



By email: hrc-wg-business@un.org

3 March 2023

Dear Sirs and Mesdames

Response to Open Call for Input: Development Finance Institutions and Human Rights

1. We refer to the above and confirm that these submissions are made on behalf of the Fair Finance Coalition Southern Africa (FFCSA).
2. The Fair Finance Coalition Southern Africa is a civil society coalition working towards ensuring Development Finance Institutions invest in a socially and environmentally responsible manner. The coalition focuses on issues of climate change and transparency. FFCSA consists of [350.Africa](#), the [Centre for Environmental Rights](#) (CER), the [Centre for Applied Legal Studies](#) (CALS), the [African Climate Reality Project](#) (ACRP), [Oxfam South Africa](#), [Earthlife Africa](#) and [Justice Ambiental](#) (JA!).

State duty to protect human rights

3. 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?

Response:

States as shareholders of international DFIs have a particular responsibility to ensure that the policies of DFIs are consistent with a clear and unequivocal commitment to respecting and advancing human rights and the environment. This would include commitments to phase out fossil fuels in accordance with clear phase out time frames, which take into account Just Transition requirements that should protect vulnerable communities from fossil phase outs across the world. States would also need to maintain oversight in respect of the practices of DFIs through participation in DFI grievance and other mechanisms which should support resolution of DFI-related grievances and accountability.

Country Shareholders should also ensure that DFI policies and decision making as well as project monitoring related information is publicly accessible in order to ensure that civil society and community organisations are able to conduct proper oversight and monitoring.

Country shareholders and states should also participate in DFI decision making in various other ways and these should be looked at carefully so as to ensure that all decisions and processes are aligned to ensure respect for and the advancement of human rights and the environment.

4. 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?

Response:

In relation to the above response, we submit that states should encourage development financing activities and policies to be consistent with international human rights standards and principles, through exercising shareholder power and through ensuring that the minimum requirements for transparency and accountability are met by DFIs, not only in relation to policies but to all information and documentation related to decision-making, project oversight and monitoring and deviations.

The Just Energy Transition Partnerships in South Africa is an example of a partnership which is designed to address the energy, climate and socio-economic crises in South Africa, with the potential to protect and advance human rights and create a new energy system. DFIs are central to the success of this process, in particular in ensuring that JETP loans are highly concessional so as to not further exacerbate the socio-economic crisis in South Africa. In addition, given the climate debt owed to the Global South, the JETP could allow opportunities for grant and other financing which would support the social protection measures required to address the consequences of a coal phase out. The nature of and levels of debt incurred by States through DFI financing greatly influences how and whether actual financing activities can advance human rights standards and principles. Debt and debt servicing arrangements attendant to development financing activities can therefore directly influence food and energy security, as well as housing affordability and access to basic human rights. It would be naïve to imagine that policy commitments alone, without the significant reform of the global financial system, would ensure that human rights and the environment are respected, protected and advanced.

5. 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.

Response:

In the South African context, our view is that the duty of the State should be informed by the Constitution and our progressive Bill of Rights, in particular:

Section 8(2) which states that the Bill of Rights applies to all law, all organs of state and binds natural and juristic persons. In this regard, the legislation which governs DFIs in South Africa would need to align with the Bill of Rights and advance constitutional protections.

Moreover, we submit that Section 24(b)(iii) of the Constitution establishes clear obligations for DFIs in relation to environmental and climate justice. The section states that, "Everyone has the right to have the environment protected for present and future generations, through reasonable legislative and other measures which secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The South African government should therefore utilise these constitutional provisions to revise the mandate of DFIs and require revision of internal policies to align with constitutional obligations as well as international standards.

6. 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?

Response:

States could participate directly in some of the mechanisms designed to oversee project implementation and engage with various stakeholders through processes which allow for oversight and engagement. State should also ensure policy coherence, amendments to applicable legislation or establishing legislation and associated regulations to reflect specific objectives linked to the realisation of human rights, including environmental and climate justice - as this relates to local DFIs.

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

No substantive response. It is unclear as to whether this refers to DFIs as an entity or to their policies and practices.

8. 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?

Response:

States should participate in grievance mechanisms, including appeal processes or create measures to ensure independent accountability mechanisms which involve participation by civil society and community organisations. Transparency in relation to all decision making and access to all relevant information related to the enforcement of remedies should be a key area of focus.

DFIs' responsibility to respect human rights

9. Are you aware of any DFIs that have existing human rights, sustainability, or environmental and social (E&S) policies? If so, how effectively do they integrate a commitment to respect human rights, as per the UNGPs?

Response:

The [Fair Finance Coalition Southern Africa](#) ("**FFCSA**") embarked on a [research project](#) aimed at assessing the publicly available policies of six public finance institutions ("**PFIs**") operating in Southern Africa, beginning from May 2022 ("**the policy assessment**"). The assessment explored those policies across eight different themes, using the Fair Finance Guide Methodology. The full findings of that assessment indicate the extent to which the relevant PFIs, namely the African Development Bank ("**AfDB**"), the New Development Bank ("**NDB**"), the Development Bank of Southern Africa ("**DBSA**"), the Industrial Development Corporation ("**IDC**"), the Public Investment Corporation ("**PIC**"), and the Export Credit Insurance Corporation ("**ECIC**") - have policies which *inter alia* appropriately address the issues detailed above.

In summary:

AfDB and Human Rights:

AfDB received high scores in the policy themes Labour Rights and Human Rights, which can be explained by the content of the operational safeguards 2 (Involuntary resettlement) and 4 (Labour conditions and Health and safety), covering the main human rights issues at stake for workers and local communities potentially affected by the projects financed.

DBSA and Human Rights: Scored 6.7 in Policy Assessment

The DBSA's Environmental and Social Safeguards Standards (ESSS) 2020 elaborate well on the themes Labour Rights, Human Rights, and Gender Equality. For example, for its operations, financing, and

investments, the ESSS expressly incorporates the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, including the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

ECIC & Human Rights: Scored 2.0

ECIC received most of its points in the themes Nature (3.2), Labour Rights (2.8), and Human Rights (2.0) because of its adherence to the IFC Performance Standards for projects with high environmental and social impact (ESI Category A and B Projects).

New Development Bank & Human Rights: Scored 4.0

The NDB's Environment and Social Framework (ESF) provides an overarching policy for addressing environmental and social management in its operations, and the Environmental and Social Standards (ESS) set forth the key mandatory requirements with respect to Environment, Involuntary Resettlement, and Indigenous Peoples. The ESF applies to all NDB financed and/or NDB administered projects with or without sovereign guarantees, including investment projects and their components, regardless of the source of financing. The NDB's ESF explains most of the scores received in the themes of Nature and Human rights.

PIC & Human Rights: Scored 4.0

PIC's scores on themes Human Rights (4.0) and Labour Rights (2.5) are due to the fact that PIC is a signatory of the UN Global Compact and reports that it is implementing its ten principles in its investment process. This means, for instance, that by implementing the principles of the Global Compact in its investments, the PIC should require investees to have a policy commitment to meet their responsibility to respect human rights, to develop processes to enable the remediation of any adverse human rights impacts which they cause or to which they contribute, or to adopt a zero-tolerance approach to child labour and forced labour.

IDC & Human Rights: Scored 0.7

IDC discloses an environmental and social policy and due diligence framework in which it commits to incorporating environmental and social considerations in all its investment activities and developing and communicating environmental and social performance standards that clients are expected to meet within acceptable timeframes. The policy mentions a list of key environmental and social challenges including land degradation, biodiversity loss, depletion of natural resources, climate change, air pollution, water availability and pollution, human vulnerability and production and disposal of waste. Nevertheless, expectations formulated for its investees in this regard are not reported, which explains why the bank received very low scores (lower than 1 out of 10) in the themes of Climate Change, Human Rights, Labour Rights, Nature, Power Generation and Transparency & Accountability.

All 6 PFIs and Human Rights:

Fossil fuel extraction in Southern Africa, and equally across the continent, is often linked to human rights violations, particularly among individuals and communities most affected by the projects. Based on the United Nations Guiding Principles on Business and Human Rights, PFIs are responsible for ensuring human rights are protected within their operational policies and have policies that require the same commitment from the companies and projects they finance.

Most PFIs perform best on the human rights theme, with scores ranging from 0.7 for IDC to 7.7 for AfDB. AfDB and DBSA received the highest scores in this theme for

- Integrating human rights policies into their social and environmental frameworks
- Having due diligence processes based on human rights criteria to account for adverse impacts linked to business activities
- Remediation processes
- Grievance mechanisms

In contrast, ECIC, IDC, PIC, and NDB need more elaborate human rights policies that apply across their operations, and the companies and projects they finance or invest in. An important area to start would be to include policies that safeguard the rights and guarantee the free, prior, and informed consent (FPIC) of Indigenous peoples and peoples with customary tenure rights. PFIs must also pay specific attention to the wording of their policies. For instance, the AfDB performs well in this theme and includes free, prior, and informed consultation in its policies. Still, a major gap exists in the current wording, given that consultation does not imply consent. In other words, the AfDB can consult with communities affected by its projects without receiving their consent. PFIs need to improve in this area by developing clearer and more elaborate human rights policies, drawing on the International Finance Corporation's Performance Standards, the UN Global Compact, and OECD guidelines.

10. Can you provide examples of any DFIs that integrate human rights due diligence (HRDD) policies and processes into their risk management system for projects?

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more elaborate human rights policies, drawing on the International Finance Corporation's Performance Standards, the UN Global Compact, and OECD guidelines.

11. In your view, what are the main challenges and opportunities for DFIs to ensure the inclusion of human rights requirements in projects and to enforce the responsibility to respect human rights among clients?

Response:

Good policies are simply insufficient. What is required is the transparent implementation of those policies, and an accountability mechanism to both test that implementation and hold the DFI accountable for where it has failed to do so. An effective, transparent and independent recourse mechanism ("*IRM*") is thus an essential component of any DFI activity.

PFIs would do well to draw on existing best practices and the principles contained in *inter alia* the International Finance Corporation's Performance Standards, the UN Global Compact and the OECD Guidelines in formulating their policy approaches.

12. What do you perceive to be the key similarities and differences, if any, in the human rights-related conduct of multilateral, regional, sub-regional, and national DFIs?

No substantive response.

13. Can you provide insight into how and to what extent DFIs practice human rights due diligence (HRDD) or environmental and human rights impact assessment prior to, as well as during and after, their investments?

Response:

Our experience with New Development Bank and a country system approach is that a number of due diligence obligations are performed by the bank's client, in the case of South Africa, this would include state owned entities. In instances where we understand that that New Development Bank does practice due diligence, information related to due diligence processes are often not publicly available. Reports from Oxfam South Africa deal with a number of issues related to due diligence.¹

14. How can the above-mentioned processes ensure meaningful participation of impacted communities, particularly marginalised groups and individuals in the most vulnerable situations?

Response:

We repeat our answer to question three above regarding the necessity for an effective, transparent and Independent recourse mechanism through which affected communities may lodge complaints arising from DFI-related projects. The IRM must be accessible to impacted communities and persons, and not tied up in legalese.

However we stress that an IRM is a strictly reactive, after-the-fact mechanism. What is required from the outset of the DFI's intended funding is direct consultation with potentially impacted communities and

¹ See <https://www.oxfam.org.za/wp-content/uploads/2021/08/oxfam-ndb-report.pdf>; <https://www.oxfam.org.za/wp-content/uploads/2022/06/oxfam-ndb-accountability-discussion-paper-1-web.pdf>; <https://www.oxfam.org.za/wp-content/uploads/2022/06/oxfam-ndb-accountability-discussion-paper-2-web.pdf>

persons, to give meaningful effect to the right of free, prior and informed consent (“**FPIC**”) at all levels of the decision-making process. Such consultation must of necessity include communication in local languages and information-sharing, to ensure its effectiveness.

15. In your view, to what extent do DFIs impose human rights requirements on clients as a condition of financing? And are you aware of any DFI that provides technical assistance or other support to help clients become more sustainable and compliant with the UNGPs?

Response:

The World Bank required as a condition of the loan for the development of the Medupi Coal Fired Power Plant, that specific sulphur dioxide abatement technology be introduced so as to reduce pollution and promote a healthy environment as envisaged in Section 24 of the Constitution. To date, no pollution abatement technology has been introduced and communities bear the brunt of SO2 related pollution.

We are not aware of any specific UNGP related financing.

16. What are the specific human rights risks posed by DFI-related financing practices to groups in the most vulnerable situations, such as women and girls, indigenous communities, human rights defenders, persons with disabilities, persons with different sexual orientation or gender identity, older persons, persons living in poverty or migrant workers?

Response:

DFI-funded fossil fuel extraction and related activities in Southern Africa and across the African continent are linked to extensive human rights violations, particularly among individuals and communities most affected by the project. Those violations include evictions and relocation of indigenous communities from their traditional lands; sexual and gender-based violence being exacerbated by rapid urbanisation and migrant labour arising from a project; corruption arising from an influx of project finance; and of course extensive environmental degradation and pollution. It is trite that already marginalised persons and communities are the worst affected by such violations, given their existing vulnerabilities and the likelihood that the benefits (whether financial or otherwise) of DFI-funded projects are often reserved for entrenched elites.

17. To what extent do DFI associations that you are aware of address human rights and sustainability issues?

No substantive response.

Access to remedy

18. Are you aware of any cases submitted to judicial and/or non-judicial mechanisms (e.g., NHRIs, NCPs, etc.) regarding human rights abuses involving DFIs?

Response:

We are not aware of DFI related complaints to the South African Human Rights Commission.

19. What are the most significant challenges observed with regard to ensuring access to effective remedy for victims of human rights abuses affected by DFI-funded projects?

Response:

In engagement between FFCSA and communities located in Lephalale, Limpopo Province, the site of the Medupi Power Station which is funded *inter alia* by the World Bank, the AfDB and the NDB, we have been advised that affected persons and communities: (1) were not consulted by the DFIs concerned prior to the construction and operation of the project - any consultation was limited to local elites, most often traditional councils which are dominated by older men; (2) do not know who to contact in relation to complaints arising from the project; and (3) are not aware of any IRM and/or cannot access the available IRM procedure due to language and technological barriers.

Yours faithfully,

Ariella Scher and Leanne Govindsamy
On behalf of the Fair Finance Coalition, Southern Africa