

Office of the United Nations High Commissioner for Human Rights

Comments on the Draft Environmental and Social Performance Framework
(ESPF) of the Inter-American Development Bank (IDB)

13 April 2020

Contents

Introduction	2
A. Aligning human rights due diligence with international standards.....	3
B. Leveling up: Applying the strongest applicable legal standards to social risk management.....	4
C. Using versus strengthening borrower frameworks and/or country safeguard systems.....	6
D. Up-front compliance v. downstream risk management.....	7
E. Stakeholder engagement and reprisals	8
F. A more proactive and consistent approach to remedy	8
G. Comments on specific ESPS.....	10
ESPS 7 – Indigenous peoples.....	10
ESPS 9 - Gender equality.....	11
Summary of recommendations:	14
Annex I	17
Sources of human rights risk information.....	17
Annex II	20
Benefits and costs of integrating human rights risk information	20

Introduction

OHCHR welcomes the opportunity to comment on the Inter-American Development Bank's (IDB's) draft Environmental and Social Policy Framework (ESPF). We recognize that the draft aims to set a high standard in Multilateral Development Banks' (MDBs) sustainability frameworks.

We welcome the numerous positive features of the draft ESPF including its explicit and strong commitment to respect human rights and ensure that its borrowers respect human rights (para. 1.3(a) and 1.6), its commitments to gender equality and non-discrimination (para. 1.3(b)-(d)), the inclusion of self-standing Environmental and Social Performance Standards (ESPSs) on gender equality and stakeholder engagement, its "no dilution" and "functional equivalence" tests for borrowers' frameworks and co-financing arrangements, among others.

Consistent with its explicit commitment to respect human rights, we also welcome the fact that the draft ESPF and ESPSs explicitly reference international human rights treaties relevant to risk assessment and management, including in relation to labor and working conditions (ESPS 2, nn 45-46), community health and safety (ESPS 4, fn 78), indigenous peoples (nn 7 and 10), and gender equality (ESPS 9, fn 145), and in helping to delineate the boundaries of the IDB's own due diligence (fn 3). Critically, we note and welcome the clear commitment "not to finance projects or project components that would contravene... country obligations under relevant international treaties, conventions and agreements" (para. 1.6). Given the deteriorating indicators and widening gaps between international and national laws governing many of the social and environmental issues within the scope of the ESPSs, and given the dramatically increased threats to human rights due to the Covid-19 pandemic, a clear and robust policy commitment of this kind back by detailed implementation guidelines and robust implementation capacities is indispensable.

OHCHR's comments in this memo are drawn from our extensive policy dialogues with IDB and IDB Invest in recent months, as well as our technical cooperation with the IDBG, governments, businesses and communities in addressing human rights implications of specific investment projects at country level. We have observed first-hand the increasing threats faced by environmental and human rights defenders in the context of investment projects in the region, and are committed to working with all partners to minimize such risks and facilitate redress. Our comments are offered in the spirit of continuing constructive engagement and as a platform for strengthened operational collaboration in the future.

Our comments address the following issues: (A) aligning the IDB's human rights due diligence with international standards; (B) the importance of "leveling up", and consistently applying the strongest applicable source of law in connection with the borrower's social risk assessment and management; (C) the need to strike a judicious balance between

strengthening, versus using, borrower frameworks and/or country safeguards systems; (D) the need to balance downstream (“adaptive”) risk management with continued, rigorous up-front requirements; (E) the need for a self-standing policy and procedures to deal with reprisals against project-affected individuals; (F) the need for a proactive and consistent approach to remediating adverse impacts; and (G) comments on specific ESPs.

A. Aligning human rights due diligence with international standards

As indicated above, in OHCHR’s view, the clarity of the IDB’s explicit commitment to respect human rights (paras. 1.3 and 1.6) is among the noteworthy features of the draft ESPF by comparison with the sustainability frameworks of most other MDBs. The main thrust of our comments in this memo is to help IDB operationalize this commitment.

In development practice generally to date, human rights issues and risk factors are often treated as marginal to social and environmental risk management, and are often thought of as extreme, or exceptional, rather than routine. This problem may partly be attributable to the fact that the IFC Performance Standards (PS 1, footnote 12), an influential model for DFIs and other financial institutions, call for human rights due diligence only in “limited high risk circumstances.” The latter reference is problematic and may have perverse effects, as it assumes that human rights due diligence comes after risk screening and may be implemented in a stand-alone fashion only in extreme circumstances, rather than be integrated routinely within existing risk management systems.¹ In order to promote more consistent engagement with human rights risk factors, OHCHR recommends that human rights due diligence (that makes more systematic use of available human rights risk information (see Annex I)) should be an explicit requirement in the ESPF as a necessary corollary of the ESPF’s requirement to respect human rights, and should not be limited to special or high risk circumstances. Human rights due diligence is the most appropriate way to operationalise the commitment to respect human rights. The potential benefits, compared with costs, of accessing and integrating human rights information in investment project due diligence are discussed in Annex II.

Moreover, we recommend that specific human rights due diligence procedures be developed in line with the UN Guiding Principles on Business and Human Rights (UNGPs).² The UNGPs reflect existing human rights law pertaining to State regulation of corporate activity, and are reflected in the IDB’s (excellent) Social Impact Assessment Guidelines (2018),³ the Guidance

¹ For a cautionary note along these lines see Rachel Davis, “Exploring the relationship between human rights due diligence and broader environmental and social due diligence” (2018) at <https://norad.no/en/front/evaluation/news/2018/exploring-the-relationship-between-human-rights-due-diligence-and-broader-environmental-and-social-due-diligence/>.

² The UNGPs are available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. For an illustrative analysis of DFI due diligence policies benchmarked against the UNGPs see OHCHR, Benchmarking Study of DFI Safeguards and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights (draft, Sept. 2019), at https://www.ohchr.org/Documents/Issues/Development/DFI/OHCHR_Benchmarking%20Study_HRDD.pdf.

³ IDB, Social Impact Assessment: Integrating Social Issues in Development Projects (2018), fn 63, 69, 146 and 149 and accompanying text (focusing on the “cause, contribute, direct linkage” concept in particular).

Note to IFC's Performance Standard 1, OECD's Guidelines for MNEs and Responsible Business Conduct Due Diligence Guidance (2018),⁴ and sustainability frameworks of a growing number of bilateral DFIs and other financial institutions. The UN Guiding Principles provide authoritative and practical guidance that could be further integrated into the ESPF on such matters as: (a) risk assessment, prioritizing severity (including *irremediability*) over likelihood (UNGP 24), which may usefully be integrated within draft ESPF para. 3.15 (impact classification); and (b) unpacking the concept of *leverage* and exploring avenues through which leverage can be built and exercised (UNGP 19), which may usefully be integrated within draft ESPS 1, paras. 10 and 14, more clearly requiring the borrower to explore and use all potential leverage including but not limited to primary suppliers.

OHCHR recommends that:

- *Human rights due diligence should be an explicit requirement in the ESPF, and should not be limited to special or high risk circumstances. Specific due diligence procedures should be elaborated in line with the UN Guiding Principles on Business and Human Rights (UNGPs).*
- *In line with the UNGPs: (i) Draft ESPF para. 3.15 (impact classification) should be amended to prioritise severe human rights impacts, making the potential for such impacts a consideration for categorizing projects as Category A; (ii) draft ESPF paras. 3.16 should include a specific reference to where impacts arise through the IDB's and/or client's business relationships (ie. "direct linkage" situations as defined in paras 13(b) and 17(a) of the UNGPs) and to human rights as an additional area of risk that may be relevant to outcomes; and (iii) ESPS 1, paras. 10 and 14 should clarify that the borrower should explore and use all potential sources of leverage including and beyond the level of primary suppliers, even where it does not have control.*

B. Leveling up: Applying the strongest applicable legal standards to social risk management

We note that the draft ESPF invokes international human rights instruments and standards in a range of contexts, as mentioned above. However the practical implications of these references, and the intended relationship between international and (inconsistent) national law, are not always clear. For example, while para 1.6 appropriately calls for compliance with *all* relevant standards (ESPF, national laws, *and* relevant international treaty obligations), para. 6 of the draft ESPF (on ES Frameworks) calls only for compliance with national laws "including those laws implementing country obligations under international law." A similar problem is evident in draft ESPF, para. 1.3.d, footnote 10, and draft ESPS 7, para. 2, fn 124. A requirement for compliance with "national laws implementing country obligations under

⁴ OECD Due Diligence Guidance for Responsible Business Conduct (May 2018), available at <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

international law” would appear to systematically curtail the relevance of international law by reference to national law. This may undermine prudential risk management objectives, as international and regional human rights standards will often (but not always) be higher than corresponding national laws and regulations. It may also generate confusion in countries where international law has independent and direct legal effect, without the need for implementing legislation. Information from UN, regional and national human rights bodies can illuminate how national laws are being implemented in practice. These bodies of law can operate in parallel: in some countries (including Mexico, Honduras and Colombia) international treaties have direct effect in domestic law whereas in other constitutional systems implementing legislation is required. It is not the IDB’s role to determine when a human rights violation has actually occurred (which can be difficult even for specialized human rights tribunals) or to resolve conflicts between various sources of law applicable to human rights issues. Risk management on social issues, as any other issue, simply requires best professional judgement, taking into account all relevant information sources (including human rights information as outlined in Annex I). In this regard, in OHCHR’s view, social and environmental assessments, due diligence, and assessments of borrower frameworks/country systems should be informed by *all applicable bodies of law, whichever sets the highest standard*.

The problem of inconsistent treatment of international law arises in connection with specific ESPs as well. For example, draft ESPS 2 (para. 17) categorically privileges national legal standards governing discrimination in employment, which are often much weaker than ILO and UN treaty standards. A similar problem seems to be evident in draft ESPS 9, para. 9, which states that ESPS 9 will be applied “where national law is silent on gender equality”, and that where national law is inconsistent with ESPS 9 the project should be carried out “consistent with the intent of ESP 9” and “without contravening local and national laws.” This formulation is problematic given that national laws are never “silent” on gender equality; even outwardly neutral laws can discriminate indirectly. Moreover, regrettably, there is often a gulf between national laws and CEDAW standards on personal integrity rights, property rights, sexual violence, sexual and reproductive health and rights, LGBTI discrimination and other issues relevant to project social risk assessment.

OHCHR recommends that:

- *The Bank’s due diligence and the client’s social and environmental risk assessment and management should be informed and guided by international human rights law and information from UN human rights bodies (Annex I). Where international law and national law appear to be inconsistent, the highest standard should apply.*
- *Draft ESPF para. 1.3.d, fn 10, draft ESPF para. 6, and draft ESPS 7, para. 2, fn 124, should be clarified to require compliance with “national law and international law relevant to the project”.*

- *ESPS 2, para. 17, and ESPS 9, para. 9, should be amended to make clear that international legal standards should systematically be applied and should prevail in the event of any apparent inconsistencies with national law.*
- *IDB should consider inserting the phrase “track record” (along with the criteria of “capacity” and “commitment”) within the draft ESPF paras. 3.15 (impact classification), 3.17 (due diligence), 3.18 (iii), 4.2(i) (FI lending), 5.1, fn 17, and 5(iv) (ESMS’s). This suggestion is intended to clarify and convey the point that effective risk management and use of borrower frameworks calls for consideration of the borrower’s actual track record in managing risk, as well as its capacity and commitment. UN human rights mechanisms can help to shed light on commitment, capacity and track record.*
- *IDB should consider inserting, on page 67, para. 31, sub-para. 2, the phrase in italics: “(ii) including the entitlements of displaced persons provided under applicable national laws and regulations and applicable international law”... This suggestion is intended to clarify and convey a consistent position within the ESPF and ESPSs on the relevance of international law.*

C. Using versus strengthening borrower frameworks and/or country safeguard systems

OHCHR strongly supports the objective of progressively strengthening country social and environmental systems as reflected in paras 3.13 and 3.14 of the draft Policy, and IDB’s proposed “functional equivalence” test concerning its potential use of the latter systems (paras 5.1-5.3). A commitment to strengthening, rather than necessarily using, country systems seems appropriate in view of the deteriorating indicators on many of the social issues reflected in the ESPS’s, which are often caused by discrimination or lack of political will rather than capacity constraints. The Covid-19 pandemic may increase these risks dramatically. Human rights information (Annex I) can help the Bank to assess the extent to which municipal laws and regulations are in line with corresponding international laws in force in the country, as well as national authorities’ implementation practice, track record, capacities and commitment.

OHCHR recommends that:

- *International human rights law and information from UN human rights bodies (Annex I) should guide IDB’s assessments of the robustness of country risk management systems (“functional equivalence” assessments).*

D. Up-front compliance v. downstream risk management.

OHCHR recognizes the need for strengthened, adaptable risk management throughout the project cycle, and that due diligence is not a one-time event. By the same token, we note the positive evidence in other MDBs of rigorous up-front risk and compliance assessments, particularly for high-risk projects.⁵ Project-level case studies carried out by OHCHR in recent years illustrate the challenges of open-ended compliance, or the flexibility of DFIs to assess, determine, and disclose relevant information about or enforce safeguard compliance over an extended period of time. Yet, we note the recent tendency among MDBs (public and private sector financing institutions) to shift from *ex ante* compliance to more aspirational environmental and social action plans and more flexible downstream “adaptive risk management.” The OVE has reported that an increasingly large share of IDBG lending is through framework instruments, where the specific location or design of the supported investments are not known at the time of approval.⁶ We note OVE’s recommendation that IDB safeguards should provide greater flexibility to balance certain pre-approval safeguard compliance requirements with measures for achieving compliance through adaptive risk management during project implementation. However adaptive risk management and the implementation of (aspirational) environmental and social action plans place a heavy premium on supervision and reporting, and can raise potentially difficult questions about how a Bank’s leverage and incentives to encourage safeguard policy compliance change throughout project implementation, particularly where capacities, political will or accountability are lacking on the client’s side. Unlike the IFC Sustainability Framework, the draft ESPF requires only that the client meet the ESPSs “within a manner and timeframe acceptable to the Bank”, rather a more objective, rigorous and auditable standard, such as “reasonable manner and timeframe.”

OHCHR recommends that:

- *IDB should ensure that: (i) necessary investments in adaptive risk management do not displace priority for ensuring ex ante compliance with the ESPS’s, particularly for higher risk projects; (ii) where ex ante compliance is delayed for lower risk projects, appropriate resources and scrutiny should be applied to the development and implementation of appropriately detailed environmental and social action plans; and that (iii) transactions are appropriately structured to provide legal tools to require implementation at the appropriate time. We’d also recommend that the phrase “reasonable manner and timeframe” be used instead of “manner and timeframe acceptable to the Bank,” in paras. 1.5 and 3.5 of the draft ESPF.*

⁵ World Bank, Independent Evaluation Group, Safeguards and Sustainability Policies in a Changing World (2011), Chapter 4, pp.65-82, available at

<http://documents.worldbank.org/curated/en/742801468177840668/pdf/638960PUB0Safe00Box0361531B0PUBLIC0.pdf>.

⁶ IDB OVE Environmental and Social Safeguards Evaluation (2018) Report RE-521-1, CII/RE-36-1, pgs. 7 & 16-17, which shows that since 2008, about 40% of all IDB lending has been through FIs, policy loans or framework loans and over one-half of all category A and B investment lending operations approved over the last seven years and reviewed by OVE have used a framework approach, all of which present challenges in terms of safeguards policy application.

E. Stakeholder engagement and reprisals

OHCHR's work with project-affected communities in the LAC region reveals and reflects the increasing risks faced by indigenous populations, women and girls, environmental and human rights defender and others, including threats and risks of reprisals against individuals who express critical views or bring their concerns to MDBs. We note that one third of complaints brought to the IFC's Compliance Advisor Ombudsman in 2019 were associated with allegations of intimidation or reprisals. We warmly welcome the inclusion by the IDB of a dedicated standard (ESPS 10) on stakeholder engagement, including a requirement that participation be free of intimidation or coercion. Consistent with emerging practice in other MDBs and DFIs (including IDB Invest, IFC, EBRD and most recently the World Bank) OHCHR would strongly encourage IDB to publish a "zero tolerance" statement and operational and operational procedures to clarify their own responsibilities and those of their clients to prevent and respond to threats and reprisals against environmental and human rights defenders, and suggests that the IAMs Reprisals Toolkit (2019)⁷ may offer a useful resource in this regard.

OHCHR recommends that:

- *IDB should publish an explicit "zero tolerance" statement and operational procedures to guide the Bank in preventing and responding to reprisals against project-affected people, taking into account experience in IFC, IDB Invest, EBRD, the World Bank and other DFIs.*

F. A more proactive and consistent approach to remedy

In OHCHR's view, the ESPF revision presents the IDBG with a unique opportunity to set a new benchmark among MDBs on how to approach the question of "remedy" for adverse impacts. The increased vulnerabilities, inequalities, fragility and human rights violations accompanying the Covid-19 pandemic bring the question of remedy to center stage. The UN/World Bank "Pathways to Peace" report recognized that unaddressed grievances can fuel social conflict, undermine development outcomes, and deepen state fragility.⁸ A recent IDB study analysing 40 years of infrastructure projects in Latin America concluded that despite a range of warning signs, and despite decades of experience, a lack of adequate attention to the question of remedy resulted in significant costs for communities, clients and DFIs.⁹ Communities and workers may perceive risks around a project to be even higher than they might otherwise be if they feel they have no control over how their labour or resources will be used and have no

⁷ See MICI, Guide for IAMs on Measures to Address the Risk of Reprisals in Complaints Management (2019), [http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/\\$file/guide_for_iams_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf](http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/$file/guide_for_iams_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf).

⁸ World Bank and United Nations, Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (2018), especially at pp.125-130.

⁹ Graham Watkins et al, Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean (Sept 2017), available at <https://publications.iadb.org/en/lessons-four-decades-infrastructure-project-related-conflicts-latin-america-and-caribbean>.

credible access to recourse.¹⁰ From this perspective, the mere fact of signaling a serious approach to remedy can reduce risks for a project. Yet, these lessons are not consistently applied in practice, and the *preventive* function of remedial mechanisms is not often adequately appreciated.

While most DFIs have well-established requirements for clients to put in place operational level grievance mechanisms, these are not necessarily designed or required to address and remedy human rights harms. Very few DFI safeguard policies (even the most recent) specifically reflect the UNGPs' "effectiveness criteria" for grievance mechanisms in their safeguard requirements, including the criterion of involving stakeholders in the design of the mechanism which is fundamental to building trust.¹¹ Remedying harms associated with a DFI-funded project may require a range of different mechanisms and avenues – within the project and within the country (via judicial and non-judicial mechanisms) – but this seems to remain underexplored in DFI guidance to clients.

Current-generation MDB operational policies (including IFC PS, World Bank ESS 10, EBRD ESS 10) contain guidance on grievance redress, however requirements are generally clearer and more detailed in the context of resettlement than for other kinds of adverse impacts. Even in the case of forced resettlement, violations are often permitted where redress is not considered to be "technically or financially feasible." Yet, under international law, there is no such thing as a "human rights off-set."¹² No DFI safeguard policy yet recognises, explicitly, that there should be an effective remedy for all adverse human rights impacts associated with a project, irrespective of whether it is covered by safeguard policies. DFIs are placing increasing reliance upon project level grievance redress mechanisms (GRMs), however available evaluations of project-level GRMs are mixed at best¹³ and the wider grievance redress ecosystem at country level is not often adequately analysed.

Remedy can take many forms and can serve a valuable preventive (as well as corrective) function. Remedial mechanisms could include the establishment of a fund through which the IDB could, in appropriate circumstances and proportionate measure, contribute to remedy where projects its funds have caused or contributed to harms. The UNGPs and the example

¹⁰ Kemp, D, Warden, S., Owen, J., "Differentiated social risk: Rebound dynamics and sustainability performance in mining," *Resources Policy* 50 (2016) 19-26.

¹¹ The "effectiveness criteria" set out in UNGP 31 identify characteristics of such a mechanism that help make it effective; each is accompanied by a longer description: (i) legitimate; (ii) accessible; (iii) predictable; (iv) equitable; (v) transparent; (vi) rights-compatible; (vii) a source of continuous learning; and (viii) based on engagement and dialogue. To these could also be added a specific criterion on ensuring no retaliation.

¹² This is explicitly recognized in the EIB Environmental and Social Standards (2019), Glossary, "Mitigation Hierachy (Human Rights),"

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKewiSijq3NjoAhVS26QKHWTWDH0QFjAEegQIBBAB&url=https%3A%2F%2Fwww.eib.org%2Fattachments%2Fstrategies%2Fenvironmental_and_social_practices_handbook_en.pdf&usg=AOvVaw3AG-h0zS5yvMNUt5VP_3eX.

¹³ See e.g. World Bank, *Global Review of Grievance Redress Mechanisms in World Bank Projects*, Guidance Note 90388 (2013), pp.15-16, available at

<https://openknowledge.worldbank.org/bitstream/handle/10986/20117/903880WP0Box380edressMechanismsinWB.pdf?sequence=1&isAllowed=y>.

of the Dutch Banking Sector Agreement's recent paper on enabling remediation¹⁴ could help frame the Bank's reflections on how its own leverage may be exercised to enable remedy in particular contexts. Given MDBs' explicit sustainable development mandates, they have wider responsibilities but also wider opportunities and tools than those of commercial banks to address these issues. In OHCHR's view, a more proactive and consistent approach to the question of remedy, integrated within contractual conditions and policy dialogues, can strengthen legitimacy, build trust with communities, and strengthen norms and expectations for the provision of remedy by the State and other responsible actors within and beyond the scope of a given project.

OHCHR recommends that:

- *IDB should implement a consistent, planned response to providing for and/or enabling remedy, within a larger "remedy eco-system" framework, predicated upon explicit recognition of the right to an effective remedy.*
- *Para. 3.20 of the draft ESPF should specify the Bank's right not only to exercise its own contractual remedies in the event of the client's non-compliance, but to (i) provide for or enable remedy to project-affected communities in connection with adverse impacts, (ii) provide technical advice to clients and affected communities on remedy, and (iii) recognize and address un-met grievances as sustainable development opportunities.*
- *Any decisions by the Bank to exercise its contractual remedies under para. 3.20 of the draft ESPF should take into account the potential human rights impacts of divestment on project-affected communities.*

G. Comments on specific ESPS

ESPS 7 – Indigenous peoples

OHCHR welcomes the recognition of the fact that indigenous peoples are often the most marginalized and vulnerable populations in connection with development projects in the LAC region, and that the first stated objective of draft ESPS 7 is to ensure that the development process fosters full respect for indigenous peoples' human rights. Footnote 124 states that in addition to complying with ESPS 7, the borrower must comply with "applicable national law, including laws implementing obligations under international law." As discussed earlier, this formulation is problematic given the relative weaknesses and gaps in national recognition and protection of indigenous peoples in many countries in the LAC region, and given the fact that international human rights law may have direct, independent legal effect in a number of countries in the LAC region without the need for implementing legislation.

The issue of Free, Prior and Informed Consent (FPIC) may require further clarification, in OHCHR's view, guided by the 2007 UN Declaration on the Rights of Indigenous Peoples

¹⁴ See <https://www.imvoconvenanten.nl/en/banking/news/recommendations-remediation>.

(UNDRIP) and the authoritative interpretation of the UN Expert Mechanism on Indigenous Peoples (EMRIP).¹⁵ There are several other respects in which draft ESPS 7 may be aligned more closely with applicable international legal principles, as follows:

OHCHR recommends that:

- *ESPS 7 should clarify that the ESPS should be interpreted consistently with borrowers' international legal obligations under relevant human rights instruments, and in light of the 2007 UN Declaration on the Rights of Indigenous Peoples. Where ESPS 7 and national law set different standards, the borrower should observe the higher standard.*
- *Para. 9 of ESPS 7 should be amended to make clear that FPIC (not only ICP) may be required in the circumstances described in paragraphs 14–18 of ESPS 7.*
- *Para.13 should be amended to clarify each constituent elements of a FPIC process: a) "free" (without intimidation or harassment); b) "prior" (commence at the earliest possible stage), and c) "informed" (objective, clear, accurate).*
- *The final sentence in para. 13 (on the lack of a unanimity requirement) should be deleted, given its potentially divisive impacts upon indigenous peoples. Instead, IDB is invited to consider including a requirement that "the pursuit of FPIC should be undertaken in accordance with indigenous peoples' own customary norms and traditional methods of decision-making, with their legitimate representatives, and should be culturally appropriate. Any conflict should be resolved within the community membership itself."*
- *ESPS 7 ("Circumstances requiring FPIC", pp.79-81) should be amended to specify that FPIC is required in the following situations: (a) relocation of indigenous peoples (art. 10 of the UNDRIP), (b) storage of hazardous wastes on indigenous peoples' lands (art. 29 of UNDRIP), (c) where extractives projects are undertaken within indigenous peoples' territory, and (d) in other instances where a measure or project is likely to have a substantial negative impact on indigenous peoples' lives, lands, territories or resources.¹⁶ We also recommend that the term "cultural heritage" be used in this context, rather than "critical cultural heritage."*
- *Para. 15 should be amended to reflect the requirement that alternative similar lands should be "equal in quality, size and legal status."*

ESPS 9 - Gender equality

OHCHR warmly welcomes the incorporation of a specific standard on gender equality, ESPS 9, unique among MDB safeguard policies. Gender equality is intrinsically important and a powerful development multiplier. OHCHR welcomes explicit recognition of the need to pay attention to the interaction of gender inequalities with other inequalities (ESPS 9, para 5), and the explicit recognition of the negative impact of discrimination based on sexual orientation

¹⁵ EMRIP report, UN Doc. A/HRC/39/62.

¹⁶ Human Rights Committee, *Länsman et al. v. Finland* (CCPR/C/52/D/511/1992) and *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006).

and gender identity throughout ESPS 9. The discrimination experienced by women in the private and public spheres drives vulnerability and undercuts women's participation and equal access to the benefits of development projects. Women and girls are often absent in designing, implementing and monitoring development projects, and when they are present, their voices do not always have same weight as those of men. Women are often first in line defending their homes from forced evictions and last in line for compensation. Women in rural areas or belonging to ethnic groups face multiple forms and layers of discrimination and marginalization, which are often exacerbated in the contexts of negative impacts of development or business projects. Gender-based violence (including from worker influx) remains a stubbornly common feature of development projects, and personal security risks limit the access by many women to transport, sanitation and other infrastructure and services. Displacement and dispossession may dramatically alter women's social and economic roles and expose women and girls to higher risks of human trafficking or other exploitative practices as well as gender-based violence.

These realities are implicitly acknowledged in the recent G20 Principles on Quality Infrastructure Investment (QII) which recommend that "the design, delivery and management of infrastructure should respect human rights", including women's rights.¹⁷ We note that draft ESPS 9, fn 145, goes further than any other MDB sustainability framework in spelling out a range of legally binding international conventions (including CEDAW and its 1999 Optional Protocol), declarations and other instruments relevant to gender equality and LGBTI rights, and contains guidance on a range of well recognized human rights concepts including intersectionality and the need for (temporary) special measures to redress structural inequalities. The objectives of draft ESPS 9 include meeting "the requirements of international commitments relating to gender equality" however, as previously noted, ESPS 9 and the draft ESPF as a whole could go further in clarifying that the highest applicable standard of protection should govern social and environmental assessments and should prevail over weaker standards to the extent of any inconsistency. Draft para. 9 seems to be problematic, in that it seems to ignore the pernicious impacts of indirect discrimination (national laws are rarely if ever "silent" on gender equality; outwardly neutral laws may still impact negatively against women and girls), and privileges national laws over other (potentially stronger) sources of law, such as regional and international standards.

We would also recommend that a gender analysis should be required as a default option for all projects, regardless of the initially perceived level of potential gender-based risks and impacts. Often projects that appear to have no gender implications will nevertheless impact differently on men and women. For example, a design of public transport or roads would have different impacts on women and men when they are designed in a gender-blind manner, as women use public transport in different modes from those of men, and women tend to be

¹⁷ G20 QII Principle 5.2 (June 2019), available at https://www.mof.go.jp/english/international_policy/convention/g20/annex6_1.pdf.

more pedestrians than drivers.¹⁸ Unless a gender analysis is carried out systematically at the outset, many potential gender-based impacts will be missed.

OHCHR recommends that:

- *Consistent with draft ESPS's stated objectives, para 9 of draft ESPS 9 should be deleted and replaced with the following sentence: "The ESPS is to be interpreted consistently with borrowers' international legal obligations under CEDAW and other relevant instruments. Where this ESPS and national law set different standards, the borrower should observe the higher standard."*
- *ESPS 9, fn 145, should be amended to reflect the legally binding nature of the CEDAW convention and its Optional Protocol: "Every one of the Bank's member countries in the region are legally bound by CEDAW, all but four have also ratified the Optional Protocol to CEDAW (1999),¹⁹ and all have backed the Universal Declaration on Human Rights (1948).." *[and the various other non-binding instruments referred to thereafter].**
- *In ESPS 9, para 10, the phrase "For operations with potential gender-based risks and impacts that may disproportionately affect people by their gender, the borrower will conduct a gender analysis (GA) as part of the environmental and social due diligence" should be replaced with "For all projects, the borrower will conduct a gender analysis (GA) as part of the environmental and social due diligence."*
- *In ESPS 9, para 18, a bullet point should be added to address specific obstacles faced by LGBTI and non-gender conforming persons in participation, such as social stigma and/or fear for criminalization.*

¹⁸ For a positive example in the region see International Transport Forum, Public transport system design: A gender perspective from Chile, at <https://www.itf-oecd.org/sites/default/files/docs/transport-connectivity-gender-perspective.pdf>.

¹⁹ For the list of States parties to these and other core human rights treaties of the UN see <https://indicators.ohchr.org/>.

Summary of recommendations

OHCHR respectfully recommends that:

1. Human rights due diligence should be an explicit requirement in the ESPF, and should not be limited to special or high risk circumstances. Specific due diligence procedures should be elaborated in line with the UN Guiding Principles on Business and Human Rights (UNGPs).
2. In line with the UNGPs: (i) Draft ESPF para. 3.15 (impact classification) should be amended to prioritise severe human rights impacts, making the potential for such impacts a consideration for categorizing projects as Category A; (ii) draft ESPF paras. 3.16 should include a specific reference to where impacts arise through the IDB's and/or client's business relationships (ie. "direct linkage" situations as defined in paras 13(b) and 17(a) of the UNGPs) and to human rights as an additional area of risk that may be relevant to outcomes; and (iii) ESPS 1, paras. 10 and 14 should clarify that the borrower should explore and use all potential sources of leverage including and beyond the level of primary suppliers, even where it does not have control.
3. The Bank's due diligence and the client's social and environmental risk assessment and management should be informed and guided by international human rights law and information from UN human rights bodies (Annex I). Where international law and national law appear to be inconsistent, the highest standard should apply.
4. Draft ESPF para. 1.3.d, fn 10, draft ESPF para. 6, and draft ESPS 7, para. 2, fn 124, should be clarified to require compliance with "national law *and international law relevant to the project*" [emphasis added].
5. ESPS 2, para. 17, and ESPS 9, para. 9, should be amended to make clear that international legal standards should systematically be applied and should prevail in the event of any apparent inconsistencies with national law.
6. IDB should consider inserting the phrase "track record" (along with the criteria of "capacity" and "commitment") within the draft ESPF paras. 3.15 (impact classification), 3.17 (due diligence), 3.18 (iii), 4.2(i) (FI lending), 5.1, fn 17, and 5(iv) (ESMS's). This suggestion is intended to clarify and convey the point that effective risk management and use of borrower frameworks calls for consideration of the borrower's actual track record in managing risk, as well as its capacity and commitment. UN human rights mechanisms can help to shed light on commitment, capacity and track record.
7. IDB should consider inserting, on page 67, para. 31, sub-para. 2, the phrase in italics: "(ii) including the entitlements of displaced persons provided under applicable national laws and regulations *and applicable international law*"... This suggestion is intended to clarify and convey and consistent position within the ESPF and ESPSs on the relevance of international law.

8. International human rights law and information from UN human rights bodies (Annex I) should guide IDB's assessments of the robustness of country risk management systems ("functional equivalence" assessments).
9. IDB should ensure that: (i) necessary investments in adaptive risk management do not displace priority for ensuring ex ante compliance with the ESPS's, particularly for higher risk projects; (ii) where ex ante compliance is delayed for lower risk projects, appropriate resources and scrutiny should be applied to the development and implementation of appropriately detailed environmental and social action plans; and that (iii) transactions are appropriately structured to provide legal tools to require implementation at the appropriate time. We'd also recommend that the phrase "reasonable manner and timeframe" be used instead of "manner and timeframe acceptable to the Bank," in paras. 1.5 and 3.5 of the draft ESPF.
10. IDB should publish an explicit "zero tolerance" statement and operational procedures to guide the Bank in preventing and responding to reprisals against project-affected people, taking into account experience in IFC, IDB Invest, EBRD, the World Bank and other DFIs.
11. IDB should implement a consistent, planned response to providing for and/or enabling remedy, within a larger "remedy eco-system" framework, predicated upon explicit recognition of the right to an effective remedy.
12. Para. 3.20 of the draft ESPF should specify the Bank's right not only to exercise its own contractual remedies in the event of the client's non-compliance, but to (i) provide for or enable remedy to project-affected communities in connection with adverse impacts, (ii) provide technical advice to clients and affected communities on remedy, and (iii) recognize and address un-met grievances as sustainable development opportunities.
13. Para 3.20 of the draft ESPF should specify that any decisions that the Bank may take to exercise its contractual remedies should take into account the potential human rights impacts of divestment on project-affected communities.
14. ESPS 7 should clarify that the ESPS should be interpreted consistently with borrowers' international legal obligations under relevant human rights instruments, and in light of the 2007 UN Declaration on the Rights of Indigenous Peoples. Where ESPS 7 and national law set different standards, the borrower should observe the higher standard.
15. Para. 9 of ESPS 7 should be amended to make clear that FPIC (not only ICP) may be required in the circumstances described in paragraphs 14–18 of ESPS 7.
16. Para.13 should be amended to clarify each constituent elements of a FPIC process: a) "free" (without intimidation or harassment); b) "prior" (commence at the earliest possible stage), and c) "informed" (objective, clear, accurate).
17. The final sentence in para. 13 (on the lack of a unanimity requirement) should be deleted, given its potential divisive impacts upon indigenous peoples. Instead, IDB is invited to consider including a requirement that "the pursuit of FPIC should be

undertaken in accordance with indigenous peoples' own customary norms and traditional methods of decision-making, with their legitimate representatives, and should be culturally appropriate. Any conflict should be resolved within the community membership itself."

18. ESPS 7 ("Circumstances requiring FPIC", pp.79-81) should be amended to specify that FPIC is required in the following situations: (a) relocation of indigenous peoples (art. 10 of the UNDRIP), (b) storage of hazardous wastes on indigenous peoples' lands (art. 29 of UNDRIP), (c) where extractives projects are undertaken within indigenous peoples' territory, and (d) in other instances where a measure or project is likely to have a substantial negative impact on indigenous peoples' lives, lands, territories or resources. We also recommend that the term "cultural heritage" be used in this context, rather than "critical cultural heritage."
19. Para. 15 should be amended to reflect the requirement that alternative similar lands should be "equal in quality, size and legal status."
20. Consistent with draft ESPS's stated objectives, para 9 of draft ESPS 9 should be deleted and replaced with the following sentence: "The ESPS is to be interpreted consistently with borrowers' international legal obligations under CEDAW and other relevant instruments. Where the ESPS and national law set different standards, the borrower should observe the higher standard."
21. ESPS 9, fn 145, should be amended to reflect the legally binding nature of the CEDAW convention and its Optional Protocol: "Every one of the Bank's member countries in the region are legally bound by CEDAW, all but four have also ratified the Optional Protocol to CEDAW (1999),²⁰ and all have backed the Universal Declaration on Human Rights (1948)." [and the various other Conference outcomes and non-binding instruments listed thereafter].
22. In ESPS 9, para 10, the phrase "For operations with potential gender-based risks and impacts that may disproportionately affect people by their gender, the borrower will conduct a gender analysis (GA) as part of the environmental and social due diligence" should be replaced with "For all projects, the borrower will conduct a gender analysis (GA) as part of the environmental and social due diligence."
23. In ESPS 9, para 18, a bullet point should be added to address specific obstacles faced by LGBTI and non-gender conforming persons in participation, such as social stigma and/or fear for criminalization.

²⁰ For the list of States parties to these and other core human rights treaties of the UN see <https://indicators.ohchr.org/>.

Annex I

Sources of human rights risk information

Relevant sources of risk information include the following international (UN) human rights mechanisms:

- 1. Universal Periodic Review (UPR):** The UPR is a peer review process voluntarily undertaken by all countries on a 4-5 year cycle in the UN Human Rights Council, a subsidiary inter-governmental body of the UN General Assembly. Official information, UN data and reports, and information from NGOs and other stakeholders are submitted as part of the data base for the review.²¹ Moreover a UN “compilation report” is published for each country’s review, containing a summary of recommendations issued by all UN human rights bodies for the country concerned, on issues relevant to contextual risk assessments as well as specific MDB safeguard policy requirements. As discussed in the Nam Theun 2 case study, reports submitted to the UN for the recent UPR reviews of Lao PDR contained extensive analysis and recommendations specific to NT2, and to hydropower development more generally.
- 2. Treaty bodies:** Human rights treaty bodies are 18-24 member expert committees which review countries’ implementation of their legal obligations under the international human rights treaties they have ratified. They deal with issues such as the rights of women children, migrant workers, persons with disabilities, racial discrimination (including against indigenous peoples and minorities), civil and political rights (including personal security, freedom of expressions and association and related participation rights), economic and social rights (including forced evictions and resettlement, labour rights, health, water and sanitation), among others.²²
- 3. Special Procedures** are independent individuals and/or working groups, appointed by member States in the UN Human Rights Council, mandated to analyse and report on human rights situations in particular countries and/or thematic issues (like the right to food, health, housing, the environment, rights of indigenous peoples, violence against women, freedom of expression, human rights defenders, toxic waste, arbitrary detention, and many others).²³ Special Procedures are increasingly focusing on human rights implications of large investment projects, such as recently in Honduras (the UN

²¹ All documentation regarding the UPR is publicly available and searchable by country at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

²² See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

²³ See <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>.

Working Group on Business and Human Rights), Lao PDR (Special Rapporteur on extreme poverty and human rights, in relation to hydro-dam development and public participation), Bolivia (Independent Expert on foreign debt, on infrastructure development and indigenous peoples' rights) and Mexico (Special Rapporteur on human rights defenders, on threats to environmental and human rights defenders connected with mega-projects), as well as on contextual risks and constraints to public participation and stakeholder engagement (for example, Cambodia,²⁴ Lao PDR, Philippines²⁵ and Myanmar).²⁶

- 4. OHCHR, UN field presences and other UN bodies.** As part of annual reporting to UN bodies, or at the direct request of those bodies, OHCHR and other UN entities with presence in the field routinely produce reports on country situations. Such reports are also increasingly prepared by *ad hoc* independent expert bodies commissioned by the UN, such as commissions of inquiry. For example, recent reporting of the Independent Fact-Finding Mission for Myanmar, operating under the authority of the U.N. Human Rights Council, contains extensive analysis and recommendations of direct relevance to investment project due diligence and social and environmental risk assessment.²⁷ Protection measures ordered by the International Court of Justice in the claim brought by The Gambia against Myanmar under the Genocide Convention include an order not to disturb evidence relevant to criminal prosecutions, which has direct relevance to any person or organization supporting infrastructure development in Northern Rakhine State.²⁸

The UPR and Special Procedures can produce information and recommendations relevant to social and environmental risk assessment even where the country concerned is not party to the relevant treaty. For example, the Special Rapporteur on the right to water and sanitation may visit a country and make recommendations relevant to investment project risk assessment even where the country has not ratified the ICESCR. More generally, the UPR reviews of the UN Human Rights Council are based, in part, on the Universal Declaration of Human Rights, which covers all rights: civil, social, cultural, economic and political. Information relevant to social and environmental risk assessment may also come from individual complaint procedures under the various UN human rights mechanisms.

²⁴ See <https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/KH/Pages/SRCambodia.aspx>.

²⁵ See <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24538&LangID=E>.

²⁶ See <https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx>.

²⁷ See the Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), paras. 98, 110-11, 407, 413, 429, 476, 1181-12, 1216-19, 1224-29 and 1618, (on the risks of infrastructure development intentionally obstructing evidence of international crimes) 1239-44, 1295, 1425, 1565 and 1668 (calling for human rights due diligence by all development actors); and Independent International Fact-Finding Mission on Myanmar, Report on Economic Interests of the Tatmadaw (Aug. 2019) at <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx>.

²⁸ The ICJ's decision is available at <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>. The Court's decision drew extensively from the UN Fact-Finding Mission's reporting.

Other relevant sources of risk information include the ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, responsible for monitoring the ILO core conventions and other international labour standards.²⁹ In addition, 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,³⁰ American³¹ and European regions.³²

Beyond the UN and ILO systems, human rights risk information is available from many other sources including the media, subscription databases, research institutes, analytics consultancy firms, national and international NGOs and other civil society organisations, and communities themselves. NGOs frequently perform a vital role in bringing to light potential human rights risks associated with investment projects and often help affected communities to access grievance redress mechanisms (including project level mechanisms, national grievance redress systems, and MDBs' mechanisms).³³ National Human Rights Institutions may also make important contributions to monitoring the human rights situations in a given country or region, and could provide expertise to independent advisory panels or otherwise be valuable partners in social and environmental risk assessment and mitigation.

²⁹ See <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

³⁰ See <http://www.au.int/en/organs/cj>.

³¹ See http://www.oas.org/en/topics/human_rights.asp.

³² See <http://www.echr.coe.int/Pages/home.aspx?p=home&c=>.

³³ Beyond the NGO sources referred to in these case studies, an extensive list of international NGOs working in the field of human rights is available at <https://www1.umn.edu/humanrts/links/ngolinks.html>.

Annex II

Benefits and costs of integrating human rights risk information

While the evidence is not definitive, available evaluations support the proposition that the benefits of effective safeguard implementation outweigh the costs. ADB's Independent Evaluation Department (IED), for example, has concluded that "safeguards implementation creates a positive net value, which tends to be higher for ADB's standards."³⁴ As put by the former Director General of the IED, "for an individual project, the cost may seem unnecessarily high if safeguards prompt excessive scrutiny. But damages avoided (i.e. the benefits of having the system) across projects can more than offset the cost of having safeguards in place."³⁵ However, the balance of benefits and costs from well-designed and managed resettlement frequently go unmonitored, and are therefore largely unknown.³⁶

The value of rigorous and comprehensive up-front risk assessment, relative to cost, has been confirmed in safeguard evaluations in other MDBs. The World Bank's IEG has assessed that the benefits of safeguard policies, including up-front requirements for higher risk projects, outweigh the costs,³⁷ and a 2015 IDB study found that safeguard compliance (an estimated 1 percent of project costs on average) did not have an independent impact on the length of the project cycle.³⁸ Moreover, the likely effectiveness of earlier corrective measures is higher as they precede and therefore have greater impact on implementation, backed by the leverage of having been built into the project agreement's disbursement structure and non-compliance covenants at the outset.

The benefits of incorporating human rights risk information, specifically, relative to the cost of accessing it, are difficult to model and quantify in the abstract. However the costs of accessing human rights risk information are negligible. Much of this information is freely available on-line (see Annex I). Doing so may trigger additional mechanisms (such as the creation of an independent advisory panel, or incorporation of human rights expertise within third party monitoring arrangements) or qualitatively different processes (such as enhanced

³⁴ ADB Independent Evaluation Department (IED) Real-Time Evaluation of ADB's Safeguard Implementation Experience Based on Selected Case Studies, 2016, pgs. xv-xvi.

³⁵ Vinod Thomas, "Top 5 surprising independent evaluation results," *Asian Development Blog* (Jan. 4, 2016), at, <http://blogs.adb.org/blog/top-5-surprising-independent-evaluation-results>. See also World Bank Independent Evaluation Group *Safeguards and Sustainability Policies in a Changing World* (2010), p.78; Watkins, Graham, et al (2017) *Lessons from four decades of infrastructure project related conflicts in Latin America and the Caribbean*. Inter-American Development Bank.

³⁶ World Bank Press Release: "World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems" (Mar. 4, 2015) at <http://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems>.

³⁷ World Bank, Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World* (2010).

³⁸ Boston University, *Greening Development Finance in the Americas* (2015), p.29 at <https://pdfs.semanticscholar.org/aa00/56e1d5f0edae6485ccbe5b4f62042a7c4cb2.pdf>.

social analysis or consultation requirements) which involve additional costs at the outset. However these kinds of costs may turn out to be negligible compared with the costs of not doing so.

A more tangible sense of potential costs and benefits can be gleaned from analyses of the costs of poor stakeholder engagement, grievance redress and social conflict in the infrastructure and extractives sectors. If stakeholder engagement is to be effective, it must be free and without coercion or reprisals, it must be inclusive (that is to say, reflecting inputs and preferences of those most vulnerable or marginalized, including those experiencing discrimination on the grounds of race, sex, ethnicity, political or other opinion, or national or social origin, or other status), and it must provide the basis for informed decision-making.³⁹ Effective grievance redress, similarly, requires an environment in which complaints can be raised freely and without fear of reprisals. Grievance mechanisms should, among other things, be independent, accessible, equitable and rights-respecting.⁴⁰ In other words, by necessary implication, effective stakeholder engagement and grievance redress require the observance of a wide range of internationally recognized human rights, including civil, political, economic, social and cultural rights. Cost-benefit analyses of stakeholder engagement and grievance redress may therefore, indirectly and imperfectly, help to model potential costs and benefits of integrating a number of important human rights variables in project design and due diligence relevant to most if not all development projects (particularly large development projects).

Recent evaluations by the IDB and other organizations have found that lack of community consultation and lack of transparency have caused social conflict and have been major factors in the failure of infrastructure projects in the Latin American region.⁴¹ An IDB evaluation, *Lessons from 4 Decades of Infrastructure Project Related Conflicts*, 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.”⁴² These costs cannot be equated merely with lost revenue or sunk investment due to higher risk of delay, cost overruns or cancellation, 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.

³⁹ See e.g. World Bank ESS 10, and EBRD ESS 10.

⁴⁰ UN Guiding Principles on Business and Human Rights (2011), *supra* note 2, principles 29-31.

⁴¹ Watkins et al (2017), *supra* note 35; Boston University, Global Development Policy Center (2018), Standardizing Sustainable Development? Development Banks in the Amazon, available at <https://www.bu.edu/gdp/files/2018/04/Development-Banks-in-the-Andean-Amazon.pdf>.

⁴² Watkins, et al (2017), *Ibid*.

The IDB study found that project delays (81% of cases) and cost overruns (58% 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 5 years. Similarly, the average publicly reported cost overrun from sampled projects was US\$1,170 million, or 69.2% of average original budget.⁴³ These kinds of losses are consistent with findings about the costs of failed stakeholder engagement in the extractives sector and, recently, in connection with the Dakota Access Pipeline in the USA,⁴⁴ as well as more general findings of the World Bank and UN on how unaddressed grievances may fuel violence and state fragility.⁴⁵

The IDB study noted that costs of failed stakeholder engagement may transcend individual projects and may impose a reputation cost surcharge for future (similar) investments for years to come. The IDB study finds that “communities strongly oppose projects that they believe might cause damage similar to the damage of comparable projects elsewhere, even in other countries or continents... that 28% of projects faced historically motivated community opposition.”⁴⁶ This problem is clearly evident in connection with large hydropower projects in several countries in the Latin American region. With these factors in mind, it seems clear that the potential benefits of integrating and acting upon available human rights risk information at the project design stage will generally outweighs the costs of not doing so.

⁴³ Op cit, p. 15.

⁴⁴ First Peoples Worldwide/University of Colorado, Social Cost and Material Loss: the Dakota Access Pipeline (2018), available at https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf, noting that investors lost \$7.5B and banks financing the pipeline incurred an additional \$4.4B in costs in the form of account closures, not including costs related to reputational damage; and Rachel Davis & Daniel Franks, Cost of Company-Community Conflict in the Extractive Sector (2014), available at <https://www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/>, noting lost production costs of up to \$20M for major mining projects between \$3-5B capital valuation.

⁴⁵ World Bank and United Nations, Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (2018), especially at pp.125-130.

⁴⁶ Op cit, p. 11.