



Tip Sheet for Financial Intermediaries

Sample Environmental & Social-Related Contractual Provisions for Legal Agreements Between a Financial Intermediary and Its Clients



Creating Markets, Creating Opportunities

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I. Purpose

The International Finance Corporation (IFC) has developed this tip sheet to provide financial intermediaries including its financial intermediary (FI) clients with sample environmental and social (E&S)-related contractual provisions that they may consider incorporating in their legal agreements with their clients (the FI's borrowers or investees).

When FIs receive financing from lenders/investors, including IFC, such lenders/investors may prescribe E&S-related requirements that apply to a portfolio or asset class they finance that may be cascaded to the FI's borrowers or investees falling in such portfolio/asset class.¹ FIs typically adopt these E&S-related requirements by developing E&S policies applicable to such portfolio or asset class, which may then impose requirements on the FI's clients. Such requirements are typically included by the FI in legal documentation with its clients. Section II of this tip sheet provides an overview of relevant E&S-related provisions; Section III provides sample language for such provisions.

This tip sheet creates no additional responsibilities or commitments on the part of IFC or its FI clients. It should be understood as guidance only to assist FI clients in incorporating E&S considerations into legal documentation, as appropriate, and does not constitute legal advice. FI clients should use this tip sheet in their sole discretion, after consulting with their legal counsel, with due consideration and diligence to the legal and regulatory framework in which the FI client or their relevant borrowers or investees operate. IFC would not be responsible in any manner to review such sample provisions or be liable in any manner or form should the FI client and its borrowers or investees agree to include such sample provisions in their legal documentation.

II. Environmental and social provisions in legal agreements

The structure of the agreement between an FI and its relevant client will depend on the nature of the financing, the project/transaction, and the complexity of the E&S risks as determined by the FI's E&S due diligence process, conducted in line with the FI's applicable E&S policy.

E&S-related contractual provisions that are commonly included in legal agreements between FIs and their clients may include the following²:

- **Representations and Warranties:** Assertions or statements of fact by the client related to E&S issues, e.g., asserting the absence of known E&S risks other than those identified during appraisal.
- **Affirmative Covenants:** Measures or actions to be taken by the client. These typically include the requirement for compliance with national E&S laws and regulations as well as with the FI's E&S policy from a particular date, i.e., the date of investment by the FI. They also typically include the requirement to implement any agreed environmental and social action plan (ESAP), outlining the specific mitigation actions, as identified during the due diligence process and to be taken by the client to meet the FI's E&S requirements, according to an agreed timeframe for implementation, and which is typically included as an annex to the legal agreement.
- **Negative Covenants:** Actions that the client has to refrain from undertaking. These typically include the requirement to not amend an ESAP or not support specific activities, for example such as activities on the FI's exclusion list.
- **Conditions Precedent:** Conditions and requirements that the client has to fulfill prior to disbursement of funds by the FI, including conditions for prior to the first disbursement and prior to each subsequent disbursement. These may include proof of valid permits and licenses, preparation of government-requested reports, and delivery of completion of mitigation actions stipulated in the ESAP.
- **Event of Default:** In debt transactions, an event of default would involve non-compliance and would require cure periods or waivers depending on the FI's risk assessment of its client's non-compliance or default. To the extent that the FI assesses that the event of default is material and that the circumstances require serious actions, then the FI may consider multiple consequences including allowing the FI to cancel a transaction and declare all amounts owed by the client to become

¹ For details on IFC's requirements for FIs, including cascading requirements, please consult the Environmental and Social Sustainability Policy, accessible at: https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kilrwog. See also the additional guidance provided in the FI Interpretation Note, accessible at: <https://www.ifc.org/IN-FI>.

² See recent Equator Principles Association guidance as an additional reference: "Guidance Note for EPPFs on Incorporating Environmental and Social Considerations into Loan Documentation" (December 2020), accessible at: https://equator-principles.com/app/uploads/Loan_documentation_EP_Dec2020.pdf.

immediately due and payable. For transactions that involve complex E&S issues, this may include considering material non-compliances with E&S-related provisions (subject to applicable law and the FI's E&S policy) to be an event of default and specifying a time period during which the client can resolve the issue.

- **Monitoring and Reporting:** Conditions set by the FI to enable monitoring of the relevant project, including site supervision visits and access to sites and facilities, and reporting required from the client, such as the submission of periodic (e.g., annual) E&S performance reports and notification of significant E&S incidents.

III. Indicative environmental and social provisions

The inclusion of any E&S-related contractual provisions in legal agreements between the FI and its clients would be strictly subject to commercial agreement and negotiations, the nature of the financing, the project/transaction, and the complexity of the E&S risks. All E&S-related provisions should be read in the context of the terms of the legal agreement and any existing provisions therein. FIs may differ in the extent of E&S-related provisions they prefer to use depending on the E&S risks they assess.

The following indicative provisions are suggestions, which should be read and considered by the FI and its relevant clients on a case-by-case basis in light of the FI's E&S policy, applicable law, and project-specific requirements, and alongside advice of external counsel to the FI and to its clients, respectively. Legal counsel of the FI should be involved in developing E&S-related provisions for any specimen legal agreements and for inserting or adapting them for specific transactions along with the relevant client's legal counsel.

The sample draft language (column 3) is intended for simple loan transactions; additional changes would be necessary to reflect specific project characteristics.

| Indicative Provision | Rationale for Including Provision | Sample Draft Language for Provision |
|--|---|---|
| Representations | | |
| Representation as to the absence of undisclosed E&S risks | <ul style="list-style-type: none"> • Provides the FI with greater assurance of absence of E&S risks in addition to the FI's own due diligence. | The Borrower represents and warrants that: (i) there are no material E&S risks or issues in relation to the project other than those identified by any E&S assessment; (ii) it has not received nor is aware of either any existing or threatened complaint, order, directive, claim, citation or notice from any authority or any material written communication concerning the project's ³ failure to comply with any matter covered by the FI's E&S policy; |
| Conditions of Disbursement | | |
| First disbursement made conditional on the client having taken certain actions to support compliance with the FI's E&S policy | <ul style="list-style-type: none"> • Strengthens the client's E&S risk management and increases the FI's leverage. | The obligation of FI to make the first disbursement is subject to the fulfillment or waiver of the condition that the Borrower has completed an E&S assessment, fulfilled applicable items set out in any action plans setting out E&S measures to be taken to enable the project to be in compliance with the FI's E&S policy, and implemented an E&S management system to enable the Borrower to identify, assess, and manage E&S risks, each acceptable to FI; |
| All disbursements made conditional on representations as to the absence of undisclosed E&S risks remaining true | <ul style="list-style-type: none"> • Provides the FI with greater assurance of absence of such risks throughout project cycle. • Increases the FI's leverage. | The obligation of FI to make any disbursement is subject to the condition that the representations and warranties made are true and correct in all material respects on and as of the date of that disbursement; |
| All disbursements made conditional on the completion of certain action plan items | <ul style="list-style-type: none"> • Increases the FI's leverage. | The Borrower has completed, to FI's satisfaction, the relevant actions of the action plan that are required to be fulfilled or waived before that disbursement; |

³ Project is used to refer to the Borrower's relevant activities, as defined in the legal agreement.

| Indicative Provision | Rationale for Including Provision | Sample Draft Language for Provision |
|--|---|--|
| Covenants | | |
| Comply with the FI's E&S policy | <ul style="list-style-type: none"> Supports the FI's management of E&S, legal, and reputational risks, providing it leverage to manage them throughout the project cycle. | The Borrower shall undertake that its project complies with the FI's E&S policy; |
| Implement/operate an E&S management system | <ul style="list-style-type: none"> Strengthens the client's E&S risk management. | The Borrower shall ensure the continuing implementation and operation of the E&S management system; |
| Report E&S incidents | <ul style="list-style-type: none"> Is necessary to enable the FI's own incident reporting. Supports the FI's management of E&S, legal, and reputational risks, allowing it to take action as necessary following an incident. | The Borrower shall, as soon as possible, but no later than a set number of days (typically 3 days) after becoming aware of its occurrence, notify FI of any incident, accident, or circumstance occurring on any site, plant, equipment, or facility included in the relevant project or which could reasonably be expected to have a material adverse impact on the implementation or operation of the relevant project in compliance with the FI's E&S policy, or an adverse effect on the environment, health or safety, including without limitation, explosions, spills or workplace accidents which result in death, serious or multiple injury, or major pollution, specifying, in each case, the nature of the incident, accident, or circumstance and the impact or effect arising or likely to arise therefrom, and the measures to be taken to address them and prevent any future similar event; and keep FI informed of the ongoing implementation of those measures; |
| Provide annual reporting | <ul style="list-style-type: none"> Is required to enable the FI's own annual reporting. Supports the FI's management of E&S, legal, and reputational risks, allowing it to take actions as necessary to mitigate them. | The Borrower shall in each year submit to FI a report on the E&S performance of the project, containing the necessary information to support the FI's own reporting; |
| Provide information required by the FI for its disclosure policies/commitments⁴ | <ul style="list-style-type: none"> Supports the FI receiving information necessary for any disclosure policies/commitments. | The Borrower shall take such action as FI shall reasonably require in accordance with the relevant FI disclosure policy/commitment to permit FI to disclose relevant information; |
| Events of Default | | |
| Any event of default tied to compliance by the Borrower with covenants under the financing agreement (subject to any notice and cure periods), including to non-compliance with the FI's E&S policy | <ul style="list-style-type: none"> Increases the FI's leverage. | It shall be an Event of Default if the Borrower fails to comply with any of its obligations under this agreement, and any such failure continues for a period of [] days after the date on which FI notifies the Borrower of that failure; |

⁴ E.g., IFC FI equity clients (universal banks) commit to disclose annually the name, location by city, and sector for: (i) any Category A sub-projects provided that such disclosure does not contradict any local laws and regulations, (ii) exposure (as percentage of the total portfolio) to coal-related projects. Certain IFC FI debt clients commit to disclose annually the name, location by city, and sector of any supported Category A and certain Category B sub-projects (in the case of Category B, climate-related sub-projects where the loan from the IFC FI debt client to such a project is greater than \$20 million).

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