

Hearing : Food Security, 14 March 2023

« Le nouveau contrat de gestion de BIO et la place qu'y occupent le devoir de vigilance et la sécurité alimentaire. »

Comments on behalf of the Office of the United Nations High Commissioner for Human Rights (OHCHR)

Mac Darrow, Representative, Washington DC

1. In February 2023, the Office of the UN High Commissioner for Human Rights (OHCHR) published a [Benchmarking Study on Development Finance Institutions' Safeguards Policies](#) (“OHCHR Study”, or “Study”).
2. The Study analyzes the environmental and social (E&S) safeguard policies of a range of bilateral and multilateral development finance institutions (DFIs), assessing the extent of their alignment with international human rights standards including the UN Guiding Principles on Business and Human Rights (UNGPs) and OECD standards on Responsible Business Conduct.
3. BIO’s E&S Strategy and Policy (Jan. 2023, “Policy”) and E&S Manual (April 23, 2019) affirm that BIO upholds the UNGPs, among other relevant international standards. However the specific standards of the UNGPs aren’t referenced in the Policy or Manual hence it is not clear how alignment was sought to be achieved. The UN Human Rights Study can help to fill in any gaps in this regard.
4. The OHCHR Study focuses more on multilateral than bilateral DFIs and does not specifically include an analysis of BIO’s policies. However the Annex of the report does feature a gap analysis of the Performance Standards of the International Finance Corporation (IFC), the private sector financing arm of the World Bank Group, which are the default set of E&S standards for private sector financing DFIs globally. Under BIO’s Policy, the IFC PS appear to be the main framework through which human rights issues are to be addressed, hence the analysis in the Annex to our Study seems to be of direct relevance for present purposes.
5. The OHCHR Study identifies a number of gaps and areas where DFIs’ E&S safeguard policies may usefully be strengthened from a human rights perspective. It also highlights numerous good practices across DFIs. The Study focuses on due diligence and risk management practices, framed mainly by the UNGPs which is the authoritative framework for addressing human rights impacts of business activity. The concept of “human rights due diligence” is central in this regard, and is the principal means of discharging the responsibility to respect human rights.

6. Given the functional specificity of E&S safeguard policies and the UNGPs, the OHCHR Study is not explicitly framed in terms of a “human rights-based approach to development.” However we consider that the responsibility to respect human rights, through human rights due diligence, is an integral part of a human rights based approach. The main principles of a human rights approach, including participation, equality and non-discrimination, and accountability, are well reflected in the UNGPs. A human rights-based approach goes further, however, and provides a conceptual framework and tools for substantive policy analysis.
7. The OHCHR Study focuses only on policy *formulation*, not implementation. However good outcomes depend *both* upon strong policies and implementation practices. The prerequisites to effective policy implementation include DFI structure, staffing, resources, and internal accountability arrangements and incentive structures, which are very difficult to benchmark. Further work is needed to analyze and benchmark implementation systems across bilateral and multilateral DFIs, in OHCHR’s view.
8. Subject to these caveats, our Study notes a number of positive features in the evolution of DFI E&S safeguard policies from a human rights perspective, across the board. Examples include:
 - Increasing alignment of E&S safeguard policies with human rights;
 - Strengthening policy commitments and requirements concerning stakeholder engagement, and addressing a range of discrimination issues;
 - Growing incorporation of explicit human rights due diligence, though not always as a routine element of the E&S risk management system; and
 - Growing practice of conducting contextual risk assessment, including human rights issues, within project E&S risk assessments.
9. However there are also some common gap areas, which also seem to be relevant on the face of BIO’s E&S Policy and Manual:

DFIs as duty-bearers

10. There is little recognition of the fact that DFIs are duty-bearers, and under the UNGPs have E&S risk mitigation responsibilities in line with their involvement in negative E&S impacts. The client has primary responsibility for project implementation, as the BIO E&S Policy recognizes, however DFIs rarely recognize that they themselves may either *contribute* to negative impacts (which can occur through poor due diligence, for example) or may be *directly linked* to negative impacts through their business relationships. This is a fundamental shortcoming from the perspective of the UNGPs and OECD

Responsible Business Conduct standards, and emerging corporate due diligence regulatory regimes in the EU and at national level.

11. Our Study also notes that DFIs are subject to different bodies of human rights law, and that bilateral DFIs are subject to national as well as international human rights law. Under UN human rights treaties and the UNGPs, States may breach the duty to respect or to protect under international human rights law owing to human rights abuses by State-owned enterprises.¹ The UNGPs (principle 4) provides that States should take “additional” steps to protect against human rights abuses by business enterprises that are owned or controlled by the State. In the view of the UN Working Group on Business and Human Rights, those steps include: (a) requiring State-owned enterprises to take action to prevent abuse of human rights abroad and through their business relationships; (b) requiring the State-owned enterprise to carry out full-cycle human rights diligence (HRDD, discussed below); (c) requiring reporting on human rights performance, and (d) ensuring effective remedy for human rights violations.²
12. The Safeguards Policy of the International Climate Initiative (IKI) of the government of Germany provides a clear framing of E&S risk management responsibilities between IKI and the client, based upon the UNGPs.³ The Legacy Landscapes Fund (LLF), with support of KfW, has produced “best practice” guidance for Environmental and Social Action Plans in using the UNGPs to define the remediation responsibilities of LLF and its grantees, based on the extent to which each has *caused* or *contributed* to negative impacts, or are *directly linked* to negative impacts through their business relationships.⁴

Recommendations:

- Safeguard policies should explicitly reflect the obligations of DFIs under national and international human rights law, and should contain a specific commitment that the DFI: (a) respects human rights in connection with the projects it finances, and (b) requires its clients to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused or contributed to by, or directly linked to, the business activities of clients.
- Safeguard policies should be explicitly aligned with the UN Guiding Principles on Business and Human Rights in order to strengthen the framework for: (a) risk assessment; (b) ongoing, risk-based due diligence; (c) addressing risks throughout the value chain; and (d) remedy.

Human rights due diligence (HRDD)

¹ UN Doc. A/HRC/32/45 (May 4, 2016), paras. 30 and 34.

² *Id.*, Part III, paras. 45-87.

³ [Safeguard Policy of the International Climate Initiative](#) (Jan. 15, 2023), pp.9-10.

⁴ Legacy Landscapes Fund, [Guidance Note: Environmental and Social Action Plan Development](#) (Annex C) (Jan. 2023), pp.4-5.

13. Under the UNGPs and OECD Guidelines, HRDD is a broad concept and set of processes through which a business identifies, prevents, mitigates, tracks and accounts for its human rights impacts. The HRDD process stems from an explicit human rights policy commitment which is embedded in and implemented through appropriate management systems. HRDD is an ongoing, continuous requirement and may involve a bundle of different processes and the deployment of a range of specific tools over time. Human rights impact assessments are among those tools, which may be implemented in a stand-alone fashion or integrated within existing instruments such as ESIA's.
14. However HRDD is not widely understood by many DFIs, and is often considered exceptional rather than routine, applicable only in "high risk" circumstances. This is the case in the IFC Performance Standards, and BIO's E&S Policy (p.3, footnote 4). In OHCHR's view, it is important that the conceptual confusion in this area be addressed, and that HRDD be implemented on a routine rather than exceptional basis. If considered relevant only in exceptional high-risk situations, human rights issues and information sources may more readily be overlooked, and project risk categorization, assessment and management may be undermined.

Recommendation:

- Human rights due diligence should not be a one-time, static event, and should not be limited to special or "high risk" circumstances. Information and recommendations from UN, regional and national human rights bodies should inform routine human rights due diligence throughout the project cycle.

Limited scope of due diligence

15. One of the main findings in the OHCHR Study is that the scope of due diligence as practice in many DFIs often covers a limited type and range of business relationships, and does not reflect the reality of interconnected supply chains. The UNGPs and OECD Responsible Business Conduct standards encourage risk-based due diligence throughout the value chain. However, with isolated exceptions, due diligence under DFI Safeguards tends to focus on "upstream" supply chain risk management, and then mainly on labor and biodiversity impacts, and "primary suppliers" as variously defined.
16. The practice of putting boundaries around the scope of due diligence ("upstream", "primary suppliers") is sometimes justified on the basis that it provides clarity, however it is not obviously the most efficient approach, given that the initial tiers are not necessarily where the most salient risks are. Forced labor, for example, is often buried deep in supply chains. Impacts on users and consumers "downstream" from the project are almost systematically missed, as are impacts arising from many digital technology projects which may be dispersed in nature (including cross-boundary) and materialize after a long lag time.

Recommendation:

- DFIs' due diligence should focus on where the most severe risks are in the value chain, downstream as well as upstream. DFIs and their clients should address potential and actual human rights impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, starting with and prioritizing the most severe based on scale, scope and remediability.

Remedy

17. One of the most persistent areas of confusion and contention revealed through consultations for the OHCHR Study was on the subject of remedy for E&S, including human rights, harms. The subject of remedy was the subject of a separate OHCHR study published in 2022, [Remedy in Development Finance](#). There is a significant remedy gap in practice, particularly where serious harms are concerned. Yet remedy is still too often seen as a blame game between the DFI and client, or source of reputational or litigation risk, rather than a development opportunity or collective quest for better E&S outcomes. This creates a potentially serious moral hazard problem wherein externalities and costs are borne overwhelmingly by communities and individuals who may have little if any say or control over the project.
18. The term “remedy” is sometimes reduced to the question of whether a DFI has an effective grievance mechanism, and/or whether a project-level grievance mechanism is in place. These are important questions, and the UNGPs (principle 31) outline a number of “effectiveness criteria” to help evaluate such mechanisms: *legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning; and based on engagement and dialogue*. Annex II of OHCHR's , [Remedy in Development Finance](#) report provides more detailed criteria to help assess the effectiveness of a DFI's accountability mechanism. Last year, the Green Climate Fund's Independent Redress Mechanism has published the first pilot [self-assessment](#) exercise. There could be a range of other remedial mechanisms or processes available to project-affected people, in what is often called the remedy “ecosystem”, which should be mapped out in the context of particular projects.
19. However the “remedy” concept goes well beyond the role and functions of specific accountability mechanisms, and should engage DFIs directly. The OHCHR Study argues that DFI safeguard policies mitigation hierarchies should be amended to reflect the concept of “remedy” as understood in human rights terms, and that remedy should be approached as an ordinary project contingency. Recommendations from the OHCHR Benchmarking Study and [Remedy in Development Finance](#) report, relevant to BIO, include the following:

Recommendations:

- Remedy should be understood broadly as including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁵ Project-affected people should be consulted on appropriate form(s) of remedy in each case.
- Safeguards should include an explicit commitment to remedy harms as a corollary of their "do no harm" mandates. Mitigation hierarches should explicitly include "remedy" and recognize that off-setting is inappropriate for human rights impacts. In OHCHR's view an appropriate formulation would be "prevent, minimize, mitigate and/or remedy."
- Remedy should be approached as an ordinary project contingency, or planning issue, rather than something exceptional. Structures, responsibilities and mechanisms for effective remediation should be built into the project and contractual conditions from the outset.
- Clients should be required to cooperate in and provide for remedy when they have caused or contributed to harms, and to use leverage with their own business relationships, including their value chains, to cascade these requirements.
- DFIs should build and exercise all available forms of leverage to encourage clients to meet their remedy responsibilities, and should be prepared to contribute to remediation, together with the client and other responsible parties, appropriate to their share in the responsibility for harm.
- Environmental and Social Action Plans (ESAPs) should be full costed within the project budget. For higher risk projects, Safeguards and loan/investment agreements should require that the client establish contingency funds or insurance for remedying E&S and human rights impacts.
- Client contracts should require disclosure of the DFI's accountability mechanism, which should be assessed against the "effectiveness criteria" in the UNGPs (principle 31).

Responsible exit

20. Another issue which has been gaining increased attention among DFIs, closely related to the issue of remedy, is the concept of "responsible exit." The idea of "responsible exit" emerged from problems associated with unremediated E&S and human rights issues occurring in the course of project closure or a DFI's exit, whether planned or unexpected. The term "responsible exit" applies to a range of situations: routine exits at the end of a loan, to planned exits from equity investments at a designated time, to situations in which analyses of adverse impacts prompt DFIs to terminate their involvement early.

21. Responsible exit is the corollary of "responsible entry." However, generally speaking, there appears to be a significant imbalance between the efforts expended by DFIs on upfront compliance and development impact when entering projects, compared with exit. BIO's E&S Policy and Manual do not appear to contain specific guidance on this subject. The UNGPs and OECD Guidelines establish clear expectations that the human rights implications of

⁵ UN Basic Principles and Guidelines on the Right to a Remedy; UN Guiding Principles on Business and Human Rights, principle 25.

exit should be taken into account prior to any decision to exit. OHCHR suggests that DFIs should consider developing a set of guiding principles for exits that are incorporated into Safeguards, procedures, legal documentation and guidance. In OHCHR's view, Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations. In February 2023 IFC's Compliance Advisor Ombudsman published a valuable [discussion paper](#) on Responsible Exit, which may inform policy and practice on this subject.

Recommendation:

- DFIs should consider developing a set of guiding principles for exits that are incorporated into Safeguards, procedures, legal documentation and guidance.
- Safeguards should require a responsible exit action plan to address and remediate any adverse environmental and social impacts, including any impacts that originally prompted the exit as well as those resulting from exit, involving all responsible parties and reflecting broad consultations.

Stakeholder engagement

22. Active and inclusive stakeholder engagement is essential for the positive impact of investment projects and is predicated upon a range of human rights guarantees, including the rights to freedom of expression, association, assembly and access to information, non-discrimination, minimum socio-economic rights guarantees, and protection against reprisals. However, the research and consultations carried out for the OHCHR Study show the need for many DFIs to improve their consultation practices. Complaints to DFIs' accountability mechanisms have consistently documented shortcomings in this area.⁶

23. Recent DFI Safeguard updates have begun to include a separate E&S standard on stakeholder engagement, helping to ensure that stakeholders have the capacity, freedom and opportunity to access and act upon project information and influence project design and implementation. Examples include the European Bank for Reconstruction and Development and the Inter-American Development Bank and, in proposed, the Asian Development Bank. Reprisals against project-affected people have been rising in all regions, and the leading multilateral development banks have developed policies and procedures on these issues. However the track record of major DFIs in connection with stakeholder engagement and addressing reprisals risks remains uneven at best. Internal incentive structures, organizational culture issues, and conflicting incentives must often be addressed, or else policies and procedures in these areas will not be implemented.

⁶ OHCHR, *Remedy in Development Finance: Guidance and Practice* (2022), pp.31-33.

Recommendation:

- Safeguard policies should include a self-standing E&S standard on stakeholder engagement, including detailed requirements for Banks and clients on how to prevent and address reprisals risks.

Transparency v. commercial confidentiality

24. DFIs' safeguard and disclosure policies often have broad exemptions for "business-sensitive" or legal or financial information that prioritize commercial interests over more fundamental human rights values and transparency goals. This seems to be a particular challenge in private sector DFIs and may account for these institutions' relatively low transparency ratings, compared with most sovereign lenders.⁷ The recognition of access to information as a human right under international, regional and (increasingly) domestic law is of critical importance in framing the balance between commercial interests and the rights of project-affected communities.

25. Broad exemptions for business information also run counter to emerging requirements for companies to report publicly on ESG and human rights issues, in response to demands from regulators, stock exchanges, investors and other stakeholders.⁸ Information withheld from public disclosure on "commercial-in-confidence" grounds is frequently made available in subscription services, which effectively reduces a putative question of principle ("This information is inherently confidential") to a more prosaic question of "Can you afford to pay?" The OECD guidance on corporate lending notes that clients can waive the right to confidentiality⁹ and suggests that banks could systematically seek consent from clients to disclose certain information.

Recommendations:

- In line with DFI best practice,¹⁰ E&S information should be publicly disclosed at least 60 days prior to Board consideration of high-risk projects.
- DFIs should systematically seek clients' approval to disclose information that may otherwise be considered commercially sensitive, where disclosure would serve E&S risk management purposes.
- "Commercial in confidence" exceptions to information disclosure should be interpreted narrowly, subject to a public interest exception where potential human rights abuses are concerned. The presumption should be in favour of

⁷ Publish What You Fund, [Aid Transparency Index](#) (2020).

⁸ See for example the EU's Proposal for a Corporate Sustainability Reporting Directive (CSRD); Global Reporting Initiative; International Sustainability Standards Board (ISSB)'s two proposed sustainability disclosure standards; and the reporting initiatives listed in CCSI's *Respecting the Human Rights of Communities: A Legal Risk Primer for Commercial Wind and Solar Power Development*, (Mar. 2022), p.10.

⁹ OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting* (2019), Box 1.1 - A Bank's Duty of Client Confidentiality.

¹⁰ See e.g. IFC [Access to Information Policy](#) (Jan. 1, 2012), para. 31.

proactive disclosure, with any exemptions defined narrowly and justified on a case-by-case basis by reference to foreseeable harm to a legitimate, recognized interest.

