

WHAT IS HUMAN RIGHTS DUE DILIGENCE?

Human rights due diligence describes an ongoing process necessary to identify, prevent, and address adverse human rights risks and impacts.

WHO HAS HUMAN RIGHTS DUE DILIGENCE OBLIGATIONS AND WHAT ARE THEY?

There are distinct due diligence obligations and responsibilities for Development Finance Institutions (DFIs) and for their clients. These due diligence requirements should be spelled out in the DFI's policies, and DFI should actively work with clients to ensure compliance and remedy for any harm.

➤ HUMAN RIGHTS DUE DILIGENCE OBLIGATIONS OF THE PUBLIC SECTOR:

The human rights due diligence obligations of States stem from their fundamental duties to respect, protect and fulfil human rights. The human rights due diligence obligations of public sector actors consist of the duty to, through effective legislation, policies, adjudication, and other action, **prevent** human rights abuses, **investigate** allegations of abuse, **punish** perpetrators of abuses, and provide **redress**.ⁱ These obligations apply not only to abuses committed by State actors, but also those perpetrated by third parties.ⁱⁱ

➤ HUMAN RIGHTS DUE DILIGENCE RESPONSIBILITIES OF THE PRIVATE SECTOR:

The UN Guiding Principles on Business and Human Rights describe human rights due diligence as a process to **identify, prevent, mitigate** and **account** for human rights impacts.ⁱⁱⁱ This process should include assessing a business' actual and potential human rights impacts, integrating these findings into business operations, taking action to prevent or mitigate potential impacts, and tracking and communicating performance.^{iv} This due diligence process should be combined with a **policy commitment** to respect human rights as well as measures to ensure **remedy**.^v

THE HUMAN RIGHTS DUE DILIGENCE OBLIGATIONS OF DFIs

The human rights due diligence obligations of DFIs can stem from their legal obligations as international organizations, as state enterprises or entities executing state functions, or from their founding documents and other international agreements.^{vi} DFIs which are private corporations also have due diligence responsibilities under international instruments and codes of conduct. Human rights due diligence for DFIs should therefore be thought of in the context of both the human rights obligations of states and international organizations, the business responsibility of commercial entities, as well as the development mandate of DFIs.

For DFIs, HRDD is an ongoing process necessary to ensure that they respect, protect, and work toward fulfillment of human rights. This involves **identifying** human rights risks and impacts directly or indirectly connected with the DFI's activities; **preventing** human rights abuses; **mitigating** adverse human rights impacts, and **maximizing** positive human rights impacts where possible; **accounting** for how human rights are impacted and impacts are addressed, and **remediating** any adverse impacts.

WHAT DOES HUMAN RIGHTS DUE DILIGENCE LOOK LIKE FOR DFIS?

There are several layers to HRDD for DFIs: 1) the DFI undertakes its own due diligence to ensure that it respects, protects and fulfills human rights within its own activities, 2) ensures that its public and private sector clients undertake human rights due diligence in accordance to their respective human rights obligations or responsibilities within the context of the DFI-supported activity, and 3) where those clients are acting as financial intermediaries, the DFI must assess and address the human rights impacts of the end use of its investments.

As public development institutions financing, but not directly implementing development projects, DFIs' human rights due diligence includes active analysis and intervention by the DFI, as well as ongoing supervision, monitoring and capacity building with clients. Due diligence measures may take different forms depending on the nature of the DFI's relationship with the client, e.g. whether it is providing a direct loan or a loan through a financial intermediary, equity investment, credit guarantee, technical assistance, etc. The obligation, however, remains that adverse human rights impacts are addressed. DFIs should use their leverage and resources to ensure compliance with human rights standards as well as remedy for adverse impacts caused, contributed, or linked to their activities, including those caused by clients or third parties, or linked to the DFI through financial intermediary investments.

HOW IS HRDD DIFFERENT THAN STANDARD SOCIAL AND ENVIRONMENTAL DUE DILIGENCE?

Development banks normally undertake some form of social and environmental due diligence around their operations. Human rights due diligence, however, differs from standard social and environmental due diligence in the following key ways:

- Decisions regarding the design or approval of a given investment take into account the views of affected communities and other rights-holders and are consistent with human rights standards
- Assessment of risks and impacts includes the full scope of relevant human rights risks and impacts, with impacts measured against human rights standards
- The process for assessing and managing risks and impacts is transparent, participatory, non-discriminatory, accountable
- Scope of assessment includes contextual risks and activities of other actors, including governments, suppliers and third parties
- Risks are assessed based on the severity of human impacts, taking into account the scope (number of people impacted), scale (gravity of impact) and remediability (ease or difficulty of making the impacted person whole again) of the impact or harm, as well as the vulnerability (exposure and resilience to risk) of those who may be impacted

- Risks and impacts are managed so as to prevent human rights abuses, avoid adverse human rights impacts, and give priority to remediating harms rather than merely compensating or offsetting
- Active and ongoing supervision, participatory monitoring and engagement is employed, scaled to the nature and severity of potential impacts, rather than reliance on self-reporting
- Risk and impact assessment are interconnected with project design and management in order to avoid unacceptable levels of risk, anticipate and plan for acceptable levels of risk, and minimize, remediate, and ensure remedy for any harms, including by utilizing leverage with other actors

WHEN SHOULD HRDD BE APPLIED?

Human rights due diligence should be integrated within DFI's social and environmental management systems. DFIs should apply some degree of human rights due diligence to all of their activities. The appropriate level of HRDD and the specific measures employed, such as use of a human rights impact assessment, an expert panel, or more in-depth engagement with marginalized groups, will vary depending on the nature and severity of the potential impacts of a given activity as identified in an initial risk screening or evaluation. The attached annex illustrates the key components of human rights due diligence for DFIs and how these components fit together in a cohesive environmental and social management system.

ANNEX: KEY COMPONENTS OF HUMAN RIGHTS DUE DILIGENCE FOR DFIS

Human Rights Due Diligence for DFIs can be broken down into the following key components:

1) Human Rights Commitment

- A policy commitment to advance a human rights-based approach to development or at a minimum respect human rights, avoid adverse human rights impacts, and not contravene borrowers' or host countries' obligations under international law.
- Adoption of due diligence procedures and systems and incorporation of the results of human rights due diligence and other environmental and social assessments into project design, approval, and management.
- Operational standards that cover relevant human rights impacts, are consistent with relevant human rights standards, and reference relevant human rights instruments.
- Clear delineation of human rights due diligence roles and responsibilities between the DFI and clients. Depending on the type of investment, DFIs will generally be responsible for:
 - Ensuring adequate engagement with affected communities;
 - Assessing the project against the relevant legal framework;
 - Assessing the project against their own policies and standards;
 - Assessing the client's capacity to meet standards, as well as the capacity of local and national monitoring agencies;
 - Providing advice and assistance to the client for risk and impact management;

- Monitoring performance (including in-person monitoring missions) and ensuring compliance with DFI standards, national legislation, and relevant human rights standards^{vii}; and
- Publicly disclosing relevant information.
- Provision of necessary human rights-related resources (human, technical and financial) at each step of the due diligence process.

2) Engagement with Project Affected People

- Assessing the enabling environment for public participation in the project.
- Ensuring participation upstream and throughout the lifecycle of development processes, including the design of development interventions.
- Ensuring and verifying free, prior and informed consent of indigenous peoples, and in all cases, ongoing broad community support through meaningful consultation without discrimination or intimidation.
- In situations where people are unable to speak freely, taking additional measures to ensure meaningful consultation, including by engaging independent third parties when appropriate.
- Ensuring relevant project information is communicated to project affected people and other rights-holders in a form and format accessible to those people and in a timely manner. This includes information on relevant rights under national and international law and DFI standards, the content of and process for risk analysis and mitigation, the content of DFI due diligence requirements, the delineation of responsibilities between DFIs and clients, contractual requirements, monitoring and enforcement processes, and availability of grievance and accountability mechanisms.

3) Risk Screening

- Ensure that screening of risk for all projects is performed prior to project approval.
- Ensure that screening includes human rights risks related to both the country/sectoral context, client capacity and will, as well as the nature of the project itself, and examines differentiated impacts on marginalized communities or groups who may be more vulnerable to the impact or have disparate access to project benefits.
- The scope of the risk assessment should include the activities of other actors connected to the project operations, including governments, suppliers, contractors, security personnel, and third parties.
- Clarify who does the screening and what tools or methodology they will use. Ensure that these tools and methodologies have a human rights lens or capture human rights risks, rely on a variety of sources of information, including reports from media, independent civil society organizations, and human rights bodies.

4) Risk Categorization

- An initial risk category should be assigned prior to project approval.
- Ensure that risk categorization gives priority not to the size of the investment/project footprint or the probability that a given impact will occur, but rather to the severity of adverse human impacts, determined based on scope (how many people affected), scale (how grave the harm is), remediability (how easy or difficult to remediate), and vulnerability (how exposed or resistant are different groups to the impact).
- The assigned risk category, and its justification, should be disclosed.

5) Impact Assessment

- An ongoing participatory process that fully captures the full range of potential impacts on the enjoyment of human rights, including differentiated impacts on marginalized individuals or groups who may be more vulnerable to the impact, and assesses the severity of those impacts.
- Should be carried out with potentially affected communities, provide an accounting of the results of consultations and how taken into account, as well as a process for community verification of draft assessment reports.
- Assessment of impacts, and potential opportunities to contribute to the realization of human rights, should rely on internationally recognized human rights standards and include a baseline assessment of relevant socioeconomic history and context, including discrimination and conflict analysis, client capacity, and relevant legal and regulatory framework vis a vis international law.
- Robust alternatives discussion, including justification of how the chosen project/program design produces the least adverse social impacts and most positive social impacts among alternatives.
- The scope of the impact assessment should include the activities of other actors connected to the development activity, including governments, suppliers, contractors, security personnel, armed groups, or other third parties.

6) Management of risks and impacts

- Focus and form of risk management, including consultation processes, scope of impact assessment, technical expertise needed, risk prevention measures, and monitoring measures, should be commensurate to the nature and severity of risk.
- Risk and impact management should follow a mitigation hierarchy where human rights violations are prevented and adverse impacts are avoided. Those impacts that cannot be avoided are minimized, and where minimization is not possible, restitution is provided. Where restitution is not possible, other acceptable remedy should be provided.
- All adverse impacts should be addressed as early as possible. Where sequencing of mitigation measures is required, it should be based on significance or severity of impacts on people (based on scope, scale, remediability, vulnerability).
- Relevant management plans should be developed with project affected people, be sufficiently detailed, clearly delineate responsibilities and timelines, and allocate the financial and human resources necessary to ensure all adverse human rights impacts are fully addressed.

7) Enhanced Due Diligence Protocol for Heightened Risk

Where there is a heightened risk of adverse human rights impacts, additional measures are applied to address those risks and prevent harm. These basic measures should be set out in policy as a basic protocol which is then tailored to the nature and severity of the risks in a given project. Standard components include the following:

- Relevant human rights expertise, e.g. indigenous peoples, gender, persons with disabilities, conflict etc. This includes DFI staff plus use of external panels of experts, engagement with relevant national or international organizations or human rights bodies or agencies.
- A dedicated or stand-alone human rights impact assessment or issue-specific assessment, such as a gender assessment or conflict assessment. Regardless of the name of the assessment it should be informed by and consistent with human rights standards.

- A greater degree of engagement and consultation with local communities and vulnerable groups, employing necessary measures to ensure that vulnerable or marginalized groups are fully informed and able to participate freely without fear of reprisal.
- Capacity-building measures for clients, such as training on security forces or support in resettlement assessments.
- Capacity-building measures for communities, such as in land management, negotiation, or legal matters.
- Joint community management plans regarding relevant risk areas, such as natural resource management, conflict, gender, or reprisals.
- Loan covenants to prevent human rights abuses, including reprisals or excessive use of force.
- Contingency/emergency plans, including triggers for additional mitigation, monitoring or compliance measures as well as funds to provide for remedy in the case of adverse human rights impacts.
- Protocols to ensure security of affected community members and others expressing their views regarding the project, and to prevent and respond to potential threats. Such protocols must be developed with those individuals or groups that are impacted and be consistent with their human rights.
- Use of community-led and third-party monitoring. More in-depth and more frequent monitoring with reporting that goes directly to management. Monitoring reports should be publicly disclosed, with redactions only where communities deem necessary for their safety.
- Proactive community engagement by complaint or grievance mechanisms to ensure awareness and accessibility to the mechanisms.

8) Monitoring and Reporting

- Ongoing monitoring by the DFI throughout the project cycle on project risks, impacts, implementation, development outcomes, and community views and engagement.
- DFIs' monitoring must include meaningful input from communities or utilize participatory monitoring methods, and cannot rely solely on reports from clients.
- Monitoring should be based on disaggregated, human rights-informed indicators and should include compliance with applicable legislation, international human rights standards, DFI policies, contract conditions, agreed plans and community agreements.
- Reporting must be public and disclosed to project affected communities in a manner and timeframe that allows them to impact decisions relating to the project.
- In addition to project – specific monitoring and reporting, the DFI should evaluate and report on its overall human rights performance.

9) Compliance with Human Rights Standards

- The DFI should actively work with the client and provide adequate capacity building and technical assistance to ensure ongoing compliance with DFI policies, national law, and international law, including human rights norms.
- Actions to ensure compliance should be spelled out in the loan contract.
- The DFI should take all necessary measure to ensure ongoing compliance with human rights standards. This includes utilizing available leverage with the client or third parties, such as suspension of disbursements, conditioning future lending or resources, high-level

engagement with governments and other influential parties, as well as coordinated action with other lenders as appropriate.

- Where the client and DFI are not able to ensure compliance with human rights standards, the DFI should, in consultation with the affected community, develop a plan for responsibly exiting the project while continuing to use any available leverage, including relationships with other lenders or publicly raising concerns, to press for compliance.

10) Remedy

- The DFI and client should proactively disclose the existence of independent accountability mechanisms and project-level grievance mechanisms to the affected communities.
- Policy or contract requirement that both DFI and client promptly and effectively address any adverse human rights impacts and ensure remedy for any human rights abuses they have caused or contributed to or are linked to. Remedy should prioritize restitution wherever possible, rather than mere compensation.
- Providing effective remedy includes taking necessary actions to restore the affected community members to their prior level of rights enjoyment either through direct actions by the DFI or by utilizing leverage with the client or third parties where needed. Leverage should include suspension of disbursements, conditioning future lending or resources, high-level engagement with governments and other influential parties, as well as coordinated action with other lenders as appropriate.
- Independent accountability mechanisms and project-level grievance mechanisms should at a minimum meet the UNGP “effectiveness criteria”: legitimacy, acceptability, accessibility, predictability, equitable, transparent, rights-compatible, and a source of continuous learning.^{viii}

ⁱ The United Nations treaty bodies as well as the regional human rights systems have all found a state duty of human rights due diligence to prevent and punish violations of human rights by third parties. Velásquez Rodríguez, Inter-American Court of Human Rights, judgment of 29 July 1988, Annual Report of the IACtHR, 1988, p. 971. 28 ILM (1989) p. 326; *See Opuz v. Turkey*, App. 33401/02 (Eur. Comm’n on H.R. Sept. 6, 2009) (concluding that the national authorities failed in the obligation to protect the right to life and “cannot be considered to have displayed due diligence”); *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02, para. 143 (Afr. Comm’n on Human and People’s Rights, May 15, 2006); *See, e.g.*, UN Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8, CCPR/C/21/Rev.1/Add. 1326 (May 2004).

ⁱⁱ *Ibid.*

ⁱⁱⁱ The UNGPs elaborated on some of the international human rights responsibilities pertaining to businesses. Special Representative on Business and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, unanimously adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC17/31 (June 2011) (by John Ruggie) [hereinafter UNGPs], Principle 15.

^{iv} *Ibid.*, Principle 17.

^v *Ibid.*, Principle 15.

^{vi} *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p.174; *Egypt v. WHO, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73. DFIs which are Specialized Agencies of the United Nations are also bound by the human rights objectives of the UN Charter: Charter of the United Nations, June 26, 1945, 59 Stat.1031, T.S. 993, 3 Bevans 1153, entered into force Oct.24, 1945, arts. 1(3), 55, 56. Other DFIs per their charters are bound by regional human rights law. Others have human rights obligations due to their status as state-owned enterprises, as entities fulfilling state functions, or as entities over which the state has significant control.

^{vii} Where standards conflict, the standard most protective of human rights applies.

^{viii} UNGPs, Principle 31.