs and essential to their reputations, comparative advantages and continuing influence. The more established DFIs, including multilateral development banks, have dealt extensively with remedy in specific contexts, such as resettlement, experience that may be adapted, deepened and translated to addressing other social harms.

SUGGESTED PRIORITY ACTIONS

Annex I contains a comprehensive list of the main recommendations in this publication, organized functionally, addressed to DFIs, their shareholders and IAMs. While recognizing the diversity in their organizational structures, capacities, functions and operating contexts, DFIs seeking to strengthen their approach to remedy are encouraged to consider the following priority actions as starting points.

1. Communicate internally on remedy

DFIs should communicate clearly, from board and senior management levels to staff, that:

- Remedy is central to the "do no harm" mandate and sustainability objectives of DFIs and development effectiveness.
- Informed risk-taking, with rigorous due diligence and attention to remedy, will be supported in order to encourage innovation and help achieve the mandated goals of DFIs.
- Harms from DFI-funded projects cannot always be prevented, but should not be externalized onto those whom DFIs seek to support through development.
- Positive environmental and social outcomes are the dominant organizational objective.
- Full transparency is essential for accountability and remedy.
- Remedy should not be seen as a "blame game" but rather an ordinary project contingency and a central part of a collective effort to make a positive difference in peoples' lives.

2. Update policies and systems

DFIs should:

- Carry out rigorous and publicly disclosed evaluations of the remedy mechanisms available through DFIs (including but not limited to IAMs) and their clients (including GRMs) to assess whether their remedy systems are working as effectively and efficiently as they can.
- Update safeguard policies to clarify the expectation that all adverse impacts should be remedied and revise mitigation hierarchies to provide for remedy when other actions to prevent or mitigate harms are insufficient.
- Based on the public evaluation mentioned above, develop a remedy framework for the institution that includes: (a) a vision of how its remedy mechanisms may operate within the larger remedy ecosystem; (b) a comprehensive mapping of different forms of leverage that could be exercised by it to help enable remedy; (c) an assessment of circumstances and criteria according to which it should contribute directly to remedy, in accordance with the parties' respective contributions to harm; and (d) provision for ring-fenced funds, insurance instruments and other potentially viable financing mechanisms.
- Within the scope of the above framework, develop a responsible exit policy framework to minimize and address residual impacts (see chap. V).
- Recognizing that trends and patterns of grievances can help identify systemic problems that may require more systemic solutions: (a) provide full time-bound disclosure of project environmental and social documentation and on remedial outcomes to promote lessons learned; and (b) interpret any exceptions to information disclosure, including on commercial grounds, narrowly, subject to overriding public interest and human rights considerations.
- Establish and maintain effective IAMs, in line with the criteria in principle 31 of the Guiding Principles on Business and Human Rights (see annex II), authorize and enable IAMs to address harms linked to policy non-compliance (not procedural compliance alone) and require clients to make IAMs known to project-affected people.

3. Build capacities

DFIs should build internal DFI capacities on environmental and social, human rights and accountability issues, and align internal incentives and staff members' accountabilities with environmental and social objectives. In particular, DFIs should strengthen mandates and capacities to identify and address grievances early, before they are aggravated or escalate.

Annex I
Recommendations

The recommendations listed below do not reflect the full breadth of issues and actors discussed in this publication. Rather, for pragmatic reasons, the selection below was informed by a sense of priorities gleaned through consultations with counterparts – DFIs, IAMs and civil society organizations – and reflects the judgment of OHCHR on what the most common and consequential remedy gaps presently are, relevant to the great diversity of bilateral and multilateral DFIs, and where the international human rights framework and the present publication could make a useful contribution. The recommendations draw from but do not mirror the structure of the publication. Rather, for ease of reference, they are organized thematically.

In line with this publication's main objectives, most of the recommendations in this annex are directed to DFIs rather than clients or accountability mechanisms. This choice is justified in view of: (a) the important normative, financial and operational roles of DFIs; (b) their influence over the broader accountability reform agenda (including at IAMs); (c) the embryonic and fragmented nature of remedy discussion in DFIs to date; and (d) the comparative wealth of analysis and recommendations on accountability and remedy for clients (Governments and companies) and IAMs, including within the scope of the OHCHR Accountability and Remedy Project. Unless a contrary intention appears, recommendations to DFIs are intended to address shareholder Governments and Board members as well as management.

A. MANDATES

It is recommended that DFIs:

- Clarify that timely and effective remedy is a human right and central to their "do no harm" mandate and sustainability objectives.

B. SAFEGUARDS

It is recommended that DFIs:

- Ensure that safeguards specify that IAMs should seek to address and remedy harms, in addition to (and related to) the environmental and social performance of DFIs.
- Integrate the Guiding Principles on Business and Human Rights within their safeguard policies in order to harmonize upwards and strengthen: (a) social risk assessment and prioritization; (b) human rights due diligence; (c) approaches to remedy; and (d) GRMs
- Ensure that safeguards clearly differentiate between risk assessment and management ("do no harm") objectives, on the one hand, and sustainability objectives, on the other.
- Define their projects' "area of influence" broadly, by reference to project impacts in the short, medium and long term.
- Define "associated facilities" and "cumulative impacts" broadly and avoid artificially ring-fencing project-related risks and responsibilities.
- Amend mitigation hierarchies in order to:
  - Incorporate a clear requirement that adverse impacts, including adverse human rights impacts, should be remedied.
  - Ensure that human rights impacts are not subject to offsetting.
  - Provide a broader range of reparations (i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), rather than compensation and offsetting alone.
  - Ensure that the "technical or financial feasibility" criterion does not trump human rights considerations.
- Specify that the client's environmental and social commitments extend to a reasonable period of time (such as two years) beyond project closure, and that contingency funds be set aside for the purpose of remedy, backed by legally binding performance covenants.
- Require contingency planning for remedy and that environmental and social action plans include provisions on remedy, including and beyond the resettlement context.
- Require the documentation of the absence of human rights impacts, in situations in which this is the case, and the reasons justifying such a conclusion.
- Update exclusion lists to include prohibitions concerning a wider range of serious human rights violations (including and beyond forced labour), as well as particular project or transaction structures (such as special economic zones and projects using tax havens), which may be associated with serious human rights risks.
- For serious human rights violations associated with a project (including but not limited to forced and child labour):
  - Require the rapid remediation of impacts and make this a point of escalation with the client and within DFI senior management and the board.
  - In situations in which human rights risks in supply

chains are particularly high or may be irremediable, require clients to shift their supply chains to suppliers that can demonstrate safeguard compliance.

- Require clients to publish a list of commitments made during the course of consultations with project-affected people, and reflect these commitments in third-party beneficiary clauses in legal agreements.
- Publish IAM processes and management action plans as a routine part of project documentation.
- Ensure that strategies and operational policies in fragile and conflict-affected settings include the principle of prompt, adequate and effective remedy, and develop specific guidance addressing the challenge of remedy in such settings.
- Require that any delay in application of safeguards in fragile and conflict-affected or other emergency settings includes requirements for advance public justification, an ex ante human rights impact assessment, initial mitigatory steps to avoid harm and a clear plan directed at achieving full compliance.
- Ensure that safeguards include strong requirements to prevent and respond to intimidation and reprisals against project-affected people, supported by detailed operational guidance, and that these requirements are reflected in contractual agreements with the client and through the supply chain.

C. INDEPENDENT ACCOUNTABILITY MECHANISMS

It is recommended that DFIs:

- Take all necessary measures to ensure that the existence of IAMs is made widely known among project-affected populations in a manner understandable to local communities, provide systematic verification that IAMs have been disclosed, encourage clients to work constructively in connection with IAM proceedings and include requirements to the above ends in legal agreements and project documents.
- Specify that remedy should be an outcome of compliance reviews, as well as dispute resolution, and that management action plans should address harms related to identified non-compliance.
- Authorize IAMs to include in their investigation reports recommendations on what should be included in management action plans.
- Consult with IAMs on the content of management action plans during their preparation.
- Authorize IAMs to present their views on the draft management action plan to the board prior to its approval, so that boards can take the views of IAMs into account when approving such plans.
- Authorize IAMs to carry out compliance reviews without requiring board approval.
- Ensure that management action plans draw from a broad range of reparations options (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), in consultation with the complainant(s), and that IAMs are specifically authorized to recommend reparations in the form of financial compensation.
- Authorize IAMs to monitor the implementation of management action plans and (subject to confidentiality) dispute resolution agreements, and report on the extent to which project-related harms have been remedied.
- Allow complaints to be filed with IAMs prior to board approval in order to allow early resolution of problems.
- Allow complaints to be filed with IAMs during a reasonable period of time (such as two years) after project closure or two years after the complainant became aware of the harm, whichever is later.
- Allow a fully informed choice by complainants and fluidity between compliance reviews and dispute resolution, in order to provide the flexibility needed to enable remedy in practice.
- Consider authorizing IAMs to issue binding recommendations on both DFIs and clients.
- Track all complaints received by IAMs, including ineligible complaints, in order to contribute to the institutional learning objectives of DFIs.
- In consultation with other DFIs, establish robust and transparent frameworks for IAM collaboration in handling complaints connected with co-financed projects and, in situations in which DFIs have conflicting safeguard requirements, ensure that the most stringent applicable standards are applied.

It is recommended that IAMs:

- Carry out and publish regular self-assessments of their effectiveness using the Guiding Principles on Business and Human Rights' effectiveness criteria and suggested indicators (annex II).
- Establish a peer review mechanism to encourage more consistent performance against the Guiding Principles on Business and Human Rights' effectiveness criteria, drawing upon the experience of OECD national contact points and national human rights institution peer review and accreditation processes.

D. BUILDING AND EXERCISING LEVERAGE FOR REMEDY

It is recommended that DFIs:

- Build and exercise all available leverage to strengthen remedy through commercial and legal means, normative and convening roles, and through innovation, capacity-building, shareholder actions, collective action and supporting GRMs within the client and the larger remedy ecosystem.
- Increase leverage for remedy in loan agreements through:
  - Loan covenants (on issues including safeguard

compliance and action plans, commitments to notify DFIs of human rights violations and address impacts, GRMs, non-retaliation, cascading safeguard and remedy requirements to subcontractors, passing on requirements after the exit of DFIs and third-party beneficiary rights).
  - Conditions of disbursement.
  - Conditions of termination and/or suspension of disbursements on human rights grounds.
  - Requirements concerning contract transparency.
  - Contract renewals.
- Explicitly include violations of international human rights law within project exclusion lists, and use these as the basis for penalties or other appropriate sanctions during project implementation if violations and associated harms arise and are not addressed quickly.
- Ensure that clients are obliged under standard form legal agreements to notify DFIs of serious human rights issues arising during project implementation, and permit DFIs to carry out or commission investigations, and refer serious incidents to appropriate authorities as needed.
- Increase leverage through legal agreements pertaining to equity, debt and other investments, including through shareholder provisions, management provisions, impact covenants, termination provisions and "put options" in subscription agreements exercisable in cases of serious non-compliance.
- Ensure that contractual requirements for grievance management are cascaded to subcontractors, complemented by increased supervision and technical support as needed.

E. GRIEVANCE REDRESS MECHANISMS

It is recommended that DFIs:
- Highlight the multiple roles that GRMs play in:
  - Informing decision-making.
  - Providing early warning and timely resolution of concerns, thereby avoiding escalation of problems into social conflict and potential project delays.
  - Serving as an accountability and remedy mechanism.
  - Improving due diligence and learning by identifying trends and themes arising in connection with grievances.
- Review their overall GRM architecture, assess the relative accessibility and effectiveness of the various components taking into account the effectiveness criteria in annex II and communicate the results publicly.
- Require full transparency and early consultation with communities and workers in connection with: (a) the design and functioning of GRMs; (b) the choice of remedy; and (c) the quality and impact of remedial outcomes.
- Ensure that project-affected people are able to exercise an informed choice about what GRMs (including from among IAMs in co-financed projects) and procedures (compliance review and/or dispute resolution) to utilize, without prejudice to other judicial or administrative mechanisms in parallel.
- Require clients to inform affected communities of available remedy mechanisms in addition to IAMs and GRMs, and prohibit clients from obstructing or lobbying Governments to restrict access to remedy.
- Ensure that GRMs have the mandate and flexibility to address a full range of reparations, alone or in combination, as the case requires, and that outcomes are non-discriminatory (e.g. do not privilege men over women), prompt, adequate and effective to address the given harms.
- Require that grievance redress processes seek to redress imbalances in power, including through:
  - Encouragement of (local and international) representation of claimants.
  - Special measures to support marginalized or vulnerable persons (including by making information available in appropriate languages and formats, building claimants' capacities, and advising on sources of technical, financial or other support).
  - The presumption of the legitimacy of complaints.
  - Fair and reasonable rules regarding the burden of proof.
- Require clients to report periodically and publicly on the effectiveness and outcomes of their GRMs.
- Clarify and strengthen requirements regarding financial intermediaries' GRMs in line with the Guiding Principles on Business and Human Rights' effectiveness criteria.
- Ensure that basic due process principles and fairness are integrated with the requirements of safeguard policies for grievance redress processes, including requirements relating to:
  - Provision of reasoned decisions.
  - Production, access and control of information pertaining to the claims.
  - Structural independence of GRMs from the clients' operations.
  - Separation of investigations and dispute resolution functions.
- Develop specific assessment/diagnostic tools and guidance for DFI staff concerning the design and operation of an effective GRM, addressing the following questions:
  - **Functions.** Does the mechanism have the appropriate: (a) mandate and authority to address and resolve concerns raised by stakeholders and to influence project design and implementation decisions; (b) staffing; (c) processes; (d) budget; and (e) oversight?
  - **Effectiveness.** Does the mechanism meet the effectiveness criteria and indicators in annex II?
  - **Interactions with other mechanisms.** Particularly in situations in which the mechanism is operating in

fragile and conflict-affected contexts or otherwise dealing with potentially serious issues, is there a clear framework governing interactions with and referrals to other mechanisms in the national and international remedy ecosystem?
- o **Protection of complainants.** Given closing civil space and the increasing risks and threats faced by complainants and communities, do GRMs have clear policies and robust, comprehensive procedures to prevent and respond to intimidation and reprisals?

F. CONTRIBUTING TO REMEDY

It is recommended that DFIs:
- Publicly commit to contributing to remedy in situations in which they have contributed to the harm.
- Be guided by the Guiding Principles on Business and Human Rights when determining involvement in harms and proportionate responsibility for remedy.
- When determining their own possible contributions to remedy, take into account not only their involvement and that of their clients in the given harms, but also:
  - o Their development mandate.
  - o Other factors that can significantly impede access to remedy.
  - o The complexity of the investment structure and operating context.
  - o Any legacy issues.
- Set aside ring-fenced funds for accessible, rapid and reliable reparations.
- Consider all relevant forms of reparation (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), and all potentially effective remedy funding mechanisms, including escrow accounts, trust funds, insurance schemes, guarantees and letters of credit.

G. RESPONSIBLE EXIT

It is recommended that DFIs:
- Carry out a stocktaking of their exit practices from different kinds of projects (loans, equity investments, public-private partnerships and financial intermediaries) and circumstances (high risk versus low risk) and across geographies and sectors, to help build an overall picture of how routine and non-routine exits are presently being addressed and what the environmental and social implications are.
- Carry out more extensive evaluations of environmental and social impacts of project closure and more systematic reviews of supervision reports on outstanding safeguard issues not resolved by the time of project closure, in order to build the evidence base and inform policy.
- Build and use all available leverage, including through legal agreements, post-exit action plans, capacity-building support, extension of project closure, linking continued environmental and social compliance to the prospect of repeat loans, engaging with national authorities and working with syndicated banks or other investors in the client company to pressure the client to take action.
- Integrate more detailed environmental and social requirements concerning exit within loan agreements, including clear criteria for the selection of future lender(s) or buyer(s), and requirements that early client prepayment should be tied to a set-aside of funds for remedy.
- Develop a responsible exit framework applicable across the full project cycle in order to clarify expectations, strengthen legitimacy, minimize unintended consequences, promote consistency and help remedy residual impacts, guided by the following principles:
  - o Integrate potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle.
  - o Do not "cut and run", without first using all available leverage and exploring all viable mitigation options, and without conducting a human rights impact assessment and consulting with all relevant stakeholders.
  - o Do not leave behind unremediated harms, including those arising from the exit.
  - o Seek to ensure that project benefits have been provided and the project will operate in an environmentally and socially responsible manner after the exit.
  - o Ensure that no community members or workers face the risk of retaliation due to the exit.
  - o Proactively seek a responsible replacement(s) for themselves on exit.
- Require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.
- Publicly disclose the termination provisions of DFI loan agreements in order to help understand whether they require any assessment of unremediated environmental and social impacts as a condition of exit.

Annex II

Independent Accountabilty Mechanism Assessment Tool – Benchmarking against the Guiding Principles on Business and Human Rights' Effectiveness Criteria

The Guiding Principles on Business and Human Rights have exerted a strong influence on global normative frameworks relevant to development finance, including the Equator Principles and the OECD Guidelines for Multinational Enterprises, and are increasingly being integrated into the safeguard policies of DFIs and IAM procedural guidance. IAMs are non-judicial mechanisms to which principle 31 of the Guiding Principles applies. Under principle 31, GRMs should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue.

The Guiding Principles on Business and Human Rights have influenced discussions on remedy among IAMs and project-level GRMs, and certain IAMs have recommended that their parent banks refer to the Guiding Principles' effectiveness criteria (contained in principle 31) when designing and evaluating project-level GRMs.[510] Many IAMs already assess their own effectiveness by reference to similar criteria. More consistent and transparent application of common criteria, drawing upon stakeholder surveys, could help to shed light on systemic issues and gaps affecting access to remedy.

This annex briefly examines each of the effectiveness criteria in the context of IAM design and functions and identifies indicators that may facilitate the application of the criteria in this context. The suggested indicators are not exhaustive and should be read in the context of complementary analyses on this subject.[511]

A. LEGITIMATE: ENABLING THE TRUST OF THE STAKEHOLDER GROUPS FOR WHOSE USE THEY ARE INTENDED AND BEING ACCOUNTABLE FOR THE FAIR CONDUCT OF GRIEVANCE PROCESSES

Legitimacy has many dimensions but, arguably, the most important characteristic for any GRM is independence. The independence of an IAM can be reinforced or restricted in a range of ways, in addition to the discussion on mandate restrictions in the previous section. The governance of IAMs, including structure, management relationship, reporting lines and board oversight, are among the most fundamental questions in this regard. All IAMs at multilateral DFIs (with the exception, until recently, of IFC) have a direct reporting line to the DFI board, rather than DFI management. Subject to the problem of conflict of interest at board level, as previously discussed, this direct reporting relationship to the board provides IAMs with the necessary degree of independence when assessing DFI compliance.

Some commentators have advocated for the creation of a unified IAM (or "super IAM") covering all DFIs, as a means of ensuring truly independent oversight, strengthening accountability and promoting administrative efficiency. It has been suggested that the ILO Administrative Tribunal, which can hear cases concerning any of its member organizations, may provide inspiration for this purpose. One should not discount the political challenges confronting the establishment of a unified IAM of this kind, given the separate governance and shareholding structures of existing DFIs, the fractious state of geopolitics and strains on multilateralism and the continuing (and perhaps increasing) resistance of many States to accountability reforms. A unified IAM, if or when conditions should permit, may in principle have compelling substantive advantages and efficiency benefits,[512] although pending further consolidation of IAM practice one must also weigh the risks of concentration of authority and ensure that harmonization does not unwittingly restrict innovation.

Other prerequisites for independence and legitimacy include the need to involve external stakeholders in the process of selection and appointment of senior IAM staff and to ensure that performance reviews for such staff are carried out by the board (not DFI management), and to ensure that IAMs control their own budget and contracting. Legitimacy also involves consideration of the extent to which IAMs are trusted by complainants. On this issue, an influential benchmarking exercise in 2016 found (positively) that "complainants generally report that they are treated fairly by the IAMs and appreciate that their concerns are taken seriously".[513]

Indicators of legitimacy include:

- Is the mechanism independent of management?
- Is the mechanism authorized to initiate investigations without board approval?
- Does the mechanism have a direct reporting line to the board?
- Does the mechanism control its own budget, staffing and contracting?

• Are hiring procedures transparent and are external stakeholders involved in the process of selection of senior IAM staff?
• Are IAM managers and staff held to high standards of ethical conduct?
• Are performance reviews of senior IAM staff carried out by the board rather than management?
• Is the mechanism trusted by complainants?
• Does the board have procedures to ensure due process in responding to IAM recommendations and to eliminate conflicts of interest?
• Are IAM staff members precluded from seeking employment in the parent DFI, and vice versa, for a reasonable "cooling off" period (such as two years)?
• Are IAM staff suitably qualified in relation to the requisite language skills, experience working with victims, understanding of local contexts and relevant expertise (including, ideally, human rights and/or business and human rights)?
• Does the mechanism carry out regular trainings for personnel in order to keep pace with relevant standards and practices?

B. ACCESSIBLE: BEING KNOWN TO ALL STAKEHOLDER GROUPS FOR WHOSE USE THEY ARE INTENDED AND PROVIDING ADEQUATE ASSISTANCE TO THOSE WHO MAY FACE PARTICULAR BARRIERS TO ACCESS

Accessibility to IAMs remains a core concern for communities and the organizations that represent them. This is a key point raised consistently in IAM reviews and is also implicit in the small percentage of project-related complaints that are brought to IAMs (as few as 1 to 3 per cent of all projects), the high attrition rate of complaints[514] and practical challenges in achieving positive outcomes for more serious complaints. The variables include:

• Awareness. As is well recognized, the lack of awareness of IAMs remains among the most fundamental and obvious barriers to remedy. Many but not all IAMs have active outreach activities, but clients are rarely required to publicize the existence and availability of IAMs to project-affected populations.[515] This simple measure could easily be addressed in safeguard policy revisions and legal agreements and the fact that so few DFIs have done so appears to reflect the conflicting incentives and mixed motives within many DFIs on accountability issues.

• Eligibility requirements. Such requirements can be a significant obstacle in practice, given the substantial burdens that communities and workers may face simply in getting to the point of being able to file a complaint, beginning with understanding who is behind a project that may affect them and who is financing it and understanding IAM procedures. It has been estimated that more than half of all complaints filed with IAMs until the year 2016 were not registered or were found ineligible.[516] The reasons for this are not entirely clear, but the strictness of eligibility requirements is almost certainly a factor:[517]

  o Link between non-compliance and harm. While most IAMs require that the complainant show a link between the complaint and the institution's safeguards, others do not. The latter approach allows dispute resolution between the complainant and client to proceed separately from the question of the bank's non-compliance,[518] thus promoting accessibility and enhancing the early resolution of problems.

  o Requirements for complainants to bring cases to management first. Unduly rigid requirements of this kind can present unreasonable access constraints to complainants.[519] Complainants typically only bring complaints to IAMs when other avenues, including with the client or the DFI team, are not reasonably open to them or have failed. Complainants are facing increasingly serious personal threats and retaliation risks and, sometimes, obstruction from DFIs themselves.[520] A categorical requirement that complainants first exhaust avenues with clients and DFIs ignores these realities.

  o Exhaustion of local remedies. Some IAMs do not accept complaints that are subject to parallel court proceedings at the country level. While national laws may sometimes constrain parallel (including IAM) proceedings concerning complaints dealing with the same subject matter, a categorical exclusion by IAMs of complaints subject to parallel (national) proceedings constitutes an unwarranted restriction of access to IAMs and overlooks the distinctive objectives and focus of court proceedings (focusing on the application of national laws vis-à-vis the State or client) and IAM proceedings (focusing on the application of safeguard policies vis-à-vis the bank or problem-solving between the parties), and the very different remedial options that may be available under each.[521] There may undoubtedly be overlap in certain cases, given that the client is responsible for implementing the management action plan flowing from the mechanism's review of the bank. But a categorical exclusion precludes case-by-case analysis and ignores the comparatively serious logistical and other challenges that complainants may face in connection with court proceedings: the latter may take far longer than the length of the DFI loan and thus effectively preclude access to IAMs for practical purposes. Just as most safeguards prohibit clients' GRMs from preventing access to judicial or non-judicial mechanisms, complainants in

58 BOX 58 LEVERAGING MULTIPLE PROCEEDINGS FOR EFFECTIVE REDRESS

The response by CAO to complaints in connection with the investment of IFC in the Wilmar Group's palm oil plantation in West Kalimantan, Indonesia, involved both its compliance review and dispute resolution functions. CAO mediation helped achieve a number of important results, including the return to communities of 1,699 hectares of forest area, compensation for land clearances and the provision of investment funds for broader community development. Concerns relating to wider environmental impacts, land titling and industry practices, were dealt with by the Roundtable on Sustainable Palm Oil multi-stakeholder process.[522]

An April 2015 CAO audit report on labour standards (discrimination on the basis of union status) non-compliance in relation to a $50 million IFC loan to Avianca airlines (Colombia) positively influenced ongoing court proceedings brought by the complainant unions. The client (Avianca) fully reimbursed its loan in December 2013, two years early, however, according to the International Trade Union Confederation: "the CAO report provided useful corroboration of Avianca's illegal labour practices to the unions' lawyers, who were at that moment pursuing claims against the company before Colombia's supreme court. The court found against Avianca in June 2015."[523]

EIB is unusual in that it is subject to the jurisdiction of European Union accountability mechanisms including the European Ombudsman and the compliance mechanism of the Aarhus Convention. In 2009, the Aarhus compliance mechanism investigated the compliance of EIB with respect to its obligations under the Aarhus Convention concerning access to information and public participation in the decision-making on the financing and construction of a thermal power plant in Vlorë (Albania). The project was co-financed with the World Bank and EBRD, whose IAMs also received complaints. The Aarhus compliance mechanism found EIB to be in compliance, whereas the EBRD Independent Recourse Mechanism (as it then was) found non-compliance by EBRD and recommended policy changes ("non-repetition") but not remedy for the complainants. The Inspection Panel's non-compliance findings were based in part on the Aarhus compliance mechanism's analysis and findings, given the similarity in the requirements of the Aarhus Convention and the World Bank's Operational Policy 4.01 concerning public consultation and disclosure.[524]

IAM proceedings should have the option to choose which avenues they want to pursue, alone or in combination, to enable access to justice (see box 58).

- Reasoned decisions about eligibility. To the extent that IAMs do not already do so, they should disclose reasoned explanations about why complaints do not meet eligibility criteria. This is not only vital for accessibility, but is a minimum requirement of due process.

• **Representation and standing.** IAMs generally allow complainants to be represented by civil society organizations, which has a strong, positive effect on remedy outcomes.[525] However, some IAMs impose unwarranted constraints in this regard, such as limiting the scope of representation by international organizations.[526] While it is not always easy for an IAM to identify whether a claim to represent a community is valid or not, complainants should be given maximum latitude in this regard. Complainants frequently face multiple, intersecting barriers in accessing DFIs, including lack of knowledge, distance, the financial cost of pursuing a remedy, intimidation from Governments or businesses and procedural barriers.[527] Understanding and articulating the linkages between project impacts and safeguard standards (where this is required to be shown) may be well beyond the scope of local communities to articulate without the support of civil society organizations. The majority of complaints are supported by national civil society organizations that, for substantive, logistical or personal security reasons, require help from international civil society organizations. Should a DFI have questions about the validity of a complainant's representation, these should be dealt with through the investigation process itself rather than ex ante prohibitions or restrictions.[528]

• **Time frames.** Time frames should be as flexible as possible to allow for complaints early in the project cycle (pre-board approval) through to post-project closure. Truncated time frames force more complainants to base their claims on "likely" (rather than actual) harms from a project, which can be difficult to sustain without support from civil society organizations with technical expertise in connection with that type of project. A number of IAMs permit the filing of complaints after project closure for a given period of time (such as two years, or two years after the complainant becomes aware of the harm, whichever is later), acknowledging the challenges that complainants frequently face in bringing complaints and the fact that harms may take time to manifest themselves. In the view of OHCHR, the latter practice should be encouraged.

59

BOX 59

GOOD PRACTICES – ADMISSIBILITY PROVISIONS OF THE AFRICAN DEVELOPMENT BANK INDEPENDENT RECOURSE MECHANISM AND THE GREEN CLIMATE FUND INDEPENDENT REDRESS MECHANISM

The AfDB Independent Recourse Mechanism may accept complaints relating to projects that have either been approved by the board or are under consideration for financing by Bank management. The latter provision may enable early responses and help avoid harm.

The GCF Independent Redress Mechanism's policy provides: "The IRM shall not process a grievance or complaint regarding a GCF funded project or programme submitted to the IRM on or after whichever is the later of the following two dates: (a) within two (2) years from the date the complainant became aware of the adverse impacts referred to in paragraph 20 above or (b) within two (2) years from the closure of the GCF funded project or programme."[529] The Operating Rules and Procedures of the AfDB Independent Recourse Mechanism have similar provisions (para. 12).

Indicators of accessibility include:

- Are both DFIs and clients required to publicize the existence of IAMs among project-affected people in a manner understandable to the communities concerned (taking into account language, disability and other relevant factors), and is this requirement included in contractual agreements?
- Are access barriers for women, children, persons with disabilities, indigenous people and other population groups identified and addressed, in addition to barriers arising from multiple and intersecting forms of discrimination (e.g. women with disabilities and indigenous girls)?
- Are complainants free from any categorical requirement to exhaust remedial avenues with the client, GRM and/or DFI?
- Are complainants free to pursue complaints through IAMs irrespective of parallel proceedings (judicial or otherwise), in principle?
- Are complainants free to choose between compliance review and dispute resolution processes, or both simultaneously, and are they empowered to make informed choices in this regard?
- Are complainants free to choose who to represent them, be they local or international organizations?
- Can complaints be admitted prior to board approval, thereby enabling preventive actions?
- Can complaints be admitted for a reasonable period of time (such as two years) after project closure and are the time limits for accessing IAMs flexible enough to take into account the time needed for abuses to become apparent?
- Are evidentiary requirements reasonable, taking into account complainants' capacity constraints?
- Are complainants free from any requirement to prove a link between project harms and the DFI safeguard compliance?
- In situations in which complaints do not meet eligibility criteria, are clear reasons provided within a reasonable time?

C. PREDICTABLE: PROVIDING A CLEAR AND KNOWN PROCEDURE WITH AN INDICATIVE TIME FRAME FOR EACH STAGE, AND CLARITY ON THE TYPES OF PROCESSES AND OUTCOMES AVAILABLE AND THE MEANS OF MONITORING IMPLEMENTATION

Delays are a frequent problem for complainants, leading to unpredictable processes.[530] According to one study, the average length of dispute resolution processes and compliance investigations is 12 months.[531] Lengthy IAM proceedings can impose a significant burden on complainants and project-affected communities who must live with ongoing harms for the duration of the proceedings, often at significant cost to their livelihoods. From the standpoint of complainants, it is also critical to clarify the relationship between the dispute resolution and compliance review functions of IAMs and afford full flexibility to move between them.

The complexities of co-financing can create particular challenges to the predictability of IAM processes. DFIs may finance different parts of a programme or project, or may be involved at different points in the project cycle, and may sometimes assign different names to the same project. These circumstances can make it hard for complainants to identify who is financing a given project and where to file complaints. In some cases, complaints have been filed with all relevant IAMs, notwithstanding great variations in their quality and effectiveness.

As a matter of principle, complainants should be able to make an informed choice about which mechanism(s) are most suited to their needs and to use potentially viable mechanisms in combination as needed. Efforts to streamline complaint processes should be based on consultation and the consent of complainants. In situations in which IAMs cannot or do not collaborate, this leaves the complainants with the option of dropping proceedings with all but one of the mechanisms, or participating in multiple processes with the multiple logistical and emotional burdens involved, including the potential for retraumatization in situations in which harms are severe.[532]

Where multiple IAMs are involved, each ordinarily applies the safeguards of its own parent bank, which may produce different outcomes on the basis of the same facts. This is not only problematic for complainants but sends inconsistent messages to project proponents and government authorities involved. IAMs have developed memorandums of understanding for use in such cases, specifying how collaboration between them should work. These agreements should provide for as streamlined a process as possible, avoiding unnecessary duplication and repetition and minimizing burdens on complainants. In situations in which multiple safeguard standards apply, it is important to observe the strongest applicable standards, for the sake of environmental and social sustainability.[533] Such a requirement should be incorporated into standard contract language.

- In situations in which the safeguard standards of the participating banks differ in strength and scope, is there a requirement that the most stringent applicable standards be applied?

D. EQUITABLE: SEEKING TO ENSURE THAT AGGRIEVED PARTIES HAVE REASONABLE ACCESS TO THE SOURCES OF INFORMATION, ADVICE AND EXPERTISE NECESSARY TO ENGAGE IN A GRIEVANCE PROCESS ON FAIR, INFORMED AND RESPECTFUL TERMS

This equitability criterion is concerned with due process, the active participation of project-affected people in shaping the response to the harm and addressing power imbalances between the parties. IAM procedures should provide procedural safeguards in the consultation process, including equal opportunity to access information and to review and respond to evidence. Complainants are centrally involved in dispute resolution processes but this is not necessarily so for compliance review. Nevertheless, in some cases IAM procedures do afford claimants the right to be consulted and receive feedback over the course of the compliance review process, including reviewing and responding to draft compliance review reports, management action plans and monitoring reports. And in some DFIs, the board is presented with both management and the complainants' comments on the management action plan, and sometimes also those of the accountability mechanism.

As a minimum due process requirement and basic requirement of administrative law, IAMs should provide clear explanations of their findings to complainants, to management and to the board. Moreover, as recommended in the report on the third phase of the OHCHR Accountability and Remedy Project, GRMs should allow parties to challenge the manner in which the mechanism has responded to a grievance or the outcome of a grievance process. This could include referral and appeal processes. With the exception of EIB, which

60 BOX 60
GOOD PRACTICE ON FOLLOW-UP ON IMPLEMENTATION

Under the Procedures and Guidelines of the GCF Independent Redress Mechanism, remedial action plans are developed by the GCF secretariat in consultation with the Mechanism, complainants and the executing entity, and the Mechanism must agree on the terms of the action plan (para. 67). The Mechanism can recommend improvements to the plan during implementation (para. 70) and reports to the board periodically on implementation and consults with complainants, the GCF secretariat and the executing entity on draft monitoring reports (paras. 76–77). The Procedures and Guidelines also contain (paras. 69–74) relatively strong requirements regarding consultation and IRM monitoring of management action plans.

Indicators of predictability include:

- Are IAM processes and time frames made clearly known to complainants in advance?
- Are IAMs clear about which harms they can address and which remedies/outcomes are realistically available?
- Do IAMs provide information in relation to their ability to:
  - Monitor the implementation of actions agreed in compliance and dispute resolution?
  - Monitor the effectiveness of actions taken to address harms and to require updates/corrections if the initial actions identified are not addressing the issues?
  - Carry out monitoring missions on the ground, including with original complainants, other stakeholders, clients and local government?
  - Report to the board on implementation?
  - Continue monitoring until harms are remedied?
- In projects involving multiple DFIs (or IAMs):
  - Is there a memorandum of understanding in place between IAMs, or case-specific memorandums of understanding/agreements, that simplify processes for complainants and specify how collaboration between IAMs will work?
  - Are complainants consulted on efforts to streamline complaint processes?

is subject to the European Ombudsman's oversight, there are currently no formal avenues to appeal IAM compliance review decisions or DFI management responses. Nevertheless, a number DFIs do allow appeals of decisions denying access to information, which may open the door for a wider range of appeals in the future.

Addressing power imbalances should start at the earliest stages of a complaint, as IAMs can and do provide help and advice to enable complaints to understand the advantages and disadvantages of different routes to remedy and choose the option that is best for them.[534] This can sometimes create a problem for them given their role as an impartial mediator in dispute resolution processes.[535] In such circumstances alternative approaches, such as engaging third parties to provide capacity-building, may need to be explored (see box 61).

IAMs routinely provide capacity-building and technical support for complainants,[536] although more investment in this area seems to be needed and consideration should also be given to providing particularly vulnerable communities with livelihood support during dispute resolution and compliance review processes. Capacity-building may also be necessary at the government level as well: even in situations in which it is not the client, the Government may have important roles to play in enabling or delivering remedial outcomes (e.g. in relation to land administration). In such circumstances, and to ensure their support, it is important that government partners understand what IAM processes are aiming to achieve and the potential benefits of dispute resolution.

61 BOX 61
POWER IMBALANCES AND CAPACITY-BUILDING IN THE CONTEXT OF DISPUTE RESOLUTION[537]

Power imbalances

- Educational levels and associated capacity to gather, interpret and use technical information (including things such as evidence-based timelines, maps and environmental impact assessments)
- Educational levels and associated capacity to access, interpret and use legal information, including an awareness of legal rights
- Access to and capacity to interpret and use economic and financial information related to projects (such as to make a realistic assessment of the economic value of a project, to assess land value for compensation negotiations or to assess a company's financial position to strategize a negotiating approach)
- Access to information about what other forms of leverage they may be able to deploy and how to deploy them in negotiations (such as minimum standards relating to free, prior and informed consent, or what other communities have been able to achieve in comparable situations, and how it might be replicated, such as benefit-sharing arrangements)
- Skills and experience to understand and navigate negotiation sessions
- Logistics and basic resources, such as mobile telephones, credit for mobile telephones, cars and petrol, and access to email and the Internet
- Capacity to manage internal disagreements and divisions within communities over which procedures to pursue, strategies for engagement, goals and representation arrangements

Potential capacity-building measures to respond to power imbalances

- Provide capacity support to put forward the best possible case for their interests, including drawing on any relevant legal rights, standards (such as the performance standards), precedents in other cases, or technical, financial or economic information, and helping communities identify and use potential sources of leverage
- Provide support for the formulation of initial complaints, including articulation of grievances and goals
- Provide support for communities to deliberate and make decisions among themselves, including in the formulation of initial demands, during any process and after
- Provide capacity support throughout mediations, including in ensuring communities fully understand the process, the preconditions and the proposals that arise
- Provide advice on the particular attention that should be paid to preconditions for mediation, including learning from other cases about which preconditions support better processes and outcomes, such as conditions about confidentiality, provision of livelihood during the negotiation period, forms of evidence that will be accepted in the process and so on
- Provide assistance in gathering, understanding and using technical, legal, financial and economic information in support of the community's claim
- Provide logistics and basic resources, such as mobile telephones, credit for mobile telephones, transport and access to email and the Internet, throughout the process
- Provide assistance to implement agreements, for example through the provision of a development consultant to help with tasks such as establishing cooperatives, and building financial literacy and relevant technical skills[538]

Finally, the equitability criterion also requires consideration of the evidentiary standards that complainants are required to meet. IAM procedures are not always clear about what kind of evidence needs to be presented in support of complaints,[539] which allows flexibility for IAMs but may create confusion for complainants. IAMs sometimes impose unduly high evidentiary requirements on complainants to show non-compliance and harm causally linked to the bank's non-compliance. For example, IAMs may require that complainants show "serious violations" or "material adverse impacts" or "direct and material impact", which can pose significant admissibility hurdles.

In some cases, IAMs have shown more flexibility and willingness to consider "likely" harms and some may proactively seek information as needed.[540] Apart from furthering equity goals, more proactive approaches of this kind also help IAMs fulfil preventive, rather than reactive, environmental and social objectives. However, it is also important to recognize that identifying "likely harm" will often be beyond the lived experience and technical capacities of complainants. Specialized expertise may be required in order to demonstrate that investments in particular sectors utilizing certain technologies may foreseeably lead to particular harms.

Indicators of equitability include:

- Are complainants provided with the necessary advisory, technical or financial support?
- Do IAMs take into account stakeholders' different needs, abilities, vulnerabilities, languages, cultures and personal circumstances, including exposure to trauma?
- Do compliance procedures permit both the IAMs themselves and complainants to review and provide comments on management action plans before they are finalized?
- Is DFI management required to consider such comments and provide a reasoned explanation in situations in which such comments are not taken into account?
- In addition to management action plans, are complainants able to obtain and comment on other relevant information (e.g. the evidence submitted, investigation reports and any personal reports, such as medical evaluations) before material decisions are made?
- Are there any formal avenues to appeal IAM compliance review decisions or DFI management responses?
- Do IAMs have capacity-building programmes and budgets to help equalize the power relations between the parties?
- Do DFIs and/or IAMs actively engage with stakeholders to make them aware of their rights and safeguard protections and, as needed, facilitate access to external experts and advisers to address power imbalances within the complaints handling process?
- Are standards of evidence sufficiently flexible and informal from the complainant's perspective?
- Are IAMs required to proactively seek information relevant to admissibility as needed?
- At the conclusion of an IAM process do complainants receive:
  - A record of the process, outcomes and reasons for decisions?
  - A record of any agreement?
  - Information about how to challenge or follow up?

E. TRANSPARENT: KEEPING PARTIES TO A GRIEVANCE INFORMED ABOUT ITS PROGRESS, AND PROVIDING SUFFICIENT INFORMATION ABOUT THE MECHANISM'S PERFORMANCE TO BUILD CONFIDENCE IN ITS EFFECTIVENESS AND MEET ANY PUBLIC INTEREST AT STAKE

Transparency is critical for strengthening accountability and equalizing power imbalances between the parties.[541] Strengthened transparency is important in its own right and essential for meeting other effectiveness criteria of the Guiding Principles on Business and Human Rights: building trust and legitimacy, enabling access, improving predictability and equitability through clear rules on information handling and regular information flows to complainants. The track record of IAMs is mixed in this regard, with variable requirements regarding the content and timing of disclosure and variable accessibility of websites. Some IAMs publish a full list of cases including those deemed ineligible, which provides useful information on the broader types of harms and concerns in projects and provides the basis for more robust trend analysis. However, this is not a consistent practice.

When searching IAM websites, it can be difficult for complainants to locate the list of complaints filed as IAMs use different terminology, which may not be intuitive to the uninitiated. Many IAM websites have very limited functionality on the options for searching cases on their websites, which can be frustrating for those looking for particular combinations or trying to assess trends. Currently, few if any DFIs indicate on their "project document" sites that a project is undergoing review by an IAM and yet this is relevant information for anyone interested in a project. Moreover, the information given on cases handled on IAM websites is often extremely limited, thus necessitating a laborious process of opening a wide range of documents in order to understand a given case.

A case overview should be available immediately on the website when clicking on a case (as opposed to having to open up case documents) and should include:

- The risk categorization of the project.
- A short explanation of what the complaint covers.
- A short explanation of the project and a link to the project documents – not just the complaint documents.

- A clear link to documents involved in complaint management at each step in the process: (a) for compliance reviews this would include management action plans, monitoring reports, management responses to management reports, and publicly available board discussions on the complaint; and (b) for dispute resolution this would include information about the process, the outcome, the agreement (if it can be made publicly available), monitoring reports and a summary of the case outcome.
- Severity of the issues dealt with: it would be useful to have some overview on the website of the scale, scope and irremediability of issues covered in the complaint – that is, how many people are affected, the seriousness of the potential or actual harms as alleged and whether any harms may be irremediable.
- Status of the case: a functionally clear and accessible explanation of whether a case is open, closed (with or without outputs) or ineligible (with reasons given), or similar descriptions with searchable terms.
- Regular update of status: cases are sometimes left in an indeterminate status for years without any update. While recognizing the uncertainties affecting closure in some circumstances, it would nonetheless be useful to update case status at least once a year.
- Most importantly, an explanation of the interim and final outcomes of the case. This should include a short description of (a) interim outcomes, pertaining to complaints that may or may not already be subject to a management action plan, including an indication of any legitimate confidentiality caveats; and (b) final outcomes. This is vital in order to understand what remedies have been provided. An indication of complainants' satisfaction, or otherwise, would also be important.

Indicators of transparency include:

- Are there clearly defined procedures on how IAMs process complaints with clear lines of responsibility and accountability, which are fully documented and publicly available?
- Do IAMs remain continuously, proactively engaged with parties regarding the status of cases?
- Do IAMs have clear rules on handling and disclosing information among the parties, with clear, limited exceptions for commercially confidential documents?
- Do DFI information policies include a public interest override to mandate disclosure in situations in which human rights violations are concerned?
- Do IAMs regularly publish a full list of cases, including those deemed ineligible, and key performance metrics, such as the number of complaints, summary outcomes and satisfaction rates?
- For individual cases, do IAMs publish in a user-friendly manner the full record of a case as well as a summary, an easy way to understand the status of the case and the documentation of the case (complaint submitted, IAM decision, management response, interim and final outcomes, and any monitoring reports)?
- Does the DFI project document website include reference to any IAM complaints and associated documentation such as management action plans and dispute resolution agreements?
- Do IAMs publish annual reports and regular newsletters?

F. RIGHTS-COMPATIBLE: ENSURING THAT OUTCOMES AND REMEDIES ACCORD WITH INTERNATIONALLY RECOGNIZED HUMAN RIGHTS

The rights-compatibility criterion was discussed briefly in the Introduction, section C, above, and is essentially concerned with ensuring that DFI processes and outcomes put people at the centre, and that relevant international human rights standards are taken into account. Voluntary, non-coercive processes leading to agreed outcomes provide a strong basis for rights compatibility. In situations in which human rights standards are integrated explicitly within DFI safeguard policies, as is increasingly the case (Introduction, sect. D), rights-compatible processes and outcomes will more consistently follow. Some IAMs, such as the World Bank Inspection Panel, have considered the human rights dimensions and implications of complaints notwithstanding the lack of explicit referencing of human rights in safeguard policies.[542] But this is not a consistent practice either within the Panel or across IAMs.

Under the 2021 CAO policy, it is asserted that "CAO facilitates access to remedy for Project-affected people in a manner that is consistent with the international principles related to business and human rights included within the Sustainability Framework".[543] This may be a veiled reference to the Guiding Principles on Business and Human Rights but this is not clear. CAO is also required to observe good international practice concerning the responsibility of businesses to respect human rights.[544]

The AfDB Independent Recourse Mechanism must consider "international standards" when assessing compliance, and both CAO and the AfDB Independent Recourse Mechanism must ensure that dispute resolution outcomes are consistent with international law (which includes international human rights law).[545] The latter requirements, if implemented, may help correct for the lack of knowledge of international human rights law among communities, clients and banks, and the tendency of claimants in dispute resolution proceedings to settle for what they think may be achievable rather than what they deserve. IAMs can play a role in guiding the parties, including the complainants, towards processes and outcomes that meet basic principles of non-discrimination among the claimants and, as

necessary, wider community members.[546] In situations in which critical harms are not addressed successfully through dispute resolution or the desired remedies are not available, IAMs can help to identify other avenues through which complainants can pursue these concerns.

Last but not least, communities are facing increasing intimidation and threats in connection with development projects in most parts of the world, driven in part by the COVID pandemic.[547] CAO and the IDB Independent Consultation and Investigation Mechanism are among the few IAMs to collect data and report publicly on this problem. In 2020, CAO complainants raised concerns about reprisals in 44 per cent of cases, which was a 36 per cent increase compared with the previous year.[548] In the case of the Independent Consultation and Investigation Mechanism, during 2020, 28 per cent of complaints expressed such fears and requested confidentiality. IAMs have taken a lead in developing policy guidance to address this issue, but DFIs – with a few exceptions – have been slow to follow.[549] It is difficult for IAMs to prevent and help address reprisals risks without the clear commitment, support and leverage of the parent bank, which are often lacking in practice.

Indicators of rights-compatibility include:

- Are IAM processes respectful, culturally sensitive and empowering from complainants' perspectives?
- Are the affected stakeholders consulted about available remedies and the manner in which they should be delivered?
- Do DFI safeguards and IAM procedures specifically integrate international human rights standards, including with respect to the Guiding Principles on Business and Human Rights, human rights due diligence and remedy?
- In cases in which there is a conflict between national norms and international norms on human rights, do DFIs and/or IAMs always adopt the higher standard in their deliberations?
- Do IAMs specify that compliance reviews and dispute resolution processes and outcomes should be non-discriminatory, gender sensitive and compatible with international human rights law?
- Do IAMs take international human rights law into account in compliance reviews, as relevant to the country, project and issues involved?
- Do IAMs assess possible human rights implications of dispute resolution processes, consult with and advise the parties accordingly?
- Do IAMs have a plan to address non-implementation of outcomes, such as through referral to another mechanism?
- Do IAMs evaluate the effectiveness of remedies, address deficiencies, and assess and address the implications of remedies to avoid contributing to further harm?
- Do DFIs and IAMs have clear published commitments, operational policies and procedures to prevent and address the risks of reprisals?
- Do IAMs provide for the confidentiality of complainants and permit anonymous complaints in situations in which there are reasonable grounds to believe that there would be a genuine threat to the safety of the complainants if their identities were disclosed?
- Do DFIs and IAMs collect data and publicly report on the risks of reprisals, taking due account of confidentiality concerns?
- Are requirements to avoid and address the risks of reprisals included in the contractual agreements of DFIs with their clients and are there sanctions for non-compliance?

G. A SOURCE OF CONTINUOUS LEARNING: DRAWING ON RELEVANT MEASURES TO IDENTIFY LESSONS FOR IMPROVING THE MECHANISM AND PREVENTING FUTURE GRIEVANCES AND HARMS

This effectiveness criterion has two elements: (a) drawing on lessons learned to improve IAMs; and (b) drawing on lessons learned to prevent future grievances and harms. While IAMs usually publish annual reports and newsletters, it can be difficult to glean a complete picture of the types of outcomes that have been achieved. Some have carried out retrospective studies, of varying analytical depth, and lessons learned studies focusing on particular functions or themes.[550] Interestingly, from 2021, any new AfDB project proposals will need to include notification to the board of any prior IAM proceedings involving the proposed client and the outcomes thereof.[551]

However, across the board, there appears to be insufficient data collection and public reporting on outcomes. Lessons learned publications sometimes lack critical rigour and fail to address key access constraints for complainants, such as the problem of the high dropout rate of complaints at many IAMs. More systematic analysis and public dialogue on key access constraints could help to more strategically shape the IAM reform agenda and guide the difficult choices that communities and civil society organizations must face on where and how to pursue remedy.

Indicators of continuous learning include:

- Do DFIs carry out and publish evaluations, retrospectives and lessons-learned studies?
- Do DFIs and IAMs seek regular feedback on the experiences of parties and keep a systematic record of the frequency, patterns and causes of grievances?
- Do DFIs and IAMs collect and regularly publish data on remedial outcomes?
- Are new DFI project proposals required to be accompanied by a disclosure to the board of prior IAM proceedings involving the proposed client and the outcomes thereof?

- Are evaluations and lessons learned studies critical in orientation and are they consulted on publicly?
- Do lessons learned explicitly feedback into DFI strategies, policies and procedures?
- Do evaluations and lessons learned studies analyse:
  - Key access constraints from complainants' perspectives?
  - The nature and patterns of grievances in a way that may reveal sector-specific or systemic issues?
  - Examples of good practices, which can be adopted by DFIs and their clients to enhance human rights due diligence processes?

H. BASED ON ENGAGEMENT AND DIALOGUE: CONSULTING STAKEHOLDERS ON THE MECHANISM'S DESIGN AND PERFORMANCE AND FOCUSING ON DIALOGUE AS THE MEANS TO ADDRESS AND RESOLVE GRIEVANCES

This criterion refers to the importance of consultation with affected stakeholders in connection with the design and performance of a GRM and in the resolution of grievances. This criterion was intended to apply specifically to project-level GRMs; however, it may also be useful in the context of DFIs/IAMs. Multilateral development banks have made important contributions to the emergence of norms for public consultation in relation to matters of public interest, including safeguard policy revision processes and accountability reviews. Several IAMs, similarly, have well-developed public consultation procedures, which are essential for ensuring the responsiveness, positive impact and legitimacy of mechanisms in the eyes of the public. Several also have well-established, robust dispute resolution capacities. But the track record among IAMs is an uneven one.

Indicators of engagement and dialogue include:

- Are external stakeholders consulted in the design of the mechanism, the development and revision of internal policies and IAM procedures and in the ongoing performance review of the mechanism?
- Are complainants actively involved in shaping remedies and commenting on the formulation, implementation and monitoring of management action plans?
- Do IAMs have robust dispute resolution capacities and internal training and advisory support to ensure that personnel keep pace with developments in mediation best practice?
- Do IAMs have procedures for compliance review that allow for dialogue and engagement with complainants and other affected stakeholders as part of the investigative and remedy development processes and are IAM staff adequately trained in interview and dialogue techniques that are culturally appropriate and reflect a gender perspective?
- Are IAMs and DFI management required to consider external stakeholders' inputs and provide a reasoned explanation of the extent to which comments were taken into account?
- Are communities fully supported to participate in the respects outlined above, through robust and proactive information disclosure in relevant languages and accessible formats, and capacity-building support as needed?


Inclusive Development International

Annex III
Mechanisms of Development Finance Institutions That Can Contribute to Remedy

DFIs have a range of internal mechanisms that can and at times do play roles in providing access to mechanisms to address concerns and, in some cases, providing direct resolution of concerns. As noted above (annex II), these are not presented clearly or coherently on DFI websites. In most cases, it is difficult for the public to make informed choices about the suitability, accessibility and effectiveness of the various mechanisms, whether similar due process considerations apply and how they interrelate (if at all).

A. BOARD MEMBERS

Board members can play many different and important roles in improving both access to remedy within the DFI system and in following up on the actual delivery of remedy for harms in DFI-funded projects throughout the project cycle, but this requires active and engaged board members. The actions and roles of board members include:

- Serving as early access points to raise concerns about projects or types of projects well before the projects are presented for consideration by the board and asking questions formally and informally about issues arising in project preparation. This is not a systematic way of addressing concerns but can be an important informal access point, especially in instances in which the institution itself is not responsive. Some IAM procedures allow complaints before projects are approved by the board; others do not. This earlier window is particularly important for raising issues early, when preventive actions can be taken most effectively. For DFIs that have mechanisms that are not able to address complaints before board approval and the eligibility criteria of which are unnecessarily strict, early access to board members is particularly important.
- Carefully scrutinize projects/programmes proposed for approval, particularly with respect to safeguard requirements and proposed responses, especially in challenging contexts and fragile and conflict-affected settings in which contextual risk factors are especially important. Board members can ask questions about whether evaluation and IAM lessons learned have been considered.
- Reviewing and closely monitoring management responses/management action plans to non-compliance findings by IAMs, and making sure that management action plans correspond to the issues identified in compliance reports and are updated as needed when corrective actions are not effective in addressing harms. Some boards have specific committees dedicated to IAMs, such as the ADB Board Compliance Review Committee, that can dedicate attention, build expertise and follow up on these matters.
- Being supportive of IAM functions and other initiatives to reinforce accountability at DFIs. This also includes being supportive and speaking out about the importance of civil society space so that issues can be raised by project-affected people without retaliation. The increasing risk of filing complaints with IAMs has now been well documented.[552] Numerous DFIs and IAMs have adopted policies on non-retaliation against those who raise concerns about DFI operations; it is important that board members offer visible support for the rigorous implementation of these measures and for regular, structured[553] dialogue with civil society organizations.
- Supporting a review/evaluation of the effectiveness of the DFI in addressing harms, considering issues of scope and effectiveness in addressing harms.

B. INTERNAL "EARLY WARNING AND RESPONSE" MECHANISMS

- **Civil society organizations/external relations teams at DFIs.** These teams are set up to liaise with civil society organizations and serve as listening posts for early warning of problems with projects. However, sometimes these teams are located in the communications department rather than in the environmental and social department. Hence, when concerns move from dialogue to complaint, there may be tensions between internal teams and a lack of clarity about continued dialogue between the civil society organizations teams and the organizations representing complainants.
- **Rapid response teams.** IFC recently created a new Environment and Social Policy and Risk Department. Its tasks include providing oversight of high-risk projects, mobilizing rapid response teams as needed and

overseeing operational teams in handling complaints from affected communities,[554] thereby providing a visible focal point for early access to DFI staff.

- **Internal complaint management services.** An internal complaint system can provide quick access to problem-solving services within DFIs, independently of the teams on the ground. This mechanism may provide some assurance to communities that did not succeed in resolving issues of concern with DFI staff on the ground or with project GRMs (see box 62 on the World Bank Grievance Redress Service).

BOX 62

WORLD BANK GRIEVANCE REDRESS SERVICE

The World Bank Grievance Redress Service is established within the DFI but is functionally separate and independent from the Bank's teams that are responsible for preparing and supporting the implementation of projects. It provides a formal avenue for people and communities to submit complaints directly to the World Bank if they believe a Bank-funded project has or is likely to adversely affect them,[555] thus opening the way to addressing concerns early on. The Grievance Redress Service operates as an alternative to project-level GRMs and the Inspection Panel, at the discretion of complainants. The Grievance Redress Service received 225 complaints in the year 2020, 90 of which were declared admissible. The main concerns of complainants were land acquisition, compensation, resettlement, stakeholder engagement and project implementation. It is difficult to assess the overall impact of the Grievance Redress Service, however, its annual reports provide registers of the complaints received, illustrative results and summaries of outcomes. In the year 2020, following its first five years of operation, the World Bank launched an institutional strengthening exercise to promote more consistent approaches to handling grievances and dealing with confidentiality, clarify the roles of Bank teams and the Grievance Redress Service in managing complaints, build awareness about the role and functions of the Service and strengthen its case management system, among other objectives.[556]

C. INFORMAL LABOUR GRIEVANCE REDRESS

There are also other, less visible and informal mechanisms at some DFIs to address human rights grievance. For example, the Global Unions – a body made up of the International Trade Union Confederation, nine global union federations and the Trade Union Advisory Committee to OECD – negotiated an informal mechanism with IFC, which allows trade unions to register complaints simultaneously with IFC and the Global Unions, which both organizations informally attempt to resolve together. Approximately, 30 complaints had been registered under this mechanism as of the year 2015 and, according to the International Trade Union Confederation, the mechanism had contributed to the resolution of problems on a number of occasions, particularly in the area of freedom of association.[557]

D. EVALUATION

All of the major DFIs have an evaluation department. Most are independent units that report directly to the board of executive directors and carry out a range of evaluations and functions, such as:

- Looking at projects, with the primary aim of measuring project outcomes against the original objectives, the sustainability of results and institutional development effects.
- Assessing the economic benefits of projects and the long-term effects on people and the environment against an explicit counterfactual.
- Looking at policies, programmes and processes in order to facilitate institutional learning about what works in which contexts. For example, several evaluation departments have reviewed safeguards, often as an input into broader safeguard reviews, in order to help assess their strengths and weaknesses.
- Carrying out in-depth examination of specific issues that may be at the source of complaints, such as evaluating the support of DFIs for gender equality or diversity.[558]

Evaluations provide useful insights for both IAMs and civil society organizations – in identifying the kinds of risk patterns and combinations that tend to repeatedly lead to harms; the gaps in safeguard and other policy frameworks; and the kinds of steps that can be expected to address particular harms under consideration – and thus have a role to play in improving remedy. Some IAMs appear to have strong relationships with their parent banks' evaluation departments, drawing on evaluation insights in order to maximize their own institutional efficiencies.

Evaluations of IAMs can illuminate a range of issues relevant to remedy including: (a) whether complainants receive redress under the IAM compliance review and dispute resolution processes and, if not, what are the principal barriers; (b) whether project-specific non-compliance is corrected and whether remedial actions address the full scope of harms identified or whether

there are types of harms that often go unaddressed; (c) whether learning from IAM cases is actually incorporated into DFI processes and institutional reforms. However, so far, no DFI evaluation department appears to have reviewed the effectiveness and implementation of environmental and social action plans or the effectiveness of management action plans in responding to compliance reviews, both of which would provide valuable insights into improving remedial measures.

E. AUDIT

The main objective of internal audit departments is to promote the efficiency and effectiveness of management processes and controls. Audit departments can also play an important role in reviewing the management and implementation of safeguards.[559] A major concern of many complainants is inadequate follow-up and implementation of management action plans in response to IAM non-compliance findings. Boards have an obvious role to ensure that there is robust follow-up to management actions to address harms, but audit departments may also play a role in tracking whether management plans in response to complaints have been followed through and implemented and whether the process has been efficient and effective. The World Bank Board recently assigned the Bank's Internal Audit Department just such a role, although at the time of writing it was too early to tell how that process would work. But given the limited leverage that most complainants have to secure the "last mile" in the delivery of remedy, engaging potentially powerful audit departments in this process may prove to be a positive development.

F. INTEGRITY DEPARTMENTS

Integrity departments typically investigate fraud, corruption, coercion, collusion and obstructive behaviour within DFI-funded projects, focusing in particular on procurement policies. But they also deal with allegations of serious staff misconduct involving issues such as sexual exploitation, discrimination and bullying. Integrity departments have stronger mandates than IAMs as they can impose sanctions. Integrity departments can disbar companies and individuals from doing business with DFIs for a specified period and do so in a public way, listing disbarred entities on their website.[560] As discussed earlier, the Agreement for Mutual Enforcement of Disbarment Decisions among ADB, AfDB, EBRD, IDB and the World Bank Group provides an interesting of example of DFIs leveraging their collective power to increase the reach and deterrent effect of an approach to address a collective harm – corruption. Remedies can include requiring restitution of diverted funds[561] and the funding of international anti-corruption or other relevant initiatives on sustainability or environmental protection.[562]

To the extent that procurement contracts deal with labour rights issues, integrity departments could be called on to consider whether there has been corruption in relation to the labour matters covered. For example, in response to an IAM recommendation concerning "introduction of enhanced non-employee worker protection requirements into the process of selection of contractors", EBRD management noted that this was a procurement matter and outside the Project Complaint Mechanism's mandate but affirmed that the Bank's standard conditions of contract included relevant provisions for: (a) engagement of staff and labour; (b) rates of wages and conditions of labour; (c) labour laws; (d) facilities for staff and labour; and (e) health and safety and other related provisions to protect and safeguard the rights of labour.[563] Equally, integrity departments could be called on to investigate fraud in land transactions in a DFI-funded project, an example that could be of direct relevance to local communities.

G. OMBUDSMAN

EIB is unique among DFIs in having an ombudsman, who oversees the institution's human rights accountability. This is because EIB is part of the European Union and therefore falls within the mandate of the European Ombudsman. The Ombudsman is mandated, among other things, to investigate complaints concerning maladministration by institutions, bodies and agencies of the European Union, noting that "maladministration occurs if an institution or body fails to act in accordance with the law or the principles of good administration, or violates human rights".[564] EIB and the European Ombudsman have an memorandum of understanding that sets out a two-stage complaints process: the EIB Group Complaints Mechanism handles, in the first instance, the complaints concerning an EIB project, policy or activity. If the outcome of this complaint is not satisfactory, the citizen can then escalate the concern to the European Ombudsman.[565] The Ombudsman had dealt with 166 complaints concerning EIB as of mid-2020, some of which involved matters related to human rights (referred to as fundamental rights in the European Union).[566]

H. ADMINISTRATIVE TRIBUNALS

Administrative tribunals are part of the internal grievance system of DFIs, resolving disputes of an employment or administrative nature. They are independent mechanisms, typically staffed by judges and professional mediators, reviewing personnel decisions

by management.[567] These tribunals are not accessible to outside parties who may be affected by the operations of DFIs, however, they are relevant in the present context because they provide remedies for staff whose labour rights may have been violated. Remedies may include reparations in the form of compensation and restitution, and decisions of the tribunal are legally binding.[568] This is an interesting model, which, by analogy, challenges the conventional wisdom that it is inappropriate for IAMs to determine and issue binding decisions concerning the remediation of environmental and social harms.

I. ACCESS TO INFORMATION MECHANISMS

Departments or teams in charge of transparency and access to information develop and implement transparency policies and act as gatekeepers in dealing with access to information requests. Some institutions handle complaints about access to information through their IAMs,[569] while others address it through internal committees or mechanisms.[570] One interesting practice relevant to remedy within DFIs is that the access to information policies of the World Bank, ADB and IDB provide for an independent appeals process when claims for access to information are rejected at the first level.[571] Currently, IAMs act as an independent review for complaints made to DFIs, but DFIs do not otherwise provide for independent appeals processes and there is no review of IAM decisions including on the ineligibility of complaints.

ENDNOTES

[1] Attributed to the French poet and novelist Victor Hugo (1802–1885). The more precise, original formulation is: "il y a quelque chose de plus puissant que la force brutale des baïonnettes: c'est l'idée dont le temps est venu et l'heure est sonnée" [there is something more powerful than the brute force of bayonets: it is the idea whose time has come and hour struck], Gustave Aimard, *Les Francs Tireurs* (Paris, Amyot, 1861), p. 68.

[2] The lack of common definitions and consistent measurements of international development finance can lead to misleading estimates and comparisons. However, annual investments of a subset of 30 bilateral and multilateral DFIs reportedly grew from almost $12 billion to $87 billion between 2000 and 2017, a seven-fold increase (Daniel F. Runde and Aaron Milner, "Development finance institutions: plateaued growth, increasing need" (Center for Strategic and International Studies, 2019), p. 2). However, the aid landscape is changing. Between 2008 and 2019 financing from the China Development Bank and the Export-Import Bank of China, alone, reportedly amounted to $462 billion (Ammar A. Malik and others, *Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects* (Williamsburg, AidData at William & Mary, 2021), p. 95. In contrast, in 2018, the estimated assets of "public development banks", generally understood to be a broader category than DFIs, were $11.2 trillion (Régis Marodon, "Can development banks step up to the challenge of sustainable development", International Research Initiative on PDBs and DFIs Working Groups, Working Paper No. 14 (2020), p. 7). For a discussion of definitional and data constraints, as well as an illustrative listing of 531 DFIs (according to a broad definition of the term), see Jiajun Xu, Xiaomeng Ren and Xinyue Wu, *Mapping Development Finance Institutions Worldwide: Definitions, Rationales, and Varieties,* NSE Development Finance Research Report, No. 1 (Beijing, Peking University, 2019), pp. 4–5 and 36–61.

[3] At least 28 multilateral development banks have been formed since 1944 (Tyler Pratt, "Angling for influence: institutional proliferation in development banking", *International Studies Quarterly,* vol. 65, No. 1 (2021), pp. 95–108, at p. 96. However, in the present publication, unless a contrary intention appears, the term "multilateral development banks" refers to the World Bank Group (including the International Bank for Reconstruction and Development (IBRD), the International Development Association, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA)), the African Development Bank (AfDB), the Inter-American Development Bank (IDB), the Asian Development Bank (ADB), the Asian Infrastructure Investment Bank (AIIB), the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB). This selection is justified by the assessment of OHCHR of these multilateral development banks' relative and cumulative financial and policy influence, geostrategic significance and available data and literature for evaluative purposes.

[4] World Bank Group, *World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025* (Washington, D.C., 2020).

[5] David Kovick, "Rethinking remedy and responsibility in the financial sector: how using an ecosystem approach can push the remedy conversation out of deadlock and into meaningful action", Shift, May 2019. The "remedy ecosystem" concept is discussed in more detail in chap. III, sect. E.2. For overviews of GRMs applicable to corporate activity, see the Accountability and Remedy Project's home page on the OHCHR website, at www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx; and International Federation for Human Rights Leagues, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse* Mechanisms, 3rd ed. (Paris, 2016). For an example of sectoral guidance, see Emma Blackmore, Natalie Bugalski and David Pred, *Following the Money: An Advocate's Guide to Securing Accountability in Agricultural Investments* (London, International Institute for Environment and Development and Inclusive Development International, 2015), pp. 95–115.

[6] Statement by Michelle Bachelet, United Nations High Commissioner for Human Rights, "Fifteenth anniversary of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 'the catalytic power of reparations'", 16 December 2020. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26615&LangID=E.

[7] Examples arising most commonly in the research and consultations for this publication include forced displacement, gender-based violence, physical threats and violence against project-affected people, failure to respect and protect indigenous peoples' rights including free, prior and informed consent, shortcomings with respect to consultation and participation, the destruction of homes, lands and livelihoods, forced and child labour and other serious labour rights violations.

[8] See, e.g., Permanent Court of International Justice, *Case concerning the Factory at Chorzów (Germany v. Poland)*, Series A, No. 17, 13 September 1928, pp. 29 and 47; Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2 (3); Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 5; and the various references in Theo van Boven, "Victims' rights to a remedy and reparation: the new United Nations principles and guidelines", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Carla Ferstman, Mariana Goetz and Alan Stephens, eds. (Leiden, Brill/Nijhoff, 2009).

[9] See, e.g., the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Human Rights Committee, general comment No. 31 (2004); and Committee on the Rights of the Child, general comment No. 5 (2003), para. 24.

[10] Basic Principles on Remedy, para. 8.

[11] Ibid., para. 12.

[12] Ibid., para. 11 (b).

[13] Bachelet, "Fifteenth anniversary of the Basic Principles and Guidelines".

[14] Basic Principles on Remedy, para. 18; Human Rights Committee, general comment No. 31 (2004), para. 16; and Lisa J. Laplante, "Just repair", *Cornell International Law Journal*, vol. 48 (2015), pp. 523–525.

[15] Basic Principles on Remedy, para. 19.

[16] Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed. (Oxford, Oxford University Press, 2015), p. 272.

[17] Basic Principles on Remedy, para. 20.

[18] Shelton, *Remedies in International Human Rights Law*, p. 31. The author goes on to note that: "The primary goal of human rights remedies should be rectification or restitution rather than compensation. When rights are violated, the ability of the victim to pursue self-determination is impaired and it is not justifiable generally to assume that compensation restores the moral balance *ex ante*. A morally adequate response addresses itself in the first instance to restoring what was taken."

[19] Shelton, *Remedies in International Human Rights Law*, p. 394; and Clara Sandoval Villalba, *Rehabilitation as a Form of Reparation under International Law* (London, Redress Trust, 2009), p. 10.

[20] Basic Principles on Remedy, para. 22.

[21] A/CONF.151/26/Rev.1(Vol. I) and Corr.1, resolution 1, annex I.

[22] Bachelet, "Fifteenth anniversary of the Basic Principles and Guidelines".

[23] This section draws upon the work of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/72/162, para. 16).

[24] Of course, as important as individuals' expressed preferences are, people are often conditioned to lower their expectations about

remedy (and many other things) due to historical access barriers, lack of information, socioeconomic conditions and structural obstacles, and power imbalances. Conversely, in other situations, claimants' expectations may be unattainably high.

[25] Shelton, *Remedies in International Human Rights Law*, pp. 10–16. See also Regional Business and Responsible Entrepreneurship Centre and the Institute for Business Ethics, University of St Gallen, *Between Solidarity and Obligation: Challenges for the Participation of Businesses in Symbolic Reparation* (2019).

[26] In fact, setting up a school in the same location does not even offset child labour in the same location. A programme to transition children out of work and into school would be an appropriate response to child labour, particularly harmful child labour, in a given location. Another example would be a situation in which a DFI supports school construction in one area while resettled children in a different area have their education disrupted.

[27] Equator Principles (version as at July 2020), p. 3. The Equator Principles are a risk management framework based on the IFC Performance Standards on Environmental and Social Sustainability and adopted by financial institutions for determining, assessing and managing environmental and social risk in certain projects. See also Guiding Principles on Business and Human Rights, principle 11.

[28] Retaliation, for present purposes, refers to any harmful conduct undertaken in order to prevent or discourage a person from, or punish a person for, raising concerns about a DFI-supported project or accessing, or interacting with, a GRM. In the present publication, consistent with common usage, the terms "retaliation" and "reprisals" are used interchangeably. For a fuller definition, see A/HRC/44/32/Add.1, p. 5. The addendum provides background, definitions, examples and contextual information to the report on the third phase of the Accountability and Remedy Project (A/HRC/44/32). For an overview on how to read Accountability and Remedy Project reports, see www.ohchr.org/Documents/Issues/Business/arp-report-explained.pdf. For an overview of the third phase of the Accountability and Remedy Project, see www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.

[29] World Bank Group, *World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025*, pp. viii–ix, 2–3, and paras. 8, 12–13, 48, 53, 87, 97, 99, 126–128, 148, 164, 172, 230 and annex 2.

[30] Ibid., para. 151: "Strong ESG performance correlates with positive development outcomes. The IFC and MIGA Performance Standards reflect good international industry practice and offer an effective framework for environmentally and socially sustainable private sector outcomes in FCV settings. However, ESG risks are heightened in these settings because many of the contextual risks are systemic – for example, security, gender-based violence, and land rights – while others are outside the control of private sector actors. Private sector investment can also unintentionally exacerbate conflict and violence if the allocation of benefits and jobs sparks tensions among conflicting groups."

[31] ADB, *MFI Safeguards Framework: A Comparative Review* (2020), para. 138; and ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement* (2020), para. 171.

[32] World Bank Group, *World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025*, pp. 10, 11 and 20, at p. 11: "There must be a recognition that some risks may materialize during the life of a project that cannot be fully avoided or mitigated."

[33] Nick Killick, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-risk Countries* (London, Institute for Human Rights and Business, 2011).

[34] AIIB, *Environmental and Social Framework* (2021), para. 53.

[35] Graham Watkins and others, *Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean* (IDB, 2017).

[36] Deanna Kemp, Sandy Warden and John R. Owen, "Differentiated social risk: rebound dynamics and sustainability performance in mining", *Resources Policy*, vol. 50 (2016).

[37] Caitlin Daniel and others, eds., *Glass Half Full? The State of Accountability in Development Finance* (Amsterdam, SOMO, 2016), p. 57. To similar effect, see Susan Park, *Environmental Recourse at the Multilateral Development Banks* (Cambridge, United Kingdom, Cambridge University Press, 2020), pp. 70–71.

[38] Regional Business and Responsible Entrepreneurship Centre and the Institute for Business Ethics, *Between Solidarity and Obligation*, p. 32.

[39] Femke Wijdekop, *Restorative Justice Responses to Environmental Harm* (Amsterdam, International Union for the Conservation of Nature, 2019). The restorative justice principle recognizes that addressing environmental damages through the imposition of fines – the usual sanction for environmental offences – is unlikely to repair the environmental and social harm caused by an environmental offence.

[40] See, e.g., ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*; and Peter Woicke and others, *External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness: Report and Recommendations* (Washington, D.C., World Bank, 2020) para. 108: "Annual investments [by IFC] in FIs (loans and equity) rose from roughly $1 billion to nearly $5 billion annually from 2001 to 2016 …. Investment in FIs has fluctuated between 30 percent and 50 percent of IFC's total commitments." Para. 112 draws attention to the noteworthy efforts that IFC and MIGA have made in assessing and supporting financial intermediary clients in improving their understanding and management of environmental and social issues. See, e.g., https://firstforsustainability.org.

[41] CAO, "CAO audit of a sample of IFC investments in third-party financial intermediaries" (2012), available at www.cao-ombudsman.org/sites/default/files/downloads/Audit_Report_C-I-R9-Y10-135%20%281%29.pdf. See also ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 265; ADB Independent Evaluation Department, *Safeguards Operational Review: ADB Processes, Portfolio, Country Systems, and Financial Intermediaries* (2014); and IDB Office of Evaluation and Oversight, *Evaluation of IDB Group's Work through Financial Intermediaries* (Washington, D.C., 2016). The 2016 IDB evaluation of financial intermediary operations also identified providing guidance tailored to different financial intermediary portfolio characteristics (e.g. sector, size, type and nature of investments) as an area in which further attention is warranted.

[42] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, pp. xviii and xix.

[43] AfDB Independent Development Evaluation, *Evaluation of the AfDB's Integrated Safeguards System: Summary Report* (Abidjan, AfDB, 2019), pp. 40–41.

[44] See, e.g., OHCHR and Heinrich Böll Stiftung, *The Other Infrastructure Gap: Sustainability – Human Rights and Environmental Perspectives*, fig. 4; and Bretton Woods Project, "Indonesian CSOs demand World Bank stop funding infrastructure funds", 7 April 2017.

[45] See, e.g., Keith Johnson, "Big oil's tobacco moment", Foreign Policy, 27 May 2021; and "Open letter on the Omnibus Bill on Job Creation". Available at www.greencentury.com/wp-content/uploads/2020/10/Indonesian-Omnibus-Investor-Letter.pdf.

[46] See endnote 8 above.

[47] A/HRC/17/31, annex.

[48] See http://mneguidelines.oecd.org/MNEguidelines.

[49] For a fuller discussion, resources and guidance, see www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

[50] For a discussion, see www.ohchr.org/EN/Issues/Business/Pages/MandatoryHRDD.aspx.

[51] Terms in quotation marks have a very specific meaning as set out in the Guiding Principles on Business and Human Rights. In general terms, the Guiding Principles and human rights law use the term human rights "violations" when the source of the harm is a Government and human rights "abuses" when harms are caused by a non-State actor.

[52] On the distinctions between human rights due diligence and other forms of legal due diligence, see A/HRC/30/20/Add.2, para. 8. And on the relationship between human rights due diligence and a bank's responsibility for impacts, see Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation* (The Hague, Social and Economic Council of the Netherlands, 2019), sect 2.2. The coalition comprises banks (including a number of Equator banks), the Dutch Banking Association, trade unions, civil society organizations and the Government of the Netherlands. See www.imvoconvenanten.nl/en/banking.

[53] OHCHR, "The application of the Guiding Principles on Business and Human Rights to minority shareholdings of institutional investors" (2013); advice to OECD on the application of the Guiding Principles to the financial sector (available at www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf); and "OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector" (2017); OECD, "Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises" (2014); OECD, "Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship" (2014); and OECD, "Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector" (2014).

[54] Human Rights Council resolutions 26/22, 32/10, 38/13 and 44/15.

[55] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

[56] See http://independentaccountabilitymechanism.net.

[57] A/HRC/44/32 and A/HRC/44/32/Add.1.

[58] The OECD Guidelines for Multinational Enterprises contain a human rights chapter aligned with the Guiding Principles on Business and Human Rights. See https://mneguidelines.oecd.org/database/instances/no0009.htm.

[59] See https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/nbim_final.pdf.

[60] See https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf.

[61] See http://mneguidelines.oecd.org/database/instances/nl0029.htm.

[62] See https://financeincommon.org/sites/default/files/2021-06/FiCs%20-%20Joint%20declaration%20of%20Public%20Development%20Banks.pdf.

[63] See, e.g., GRAM Partnership, "Concept note: the growth of grievance redress and accountability mechanisms (GRAMS)" (2020).

[64] Examples include CAO, *Dispute Resolution Toolkit* (2018), chap. 1 on getting started with dispute resolution, p. 4 (footnote 2). Available at www.cao-dr-practice.org/reports/CAO_1_GettingStarted.pdf.

[65] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, sect. 7.8.

[66] IDB, *Environmental and Social Policy Framework* (2020), para. 1.3. See also IDB Invest, *Environmental and Social Sustainability Policy* (2020), para. 17.

[67] EBRD, *Environmental and Social Policy* (2019), para. 2.4; and FMO, "Sustainability Policy" (2016), p. 4.

[68] EIB Environmental and Social Standard 8, para. 46.

[69] IDB Invest, *Implementation Manual: Environmental and Social Sustainability Policy* (2020), pp. 56 and 106, citing IFC Performance Standard 1, footnote 12 therein. However, the *Implementation Manual* usefully clarifies (on p. 57) that: "As with other issues and specialized topics within the overall Sustainability Framework, the degree of effort and attention in relation to human rights should be proportionate to risk levels. Higher risk situations will require more in-depth attention and expertise."

[70] IDB, *Environmental and Social Policy Framework*, p. 34, footnote 52.

[71] Equator Principles, principle 4. Until 2020, the Equator Principles, like the IFC Performance Standards, only required a human rights impact assessment in "limited, high-risk circumstances". However, the fourth revision of the Equator Principles in 2020 contains a new requirement that potential adverse impacts be assessed for every project regardless of whether the risk merits a full Environmental and Social Impact Assessment (principle 2).

[72] For a discussion, see Allen & Overy, "Updated Equator Principles finalized", 27 January 2020.

[73] Equator Principles, principles 2 and 6.

[74] See, e.g., www.banktrack.org; David Kinley, *Necessary Evil: How to Fix Finance by Saving Human Rights* (Oxford, University Press, 2018); and the Fair Bank Guide (2018), at https://eerlijkegeldwijzer.nl/media/494458/10-2018-po-mensenrechten.pdf.

[75] See, e.g., BankTrack, "The BankTrack Human Rights Benchmark 2019", 3rd ed. (Nijmegen, 2019); and Kym Sheehan and David Kinley, "The 2020 financial services human rights benchmark report", University of Sydney (Sydney, 2020).

[76] See the ANZ Bank example in box 5. ABN AMRO Bank has also taken steps towards establishing an independent bank-level GRM, through a possible ombudsman function, emanating from the bank's commitment to human rights. See ABN AMRO Bank, *Human Rights Report 2018: Putting People Centre Stage* (Amsterdam, 2019).

[77] GCF, "Environmental and Social Policy", sect. 7.3.

[78] Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*.

[79] Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, "Follow-up statement regarding complaint submitted by Equitable Cambodia and Inclusive Development International on behalf of Cambodian families", (2020); and Inclusive Development International, "Cambodia: securing compensation for ANZ-backed land grab" (undated).

[80] OPIC Office of Accountability, "Annual report FY 2013", p. 3; OPIC Office of Accountability, "Four-year report 2005–2009", pp. 8–9; and memorandum from Lawrence Spinelli, acting President and Chief Executive Officer of OPIC, to Jean Aden, Director of the Office of Accountability, "Office of Accountability compliance review of OPIC's social due diligence of the Couer d'Alene Mines/San Bartolomé Project", 13 July 2009. Available at www.dfc.gov/sites/default/files/2019-08/management_response_071309.pdf.

[81] See www.unpri.org/news-and-press/principles-for-responsible-investment-sets-new-human-rights-expectations-for-investors/6638.article.

[82] See www.unepfi.org.

[83] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

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

[85] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 8: "In response to these developments, several DFIs have included stronger human rights dimensions in their E&S standards. Among private banks, discussions on providing remedy in case of harm are rapidly evolving. Some banks are making strong commitments to contribute to remedy, and to disclose more information about the environmental and social performance of individual investments. Commitment to E&S principles in the private sector has rapidly evolved. Given this rapid evolution, there is a need for IFC to regain leadership in shaping environmental and social policies and practices."

[86] For a useful discussion, see Clemens Treichl and August Reinisch, "Domestic jurisdiction over international financial institutions for injuries to project-affected individuals: the case of *Jam v. International Finance Corporation", International Organizations Law Review*, vol. 16, No. 1 (2019).

[87] Supreme Court of the United States of America, *Jam et al. v. International Finance Corporation*, No. 17-1011, Opinion, 31 October 2018, 586 U.S. __ (2019). See also United States District Court for the District of Columbia, *Doe et al. v. International Finance Corporation et al.*, Case No. 1:2017cv00363, 9 March 2017; and *Zhan v. World Bank*, Case No. 19-CV-01973, Memorandum Opinion, 20 November 2019. See also United States District Court for the District of Columbia, *Rodriguez et al. v. Pan American Health Organization*, Civil Action No. 20-928, Memorandum Opinion, 9 November 2020, which is also relevant in some respects to the immunities of DFIs based in the United States. As of May 2021, this case was on appeal to the United States Court of Appeals for the District of Colombia Circuit. See also https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/#timelineff69-1a905f26-f4b6; and Marco Simons and MacKennan Graziano, *"Jam v. International Finance Corporation: the US Supreme Court decision and its aftermath"*, *Business and Human Rights Journal*, vol. 5, No. 2.

[88] CAO, "Monitoring of IFC's response to: CAO audit of IFC Investment in Coastal Gujarat Power Limited, India", C-I-R6-Y12-F60 (2015), p. 5, available at www.cao-ombudsman.org/sites/default/files/downloads/CGPLmonitoringreportJanuary2015.pdf.

[89] United States Court of Appeals for the District of Colombia Circuit, *Jam et al. v. International Financial Corporation*, No. 20-7092, Opinion, 6 July 2021), pp. 10–12. On 13 August 2021, the same Court denied a petition for rehearing *en banc*.

[90] See, generally, Clemens Treichl and August Reinisch, "Domestic jurisdiction over international financial institutions for injuries to project-affected individuals", *International Organizations Law Review*, vol. 16 (2019); Desiree LeClercq, "A rules-based approach to *Jam's* restrictive immunity: implications for international organizations", *Houston Law Review*, vol. 58, No. 1 (2020); Latham & Watkins, "Will *Jam v. IFC* increase multilateral development banks' US legal exposure?", client alert commentary, No. 2483, 18 April 2019; and Peter Boldt and Bethany Pereira, "*Jam v. IFC* – What does it mean for accountability?", Independent Redress Mechanism, 29 March 2019. See also Clifford Chance, "Lower courts grapple with international organization immunities after US Supreme Court decision in *Jam*", 16 March 2021 (noting uncertainty in relation to the "commercial activity" exception to international organizations' immunity under applicable United States legislation pending appeal of *Rodriguez et al. v. Pan American Health Organization et al.*, Civil Action No. 20-928, Memorandum Opinion, 9 November 2020, to the District of Colombia Circuit).

[91] European Court of Human Rights, *Waite and Kennedy v. Germany*, application No 26083/94, Judgment, 18 February 1999; and *Beer and Regan v Germany*, application No. 28934/95, Judgment, 18 February 1999.

[92] Treichl and Reinisch, "Domestic jurisdiction over international financial institutions for injuries to project-affected individuals", pp. 129–130. The authors note (p. 129): "From a European perspective in particular, it is striking that US jurisprudence on immunities of international organizations is widely disassociated from any reasoning on the basis of human rights law." However, they argue (p. 130) that the right to a remedy under the International Covenant on Civil and Political Rights and other applicable human rights instruments may be incorporated within judicial reasoning on international organizations' immunities claims in United States courts under established principles of statutory interpretation.

[93] Daniel Bradlow, "Multilateral development banks, their member States and public accountability: a proposal", *Journal of International Economic Law* (2019). For a more ambitious proposal, see Dhruv Sharma, "The immunities of international organisations: *Jam v. IFC* and the need for external review mechanisms", *NLUD Journal of Legal Studies*, vol. 2, arguing for an independent international tribunal to adjudicate private disputes against international organizations.

[94] For an argument to this effect, see United States Court of Appeals for the District of Colombia Circuit, *Jam et al. v. International Finance Corporation*, Case No. 16-7051, Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants, 17 August 2016, pp. 21–22. Along similar lines, Treichl and Reinisch (in "Domestic jurisdiction over international financial institutions for injuries to project-affected individuals") argue (p. 136) that the accountability mechanisms of international financial institutions "should be built upon to provide project-affected people with remedies similar to the ones available to international civil servants before administrative tribunals." More generally, see Vanessa Richard, "Independent accountability mechanisms as guardians of a kaleidoscopic legal accountability", in *The Practice of Independent Accountability Mechanisms: Towards Good Governance in Development Finance*, Owen McIntyre and Suresh Nanwani, eds. (Leiden, Brill, 2020), p. 311.

[95] Boldt and Pereira, "*Jam v. IFC* – what does it mean for accountability?"; and Daniel Bradlow, "Multilaterals must earn the right to limited immunity", *Financial Times*, 28 March 2019: "Such mechanisms offer borrower states three benefits: they mitigate the litigation threat; they provide a meaningful response to the harm caused by the adverse effects of their projects; and they contribute to MDBs and their borrowers learning how to manage the environmental and social impacts of their operations." See also Komala Ramachandra, "Civil society in the independent accountability mechanism community of practice", in McIntyre and Nanwani, *The Practice of Independent Accountability Mechanisms*, p. 306: "Failure to provide remedy is a recurring critique of IAMs, one that is emerging as the most pressing area for action …. The oft-repeated critique that IAMs are a diversionary tactic without tangible outcomes or changes on the ground can appear affirmed by various qualitative and quantitative studies …. Indeed, civil society's frustrations have pushed many back to earlier tactics of protest, pressure on donor governments, and resorting to other avenues for remedy", including law suits.

[96] Peter Birghoffer and others, *Lender Liability and Due Diligence for Environmental and Social Harm: A Comparative Analysis* (New York, New York University School of Law International Organizations Clinic, 2021). The study did not directly consider which, if any, actions of multilateral development banks might be sufficient to constitute "control" over a client sufficient to give rise to liability if privileges and immunities were not upheld by national courts. However, subject to the immunities question, the Clinic's analysis of existing law as applied to commercial banks may be indicative of approaches that courts may take in future to determine thresholds past which DFI supervision or related actions might trigger direct liability, and help to evaluate potential claims against (and defences by) multilateral development banks, including the extent to which due diligence practices may reduce the likelihood of liability. The Clinic's report may also be relevant in connection with the question of how courts may approach the "commercial" exception to international organizations' immunity in the United States. For analysis of the relationship between human rights due diligence and determinations of corporate liability, see A/HRC/38/20/Add.2. For comments on the relationship between human rights due diligence and legal liability more generally, see A/HRC/11/13, paras. 80–84. For comments on the relationship between commercial banks' remedial mechanisms and the risk of legal liability, see, Ryan Brightwell and Daisy Gardener, "Developing effective grievance mechanisms in the banking sector" (Nijmegen, BankTrack and Oxfam Australia, 2018), p. 29.

[97] Philippe Le Houérou, "Opinion: at IFC, accountability is of utmost importance", Devex, 10 April 2019.

[98] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 152.

[99] On the potential benefits (as against costs) of early remedial action see Richard, "Independent accountability mechanisms as guardians of a kaleidoscopic legal accountability", pp. 333–334; and Suresh Nanwani and Owen McIntyre, "Independent accountability mechanisms: promotion of standards, good governance and accountability", in McIntyre and Nanwani, *The Practice of Independent Accountability Mechanisms*, pp. 353–354, on the CAREC Transport Corridor I (Bishkek-Torugart Road) Project, Kyrgyzstan.

[100] Performance appears to vary considerably among DFIs. The variables include DFI and client commitment and capacity, the comprehensiveness and rigour of safeguard policies, geography and country context, the investment product or form of financing involved (some, such as financial intermediary and development policy lending, present greater challenges than others), and adequacy and quality of client reporting. The lack of consistent environmental and social monitoring and public reporting precludes more definitive analysis. In a recent survey of transparency policies and practices of 20 DFIs, it was found: "Planned monitoring and evaluation of the environmental and social management of projects is more commonly disclosed by multilateral DFIs than by bilateral DFIs. Half of the bilateral DFIs disclose planned monitoring and evaluation while the others do not. All but four multilaterals disclose planned monitoring and evaluation of project E&S management" (DFI Transparency Initiative, "ESG and accountability to communities: workstream 3 working paper" (2021), p. 17).

[101] See www.afdb.org/en/independent-review-mechanism/management-of-complaints/registered-requests/rq20163-guinea.

[102] See, e.g., CAO, "CAO conclusion report: Chad/Chad-Cameroon Pipeline-03/Chad" (2020). Available at https://cao-ombudsman.org/sites/default/files/downloads/CAODRConclusionReport-Chad_Jan2020-English.pdf.

[103] Independent Accountability Mechanisms Network, "Citizen-driven accountability for sustainable development: giving affected people a greater voice – 20 years on" (2012), pp. 12–13.

[104] For more detailed discussion of the evidence and assumptions upon which this proposition is based, see endnotes 321–332 and accompanying text.

[105] World Bank Inspection Panel, "Insights of the World Bank Inspection Panel: responding to gender-based violence complaints through an independent accountability mechanism" (Washington, D.C., IBRD and the World Bank, 2020); and the discussion on responding to gender-based violence on 9 December 2020 (available at www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/Emerging%20Lessons%20Series%20No.%206-GBV.pdf).

[106] For another example of robust institutional changes to prevent future harms, in response to an IAM compliance investigation, see Janine Ferretti, "Final report on IDB management's actions to address ICIM compliance review report recommendations on Mareña Renovables Wind Project" (IDB, 2018) (including updated policy guidance and internal training on contextual risk analysis, social impact assessment and stakeholder engagement).

[107] World Bank, "Uganda Transport Sector Development Project, fact sheet", 7 June 2017.

[108] In September 2021, the World Bank established the new World Bank Accountability Mechanism, which houses the Inspection Panel (which will continue to carry out compliance reviews) and the new Dispute Resolution Service. See www.inspectionpanel.org/news/board-approves-resolutions-establish-world-bank-accountability-mechanism-add-tools-panel.

[109] World Bank Inspection Panel, "Insights of the World Bank Inspection Panel"; and World Bank, *Uganda Transport Sector Development Project – Additional Financing: Lessons Learned and Agenda for Action* (2016).

[110] World Bank, "Uganda Transport Sector Development Project, fact sheet".

[111] See https://projects.worldbank.org/en/projects-operations/document-detail/P161704?type=projects; and https://bankinformationcenter.org/en-us/update/scope-final-update.

[112] See https://bankinformationcenter.org/en-us/update/uganda_gbv_cancellation.

[113] See http://pubdocs.worldbank.org/en/399881538336159607/Good-Practice-Note-Addressing-Gender-Based-Violence.pdf.

[114] World Bank, "First progress report on the implementation of the management action plan in response to the inspection panel investigation report (INSP/106710-UG) on the Republic of Uganda Transport Sector Development Project – Additional Financing P121097" (2017), pp. 8 and 28.

[115] Adva Saldinger, "World Bank updates procurement policy to enforce gender-based violence rules", Devex, 1 December 2020.

[116] "One conclusion that repeats itself throughout the case studies and the surveys … is that the failure to ensure redress for complainants is the result of the DFI's inability or unwillingness to commit to and implement measures that address complainants' grievances. Too often, complainants are left with a strong, compelling report by the IAM detailing significant deficiencies in the implementation of the DFI's environmental and social standards, but without an equally robust response from the DFI. Similarly, even where the DFI's client has made meaningful commitments to complainants through a dialogue process, the DFI rarely, if ever, contributes to the remedy, even if it has contributed to the harm" (Daniel and others, *Glass Half Full?*), p. 62.

[117] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 163.

[118] Simon Archer and Tina Piper, "Third party liability and international financial institutions", in *Global Governance and the Quest for Justice – Vol. III: Civil Society*, Peter Odell and Chris Willett, eds. (Oxford, Hart Publishing, 2008), p. 76.

[119] See www.rivernet.org/general/wcd/welcome.htm.

[120] IFC, "International Finance Corporation's Policy on Environmental and Social Sustainability" (2012), para. 9.

[121] Ibid., para. 1.

[122] IDB, *Environmental and Social Policy Framework*, para. 1.4.

[123] For an illustrative discussion, see Galit Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford, Stanford University Press, 2012).

[124] See, e.g., AfDB Independent Development Evaluation, *Evaluation of the AfDB's Integrated Safeguards System: Summary Report*, p. 47: "Bank incentives and organizational KPIs continue to emphasize lending and disbursement targets, despite ongoing Bank-wide efforts to more strongly emphasize quality and results." For many DFIs, shrinking administrative budgets are a perennial constraint to effective implementation of safeguard policies.

[125] Anecdotally, it can be difficult, and it may require courage, for a staff member to recommend not to proceed with projects on environmental and social grounds when, for political or other reasons, senior management or the executive board wishes to go ahead.

[126] See, e.g., www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/development+impact/resources/201809-mdbs-additionality-framework.

[127] See, e.g., www.fmo.nl/l/library/download/urn:uuid:d85800f8-607a-4118-bb7a-059392b8c869/fmo+impact+model+%26+methodology.pdf.

[128] The balance of benefits and costs from well-designed and managed resettlement have frequently gone unmonitored. See, e.g., World Bank, "World Bank acknowledges shortcomings in resettlement projects, announces action plan to fix problems", 4 March 2015.

[129] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 82.

[130] Watkins and others, *Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean*.

[131] Margaret Wacheneld, "Benchmarking study of development finance institutions' safeguard policies and due diligence frameworks against the UN Guiding Principles on Business and Human Rights", draft prepared for OHCHR (2019).

[132] ADB, *MFI Safeguards Framework: A Comparative Review* (2020), para. 181.

[133] Alf Jerve, "Defining the boundaries of a project: where does Bank accountability stop? Lessons from Panel cases and beyond", presentation at the World Bank spring meetings, 18 April 2013 (World Bank Inspection Panel).

[134] For example, for social risks, the AIIB Environmental and Social Framework has self-standing performance standards only for resettlement and indigenous peoples (AIIB, *Environmental and Social Framework*). For a more embracing definition see, e.g., World Bank, "Guidance note for borrowers – Environmental and Social Framework for IPF operations – ESS1: assessment and management of environmental and social risks and impacts", para. GN28.1, which notes that: "The Borrower should consider, in the environmental and social assessment, in an appropriate manner, the full scope of risks and impacts that may arise in connection with the project. While consideration should be given to the risks and impacts identified in paragraph 28 and ESSs 2–10, the Borrower, through the environmental and social assessment, should also scope the project *to identify risks and impacts that are not covered in ESSs 1–10*, but may be specific to the proposed project" (emphasis added).

[135] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*. IAMs frequently report problems with unduly narrow definitions of "area of influence", see Richard, "Independent accountability mechanisms as guardians of a kaleidoscopic legal accountability", pp. 323–324.

[136] ADB, *MFI Safeguards Framework: A Comparative Review*, para. 187.

[137] Ibid., para. 173.

[138] Daniel Bradlow and Andria Naudé Fourie, "The evolution of operational policies and procedures at international financial institutions: normative significance and enforcement potential" (American University Washington College of Law, 2011), p. 14, noting the logic that "increased transparency (and the increased public scrutiny following from this) leads to better conditions for ensuring institutional compliance with [operational policies]".

[139] Ramachandra, "Civil society in the independent accountability mechanism community of practice", pp. 305–306.

[140] See https://ews.rightsindevelopment.org.

[141] See, e.g., Park, *Environmental Recourse at the Multilateral Development Banks*, p. 70; ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 57: "The lowest rated safeguard criterion during preparation was for disclosure (64% of projects satisfactory)." More generally, see DFI Transparency Initiative, "ESG and accountability to communities: workstream 3 working paper", pp. 34–37.

[142] DFI Transparency Initiative, "ESG and accountability to communities: workstream 3 working paper", pp. 30–32 and 34; and Daniel and others, *Glass Half Full?*, p. 48. Notable exceptions include IDB, *Environmental and Social Policy Framework*, p. 42, para. 39; AfDB Independent Recourse Mechanism, "Operating Rules and Procedures" (2021), para. 4; and the resolution establishing the United States International Development Finance Corporation's IAM, para. 5 of which specifies: "The existence of the IAM and how to contact it will be included in appropriate project documents."

[143] DFI Transparency Initiative, "ESG and accountability to communities: workstream 3 working paper", pp. 20 and 23.

[144] Ibid, p. 23.

[145] However, for a positive example, see the ADB project site, which includes a search function by a wide range of action plans and other documentation (www.adb.org/projects/documents) and a useful project glossary (www.adb.org/projects/glossary).

[146] See, e.g., the EBRD Independent Project Accountability Mechanism.

[147] By comparison with the relatively strong performance of a group of four sovereign lenders (ADB, AfDB, IDA and IDB), a recent survey found that EBRD, EIB and IFC were "seriously hampered … by a lack of finance and budget information at both the activity and organisation levels, and by a lack of performance-related data, particularly results and reviews and evaluations" (Publish What You Fund, "Aid Transparency Index 2020", p. 21).

[148] Oxfam International, "Open books: how development finance institutions can be transparent in their financial intermediary lending, and why they should be", p. 21: "The arguments of client confidentiality and perceived competitive disadvantage ignore the fact that many banks and other financial institutions already disclose publicly their client relationships. Information about deals – including client identity, project details, sector, and deal size – is provided to banking and finance industry databases, such as Thomson Reuters Eikon."

[149] See https://disclosures.ifc.org/access-info-policy; and Brightwell and Gardener, "Developing effective grievance mechanisms in the banking sector", p. 23.

[150] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 275.

[151] Ibid., para. 110.

[152] Ibid., para. 47 (footnote omitted).

[153] See https://accountabilityconsole.com.

[154] See, e.g., World Bank, "World Bank acknowledges shortcomings in resettlement projects, announces action plan to fix problems".

[155] In ADB, "2016 learning report on the implementation of the accountability mechanism policy" (Manila, 2017), the authors concluded that the lack of adequate and meaningful consultation continued to be the main trigger underlying new complaints. Many borrowing countries do not have the national systems in place to conduct meaningful, accessible and safe consultations with impacted communities and project stakeholders. See ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 221: "Limited stakeholder consultation, especially during implementation, is a key contributory factor to safeguard compliance cases." See also ADB Compliance Review Panel, *Final Report on Compliance Review Request No. 2013/1 on the Mundra Ultra Mega Power Project in India* (Asian Development Bank Loan 2419) (2015), para. 141.

[156] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, paras. 106–107.

[157] For a more detailed discussion, see below, endnotes 193–198 and accompanying text.

[158] World Bank Group, *World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025*, paras. 154 and 231. The quoted formulation may understate the importance of accountability and remedy in fragile and conflict-affected settings, including with respect

to grievances that may fuel State fragility and conflict. It may also belie the role of accountability in strengthening incentives for learning to be internalized and implemented.

[159] Daniel and others, *Glass Half Full?*, p. 17: "Steep attrition is visible at every phase of the complaints process, meaning many eligible complaints leave the process before they are able to achieve results. … Many complaints that have been found eligible never actually proceed to problem-solving or compliance review. This often occurs because of IAM decisions." Admittedly, however, it is hard to know the extent to which this is within the normal parameters for ombudspersons or GRMs in general.

[160] For example, the World Bank Inspection Panel has taken the initiative to publish a lessons-learned series: see www.inspectionpanel.org/index.php/publications. IAMs also request information from management on the effectiveness of project-level GRMs in particular cases, e.g., EBRD Project Complaint Mechanism, "Türk Traktör Project, request number: 2015/03 – Compliance Review Monitoring Report II – December 2018 (2018)", p. 9: "The PCM looks forward to reviewing supporting information from Management to confirm the effectiveness of the Client grievance mechanism. PCM expects receiving information regarding the nature of complaints submitted by workers to the Client's grievance mechanism and the actions undertaken by the client to respond to grievances raised. Accordingly, the PCM will continue to monitor implementation during the next monitoring period."

[161] ADB, *Accountability Mechanism Policy 2012* (Manila, 2012), para. 196.

[162] For other materials on human rights defenders, see www.business-humanrights.org/en/bizhrds.

[163] See, e.g., Park, *Environmental Recourse at the Multilateral Development Banks*, p. 65, attributing apparent shortcomings in the compliance reviews of the IDB Independent Consultation and Investigation Mechanism to the role of executive directors influencing the process.

[164] GCF, "Guidelines to facilitate Board consideration of IRM reports on reconsideration requests, grievances or complaints", GCF/B.27/10 (2020), annex, para. 1.3, of which states: "In the interests of ensuring the credibility of the GCF and its reconsideration and grievance redress processes, it is critical for the Board to act in keeping with the same standards of fairness, equity, impartiality, transparency and justice in making any decisions on the IRM's case findings and recommendations."

[165] See, e.g., www.ebrd.com/ineligible-entities.html; and www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/AC_Home/Sanctionable_Practices.

[166] See www.adb.org/sites/default/files/institutional-document/32774/files/cross-debarment-agreement.pdf.

[167] See, e.g., EBRD, "Enforcement Policies and Procedures" (London, 2017), para. 10.2 (vii): "Restitution: the Respondent is ordered to make restitution to another party or the Bank (with respect to the Bank Resources) in an amount representing the diverted funds or the economic benefit that the Respondent obtained as a result of having committed a Prohibited Practice."

[168] For any DFI, the proportion of problematic projects that result in a complaint to an IAM is likely to be very small. For example, in the case of ADB only 3 per cent of all projects result in complaints. ADB, *2018 Learning Report on Implementation of the Accountability Mechanism Policy* (Manila, 2019), p. 38. Moreover, individual IAM complaints might only raise a fraction of concerns arising in connection with a given project. For a discussion of other challenges in analysing IAM practice, see Andria Naudé Fourie, "Comprehensive methodologies to facilitate learning within the IAM community of practice", in McIntyre and Nanwani, *The Practice of Independent Accountability Mechanisms*, pp. 191–192.

[169] See https://accountabilityconsole.com.

[170] Daniel and others, *Glass Half Full?*, p. 29.

[171] CAO, *The CAO at 10: Annual Report FY2010 and Review FY2000-10* (Washington, D.C., 2010), p. 61. "Complaints raised questions related to project siting; communication about Environmental Impact Assessments; categorization and subsequent supervision of the project; and poor application of policies deemed necessary to provide adequate protections to mitigate impacts that local residents were already experiencing."

[172] IAM practice illustrates how procedural non-compliance by DFIs can adversely affect the substantive economic, social and cultural rights of project-affected communities. For example, one issue in the investigation by the AfDB Independent Review Mechanism of the Medupi Power Project in South Africa was the adequacy of the consultation process in a culturally, racially, linguistically and economically heterogeneous community and an underestimation of the impacts on poor and vulnerable population groups. See also David Bradlow and Andria Naudé Fourie, "The multilateral development banks and the management of the human rights impacts of their operations", in *Research Handbook on Human Rights and Business*, Surya Deva and David Birchall, eds. (Cheltenham, Edward Elgar, 2020). To similar effect, see International Accountability Mechanisms Network, "Citizen-driven accountability for sustainable development", p. 20.

[173] Park, *Environmental Recourse at the Multilateral Development Banks*, pp. 42 and 69. The other most common area of non-compliance findings has been involuntary resettlement.

[174] World Bank Inspection Panel, *Consultation, Participation and Disclosure of Information*, Emerging Lessons Series No. 4 (Washington, D.C., IBRD and the World Bank, 2017), p. iv.

[175] ADB, 2018 *Learning Report on Implementation of the Accountability Mechanism Policy*, p. 24.

[176] EBRD Project Complaint Mechanism, "2018 project accountability report" (London, 2018), p. 22.

[177] With permission from the Accountability Console, as of 30 March 2020, reflecting 1,261 complaints filed with IAMs across a range of DFIs (including multilateral and bilateral DFIs) and United Nations mechanisms.

[178] Independent Accountability Mechanisms Network, "Citizen-driven accountability for sustainable development", fig. 3, p. 20.

[179] According to the Business and Human Rights Resource Centre, more than one third (210) of all attacks in the year 2020 against defenders in relation to business and human rights-related issues stemmed from lack of meaningful participation, access to information and consultation (Business & Human Rights Resource Centre, "In the line of fire: increased legal protection needed as attacks against business and human rights defenders mount in 2020" (2021)).

[180] See www.eib.org/en/publications/guidance-note-for-eib-standard-on-stakeholder-engagement-in-the-eib-operations.

[181] See, e.g., ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 259: "Most MFIs have recognized that clients are better served when the policy domains that generate the most frequent environmental and social risks are clearly spelled out."

[182] Equator Principles, exhibit II.

[183] See, e.g., New York University School of Law International Organizations Clinic, "Human rights risks of digital technology projects" (on file with OHCHR); and the OHCHR B-Tech Project (www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx).

[184] Commonwealth Development Corporation and others, *Managing Risks Associated with Modern Slavery: A Good Practice Note for the Private Sector* (2018); and Institute for Human Rights and Business, "Responsible Recruitment Gateway", at www.ihrb.org/employerpays.

[185] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 97.

[186] World Bank, "Bank directive: addressing risks and impacts on disadvantaged or vulnerable individuals or groups" (2021); and "Technical note on addressing racial discrimination through the environmental and social framework (ESF)" (2021). The latter is based explicitly on the International Convention on the Elimination of All Forms of Racial Discrimination.

[187] IDB, *Environmental and Social Policy Framework*, para. 1.1; and IDB Invest, *Environmental and Social Sustainability Policy*, para. 22.

[188] ADB, *MFI Safeguards Framework: A Comparative Review*, para. 132.

[189] Ibid., para. 193.

[190] For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

[191] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, paras. 195 and 239.

[192] Andria Naudé Fourie, *World Bank Accountability – In Theory and in Practice* (The Hague, Eleven International Publishing, 2016), sect. 9.1.

[193] ADB, 2018 *Learning Report on Implementation of the Accountability Mechanism Policy*, p. 37: "There is no clear linkage of a complaint and a project's safeguard categorization, thus not being a sufficient parameter to identify risks of complaints." Exceptions include IDB Invest's *Environmental and Social Sustainability Policy* (para. 32 (ii)) and its *Implementation Manual* (part II, sect. 1 on risk factors). At the time of writing, IFC was developing and piloting a contextual risk assessment tool tailored to fragile and conflict-affected contexts. In such contexts, it is also important to analyse the potential for DFI-supported projects themselves to exacerbate contextual risk factors and contribute to human rights violations. See United Nations University, *Developing Freedom: The Sustainable Development Case for Ending Modern Slavery, Forced Labour and Human Trafficking* (New York, 2021), p. 37.

[194] ADB, Myanmar: COVID-19 Active Response and Emergency Support Program (September 2020). Available at www.adb.org/projects/54255-001/main.

[195] Reports of the independent international fact-finding mission on Myanmar, an expert body established by the Human Rights Council, are available at www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx, including a detailed report in September 2019 on the economic interests of the military. See also A/HRC/45/5.

[196] See, e.g., ADB, "Country Partnership Strategy for Myanmar 2017–2021: building the foundations for inclusive growth", para. 17: "Poverty is unavoidably interlinked with conflict in Myanmar … Lasting peace and protection of the rights of minorities will be critical for inclusive development in ethnic areas, but may take years to achieve."

[197] Nguyen Thi Bich Ngoc, "Investors slam on brakes in Myanmar in wake of coup", Nikkei Asia, 6 February 2021.

[198] To similar effect, see OPIC Office of Accountability, *OA Review: Buchanan Renewable Energy Projects in Liberia* (2014).

[199] See, e.g., World Bank Independent Evaluation Group, *Managing Environmental and Social Risks in Development Policy Financing* (Washington, D.C., IBRD and the World Bank, 2015), p. ix: "Though the main effects of policy reforms will likely be positive, there is also the possibility of unintended negative effects, or 'risks': a policy aimed at increasing investment in mining by adjusting royalty rates could lead to expanded mining with associated damage to landscapes and pollution of waterways; reduction of energy subsidies might place a financial burden on the poor. The significant environmental and social effects of policies can be indirect and long-term, as well as direct and short term."

[200] See, e.g., Gaia Larsen and Athena Ballesteros, "Striking the balance: ownership and accountability in social and environmental safeguards", working paper (Washington, D.C., World Resources Institute, 2013), pp. 18–21; and World Bank Independent Evaluation Group, *Managing Environmental and Social Risks in Development Policy Financing*, p. 15: "When significant environmental and social risks are present, Program Documents are rarely adequately informed by analytical work."

[201] ADB, *Safeguard Policy Statement* (2009), paras. 15 and 48.

[202] See, e.g., Harvey Himberg, *Comparative Review of Multilateral Development Bank Safeguard Systems: Main Report and Annexes* (2015), pp. 6–10; and IDB, *Environmental and Social Policy* Framework, para. 4.8.

[203] Larsen and Ballesteros, "Striking the balance", pp. 19–20.

[204] See, e.g., World Bank Independent Evaluation Group, *Managing Environmental and Social Risks in Development Policy Financing*, p. xi: "there is at present no formal system in place in the Bank to monitor and evaluate environmental and social risks and their mitigation in [development policy financing]". The World Bank has since updated its operational policy on development policy financing, however, monitoring and evaluation are still assigned to the member country (World Bank, "Bank policy: development policy financing" (2017).

[205] For a striking example of the potential benefits of recourse to IAMs in this context, however, see World Bank Inspection Panel, *Investigation Report, Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC)* (2007), which contributed greatly to the recognition and protection of indigenous peoples' rights in the Democratic Republic of the Congo. Development policy lending is sometimes accompanied by project-level GRMs, see, e.g., World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects* (Washington, D.C., 2014), p. 10. However, it is difficult to assess how widespread this practice is and what the impacts have been to date.

[206] Notably, ADB requests a matrix of social and environmental impacts and mitigation measures if a policy change is found to bring social or environmental risks (Larsen and Ballesteros, "Striking the balance", p. 21).

[207] World Bank, *Uganda: Transport Sector Development Project – Additional Financing: Lessons Learned and Agenda for Action* (2016), p. 20. "There is a fundamental need for the Bank to improve the quality and performance of contractors undertaking construction projects, especially in environments of high social risk. This becomes especially critical where there is weak institutional capacity and a high governance risk."

[208] Mitigation was first defined in regulations in the United States National Environmental Policy Act (40 CFR 1508.20): "Mitigation includes: (a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing or providing substitute resources or environments."

[209] For a useful account of the history and parameters of social impact assessment, see Frank Vanclay and others, *Social Impact Assessment: Guidance for Assessing and Managing the Social Impacts of Projects* (Fargo, International Association for Impact Assessment, 2015).

[210] IFC, *Guidance Note 1: Assessment and Management of Environmental and Social risks and Impacts* (2012, updated 2021), para. GN62.

[211] World Bank Environmental and Social Standard 1, para. 27.

[212] World Bank, "Guidance note for borrowers – Environmental and Social Framework for IPF operations – ESS1", para. GN27.1.

[213] EIB, *Environmental and Social Standards*, glossary, environmental and social impact assessment, and mitigation hierarchy (human rights).

[214] Equator Principles, preamble.

[215] EBRD Performance Requirement 7, para. 24.

[216] Regional Business and Responsible Entrepreneurship Centre and the Institute for Business Ethics, University of St Gallen, *Between Solidarity and Obligation*, p. 24.

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

[218] Nick Killick and Margaret Wachenfeld, *State of Play – Business and the Sustainable Development Goals: Mind the Gap – Challenges and Implementation* (London, Institute for Human Rights and Business, 2015).

[219] EIB Environmental and Social Standard 1, para. 45.

[220] ADB, *MFI Safeguards Framework: A Comparative Review*, para. 83.

[221] A/73/163, para. 59 (emphasis added).

[222] See, e.g., IFC Performance Standard 1, para. 14, in which both technical and financial feasibility are linked to commercial considerations. See also EBRD, *Environmental and Social Policy*, para. 5.3; and Performance Requirement 1, para. 21.

[223] World Bank Environmental and Social Standard 1, paras. 6 (b) and 27 (b).

[224] IFC Performance Standard 1, footnote 21: "Financial feasibility is based on commercial considerations, including relative magnitude of the incremental cost of adopting such measures and actions compared to the project's investment, operating, and maintenance costs, and on whether this incremental cost could make the project nonviable to the client."

[225] EIB Environmental and Social Standard 1, paras. 43–44.

[226] See, e.g., World Bank Environmental and Social Standard 1, para. 37.

[227] IFC Performance Standard 1, para. 12.

[228] Interestingly, EBRD safeguards appear to provide for a broader requirement to remedy impacts in relation to clients' contractors than it does for its own clients. EBRD Performance Requirement 1, para. 27: "It is the client's responsibility to ensure that contractors working on project sites meet the ESMS requirements by adopting and implementing an appropriate contractor management system. Effective contractor management includes: assessing environmental and social risks associated with contracted works and services and incorporating relevant ESMP conditions into tender documents as appropriate, contractually requiring contractors to apply these standards and provide for mitigation and/or remedies in case of non-compliance."

[229] See www.cgdev.org/blog/uk-aid-watchdog-cdc-time-be-more-accountable-more-transparent-development-finance.

[230] An exception is the IFC Policy on Environmental and Social Sustainability, para. 26: "Where there are significant environmental or social impacts associated with the business activity, including past or present adverse impacts caused by others, IFC works with its client to determine possible remediation measures."

[231] IFC Performance Standard 2, para. 27; and EBRD Performance Requirement 2, para. 26.

[232] EBRD Performance Requirement 4, para. 10.

[233] IFC Performance Standard 2, para. 29.

[234] EBRD Performance Requirement 2, para. 26.

[235] EBRD, Performance Requirement 7, para. 23.

[236] For example, EBRD Performance Requirement 7, para. 18, provides in the context of relocating indigenous peoples that they "will be entitled to receive fair and equitable compensation from the client for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged as a result of the project without their FPIC." Compensation alone cannot make people whole in this context.

[237] EIB Environmental and Social Standard 1, para. 7.

[238] Aarhus Convention, art. 9 (4).

[239] *The Aarhus Convention: An Implementation Guide* (United Nations publication, 2000), pp. 132, noting that under the Aarhus Convention "Parties must ensure that the review bodies provide 'adequate and effective' remedies", including monetary compensation and injunctive relief to prevent irreversible impacts of many environmentally hazardous acts and activities.

[240] The Escazú Agreement entered into force on 22 April 2021. The IDB, *Environmental and Social Policy Framework* (para. 1.3, and Environmental and Social Performance Standards 7 and 10) reference the Escazú Agreement in aspirational terms but do not require that operations comply with it.

[241] See, e.g., EBRD Performance Requirement 4, para. 38: "For projects where major-accident risk is present, the client will assist and cooperate with the relevant authorities and the project-affected community in their preparations to respond effectively to emergency situations. If local authorities or responders have little or no capacity to respond effectively, the client will play an active role in preparing for and responding to emergencies associated with the project, and will provide adequate evidence to demonstrate capacity to respond to reasonably predictable incidents, either directly or indirectly."

[242] Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

[243] See www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/ehs-guidelines.

[244] Jessica Rosien, "Understanding the Asian Development Bank's safeguard policy: what protections does the Bank's new safeguard policy provide for communities and the environment?" (Victoria, Oxfam Australia, 2010). The ADB safeguard policy allows the borrower/client to proceed with projects, even if structural elements are in high-risk locations and in situations in which failure or malfunction may threaten the safety of communities.

[245] On the poor track record of disclosure of IAMs, see endnote 142 above and accompanying text.

[246] EIB Environmental and Social Standard 10, para. 45.

[247] EBRD Performance Requirement 10, para. 28.

[248] See, e.g., CAO, "Operational Guidelines" (Washington, D.C., 2013), para. 3.2.2.

[249] See, e.g., IFC Performance Standard 1, para. 2: "this Performance Standard supports the use of an effective grievance mechanism that can facilitate early indication of, and prompt remediation for those who believe that they have been harmed by a client's actions". See also para. 35 where the focus is "grievances about the client's *environmental and social performance*" (emphasis added), which sends potentially confusing signals.

[250] See, e.g., EIB Environmental and Social Standard 10, para. 45.

[251] See, e.g., EIB Environmental and Social Standard 8, para. 28.

[252] Ibid., para. 38.

[253] See, e.g., A/HRC/44/32, annex, policy objectives 15 and 16.

[254] Exceptions include GRMs for contracted workers.

[255] IFC, "Interpretation note on financial intermediaries" (2012, updated 2018), paras. IN53–IN54; and IFC, "IFC's response to CAO's Third Monitoring Report" (2017), p. 6, available at www.cao-ombudsman.org/sites/default/files/downloads/IFCResponsetoCAOThirdFIMonitoringMarch2017.pdf. IFC has made available useful tools and training for financial institutions on environmental and social risk management through its Financial Institutions: Resources, Solutions and Tools portal, but these do not appear to address handling concerns about subprojects. See https://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/establish-and-maintain-an-esms.

[256] GCF, "Environmental and Social Policy", para. 12 (c). The GCF Independent Redress Mechanism also has a mandate to build the capacity of the GRMs of direct access entities (national and regional financial intermediaries).

[257] New York University School of Law International Organizations Clinic, "Human rights risks of digital technology projects".

[258] OHCHR, "Access to remedy and the technology sector: a 'remedy ecosystem' approach", B-Tech Foundational Paper, p. 3. Other papers on remedy in the context of the technology sector are available at www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx.

[259] See www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx.

[260] IFC, "International Finance's Corporation's Policy on Environmental and Social Sustainability", para. 19: "There are several types of activities that IFC does not support, either through its investments or advisory services. These activities are set out in the IFC Exclusion List."

[261] Wacheneld, "Benchmarking study", p. 10.

[262] ADB Independent Evaluation Department, *Thematic Evaluation Study: Real-Time Evaluation of ADB's Safeguard Implementation Experience Based on Selected Case Studies* (2016), p. xi.

[263] World Bank Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World* (Washington, D.C., 2010).

[264] Fei Yuan and Kevin P. Gallagher, "Greening development finance in the Americas" (Boston University, 2015), p. 39.

[265] World Bank, "World Bank acknowledges shortcomings in resettlement projects, announces action plan to fix problems".

[266] Rebecca Ray, Kevin P. Gallagher and Cynthia Sanborn, "Standardizing sustainable development? Development banks in the Andean Amazon" (Boston University, 2018).

[267] Watkins and others, *Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean*, p. 4.

[268] Rachel Davis and Daniel Franks, *Cost of Company-Community Conflict in the Extractive Sector* (Cambridge, Massachusetts, Harvard Kennedy School, 2014), pp. 8 and 19, estimating lost production costs of up to $20 million a week for major mining projects with a capital valuation of between $3 billion and $5 billion.

[269] Carla F. Fredericks and others, *Social Cost and Material Loss: the Dakota Access Pipeline* (First Peoples Worldwide and University of Colorado Boulder, 2018).

[270] Ibid., p. 4.

[271] Principle 15 (c).

[272] Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*; Kovick, "Rethinking remedy and responsibility in the financial sector"; and boxes 38 and 43 in the present publication.

[273] Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*, pp. 21–22. See generally Kovick, "Rethinking remedy and responsibility in the financial sector".

[274] Institute for Human Rights and Business and the Global Business Initiative on Human Rights, *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships* (London, 2012), chap. 4.

[275] See also Dutch Banking Sector Agreement Working Group on increasing leverage, *Increasing Leverage Working Group – Progress Report Phase I* (The Hague, Social and Economic Council of the Netherlands, 2018), annexes I and II.

[276] EBRD, "Guidelines to loan disbursements for non-sovereign operations" (London, 2013). In case of identified non-compliance, EBRD may set corrective measures for addressing areas of material non-compliance as conditions precedent to disbursements or as covenants under the financing agreements for a new project.

[277] Selected DFIs reviewed do not appear to make available standard form legal requirements on safeguard issues. The Equator Principles list the types of covenants included in their commercial agreements.

[278] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, para. 206.

[279] United States International Development Finance Corporation, Board decision BDR20 (45), 9 September 2020, para. 5. See also endnote 142 above and accompanying text.

[280] For discussion of a range of other actions that banks could or should take in situations in which their investments are associated with serious human rights abuses, see EerlijkeBankwijzer, *Fair Bank Guide: Assessing the Response of Dutch Banks to Severe Human Rights Abuses in the Extractive Industry* (2018), pp. 11–17.

[281] Coalition for Human Rights in Development, *Uncalculated Risks: Threats and Attacks against Human Rights Defenders and the Role of Development Financiers*. In a noteworthy example, see EBRD, "Retaliation against civil society and project stakeholders", in which the Bank defines threats of retaliation in connection with one of its projects as a "coercive practice" under its Enforcement Policy and Procedures, which may be subject to enforcement proceedings.

[282] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 288.

[283] Conor Cradden, Jean-Christophe Graz and Lucien Pamingle, "Governance by contract? The impact of the International Finance Corporation's social conditionality on worker organization and social dialogue" (2015), pp. 22–23.

[284] Columbia Center on Sustainable Investment, "Requirements for community development in mining laws" (2017). See also Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke, "Emerging practices in community development agreements" (Columbia Center on Sustainable Investment, 2016).

[285] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 147.

[286] European Parliament, "Report on the financial activities of the European Investment Bank – annual report 2019" (2020), para. 65.

[287] IFC, *International Finance Corporation's Policy on Environmental and Social Sustainability*, paras. 49–53, at para. 53: "When IFC invests in projects involving the final delivery of essential services, such as the retail distribution of water, electricity, piped gas, and telecommunications, to the general public under monopoly conditions, IFC encourages the public disclosure of information relating to

household tariffs and tariff adjustment mechanisms, service standards, investment obligations, and the form and extent of any ongoing government support. If IFC is financing the privatization of such distribution services, IFC also encourages the public disclosure of concession fees or privatization proceeds. Such disclosures may be made by the responsible government entity (such as the relevant regulatory authority) or by the client." However, at the time of writing no project contracts appeared to be publicly available on the IFC website.

[288] Charles Kenny, "Transparency at development finance institutions: moving to better practice" (Center for Global Development, 2020), which includes links to: www.cgdev.org/publication/principles-commercial-transparency-public-contracts and www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation. See also NautaDutilh, "Dutch Banking Sector Agreement on international responsible business conduct regarding human rights: legal report on the possibilities for increased transparency in light of the adhering banks' client confidentiality obligations" (2017); and BankTrack "'We are unable to comment on specific customers …' – challenging banks on client confidentiality" (2019).

[289] EerlijkeBankwijzer, *Fair Bank Guide*, pp. 17–18.

[290] IFC, *Creating Impact: The Promise of Impact Investing* (Washington, D.C., 2019), p. 10.

[291] A put option is a contract that allows an investor the right, without obligation, to sell shares of an underlying security at a certain amount at a certain time. See www.investopedia.com/terms/p/putoption.asp.

[292] EBRD, *Environmental and Social Policy*, para. 2.10.

[293] See https://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/establish-and-maintain-an-esms.

[294] ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, p. xi and paras. 78 and 80: "Most projects, as well as provision of technical assistance, supported measures to strengthen client safeguard capacity. … During project preparation, most projects recognized that client capacity to manage environmental and social risks was an issue and made provisions to support the client, but broader institutional and capacity assessments and support were limited. … Despite ADB support, all the countries visited still needed significantly enhanced safeguard capacity."

[295] ADB, 2018 *Learning Report on Implementation of the Accountability Mechanism Policy*, p. 37.

[296] Ibid.

[297] See www.fastinitiative.org.

[298] Guatemala Human Rights Commission, "World Bank asked to delay funding to Guatemala until reparations plan is implemented for Chixoy Dam victims", 3 June 2014.

[299] World Bank Inspection Panel, *Investigation Report No. 58016-KH, Cambodia: Land Management and Administration Project (Credit No. 3650-KH)* (2010), pp. vi–vii.

[300] World Bank, *Management Report and Recommendation in Response to the Inspection Panel Investigation Report – Cambodia: Land Management and Administration Project (IDA Credit No. 3650-KH)* (2011).

[301] World Bank, "Progress report No. 2 on the implementation of management's action plan in response to the Inspection Panel investigation report (No. 58016-KH) – Cambodia: Land Management and Administration Project (Credit No. 3650-KH)" (2012), p. 4. See also Samean Yun, "Loans halted over land dispute", Radio Free Asia, 9 August 2009.

[302] See www.inclusivedevelopment.net/boeung-kak-lake/us-congress-passes-law-demanding-redress-for-boeung-kak-community-pressures-world-bank-to-take-action.

[303] See the current list of IAMs in the Independent Accountability Mechanisms Network: http://independentaccountabilitymechanism.net.

[304] See, e.g., Richard Stewart, "Remedying disregard in global regulatory governance: accountability, participation, and responsiveness", *American Journal of International Law*, vol. 108, No. 2 (2014).

[305] See, e.g., AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 58, although see GCF, "Decision of the Board on updated Terms of Reference of the Independent Redress Mechanism (revised)", B.BM-2017/10 (2017), annex II, para. 11. See also IDB Independent Consultation and Investigation Mechanism, "Policy of the Independent Consultation and Investigation Mechanism of the IDB" (2014), para. 36; CAO, "CAO Operational Guidelines", para. 4.1; EBRD Project Complaint Mechanism, "Project Complaint Mechanism (PCM) Rules of Procedure" (2014), para. 41; and ADB Accountability Mechanism, *Accountability Mechanism Policy* 2012 (Manila, 2012), para. 130.

[306] Vanessa Richard, "Justice by any other name? The grievance mechanisms of multilateral development banks", *SSRN Electronic Journal* (2014).

[307] ADB, "2016 Learning report on the implementation of the accountability mechanism policy".

[308] See, e.g., CAO, "CAO Operational Guidelines", sect. 3.1.

[309] The question of the admissibility of complaints before board approval of a project is discussed below in endnote 340 below and accompanying text.

[310] See, e.g., EBRD Project Complaint Mechanism, "Project Complaint Mechanism (PCM) Rules of Procedure", p. 1; AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 44; and ADB Accountability Mechanism, *Accountability Mechanism Policy 2012*, para. 126.

[311] Vanessa Richard, "Accountability by proxy? The ripple effects of MDBs' international accountability mechanisms on the private sector" (2015).

[312] Daniel and others, *Glass Half Full?*, p. 39, when explaining the Inspection Panel's relatively high rate of results: "The Inspection Panel found 63.5% of concluded cases eligible and 33% of concluded cases reached a substantive phase. Notably, all cases that reached a substantive phase went on to achieve results. This high rate of results in part reflects the Inspection Panel's procedures, which do not include a problem-solving phase and therefore remove from the complaint process the many uncontrolled variables involved in achieving a result through problem-solving."

[313] CAO, *Dispute Resolution Toolkit*, chap. 1 on getting started with dispute resolution, p. 4 (footnote 2). Available at www.cao-dr-practice.org/reports/CAO_1_GettingStarted.pdf.

[314] In contrast to compliance review, "problem-solving processes take a more pragmatic look at what is possible, rather than what is 'right'" (Samantha Balaton-Chrimes and Kate Macdonald, *The Compliance Advisor Ombudsman for IFC/MIGA: Evaluating Potential for Human Rights Remedy* (Corporate Accountability Research, 2016), p. 7).

[315] CAO, "CAO Operational Procedures", sect. 3.2.2; IFC/MIGA, "IFC/MIGA Independent Accountability Mechanism (CAO) Policy" (2021), para. 67; AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 49.

[316] As noted in Woicke and others, *External Review of IFC/MIGA E&S Accountability*, paras. 316–319, at para. 317, management action plans "represent detailed commitments, specified in operational measures, of the IFI Management and the client to undertake remedies, and provide the road map for carrying out remedial actions." Almost all IAMs require the preparation of management action plans and Board approval of such plans. The exception to this is CAO and the

Independent Complaints Mechanism of DEG, FMO and Proparco, which are authorized to make recommendations on how harm and non-compliance can be corrected through the management response. CAO has a mandate to monitor whether projects have been brought into full compliance, however, most other IAMs are restricted to monitoring the implementation of management action plans. Hence, if the management action plan only partially addresses identified non-compliance, effective remedy may be put further from reach.

317 GCF Independent Redress Mechanism, "Decision of the Board on updated Terms of Reference of the Independent Redress Mechanism (revised)", para. 14 9 (c); and AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 67 (iii) (c).

318 Richard, "Independent accountability mechanisms as guardians of a kaleidoscopic legal accountability", pp. 330–332. For examples of contributions of compliance reviews to policy reforms at OPIC, DEG and FMO, see Teresa Welsh, "What happens when a DFI project goes wrong?", Devex, 26 March 2019.

319 Vanessa Richard, "Mind the (justiciability) gap: non-judicial remedies and international legal accountability for environmental damages", in *Climate Change Liability and Beyond*, Jiunn-rong Yeh, ed. (2016), pp. 128–129, in which she states that the creation of GRMs "was motivated less by the promotion of the rule of law within the organization than by concerns regarding the organization's legitimacy and concerns over the balance of power among the bank's bodies." See also Independent Accountability Network, "Citizen-driven accountability for sustainable development", p. 24.

320 For an illustrative discussion, see New York University Law School Clinic on International Organizations, *The World Bank Inspection Panel and International Human Rights Law* (2017).

321 See, e.g., ADB, *2018 Learning Report on Implementation of the Accountability Mechanism*, pp. 34 and 38. The external review of IFC/MIGA found that as of July 2019 "the CAO portfolio represented 1.2 percent of the total IFC project portfolio. … CAO complaint rates are comparable to complaints filed with the European Investment Bank (EIB) complaint mechanisms, though somewhat higher than for other IAMs" (Woicke and others, *External Review of IFC/MIGA E&S Accountability*, paras. 194–195).

322 See, e.g., IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, para. 3.13: "The lack of a registry of the complaints received by Management during the period under evaluation makes it impossible to establish with any certainty the volume of concerns received by Management and the fate of those complaints. An analysis of the complaints that were examined in the eligibility stage shows significant inconsistencies in the way Management addressed the contacts made by requesters before reaching out to the MICI: (i) one fourth of the analyzed requests was either not met with any response from Management or was given an acknowledgment of receipt followed by a forwarding of the complaint to the execution unit, usually indicating that the latter was the party responsible for execution of the works; (ii) in another fourth of the requests, there were initial contacts or exchanges with the requesters but no significant follow-up or subsequent response on the issues raised or involved; (iii) in one request, Management advised the requesters to contact the MICI; (iv) in the remaining requests, there was greater interaction with the requesters (e.g., letters, emails, meetings), although the requesters decided in the end to turn to the MICI anyway, indicating dissatisfaction with the responses received or failure to solve their problems."

323 These observations on the state of play are supported by Park, *Environmental Recourse at the Multilateral Development Banks*, pp. 55–56; AfDB Independent Development Evaluation, *Evaluation of the AfDB's Integrated Safeguards System: Summary Report*, pp. 31–41 (analysing environmental and social supervision, action planning, reporting and related challenges at AfDB); ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, especially pp. 17–43; IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, p. 27; World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*; World Bank, "Gaining traction or spinning wheels? Factors influencing the effectiveness of grievance mechanisms in World Bank-financed projects" (Washington, D.C., 2021); World Bank, "Insights into grievance mechanisms: findings from a survey of grievance focal points in project implementation units (Washington, D.C., 2021); Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*, p. 15; analysis carried out by OHCHR in June 2021 of 250 multilateral development bank implementation completion and results report reviews, project completion report reviews, internal audit reports and summaries, independent country and thematic evaluations, IAM annual reports and lessons learned studies; an independent review of 257 closed compliance review cases across all IAMs in the Accountability Console Database (https://accountabilityconsole.com) carried out under the auspices of New England Law (on file with OHCHR); consultations carried out between 2014 and 2020 in connection with the OHCHR Accountability and Remedy Project; and key informant interviews and consultations carried out by OHCHR between 2020 and 2021 with existing and former DFI and IAM staff members and accountability NGOs. On rule of law trends more generally, see the World Justice Project Rule of Law Index 2020, at https://worldjusticeproject.org/rule-of-law-index/global/2020. More systematic data collection by DFIs and IAMs, strengthened supervision across DFIs and improved client reporting would permit more definitive conclusions.

324 Woicke and others, *External Review of IFC/MIGA E&S Accountability*, paras. 311–312.

325 IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, paras. 5.7–5.10. Worryingly, the Office of Evaluation and Oversight "was repeatedly told that the compliance review phase whitewashes the image of the IDB Group and is not a genuine attempt to resolve the problems that its projects might create for the communities" (ibid., para. 5.7).

326 Park, *Environmental Recourse at the Multilateral Development Banks*, p. 53, and pp. 54–57 for a discussion of methodological caveats and the challenge of measuring substantive outcomes rather than procedural criteria.

327 CAO, "CAO in numbers" (2020), available at www.cao-in-numbers.org/. At the same time, it should be noted that a dispute resolution settlement should not necessarily be equated with "success" or imply that all harms have been remediated.

328 IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, paras. 5.2–5.6.

329 Savanas E. Enseada, *Third Review of the African Development Bank's Independent Review Mechanism: Revised Draft Report* (2020), pp. 61–71.

330 OHCHR is grateful to Accountability Counsel for access to the database.

331 It is not possible to specify a percentage given the information gaps and methodological constraints. A smaller sample of 60 compliance review reports from four of the IAMs with the largest caseloads (the EBRD Independent Project Accountability Mechanism, CAO, the World Bank Inspection Panel and the EIB Group Complaints Mechanism) was also analysed in order to assess the extent of policy compliance and the kinds of remedy that are being recommended. The analysis found that 75 per cent of cases (45 in all) involved at least one non-compliance finding and that 27 per cent (16 cases) involved non-compliance in relation to all policy requirements at issue. See also Park, *Environmental Recourse at the Multilateral Development Banks*, noting (on the basis of an analysis of all known (1,052) IAM submissions between 1994 and mid-2019) that IAMs have enabled people to air their grievances, although the actual results are difficult to determine.

[332] For an example of an attempt to address this problem, see Independent Consultation and Investigation Mechanism, "MICI response to the evaluation of the Independent Consultation and Investigation Mechanism *(MICI)*" (2021), para. 2.13: "MICI will strive to issue Compliance Review reports containing recommendations with alternatives for the Board to determine appropriate or necessary measures to ensure redress when it is impossible to bring the project into compliance with policies, and to overcome challenges when Executing Agencies and Clients cannot finance those measures."

[333] IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, p. 59, noting the "systemic challenges" that "it is precisely the borrowers, clients, and executing agencies [not the IDB] that both implement and finance any corrective measures. This creates difficulties when the borrower or client is not willing to implement these measures due to their cost or because it considers that the adverse impact on the requesters is the result of failures in the supervisory duty of the MDB." To similar effect, see Cradden, Graz and Pamingle, "Governance by contract?", pp. 7–8.

[334] GCF, "Decision of the Board on updated Terms of Reference of the Independent Redress Mechanism (revised)", paras. 13 (d) and 14.

[335] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 308. To similar effect, see IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, p. 59.

[336] AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 69 (b); and EBRD, "Project Accountability Policy" (London, 2019), para. 2.7 (a).

[337] For example, CAO, the GCF Independent Redress Mechanism and the AfDB Independent Recourse Mechanism. In all three cases, the circumstances in which self-initiated complaints are authorized include situations in which project-affected people face the risk of reprisals. AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 75 (iv); and GCF, "Decision of the Board on updated Terms of Reference of the Independent Redress Mechanism (revised)", para. 12.

[338] Balaton-Chrimes and Macdonald, *The Compliance Advisor Ombudsman for IFC/MIGA*, p. 64, criticizing a review by CAO in which it which had declined to conduct an audit of MIGA on the basis that "the mining project was only in the exploration phase, and assessments of the kind requested in the complaint were still under way by the company. This is despite the fact that compensation agreements resulting in the relinquishment of land rights were already being agreed at this time, and associated social impacts on the community were already evident. An audit of MIGA's decision to support the project would have been worthwhile insofar as it would have generated a) important information that could be used by community groups to seek redress, and b) discussion around how negative social impacts had occurred, and how IFC/MIGA should manage social and environmental risk in the very earliest stages of a project when assessments are not yet complete but business activity is taking place."

[339] AfDB Independent Recourse Mechanism, "Operational Rules and Procedures", paras. 67 and 69; and GCF, "Decision of the Board on updated Terms of Reference of the Independent Redress Mechanism (revised)", paras. 11–14.

[340] AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 67 (iii).

[341] GCF, "Procedures and Guidelines of the Independent Redress Mechanism" (2019, amended 2021), paras. 58 and 66.

[342] See endnotes 163–167 above and accompanying text.

[343] Katrina Lehmann-Grube and Lalanath de Silva, "At the crossroads: independent accountability mechanisms' reforms", Green Climate Fund Independent Redress Mechanism, 22 April 2020.

[344] See, e.g., EBRD Independent Project Accountability Mechanism, "Lukoil Shah Deniz Stage II Project (46766), request No. 2017/07: compliance review monitoring report I – monitoring period: June 2019–July 2020" (2020), recommending (p. 11) that the EBRD should: "Issue Guidance to Clients that outlines key effectiveness criteria for Project-level grievance mechanisms, aligned with the effectiveness indicators set out in the UN Guiding Principles on Business and Human Rights." For further evidence of the utility of principle 31 in this context, see World Bank, "Fostering the inclusion of disadvantaged or vulnerable individuals or groups"; and "Insights into grievance mechanisms".

[345] While this effectiveness criterion is concerned with operational-level GRMs, its elements have broader relevance and could usefully be drawn upon by other types of non-State-based grievance redress mechanisms, including IAMs.

[346] See https://mneguidelines.oecd.org/ncppeerreviews.htm and www.ohchr.org/EN/Countries/NHRI/Pages/GANHRISSubCommitteeAccreditation.aspx.

[347] Principle 31. For an illustration of the application of these effectiveness criteria by an IAM, see www.cao-grm.org.

[348] World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*, p. 16: "Only 7 of 23 [sampled] projects were able to provide data on grievances received and resolved. Reasons vary: lack of dedicated financial resources, project staff overburdened and/or uninformed, GRMs are rarely in results matrices and therefore are not monitored, etc. We found that a key driver of whether a GRM moved from paper to reality was whether both the [task team leader] and the borrower are convinced of the GRM's value to the project. When the business case is not clear to those in the driver's seat, the GRM often falls by the wayside." For more detailed analysis of the prerequisites for effective GRMs, drawn from the World Bank's experience, see World Bank, "Gaining traction or spinning wheels?"; and "Insights into grievance mechanisms".

[349] ADB, *2018 Learning Report on Implementation of the Accountability Mechanism Policy*, pp. 25 and 27.

[350] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 362.

[351] Ibid., para. 95. See also World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*; Stefan Zagelmeyer, Lara Bianchi and Andrea R. Shemberg, *Non-State Based Non-Judicial Grievance Mechanisms (NSBGM): An Exploratory Analysis*, a report prepared for OHCHR by the University of Manchester (Manchester, 2018), pp. 24–25 (commenting on the lack of available data on outcomes from GRMs); and May Miller-Dawkins, Kate Macdonald and Shelley Marshall, *Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms* (Corporate Accountability Research, 2016), p. 34.

[352] ADB, *2018 Learning Report on Implementation of the Accountability Mechanism Policy*, p. 38.

[353] Caroline Rees and David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena* (Cambridge, Massachusetts, Harvard University, 2008), p. 3.

[354] A/HRC/44/32, annex, policy objectives 6–14; and A/HRC/44/32/Add.1, paras. 30–74.

[355] See, e.g., EBRD Independent Project Accountability Mechanism, "Lukoil Shah Deniz Stage II Project", recommending (at p. 11) that the EBRD should "issue Guidance to Clients that outlines key effectiveness criteria for Project-level grievance mechanisms, aligned with the effectiveness indicators set out in the UN Guiding Principles on Business and Human Rights".

[356] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 359.

[357] World Bank, *Uganda Transport Sector Development Project – Additional Financing: Lessons Learned and Agenda for Action*, para. 65.

[358] For example, the International Chamber of Commerce offers standard rules for three different types of dispute boards: dispute adjudication boards issue decisions that must be complied with immediately. On the other hand, dispute review boards issue recommendations that are not immediately binding on the parties. However, such recommendations become binding if no party objects within 30 days. Finally, combined dispute boards offer an intermediate solution between dispute review boards and dispute adjudication boards. See https://iccwbo.org/dispute-resolution-services/dispute-boards.

[359] However, the need for an independent panel might itself be taken as an indicator that conditions for executing complex, high-risk projects may not exist in a country. ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, "Supplemental appendix 2: literature review of safeguard experiences", para. 18.

[360] A recent review of company-commissioned independent inquiries into aspects of the social performance of the mining industry found that "tracking what the companies agreed to do as an outcome of the inquiry process, and who is accountable, is often difficult." The authors of the report concluded that: "In order to determine whether CCIIs – or other such forms of engagement – hold value in understanding and remediating complex cases, there will need to be investment in targeted social research" (Deanna Kemp, John Owen and Susan Johnston, "Company-commissioned independent inquiries in the mining sector: a preliminary paper and a case for applied research" (Brisbane, Centre for Social Responsibility in Mining, Sustainable Minerals Institute, University of Queensland, 2018), pp. 15 and 26).

[361] Reidar Kvam, "Meaningful stakeholder engagement: a joint publication of the Multilateral Financial Institutions Group on Environmental and Social Standards" (IDB, 2019), p. 31.

[362] Ibid.

[363] See, e.g., International Commission of Jurists, *Effective Operational-Level Grievance Mechanisms* (Geneva, 2019), sect. 2.6.

[364] World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*. For more detailed guidance on this theme, see A/HRC/44/32, annex, policy objectives 6–14 and policy objective 8 (in particular paras. 8.3 and 8.4); and A/HRC/44/32/Add.1, paras. 43–46.

[365] See www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.

[366] See www.cao-grm.org; and IFC, "Good practice note: addressing grievances from project-affected people" (Washington, D.C., 2009).

[367] IFC, *Good Practice Handbook – Use of Security Forces: Assessing and Managing Risks and Impacts, Guidance for the Private Sector in Emerging Markets* (Washington, D.C., 2017).

[368] Commonwealth Development Corporation and others, *Managing Risks Associated with Modern Slavery: A Good Practice Note for the Private Sector*.

[369] ADB, *Designing and Implementing Grievance Redress Mechanisms: A Guide for Implementors of Transport Projects in Sri Lanka* (Manila, 2010).

[370] EBRD, "EBRD Performance Requirement 2: labour and working conditions – employee grievance mechanism guidance note", p. 3.

[371] Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*. The Working Group indicates that it draws on earlier work carried out by Shift and the Triple R Alliance.

[372] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 365.

[373] EBRD, "Grievance management guidance note" (2012), para. 4.4.

[374] World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*.

[375] ADB, *2018 Learning Report on Implementation of the Accountability Mechanism Policy*, p. 36: if "for cultural or other reasons complaints have not been elevated to the AM, but the portfolio and the knowledge about the capacity of borrowers/clients indicates that there are likely to be communities and households adversely affected by ADB-assisted projects, then there should be a special focus on whether or not the consultation/participation and GRMs are indeed being implemented in accordance with ADB policy."

[376] One of the exceptions is IFC ("Interpretation note on financial intermediaries" (2012, updated 2018)), which followed a CAO compliance review of the Corporation's policy and practices regarding financial intermediaries).

[377] Oxfam International, "Open books: how development finance institutions can be transparent in their financial intermediary lending, and why they should be", p. 18.

[378] See www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021.

[379] Brightwell and Gardener, "Developing effective grievance mechanisms in the banking sector".

[380] See www.banktrack.org/blog/frequently_asked_questions_about_banks_and_grievance_mechanism.

[381] See www.devdiscourse.com/article/business/531149-adb-to-develop-accountability-mechanism-framework-to-manage-social-risks; www.adb.org/projects/53140-001/main#project-pds; and www.adb.org/projects/53140-001/main#project-documents.

[382] See www.adb.org/sites/default/files/project-documents/53140/53140-001-tacr-en_0.pdf.

[383] See www.adb.org/sites/default/files/project-documents/53140/53140-001-tacr-en.pdf.

[384] See www.accountabilitycounsel.org/2019/11/news-of-progress-in-the-movement-to-advance-accountability-for-chinese-overseas-finance.

[385] Adapted from Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*, sects. 4.8.1–4.8.2.

[386] Miller-Dawkins, Macdonald and Marshall, *Beyond Effectiveness Criteria*, pp. 44–45.

[387] Ibid., p. 36.

[388] EIB Environmental and Social Standard 10, paras. 48–50, at para. 48.

[389] See, e.g., EIB Environmental and Social Standard 8, para. 25.

[390] See, e.g., IFC Performance Standard 4.

[391] See, e.g., EBRD Performance Requirement 8, para. 17.

[392] See, e.g., EBRD Performance Requirement 2.

[393] See, e.g., EIB Environmental and Social Standard 10, para. 48.

[394] Ibid., paras. 48–50.

[395] See, e.g., World Bank Environmental and Social Standard 10, annex 1, para. 2 (e).

[396] A/HRC/44/32, annex, policy objective 9, para. 9.4, and policy objective 12, para. 12.4; and A/HRC/44/32/Add.1, paras. 51 and 67.

[397] See the reports prepared during the first and second phases of the Accountability and Remedy Project (www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx).

[398] On national contact points, see endnotes 58–61 and 79 and accompanying text.

399 As of February 2021, there were 50 national contact points (https://mneguidelines.oecd.org/ncps). One of the strengths of national contact points is that their mandate extends beyond the country where they exist, as they may address issues involving companies operating in or from their country. To date, national contact points have handled cases on issues occurring in over 100 countries and territories. While some successes have been achieved, the track record to date is mixed at best. See OECD, *Providing Access to Remedy: 20 Years and the Road Ahead* (2020), pp. 32–34; and OECD Watch, *Remedy Remains Rare* (Amsterdam, 2015).

400 See http://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf.

401 Safeguards typically require that client GRMs should not substitute for those provided through collective agreements or interfere with workers organizations, which includes trade unions.

402 See the Multi-Stakeholder Initiative Database (https://msi-database.org).

403 MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (2020). The report reflects on a decade of research and analysis into multi-stakeholder initiatives and concludes that they "are not effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy. While MSIs can be important and necessary venues for learning, dialogue, and trust-building between corporations and other stakeholders … they cannot be relied upon for the protection of human rights." It also states that they need to be supplemented with "mandatory measures at local, national, and international levels".

404 See www.ohchr.org/en/hrbodies/hrc/pages/home.aspx. These mechanisms are not suited to provide remedies for specific harms, however. The universal periodic review examines the overall human rights performance of all Member States. The Human Rights Council's complaint procedure only addresses gross or systematic human rights violations.

405 See www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

406 See www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.

407 See www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang–en/index.htm.

408 Examples include the Examination of Grievances Recommendation, 1967 (No. 130); the Protocol to the Forced Labour Convention, 1930 (No. 29), art. 4 (1); the Indigenous and Tribal Peoples Convention, 1989 (No. 169), especially art. 16; and Violence and Harassment Convention, 2019 (No. 190), art. 10.

409 See https://au.int/en/legal-organs.

410 See www.oas.org/en/topics/human_rights.asp.

411 See www.echr.coe.int.

412 For a discussion, see Diego Rodríquez-Pinzón, "Precautionary measures of the Inter-American Commission on Human Rights: legal status and importance", *Human Rights Brief*, vol. 20, No. 2 (2013).

413 This is required by some DFIs, e.g. EIB Environmental and Social Standard 10, para. 48.

414 This is specifically provided for in World Bank Environmental and Social Standard 10, annex 1, for example.

415 See also Scott Morris, "Doing more than safeguarding the safeguards at the World Bank," Center for Global Development, 4 August 2016.

416 See www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety.

417 There does seem to be some form of assessment in the World Bank Program-for-Results Financing reviews, see World Bank, *Program-For-Results: Two-Year Review* (2015), pp. 28–29.

418 ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, p. xix.

419 World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*, paras. 1.06 and 3.21 (4). See also World Bank, "Gaining traction or spinning wheels?"; and ""Insights into grievance mechanisms".

420 International Commission of Jurists, *Effective Operational-level Grievance Mechanisms*, para. 27.

421 Attempts by GRMs to handle such issues have often been criticized. See, e.g., International Commission of Jurists, *Effective Operational-level Grievance Mechanisms*, p. 11. For guidance, see A/HRC/44/32, annex, para. 1.3; and A/HRC/44/32/Add.1, para. 11.

422 International Commission of Jurists, *Effective Operational-level Grievance Mechanisms*, para. 46, citing the failure in 2015 of the Bento Rodrigues dam in Mariana, Brazil, owned by Samarco Mineração, a joint venture between Vale and BHP Billiton in Brazil, and the collapse of Rana Plaza in Bangladesh in 2013.

423 A/HRC/44/32, annex, policy objective 12, paras. 12.3 (c) and 12.4 (discussing the need for GRMs to have policies on these issues); and A/HRC/44/32/Add.1, para. 67. See also International Commission of Jurists, *Effective Operational-level Grievance Mechanisms*, p. 67.

424 A/HRC/44/32, annex, policy objective 9, para. 9.4, and policy objective 12, para. 12.4; and A/HRC/44/32/Add.1, paras. 51 and 67.

425 A/HRC/44/32, annex, policy objective 12, paras. 12.3 (c) and 12.4; and A/HRC/44/32/Add.1, para. 67.

426 International Commission of Jurists, *Effective Operational-level Grievance Mechanisms*, p. 67.

427 Ibid., p. 73. Also noting (p. 72) that: "After some initial controversy with the use of legal waivers the emerging trend is for companies not to employ them in the context of OGMs [operational GRMs]."

428 OECD, "Paris Declaration on Aid Effectiveness" (Paris, 2005). See also www.oecd.org/dac/effectiveness.

429 OECD, "Paris Declaration on Aid Effectiveness", para. 21.

430 ADB Independent Evaluation Department, *Corporate Evaluation Study: Safeguards Operational Review: ADB Processes, Portfolio, Country Systems, and Financial Intermediaries* (2014). The World Bank's 2005 Policy (OP 4.00) on Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects used this approach as has ADB.

431 IDB, *Environmental and Social Policy Framework*, para. 5.1: "The IDB may consider the use of the Borrower's Environmental and Social Framework relevant to the project, provided this is likely to address the risks and impacts of the project and will enable the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functional equivalence)" (footnote omitted).

432 World Bank, *The World Bank Environmental and Social Framework* (Washington, D.C., 2017), p. 6, at para. 23.

433 ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, p. xxxvi, para. 13, and para. 309.

434 ADB Independent Evaluation Department, *Results-based Lending at the Asian Development Bank: An Early Assessment* (2017).

435 ADB Independent Evaluation Department, *Effectiveness of the 2009 Safeguard Policy Statement*, p. 45: "To date most of the emphasis has been on supporting RBL preparation and relatively little attention

has been paid to safeguards during implementation. However, implementation of RBL programs needs to be different from the compliance-based approach used in stand-alone projects. Field-level monitoring and an independent verification agency with safeguard expertise is essential for all RBL programs that trigger safeguards."

436 African Development Bank Group, *Assessment of the Use of "Country Systems" for Environmental and Social Safeguards and their Implications for AfDB-Financed Operations in Africa* (Abidjan, 2015). See AfDB Independent Development Evaluation, *Evaluation of the AfDB's Integrated Safeguards System: Summary Report*, p. 42. See also University of Wyoming International Human Rights Law Clinic, *Social Trends Analysis for Select Countries in Latin America and the Caribbean* (IDB, 2020); and *Social Trends Analysis for Select Countries in Asia* (2021).

437 OHCHR, "The application of the Guiding Principles on Business and Human Rights to minority shareholdings of institutional investors"; advice to OECD on the application of the Guiding Principles to the financial sector (available at www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf); and "OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector". See also OECD, *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises* (2017); and *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises* (2019).

438 Financial institutions, like other enterprises, may cause or contribute to adverse impacts in their own operations (e.g. adverse labour impacts with respect to their own employees), however, the focus of the present publication is on financial institutions' involvement in impacts through financing investment projects.

439 OHCHR, "OHCHR response to request from BankTrack", pp. 5–6 (footnotes omitted). See also OECD, *Due Diligence for Responsible Business Conduct*, p. 71.

440 Guiding Principles on Business and Human Rights, principles 13, 19 and 22. For an illustration in the context of a development financing relationship, see Swedwatch, *No Business, No Rights: Human Rights Impacts When Land Investments Fail to Include Responsible Exit Strategies. The Case of Addax Bioenergy in Sierra Leone*, Report No. 86 (2017), pp. 49 and 54.

441 For a discussion of relevant factors determining "contribution" to harm, see OHCHR, "OHCHR response to request from BankTrack", pp. 7–10.

442 On the question of how banks can determine their responsibilities in this regard, see OHCHR, "OHCHR response to request from BankTrack".

443 On the distinction between "providing for" and "cooperating in" remedy, see OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (New York and Geneva, 2012), p. 64.

444 OECD, *Responsible Business Conduct for Institutional Investors; Due Diligence for Responsible Corporate Lending and Securities Underwriting*.

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

446 Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 326.

447 Ibid., para. 327.

448 Ibid., para. 337.

449 Drawn from OHCHR, "OHCHR response to request from BankTrack", pp. 6–10.

450 By comparison, OECD notes, in *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), three highly interrelated factors: (a) 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; (b) 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 (c) the degree to which any of the enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring. See also Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*, pp. 37–45. In 2021, OECD was developing guidance on the application of the OECD Guidelines to project finance and asset-based finance, in situations in which DFIs and export credit agencies are involved. The guidance is also relevant for DFIs as economic actors and for their co-financiers and clients.

451 Dutch Banking Sector Agreement Working Group on enabling remediation, *Discussion Paper – Working Group Enabling Remediation*, p. 37.

452 Sophie Edwards, "Calls for IFC to create 'remedy fund' to compensate harmed communities", Devex, 31 October 2019.

453 See endnote 114 above. The bond would be for a reasonable amount, normally not to exceed 10 per cent of the contract amount and be cashable based on failure to comply with the engineer's notice to correct defects. However, as indicated earlier, this mechanism appears to be discretionary and the extent to which it has been used is not clear.

454 Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 333.

455 See endnote 167 above

456 See, e.g., www.inspectionpanel.org/news/board-approves-resolutions-establish-world-bank-accountability-mechanism-add-tools-panel.

457 United States Department of the Treasury, "Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies" (2019), p. 11: "Key U.S. priorities for 2019 are … building on the efforts of the Gender-Based Violence Task Force and supporting efforts of the World Bank to have stronger recourse for the rare instances in which projects cause grave harm, such as gender-based violence."

458 CAO, "Annual report 2019" (Washington, D.C., 2019), p. 19: Amalgamated Plantations "was implementing an Action Plan to address shortcomings and legacy issues in key areas such as human health, worker health and safety, housing, and sanitation infrastructure".

459 CDC and DEG, "Managing legacy land issues in agribusiness investments" (London and Cologne, 2016).

460 Danish Institute for Human Rights, *Human Rights Impact Assessment: Guidance and Toolbox* (Copenhagen, 2020).

461 See, e.g., EBRD, *Environmental and Social Policy*, para. 1.3: "EBRD administers a number of donor funds. Projects or activities financed in whole or in part with donor funds will comply with this Policy. Additional donor requirements relating to environmental or social matters may apply to projects financed with donor funds as agreed between EBRD and donors."

462 See, e.g., World Bank Environmental and Social Standard 5, para. 16; and World Bank, "Guidance note for borrowers – Environmental and Social Framework for IPF Operations – ESS5: land acquisition, restrictions on land use and involuntary resettlement" (2018), paras. GN16.1 and GN16.2; and IFC Performance Standard 5, footnote 14.

463 Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 336.

464 A specialized business and human rights arbitral tribunal has been proposed to be established in The Hague that could be a model for

developing the kinds of expertise that would be needed to address insurance claims related to human rights impacts. See Center for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration* (The Hague, 2019).

[465] Para. 50 of the Accord. For an illustration of cases brought to arbitration under the Accord, see https://pca-cpa.org/en/cases/152.

[466] Daniel Rozas and others, "The art of the responsible exit in microfinance equity sales" (Washington, D.C., Consultative Group to Assist the Poor and Center for Financial Inclusion, 2014), p. 2.

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

[468] Certain multilateral development bank safeguards make clear that the client's environmental and social obligations extend to closure or post-closure (e.g. EBRD Environmental and Social Standard 1, para. 4; and IFC Performance Standard 1, para. 4, respectively). See World Bank, *The World Bank Environmental and Social Framework*, para. 56: "A project will not be considered complete until the measures and actions set out in the legal agreement (including the ESCP) have been implemented. To the extent that the Bank evaluation at the time of project completion determines that such measures and actions have not been fully implemented, the Bank will determine whether further measures and actions, including continuing Bank monitoring and implementation support, will be required." In similar terms, see IDB, *Environmental and Social Policy Framework*, para. 3.23. Other actions beyond continued monitoring and technical support may reportedly include extension of project closure and requirements for post-exit action plans. For an example, see World Bank, "Second progress report on the implementation of management's action plan in response to the Inspection Panel investigation report (INSP/R2018-0002) on the Democratic Republic of Congo: second additional financing for the High-Priority Roads Reopening and Maintenance Project (P153836)" (2020), para. 7 (xxviii).

[469] A recent World Bank evaluation noted shortcomings in how safeguard non-compliance issues were addressed at project closure. See World Bank Independent Evaluation Group, *Appendixes: Results and Performance of the World Bank Group 2018*, p. 170. For comments on the general state of play, see Swedwatch, *No Business, No Rights*, p. 16.

[470] IFC, "Management response to the CAO compliance investigation report, Latin America and Caribbean, Corporación Interamericana para el Financiamento de Infraestructura, S.A. (Project #26031)" (2020), p. 38. See also Bretton Woods Project, "IFC denies responsibility for harms following CAO's Guatemala dam investigation", 16 July 2020.

[471] OECD Guidelines for Multinational Enterprises, p. 25, para. 22. According to OECD (*OECD Due Diligence Guidance for Responsible Business Conduct*, p. 31), disengagement from a supplier or other business relationship should be seen as "a last resort after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impact does not take immediate action to prevent or mitigate them. Any plans for disengagement should also take into account how crucial the supplier or business relationship is to the enterprise, the legal implications of remaining in or ending the relationship, how disengagement might change impacts on the ground, as well as credible information about the potential social and economic adverse impacts related to the decision to disengage."

[472] Mariëtte van Huijstee, Lydia de Leeuw and Joseph Wilde-Ramsing, "Should I stay or should I go? Exploring the role of disengagement in human rights due diligence" (SOMO, 2016).

[473] Juan Dumas, "A responsible exit from the Agua Zarca Project: summary of recommendations" (2007), which includes (para. 1.4) an attempt to reconcile the recommendations with international human rights standards.

[474] Liz Ford and Sam Jones, "Bank faces lawsuit over Honduras dam project as spirit of Berta Cáceres lives on", *Guardian*, 18 May 2018.

[475] World Bank Group, *World Bank Group Strategy for Fragility, Conflict, and Violence 2020–2025*, para. 154.

[476] See endnote 469 above.

[477] See, e.g., OPIC Office of Accountability, *Assessment of OPIC's Environmental and Social (E&S) Monitoring of Projects* (2018).

[478] CDC and DEG, "Managing legacy land issues in agribusiness investments".

[479] GCF, "Procedures and guidelines of the Independent Redress Mechanism", para. 23; and AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 12.

[480] OPIC Office of Accountability, "OA Review: Buchanan Renewable Energy Projects in Liberia" (2014), pp. 67–69. The human rights analysis is on pp. 51–55.

[481] Rio Tinto, "Rio Tinto and Bougainville community residents reach agreement to assess legacy impacts of Panguna mine", 21 July 2021; and Human Rights Law Centre, "Bougainville communities secure commitment from Rio Tinto to assess environmental and human rights impacts of former mine", 21 July 2021.

[482] See, e.g., www.eib.org/en/about/governance-and-structure/organisation/services/entity/tmr/index.htm.

[483] See, e.g., EBRD, "Risk management": "The Corporate Recovery team is charged with management and work-out for impaired Banking assets and maintains a joint report to Banking management. Maximisation of recovery value is a key goal."

[484] See, e.g., EBRD Project Complaint Mechanism, "Altain Khuder Debt & Equity, request number: 2015/01: compliance review monitoring report I – November 2017". Management agreed to update its procedures to require the Corporate Recovery Department to inform the Environmental and Social Department but not to take further action: "inform ESD when a project is likely to, or if it has been transferred to Corporate Recovery (or is involved in any other legal dispute) as this may impact our ability to monitor or otherwise influence the project."

[485] These are departments/units that deal with non-performing or impaired assets that are stressed or at risk of becoming non-performing or impaired. They typically take over these assets from operational departments with the objective of protecting the interests of DFIs.

[486] Andrea Armeni and Miguel Ferreyra de Bone, *Innovations in Financing Structures for Impact Enterprises: A Spotlight on Latin America* (Washington, D.C., IDB, 2017).

[487] See endnote 475 above and accompanying text.

[488] Grassroots Capital Management, "'Hardwiring' social mission in MFIs" (2014), p. 2.

[489] Rozas and others, "The art of the responsible exit in microfinance equity sales", p. 8.

[490] See, e.g., Swedish Environmental Protection Agency and the United Nations Development Programme, *Extracting Good Practices: A Guide for Governments and Partners to Integrate Environment and Human Rights into the Governance of the Mining Sector* (New York, 2018), pp. 83–88.

[491] See, e.g., Aaron Sayne, Alexandra Gillies and Andrew Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts* (Natural Resources Governance Institute, 2017).

[492] EBRD, "Guidelines to loan disbursements for non-sovereign operations" (London, 2013).

[493] Joseph Wilde-Ramsing, Katherine Booth and Audrey Gaughran, "Telenor's exit from Myanmar: a cautionary tale for the just transition, Institute for Human Rights and Business, 26 September 2021; and Telenor Group, "Update on the ongoing OECD complaint against Telenor on the sale of Telenor Myanmar", 27 September 2021.

[494] *Hamida Begum (on behalf of MD Khalil Mollah) v. Maran (UK) Limited* [2021] EWCA Civ 326, para. 67.

[495] Hannah Schiff and Hannah Dithrich, "Lasting impact: the need for responsible exits" (Global Impact Investing Network, 2018).

[496] Reidar Kvam, *Social Impact Assessment: Integrating Social Issues in Development Projects* (IDB, 2018), p. 82.

[497] Kvam, "Meaningful stakeholder engagement: a joint publication of the Multilateral Financial Institutions Group on Environmental and Social Standards", pp. 32–33.

[498] EBRD, "Retrenchment guidance April 2010: retrenchment and restructuring – labour and community issues, a brief guide" (2010).

[499] IFC, "Good practice note: managing retrenchment" (2005).

[500] There is no definitive list of "enabling rights". All human rights are intrinsically important and (in theory if not always in practice) interrelated and interdependent. However, the term "enabling rights" refers to rights whose functional importance in any context is especially significant.

[501] See also van Huijstee, de Leeuw and Wilde-Ramsing, "Should I stay or should I go?"; and OECD, "Session note: responsible disengagement", prepared for the Global Forum on Responsible Business Conduct, 30 June 2017, which provides excerpts of the various OECD guidance documents on responsible business conduct and further guidance on exit.

[502] Coalition for Human Rights in Development, *Uncalculated Risks: Threats and Attacks against Human Rights Defenders and the Role of Development Financiers*, p. 35.

[503] Joseph Wilde-Ramsing, Marian G. Ingrams and Mariëtte van Huijstee, "Responsible disengagement in the time of corona" (SOMO, European Center for Constitutional and Human Rights and PAX, 2020), pp. 2–3.

[504] Rozas and others, "The art of the responsible exit in microfinance equity sales", p. 7.

[505] See www.impactprinciples.org. IFC notes that "many development finance institutions (DFIs), which are owned by governments, have mandates that could be interpreted as intended to contribute to social and environmental impact" and "these investors' contribution to positive social and environmental impact is readily identifiable, given the mandates of these funds and institutions, their role in providing additional capital to firms, and their typically direct, and often long-term, relationship with investees that allows them to exert influence over management or transfer knowledge" (IFC, *Creating Impact: The Promise of Impact Investing* (Washington, D.C., 2019), pp. xii–xiii).

[506] Priscilla Boiardi and Lisa Hehenberger, *A Practical Guide to Planning and Executing an Impactful Exit* (Brussels, European Venture Philanthropy Association, 2014), p. 8.

[507] Swedwatch, *No Business, No Rights*, pp. 43 and 54–55.

[508] Intergovernmental Panel on Climate Change, "Summary for policymakers", in *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (2018), para. D.6.1.

[509] See, e.g., OPIC Office of Accountability, *Assessment of OPIC's Environmental and Social (E&S) Monitoring of Projects*.

[510] See, e.g., EBRD Independent Project Accountability Mechanism, "Lukoil Shah Deniz Stage II Project", recommending (at p. 11) that the EBRD should "issue Guidance to Clients that outlines key effectiveness criteria for Project-level grievance mechanisms, aligned with the effectiveness indicators set out in the UN Guiding Principles on Business and Human Rights". CAO "core principles" substantially reflect principle 31, see IFC/MIGA, "IFC/MIGA Independent Accountability Mechanism (CAO) Policy", para. 10.

[511] See, e.g., van Huijstee, de Leeuw and Wilde-Ramsing, "Should I stay or should I go?"; and the report and background materials pertaining to the third phase of the OHCHR Accountability and Remedy Project, which included a dedicated consultation in June 2019 with IAMs.

[512] Bradlow, "Multilateral development banks, their member States and public accountability: a proposal".

[513] Daniel and others, *Glass Half Full?*, p. 61.

[514] Daniel and others (in *Glass Half Full?*) present a flow diagram of the "dropout" rate of cases from IAM processes due to various reasons, pp. 36–37

[515] See endnote 142 above and accompanying text.

[516] Daniel and others, *Glass Half Full?*, p. 31.

[517] In a review of 1,052 claims to IAMs since 1994, on average, only 52 per cent of claims were registered (Park, *Environmental Recourse at the Multilateral Development Banks*, p. 47). See also Daniel and others, *Glass Half Full?*, p. 31. The latter review also drew attention to the gaps between a positive eligibility assessment and failure to conclude a case, pointing to: "the IAM independently decided that problem-solving or compliance review was unnecessary or inappropriate; the complainant chose not to pursue problem-solving or compliance review; the company or government carrying out the project in question refused to participate in problem-solving; or the institution's board refused to authorise a compliance investigation."

[518] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 209.

[519] See, e.g., IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, paras. 3.12–3.13.

[520] See, e.g., World Bank Inspection Panel, "Report and recommendation on request for inspection – Brazil: Paraná Biodiversity Project (PBP) (GEF TF 051007)" (2006), para. 43; and Deutsche Presse-Agentur, "DPA: Asian Development Bank denies requesting action against NGOs", Cambodia Trainspotter, 19 September 2011).

[521] See, e.g., IDB Office of Evaluation and Oversight, *Corporate Evaluation: Evaluation of the Independent Consultation and Investigation Mechanism (MICI)*, paras. 3.14–3.16; and Park, *Environmental Recourse at the Multilateral Development Banks*, noting (at p. 52) that the IDB has itself commented that the lack of jurisdiction of the Independent Consultation and Investigation Mechanism over complaints that are the subject of parallel court proceedings has prevented access to justice.

[522] Balaton-Chrimes and Macdonald, *The Compliance Advisor Ombudsman for IFC/MIGA*, p. 66; and CAO, "Resolving land disputes in the palm oil sector through collaborative mediation" (2009).

[523] International Trade Union Confederation, *The Labour Standards of the Multilateral Development Banks: A Trade Union Guide* (2019), p. 30.

[524] ECE/MP.PP/C.1/2009/2/Add. 1; and World Bank Inspection Panel, *Investigation Report – Albania: Power Sector Generation and Restructuring Project (IDA Credit No. 3872-ALB)* (2009), paras. 330–377.

[525] Daniel and others, *Glass Half Full?*, analysing all complaints filed at IAMs from the dates of their establishment until 30 June 2015, found: "of concluded cases filed without any CSO support, 62% were found eligible, 38% reached a substantive phase and only 19% achieved results. In contrast, of concluded cases that involved an international CSO, 87% were found eligible, 70% reached a substantive phase, and 63% achieved results."

[526] See, e.g., AIIB, "AIIB policy on the Project-affected People's Mechanism" (2018), which permits international representation only in "exceptional situations, when in-country representation is unavailable" (para. 3.1). ADB, *Accountability Mechanism Policy 2012*, para. 138, contains a similar constraint.

[527] Miller-Dawkins, Macdonald and Marshall, *Beyond Effectiveness Criteria*, p. 27.

[528] See CAO, *Dispute Resolution Toolkit*, chap. 2, for further discussion and suggestions on representation. Available at www.cao-dr-practice.org/reports/CAO_2_Representation.pdf.

[529] GCF, "Procedures and Guidelines of the Independent Redress Mechanism", para. 23.

[530] Daniel and others, *Glass Half Full?*, p. 51.

[531] Ibid., p. 43.

[532] A/HRC/44/32.

[533] In situations in which multiple standards or sources of law apply to a given project, as is almost invariably the case, multilateral development bank safeguards sometimes (though inconsistently) require observance of the highest applicable standard. For example, IDB Environmental and Social Performance Standard 3, para. 5, provides: "When applicable regulations differ from the levels and measures presented in the [World Bank's Environmental, Health and Safety Guidelines], Borrowers will be required to achieve whichever is more stringent." And in the context of co-financing, IDB, *Environmental and Social Policy Framework*, para. 6.2 provides: "A common approach would be acceptable to the IDB when it is consistent with the principles of no dilution … and when it enables the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functionally equivalent)."

[534] CAO, *Dispute Resolution Toolkit*, chap. 1 on getting started with dispute resolution, which usefully addresses this issue. Available at www.cao-dr-practice.org/reports/CAO_1_GettingStarted.pdf.

[535] Miller-Dawkins, Macdonald and Marshall, *Beyond Effectiveness Criteria*, p. 37. As noted in an in-depth review of CAO practice: "in negotiations or mediations, an ability to judge how existing power dynamics are operating may be needed to ensure that some level of fairness or justice is achieved. Impartiality as fairness does not mean treating all parties the same, particularly under conditions of significant asymmetry of power. Equally, building leverage in an institution requires an ability to find ways to strategically motivate companies to come on board, including by using their competitors to make it difficult for large companies to remain outside the process. This role of building the institution and engaging actors in the process is not impartial in the strict sense" (footnote omitted).

[536] CAO, *Dispute Resolution Toolkit*, chap. 3 on joint fact-finding. Available at www.cao-dr-practice.org/reports/CAO_3_JointFactFinding.pdf.

[537] This table is adapted from Balaton-Chrimes and Macdonald, *The Compliance Advisor Ombudsman for IFC/MIGA*, pp. 40–45.

[538] Some of these measures are already being implemented by some IAMs, which may lay the ground for more consistent practice. See also CAO, *Dispute Resolution Toolkit*, chap. 1 on getting started. Available at www.cao-dr-practice.org/reports/CAO_1_GettingStarted.pdf.

[539] Woicke and others, *External Review of IFC/MIGA E&S Accountability*, para. 297.

[540] ADB Compliance Review Panel, *Final Report on Compliance Review Request No. 2013/1 on the Mundra Ultra Mega Power Project*, para. 140: "ADB's safeguard policies, such as the environmental and social policies, require the Borrower to undertake early surveys and studies with the intention of (a) establishing the baseline data, (b) identifying impacts, and (c) monitoring impacts. If these policies are not complied with, then baseline data are not established and impacts may be difficult to be identified and monitored. Without this information, the pre-project situation is often difficult to reconstruct. If, as a result of non-compliance with ADB policies, adequate baseline information is not available, the CRP will, of necessity, base its conclusion on the best other evidence available. This is essential in order to ensure that the ADB safeguard policies and ADB Accountability Mechanism are effective."

[541] Ramachandra, "Civil society in the independent accountability mechanism community of practice", pp. 305–306.

[542] New York University Law School Clinic on International Organizations, *The World Bank Inspection Panel and International Human Rights Law*.

[543] IFC/MIGA, "IFC/MIGA Independent Accountability Mechanism (CAO) Policy", para. 5.

[544] Ibid., para. 10 (g).

[545] Ibid., para. 67; and AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 49. See also CAO, "CAO Operational Guidelines", sects. 1.1 and 3.2.2.

[546] A requirement for IAMs to assess and address human rights implications of dispute resolution cases should not be seen as a "check the box" exercise, an external veto, or legal analysis of whether dispute resolution outcomes definitively violate international law in a formal sense (which can be a difficult technical judgment even for specialized tribunals). Rather, the expectation would be that IAMs make themselves aware of potential human rights issues relevant to the respective case, seek external guidance when needed and share their assessments with the parties so that they are fully informed of potentially unintended consequences. For a reconciliation of potential tensions between human rights and mediation, including the role of education and empowerment, see Caroline Rees, "Mediation in business-related human rights disputes: objections, opportunities and challenges", Working Paper No. 56 of the Corporate Social Responsibility Initiative, (Cambridge, Massachusetts, Harvard University, 2010).

[547] Business and Human Rights Resource Centre, "In the line of fire: increased legal protection needed as attacks against business & human rights defenders mount in 2020" (2021). According to this report, 604 attacks were reported against defenders working on business and human rights-related issues, up from 572 in 2019. Latin America and Asia and the Pacific recorded the most attacks, and agribusiness and mining were the most problematic sectors. One third (210) of all attacks stemmed from lack of consultation or the failure to secure the free, prior and informed consent of affected communities.

[548] See the 2020 annual report of CAO.

[549] As at 2021, the leaders in policy development among DFIs included IFC, IDB Invest and EBRD.

[550] The World Bank Inspection Panel's retrospectives and "emerging lessons" series are notable examples: see www.inspectionpanel.org/publications.

[551] AfDB Independent Recourse Mechanism, "Operating Rules and Procedures", para. 102.

[552] Human Rights Watch, "At your own risk: reprisals against critics of World Bank Group projects", 22 June 2015. See also Coalition for Human Rights in Development, *Uncalculated Risks: Threats and Attacks against Human Rights Defenders and the Role of Development Financiers*.

[553] For example, EIB has an annual civil society seminar with the board of directors and the Management Committee.

[554] Philippe Le Houérou, "Opinion: stepping up our game on environment and social issues", Devex, 13 June 2019.

[555] See https://projects.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service.

[556] World Bank, *Annual Report FY20: Grievance Redress Service*.

[557] Cradden, Graz and Pamingle, "Governance by contract?", pp. 8 and 19.

[558] IDB Office of *Evaluation and Oversight, Evaluation of the Bank's Support for Gender and Diversity* (Washington, D.C., 2018).

[559] See, e.g., the Internal Audit Vice Presidency's advisory review of the World Bank's environmental and social risk management, a summary of which is available at World Bank Group, "Internal Audit Vice Presidency (IADVP): FY14 fourth quarter activity report" (2014); and the Group Internal Audit Vice Presidency's review of the environmental and social risk management of MIGA, a summary of which is available at World Bank Group, "GIA FY2020 quarter 3 activity report" (2020).

[560] See, e.g., www.ebrd.com/ineligible-entities.html; and www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/AC_Home/Sanctionable_Practices.

[561] See endnote 167 above.

[562] EIB, "Fraud investigations activity report 2018" (2019), pp. 22–23.

[563] EBRD Project Complaint Mechanism, Jvari-Khorga Interconnection management action plan, 20 July 2018. Available at www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html.

[564] See www.ombudsman.europa.eu/en/how-can-the-ombudsman-help.

[565] See www.eib.org/en/about/governance-and-structure/control_and_evaluation/ombudsman.htm.

[566] See, e.g., European Ombudsman, "Decision in case 670/2019/PL on the European Investment Bank's refusal to disclose an expert report on whether Svans are indigenous people", 15 July 2020.

[567] See, e.g., www.adb.org/about/administrative-tribunal.

[568] See, e.g., www.ebrd.com/who-we-are/corporate-governance/administrative-tribunal.html.

[569] See, e.g., www.eib.org/en/publications/complaints-mechanism-flyer.htm.

[570] See, e.g., www.adb.org/documents/access-information-policy.

[571] Maeve McDonagh, "Evaluating the access to information policies of the multilateral development banks", in McIntyre and Nanwani, *The Practice of Independent Accountability Mechanisms: Towards Good Governance in Development Finance*, p. 157.



Office of the United Nations
High Commissioner for Human Rights
Palais des Nations
CH 1211 Geneva 10, Switzerland
Email: OHCHR-InfoDesk@un.org
Website: www.ohchr.org

ISBN 978-92-1-154244-8

