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OHCHR comments on draft Safeguards Policy of BMU's International Climate Initiative (IKI)

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INTRODUCTION

We are grateful for the invitation to comment on the draft Safeguards Policy of BMU's International Climate Initiative (IKI) and offer some observations from a human rights perspective. Our comments in this memo are not comprehensive, but rather are intended to focus on distinctive features and practical implications of the international human rights framework for due diligence and risk management, which are rarely addressed adequately in the safeguard policies of other financing institutions.

Alignment with international standards

Firstly, our Office warmly welcomes the very strong grounding of the draft Safeguards in applicable international treaties and other relevant standards including, notably, the UN Guiding Principles on Business and Human Rights (UNGPs) (draft IKI safeguards, Sections 1.1 and 1.4). The UNGPs are increasingly being reflected in safeguard policies of development finance institutions (DFIs), including those of the EIB and, more recently, the Environmental and Social Policy Framework (ESPF) of the Inter-American Development Bank (IDB), applicable to sovereign as well as non-sovereign lending.

The IKI Safeguards development process offers the opportunity for the BMU to set a new, strong international benchmark for development financing institutions (DFIs) globally, anchoring risk management and remediation responsibilities within the UNGPs and other applicable standards. Citations of international standards, including the UNGPs, are sometimes merely rhetorical. BMU has an important opportunity to ensure clear, meaningful alignment of IKI's safeguards with the UNGPs, with potentially significant benefits for sustainability. Rigorous alignment would also set projects up for the standards required for companies in Germany's Corporate Due Diligence in Supply Chains Law, the German National Action Plan on Business and Human Rights, and emerging EU human rights due diligence legislation.¹

¹ See <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html>; <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/NAP/About-the-NAP/Original-version-of-the-NAP/original-version-of-the-nap.html> (Section 1.1. "Basic rules of economic policy"); and more generally, Clifford Chance & Global Business Initiative on Human Rights, "Business and Human Rights: Navigating a Changing Legal Landscape" (Jan. 2022), at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/01/gbi-cc-briefing-final.pdf>



Other positive features

We note a number of positive features of the draft safeguards beyond its declared intention to align with international human rights standards. Notable among these, in our view, are the clear and very specific time-bound requirements regarding the amendment process (Section 7.1), the explicit requirement for continuing safeguard compliance obligations following project completion (Section 6.5), the aim of IKI's independent complaint mechanism (ICM) to help projects "establish effective remedies" (Section 8), the explicit requirement that FPIC must meet international standards (Section 9), and the important acknowledgement in Section 6.2.2 that "due diligence always takes priority over time pressure in the application assessment process."

Apparent shortcomings

Despite the positive features, there are a number of respects in which the draft safeguards may be strengthened, in OHCHR's view, and more closely aligned with international human rights standards. Some of these apparent shortcomings relate to the fact that safeguard requirements are defined in relation to the IFC Performance Standards (IFC PS) (Section 1.4), which in some respects have been overtaken by international human rights law and other relevant risk management frameworks.²

The most significant apparent gap, and source of conceptual confusion, seems to be in the definition of responsibilities for compliance with safeguards and the mitigation hierarchy, which have potentially significant implications for the rigour of risk management and remedying adverse project impacts.

We also offer comments and recommendations below intended to strengthen the draft Policy's mitigation hierarchy from a human rights perspective, as well as the Policy's proposed frameworks for supply chain risk management, FI operations, and addressing risks and impacts of different scenarios for exiting projects ("responsible exit").

² OHCHR, Benchmarking Study on DFI Safeguard Policies (forthcoming 2022). Examples of gaps include the fact that human rights due diligence is exceptional, not routine, under IFC PS 1 (fn 12), and the fact that human rights impacts are subject to off-setting.

A. RESPONSIBILITY FOR COMPLIANCE WITH SAFEGUARDS STANDARDS

As vital and welcome as BMU's and ZUG's human rights commitment is (Sections 1.1 and 1.4), we would suggest that it be sharpened in line with the human rights policy commitments in the EBRD's and IDB's safeguards, modified slightly, as follows: *"BMU and ZUG are obliged to respect human rights in connection with projects financed by them. BMU and ZUG will require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients."*³

Overall responsibility for compliance

Under Section 2.1 it is stated that *"implementing organizations are responsible for compliance with the Safeguards Policy and the safeguards standards it contains."* This would seem to be a departure from many other DFIs' safeguards, under which the DFI has specific responsibilities for Policy compliance and clients are obliged to comply with safeguards standards (or performance standards, or environmental and social standards, however called).

Relationship with adverse impacts

However, more fundamentally still, client responsibilities under the draft safeguards are defined by a taxonomy that appears to conflict with the UNGPs. Under Section 2, responsibilities are either "cease-or-prevent" obligations (applicable if adverse impacts are the result of project activities) or "best endeavours" obligations (applicable in two situations: (i) if the project "contributes to third party activities which have a direct causal link to (potential) adverse impacts"; and (ii) if the project "is proven to have a direct link to the adverse impacts through its relationships to political, implementing or contractual partners or other third parties."). In a similar vein, we note that under Section 3.3 "indirect risks" (such as those relating to project developed with a fund (co-)financed by IKI) can only entail "best endeavours" obligation and, moreover, that the proposed definitions of "direct" and "indirect" risks seem to be inconsistent with the clearer and more intuitive understanding of these terms in the safeguard policies of leading MDBs.⁴

In OHCHR's view, while the proposed taxonomy of obligations is explicitly framed by UNGP 19(b) (cause-contribute-direct linkage), it does not accurately reflect the UNGPs' requirements. The

³ EBRD ESF, para. 2.4; IDB ESPF, para. 1.3. The single difference is that the formulation recommended here is couched in the language of legal obligation (rather than mere policy commitment), consistent with the draft IKI safeguards (Sections 1.1 and 1.4).

⁴ See e.g. World Bank ESS 1, Guidance Note for Borrowers (June 2018), GN 23.5, footnotes 20 and 21 (defining indirect impacts according to foreseeability); EBRD Performance Requirement 1, paras. 8 and 9; AfDB Integrated Safeguards System (2013), p.23. The IDB ESPF, pp.22 and 24, by contrast, define "direct" and "indirect" on the basis of causality v. contribution to impacts. The EIB safeguards also include induced impacts.



proposed categories seem to be conceptually unclear and do not adequately address all relevant parties' responsibilities to contribute to remedy in "cause" and "contribute" situations.⁵ Unless great care is taken, paraphrasing of this kind can cause confusion, undermine project-level mitigation efforts, and impede the effective implementation of the UNGPs and human rights due diligence legislation at national and EU levels.

In order to more accurately reflect the UNGPs' standards, the safeguards should articulate BMU/ZUG's and implementing organizations' responsibilities explicitly in relation to their respective involvement in impacts (cause-contribute-direct linkage). "Linkage" situations are likely the most common in the context of development financing.⁶ Where adverse impacts are "linked" to BMU/ZUG's operations, products or services by its business relationship with another entity, BMU/ZUG should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGP 13(b) and 19).⁷ In this regard, we would note that the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and BMU/ZUG's financial product or service. Rather, the link needs to be between the financial product or service provided by BMU/ZUG and the adverse impact itself.⁸

However, there may well be circumstances where BMU/ZUG by its own actions or omissions has "contributed" to harms together with an implementing organisation (which will be more likely where BMU/ZUG has failed to carry out adequate due diligence).⁹ In such situations, the IKI Safeguard Policy

⁵ The latter shortcoming may be linked to the problem that the proposed mitigation hierarchy does not explicitly include remedy.

⁶ OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), p. 3, available at <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>, p. 3.

⁷ For an illustration, under the EIB's (former) 2018 safeguards: "The promoter is recommended to regularly carry out human rights due diligence in order to identify and assess any actual or potential adverse impact with which it may be involved (i.e. impacts that it may cause or contribute to as a result of its own activities or which may be directly linked to its operations, products or services by its business relationships). This is of special relevance in the case of business enterprises. As outlined in the UN Guiding Principles on Business and Human Rights, this process should: (a) draw on internal and/or independent external human rights expertise; and (b) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the of the business enterprise and the nature and context of the operation." EIB, Environmental and Social Standards (2018), ESS 9, fn 45. Available at https://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf. The present submission does not contain an analysis of EIB's new safeguards, adopted on 2 February 2022, which at the time of writing were not publicly available.

⁸ OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), pp.5-6, available at <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. See also OECD (2018) "Due Diligence for Responsible Business Conduct", p. 71. Available at <https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>.

⁹ For a discussion of relevant factors determining "contribution" to harm see OHCHR, "The application of the UNGPs in the context of the banking sector" (June 2017), pp.5-10, available at <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

should clearly state that BMU/ZUG must: (i) cease its own contribution; (ii) use its leverage with the implementing organisation to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between “contributing to” and having a “direct link” to an adverse human rights impact, and a financial institution’s involvement with an impact may shift over time, depending on its own actions and omissions.¹⁰ Figure 1 summarises these principles, applicable to BMU/ZUG as well as implementing organizations (“companies”).

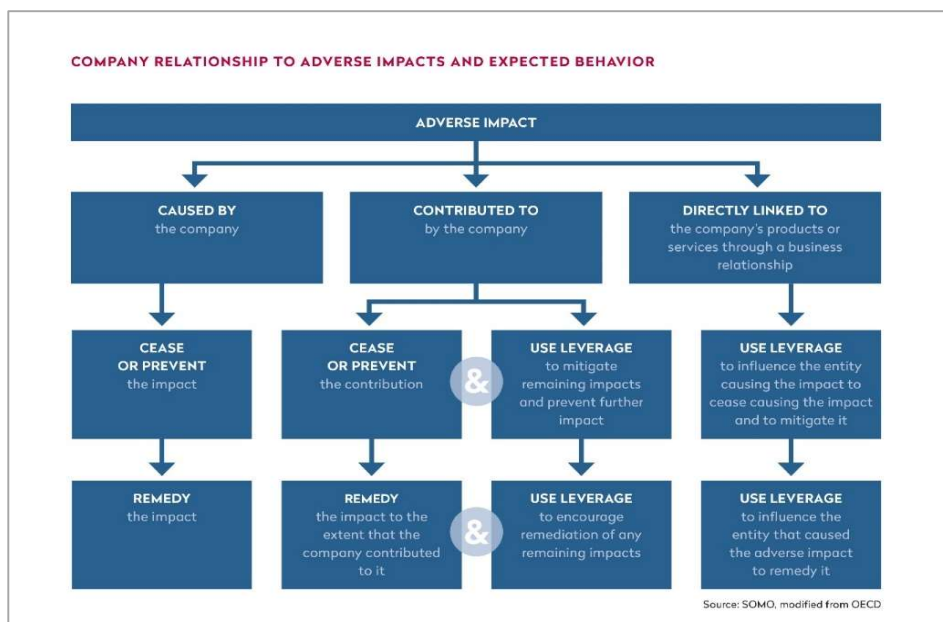


Figure 1: Company relationship to adverse impacts and expected behaviours

“Contributing to remedy” means providing remediation appropriate to one’s share in the responsibility for the harm. Whether providing for or cooperating in remedy,¹¹ 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. Other means of contribution may include engagement of expert studies, supporting the engagement of a facilitator and providing technical expertise. Ultimately, affected stakeholders should be meaningfully consulted about the type of remedy that would be appropriate in a given situation and the manner in which it should be delivered.¹²

¹⁰ Id.

¹¹ 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.

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

OHCHR recommends that the above definitions and distinctions be reflected in the IKI safeguards in order to ensure that BMU/ZUG's and clients' respective responsibilities are more clearly understood and closely aligned with the UNGPs and relevant legislation, thereby stimulating more consistent implementation and effective remedial responses.

OHCHR recommends that:

- *Section 1.4 of the Policy should contain a more specific commitment that: "BMU and ZUG are obliged to respect human rights in connection with projects financed by them. BMU and ZUG will require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients."*
- *BMU's and ZUG's risk-based due diligence responsibilities under the Policy should be further clarified and spelled out in detail in Section 2.2, including with respect to risk classification (which is typically the responsibility of the lender, not the client), screening, review and gap-filling of information provided by clients, supervision, site visits, third party monitoring where needed, and ensuring grievance redress, taking into account MDB best practice.¹³*
- *The Policy should define BMU/ZUG's and implementing organizations' responsibilities explicitly in relation to their respective involvement in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above, rather than the taxonomy of obligations in Section 2.*
- *Section 3.3 should be deleted, given that the definitions of direct and indirect risks are not clear and conflict with the UNGPs involvement framework and established definitions of these terms in MDB safeguard policies. OHCHR recommends that standard definitions of direct, indirect, transboundary and cumulative risks and impacts be incorporated within Section 3.2.*

¹³ See e.g. World Bank ESF, paras. 15-61; IFC Sustainability Policy, paras. 19-45.

B. MITIGATION HIERARCHY

We note that the Goals of the draft safeguards (section 1.2, goal (b)) include “reducing, minimising and ideally preventing adverse impacts.” The mitigation hierarchy is defined in Section 1.3 as: “1) *avoid/prevent* adverse impacts, 2) *minimise/reduce* adverse impacts, 3) *mitigate* adverse impacts, and 4) as an exception, *offset* adverse impacts.” Other provisions (e.g. Section 2) call for efforts to “prevent, minimise or mitigate adverse impacts” (e.g. Sections 2, 4.2(b)(ii), 6 and 7, although the terminology within Section 7 is not consistent). We note that the proposed mitigation hierarchy is similar, though not identical, to mitigation hierarchies of most MDBs,¹⁴ but does not explicitly include “remedy.”

We also note that the IKI safeguards make no distinction between “offsetting” when it comes to human rights risks and impacts, as distinct from environmental impacts (from where the off-setting concept term originated and may be more appropriate). This important distinction is reflected in the 4th revision of the Equator Principles and the human rights mitigation hierarchy in the 2018 EIB social and environmental standards, but not the IFC PSs. The Preamble of the Equator Principles states: “Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimised and mitigated, and where residual impacts remain, clients should provide *remedy* for human rights impacts or offset environmental impacts as appropriate.” [emphasis added]

The World Bank’s Guidance Note for borrowers on implementing ESS 1 specifically includes the responsibility to remedy,¹⁵ as do the policies of the EBRD’s Independent Project Accountability Mechanism and the updated (June 2021) Rules and Procedures of the AfDB’s Independent Recourse Mechanism.¹⁶ Under international human rights law, which the IKI safeguards have committed to respect, “remedy” is a holistic concept encompassing not only compensation (a standard component of DFI mitigation hierarchies), but also restitution, rehabilitation, satisfaction (including public accounting, aimed at restoring the dignity of those who have suffered human rights violations), and guarantees of non-repetition (including policy changes to prevent recurrence). OHCHR’s *Remedy in Development Finance: Guidance and Practice* (forthcoming 2022) elaborates more extensively on this theme.

¹⁴ Safeguard policies of the World Bank and EBRD include “compensate”, in addition to or alternatively to off-setting. IDB ESPF 2020, para. 3.19, uses “avoid, minimize, mitigate, or compensate”, without an off-setting option. The AfDB’s mitigation hierarchy is similar but includes “as a last resort compensate for and offset.”

¹⁵ World Bank, “Guidance note for borrowers – Environmental and Social Framework for IPF operations – ESS1”, para. GN27.1(c).

¹⁶ AfDB Independent Recourse Mechanism, “Operating Rules and Procedures”, para. 69 (b); and EBRD, “Project Accountability Policy” (London, 2019), para. 2.7 (a). Where the AfDB-IRM finds non-compliance, the management action plan must include “clear time-bound actions for returning the Bank to compliance and achieving remedy for affected populations.”



OHCHR recommends that:

- *Off-setting should explicitly be excluded for social (including human rights) impacts.*
- *A consistent formulation of the mitigation hierarchy should be used throughout the safeguards and the responsibility to remedy adverse impacts should explicitly be reflected, in line with DFI best practice and Section 8 of the draft safeguards (the aim of helping projects to “establish effective remedies”). In OHCHR’s view an appropriate formulation would be “avoid/prevent, minimize/reduce, mitigate and/or remedy.”*

C. SUPPLY CHAIN RISK MANAGEMENT

The draft Safeguards (Section 1.1, at p.7) note the obligations of states to protect against human rights abuses along its supply chains. However, in OHCHR’s view, in order to more accurately reflect the UNGPs’ guidance, the draft Safeguards should spell out more clearly and comprehensively the responsibilities of implementing organizations’ and BMU/ZUG in this regard. In this regard we note EIB’s adaptation of the UNGP’s involvement framework in articulating expectations for supply chain risk management on occupational, health and safety issues.¹⁷ This seems to be an area particularly ripe for BMU’s leadership, in view of Germany’s supply chain due diligence law and anticipated EU legislation and the weaknesses in many DFIs’ safeguard policies. A more proactive approach is essential if issues such as forced labour, often buried deep in supply chains, are to be more consistently identified and tackled.

In approaching this issue, we note that DFIs often limit the scope of the client’s E&S responsibilities to “primary” supply chains, to the extent that the client can reasonably exercise control.¹⁸ We note that the term “primary supplier” is defined narrowly in other DFIs’ safeguards, and that the boundaries are

¹⁷ EIB, Environmental and Social Standards (2018), ESS 9, para. 15: “Whilst recognising the difficult challenges associated with enforcing these standards along supply chains, the EIB nonetheless expects promoters to demonstrate satisfactory practices in this respect by appropriate due diligence in the selection of the contractors and suppliers.” Available at https://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf.

¹⁸ See e.g. IFC, Guidance Note 1, Assessment and Management of Environmental and Social Risks and Impacts (Jan. 1, 2012), para. 10: “Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with primary supply chains, as defined in Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30).” To similar effect see World Bank, Guidance Note for Borrowers (ESS 1) (June 2018), para. 34.

not always clear and significant risks may inadvertently be excluded.¹⁹ There is also a tendency in some DFIs to confuse the question of *responsibility* (for risks and impacts) with *leverage* (to address impacts).²⁰

In OHCHR's view, consistent with the UNGPs, the scope of supply chain due diligence should cover all those impacts with which BMU/ZUG is involved (including those directly linked to their operations, products or services by their business relationships),²¹ whether or not these relate to primary suppliers. The extent of leverage that BMU/ZUG and implementing organizations may have over other entities may affect the extent to which they can effect change in those business relationships causing human rights harms, but it does not affect the scope of harms that BMU/ZUG and implementing organizations should be trying to address. Where it is necessary to prioritize actions to address harms, this should be determined by the severity (scale, scope and irremediability)²² of risk, not the extent of leverage or control.

Finally, under some DFI safeguards, we note that where forced or child labour impacts are in a client's supply chain and where remedy is not possible, clients can be required to shift their supply chains to suppliers that can demonstrate that they comply with safeguard policy requirements²³ or to eliminate such practices within a reasonable time frame according to Good Industry Practice.²⁴ OHCHR suggests that these important requirements be included in the IKI safeguards in respect of all serious adverse human rights impacts (not limited to forced or child labour issues).

¹⁹ See e.g. World Bank, *Id.*, fn 34: "Primary suppliers are those suppliers who, on an ongoing basis, provide directly to the project goods or materials essential for the core functions of the project. Core functions of a project constitute those production and/or service processes essential for a specific project activity without which the project cannot continue." Hence, for example, if there was a supply chain disruption in relation to a given project, the client might disavow responsibility for E&S risks in relation to the (temporary) supplier, because the supply relationship is not "ongoing." The terms "directly," "essential" and "core functions" are also open to interpretation.

²⁰ The terms "project influence" and project "leverage" in Section 9, page 10, may benefit from further clarification in OHCHR's view. For discussions on the ways in which BMU/ZUG and contracting entities may build and exercise leverage on E&S issues in the finance value chain (including but not limited to contractual leverage), see the report of the Dutch Banking Sector Agreement working group on enabling remediation (2019), available at <https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf>, and OHCHR, *Remedy in Development Finance* (forthcoming 2022), Chap. III.

²¹ UNGP, Principle 17. The commentary to GP 17 recognises that where business enterprises have large numbers of entities in their value chains it may not be possible to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence. OHCHR, *Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), p.42, available at <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>.

²² UNGPs, Principle 24, available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

²³ IFC PS 2, para. 29.

²⁴ EBRD PR 2, para. 26.

OHCHR recommends that:

- *BMU/ZUG clarify their approaches to addressing supply chain risks, and in so doing, utilize the UNGPs involvement framework and avoid any categorical distinctions between “primary” and non-primary suppliers or tiers in the supply chain.*
- *BMU/ZUG and implementing organizations should address all potential human rights impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships.*
- *The IKI safeguards should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by BMU/ZUG and implementing organizations to address human rights risks in which they are involved.*
- *When it’s necessary to prioritize actions, BMU/ZUG and implementing organizations should start with the most severe risks and impacts, taking into account their scale, scope and irremediability.*
- *Where serious human rights impacts are in a client’s supply chain and where remedy is not possible, clients should be required to shift their supply chains to suppliers that can demonstrate that they comply with the IKI safeguard requirements or to eliminate such practices within a reasonable time frame.*



D. RESPONSIBLE EXIT

We note that there is inconsistent practice and rarely very clear policy among DFIs on how to address E&S issues post-exit. We note that the subject of “responsible exit” has recently been under discussion in certain DFIs including FMO and IFC. But in general terms there seems to have been an imbalance between the efforts expended by DFIs on up-front compliance and development impact when entering projects, compared with exit.²⁵ Data on this issue is scarce: most recent DFI Safeguard evaluations have neglected E&S issues at closure, and for the most part, exits occur completely out of the public eye.

OHCHR notes that BMU may be ahead of the curve in this context, in some respects. Section 6.5 of the draft IKI safeguards requires continuing safeguard accountability after the project has ended, and client contribution to mitigation post-project completion as needed. This of course raises the question of what mechanisms BMU/ZUG may have to ensure compliance, and how leverage may consciously and systematically be built at the beginning of client relationships.

In OHCHR’s view, the IKI safeguards should map the various means by which BMU can build and exercise leverage in practice, 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 lenders 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 the prospect of repeat loans), among others,²⁶ along with capacity support for the client where needed.

We also welcome the fact that Section 7.2 explicitly includes human rights violations among the conditions warranting project termination, and that project termination is considered a last resort. In line with the UNGPs, decisions to terminate a project should also take into account a rigorous assessment of potential human rights impacts on project-affected people. However, Section 7.2 does not require consideration of the potential impacts of BMU/ZUG’s and/or implementing organizations’ own exit from projects, or offer much guidance on how to exit responsibly, whether the exit is routine (planned) or unplanned. OHCHR’s *Remedy in Development Finance: Guidance and Practice* (2022), chapter V, offers detailed suggestions in this regard.

²⁵ A recent World Bank evaluation noted shortcomings in how Safeguard non-compliance issues were addressed at project closure. World Bank Independent Evaluation Department (2018a) “Results and Performance of the World Bank Group 2018”, p.170. Available at <https://ieg.worldbank.org/sites/default/files/Data/Evaluation/files/rap2018-appendixes.pdf#page=174>.

²⁶ OHCHR, *Remedy in Development Finance* (forthcoming 2022), Sections III and IV.

OHCHR recommends that:

- *Section 6.5 of the IKI safeguards should include a brief summary of the various means by which BMU/ZUG can build and exercise leverage post-closure in practice (through legal agreements and otherwise), ideally through a thoroughly consulted action plan that covers remedial measures as necessary, backed by explicit remediation requirements in safeguards and legal agreements.*
- *Beyond the conditions for project termination in Section 7.2, the IKI safeguards should outline the main elements of a “responsible exit framework” applicable across the full project cycle, including:*
 - *A clear requirement not to exit 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;*
 - *A commitment not to leave behind unremediated harms, including those arising from the exit;*
 - *A commitment to ensure that project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
 - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
 - *A commitment to seek a responsible replacement(s) for BMU/ZUG, or the implementing organisation, as the case may be, on exit.*
- *The IKI safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.*
- *The IKI safeguards should require public disclosure of termination provisions of loan agreements in order to help understand whether they require any assessment of unremediated environmental and social impacts as a condition of exit.*



E. FINANCIAL INTERMEDIARY OPERATIONS

MDB experience shows the challenging nature of FI operations from a risk management perspective,²⁷ requiring rigorous due diligence and carefully articulated responsibilities for impacts and remediation in the finance value chain. As indicated above, the OECD Guidelines and UNGPs call for consideration of human rights impacts in supply chains and other business relationships.

Subject to the comments made earlier regarding the taxonomy of responsibility for addressing impacts, OHCHR welcomes the clear requirement in Section 4.2 that the IKI (and IFC) safeguards apply to FI operations and sub-projects, and the clear, time-bound reporting requirements pertaining to portfolios in categories A or B (Section 4.2, para (c)). In line with earlier recommendations, however we'd recommend that the mitigation hierarchy in para. (b)(ii) (p.16) be amended to *“avoid/prevent, minimize/reduce, mitigate and/or remedy”*, and that sub-project due diligence (para. (b)(iii), p.16) take into account *international* as well as national laws on environmental and social issues.

On the latter point (sources of relevant law), we note that the IFC's Interpretation Note for FIs (para IN 25) has an open-ended list of potentially relevant international standards relevant to higher-risk clients.²⁸ IFC PS 1 (Guidance Note 1, para GN 10) has a different formulation, requiring compliance with national law *“including national laws implementing host country obligations under international law”*. However, the latter formulation doesn't seem to take into account situations where international law is a direct part of the domestic constitutional order (without need for implementing legislation), nor the increasing gulf between the levels of human rights protection afforded by national and international standards, and in any case would seem to fall short of BMU's clear commitment to respect international human rights standards. For clarity, as well as rigour, OHCHR recommends that FIs should comply with the IKI safeguards and relevant national and international laws, and due diligence should be informed by all applicable bodies of law, whichever sets the highest standard.

We also note that there is no discussion of remedy mechanisms in the context of FI operations or sub-projects. In this regard, the IFC PSs require only that FIs establish an *“External Communications Mechanism”* unless the FI's own operations generate adverse E&S impacts.²⁹ By contrast, we note that the Green Climate Fund requires each *“accredited entity”* (FI) to have an institution-level GRM that complies with the UNGPs.³⁰

²⁷ See e.g. CAO Audit of a Sample of IFC Investments October 10, 2012 of a Sample of IFC Investments in Third-Party Financial Intermediaries Report No. I-R9-Y10-F135 (10 October 2012) at http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf, and ADB IED, Corporate Evaluation Study: Safeguards Operational Overview (Oct. 2014), pp.52-64, at <https://www.adb.org/sites/default/files/evaluation-document/89401/files/ces-safeguards.pdf>, and the strengthened safeguards introduced to FI operations in IFC and EBRD, among others.

²⁸ See <https://www.ifc.org/wps/wcm/connect/a6de7f69-89c8-4d4a-8cac-1a24ee0df1a3/FI%2BInterpretation%2BNote.pdf?MOD=AJPERES&CVID=n27ywSg>.

²⁹ IFC, Interpretation Note on Financial Intermediaries (Jan. 1. 2012, updated Nov. 2018), paras. IN53, IN 54.

³⁰ Green Climate Fund, Environmental and Social Policy, para. 12(c).

OHCHR recommends that:

- *The mitigation hierarchy in para. (b)(ii) (p.16) be amended to “avoid/prevent, minimize/reduce, mitigate and/or remedy”, and that sub-project due diligence (para. (b)(iii), p.16) take into account international as well as national laws on environmental and social issues, whichever body of law sets the highest standard.*
- *The objective of “remedy” should be included explicitly in the description and functions of grievance mechanisms in the context of FI operations.*
- *Grievance mechanisms should be assessed in accordance with the criteria in UNGP 31.³¹*
- *All necessary steps should be taken to ensure that the existence of FIs’ and sub-project-level GRMs and IKI’s independent complaint mechanism (ICM, Section 8) are publicly known.*
- *Implementing organizations should be required to review grievance mechanisms in their supply chains.*
- *Implementing organizations’ GRMs should be able to receive complaints from all those adversely impacted including through those organizations’ business relationships.*

F. CONCLUDING REMARKS

We thank BMU again for the opportunity to contribute to this important consultation process. We hope that our recommendations will help BMU set a new international benchmark for rigorous safeguard policies which clearly and meaningfully integrate the UNGPs. We remain available to answer questions or provide further input as needed.

³¹ OHCHR, *Remedy in Development Finance* (forthcoming 2022, Annex II).