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UN Working Group on Business and Human Rights

Open call for input on “Development Finance Institutions and Human Rights”

Submission by the Institute for Human Rights and Business (IHRB)

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Responses to questions concerning State duty to protect human rights.

1. What should be the role of States in ensuring international Development Finance Institutions (DFIs) respect human rights and the environment? What challenges have you observed in this regard?

Development finance, broadly defined as “the use of public resources to facilitate investment and development in low- and middle-income countries”[1], is implemented by a range of entities from national and multilateral development banks to other state-backed financial mechanisms such as export credit agencies or sovereign wealth funds. Arguably, private banks and various forms of private investment can also be classified as part of the development finance ecosystem, for example, when the role of Just Energy Transition Partnerships (JETPs)[2] or Project Finance initiatives such as the Equator Principles are considered. States have critical roles in overseeing this broad financial ecosystem, by exercising direct control over some actors in ways that align with their own international human rights obligations, and in all other instances, by adopting legislation and policy guidance that will influence the behaviours of private financial actors, including with respect to human rights and environmental due diligence

[1] Remedy in Development Finance: Guidance and Practice, OHCHR, 2022, p.8, https://www.ohchr.org/sites/default/files/2022-02/Remedy-in-Development.pdf

[2] On JETPs, see for example, https://www.ihrb.org/focus-areas/just-transitions/one-year-on-5-takeaways-from-south-africas-just-energy-transition-partnership

commitments and outcomes. The Glasgow Financial Alliance for Net Zero (GFANZ)[3] launched at COP26, is an example of this wider ability to influence finance well beyond the traditional DFI sector.

There are a number of challenges associated with the role of States in relation to DFIs with respect to human rights and the environment. These include the following, some relating to the direct role of the State as an investor and grant-maker, others to the role of State (as a rule-maker and deployer of leverage, guarantees, debt and incentives) in the wider financial ecosystem.

In terms of the direct role:

There is an ambiguity amongst some state-backed financial institutions as to whether they are in fact state-based or private commercial entities. This has caused disputes within the context of the OECD Guidelines for Multinational Enterprises and also amongst some Export Credit Agencies as they should be subject to mechanisms focusing on commercial entities - such as 'National Contact Points'. In other words, there has been some 'deliberate ambiguity' in relation to export credit agencies and sovereign wealth funds as to whether they have state-like duties or business-like responsibilities for human rights.

There are questions regarding state overseas development assistance when it is allocated to programmes that are inconsistent with international human rights norms, such as development assistance that is overly trade contingent, linked to explicit military objectives or punitive asylum policies.

Many financial institutions (both sovereign and private) look to the IFC Performance Standards and not the UN Guiding Principles on Business and Human Rights as their lodestar, whilst the former has not been fully aligned with the latter.

In relation to the indirect role of States, the following can be observed:

[3] https://www.gfanzero.com

There are many actors in the financial sector, such as impact investors, private equity companies and insurance companies, who have still not taken adequate steps to align their own policies and practices with human rights standards.

There has been a tendency amongst some private banks to position themselves as exclusively 'linked to' but not 'contributing' to the potential negative impacts of clients.

There is a general tendency to deprioritize human rights within broad ESG portfolios or human rights within the 'justice' components of state-backed 'Just Energy Transition Partnerships', particularly amongst private investors.

2. How do States encourage development financing activities and policies to be consistent with international human rights standards and principles and ensure that human rights risk is integrated into the due diligence processes of DFIs?

Prevailing practice indicates that the entire financial ecosystem aligns more with the Bretton Woods institutions, in particular the International Finance Corporation's Performance Standards, rather than in full alignment with standards that have emerged over the past 15 years, such as the UN Guiding Principles on Business and Human Rights or the Paris Climate Agreement. The IFC Performance Standards have not been updated since 2012, and this acts as a drag anchor particularly in relation to inclusion of some human rights issues and the whole human rights due diligence and access to remedy framework. It is telling that a number of state-backed export credit agencies are now part of the Equator Principles initiative whose work on human rights has now superseded the IFC Performance Standards themselves, evidence perhaps that private sector and some state-backed financial entities have progressed whilst others have not. If further reform of the IFC Performance Standards is politically too difficult, then the piecemeal approach will need to continue until the Bretton Woods institutions are themselves reformed. It should be noted that the World Bank Group's Human Rights, Inclusion and Empowerment multi-donor trust fund[4] aims to strengthen application of human rights principles across the Bank's work, including Bank-executed grants. However, this remains a relatively small fund with currently only 8 countries providing budgetary support. Scaling up such Bank programs and involving more countries in their implementation would be a useful action.

[4] https://www.worldbank.org/en/programs/humanrights/overview

It should be noted as well that ongoing discussions concerning reform of the international financial architecture are underway in anticipation of 2024 and the 80th anniversary of the Bretton Woods conference. These reform debates provide important opportunities for States to reassess and strengthen the place of human rights and related issues in development finance strategies. Useful contributions by experts and investors, including from the perspective of the climate crisis[5], highlight the need for State actions to ensure such reforms, including to correct market failures. All such initiatives would benefit from more robust consideration of how human rights commitments and actions can be mainstreamed within the development finance ecosystem.

In relation to individual private financial institutions and investors, States should play a central role in establishing a level playing field with better incentives for actors involved. A number of governments funded the development of the Corporate Human Rights Benchmark[6] through development assistance finance, and this benchmarking tool should also help inform the way States themselves behave through export credit decisions as well as sovereign wealth fund investments. In many jurisdictions, the reform of company law itself will allow for greater weight being given to ESG factors including human rights criteria.

3. How can States harness the potential of DFIs to accomplish important policy objectives such as achieving gender equality, protecting human rights and the environment, mitigating climate change and realising the Sustainable Development Goals? Please provide examples if possible.

If effectively implemented, development finance can have enormous leverage in helping achieve better human rights outcomes. One current example of where significant potential can be realised with respect to specifically affected stakeholder groups involves the role of JETPs mentioned previously as the mechanism through which States such as South Africa, India, Indonesia, Vietnam and Senegal are leveraging sovereign and private resources for their transitions away from coal and other high-carbon energy sources. The "J" in "JETP" relates to the transitions being "just", which should be understood not only in terms of commitments to protecting worker rights and fostering new forms of sustainable employment for affected communities, but also in terms of broader human rights implications of such transitions. When

[5] https://www.avivainvestors.com/en-us/views/aiq-investment-thinking/2022/11/climate-emergency/

[6] https://www.worldbenchmarkingalliance.org/corporate-human-rights-benchmark/

supporting these and other transition-related financial plans in the run up to COP28, States should use growing momentum around these initiatives to more proactively elaborate on human rights expectations for all actors involved, and clarify their individual and collective commitments to aligning support in these areas with international human rights and labour standards. Existing guidance documents such as the Just Transition Finance Tool for banking and investing activities[7], developed by the International Labour Organization with the LSE Grantham Research Institute, are useful contributions that States can benefit from in their own policy formulation, and build on in related areas.

4. How can/should States engage with DFIs, private businesses, investors, civil society, rights-holders, and trade unions to prevent and address adverse human rights impacts caused by irresponsible development financing practices?

States must clearly be both transparent and accountable in their actions with all societal actors. They should be explicit about their 'theory of change' in terms of how the financial ecosystem will perform, and set out the incentives and disincentives they will deploy in order to achieve better human rights outcomes. Not only is there a continuing lack of 'human rights literacy' within many financial institutions, but there is also a lack of financial literacy within many human rights organisations, and so knowledge exchange is often an essential part of State actions to encourage better outcomes, including through ongoing multi-stakeholder processes.

States should be opportunistic and strategic when engaging DFIs and other actors on human rights related issues. For example, there are important opportunities in the context of mobilising climate related finance and advancing the Just Transition agenda, which many DFIs have started to embrace. States should view this growing area as one through which to engage with DFIs and other actors on a wide range of human rights issues. IHRB and Clifford Chance produced a report in 2021[8] which pointed out the current lack of clear policy direction from governments and regulators on the roles of financial institutions in securing just transitions, as well as the opportunities for joint action. The report offers guidance that could support State engagement with a range of relevant actors.

5. What are the specific human rights risks posed by DFIs to groups in the most vulnerable situations, such as women and girls, indigenous communities, human rights defenders, persons

[7] https://www.ilo.org/global/topics/green-jobs/publications/WCMS_860182/lang--en/index.htm

[8] https://www.cliffordchance.com/content/dam/cliffordchance/PDF/just-transactions-whitepaper.pdf

with disabilities, persons with different sexual orientation or gender identity, older persons, persons living in poverty or migrant workers?

The list of risks is too long to cover comprehensively in such a submission, but one example from IHRB's own work is the uncertainty many migrant workers face in relation to their own financial options, the importance of worker remittances to home countries, and the development related impacts for individuals, families and wider societies. Whilst the cost of remitting money has decreased in real terms over recent years, it is still often very high when compared to other forms of financial transaction. The exploitation of migrant workers through the payment of worker recruitment fees and associated costs, can lead to forms of debt bondage and further exploitation, so too irregular financial payments that many asylum seekers must pay in order to access the protection of other States. More information and analysis on improving development outcomes through responsible recruitment of migrant workers is available in IHRB's 2022 report on this subject.[9]

There are many actions States can take to better enforce their own laws and reduce economic exploitation impacting migrant workers. Some States now class their expenditure on supporting asylum seekers within their own borders as part of their international development finance (under OECD rules) and this prompts the need for a much wider understanding of how all government policies align with DFI objectives. National business and human rights action plans and peer-reviews under the UN Human Rights Council's Universal Periodic Review reporting mechanism are two important tools to highlight areas for better alignment.

6. What measures should States take to ensure access to an effective remedy when DFI-supported projects are associated with adverse impacts on individuals, communities, and the environment?

There is already extensive guidance available to States on steps needed to ensure access to effective remedies in the context of development projects, which should be more actively studied and more rigorously implemented. For example, the 2020 External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness[10] pointed out how social and

[9] https://www.ihrb.org/focus-areas/migrant-workers/realising-rights-and-maximising-benefits-improving-development-outcomes-through-the-responsible-recruitment-of-migrant-workers

environmental abuses linked to development projects were not adequately addressed[11], and included numerous recommendations concerning how World Bank projects and processes could develop more effective and appropriate forms of dispute resolution, and remedies for non-compliance. The OHCHR Accountability and Remedy Project is another resource with numerous references and recommendations States should consider in the context of remedy for adverse impacts linked to development finance projects. In particular, the ARP report on improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms[12] is of particular relevance to development finance institutions, their own grievance mechanisms themselves and their personnel. OHCHR's 2022 report on Remedy in Development Finance: Guidance and Practice, referenced in response to question 1 of this submission is also of importance in this respect.

[10] https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf

[11] https://www.hrw.org/news/2020/08/24/world-bank-group-failing-remedies-project-abuses

[12] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/113/99/PDF/G2011399.pdf?OpenElement