



UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER

# **Comments on the European Bank for Reconstruction and Development (EBRD) draft Environmental and Social Policy**

17 May 2024

## Contents

Introduction .....	2
Positive elements .....	2
Suggested areas for strengthening .....	4
Managing risks in value chains .....	5
A proactive and robust approach to remediation .....	7
Responsible exit .....	15
Digitalization risks .....	16
Respecting international law.....	19
Assessing, preventing and responding to reprisals risks.....	20
Financial intermediaries.....	21
Other financial instruments .....	23
Common approaches .....	24
Climate change.....	25
Conclusion .....	26
ANNEX - LIST OF RECOMMENDATIONS.....	27

## Introduction

1. OHCHR welcomes the opportunity to comment on EBRD’s draft Environmental and Social Policy (ESP, or Policy), and for the opportunities to contribute to EBRD’s consultation processes since 2023. We have greatly valued our constructive engagement and the time made available by EBRD’s Environment and Sustainability Department for this purpose. We would like to recognize, in particular, EBRD’s investment of time and resources to consult with our Office on the implications of global business and human rights standards and digitalization for project E&S risk management.

## Positive elements

2. We note that the draft ESP is in form and substance very similar to the 2019 ESP, however we welcome the explicit recognition of human rights within the scope of E&S risk assessment,<sup>1</sup> and EBRD’s clear and robust human rights commitment (Policy, para. 2.5). The latter policy commitment was already best practice among MDBs, in our view, and we welcome the stipulation that human rights risks and impacts should explicitly be addressed (Policy, para. 2.5; ESR 1, paras. 1 & 3). We also welcome the additional detail in the draft ESP on vulnerable people, including recognition of the need to address discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) and of people’s “political views and affiliations”.<sup>2</sup> In a similar vein we welcome the additional focus on gender equality and the proposed new GBVH requirements in ESR’s 2 and 4, however our Office maintains the view that gender equality

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<sup>1</sup> As a minor matter, in the definition of “human rights” in Section 2: Definitions, we’d suggest that the International Bill of Rights be mentioned first, ahead of the UN Guiding Principles on Business and Human Rights (UNGPs) and core ILO standards.

<sup>2</sup> Section 2: Definitions.

and SOGIESC warrant dedicated attention within a stand-alone Environmental and Social Requirement, in addition to being integrated throughout the ESP, and considers IDB's ESPF to constitute best practice in this regard.<sup>3</sup>

3. Other positive elements in the draft ESP in our view, subject to the comments and recommendations below, include the proposed widening of the scope of supply chain risk management.<sup>4</sup> Significantly, at least for "core" supply chains,<sup>5</sup> para. 21 of ESR 1 would require "significant" E&S risks (including but not limited to labour and biodiversity impacts) to be "prevented, mitigated and remediated," regardless of the tier in the supply chain where they occur. Under ESR 1, para. 21, the supply chain risk management system (or client's ESMS) "will take into account: (a) the *severity* and likelihood of the risks and impacts; (b) *whether the client caused, contributed or is directly linked to these risks and impacts*; and (c) the client's *leverage* over the relevant core suppliers. Where necessary, the client will also assess whether terminating the relationship with a supplier would exacerbate the environmental and social risks and impacts identified" [emphasis added]. The latter requirements, anchored in a "risk and responsibilities" analytical framework, align closely with global standards on business and human rights<sup>6</sup> and are a leading practice among MDB safeguards and operational policies, in OHCHR's view.
4. OHCHR also welcomes the inclusion of contextual risk assessment which we note is integrated in requirements for project E&S risk assessment, project appraisal, E&S assessments and FI operations.<sup>7</sup> However we would suggest that the Definitions (Section II) be amended to include a definition of "contextual risks," with explicit reference to human rights factors and constraints on civic space.<sup>8</sup> We also welcome the inclusion in the

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<sup>3</sup> We note that ADB's [Summary of Analytical Study on Gender and Safeguards](#) (May 2022), para. 32, expresses a similar view: "[A]mongst all MFIs, IDB has the most comprehensive coverage with explicit mention of gender considerations across various standards in addition to a standalone standard on gender."

<sup>4</sup> ESP, para. 2.9 requires collective leverage to address supply chain risks in certain circumstances. ESR 1, para. 4, provides that the ESRs may apply to a client's business activities beyond the project. ESR 1, para. 10 provides that the ESMS will consider third party risks and impacts. However see further below for recommendations on strengthening risk-based due diligence throughout the value chain, downstream as well as upstream.

<sup>5</sup> Section II (Definitions), ESR 1, footnote 24 & ESR 2, footnote 32: "Core suppliers are those suppliers and sub-suppliers, regardless of tier, who provide goods, equipment or materials essential to the core functions of the project."

<sup>6</sup> See in particular [UN Guiding Principles on Business and Human Rights](#), principles 17 & 19. OECD guidance on Responsible Business Conduct is to a similar effect.

<sup>7</sup> ESP, para. 7.1, 7.15, and ESR 1, para. 12, ESR 9, para. 8, ESR 10, para. 15.

<sup>8</sup> For example, ADB's [draft ESF](#) (Oct. 2023), para. 47, stipulates: "In addition to a project's E&S risks and impacts, ADB will consider risk factors that are relevant in the country and project context. The analysis of contextual risks may include (i) a host country's legal and institutional framework and commitments under applicable international agreements; (ii) relevant host country and project-level governance structures and the institutional capacity and commitment of the borrower and client; (iii) digital risks and data privacy; and (iv) other contextual issues or vulnerabilities such as FCAS and SIDS and information relevant to host country obligations under applicable international agreements. ... A risk classification may also change because of changes to the contextual risks affecting a project." More specific to civil space and reprisals risks, see IFC, [Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders](#) (2021), pp.20-23, including indicative data sources.

draft ESP of digitalization risks,<sup>9</sup> although as suggested below more detailed requirements will be needed if the ESP is to equip EBRD and its clients to more successfully identify and address the potentially wide range of digital risks applicable to EBRD-financed projects.

5. Finally, subject to the further comments below, OHCHR also welcomes the stipulation in ESR 2 that risk assessment should be governed by the highest applicable E&S standard (ie. ESRs, national law, or international law),<sup>10</sup> the inclusion of forced evictions<sup>11</sup> (along with forced and child labour) in the Exclusion list, the inclusion of the concept of universal design and access requirements for buildings,<sup>12</sup> the strengthening of the Policy's requirements concerning retaliation (at least insofar as the client's obligations are concerned) and stakeholder engagement, the requirement that grievance mechanisms meet the effectiveness criteria in principle 31 of the UN Guiding Principles on Business and Human Rights,<sup>13</sup> the requirements in ESR 2 that clients should build available leverage and exit projects responsibly,<sup>14</sup> the relatively strong requirements in ESR 2 regarding auditing, incident reporting and remediation of child and forced labour impacts,<sup>15</sup> the requirement in ESR 1 (para. 10) that residual E&S impacts should be remediated (not merely compensated or off-set), and the requirements for costed corrective action plans and resettlement plans in ESR 5.<sup>16</sup>

### Suggested areas for strengthening

6. As a general matter, we note that the draft ESP appears to contain numerous broad discretions and/or under-specified requirements, which may generate confusion, inconsistent practice, and undermine sustainability and accountability objectives. We do not attempt a full account of this here however some of areas where more clarity and detailed or robust requirements may be useful are: (a) the requirement that the ESSs be implemented "within a timeframe acceptable to the Bank"<sup>17</sup> (rather than a more objective and auditable "reasonableness" requirement such as that in the IFC Performance Standards); (b) timeframes for disclosure of documentation of different kinds, such as E&S assessments, audit reports and monitoring reports for category B projects;<sup>18</sup> (c) conditions under which the EBRD should undertake its own independent consultations with

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<sup>9</sup> ESR 1, para. 17, and Section II: Definitions.

<sup>10</sup> ESR 2, paras. 7 & 30. ESP, para. 6.2 requires the observance of the ESRs or national law, whichever is the higher standard, but does not include international law. We discuss this issue further below.

<sup>11</sup> Policy, App. 1, & ESR 5, para. 13. We also welcome the fact that the term "forced evictions" takes account of the accepted definition of this term under the International Covenant on Economic, Social and Cultural Rights, to which nearly all EBRD members are party. ESR 5, para. 2, footnotes 58-61.

<sup>12</sup> ESR 4, para. 26.

<sup>13</sup> ESR 10, para. 35, footnote 108.

<sup>14</sup> ESR 2, paras. 45-47, and the recognition in ESP, para. 2.9 of the commitment to exercise collective leverage to address supply chain risks in certain contexts. OHCHR welcomes the fact that these requirements are broadly in line with the expectations in the UN Guiding Principles on Business and Human Rights (principle 19), subject to the comments and recommendations below.

<sup>15</sup> ESR 2, paras. 9-11, 29, 32 & 45-46. We note that a more general requirement for reporting significant E&S "incidents and accidents" is contained in ESR 1, para. 38.

<sup>16</sup> ESR 5, paras. 7, 52(vi) & 57.

<sup>17</sup> ESP, para. 6.4; ESR 1, para. 5.

<sup>18</sup> This seems particularly important given the relatively high proportion of Category B projects in practice, and given the fluidity of E&S risk throughout the project cycle. *See also* ESR 1, para. 37; & ESR 5, para. 62.

stakeholders;<sup>19</sup> (d) requirements regarding site visits and third party monitoring;<sup>20</sup> and (e) obligations of EBRD to proactively seek information necessary for project appraisal (rather than depend exclusively upon information provided by the client).<sup>21</sup> We also note that a reference in the Policy, para. 4.3, to the establishment by management of a new project complaints mechanism, and express the hope that this will not in any way detract from the important dispute resolution and compliance review functions of IPAM.<sup>22</sup>

7. The more specific issues that we highlight for EBRD's consideration in this memo are: (a) the need for risk-based due diligence throughout the value chain; (b) the need for a more robust and effective approach to remedying adverse impacts; (c) the need for a more explicit framework to guide EBRD in exiting projects in a responsible fashion ("responsible exit"); (d) the need for a more detailed and robust framework for managing risks of digital projects; (e) the need to more consistently harmonize upwards in accordance with international legal standards; (f) the need for a clearer and more robust approach to addressing intimidation and reprisals risks; (g) the need for strengthened approaches to E&S risk management for financial intermediaries (FIs), other financial instruments, and common approaches; and (h) climate change. A list of recommendations is included in the Annex.

### Managing risks in value chains

8. One of the most common shortcomings in the safeguard policies of many DFIs, with potentially far-reaching consequences for sustainability, is that the scope of E&S due diligence and risk management is often limited to "primary suppliers," upstream, and to forced and child labour and biodiversity impacts.<sup>23</sup> "Primary" suppliers are often defined as those which goods or materials "directly" to a project, on an ongoing basis, and the goods and services must be indispensable to a particular project activity. Furthermore, following the definition in the IFC's Performance Standards (2012), the term "primary suppliers" has

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<sup>19</sup> ESP, para. 7.18 states: "The Bank may, in some cases, conduct its own public engagement activities to gauge stakeholder views." However OHCHR considers that independent consultation should be a requirement in high-risk projects particularly where civic space is limited and risks of intimidation or reprisals are evident.

<sup>20</sup> ESP, para. 7.23 states: "The EBRD may also periodically verify the monitoring information prepared by clients through site visits to projects by the Bank's environmental and social specialists and/or independent experts." See also ESR 1, para. 36. However in OHCHR's view more specific requirements for EBRD site visits and third party monitoring should be in place for higher risk projects.

<sup>21</sup> Cf. Para. 7.16 of the Policy seems to portray EBRD's role in unduly passive terms: "It is the responsibility of the client to ensure that adequate information is provided on the environmental and social impacts and risks of the project so that the Bank can undertake an environmental and social appraisal in accordance with this policy."

<sup>22</sup> OHCHR notes the increasing pressures and challenges faced by DFIs' independent accountability mechanisms, internally and externally, particularly their compliance review functions. See OHCHR, [Remedy in Development Finance](#) (2022), pp.59-72 & 127 (Box 62), which discusses other grievance mechanisms as well. It is particularly important that the establishment of a new grievance mechanism, within management, does not deflect from the need for strengthened support to the effective functioning of existing, independent mechanisms which, to the extent of their independence, are likely to enjoy greater trust from potential claimants.

<sup>23</sup> OHCHR, [Benchmarking Study on DFI Safeguard Policies](#) (2023), pp.58-62 & 136-138. This is the case under EBRD's existing ESP, viz PR1, para. 28, PR 2, paras. 25-27; and PR 6, paras. 25-29.

often been understood to mean “1<sup>st</sup> tier” suppliers, only.<sup>24</sup> This is antithetical to a risk-based approach, in OHCHR’s view. Many salient and serious (but potentially manageable) risks lie beyond the initial tiers, while allowing for necessary prioritization in accordance with severity. Limiting one’s focus to primary suppliers can be inefficient as well as ineffective, if that is not where the most salient risks are.

9. As indicated above, OHCHR welcomes the steps proposed by EBRD so far to widen the scope of E&S due diligence and risk management. ESR 1, para. 21, is of particular significance in this regard, as discussed in paragraph 3 above. Further to this, ESP, para. 2.9 would require collective leverage to address supply chain risks in certain circumstances. ESR 1, para. 4, provides that the ESRs may apply to a client’s business activities beyond the project, although does not provide further detail. ESR 1, para. 10 provides that the ESMS will consider third party risks and impacts, although these are not defined further. Where labour risks are “significant”, ESR 2, para. 45 would require the client to build and utilize contractual and collective leverage throughout the supply chain, irrespective of the tier. The definition of “core” suppliers appears restrictive, in OHCHR’s view, however the requirement that significant E&S risks be “prevented, mitigated and remediated” through the supply chain, regardless of the tier, is an important advance compared with the general run of DFI safeguard policies, as is the requirement that clients build contractual and collective leverage to address these particular risks. These important measures deserve recognition in OHCHR’s view.
10. Nevertheless, with limited exceptions,<sup>25</sup> OHCHR notes that the E&S risk management responsibilities in the ESP are focused mainly on “upstream” suppliers rather than users or consumers or other stakeholders elsewhere in the value chain. In OHCHR’s view it is essential that impacts on users, consumers and other relevant stakeholders be included in a more comprehensive fashion, prioritized according to risk. This is not just a question of aligning with international business and human rights standards, as the draft ESP in certain other respects seeks to do: the simple reality is that not all salient risks lie upstream. An increasing number of companies are effectively carrying out “downstream” due diligence in various sectors,<sup>26</sup> demonstrating feasibility, and there is ample finance sector experience

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<sup>24</sup> In 2021 the Guidance Note for PS 1 was updated in order to clarify that “primary suppliers” should no longer be limited to the first tier of the supply chain. However under the updated guidance the scope is still limited to those “who on an ongoing basis forms part of the supply chain of goods or materials essential for the core business processes of the project.” By contrast the UNGPs expect businesses to identify and address where human rights risks and impacts are the most severe among their business relationships, not just in those relationships that are “essential” to the business, and to take into account their own involvement in those impacts (cause-contribute-linkage).

<sup>25</sup> ESR 4, paras. 31-32 (product safety) and para. 37 (“vulnerable road users”); ESR 3, para. 10 (regarding impacts of water abstraction on third-party users), and ESR 8 (“cultural heritage users”).

<sup>26</sup> See e.g. OHCHR B-Tech, [The Feasibility of Mandating Downstream Human Rights Due Diligence: Reflections from technology company practices](#) (Sept. 2022); ADB Brief No. 129 (Sept. 2022), [Deep Tier Supply Chain Finance](#); Hogan & Reyes, [Downstream Human Rights Due Diligence: Informing Debate Through Insights from Business Practice](#), *Business & Human Rights Journal* (2023), pp.1-7; OECD Watch *et al*, [Downstream due diligence: Setting the record straight](#) (Dec. 2022); Danish Institute for Human Rights, [Due diligence in the downstream value chain: Case studies of current company practice](#) (Oct. 12, 2023); and Global Business Initiative, [Effective downstream human rights due diligence: Key questions for companies](#) (Feb. 14, 2023). Moreover in June 2023 the OECD released updated [Guidelines for Multinational Enterprises](#) which, among other things, reinforced the applicability of downstream (as well as upstream) due diligence expectations.



to draw upon in the AML/KYC context.<sup>27</sup> The effective management of digital risks, in particular, is impossible without an explicit and intentional “downstream” focus on users and others who may be impacted in potentially profound and irremediable ways by DFI-supported digital projects.<sup>28</sup> This includes but goes well beyond “product safety” in ESR 4 (paras. 31-32).

11. Moreover, while ESR 2 requires clients to build contractual and collective leverage to address labour risks, we note that E&S risk management for “associated facilities” and requirements to address retaliation remain limited by the extent of the client’s existing control.<sup>29</sup> This may disincentivise proactive engagement with risk, in OHCHR’s view. We note that the ESP, para. 6.5, would at least require the client to demonstrate its lack of control over associated facilities, where it claims that this is the case,<sup>30</sup> but this is not likely to address the incentives problem referred to above and is not the same as an explicit, proactive requirement to build all available forms of leverage.

**OHCHR recommends that:**

- *The ESP should clarify that clients should address all potential E&S (including human rights) impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, downstream as well as upstream.*
- *ESR 2, para. 45, should be amended as follows: “Where the client does not have a direct contractual relationship with a sub-supplier, the client will use reasonable efforts to build ~~their leverage by working with relevant entities~~ and exercise all available forms of leverage to prevent and mitigate the risks identified. The term “leverage” should be defined to include “contractual, commercial, financial, relationship leverage, and/or collective leverage, and/or capacity building.”*
- *Paragraph 5.6 of the ESP should be amended as follows: “...that such associated facilities may present. The client will be required to build and exercise all available forms of leverage to address the latter risks. The client will be required to demonstrate the extent to which ....”*
- *Paragraph 21 of ESR 1 should be amended as follows: “...Where significant risks are identified, the client will ~~use reasonable efforts~~ build and exercise all available forms of leverage to prevent and mitigate these risks and to remediate impacts as necessary. ..”*

**A proactive and robust approach to remediation**

12. The idea of “remedy” for E&S impacts is central to accountability, and to DFIs’ mandates to promote sustainable development and avoid harm to people and the environment. As indicated at the outset, we welcome the relatively strong requirements in ESR 2 regarding

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<sup>27</sup> Anti-Money Laundering/Know Your Customer. See e.g. ADB Brief No. 129 (Sept. 2022), [Deep Tier Supply Chain Finance](#). On the growing movement and motivating factors towards downstream due diligence generally see BSR, [Human Rights Due Diligence of Products and Services](#) (July 15, 2021).

<sup>28</sup> OHCHR, Policy Brief: DFIs & Digital Risks (consultation draft, March 2024).

<sup>29</sup> ESR 1, paras. 6 & 14. To similar effect, ESR 5, para. 44.

<sup>30</sup> ESP, para. 6.5: “The client will be required to demonstrate the extent to which it cannot exercise control or influence over associated facilities by providing details of relevant considerations, which may include legal, regulatory and institutional factors.”

auditing, incident reporting and remediation of child and forced labour and resettlement impacts.<sup>31</sup> We welcome the requirement in the ESP, para. 21 that “significant” E&S risks should be “prevented, mitigated and remediated,” and similar requirements in ESR 1, para. 10 that the client’s ESMS “should include provisions for the remediation of significant residual environmental and social impact,” and that effective management of contractors and sub-contractors under ESR 1, para. 32 includes making provision for remedying adverse impacts.<sup>32</sup> We also welcome the requirements for costed corrective action plans and resettlement plans in ESR 5, and the requirements for contingency funds in the resettlement context.<sup>33</sup> We would recommend that such arrangements be in place for all higher-risk projects, whether or not resettlement is implicated.

13. However, contrary to leading practice among DFIs and commercial banks, and contrary to ESR 1, para. 21, we note that the mitigation hierarchy in the Policy still includes “offsetting” residual impacts as a default. Off-setting is inappropriate for human rights impacts, and has been strongly challenged in the biodiversity and climate change contexts as well. Moreover, although the client’s responsibility for E&S impacts (cause-contribute-linkage) is an explicit part of the framework for remediation of E&S impacts in “core” supply chains, the draft ESP overall still does not appear to reflect a robust and comprehensive approach to remedy predicated upon an assessment of all relevant parties’ (including EBRD’s) potential involvement in (or contributions to) E&S impacts. There is no operative definition of “remedy” and no suggested criteria to guide the EBRD’s assessment of its own involvement in impacts.
14. Under international human rights law, “remedy” is a comprehensive concept encompassing not only compensation (referenced repeatedly in the ESP, and 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).<sup>34</sup> Where projects are associated with serious abridgements of human rights, such as forced evictions, GBVH, or reprisals against environmental or human rights defenders, a combination of the above remedies will often be required in order to make people whole. OHCHR would recommend that this multi-faceted definition of remedy be included in the Definitions section (Section II) of the ESP, and that the mitigation hierarchy be amended as follows: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to *remedy* such impacts.”<sup>35</sup> [Emphasis added].

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<sup>31</sup> ESR 2, paras. 9-11, 29, 32 & 45-46.

<sup>32</sup> ESR 1, para. 32: “Effective contractor management includes ... contractually requiring contractors to apply [E&S] standards and provide for mitigation and/or remedies in the case of non-compliance.”

<sup>33</sup> ESR 5, paras. 7, 52(vi) & 57. It is critical for remedial action plans to be costed. In this regard, para. 57 provides, in part: “..The budget will contain adequate contingencies to finance corrective actions, as well as the planning and mitigation of unanticipated impacts, if any. ...For projects using a resettlement framework, the client will prepare an estimated budget based on the scoping of anticipated resettlement risks and impacts and with sufficient contingency, with a commitment to the future allocation of funds for a resettlement plan.”

<sup>34</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.11-12.

<sup>35</sup> In this regard the Preamble of the 4<sup>th</sup> revision 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 AfDB’s updated Integrated Safeguard System (2023), Operational Safeguard Standard 7 (“Vulnerable groups”), includes “remedy” in the



15. Secondly, we would recommend that the ESP articulate how EBRD and clients are to assess their respective involvement in E&S impacts, and the consequences that should follow insofar as mitigation and remediation responsibilities are concerned. Under the UNGPs, OECD RBC guidance, and leading practice among DFIs, a party's responsibilities in connection with adverse impacts should be determined in light of whether they may fairly be said to have "caused" or "contributed to" adverse impacts, or alternatively are "directly linked" to those impacts through their business relationships and financial products or services. This was also among the central recommendations of the 2020 IFC/MIGA External Review on E&S Accountability.<sup>36</sup> ESR 1, para. 21 reflects these principles and, as mentioned earlier, articulates clear consequences for the client, broadly aligned with international business and human rights standards (albeit limited to "core suppliers"). However the ESP does not mention these principles at all.
16. "Linkage" situations (rather than "causing" or "contributing to" impacts) are the most common scenario in the context of development financing.<sup>37</sup> Where adverse impacts are "linked" to EBRD's operations, products or services by its business relationship with another entity, EBRD (as well as the client) should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGP 13(b) and 19). 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 EBRD's financial product or service. Rather, the link needs to be between the financial product or service provided by EBRD and the adverse impact itself.<sup>38</sup>
17. However, there may well be circumstances where a lender by its own actions or omissions has "contributed" to harms together with an implementing organization, such as where the lender has not carried out adequate due diligence.<sup>39</sup> In "contribution" situations, under the UNGPs and OECD RBC guidance, a lender should: (i) cease its own contribution; (ii) use its leverage with the implementing organization 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. Moreover, a financial institution's involvement with an impact may shift over time, depending on its own actions

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mitigation hierarchy, although the term is not defined. OHCHR's [Remedy in Development Finance: Guidance and Practice](#) (2022) Chapter II, elaborates more extensively on this theme.

<sup>36</sup> IFC/MIGA [External Review on E&S Accountability](#) (June 2020), paras. 306-339, discussed at p.17 of our April 2021 [submission](#) on the ADB SPS review.

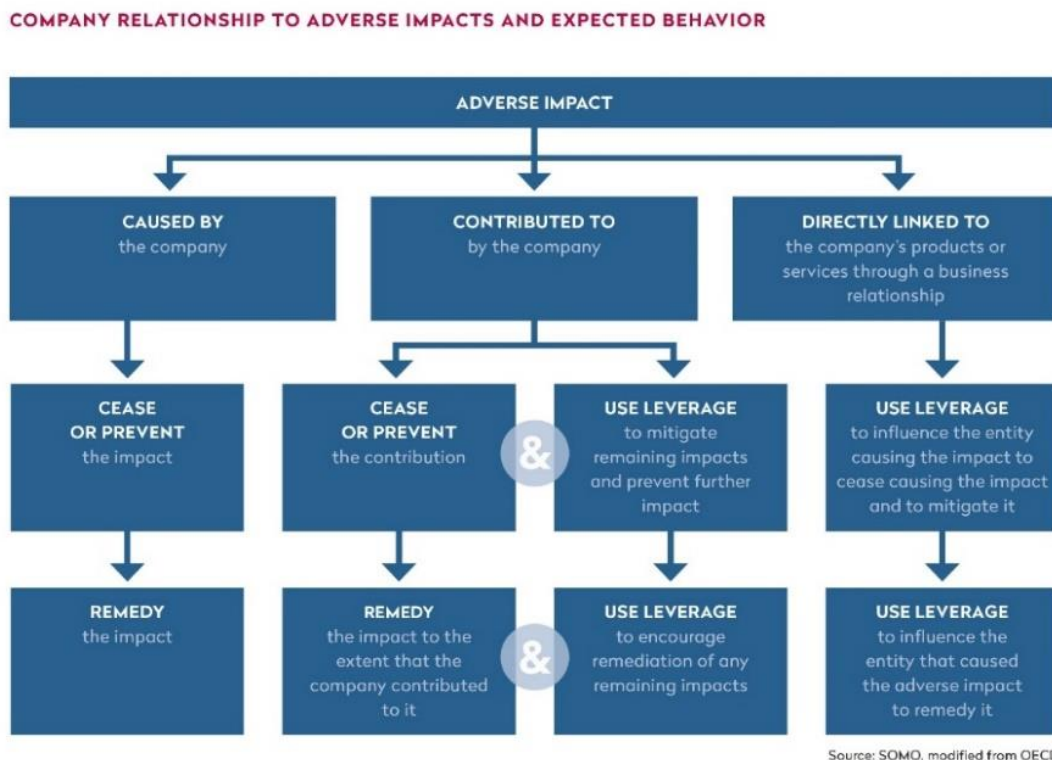
<sup>37</sup> [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), p.3.

<sup>38</sup> [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-6. See also OECD (2018) [Due Diligence for Responsible Business Conduct](#), p.71.

<sup>39</sup> For a discussion of relevant factors determining "contribution" to harm see [OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector](#) (June 2017), pp.5-10.

and omissions.<sup>40</sup> Figure 1 summarises these principles, applicable in principle to lenders as well as clients:

**Figure 1**



18. “Contributing to remedy” means providing remediation appropriate to one’s share in the responsibility for the harm. Whether providing for or cooperating in remedy,<sup>41</sup> the processes should be legitimate in the eyes of those who have suffered the harm and should follow basic requirements of fairness and due process. Cooperating in remediation does not necessarily mean that a lender should be expected to provide financial compensation to project-affected people, although there will often be circumstances where this is warranted.<sup>42</sup> Other means of contribution may include the 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.<sup>43</sup>
19. It is sometimes thought that lenders should not contribute directly to remedy, even if they have contributed to the adverse impacts, because to do so would either discincentivize

<sup>40</sup> *Id.*

<sup>41</sup> On the distinction between “providing for” and “cooperating in” remedy, see OHCHR, [Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), p.64.

<sup>42</sup> See e.g. OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Part IV, pp.82-88. On the importance of and suggested parameters for financial compensation for victims of GBV see UN Women, UNFPA, WHO, UNDP & UNODC, [Essential Services Package for Women and Girls Subject to Violence](#) (2015), Module 3, p.26; and the [Guidance Note of the UN Secretary General on Reparations for Conflict-Related Sexual Violence](#) (June 2014), pp.16-17.

<sup>43</sup> A/HRC/44/32, annex, policy objective 12, para. 12.2; and A/HRC/44/32/Add.1, paras. 64–66.

client remedial actions (the “moral hazard” problem) and/or increase litigation risk for the lender. But neither concern holds up to scrutiny, at least as a categorical proposition.

20. On the “moral hazard” problem, firstly: we could well appreciate that clients may be disincentivized to take a proactive approach to remedy if or to the extent that EBRD were to contribute whenever the client opted not to. But lenders and clients have fundamentally different roles. The former will never stand in the shoes of the latter. Numerous banks have contributed directly to remedy in particular cases albeit without the benefit of clear policy.<sup>44</sup> Clear decision-making criteria and contractual conditions, including in relation to contingency funds for remedy (as draft ESR 5 already requires in the resettlement context<sup>45</sup>) and reimbursement rights to the lender, can keep concerns about moral hazard in proportion.<sup>46</sup> Conversely, the lack of any framework to guide EBRD’s contributions generates inconsistency and disincentivizes EBRD engagement with E&S risk. In any case the most pressing moral hazard concern on the present state of affairs is undoubtedly the continuing externalization of E&S costs upon project-affected people who are least responsible or able to influence the project. The inclusion within the ESP of a commitment that E&S costs should be internalized within the project<sup>47</sup> may help to reset expectations in this regard, in OHCHR’s view.
21. Concerns about litigation risk, similarly, are often overstated given the broad scope and construction of most jurisdictional immunities of MDBs, the many legal and practical barriers to litigating claims (particularly, international claims), and the narrow scope for lender liability claims in many jurisdictions, even against commercial banks, much less MDBs. A recent study commissioned by OHCHR of lender liability regimes pertaining to commercial banking in the United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as in the European Union and Hong Kong, China, among several other jurisdictions, suggests that: (a) lender liability for environmental and social impacts is limited in the jurisdictions surveyed; and (b) broader proactive due diligence will not be likely to increase liability risks and in fact may reduce them.<sup>48</sup>
22. In any case, theoretical concerns about moral hazard and litigation risk need to be seen in the light of DFI policy and practice, which are evolving in the direction of more proactive and effective approaches. Among DFIs, Swedfund’s Sustainability Policy provides one of the clearest articulations of remedy expectations, closely aligned with the UNGPs:

*“To fulfil our commitment to respect human rights, we aim to avoid causing or contributing to adverse human rights impacts resulting from our own activities*

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<sup>44</sup> See para. 26 below.

<sup>45</sup> ESR 5, para. 57.

<sup>46</sup> Contractual conditions might include, for example, reimbursement rights to EBRD in circumstances where it chose to step in early and remediate potentially serious impacts, without having contributed to those impacts itself.

<sup>47</sup> Examples include the AfDB’s [Integrated Safeguard System](#) (2023), ESOS 1, para. 36; and ADB’s [draft ESF](#) (Oct. 2023), ESS 1, para. 29.

<sup>48</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.20-21; and Fisher & de Búrca, [Opinion: Challenging the World Bank Group’s stance on remedying harm](#), *Devex* (June 13, 2023).

*and to address such impacts if they occur. Where we identify that we have caused or contributed to adverse human rights impacts, we will provide for, or cooperate in, their remediation through legitimate processes.*

*We also aim to prevent or mitigate adverse human rights impacts that are directly linked to our operations by our business relationships. Where we identify adverse human right impacts that are directly linked to our operations through our business relationships, we will seek to work with our business partners to ensure that remediation occurs.<sup>49</sup>*

23. Other financing institutions' policies have been evolving in this direction as well. Examples include Finnfund's [Sustainability Policy](#) (Feb. 28, 2020) (s. 3.3.1), the [International Climate Initiative \(IKI\) Safeguards Policy](#) (valid Jan. 15, 2023) (pp.9-10), [guidance](#) produced by Legacy Landscapes Fund (LLF) for ESAPs in the conservation sector (page 4), and the [Grievance Mechanism Policy](#) (2022) of the Belgian Investment Company for Developing Countries (BIO) (p.6, "Remedy").<sup>50</sup>
24. Best practice in commercial banking supports this trend. The [ANZ Human Rights Statement](#) (May 2022), pp.3-4, states: "We use risk-based due diligence to identify human rights risks and impacts associated with our business relationships. ... In line with the UNGPs we seek to cooperate in remediation through legitimate processes and, where reasonable, use leverage to encourage our Customers to prevent or mitigate any impacts."<sup>51</sup> ANZ is also a notable instance where an enabling policy on remedy has successfully been put into practice (see further below), generating "win-win" outcomes for the bank and project-affected people.<sup>52</sup>
25. Another commercial bank whose remedy policy appears to be moving ahead of that of the MDBs is Westpac bank, which has committed to "[p]roviding for, or cooperating in, the remediation of adverse human rights impacts where we identify that we have caused or contributed to these impacts. Where we have not caused or contributed to an adverse impact, but are directly linked to it, we recognise we may [nevertheless] be able to play a role in remedy."<sup>53</sup> The leadership of commercial banks on this issue is all the more notable given their private character and lack of a sustainable development mandate.
26. There is also a growing body of experience showing how DFIs may contribute directly to remedy in practice, without triggering unmanageable moral hazard or litigation risk

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<sup>49</sup> [Swedfund Policy for Sustainable Development](#), pp.2-3. See also Swedfund's [Human Rights Guidance](#) (2020), para. 1.4, and Equator Principles [Guidance Note on Implementing Human Rights Assessments](#) (2020), p.18.

<sup>50</sup> BIO Grievance Mechanism Policy (2022), p.6: "In situations where BIO has caused the harm, for instance by failing to comply with its own policies and procedures such as the environmental and social due diligence or monitoring, BIO's Grievance Mechanism shall take the necessary steps, appropriate to the company's size and circumstances, to ensure the provision of remedy." The Legacy Landscapes Fund ESAP [guidance](#), produced with the support of KfW and SHIFT, is closely aligned with the UNGPs and provides helpful guidance and decision-making trees on assessing involvement in impacts and exercising leverage.

<sup>51</sup> Moreover ANZ's [Grievance Mechanism Framework](#) states (para 23.3.2) that where ANZ has contributed to harms it will "remedy the impact appropriate to the Customer's own conduct and contribution" and (para 24) an independent mediator or expert may be engaged to help make determinations on ANZ's contribution to an impact.

<sup>52</sup> See OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), Box 5.

<sup>53</sup> See [Westpac Human Rights Position Statement and Action Plan](#) (June 2023).

concerns. While only the tip of the iceberg, and while clearer policy frameworks and more consistent practice would certainly be desirable, illustrative examples from different DFIs, geographies and sectors include:

- In March 2024 IFC agreed to directly fund a remediation program for survivors of child sexual abuse for a period of 3 years, following non-compliance findings by its Compliance Advisor Ombudsman;<sup>54</sup>
- IFC Asset Management Company has agreed to finance \$5.2M for community services as part of a settlement of a legal claim brought by communities in Honduras adversely impacted by an IFC-financed agribusiness project<sup>55</sup>;
- World Bank, Uganda Transport Sector Development Project, involving a wide range of actions including mobilization of \$1.67M from the Bank's rapid social response trust fund and technical assistance to the Uganda National Roads Authority (see Box 7 of the OHCHR [Remedy report](#) 2022);
- World Bank, Albania Coastal Management project: [World Bank: Albania Project Mistakes Appalling – Eurasia](#), where the World Bank's contributions reportedly included payment of legal aid and assistance packages for those affected by housing demolitions;
- ADB and AusAID support for livelihoods and debt relief in connection with the Cambodia Railway Project;<sup>56</sup>
- ADB's financing of a \$200k mitigation plan in connection with the North-South Corridor (Kvesheti-Kobi) Road Project in Georgia;<sup>57</sup> and
- OPIC's financing of an indigenous peoples' development plan in connection with a mining venture in Bolivia, following non-compliance findings by its Office of Accountability (Box 5 of the OHCHR [Remedy report](#) 2022).

27. Drawing from evolving policy and practice, OHCHR recommends that the ESP reflect a robust and comprehensive remedy framework according to which responsibilities to address adverse impacts take into account the respective involvement of clients and EBRD in impacts (cause-contribute-direct linkage), thereby helping to align EBRD's and the

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<sup>54</sup> See [IFC Board Approves Action Plan in Response to CAO Investigation Related to IFC's Investment in Bridge International Academies in Kenya](#). One notable weakness in the remediation proposal at the time of writing was the apparent omission of the possibility of financial compensation for victims (as opposed to financial assistance to access services made more widely available). On the importance and parameters for financial compensation in this context, as part of a wider suite of remedy options, see UN Women, UNFPA, WHO, UNDP and UNODC, : [Essential Services Package for Women and Girls Subject to Violence \(unfpa.org\)](#), Module 3, p.26; and [Guidance Note of the UN Secretary General on Reparations for Conflict-related Sexual Violence](#) (June 2014), pp.16-17.

<sup>55</sup> See [Honduran farmers, IFC settle suit alleging violence linked to investment | Devex](#) (Dec. 2023).

<sup>56</sup> ADB is reported to have provided technical assistance for an enhanced livelihood program while AusAID contributed to household debt relief, following non-compliance findings of ADB's Compliance Review Panel.

<sup>57</sup> ADB, [Proposed Remedial Action Plan](#), Georgia: North-South Corridor (Kvesheti-Kobi) Road Project (April 2023) at p.8: "Implementation of the RAP and the mitigation action plan is expected to cost about \$200,000 and will be financed by ADB loan proceeds and existing technical assistance resources. The RAP includes the actions and timelines to bring the project back into compliance with ADB policies and procedures and/or mitigate any harm, as appropriate."

clients' incentives with the ESP's objectives, keep pace with best practice, and contribute to more consistent and effective remedial responses.

**OHCHR recommends that:**

- *The following definition of remedy should be included in the Definitions section of the ESP (Section II): "Restitution, rehabilitation, satisfaction, and guarantees of non-repetition." Such a definition would reflect international human rights standards and equip EBRD and clients to address a broad range of adverse social (including human rights) impacts.*
- *The mitigation hierarchy in the ESP (Section II: Definitions), and throughout the ESRs, should be amended to: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts." The inappropriateness of off-setting human rights impacts should explicitly be recognized. Projects with significant residual impacts, without any prospect of remedy, should not be financed.*
- *In line with best practice, the ESP should contain an explicit commitment that "the client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy are considered part of a project's costs."<sup>58</sup>*
- *Responsibilities to address adverse impacts should take into account the respective involvement of clients and EBRD in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above. OHCHR recommends that para. 7.23 of the ESP be amended as follows: "If the client fails to comply with the social and environmental commitments set out in the financing agreements, the EBRD may agree with the client remedial measures to be taken by the client to achieve compliance. While the client has primary responsibility for project implementation, EBRD recognizes that there may be circumstances where it is appropriate and necessary for EBRD to contribute to remediation of environmental and social impacts. Such determinations should take into account EBRD's involvement in impacts, international business and human rights standards,<sup>59</sup> stakeholder consultations and any relevant compliance review findings by IPAM, and do not detract in any way from the client's or other parties' responsibilities. If the client fails to comply with the agreed remedial measures, ..."*
- *The ESP and ESR 1 should spell out different kinds of leverage (including commercial, financial, contractual, collective and through capacity building) that may be built and deployed by EBRD and clients to address human rights risks in which they are involved. An examination all available forms of leverage should be part of project Appraisal.*
- *ESR 1, para. 5 should be amended as follows: "The ESAP will include a budget for capital and recurrent costs and will form part of the financing agreements and include the client's obligations to support the implementation of the ESAP." Similarly, ESR 1, para. 28 should be amended as follows: "...The ESMP will include a budget for capital and recurrent costs and will define outcomes, measurable to the extent possible, with targets and performance indicators that can be tracked over defined time periods. ..." These suggested changes would be consistent with costing/budgeting requirements for corrective action plans and resettlement plans (ESR 5, paras. 7, 52(vi) & 57) and will help to ensure that all E&S costs are internalized within the project.*

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<sup>58</sup> See e.g. ADB draft ESF (Oct. 2023), ESS 1, para. 29: "The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project's costs." And also AfDB, ESOS 1, para. 36.

<sup>59</sup> UN Guiding Principles on Business and Human Rights, and OECD MNE Guidelines and Responsible Business Conduct due diligence guidance.



- EBRD's monitoring requirements (Policy, para. 7.23, and ESR 1, para. 40) should include the following requirement: "EBRD has the right to carry out, or require the client to carry out, an audit or assessment where there is evidence of a serious departure from the ESAP and/or the ESRs, the costs of which should be borne by the client." The latter requirement would be consistent with the auditing requirement for labour impacts in ESR 2.
- In line with DFI best practice<sup>60</sup> and EBRD's approach to integrity issues,<sup>61</sup> the ESP should state that: "EBRD may debar a person or entity for refusing to engage in efforts to remediate identified environmental, social, and human rights harm stemming from their activities, including harm that may be identified through an IPAM compliance review process."
- EBRD should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.
- Consistent with the draft ESP's proposed approach in relation to resettlement impacts (ESR 5, para. 57), and with the reasoning in Section 7.8 of the report for the [External Review of the ES Accountability of the IFC and MIGA](#) (paras. 329-339), the EBRD should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by EBRD contributions to the extent of the bank's own involvement in any adverse impacts. A decision by EBRD to contribute financially to remediation, in line with its own contribution to harms, is separate from and should not be seen as an admission of legal liability.

### Responsible exit

28. We welcome the requirements in ESR 2, paras. 45 & 47, to build and exercise contractual leverage and to exit projects responsibly, in response to forced and child labour risks and impacts in supply chains.<sup>62</sup> We agree that contractual leverage deserves priority consideration, however we'd suggest that para. 45 be amended to include other potentially effective sources of leverage, including commercial/financial leverage, relationship leverage, capacity-building and collective leverage,<sup>63</sup> and that the requirements to build and exercise leverage and exit projects responsibly not be limited to ESR 2.

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<sup>60</sup> See US Development Finance Corporation, [Federal Register :: Nonprocurement Suspension and Debarment; Correction](#) (2024).

<sup>61</sup> OHCHR, [Remedy in Development Finance](#) (2022), Box 26, referring to the 2010 Agreement for the Mutual Enforcement of Disbarment Decisions, between EBRD, EIB, AfDB, IDB and the World Bank Group.

<sup>62</sup> ESR 2, para. 45: "Where the client does not have a direct contractual relationship with a sub-supplier, the client will use reasonable efforts to build their leverage by working with relevant entities to prevent and mitigate the risks identified." And para. 47: "As a last resort, after failed attempts to prevent or mitigate significant risks or adverse impacts, and when there is no reasonable prospect of compliance with paragraphs 44 to 46 of this ESR, the client will develop and implement a responsible disengagement plan in relation to the relevant supplier(s) or sub-supplier(s)."

<sup>63</sup> OHCHR, [Remedy in Development Finance: Guidance and Practice](#) (2022), pp.48-58.

29. On the substantive elements of a “responsible exit” framework, we refer to the discussion in pp.89-93 of OHCHR’s [DFI Safeguard Policies Benchmarking Study](#) (2023). We note the continuing imbalance, generally, between the efforts expended by DFIs on up-front compliance and development impact when entering projects, compared with exit. We note that numerous DFIs (including IFC, IDB Invest and certain EDFIs) have been moving to address this significant gap in operational policy and practice. We note that UN and OECD standards on responsible business conduct encourage companies to build and exercise all feasible leverage options, engage with E&S risk, and assess human rights impacts of any decision to exit.<sup>64</sup>

**OHCHR recommends that:**

- *The ESP and ESR 1 should outline the main elements of a “responsible exit framework” to guide actions across the project cycle, including:*
  - *integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
  - *a clear requirement not to exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;*
  - *a commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
  - *a requirement that no community members or workers face risk of retaliation due to the exit; and*
  - *a commitment to seek a responsible replacement(s) for EBRD, or the client, as the case may be, on exit.*<sup>65</sup>

**Digitalization risks**

30. The exposure of MDBs to digitalization risks is rising rapidly, presenting a challenge to MDBs’ existing E&S risk management approaches. Between October 2023 to January 2024, OHCHR assessed 3,450 digitalization projects, and/or projects with digital components, in nine MDBs, including 815 EBRD projects, in four sectors: ICT, health, finance and public administration. The research noted that the digital footprint of the surveyed MDBs is large, and growing but, based upon available data, digital risks do not appear to be regularly identified and addressed at the project level.<sup>66</sup> In EBRD’s case, within a sample of 103 projects assessed by OHCHR to have a relatively clear digital component, none was assigned an “A” rating, and fourteen were rated “B.”<sup>67</sup> Yet digital risks can be diverse, pervasive and severe, and go well beyond data protection issues and abridgements of the right to privacy.

31. OHCHR welcomes the fact that EBRD, along with ADB, is among the first MDBs to explicitly integrate attention to digitalization risks in its E&S safeguard policies. Of course, E&S

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<sup>64</sup> UNGP 19, commentary.

<sup>65</sup> For an excellent analysis supportive of these recommendations, albeit targeted to IFC, see IFC/CAO, [Responsible Exit: Insights from CAO Cases](#) (Dec. 2023).

<sup>66</sup> The database is a working document, available from OHCHR on request along with a methodology note.

<sup>67</sup> Most projects in this sample were in the ICT and Finance sectors. The majority of the projects surveyed were FI operations, in the “FI” risk category. Across all MDBs surveyed, ICT sector projects were more likely to trigger safeguards given physical impacts of ICT infrastructure rather than digital risk concerns.

safeguard policies do not and need not attempt to contain all E&S risk management requirements on digitalization or any other issue. However, in OHCHR's view, it is important that key definitions, thresholds, definitions of roles, and requirements pertaining to disclosure, stakeholder engagement, E&S risk assessment, mitigation and remedy be contained in the ESP. The ESP is the main framework for managing E&S risks in EBRD-supported projects,<sup>68</sup> backed by dedicated E&S expertise and resources. The ESP is consulted upon publicly and approved by the Board, and its requirements will be integrated within client contracts and subject to independent accountability. The incentives for implementation of ESP requirements are greater than those for other kinds of guidance. If a full range of digital risks are not explicitly integrated in the ESP, along with core definitions, delineation of roles and risk management requirements, E&S risk management practice will likely be inconsistent and the goals of accountability and sustainability will be undermined, in OHCHR's view.

32. Subject to that, we welcome the steps that EBRD is already proposing to integrate digitalization risks within the ESP. We note the definition of "digitalization" in Definitions (Section II), and the inclusion of digital platform workers in ESR 2 (para. 4(c)), and in particular ESR 1, para. 17, which states: "Where projects or the client's business activities involve the management of digital personal data, significant reliance on digital services and technologies, or the substantial digitalisation of services or products, the assessment process will consider environmental and social risks and impacts associated with cybersecurity, data protection and privacy." We also note the explicit recognition in the ESP, para. 2.12, of the linkages between digital risk and human rights,<sup>69</sup> however given the absence and/or weaknesses in data protection laws in most countries we would suggest that that paragraph be amended as follows: "...The Bank will consider where the use of significant digitalisation can have adverse environmental and social impacts in the projects, it finances in line with taking into account any gaps between national legislation and international human rights and data protection standards."
33. OHCHR would respectfully recommend that the definition of "digitalization" (Definitions, ESP, Section II) recognize that in digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.<sup>70</sup>

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<sup>68</sup> ESP, para. 2.2.

<sup>69</sup> ESP, para. 2.12: "The EBRD is cognisant of the possible adverse environmental and social impacts, issues and risks of digitalisation, cybersecurity and data privacy with respect to human rights and public health and safety. The Bank will consider where the use of significant digitalisation can have adverse environmental and social impacts in the projects it finances in line with national legislation."

<sup>70</sup> OHCHR, [DFI Safeguard Policies Benchmarking Study](#) (2023), pp.112-114 (Box 59). To similar effect see ADB, [Managing Digital Risk: A Primer](#) (Dec. 2023), chapter 8.

34. In OHCHR's view "digital risks", broadly defined, should not only be part of the definition of contextual risk, as proposed earlier, and E&S risk assessment requirements (ESR, para. 17), but should also be reflected in the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy. Moreover, given the comparatively long period of time over which digital risks may materialize, the admissibility threshold for complaints to the IPAM and other relevant mechanisms needs to be more flexible.
35. In OHCHR's view, a self-standing ESR would offer the optimal and most effective means of addressing digital risks. Digital innovations, and their associated risks, are cross-cutting, complex, rapidly evolving and in some cases far broader than any other type of impact covered by existing Safeguards. That means they need to be addressed through a more detailed and nuanced set of requirements that should include, but likely go well beyond, simply adding references to privacy and/or data protection as risks to be addressed in existing E&S safeguard requirements. Identifying and addressing these risks will require tailored approaches and tools that may be fundamentally different from the ways that risk is assessed and addressed under other ESRs. The insightful analysis in ADB's digital risk [primer](#) illustrates the diverse and potentially challenging nature of digital risk management, including (at chapter 8) discussion of their human rights dimensions.
36. It is sometimes suggested that the novel and dynamic nature of many digital risks may actually militate *against* the inclusion of these risks in safeguard policies, and that other kinds of policy guidance such as policy notes, good practice notes and/or programming guides would enable more flexible responses tailored to specific emerging challenges. However in OHCHR's view, consistent with MDBs' practice, the ESP and "softer" forms of guidance should be seen as complementary rather than in opposition. The central role of the ESP as fulcrum for E&S risk management is discussed above, para. 31.

**OHCHR recommends that:**

- *The ESP should include a stand-alone ESR on digital risk.*
- *The definition of "digitalization projects" (Definitions, Section II) should be amended to reflect not only privacy and data security considerations, but other relevant human rights risk factors potentially associated with digital projects, including environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, and access to justice and due process rights, subject to the legal, political and social context in which projects are designed and implemented.*
- *"Digital risks", broadly defined, should not only be part of the definition of contextual risk, as OHCHR has proposed, and E&S risk assessment requirements (ESR, para. 17), but should also be reflected in the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.*
- *ESP, para. 2.12 should be amended as follows: "...The Bank will consider where the use of significant digitalisation can have adverse environmental and social impacts in the projects, ~~it finances in line with~~ taking into account any gaps between national legislation and international human rights and data protection standards."*

- *Given the comparatively long period of time over which digital risks may materialize, the admissibility threshold for complaints to the IPAM and other relevant mechanisms should be flexible.*

### Respecting international law

37. Good practice in DFI safeguards increasingly requires the observance of all relevant sources of law, including international standards, prioritizing whichever standards are most stringent. This is particularly important in view of the potentially wide gaps between national and international standards on issues covered by DFI safeguards, particularly in connection with social issues.<sup>71</sup> As indicated at the outset, we welcome the recognition in the ESP, para. 6.2, that the most stringent applicable standard (as between national law and the ESRs) should apply. However, in line with the approach taken in ESR 2, paras. 7 and 30, we would urge that international legal standards (which may exceed both national law and the ESRs) should also be included.<sup>72</sup>
38. We note that ESR 1, para. 12, which sets requirements for E&S assessments, puts applicable international law on an uncertain footing: “The assessment process will ... identify: (i) applicable environmental and social laws and regulatory requirements of the jurisdictions in which the project operates, *including laws implementing host-country obligations under public international law*; and (ii) applicable requirements under the ESRs” [emphasis added]. The italicized text is confusing, in OHCHR’s view. It negates the independent operation of international law and contradicts the proposition that the highest applicable standard (domestic, international, or ESP) should be respected. A national law is a national law, whether or not it purports to implement international obligations. National laws do not always specify whether or not they purport to implement international law, and even where they do, they may not reflect international requirements fully. Moreover, depending upon the client country’s constitution, international treaties may have domestic effect without need for legislation.

### **OHCHR recommends that:**

- *The final sentence of ESP, para. 6.2, should be amended as follows: “...When host country regulations differ from the ESRs or applicable international legal agreements, projects will be required to meet whichever is more stringent.” Consistent with the approach taken in ESR 2, this would help to ensure that any contradictions between E&S Policy requirements, international and national standards will be resolved in favour of the more stringent standard.*
- *ESR 1, para. 12, should be amended as follows: “The assessment process will ... identify: (i) applicable environmental and social laws and regulatory requirements of the jurisdictions in which the project operates, ~~including laws implementing host-country~~*

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<sup>71</sup> Comprehensive country-specific analysis and recommendations from the various UN human rights bodies are available through the “Country” tab at OHCHR’s home page: [UN Human Rights Office \(ohchr.org\)](https://www.ohchr.org/).

<sup>72</sup> ESP, para. 6.2. Cf. ESR 2, paras. 7. “Projects are required to comply with whichever of the following provides the greater degree of protection: (i) national labour, employment and social security law,<sup>27</sup> (ii) the principles and standards embodied in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work (1998 as amended in 2022), and (iii) this ESR.”

~~obligations under public international law;~~ (ii) *applicable international human rights and environmental standards; and (ii) applicable requirements under the ESRs*“[.]

### Assessing, preventing and responding to reprisals risks

39. Project-related reprisals risks have been increasing in recent years in line with shrinking civic space and erosion of democratic governance in many EBRD member countries. OHCHR welcomes the fact that EBRD and most other MDBs have published “zero tolerance” commitments to address reprisals and, and that EBRD has also produced internal guidance on these issues.<sup>73</sup>
40. OHCHR notes, positively, the new stakeholder engagement requirements in ESR 10 and ESR 1, para. 14, which include explicit attention to intimidation and retaliation. We note that the term “retaliation” is not included in the Policy’s definitions (Section II) and there is no “zero tolerance” commitment expressed in the Policy itself. Moreover the draft ESP’s framework for protection against intimidation and retaliation appears to be focused exclusively upon the client. It is hard to see how such a framework could be effective in practice, in OHCHR’s view. The main substantive requirements in the ESP are that stakeholder engagement and grievance mechanisms should be free of reprisals.<sup>74</sup> However clients are frequently the source of reprisals risk, and project-level grievance mechanisms may be as well. There appear to be no specific requirements in the ESP concerning EBRD’s role and responsibilities to build and exercise leverage to ensure that reprisals risks are assessed, prevented and addressed throughout the project cycle.

#### **OHCHR recommends that:**

- *The Definitions section (Section II) should contain a definition of “reprisals”, in line with that of the draft ADB ESF (Oct. 2023): “Retribution, intimidation, threats, harassment, punishment, judicial proceedings, or any other retaliatory acts against those who voice their opinion or opposition to a project, to a third party related to a project, or to a client.”*
- *EBRD’s existing commitment to address intimidation and retaliation against civil society and project stakeholders<sup>75</sup> should be reproduced in the Policy, in an amended form as expressed below, ideally in a new para. 2.8: “The EBRD does not tolerate actions by EBRD clients or other project counterparties that amount to reprisals, as defined in Section II of the Policy, and will exercise all available leverage and work with the client and other relevant parties to prevent and address reprisals risks.”*
- *The ESP should contain clear requirements for EBRD to assess, prevent and respond to risks of intimidation and retaliation throughout the project cycle.*
- *EBRD should publish detailed procedures on how it should fulfil the above requirements,<sup>76</sup> including parameters and data sources for retaliation risk assessment*

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<sup>73</sup> The EBRD’s internal guidance is referred to in EBRD, Retaliation Against Civil Society and Project Stakeholders (Jan. 2019), para. 5, however OHCHR is not aware whether these guidelines were consulted upon publicly or are publicly available.

<sup>74</sup> In particular OHCHR notes, positively, ESR 10, para. 8: “Where the EBRD’s appraisal or monitoring identifies potentially high risks of retaliation or risks to the safety of stakeholders in connection with the project or client, the client will include within a Stakeholder Engagement Plan (SEP) the measures proposed to prevent and mitigate these risks and will develop a process to investigate allegations or occurrences of such activities.” And ESR 10, para. 36, which includes: “..the grievance mechanism will include dedicated reporting channels, specialist support and response procedures for certain complaints, such as those relating to gender-based violence and harassment or retaliation.”

<sup>75</sup> EBRD, Retaliation Against Civil Society and Project Stakeholders (Jan. 2019).

<sup>76</sup> OHCHR recommends that EBRD’s own guidelines on how to deal with reprisals issues throughout the project cycle be consulted upon and published, taking into account the IAM Network’s [Guide for](#)



*and an outline of the various forms of leverage (contractual and non-contractual) that may be deployed to prevent and respond to intimidation and retaliation risks.*

- *The proposed definition of “contextual risk” in the ESP<sup>77</sup> should include “civic space and freedoms of expression, association and assembly”.*
- *EBRD and its IPAM should systematically collect and publish aggregate data and trends analysis on reprisals in connection with EBRD-supported projects and IPAM procedures, including information on the nature and impact of response measures.*

## Financial intermediaries

41. We note that DFI financing through private and public sector FIs is rising, and for some DFIs has reached more than 50% of their total investment portfolio, and that transparency and E&S risk management have consistently proven problematic for these kinds of operations.<sup>78</sup> Yet we note that the proposed requirements for FI operations do not seem to be as extensive or rigorous as those of some other MDBs, in certain important respects. Given the mixed incentives of many FIs<sup>79</sup> and relatively poor E&S track record of FI operations across other DFIs to date, more detailed, proactive and clearer due diligence requirements by EBRD would seem to be warranted.
42. In this regard we note in particular the removal from EBRD’s existing policy of the Referral List (PR 9, para. 13). In OHCHR’s view the Referral List embodied good practice in FI E&S risk management,<sup>80</sup> providing EBRD with leverage for positive sustainability outcomes in relation to category B as well as category A sub-projects. In OHCHR’s view the Referral List should not only be retained, but expanded, encompassing emerging E&S risk areas such as in connection with digitalization, the salience of which EBRD has recognized elsewhere in the draft ESP.
43. Also of concern, in OHCHR’s view, is that only category A sub-projects would be required to comply with the ESRs,<sup>81</sup> leaving all other projects to be governed by (often, weak) national law and the Exclusion List. This creates an unfortunate contradiction wherein a given category B sub-project directly financed by EBRD would be subject to the ESRs but the same sub-project financed through an FI would not. It is difficult to square this result with a risk-based approach, in OHCHR’s view. Given the relative weakness of national laws on many social issues, compared with international human rights standards, and given the broad scope of social issues and risks relevant to any

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[Independent Accountability Mechanisms to Address Risk of Reprisals in Complaint Management](#) (2019), with necessary adaptations for EBRD.

<sup>77</sup> See footnote 8 above and accompanying text.

<sup>78</sup> See e.g. Publish What You Fund, [Financial Intermediaries](#), Workstream 5 Working Paper (2021), p. 5. For an excellent review and recommendations pertaining to DFIs’ financial intermediary investments see Danish Institute for Human Rights, [Fit for Purpose? An analysis of development finance institutions’ management of human rights risks in intermediated finance](#) (Apr. 10, 2024).

<sup>79</sup> See e.g. CEE Bankwatch, CounterBalance, Euronatur & Recourse, [Why can a third of European Investment Bank lending evade the bank’s environmental and social rules?](#) (Sept. 21, 2021), p.3.

<sup>80</sup> We note that AIIB has a similar requirement: “Prior Approval of Higher Risk Activities. The Bank requires the FI to furnish to the Bank for the Bank’s prior approval the FI’s detailed environmental and social due diligence assessment and instruments for all Higher Risk Activities.”

<sup>81</sup> Policy, para. 9; ESR 9, para. 14).

given FI operation, OHCHR would recommend that *higher-risk sub-projects*<sup>82</sup> should be governed by national law, the ESRs, and/or international law, whichever sets the most stringent standard.

44. The flagging of higher risk projects could be accompanied by more specific requirements concerning EBRD site visits,<sup>83</sup> stakeholder engagement, technical support and/or third party monitoring, in OHCHR's view. We would suggest that more robust due diligence requirements should be undergirded by (and indeed should begin with) more proactive requirements in the Policy for the Bank to seek information from independent sources, rather than depend exclusively upon information provided by the client. This would also seem to be needed in order to enable the Bank independently to assess the evolving risk profile of sub-projects.
45. Finally, on the subject of remedy, we note that ESR 9, para. 15, requires the FI to put in place a "system for dealing with communications on E&S matters," and a grievance mechanism as part of that, which should be able to respond to concerns and grievances in a "structured and timely manner." We note that no further requirements are specified. In line with best practice, and consistent with draft ESR 10 (para. 35, footnote 138), we'd recommend that each FI should be required to have an institution-level GRM that complies with the "effectiveness criteria" of the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>84</sup> In order to make accountability and remedy possible, we would also recommend that the EBRD's support for a sub-projects be disclosed at sub-project sites along with information about the roles, functions and contact details for the FI (and any sub-project) GRM, and the EBRD-IPAM, in an accessible, visible and comprehensible manner from the perspective of people affected by the sub-project.
46. The Danish Institute for Human Rights has undertaken a thorough review of DFI policy in this area<sup>85</sup> which need not be summarized here. However for a recent counterpoint, the recently updated Integrated Safeguard System (ISS) of AfDB contains relatively specific requirements for FI operations in relation to stakeholder engagement,<sup>86</sup> time-

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<sup>82</sup> "Higher risk" could be defined in terms of EBRD's Referral List. By way of comparison, AIIB defines Higher Risk Activities as "a) all Category A activities; and (b) selected Category B activities, as determined by the Bank, that may potentially result in: (i) Land Acquisition or Involuntary Resettlement, (ii) risk of adverse impacts on Indigenous Peoples and/or vulnerable groups, (iii) significant risks to or impacts on the environment, community health and safety, biodiversity, and cultural resources, (iv) significant retrenchment of more than 20% of direct employees and recurrent contractors, and/or (v) significant occupational health and safety risks." However in OHCHR's view it is important to include human rights risks specifically given their distinctive meanings and accountability requirements under international and national laws, and given the overriding public interest involved.

<sup>83</sup> We note that site visits are optional under draft ESR 9, para. 17, and there is no suggested frequency linked to risk.

<sup>84</sup> The GCF requires each "accredited entity" (financial institution) to have an institution-level GRM that complies with the UNGPs. GCF, ESP, para. 12(c). The effectiveness criteria in UNGP principle 31 are: legitimacy, accessibility, predictability, transparency, equitability, rights compatibility, source of continuous learning, and based on engagement and dialogue. The GCF-IRM also has a mandate to build the capacity of the GRMs of Direct Access Entities (national and regional FIs). In March 2022 the GCF-IRM published a [self-assessment](#) against the UNGP 31 effectiveness criteria. This was the first such self-assessment of any member of the global IAMs Network.

<sup>85</sup> Danish Institute for Human Rights, [Fit for Purpose? An analysis of development finance institutions' management of human rights risks in intermediated finance](#) (Apr. 10, 2024).

<sup>86</sup> AfDB [Integrated Safeguard System](#) (2023), ESOS 9, paras. 25-28. Notably, ESOS 9, para. 28, includes: "The FI will require that the subprojects disclose the Bank's support to them, the existence of the project-level GRM, and the Bank's IRM, and ensure that this information is clearly visible, accessible and

bound (maximum 3-day) notification to AfDB of “materially significant adverse events” (which explicitly include human rights violations),<sup>87</sup> information disclosure,<sup>88</sup> regular (at least quarterly) reporting from the FI to the Bank on E&S risk,<sup>89</sup> review by the Bank of high-risk FI sub-projects,<sup>90</sup> and the application of a portfolio approach in relation to general purpose FI financing.<sup>91</sup> Moreover AfDB’s ISS stipulates that its Operational Standards apply to any FI subproject that involves “adverse risks and impacts on vulnerable groups.”<sup>92</sup>

**OHCHR recommends that:**

- *The EBRD Referral List in the 2019 ESP should be retained and expanded to include emerging E&S risk areas, including those associated with digitalization.*
- *ESR 9 should require:*
  - *compliance by sub-projects with international law, national law, and the ESRs, whichever sets the most stringent standard;*
  - *specific supervision requirements for EBRD, including site visits and/or third party monitoring for higher risk sub-projects;*
  - *time-bound notification by the FI to EBRD of significant E&S events, including human rights violations, in line with AfDB’s Integrated Safeguard System, para. 35;*
  - *publication of ESIA’s and other relevant E&S documentation for high-risk projects 120 days prior to FI or EBRD Board approval, whichever is earlier;*
  - *time-bound disclosure of the name, sector and location of sub-projects on EBRD’s and the FI client’s website, prior to the FI operation’s approval and periodically thereafter;*
  - *the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and*
  - *disclosure at the project site of EBRD’s involvement in sub-projects, and of the existence of the EBRD-IPAM and project-level GRM, ensuring that this information is clearly visible, accessible and understandable to affected communities.*

**Other financial instruments**

47. OHCHR notes the relative lack of clarity about E&S requirements for “other financial instruments”, and what particular instruments may be included. For capital market transactions OHCHR notes, positively, that para. 7.14 of the Policy would require that clients comply with the ESRs after subscription, and that Category A projects financed

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*understandable to affected communities”* [emphasis added]. ESOS 9, footnote 274 reiterates this important requirement.

<sup>87</sup> AfDB ISS, Policy, para. 35. See also ESOS 9, para. 23 (in less specific terms). The AfDB definition of materiality appears to be broader than that in the EBRD Guidance Note for FIs (Mar. 2023), pp.4, 12 & 15, is less site-specific, and does not conflate E&S risk with reputational risk.

<sup>88</sup> AfDB ISS, ESOS 9, paras. 23-25 & 28.

<sup>89</sup> *Id.*, para. 17(g) & 24.

<sup>90</sup> AfDB ISS, Policy, para. 41.

<sup>91</sup> AfDB ISS, ESOS 9, para. 6. A similar requirement is reflected in the EBRD Guidance Note for FIs (Mar. 2023), p.5, which in OHCHR’s view would be important to reflect in the ESP itself.

<sup>92</sup> *Id.*, para. 12. The term “vulnerable groups” is defined broadly, in similar terms to EBRD’s draft ESP (2024).

using such instruments would require the development and disclosure of an ESIA prior to approval. However para. 7.12 appears to be of uncertain scope and clarity.<sup>93</sup> Alternative risk assessment frameworks are permitted subject only to the requirement that they be aligned with the “objectives of the ESRs”, which are generally very broad in nature.<sup>94</sup>

48. It seems important to further clarify the scope of “other financial instruments,” define applicable requirements and strengthen E&S approaches, in OHCHR’s view. Trade finance, for example, slowed during the Covid-19 pandemic, but expectations and demands have risen sharply since then. Individual trade finance operations may be very large in dollar terms, yet the development impact is not always self-evident, and DFIs’ existing E&S frameworks do not appear to have kept pace with the E&S risk management demands in this area.<sup>95</sup> While “ESG” frameworks have been proliferating in recent years, definitions and metrics are still in their infancy and their rigour has often been criticized.<sup>96</sup> OHCHR notes that IFC’s E&S Review Procedures require that IFC review each short-term trade finance transaction and apply the IFC Exclusion List.<sup>97</sup> OHCHR would suggest that a similar precautionary approach be applied by EBRD to trade finance and other financial instruments, as a default, subject to the development of more reliable E&S risk management approaches that are “substantially equivalent” to the ESRs.

**OHCHR recommends that:**

- *The ESP should further specify the various kinds of financial instruments that are intended to be included in the category “other financial instruments”, and identify distinctive features pertaining to the E&S risk management of each.*
- *The criteria of “capacity, commitment and track record” should be used consistently across the ESP, including but not limited to paras. 7.11, 7.12, 7.14 and 7.15, in connection with project appraisal and the client’s ESMS.*
- *Pending the development of robust and reliable ESG metrics, any alternative E&S approaches should be subject to the EBRD’s Exclusion List (Appendix 1). Category A projects (Appendix 2) should also be excluded, in line with EBRD’s existing approach in relation to capital market transactions.<sup>98</sup>*
- *Alternative approaches to E&S risk management for “other financial instruments” should be “substantially equivalent” to the ESRs, not merely “consistent with the objectives” of the ESRs.*

**Common approaches**

49. For co-financing situations, we note that the Policy, para. 2.14, provides only that: “In determining whether the common approach is acceptable, consideration will be given to the policies, standards, and implementation procedures of the multilateral or bilateral agencies or organisations, as applicable.” It is useful and important, in OHCHR’s view, that para. 2.14 recognizes the importance of implementation procedures of potential co-financing institutions, in addition to policies and standards, although there is a range of

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<sup>93</sup> Para. 7.12 also calls for consideration of the “capacity and capability” of the client. Paras. 7.11, 7.14 and 7.15 refer to “capacity and commitment.” OHCHR would suggest that the phrase “capacity, commitment and track record,” which are different but related criteria, be used systematically throughout the ESP.

<sup>94</sup> Policy, para. 7.23, & ESR 1, para. 3 (stating broadly worded objectives).

<sup>95</sup> OHCHR, [Benchmarking Study of DFI Safeguard Policies](#) (2023), pp.96-97.

<sup>96</sup> See e.g. ADB Brief No. 256 (Sept. 2023), [2023 Trade Finance Gaps, Growth, and Jobs Survey](#), p.5; Inclusive Development International [Submission to the UN Working Group Call for Input](#) (Oct. 13, 2023).

<sup>97</sup> IFC, [Environmental and Social Review Procedures](#) (2016), Chapter 7, para. 3.3.2.

<sup>98</sup> ESP 2019, para. 4.11.

other important determinations of policy implementation in any given DFI.<sup>99</sup> However it is equally important, in OHCHR's view, to ensure that substantive E&S requirements in any common approach are substantially equivalent to those of the EBRD.

**OHCHR recommends that:**

- *ESP, para. 2.14 should be amended as follows: "...consideration will be given to the policies, ~~and standards, and implementation procedures~~ of the multilateral or bilateral agencies or organisations, as applicable, which must be substantially equivalent to those of EBRD, as well as to the latter agencies' or organisations' implementation procedures and systems. A decision on the use of a common approach ..."*

Climate change

50. We note the increasing urgency of the climate crisis, the profound and potentially irreparable negative impacts of climate change on human rights, the strengthening framework of international human rights law relevant to climate change, and the agreed need to address climate change from a human rights perspective.<sup>100</sup> We note that under its new [energy strategy](#) EBRD will not finance coal projects or upstream gas, and that new fossil fuel projects will be financed in "increasingly rare instances."<sup>101</sup> However an urgent, comprehensive phase-out of fossil fuels and shift to renewable energy is now needed, in OHCHR's view, including an exclusion of midstream and downstream gas projects.<sup>102</sup>
51. We welcome the fact that climate change is included within the draft ESP's definition of "social matter", as well as "environmental matter" (Definitions, Section II). We welcome EBRD's intention (Policy, para. 2.8) to support countries to implement their obligations under the Paris Agreement and to support "zero carbon" investments, although we would suggest that the latter investments should be supported "wherever possible" rather than "wherever appropriate."
52. We also note that attention to climate change has been incorporated within ESR 1 (para. 1, "climate" included within E&S risks and impacts), ESR 3 (paras. 3 &4), ESR 41 (para. 41) and ESR 9 (para. 13). However we note that ESR 3 (para. 23) seems to confuse the mitigation hierarchy and introduces a cost-effectiveness requirement, and ESR 9 (para. 13) would require that FI sub-projects be monitored only in accordance with national law (rather than the typically higher standards of international law and/or the ESRs). We welcome the fact the Policy (para. 2.8) has been amended to require project GHG emissions to be "removed", in addition to avoided or reduced. However, prioritization of avoidance could be made clearer in OHCHR's view, and be made consistent with the definition of the

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<sup>99</sup> For a brief illustrative outline of these see OHCHR, [Benchmarking Study of DFI Safeguard Policies](#) (2023), pp.10-11, discussing leadership, internal incentive structures, E&S resources and capacities, accountability and governance arrangements.

<sup>100</sup> See generally [The impacts of climate change on the effective enjoyment of human rights | OHCHR](#).

<sup>101</sup> EBRD, [Energy Sector Strategy 2024-2028](#), p.4.

<sup>102</sup> See International Energy Agency, [Net Zero Roadmap: A Global Pathway to Keep the 1.5 C Goal in Reach](#) (2023); Jones, N., [Paris-aligned or Paris-misaligned? Fossil fuel financing under the European Bank for Reconstruction and Development's Paris alignment methodology](#), International Institute for Sustainable Development (Mar. 21, 2023); and [Letter](#) from Bank Climate Advocates *et al* to EBRD President (May 16, 2024).

mitigation hierarchy in the Definitions section (Section II), amended to substitute “remedy” for “compensate and/or off-set,” as recommended earlier.

**OHCHR recommends that:**

- *EBRD should extend its fossil fuel exclusion to cover midstream and downstream gas.*
- *ESR 3, para. 23 should be amended as follows: “The client’s environmental and social assessment process will consider alternatives and implement technically and financially feasible ~~and cost-effective~~ options to avoid, and if avoidance is not possible, to-or minimize, mitigate and as a last resort, remedy any potential residual adverse impacts arising from project-related GHG emissions during the design and operation of the project.”*
- *The Policy, para. 2.8, should be amended as follows: “...The EBRD will engage, whenever ~~appropriate~~ possible, in innovative investments and technical assistance to support zero no/low-carbon investments, renewables and climate change mitigation and adaptation opportunities, ...”*
- *ESR 9, para. 13 should be amended to ensure that FI sub-projects are monitored in accordance with national law, international law, and the ESRs, whichever sets the highest standard.*

Conclusion

53. We hope that these comments, and the recommendations in the Annex, are useful to EBRD in finalizing the ESP. We reiterate our appreciation for our constructive and ongoing engagement with EBRD on these issues and are at your disposal for clarifications and any follow-up as needed.

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## ANNEX - LIST OF RECOMMENDATIONS

OHCHR respectfully recommends the following:

### Risk-based value chain due diligence

1. *The ESP should clarify that clients should address all potential E&S (including human rights) impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, downstream as well as upstream.*
2. *ESR 2, para. 45, should be amended as follows: “Where the client does not have a direct contractual relationship with a sub-supplier, the client will use reasonable efforts to build ~~their leverage by working with relevant entities~~ and exercise all available forms of leverage to prevent and mitigate the risks identified. The term “leverage” should be defined to include “contractual, commercial, financial, relationship leverage, and/or collective leverage, and/or capacity building.*
3. *Paragraph 5.6 of the ESP should be amended as follows: “...that such associated facilities may present. The client will be required to build and exercise all available forms of leverage to address the latter risks. The client will be required to demonstrate the extent to which ....”*
4. *Paragraph 21 of ESR 1 should be amended as follows: “...Where significant risks are identified, the client will ~~use reasonable efforts~~ build and exercise all available forms of leverage to prevent and mitigate these risks and to remediate impacts as necessary. ..”*

### A proactive and robust approach to remediation

5. *The following definition of remedy should be included in the Definitions section of the ESP (Section II): “Restitution, rehabilitation, satisfaction, and guarantees of non-repetition.” Such a definition would reflect international human rights standards and equip EBRD and clients to address a broad range of adverse social (including human rights) impacts.*
6. *The mitigation hierarchy in the ESP (Section II: Definitions), and throughout the ESRs, should be amended to: “avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts.” The inappropriateness of off-setting human rights impacts should explicitly be recognized. Projects with significant residual impacts, without any prospect of remedy, should not be financed.*
7. *In line with best practice, the ESP should contain an explicit commitment that “the client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy are considered part of a project’s costs.”*
8. *Responsibilities to address adverse impacts should take into account the respective involvement of clients and EBRD in impacts (cause-contribute-direct linkage), as*

summarized in [Figure 1](#) above. OHCHR recommends that para. 7.23 of the ESP be amended as follows: “If the client fails to comply with the social and environmental commitments set out in the financing agreements, the EBRD may agree with the client remedial measures to be taken by the client to achieve compliance. While the client has primary responsibility for project implementation, EBRD recognizes that there may be circumstances where it is appropriate and necessary for EBRD to contribute to remediation of environmental and social impacts. Such determinations should take into account EBRD’s involvement in impacts, international business and human rights standards,<sup>103</sup> stakeholder consultations and any relevant compliance review findings by IPAM, and do not detract in any way from the client’s or other parties’ responsibilities. If the client fails to comply with the agreed remedial measures, ...”

9. The ESP and ESR 1 should spell out different kinds of leverage (including commercial, financial, contractual, collective and through capacity building) that may be built and deployed by EBRD and clients to address human rights risks in which they are involved. An examination all available forms of leverage should be part of project Appraisal.
10. ESR 1, para. 5 should be amended as follows: “The ESAP will include a budget for capital and recurrent costs and will form part of the financing agreements and include the client’s obligations to support the implementation of the ESAP.” Similarly, ESR 1, para. 28 should be amended as follows: “...The ESMP will include a budget for capital and recurrent costs and will define outcomes, measurable to the extent possible, with targets and performance indicators that can be tracked over defined time periods. ..” These suggested changes would be consistent with costing/budgeting requirements for corrective action plans and resettlement plans (ESR 5, paras. 7, 52(vi) & 57) and will help to ensure that all E&S costs are internalized within the project.<sup>104</sup>
11. EBRD’s monitoring requirements (Policy, para. 7.23, and ESR 1, para. 40) should include the following requirement: “EBRD has the right to carry out, or require the client to carry out, an audit or assessment where there is evidence of a serious departure from the ESAP and/or the ESRs, the costs of which should be borne by the client.” The latter requirement would be consistent with the auditing requirement for labour impacts in ESR 2.
12. In line with DFI best practice<sup>105</sup> and EBRD’s approach to integrity issues,<sup>106</sup> the ESP should state that: “EBRD may debar a person or entity for refusing to engage in efforts to remediate identified environmental, social, and human rights harm stemming from their activities, including harm that may be identified through an IPAM compliance review process.”
13. EBRD should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical

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<sup>103</sup> UN Guiding Principles on Business and Human Rights, and OECD MNE Guidelines and Responsible Business Conduct due diligence guidance.

<sup>104</sup> ESS 1, para. 29: “The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project’s costs.”

<sup>105</sup> See US Development Finance Corporation, [Federal Register :: Nonprocurement Suspension and Debarment; Correction](#) (2024)

<sup>106</sup> OHCHR, [Remedy in Development Finance](#) (2022), Box 26, referring to the 2010 Agreement for the Mutual Enforcement of Disbarment Decisions, between EBRD, EIB, AfDB, IDB and the World Bank Group.

guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.

14. Consistent with the draft ESP's proposed approach in relation to resettlement impacts (ESR 5, para. 57), and with the reasoning in Section 7.8 of the report for the [External Review of the ES Accountability of the IFC and MIGA](#) (paras. 329-339), the EBRD should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by EBRD contributions to the extent of the bank's own involvement in any adverse impacts. A decision by EBRD to contribute financially to remediation, in line with its own contribution to harms, is separate from and should not be seen as an admission of legal liability.

#### Responsible exit

15. The ESP and ESR 1 should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:
- Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;
  - A clear requirement not to exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;
  - A commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;
  - A requirement that no community members or workers face risk of retaliation due to the exit; and
  - A commitment to seek a responsible replacement(s) for EBRD, or the client, as the case may be, on exit.

#### Digitalization risks

16. The ESP should include a stand-alone ESR on digital risk.
17. The definition of "digitalization projects" (Definitions, Section II) should be amended to reflect not only privacy and data security considerations, but other relevant human rights risk factors potentially associated with digital projects, including environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, and access to justice and due process rights, subject to the legal, political and social context in which projects are designed and implemented.
18. "Digital risks", broadly defined, should not only be part of the definition of contextual risk, as OHCHR has proposed, and E&S risk assessment requirements (ESR, para. 17), but should also be reflected in the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.

19. ESP, para. 2.12 should be amended as follows: “...The Bank will consider where the use of significant digitalisation can have adverse environmental and social impacts in the projects, ~~it finances in line with~~ taking into account any gaps between national legislation and international human rights and data protection standards.”
20. Given the comparatively long period of time over which digital risks may materialize, the admissibility threshold for complaints to the IPAM and other relevant mechanisms should be flexible.

#### Respecting international law

21. The final sentence of ESP, para. 6.2, should be amended as follows: “...When host country regulations differ from the ESRs or applicable international legal agreements, projects will be required to meet whichever is more stringent.” Consistent with the approach taken in ESR 2, this would help to ensure that any contradictions between E&S Policy requirements, international and national standards will be resolved in favour of the more stringent standard.
22. ESR 1, para. 12, should be amended as follows: “The assessment process will ... identify: (i) applicable environmental and social laws and regulatory requirements of the jurisdictions in which the project operates, ~~including laws implementing host country obligations under public international law~~; (ii) applicable international human rights and environmental standards; and (ii) applicable requirements under the ESRs”[.]

#### Assessing, preventing and responding to reprisals risks

23. The Definitions section (Section II) should contain a definition of “reprisals”, in line with that of the draft ADB ESF (Oct. 2023): “Retribution, intimidation, threats, harassment, punishment, judicial proceedings, or any other retaliatory acts against those who voice their opinion or opposition to a project, to a third party related to a project, or to a client.”
24. EBRD’s existing commitment to address intimidation and retaliation against civil society and project stakeholders<sup>107</sup> should be reproduced in the Policy, in an amended form as expressed below, ideally in a new para. 2.8: “ The EBRD does not tolerate actions by EBRD clients or other project counterparties that amount to reprisals, as defined in Section II of the Policy, and will exercise all available leverage and work with the client and other relevant parties to prevent and address reprisals risks.”
25. The ESP should contain clear requirements for EBRD to assess, prevent and respond to risks of intimidation and retaliation throughout the project cycle.
26. EBRD should publish detailed procedures on how it should fulfil the above requirements,<sup>108</sup> including parameters and data sources for retaliation risk assessment and an outline of the various forms of leverage (contractual and non-contractual) that may be deployed to prevent and respond to intimidation and retaliation risks.

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<sup>107</sup> EBRD, Retaliation Against Civil Society and Project Stakeholders (Jan. 2019).

<sup>108</sup> OHCHR recommends that EBRD’s own guidelines on how to deal with reprisals issues throughout the project cycle be consulted upon and published, taking into account the IAM Network’s [Guide for Independent Accountability Mechanisms to Address Risk of Reprisals in Complaint Management](#) (2019), with necessary adaptations for EBRD.

27. *The proposed definition of “contextual risk” in the ESP<sup>109</sup> should include “civic space and freedoms of expression, association and assembly”.*
28. *EBRD and its IPAM should systematically collect and publish aggregate data and trends analysis on reprisals in connection with EBRD-supported projects and IPAM procedures, including information on the nature and impact of response measures.*

#### Financial intermediaries

29. *The EBRD Referral List in the 2019 ESP should be retained and expanded to include emerging E&S risk areas, including those associated with digitalization.*
30. *ESR 9 should require:*
  - *compliance by sub-projects with international law, national law, and the ESRs, whichever sets the most stringent standard;*
  - *specific supervision requirements for EBRD, including site visits and/or third party monitoring for higher risk sub-projects;*
  - *time-bound notification by the FI to EBRD of significant E&S events, including human rights violations, in line with AfDB’s Integrated Safeguard System, para. 35;*
  - *publication of ESIA’s and other relevant E&S documentation for high-risk projects 120 days prior to FI or EBRD Board approval, whichever is earlier;*
  - *time-bound disclosure of the name, sector and location of sub-projects on EBRD’s and the FI client’s website, prior to the FI operation’s approval and periodically thereafter;*
  - *the establishment and effective operation of an FI grievance mechanism, in accordance with the effectiveness criteria in the UN Guiding Principles on Business and Human Rights (principle 31); and*
  - *disclosure at the project site of EBRD’s involvement in sub-projects, and of the existence of the EBRD-IPAM and project-level GRM, ensuring that this information is clearly visible, accessible and understandable to affected communities.*

#### Other financial instruments

31. *The ESP should further specify the various kinds of financial instruments that are intended to be included in the category “other financial instruments”, and identify distinctive features pertaining to the E&S risk management of each.*
32. *The criteria of “capacity, commitment and track record” should be used consistently across the ESP, including but not limited to paras. 7.11, 7.12, 7.14 and 7.15, in connection with project appraisal and the client’s ESMS.*
33. *Pending the development of robust and reliable ESG metrics, any alternative E&S approaches should be subject to the EBRD’s Exclusion List (Appendix 1). Category A projects (Appendix 2) should also be excluded.*

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<sup>109</sup> See footnote 8 above and accompanying text.

34. *Alternative approaches to E&S risk management for “other financial instruments” should be “substantially equivalent” to the ESRs, not merely “consistent with the objectives” of the ESRs.*

#### Common approaches

35. *ESP, para. 2.14 should be amended as follows: “...consideration will be given to the policies, ~~and standards, and implementation procedures~~ of the multilateral or bilateral agencies or organisations, as applicable, which must be substantially equivalent to those of EBRD, as well as to the latter agencies’ or organisations’ implementation procedures and systems. A decision on the use of a common approach ...”*

#### Climate change

36. *EBRD should extend its fossil fuel exclusion to cover midstream and downstream gas.*
37. *ESR 3, para. 23 should be amended as follows: “The client’s environmental and social assessment process will consider alternatives and implement technically and financially feasible ~~and cost-effective~~ options to avoid, and if avoidance is not possible, to ~~or~~ minimize, mitigate and as a last resort, remedy any potential residual adverse impacts arising from project-related GHG emissions during the design and operation of the project.”*
38. *The Policy, para. 2.8, should be amended as follows: “...The EBRD will engage, whenever ~~appropriate~~ possible, in innovative investments and technical assistance to support zero no/low-carbon investments, renewables and climate change mitigation and adaptation opportunities, ...”*
39. *ESR 9, para. 13 should be amended to ensure that FI sub-projects are monitored in accordance with national law, international law, and the ESRs, whichever sets the highest standard.*

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