

Financing Human Rights Abuse: The Role of Public and Private Financial Institutions

A complex range of public and private institutions provide financing for both corporate and state activity that is associated with human rights abuse. These financial institutions present an opportunity for the widespread dissemination and implementation of the UN Framework on Business and Human Rights. Many of these institutions require borrowers to comply with social and environmental requirements as a condition of financing, but none currently has policies in place to ensure respect for the human rights of those people who are affected by the activities that they finance. Despite having clear human rights obligations, these institutions continue to bankroll human rights abuse with impunity. The following recommendations are designed to ensure that finance, whether public or private, respects human rights.

Domestic public institutions

Diverse public institutions, including export credit agencies, development finance institutions and development banks, provide corporations with significant backing in the form of financing, guarantees and insurance. In 2011, members of the Association of European Development Finance Institutions provided the private sector with over \$30 billion in financing. The same year, the Brazilian Development Bank financed an additional \$67 billion in private sector investment. The influence of public financiers can be considerable. In the case of export credit agencies, for example, the OECD states: “official support plays an increasingly important role in individual transactions and for projects in developing countries where the availability of official support is decisive in allowing the project and the related exports to be realised.”

The state duty to protect human rights contemplates the operations of government bodies, including financial agencies. The UN Guiding Principles recommend that states take steps “to protect against human rights abuses by business enterprises that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.”

Despite greater awareness regarding this obligation, state institutions continue to finance and insure companies whose activities are associated with human rights abuse.

In order to discharge their duty to protect human rights:

- States must adopt legal provisions that prohibit domestic financial institutions from supporting companies whose operations violate human rights. These provisions should create an explicit duty of care for public financial institutions towards those who are affected by the financial products they provide.
- Public financial institutions must adopt transparent human rights policies that include due diligence processes effective in identifying and mitigating human rights abuse.
- Where finance is provided via intermediaries, which is increasingly the case for many development finance institutions, these institutions must perform their own due diligence rather than outsourcing it to the intermediaries and must retain control over what is financed.

- Public financial institutions must develop the necessary capacity, hire staff and designate resources to undertake effective human rights due diligence.
- Public financial institutions must disclose public information regarding the application of their human rights policies.
- States must provide meaningful opportunities for those whose human rights are violated by publicly-supported activities to access remedy. States must make these opportunities known to affected individuals and communities.

Multilateral public institutions

States are not relieved of their duties under international law to respect, to protect and to fulfill human rights when they act collectively through multilateral development banks (MDBs) like the World Bank Group (WBG). Nor can states, as borrowers, ignore their human rights obligations in implementing projects financed by MDBs. As a UN specialized agency, the WBG has an additional responsibility to act consistently with the UN Charter, which requires “[u]niversal respect for, and observance of, human rights and fundamental freedoms for all...” The UN Committee on Economic, Social and Cultural Rights has also observed that international agencies, such as the World Bank, “should act as advocates of projects and approaches which contribute ... to enhanced enjoyment of the full range of human rights.” Individually and collectively, states have the duty to ensure that their decisions do not lead to human rights abuse. This duty is also reflected in the UN Guiding Principles on Business and Human Rights. The commentary to the Guiding Principles states that, “States retain their international human rights law obligations when they participate in such [international financial] institutions.” In addition, the Maastricht Principles on Extra-Territorial Obligations provide useful interpretative support to the Guiding Principles, clarifying that a state must take all reasonable steps to ensure that the relevant organization acts consistently with its own international human rights obligations.

The International Finance Corporation (IFC), the private sector lending arm of the WBG, recently completed a review of its Policy and Performance Standards on Social and Environmental Sustainability. The revised policies, which came into effect in January 2012, made important progress in recognizing the human rights responsibilities of its clients, but fell far short of adopting the human rights due diligence requirements necessary to support its clients in the discharge of those responsibilities. For example, the IFC does not require human rights impact assessments, merely indicating in a footnote that the client may wish to undertake human rights due diligence in limited, high risk circumstances.

The public sector lending arm of the WBG—the International Bank for Reconstruction and Development and the International Development Association—has just launched a two-year review of its environmental and social policies, known as the safeguard policies. The safeguard policies are an important body of soft law, long seen as the leading standard for development finance. The review provides an opportunity for the WBG to reclaim its leadership in standard-setting by adopting robust human rights requirements. This alone, however, is insufficient. The safeguard policies apply to a shrinking percentage of the Bank’s operations. Over the last few years, the WBG has developed new lending instruments, such as the recently approved Program-for-Results, with custom-made policies that often lack clarity.

As Governors of the World Bank Group, states should do the following in order to fulfill their human rights obligations and those of the WBG:

- Adopt national level policies on human rights and development that guide government engagement in MDBs, including withholding support for MDB-financed activities for which the MDB and its client have not conducted and published human rights due diligence 120 days in advance of consideration by the Board of Directors of the respective MDB;

- Ensure that the WBG adopt a policy explicitly committing to withhold support for any project or program that could lead or contribute to human rights abuse;
- Ensure that the WBG commit to observing human rights standards in all of its activities, including investment lending, extending to recurrent expenditures; development policy lending; Program-for-Results lending; lending through financial intermediaries; and technical assistance;
- Ensure that the WBG undertake, and require borrowers to undertake, adequate human rights due diligence for all WBG activities, disclose the results of that due diligence, and put in place effective mechanisms to address potential adverse human rights impacts; and
- Empower WBG accountability mechanisms, the Inspection Panel and the Compliance Advisor Ombudsman, to provide remedy to those harmed by WBG-financed activities, including project suspension and compensation for harm.

Private institutions

The corporate responsibility to respect human rights is a baseline expectation of all companies in all situations. Private sector banks and other financial institutions are expected to follow the UN Guiding Principles in the same way as any other company.

In November 2011, following his mandate as UN Special Representative on Business and Human Rights, John Ruggie published an ‘interpretive guide’ that further clarifies the corporate responsibility to respect human rights. Mr. Ruggie provides illustrative examples of adverse human rights impact that is “directly linked to an enterprise’s operations, products or services by its business relationships, but where the enterprise itself may not [...] have contributed to it.” Topping his list is the granting of “financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities.”

Banks and other private financial institutions must adapt their business operations in recognition of their responsibility to respect human rights:

- States must adopt legal provisions that prohibit private financial institutions from funding operations that violate human rights.
- Private financial institutions should develop an explicit human rights policy. Such a policy should begin with a statement referencing the human rights standards the institution commits to follow in the conduct of all its business operations.
- The statement of policy should be followed by an assessment of the degree of human rights due diligence required regarding each specific activity. For high risk transactions, private financial institutions should undertake more in-depth analysis regarding human rights impact.
- Private financial institutions should develop the necessary capacity, hire staff and designate resources to undertake effective human rights due diligence.
- ‘Knowing and showing’ should guide financial institutions’ human rights policies and practices. Transparency regarding standards, procedures and controversial transactions is a key requirement.
- Regarding access to remedy, financial institutions should either create individual accountability mechanisms that govern their corporate entity alone, create such a mechanism within the framework of a voluntary standard such as the Equator Principles, or pool resources to establish a new, altogether freestanding mechanism. In order to be useful and acceptable for both the private sector institution and potential complainant, any mechanism that is developed must be independent, transparent, professional, fair, accessible and effective.
- As part of their non-financial due diligence, investors (or banks in their role as investors) should assess the degree to which corporations in which they consider investing have implemented the UN Guiding Principles. This human rights due diligence should be undertaken in fulfilment of the investors’ own responsibility to respect human rights, and should guide their investment decisions.