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Guide to Contractual Provisions for Remedy in DFI Financing

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Abbreviations and acronyms

DFI	Development Finance Institution
E&S	Environmental and social
ESAP	Environmental and Social Action Plan
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management System
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
IAM	Independent Accountability Mechanism
LC	Letter of credit
OHCHR	Office of the United Nations High Commissioner for Human Rights
UNGPs	UN Guiding Principles on Business and Human Rights

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EXECUTIVE SUMMARY

Multilateral development banks and bilateral development finance institutions (DFIs) have developed a complex web of policies and mechanisms, including environmental and social (E&S) Safeguard policies and procedures, to prevent and mitigate E&S risks and adverse impacts in relation to the projects that they finance. These measures have been developed and applied over a period of more than four decades. The corollary of this 'do no harm' principle is the requirement to take action to address and remedy harms where they do occur.

Notwithstanding these measures, too many gaps between the claims of communities and workers for remedial action for harms and the delivery of that remedial action remain. Too often DFIs and their clients fail to see remedy as an ordinary project contingency and development opportunity. This Guide offers practical pointers to help fill existing remedy gaps by strengthening attention to remedy in the legal contracts between DFIs and their clients, and helping all parties prepare for remedy, through Drafting Considerations and suggestions for contractual provisions for DFI financing in large private sector projects in developing countries.

Project-affected people often have the most pressing and personal stakes in projects, yet, to OHCHR's knowledge, they are rarely parties to project contracts and probably never parties to financing contracts. Specific project action plans, such as E&S action plans, resettlement action plans, and community development plans, are designed to protect and benefit project-affected people and are usually covenanted in the DFI financing agreement; while the project company is responsible for implementing these plans, only the DFI can enforce it as a matter of contract law. Project-affected people, on the other hand, cannot enforce their rights to receive compensation, livelihood assistance, community benefits, or other benefits under the project, and must usually resort to legal theories, causes of action, and forums that may be more complicated than those pertaining to contractual claims.

The ten Drafting Considerations set forth in this Guide are intended to help drafters of DFI financing agreements to anticipate and address these existing remedy gaps for the benefit of the project-affected people, as well as the DFI and the project. The Drafting Considerations recommend attention to: the lack of legal status of the project-affected people and techniques to counter it; E&S and human rights due diligence; disclosure of project information; prioritization of human rights remedies over contractual or technical remedies; exercise of leverage; provision of financing mechanisms for remedy; multiple options for disputes resolution; responsibilities vis-a-vis contractors, subcontractors, suppliers and other third parties; responsible exit; and the DFI's own contribution to remedy. These Considerations are not strictly legal in nature and do not constitute legal advice, but rather, taken together, they provide the context and rationale for the suggested contractual provisions that follow.

These Drafting Considerations describe challenges that DFIs and projects almost always encounter and must overcome. Considerations should be thoroughly analyzed and, when applicable, or relevant, should be reflected in the DFI financing agreement, either in the form of the corresponding contractual provisions suggested in Chapter IV, or in any other appropriate form under the project circumstances. The Drafting Considerations and the suggested contractual provisions (or other appropriate provisions) help the DFI and the project to fully and

accurately anticipate and assess all costs and benefits of the project; this will in turn benefit the project-affected people through avoidance, minimization, and remedy of adverse project impacts.

The suggested contractual provisions reflect both existing best practice and new ideas that offer drafters some food for thought. The provisions are sequenced in the usual order of provisions in loan agreements, starting with Definitions; Representations and Warranties; Conditions of Disbursement; General Undertakings (affirmative and negative covenants); Informational Undertakings; Dispute Resolution; and Events of Default. The Additional Undertakings in Clause 8 propose additional provisions that would obligate the project company and the DFI to implement certain requirements that would help improve the project's E&S and human rights outcomes, and enable a DFI to exit a project responsibly, while binding the project to continue to fulfil its E&S and human rights obligations. This Guide treats human rights obligations as an integral part of E&S impacts, which are already the subject of standard provisions in DFI contracts.

Equity investment is another direct financing technique for DFIs, often occurring alongside DFI loans, though some equity investment can be freestanding and may have complicated structures. This Guide recommends several basic provisions in subscription agreements, shareholder agreements, share retention agreements, put option agreements, and even agreements related to capital calls, if any. These provisions are drafted to ensure maximum enforceability of E&S and human rights obligations, while keeping in mind that equity agreements often express these obligations in procedural terms as part of the investee company's corporate governance functions, which is different from the way E&S and human rights obligations are expressed in loan agreements.

Together, the Drafting Considerations and suggested contractual provisions offer guidance to operational and legal staff, management, and Executive Board members of multilateral and bilateral DFIs, concerned with drafting or reviewing contractual provisions in financing agreements with clients, or overseeing the application of relevant policies and procedures. This Guide is also relevant to non-DFI financial institutions, especially private financial institutions and the Equator Principles Financial Institutions, some of which have been showing leadership on remedy. The Guide may also benefit law firms representing public and private financial institutions, project lenders, equity and/or impact investors, helping to ensure that clients receive comprehensive legal advice on remediation responsibilities. In addition, by referring to this Guide, OHCHR hopes that civil society organizations and project-affected people will gain awareness of the rights and responsibilities of DFIs and their clients for remedy and be better able to pursue remediation in practice.

Finally, this Guide can also be used as a resource for those involved in updating DFI remedy policy frameworks, E&S Safeguard policies and procedures, and the piloting process under the 2025 IFC/MIGA Remedial Action Framework.

I. ABOUT THIS GUIDE

Background

Multilateral development banks and bilateral development finance institutions (both referred to here as "DFIs") have long-standing mandates to support sustainable development and in doing so, to do no harm, while delivering environmental and social (E&S) benefits as well as financial returns. E&S benefits may be achieved directly by supporting access to water, healthcare, education or job creation, or indirectly by creating assets, such as physical, digital, or other infrastructure that enhance people's opportunities and enjoyment of social, economic, and cultural rights. However, such investments can also lead to adverse E&S and human rights impacts and externalities.[1]

Over more than four decades, DFIs have developed their own mechanisms to prevent and mitigate many of these risks and adverse impacts. These include policies and procedures, including E&S Safeguards,[2] the main objective of which is to ensure that projects do no harm. The corollary of the do no harm principle is to take action to address and remedy harms where they do occur. Many DFIs have put in place their own institutional mechanisms including, notably, independent accountability mechanisms (IAMs), to address grievances about DFI-funded projects and require their clients to develop their own grievance mechanisms.

However, in DFI-financed operations, there remain too many gaps between the claims of communities and workers for remedial action for harms done and the delivery of that remedial action in practice.[3] Client level grievance mechanisms should ideally be the first resort for claims to address harms. Where these do not exist, are ineffective, or worse, result in retaliation, domestic courts and administrative mechanisms should ideally be the primary avenue for accessing justice and resolving disputes on human rights and environmental matters. However, claimants often face serious barriers, including weak rule of law, underdeveloped domestic human rights legislation, inefficient or corrupt judicial systems, and lack of resources and legal capacity. The barriers may be especially pronounced in fragile or conflict affected states. In addition, project-affected people often lack access to adequate project information and, as they are not parties to contractual agreements in DFI financing arrangements, they are not able to assert contractual rights against project companies as DFIs can.[4]

One important way to begin to address these gaps is by strengthening attention to these issues in the legal contracts between the DFI and their clients. This Guide offers Drafting Considerations and suggestions for contractual provisions for remedying adverse E&S and human rights impacts or harms in projects supported by DFIs. It reflects emerging policy and practice on remedy in DFIs and commercial banks[5] and is intended to respond to the thickening web of policies and regulation on business and human rights that reinforce the centrality of remedy at global, regional, and national levels.

Audience & objectives

The main focus of this Guide is on traditional physical projects financed by one or more DFIs and implemented by private sector clients through project finance or similar lending structures, documented in DFI loan agreements or parallel equity investment agreements[6] (collectively referred to here as "DFI financing agreements").[7] Certain parts of this Guide may also benefit other forms of financing projects, even if they use different contractual formats. After all, the need for remedy is a universal challenge for all forms of financing.

At the core of the Guide is a set of *Drafting Considerations* and suggested *contractual provisions* for lawyers. The *Drafting Considerations* are intended to guide the formulation of *contractual provisions* in relation to ten higher priority issues identified in consultation with experts in this field. The *Drafting Considerations* articulate the rationale for the suggested *contractual provisions* and seek to clarify the

responsibilities of project companies and DFIs in enabling and providing remedy. These provisions not only benefit the Project-Affected People, but also the contractual parties so that the DFI can fully and accurately assess all the costs and benefits of the project and related activities, including the DFI exit from the project.

The main intended audiences of this Guide are operational and legal staff, management, and Executive Board members of multilateral and bilateral DFIs, concerned with drafting or reviewing contractual provisions in financing agreements with clients, or overseeing the application of relevant policies and procedures.

This Guide is also relevant to non-DFI financial institutions, some of which have been showing leadership on remedy (Box 2). Many non-DFI financial institutions, mostly (but not always) private financial institutions, co-lend to projects together with one or more DFIs.[8] [9] Similarly, in equity investing, private investors invest alongside DFIs. Regardless of the mechanism by which such lending or equity investment takes place, these private financial institutions should have a common interest in clarifying and strengthening contractual provisions on remedy.

Through the application of this Guide, it is hoped that:

- DFIs and clients will be able to interpret and implement their respective remediation responsibilities in a manner which gives effect to the multiple, overlapping sources of law and policy that may be applicable in any given situation, and will gain deeper insights into how to better integrate preparations for and responses to adverse E&S and human rights impacts and/or remedy in legal contracts, and thereby avoid financial, reputational, and other costs.
- Private financial institutions including Equator Principles Financial Institutions (EPFIs) and commercial banks may strengthen their own contractual provisions for remedy.
- Law firms that advise DFIs, EPFIs, project lenders, equity and/or impact investors will be able to provide comprehensive legal advice concerning their clients' remediation responsibilities.
- Civil society organizations (CSOs) and project-affected people will gain awareness of rights and responsibilities for remedy and be better able to pursue remediation in practice.
- Remedy policy frameworks in DFIs will be strengthened, including E&S Safeguard policies and the piloting process for new contractual provisions under the IFC/MIGA Interim Remedial Action Framework.[10]

Disclaimer

This document provides general guidance for drafting certain legal provisions in DFI agreements for large-scale projects in emerging markets. It is intended for the audiences and purposes outlined above regardless of the legal system. It does not provide legal advice. Users of this guidance should seek legal advice and ensure that they have a good understanding of the national laws of the host country in which project activities are contemplated. In the event of conflict between such national law and provisions in this Guide, the former would prevail. The final structure of the agreement, the extent of obligations of the contract parties, and the exact wording of the legal provisions will depend on many factors, including but not limited to the contemplated project activities, the type of financial transaction, the complexity of the E&S risks, the gravity of impacts and the national context, among others. OHCHR shall not be liable for any losses or damages incurred or suffered in connection with this Guide.

II. REMEDY & DEVELOPMENT FINANCE INSTITUTIONS

A brief explainer: Remedy and reparation

Remedy is a foundational concept in international human rights law. If a person's rights are violated, they have a moral and legal entitlement to remedy, which means they should have equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

Remedies have several objectives: (a) redress, making victims "whole" and returning them to the status quo ante where possible, and/or to provide symbolic recognition and empowering victims as rights holders, mitigating harms; (b) prevention, pre-empting future abuses; and (c) deterrence, discouraging others from causing harms.

As part of remedies, reparation for harm suffered can take several forms: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. (See Box 1 for a summary of these terms, and Annex 1 for full definitions and examples as provided in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations).[11]

Box 1: Forms of Reparations

Restitution is about restoring the affected stakeholders to their original position to the greatest possible extent. It can also be about making sure another party does not unjustly enrich themselves at the affected stakeholders' expense.

Compensation for economically assessable damage can be both financial and non-financial.

Rehabilitation is about steps needed to restore someone's health or dignity, such as providing medical and psychological assistance and legal and social services.

Satisfaction encompasses cessation of violations and an accounting of the facts and acknowledgement of responsibility and similar measures to restore the victim's dignity.

Guarantees of non-repetition are also considered a remedial step, as they ensure that people are not repeatedly subject to the same harms.

These forms of reparation can encompass both the process and the actual forms of repair. They are not intended to be alternatives: to the contrary, where projects are associated with serious abridgements of human rights, such as forced evictions, gender-based violence, or reprisals against environmental or human rights defenders, a combination of the above remedies will often be required to make people whole.

DFI E&S Safeguards and remedy

DFIs E&S Safeguards originated in the late 1980s in response to a particular set of physical environmental and social risks associated with traditional infrastructure investment projects. Originating with the World Bank, E&S Safeguard policies have been replicated in all major MDBs and many bilateral DFIs as well, based on their recognized value to the banks, their public and private sector clients and their investees. They are now a key component of DFIs' 'license to operate' and value proposition[12] and serve as an essential tool for promoting sustainability and managing E&S risks throughout the project cycle.

Almost all DFI E&S Safeguards emphasize doing no harm in E&S terms, encompassing many aspects of remedy. For example, Safeguards typically contain a 'mitigation hierarchy' which aims to ensure that harms are first avoided, then minimized or mitigated, and that any residual impacts are "compensated and/or off-set".[13] DFI Safeguard policies concerning resettlement, labor, indigenous peoples, cultural heritage and other topics contain requirements for reparations for a range of E&S harms.

Recently, a number of bilateral DFIs and commercial banks have adopted remedy requirements which in some respects go beyond those of the major MDBs in clarifying responsibilities for remedy, taking into account the client's and bank's respective involvement in impacts. Similarly, the most recent update of the Equator Principles (EP4) specifically included 'remedy' (and excluded 'off-setting') as part of the mitigation hierarchy insofar as human rights impacts are concerned and adopted specific guidance for EPFIs and their clients on remedy.[14]

Box 2: DFI Safeguard Provisions & Commercial Bank Policies on Remedy

Finnfund Sustainability Policy (2020), s. 3.3.1: 'In case actual adverse impacts on human rights have occurred in connection with investee activities, Finnfund takes steps and uses its leverage to have these impacts addressed by the investee and promotes effective access to remedy for those who have been harmed. In alignment with the UN Guiding Principles [on Business and Human Rights], Finnfund's degree of connection to the impact and its possibilities to exercise and increase its leverage on the investees are taken into account. Remedies can take different form depending on the situation.'

Swedfund's Policy for Sustainable Development (2023), p.3: 'To fulfil our commitment to respect human rights, we aim to avoid causing or contributing to adverse human rights impacts resulting from our own activities and to address such impacts if they occur. Where we identify that we have caused or contributed to adverse human rights impacts, we will provide for, or cooperate in, their remediation through legitimate processes.' See also Swedfund's Human Rights Guidance (2020), para. 1.4.

BIO (Belgium DFI) Grievance Mechanism Policy (2022) provides (p.6, "Remedy"): '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.'

International Climate Initiative (IKI) Safeguards Policy (2023) provides that where avoidance and mitigation are not possible, negative impacts should be remedied. Pages 9-10 state: 'In accordance with the UNGPs, the due diligence process distinguishes respective actors in line with the level of involvement in the 'responsibility chain' in possible adverse impacts on the environment and people. A distinction is made between three levels of involvement [cause, contribute, and direct linkage, in line with the UNGPs]. An actor's due diligence obligations differ in line with the level at which the actor is involved in the occurrence of damage. … As the providers of the funding, the responsible ministries and ZUG …. can contribute to possible adverse impacts if they fail to comply with their due diligence obligations as they review and monitor the safeguard standards throughout the project cycle.'

ANZ Human Rights Grievance Mechanism Framework (2025) states that where ANZ has contributed to harms it will 'provide for, or cooperate in, the remediation of the impact in a manner proportionate to its involvement and in a manner it considers appropriate in consultation with the affected people'

(Annexure 1, 3(b)), and an independent mediator or expert may be engaged to assist with resolution or determining remedy (para 30).
Westpac's Human Rights Position Statement and Action Plan (2024) states that the bank will 'provide for or cooperate in remediation. . . where we have caused or contributed to impacts. Where we have not caused or contributed to an adverse impact, but are directly linked to it, we recognise we may be able to play a role in remedy.'

Nordea and **ABN AMRO** have similar policy commitments.

These policy changes are associated with broader normative shifts at the global, regional and national levels influenced by the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the human rights chapter of which is aligned with the UNGPs).[15] The UNGPs are increasingly being integrated within E&S Safeguards and other operational policies of DFIs,[16] and risk management frameworks of commercial banks, investors and clients. These normative standards have implications for the way E&S Safeguards are applied as discussed below.

Defining and distinguishing the remedy responsibilities of DFIs and clients

The UNGPs clarify what is expected of different business enterprises that may be involved in the same potential and actual adverse human rights impacts. The typology used in the UNGPs – of causation, contribution, and direct linkage – is often referred to as the "involvement framework." The involvement framework helps to understand the various ways in which business enterprises may become involved in such impacts and the actions that they are expected to take in response, including as part of their human rights due diligence.

Likewise, DFI E&S Safeguards typically set out differentiated requirements for DFIs and their clients. The client (not the DFI) has the primary responsibility for project implementation and thus for avoiding and remedying negative impacts. Due to its implementation responsibilities and presence on the ground, the client is expected to be the first to detect harm, whether potential or actual, report it and propose appropriate remedial responses.

E&S Safeguards generally provide that DFIs are responsible for appraisal and supervision of clients throughout the life of their relationship. Under the UNGPs, an institution financing a client's project may, depending on the circumstances, be considered to be "contributing" or "directly linked" to the impacts of the client's project through their financing. The UNGPs outline what is expected of the financial institution in such cases, including with respect to building and using leverage over clients to mitigate harm to the greatest extent possible. It is worth noting, however, that where an institution has contributed to or has a direct link to an adverse impact through a client relationship, this does not shift the responsibility from the client onto the institution; the client always retains its own responsibility to respect human rights, including with respect to remediation.[17]

Where a DFI is "directly linked" to E&S impacts through a business relationship it should, at a minimum, actively exercise the full spectrum of its leverage with its clients to prompt the client to prevent, mitigate or remedy the adverse impacts. Thus, the UNGPs are aligned with E&S Safeguards but provide additional impetus and guidance to DFIs in exercising their responsibilities. In particular, the UNGPs reflect the expectation that a DFI's existing leverage should not be taken as a given, but rather, the DFI should explore all feasible means of building and exercising leverage, individually and collectively with other concerned actors.[18]

Appropriate contractual provisions (as discussed further below) can help prepare DFIs to exercise leverage effectively when the need arises. Leverage can also arise from financial and commercial arrangements, and as well as reputational and network resources, proactively offering incentives and assistance (including technical assistance) to help projects meet their E&S and human rights challenges.

The UNGPs also contain the expectation, in line with ordinary principles of justice, that where, by action or omission, a DFI contributes to adverse E&S impacts connected with a project, it (the DFI) should also be prepared to contribute proportionately to remedy. See the diagram explaining this relationship in Box 3.

Box 3: Applying UNGP concepts to DFI responsibilities for remedy

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

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

Source: OHCHR (2022), p. 83.

As noted above, DFI Safeguard policies commonly require clients to establish project-level grievance mechanisms. Grievance mechanisms which meet the UNGPs "effectiveness criteria"[19] can play an important role in helping clients to meet their remedy responsibilities in practice. DFIs also have their own institutional mechanisms – teams within the DFI to deal with grievances and IAMs (where they exist) undertake compliance review and dispute resolution functions for the benefit of project-affected peoples. While at times a mechanism of last resort for project-affected peoples, IAMs play a vital role within the larger remedy "ecosystem," which includes judicial and non-judicial, state-run and privately-run, and formal and informal mechanisms.[20]

In summary, DFIs have their own policies and mechanisms to manage adverse E&S, including human rights impacts from their project finance operations, complemented by a comprehensive normative framework within the project landscape where remedy responsibilities are shared with project companies and other relevant actors, differentiated in accordance with their respective involvement in impacts. The contractual provisions for the project should make these responsibilities clear and enforceable and make explicit provision for remedy.

Practical implications for DFI-financed projects:

1. Project company: As the entity constructing and operating the project, the project company bears the primary responsibility for avoiding and remedying E&S and human rights harms. If it causes or contributes to human rights harms, it is obligated and best placed to remedy those harms.
2. DFIs: DFIs operate at a level removed from the ground but hold significant responsibility. They should first actively assess and then monitor and inquire into project activities, prompt the project company to take appropriate remedial measures if harm occurs, and when their own actions or omissions contribute to harms, such as when they fail in their own due diligence or oversight responsibilities, they should step in alongside clients to help correct or remedy the adverse impacts.

3. Remedy: Both the project company and DFIs should consider the human rights impact and harm in all its dimensions. Remedy has numerous dimensions (see Box 1 and Annex 1). The needs and expressed wishes of project-affected people should be ascertained to determine the appropriate forms of remedial response.[21]
4. Financial provisioning for remedy: In higher risk projects, DFIs should require that a project company has adequate funds to implement remedial measures, be it through contingency funds, insurance or other suitable mechanisms, subject to E&S risk levels and other relevant considerations. Ring-fenced funds for remedy should be established early and should remain replenished at appropriate levels throughout the project's lifecycle, during the DFI's involvement and after its exit from the project.

III. DRAFTING CONSIDERATIONS

This Guide identifies ten priority thematic areas that almost always challenge DFIs and project companies in their effort to address ongoing or potential adverse human rights impacts, consistent with the E&S Safeguards and the UNGPs. These are presented as '*Drafting Considerations*' that are not strictly legal in nature and do not constitute legal advice but together provide the context and rationale for the contractual provisions suggested in Chapter IV. During the drafting process, each Drafting Consideration should be thoroughly considered and, when applicable or relevant, be reflected in the DFI financing agreements, either in the form of the corresponding contractual provisions suggested in Chapter IV or in any other form appropriate under the project circumstance.

DFI policies, procedures, and mechanisms should be reflected and cascaded down from client to contractors and suppliers in the projects that DFIs finance, through project-level policies, procedures, mechanisms and tools, including E&S assessment and management plans and systems. Contractual provisions should assign clear responsibilities in relation to the project company and their business relationships to avoid and remedy adverse human rights impacts.

Drafting Consideration 1: Upholding the rights of project-affected people

Key Points

- *Project-affected people often have the most pressing and personal stakes in projects, yet they are rarely party to project contracts and never party to financing contracts. They lack contractual claims to enforce promises made to them by the project company. Too often the undertakings to them by the project company are not fully documented or incorporated into contracts.*
- *There are techniques to fill these gaps. The project can document its obligations to the project-affected people. Other contracts, such as Community Development Agreements, can be used to directly reflect their needs and perspectives. And third-party beneficiary rights can be provided in appropriate agreements.*
- *DFIs should ensure in their agreement that the project is set up to enable project-affected people to have access to a full range of mechanisms to resolve disputes and pursue their claims, from the borrower's grievance mechanism, the DFI's IAMs, other alternative disputes resolution mechanisms, including arbitration, and to host state or home state courts.*
- *Stakeholder consultation is at the heart of these interactions.*

See corresponding contractual provisions: Clauses 2.4, 3.2, 3.4, 3.6, 4.3, 6, 8

Project-affected people often have the most pressing and personal stakes in projects, yet, to OHCHR's knowledge, they are rarely party to project contracts and never party to financing contracts. Project action plans, such as environmental and social action plans (ESAPs), resettlement action plan and community development plan, are designed to protect and benefit project-affected people and are usually covenanted in the DFI financing agreement (either specifically or as part of the overall ESAP). However, only the DFI and the project company have control over these plans. The legal responsibility to implement the ESAPs lies with the project company while the other contract party – the DFI – can enforce it as a matter of contract. The project-affected people, on the other hand, cannot enforce their rights to receive compensation, livelihood assistance, community benefits, or other benefits under the project (or as agreed with another party such as a governmental agency), and must usually resort to legal theories and fora rather than by way of a simple contractual claim.

DFIs and project companies may apply several techniques, both inside and outside the DFI financing agreements, to address this challenge and uphold the project-affected people's rights to justice and effective remedy:

- First and foremost, project companies should be required to meticulously document specific benefits promised to individuals and communities, such as jobs, business opportunities, public infrastructure such as hospital and schools, reforestation, housing and livelihood support, and others. Clear guidance on how claims for unfulfilled promises can be made should be communicated. If benefits (such as resettlement or livelihood support) are to be provided by a third party, such as a national or local government agency, these should be documented through a legal or administrative procedure under national law. In the resettlement context, this will often occur through an expropriation or eminent domain process through which private property is taken with compensation for public purposes. The project company, or its agent, should help facilitate the documentation process (Clause 3.4).

- DFI agreements may provide for contractually protected rights to realize community and individual benefits through a third-party beneficiary clause (see Box 4). This may be combined with effective options to legally enforce such clauses, as further described below.

- The DFI should pay close attention to the issuance of environmental permits and licenses. In some jurisdictions, environmental permits and licenses can be cursory, yet they may still contain requirements consistent with the project's Environmental and Social Impact Assessment (ESIA) and specify matters that affect the rights of communities in relation to the project, such as prohibiting deforestation or protecting communities' health, safety and security. In most jurisdictions, these documents should be publicly available and enable affected individuals and communities to understand the regulatory requirements applicable to the project, and in some cases, support project-affected people's claims for remedy arising from noncompliance with permits or licenses. (Clauses 2.4, 3.2)

- Contracts outside DFI agreements could also be explored, such as a community development agreement between the project company and the community leaders representing the project-affected people. Such an agreement could document all community-level benefits promised by the company and could be strengthened by adding representatives of the local or national government, if appropriate.[22]

- Because project-affected people generally face high barriers to resolve their grievances and claims, they should be aware of multiple disputes resolution mechanisms from which to choose one that best suits their situation. Project-level grievance mechanisms and IAMs should be well-publicized to the project-affected people and tailored to address human rights harms effectively. In addition, Drafting Consideration 7 and Clause 6 suggest ways to make two-way (project – project-affected people) or three-way (project – DFI – project-affected people) disputes subject to the effective jurisdiction of courts of the host or home country or international arbitration, at the option of the project-affected people, in accordance with the circumstances of the grievance or claim. The E&S Safeguards of the DFI play an important role in setting project-specific contractual environmental and social standards that protect project-affected people. Because the project will continue its operations beyond the DFI's exit, these standards should remain enforceable at least for a specified period following the DFI's exit. Clause 8 suggests ways to define or redefine this relationship among the DFI, the project company and the affected communities.

- Stakeholder engagement and disclosure of information is at the center of the interaction between the project and the project-affected people. Meaningful consultation with project-affected people and ensuring their broad support on matters that affect them (including ensuring the free, prior and informed consent of indigenous peoples (Clause 3.6)) should be a cornerstone of project operations through the entirety of the project. These engagement requirements and implementation details, such as the project's personnel assigned to stakeholder engagement, specific modalities and assigned responsibilities, and budget allocation for consultation meetings, should be stated in the Stakeholder Engagement Plan (usually part of the project's ESAP) (see the definition of Stakeholder Engagement Plan). If the project must establish a Corrective Action Plan and/or Remedial Action Plan, the provisions that affect the project-affected people should be developed in consultation with them and finalized to their satisfaction (Clause 4.3(b)). At all material times, from the earliest stages of the project, stakeholders should be made aware of the protections that are in place, including in the DFI agreement, and the arrangements for post-DFI exit periods (see Drafting Consideration 3).

Box 4: Resources on how to create leverage for Project-Affected People as third-party beneficiaries

Drafters can consider the following resources to designate project-affected people as third-party beneficiaries or otherwise help them to enhance their leverage.

1. **Corporate Accountability Lab** has published Towards Operationalizing Human Rights and Environmental Protection in Supply Chains: Worker-Enforceable Codes of Conduct (2021). This helpful practice pointer for supply chain management contains sample language as well as guidance to facilitate enforceability.

2. **The Working Group of the American Bar Association Business Law Section** is currently considering Model Contract Clauses to Protect Human Rights in International Supply Chains, Version 2.1, which is expected to include several versions of suggested contractual provisions that match several possible scenarios and circumstances to help drafters consider different ways to create leverage for project-affected people. Until Version 2.1 becomes final, Version 2.0 can be accessed here (Box 5).

3. **IISD's** Model Contractual Clauses for Responsible Investment in Agriculture (2025) contains third-party beneficiary provisions (Section 58).

4. Note also the possibility of **insurance payments to third-party beneficiaries**: Third-party beneficiary insurance is available and is used where funds are paid out to third parties to cover losses incurred by the project party for liabilities owed to third parties. Third-party environmental liability insurance is widely available. Insurance for E&S and human rights liability to third parties could be negotiated. (Source: Annex 3.)

Finally, project-affected people (or their representative(s)) could be named third-party beneficiaries in any project agreement that would formalize a Remedial Action Plan and/or Corrective Action Plan; alternatively, they can be direct parties to such an agreement, similar to the way in which they can added as parties to Community Development Agreements.

Drafting Consideration 2: Due diligence as foundation for remedy

Key Points

- *Human rights due diligence (HRDD) under the UNGPs refers to the process by which entities identify, prevent, mitigate, and account for how they address their adverse human rights impacts.[23] HRDD is an ongoing process and focuses on risks and impacts on people. It takes account of contextual issues and can be broad in scope and repeated over the project life. An increasing number of DFIs are incorporating HRDD into their operational policies.*
- *E&S due diligence usually serves similar but not identical functions to HRDD. E&S due diligence for DFIs is a process that centers on risks to and impacts on the environment and people from business activities, often implemented through the upstream process of Environmental and Social Assessment (ESIA).*
- *Rigorous and ongoing due diligence benefits the project, the DFI and the project-affected people. It helps the contractual parties to fully and accurately assess all costs and benefits of the project in order to avoid or minimize adverse E&S and human rights impacts, which in turn protects and enhances the rights of the project-affected people.*
- *As such due diligence is a cornerstone of robust contractual provisions and should be mandatory in DFI agreements on an ongoing basis.*
- *Both the project company and the DFI should carry out due diligence, including HRDD, on an ongoing basis, and as circumstances change, new or updated assessments may be necessary, including when the project's scope changes or a DFI exit is contemplated.*

See corresponding contractual provisions: Clauses 3.2, 4.3, 4.5, 7, 8.4, 8.5

'[M]istakes are less likely when accompanied by rigorous due diligence, and less consequential when accompanied by remedy'.[24] Due diligence helps establish the building blocks for environmental, social and human rights contractual provisions, which in turn are indispensable for enforceable remedies.

Rigorous and ongoing due diligence is in the best interest of the project company and the DFI because it helps expose project weaknesses or breaches of environmental and social standards early in the process, helping the contract parties to fully and accurately assess all costs and benefits of the project. Early identification and swift responses to adverse impacts mean that the impacts will be less likely to be severe and less costly to remedy. And avoidance of impacts and more rapid remediation has obvious benefits for the rights of the project-affected people.

Each contracting party is responsible for its own initial and ongoing due diligence. The initial due diligence for adverse environmental and social impacts and risks in the types of larger, physical projects financed by DFIs and covered by this Guide typically includes a process of ESIA carried out by the project under the supervision of the DFI. ESIAs are usually conducted at the outset of a business activity and center on the physical aspects of the activity and its impacts.

HRDD, on the other hand, encompasses the various processes and tools[25] by which DFIs, their clients and other relevant actors identify and assess their actual and potential human rights impacts, take action to prevent and mitigate such impacts, track the effectiveness of such action, and communicate their actions to relevant stakeholders. HRDD is focused on project-affected people's dignity, well-being, and rights. HRDD processes can complement the process of ESIA by identifying specific human rights risks not typically covered by ESIAs, such as those specific to the country and local contexts.[26] Prior to any exit from the project, the DFI should conduct HRDD, alongside an assessment of all potential issues, to ascertain likely scenarios for and impacts of responsible exit and how to address such impacts on exit or post-exit. For these reasons, HRDD, in addition to E&S due diligence, is required in the contractual provisions (Clause 4.5). For more analysis on how the separate but related process of ESIA and HRDD affect remedy implementation, see Drafting Consideration 4.

The results of these due diligence processes should inform the project's Environmental and Social Action Plan (ESAP) and more detailed Environmental and Social Management Plan (ESMP) and/or System (ESMS), which guide the project's operations. These plans form the core of the project's E&S and human rights responsibilities in contracts and, as such, the contracts should explicitly describe the consequences of noncompliance. (Clause 7.) If the HRDD findings are not otherwise incorporated into the ESAP, ESMP or ESMS, then requirements to address the findings should be separately covenanted to ensure remedy for human rights harms (see Clauses related to remedial measures/action plans).

Careful review of project documents is an important step in the initial due diligence process. This review should ensure, among other things, that the environmental, social and human rights undertakings outside the DFI agreements (such as in the concession agreement, investor-state agreement, or other public-private partnership agreement) are consistent with or are complementary to those in the DFI agreements. Environmental permits and licenses are particularly important because they can create a regulatory underpinning to the process of ESIA, effectively turning ESIA recommendations into project-specific permitting requirements.[27] Environmental permits and licenses endure beyond the point of the DFI exit from the project and can give project-affected people another avenue to seek remedy under local law. (Clause 3.2.)

Each party should continue to perform due diligence as necessary throughout operation, especially in connection with material changes in the circumstances of the project or project-affected people, and material project scope change, such as expansion and partial or full project closure. Depending on the extent of the project change, a supplement or revision to the original ESIA may be necessary. Any material supplement or revision should only proceed with the DFI's approval and subject to regulatory approval, if required (Clause 4.5). The DFI's ongoing due diligence responsibilities include ascertaining project compliance with applicable environmental and social standards, permits and licenses, reviewing monitoring reports, conducting site visits, notifying the project company of any breach of an environmental or social requirement, and helping to bring the project back into compliance.

Due diligence is also necessary when a DFI begins to contemplate an exit from the project. This may be a timed exit, such as upon the full payment of the loan, or an unexpected exit, such as when the project proposes to prepay the DFI and terminate the agreement. In both cases, but especially in the latter case, the DFI will need to assess the project company's preparedness and capacity to sustain environmental,

social and human rights performance and remedial actions after the DFI's exit. This includes ascertaining the project's track record on compliance, the availability of the project company's funds for remedy based on projected costs, identifying potential third parties which could act as a monitor or enforcer, and the DFI's right to step in to cure a breach and seek reimbursement from the project. The outcome of such an assessment may be captured in a time-bound Deed of Covenant between the parties, or any other document that is effective post-exit, and made public (Clause 8.5).

The contracting party's exercise of due diligence and the contractual provisions that flow from it may help to meet concerns that a robust approach to remedy may create a 'moral hazard' by disincentivizing client actions and/or inviting frivolous claims against the project company or DFI. In the face of such concerns, targeted contractual provisions should impose a measure of discipline by requiring the project company to avoid or appropriately respond to adverse E&S impacts as they occur, thereby reducing the need for the DFI to intervene with its own funds, technical assistance and other resources. Except in situations where a DFI is solely responsible for a harm, any financial contribution by a DFI to remedial actions would explicitly be subject to contractual clauses requiring reimbursement from the client (Clauses 7.2, 8.5(b)). If the DFI's actions or omissions contributed to the harm then its contribution to remedial action, like other contributors, would be expected to be in proportion to its contribution to harms (Clause 8.4).[28]

Drafting Consideration 3: Presumption in favor of transparency and disclosure

Key Points

- *Consistent with the principle of transparency, DFIs and projects should disclose project agreements, all or the relevant parts of DFI financing agreements, and E&S reports and information on E&S risks and impacts so that project-affected people have an accurate and complete understanding of the project's requirements and actions to mitigate harm and provide benefits.*
- *Project-affected people should know about the functions of the project's grievance mechanisms and the DFI's IAM.*
- *Project-affected people need to be able to stay abreast of matters that impact them throughout the life of the project, including in cases of emergency that may affect their health, safety and security, and need to be able to understand the arrangements in place to protect their rights following the DFI's exit.*

See corresponding contractual provisions: Clauses 3.5, 5.3, 8.5

Project and financing agreements in DFI private sector projects are generally not freely available to the public and are nearly impossible for stakeholders to access. While some sector-specific initiatives, such as those for the extractive industries,[29] foster public disclosure of project agreements, most of the disclosed contracts are limited to concessions or similar investor-state contracts and rarely include other project agreements or financing agreements.[30] Other sectors, including notably the infrastructure sectors, seem to lack comparable internal or external pressures for contracts disclosure. This information vacuum disadvantages many stakeholders, especially project-affected people who are not parties to the DFI financing agreements, have no simple and reliable way of obtaining information that concerns them,[31] and hence are less able to seek remedy when their rights are harmed.

At a minimum, any DFI financed project should disclose the main project agreements, such as the concession agreement or other similar investor-state or public-private partnership agreement with the

relevant contracting authority.[32] In the case of DFI financing agreements, the standard template E&S provisions for Category A and B projects, which are the starting point for drafting E&S provisions in virtually all DFI financing agreements, should be readily available to all. In addition, contracting parties should agree to either disclose the entire DFI financing agreement, or at least, all information that project-affected people need to protect their rights, together with E&S reports and other information on E&S risks and impacts (Clause 5.3).[33] Since local law may provide for specific disclosure, due diligence is necessary to ensure that the most robust disclosure provisions apply to the project.

The principle of transparency also points to the necessity of frequent and transparent communication and engagement between the contracting parties and the project stakeholders on the status of the Project, the availability of the project grievance mechanism and the IAM process as options for early resolution of disputes, and remedies for harm, among other things (Clauses 3.5, 5.3(c)). While each contracting party should maintain confidentiality of information as agreed in the DFI agreement (see the definition of Confidential Information), under exceptional circumstances, such as when confidential information could avert imminent and serious harm to public health, safety or security, and/or imminent and significant adverse impacts on human rights or the environment, either party (most likely the DFI) should be permitted to disclose such information without incurring any liability for breach of confidentiality (Clause 5.3(d)).

The contracting parties should disclose the DFI's exit from the project and the new arrangements for managing ongoing and future E&S issues and disputes following the DFI's exit (Clause 8.5(c)).

Drafting Consideration 4: Contractual remedy vs. human rights remedy

Key Points

- *Contractual remedies are legal remedies available to one contractual party to enforce its rights against the other. DFIs can exercise their contractual remedies to require a project to repay its loan as well as require corrective measure to comply with other loan conditions, including compliance with the stated E&S requirements.*
- *Human rights remedies are remedies afforded to project-affected people for adverse human rights impacts caused or contributed to by the project, whether anticipated in the DFI agreement or not.*
- *Contractual remedies may constitute human rights remedies but the reverse is not always the case. Corrective measures may bring a project back into compliance with technical standards but may still not address associated harms to people. Hence, the two types of remedies need to be distinguished to ensure that harms to project-affected people are not overlooked or treated as secondary.*
- *Corrective action plans should be used to correct non-compliance and bring a project back into compliance, whereas remedial action plans should aim to provide remedy to project-affected people for harms caused or contributed to by the project company, including harms that are not expressly contemplated in the initial ESIA. In practice, the corrective action plan and remedial action plan may overlap. In these cases, the plans may be combined.*
- *In the event that both corrective measures and remedial measures require implementation, projects should endeavor to prioritize the remedial measures, especially when loss of life or bodily injury is imminent or likely.*

See corresponding contractual provisions: Clause 4.3

Remedy in the human rights context should not be confused with 'contractual remedies,' which are *legal* remedies available to one contractual party to enforce their rights against the other. For a DFI loan agreement, contractual remedies include the rights to damages, fees, penalties, and specific performance - the rights to make sure the lender can be repaid and made financially whole. But contractual remedies also include enforcing compliance with E&S requirements. Remedies focused on curing noncompliance may overlap or be separate from remedial measures for project-affected people. For this Guide, remedial measures should be understood as measures that are aimed at redressing harm to project-affected people. They should be distinguished from the financial, legal or technical actions of a contractual party to ensure repayment and to correct noncompliance with legal requirements.

It is possible that corrective measures of an environmental and social nature are also remedial measures that concern project-affected people; for instance, conferring livelihood benefits or compensation for displaced persons to correct poor implementation of a resettlement action plan may be both a corrective measure (addressing contractual noncompliance) and a remedial measure (addressing human rights harms). On the other hand, corrective measures may bring a project back into compliance with technical standards but may still not address associated harms to people.

Remedial measures are not always corrective measures. Human rights harms are not always specifically foreseen in the Safeguard policy or ESIA. For example, human rights harms that may arise from ongoing national or local contextual issues that are exacerbated by project activities may not have been covered in the project ESIA, and hence not captured in the DFI loan agreement or other contractual documents. Unless these situations are addressed in HRDD, resulting in specific contractual provisions, there may be no contractual basis to require a client to address the impacts.

In practice, since many E&S covenants are derived from the DFI's E&S Safeguards, which address impacts on people, there can be a significant overlap between corrective and remedial measures. However, this Guide maintains a distinction between corrective and remedial measures, in order to underscore the need for projects to consider whether compliance with E&S requirements specified in contracts sufficiently prioritizes and addresses harms to people.

In the event that both corrective measures and remedial measures require implementation, projects should endeavor to prioritize the remedial measures, especially when loss of lives or bodily injuries are imminent or likely.

Drafting Consideration 5: Creating and exercising leverage

Key Points

- *Leverage is the 'ability to effect change in the wrongful practices of an entity that causes harm.' DFIs should seek opportunities to create leverage, inside and outside contractual instruments.*
- *Leverage inside contracts: The focus of this Guide is on creating leverage inside DFI agreements. DFIs should be aware of opportunities to create leverage using project agreements where possible to improve the remedy prospects of project-affected people.*
- *Leverage outside contracts: This may take many forms, including capacity building; normative influence; shareholder actions; collective actions, etc.*
- *Knowledge of specific project circumstances, enabled by public disclosure, is a form of leverage that can be exercised by project-affected people.*
- *DFIs need to increase and exercise their leverage, which may be more significant than they acknowledge.*

- *Despite efforts to increase and exercise leverage, if a DFI is unsuccessful in influencing the project to address the adverse E&S and human rights impacts when such impacts are severe, the DFI should carefully consider and follow the requirements of a responsible exit.*

See corresponding contractual provisions: Clauses 4.8, 8.1, 8.4

Leverage can be understood as the 'ability to effect change in the wrongful practices of an entity that causes a harm' (UNGP Principle 19). When a contracting party has, or is perceived to have, the 'ability' to effect change, it will usually have access to a place at the table to demand change. Leverage can be contractual leverage, captured in a legally enforceable agreement, or non-legal in nature, encompassing an array of situations and methods, such as influence exerted in connection with a business relationship with the other contracting party. Leverage could be negative or punitive (e.g. the ability of a lender to declare an event of default) or positive (e.g. financial or other incentives, such as capacity building).

Contractual leverage is the primary focus of this Guide, and more specifically, contractual provisions in DFI financing agreements that support a contracting party's ability to bring about an expected E&S and human rights outcome. This Guide suggests contractual provisions that can establish robust DFI leverage vis-a-vis the borrower, in addition to provisions that would extend leverage beyond the life of the contractual relationship (e.g., indemnification (Clause 8.4)) or a in a related but separate contractual or business relationship, such as through contractors, subcontractors, suppliers and other third parties (Drafting Consideration 8), through agreements related to parallel equity investment (Chapter V), and non-legal leverage (involvement of a third party, such as a government agency) (Clauses 4.8, 8.1(a)).

Leverage in one contract can be enhanced through another. For example, a DFI's leverage in relation to E&S matters in a loan agreement can be strengthened by robust project agreements, such as an investment agreement or concession agreement with a government agency, in which the project company gives E&S undertakings to the government agency that are consistent with or similar to those in the DFI loan agreement (Annex 2). These undertakings can then be enforced by the relevant government agency or the DFI through a direct agreement with the agency. Another example of enhancing leverage through a separate contractual arrangement is the use of sponsor guarantee, discussed in Drafting Consideration 5.

IFC and MIGA have recognized the importance of leverage in projects and stated in its recent IFC/MIGA Interim Approach to Remedial Action that they may contribute to remedial action by using 'available financial, contractual and/or relationship influence and leverage to encourage clients and other responsible parties to take remedial action to address harm.'[34] In an earlier version of such Action Plan, IFC/MIGA have listed some examples of potential contractual leverage.[35] This Guide builds on and broadens the scope of these suggestions in the Suggested Contractual Provisions below.

A contracting party should try not only to increase its leverage in a business relationship, but also to *exercise* such leverage, to effect remedies for human rights harms (UNGP Principle 19). Although DFIs often insist that they lack leverage to correct E&S breach in projects, their leverage likely is more significant than they acknowledge, considering their contractual leverage inherent in project financing, as well as formal privileges and customary deference accorded to them, especially in emerging markets that depend on them heavily. This has led civil society organizations to observe that DFIs are unwilling to exercise their considerable leverage (for example, in the Jam project). Although an exercise of leverage always involves case-by-case judgment, failure to appropriately exercise existing leverage in the face of

ongoing harm can be taken as a failure of the enterprise's internal decision-making process and a potential contribution to human rights harms.

A DFI may make best efforts to increase and exercise its leverage to influence the non-performing party, but if it is unsuccessful in getting it to address ongoing E&S impacts, it may conclude that the business relationship should be terminated. In this case, the DFI should carefully review the prerequisites to exit noted in Drafting Consideration 9, including an assessment of the potential consequences of its exit and the E&S and human rights implications. If an ongoing adverse E&S and human rights impacts are severe, the DFI should carefully consider whether a responsible exit from the relationship is possible (Drafting Consideration 9).[36]

Finally, knowledge of project information can strengthen the leverage of stakeholders vis-a-vis the project and the DFI. The power of transparency and disclosure to enhance such leverage should not be underestimated (Drafting Consideration 3).

Drafting Consideration 6: Financing mechanism for remedy

Key Points:

- *Contingency planning and financial provisioning for contingencies is good business. The same discipline should extend to potential exposure for circumstances necessitating remedy for harm to project-affected people caused or contributed to by the project.*
- *To ensure financial provisioning for such contingencies, a wide range of financing mechanisms is available, from simple in-house mechanisms to more elaborate schemes involving external financial institutions or guarantors, all of which may have different pros and cons that need to be weighed in any given context. A sponsor guarantee is another mechanism to provide funds for remedy.*
- *When the project company is unable or unwilling to effect the necessary remedy, and there is a shortfall, the DFI could step in, help create a financial reserve for the implementation of a remedial action plan, or implement the plan if possible, and seek reimbursement from the project company if the DFI paid out of pocket for the remedy and did not contribute to the harms.*
- *DFIs should also consider establishing their own remedial funding mechanisms.*

See corresponding contractual provisions: Clauses 3.3, 3.7, 7.2, 8.1, 8.5

The 2020 External Review of IFC's and MIGA's Environmental and Social Accountability recommended that:

> "*Two mechanisms should be established to fund remedial actions: (1) contingent liability funds from the client that can be tapped in the event that E&S harm materializes and is linked to the client's failure to meet the Performance Standards; and (2) funds that IFC/MIGA can contribute, in the event that either has contributed to E&S harm*. "

This Drafting Consideration 6 addresses the project company's responsibility for establishing a remedial financing mechanism. The DFI's own remedial financing mechanism is addressed in Drafting Consideration 10.

It is common practice in project finance to provide for contingency (such as 5-10% of the total project cost) in the project budget at the outset to cover unforeseen expenses. The same upfront provisioning for potential cost exposures for remedy for harm caused by the project is better practice, instead of waiting until adverse impacts develop.[37] In addition to social or environmental harms from project operations, a project could have an incident or close prematurely for economic or other reasons, thereby generating other liabilities. The contingency budget should be established at the outset, or built up over time, and should be replenished after each use. If E&S risks are likely to decline over time, the required balance of the mechanism can likewise decline over time in accordance with a schedule (definition of Remedial Financing Mechanism, Clause 3.3).

Contingency budgeting is just one way of ensuring that the project has access to funds for remedy. Other techniques include standing funds and sinking funds that are managed by the project company, as well as third-party managed escrow accounts, trust funds, performance bonds, third-party liability insurance, guarantees and letters of credit. (Clause 3.3.) Each has potential advantages and disadvantages that need to be analyzed carefully, within the larger scheme of all potential remedial methods and other required contingency funding, including funds needed to ensure the orderly closure of the project. For an analysis of pros and cons of various financial instruments to be considered, see Annex 3.[38] Also see Box 7 for an example of an internal fund within a governmental agency that set aside 1% of the project cost for the purpose of financing remedy in high-risk projects focused on protecting marginalized groups.

In addition, a freestanding sponsor guarantee agreement or one or more project agreements can be used to hold the sponsor of the project responsible for remedy. For example, if the project involves a project funds agreement with a sponsor or sole or major shareholder of the project company,[39] the sponsor's responsibility to financially support the project to reach project completion can be extended beyond the physical completion of the project, so that the sponsor guarantees the project's remediation of future E&S harms caused or contributed to by the project, even beyond the point of the DFI's exit from the project. A sponsor guarantee is a mechanism that is available to all forms of financing, and not limited to project finance.

Contingency funds for remedy should only be available for the stated purpose of financing remedies (which can include the full range of acts of remedy and reparation listed in Annex 1) for harms to people caused or contributed to by the project and should be ring-fenced from other funds of the project company. A third party may be engaged to administer the funds, which would usually be a safer option than self-administered funds. However, this also involves costs to the project company, especially when mechanisms will have to be maintained over a long period of time, and there is a need for clear instructions on when, how much, to whom and how funds should be paid out, which is difficult to foresee at the outset. Moreover, the project company should be watchful for any mismanagement of the funds or bankruptcy or other relevant business risks applicable to the third party. It is possible for a DFI to hold and administer such funds in trust, though this may present a conflict of interest. Other financial institutions may have comparative advantages over DFIs in this regard.

To avoid the project's inability or unwillingness to pay for remedy, the DFI could set up its own contingency funding using its own funds or setting aside funds repaid by the Borrower, such as in prepayment situations (Clause 8.1(b)). In addition, the DFI should ensure that it has an option to carry out appropriate remedial measures where the project company has not done so and thereafter seek reimbursement from the project company for any out-of-pocket expenses. (Clauses 7.2, 8.5(b).) To date, DFIs have generally not made such provisioning a standard practice, arguing that such remedy funds might invite spurious claims, increase litigation risks to unacceptable levels or create unacceptable moral

hazard risks in the sense of disincentivizing necessary client actions. Categorical claims of these kinds are difficult to justify, however, and have been countered elsewhere.[40]

Finally, regarding legacy issues, such as unremediated adverse E&S and human rights impacts that arose from earlier activities that were engaged in anticipation of or preparation for the project, whether by the project company, proponents or affiliates, the state, or any other third party, Chapter IV suggests representations and warranties on the conditions and remediation of such legacy issues (Clause 3.7). Depending on the situation and severity of any outstanding legacy issues, the DFI could earmark funds specifically from the project loan for the purpose of assisting the borrower with the remediation of such legacy issues.

Drafting Consideration 7: Dispute resolution

Key Points:

- *Resolution of E&S and human rights disputes, especially those involving project-affected people, will likely require different mechanisms and skillsets from resolution of commercial disputes.*
- *The parties to the DFI Agreement should first attempt to resolve their E&S and human rights disputes through good faith negotiation, and only if the negotiation is not possible or fails, by working through the alternative dispute resolution methods provided in the Agreement. Disputes involving the interpretation of DFIs' E&S Safeguards and issues of noncompliance with E&S requirements may be more effectively addressed by experts or expert boards.*
- *Both parties to the DFI Agreement should submit to the jurisdiction of home and host states to resolve E&S and human rights claims brought by project-affected people and/or for enforcement of arbitral awards.*
- *A range of options, judicial and non-judicial, formal and informal, and international, national and local, should be available to project-affected people so that they may choose an option best attuned to their needs. Project-level grievance mechanisms and DFI's IAMs are part of this range of options, and may facilitate early resolution of grievances.*
- *If the project-affected people wish to pursue arbitration, a special pool of arbitrators with deep knowledge of E&S and human rights laws and disputes should be involved. The project-affected people should also be able to pursue a claim against the parent company or investor of the project company in its home state.*
- *Exhaustion of remedies should not be required for E&S and human rights claims of project-affected people.*

See corresponding contractual provisions: Clauses 3.5, 4.3, 4.6, 5.1, 5.3, 6.1 - 6.5

Large-scale projects must navigate an ever-growing range of risks from climate, pollution and biodiversity loss to impacts on the livelihoods, cultural resources and safety and security of project-affected people. These risks may be intensified by civil unrest, armed conflict or other extraneous factors. Failure to anticipate and manage these challenges can result in disputes escalating into costly and time-consuming legal battles, not to mention threats to safety and security of project workers and project-affected people.

Disputes involving E&S and human rights matters may be fundamentally different from traditional contractual disputes between the contracting parties and may involve many areas of the law outside business and commercial law. In some cases, the project may cease operation and lose assets following a catastrophic event, forcing the claimants to pursue a legal proceeding outside the project's host country. The prospects for legal remedies can be more challenging in such contexts and may be beyond the role and reach of traditional commercial arbitrations or host state courts. Whether these disputes are between the contracting parties or between the project-affected people and one or both of the contracting parties, alternative methods of prevention and resolution should be part of available disputes resolution mechanisms.

Frequent and open communication between the contracting parties is essential for preventing or minimizing disputes, and building understanding, trust and reconciliation. They should first attempt to resolve any E&S disputes between them through the process of good faith negotiation. If such negotiation is not possible or fails and irreconcilable differences emerge between the parties, they should then resolve their disputes through a range of alternative disputes resolution methods, from mediation to the involvement of an expert or a disputes board, to prevent differences from escalating into more formal, expensive and time-consuming methods.[41]

Publicly available model E&S contractual provisions encourage more frequent and comprehensive periodic project reporting and notifications of incidents, potential breaches, and issues involving project-affected people.[42] (See also Clause 5.1.) Since such reporting may lead to early recognition and resolution of potential problems, they should routinely be made available to project-affected people (Clause 5.3(c) (see Clause 5.3(d) for exceptional circumstances). Subject to overriding personal security and confidentiality concerns, the contracting parties should have regular meetings and exchanges of information with project-affected people to foster common understanding, prevent problems from arising, and engage in good faith negotiation to resolve any problems that come to their attention (Clauses 4.3(b), 6.2.). DFI financing agreements typically require project-level grievance mechanisms, particularly for smaller claims relating to individual harm (Clause 3.5).

For more serious and complex claims, the project-affected people may decide to resort to the DFI's IAM or other appropriate administrative or judicial mechanisms. In these cases, the project and the DFI should cooperate with the IAM or other relevant processes in good faith and expeditiously implement the recommended measures for resolution (Clauses 4.6(c), 6.3; see also Clause 3.5 on the project's obligation to inform the project-affected people about the existence of its grievance mechanism and the IAM).

Conflicts between the parties may center on the interpretation of the applicable DFI E&S policies, EIAs, ESAPs, and corrective or remedial actions plans, which can be technical in nature and subject to each DFI's internal rules of interpretation and precedents. Hence, a trusted expert(s) or an expert board should be identified in the DFI agreement in advance (or appointed by those who have access to a pool of such experts) for the purpose of interpreting these policies and documents and resolving technical disputes (Clause 6.2).[43] These experts could be environmental experts or academics and lawyers who specialize in business and human rights, or in some cases, a member(s) of the relevant IAM, either in their compliance or advisory role. Only when the recommendations of such experts are not accepted should the parties proceed to arbitration or judicial mechanisms.

Complicated, widespread or politicized disputes involving project-affected people may call for a careful assessment of options for judicial fora in the host or home state or arbitral mechanisms at the national, regional or international level. Leaving project-affected people options for effective review and remedies will maximize the chances that some form of effective resolution can take place. For this reason, when

project-affected people are seeking redress for environmental, social or human rights claims, they should not be held to the exhaustion of remedies requirement (Clause 6.4.).

Without limiting the options in any way, local host state courts may be the best option for enforcing clauses in the contract that are narrow, specific and objective, such as local purchasing requirements or the number of employees to be hired, or damage caused by new roads or blasting.

Remedies might be more enforceable against the project's parent company or investor when legal action is taken in its home state, especially for larger damages and reparation for major events where the project company has lost its value. Although such actions are not common, multinational companies have successfully been sued in the United States, Europe, Canada and elsewhere for damages alleged to have been caused abroad. It is, therefore, worth exploring and providing for this possible option in DFI Agreements, by ensuring home and host state courts are identified as courts of potential jurisdiction to which claimants, including project-affected people, may bring cases. It is important to note here that enabling the host and home state courts to take jurisdiction simply provides for the option for the most effective forum to hear a case, while keeping (often inflated) jurisdictional concerns in perspective. The intention is to open the door to the judicial process while leaving the results of that process to the applicable substantive and procedural rules. (Clause 6.4.)

International arbitration can also be an effective option in some circumstances. An important element of international arbitration is the potential for international enforcement, which may go well beyond the enforcement of national court judgements. There are also emerging options for third-party funding, which could be used by project-affected people in situations where damages could be very significant, or where defenses raised by the defending company may significantly increase the costs of the litigation process. Thus, having an option for arbitration, for example, under the Hague Rules on Business and Human Rights Arbitration[44] instead of the default commercial arbitration rules of the International Chamber of Commerce, may provide a suitable entry point and process for resolving E&S and human rights disputes. When negotiating the DFI financing and/or related project agreements, the parties should consider which option(s) might work best given the type of risks faced by the project. (Clause 6.5.)

Ultimately, there is a need for binding adjudicative mechanisms for project-affected people, in addition to third-party beneficiary provisions. The availability of such mechanisms is not simply a matter of fairness for project-affected people, but the prospect of binding adjudication would also help to make the informal or alternative mechanisms initially referred to in this Drafting Consideration more effective, by ratcheting up the incentives of the parties involved.

Drafting Consideration 8: Obligations vis-a-vis contractors, subcontractors, suppliers and other third parties

Key Points

- *Assessing and addressing E&S and human rights risks and impacts arising from project contractors, subcontractors and suppliers is part of the project's due diligence responsibility.*
- *Many of the E&S and human rights provisions in DFI agreements are also relevant at the contractor, subcontractor and supplier levels and should be duplicated in the appropriate project agreements with such parties.*
- *Where the project company lacks leverage vis-a-vis these third parties, it should work with the DFI to analyze the situation and identify possible actions and ways of increasing*

leverage. This process also applies to the project's potential leverage (or lack of leverage) with operators of associated facilities (third-party providers of services and inputs needed for the project).

See corresponding contractual provisions: Clauses 3.2, 4.2, 4.8, 8.1

Over the course of the project, the project company will engage contractors, who will in turn engage subcontractors and suppliers, each with their own workforce, and potential activities that may cause harm to the environment, workers and nearby communities. In some cases, the project will depend on third parties to provide facilities, inputs and services, which may result in harms outside the project's physical boundaries (for example, a poorly executed resettlement by a third party that is providing transmission lines to evacuate power generated by a DFI financed power generation project). Since these risks are associated with the project and must be managed, this Guide underscores the importance of the project's upfront and ongoing due diligence of E&S and human rights risks and impacts arising from these relationships, even though DFIs' Safeguard policy requirements for E&S risk management in these relationships, and especially in supply chains, are, with limited exceptions, not currently sufficiently broad or robust.[45]

This Drafting Consideration also introduces a different way to approach supplier relationships: instead of a unilateral relationship dominated by the buyer, and shifting of responsibilities to suppliers, a more collaborative relationship between the buyer and the supplier through a shared responsibility in ongoing HRDD (Box 5).

The DFI agreement should require that the project company put in place a robust management system to track the E&S and human rights performance of these parties, through the process of E&S due diligence and HRDD, consistent with the UNGPs and any applicable laws and standards, as well as allocation of dedicated human and financial resources (definition of Environmental and Social Management System; Clause 3.2(c)). Moreover, the agreement should require the project company to pass down all relevant E&S requirements to those contractors and suppliers identified by the project's due diligence as presenting the most significant potential risks (Clause 4.2). This should include obligations to assess the severity[46] (meaning scale, scope and irremediability), first and foremost, as well as likelihood of human rights harms[47] and measures to avoid and remedy harms when they occur (including direct financial provisioning as needed), the establishment of grievance mechanisms proportionate to the types and severity of complaints that can be anticipated, and other measures that are described in this Guide as appropriate to the circumstances. In some cases, the mitigation mechanisms established for the project could be extended to these third parties; for instance, the project's grievance mechanism could also respond to complaints directed to contractors and suppliers, especially when they work inside or just outside the project's physical boundaries, thereby reducing duplication and confusion from the perspective of the intended users of these services.

The project company should understand that its relationship with contractors and suppliers is one of partnerships and that ongoing communication, monitoring, collaboration and support will be necessary to avoid and remedy E&S and human rights harms that may occur in these relationships (Box 5). At the same time, it is important to create leverage vis-a-vis contractors and suppliers,[48] whether inside or outside the contract, for the same reason that DFI lenders and investors should do so vis-a-vis the project company. Such leverage will be helpful in the event that the relevant contractor or supplier does not agree to modify practices or remedy past or ongoing harms.

The project's proposed termination of the supply relationship should be informed by due diligence, similar to that required in advance of a DFI's planned exit from a project (Drafting Consideration 9 and Clause 8). Also see the Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0 in Box 5.

Box 5: The Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0

This initiative by the American Bar Association Section of Business Law and the Principled Purchasing Project to incorporate the UNGPs into international purchasing practices begins with the premise that buyers share contractual responsibility for protecting human rights with their suppliers and sub-suppliers. Instead of a unilateral relationship dominated by the international buyer, the model clauses encourage a more collaborative relationship between the buyer and the supplier. It puts less emphasis on a standardized and tick box approach to representations and warranties, which could leave the supplier with a breach and a potential termination of the contract, and more on human rights due diligence, requiring both parties to take appropriate steps to identify and mitigate human rights risks and to address adverse human rights impacts. However, when adapting this model to other contexts, it is important to bear in mind that a party's responsibility to address adverse impacts should depend upon the extent to which it has caused or contributed to those impacts.

Source: American Bar Association Section of Business Law (2021). Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains.

Similar challenge exists with managing the project's relationship with operators of associated facilities. DFIs can potentially play a role in facilitating a dialogue with third parties and alleviate the project's perceived or real lack of leverage with them. In some cases, the DFI's standing may allow it to work with the relevant local authorities and regulators to address problems arising from the project's relationship with third parties. Project companies in turn have a responsibility to seek practical solutions by asking for the DFI's assistance and exercise of leverage in these challenging circumstances. (Clauses 4.8, 8.1(a).)

Drafting Consideration 9: Responsible exit and beyond

Key Points:

- *From the outset, DFIs should have a plan for exiting responsibly from projects.*
- *When faced with an exit from a project, the DFI should assess the consequences of its exit, ensure consultation with the project-affected people is up to date, harm has stopped and steps are in place to prevent recurrence, and remedial financing mechanisms are available. In addition, it should seek ways to ensure that the project company will continue to be able to remedy future E&S and human rights harms.*
- *The terms of the responsible exit should be publicly available.*

See corresponding contractual provisions: Clauses 4.8, 7, 8.3, 8.5

'Responsible exit should be the corollary of "responsible entry" into projects. DFIs' hurdle at entry is normally high with careful due diligence on financial and non-financial aspects of prospective projects. They should take equal care when faced with a potential exit from projects.

In a DFI-financed project, a DFI exit from a loan relationship usually follows one of several scenarios. The exit can occur automatically when the loan is fully paid, or abruptly when the DFI is prepaid ahead of the full contractual term. Borrowers resort to prepayment for many reasons, including financial, strategic, or even for E&S and human rights reasons.[49] The exit can also be prompted by the DFI declaring an event of default and acceleration of the loan[50] under the terms of the DFI loan agreement. Examples may include a serious breach of the E&S requirements by the project company, or an event of default declared by another lender which results in a cross-default of the DFI loan and the DFI's exit.[51] An exit from an equity position may occur following negotiations with the project company and its shareholders, or by the exercise by a DFI of a put option (the right of a shareholder to sell its shares at a predetermined price) under a put option agreement.

Just as an entry into a project should be carefully planned and informed by due diligence, a DFI's exit should also be deliberate and informed by an assessment and consideration of the project circumstances and consequences of the exit, including:

- the project's finances
- identification of outstanding and unremediated adverse impacts and steps to remedy them
- the project's capacity and willingness to continue to observe the project's E&S requirements
- the expressed views of stakeholders, including the project-affected people
- the broader macro-level implications on the host country's sustainable development
- availability of support from third parties

See also IFC's Responsible Exit Principles (Box 6), which also includes considerations on impact on mobilization.

The DFI exit should be pursued only after it becomes clear that mitigation and all leverage options have been exhausted or that staying in the project will further aggravate E&S or human rights risks. Ongoing or potential future E&S or human rights impacts will necessitate prioritized protection of the rights of the project-affected people even after the DFI financing agreement terminates. (Clause 8.5(a).)

Where a breach of an E&S requirement is ongoing, any proposed prepayment by the project company requires careful consideration. As a matter of principle, the parties should prioritize remedies for human rights harms over the exercise of contractual remedies (see Drafting Consideration 4) and take active steps to ensure the harms stop and do not recur before terminating their relationship. The DFI loan agreement should anticipate and address this scenario, for example by prohibiting or penalizing prepayment when an unremediated breach exists. If undischarged financial obligations for remedy exist, the DFI could impose a penalty equal to the financial gap or set aside a portion of the prepaid funds as a contingency before they are applied to the payment of principal, interest, fees and any applicable financial penalties. Alternatively, the DFI could pay for remedy and receive reimbursement as part of the prepayment financial transaction (Clause 8.5).

If the DFI is also holding equity in the project company, full repayment of the loan may result in abrupt loss of leverage since covenants in the loan agreement are generally not fully replicated in the parallel equity related agreements. At that point, whether the DFI should remain as a shareholder warrants careful consideration. If the project company's intent or capacity to address E&S and human rights impacts is in doubt, the exit analysis will have to factor in these concerns. The existence of a put option agreement with the project company may help to justify a decision by the DFI to exit the project. Even in the absence of a put option, if the project company wishes to dissociate from the DFI altogether, it may offer a negotiated exit. In this circumstance, again, the DFI would need to weigh all relevant considerations including the severity of the adverse E&S impacts, whether the exit would be consistent

with its E&S and human rights responsibilities, whether staying invested in the project company with diminished leverage may nevertheless incentivize the project company to effect remedial measures, and any reputational, financial or legal considerations involved.[52] [53]

In DFI loan agreements, a breach of a material E&S requirement that remains unremediated after a specified period should be made an explicit event of default.[54] Doing so would avoid any doubt as to whether the DFI can call an event of default for nonfinancial matters. The consequences of an event of default, such as acceleration and cross-defaults, can be debilitating to the project company. There is reason therefore to approach this contractual remedy with caution. Yet, while practice is uneven, DFIs have sometimes exercised their right to call an event of default, accelerate their loan, and exit the project when faced with an incurable breach of an E&S requirement. It will be advisable for the event of default provision to include clear consequences to the borrower, as well as an obligation of the lender to set up its own financial reserve in the event that the project company does not or will not pay for remedy, and a right of the DFI to be reimbursed where it steps in and pays for remedy that should have been paid for by the borrower. (Clauses 7.1, 7.2.) (But also see Drafting Consideration 10 below regarding the DFI's contribution to harm).

Another consequence of an event of default is that the loan agreement will terminate after the repayment of the loan. This means all covenants, including the environmental and social ones, will also terminate. But one possible exception would be an indemnification clause for any failure by the project to comply with any E&S requirements that explicitly survive the termination of the agreement, to the extent permitted by applicable law (Clause 8.4). This is one way of ensuring that some of the project company's responsibilities in the DFI contract survive the DFI exit at least for some limited time.

Termination of the DFI agreement is another reason why DFIs should create leverage outside the DFI loan agreement so that the project company will continue to be obligated to perform its E&S requirements beyond the duration of the agreement. This is especially crucial if the event of default was prompted by the project company's breach of an E&S requirement that continues to harm people. In these situations, the options available to DFIs[55] may include:

- Formalizing a post-exit Remedial Action Plan and/or Corrective Action Plan with an estimated implementation period so that ongoing impacts or future risks can be addressed and supported by the project's remedial financing mechanism (and/or the sponsor guarantee or support) (Clause 3.3). To ensure its enforceability, the parties may consider entering a deed of covenant, which is a more formal document than a contract, requiring witnesses (in English law jurisdictions) (Clause 8.5(b).).
- When the mandate of the IAM of the exiting DFI permits, a deed of covenant may specify that IAMs may continue to receive an environmental or social claim even after the DFI's exit from the project (Clause 8.5(b)(ii)).
- Appointing a third party, such as national or local authority or a trusted financial institution, to monitor the project's implementation of the Corrective Action Plan and/or the Remedial Action Plan (Clause 8.5(b)(iv)).

These arrangements should be disclosed to the public so that project-affected people know how to seek remedies for ongoing or future harms (Clause 8.5(c)).

Box 6: IFC's Responsible Exit Principles (2024)

IFC published a set of Responsible Exit Principles, consisting of the following five brief principles:

Principle 1. Evaluate the achievement and sustainability of the targeted development impact.
Principle 2. Address E&S issues.
Principle 3. Use leverage pre-exit.
Principle 4. Consider institutional constraints and precedential implications.
Principle 5. Consider impact on mobilization.

Each principle is followed by a commentary, but the principles and commentaries are brief and somewhat cryptic in nature. The most well-developed principle is Principle 2 on 'E&S issues' which contains brief references to 'resolution' and 'remediation' of harm to people and the environment prior to exit, which are qualified by 'where feasible' or 'to the extent practicable.' This implies that remedying harm is a priority over other competing considerations (such as mobilization). The Principles are also limited in scope in that "passive" exit situations (client prepayment) are excluded. And it is not clear how the Principles would be applied to IFC operations and who is responsible for implementation, data collection and reporting. Altogether, the Principles appear to miss an opportunity to embed a clear approach to remedy in IFC operations.

This Drafting Consideration concludes with one other important contextual point. In virtually all jurisdictions where DFI financing occurs, local and national governmental agencies with a mandate to protect the environment exist. These agencies are indispensable for DFI projects to ultimately succeed and deliver human rights and sustainable development outcomes in the long run. Their role is particularly crucial in situations where harms are caused or exacerbated by a third party that neither the DFI nor the project controls or influences, such as operators of associated facilities. While project-level grievance mechanisms and IAMs may play helpful roles in enabling remedy, they rarely have a robust enforcement capacity. For this reason, projects should establish a relationship with all relevant agencies and work alongside them to impart knowledge and skills to monitor and oversee projects for the benefit of the project and the project-affected people. The DFI should facilitate and nurture this relationship. Once such a relationship is established, the project's corrective action plan and/or remedial action plan may be monitored by the relevant local or national governmental agency (or agencies), which is a more sustainable option for all parties concerned in the long run. (Clause 4.8, 8.1(a).)

Drafting Consideration 10: DFI's contribution to remedy

Key Points:

- *A DFI has the responsibility to contribute to remedy when it contributes to harm.*
- *When the DFI and the project company both contribute to an environmental or human rights harm, the parties' contributions to remedy should take into account their respective contributions to the harm.*
- *DFIs can discharge this responsibility through various options, including making its own financial provisioning to contribute to remedy, providing assistance to support studies or assessments to address grievances, supporting services to local communities, in all cases, prioritizing the right of the project-affected people to have harms remediated.*
- *DFIs should consider a consistent approach to remedy instead of an ad-hoc, project-by-project approach. This may be best achieved through a clear policy framework on remedy,*

which can be reinforced further if DFIs as a group adopt a consistent DFI-wide policy framework.

See corresponding contractual provisions: Clauses 4.3(b), 8.1

Drafting Consideration 6 discussed the project company's responsibility for remedy when it caused or contributed to human rights harm. In this final Drafting Consideration 10, the responsibilities of DFIs will be considered. Unlike in the case of the project company, it will be rarely the case that a DFI "causes" harms at the project level in UNGP terminology because it is not acting alone directly at a project site or in project operations. Nevertheless, through actions or omissions, the DFI may "contribute" to harms, for example, by incentivizing or facilitating third parties to cause harm. In such situations, a contribution to remedy, proportionate to the DFI's contribution to harms, would be expected (See Box 3). When providing financing, a DFI will (in most cases) be "directly linked" to harms through its business relationship with its client. In this scenario, a DFI contribution to remedy would not necessarily be expected, although DFIs may choose to do so. At a minimum, the DFI should seek to prevent and mitigate the harm, including through exercising all available leverage to ensure that those who have caused or contributed to harms fulfil their own remedial responsibilities.

The DFI financing agreement can anticipate these situations of lender responsibility and require contribution to remedy. For example, the agreement can record the lender's commitment to pay for remedy and seek reimbursement from the Borrower for the Borrower's share of the harm (Clause 4.3(b)) (but not the DFI's share), or set up a remedial financing mechanism as a backup to the project company's remedial financing mechanism to pay for the Corrective Action Plan and/or Remedial Action Plan (Clause 8.1(b)). It can also provide an obligation for the lender to consider capacity building and other programs to help the project company better address human rights harms (Clause 8.1(a)). Such an arrangement could be established on an ad hoc basis, or may be mandated by a DFI policy. Regardless, project-by-project contributions to remedy may be implemented in an inconsistent fashion across projects and may be difficult to track centrally.

An alternative approach would be for a robust DFI policy on remedy to require, as part of high standards on remedy, a single institutional level remedial financing mechanism for all projects so that remedial financing is always available to projects. A DFI's IAM (where it exists) may play a useful role in helping to determine a DFI's contribution to harms. Certain IAMs are already vested with explicit authority to make recommendations in relation to financial compensation where harms are linked to the DFI's policy non-compliance.[56]

In order to make an institutional remedy framework operational, DFIs will need to consider where and how funds are kept, how to ensure safekeeping if third-party institutions (where these are involved) fail or cease to exist, and the criteria for payouts. If every DFI were to establish such a framework individually, it would avoid the inconsistency and incoherence that results when each DFI decides for itself whether to rely upon project-level or institutional-level mechanisms.

It is sometimes claimed that the establishment by a DFI of a potentially large pool of funds for remedy may increase litigation risk, invite spurious claims and create a moral hazard problem, disincentivizing clients from taking appropriate actions..[57] To the contrary, funding arrangements of this kind can incentivize the DFI management to engage proactively with responsible parties to prevent and remedy harms through ongoing due diligence, active monitoring and the requirement that the project establish and deploy effective project-level remedial financing mechanisms, precisely so that there should be no

need to access DFI mechanisms. A proactive approach of this kind offers the most effective way for DFIs to ensure that they do not contribute to human rights harms, and if harm occurs, that funds will be available as needed for remedy. These considerations are central to the development of a comprehensive remedy policy framework across all the DFIs.

Box 7: Piloting a Remedy Fund

One U.S. Government agency successfully piloted the use of a 'Project-Related Emergency Response Fund' that was designed to address unintended harms arising from a high-risk project focused on protecting marginalized groups from violence and discrimination. The project set aside and earmarked approximately 1% of the total project cost to be available to address issues including, but not limited to, medical and legal support to individuals and increased security measures for civil society organizations. This Fund operated as an internal project mechanism that effectively ensured that funds were readily available to remedy unintended harms. At the conclusion of the program, the unexpended balance of this Fund was applied to cover the operational expenses of civil society organizations representing marginalized groups. Although this was not a widespread practice within the relevant agency, and it does not address all remedy issues, it is an approach that provided an actual plan and resources for addressing unintended harms in connection with certain projects that involved human rights risks.

Source: Stakeholder interview

IV. SUGGESTED PROVISIONS FOR DFI LOAN AGREEMENT

This chapter suggests contractual provisions that address E&S and human rights risks and impacts that may arise in a project (the Project) financed by a DFI (Lender[58]) through a DFI Loan Agreement (Agreement), including specific responsibilities of the borrower / project company (Borrower) and the Lender (the Borrower and Lender are Parties to the DFI Agreement) for avoiding and remedying adverse human rights impacts, during and after the DFI's support for the Project.

The suggested provisions were derived from multiple sources, including those acknowledged in Annex 4, while other provisions were inspired by suggestions that appeared in the draft IFC/MIGA Approach to Remedial Actions paper (2022)[59] as well as the significant body of work on the topic of remedy carried out by OHCHR and others. They were also designed to address all ten Drafting Considerations. As a result, the suggested provisions reflect good or best practice as well as provisions that have been drafted specifically for this Guide for the purpose of calling attention to the gaps in present practice, as suggested by the Drafting Considerations.

In this Chapter, both general E&S provisions that are widely accepted as standard (in black font) and those that are specific to remedy (in blue font) appear together. Although model E&S contractual provisions are not novel and good model versions are publicly available, this document presents detailed E&S provisions alongside remedy provisions, given their inter-relatedness and the benefit of seeing the specific remedy provisions in context.

The provisions below are designed to address risks and impacts that would normally be expected in large and complex projects (such as Category 'A' and 'B') under the DFI categorization system. However, risk is dynamic and contextual, and even 'C' projects may require certain remedy provisions.

Since the suggested provisions are general and must be tailored to fit the specific project circumstances and address all applicable Drafting Considerations, each party to a DFI Loan Agreement should seek legal

advice from qualified legal counsel and either incorporate the suggested contractual provisions with appropriate modification or draft other provisions. Either way, proper initial due diligence and risk assessment is a critical first step in choosing appropriate contractual provisions.

The suggested provisions follow the usual order of provisions in loan agreements, starting with Definitions; Representations and Warranties; Conditions of Disbursement; General Undertakings (affirmative and negative covenants); Informational Undertakings; Disputes Resolution; and Events of Default. The final Clause 8 on Additional Undertakings suggests several further provisions that obligate the Borrower and Lender to implement certain requirements that will help improve the Project's E&S outcomes and enable a DFI to exit a Project responsibly.

Finally, this Guide offers the suggested contractual provisions so that both projects and project-affected people may benefit from them. The provisions should help projects to fully and accurately assess all the costs and benefits of the project and related activities, including exit from the project, while also helping project-affected people experience full enjoyment of rights protection alongside the positive benefits of projects.

1. DEFINITIONS

The terms listed below collectively provide a foundation for clear and enforceable contractual provisions for remedy. The list is deliberately explanatory and inclusive; as such, it contains many standard E&S definitions and provisions not specific to remedy *per se*. As discussed above, the remedy provisions are included in order to provide context and clarify the meaning and intended application of the remedy provisions.

* * * * * *

Borrower's Grievance Mechanism: The processes and personnel assigned to receive and facilitate resolution of Environmental and Social Claims[, including those arising from the activities and conduct of the Borrower's [significant] contractors and subcontractors[60]]. It is scaled to the risks and adverse impacts of the Project and focus on the Project-Affected People as their primary user with the objective of resolving their grievances and providing for or cooperating in providing for Remedy as appropriate, in good faith, early, effectively, and collaboratively with those bringing an Environmental and Social Claim and/or their representatives. The Borrower's Grievance Mechanism is periodically updated based on lessons learned from responding to Environmental and Social Claims (if any). The Borrower's Grievance Mechanism shall not impede access to judicial or administrative remedies.

Community Development Agreement: A Community Development Agreement between the Borrower [or an affiliate or designated entity of the Borrower] and [the duly designated representatives of Project-Affected People] [and the appropriate representatives of the local government of __] that enumerates the individual and community rights and benefits of the Project available to the Project-Affected People present in the Project area, the budget for the implementation of the Agreement and the timeline of distribution of benefits;[61]]

Confidential Information: Information (however it is conveyed or on whatever media it is stored) that is clearly marked and kept as confidential, not in the public domain, and the disclosure of which would, or would likely, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, and all personal data. Confidential information should be redacted where appropriate from the relevant document/media so that the remaining information can be disclosed. For the purposes of this Agreement, there is a presumption in favor of disclosure with respect to environmental and social information, especially information pertaining to

environmental and social risks and impacts that may affect Project-Affected People, absent compelling reason not to disclose such information.

Corrective Action Plan: An action plan, whether freestanding or an amendment to the ESAP, with an appropriate timeframe, budget and relevant deliverables and compliance indicators for implementation of such Corrective Measures as are necessary to bring the Project into compliance with or to correct a breach of any Environmental and Social Requirements that arises during Project operations and which may be combined with a Remedial Action Plan, provided that it contains the Remedial Measures for the Project-Affected People in addition to the Corrective Measures.

Corrective Measures: Such measures as are necessary to correct any noncompliance of any provisions in this Agreement, including the Environmental and Social Requirements.

Environmental and Social Action Plan (ESAP): That part of the ESIA (or a freestanding plan pursuant to the ESIA) that describes the mitigation measures required to mitigate the assessed impacts of the Project and their estimated cost, together with the Stakeholder Engagement Plan, as updated as required by this Agreement.[62]

Environmental and Social Claim: Any administrative, regulatory or judicial claim, demand, judgment, suit, or complaint relating to any Environmental and Social Requirement or Environmental and Social Matter or otherwise and affecting the Project-Affected People.

Environmental and Social Consultant: Any advisor engaged by the Lender to advise on any of the Environmental and Social Requirements or Environmental and Social Matters.

Environmental and Social Dispute: Any dispute between the Parties out of or in connection with this Agreement concerning any Environmental and Social Matter or Environmental and Social Requirement.

Environmental and Social Impact Assessment (ESIA): The environmental and social impact assessment process and document produced pursuant to the Project description contained in this Agreement and the Environmental and Social Laws and Environmental and Social Standards, and as updated as required by this Agreement.

Environmental and Social Incident: An incident or accident relating to the Project which, under the Environmental and Social Requirements, requires the Borrower to undertake immediate Corrective Measures or Remedial Measures.

Environmental and Social Laws: Any applicable statutes, laws, regulations, orders, by-laws, decrees or orders of [insert jurisdiction of the Project] in each case having the force of law and relating to Environmental and Social Matters.

Environment and Social Matters[63]: In relation to the Project, any matter related to the natural environment and the dignity, well-being and rights of people, including but not limited to:

(a) land ownership and use, livelihood, physical or economic displacement, cultural heritage, influx, community health, safety, and security, gender-based violence, fundamental principles and rights at work and working conditions including occupational health and safety, public engagement, consultation, disclosure, civic space and exposure of people to retaliation or reprisals risks;
(b) discrimination and vulnerability issues, including discrimination against individuals or groups who, by virtue of their age, gender, race, ethnicity, religion, disability, social, civic For health status, sexual orientation, political opinion, gender identity, economic disadvantages or indigenous or minority status, and/or dependence on unique natural

resources, may be more likely to be at risk of being adversely affected by project impacts, and/or more limited than others in their ability to take advantage of a project's benefits, and/or excluded from/unable to participate fully in consultation processes and benefit sharing in a project; and

(b) air, water and land; natural resources, biodiversity and ecosystems; any pollutants, including greenhouse gases, waste and hazardous substances; any release of pollutants; vibration; noise; nuisance; and visual pollution.

Environmental and Social Management System (ESMS): The Borrower's internal management system comprised of policies (including a policy on ongoing E&S due diligence and HRDD), procedures and processes together with the financial and human resources required to implement the ESAP, as updated, and to enable the Borrower to comply with the Environmental and Social Requirements.

Environmental and Social Monitoring Report: A periodic environmental and social monitoring report with respect to the Project prepared by the Borrower in accordance with the requirements in this Agreement, which may be subject to verification by an Environmental and Social Consultant, at the request of the Lender.

Environmental or Social Permits: All environmental and social approvals, authorizations, certificates, licenses, and permits of the Project required under Environmental and Social Laws and based on the ESIA.

Environmental and Social Requirements:

(a) all Environmental and Social Permits;

(b) all Environmental and Social Laws;

(c) the Environmental and Social Standards;

(d) the ESAP (including the Stakeholder Action Plan); and

(e) the Community Development Agreement [if any].

(f) any Corrective Action Plan and/or Remedial Action Plan (if any in effect).

Environmental and Social Standards: The applicable environmental and social safeguard policy, sustainability policy, environmental and social framework or similar policy(ies), procedures and other requirements of the Lender [list the specific standards].

Human Rights Due Diligence (HRDD): The ongoing process by which entities identify, prevent, mitigate, and account for how they address their adverse human rights impacts. Human rights due diligence should involve meaningful consultation with Project-Affected People and other relevant stakeholders.[64] The process should take into account the human rights context of the Project, such as risks within the Project's host country or subnational level or sector that could negatively affect the Project-Affected People, or which the Borrower's operations could exacerbate, thereby leading to further adverse impacts of the Project on Project-Affected People[65]

Lender's Independent Accountability Mechanism: The processes and personnel established by the Lender to receive and facilitate resolution of grievances concerning the Project or the Borrower and operating in coordination with the Borrower's Grievance Mechanism, or other grievance mechanisms of third parties. The Lender's Independent Accountability Mechanism is legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue

with Affected Stakeholders.[66] If grievances are brought to both the Borrower's Grievance Mechanism and the Lender's Independent Accountability Mechanism, the mechanisms will consult and collaborate as appropriate, recognizing that they play different roles.

Project-Affected People: Those stakeholders, whether or not identified in the Stakeholder Engagement Plan, who face or may face adverse environmental, social or human rights impacts of the Project.

Project Completion Date: The date by which the Project is certified by: (i) its authorized representatives as [having been physically completed and is fully operational in accordance with the relevant project specifications, including the applicable parts of the Environmental and Social Requirements]; and (ii) its auditors as [meeting various financial obligations set out in this Agreement, including the obligation to fund the Remedial Financing Mechanism (if applicable)]; and provided that no Event of Default and no event which with lapse of time or notice would become an Event of Default shall have happened and be continuing.

Remedial Action Plan: An action plan, whether freestanding or an amendment to the ESAP or part of an agreement between the Project and the Project-Affected People, with an appropriate timeframe, budget and relevant deliverables / compliance indicators for implementation of the Remedial Measures. A Remedial Action Plan may be combined with a Corrective Action Plan, provided that it contains the Remedial Measures for the Project-Affected People in addition to the Corrective Measures.

Remedial Financing Mechanism: Such financial mechanism of the Borrower or third party as is necessary to pay for the implementation of the Remedial Action Plan, including but not limited to contingency provisioning; contingency fund; escrow account; trust fund whether by the Lender or any other donor(s); sponsor guarantee or support for remedy; third-party liability insurance; and guarantee or letter of credit.

Remedial Measures: Such measures as are necessary to provide Remedy for adverse human rights impacts on Project- Affected People caused or contributed to by one or the other Party, whether related to any Environmental and Social Matter or otherwise, and shall include appropriate action items focused on and prioritizing impacts on people. Remedial Measures shall be identified in consultation with the Project-Affected People and may include Corrective Measures that pertain to the adverse environmental and social impacts on Project-Affected People. Remedial Measures should take precedence over Corrective Measures that do not address impacts on people.

Remedy: The recourse provided to Project-Affected People to seek to restore them, whenever possible, to the situation they would have been in had the adverse impacts not occurred so as to counteract or make good the adverse impact(s). The recourse actions shall be proportionate to the adverse impacts and are likely to require a combination of various measures including, for example, apologies, restitution, rehabilitation, financial or non-financial compensation and/or prevention of additional or future adverse impacts.

Responsible Exit: The terms and conditions of the termination of this Agreement that are informed by an assessment of the environmental, social, human rights, and sustainable development factors in connection with the Lender's exit from the Project and incorporating plans and mechanisms to avoid or remedy continuing or future risks or adverse impacts to Project-Affected People in relation to Environmental and Social Matters.

Retaliation: Any detrimental act, whether direct or indirect, active or passive, recommended, threatened or actually taken against any person or their representative in connection with an Environmental and Social Claim or concerns or protest the person or their representative have raised about the Project or

the Borrower, including but not limited to harassment, threats, violence, damage to property, discriminatory treatment, impairing or harming, or threatening to impair or harm directly or indirectly, any relevant person or the property of the person, the withholding of any entitlement, and dismissal from or deterioration in terms and conditions of employment or any other office or legal actions threatened or taken to dissuade Project-Affected People or their representative from raising a grievance with the Borrower's Grievance Mechanism, the Lender Grievance Mechanism, a court or other dispute resolution process, or imposition of financial costs.

Stakeholder Engagement Plan: A freestanding plan or that part of the ESAP that describes all groups and individuals who are stakeholders of the Project, including the likely Project-Affected People, and how the Borrower will engage with them and ensure their broad support on matters that affect them over the life of the Project, [and the free, prior and informed consent of the indigenous peoples, if they are involved] including consultation with them on matters that affect them under any Corrective Action Plan and/or Remedial Action Plan, together with an estimated budget for implementing such Plan[, and the description of the process of free, prior and informed consent, if applicable, in the context of the Project.]

2. REPRESENTATIONS AND WARRANTIES

This section in the loan agreement normally contains statements of fact that are true as of the specified point in time, such as at the time of signing of the agreement, or at the time of first or subsequent disbursements. If the borrower is unable to affirm that the statements are true or discloses any noncompliance, or the lender becomes aware of borrower noncompliance through its due diligence, the borrower must correct the situation before they can sign the agreement and reach financial close or receive disbursement, unless the lender waives such noncompliance. In many cases, only material compliance is expected. Instead of accepting material compliance, the lender should encourage the borrower to disclose all noncompliance instances on matters that are then affecting the Project-Affected People, and to encourage remediation prior to signing / disbursement, or agree on an acceptable Corrective Action Plan and/or Remedial Action Plan.

* * * * *

2.1 Environmental and Social Requirements: The Borrower and the Project are in compliance with the Environmental and Social Requirements;

2.2 No Environmental and Social Claim: No Environmental and Social Claim has been made, or to the best of the Borrower's knowledge and belief, threatened against it;

2.3 No Environmental and Social Incident: No Environmental and Social Incident has occurred and is continuing;

2.4 Environmental and Social Permit: Each Environmental and Social Permit then required for the implementation of the Project has been obtained and is in full force and effect and publicly available;

2.5 True ESIA: The ESIA was true, complete and accurate at the time of submission and did not omit any information, the omission of which would have made the ESIA misleading in any material respect.

3. CONDITIONS OF DISBURSEMENT

Conditions of disbursements are conditions that must be met before funds can be released by the Lender, typically in installments. The first disbursement will involve the greatest number of conditions, as the project is gearing up. The lender leverage is the highest at that point. Subsequent disbursements can also require additional conditions – they can be either 'Conditions of All Disbursements' or if necessary, conditions of a specific disbursement; for example, if the disbursement can occur only after a specific

event, such as achievement of a construction milestone or some kind of certification, such an event can be added. If some conditions can only be achieved later, for instance, with the use of the loan proceeds from the Lender, they can be drafted as covenants.

* * * * *

3.1 Representations and Warranties: The Representations and Warranties are true and correct by reference to the facts and circumstances then existing.

3.2 Approval and Delivery of Documents: The Borrower has delivered to the Lender the following documents, together with the verification of the Environmental and Social Consultant that the Borrower has sufficient capacity, expertise, and financial and human resources to implement and comply with them:

(a) the ESIA and the ESAP, including [list all the plans and the Stakeholder Engagement Plan] and evidence of acceptance or approval of these by the relevant authorities

(b) the ESAP, including [list all the specific plans and the Stakeholder Engagement Plan];

(c) the Project's HRDD report or the portion of the due diligence report that meets the requirements of HRDD;

(d) the executed engagement letter for the Environmental and Social Consultant for _____ [term); and

(e) each of the Environmental and Social Permits [set out in Schedule __].

3.3 Remedial Financing Mechanism: The Borrower has established the Remedial Financing Mechanism and deposited [$__] [__% of the Project budget] [the first installment payment under the funding schedule set out in Annex __[67]] [in a separate bank account] [in an escrow account / trust fund with a third party acceptable to the Lender] [with the Lender] [with appropriate instructions to be agreed with the Lender] for the sole purpose of paying for the cost of the implementation of any Corrective Action Plan and/or Remedial Action Plan] [or alternatively: The Borrower has purchased a liability insurance policy / performance bond / a letter of credit in the amount of $__ with [an insurer / financial institution satisfactory to the Lender] and with terms acceptable to the Lender for the sole purpose of enabling] [or: The Borrower has secured the guarantee of [the Project sponsor][a financial institution acceptable to the Lender] to guarantee] the payment of the cost of implementation of any Corrective Action Plan and/or Remedial Action Plan.

3.4 Documentation of Rights and Benefits of Project-Affected People: The Borrower has engaged with the Project-Affected People to explain the rights of and benefits available under the ESAP, and has created a [public registry of the rights and benefits, understandable in the language of the Project-Affected People and displayed in public places], [memorandum, letter or another document understandable in the language of the Project-Affected People, delivered to [each Project-Affected People] [the duly designated representatives of Project-Affected People]]; [alternatively: The Borrower has entered into a Community Development Plan];[68]

3.5 Borrower's Grievance Mechanism and Lender's Independent Accountability Mechanism: The Borrower has established to the satisfaction of the Lender [and the Environmental and Social Consultant] the Borrower's Grievance Mechanism, and informed the Project-Affected People about the purpose, function and processes of its Grievance Mechanism, together with the purpose, function and processes

of the Lender's Independent Accountability Mechanism, in an understandable and culturally appropriate manner, consistent with the Stakeholder Engagement Plan.

3.6 Consent or Support for the Project: The Borrower and the Project have obtained the [free, prior and informed consent of the Project-Affected People who are indigenous people] [broad community support of the Project-Affected People] for the Project and its anticipated adverse impacts in relation to the Environmental and Social Matters and the proposed mitigation measures, as mandated by the Environmental and Social Requirements, and has submitted to the Lender any supporting documents and information that demonstrate such [consent] [support];[69]

3.7 Disclosure and Remedy of Existing or Legacy Conditions: The Borrower has disclosed to the Lender and Remedied or otherwise addressed to the Lender's satisfaction any adverse human rights or environmental impacts from any activities taken in anticipation of or in preparation for the Project, including those of its affiliates, contractors, suppliers, [associated facilities] or government entities.[70]

4. GENERAL UNDERTAKINGS (AFFIRMATIVE AND NEGATIVE COVENANTS)

These undertakings or covenants of the Borrower comprise the core of the ongoing Borrower obligations on E&S and human rights issues. The undertakings could be either affirmative or negative. These can be combined with the Informational Undertakings that appear immediately below.

* * * * *

4.1 Compliance with Environmental and Social Requirements: The Borrower shall design, construct, operate, maintain, monitor and decommission the Project, its site, facilities and equipment and engage and consult with stakeholders in accordance with the Environmental and Social Requirements.

4.2 Management of Contractors and Suppliers: As part of its ongoing due diligence, and in order to address Environmental and Social Matters associated with the activities of its contractors, subcontractors, suppliers and other third parties, such as the operators of associated facilities, the Borrower shall continuously assess the environmental and social risks associated with such third parties, include appropriate measures in its [ESAP] [EMSP] [ESMS] commensurate with the nature and scale of such risks, prioritizing the severity, first and foremost, as well as the likelihood of adverse human rights impacts, and reflect appropriate environmental and social provisions in contracts with the third-party provider of the relevant goods and services[, and take into account and extend as appropriate measures and systems that the Borrower has already established for itself, including the Borrower's Grievance Mechanisms, the Corrective Action Plan and/or the Remedial Action Plan, and the Remedial Financing Mechanism, among others, for the use by the third-party provider.]

4.3 Ongoing Due Diligence and Corrective Action Plan and/or Remedial Action Plan:

(a) The Borrower shall conduct ongoing due diligence against the Environmental and Social Requirements, and the process of HRDD as appropriate, to monitor any environmental, social and human rights impacts of the Project;

(b) whenever Corrective Measures and/or Remedial Measures are required under the terms of this Agreement, whether by the Environmental and Social Requirements, the process of HRDD, as a consequence of or to remedy an Event of Default pursuant to Clause 7 or prior to the Lender's Responsible Exit pursuant to Clause 8.5, or otherwise, the Borrower shall promptly compile a Corrective Action Plan to address any non-compliance of the Environmental and Social Requirements, and/or a Remedial Action Plan to address any adverse impacts related to any Environmental and Social Matters, as the case may be,

consult with the Project-Affected People on matters that affect them, and obtain their approval as well as Lender approval of such Plan for implementation as soon as reasonably practicable in the circumstances, and comply in all material respects with the relevant Plan, and report to the Lender on its implementation, [monthly / quarterly / annually] in accordance with the terms of the Plan;

(b) in the event that the Borrower is unwilling or unable to compile such Corrective Action Plan and/or Remedial Action Plan, the Borrower hereby agrees that the Lender, at the expense of Borrower, may prepare a Corrective Action Plan and/or Remedial Action Plan in form and substance satisfactory to the Lender, to correct any identified non-compliance and/or remedy the adverse impacts on Environmental and Social Matters, as the case may be, and Borrower shall implement such Corrective Action Plan and/or Remedial Action Plan in accordance with the terms provided in it;

(c) the Lender may require the Borrower to retain a qualified impartial party to support the negotiation, development and implementation of Remedial Measures in consultation with the Project-Affected People when the Borrower is unable to agree with the Project-Affected People on appropriate Remedial Measures that satisfy them;

(d) in the event that both Corrective Measures and Remedial Measures require implementation, the Remedial Measures should be prioritized when loss of lives or bodily injuries are imminent or likely; and

(e) when a Corrective Action Plan and/or Remedial Action Plan is established pursuant to this Clause 4.3, the Plan(s) becomes part of the Environmental and Social Requirements that bind the Borrower.

4.4 Application and Management of Remedial Financing Mechanism:

(a) Upon the Lender approval of the Corrective Action Plan and/or the Remedial Action Plan in accordance with Clause 4.3, the Borrower shall pay for the implementation of the Plan(s) [out of its own budget,] [or the Remedial Financing Mechanism,] in accordance with the specific terms and conditions set out in such Plan

(b) The funds in the Remedial Financing Mechanism shall also be available to pay for the Remedial Measures, when a decision or a judgment rendered by the Borrower's Grievance Mechanism, Lender's Independent Accountability Mechanism, or a dispute resolution process set out in Clause 6, as the case may be, finds that the Borrower has failed to meet the Environmental and Social Requirements or otherwise caused or contributed to adverse human rights impacts on Project-Affected People;

(c) Within __ days after the Remedial Financing Mechanism is drawn down in accordance with (b) above, the Borrower shall [replenish it [in full] [in accordance with the funding schedule set out in Annex __]] [purchase a new insurance policy / performance bond / letter of credit in the amount of $__][secure a new guarantee from __ in the amount equal to the original amount of guarantee set out in __ above];

(d) [In the event of [the Borrower's refusal or inability to apply the Remedial Financing Mechanism] [the refusal of the third party who is charged with the safe keeping and drawdown of funds from the Remedial Financing Mechanism] [the refusal of the insurer / guarantor / financial institution] to pay for the implementation of the Corrective Action Plan and/or the Remedial Action Plan, or for the purpose stated in Clause 4.4(b), the

Borrower shall permit the Lender to pay for the implementation of the Plan and seek reimbursement from the Borrower;] and

(e) The Borrower agrees to maintain the Remedial Financing Mechanism at all times during the [life of the Project [and __ years after the closure of the Project] [whereupon the funds remaining in the Remedial Financing Mechanism, if any, shall be [disbursed to the Borrower [or shareholders of the Borrower in proportion to their shareholding,] as appropriate].

4.5 Amendments to ESIA, ESAP, etc.: The Borrower shall not make any material amendments to the ESIA or the ESAP, except that: (i) if it proposes to make any material changes to the Project, and such changes are approved by the Lender; or (ii) if an amendment is necessitated by a Corrective Action Plan and/or Remedial Action Plan that has been approved by the Lender; then it shall promptly amend or update the ESIA and ESAP and obtain the Lender approval of the amendments, as well as obtain any new or updated Environmental and Social Permits as necessary.

4.6 Site visits:

(a) Upon reasonable prior written request, the Borrower shall permit any designated representative of the Lender or the Lender's Independent Accountability Mechanism, or the Environmental and Social Consultant, during normal business hours, to:

(i) visit any of the sites and premises where the business of the Borrower is conducted;

(ii) inspect any of the Borrower's sites, facilities, plants and equipment;

(iii) have access to the Borrower's books of accounts and records; and

(iv) have access to those employees, agents and consultants of the Borrower who have or may have knowledge of matters with respect to which the Lender, the Lender's Independent Accountability Mechanisms or the Environmental and Social Consultant seeks information.

(b) The Borrower shall permit:

(i) up to [four] regular visits per calendar year by the designated representative of the Lender or the Environmental and Social Consultant;

(ii) to the extent additional visits may be reasonably required: (A) in connection with the verification of Project Completion; (B) following the occurrence of an Environmental and Social Incident; (C) in reference to a Corrective Action Plan and/or Remedial Action Plan; (D) in reference to an investigation by the Lender's Independent Accountability Mechanism; and (E) upon the occurrence of an Event of Default that relates to any Environmental and Social Requirement or Environmental and Social Matter.

(c) The Borrower shall cooperate in good faith with each of the designated representative of the Lender or the Lender's Independent Accountability Mechanism, or the Environmental and Social Consultant, pay all reasonable expenses incurred by them, and cause its employees and agents to provide in good faith full cooperation and assistance to them in connection with the exercise of the Lender's rights specified in this Clause.

4.7 Non-Retaliation: The Borrower shall not [and the Borrower shall require that its contractors, and subcontractors shall not] engage in, support or in any way condone Retaliation against persons or their representatives who have brought an Environmental and Social Claim or otherwise expressed grievances or dissatisfaction with the Borrower or the Project or engaged with the Borrower's Grievance Mechanism, the Lender's Independent Accountability Mechanism or other judicial or administrative mechanism.

4.8 Cooperation with the Lender: The Borrower shall cooperate with the Lender and consider in good faith any Lender offers for financing dialogue facilitation and activities to support the Borrower and its efforts to implement the Corrective Action Plan and/or the Remedial Action Plan, including but not limited to: capacity building; facilitation of meetings among contractors, subcontractors, associated facilities operators, local governments, regulators, other Project investors, civil society organizations, and Project-Affected People or their representatives; and convening of relevant parties and stakeholders for resolution of any differences, and similar activities.

5. INFORMATIONAL UNDERTAKINGS

These undertakings or covenants relate to the Borrower's obligation to provide or accommodate the preparation of regular or special reports and notices. Provisions related to transparency and disclosure of information are also included here.

* * * * *

5.1 Periodic Environmental and Social Reports:

(a) Borrower's Quarterly and Annual Reports: The Borrower shall deliver to the Lender:

(i) Within thirty days of the close of each financial quarter of the Borrower[, and until [the Project Completion Date]]; a Quarterly Environmental and Social Performance Report in the form of [Exhibit __]; and

(ii) Within sixty days of the close of the financial year of the Borrower, an annual Environmental and Social Monitoring Report in the form of [Exhibit __].

(b) Independent Report of the Environmental and Social Consultant: The Borrower shall permit the Environmental and Social Consultant to: (i) review and verify its Annual Environmental and Social Monitoring Report and deliver such verification to the Lender no later than [sixty] days after the completion of the Report; and (ii) at the request of the Lender, comment on or perform audits in relation to the Borrower's compliance with the Environmental and Social Requirements or any Environmental and Social Incident, including any measures taken by the Borrower to correct any noncompliance with the Environmental and Social Requirement or to address the Environmental and Social Incident (whether pursuant to any Corrective Action Plan and/or Remedial Action Plan as appropriate or otherwise).

5.2 Environmental and Social Notifications: No later than within three days of the Borrower becoming aware of its occurrence, the Borrower shall notify the Lender in writing (with a copy to the Environmental and Social Consultant) of the details available to it at such time of any:

(a) [Material] Environmental and Social Incident or [material] breach of any applicable Environmental and Social Requirement (in each case, together with information on proposed measures (if any) being taken to address or correct any such Environmental

and Social Incident or breach (whether pursuant to any Corrective Action Plan and/or Remedial Action Plan or otherwise);

(b) [material] Environmental and Social Claim or Environmental and Social Dispute issued or notified in writing against the Borrower in connection with the Project;

(c) revocation, denial, non-renewal, material modification or suspension of an Environmental and Social Permit; and

(d) any significant community or worker related action, challenge or protest.

5.3 Transparency and disclosure:

(a) The Parties agree that the principle of transparency shall guide them in their dealings with each other, with the Project-Affected People, members of the public and the relevant regulators and authorities;

(b) The Borrower shall engage regularly with the Project-Affected People and any other stakeholders whether contemplated under the Stakeholder Engagement Plan or not, and update them regularly on the status of the Project; and

(c) The Parties agree that the provisions of this Agreement shall not be treated as Confidential Information and may be disclosed without restriction. The Parties acknowledge that, in addition to the disclosure of this Agreement to the Project-Affected People, each is entitled to publish this Agreement (on the internet or otherwise) in full or in summary, and any part of the ESAP, including any Corrective Action Plan and/or Remedial Action Plan, the Environmental and Social Requirements, Environmental and Social Monitoring Reports, all relevant and non-personal information regarding the Borrower's Grievance Mechanisms and the Lender's Independent Accountability Mechanism, and, in consultation with each other, such other information deemed by both to be appropriate for public disclosure.

(d) Notwithstanding the obligation in this Agreement pertaining to Confidential Information, each Party shall reserve the right, under exceptional circumstances, to disclose certain non-public information that it deems likely to avert imminent and serious harm to public health, safety or security, and/or imminent and significant adverse impacts on the environment, or past or ongoing human rights violations. If circumstances permit, prior to such disclosure, the disclosing Party shall notify the other Party of such disclosure. The other Party shall waive any claim for breach of confidentiality in the event of such disclosure by the disclosing Party.

6. DISPUTE RESOLUTION

Because E&S and human rights disputes should not be resolved by commercial arbitrators and litigators who lack expertise in the subject matter and are not used to representing project-affected people, this Guide generally prefers various alternative disputes resolution (ADR) options to resolve such disputes, including good faith negotiation, mediation, the involvement of technical experts and disputes board, and arbitration before escalating disputes to litigation. To address DFI concerns that disputes involving the interpretation of their E&S safeguard policies are heard and resolved by internationally recognized

experts in those policies, Clause 6.3 is expanded to fully describe the expert selection process. For project-affected people's environmental and social claims, the Borrower's Grievance Mechanism and the Lender's Independent Grievance Mechanism are additional means of alternative dispute settlement. The section concludes with suggested provisions for home and host state court jurisdiction and for arbitration that is tailored to address human rights and environmental disputes.[71]

* * * * *

6.1 Environmental or Social Disputes between the Parties: If an Environmental and Social Dispute arises, either Party may by notice in writing to the other Party, at [the address], give notice that an Environmental and Social Dispute has arisen, setting out brief details of the nature of the Environmental and Social Dispute. Such a Dispute shall be resolved in accordance with this Clause 6. [In the event of a serious Environmental and Social Dispute or such Dispute arising from a disagreement on whether a breach of Environmental and Social Requirements has occurred, the Lender shall reserve the right to withhold any remaining disbursements of the Loan, if any, and/or take control of the Borrower's cash flow.]

6.2 Good Faith Negotiation: The Parties shall first attempt to settle any Environmental and Social Dispute by good faith negotiation. Such negotiation shall take place within fifteen (15) days of the delivery of the above notice of any Environmental and Social Dispute pursuant to Clause 6.1. Any negotiations shall be confidential and shall be conducted without prejudice to the rights of the Parties in any future proceedings.

6.3 Expert Determination:

(a) Any Environmental and Social Dispute concerning any of the Environmental and Social Requirements that is not resolved amicably through good faith negotiation shall be referred, at the request of either Party, to [an independent expert] [the Expert Board described in Annex] for determination. The Parties [hereby jointly choose _____ as an independent appointing authority who shall select one expert for the purpose of this Clause 6.2 [ten] days after the Parties' request to the appointing authority to appoint an expert] [shall jointly choose one expert from the list of experts in [Annex __]] and the Parties shall agree with the expert on the terms of their appointment. If the appointing authority or the Parties are unable to agree on the identity of the expert, or if the person selected is unable or unwilling to act, then, within [thirty days] of either Party's first request for an expert, the Parties shall engage in negotiation to jointly choose an expert or proceed to resolve the matter under Clause 6.4 or 6.5.

(b) The expert to be appointed may be an individual, partnership, association or body corporate and shall be generally recognized as an expert in the Environmental and Social Standards and shall have __ years of experience in that field;

(c) All costs of and associated with the request for the appointment of an expert shall be borne equally between the Parties;

(d) The expert shall act as an expert and not as an arbitrator;

(e) [The expert's determination shall (in the absence of manifest error) be final and binding on the Parties and not subject to appeal;]

(f) The expert shall decide the procedure to be followed in the determination in accordance with this Agreement [and in consultation with the Parties] and shall be requested to make their determination in writing, with reasons, within [30] days after their appointment;

(g) In their determination, the expert shall make recommendations on appropriate Corrective Measures and/or Remedial Measures. Any amount payable by one Party to another, or to the Project-Affected People, as the case may be, as a result of the expert's determination shall be due and payable within [seven] days of the expert's determination being notified to the Parties or as specified within the determination;

(h) If the Parties fail to agree: (i) whether or not a dispute is an Environmental and Social Dispute within fifteen (15) days of service of the notice pursuant to Clause 6.1; (ii) whether the expert's determination was in manifest error or fraudulent; or (iii) to implement fully the expert's determination, then the matter may be resolved in accordance with Clause 6.5 or 6.6.

6.4 Environmental and Social Claims: In the event that Project-Affected People have an Environmental and Social Claim, the Parties acknowledge that such Project-Affected People may proceed to resolve their claim through one or more mechanisms they consider most appropriate, in the order that they consider most appropriate, whether provided for in this Agreement or otherwise. [Without limiting the generality of the foregoing, the Project-Affected People may first wish to engage in a good faith negotiation with the Borrower (and/or the Lender as appropriate) before proceeding to other mechanisms, within a period of __ days from the day that the Environmental and Social Claim arose.] In the event that they decide to bring a complaint to the Lender's Independent Accountability Mechanism to address their Environmental and Social Claim, the Parties shall participate in good faith in the Mechanism's process as required by the Mechanism. For this purpose, the Borrower shall meet the requirements in Clause 4.7. The Parties further acknowledge that their selection of mechanism(s) to resolve the Environmental and Social Disputes shall not bind the Project-Affected People, and that submission of the Parties to jurisdiction of courts pursuant to Clause 6.5 below does not affect in any way the options of the Project-Affected People to choose their dispute resolution mechanism or the jurisdiction of the Lender's Independent Accountability Mechanism.

6.5 Jurisdiction of Courts: The Parties agree that the courts of [the host state of project) shall have jurisdiction over disputes related to this contract. The Parties further agree that any disputes involving Project-Affected People concerning the contract provisions for which they are third-party beneficiaries or any alleged adverse E&S and human rights impacts related to the project are subject to the jurisdiction of [the host state] courts and the courts of the home state of [name the Borrower's parent, investor or other appropriate affiliate company]. The Parties shall not invoke or seek to invoke defenses that seek to limit or reduce or eliminate the jurisdiction of the courts as set out herein.

6.6 Arbitration of Environmental and Social Disputes and Environmental and Social Claims: If, pursuant to Clause 6.3(h), the Parties decide to resolve their Dispute by arbitration, or any Project-Affected People decides that their Environmental or Social Claim involving either or both Parties should be resolved by arbitration, such Environmental and Social Dispute or Environmental and Social Claim shall be settled by arbitration in accordance with [the Hague Rules on Business and Human Rights Arbitration[72]].[73] The Parties further agree that:

(a) The number of arbitrators shall be [one] [three] (the Arbitral Tribunal) and that each arbitrator shall be internationally recognized as an expert in international environmental or human rights law and shall have __ years of experience in that field;

(b) The seat of arbitration shall be . . . [city and country];

(c) The language(s) to be used in the arbitral proceedings shall be [select language];

(d) [The [Permanent Court of Arbitration] shall provide secretariat services and serve as registry in the arbitration;[74]]

(e) The arbitrator fees shall not exceed _____ and, unless otherwise determined by the Arbitral Tribunal, the arbitrators' fees [and associated institutional costs[75]] shall be split equally between or among the parties to the arbitration;

(f) The parties shall participate in good faith in the arbitration proceedings with a view to resolving the relevant Environmental and Social Claim or Environmental and Social Dispute as appropriate;

(g) The Arbitral Tribunal shall issue a reasoned award in writing within [sixty] days from the date of the close of the arbitration hearing. The award of the Arbitral Tribunal shall be final and binding upon the parties to the arbitration from the date it is made;

(h) Judgment on the award of the Arbitral Tribunal may be entered and enforced by any court of competent jurisdiction;

(i) In the event that the Arbitral Tribunal recommends either Party to take any specific Corrective Measures or Remedial Measures for the benefit of any Project-Affected People, the relevant Party shall compile a Corrective Action Plan and/or Remedial Action Plan to the satisfaction of the Project-Affected People for immediate implementation. If the Borrower is responsible for the implementation of the Remedial Action Plan, it shall apply the funds in the Remedial Financing Mechanisms toward the implementation of the Plan. [If the Lender is responsible for the implementation of any part of the Remedial Measures, it shall apply [its own funds] [the Lender's reserve in accordance with Clause 8.1(b)] toward the payment for the implementation of the Remedial Action Plan];

(j) To the fullest extent permitted by law each Party irrevocably and unconditionally:

a. submits to the courts of any jurisdiction in relation to the recognition of any judgment or order of the courts of [jurisdiction of arbitration seat] in support of any arbitration in relation to any Environmental and Social Dispute or Environmental and Social Claim and in relation to the recognition of any arbitral award and waives and agrees not to claim any sovereign or other immunity from the jurisdiction of any court in relation to the recognition of any such judgement or court order or arbitral award and agrees to ensure that no such claim is made on its behalf; and

b. consents to the enforcement of any order or judgment in support of arbitration or any award made or given in connection with any Environmental and Social Dispute or Environmental and Social Claim and the giving of any relief in the courts of any other jurisdiction whether before or after final arbitral award.

7. EVENTS OF DEFAULT

This section lists events that constitute an Event of Default under the DFI Agreement and the consequences of the Default. An Event of Default based on the Borrower's non-compliance with the Environmental and Social Requirements should be made an explicit Event of Default, with specific consequences, including in relation to remedy obligations.

* * * * *

7.1 **Events of Default**: If one or more of the events below shall have happened and be continuing, then the Lender, by notice to the Borrower, may declare the principal of and all accrued interest on the Loan together with any other amounts accrued or payable under this Agreement to be, and the same shall become, immediately due and payable without any further notice:

(a) Environmental and Social Requirements: The Borrower is in material breach of an Environmental and Social Requirement or in breach of more than one of the Environmental and Social Requirements or has failed to remedy an adverse impact in relation to any Environmental and Social Matter, and the Borrower has not corrected such noncompliance or remedied the adverse impact in relation to any Environmental and Social Matter within [thirty] days of receiving notice in writing from the Lender to do so.

7.2 Consequences of an Event of Default: Upon the Lender's declaration of an Event of Default, all costs and expenses arising out of the Borrower's failure to comply with the Environmental and Social Requirements, including but not limited to the following items, shall become fully payable in addition to all principal, interest, fees, penalties associated with the Loan.

(a) the Environmental and Social Consultant's fees and expenses;

(b) the balance required to maintain the Remedial Funding Mechanism fully funded as required under this Agreement; and

(c) the costs and expenses incurred by the Lender to correct any ongoing breaches of the Environmental and Social Requirements or to Remedy any adverse impact in relation to Environmental and Social Matters.

8. ADDITIONAL UNDERTAKINGS

This section contains unique provisions that are designed to help ensure the Project's ability to meet its Environmental and Social Requirements and perform Remedial Measures as necessary, before and after the Lender's Responsible Exit from the Project.

* * * * *

8.1 Lender's Undertakings:

(a) The Lender hereby undertakes to consider and engage with the Borrower in good faith with respect to any request by the Borrower for assistance in connection with the

Borrower's efforts to avoid adverse human rights impacts or Remedy such impacts on Project-Affected People, including but not limited to requests for support for enabling activities such as technical assistance, capacity building, fact-finding, dialogue, facilitation, community development, mobilization of stakeholders,[76] support for collective action, and other similar assistance;[77] and

(b) Upon the occurrence of [a trigger event, such as the start of the Borrower's payment of the principal and interest amounts due under this Agreement, the establishment of a Corrective Action Plan and/or the Remedial Action Plan, the Borrower's prepayment or assignment of the Loan, an Event of Default, or any other appropriate project milestone], the Lender shall set aside from [its own funds] [from payments received from the Borrower pursuant to this Agreement upon the Event of Default or prepayment of the Loan or otherwise] to pay any costs of Remedy, in the event of the Borrower's failure to pay for its contribution to adverse environmental, social and human rights impacts of the Project, in the amount of ____ and maintain such reserve until [the Corrective Action Plan and/or Remedial Action Plan has been fully implemented] [its Responsible Exit is complete].

8.2 No Assignment: The Borrower shall not assign or otherwise transfer all or any part of its rights or obligations under the Agreement without the prior written consent of the Lender, and provided that the conditions in Clause 8.5 are satisfied.

8.3. Prepayment of the Loan: The Borrower shall not be permitted to prepay the Loan unless it has complied with all obligations under the Environmental and Social Requirements, including the then outstanding obligations under any Corrective Action Plan and/or Remedial Action Plan, has no pending [or threatened] Environmental and Social Dispute or Environmental and Social Claim, and has fully funded the Borrower's Remedial Financing Mechanism in accordance with this Agreement and the requirements of the Corrective Action Plan and/or Remedial Action Plan, and provided that the conditions in Clause 8.5 are satisfied.

8.4 Indemnification: The Borrower shall pay to the Lender or as the Lender may direct, all costs and expenses (including consultant fees and expenses) of the Lender arising out of or in connection with:

(a) any failure by the Borrower or the Project to comply with any Environmental and Social Requirements, including the Corrective Action Plan and/or the Remedial Action Plan; and

(b) the Lender's costs and expenses incurred in implementing any Corrective Measures of Remedial Measures, if the Borrower fails to implement them.

These indemnification provisions shall survive the repayment of the Loan to the maximum extent permissible by law. The Borrower shall contribute the maximum portion that it is permitted to pay under the Applicable Law and under this Agreement; provided however, that notwithstanding the foregoing, the Borrower's obligation to indemnify the Lender shall be reduced proportionately to the extent that the Lender contributed to the Borrower's non-compliance with the Environmental and Social Requirements or failure to remedy adverse impacts related to Environmental and Social Matters.

8.5 Terms of the Lender's Responsible Exit: Prior to the termination by the Lender of this Agreement, whether upon complete repayment of the Loan, whether an Environmental and Social Claim

or Dispute is then outstanding or not; an Event of Default; prepayment of the Loan by the Borrower; or for any other reason:

(a) the Lender, with the Borrower's input, if feasible, shall carry out an appropriate process of due diligence on its expected exit to ascertain the situation of any adverse environmental, social and human rights impacts from the Project that are then affecting or can reasonably be expected to affect the Project-Affected People in the future, the status of any pending [or threatened] Environmental and Social Claims or Environmental and Social Dispute, the broader effects of the exit on sustainable development of [host country] , and the capacity of the Borrower to implement the Environmental and Social Requirements and effect Remedy where necessary, together with an estimated cost of implementation and the confirmation of the balance of the Remedial Financing Mechanism;

(b) the Borrower shall compile [in consultation with Project-Affected People or other relevant stakeholders] a Corrective Action Plan and/or Remedial Action Plan reflecting the findings from Clause 8.5(a), and shall incorporate such Plan(s) in a [Deed of Covenant[78]] [Memorandum of Understanding] [post-exit action plan] [any other document deemed appropriate] with a term equal to or exceeding the expected duration of the Corrective Action Plan and/or Remedial Action Plan for the purpose of setting out the terms and conditions of the Lender's Responsible Exit, together with the affirmation of the Borrower (or its assigns) to:

(i) continue to comply with the Environmental and Social Requirements (including any Corrective Action Plan and/or Remedial Action Plan) and Remedy any adverse in relation to Environmental and Social Matters;

(ii) enable the Project-Affected People to continue to pursue their Environmental and Social Claims, including providing access to the Borrower's Grievance Mechanism and the Lender's Independent Accountability Mechanism for lodging any Environmental and Social Claim[79];

(iii) maintain or supplement as necessary the Remedial Financing Mechanism in accordance with the cost estimates for the Plan(s) and the payment schedule provided in the [Deed of Covenant] [Memorandum of Understanding] after proper accounting of any costs and expenses incurred by the Lender, if any, to be reimbursed, and availability of any funds the Lender has held in reserve and available for this purpose [whether funds paid back by the Borrower or otherwise]; [and

(iv) enter into a partnership with [a third party] which will monitor and verify the Borrower's ongoing compliance with the Environmental and Social Requirements and engage with Project-Affected People to ensure all relevant environmental, social and human rights risks and impacts are identified and addressed;

together with any other mutually agreed measures to enable the Borrower (or its assigns) to correct or Remedy any existing or future adverse environmental, social and human rights impacts.

(c) Such [Deed of Covenant] [Memorandum of Understanding] [post-exit action plan / any other document deemed appropriate] shall be approved by the Lender and publicly

disclosed and displayed in public spaces accessible to the Project-Affected People in language that is understandable to them.

8.6 Third-party Beneficiaries: See Box 4 for drafting resources.

V. SUGGESTED PROVISIONS FOR EQUITY INVESTMENT

DFI purchase of equity is an increasingly popular direct financing structure. Equity investment presents the possibility of an 'upside,' which may be an attractive financial return, or enhanced development or some other desired impact in the case of impact investment. Equity enables a shareholder to access other shareholders, including the controlling shareholders and top management, as well as company performance information. Some shareholdings may come with board seats. Given these types of benefits, DFIs often invest in equity in parallel with their project lending. However, if the DFI share of the equity holding is small, which is often the case, the DFI may not have much influence in the project company when it comes to voting.

Generally, agreements related to equity do not have the same depth and flexibility as loan agreements in a project finance setting. E&S and human rights provisions in equity agreements tend to be expressed differently, often in more succinct and procedural terms as part of the investee company's corporate governance of E&S and human rights obligations. For example, a shareholders' agreement can set out the fundamental rules of governance of the project company, such as the company's broad commitments to E&S and human rights matters and its remedy obligations (which can also be set out in the company's charter or bylaws). The contractual provisions in equity transactions also have a different life cycle. For example, a subscription agreement can accommodate upfront conditions prior to share subscription and purchase (in the same way as conditions of loan disbursement), but once the shares are purchased, the agreement has served its purpose so that future covenants will not be enforceable.

Some arrangements are unique to equity, with specific advantages, such as provisions for a put or call. A put option agreement will enable the DFI to exit the project by selling the shares at a predetermined purchase price but, as with a loan agreement, creativity will be needed to ensure that E&S and human rights, and remedy obligations will survive the DFI's exit. Periodic capital calls can enable the project company to call for additional capital to be invested. This could be a helpful tool for a company to fund E&S and human rights compliance and/or remedy.

When a DFI has both loan and equity exposures in a project, the DFI will enjoy increased leverage that could maximize its influence in the project and protect the investment. While the DFI loan agreement can impose restrictions and requirements on the project company through detailed covenants, the equity can provide a means for the DFI to influence the company from the inside. Where a DFI has leverage from its loan and equity investments, they can potentially exercise it to proactively influence the project company's performance, including the discharge of the E&S and human rights obligations.[80]

The DFI will have to carefully think through the advantages and disadvantages of continuing to hold equity in the project company without the loan once it is paid up or prepaid. If the company is doing well, and the loan is paid up without any significant problems, there may be a financial benefit to holding on to the equity. But if the exit from the loan was prompted by persistent breaches by the project company of its E&S and human rights obligations, the DFI likely will opt out of the investment. A put option, where one is in place, can facilitate the DFI's speedy exit from the problem company; otherwise, an exit will have to be negotiated. The DFI may be able to use its exit to extract the maximum commitment from the project company to right the wrong in the future. But such an exit may have a destabilizing impact on the project company, which could further burden it with negative press and

adverse impacts on business relationships. Worse, the DFI may be unable to extract any future commitments from the project it leaves behind. These considerations should prompt the DFI to consider carefully from the beginning of its negotiations with the project sponsors whether to invest in equity, and if so, how to structure its investment for the maximum benefit to the DFI, the project and the project-affected people, from responsible entry to responsible exit.

The following paragraphs discuss Drafting Considerations to advance E&S and human rights matters and remedy in agreements typically used by DFIs in association with an equity purchase. Many of the substantive E&S, human rights and remedy provisions discussed in the loan section are also relevant in the equity context.[81] To the extent relevant, the same definitions used in Chapter IV are used here.

Subscription Agreement

This agreement enables the purchaser to subscribe to and purchase shares in the investee company (the Company) at a predetermined price or formula. There are no 'covenants' in this agreement because after the shares are subscribed to and paid for the purpose of the agreement is fulfilled and no future promises can be enforced.

1.1 Representations and warranties

See the Representations and Warranties in Clause 2 of Chapter IV.

1.2 Conditions of subscription

See the conditions of disbursement in loan agreements which can be adapted to be conditions of subscription (see Clause 3 in Chapter IV). In addition, the following provisions can be considered:

(a) The Company has established its due diligence policies and procedures, including the process of HRDD, as part of the ESMS, to identify and address adverse environmental, social and human rights impacts of the Project and to effect Remedy if adverse impacts result from its operations;

(b) The Company has incorporated in its [charter] [bylaws] provisions reflecting its environmental, social and human rights due diligence policy and a commitment to effect Remedy if adverse impacts result from its operations; and

(c) The Board of Directors of the Company has established an environmental, social and human rights committee or a similar board committee to provide proper oversight and reporting on the Company's operations and compliance issues related to the Environmental and Social Requirements and Environmental and Social Matters.

Shareholders Agreement

Shareholders of an investee company enter into this agreement to formalize certain agreements among them. It can be a powerful tool to ensure that all shareholders have the same understanding about the E&S and human rights governance of the company. The agreement will bind the shareholder for the duration of their shareholding, take precedence over the company's bylaws, will bind officers and directors and protect the rights of minority shareholders.

Any of the covenants already discussed for the DFI loan agreement can be converted into an agreement among the shareholders, especially the high-level commitments on E&S due diligence and HRDD and commitment to remedy any adverse impacts from operations. In addition, the shareholders can agree to include in the company charter or bylaws a specific commitment or statement on E&S and human rights and to establish board committees on such matters, as already discussed above.

As with loan agreements, the drafter can consider whether it is possible to designate project-affected people as third-party beneficiaries of the investee company's policy in a shareholder agreement. See Box 4 for suggested drafting resources. If the shareholders agree, the Shareholder Agreement can also contain language about the responsible exit obligations of shareholders (see Clause 8.5). Finally, it can be used to detail some or all shareholders' responsibilities in relation to remedy, including a shareholder guarantee of remedy. See also the Share Retention Agreement section below.

Share Retention Agreement

In project finance, lenders may wish to keep the project proponent or sponsors as shareholders in the project company until a certain project milestone, most likely project completion (the project construction is complete, and the project has achieved technical (including E&S) specifications and financial completion and is ready to operate). Such an obligation, called share retention, usually appears in Project Funds Agreement, where the project sponsors remain financially responsible to see the project through project completion (see supra 37) but it can also appear in another agreement in which the project sponsor is a party, such as a shareholder agreement, or a freestanding share retention agreement between the DFI and the project sponsor.

In cases where the project sponsors are backstopping the project company's responsibility to effect and pay for remedy through a project support or project funds agreement, the share retention arrangement would ensure that the sponsor-guarantors remain available to perform on their financial obligation and cannot claim that they no longer can pay for remedy because they ceased being a shareholder of the company.

The following is an abbreviated example of a share retention clause:

3.1 Share Retention: The Company undertakes, until the later of the Project Completion Date, and the date on which the Loan is repaid in full, not to: (i) sell, assign, pledge or otherwise dispose of or encumber without the prior written approval of the [DFI] any of the shares in the capital of the Company presently held by it or that it may subscribe to or acquire in the future; (ii) waive, fail to exercise, sell, assign, transfer or otherwise dispose of any subscription rights that may accrue to it in relation to any increase in the capital of the Company; (iii) take or permit to be taken or fail to take any action, if the effect of (i) or (ii) would reduce the percentage of the outstanding share capital of the Company held by it directly or indirectly below fifty-one percent of the Company/s subscribed capital.

Put Option Agreement

This agreement enables the purchaser of the company shares to sell its shares back to the company (or the controlling shareholder) at a predetermined price within a specified time period. Because this agreement usually is dominated by the financial formula by which the parties will arrive at the put price, it will not go into the technicalities of those provisions. However, this Guide suggests that the terms of responsible exit can be included in this agreement to signal to the project company what it must do to get ready for the DFI shareholder to exit from the project and to ensure that the arrangements for the administration and implementation of any Corrective Action Plan and/or Remedial Action Plan and the Remedial Financing Mechanism are in order (see Clause 8.5).

Agreement on Capital Calls

Capital calls can be used by an entity (often limited partnerships) to call for shareholders (partners) to make equity investment in the entity. Calls are made when the entity calling for funds need to receive capital, and in the context of remedy in DFI projects, calls can be agreed in advance with some or all shareholders (including a DFI), requiring them to invest capital in the project company to enable it to perform its E&S, human rights and remedy obligations.[82]

VI. CONCLUDING COMMENTS

Within a short period of time, the issue of remedy has moved from the margins to the center of operational policy discussions in development finance. The precise scope of the 'remedy gap' – the gap between theory and practice on remedy - is difficult to assess but, on available evidence, is likely to be very significant across DFIs. Recent MDB policy reforms aiming to accelerate and simplify development financing may inadvertently create additional obstacles to remedy. DFIs are facing increasing pressure to invest in fragile and conflict-affected states (FCSs), where E&S Safeguards and remedy are sometimes seen purely as impediments or business costs, rather than as enablers of success in such settings.

At the same time stakeholder expectations for remedy appear to be strengthening, in line with the increasing integration of the UNGPs and OECD RBC standards within national legal systems and within operational and accountability policies of DFIs and commercial banks, and given the emerging track record of DFIs and commercial banks in delivering on remedy in emblematic cases. Recent MDB E&S Safeguard policy review processes have not generally kept pace with these developments; however, at the time of writing, the IFC/MIGA Remedial Action Framework piloting process appeared to foreshadow a course correction and give cause for greater optimism.

The present Guide is predicated upon the proposition that robust contractual provisions for remedy are an essential companion to development financing operations, especially in FCS settings. Remedy should be seen as part of an ordinary project contingency. Contractual provisions, aligned with the UNGPs and OECD RBC standards, should clarify all parties' roles in enabling and contributing to remedy and should incentivize the building and exercise of all available forms of leverage.

OHCHR hopes that the present Guide will be a useful resource for all those involved in DFI operational policy review processes, including but not limited to the IFC/MIGA Remedial Action Framework, and in supporting project-affected peoples' claims for remedy in practice.

ANNEX 1: Excerpts from Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(*a*) Physical or mental harm;

(*b*) Lost opportunities, including employment, education and social benefits;

(*c*) Material damages and loss of earnings, including loss of earning potential;

(*d*) Moral damage;

(*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(*a*) Effective measures aimed at the cessation of continuing violations;

(*b*) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(*c*) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(*d*) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(*e*) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(*f*) Judicial and administrative sanctions against persons liable for the violations;

(*g*) Commemorations and tributes to the victims;

(*h*) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(*a*) Ensuring effective civilian control of military and security forces;

(*b*) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(*c*) Strengthening the independence of the judiciary;

(*d*) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(*e*) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(*f*) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(*g*) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(*h*) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

ANNEX 2: Project Agreements

The following legal instruments typically used in DFI finance of projects offer opportunities to strengthen the project's environmental and social obligations and responsibility for remedy, in addition to the DFI financing agreements mentioned in this Guide. [A brief explanation of each document and how it can incorporate environmental and social provisions to come]

- Term sheet, engagement letter, mandate letter, etc.
- Common Terms Agreement
- Inter-Creditor Agreement
- Syndication Agreement
- Direct Agreement
- Project Support or Project Funds (and Share Retention) Agreement
- Underlying project agreement or investment agreement, such as Concession Agreements, Investor-State contracts, Public Private Partnership Agreement, etc.
- EPC Contracts, Construction / Civils Works Contracts, etc.
- Supply Agreements
- Community Development Agreement

ANNEX 3: Analysis of Financial Mechanisms Used by DFIs in Private Lending

1. Third-Party Liability Insurance	
How does the mechanism work?	Insurance is applicable in all types of DFI funding deals: project finance; corporate finance; equity; PPP. The project company, as the policyholder, will take out the insurance policies (the "contracts"). The contracts transfer risk to the insurer, for losses/liabilities incurred by the project company. The project company pays a premium to the insurer. The insurer pays out on the occurrence of a covered policy event. Various types of insurance products are available in the market including for environment liability and third-party liability. The project company would be required by the DFI, as a contractual condition of DFI funding, to obtain insurance against liabilities to third parties. The parties will agree to the scope of the covered policy events, including exclusions, before entering into the contract. Generally, the policy will cover loss or damage suffered by the project company, arising from liability owed to third parties. Insurance can cover unforeseen liabilities.
Trigger	The project company (the insured/the policyholder) notifies the insurer on the occurrence of a policy event. A policy event, subject to the policy terms, will be defined by reference to the insured having incurred liability to a third party. This will generally require a judgment or determination of liability between the project company and the third party. Therefore, the trigger event is not likely to be a breach by the project company borrower of its obligations to the DFI (i.e. breach of ESG covenants). Once notified, the insurance company will investigate the matter and decide whether to validate the claim. The insurer may dispute liability. If the insurer validates the claim, the funds will be paid to the third-party beneficiaries. The insurance company will pay out an amount which is required to fulfil the liability of the project company towards the third party. The determination of this liability would be established using the mechanism in the contract for the resolution of disputes under the policy. The agreed forum could range from the local courts in the jurisdiction of the project company to international commercial arbitration.

Suitability for use for human rights related compensation	Third-party beneficiary insurance is available and is used where funds are paid out to third parties to cover losses incurred by the project party for liabilities owed to third parties. Third-party environmental liability insurance is widely available. In principle insurance for social / human rights liability to third parties could be negotiated.

Advantages	Disadvantages
• Insurance is a mechanism which is well- suited for dealing with unforeseen liabilities. • Obtaining insurance is already market standard and would not require the parties to adapt and factor this into the deal economics. It is easy to put in place and likely to be generally acceptable to parties. Insurance does not disrupt normal structure of funding deals and parties' expectations. It does not require collateral so may be more accessible to small and medium businesses and does not tie up capital. • Provides assurance and confidence that if a project company is liable to pay financial compensation to third parties for covered harm, that liability could be met. • Should not be affected by negative changes in the project company's financial strength provided the policy specifies that it is payable in the event of the project company's insolvency/dissolution. • Incentivizes the borrower to reduce the risk of incurring liabilities, in order to reduce premiums or avoid increases due to claims. • DFI lenders usually require that the insurance be obtained from an insurance company with an acceptable credit rating. This is to ensure that the insurance company can pay out following the occurrence of the covered event.	• Social liabilities such as human rights issues are not typically covered by third-party liability insurance. Therefore, such cover would be the subject of negotiation between parties, and there might be cost issues with the level of premium payable. • Insurance does not guarantee any ring-fenced or pooled funds of money available where harms occur. • The process of claiming under the policy is protracted. Usually, the provision of funds following policy events may take some time, particularly if the liability trigger is challenged by the insurer. Therefore, unlikely to provide funds promptly. • Liability insurance policies have a maximum level of indemnity. They may not, therefore, provide the entire amount of cover for an event causing damage. • The policy will also have limitations and exclusions from cover.

2. Guarantee/Letter of Credit ("LC")	
How does the mechanism work?	Guarantee and LCs are applicable in all types of DFI funding deals: project finance; corporate finance; equity; PPP, although the way in which they form part of the project structure will differ depending on the type of transaction. Typically, in most DFI lending contexts, one or more entities will be called on to provide assurances/stand-behind the borrower. The assurer will be called on to provide money where the borrower has failed to. These assurances are considered to be collateral/assets in any deal. The identity of the assurer will vary and could range from one of the financial institutions lending money themselves or could be a parent company of the SPV. Whether the assurance is given by a financial institution or a parent company, such assurance could be given by way of either a guarantee or a letter of credit. Guarantee • A guarantee is an undertaking to pay or satisfy the borrower's obligations if the borrower fails to do so provided by another entity which could be a parent company or affiliate of the borrower or the DFI. • Under this structure, a parent company or the DFI would agree to release funds under a guarantee following a demand by the relevant third party upon the occurrence of certain specific and clearly articulated triggering events and/or conditions. • Guarantees can take a number of forms with differing ranges of accessibility but are typically limited to a specified amount (i.e. unlimited guarantees are not common because companies/DFIs do not want uncapped contingent liabilities on their balance sheet).
	Letters of credit • These are financial instruments that allow money to be accessed in a manner equivalent to cash.

	• Letters of credit need to be supported by collateral, which needs to be provided 'up-front', usually in the form of cash equal to the amount of the letter of credit. However, if the parent company/DFI backing the letter of credit is creditworthy and has an existing relationship with the bank issuing the LC, the bank may agree to issue the LC only on the basis of a contractual obligation on the DFI or the parent company guarantor (without also requiring cash collateral). In both instances, if a claim is made under the LC, the bank issuing the LC will access the cash collateral or make a claim against the parent company/DFI which has backed the LC. In addition to the collateral / contractual obligation to compensate for the amount paid under an LC, banks often require additional administrative /other fees in order issue the LCs. • Usually the bank issuing the LC will not make an independent determination as to whether an event has occurred, the trigger would be the presentation of a demand in a form which has been pre-agreed.
Trigger	The circumstances in which a person is entitled to make a claim must be clearly agreed between the borrower, and the individuals who will be entitled to make a claim on the guarantee mechanism and documented. The persons entitled to make a claim under a guarantee or an LC should be a specific entity or a group of entities which can be clearly identified.
Suitability for use for human rights related compensation	Typically, guarantees and LCs are used in the DFI context to manage liabilities and breaches flowing between the commercial parties. The most common use of this structure is to provide financial security for a contingent claim of liquidated damages; for example, in the context of construction contracts, letters of credit are typically used to allow the deduction of liquidated damages from a contractor in circumstances where, for example, construction milestones have not been met. In principle, a guarantee or LC could be used for the provision of funds in non-project specific situations. These may be suitable where a human rights impact assessment has identified specific, foreseeable harms as a result of deficiencies in the project company's practices. A guarantee could be required to be drawn on if those harms materialise.

Advantages	Disadvantages
• Once the guarantee mechanism is triggered, the entity entitled to make a demand will receive money up front. • Access to funds should not be affected by negative changes in the project company's financial strength.	• Best used for foreseeable, specific and quantifiable claims as the amount of guarantee and circumstances in which a person can make a claim need to be delineated. Usage for unforeseen liabilities is limited because of the requirement for this to be capped and need for collateral (for an LC). • LCs are rarely used where there is a need to address liability issues, as the determination of liability is difficult to incorporate in a 'trigger' mechanism which is restricted to the presentation of a demand in a pre-agreed form. • Guarantees can be expensive to put in place. Most companies in the project finance context required to obtain a guarantee are SPVs and would therefore not have the required credit rating to be able to obtain a guarantee without the provision of collateral or backing by a parent company with the requisite credit rating and assets. • Provision of cash collateral means the money is tied up and cannot be otherwise used by the company or the project. If another entity such as the parent company or the DFI itself is backing the LC, they are taking on a contingent liability which is equal to the amount of the LC on their balance sheet; which is not usually commercially acceptable. • DFIs are usually not in the business of issuing LCs unlike commercial banks. DFIs generally do not issue LCs or back the issue of LCs in relation to commercial transactions.

3. Ring-fenced asset (funds)	
How does the mechanism work?	The term 'funds' is used in this context to refer to any ring-fenced pool of money or assets. We do not refer to other fund structures (i.e. in relation to investment) in this note. There are many ways to achieve ring-fenced assets, and many variable terms in how such a 'fund' would be financed, circumstances in which it could be accessed and by whom (see Sections 19 - 31 of the Note). The term 'mutual fund' typically refers to a mechanism by which a group of actors pool together funds on the basis of set rules of engagement and differs from a 'project-specific fund'. In each case, members of the fund must agree (or, alternatively, be required) to pay up to a specified (or unspecified) amount if a member of the fund/pool fails to do so. If the amount of such payment exceeds the monies held by the fund/pool, an additional drawing may be made on the members.
Trigger	The fund needs to be supported by an additional mechanism that allows the fund amounts to be managed and disbursed. These are discussed below at 3a (escrow account) and 3b (trust fund).
Relevant examples that could be adapted for use for the remedy of human rights harms	There is no prohibition on a fund being established for project specific activities, with the borrower entity, and may include other entities. Alternatively, a multilateral fund could be established with other DFIs.

Advantages	**Disadvantages**
• Mutual funds (or non-project specific funds) may avoid the complexity and costs associated with establishing, maintaining and monitoring financial securities on a project-specific basis. • Terms of accessing the fund could be crafted without requiring establishment of liability to third parties i.e. on occurrence of proof of harm.	• Significant cost, time and expertise may be needed to establish and monitor the fund. This requires bureaucratic administration by DFI – especially for bespoke funds. • In mutual funds, if contributions are not differentiated according to the risk of the individual member (risk profiles), individual members may not be incentivised to mitigate human rights / environmental risks.

• Ring-fencing of assets ensures there will be funds available should relevant trigger be met. Provided the amount of assets in the fund/pool is enough to pay a claim and/or other members have sufficient funds to provide official funding in the event of a trigger event, a fund should not be affected by negative financial viability of the individual members e.g. insolvency or dissolution. Contributions may be segregated from the project company's assets, meaning that they are likely to be beyond the reach of its creditors should it enter into insolvency or dissolve. • Protects the project company from the financial consequences of liabilities arising by spreading costs among members / multiple contributors. • This mechanism should provide some incentive for each member to reduce the risk, if the amount each member is required to contribute to the pool of funds is determined by individual risk profiles.	• Overly complex terms and conditions for payment from the fund may make the fund difficult to draw upon when necessary, and delay the provision of the funds to third parties.

3. Mechanisms for accessing money

Once the terms or parameters of the 'fund' are known, there is a question of which legal structure is preferable to reflect the contractual intention. At the most basic end, a fund could be established by a DFI setting aside a designated bank account, to which only it has the power to access (and such access could be governed by its own policies).

Other funds might be established through domestic legislation. For example in the United States, a legislative scheme established the Abandoned Mine Land Reclamation Program, which requires present-day coal mine operator companies to pay in fees to the 'AML Fund', a trust fund on the books of the Treasury of the US, administered by the Secretary of the Interior.* A specialised Office within the Department of the Interior distributed money from the Fund to states and tributes for projects to reclaim old abandoned mines.**

We consider below in more detail two other, more complex, legal structures to facilitate the ring-fencing of assets: (a) escrow account; and (b) trust fund.

* For more information, see: https://www.osmre.gov/lrg/docs/SMCRA.pdf

** For more information, see: https://www.osmre.gov/programs/aml.shtm

3a. Escrow Accounts	
How does the mechanism work?	An escrow is a financial instrument whereby monies will be deposited in a ring-fenced bank account. It can be used in all types of DFI funding deals: project finance; corporate finance; equity; PPP. Escrow accounts are most appropriate for project-specific funds, where there will be limited occasions of withdrawal over a defined contractual period, rather than ongoing, mutual or industry funds which will be required to be used on multiple occasions. The escrow agreement dictates the circumstances in which funds can be withdrawn from this account. The bank holding the escrow account would expect the escrow agreement to clearly set out specific and clear triggers following which the money in the escrow account can be withdrawn. In the DFI lending context, the bank could be instructed under the escrow agreement to release the funds if the request is made, for example, by an independent body or accountability mechanism which has made a determination as to liability. The bank holding the escrow account usually serves only an administrative function and would not agree to take responsibility for making determinations under the escrow agreement. For a project-specific fund, the project company and DFI negotiate the amount to be placed in escrow. This involves an estimate of the project company's liability, and the circumstances in which the escrow amount can be paid out. An escrow agent is a third party, a person or entity, which will hold the funds. The escrow agent will hold the funds in the escrow accounts for the parties until both parties have fulfilled their contractual requirements. The escrow agent has a fiduciary responsibility to both parties of the escrow agreement.

	• The escrow account can be funded in various ways e.g.: • A part of it could be funded upfront by both the DFI and the project company with ongoing contributions by the DFI and the company (for example, by way of an additional fee which is charged to the DFI). • One of the options is to fund this account as a percentage of distributions that would have otherwise been paid out to the parent company. Once the liability has been discharged, the funds in this escrow account will be released to the parent company and will need to remain outside the DFI's security package. • A variation of this structure would be a default-based escrow account where the obligation to fund the escrow account arises if there has been a default accompanied by a contribution holiday if there have been no breaches.
Trigger	The escrow agent agrees to pay out the money according to the terms of the documentation establishing the account, usually directly to the DFI on presentation of specified documentation. The DFI, once it has received the money, will then allocate the funds to the third-party beneficiaries.
Suitability for use for human rights related compensation	See above for funds.

Advantages	Disadvantages
• The lender has immediate access to monies on presentation of specified documentation (may be more difficult if parties wish for third party to be able to draw from escrow account). • There is potential for the value of the fund to grow while held in escrow (e.g. through interest or authorised short-term investments). The escrow agreement would need to specify the party entitled to any returns.	• Administrative issues with enabling third parties to access money may be insurmountable – KYC obligations can be burdensome. • The amount of money deposited might be reduced by inflation or risk to investments in it, and insufficient to remedy harm. • The amounts to be retained in these reserve accounts are extensively negotiated, which can cause delay and additional expense in the context of a specific project.

3b. Trust Fund	
How does the mechanism work?	A trust fund establishes a legal entity to hold assets for a person or organisation. Trust funds can hold a variety of assets such as money, stocks or bonds, or a combination of many different types of assets. Trusts are made in favour of a beneficiary by a grantor and administered by trustees. The company and other stakeholders set up the trust and populate it with certain funds. There may be an on-going requirement on companies to contribute to this trust fund as part of their contractual obligations to the DFI under the funding documentation. The third-party beneficiaries are the chosen persons to receive the trust fund assets, if an incident occurs which gives rise to the need to access the funds for 'the intended purpose' stipulated in the funding documentation. The trust could also be set-up with the DFI being the beneficiary in which case any funds to the third party would have to flow through the DFI. The trustees manage the fund in a manner according to the documentation that established the trust. The trustees are neutral third parties and can be persons or entities, such as a trust bank. Depending on the nature of project, the government of the country in which the project is located could be appointed as one of the trustees.
Trigger	An incident occurs which gives rise to the need to access the funds for 'the intended purpose', according to the documents drafted to establish the trust. The trustee agrees to pay out the money according to the terms of the documents drafted to establish the trust, to the beneficiaries of the trust, on presentation of specified documentation.
Suitability for use for human rights related compensation	Trust fund structures are used in the oil and gas industry, particularly in the context of joint operating agreements. For example, the Association of International Petroleum Negotiators' Model Joint Operating Agreement provides for the establishment of a decommissioning trust fund, which can be drawn down in the event a party fails to meet decommissioning costs associated with the JV. Parties to the Joint Operating Agreement. Parties are required to pay

<table>
<tr><th colspan="3">3b. Trust Fund</th></tr>
<tr><td></td><td colspan="2">in cash or provide security to maintain the fund, in proportion to their interest in the underlying JV. The trustee is an external trustee employed by a commercial financial institution. The trustee is empowered to realise any security provided by a party in the event of a default by that party of its obligations. The use of trust funds will be appropriate in relation to rectifying environmental damage, but may be more difficult in relation to other human rights harms, where it may not be possible to identify beneficiaries at the establishment of the trust, unless, for example, they are already defined in a human rights impact assessment.</td></tr>
<tr><th colspan="2">Advantages</th><th>Disadvantages</th></tr>
<tr><td colspan="2">• Clear up-front articulation of the beneficiaries and the purpose of the fund.

• Third-party trustee assumes burden of administration of trust fund (for a fee).</td><td>• Legal complexities in defining beneficiaries.

• Disputes over trusts can result in litigation, thereby increasing cost and delay.</td></tr>
</table>

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ANNEX 4: Resources

This Guide consulted the following sources, among others:

ABA Draft Model Clauses for Responsible Investing (consultation draft) (2025)

OHCHR Benchmarking Study of Development Finance Institutions' Safeguard Policies (2023)

OHCHR Remedy in Development Finance. GUIDANCE AND PRACTICE (2022)

OHCHR Strengthening Supply and Value Chain Risk Management. The Role of Development Finance Institutions' Environmental & Social Safeguard Policies. Policy Brief (2025)

Loan Agreement between Coastal Gujarat Power Limited and International Finance Corporation dated April 24, 2008

Equator Principles GUIDANCE FOR EPFIS ON INCORPORATING ENVIRONMENTAL AND SOCIAL CONSIDERATIONS INTO LOAN DOCUMENTATION (2020)

The Responsible Contracting Toolkit

External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness. Report and Recommendations (2020)

IFC/MIGA Approach to Remedial Action (2022)

IFC/MIGA Interim Approach to Remedial Action (2025)

Legacy Landscapes Fund (2024) Standard E&S Clauses, ESMS Annex D

World Bank Guidance on PPP Contractual Provisions (2019)

Various OHCHR and CSO submissions to the consultation on IFC Approach Paper on Remedy

ENDNOTES

[1] OHCHR, Benchmarking Study on DFI Safeguard Policies (Feb. 2023) ("Benchmarking Study"), pp.83-89. In the present Guide, as in OHCHR's Benchmarking Study, human rights impacts are defined by reference to UN human rights and ILO labor rights instruments are taken to be included within the scope of E&S issues more generally. *See* OHCHR, Benchmarking Study, p.4 (Box 2).

[2] In this Guide, "E&S Safeguards" or "Safeguards" refers to Board-approved operational policies which establish E&S due diligence and risk management requirements for MDBs/DFIs and clients, respectively, across all phases of the project cycle. Following the example of the International Finance Corporation (IFC), MDB Safeguards often take the form of a "Policy", which defines the bank's own due diligence requirements, and a set of 8-10 E&S standards applicable to the client. Many private sector DFIs have adopted the IFC Performance Standards. Most MDBs have Safeguards of broad scope, covering most or all of their operational activities and financing modalities (though less commonly, advisory or technical assistance work). But this is not a uniform practice. For example, the World Bank has an Environmental and Social Framework that applies only to investment project financing, and has separate Board-approved policies for development policy financing and Program-for-Results financing.

[3] For a description of the nature and scale of the "remedy gap" in practice *see* OHCHR (2022) Remedy in Development Finance, Chapter I & pp.59-62.

[4] *Id*., Chapter I and (on contractual leverage) pp.52-56.

[5] For a sampling, *see* e.g. OHCHR, Comments on EBRD draft Environmental and Social Policy (2024) at paras. 22-26.

[6] In other words, this Guide addresses agreements used in direct loan and equity investment in projects. It does not address other forms of private lending, such as financial intermediary operations or public sector lending.

[7] Other agreements frequently used to establish a project are called project agreements – see a list of typical project agreements in Annex 2.

[8] Institutions do so through a 'syndicate' or a group of parallel lenders or co-lenders, where each lender is a lender of record (lender in its own name). These lenders often agree to be bound by common loan terms, including a single set of E&S requirements. Although an 'arranger' of a syndication may be compensated by the others for arranging the syndication, and may take on some loan administration duties, the co-lenders are generally equals in a syndicate bound by same rights and responsibilities and enjoy the same relationship with their borrower client, including in relation to E&S requirements. Hence all co-lenders should be concerned with clarifying and strengthening contractual provisions on remedy.

[9] There may be exceptions, however, such as when a bank is compensated by others for carrying out E&S due diligence. In some cases, financial institutions buy a 'participation' or a portion of a DFI loan through a 'B Loan' program, where the loan administration of the B Loan is handled through the DFI. In this case, the DFI remains the lender of record. The participating bank can rely on the DFI for compliance with international regulations, risk management and due diligence (including E&S due diligence). Here, the participating bank may have a different responsibility from the DFI. For more information on IFC B Loan program and the benefits of participating in such a program, *see* https://www.ifc.org/content/dam/ifc/doc/2022/ifc-syndications-brochure-2022.pdf.

[10] IFC/MIGA (2025). Available at: https://www.ifc.org/content/dam/ifc/doc/2025/IFC-MIGA-Remedial-Action-Framework-April-15-2025.pdf. Also see the 2022 approach paper on the foregoing: IFC/MIGA Approach to Remedial Action.

[11] The UN Guiding Principles on Business and Human Rights (UNGPs) refer to the UN Basic Principles.

[12] *See e.g.* World Bank, External Review of the Board Approved Reforms to the Inspection Panel Toolkit and the Creation of the World Bank Accountability Mechanism, Brief (Jan. 30, 2024): "Accountability is at the core of the World Bank's value proposition as premier development financial institution." Useful evaluations include World Bank Independent Evaluation Group, Safeguards and Sustainability Policies in a Changing World (2010) (including chapter 4 on benefits and costs of Safeguards); *and* ADB Independent Evaluation, Real-Time Evaluation of ADB Safeguard Implementation Experience Based on Selected Case Studies (Nov. 23, 2016).

[13] This requirement is not fully aligned with the UN Basic Principles and ignores the fact that human rights impacts (and indeed, arguably, numerous environmental impacts) cannot or should not be "off-set".

[14] The Equator Principles 4 preamble 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 minimized and mitigated, and where residual impacts remain, clients should provide remedy for human rights impacts or offset environmental impacts as appropriate.' The Equator Principles Guidance Note on Implementing Human Rights Assessments (2020) states at p.18: 'In some cases where stakeholders experience certain impacts and conclude that clients (or other mechanisms) have not adequately remedied those impacts, stakeholders might expect EPFIs to participate directly in providing a remedy. This expectation may arise even in situations where the EPFI might view its role as limited to only being "directly linked" to the impact and not contributing to it, and thus not strictly requiring the EPFI's direct involvement in remediation according to the UNGPs (UNGPs Principle 22 and Commentary). This reinforces the importance of EPFIs engaging with clients at the outset of project development on the design of appropriate grievance mechanisms and protocols for addressing situations requiring remedy and the need for close monitoring of on the ground developments as projects progress. The earlier that issues are identified, the more easily they can be addressed by clients, including through remedial mechanisms, if necessary.'

[15] See the summary of available guidance on the application of the UNGPs and OECD Guidelines to the Financial Sector in the OHCHR Benchmarking Study of Development Finance Institutions' Safeguard Policies (2023), Box 3 on p. 5. The 2023 update on the OECD

MNE Guidelines strengthens expectations that enterprises contribute to remediation, to the extent that they have contributed to harms (pp.25-27, especially para 51).

[16] *Id*., Box 9, pp.24-25.

[17] See OHCHR, Application of the UNGPs in the context of the banking sector (2017).

[18] DFI Safeguard policies are beginning to reflect this expectation. See EBRD ESP 2024, ESR 2, para. 45, which requires: "*Where the client does not have a direct contractual relationship with a sub-supplier, the client will use reasonable efforts to build and exercise all available forms of leverage to prevent and mitigate the risks identified*." A more attenuated example is AfDB ISS 2023, ESOS 2, para. 44: 'Where there are significant risks related to OHS, child or forced labour or modern slavery, and to the extent technically and financially feasible, the Borrower shall undertake efforts to raise its level of influence over the supply chain.' Some MDBs also recognize the need to collaborate with third parties where 'control or influence' is limited (e.g. IFC Guidance Note 1, para. 2; IDB Guidelines for ESPS 1, para. 2). *See also* World Bank (2023) Supply Chain Management: An introduction and practical toolset for procurement practitioners, p.11, on how to 'create leverage' in the four main phases of the procurement process.

[19] OHCHR (2022). Remedy in Development Finance. Annex II.

[20] *Id*., Part III.

[21] OHCHR, Access to Remedy in Cases of Business-Related Human Rights Abuse: An Interpretive Guide, pp. 29-31.

[22]Aizawa & Mann (2022). Environmental, Social and Economic Development Provisions in Investment Agreements. A Resource for Government Lawyers in the Commonwealth. Commonwealth Secretariat.

[23] UNGPs, principles 17-21. While HRDD focuses on human rights (including the right to a clean, healthy and sustainable environment) rather than the environment as such, the connection between environmental damage and human rights harm is becoming increasingly clear. HRDD should cover human rights harms connected to environmental destruction. Notwithstanding this, the term "human rights and environmental due diligence" (HREDD) is sometimes used in other contexts. The concept of due diligence under the OECD MNE Guidelines covers "responsible business conduct" (RBC) more broadly.

[24] OHCHR (2023). OHCHR submission to IFC/MIGA Framework for Remedial Action, p. 3.

[25] UNGPs, principle 18 (commentary) clarifies that the assessment of human rights impacts does not necessarily require a stand-alone human rights impact assessment (HRIA). An ESIA may serve this purpose provided that all relevant human rights are considered. On HRIAs, see Human rights and impact assessment | The Danish Institute for Human Rights.

[26] For a more comprehensive analysis of the similarities and differences between the process of HRDD and ESIA typically used by DFIs, using IFC Performance Standard 1 as a basis of comparison, see OHCHR (2023), Annex (see pp. 126-130 for a summary of analysis) (and see subsequent pages for a more detailed analysis of the overlaps and gaps between the IFC Performance Standards and the UN Guiding Principles on Business and Human Rights and international human rights standards).

[27] Aizawa & Mann (2022).

[28] For a full rebuttal against the moral hazard argument, *see*: Lender Liability and Due Diligence for Environmental and Social Harm: A Comparative Analysis. NYU International Organizations Clinic (2021); also *see*: Open Letter to World Bank Group Executive Board Members. Legal issues concerning the IFC/MIGA draft Approach to Remedy (2023).

[29] For published oil, gas and mining contracts, *see:* https://resourcecontracts.org/ and for published agricultural and forestry contracts *see:* https://ccsi.columbia.edu/content/openlandcontractsorg-database-publicly-available-land-agriculture-and-forestry-contracts.

[30] See Annex 2 for a sample list of project agreements typically used by DFIs in project finance.

[31] For example, financing terms of significant project lending are available in subscription services that are usually too expensive for individuals and small organizations to access (besides, these publications do not report on the terms of environmental and social measures). Project agreements may also be available in theory because they are read into Parliamentary or other public records. Notwithstanding these and other relevant circumstances, financing terms are still not readily accessible and certainly not in one place.

[32] To date, only IFC requires disclosure of the principal extractive industry contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract. In the case of infrastructure projects, IFC encourages disclosure of information related to certain key terms, including tariffs (IFC Sustainability Policy, paras. 50-52).

[33] The failure by DFIs to disclose financing agreements to DFI board members obviously makes it more difficult for the latter to discharge their fiduciary obligations.

[34] IFC/MIGA Interim Approach to Remedial Action (2025). This document contains recommendations that appear to be more limited in scope compared to the 2022 version mentioned in infra 34.

[35] '*Examples of potential contractual provisions that IFC/MIGA would explore further include those related to financial incentives to encourage compliance with the Performance Standards; client commitments to remediate/develop remedial plans for certain potential adverse impacts (including IFC/MIGA's expectations that clients provide remedy for harms caused due to non-compliance with E&S requirements); participation in alternative dispute resolution (e.g., IFC/MIGA would observe developments related to arbitration and consider testing relevant provisions related to arbitration between the client and affected communities or individuals); strengthening the existing provisions on responsibilities to report on and assess allegations and adverse impacts emerging from serious incidents; responsibilities for remedy or compliance with other E&S-related requirements post exit (e.g., for a fixed period of time); specific contractual remedies, including for noncompliance with E&S requirements; strengthening provisions to participate in*

the CAO process, including Management Action Plan (MAP) preparation; and considering how support for remedial actions extend to relevant third parties (e.g., associated facilities, sub-contractors). . . . As mentioned in paragraph 12, as an insurance provider, MIGA, unlike IFC, does not have a direct contractual relationship with the project company responsible for the implementation of the guaranteed project. Therefore, MIGA will evaluate the applicability of the additional and revised contractual provisions outlined in this section, taking into account the nature of its business model, including its indirect relationship with the project company.' IFC/MIGA Approach to Remedial Action (2022), p.8.

[36] See further Legacy Landscapes Fund (2024). Standard E&S Clauses, ESMS Annex D.

[37] According to initial research by a pro bono law firm, all the mechanisms considered that facilitate compensation for victims of human rights harms have been put in place 'after-the-event', when it is clear what event has given rise to harm. In some cases, liability has been established against entities prior to money being pooled for the purposes of dissemination to victims (e.g. in other instances, entities that may have had some involvement in human rights harms, or reputational interest in remedy, have voluntarily agreed to make monies available to victims, and have established governance structures regarding the determination of who is entitled to the funds and on what basis (for example, the Rana Plaza Donor Trust Fund, which received donations from retail companies after public pressure. Another example is the Renova Foundation which is responsible for the mobilisation of the reparation of damages caused by the collapse of the Fundao dam in Marian, Brazil. The Foundation has more than 70 participating entities).

[38] At the time of writing, no common methodology for estimating approximate cost measures for remedy exists, and cost data on third-party administered remedial financing mechanisms is almost non-existent. Even the approximate premia information on environmental liability insurance, which may be the closest commercial product for remedy specifically for adverse environmental impacts, is scarce or inconsistent considering significant premia variation. Some data from China suggests approximate 2.44% insurance rate for environmental pollution liability insurance: Chen S, Yang J. Environmental Pollution Liability Insurance Pricing and the Solvency of Insurance. Companies in China: Based on the Black-Scholes Model. Int J Environ Res Public Health. 2023 Jan 16;20(2):1630. doi: 10.3390/ijerph20021630. PMID: 36674382; PMCID: PMC9865962.

[39] This is an agreement that makes the shareholders or sponsors of a project financially responsible for the project achieving a key milestone event, usually called the Project Completion Date, defined as a point in which the project construction is physically complete, the project achieves technical (including any environmental and social specifications) and financial completion and is in full operation (see the definition in Clause 1, Chapter IV). This arrangement is often paired with the requirement that the project proponent or sponsor retain all its shares in the project company until project completion is achieved. This is not a standard arrangement for project finance (also known as non-recourse finance), but is a technique used by DFIs in emerging markets projects, where non-completion risk can be very high.

[40] OHCHR (2022), pp.5, 20-21, & 82-83; Opinion: Challenging the World Bank Group's stance on remedying harm | Devex; Danish Institute for Human Rights, Response to Draft IFC/MIGA Approach to Remedial Action and IFC Responsible Exit Principles (Apr. 2023). *Cf*: Submission of EarthRights International on the draft IFC/MIGA Approach to Remedial Action (2023) pp.6-8 & 15-22. EarthRights argues that "robust, meaningful, and effective mechanisms to prevent and mitigate harm and trusted, legitimate mechanisms to access remedy - from both the borrower and IFC – is the best way to both prevent future litigation and to enhance positive development outcomes" (*Id*., p.1).

[41] Mediation is an alternative dispute resolution mechanism that involves an external mediator who acts as a neutral facilitator to help the parties in dispute try to arrive at a negotiated settlement. A Disputes Board is a more formal mechanism usually involving the appointment of a panel of external individuals named in a contract to whom disputes can be referred throughout the life of the contract.

[42] An example is the Loan Agreement between Coastal Gujarat Power Limited and International Finance Corporation dated April 24, 2008 (see Section 5.5(c)(v)).

[43] The International Bar Association's Model Mine Development Agreement defines 'Independent Sole Expert' as 'an individual, an employee of an internationally recognized mining consulting firm competent on international mineral markets and prices, or an individual, or employee of an internationally recognized environmental and/or social consultancy firm, competent in the field of international mining operations, as appropriate, as the parties may agree in writing, or failing such agreement within [___] days, as shall be appointed for this purpose on the application of either party by the International Centre for Expertise in accordance with the provision for the appointment of experts under the Rules for Expertise of the International Chamber of Commerce.

[44] Adopted in 2018, *available at* https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/.

[45] Strengthening Supply and Value Chain Risk Management: The Role of DFI Environmental and Social Safeguard Policies - Policy Brief. OHCHR (2025). The most advanced supply chain management requirements at the time of writing can be found in EBRD's Environmental and Social Policy (2024), ESR2, paras. 44-46.

[46] UNGPs, principles 14 and 24.

[47] EBRD explains that '[t]he severity factor has a greater weighting than the likelihood factor.' Guidance on assessing and managing environmental and social risks in the supply chains of sub-projects. EBRD (2024), p.5.

[48] On the use of leverage in the context of supply chain management, see EBRD Environmental and Social Policy, ESR2, para. 45.

[49] It is reported that some borrowers prepay DFI loans when complaints are brought to the DFI's IAM. In the case of IFC, it is reported that '30% of projects linked to CAO complaints cited environmental and social issues as a reason for the early exit, and 23% cited the CAO

process itself as part of the exit calculation.' Accountability Council (2024). Why IFC's Practice Of Irresponsibly Exiting Projects Must Stop.

[50] Acceleration means all outstanding principal, interest, fees and penalties payable in the future under the loan agreement become immediately payable in full.

[51] A cross-default clause can put a borrower in default of one loan agreement if they default under another loan agreement. This way the borrower could be liable for repaying all loans with cross-default clauses all at once in a domino effect. Due to the serious consequences, cross-default is an example of lender leverage which lenders are generally reluctant to exercise.

[52] UNGP, principle 19, commentary: In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

[53] See the case study on dilemmas in connection with a possible DFI exit in OHCHR (2022), pp. 108-109.

[54] It may also be necessary for the DFI to be able to call an event of default ("material event") for breaches of one or more environmental and social requirements (see Clause 7.1).

[55] Also see the discussion on DFI options in OHCHR (2022), p. 98.

[56] The External Review of IFC/MIGA E&S Accountability (June 2020), pp.75-79, recommends the establishment of "contingent liability funding requirements and mechanisms for all investments that present significant E&S risk", as well as a "policy on the use of IFC/MIGA resources to contribute to remedy, clarifying the criteria, potential uses, and limitations of such resources to contribute to remedy."

[57] For a description of the remedy gap in DFI-financed projects and recommendations to address it, see supra 3.

[58] There may be more than one lender each with its own loan agreement with or without an intercreditor agreement, or multiple lenders that are parties to one common terms agreement or participating in a syndication through a syndication agreement, just to mention a few examples of lending arrangements. The suggested contractual provisions are not tailored to these different lending arrangements.

[59] The 2025 IFC/MIGA Interim Remedial Action Framework no longer refers to all of these suggestions.

[60] The language in brackets should be used if the Borrower's contractors and subcontractors will not establish their own grievance mechanisms but the Borrower Grievance Mechanism will address complaints related to their activities and conduct.

[61] This agreement puts community development plan in a contractual format and should be used instead of the plan if circumstances permit. Multiple resources for drafting Community Development Agreements are available, including the World Bank resources at: https://documents.worldbank.org/en/publication/documents-reports/documentdetail/278161468009022969/community-development-agreement-model-regulations-and-example-guidelines; Model Mining Development Agreement Annex B | Community Development Agreement Objectives; and IISD Model Contract Clauses for Responsible Investment in Agriculture, Annex C. | Community Development Agreement Requirements; among others.

[62] An ESAP may be supplemented by an ESMP and/or the ESMS, both of which will contain more detailed processes and procedures to implement the ESAP.

[63] The definition here is deliberately broad and includes matters that are not specifically mentioned in DFIs' safeguards, since it is possible that environmental and social matters not foreseen in the Safeguards or the original ESIA may arise in a project, requiring Remedial Measures. The definition is consistent with IFC Performance Standard 1, para 7, which requires establishing and maintaining a process of identifying and considering 'all relevant environmental and social risks and impacts of the project, including those identified in Performance Standards 2 through 8'.

[64] UNGPs 18(b), 20(b).

[65] UNGPs, Principles 17-21. This definition of HRDD is also compatible with the OECD RBC due diligence, as noted in supra 15 and 23.

[66] These "effectiveness criteria" are drawn from private sector practice and are reflected the UNGPs, principle 31. For an elaboration and illustration of how these criteria apply in the context of the roles and functions of DFIs' Independent Accountability Mechanisms, see OHCHR (2022), Annex II, *and* Self-Assessment Report of the IRM | Independent Redress Mechanism | Green Climate Fund, respectively.

[67] If this installment method is used, the Borrower should covenant the ongoing payment of installment payments until such time the Remedial Financing Mechanism is fully funded.

[68] This can also be drafted as a covenant with a specified due date. See some resources that can help create leverage for Project-Affected People as third-party beneficiaries in Box 4.

[69] In the event that national or local law provides criteria or threshold for community consent or support, this provision may be modified to be consistent with such law, provided that such law affords protection that is consistent with international human rights law.

[70] Although the Borrower's representation and warranty that it is in compliance with the Environmental and Social Requirements or that no Environmental and Social Claims exist may technically cover Project preparation activities, this specific condition of disbursement may be needed in case significant Project activities already occurred in anticipation of the Project, such as oil, gas or mineral exploration with adverse environmental or social impacts, and resettlement by the host government in order to contribute cleared land for the Project without adequate mitigation or compensation. Another example is when the Project is an expansion of an original project, and adverse impacts identified by an audit of the original project needs to be addressed prior to funding the expansion.

[71] This Clause 7 considered several resources, including the guidance for contractual provisions for disputes resolution found in the World Bank Guidance for PPP Contractual Provisions (2019), Chapter 11. Due to their length, this Guide does not include suggested provisions for mediation and disputes boards; however, the above World Bank Guidance has ample guidance and suggested drafting for these two ADR techniques, and drafters are encouraged to consult them. For suggestions on an alternative to disputes board focusing on early intervention through active dialogue and problem-solving rather than formal binding resolutions, see: OHADAC Arbitration Centre's Conflict Management Committee Rules.

[72] Available at: https://docs.pca-cpa.org/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration.pdf. The arbitration provisions in Clause 6.6 are generally consistent with the Hague Rules. There may be other suitable arbitral rules and venues for arbitration of environmental, social and human rights disputes; however, the Parties should not agree to use commercial arbitration rules, such as the Rules of Arbitration of the International Chamber of Commerce or elect commercial law arbitrators on the arbitral tribunals constituted to address Environmental and Social Disputes and Claims.

[73] The provisions in Clause 6.6 should be consistent with the chosen rules of arbitration.

[74] The Hague Rules provide that: Although the Permanent Court of Arbitration may already be called upon to provide institutional support to the arbitration under Article 1(5) of the Rules, the parties may wish to provide expressly for such administrative support by the PCA or to provide for administrative support by another arbitral institution.

[75] Generally, the costs of the arbitration are more unpredictable and may be difficult to cap.

[76] Such support may include support to mobilize third-party operators of associated facilities and subcontractors, local governments, regulators, civil society organizations, other Project investors, etc., in addition to Project-Affected People.

[77] Based on IFC/MIGA Approach to Remedial Action, para. 17b.

[78] A deed of covenant, if available under the Applicable Law, is a formal instrument that may offer better enforceability than an agreement. It may not require any consideration to be given but instead may require certain formalities, such as witnesses.

[79] Whether an IAM can accept complaints following the relevant DFI's exit from a project will depend on the IAM's mandate. Not all IAMs are able to do so.

[80] It is possible that too much leverage through a large loan and/or equity exposure in a project may cause DFIs to think twice about their potential exposure to provide remedy if projects fail to adequately address adverse E&S and human rights impacts. However, the DFI leverage likely will have to be quite significant in order for the DFI to be legally liable for remedy. See: NYU International Organizations Clinic (2021).

[81] In addition, drafters may wish to consult the Responsible Investor Model Clauses, an initiative of the Responsible Contracting Project, in conjunction with the Responsible Investor Model Clauses ("RIMC") Working Group, part of the American Bar Association ("ABA") Business Law Section. These model clauses can be inserted in charters, shareholder agreements, investor rights agreements, purchase agreements, and side letters associated with equity purchase.

[82] As proposed in the Open Letter to World Bank Group Executive Board Members. Legal issues concerning the IFC/MIGA draft Approach to Remedy (2023), supra 28.