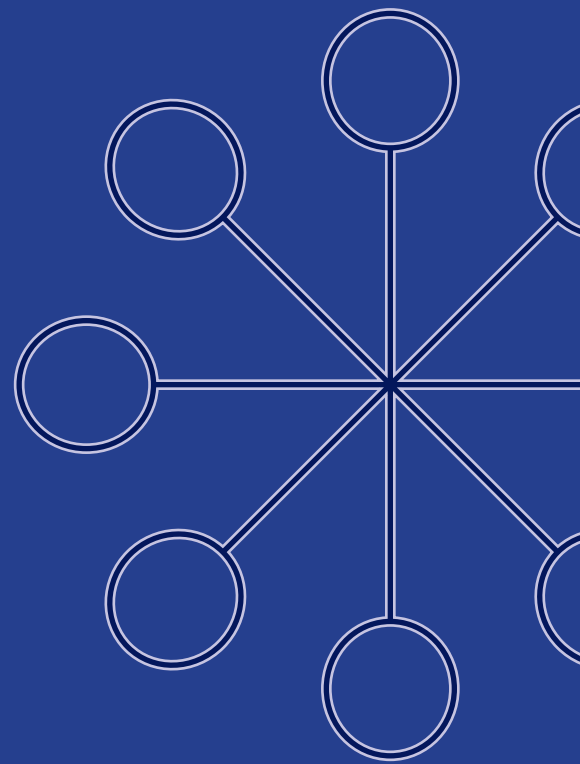
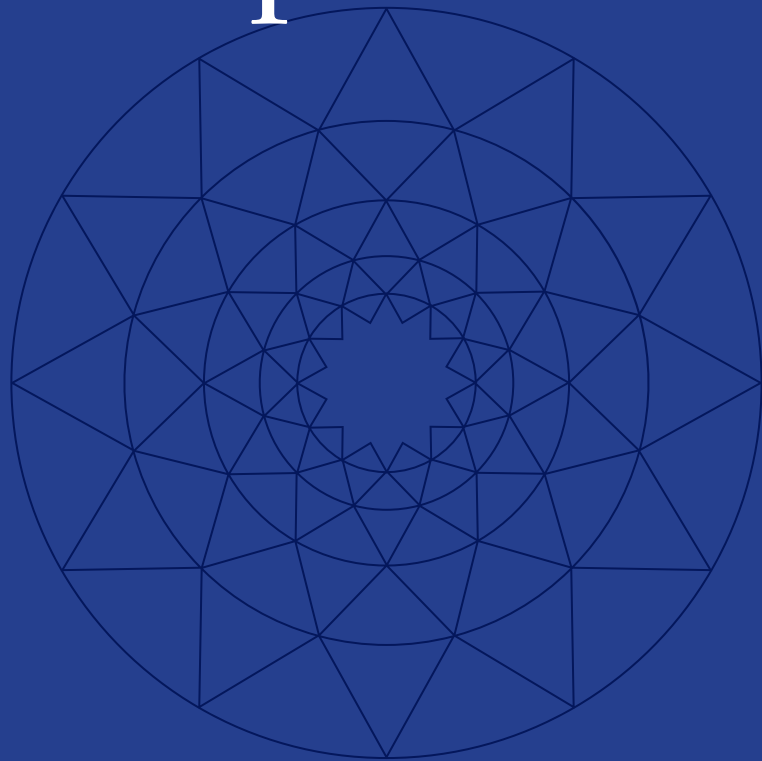


# Preventing Violations: The Promise of Due Diligence for the International Financial Corporation



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Additional information on and prior reports by the IO Clinic are available at <http://www.iilj.org/courses/international-organizations-clinic/>.

### Principal Authors of the Report

Ellen C Campbell, JD'17, Elizabeth Dominic, LLM '17, Snezhana Stadnik, JD'18, Yuanzhou (Jo) Wu, JD'18

### Clinic Directors

Gráinne de Búrca, Florence Ellinwood Allen Professor of Law, Faculty Director, Hauser Global Law School, Director, Jean Monnet Center for International and Regional Economic Law & Justice

Angelina Fisher, Program Director, Institute for International Law and Justice, Adjunct Professor of Law

### Design and Layout

Ann Antoshak

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## EXECUTIVE SUMMARY



The International Finance Corporation (“IFC”), as a legally and financially independent member of the World Bank Group, aims to end extreme poverty worldwide and enhance financial prosperity by providing capital and guidance to private-sector entities in developing countries. The IFC has an advanced and much-admired Sustainability Framework that imposes “due diligence” obligations on its clients in relation to social and environmental risks by means of eight Performance Standards. Nevertheless, the IFC has been the target of significant criticism owing to the fact that many of its projects have been implicated in serious human rights violations. This report argues that serious human rights abuses of this kind have occurred because the current Sustainability Framework does not adequately integrate consideration of human rights into the IFC’s due diligence processes.

The report begins by outlining the obligations of international organizations, and specifically of the IFC, under international human rights law. It explains how these human rights obligations can be satisfied by adequate due diligence and how, conversely, lack of adequate due diligence with respect to human rights risks constitutes a violation of international human rights law. The report moves on to identify shortcomings within the IFC’s current due diligence practices and proposes a method for incorporating human rights considerations into these due diligence practices. With a view to highlighting the importance of an adequate assessment of contextual and sector-specific human rights risk information, this method is exemplified in relation to a case that has received much criticism: the IFC-funded Dinant palm oil plantation in Honduras.

### Obligations of the IFC under International Law

As an international organization enjoying legal personality, the IFC can incur obligations and responsibility under international law. Member states explicitly conferred legal personality on the IFC in its Articles of Agreements, and following the logic of the International Court of Justice in its Reparations case, the IFC enjoys rights and incurs obligations under international law to the extent necessary for the performance of its functions and tasks.

The IFC’s human rights obligations stem from three distinct sources: customary international law, the terms of the UN Charter, and its obligations arguably also flow ‘transitively’ from the international legal obligations of the IFC’s member states.

First, international human rights obligations can arise from the “general rules of international law”, and not only under treaties. Following the reasoning of the ICJ in its advisory ruling on a World Health Organization agreement with Egypt, international organizations can incur obligations under customary international law. A range of political and civil rights human rights including the right to life and the right to humane treatment are accepted as having reached the level of customary international law and in some cases are considered *jus cogens*. Economic and social rights are likely to be of particular concern to the IFC, as many of the rights commonly violated by IFC projects fall into this category. The UN Committee on Economic, Social and Cultural Rights has found UN agency

involvement in projects involving forced labor and large-scale eviction to be contrary to the ICESCR.

Second, the IFC, as part of the World Bank Group, is part of a UN specialized agency, and is thus affected by the requirements of the UN Charter. While the independence of the institutions of the World Bank Group is noted in the relationship agreement with the UN, this refers to their independence from UN interference or from attempts to direct the institutions, rather than the non-applicability of international law articulated in the UN Charter. Articles 55–57 of the UN Charter, which entail a duty to respect basic human rights, are applicable also to the IFC. As to which rights are protected, the Universal Declaration on Human Rights has been described as serving as an ‘authoritative interpretation’ of the nature of Charter-based obligations.

Third, the IFC may be bound, within the scope of the tasks and powers conferred upon it, by the obligations contained in the treaties to which its member states are parties. This has been described as an international organization being “transitively bound” by its member states’ treaty obligations. While this transitive account of the human rights obligations of international organizations has been contested, a persuasive argument can be made that the IFC should consider the legal obligations of its member states, including their relevant human rights obligations, when formulating its policy.

In conclusion, as a subject of international law, the IFC must comply with relevant international human rights standards contained in customary international law and general principles of international law. At a minimum, the IFC has a legal duty to respect those international human rights that have reached the level of customary international law or *jus cogens*. Moreover, as a member of the UN system, the IFC has an obligation to ensure that its activities do not violate the core content of the human rights set out in the Universal Declaration. Lastly, the IFC is obligated to respect member states’ obligations. Consequently, the IFC has a minimum obligation to ‘do no harm’, and should align its policies so as to member states’ obligations. This requires the IFC to take positive action as appropriate to ensure that its advice, policies and practices do not lead or contribute to violations of human rights.

## **Using Due Diligence to Comply with International Human Rights obligations**

Having outlined the IFC’s human rights obligations under international law and its duty to respect the human rights obligations of its member states, the report goes on to demonstrate how these obligations may be satisfied by the IFC through the practice of due diligence. ‘Due diligence’ is legally defined as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. The standard of reasonable diligence will vary according to the actor, the nature of the underlying obligation, and the nature of the harm to be prevented.

A concept of due diligence is deeply embedded in national and international legal systems and has its origins in very early legal systems. Common elements of the principle of due diligence emerge from different areas of domestic and international law across a wide range of substantive subject areas. An analysis of the principle of due diligence in multiple arenas of international and domestic law reveals a number of clear elements of this emergent general principle of international law.

First, the duty of due diligence is a procedural duty common across multiple legal systems, domestic and international. As a procedural obligation that arises from another underlying legal duty or obligation, due diligence is a standard used to measure compliance with the underlying legal duty. In essence, due diligence is an obligation of conduct, not result.

Second, the content and extent of due diligence required varies according to circumstance and context. For example, a state's duty to perform due diligence may differ depending on the level of development the state has achieved, although there appears to be a certain minimum core. Greater due diligence may be required in situations where the harm feared may be irreparable. With respect to international human rights law, while states are the primary bearers of responsibility and have a duty to protect, private actors and business enterprises are increasingly accepting (or having imposed on them by domestic law) a responsibility to respect human rights. In response to the development of standards such as the UN Guiding Principles and the OECD Guidelines, many public as well as private institutions have begun utilizing human rights impact assessments to meet their human rights obligations. In general, across all of the areas of law examined in this report, the standard of due diligence has been found to be one of reasonableness according to the specific circumstances.

Third, the requirement of due diligence generally operates over time and is a continuing obligation of conduct. It entails an ex ante duty to identify relevant risks and to take action to minimize the risk of harm, no matter whether the harm in question is caused by third parties or by internal inaction. Due diligence entails an ongoing duty to monitor and to mitigate where exposure to the relevant risk continues. In some circumstances, due diligence requires that follow-up access to a remedy or reparations be provided.

## **The Gap: Analyzing Shortcomings in the IFC's existing Due Diligence Process**

In making investments, the IFC requires adherence to its Policy on Environmental and Social Sustainability ("the Sustainability Policy") and Performance Standards (PSs), which are together referred to as the Sustainability Framework. The IFC's Sustainability Policy imposes a range of due diligence obligations regarding environmental and social risks on its clients through the Performance Standards that have been adopted as part of its Sustainability Framework. Although the IFC has made significant progress with regard to its sustainability policies and due diligence practices in the last two decades, gaps and weaknesses remain. As it stands at present, the IFC's Sustainability Framework does not adequately integrate consideration of human rights risks into the IFC's due diligence process. Consequently the IFC's due diligence requirements do not meet its obligations under international law.

There is a range of human rights which have been shown through past cases to be particularly likely to be adversely affected by the kinds of projects in which the IFC invests. Reference to these human rights risks should be explicitly incorporated into the Sustainability Framework. While the three relevant sustainability documents—the Sustainability Policy, Performance Standards, and Guidance Notes—currently make a number of references to human rights, these references are limited. At present the IFC addresses its own due diligence primarily by requiring its clients to act in compliance with eight Performance Standards, and it takes the view that these standards cover a wide variety of human rights. However, the performance standards do not meet the requirements set by international human rights law and the IFC has not comprehensively integrated adequate consideration for human rights into its Sustainability Framework. Further, the Performance Standards at times may have resulted in clients abiding by alternative or lower standards than those actually required by international human rights law.

In response to the human rights violations which occurred in the IFC-funded Dinant palm oil plantation in Honduras, where country and sector risks of conflict and violence around land were or should have been known to the IFC, the CAO found that the due diligence carried out by the IFC had not been commensurate to the risk, and thus did not meet a key requirement of the Sustainability Policy. By inadequately categorizing and assessing risk during the pre-investment stage, the IFC did not meet its own internal ex ante due diligence requirements. To bring



its operations into compliance with internal institutional law (the Sustainability Framework) and with obligations under international law, the IFC needs to revisit its current due diligence process, and to change the way in which it operationalizes the due diligence requirements in practice and assesses project risks.

## **The Solution: Incorporating Human Rights Risk Information Into the IFC's Due Diligence**

The shortcomings identified above could be addressed by systematically considering human rights risk information before the first IFC disbursement (*ex ante*), before project harms and reputational damage have occurred, and after the first disbursement (*ex post*) to ensure that compliance with conditionalities is included in the loan agreement. Human rights risk information should be dealt with in the same way as other relevant information sources that the IFC already consults to conduct environmental and social due diligence. Human rights risk information could inform the IFC's Environmental and Social team about corruption, unequal treatment of ethnic minorities, conflicts centered around land use, armed conflict, poverty, and unavailability of natural resources, to name just a few. Consideration of human rights risk information could thus further strengthen country diagnostics and social and environmental risk assessment, resulting in better-informed monitoring, redress and mitigation measures. Here, a methodology for the IFC to identify and adequately address human rights risks at various stages of the project cycle is proposed.

The human rights risks associated with a project can generally be divided into two categories: region- or country-specific, and sector-specific. The sources for the risks can be further classified by actor-type: formal actors, informal actors, and the World Bank Group itself. Formal actors like international organizations and state governments publish regional and country specific reports based on country visits and stakeholder engagements. Consultation of US State Department and OHCHR country conditions reports in the Dinant case would have alerted the IFC to the land disputes and violence surrounding palm oil plantations. Further, informal actors like civil society groups, media, and academic writers frequently publish reports providing information about the economic, social and political situations in the country as well as in particular sectors of industry. The World Bank Group itself has access to information obtained during the assessment stages of a project and through consulting processes. IFC requirements such as site visits, community engagement, and grievance mechanisms could have been used to supplement human rights risk information identified through desk research.

In many cases, the early integration of human rights risk information and mitigation measures could have helped the IFC avoid costly failures, significant harm to individuals and communities and harm to its own reputation. The Dinant-Honduras case was characterized by inadequate human rights due diligence and, to varying degrees, by inadequate analysis of the political and social context and of supervision. In the Honduran case, human rights risk information was readily available from the international human rights system and from reputable sources on sector-specific risks, but was not consulted. The adoption of a systematic methodology to consider human rights in its due diligence practices would have made a difference for the IFC's involvement in Dinant-type investments. Had the IFC properly accessed the relevant and available risk information, it would have assigned the project to a higher risk category, which would have led either to more extensive monitoring and supervision, or to a decision to not fund the project at all.

## Conclusion

The IFC has to some extent already acknowledged the importance of paying adequate attention to human rights considerations; it has adopted a version of the “do no harm” principle, it does not invoke the political prohibition clause to avoid consideration of human rights, and it has internalized a set of due diligence responsibilities. Further, the IFC has adopted certain procedural human rights obligations, by incorporating aspects of the principles of transparency, participation and accountability in the formulation of its policies. Thus the IFC has also adopted an Access to Information policy, its Performance Standards require consultation with affected communities, and it complies with the CAO’s investigations and audits, which should lead to better decision-making and accountability. These principles are rooted in concepts of international human rights and good governance in the field of sustainable development.

In essence, the IFC has adapted its internal institutional law over time to recognize the need to mitigate ex ante the potentially harmful ex post human rights consequences which undermine the effectiveness of the IFC’s projects and its reputation. This report argues that the IFC should build proactively on this trend, rather than reacting in an ad hoc and occasional way to the criticisms and outrage of civil society. In order to effectively realize its mandate, to fulfill the formal commitments articulated in internal policies like its Sustainability Framework, and to satisfy its human rights obligations under international law, the IFC should integrate adequate consideration of human rights into its due diligence policies.



# PART I

## Obligations under International Law to Incorporate Human Rights Considerations into Due Diligence

### 1. Introduction

#### 1.1 About the IFC

The International Finance Corporation (“IFC”) is a legally and financially independent member of the World Bank Group. It is the world’s largest international development organization that focuses on the private sector.<sup>1</sup> The IFC’s Articles of Agreement call for it to “further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less-developed areas.”<sup>2</sup> The IFC sets out to fulfill its mandate by providing capital and guidance to private-sector entities in developing countries.

#### 1.2 The IFC and Sustainable Development

There has been a gradual shift in the interpretation of the development mandates and policies of international financial institutions over the last few decades. Since the 1980s, there have been increasing calls for “adjustment with a human face,” and movement towards viewing poverty reduction and the realization of human rights as complementary rather than distinct and unrelated goals.<sup>3</sup> International financial institutions gradually began to consider environmental and social risks when carrying out their operations, and the view that human rights are “central to the success of poverty alleviation programs” became more widely held.<sup>4</sup> This changing view was also adopted by various actors within the World Bank Group.<sup>5</sup> Furthermore, some of the earlier and highly restrictive interpretations of the “political prohibition” clause of the articles of agreement of the World Bank and the IFC, which limited the permissible engagement of the international financial institutions with human rights, are no longer dominant within the Bank group.<sup>6</sup>

<sup>1</sup> See About IFC: Overview, INTERNATIONAL FINANCE CORPORATION (2016), [https://www.ifc.org/wps/wcm/connect/0d31877e-ca84-46b0-9e05-60ff442653c1/IFC\\_AR16\\_Section\\_1\\_AboutIFC.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/0d31877e-ca84-46b0-9e05-60ff442653c1/IFC_AR16_Section_1_AboutIFC.pdf?MOD=AJPERES).

<sup>2</sup> Articles of Agreement of the IFC, Art. I.

<sup>3</sup> See Adam McBeth, Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights, 40 *Geo. Wash. Int’l L. Rev.* 1113, 1124 (2008).

<sup>4</sup> Siobhán McInerney-Lankford, International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations, in *INTERNATIONAL FINANCIAL INSTITUTIONS & INTERNATIONAL LAW* 240, 242 (Bradlow & Hunter eds, 2010). Influential and distinguished thinkers have argued that human rights are an integral part of development itself. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

<sup>5</sup> Senior Vice President and General Counsel of World Bank, Legal Opinion on Human Rights and the Work of the World Bank 9 (Jan. 27, 2006) (World Bank’s Articles of Agreement “permit, and in some cases require the Bank to recognize the human rights dimensions of its development policies and activities”); Roberto Danino, The Legal Aspects of the World Bank’s Work on Human Rights, 8 *DEVELOPMENT OUTREACH* 30 (2006) (subsequent general counsels at the Bank have later expressed a more restrictive view of the role of human rights in the work of the Bank, but an opinion of a later general counsel of the Bank expressed the view that “this conception of the alleviation of poverty has an especially strong human rights dimension”).

<sup>6</sup> The “political prohibition” clause is contained in the Articles of Agreement of the IFC, Art. III, §9. While certain legal counsel of the Bank, and in particular Anne Marie Leroy, adopted a restrictive reading of the clause, suggesting that the institutions must only take into account economic considerations. Others including Ibrahim

The IFC has also gradually embraced a sustainable approach to development. The IFC did not initially have a formal environment or social policy approach to its development activities, but in 1993 it developed an environmental review procedure in line with the World Bank's approach to social and environmental policies.<sup>7</sup> These procedures continued to develop until 2001, when the IFC Board approved a document that made explicit reference to the concept of "sustainability." The plan involved a triple bottom line approach—"measuring people, planet, and profits."<sup>8</sup> By 2017, the IFC already had two iterations of its sustainability policies; each version purportedly adopting "valuable lessons from IFC's implementation experience and feedback from [its] stakeholders and clients around the world."<sup>9</sup> The current Sustainability Policy states that central to the "IFC's development mission are its efforts to carry out investment and advisory activities with the intent to 'do no harm' to people and the environment."<sup>10</sup>

To effectuate its commitment to sustainability, the IFC imposes a range of "due diligence" obligations regarding environmental and social risks on its clients through eight Performance Standards adopted as part of its Sustainability Framework.<sup>11</sup> The IFC itself conducts due diligence of its clients' commitments and capacities to reduce risks, and it works with clients to improve projects' social and environmental outcomes. Though many of the social and environmental risks covered in the Performance Standards have a human rights dimension, the IFC views the responsibility to respect human rights as being primarily the obligation of the client and—according to available information—rarely undertakes or imposes "human rights due diligence" as a prerequisite for investment.<sup>12</sup> In that sense, the IFC lags behind many private sector entities that have adopted a rights-based approach to due diligence.<sup>13</sup>

### 1.3 Aim of this Report

The IFC has greatly expanded its due diligence practices since its founding, to the point of becoming an industry leader with regard to its sustainability policies.<sup>14</sup> Nevertheless, gaps and weaknesses remain. The IFC has been the target of criticism after several of its projects have been implicated in serious human rights violations.<sup>15</sup> This report

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Shihata, Roberto Danino and Ana Palacio, have adopted a range of less restrictive interpretations. For a discussion, see Hassane Cissé, Should the Political Prohibition Clause in Charters of the IFIs be Revisited?, in *THE WORLD BANK LEGAL REVIEW* 59 (Bradlow & Hunter eds., 2010). See also Roberto Danino, Legal Aspects of the World Bank's Work on Human Rights, in *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL ENFORCEMENT* 509 (Alston & Robinson ed., 2005); Ana Palacio, The Way Forward: Human Rights and the World Bank, 8 *DEVELOPMENT OUTREACH* 35, 35–37 (2006).

7 See CAO, A Review Of IFC's Safeguard Policies 13 (Jan. 2003), available at <http://www.cao-ombudsman.org/howwework/advisor/documents/ReviewofIFCSPsfinalreportenglish04-03-03.pdf>.

8 See id.

9 IFC, Sustainability Framework Fact Sheet, [http://www.ifc.org/wps/wcm/connect/6c6cd30049800a1fa93bfb336b93d75f/Updated\\_SustainabilityFramework\\_Fact-sheet.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/6c6cd30049800a1fa93bfb336b93d75f/Updated_SustainabilityFramework_Fact-sheet.pdf?MOD=AJPERES).

10 IFC's Policy on Environmental and Social Sustainability, para. 9 (2012) [hereinafter Sustainability Policy]. Moreover, the IFC seeks to ensure costs of economic development do not fall disproportionately on those who are poor or vulnerable. Id.

11 See Appendix: Annex B, infra. The IFC makes investments in adherence to its Policy on Environmental and Social Sustainability ("the Sustainability Policy") and Performance Standards (PSs)—together referred to as the Sustainability Framework.

12 The IFC's due diligence process is articulated in its Sustainability Policy (2012). As will be outlined in this report, the IFC's due diligence differs from the kind of 'human rights due diligence' which has "risen to prominence as a potential tool for meeting the twin challenges of shaping better business behavior and providing access to justice for victims when business fails to meet the standards set by society. Due diligence is . . . a means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause, and through which judicial and regulatory bodies can assess an enterprise's respect for human rights." Olivier de Schutter et al., Human Rights Due Diligence: The Role of States (2012), <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf>.

13 The OECD has suggested that some IFIs are notable outliers in their approach to human rights; it notes that many multilateral development agencies are now much more involved in human rights mainstreaming, dialogue and projects. See OECD, *INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT* 149 (2nd ed. 2013); OECD, *DAC Action-oriented Policy Paper On Human Rights And Development* (2007).

14 The IFC initially published Performance Standards in 2006, expanding on the safeguard policies in place since 1998. For the first time, they required environmental and social action plans for all projects. Its Performance Standards, further updated in 2012, were influential in the development of the Equator Principles, which are presently used by many financial institutions. See Ana Maria Estevez, *Social Impact Assessment: The State of the Art*, 30 *Impact Assessment & Project Appraisal* 34, 36 (2012); Daniel Franks & Frank Vanclay, *Social Impact Management Plans: Innovation in Corporate and Public Policy*, 43 *Env. Imp. Assess. Rev.* 40–45 (2013).

15 While the IFC enjoys immunity under Article VI of its Articles of Agreement, such immunity is likely to continue to come under pressure before domestic courts and in other fora. See e.g. the recent Earthrights litigation in *Jam v. IFC*, 46 *ELR* 20069, No 15-612, (DDC 2016). Due diligence has traditionally functioned as an affirmative defense to actions brought even if an immunity claim is unavailable.

urges the IFC to take human rights explicitly into account during its due diligence process since it is required to do so under international law, and perhaps more importantly for the IFC, because inadequate consideration of human rights at the due diligence stage contributes to the likelihood of human rights violations in IFC projects. This report also proposes a systematic way for the IFC to gather human rights risk information and to take human rights into consideration more effectively within its due diligence processes.

Part I of this report is structured as follows. Section (2) examines the extent to which the IFC is bound by international law, specifically international human rights law. Section (3) introduces the principle of due diligence, and explains how it can be used to satisfy the IFC's underlying legal obligations, especially those under international human rights law. The following Section (4) identifies and articulates the IFC's legal duty of due diligence under its international human rights obligations. It then measures the IFC's current practice under its Sustainability Framework against its legal obligations and highlights areas in which the practice of the IFC does not match the scope of its international obligations.

Part II first proposes a methodology the IFC could adopt to gather human rights risk information. The proposed methodology is then applied to a hypothetical case similar to the IFC-funded Dinant Corporation in Honduras, an illustrative case involving a range of human rights violations often implicated in IFC projects.

## 2. The IFC's Obligations under International Law

International law has traditionally regulated state behavior. However, the increased power exercised by international organizations has generated debate about the legal obligations and responsibilities of such actors. The International Law Commission (ILC) in 2011 addressed this topic by adopting the Draft Articles on the Responsibility of International Organizations (DARIO) modeled on the ILC's 2001 Articles on State Responsibility (ASR). These draft articles note that the legal obligations of an international organization under international law "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order...and are likely to arise from the rules of the [international] organization... [such as] the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization".<sup>16</sup>

While the DARIO in many respects do not enjoy the consensus underpinning the ASR<sup>17</sup>, the International Court of Justice ("ICJ") has long taken a similar view to the Draft Articles at least on the question of international organizations being subjects of international law and hence bound by certain legal obligations. The ICJ stated in 1980 that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."<sup>18</sup>

The sections below examine the extent to which the IFC is bound by international law, specifically by international human rights law. The international legal personality of the IFC and its implications are first discussed. This is followed by an analysis of the IFC's human rights obligations, which stem from three distinct sources: customary international law, the UN Charter, and arguably also from "transitive" obligations derived from the direct international legal obligations of the IFC's member states.

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<sup>16</sup> ILC, DARIO Commentary, at 31, 63rd Sess., U.N.Doc. A/66/10 (2011).

<sup>17</sup> Indeed, many prominent commentators have criticized DARIO and suggested that it is not widely accepted as an accurate statement of international law, unlike the predecessor Draft Articles on State Responsibility. See, e.g., Jose Alvarez, *Governing the World: International Organizations as Lawmakers*, 3 SUFFOLK TRANSNAT'L L. REV. 591, 612 (2008) ("What the ILC has done is essentially to take the ILC's previous, and highly successful, effort to delineate articles of state responsibility and do a "global search and replace" so that anywhere the word "state" appeared in the old articles, the word "international organization" now appears.").

<sup>18</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep.73, paras. 89–90 (Dec. 20) [hereinafter WHO and Egypt ICJ Opinion].

## 2.1 The International Legal Personality of the IFC

An international organization may incur international responsibility only if it possesses international legal personality.<sup>19</sup> Legal personality is also generally presumed to be necessary for international organizations to execute the mandate articulated by their member states in the constituent treaty.<sup>20</sup> The ICJ in the Reparations case found that the United Nations enjoyed legal personality under international law, because the UN enjoyed powers which flowed implicitly from the tasks conferred on the organization.<sup>21</sup> The ICJ further noted that “whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”<sup>22</sup> In other words, international organizations do not necessarily have the same comprehensive legal personality as states—rather, their legal personality, including the rights they enjoy and the obligations they have, is determined by their tasks and purposes.<sup>23</sup>

Following the ICJ’s reasoning in the Reparations case, the IFC is capable of enjoying rights and being subject to international law to the extent necessary for the performance of its functions and tasks.<sup>24</sup> Additionally, its own Articles of Agreement also confer legal personality upon the IFC.<sup>25</sup> Scholars and practitioners of international law generally agree that “international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law.”<sup>26</sup> Hence, as a subject of international law and given its purpose and function, the IFC is bound by a range of international legal obligations, including those under international human rights law.<sup>27</sup> The extent of these obligations is explored in the next three sections.

## 2.2 The IFC Has Human Rights Obligations under Customary International Law

International organizations have on occasion argued that since they have not ratified or “formally confirmed” international human rights treaties, they do not have treaty-based obligations.<sup>28</sup> However, the ICJ has ruled that international legal obligations including human rights obligations arise not only under treaties but also from “general rules of international law.”<sup>29</sup> Consequently, three general arguments for the applicability of international customary law and general principles to international organizations have been advanced: first, international organizations are subjects of international law; second, member states have bound the organization to customary rules; and third, customary rules and general principles are part of “general international law,” which applies to international organizations.<sup>30</sup>

<sup>19</sup> DARIO art. 2(a) (international organizations’ legal personality is a necessary precondition for them to bear responsibility under international law). See the discussion in MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 125 (2003); SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 63–71 (2001); ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 22 (1995).

<sup>20</sup> See JAN KLABBERS, INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 51 (2nd ed., 2009).

<sup>21</sup> See Reparation for injuries suffered in the service of the Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, para. 10 (Apr. 11).

<sup>22</sup> *Id.*

<sup>23</sup> See generally Nneoma Chigozie Udeairry, To What Extent do International Organizations Possess International Legal Personality?, (Sept. 15, 2011), <http://dx.doi.org/10.2139/ssrn.2052555>.

<sup>24</sup> DANIEL BRADLOW & DAVID HUNTER, INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 11 (2010).

<sup>25</sup> Articles of Agreement of the IFC, Art. II (“[t]he Corporation shall possess full juridical personality and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings”).

<sup>26</sup> August Reinisch, The Changing International Legal Framework for Dealing with Non-State Actors in NON-STATE ACTORS AND HUMAN RIGHTS 46 (Alston ed., 2005).

<sup>27</sup> See DARROW, *supra* note 19; BRADLOW & HUNTER, *supra* note 24, at 11; B.S. Chimni, International Financial Institutions and International Law: A Third World Perspective, in INTERNATIONAL FINANCIAL INSTITUTIONS & INTERNATIONAL LAW 43 (Bradlow & Hunter eds, 2010).

<sup>28</sup> See e.g., François Gianviti, Economic, Social and Cultural Rights and the International Monetary Fund 14, 18, 44 (2001) (unpublished paper); and IBRAHIM SHIHATA, THE WORLD BANK INSPECTION PANEL 241 (2nd ed., 1994).

<sup>29</sup> WHO and Egypt ICJ Opinion, *supra* note 18, at paras. 89–90.

<sup>30</sup> HENRY G. SCHERMERS, THE LEGAL BASIS OF INTERNATIONAL ORGANIZATION ACTION 402 (1998).



Although the use of the phrase “general international law” by international courts and tribunals is inconsistent and has given rise to some confusion,<sup>31</sup> an entity with legal personality is arguably bound by customary international law. It has been suggested that since international organizations cannot create or generate customary international law, the courts’ use of the modifier “general” describes “rights and obligations as generally applicable and binding on every entity that has the capacity to bear them.”<sup>32</sup> Thus, notwithstanding the slight ambiguity of this term, an entity with international legal personality and hence such capacity may bear relevant obligations under customary international law.<sup>33</sup>

The question then becomes which rules of international human rights law have reached the status of custom. The extent to which all of the provisions of the Universal Declaration of Human Rights are binding as a matter of customary international law is debated.<sup>34</sup> It is also debated whether international organizations are bound by customary human rights standards resulting from treaties that have been signed or ratified by nearly all States with the intention to create universal law.<sup>35</sup>

Nevertheless, it has been widely recognized that many specific provisions of the UDHR have acquired the status of customary international law or the status of general principles of international law, and are therefore legally binding.<sup>36</sup> Some of the political and civil rights that enjoy wide support as customary international law include rules prohibiting arbitrary killing, slavery, torture, detention, and systematic racial discrimination.<sup>37</sup> Economic and social rights may be of particular concern to the IFC, as many of the rights commonly violated in the course of IFC projects fall into this category. The UN Committee on Economic, Social and Cultural Rights has stated that UN agencies engaged in projects involving forced labor and large-scale eviction<sup>38</sup> are contrary to the ICESCR.<sup>39</sup> Other economic and social rights that have been found to “enjoy sufficiently widespread support so as to be at least potential candidates for rights recognized under customary international law are: the right to free choice of employment; the right to form and join trade unions; and the right to free primary education, subject to a state’s available resources.”<sup>40</sup>

It is broadly accepted that at least some provisions of human rights law have the status of *jus cogens* and bind every subject of international law.<sup>41</sup> Some of the rights which have been identified as *jus cogens* or in the course

<sup>31</sup> Kristina Daugirdas, *How and Why International Law Binds International Organizations* 11, 16 (N.Y.U. Sch. Law, Jean Monnet Working Paper Series, 16/15, 2015); See also GENNADI DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 9–10 (1993) (noting various ways that the term “general international law” and similar variations are used); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 436–37 (1983) (It is sometimes used to refer to customary international law and general principles of international law).

<sup>32</sup> ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 87 (2005) (“customary international law (what is sometimes referred to as general international law, as opposed to treaty law) is often employed to hold non-state actors accountable under international law . . . The adjective ‘general’ is employed here because it is misleading to suggest that [IOs] have generated these rights and obligations through ‘custom.’”)

<sup>33</sup> Sanae Fujita, *The Challenges of Human Rights Mainstreaming in the World Bank*, 15 INT’L J. OF HUM. RTS. 374, 374–75 (2011) (“[a] legal person is bound by customary international law including some provisions in the Universal Declaration of Human Rights.”).

<sup>34</sup> DARROW, *supra* note 19, at 130.

<sup>35</sup> Martin Faix, *Are International Organizations Bound by Human Rights Obligations*, 5 CZECH Y.B. PUB. PRIV. INT’L L. 267, 286 (2014). Note that the Convention against Torture has been ratified by 160 states and signed by ten more; the International Convention on Civil and Political Rights has been ratified by 168 states and signed by seven more, and the International Convention on Economic and Social Rights has been ratified by 164 States and signed by six more. The ILO Declaration on Fundamental Principles and Rights at Work enjoys near universal adherence. See OHCHR, *Status Of Ratification Interactive Dashboard*, <http://indicators.ohchr.org/>.

<sup>36</sup> Hurst Hannum, *The Status of Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L., 287, 317, 322–54 (1995); J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character in HUMAN RIGHTS. THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 21–37 (B.G. Ramcharan ed., 1979).

<sup>37</sup> CLAPHAM, *supra* note 32, at 86.

<sup>38</sup> This may violate the right to housing. See, e.g., *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUMAN RIGHTS Q. 691 (1997) (Forced eviction results in the violation of right to housing as the state’s obligation to respect requires it to refrain from interfering with the enjoyment of economic, social and cultural rights. Also, in light of obligations to protect, states have to prevent violations of rights by third parties).

<sup>39</sup> U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant)*, para. 6, U.N. Doc. E/1990/23 (Feb. 2, 1990). In negative terms, it requires IOs to not be engaged in projects involving activities in contravention of principles of international law, such as forced evictions or forced labor. Positively, it also requires the agencies to promote projects resulting in not only economic advancement, but also in the enhancement of the broad range of human rights. See also *International Covenant on Economic, Social and Cultural Rights*, art. 22; CLAPHAM, *supra* note 32, at 144 n.135.

<sup>40</sup> Hannum, *supra* note 36, at 349.

<sup>41</sup> Faix, *supra* note 35, at 286; Daugirdas, *supra* note 31.

of becoming *jus cogens* include: the right to life; the right to humane treatment; prohibition of slavery or forced labor; prohibition of discrimination on the basis of race, color, sex, language, religion, or social origin; prohibition of imprisonment for civil debt; prohibition of crimes against humanity; the right to legal personhood; and the freedom of conscience.<sup>42</sup> There is also significant overlap between those rights that have acquired customary status and the rights that have come to be recognized as *jus cogens* or obligations *erga omnes*.<sup>43</sup>

It is now clear that “to the extent that there is a live debate in the academy over the human rights obligations of international financial institutions, it centers on the scope—not the existence—of those obligations.”<sup>44</sup> Specifically, there is some discussion regarding whether international organizations have a duty to “respect,” “protect,” and “fulfill” human rights, or only some more limited range of duties.<sup>45</sup> The core component of the obligation to respect is to “do no harm”. This requires abstaining from doing anything that infringes on an individual’s freedom or integrity. The obligation to protect generally requires taking measures necessary to prevent third parties (individuals or groups) from violating the integrity, freedom of action or human rights of the individual, whereas the obligation to fulfill requires taking further measures necessary to ensure opportunities for individuals to realize rights recognized in human rights instruments.<sup>46</sup>

The tripartite framework for obligations was initially developed in relation to states. It has been argued that if an international organization is not party to any treaties, it does not have the same obligations states do under those treaties. Accordingly, an international organization may have less extensive obligations to protect human rights than do states with a plenary set of powers. International organizations’ duty to “fulfill” certain human rights obligations is likely to be more limited than that of states, given their functionally more limited tasks and powers.<sup>47</sup> An international organization’s duty is, at a minimum, to respect human rights under the do-no-harm principle.<sup>48</sup>

The negative obligation to do no harm<sup>49</sup> requires the international organization to take measures to fulfill such a duty. For example, a minimum obligation of respect for human rights would require international financial institutions such as the IFC to “ensure that their advice, policies and practices do not lead to violations of the right to food.”<sup>50</sup> In order not to infringe relevant human rights, the organization would need to carry out impact studies on vulnerable groups at risk before taking action.

In conclusion, under customary international law, the IFC as an international organization enjoying international legal personality has at the very least the legal duty to respect and avoid infringing those international human rights that have reached level of customary international law or *jus cogens*.

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<sup>42</sup> The source of many of these rights is the International Covenant on Civil and Political Rights (ICCPR), but they are also to be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the ICC Statute. See INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS 34-45 (F.F.Martin et al. eds., 2006).

<sup>43</sup> DARROW, *supra* note 19. See also Vienna Convention art. 53; Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep.3, para. 33 (Feb. 5).

<sup>44</sup> Bank Information Center, The Role and Responsibilities of International Financial Institutions with Respect to Human Rights and Their Relevance to the Private-Sector (Feb. 2007); CLAPHAM, *supra* note 32, at 150–52.

<sup>45</sup> See Asbjorn Eide, Realization of Social and Economic Rights and the Minimum Threshold Approach, 10 HUMAN RIGHTS J. 37 (1989). For different perspectives, regarding the appropriate level of obligation, see SKOGLY, *supra* note 19, at 109, 145; DARROW, *supra* note 19, at 132–33; CLAPHAM, *supra* note 32, at 151.

<sup>46</sup> Eide, *supra* note 45, at 37.

<sup>47</sup> DARROW, *supra* note 19, at 131–32. See also CLAPHAM, *supra* note 32, at 151 (the human rights obligations of international organizations, including the relevant customary international human rights law, are based on their international legal capacity. Non-state actors “can therefore be said to have obligations, not only to respect human rights, but also to protect and even fulfill human rights in appropriate circumstances”).

<sup>48</sup> SKOGLY, *supra* note 19, at 151, 193.

<sup>49</sup> SANAE FUJITA, THE WORLD BANK, ASIAN DEVELOPMENT BANK AND HUMAN RIGHTS: DEVELOPING STANDARDS OF TRANSPARENCY, PARTICPATION AND ACCOUNTABILITY 9 (2013).

<sup>50</sup> U.N. Commission on Human Rights, Report of the Special Rapporteur on Right to Food: Mission to India, para. 43, U.N. Doc. E/CN.4/2006/44 (Mar. 20, 2006).



### 2.3 The IFC Has Obligations under the UN Charter

The World Bank Group, to which the IFC belongs, is a UN specialized agency whose actions are arguably covered by the human rights provisions of the UN Charter.<sup>51</sup> Based on this specialized agency status, the provisions of the UN Charter governing the purposes and principles of the UN are applicable to the Bank and its groups.<sup>52</sup> Article 1(3) of UN Charter specifies, among the purposes of the Organization, the promotion and encouragement of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Moreover, Article 55(c) of the UN Charter expressly requires that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”<sup>53</sup>

It has been argued that since the specialized agencies’ legal relationship with the UN has been established by a separate agreement, the UN Charter as a treaty can only bind UN member states and organizations established by the Charter.<sup>54</sup> However, Article 103 of the UN Charter, which provides for the supremacy of the UN Charter over any other international agreement (including the agreement establishing the relationship of the specialized agencies), can also be invoked to assert the primacy of the human rights provisions of the Charter.<sup>55</sup> Hence, international financial institutions have been said to be “legally obligated to not conduct actions contravening the principles and purposes of the UN Charter, and also to respect the Charter, including the human rights provisions.”<sup>56</sup> The legal obligation established by Articles 55–57 entails a duty to respect basic human rights.<sup>57</sup> As to which rights are protected, the UDHR has been described as serving as an ‘authoritative interpretation’ of the nature of Charter-based obligations.<sup>58</sup>

The World Bank has noted that it is legally more independent from the UN than other specialized agencies, particularly the World Health Organization (WHO). The relationship agreement between the UN and WHO includes specific reference to the “obligation of the UN to promote the objectives set forth in Article 55 of the Charter.”<sup>59</sup> The fact that a similar reference is not included in the relationship agreement between the UN and World Bank does not mean that it is unaffected by the obligations in Article 55. On the contrary, the inclusion of the reference to Article 55 in the WHO relationship agreement shows that the specialized agencies’ role in promoting the goals of Article 55 has been recognized.<sup>60</sup> Further, it is entirely reasonable to argue that the independence of the institutions of the World Bank Group is independence from UN interference or from attempts to direct the institution, rather than the non-applicability of international law as expressed in the UN Charter.<sup>61</sup>

<sup>51</sup> Agreement between the United Nations and the International Bank for Reconstruction and Development art. 1(2), Apr. 15, 1948, 109 U.N.T.S. 341. See also *The World Bank Group And The United Nations: Working Together for Development*, <http://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/WBG-UN-Brochure.pdf>.

<sup>52</sup> See, e.g., K. TOMASEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS: A STUDY FOR THE DANISH CENTRE OF HUMAN RIGHTS* 31 (1989).

<sup>53</sup> U.N. Charter Art. 1, 55.

<sup>54</sup> FUJITA, *supra* note 49, at 10; *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 799 (B. Simma et al. eds., 1994). *Contra* THOMAS BUERGENTHAL, *The World Bank and Human Rights*, in *THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS, AND THE DEVELOPMENT OF INTERNATIONAL LAW: A SYMPOSIUM HELD IN HONOR OF IBRAHIM F.I. SHIHATA*, in *THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* 31 (Weiss et al. eds., 1999) (ICJ Justice Buergerthal has stated that the World Bank has obligations that arise under the United Nations Charter and other human rights treaties).

<sup>55</sup> Skogly notes that this point developed by the ILC can be used to argue that agreements the WB enters into with its member countries, which are also UN member countries, will be subject to Article 103. See SKOGLY, *supra* note 19, at 101–02. See also DARROW, *supra* note 19, at 128.

<sup>56</sup> SKOGLY, *supra* note 19, at 102.

<sup>57</sup> DARROW, *supra* note 19, at 124–29; Article 55 states that the UN shall promote . . . (c) universal respect for, and observance of, human rights and fundamental freedoms. . . .” Article 56 provides that “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” Some commentators argue that Article 57, which brings a specialized agency into relationship with the UN, works together with Article 56 to bind UN member states and specialized agencies to work with the UN to achieve the goals articulated in Article 55. See, e.g., M. Elahi, *The Impact of Financial Institutions on the Realization of Human Rights: Case Study of the International Monetary Fund in Chile*, 6 *BOS. C. THIRD WORLD L. J.* 143, 148 (1986).

<sup>58</sup> DARROW, *supra* note 19, at 128; see Philip Alston & Bruno Simma, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. INT’L L.* 82, 82–108 (1992).

<sup>59</sup> SKOGLY, *supra* note 19, at 104.

<sup>60</sup> *Id.* at 119.

<sup>61</sup> *Id.* at 105.

In conclusion, the UN Charter imposes obligations on its member states and on the UN system itself to promote universal respect for human rights. This obligation applies to the specialized agencies like the World Bank to which the IFC belongs, since its relationship agreement connects the IFC to the principles and purposes articulated in the UN Charter. This relationship with the UN implies an obligation to at least respect the Charter provisions.<sup>62</sup>

## 2.4 The IFC May Incur Obligations via its Member States

As an international organization created by and composed of states, the IFC may incur human rights obligations indirectly via its member states. Member states of the IFC have obligations under international law, which include those under international human rights law. Their human rights obligations stem from the UN Charter, international human rights treaties, customary international law, and general principles of law. States do not shed their international legal obligations when creating international organizations, including any international financial institutions.<sup>63</sup> If states were to create institutions with lower standards than those the states are required to comply with under international human rights law, they would effectively be circumventing their international legal obligations. Further, the IFC could even be bound by the obligations contained in the treaties to which its member states are parties. This has the effect of transferring the relevant obligations of member states to the IFC within the context of the IFC's relevant powers and tasks.<sup>64</sup> This has been described as an international organization being “transitively bound” by its member states’ treaty obligations.<sup>65</sup>

However, the ‘transitive’ account of the human rights obligations of international organizations has been contested. Taken seriously, such an approach could give rise to conflicts between the treaty obligations of states and the provisions of treaties that establish international organizations.<sup>66</sup> The number and content of human rights obligations, for example, vary from state to state depending upon how many binding human rights treaties each state has ratified. Nevertheless, even if the strong version of the ‘transitive’ argument is rejected, it is eminently reasonable to argue that governments are “obliged to ensure that the organizations operate in a manner consistent with the human rights provisions of the UN Charter, and other general principles of international law and human rights law.”<sup>67</sup> An argument for hybrid responsibility can also be made: states are required to ensure that the IFC does not contravene its human rights obligations.<sup>68</sup>

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<sup>62</sup> U.N. Charter art. 55; SKOGLY, *supra* note 19, at 105, 120 (“It is not said that the UN shall promote human rights, which is a different level of obligations than promoting respect for human rights”). See also Philip Alston, *The International Monetary Fund and the Right to Food*, 30 *HOW. L. J.* 473, 479 (1987).

<sup>63</sup> See Paul Hunt, *Using Rights as a Shield*, 6 *HUM. RTS. L. PRAC.* 111 (2002).

<sup>64</sup> See Alston, *supra* note 62, at 479–80 (“the IMF ought not to encourage or facilitate a state’s violating [its] international legal obligations by encouraging it, or in effect forcing it to enter into an agreement which in fact violates the economic rights of the citizens of that country”); SKOGLY, *supra* note 19, at 83 (describing Schermers and Blokker’s argument that it is “plausible” that treaties can bind IOs without their consent).

<sup>65</sup> Frédéric Mégret & Florian Hoffmann, *The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 *HUM. RTS. Q.* 314, 318 (2003) (explaining that the United Nations is bound by international human rights standards “as a result and to the extent that its members are bound”).

<sup>66</sup> Daugirdas, *supra* note 31, at 31.

<sup>67</sup> SKOGLY, *supra* note 19, at 109.

<sup>68</sup> The IFC is to some extent obligated to respect member states’ obligations by taking positive actions to ensure that its internal policies are sufficiently protective of human rights. See U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observation of Committee on Economic, Social and Cultural Rights: Egypt*, para. 28, UN Doc. E/C.12/1/Add/44 (May 23, 2000) (Egypt needs to take into account social and cultural rights of its vulnerable groups in its negotiations with IFIs). See also U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observation of Committee on Economic, Social and Cultural Rights: Italy*, para. 20, UN Doc. E/C.12/1/Add/43 (2000) (Italy needs to do all that it can to ensure that IMF policies and decisions are in conformity with Art. 2(1) of the ICESCR); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 *HUMAN RIGHTS Q.* 691, 698 (1997) (“the obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively”).

<sup>69</sup> McBeth, *supra* note 3, at 1106 (citing JORGE DANIEL TAILLANT, *HUMAN RIGHTS AND THE INTERNATIONAL FINANCIAL INSTITUTIONS* (2002)). See also Annex I of the submission of the UN Office of the High Commissioner for Human Rights on the World Bank’s then draft Environmental and Social Framework in March 2016, Business & Human Rights Resource Centre, *Frequently Asked Questions on Human Rights and Multilateral Development Banks*, <https://business-humanrights.org/en/ohchrs-comments-on-world-bank%E2%80%99s-draft-environmental-social-framework>.

The consequence of this argument is not that the IFC ought to function as a kind of “human rights police”<sup>69</sup> that engages with a client in a given state only if that state complies with its human rights obligations under international law.<sup>70</sup> Rather the argument recognizes that states are the primary bearers of responsibility when it comes to human rights obligations and insists that the IFC ought to anticipate what human rights concerns it needs to take into account in its internal practices in order to assist its member states in meeting their human rights obligations. Echoing this approach, the United Nations Economic and Social Council (ECOSOC) has stated that international financial institutions are obligated to take measures that are in line with member states’ human rights obligations.<sup>71</sup> This will require the IFC to take some positive actions to prevent human rights violations, and in effect comply with the “do no harm” principle.

Under this line of argument, the IFC should not fund, and thus empower, private sector rights-abusers, whose violations become the member state’s responsibility to control. That said, while a persuasive argument can be made that the IFC should consider its member states’ legal obligations when formulating policy, this transitive duties argument is not yet widely accepted.

## **2.5 Conclusion: The IFC’s Human Rights Obligations under International Law**

In summary, the IFC’s human rights obligations stem from three distinct sources. First, certain international human rights laws directly bind the IFC itself as a subject of international law that must comply with relevant customary international law and general principles. A range of human rights has reached the level of custom and in some cases these rights are also considered *jus cogens*. The economic and social rights in this category are likely to be of particular concern to the IFC, as these encompass many of the rights commonly violated by IFC projects.

Second, the IFC, as part of the World Bank Group, is part of a UN specialized agency, and is thus affected by the requirements of the UN Charter. While the independence of the institutions of the World Bank Group is noted in the relationship agreement with the UN, this refers to their independence from UN interference or from attempts to direct the institutions, rather than the non-applicability of international law articulated in the UN Charter. Articles 55–57 of the UN Charter, which entail a duty to respect basic human rights, are also applicable to the IFC. As to which rights are protected, the Universal Declaration on Human Rights has been described as an ‘authoritative interpretation’ of the nature of Charter-based obligations.

Third, the IFC may be bound, within the scope of the tasks and powers conferred upon it, by the obligations contained in the treaties to which its member states are parties. While this transitive account of the human rights obligations of international organizations has been contested, a persuasive argument can be made that the IFC should consider the legal obligations of its member states, including their relevant human rights obligations, when formulating its policy.

Considering the IFC’s obligations under international human rights law, it has been suggested that the IFC, a subject of international law, owes a minimum obligation of due diligence to “ensure that the subject’s own policies, actions, or possible neglect do not undermine the human rights obligations of other subjects of international law.”<sup>72</sup> The next section analyzes the current scope and content of due diligence under international law in order to propose how the IFC could satisfy its external human rights obligations through due diligence.

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<sup>70</sup> “Such a position would render IFIs an enforcement tool of international human rights law in relation to states’ obligations.” McBeth, *supra* note 3, at 1106.

<sup>71</sup> U.N. Econ. & Soc. Council (ECOSOC), *Procedural Decisions*, para. 515, U.N. Doc. E/1999/22 (1999).

<sup>72</sup> See Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT’L L. 474 (2009) (“It is frequently posited that as a general principle of international law within the meaning of Article 38(1)(c) of the statute of the ICJ, and arguably as a norm of customary international law, the minimum obligation owed by any subject of international law is a “duty of diligence” to ensure that the subject’s own policies, actions or possible neglect do not undermine the human rights obligations of other subjects of international law (including states’ human rights treaty obligations”).

### 3. Due Diligence to Satisfy Obligations under International Law

Since international organizations are rarely parties to human rights treaties, their human rights obligations are best operationalized — as is the case for the private sector — “through the prism of due diligence.”<sup>73</sup> Due diligence is defined by Black’s Law Dictionary as “the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.”<sup>74</sup> This section will trace the extent to which due diligence is an emerging general principle under Article 38 of the ICJ Statute, binding upon the IFC as a subject of international law.<sup>75</sup>

The section first explains the origins of due diligence as a principle of international law. It then analyzes the scope and content of due diligence obligations in various areas of international and domestic law and extracts the common elements of legal due diligence obligations. The analysis focuses on identifying the key dimensions of due diligence as an emerging general principle. It is also used in the next section to compare the IFC’s current practice of due diligence with its obligations under international law.

#### 3.1 Origins of Due Diligence as a Legal Concept

Due diligence was historically framed as a ruler’s duty to prevent harms to third parties by a ruler’s own subjects. The idea of due diligence, though differing in application, dates back to at least 1000 BC.<sup>76</sup> Equating state and ruler, Grotius imagined the specific duties the ruler of a state might owe due to malfeasance by its subjects as *patientia* and *receptus*. *Patientia* meant that if a ruler knew of the crimes of a subject, the ruler had a duty to attempt to prevent the continuing commission of such crimes. *Receptus* meant that after the commission of a crime by a subject, the ruler had the duty to attempt to punish the criminal.<sup>77</sup> Failure in either duty would result in liability being imputed to the ruler.<sup>78</sup> Thus, the historical notion of due diligence incorporated cross-temporal requirements: *ex ante* (to prevent future harm) and *ex post* (to redress the harm).

#### 3.2 Manifestations of Due Diligence in Various Areas of Law

The modern concept of due diligence can be found in a range of legal fields including international human rights law, international environmental law, international investment law, as well as domestic corporate and tort law. Due diligence may be owed to shareholders of a corporation, employees or customers, and also to third-party sovereigns or individuals. Due diligence may be owed by sovereign states, corporations, employers, boards of directors, and also by international organizations like the IFC.

While there is continuing debate on the subject, general principles of international law may be derived not only from principles developed in domestic jurisdictions, but from international sources as well.<sup>79</sup> The breadth of application of the modern principle of due diligence, across such a plethora of legal regimes, points toward its emergence as general principle of international law.

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<sup>73</sup> See CLAPHAM, *supra* note 32, at 151 (citing Pierre Klein, who argues that an obligation of vigilance, or due diligence, fixes on international organizations with regard to activities under their control, which can affect the rights of other subjects of international law).

<sup>74</sup> BRYAN A. GARNER, BLACK’S LAW DICTIONARY (8th ed. 2006) (emphasis added).

<sup>75</sup> Statute of the ICJ, art. 38, para. 1. See also RESTATEMENT (THIRD) OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES, §102 (general principles common to the major legal systems of the world).

<sup>76</sup> See Jan Arno Hessbruegge, The Historical Development of the Doctrines of Attribution and Due Diligence under International Law, 36 NYU J. INT’L L. & POL. 265, 265–66 (2004) (citing The Journey of Wen-Amon to Phoenicia (John A. Wilson trans.), in THE ANCIENT NEAR EAST 16–18 (James K. Pritchard ed., 1958)). Due diligence arose from the ancient principle of *sic utere tuo ut alienum non laedus* (do not use your territory to harm another). See *id.*

<sup>77</sup> See *id.* at 283–84 (citing HUGO GROTIUS, DE JURE BELLI AC PACIS [ON THE LAWS OF WAR AND PEACE] bk. II, ch. XXI, §§ II, III, IV (first published in 1625)).

<sup>78</sup> See *id.* at 286.

<sup>79</sup> See DARROW, *supra* note 19, at 131; Alec Stone Sweet, Proportionality, General Principles of Law, and Investor-state Arbitration: A Response to Jose Alvarez, 46 NYU J. INT’L L. & POL. 911 (2014); *contra* Jose Alvarez & Katheryn Khamsi, The Argentina Crisis and Foreign Investors: A Glimpse into the Heart of the International Investment Regime, in THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 379, 441 n.332 (Sauvant ed., 2009).

Below is an examination of the scope and content of due diligence standards across international and domestic law. The chart summarizes the sources for due diligence standards in various areas.

	<b>Actors</b>		
	<b>States</b> (Traditionally Public Actors)	<b>Private Actors</b> (Individuals & Corporations)	<b>Int'l Organizations [purely public]</b> (UN) or mixed (IFC)
<b>Int'l Human Rights Law</b>	Treaties and output of human rights tribunals & treaty bodies (binding); UN resolutions & guidelines (Customary IL and soft law)	Domestic Law (binding); internal institutional law of the private actor (internally binding); guidelines such as UNGP standards; OECD Guidelines; Thun Group Advisory Paper (soft law or non-binding)	Treaty (binding); Customary IL (binding according to the functional scope of the IO's tasks)
<b>Int'l Environmental Law</b>	Customary IL; National Legislation; Treaty Law (Binding)	Domestic Law (binding); Guidelines (soft law or non-binding)	Treaty (binding); Customary IL (binding according to the functional scope of the IO's tasks)
<b>Int'l Investment Law</b>	Customary IL; Bilateral Investment Treaties (binding); Ensuing Arbitral Decisions (binding on parties only)	Arbitral decisions (binding on parties only, otherwise persuasively relevant)	Not applicable
<b>Internal Institutional law</b>	Not applicable	Charter/By-Laws (binding), Policy Statements (soft law)	Charter/By-Laws (binding), Policy Statements (soft law); DARIO (parts of which may be binding as custom)
<b>Domestic Corporate &amp; Tort Law</b>	Not Applicable	Based on jurisdiction, common & statutory law or civil law (binding)	Based on jurisdiction, common & statutory law or civil law (binding) [Persuasively relevant]

### 3.2.1 Transboundary Harms and Modern Environmental Law

Due diligence first appeared in modern international environmental law as a state's duty to take affirmative measures to prevent actions taken by third parties within its sovereign territory from causing harm within the sovereign territory of other states.<sup>80</sup> While states are directly liable for their own actions, the duty of due diligence also requires states to prevent or mitigate harms inflicted by non-state parties.<sup>81</sup> This account of the underlying duty is evident in early case law. In the 1941 Trail Smelter arbitration, an international arbitral tribunal ruled that a state "owes at all times a duty to protect other states against injurious acts by individuals from within their jurisdiction."<sup>82</sup> This duty was later recognized as customary international law.<sup>83</sup>

<sup>80</sup> See Michael N. Schmitt, In Defense of Due Diligence in Cyberspace, 125 YALE L.J. F. 68 (2015), <http://www.yalelawjournal.org/forum/in-defense-of-due-diligence-in-cyberspace>.

<sup>81</sup> See Hessbruegge, supra note 76, at 268 (citing AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATIONS 162 (1918)).

<sup>82</sup> Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1911, 1963 (Arb. Trib. 1941). See also Corfu Channel (UK v. Alb.), Judgment, 1949 I.C.J. 4, 22 (April 9).

<sup>83</sup> See Pulp Mills on the River Uruguay, Case Concerning (Argentina v Uruguay), Judgment, 2010 I.C.J. Rep. 14, para. 101 (April 20) [hereinafter Pulp Mills Case] ("The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.").

The obligation of due diligence is presently considered an obligation “of conduct,” not “of result,” and is generally applied as the standard with which to measure fulfillment of an underlying duty.<sup>84</sup> In its Draft Articles for the Prevention of Transboundary Harms, the ILC describes due diligence as a duty “to take prevention or minimization measures” to fulfill a legal duty to prevent harm but not a duty “to guarantee that significant harm be totally prevented, if it is not possible to do so.”<sup>85</sup> Moreover, the Commentaries to the ILC’s Articles of State Responsibility (ASR) include “due diligence” in the list of standards of behavior that could be applied to the question of whether an obligation has been breached.<sup>86</sup>

The question then becomes how much due diligence is necessary to fulfill the duty. As the Seabed Disputes Chamber Advisory Opinion notes, due diligence “is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result” of compliance with legal obligations.<sup>87</sup> According to the ASR Commentaries the standard will “vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation.”<sup>88</sup> Some objective factors that further clarify the content of due diligence are predictability of harm and importance of the interest to be protected.<sup>89</sup> At the very least, the “do no harm” principle, having arguably acquired the status of customary international law, determines how much diligence might be necessary.<sup>90</sup>

Thus, in a situation of possible transboundary harm, a state fulfills its obligation of due diligence if it prevents or minimizes the risk from a foreseeable significant harm. This incorporates *ex ante* duties such as performing an environmental impact assessment,<sup>91</sup> as well as *ex post* duties of ongoing monitoring, taking timely action in the face of identified harm,<sup>92</sup> and redressing harm.<sup>93</sup>

Because once suffered, environmental harm can be irreparable, some ICJ judges have argued that a “precautionary principle” has been incorporated into the legal obligation of due diligence as part of customary international law.<sup>94</sup> Judge Cançado Trindade recently justified this view, stating that “while the principle of prevention assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm.”<sup>95</sup> Since a court decision cannot adequately remedy irreparable harms, more care *ex ante* and promptly applied provisional measures may be in order in such cases.<sup>96</sup> While there is no widespread agreement

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<sup>84</sup> Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Rep. 10, para. 110 [hereinafter Seabed Mining Advisory Opinion].

<sup>85</sup> Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at paras. 391–92 (2001).

<sup>86</sup> See *id.* at 69 (“Whether responsibility is ‘objective’ or ‘subjective’ in this sense depends on the circumstances . . . same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence.”).

<sup>87</sup> Seabed Mining Advisory Opinion, *supra* note 84.

<sup>88</sup> Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, *supra* note 85, at para. 69. See Seabed Mining Advisory Opinion, *supra* note 84, at para. 117 (“[D]ue diligence is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.”).

<sup>89</sup> See Duncan French & Tim Stephens, ILA Study Group on Due Diligence in International Law, First Report, at 3 (Mar. 7, 2014) (hereinafter First ILA Report).

<sup>90</sup> The duty to ‘do no harm’ first appeared in in the Trail Smelter case in 1941 and was articulated in the Nuclear Weapons case and the Stockholm and Rio Declarations. See generally *id.*

<sup>91</sup> See Seabed Mining Advisory Opinion, *supra* note 84, at paras. 141–150 (stating “the obligation to conduct an environmental impact assessment is a . . . general obligation under customary international law.”)

<sup>92</sup> Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, *supra* note 85, at 393 (“Due diligence is manifested in reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them.”) (emphasis added).

<sup>93</sup> See, e.g., Seabed Mining Advisory Opinion, *supra* note 84, paras. 139–40 (on availability of compensation).

<sup>94</sup> See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 243 (July 8), at 502–04 (Weeramantry, J., dissenting).

<sup>95</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and of Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, para. 55 (Dec. 16, 2015) (separate Opinion by Trindade, J.), <http://www.icj-cij.org/files/case-related/152/18856.pdf> <http://www.icj-cij.org/files/case-related/152/18856.pdf>.

<sup>96</sup> See *id.* at para. 19 (“Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages.”); *id.* at para. 59 (“Discussing provisional measures to “contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency.”).



on its acceptance as customary international law,<sup>97</sup> the “precautionary principle”, with its increased emphasis on timely response to irreparable harms even without definitive proof, cannot be ignored, whether as an approach or a principle.

In conclusion, in the areas of law dealing with transboundary harms, such as environmental law, a duty of due diligence has emerged as a principle of customary international law. It consists of an affirmative duty to protect other states from the actions of third parties within a state’s territory and operates as an affirmative defense to liability for harms that nevertheless occur. The duty is subject to the circumstances. It may require heightened advanced action and a more timely mitigating response when the foreseen harm is irreparable. Additionally, this duty has multiple temporal aspects: involving *ex ante* requirements to prevent and *ex post* requirements to monitor and mitigate.

### 3.2.2 International Investment Law

Due diligence under international investment law has two prongs. First, the investor must perform due diligence in order not to be held partially responsible for any harm the investor later suffers. Second, the state has the duty to exercise due diligence in order “to ensure the full enjoyment of protection and security.”<sup>98</sup>

When assessing the legitimacy of an investor’s expectations as part of a fair-and-equitable treatment analysis, the expectations are considered objectively, not subjectively. Investors’ subjective failure to consider easily available information does not protect them if, based on this information, their expectations were objectively unreasonable.<sup>99</sup> Investors, thus, “have a due diligence obligation to determine the extent of the risk to which they are subjected, including country and regulatory risks, and to have expectations that are reasonable in all the circumstances.”<sup>100</sup> Where tribunals found investors’ expectations to be unreasonable due to failure to perform due diligence, they have reduced damages.<sup>101</sup>

The state’s duty to perform due diligence is generally understood as a duty to adopt all reasonable measures to physically protect assets and property from threats or attacks which may particularly target foreigners or certain groups of foreigners.<sup>102</sup> This duty has gained the status of customary international law.<sup>103</sup> Usually the duty arises from

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<sup>97</sup> The MOX Plant Case (Ireland v. U.K.), Case No. 10, Order of Dec. 3, 2001 (separate opinion by Wolfrum, J.), [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/sep.op.Wolfrum.E.orig.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf) (“It is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law.”); contra Pulp Mills Case, *supra* note 83, at 152 (dissenting opinion by Vinuesa, J. ad hoc) (“[T]he precautionary principle is... a rule of law within general international law.”).

<sup>98</sup> Saluka Investments BV v. Czech Republic, IIC 210, Partial Award, para. 484 (Perm. Ct. Arb. 2006). Investor’s own conduct is a relevant factor in assessing “fair and equitable treatment” claims. For example, fraud or misrepresentation on an investor’s part can justify governmental interference. The investor is also under the obligation to perform full due diligence in order to independently assess the risks involved in making an investment. See e.g., U.N. Conference on Trade and Development, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II (2012).

<sup>99</sup> See Rudolf Dolzer & Christoph Schreuer, Standards of Protection, in PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 148 (2012) (“Legitimate expectations are not subjective hopes and perceptions; rather, they must be based on objectively verifiable facts.”).

<sup>100</sup> See U.N. Conference on Trade and Development, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II, at 78 (2012). When planning their investments, “investors should take account of the conditions in the particular host State, including the standards of governance and regulatory development prevailing in that State.” *Id.*

<sup>101</sup> MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award (2005) (where the investor’s amount of damages was reduced by 50% because of failure to perform due diligence); Peter Muchlinski, ‘Caveat investor’? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, 55 INT’L & COMP. L. Q. 527, 544 (2006).

<sup>102</sup> See Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 in RECUEIL DES COURS 347 (1997).

<sup>103</sup> See, e.g., EMMERICH DE VATEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (reprint in 3 CLASSICS OF INTERNATIONAL LAW 145, 1916) (1758); Elettronica Sicula S.P.A. (U.S. v. Italy), U.S. Memorial, at 100 (May 15, 1987), <http://www.icj-cij.org/files/case-related/76/9679.pdf> (“One well-established aspect of the international standard of treatment is that States must use ‘due diligence’ to prevent wrongful injuries to the person or property of aliens within their territory.”). This is not usually tied to “human rights,” but the fact patterns often appear to be human rights violations. See, e.g., Neer (U.S.) v. Mexico, 4 R.I.A.A. 60 (Gen. Claims Comm’n, 1926) (the claim was for wrongful death and denial of justice); Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID/ARB/87/3, Award, para. 639 (June 27, 1990) (dissenting opinion by Asante, J.).

the “full protection and security” requirement of a bilateral investment treaty, although it is often discussed along with the “international minimum standard” and “fair and equitable treatment.”<sup>104</sup> These are all objective standards,<sup>105</sup> and like with international environmental law, encompass due diligence obligations (sometimes referred to as a duty of “vigilance”<sup>106</sup>) of conduct, not outcome.<sup>107</sup> Although it is still a matter of debate, consensus tends toward the proposition that the duty depends on the subjective capacity of a state instead of being an objective standard, since “it would be difficult to accept that a State should provide protection and security to investors beyond the capacity of the State to do so.”<sup>108</sup>

In conclusion, the duty of due diligence applies to both states and investors. It is a duty of conduct, not result, and varies depending on the circumstances. Due diligence must be reasonable, determined objectively. It operates as an affirmative defense to liability for harm. For states, it operates cross-temporally, requiring them to provide full protection and security, to prevent unreasonable measures, and to provide opportunities for legal redress after the fact. For investors, it applies at the time of investment, although where an investment involves choices over time, it may also apply cross-temporally.

### 3.2.3 International Human Rights Law

International human rights law deals primarily with “the internal affairs of states” and with the duties that states (and in some cases, other actors) owe individuals within their jurisdiction.<sup>109</sup> Due diligence in the context of human rights refers to measures taken to protect against, prevent, minimize, or rectify the violation of the human rights of individuals, foreign or local, within an entity’s jurisdiction.<sup>110</sup> These obligations are imposed on states through either through human rights treaties or customary international law. Additionally, positive obligations of due diligence are sometimes imposed on corporations through domestic law in their state of incorporation or are voluntarily undertaken as a matter of business policy.

Although few human rights treaties actually use the term “due diligence,” a number of human rights courts and treaty bodies have articulated a standard and duty of due diligence. These standards are used to assess the state’s efforts to implement the substantive rights contained in the treaty. The Human Rights Committee, a treaty body established under the International Covenant on Civil and Political Rights, has stated that a failure to ensure covenant rights may “give rise to violations by States Parties of those rights, as a result of a State Parties ... failing to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”<sup>111</sup> Similarly, the Convention on the Elimination of Discrimination Against Women (CEDAW) does

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<sup>104</sup> OECD, Fair and Equitable Treatment Standard in International Investment Law, Working Papers on International Investment, at n. 34 (2004), <http://dx.doi.org/10.1787/675702255435> [hereinafter OECD on FET Standard]. See also Eric de Brabandere, Host States’ Due Diligence Obligations in International Investment Law, 42 SYRACUSE J. INT’L L & COMMERCE 319, 330 (2015) (noting blurred distinctions between full protection and security, international minimum standard, and fair and equitable treatment).

<sup>105</sup> See De Brabandere, *supra* note 105, at 329 (explaining how due diligence is applied as a comparator to determine whether a state met this objective international standard of how investors and investments should be treated).

<sup>106</sup> See *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (Dec. 8, 2000), 41 I.L.M. 896, 912 (2002) (“incumbent on the [host state] is an obligation of vigilance, in the sense that the [host state] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments.”).

<sup>107</sup> See OECD on FET Standard, *supra* note 105, at n. 34 (describing “a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating ‘strict liability.’”).

<sup>108</sup> De Brabandere, *supra* note 105, at 357–58.

<sup>109</sup> First ILA Report, *supra* note 89, at 14. See also Louise Arbour, The Responsibility to Protect under International Law, 34 REV. INT’L. STUD. 445, 452 (2008).

<sup>110</sup> See, e.g., 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) [hereinafter General Comment No. 31]; Sheri Rosenberg, Responsibility to Protect: A Framework for Prevention, in GLOBAL RESPONSIBILITY TO PROTECT I, 442, 452 (Nijhoff ed., 2009); Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Human Rights Comm’n, 44th Sess., Gen. Cmt. 20, art. 7, para. 13, at 32, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

<sup>111</sup> General Comment No. 31, *supra* note 111, at para. 8.



not contain the phrase “due diligence,” but the CEDAW Committee recognized an implied duty of due diligence when states fail to act in certain circumstances to prevent violations by private parties.<sup>112</sup> Additionally, although the American Convention on Human Rights only refers to a duty to adopt “measures as may be necessary to give effect” to the rights encoded in the charter,<sup>113</sup> the Inter-American Commission on Human Rights has interpreted this as a due diligence standard, ruling that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>114</sup> “Due diligence” is not explicitly used in the European Convention on Human Rights and the African Charter on Human and People’s Rights but the respective courts have nevertheless interpreted the treaties to require due diligence. Hence, a duty of due diligence,<sup>115</sup> albeit tailored to the circumstances of certain cases, has been inferred from the substantive rights guaranteed by major human rights treaties, in order to make treaty rights practical and effective.<sup>116</sup>

The occurrence of a human rights violation does not per se mean that a state has failed to meet its due diligence obligation, since it is a duty of conduct rather than result.<sup>117</sup> The common principles from these varied cases and treaties imply that the duty of due diligence under human rights treaties is a duty upon a state to take appropriate action under the circumstances to minimize the risk of violation,<sup>118</sup> to monitor ongoing activities for evidence of abuse,<sup>119</sup> to change course when such human rights abuses are discovered,<sup>120</sup> and to provide a legal remedy to parties abused.<sup>121</sup>

Moreover, the obligation of due diligence requires reasonable conduct. In *Opuz v. Turkey*, the ECHR adopted this reasonableness standard, stating that the state failed to meet the requirements of due diligence when, given a state’s capacity, it “knew or ought to have known” of a risk and failed to act.<sup>122</sup> In many other cases, human rights bodies have adopted a similar standard.<sup>123</sup> In short, the due diligence required is that which is appropriate or reasonable under the circumstances.

In conclusion, where there is an obligation under international human rights law to respect a human right, due diligence is a standard increasingly used to monitor compliance by states with the substantive legal obligation.

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<sup>112</sup> See, e.g., CEDAW Committee, *A.T. v. Hungary*, Communication No.: 2/2003, para. 9.2 (2003) (finding that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights”).

<sup>113</sup> Organization of American States, American Convention On Human Rights “Pact Of San Jose, Costa Rica” (B-32) art. 2, [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm).

<sup>114</sup> Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 117 (July 29, 1988).

<sup>115</sup> 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”) [hereinafter *Opuz v. Turkey*]; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02, para. 143 (Afr. Comm’n on Human and People’s Rights, May 15, 2006) [hereinafter *NGO Forum v. Zimbabwe*].

<sup>116</sup> See *Golder v. United Kingdom*, App. 4451/70, 1 EHRR 524 (1975).

<sup>117</sup> See, e.g., Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 15 (1992) (describing the duty not as an “absolute” obligation to prevent or punish harmful activities carried out by private individuals; but as a “relative” obligation to maintain, with regard to such activities, that particular conduct of prevention and punishment which is required by international law.”)

<sup>118</sup> *NGO Forum v. Zimbabwe*, supra note 116, at para. 155 (“This is still a disputed element but the [ICJ] has held due diligence in terms of ‘means at the disposal’ of the State . . . It could well be assumed that for non-derogable human rights the positive obligations of States would go further than in other areas.”).

<sup>119</sup> See, e.g., *Opuz v. Turkey*, supra note 116, at para. 95 (noting problems caused by “failure to monitor the implementation of injunctions”); Organization of American States, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, para. 65 (Apr. 6, 2016),

<sup>120</sup> *NGO Forum v. Zimbabwe*, supra note 116, para. 157 (“whether under the present communication, the state . . . having realized violations had taken place, took steps to ensure the protection of the rights of the victims”).

<sup>121</sup> See Velásquez Rodríguez, supra note 115, paras. 76, 79. See also Rosenberg, supra note 111.

<sup>122</sup> *Opuz v. Turkey*, supra note 116, at para. 129.

<sup>123</sup> See *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment of Nov. 16, 2009, paras. 249–50, <https://iachr.ils.edu/cases/gonz%C3%A1lez-et-al-cotton-field-v-mexico>; see also *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, para. 134 (2011) (noting that the obligation is of “reasonable means, and not results”); *Osman v. UK*, [1998] ECHR 101, para. 116; *Kontrová v. Slovakia*, App. No. 7510/04, ECHR 2007-VI; *Branko Tomasic and Others v. Croatia*, App. No. 46598/06 (Eur. Comm’n on H.R. Jan. 15, 2009).

The duty of due diligence is not merely an ex ante duty but applies across time; it continues from the adoption of prevention measures in advance, to appropriate ongoing monitoring, to the provision of a remedy. The due diligence required is that which is appropriate or reasonable under the circumstances and depends on the capabilities of the actor.

### 3.2.4 Voluntary Corporate Standards: Human Rights Due Diligence

Apart from the binding due diligence obligations of states under international human rights law, the phrase “human rights due diligence” has also recently been used to describe a set of international and other procedural standards or guidelines addressed to private actors, mainly corporations and banks. These procedural standards, most notably the UN Guiding Principles on Business and Human Rights discussed below, while not in themselves binding under international law, are important because they provide a way to ensure that human rights are protected. Voluntary guidelines such as those discussed below have enjoyed great uptake. In some cases, these standards are even legally required under domestic law.<sup>124</sup>

Human rights due diligence guidelines are based on the “do no harm principle” discussed above. Respecting this principle requires an organization to ensure that its “policies, actions or possible neglect do not impede the realization of human rights elsewhere.”<sup>125</sup> The “do no harm” principle has been reaffirmed in the development aid context.<sup>126</sup> In the recent Dutch sector banking guidelines, the adhering banks have committed themselves to go beyond the “do no harm” principle in the OECD Guidelines and the UNGPs; and have undertaken to promote human rights and sustainable development on the basis of a “do good” principle.<sup>127</sup>

This principle has been operationalized as guidelines by several international actors. In 2007, the Organisation for Economic Co-operation and Development (OECD) adopted a set of legally nonbinding Guidelines for Multinational Enterprises, encouraging them “to respect human rights.”<sup>128</sup> Recent OECD policy guidance also indicates that “do no harm” is a relevant principle for promoting and integrating human rights in development.<sup>129</sup> In 2011, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs), developed by Professor John Ruggie as Special Representative of the Secretary-General. Ruggie explained in the submission to the Human Rights Council that “[t]o respect rights essentially means not to infringe on the rights of others - put simply, to do no harm.”<sup>130</sup> A group of banks in 2011 also formed the “Thun Group,” whose 2013 report explores and elaborates on bank-specific obligations under the UN Guiding Principles.

After an actor like a corporation or a financial institution makes a policy commitment to follow these guidelines, due diligence is required to give practical effect to the “do no harm” principle. The Ruggie principles declare that corporations “should act with due diligence to avoid infringing on the rights of others and to address

<sup>124</sup> For an analysis of various methods of incorporating human rights due diligence standards in national law, see de Schutter, *supra* note 12.

<sup>125</sup> McInerney-Lankford et al., *Human Rights and Climate Change: A Review of the International Legal Dimensions*, World Bank, at 46 (March 2011), available at <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/HumanRightsAndClimateChange.pdf>.

<sup>126</sup> See Giordiana Rosa, *A Human Rights Framework for Development Assistance*, AMNESTY INTERNATIONAL, at 2 (2010) (“[T]he status of an obligation to “do no harm” – to respect and protect rights in the provision of development assistance – has been consistently reaffirmed by the UN treaty bodies and independent experts and is increasingly widely accepted.”); The Accra Action Agenda for Action, para. 13(c) (2008) (containing a commitment to respect human rights in the context of aid effectiveness); Addis Ababa Action Agenda of the Third International Conference on Financing for Development, paras. 1, 111 (2015) (endorsed by the General Assembly in its resolution 69/313 of 27 July 2015); G.A. Res. 70/1, paras. 10, 18–19 (Oct. 21, 2015).

<sup>127</sup> See Social and Economic Council of the Netherlands (SER), *Dutch Banking Sector Agreement on international responsible business conduct regarding human rights*, at 15, para. 10 (2016), available at [https://www.ser.nl/~media/files/internet/publicaties/overige/2010\\_2019/2016/dutch-banking-sector-agreement.aspx](https://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.aspx).

<sup>128</sup> See OECD, *Guidelines on Multinational Enterprises*, at 31, para. 5 (2011), available at <http://oecd.org/daf/inv/mne/48004323.pdf> [hereinafter OECD Guidelines].

<sup>129</sup> OECD Development Assistance Committee, *Action-Oriented Policy Paper on Human Rights and Development*, at 11 (2007).

<sup>130</sup> Protect, Respect and Remedy: A Framework for Business and Human Rights, para. 24, UN Doc. A/HRC/8/5 (Apr. 7, 2008), <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

adverse impacts with which they are involved.”<sup>131</sup> The OECD’s updated Guidelines also require a policy commitment to respect human rights and human rights due diligence.<sup>132</sup> While the OECD Guidelines and UNGPs remain formally non-binding, they purportedly articulate the underlying obligations of actors under domestic and international law, and they may also gradually contribute to the emergence of hard law in the area of business responsibility.

These sets of principles recognize that the level of due diligence required varies according to a range of circumstances, though different factors that affect the duty of due diligence owed are included. The OECD Guidelines suggest that “the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the Guidelines, and the severity of its adverse impacts.”<sup>133</sup> The Thun Group advises banks, which are often more distant from the situation on the ground, to target their diligence efforts based on the severity of the potential harm feared as well as the strength of the bank’s connection to the project.<sup>134</sup> In contrast, the guidance given by the UNGPs does not consider the size of the investment to be a relevant factor, and suggests targeting based on the severity of the potential harm alone.<sup>135</sup> The Thun Group guidelines also suggest targeting situations in which groups may be particularly vulnerable to human rights abuses in a particular context.<sup>136</sup>

Although the guidelines are often applied to or directed at corporations, banks can also be held responsible for the actions of their clients over whom they claim to have very little leverage.<sup>137</sup> The OECD is in the process of formulating guidelines for responsible business conduct in the financial sector.<sup>138</sup> At the OECD 2016 Global Forum for Responsible Business Conduct, the specific responsibilities of institutional investors to take action to prevent environmental, social, and governance risk was discussed.<sup>139</sup> The bank-specific Thun Group report differentiates human rights due diligence for retail and private banking, corporate and investment banking, and asset management practices, respectively.<sup>140</sup> Based on a policy commitment to “do no harm,” the various guidelines articulate more specific means for satisfying this standard through “human rights due diligence.”<sup>141</sup>

Several sources for due diligence procedural standards applicable to the private sector, most notably those set out in the UNGPs, the OECD Guidelines, and the Thun Group Advisory Report Guidelines, provide a detailed to-do list for corporations seeking to do no harm. They exhort companies to (i) identify actual or potential impacts; (ii) prevent and mitigate impacts thus identified; and (iii) account for impacts and responses to them.<sup>142</sup> These three guidelines to conduct human rights due diligence are examined below.

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<sup>131</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, at para. 6, UN Doc A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles on Business and Human Rights], <https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

<sup>132</sup> See OECD Guidelines, supra note 129, at 31.

<sup>133</sup> Id. at 24. See also id. at 20 (noting the level of due diligence required).

<sup>134</sup> See The Thun Group of Banks, UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21, at 10, [http://www.csrandthelaw.com/wp-content/uploads/sites/2/2013/10/thun\\_group\\_discussion\\_paper.pdf](http://www.csrandthelaw.com/wp-content/uploads/sites/2/2013/10/thun_group_discussion_paper.pdf).

<sup>135</sup> See Damiano de Felice, Banks and Human Rights Due Diligence: A Critical Analysis of the Thun Group’s Discussion Paper on the UN Guiding Principles on Business and Human Rights, 19 THE INT’L J. OF HUMAN RTS., 319 (2015).

<sup>136</sup> See Thun Group Paper, supra note 135, at 10.

<sup>137</sup> See UNEP Finance Initiative, Human Rights and the Finance Sector, <http://www.unepfi.org/humanrightstoolkit/finance.php>.

<sup>138</sup> See OECD, Responsible Business Conduct in the Financial Sector, <http://mneguidelines.oecd.org/rbc-financial-sector.htm>; see also OECD Insights, The Force of Finance for Responsible Business: How the financial sector could and should contribute to responsible business conduct (June 6, 2016), <https://oecdinsights.org/2016/06/06/finance-for-responsible-business-conduct/>.

<sup>139</sup> See OECD, Agenda for Global Forum On Responsible Business Conduct, 7 (June 2016), <http://mneguidelines.oecd.org/global-forum/GFRBC-2016-agenda-outline.pdf>.

<sup>140</sup> See id.

<sup>141</sup> See The UN Principles for Responsible Contracts: Guide for Investors (2015), available at [http://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf).

<sup>142</sup> See de Schutter, supra note 12.

### 3.2.4.1 Step One. The Vanguard: HRIA

The first step of human rights due diligence under the UNGPs, OECD Guidelines, and Thun Group Guidelines is to identify actual or potential impacts on human rights from activities of the principal and their business partners. The UNGPs suggest that at this stage, meaningful consultation with potentially affected groups and other relevant stakeholders, like human rights experts, should be carried out.<sup>143</sup> The OECD Guidelines call for similar action.<sup>144</sup> Even under the most limited corporate standard, the Thun Group standard, financial institutions are encouraged to educate themselves on human rights, hiring a human rights specialist advisor if necessary.<sup>145</sup> Human rights impact assessments are suggested in situations where substantial risk is foreseen, particularly in project finance.<sup>146</sup>

The first step is often effectuated by a human rights impact assessment (HRIA).<sup>147</sup> An HRIA is a process for systematically identifying, predicting and responding to the potential human rights impacts of projects, operations or policies.<sup>148</sup> HRIAs are designed to complement an entity's other impact assessment and due diligence processes; they are framed by international human rights principles and conventions.<sup>149</sup> HRIAs “identify rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations) and seek to strengthen the capacities of rights-holders to claim their rights and of duty-bearers to fulfill their human rights obligations.”<sup>150</sup> Building on the provisions of the OECD and the UNGPs on impact assessments, the Dutch banking sector guidelines now go further in attempting to address some of the challenges of conducting human rights due diligence and HRIAs: they seek to develop a matrix or database tool, where parties can share their knowledge and research on actual and potential human rights impacts in various sectors.<sup>151</sup>

HRIAs differ from other risk evaluation tools, like social or environmental impact assessments. Generic social assessments can overlook “important human rights conditions that are embedded in a particular society, such as discrimination . . . or restrictions on freedom of expression or collective bargaining.”<sup>152</sup> HRIAs, on the other hand, “use international human rights standards (the UDHR, ICCPR, ICESCR) as their framework, and assess the state of realization of a broad spectrum of rights.”<sup>153</sup> In recent years, public institutions have also begun utilizing HRIAs to satisfy their human rights obligations before adopting and implementing policies or projects.<sup>154</sup> The UN in particular has adopted a rights-based approach to its development programming.<sup>155</sup>

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<sup>143</sup> See Guiding Principles on Business and Human Rights, *supra* note 132, at Principle 18.

<sup>144</sup> See OECD Guidelines, *supra* note 129.

<sup>145</sup> See Thun Group Paper, *supra* note 135, at 9, 20–22.

<sup>146</sup> *Id.* at 21–22.

<sup>147</sup> See BSR, Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps, and Examples, at 5 (March 2013), available at [https://www.bsr.org/reports/BSR\\_Human\\_Rights\\_Impact\\_Assessments.pdf](https://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf).

<sup>148</sup> Human Rights Translated: A Business Reference Guide, Castan Centre for Human Rights Law, International Business Leaders Forum, and Office of the United Nations High Commissioner for Human Rights, at xvii, [http://www2.ohchr.org/english/issues/globalization/business/docs/Human\\_Rights\\_Translated\\_web.pdf](http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf).

<sup>149</sup> See *id.*

<sup>150</sup> Nordic Trust Fund, Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development, at 3 (2013) [hereinafter Nordic Trust Fund HRIA report].

<sup>151</sup> See Social and Economic Council of the Netherlands, *supra* note 128, at 9–10.

<sup>152</sup> Steven Herz et al, The International Finance Corporation's Performance Standards And The Equator Principles: Respecting Human Rights And Remedying Violations?, BIC, at 12, <https://www.business-humanrights.org/sites/default/files/media/bhr/files/NGO-submission-to-Ruggie-re-IFC-standards-Equator-Principles-Aug-2008.doc> (citing OHCHR, Discussion Paper on Human Rights Impact Assessments, at 2 (2006)).

<sup>153</sup> *Id.*

<sup>154</sup> “HRIAs have been used to allow policymakers to take into account the human rights impact of laws, policies, programmes in a wide range of fields including in the economic sphere: Development programming; Various government policy and legislative initiatives; International Trade Agreements; and Government Spending Decisions.” See James Harrison, Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?, University of Warwick (2013), [http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp-old/engagement/hrequalityimpact/vienna\\_trade\\_hria\\_paper.doc](http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp-old/engagement/hrequalityimpact/vienna_trade_hria_paper.doc).

<sup>155</sup> See Siobhan McInerney-Lankford et al., *supra* note 126, at 45; HRBA Portal, The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies, <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>.

The duty to identify also includes a duty to monitor; the due diligence obligations of actors under these guidelines extend beyond ex ante research when exposure to risk remains. The UNGPs and OECD Guidelines note that human rights due diligence must be “ongoing,”<sup>156</sup> although the Thun Group argues that this may be particularly difficult for financial institutions, as they take the view that they may find it difficult to access the necessary information.<sup>157</sup> However, as previously noted, at a minimum such financial institutions should either negotiate ex ante for access to information or prove that they at least attempted to gain access to the information.

### **3.2.4.2 Step Two. Taking Action: Prevention and Mitigation**

The second step is to take measures to prevent or mitigate adverse impacts. The UNGPs and the OECD Guidelines call for companies to use their leverage to cease the adverse human rights impact.<sup>158</sup> The OECD Guidelines suggest that enterprises should put remediation processes in place in advance.<sup>159</sup> The UNGPs also emphasize the ongoing nature of corporate human rights due diligence and suggest that extra speed and effort be used in cases of harms that are irremediable.<sup>160</sup> Additionally, they encourage actors to increase their leverage to compel reduction of the harm.<sup>161</sup> The OECD Guidelines note that “[g]ood faith behaviour ... means responding in a timely fashion” when difficulties with implementing the guidelines arise.<sup>162</sup> The Thun Group suggests, at least in project finance, that a timetable for response be included in action plans.<sup>163</sup>

Banks in particular may encounter legal difficulty in extricating their investments after human rights abuses come to light, since they may not have the necessary control over the companies they have invested in to force an end to abuses.<sup>164</sup> This provides another argument for integrating human rights due diligence into “the contracting process, such as by codifying mitigation mechanisms in contract negotiations and developing prevention and mitigation plans based on awareness of potential adverse impacts foreseeable from due diligence assessments.”<sup>165</sup>

### **3.2.4.3 Step Three. Follow Up: Accountability**

The third step entailed by human rights due diligence is to account for impacts and responses. This generally includes a duty to report on the actions taken in transparent fashion. The guidelines suggest reporting requirements, specifically tracking, measuring and reporting on performance.<sup>166</sup> The OECD states that responsible business practices can “represent a competitive advantage for firms, creating increased returns for investors, while irresponsible practices can pose serious risks and costs.”<sup>167</sup> Finally, investment that results in human rights abuses carries reputational costs, to the benefit of competitors.<sup>168</sup> However, the realization of reputational benefits requires reporting of practices in ways that affected communities can easily access and trust.

<sup>156</sup> OECD Guidelines, supra note 129, at 34. See also Guiding Principles on Business and Human Rights, supra note 132, at 18.

<sup>157</sup> See Thun Group Paper, supra note 135, at 19 (“Ongoing due diligence is often challenging as the leverage and access to documentation can be limited”). Some academics have suggested that writing disclosure practices into the initial contract could alleviate this; setting up information sharing mechanisms in advance that will allow maximum disclosure and access for underprivileged potential victims. See Blair E. Kanis, Business, Human Rights, and Due Diligence: An Approach for Contractual Integration, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 418 (Martin & Bravo eds., 2015).

<sup>158</sup> See OECD Guidelines, supra note 129, at paras. 42–43.

<sup>159</sup> See id. at paras. 45–46.

<sup>160</sup> See Guiding Principles on Business and Human Rights, supra note 132, at Principle 24.

<sup>161</sup> See id. at Principles 19 and 24.

<sup>162</sup> OECD Guidelines, supra note 129, at para. 21.

<sup>163</sup> See Thun Group Paper, supra note 135, at 22.

<sup>164</sup> See Human Rights Impact Briefing No. 1: Labour Standards Violations in IOI Corporation’s Malaysian Plantations, Banktrack (2016), [http://www.banktrack.org/ems\\_files/download/ioi\\_corporation\\_human\\_rights\\_impact\\_briefing\\_160216.pdf/ioi\\_corporation\\_human\\_rights\\_impact\\_briefing\\_160216.pdf](http://www.banktrack.org/ems_files/download/ioi_corporation_human_rights_impact_briefing_160216.pdf/ioi_corporation_human_rights_impact_briefing_160216.pdf).

<sup>165</sup> Kanis, supra note 158, at 418.

<sup>166</sup> See BSR, Conducting an Effective Human Rights Impact Assessment, supra note 148.

<sup>167</sup> See OECD Insights, supra note 139.

<sup>168</sup> John Christopher Anderson, Respecting Human Rights: Multinational Corporations Strike Out, 3 U. PENN. J. LABOR & EMP. L. 463, 473 (1999) (explaining how Pepsi’s goodwill was damaged because of culpability in inhumane labor conditions in Burma, to the benefit of rival Coca-Cola).

In conclusion, while not in themselves legally binding, these three sets of guidelines on human rights due diligence for the private sector articulate and propose principles of due diligence similar to those applied under other sources of international law as indicated above. The standard of due diligence is ongoing and depends on the situation, sometimes requiring an actor to build capacity and leverage. It includes an ex ante identification of potential human rights violations and ex post monitoring and compensation. In essence, the various guidelines serve to illuminate how private and corporate actors can fulfill due diligence obligations under international human rights law.

### 3.2.5 Duties of Due Diligence in Domestic Law: Corporate and Tort

Under common law, the duties of “due care” and “due diligence” were at times historically conflated in both corporate and tort law.<sup>169</sup> Both implied a duty to prevent harm to third parties.

Under U.S. corporate law, the duty to perform due diligence is part of the fiduciary duty of care.<sup>170</sup> This duty may be owed by individual board members and also by the board in totality. The duty often includes a requirement to conduct sufficient research before taking or recommending an action. In certain cases, it may also require ongoing due diligence, especially if representations were made that monitoring would continue.<sup>171</sup> The duty of due diligence is required in several contexts, including mergers and acquisitions,<sup>172</sup> securities registration,<sup>173</sup> and investment fiduciary.<sup>174</sup> For example, before an investment is made, boards often are required to hire experts, spend sufficient time in review, and ask adequate questions in board meetings, in order to show appropriate diligence to fulfill the duty of care (or duty of good faith).<sup>175</sup>

Under civil law, the requirements are similar. Under German law, certain members of a company must act with “the due diligence of a prudent businessman” or face consequences.<sup>176</sup> This duty of due diligence also encompasses a duty to avoid damage to the company’s reputation. Under French law, the directors’ duty to shareholders is much broader; even “[i]mpacts on non-shareholders, occurring within or outside of the jurisdiction, must be taken into account if they also have an impact on the general interest of the company.”<sup>177</sup>

Under the common law of tort, due diligence is an affirmative duty which arises i) because one party created the risk of harm<sup>178</sup> or ii) because of a relationship between the parties,<sup>179</sup> irrespective of risk. Both situations require that “reasonable care” be taken to minimize the harm. However, due diligence can also arise under a statute. Under the U.S. Alien Tort Statute (ATS), a foreign national could sue an American company for harms occurring abroad,<sup>180</sup>

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<sup>169</sup> See, e.g., *Dana v. Nat'l Bank of Republic*, 132 Mass. 156, 158 (1882) (plaintiff failed in their duty if due diligence would have disclosed the facts); *Hudson v. Lynn & B. R. Co.*, 185 Mass. 510, 519 (1904) (stating there is not a distinction between the words due diligence and due care).

<sup>170</sup> Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 1–2 (2006).

<sup>171</sup> Lorna A. Schnas, *An Investment Adviser's Fiduciary Duty* (Aug. 1, 2010), <http://www.thefiduciaryinstitute.org/wp-content/uploads/2013/02/lornaschnaseFiduciary-Duty-Paper.pdf>.

<sup>172</sup> See Arthur Fleischer, Jr. & Alexander R. Sussman, *Directors' Fiduciary Duties In Takeovers And Mergers*, 31st Annual Securities Regulation Institute, [http://www.friedfrank.com/siteFiles/ffFiles/sri\\_directors\\_duties.pdf](http://www.friedfrank.com/siteFiles/ffFiles/sri_directors_duties.pdf).

<sup>173</sup> See *Due Diligence & Fiduciary Responsibility*, <http://securities.lawyers.com/securities-basics/due-diligence-and-fiduciary-responsibility.html>.

<sup>174</sup> See Zachary G. Newman & Jonathan M. Proman, *I've Been Sued for What? — Fiduciary Duty Claims Against Hedge Fund Managers and How to Avoid Them*, Hahn & Hessen LLP, <https://www.hedgeco.net/whitepapers/files/Fiduciary-Duty-Claims-Against-Hedge-Fund-Managers-and-How-to-Avoid-Them-White-Paper.pdf>; *Schwarz v. Thinkstrategy Capital Mgmt. LLC*, 797 F. Supp. 2d 439, 448 (S.D.N.Y. 2011) (a fund manager's failure to conduct due diligence is a breach of fiduciary duty).

<sup>175</sup> See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *In re Walt Disney Derivative Litigation*, 907 A.2d 693 (2005).

<sup>176</sup> Legal Perspective on an Annual Board “Statement of Significant Audiences and Materiality” – Draft German Law Perspective, [http://www.americanbar.org/content/dam/aba/administrative/environment\\_energy\\_resources/resources/german\\_legal\\_memo.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/german_legal_memo.authcheckdam.pdf).

<sup>177</sup> Mandate of the Special Representative of the Secretary 5 General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, <https://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-tools-france-cotty-vivant-for-ruggie-28-sep-2009.pdf>.

<sup>178</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 39 (2005) (finding that when an actor's prior conduct creates a continuing risk of harm, the actor owes an affirmative duty of “reasonable care” to minimize the harm).

<sup>179</sup> See *id.* at §§ 40–41.

<sup>180</sup> 28 U.S.C.S. § 1350 (LexisNexis, Lexis Advance through PL 114-244, approved 10/14/16).



and performance of sufficient due diligence could operate as a defense.<sup>181</sup> A requirement of actual or constructive knowledge of the human rights abuses has been applied under the ATS,<sup>182</sup> and corporations have been required to perform due diligence to protect themselves from liability.<sup>183</sup>

It is apparent that here, under domestic law, due diligence is an affirmative duty gives rise to a separate legal obligation. As a duty of conduct, it varies depending on circumstances, employs the standard of a “reasonable person,” and operates as an affirmative defense against liability. While it does not always operate cross-temporally, if exposure continues, the duty of due diligence continues. The major difference between domestic law and international law is that in domestic law due diligence arises out of a relationship that creates the underlying duty.<sup>184</sup>

### 3.3 Conclusion: Common Elements of the Principle of Due Diligence

The duty of due diligence, common across multiple legal systems, is arguably emerging as a general principle of international law.<sup>185</sup> Common elements of due diligence are emerging from a range of legal regimes under domestic and international systems of law.

First, due diligence is a procedural obligation that arises from another underlying legal duty or obligation as a means to give effect to that duty or obligation. It is a standard used to measure compliance with the underlying legal duty or obligation, and it is a duty of conduct, not result. Second, the content and extent of due diligence required varies according to circumstance and context. Greater due diligence may be required in situations where the harm feared may be irreparable. In general, across all areas of law examined, the standard of due diligence is one of reasonableness in light of the specific circumstances. Third, the requirement of diligence generally operates over time and is a continuing obligation. It entails an *ex ante* duty to identify risks and to take action to minimize the risk of harm. It also entails an ongoing duty to monitor and mitigate where exposure to the relevant risk continues. In some circumstances, it requires that follow-up access to a remedy or reparations be provided.

The IFC, bound by the duty of due diligence as a general principle, needs to undertake due diligence to respect human rights and “do no harm” under international human rights law. It at least has the *ex ante* duty to identify and mitigate potential human rights risks, as well as the on-going duty to monitor and mitigate newly emerging human rights violations. The gaps between IFC’s current practice of due diligence and its obligations under international law will be examined in the next section.

## 4. Comparing the IFC’s Internal Due Diligence to the International Law Standard

The IFC has established its own ‘due diligence’ responsibilities under its internal institutional law. This section analyzes the adequacy of the IFC’s internally adopted due diligence policies, measuring them against the due diligence requirements under international law as summarized in the previous section—namely, that (1) due diligence is a procedural obligation which (2) varies depending on the circumstances and context,<sup>186</sup> and (3) has an ongoing dimension over time. Accordingly, the three sections below will first describe the strengths of the IFC’s

<sup>181</sup> See Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT’L L. REV. 455 (2008).

<sup>182</sup> See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

<sup>183</sup> See Dhooge, *supra* note 182, at 455; Yihe Yang, *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel*, 40 W. ST. UL REV. 195 (2012).

<sup>184</sup> In contrast, no relationship need be shown between two states to trigger a duty of due diligence to protect against transboundary harms.

<sup>185</sup> For arguments to this effect, see e.g. JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (2016); ROBERT P. BARNIDGE, *THE DUE DILIGENCE PRINCIPLE UNDER INTERNATIONAL LAW* (2006).

<sup>186</sup> E.g., encompasses a reasonableness standard.

current policies and identify areas in which the IFC's due diligence policies fall short of the respective requirement for due diligence under international law. Upon identifying the shortcomings, recommendations are proposed to remedy any gaps. While the IFC has historically been a leader in this field, remaining a leader requires continuing effort. Additionally, bringing the IFC's internal requirements of due diligence in line with international standards would reduce the risk of further occurrences like the Honduras-Dinant or the Tata Mundra cases, which injured many and damaged the IFC's reputation, and should enhance project outcomes over time.

#### 4.1 Due Diligence as a Procedural Obligation for Duty Bearers

A procedural obligation of due diligence arising out of an underlying legal duty or obligation is common across various areas of international law.<sup>187</sup> It is a duty of conduct, not result.<sup>188</sup> As a duty bearer under international law, it is important to consider how the IFC operationalizes its obligation to respect human rights and do no harm. This section examines to what extent the IFC's current due diligence policies fulfill this obligation of conduct by identifying the strengths and weaknesses of its present policies.

To be eligible for IFC funding, a project must meet a number of criteria. For one, it must “[b]e environmentally and socially sound, satisfying our environmental and social standards as well as those of the host country.”<sup>189</sup> To determine whether a project is environmentally and socially sound, the IFC adheres to requirements articulated in its Policy on Environmental and Social Sustainability (“the Sustainability Policy”) and Performance Standards (PS), together referred to as the Sustainability Framework.<sup>190</sup> The Sustainability Policy defines the IFC's due diligence responsibilities, while the Performance Standards define clients' roles and responsibilities for managing their projects and the requirements for receiving and retaining the IFC's support.<sup>191</sup> The IFC commits itself through its policies to providing ongoing environmental and social due diligence in the various stages of an IFC-financed project.<sup>192</sup>

Additionally, the Sustainability Policy notes that central to the “IFC's development mission is its efforts to carry out investment and advisory activities with the intent to ‘do no harm’ to people and the environment.”<sup>193</sup> The IFC's internal articulation of its mission is consistent with an international organization's obligation of due diligence under international law as identified above: to respect human rights. The IFC has taken significant first steps through these efforts towards bringing its work into compliance with its international legal obligations.

Despite the strengths of the Sustainability Framework, however, the IFC has internally committed itself to these objectives through voluntary procedural guidelines rather than an acceptance of obligations stemming from

<sup>187</sup> See supra Sections 3.2.3 (International Human Rights Law) and 3.2.4 (Voluntary Corporate Standards: Human Rights Due Diligence).

<sup>188</sup> See supra Section 3.2 (Manifestations of Due Diligence in Various Areas of Law) and conclusion in Section 3.3.

<sup>189</sup> See IFC, How To Apply For Financing, [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/solutions/how-to-apply-for-financing](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/how-to-apply-for-financing).

<sup>190</sup> The 2012 edition of IFC's Sustainability Framework applies to all clients whose projects go through IFC's initial credit review process after January 1, 2012. The 2006 edition of IFC's Sustainability Framework applies to investments that went through IFC's initial credit review process from April 30, 2006 to December 31, 2011. See IFC, Sustainability at IFC, [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/ifcsustainabilityframework\\_2006](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/ifcsustainabilityframework_2006).

<sup>191</sup> Many environmental and social risks are articulated in the eight performance standards: (1) Assessment and Management of Environmental and Social Risks and Impacts; (2) Labor and Working Conditions; (3) Resource Efficiency and Pollution Prevention; (4) Community Health, Safety, and Security; (5) Land Acquisition and Involuntary Resettlement; (6) Biodiversity Conservation and Sustainable Management of Living Natural Resources; (7) Indigenous Peoples; and (8) Cultural Heritage. See generally IFC, Sustainability Policy (2012).

<sup>192</sup> Environmental and social due diligence is integrated into the IFC's overall due diligence of direct investments, financial intermediary investments and advisory services. IFC, Sustainability Policy, para. 21 (2012). See Appendix: Annex A, *infra*, for a discussion of the twelve stages of the project cycle that underscore the temporal nature of due diligence and its role in the IFC's decision-making. As a part of its broader due diligence processes (which includes review of financial and reputational risks), the IFC sets out procedures for separate teams responsible for assessing investment risk and environmental and social risk. Employees use the Environmental and Social Review Procedures (ESRP). See IFC, Environmental and Social Review Procedures Manual (2016), available at [www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP\\_Oct2016.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP_Oct2016.pdf?MOD=AJPERES) [hereinafter ESRP Manual].

<sup>193</sup> IFC, Sustainability Policy, para. 9 (2012).



external sources of law. As a duty bearer under international law, it is insufficient for the IFC to assume procedural due diligence responsibilities on a voluntary basis, especially since its commitment to ‘do no harm’ has not been linked to the underlying human rights obligations.

Two important gaps are examined below, and a number of changes are proposed. The first is that the IFC’s current policies do not engage with human rights despite the IFC being a bearer of international human rights obligations.<sup>194</sup> Despite the IFC’s adoption of a sustainability policy with due diligence procedures, it has not adopted a clear policy commitment to respect human rights. This adoption would focus the IFC’s attention on international legal standards of conduct, with a view to discharging its legal obligation to ‘do no harm’ with respect to human rights. The second gap is created by the continuing ambiguity and lack of transparency about the exact nature of the responsibilities and procedures undertaken by the IFC’s environmental and social teams in their apparent discharge of due diligence obligations. Enhancing transparency about the procedures that IFC teams currently use to verify client due diligence documentation would help to clarify whether the IFC is meeting its international obligations of due diligence.

#### **4.1.1 Adopt a Clear IFC Policy Commitment to Respect and ‘Do No Harm’ to Human Rights**

The IFC’s current policies do not use the language of human rights. As a duty bearer under international human rights law, the IFC’s policies and practices should conform to the standards articulated by authoritative international human rights bodies.<sup>195</sup> While the IFC has adopted its own due diligence policy, it has made no express commitment to human rights, and there is no indication that human rights risks are systematically considered in its due diligence processes. An express commitment would require the IFC to consider international standards of conduct and adopt appropriate procedures to ensure that its obligation to ‘do no harm’ to human rights is respected.

The adequacy of the IFC’s existing commitment to human rights can be evaluated by looking at its Sustainability Policy, Performance Standards and Guidance notes.

First, apart from the use of the phrase “environmental and social due diligence” in the Sustainability Policy, the language of human rights is mostly absent. The IFC Sustainability Policy mentions human rights in paragraph 12, stating that it “recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights.”<sup>196</sup> Moreover, in a footnote, the Sustainability Policy declares that the IFC “will be guided by the International Bill of Human Rights and the eight core conventions of the International Labour Organization.”<sup>197</sup> Apart from these human rights references, there is no clear commitment on the part of the IFC itself: the IFC does not explain how it will meet its own obligation to respect human rights in its activities and procedures.

Second, in the Performance Standards the IFC does not acknowledge any legal obligations to respect human rights. While two of the Performance Standards do include compliance with human rights principles as

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<sup>194</sup> Duty bearers are actors with an “obligation or responsibility to respect, promote and realize human rights and to abstain from human rights violations. The term is most commonly used to refer to State actors, but non-State actors can also be considered duty bearers . . . Depending on the context, individuals (e.g. parents), local organizations, private companies, aid donors and international institutions can also be duty-bearers.” UNICEF, Gender Equality, UN Coherence, and You: Glossary, <https://www.unicef.org/gender/training/content/resources/Glossary.pdf>.

<sup>195</sup> Under the UNGPs, states ensure policy coherence while corporations institute a policy commitment indicating the entity’s responsibilities toward human rights. See Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions about the Guiding Principles on Business and Human Rights 22, 26 (2014), [hereinafter OHCHR on Guiding Principles].

<sup>196</sup> IFC, Sustainability Policy, para. 12 (2012) (emphasis added).

<sup>197</sup> IFC, Sustainability Policy, para. 12, fn. 4 (2012) (emphasis added).

an objective,<sup>198</sup> these Performance Standards are both directed at the client, not the IFC. Furthermore, even when the IFC refers to human rights due diligence as part of the clients' duty, the policy effectively operates as a warning against engaging in human rights violations, rather than as an invitation to undertake human rights due diligence as a core part of assessing project risk. Footnote 12 of the IFC's Performance Standards on Environmental and Social Sustainability states that "[i]n limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business."<sup>199</sup> The footnote leaves unanswered the question of the appropriate criteria to render the footnote applicable in a "high-risk" case, given the use of language such as "may" and "limited." Based on publicly available information, the IFC has not imposed this duty on its clients for any project to date, not even in the Dinant-Honduras case. Regrettably, this footnote may be reasonably interpreted as an attempt to discourage the undertaking of human rights due diligence, sending a damaging message to the IFC's clients that in most circumstances, it is appropriate for the client not to conduct human rights due diligence.

Lastly, the associated Guidance Notes provide additional advice to clients on the implementation of the Performance Standards, although clients are not required to comply with this advice.<sup>200</sup> In several of the Guidance Notes, the IFC draws on the UNGPs to illustrate the private sector duty to respect human rights, independent of the state's duty to respect, protect and fulfill.<sup>201</sup> The IFC directs the client to the UDHR, ICCPR and ICESCR, noting there are certain rights that are of "particular relevance to business."<sup>202</sup> One of the Guidance Notes expressly links companies' compliance with the Performance Standards to their obligation to respect human rights.<sup>203</sup> Despite the term 'human rights' appearing many more times in the Guidance Notes than the other policies, the message is clear: it remains the client's duty, and not the IFC's, to respect human rights.

In summary, the three texts—the Sustainability Policy, Performance Standards, and Guidance Notes—make only limited references to human rights. Indeed, it has been argued that they permit clients to abide by alternative or lower standards than those actually required by international human rights law.<sup>204</sup>

To comply with its due diligence obligations under international law, the IFC should articulate a clear policy commitment that would link its practices to external international human rights standards. The UN Guiding Principles exhort private companies to explicitly embed their lesser duty of "responsibility to respect" in a publicly available "Human Rights Policy Statement."<sup>205</sup> This policy commitment via a public statement is "approved at the most senior level of the company and sets out its expectations of personnel, business partners and other parties directly linked to its operations, products or services."<sup>206</sup> If the IFC acknowledged and articulated its human rights obligations explicitly using human rights language, the link between the IFC's current due diligence practices and expectations of clients and international human rights law standards would be demonstrated.

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<sup>198</sup> For PS4 (Community Health, Safety, and Security), one objective is "[t]o ensure that the safeguarding of personnel and property is carried out in accordance with relevant human rights principles and in a manner that avoids or minimizes risks to the Affected Communities." IFC, Performance Standards, at 23 (2012). For PS7 (Indigenous Peoples), one objective is "[t]o ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples." *Id.* at 41.

<sup>199</sup> IFC, IFC Performance Standards on Environmental and Social Sustainability, PS 1, para. 8, fn. 12 (2012) (emphasis added).

<sup>200</sup> IFC, Guidance Notes: Performance Standards on Environmental and Social Sustainability, at ii (2012) [hereinafter Guidance Notes].

<sup>201</sup> *Id.* at 3, 45–47.

<sup>202</sup> *Id.* at 3, 44.

<sup>203</sup> "Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project." *Id.* at 1, para. 3.

<sup>204</sup> See McBeth, *supra* note 3, at 1138–39.

<sup>205</sup> OHCHR on Guiding Principles, *supra* note 196, at 27.

<sup>206</sup> *Id.*

The explicit use of human rights language in a policy statement is an important step. As a recent UN Special Rapporteur on Extreme Poverty and Human Rights has noted:

“Human rights provides a context and a detailed and balanced framework; ... it emphasizes that certain values are non-negotiable; it brings a degree of normative certainty; and it brings into the discussion the carefully negotiated elaborations of the meaning of specific rights that have emerged from decades of reflection, discussion and adjudication . . . it makes a difference if one is calling for the realization of agreed human rights to equality or to water, rather than merely making a general request or demand.”<sup>207</sup>

An articulated policy commitment to respect human rights should also make a difference in how the Performance Standards are interpreted. For example, the IFC’s procedures should evolve to ensure that compliance with Performance Standard Five (on Land Acquisition and Involuntary Resettlement) entails evictions and resettlement being carried out in conformity with relevant provisions of international human rights law.<sup>208</sup> This would mean that, at a minimum, there would need to be adequate notice, genuine consultation to explore all feasible alternatives to evictions, adequate alternative housing, and appropriate compensation if necessary.<sup>209</sup> The IFC would need to clarify when involuntary resettlement is permitted under “exceptional circumstances.”<sup>210</sup> Interpreting this term in accordance with international human rights law would require that the project in question be genuinely in the public interest and that all other alternatives to forced eviction have been explored.<sup>211</sup>

#### **4.1.2 Increase Transparency About the Respective Due Diligence Responsibilities of the IFC and its Clients**

The IFC’s own due diligence responsibilities must be clearly defined and disclosed. As it stands, the IFC undertakes “due diligence of the level and quality of the risks and impacts identification process carried out by its clients against the requirements of the Performance Standards.”<sup>212</sup> Though the Sustainability Policy purports to define the IFC’s responsibilities and the Performance Standards define clients’ roles and responsibilities, ambiguities remain about the precise due diligence responsibilities of the IFC’s environmental and social teams and those of the client.<sup>213</sup>

Some of the IFC’s responsibilities are articulated clearly in a manner that is consistent with international law. For example, it is the IFC’s responsibility to disclose the environmental and social review summary on the IFC website, along with relevant sponsor documentation, consistent with its Access to Information Policy.<sup>214</sup> The IFC also agrees to notify countries potentially affected by the transboundary effects of proposed business activities to consider possible adverse effects.<sup>215</sup> This is consistent with the IFC’s due diligence duties in the area of transboundary harms.<sup>216</sup>

<sup>207</sup> United Nations General Assembly, Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/70/274, at para. 85 (2015).

<sup>208</sup> IFC Must Demonstrate its Commitment to Respect Human Rights: Joint Civil Society Statement on IFC’s Draft Sustainability Framework, BRETTON WOODS PROJECT (Mar. 7, 2011), [www.brettonwoodsproject.org/2011/03/art-567851/](http://www.brettonwoodsproject.org/2011/03/art-567851/).

<sup>209</sup> See Amnesty International, Submission to the Review of the IFC Sustainability Framework, 15–18 (May 2010) [hereinafter Amnesty International Submission]. It would also require the IFC to consider secondary rights violations related to the primary right violation. See *infra*, note 232 and accompanying text.

<sup>210</sup> UN Basic Principles and Guidelines on Development-based Evictions and Displacement, OHCHR, para. 6, 21 (2007), available at [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf).

<sup>211</sup> See U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing: Forced Evictions, 16th Sess., paras. 2, 7, 9, 14–18, U.N. Doc. E/1998/22 (May 20, 1997).

<sup>212</sup> IFC, Sustainability Policy, para. 12 (2012).

<sup>213</sup> The policies state that the Performance Standards support the “responsibility of the private sector.” IFC, Sustainability Policy, para. 12 (2012). Moreover, the IFC merely aids clients in “manag[ing] and improv[ing] their environmental and social performance.” *Id.* at para. 6. The IFC thus reaffirms that the client has the responsibility, as a business, to respect human rights. *Id.* at para. 12.

<sup>214</sup> IFC, Sustainability Policy, para. 14 (2012). See also IFC, Access to Information Policy (2012).

<sup>215</sup> IFC, Sustainability Policy, para. 18 (2012).

<sup>216</sup> Multiple ICJ decisions have noted the need to notify the possibly affected parties in the case of possible transboundary harms. See *Pulp Mills Case*, *supra* note 83.

Moreover, the Sustainability Framework clearly delegates many responsibilities to the client. The responsibilities include conducting the environmental and social impact assessments and submitting an “annual monitoring report” which provides information on the client’s progress in meeting the environmental and social terms of the investment agreement.<sup>217</sup> However, there may be areas where the IFC improperly delegates duties which are properly its own under international law. For example, according to the Sustainability Framework, it is the client who must engage and consult with affected communities. The Framework only requires the IFC itself to determine the level of “broad community support” for the project where potentially significant adverse impacts on affected communities have been identified or where indigenous peoples are involved.<sup>218</sup> In other cases, its policy provides that the IFC only needs to verify that engagement between the client and affected communities occurred.<sup>219</sup>

Overall, the IFC’s policy commitments inadequately address its own responsibilities. As a duty bearer under international law, the IFC should not seek to transfer important due diligence responsibilities to the client without clearly articulating its own role in ensuring quality assessments. The Sustainability Framework should delineate how the IFC is to fulfill its own duty of due diligence. Disclosing how the IFC teams verify the client’s due diligence documentation would help external observers and communities clarify whether the IFC is discharging its responsibilities and obligations under international law through its own set of due diligence procedures.

#### **4.2 Due Diligence Embodies a Reasonableness Standard**

This section examines to what extent the IFC meets the second due diligence requirement, namely the requirement of reasonable conduct, and identifies some of the strengths and weaknesses of the present policies. The content and extent of due diligence required under international law varies according to circumstance and context. As discussed in section 3 above, the standard of due diligence is one of reasonableness according to the specific circumstances. Moreover, greater due diligence may be required in situations where the harm feared may be irreparable.<sup>221</sup> These key principles apply to IFC’s due diligence. We first examine to what extent the IFC’s current due diligence employs a reasonableness standard.

In the context of direct investments, the IFC declares that its due diligence is “commensurate with the nature, scale, and stage of the business activity, and with the level of environmental and social risks and impacts.”<sup>222</sup> Similarly, for financial intermediary lending, the capacity of the client’s management system should be “commensurate with the level of environmental and social risks in its portfolio, and prospective business activities.”<sup>223</sup> This language is akin to the reasonableness, “known or ought to have known” standard.

In assessing a project’s risk level to assign the appropriate provisional risk categorization, the IFC relies on due diligence in the early stages of review.<sup>224</sup> This early due diligence looks to whether the project is part of the so-called “Exclusion List” and considers the risks and impacts of the proposed investment provided by the client, to determine if such risks are manageable.<sup>225</sup> The IFC eventually decides on a provisional risk categorization of the project that is commensurate to the amount of environmental and social risk identified by the client.<sup>226</sup> This

<sup>217</sup> See *infra*, Appendix: Annex B.3 for a detailed discussion of the IFC’s delegation of responsibilities to the client.

<sup>218</sup> IFC, Sustainability Policy, para. 30 (2012).

<sup>219</sup> See ESRP Manual, *supra* note 193, at 31.

<sup>220</sup> See *supra* Section 3.3 (Conclusion: Common Elements of the Principle of Due Diligence).

<sup>221</sup> See *supra* Section 3.2.1 (Transboundary Harms and Modern Environmental Law) and 3.2.3 (International Human Rights Law).

<sup>222</sup> IFC, Sustainability Policy, para. 26 (2012).

<sup>223</sup> IFC, Sustainability Policy, paras. 34–35 (2012).

<sup>224</sup> See *infra* Appendix: Annex A for a discussion of the IFC’s project cycle.

<sup>225</sup> IFC, Sustainability Policy, paras. 19, 23 (2012).

<sup>226</sup> Category A is for business activities with significant potential adverse environmental and social risks; Category B is for activities with limited potential adverse risk; and Category C is for activities with minimal or no adverse risk. See IFC, Sustainability Policy, para. 40 (2012), for risk categorization descriptions. Category C projects do not have disclosure requirements and do not require a robust environmental and social risk assessment. *Id.* at para. 45, fn 10.

provisional categorization determines how much due diligence the IFC must later conduct to collect information through site visits and client risk assessments, impacting the final risk categorization, the conditions in the contract, who measures “broad community support” (BCS), and public disclosure requirements.<sup>227</sup> Proposed investments with moderate to high levels of environmental and social risk, or the potential for adverse impacts, are then carried out in accordance with the Performance Standards requirements.<sup>228</sup>

Although categorizing by risk severity is in principle an acceptable method to determine how much due diligence to conduct, this policy as currently practiced by the IFC may nevertheless be inadequate. From the information available, it appears that the client is the predominant source of information the IFC considers when categorizing the risks inherent in the project, even though the client-borrower may ultimately be the source of or implicated in the failures or abuses which occur.<sup>229</sup> Placement of too much trust in the client’s risk assessment information may very well fail a “reasonableness” standard.

Two specific weaknesses in the IFC’s current compliance with the reasonableness requirement of due diligence under international law are examined below, and a number of changes are proposed. First, while the IFC’s current policies may capture many environmental and social risks, including some human rights risks, the use of the existing Performance Standards as the benchmark influences the type of information the IFC reviews to ensure a project is sustainable. To meet the reasonableness standard, the IFC ought to consider specific human rights risk information, which may require a broader survey of information. Second, it is unclear whether the IFC environmental and social teams consult outside sources in addition to client provided data, and if so which sources. Without any transparency in relation to the IFC’s approach to collecting and reviewing contextual and project information it is difficult to ascertain whether the IFC meets the reasonableness standard of due diligence.

#### **4.2.1 Adopt a Rights-Based Approach to Obtain More Risk Information**

It is important for the IFC to consider what is legally imputable to it by the “known or ought to have known” standard.<sup>230</sup> In order to comply with its international legal obligations, the IFC should consult available sources beyond those provided by the client (i.e. client-produced environmental and social impact assessments). While environmental and social impact assessments may at times capture some human rights issues,<sup>231</sup> it is likely that a significant amount of relevant human rights risk information may be overlooked at the early stages of a project if the IFC does not explicitly have recourse to key international human rights standards and sources on relevant sector-specific and context-specific risks when implementing the Performance Standards.

Considering that information on regional, country and sectoral human rights risks is publicly available from a range of authoritative sources, it is reasonable for the IFC to consult human rights institutions and networks to supplement the client’s assessments. By explicitly considering human rights, the IFC would measure the extent to which a project is likely to respect human rights both in terms of substance and process by drawing on the expertise and information provided by human rights institutions and networks in the assessment.<sup>232</sup> This would also be likely

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<sup>227</sup> The outcome of the environmental and social risk assessment is relevant for determining the scope of the conditions of IFC financing and investment disbursements. IFC, Sustainability Policy, para. 21 (2012).

<sup>228</sup> IFC, Sustainability Policy, paras. 3, 6 (2012).

<sup>229</sup> See Amnesty International Submission, *supra* note 210, at 2.

<sup>230</sup> See *supra*, notes 123–24 (on the know or ought to have known standard employed by human rights tribunals). Note that under international investment law, an investor can fail the legitimate expectations test if information was easily available to contradict, and they failed to look for it. See Rudolf Dolzer & Christoph Schreuer, *supra* note 99.

<sup>231</sup> See Amnesty International Submission, *supra* note 210, at 2. (“Most of the social and many of the environmental risks identified in the IFC’s Sustainability Framework have human rights implications . . . While some human rights impacts may be captured within social and environmental impact assessment processes, these processes are not adequate to ensure all of the human rights impacts are identified and considered.”).

<sup>232</sup> See Nordic Trust Fund HRIA report, *supra* note 151, at x.

to counteract the risk of some client impact assessments being little more than box-ticking exercises.<sup>233</sup> It is common to build on research conducted by other assessments and studies using a human rights framework, and reasonable to expect a financial institution in the position of the IFC to do so.<sup>234</sup> A methodology for considering human rights risk information during the IFC's due diligence process is detailed in Part II, *infra*.

#### **4.2.2 Increase Transparency about IFC's Supplemental Risk Research**

It is unclear from surveying the IFC's Sustainability Framework and the IFC website which outside sources the IFC environmental and social teams consult in determining a project's initial risk assessment. The IFC need to be more transparent about these important matters, since it is impossible at present to determine whether the IFC meets the reasonableness standard of due diligence in its approach to collecting and reviewing contextual and project risk information.

This recommendation builds on the transparency problem identified in section 4.1.2.2 above, since at present the IFC's own due diligence responsibilities vis-à-vis its clients' due diligence documentation are unclear. The IFC's Sustainability Policy places the onus mainly on the client to initially assess risk.<sup>235</sup> While the IFC has made progress by providing some information on projects for 30 or 60 days before a project begins,<sup>236</sup> this information and the time period for which it is provided is determined by the previous risk assessment. This makes it even more important for outside actors to understand how the IFC assesses risk and what sources it uses to do so above and beyond its reliance on client-sourced material. Given the importance of the IFC's initial risk categorization to its future monitoring, contract negotiation, and even the amount of information disclosed, the IFC should publicize in greater detail what its methodology is for conducting this crucial initial risk assessment.

The basic requirement of transparency requires that affected people and other stakeholders should not be excluded from access to information until the stage at which IFC projects have already been designed and posted. Affected persons and groups should play a role in the early stages of the project, aiding in information gathering and commenting on project design. If indeed the IFC has been systematically using outside sources of information in conducting its own due diligence, it should allow civil society to know which sources it is consulting. Providing such information to civil society and affected communities would enhance IFC consultation with relevant local community groups, human rights actors, or NGOs who are concerned by a proposed project in order to raise awareness of any potential risks the project might pose. Furthermore, since the IFC is increasingly considering investing in fragile and conflict-affected areas,<sup>237</sup> disclosure of the sources used by the IFC to assess risk will allow civil society and affected groups to play a role in gathering information that the IFC reasonably ought to know about the new investment region. Client risk assessments in new investment environments will almost certainly need to be supplemented if the IFC is to discover all reasonably knowable risks.

#### **4.3 Due Diligence as an Ongoing Duty to Prevent and Mitigate**

This section examines to what extent the IFC meets the second due diligence requirement, namely the ongoing nature of the duty of due diligence. The requirement of due diligence generally operates over time and is a continuing obligation of conduct. It entails an *ex ante* duty to identify relevant risks and to take action to minimize

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<sup>233</sup> See SIMON WALKER, *THE FUTURE OF HUMAN RIGHTS IMPACT ASSESSMENTS OF TRADE AGREEMENTS* (2009).

<sup>234</sup> See Nordic Trust Fund HRIA report, *supra* note 151, at xi–xii.

<sup>235</sup> See generally Amnesty International Submission, *supra* note 210.

<sup>236</sup> See IFC, Access to Information Policy, para. 34 (2012).

<sup>237</sup> See IFC, *Creating Opportunity in Fragile and Conflict-Affected Countries*, [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+news/pressroom/creating-opportunity-in-fragile-and-conflict-affected-countries](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+news/pressroom/creating-opportunity-in-fragile-and-conflict-affected-countries)



the risk of harm, no matter whether the harm in question is caused by third parties or by internal inaction.<sup>238</sup> It also entails an ongoing duty to monitor in order to timely mitigate harms if they occur.<sup>239</sup> In some circumstances, due diligence requires that follow-up access to a remedy or reparations be provided.<sup>240</sup> We first examine to what extent the IFC's current due diligence policy and practice meets this requirement by identifying strengths and weaknesses of the present policies.

The IFC's Sustainability Policy includes certain temporal aspects of due diligence. The IFC's ex ante due diligence responsibilities occur during the project assessment phase, while its ex post due diligence responsibilities occur upon signing of the legal agreement. Ex ante due diligence that involves risk assessment and reasonable information gathering plays a role in devising action plans and mitigation strategies as discussed above.

The content of the IFC's ex post due diligence responsibilities in the Sustainability Policy is quite clear. Upon signing the legal agreement, the IFC's due diligence responsibilities appear in the form of supervision and monitoring to ensure the client is adhering to Performance Standards and conditions listed in the "Action Plan."<sup>241</sup> The IFC is required to monitor the project's compliance with the Performance Standards by reviewing periodic reports submitted by the client and conducting site visits.<sup>242</sup> This "Annual Monitoring Report" provides information on the client's progress in meeting the environmental and social terms of the investment agreement, and information on factors that might materially affect the enterprise. The IFC is then supposed to disclose the client's progress as laid out in the action plan.

Where the client fails to comply with its social or environmental commitments, the Sustainability Policy requires the IFC to "work with the client to bring it back into compliance to the extent feasible, and if the client fails to reestablish compliance, exercise remedies when appropriate."<sup>243</sup> IFC notes that "the Performance Standards . . . and other applicable environmental and social obligations of the client are covenanted in loan agreements,"<sup>244</sup> making them legally enforceable. However, this may not be sufficient to satisfy the legal obligations of the IFC and in particular its obligations of due diligence under international law. In situations in which the potential harm feared is irreparable (as would be the case for violations of the right to life, sexual violence, torture, etc.), the precautionary principle would require a more timely response than the legal enforcement of covenants in a loan agreement. Further, timely remedial measures by the client might need to be negotiated.

Despite the robust articulation of its ex ante and ex post responsibilities, the IFC's "ongoing duty" of due diligence requirement is futile if it is not used for the purpose for which it was included: i.e. to create prevention strategies before the signing of a loan agreement and to facilitate a timely response when mitigation strategies are needed after the agreement has been signed. The ongoing duty is not simply a duty to create action plans and to conduct site visits; the aim is to use the IFC's leverage to find information to create actions plan, which will later be enforced if the IFC uncovers information that the client may not be complying. The recent human rights shortcomings in IFC-supported projects (including in cases of financial intermediary lending) highlight clearly that it is not enough to check the boxes for environmental and social due diligence; the IFC must use its leverage to induce clients to meet all the requirements under the Sustainability Framework so that projects really "do no harm."<sup>245</sup>

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<sup>238</sup> See supra Section 3.3 (Conclusion: Common Elements of the Principle of Due Diligence).

<sup>239</sup> See id.

<sup>240</sup> See supra Section 3.2.3 (International Human Rights Law).

<sup>241</sup> See infra, Appendix: Annex B.2, for a discussion of the IFC's ex post supervision and monitoring responsibilities as required by its Sustainability Policy.

<sup>242</sup> IFC, Sustainability Policy, para. 7 (2012).

<sup>243</sup> IFC, Sustainability Policy, paras. 24, 45 (2012).

<sup>244</sup> See Letter from Rachel Kyte, Dir. Env't & Soc. Dev., IFC, to Fraser Reilly-King, Coordinator, Halifax Initiative Coal (Sept. 29, 2006), available at <http://www.halifaxinitiative.org/content/letter-ifc-response-one-step-forward-one-step-back-september-29-2006>.

<sup>245</sup> See generally CAO, Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries (2012).

Two current weaknesses in the IFC's current practice in relation to this "ongoing duty" requirement of international law are examined below, and a number of changes are proposed. First, while the IFC appears to engage in ex ante due diligence by conducting risk assessments and categorizations, the information gathered needs to be effectively used to create action plans and loan conditions. The enhancement of transparency (which is currently lacking) about the conditions imposed by the IFC would help to clarify whether the IFC actually achieves the aim of this ongoing duty: thoughtful prevention and mitigation strategies. Second, the ex post requirement of supervision, which involves site visits and annual reporting, again requires the IFC to use the information obtained in order to induce compliance. This may require finding ways to enhance the IFC's leverage over the client.

#### 4.3.1 Increase Transparency About the Use of Ex Ante Risk Information

The IFC could increase the effectiveness of its ex ante due diligence greatly by increasing transparency about action plans when they exist. This can be accomplished by making any information gathered on proposed projects public in a sufficiently timely fashion to enable effective critique. At present, by the time enough information is available for its release to be meaningful, the IFC and the client are likely to have expended enough resources to ensure that they are effectively committed, thereby disincentivizing any change of course despite the risks or harm revealed.<sup>246</sup> Increased transparency can help the IFC by allowing interested parties to provide useful input before action is taken. Overlooked costs and the likely need, scale and feasibility of mitigation actions could then be included in the efficiency analysis before the project commences.

The ex ante negotiation of transparency conditions is particularly necessary in the growing area of financial intermediary lending and if effectuated, can render the ex ante risk research useful. The IFC Compliance and Advisor/Ombudsman has noted that "the end-use of the majority of IFC financial intermediary financing remains undisclosed, even where the business activity financed has significant potential [environmental and social] impacts."<sup>247</sup> The IFC at a minimum should publicly disclose the known end-use of finance, which could aid in developing a methodology to enforce environmental and social standards in relation to the sub-debtors.<sup>248</sup>

Like in other areas of IFC policy, the policy that exists is not always enforced in practice. Requests from NGOs for information that should be available according to IFC policy, have nevertheless been denied by the IFC on the grounds of confidentiality without the required explanation of the need for such confidentiality.<sup>249</sup> While client confidentiality concerns may clearly at times be valid, the guidance to be found in principle 10 of the Guidelines for Responsible Contracts (adopted by the UN Human Rights Council as an addendum to the Guiding Principles on Business and Human Rights, discussed above) should be applied in such cases: i.e. confidentiality should be granted to clients when there are "compelling justifications," and confidentiality protection should endure only for a limited time.<sup>250</sup>

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<sup>246</sup> Shalanda H. Baker, *Why the IFC's Free, Prior, & Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 *WIS. J. INT'L L.* 668, 692 (2012).

<sup>247</sup> Compliance Audit of IFC's Financial Sector Investments, CAO, available at <http://www.cao-ombudsman.org/newsroom/documents/FAUDIT.htm>.

<sup>248</sup> *Id.* In this regard, the Equator Principles could be consulted, as the third version requires private sector banks to provide consent-based disclosure of names and locations of their project finance investments. See *The Equator Principles* (June 2013), [www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf).

<sup>249</sup> "The request referred to documents listed in the IFC's Environmental and Social Review Summary for the project, as well as in the Social and Environmental Action Plan ... developed by the IFC's client, Eurasian Minerals Inc. (EMX). However, the IFC argued that such information had to be requested from EMX... This decision contrasts with the IFC's Disclosure of Information Policy from 2006, ... [which] states that the IFC is required to disclose 'project-level information regarding investments and advisory services supported by IFC' and 'any relevant social and environmental impact assessment documents prepared by or on behalf of the client.'" Mathieu Vervynck, *An assessment of transparency and accountability mechanisms at the European Investment Bank and the International Finance Corporation*, EUROAD (Sept. 2015).

<sup>250</sup> *Principles for Responsible Contracts Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations*, OHCHR, at Principle 10 (2015) (discussing transparency and disclosure of contract terms).



### 4.3.2 Effectively Leverage Ex Post Information to Induce Compliance

The ex post requirement of ongoing supervision (which includes site visits and annual reporting) requires the IFC to use its relationship with the client, and any information it has obtained, in order to induce compliance. This may require finding ways to build greater leverage and following best practices in the banking sector.<sup>251</sup> It has rightly been noted that the IFC has the greatest leverage the moment before the contract is signed. Prior to the signing, confidential third-party consultants may be used to help identify and negotiate to prevent the most egregious risks. Financial institutions besides the IFC have noted that they may lack leverage in inducing ex post compliance, particularly in the case of financial intermediary lending,<sup>252</sup> and that the question becomes what level of violation justifies exit from the project. This is an excessively defeatist response. Even if the IFC has not negotiated covenants or other leverage ex ante, the IFC should consider UN Guiding Principle 19,<sup>253</sup> which suggests that instead of giving up efforts to mitigate a violation because the IFC has negotiated insufficient leverage ex ante, the IFC should attempt to create more leverage ex post.<sup>254</sup> In addition, appropriate ex ante negotiation of covenants and conditions which could function as triggers to the release of further financing could help align incentives and increase the IFC's leverage ex post.

### 4.4 Conclusion: Improve the IFC's Due Diligence and Align It With Its Obligations under International Law

While the IFC's Sustainability Framework incorporates a process of social and environmental due diligence, the policies at present inadequately meet the IFC's due diligence responsibilities under international law, particularly its human rights due diligence responsibilities. The IFC's due diligence policies should be improved in three respects: a policy commitment that reflects its human rights obligations as a duty bearer should be clearly articulated and adopted; the IFC should consult with appropriate human rights institutions and networks to gather risk information that it "should reasonably know," and it should use information obtained in the ex ante and ex post phases of due diligence effectively so as to enhance project outcomes and build leverage to induce compliance. In all these areas, greater transparency is needed.

As a duty bearer under international law, it is insufficient for the IFC to assume due diligence responsibilities on a voluntary basis, particularly since the IFC's current due diligence policy does not sufficiently include human rights due diligence. A clear policy commitment to conduct human rights due diligence would focus the IFC's attention on international human rights standards in discharging its obligation of "doing no harm." Moreover, enhancing transparency about the procedures and sources that IFC teams currently use to verify client due diligence documentation would help to clarify whether the IFC meets international standards of due diligence.

The content and extent of due diligence required under international law varies depending on context, effectively making it a standard of reasonableness. Although the IFC currently purports to use a due diligence standard according to what is "commensurate to the risk," the recurrence of human rights violations in IFC projects

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<sup>251</sup> It is worth noting that in the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, the parties and the adhering banks agree to work together and commit themselves to conducting and publishing a study (by the end of 2017) on good practices of how to increase leverage when supporting companies to improve responsible business conduct regarding human rights. The work of the Dutch banks on due diligence best practices, the definition of key terms, and reports on increasing leverage will inform the OECD's Working Party on Responsible Business Conduct in the Financial Sector. See Ryan Brightwell, *Going Dutch: What's in the new Dutch banks and human rights covenant?*, BankTrack (Nov. 10, 2016), available at [http://www.banktrack.org/blog/going\\_dutch\\_what\\_s\\_in\\_the\\_new\\_dutch\\_banks\\_and\\_human\\_rights\\_covenant](http://www.banktrack.org/blog/going_dutch_what_s_in_the_new_dutch_banks_and_human_rights_covenant).

<sup>252</sup> See Thun Group Paper, *supra* note 135.

<sup>253</sup> Guiding Principles on Business and Human Rights, *supra* note 132, at Principle 19.

<sup>254</sup> Commentary to UNGP Principle 19 suggests this be done by "offering capacity-building or other incentives to the related entity" which long-term could create other incentive problems, if clients perceived that violating the Performance Standards allowed them to negotiate and receive additional assistance. However, "collaborating with other actors" remains as a functional method, even if the IFC rejects the first. See *id.*

points to the need for the IFC to consider and take seriously other sources of risk information before investing in projects.<sup>255</sup> To meet the reasonableness standard, the IFC should consider risks to the human rights of people potentially affected by IFC-funded projects, requiring a broader survey of information inherent to the region, country and sector. Moreover, greater transparency about whether the IFC already systematically collects and reviews contextual and sector risk information would clarify whether the IFC in fact currently meets the reasonableness standard of due diligence.

Due diligence under international law entails an ongoing duty to monitor in order to prevent risks (ex ante) and to mitigate in a timely manner where exposure to the relevant risk continues (ex post). Though the IFC conducts ex ante due diligence by requiring risk assessments, the information needs to be effectively used to create action plans and contractual conditions. Enhancing transparency of the conditions currently imposed by the IFC would help to clarify whether they satisfy the underlying rationale for the ongoing duty: namely the creation of appropriate and effective prevention and mitigation strategies. Moreover, the ex post requirement of ongoing supervision (which includes site visits and annual reporting) requires the IFC to use the information it has obtained and its relationship with the client to induce compliance.

Part II below contains an illustrative case study to demonstrate the gap between the IFC's due diligence and international legal requirements, further highlighting the need to integrate adequate consideration of human rights risk information into its due diligence responsibilities.

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<sup>255</sup> In response to a recent case where country and sector risks of conflict and violence around land were or should have been known to the IFC, the CAO found that the IFC's due diligence was not "commensurate with the level of social and environmental risks and impacts," and thus did not meet a key requirement of its own Sustainability Policy. See CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras (Dec. 20, 2013), at 5, available at [http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161\\_ENG.pdf](http://www.cao-ombudsman.org/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf) [hereinafter CAO Audit of Dinant-Honduras Investment].



## PART II

# Taking into Account Human Rights Considerations in the IFC's Projects: A Case Study Analysis

## 1. Introduction

Part I examined the extent to which the IFC is bound by international law, specifically by international human rights law, and examined the standard of IFC's due diligence under international law. The IFC's current due diligence practices under its Sustainability Framework were then mapped against international standards, noting gaps and areas for improvement. The IFC's failure to comply with its internal policies and Sustainability Framework at times, for example as confirmed by the IFC's accountability mechanism (the Compliance Advisor/Ombudsman<sup>256</sup>) in the IFC-funded Dinant Corporation project in Honduras,<sup>257</sup> only worsens the IFC's non-compliance with its human rights obligations under international law.

Part II considers how the IFC's due diligence obligations under international law might be operationalized by reference to sources of human rights risk information and illustrates how the IFC can use such information with a case study of the Dinant-Honduras project. It incorporates some of the suggested changes to the IFC's due diligence obligations discussed above by proposing a methodology to systematically gather human rights risk information in a Dinant-type case.

## 2. Human Rights Risk Information Beneficial to the IFC

The Dinant-Honduras case examined in this report is characterized by inadequate due diligence and, to varying degrees, inadequate social and environmental assessment and supervision. Although information relevant to the project risk factors from various sources, such as UNDP, US Department of State, local NGOs and scholars, was available, it is unclear whether the IFC consulted these sources.

Giving due consideration to human rights risk information while examining the social and environmental risks can enhance the IFC's ability to prevent and mitigate human rights violations proactively and in a timely fashion, for the overall benefit of the project.<sup>258</sup> Human rights risk information – stemming from sources within the U.N. system, as well as NGO reports and consultations with civil society – could inform the IFC's E&S team about corruption, unequal treatment of ethnic minorities, conflicts centered around land use, armed conflict, poverty,

<sup>256</sup> To learn more about the CAO, see Appendix: Annex B.4, "The Role of the Compliance Advisor/Ombudsman."

<sup>257</sup> In its investigation of the Dinant-Honduras case, the CAO used a "reasonableness" standard and found that the IFC violated the requirement to perform an environmental and social review "commensurate to the risk." The failure was evidenced by the fact that the IFC did not investigate further beyond the information provided to them by Dinant, particularly when multiple sources of information were available and could have been considered by the IFC before deciding to invest in the project. See CAO Audit of Dinant-Honduras Investment, *supra* note 256, at 5–6.

<sup>258</sup> Salient Human Rights Issues, UNGP Reporting Framework, SHIFT (July 21, 2015), <http://www.ungpreporting.org/glossary/salient-human-rights-issues/>.

and unavailability of natural resources, to name a few.<sup>259</sup> Early consideration of human rights risks, in particular, helps to trigger tailored mitigation actions at a stage in the project when IFC has greater leverage over its client, since IFC states that it will not approve a project and disburse funds until the project “reflects IFC’s commitment to sustainability” and until its client complies with IFC’s Performance Standards.<sup>260</sup> Considering human rights risk information in this manner can further strengthen country diagnostics and improve social and environmental risk assessment, leading to better-informed monitoring, redress, and mitigation measures. From this perspective, integration of human rights enhances the operationalization of the current Sustainability Framework.

Although there may be a cost to gathering additional information, the benefits are substantial since such information can help avoid costly failures and harm to communities.<sup>261</sup> Moreover, it can help avoid significant negative repercussions for the reputation and standing of the IFC and its leadership amongst international and domestic financial institutions.

### 3. Methodology: Finding Human Rights Risk Information

Broadly speaking, human rights risk information relevant to the IFC could be divided into two categories: country-specific and sector-specific information. Relevant risk information sources include (1) UN System, (2) Regional Systems, (3) Government or Inter-governmental organizations, (4) Civil Society and Media, and (5) sources internal to the World Bank Group.

Risk identification has to be an ongoing organic process since risks to human rights may change over time.<sup>262</sup> Thus, the risk identification should be done before the first IFC disbursement (ex ante) as well as periodically after the first disbursement (ex post). The ongoing assessment is critical because new risks not present prior to disbursement might emerge during the implementation of a project. The risk information gathered during the ex ante period can help the IFC determine which conditions should be included in the loan agreement and what measures should be taken to minimize project risk. The risks identified in the ex post period will help the IFC ensure the client’s compliance with the stipulated conditions and Performance Standards.

Key issues related to human rights risks that typically arise in IFC projects include (but are not limited to) land disputes, labor conditions, economic context, political context, and indigenous people’s rights. The following table identifies some of the relevant sources for acquiring such human rights risk information:

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<sup>259</sup> BSR, Conducting an Effective Human Rights Impact Assessment, supra note 148, at 13. Though this report gives guidance to private actors on human rights risk assessment, it can be instructive to the IFC’s work.

<sup>260</sup> Consult stages 7, 8 and 9. See IFC, Solutions: IFC Project Cycle, [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/solutions/ifc-project-cycle](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/ifc-project-cycle).

<sup>261</sup> For example, in the mining industry, conflicts between local communities and private investors might result in shutdowns or delays in production and result in economic losses. See Rachel Davis & Daniel M. Franks, The Costs of Conflict With Local Communities in Extractive Industry, Chapter 6, SRMining (2011); Paul Stevens et al., Conflict and Coexistence in the Extractive Industries, Chatham House: Royal Institute of International Affairs (2013); South Africa Miners Return to Work After Longest Platinum Strike, REUTERS (June 25, 2014), available at <http://www.reuters.com/article/us-safrica-mining-idUSKBN0F00DC20140625>.

<sup>262</sup> Guiding Principles on Business and Human Rights, supra note 132, at Principle 17.

**Figure 1: Gathering Human Rights Risk Information for an IFC Project**

### Country-Specific

#### UN System

- Universal Periodic Review Reports (every three years)
- UNDP Human Development Reports (annual)
- Reports from U.N. Human Rights Treaty Bodies
- Special Procedures of the Human Rights Council (country specific reports depend on visits)
- OHCHR Reports by Special Rapporteurs (depend on visits)

#### Regional System

- Inter-American Commission on Human Rights (annual)
- African Commission on Human and Peoples' Rights (periodic)

#### Government and Intergovernmental

- U.S. State Department Country Reports (annual)
- Congressional Research Service reports for U.S. Congress (by request)

#### Civil Society and Media

- International NGOs (Human Rights Watch, Amnesty International, Freedom House, FIAN International)
- Local NGOs
- News reports
- Scholars

#### World Bank Group

- World Bank Database Country Reports
- Past client submitted information from projects in the same country

### Sector-Specific

#### UN System

- Food and Agriculture Organization of the UN Publications

#### Regional System

- Commissions may review cases from relevant sectors

#### Government and Intergovernmental

- ILO Sector Standards
- OECD Guidelines

#### Civil Society and Media

- International NGOs (Human Rights Watch, Amnesty International, Freedom House, FIAN International)
- Local NGOs
- News reports
- Scholars

#### World Bank Group

- Client: Environmental and Social Impact Assessments; Grievance Mechanisms; and Annual reports
- Past Site Visits to Similar Projects
- Past CAO or WBIP complaints and reports

### 3.1 Country-Specific Human Rights Risk Information

Country-specific risk information includes regional and country conditions, elucidating human rights risks in relation to investment of a project in the specific region or country. These risks may be political, social, or economic risks that can materialize into conflicts, political uprisings, corruption, poverty, or land disputes. The gravity of the risk varies from one country to another. Certain risks might be so egregious as to discourage IFC's investment in that country.<sup>263</sup> However, in other cases, early identification of risks might lead to appropriate mitigation strategies that, when implemented, ultimately protect the project from disruption and prevent rights violations.

<sup>263</sup> Country Risk, INVESTOPEDIA, <http://www.investopedia.com/terms/c/countryrisk.asp?lq=no-infinite>.

### 3.1.1 Sources for Gathering Human Rights Risk Information

Sources that can be helpful in gathering country-specific human rights risk information include (1) the UN system, (2) Regional Systems, (3) Governmental or Intergovernmental, and (4) Civil Society and Media.

#### 3.1.1.1 The UN System

- UN Universal Periodic Review Reports: These reports are based on submissions prepared by the state, various UN entities, and local stakeholders as part of the Universal Periodic Review.<sup>264</sup> These reports provide information about the assessed state's human rights records, including any human rights violations that occur there.<sup>265</sup>
- Special Procedures of the Human Rights Council: This Council includes independent human rights experts who report and advise on human rights from a thematic or country-specific perspective. They undertake country visits and send communications to states in relation to country-specific human rights issues.<sup>266</sup> Their reports to the Human Rights Council and UN General Assembly can be valuable sources of information about a specific country or set of issues (e.g. issues relevant to indigenous communities).
- UNDP Human Development Reports: These annual reports provide information on the state of development in a country by reference to various indicators such as human security, environmental sustainability, and inequality.<sup>267</sup> The detailed analysis accompanying each indicator can help identify relevant human rights risks of a country.
- Reports from U.N. Human Rights Treaty Bodies: These reports, particularly their concluding observations, provide information about a state's compliance with international human rights treaties and identify human rights risks in the country. Examples of committees include Committee on Migrant Workers, Committee against Torture, Committee on Economic, Social and Cultural Rights, Committee on the Rights of the Child, Committee on the Elimination of Racial Discrimination, and Human Rights Committee.
- Office of the United Nations High Commissioner for Human Rights: The OHCHR website provides a list of human rights treaties which have been ratified by each country. This helps situate the country's legal obligations under international human rights law.<sup>268</sup> In addition, OHCHR also publishes reports on special human rights issues that may cover the particular human rights risks implicated in a specific region or country.<sup>269</sup>

#### 3.1.1.2 Regional Systems

- Inter-American Commission on Human Rights: IACHR publishes periodic country reports on human rights situations in American countries and thematic reports covering human rights topics such as violence and indigenous people.
- African Commission on Human and Peoples' Rights: ACHPR publishes country reports on human rights situations in African countries. The African Charter on Human and Peoples' Rights requires member states to submit initial reports two years after Charter ratification or accession and periodic reports every two years after the initial report.<sup>270</sup>

<sup>264</sup> Universal Periodic Review: Documentation, OHCHR, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

<sup>265</sup> Universal Periodic Review, OHCHR, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

<sup>266</sup> Special Procedures of the Human Rights Council, OHCHR, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

<sup>267</sup> About Human Development, Human Development Reports, UNDP, <http://www.hdr.undp.org/en/humandev>.

<sup>268</sup> To view the ratification status by country or by treaty, see OHCHR, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx).

<sup>269</sup> Special Issues, Publications and resources, OHCHR, <http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx>; Fact Sheets, Publications and resources, OHCHR, <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>.

<sup>270</sup> State Reporting, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, <http://www.achpr.org/states/>.

### **3.1.1.3 State Government or Intergovernmental Organizations**

- U.S. State Department Country Reports: These annual reports are prepared by the U.S. State Department and identify the most prevalent human rights abuses that occur in the country as well as highlight the underlying causes of violations.<sup>271</sup>
- Congressional Research Service Reports for U.S. Congress: The CRS is a component of the Library of Congress. It conducts research and analysis for Congressmen on a broad range of national policy issues. Some of these reports may cover political, economic, and social aspects of certain countries.<sup>272</sup>

### **3.1.1.4 Civil Society and Media**

- International NGOs: Human Rights Watch, Amnesty International, Freedom House, FIAN International, and International Federation for Human Rights publish a variety of reports identifying the human rights violations prevalent in a country or in the relevant sector. For example, the Human Rights Watch website allows searching by country name to find relevant human rights information.<sup>273</sup>
- Local NGOs: The civil society groups operating locally often publish reports on local contexts as well as on various thematic issues observed locally, such as gender equality and child labor. Their reports can help identify the human rights violations based on first-hand information and sometimes more active engagement with local communities. In-person consultations with local NGOs and community groups can help identify contextual risks and illuminate local dynamics, which may not be evident in reports of international (or even national) NGOs.
- News Reports: Media reports can alert IFC to country context (or sector-specific issues) that may give rise to human rights risks associated with the projects. The IFC can then use other sources listed here for a more in-depth assessment of the risks.
- Scholars: Scholars usually study certain subjects through field research or literature reviews. They can be well acquainted with the local context and can provide pertinent information about human rights situations.

## **3.2 Sector-Specific Risk Information**

Sector-specific risk information can elucidate human rights risks that are unique to a specific sector such as agriculture, infrastructure, mining, or media and technology, among others.<sup>274</sup> When not identified and mitigated by reference to relevant human rights standards, these human rights risks can place the project in danger of termination before completion, non-completion within the scheduled time and budget, failure to meet the expected quality, or contribution to human rights violations in local communities.<sup>275</sup>

Sector specific human rights risk information often originates from intergovernmental organizations, such as the ILO, non-governmental organizations, or even corporate filings of private industry actors.

### **3.2.1 Sources for Gathering Human Rights Risk Information**

The following are examples of sources that can be helpful in gathering sector-specific human rights risk information as well as devising prevention and mitigation strategies. These sources implicate the environment, labor conditions,

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<sup>271</sup> Human Rights Reports, U.S. DEP'T OF STATE, <http://www.state.gov/drl/rls/hrrpt/>.

<sup>272</sup> Congressional Research Service Reports on Foreign Policy and Regional Affairs, FEDERATION OF AMERICAN SCIENTISTS, available at <https://fas.org/sgp/crs/row/>.

<sup>273</sup> Reports, HUMAN RIGHTS WATCH, <https://www.hrw.org/publications?keyword=Honduras&date%5Bvalue%5D%5Byear%5D=>.

<sup>274</sup> IFC Provides Comprehensive Solutions to Clients in Developing Countries to Address Today's Greatest Development Challenges, SOLUTIONS, INT'L FINANCE CORP., [http://www.ifc.org/wps/wcm/connect/CORP\\_EXT\\_Content/IFC\\_External\\_Corporate\\_Site/solutions/expertise](http://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/solutions/expertise) (identifying 10 industries: Agribusiness and Forestry; Financial Institutions; Funds; Health and Education; Infrastructure; Manufacturing; Oil, Gas, and Mining; Public-Private Partnerships; Telecommunications, Media and Technology; and Tourism, Retail and Property).

<sup>275</sup> Rajman Rawi, Project Risk Identification for New Project Manager, PROJECT TIMES (Apr. 15, 2014), <https://www.projecttimes.com/articles/project-risk-identification-for-new-project-manager.html>.



and land disputes, and they are common to many sectors of IFC's projects. However, due diligence obligations would require the IFC to conduct a broader survey of sources that might be relevant to a specific industry or sector such as mining, dam-construction and so on. The examples of sources provided herein, thus, are purely illustrative and non-exhaustive:

- International Labor Organization Sector Reports: The ILO publishes standards, codes of practice, handbooks, reports, and other online resources for 22 industries and sectors.<sup>276</sup> IFC can refer to these sources and identify common human rights risks such as child labor in a specific sector.<sup>277</sup> Furthermore, these standards can provide IFC with guidance on mitigation measures that will protect from human rights violations.
- OECD Guidelines: The OECD publishes guidelines for agricultural supply chain; extractive sector stakeholder engagement; financial sector due diligence; mineral supply chains; and textile and garment supply chains.<sup>278</sup> These guidelines are aimed at helping enterprises conduct business in a responsible way and ensure that their operations do not lead to adverse impacts and contribute to sustainable development.<sup>279</sup> By referring to these guidelines, IFC may be able to identify potential human rights risks such as forced eviction and child labor in a specific sector, as well as search for precaution or mitigation measures to be taken.
- Food and Agriculture Organization of the United Nations: The FAO produces reports and publications on Agriculture and Consumer Protection; Economic and Social Development; Fisheries and Aquaculture; Forestry; and Technical Cooperation.<sup>280</sup>

### 3.3 Internal World Bank Group Sources

Sources internal to the World Bank Group include documents produced by its clients, information gathered during IFC site visits, recommendations in CAO complaints and reports, as well as investigations and reports by the World Bank Inspection Panel. According to the IFC's Sustainability Policy, the IFC's environmental and social due diligence typically includes "reviewing all available information, records, and documentation related to the environmental and social risks and impacts of the business activity" and "conducting site inspections and interviews of client personnel and relevant stakeholders, where appropriate."<sup>281</sup>

In cases where the business activity is likely to have potential significant adverse impacts on affected communities, the IFC expects clients to engage the local communities in negotiation and consultation.<sup>282</sup> Complementary to community engagement are grievance mechanisms, which should ideally be in place from the beginning of the risk appraisal stage and remain until the end of the project's life.<sup>283</sup> Through these mechanisms, local communities can complain about the adverse impacts of projects and negotiate solutions with IFC's clients.

In terms of information provided by World Bank Group, the IFC can take advantage of its affiliation to the World Bank Group and obtain detailed information once it finds relevant public reports. For example, the World Bank Inspection Panel's reports on a 2006 Land Administration Project in Honduras can provide IFC with country-

<sup>276</sup> For a list of 22 industries and sectors, see INT'L LABOR ORG., available at <http://www.ilo.org/global/industries-and-sectors/lang--en/index.htm>.

<sup>277</sup> Agriculture; Plantations; Other Rural Sectors, INT'L LABOR ORG., <http://www.ilo.org/global/industries-and-sectors/agriculture-plantations-other-rural-sectors/lang--en/index.htm>.

<sup>278</sup> See generally OECD Guidelines, supra note 129.

<sup>279</sup> OECD-FAO Guidance for Responsible Agricultural Supply Chains, OECD (Mar. 11, 2016), available at <http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm>.

<sup>280</sup> To browse themes, see FAO, <http://www.fao.org/themes/en/>. See also FAO, Main Ethical Issues in Fisheries, Corporate Document Repository, available at <http://www.fao.org/docrep/008/y6634e/y6634e04.htm>.

<sup>281</sup> IFC, Sustainability Policy, para. 28 (2012) (emphasis added).

<sup>282</sup> IFC, Sustainability Policy, para. 30 (2012).

<sup>283</sup> Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets, INT'L FINANCE CORP. (May 2007), at 70, available at [http://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC\\_StakeholderEngagement.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC_StakeholderEngagement.pdf?MOD=AJPERES).

specific risk information,<sup>284</sup> and IFC may be able to contact the Panel for more details.

All of the resources to be reviewed by the IFC and its clients can identify valuable risk information, including relevant human rights risk information. Site visits, community engagement, and grievance mechanisms can supplement information on human rights risks identified through desk research. The case study below illustrates how information from different sources can be collated to identify and mitigate human rights risks.

## 4. Considering Human Rights Risk Information in a Future Dinant-like Project

In this section, we consider how human rights risk information can be used to prevent and mitigate human rights violations. We use the facts of the Dinant-Honduras, as they had unfolded, to illustrate how human rights risk information could be used if the IFC chose to undertake a similar project presently.

### 4.1 Dinant-Honduras Project Information

The World Bank Group, including the IFC, has been engaged in the business of funding palm oil plantations since 1965. Historically, these palm oil plantation investments frequently resulted in violent land conflicts, deforestation and inequitable benefits sharing among the local communities, particularly causing adverse impacts on indigenous communities.<sup>285</sup>

In 2008, IFC identified Dinant's palm oil plantations project in Honduras as a suitable project for investment, and sent an appraisal mission to Honduras. The objective of the Dinant project in Honduras was to expand Dinant's snacks and edible oil processing facilities to generate employment and promote economic growth, particularly in the Bajo Aguan area. In April 2009 IFC signed a loan agreement with Dinant for \$30 million. The initial disbursement was made in November 2009, and the IFC held back from disbursing the second half of the loan due to evidence of mounting violence associated with the project in 2010. A complaint filed to the President of the World Bank Group in 2010 triggered an audit of the IFC's investment in Dinant by the CAO. The complaint alleged that there was inappropriate use of Dinant's security forces, both public and private, which resulted in forced evictions and violence against farmers. It also alleged that IFC failed to consider political and security context in Honduras and the associated risks for the project.<sup>286</sup>

In its report the CAO concluded that IFC failed to exercise due diligence while reviewing the social risks and to respond adequately to intensifying social and political conflicts after committing to the project. Based on the CAO report, the IFC has since formulated an Enhanced Action Plan, which includes measures to ensure that Dinant's security protocols meet international best practice, established a grievance mechanism, and instituted more structured and robust community engagement. The CAO is currently monitoring IFC's and Dinant's compliance with these measures.<sup>287</sup>

<sup>284</sup> Inspection Panel Investigation Report, Honduras: Land Administration Project, World Bank (June 12, 2007), at <http://documents.worldbank.org/curated/en/585261468032177524/pdf/399330HN0INSR200710003.pdf>. [hereinafter WBIP Honduras Investigation Report].

<sup>285</sup> See Call to Action: No World Bank Money For Palm Oil, RAINFOREST RESCUE (May 19, 2014), <https://www.rainforest-rescue.org/petitions/587/no-world-bank-money-for-palm-oil>; The World Bank Group Framework and IFC Strategy for Engagement in the Palm Oil Sector, WORLD BANK GROUP (Mar. 31, 2011), available at [https://www.ifc.org/wps/wcm/connect/159dce004ea3bd0fb359f71dc0e8434d/WBG+Framework+and+IFC+Strategy\\_FINAL\\_FOR+WEB.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/159dce004ea3bd0fb359f71dc0e8434d/WBG+Framework+and+IFC+Strategy_FINAL_FOR+WEB.pdf?MOD=AJPERES).

<sup>286</sup> See CAO Audit of Dinant-Honduras Investment, *supra* note 256, at 2–3, 18. Other sources also reported killings arguably in relation to the project. See, e.g. Nina Lakhani, Honduras and the Dirty War Fuelled by West's Drive for Clean Energy, THE GUARDIAN (Jan. 7, 2014).

<sup>287</sup> See CAO Audit of Dinant-Honduras Investment, *supra* note 256, 37–44; Dinant Enhanced Action Plan, Consultation Draft, CAO (Apr. 2, 2014), available at [http://www.cao-ombudsman.org/cases/document-links/documents/DinantConsultationEnhancedActionPlan\\_April2\\_2014.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/DinantConsultationEnhancedActionPlan_April2_2014.pdf).

## 4.2 Identifying Ex Ante Human Rights Risk Information

The following part considers what could be done differently if the IFC was presently considering a project similar to Dinant's palm oil plantation. Specifically, the analysis identifies the sources the IFC can use to identify ex ante relevant regional and sector specific human rights risks associated with a similar project. It also discusses different ways in which the IFC could monitor the on-going project and identify human rights risks, should any arise, during the lifecycle of the project. Information discussed below is based on a wide range of sources and on the IFC's own documentation. Information potentially giving rise to human rights risk relevant to the IFC project are italicized. A table organizing the sources of human rights risk information can be found in Annex C (country-specific risks) and D (sector-specific risks) of the Appendix.

### 4.2.1 Country-Specific Human Rights Risk Information

#### 4.2.1.1 Political Context

Targeted research on the political context in Honduras could help the IFC effectively identify potential human rights risks relevant to its project.

There are various sources the IFC could look into to gather information on the political context in Honduras. First, the IFC can search for UN reports on "Honduras."<sup>288</sup> Second, since Honduras is in South America, annual reports of the Inter-American Commission on Human Rights could be a helpful and useful source for the IFC.<sup>289</sup> Third, the U.S. Department of State and the U.S. Congressional Research Service also publish country specific reports.<sup>290</sup> For example, in response to the political crisis in Honduras, CRS published a report on Honduran Political Crisis, June 2009-January 2010.<sup>291</sup> Fourth, NGO reports and news reports could also help the IFC understand the political context in Honduras. For example, Freedom House provides detailed country-specific information.<sup>292</sup> Below is an example demonstrating how these sources could be used to provide a basic understanding of the political context in Honduras (with the relevant information potentially giving rise to human rights risks for the IFC project italicized).

Honduras has enjoyed uninterrupted civilian democratic rule since 1982 when military relinquished power. In 2005, Manuel Zelaya, a lumber industrialist and former head of the Honduran Social Investment Fund was elected president. Under the new government, public protests increased.<sup>293</sup> For example, indigenous communities and environmental groups protested unrestricted mining operations.<sup>294</sup> On June 28, 2009 the military forcibly removed President Jose Manuel Zelaya and sent into exile. Subsequently Micheletti Bain became the leader of a de facto regime. On November 29, voters elected Porfirio Lobo of the National Party for President. Although the coup was bloodless, later related events resulted in the loss of life as well as limitations on freedom of movement, association,

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<sup>288</sup> Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the violations of human rights in Honduras since the coup d'état on 28 June 2009, U.N. Doc. A/HRC/13/66 (Mar. 3, 2010); Situation in Honduras: Article 5 Report, INT'L CRIMINAL COURT (Oct. 2015), available at [https://www.icc-cpi.int/iccdocs/otp/SAS-HON-Article\\_5\\_Report-Oct2015-ENG.PDF](https://www.icc-cpi.int/iccdocs/otp/SAS-HON-Article_5_Report-Oct2015-ENG.PDF).

<sup>289</sup> See generally Organization of American States, Annual Report of the Inter-American Commission on Human Rights, Chapter IV (2011), available at <http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp>.

<sup>290</sup> See generally CRS Report for Congress, Honduras: Political and Economic Situation and U.S. Relations, CONGRESSIONAL RESEARCH SERVICE (Oct. 13, 2006), available at <https://fas.org/sgp/crs/row/RS21103.pdf>; Honduras: 2009 Country Reports on Human Rights Practices, U.S. DEPT OF STATE (Mar. 11, 2010), available at <https://www.state.gov/j/drl/rls/hrrpt/2009/wha/136117.htm>.

<sup>291</sup> See Peter Meyer, Honduran Political Crisis, June 2009-January 2010, CONGRESSIONAL RESEARCH SERVICE, (Feb. 1, 2010), available at <https://fas.org/sgp/crs/row/R41064.pdf>.

<sup>292</sup> Honduras: Freedom in the World, FREEDOM HOUSE (2016), <https://freedomhouse.org/report/freedom-world/2016/honduras>. See also Honduras' Latest Coup, AL JAZEERA (May 12, 2015), <http://www.aljazeera.com/indepth/opinion/2015/05/honduras-latest-coup-150511090408289.html>; Honduras Democracy Still in Crisis 7 Years After Coup, TELESUR (June 28, 2016), <http://www.telesurty.net/english/analysis/Honduran-Democracy-Still-in-Crisis-7-Years-After-Coup-20150520-0052.html>.

<sup>293</sup> CRS Report for Congress, Honduras, *supra* note 291, at 2.

<sup>294</sup> *Id.*

expression, and assembly. During the months following the June coup, demonstrations took place across the country. Curfews were arbitrarily implemented by security forces employing disproportionate use of force, in some cases resulting in loss of life and acts of vandalism by protesters. These political events exacerbated human rights violations and land disputes in Honduras.<sup>295</sup>

More recently, after the June coup, on 30 November, 2011, the National Congress passed a decree-law, proposed by Porfirio Lobo, which authorized the armed forces to perform on a temporary basis police functions in emergency situations affecting individuals and their property.<sup>296</sup> On November 24, 2013, general elections were held and Juan Orlando Hernández of the National Party was elected President. In April 2015, the Honduran Supreme Court voided Article 239 of the constitution, which had limited presidents to one term.<sup>297</sup>

Given the coup in June 2009 and the post-coup human rights violations, it is unclear whether the current political situation will remain stable, particularly after Article 239 was voided. Given such an unstable political context, there is heightened risk for human rights, in particular the right to life. In case of future investment, the IFC should plan to closely monitor political developments in Honduras and not rely on the local government to police rights abuses.

#### **4.2.1.2 Economic Context**

The economic situation in Honduras, particularly in regards to poverty and unemployment, indicates potential human rights risks. Poverty not only indicates a lack of sufficient income, but can also reflect other deficiencies, in areas including health, schooling, and living conditions.<sup>298</sup>

To start with, the IFC could check the World Bank database, which provides an overview of economic context in Honduras, including the annual GDP growth.<sup>299</sup> The IFC could also consult the Human Development Reports by UNDP which are published annually.<sup>300</sup> Publications by the Committee on Economic, Social and Cultural Rights,<sup>301</sup> would also be helpful to the IFC. In addition to UN sources, think tanks and NGOs also provide specific information on the economic context in Honduras.<sup>302</sup> Below is an example demonstrating how these sources could be used to increase understanding of human rights risks related to economic factors.

The World Bank identifies Honduras as “a low middle-income country that faces major challenges, with more than 63 percent of the population living in poverty in 2014.” In rural areas, approximately 6 out of 10 households live in extreme poverty, or on less than US\$2.50 per day.<sup>303</sup> Agriculture has traditionally been the major component of the country’s GDP. The sector’s main product was bananas.<sup>304</sup> Unemployment and underemployment remain high despite various progressive measures adopted by the Honduran government.<sup>305</sup> The minimum wage

<sup>295</sup> Human Rights Council, Report of the United Nations High Commissioner, supra note 289.

<sup>296</sup> See ICC Article 5 report, supra note 289, at 25 n. 79 (citing decree Law interpreting Article 274 of the Constitution, Article 1).

<sup>297</sup> See supra, note 293.

<sup>298</sup> Multidimensional Poverty Index, Human Development Reports, UNDP, <http://hdr.undp.org/en/content/multidimensional-poverty-index-mpi>.

<sup>299</sup> Honduras: World Bank Open Data, WORLD BANK, <http://data.worldbank.org/country/honduras>; Honduras: Overview, WORLD BANK, <http://www.worldbank.org/en/country/honduras/overview>.

<sup>300</sup> Honduras, Human Development Reports, UNDP, <http://hdr.undp.org/en/countries/profiles/HND>. These reports explain how poverty in Honduras influences other aspects of individual rights.

<sup>301</sup> E.g., UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations, Honduras, U.N. Doc. E/C.12/HND/CO/2 (July 11, 2016).

<sup>302</sup> E.g., Country Briefing December 2016: Honduras, Oxford Poverty and Human Development Initiative (OPHI), available at [http://www.dataforall.org/dashboard/ophi/index.php/mpi/download\\_brief\\_files/HND](http://www.dataforall.org/dashboard/ophi/index.php/mpi/download_brief_files/HND); Rafael Guerreiro Osorio, The Recent Impact of Government Transfers on Poverty In Honduras and Alternatives to Enhance Their Effects, International Poverty Centre (Aug. 2008) (Working Paper No. 47), available at <http://www.ipc-undp.org/pub/IPCWorkingPaper47.pdf>; Jake Johnston & Stephann Lefebvre, Honduras Since the Coup: Economic and Social Outcomes, CENTER FOR ECONOMIC AND POLICY RESEARCH (Nov. 2013), at 7, available at <http://cepr.net/documents/publications/Honduras-2013-11-final.pdf>.

<sup>303</sup> Honduras: Overview, WORLD BANK, <http://www.worldbank.org/en/country/honduras/overview>.

<sup>304</sup> Honduras, SIDA Country Report 2006, SWEDISH INT’L DEVELOPMENT COOPERATION AGENCY 6 (May 2007), available at [http://www.sida.se/contentassets/33e2688b90d54b99b2f80fed869b1ba7/honduras\\_1492.pdf](http://www.sida.se/contentassets/33e2688b90d54b99b2f80fed869b1ba7/honduras_1492.pdf).

<sup>305</sup> CESR, Concluding Observations, supra note 302, at 6.

is not sufficient to ensure a decent standard of living and additionally a significant percentage of the workers earn less than a living wage.<sup>306</sup> In addition, Honduras is a low-income country with extremely unequal distribution of income. Particularly, according to the Committee on Elimination of Racial Discrimination, the indigenous and Afro-Honduran (Garifuna and English speaking Afro-Hondurans) communities predominantly suffer from poverty and social exclusion.<sup>307</sup> This high level of inequality combined with low average income results in the poor economic condition of the majority of the population.<sup>308</sup>

Given the outlined economic context, the IFC should consider whether a proposed project might exacerbate inequality, health, and access to housing. One relevant query, for example, is whether the IFC's project would increase the risk of unemployment by displacing local workforce and, if so, what mitigation strategies could be implemented.

#### **4.2.1.3 Gender Inequality Issues**

Information on gender inequality and relevant issues in Honduras is abundant in UN publications. Special Rapporteur Report on Violence Against Women, its Causes and Consequences (2015) points out that in Honduras inequality between men and women, particularly in terms of access to employment, health care and social security, continues to exist, and is especially heightened for rural women, indigenous women, and women of African descent.<sup>309</sup> Moreover, there continues to be a climate of impunity for sexual violence that prevents victims from reporting acts of violence.<sup>310</sup> The government's attempt to adopt various progressive measures has resulted in little visible change in women's lives.<sup>311</sup> Prevalence of various forms of violence against women resulting in the violation of their right to life, bodily integrity and equal protection of law was also noted as a prominent issue in reports from UN treaty bodies as well as in the U.S. Department of State Country Report.<sup>312</sup>

The rights to equality before law, equal protection of law, and non-discrimination (all of which prohibit gender based inequality) have been recognized in the International Human Rights Bill and are incorporated in IFC's Policy on Social and Environmental Sustainability.<sup>313</sup> It is clear that any Honduras-based project is at high-risk for gender-based rights violations. The IFC should consider holistically whether, and if so how, its project would change the power dynamic and further marginalize women's rights. At the same time, as a risk mitigation strategy, the IFC could consider how its project could empower local women. Given widespread impunity for acts of sexual violence, the IFC should consider whether bringing in male migrant workers for an IFC project may result in abuse of local women, and take actions to protect against such eventualities.

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<sup>306</sup> *Id.* at 6–7. See also Johnson & Lefebvre *supra*, note 303.

<sup>307</sup> UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the combined initial and second to fifth periodic reports of Honduras, para. 7, U.N. Doc. CERD/C/HND/CO/1-5 (Mar. 13, 2014).

<sup>308</sup> Osorio *supra*, note 303.

<sup>309</sup> Human Rights Council, Special Rapporteur Report on Violence Against Women its Causes and Consequences, Rashida Manjoo, U.N. Doc. A/HRC/29/27 (June 10, 2015) (explaining how these women continue to be victims of multiple and cross-sectoral discrimination).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> Committee on the Elimination of Discrimination Against Women (CEDAW), Consideration of reports submitted by States parties under article 18 of the CEDAW, U.N. Doc. CEDAW/C/HON/6 (Aug. 1, 2006); Committee Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/HND/CO/1 (June 23, 2009); Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/HND/CO/1 (Dec. 13, 2006); CERD Concluding Observations, *supra* note 308; Human Rights Council, Report of the United Nations High Commissioner, *supra* note 289; Honduras: 2008 Country Reports on Human Rights Practices, U.S. DEP'T OF STATE (Feb. 25, 2009), available at <https://www.state.gov/j/drl/rls/hrrpt/2008/wha/119164.htm>.

<sup>313</sup> The Policy casts an obligation on IFC's clients to minimize gender related project risks and unintended gender based differentiation impacts that would hamper the economic potential of the project. This commitment is also provided in the Performance Standard 1 through the risks and impacts identification process, Performance Standard 2 through the requirement of non-discrimination and equal opportunity at the work place and Performance Standard 7 requiring non-discrimination among indigenous peoples. The International Bill of Human Rights and IFC Sustainability Framework, INT'L FINANCE CORP., 7 available at <http://documents.worldbank.org/curated/en/470681480669101836/The-international-bill-of-human-rights-and-IFC-sustainability-framework>. IFC, Sustainability Policy, para. 13 (2012); IFC, Performance Standards, at 9 n.18 and 18 n.9, 50 (2012).

#### 4.2.1.4 Private Security Forces, Crime, and Violence

Crime and violence are some of the most important challenges for Honduras, especially kidnapping and murder.<sup>314</sup> The National Violence Observatory, an academic research institution, reported a murder rate of 86.5 per 100,000 people in 2011, 85.5 per 100,000 people in 2012, and 79 murders per 100,000 people for 2013.<sup>315</sup> The U.N. Special Rapporteur on the human rights of internally displaced persons on his mission to Honduras also documented gang violence.<sup>316</sup> Various sources have noted that private security forces exacerbate crime and violence in Honduras.<sup>317</sup> Below is an example demonstrating how information on this issue from external sources could be used in the due diligence of the IFC.

Private unlicensed security guard services and vigilante groups continued to grow and claimed to patrol neighborhoods and municipalities to deter crime. The Working Group on the Use of Mercenaries, during its 2013 mission to Honduras, identified the lack of adequate legal measures in regulating powerful Private Security Companies (PSCs) operating beyond the control of the state. Private companies often recruit PSCs to protect their properties. It is often alleged that PSCs use illegal weapons, work in collusion with the police, and commit human rights violations, including “killings, disappearances, forced evictions and sexual violence.”<sup>318</sup> In addition, the U.N. Special Rapporteur on the rights of indigenous peoples observed that there was evidence of collusion by the police and the armed forces with private or business interests, including organized crime groups in indigenous territories, which exacerbated the violence and impunity suffered by indigenous peoples. Similar concerns were identified in the U.S. Department of State report on Honduras.<sup>319</sup> The Honduran government has failed to sufficiently address this issue; its existing legal and regulatory frameworks are not consonant with international standards.<sup>320</sup>

The IFC should pay close attention to whether its proposed projects run the risk of funding and empowering such PSCs or organized crime groups. Allegations surrounding the use of PSCs pose a risk that, without proper safeguards, the use of PSCs by the project may lead to violations of the right to life and the right to be free from torture, cruel, inhuman and/or degrading treatment or punishment—rights protected by the UDHR and recognized by IFC in its performance standards.<sup>321</sup> Timely identification of these potential violations would enable the IFC to better comply with its own policies and its duties under international human rights law.

#### 4.2.1.5 Indigenous People

Indigenous people’s rights are often violated in Honduras. The Special Rapporteur on the rights of indigenous peoples on her 2016 visit to Honduras highlights “the lack of protection for their land, territories and natural

<sup>314</sup> Sophie Yacoub et al., Violence Related Injuries, Deaths and Disabilities in the Capital of Honduras, 37 INJURY J. 428–34 (2006); Caroline Moser & Ailsa Winton, Violence in the Central American Region: Towards an Integrated Framework for Violence Reduction 1-58 (Overseas Dev. Inst., Working paper No. 171, 2002); Centre on Housing Rights and Evictions (COHRE), Global Survey on Forced Evictions, Violations of Human Rights 2003-2006 (2006).

<sup>315</sup> Honduras 2016 Crime & Safety Report, OVERSEAS SECURITY ADVISORY COUNCIL, U.S. DEP’T OF STATE (2016), available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19281>.

<sup>316</sup> Human Rights Council, Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Honduras, U.N. Doc. A/HRC/32/35/Add.4, at para. 5 (Apr. 5, 2016).

<sup>317</sup> See, e.g., Human Rights Council, Report of the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Doc. A/HRC/24/45/Add.1 (Aug. 5, 2013) [hereinafter HRC Report on Mercenaries]; see also Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras, A/HRC/33/42/Add.2, at paras. 25, 86 (July 21, 2016) [hereinafter HRC Report on Indigenous Peoples]; OSAC, Honduras 2016 Crime & Safety, supra note 316, at para. 58; DEP’T OF STATE, 2008 Country Reports, supra note 313. For NGO reports and news reports identified the relevant issues, see Moser & Winton, supra note 315; COHRE, supra note 315; Nina Lakhani, Honduras and the Dirty War Fueled by the West’s Drive for Clean Energy, The Guardian (Jan. 7, 2014), available at <https://www.theguardian.com/global/2014/jan/07/honduras-dirty-war-clean-energy-palm-oil-biofuels>.

<sup>318</sup> HRC Report on Mercenaries, supra note 318, at para. 38; see also Lakhani, supra note 318.

<sup>319</sup> Some citizen security councils, as well as private security companies, with ties to former and current military or police officials, acted with the complicity of police as vigilantes or death squads to use lethal force against supposed habitual criminals. See DEP’T OF STATE, 2008 Country Reports, supra note 313.

<sup>320</sup> HRC Report on Mercenaries, supra note 318, at para. 30.

<sup>321</sup> The International Bill of Human Rights, supra note 314, at 6; IFC, Performance Standards, 30 (2012).



resources” and “a precarious social and economic situation of multidimensional poverty as a result of extreme inequality, corruption and the lack of basic social services” among the indigenous in Honduras.<sup>322</sup>

These findings are corroborated and expanded upon by multiple sources, including the Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras, the Report of the Special Rapporteur on the Situation of Human Rights Defenders, and Concluding observations of Committee of Economic, Social and Cultural Rights (2016).<sup>323</sup> Additional relevant information can be obtained from the IACHR Annual Report on Honduras (2013).<sup>324</sup> The US Country Reports on Human Rights Situation (Honduras) by Department of State (2008) also mentioned the relevant issues.<sup>325</sup> Lastly, the IFC could consult NGO reports such as FIAN’s Alternative report to state report of Honduras for review by CESR (2011).<sup>326</sup> Below is an example demonstrating how these sources can provide necessary information on indigenous people’s situations in Honduras.

Lack of clear title resulted in expropriation of the communal lands of indigenous people. Such expropriation resulted in conflicts between indigenous communities and the powerful business elites and government entities interested in exploiting the natural resources found in these communal lands.<sup>327</sup> The requirements of informed consultation and obtaining free, prior and informed consent from indigenous communities regarding development projects that would have impact on them were often not met.<sup>328</sup> In some instances, the government provided private companies with licenses to take over lands that were ancestral properties of indigenous communities without prior consultation with the indigenous communities.<sup>329</sup> The Human Rights Committee further identified the discrimination practiced against the indigenous communities particularly with respect to their land rights.<sup>330</sup> The communities that opposed development projects on their lands were subjected to persecution, harassment, violence, and forced eviction by the police and private security guards.<sup>331</sup>

The situation in Honduras clearly indicates a violation of the rights guaranteed to the indigenous people under The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which provides them with “right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>332</sup> The IFC should carefully consider how any proposed IFC project may worsen the indigenous peoples’ situation in the country and take sufficient measures to ensure that the project will not contribute to the violation of their rights. For example, even if a government license has been provided by the client, the IFC should make additional efforts to ensure that the land to be marked for the project’s use is not communal land belonging to any indigenous peoples.

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<sup>322</sup> HRC Report on Indigenous Peoples, *supra* note 318, at para. 18.

<sup>323</sup> *Id.*; Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sakkagya, U.N. Doc. A/HRC/22/47/Add.1 (Dec.13, 2012); Committee on Economic, Social and Cultural Rights (CESR), Concluding observations on the second periodic report of Honduras, U.N. Doc. E/C.12/HND/CO/2 (July 11, 2016).

<sup>324</sup> Inter-American Commission on Human Rights, Annual Report 2013, at paras. 233–438 (2013).

<sup>325</sup> See DEP’T OF STATE, 2008 Country Reports, *supra* note 313.

<sup>326</sup> FIAN Int’l, Alternative report to the state report of Honduras for review by CESR (June 2016).

<sup>327</sup> See DEP’T OF STATE, 2008 Country Reports, *supra* note 313.

<sup>328</sup> CESR, Concluding observations on the second periodic report of Honduras, *supra* note 324, at para. 11. See also FIAN Int’l, *supra* note 327.

<sup>329</sup> HRC report on human rights defenders, *supra* note 324, at para. 77.

<sup>330</sup> Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *supra* note 313, at para. 19.

<sup>331</sup> Inter-American Commission on Human Rights, Annual Report, *supra* note 325; CESR, Concluding observations on the second periodic report of Honduras, *supra* note 324, at para. 41.

<sup>332</sup> G.A. Res. 61/295, art. 26 (Sept. 13, 2007) (UNDRIP). This right has also been recognized in IFC’s Performance Standard 7 on indigenous people and requires the IFC project to “foster full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.”

#### 4.2.1.6 Land Disputes

Land disputes have been identified as a long-standing problem in Honduras.<sup>333</sup> Land disputes can lead to violence and abuses of the indigenous peoples' rights. Several reports from the UN system have identified issues related to land disputes.<sup>334</sup> In addition, numerous NGO reports and news reports have also discussed these issues.<sup>335</sup> Below is an example demonstrating how these sources can be used by the IFC to identify rights abuses related to land disputes.

Land disputes in Honduras are specifically related to the palm oil development. Much of the palm oil development took place in Bajo Aguan and resulted in escalating conflict between large landowners. The problem of landlessness dates back to the 1960s and 1970s when the Honduran government developed agrarian reform laws and gave land in the Aguan region to peasants.<sup>336</sup> In 1992, the Law for Land Modernization was passed, allowing for the sale of large tracts of land that previously could only be held collectively.<sup>337</sup> Since then, thousands of acres of land have been transferred from campesino communities that were made up of small-scale farmers to large agro-industrial firms.<sup>338</sup> Honduran farmers organized into groups – Unified Aguán Peasant Movement (MUCA), Aguán Peasant Movement (MCA) and Authentic Peasant Protest Movement of Aguán (MARCA) – to demand that the government nullify the 1990s land sales. In 2009 President Manuel Zelaya agreed to grant some farmers land titles, but after the coup d'état, the next two presidents refused to honor Zelaya's agreement, sparking peaceful occupations of 12,000 acres of disputed land.<sup>339</sup>

Dinant itself had been implicated for the violence against farmers in association with expansion of its palm oil plantations.<sup>340</sup> The Garifuna community in particular has been involved in struggle with Dinant for years.<sup>341</sup> The Inspection Panel in its 2006 report identified that the Garifuna community's right over their ethnic lands cannot be amended or limited by law.<sup>342</sup> In spite of this, Dinant's palm oil plantations expropriated large areas of the Garifuna community's and other peasants groups' lands.<sup>343</sup> The Inter-American Commission in its 2014 report on Honduras stated that the extensive palm oil plantations had drastic and disproportionate effects on the Garifuna community and two cases were submitted to the IACHR regarding the illegal occupation of the community's lands.<sup>344</sup>

Together with the sector specific information discussed below, land disputes are highly likely in a plantation project and IFC should be more attentive towards land disputes and related risks like violence and forced displacement. Beyond desk research, IFC could consult relevant grassroots groups for additional information about ongoing land disputes and associated risks that these disputes might pose for the IFC project.

<sup>333</sup> E.g. Garifuna Communities. See WBIP Honduras Investigation Report, *supra* note 285.

<sup>334</sup> *Id.* See also Eduardo Baumasteir, *Las iniciativas campesinas y la sostenibilidad de los resultados de la Reforma Agraria en el Salvador, Nicaragua, y Honduras*, UNRISD (Discussion Paper No. 105) (1999).

<sup>335</sup> Richard T. Nelson, *Honduras Country Brief: Property Rights And Land Markets*, Land Tenure Center, University of Wisconsin–Madison (June 2003); Bradford Barham et al., *The Long and Grinding Road of Inegalitarian Agrarian Structure in Honduras: Impacts of Market Reforms and Hurricane Mitch* (July 2002), available at <http://siteresources.worldbank.org/DEC/Resources/LongandGrinding.pdf>; *Honduras: Democracy Denied*, CANADIAN COUNCIL FOR INT'L COOPERATION (Apr. 2010); Jennifer Kennedy, *Deadly Conflict Over Honduran Palm Oil Plantations Spotlights CEO, CORP WATCH* (Dec. 31 2012), [www.corpwatch.org/article.php?id=15802](http://www.corpwatch.org/article.php?id=15802).

<sup>336</sup> See Nelson, *supra* note 336, at 2.

<sup>337</sup> Barham et al., *supra* note 336.

<sup>338</sup> Baumasteir, *supra* note 335.

<sup>339</sup> CANADIAN COUNCIL FOR INT'L COOPERATION, *supra* note 336, at 4; Kennedy, *supra* note 336.

<sup>340</sup> *Honduras: Miguel Facusse Dies, Threat To Communities Continues*, CULTURAL SURVIVAL (July 1, 2015), <https://www.culturalsurvival.org/news/honduras-miguel-facusse-dies-threat-communities-continues>; Council on Hemispheric Affairs, *Human Rights Violations in Honduras: Land Seizures, Peasant's' Repression, and the Struggle for Democracy on the Ground* (Mar. 7, 2014).

<sup>341</sup> *Id.*

<sup>342</sup> WBIP Honduras Investigation Report, *supra* note 285, at para. 223.

<sup>343</sup> CAO Audit of Dinant-Honduras Investment, *supra* note 256, at 6, 28.

<sup>344</sup> Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras*, para. 81, Rep. Inter-Am. Comm'n H.R. OEA/Ser.LV/II. Doc. 42/15 (Dec. 2015).

#### 4.2.1.7 Labor Conditions

The working conditions of the labor force in Honduras are poor, as clarified through multiple sources. Labor conditions are discussed in Concluding Observations of the Human Rights Committee (2006). It was also noted in reports from state governments.<sup>345</sup> Additionally, NGO reports and news reports are also available for the IFC to consult.<sup>346</sup>

Due to a high level of unemployment and underemployment, private sector laborers often have to work overtime but are only paid for the legal limit of working hours.<sup>347</sup> The private sector, which presumably includes potential IFC clients, also fails to comply with occupational health and safety regulations. The U.S. Department of Labor noted that the failure of effective implementation of labor laws in Honduras impacted the right to form unions and bargain collectively in instances of non-payment of wages, and resulted in forced overtime, health and safety violations particularly in the agriculture sector, along with other violations.<sup>348</sup> According to the International Labor Rights Forum, employers often find veiled ways to restrict salaries and mandatory payment for overtime. Additionally, women are not allowed to take maternity leave, which exacerbates the previously noted issue of the marginalization of women in Honduras. Strict rules are imposed on workers prohibiting them from speaking in the workplace and using restrooms except during the specific time allotted to them.<sup>349</sup> Child labor among the rural and indigenous communities, particularly in the agricultural sector, is also a major problem. This additionally implicates the right to education.<sup>350</sup>

The labor conditions in Honduras risk violating the ILO's labor standards, which prohibit all forms of forced and compulsory labor and require safe and sound working conditions, including definite hours of work, rest periods, adequate remuneration.<sup>351</sup> In compliance with its due diligence obligations under international law and its own Performance Standard 2,<sup>352</sup> IFC should identify such risks and ensure that proper mitigation strategies are in place at the outset of the project and further continue to monitor such risks during the life cycle of the project. The IFC should additionally consider the secondary effects on human rights noted here, such as on the rights of women and children, including the right to education.

#### 4.2.2 Sector-Specific Human Rights Risk Information

Many sources report human rights risks and violations in palm oil plantations and other kinds of plantations across the world. Most of the sources are from the ILO and non-governmental organizations. Below are three examples of key issues in the plantation sector. A table organizing the sources of sector-specific human rights risk information can be found in Annex D of the Appendix. The key human rights issues that often arise in the plantation sector include deprivation of land, forced eviction, violation of indigenous people's rights, and forced labor and child labor.

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<sup>345</sup> DEP'T OF STATE, 2008 Country Reports, *supra* note 313; Public Report of Review of U.S. Submission 2012-01 (Honduras), U.S. DEPT. OF LABOR, at iii (Feb. 27, 2015), available at [https://www.doi.gov/ilab/reports/pdf/Final\\_Report\\_of\\_Review-Honduras\\_Submission\\_022715\\_redacted.pdf](https://www.doi.gov/ilab/reports/pdf/Final_Report_of_Review-Honduras_Submission_022715_redacted.pdf); Export.gov, Honduras-Labor (Aug. 25, 2016), available at <https://www.export.gov/article?id=Honduras-Labor>.

<sup>346</sup> Asociación Servicios de Promoción Laboral (ASEPROLA), Int'l Lab. Rts F., Study of labor laws and obstacles to compliance in Honduras, Anti-Flexibility Collection, No. 3 (2004); Child workers, other labor violations found in Honduras by US, NBC NEWS (Feb. 27, 2015).

<sup>347</sup> See DEP'T OF STATE, 2008 Country Reports, *supra* note 313.

<sup>348</sup> U.S. DEP'T OF LABOR, *supra* note 346; see also Export.gov, Honduras-Labor, *supra* note 346.

<sup>349</sup> ASEPROLA, *supra* note 347, at 9–10.

<sup>350</sup> Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *supra* note 313, at para. 12; DEP'T OF STATE, 2008 Country Reports, *supra* note 313; U.S. DEPT. OF LABOR, *supra* note 346; NBC News, Child workers, other labor violations, *supra* note 347.

<sup>351</sup> Int'l Lab. Org. (ILO), Labor Standards, available at <http://www.ilo.org/global/standards/lang--en/index.htm>.

<sup>352</sup> The International Bill of Human Rights, *supra* note 314, at para. 17; IFC, Performance Standards, 16-21 (2012).

#### **4.2.2.1 Deprivation of Land and Forced Eviction**

Human rights risks related to land disputes are not unique to Honduras. Human rights violations such as forced eviction due to land disputes are very common in the plantation sector.<sup>353</sup> For example, in August 2001, the Uganda People's Defense violently evicted approximately 4,000 people from the land of 2524 hectares they had lived on for years because the Uganda Investment Authority wanted to lease it to the Kaweri Coffee Plantation Ltd.<sup>354</sup> The eviction led to other human rights violations, including the right to adequate food, the right to water, the right to adequate housing, the right to health, the right to education, and the right to enjoy cultural life.<sup>355</sup> Given that land deprivation and forced eviction are common to the palm oil plantation sector, the IFC should consider how to mitigate such risks, which might be exacerbated in the context of Honduras' political and economic climate.

#### **4.2.2.2 Indigenous People's Rights**

Indigenous people are particularly vulnerable to rights violations in plantation projects. For example, a report by Friends of Earth identifies land deprivation, the loss of intangible cultural heritage, and "language loss" as adverse impacts on the indigenous in Indonesia as a result of a palm oil plantation.<sup>356</sup> Similar issues are also identified in reports by UN Permanent Forum on Indigenous Issues and International Land Coalition.<sup>357</sup> The IFC should examine the extent to which its projects deprive indigenous peoples of land or otherwise impact them and mitigate the risk of these occurrences.

#### **4.2.2.3 Forced Labor and Child Labor**

Forced labor and child labor are common in the plantation sector. Early in 2002, Human Rights Watch had reported forced labor and child labor on banana plantations in Ecuador.<sup>358</sup> More recent reports reach similar conclusions.<sup>359</sup> The IFC should consider not only ex ante due diligence but how it will monitor projects for evidence of forced or child labor, and negotiate in advance penalties to be applied to the client if such evidence is found ex post.

### **4.2.3 Human Rights Risk Information from World Bank Group Sources**

The IFC's own experience with investments in palm oil plantations should guide its identification of sector-specific human rights risks. For example, in 2004, the IFC provided loans to the Wilmer group, one of the largest palm oil companies, for its project in Indonesia. In 2007, NGOs, small holders and organizations of indigenous people filed a complaint with the CAO that Wilmar group's activities in Indonesia were in violations of certain IFC standards and requirements. Major allegations included expropriation of indigenous communities' ancestral lands, lack of free, prior and informed consultation, and social conflicts that resulted in repressive actions by company's security forces.

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<sup>353</sup> Friends of the Earth et al., *Losing Ground, The human impacts of oil palm plantation expansion in Indonesia* (Feb. 2008); Int'l Institute of Social Studies, *Land Grabbing, Conflict and Agrarian Environmental Transformations: Perspectives from East and Southeast Asia* (2015); Forest Peoples Programme, *Land is Life: Land Rights and Oil Palm Development in Sarawak* (2007).

<sup>354</sup> See FIAN Int'l, *Human Rights violations in the context of Kaweri Coffee Plantation in Mubende, Uganda* (2014), available at [http://www.fian.org/fileadmin/media/publications\\_2015/ParallelReport\\_UGA\\_CESCR54\\_E.pdf](http://www.fian.org/fileadmin/media/publications_2015/ParallelReport_UGA_CESCR54_E.pdf).

<sup>355</sup> Id.

<sup>356</sup> Friends of the Earth et al., *supra* note 354.

<sup>357</sup> U.N. Permanent Forum on Indigenous Issues, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods*, U.N. Doc. E/C.19/2007/CRP.6 (May 2007); Int'l Land Coalition, *Palm Oil and Indigenous Peoples in Southeast Asia* (2011).

<sup>358</sup> Ecuador: *Widespread Labor Abuse on Banana Plantations*, HUMAN RIGHTS WATCH (April 24, 2002), available at <https://www.hrw.org/news/2002/04/24/ecuador-widespread-labor-abuse-banana-plantations>.

<sup>359</sup> NomoGaia, *Human Right Risk Assessment, Equatorial Palm Oil's Palm Bay Plantation* (Oct. 20, 2016); Corey Hill, *Labor abuses Common in Palm Oil Industry*, EARTH ISLAND JOURNAL (Feb. 18, 2014), available at [http://www.earthisland.org/journal/index.php/elist/eListRead/labor\\_abuses\\_common\\_in\\_palm\\_oil\\_industry/](http://www.earthisland.org/journal/index.php/elist/eListRead/labor_abuses_common_in_palm_oil_industry/); Verite, *Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector* (May 2016) (comprehensive risk analysis of the palm oil sector).

Several NGOs based in Indonesia had identified that beginning in April 2000, palm oil plantations in Indonesia had been the site of violent armed conflicts involving intimidation, shooting, torture, arbitrary arrest, and kidnapping by security forces who forced the small scale land holders to give up their lands to Wilmar group.<sup>360</sup>

In its audit report, the CAO identified that the IFC had been aware of the social and environmental risks associated with the palm oil sector in Indonesia for over two decades, derived from both its own as well as the World Bank's experience. It concluded that IFC did not meet the requirements of its performance standards and hence did not develop a proper strategy for engaging in the Indonesian palm oil sector in spite of its awareness of the risks attached to it. Due to the rising number of complaints and following extensive global consultations with various stakeholders, the World Bank and the IFC came up with a comprehensive palm oil strategy in 2011.<sup>361</sup> The new strategy, together with "lessons learned" from prior projects should guide IFC's future engagement with investments in the palm oil plantation sector.

### 4.3 Identifying Ex Post Human Rights Risk Information

In addition to the ex ante assessment, the IFC has the ex post duty to monitor and supervise the implementation of the project.

Sources for post facto assessment include sources considered for the ex ante assessment. However, to ensure that the IFC remains attuned to any new risks, escalation of previously identified risks, and/or failure of instituted mitigation strategies, the IFC needs to ensure that it conducts periodic reviews of previously consulted sources for any updates and maintain regular contacts and consultations with relevant country and sector experts and local communities at the site of the project. Where individuals or communities may be reluctant to communicate with the IFC due to fears of reprisals from the government or private actors, the IFC should seek to establish secure and confidential channels through which it can obtain necessary information without jeopardizing individual lives. Such regular contact with relevant actors can assist the IFC in timely identifying any new risks or changes in previously assessed risks and taking appropriate steps to remedy them.

## 5. Conclusion

### 5.1 Moving Forward: Recommendations

The IFC's investment in Dinant and other projects resulted in human rights violations and undermined the reputation of the IFC.<sup>362</sup> Systematically integrating human rights risk information into its due diligence should help the IFC identify risks and develop appropriate remedies to mitigate likely harms. In addition to consulting external sources, there are various additional ways in which IFC can gather the necessary information on the human rights risks associated with the IFC's projects.

The methodology followed by the Inter-American Development Bank (IADB) in which it works in collaboration with civil society consulting groups is one model that can be adopted by the IFC. The IADB identified the human rights violations in Honduras based on the report submitted to it by FIAN International, a not-for-profit organization whose objective is to expose violations of people's right to food. IADB generally works in association

<sup>360</sup> LIZ CHIDLEY, INVESTING IN DISASTER: IFC AND PALM OIL PLANTATIONS IN INDONESIA (2005).

<sup>361</sup> IFC in the Palm Oil Sector, INT'L FINANCE CORP., [http://www.ifc.org/wps/wcm/connect/industry\\_ext\\_content/ifc\\_external\\_corporate\\_site/agribusiness/resources/palmoil\\_landingpage](http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/agribusiness/resources/palmoil_landingpage).

<sup>362</sup> It is noteworthy that, in contrast to the IFC, the Inter-American Development Bank (IADB) and Deutsche Entwicklungsgesellschaft (DEG) avoided reputational costs to themselves and revoked their loans to Dinant on the basis of available human rights risk information. See OXFAM Int'l, CSO Response to CAO Investigation into IFC Investment in Corporacion Dinant, Honduras (Jan. 20, 2014); FIAN Int'l, German Development Bank Withdraws Dinant Finance in Response to Human Rights Violations in Bajo Aguan, Honduras (Apr. 12, 2011); Friends of the Earth, Land Grabbing, Palm Oil and Violence in Honduras: The Case of Grupo Dinant, Issue Brief #7.

with active civil society organizations, which form civil society consulting groups – one group for each country where IADB operates. Some of the issues on which the IADB and civil society consulting groups work together are environment, indigenous peoples, and gender and citizen security.<sup>363</sup> Following this model, for each country in which the IFC funds a project, it could identify local NGOs focusing on different areas such as the indigenous community, environment protection and gender equality, in order to create a civil society consultation group to facilitate exchange of information and expertise. Similar groups could be formed for specific sectors. Such consulting groups could facilitate provision of country- and sector-specific information that could supplement desk analysis of human rights risks posed by a particular project.

The IFC can also enter into partnership with international organizations like OHCHR, industry groups, and NGOs to create databases listing the appropriate sources for identification of country-specific and sector-specific human rights risks. The IFC may also consider working in collaboration with global risk and strategic consulting firms like Maplecroft.<sup>364</sup> Such firms could help the IFC identify the relevant risks associated with the project since they are usually involved in the practice of identifying and analyzing the relevant political, economic, environmental and human rights risks affecting global business and investors. Moreover, they will also enable IFC to develop tailored solutions in tackling each of the challenges.

Hence there are multiple ways through which IFC can collaborate with other actors in order to gather all the available and necessary information to inform it about the human rights risks attached to the project. Identification and analysis of the risks on time will help IFC either prevent or develop proper measures to mitigate the risks and thereby promote its development goal.

## 5.2 A Call to Action

The development potential of the projects funded by the IFC is often diminished by the resulting human rights violations. The underlying reason is the inadequacy of the IFC's measures for identifying the human rights risks associated with the project. Even though the Performance Standards make reference to human rights, they do not meet the requirements of the precautionary principle and reasonableness standard set by international human rights law. In order to satisfy the IFC's minimum obligation to respect human rights, it must systemically incorporate human rights risk information in its due diligence process. Human rights violations observed in association with IFC's investments in Dinant in Honduras and other projects such as Tata Tea in India and Dragon Capital in Cambodia<sup>365</sup> reinforce the need to have proper mechanisms in place to analyze human rights risks. In these projects, there were multiple sources providing credible information on various human rights risks prevalent in the country and the sector. Due to a lack of systematic consideration of human rights risks, the IFC failed to properly perform ex ante due diligence and negotiate ex post mitigation strategies.

In its response to the CAO's findings in Tata Mundra, the IFC acknowledged the need for establishing new procedures to identify sector and country specific risks. However, thus far no such reforms have been transparently undertaken.<sup>366</sup> The methodology proposed in this report, if incorporated into the IFC's due diligence process, could provide a starting point for a process that would allow the IFC to gather information in a systematic manner and ensure that its risk assessment involves a wholesale review of the social and human rights impacts of its investments,

<sup>363</sup> Civil Society Consulting Groups, INTER-AMERICAN DEVELOPMENT BANK, <http://www.iadb.org/en/civil-society/civil-society-consulting-groups-consocs,7238.html>.

<sup>364</sup> E.g. VERISK MAPLECROFT, <https://maplecroft.com>. FOLEY HOAG, Corporate Social Responsibility Practice, <http://www.foleyhoag.com/practices/business/corporate-social-responsibility>

<sup>365</sup> The Tata Tea project involved tea plantations in India, which resulted in violations of labor rights, as well as the rights to life, livelihood and an adequate standard of living. The Dragon Capital project involved rubber plantations, which resulted in illegal land grabbing from indigenous communities and subsequent forced displacement. For more information, see COLUM. L. SCH. HUM. RTS. INST., THE MORE THINGS CHANGE, THE WORLD BANK, TATA AND ENDURING ABUSES ON INDIA'S TEA PLANTATIONS 8(Jan. 2014); OXFAM Int'l, The Suffering of Others, 5 (Apr. 2015).



in addition to the economic impacts. Collecting country specific and sector specific information during the ex ante phase from the various sources we have identified will enhance the quality of the risk assessment. Similarly, during the ex post phase it will help the IFC work in coordination with the client to develop measures to effectively mitigate and remedy adverse impacts and thereby enhance the scope of development through the project.

## APPENDIX

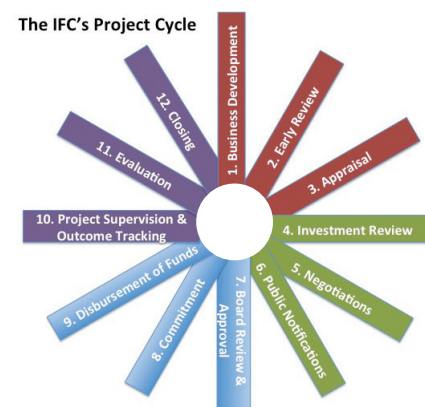
### Annex A – The IFC’S Project Cycle

This Annex details the IFC’s project cycle in order to underscore the temporal nature of due diligence and its role in the IFC’s decision-making. The IFC’s environmental and social due diligence is integrated into its overall due diligence of direct investments, financial intermediary investments, and advisory services.<sup>367</sup> Broader due diligence includes the review of financial and reputational risks, with separate teams assessing investment risk and environmental and social risk.<sup>368</sup> The IFC believes that social and environmental analysis is an essential component of every investment.<sup>369</sup> Aspects of environmental and social due diligence appear in the various stages of an IFC-financed project.

A business project goes through twelve stages to become an IFC-financed project.<sup>370</sup> The IFC completes most of its due diligence during the pre-investment stages (1-4). In the (1) Business Development stage, IFC investment and business development officers identify suitable projects, which results in an initial conversation with the client. Alternatively, a company seeking IFC investment can approach directly by submitting an investment proposal covering preliminary information about the project.<sup>371</sup> During the (2) Early Review stage, an officer prepares a project proposal, identifying risks and benefits. In some cases, a pre-appraisal visit is conducted to identify any issues in advance. IFC senior management then decides whether to authorize project appraisal.

The (3) Appraisal stage involves a full assessment of business potential, risks, and opportunities through discussions with the client and visits to the project site.

In the (4) Investment Review stage, the IFC’s project team makes its recommendations to management, who then decide whether to approve the project. To be approved, “the team and departmental management must



<sup>366</sup> Human Rights Watch, World Bank Group: India Tea Investment Tramples Rights (Nov. 8, 2016).

<sup>367</sup> IFC, Sustainability Policy, para. 21 (2012).

<sup>368</sup> *Id.*

<sup>369</sup> “Early involvement of IFC’s social and environmental specialists contributes to a greater understanding of clients’ needs and of the environmental and social risks and opportunities associated with a proposed investment. IFC can help companies gain competitive advantage by reducing and managing environmental and social risk and by identifying opportunities to enhance business value.” IFC, Solutions: Due Diligence (2016), [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/solutions/due+diligence](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/due+diligence)

<sup>370</sup> See IFC Project Cycle, *supra* note 261.

<sup>371</sup> Investment proposals should include the following preliminary information: 1. Brief description of project, 2. Sponsorship, management & technical assistance, 3. Market & sales, 4. Technical feasibility, manpower, raw material resources & environment, 5. Investment requirements, project financing, and returns, 6. Government support & regulations, and 7. Timetable envisaged for project preparation and completion. See IFC, Solutions: Investment Proposals (2016), <http://www.ifc.org/wps/>

be confident that the client is able and willing to meet IFC standards and work with us to improve the sustainability of their enterprise.”<sup>372</sup> The IFC only invests in projects that are expected to meet IFC standards “within a reasonable period of time.”<sup>373</sup>

After approval by IFC management, the (5) Negotiation phase begins; the project team starts to negotiate the terms and conditions of IFC participation in the project, including disbursement conditions, performance requirements, and action plans to resolve outstanding issues. At this stage, in order to comply with best practices of corporate human rights due diligence, the IFC could explicitly negotiate the consequences of the investee’s violation of certain human rights.<sup>374</sup>

During the (6) Public Notification stage the IFC posts on its website a summary of the investment proposal, along with the environmental and social review conducted in accordance with the Environmental and Social Review Procedures Manual.<sup>375</sup> Only after this is the project submitted to the IFC’s Board of Directors for consideration and approval through regular or streamlined procedures, depending on the risk categorization of the project.

Upon (7) Board approval, the (8) Commitment stage ensues where the IFC and the company sign the legal agreement for investment, which includes the client’s action plan. The (9) Disbursement of Funds, usually paid out in stages, follows the signing of the agreement. During the (10) Project Supervision stage, the IFC monitors to ensure compliance with loan conditions. The client has to submit an Environmental and Social Annual Monitoring Report so that the IFC can access the E&S risk of the project on a yearly basis. The (11) Evaluation stage is ongoing as the IFC documents the project’s success and performance through annual evaluations. The books are closed on the project only when the investment has been paid in full, the equity stake sold, or the debt written off. One risk is that monitoring may be terminated too soon; and that human rights violations could still occur after the debt has been written off or after the project cycle has been completed.

## **Annex B – Due Diligence Responsibilities of the IFC and its Clients**

This Annex analyzes the IFC’s due diligence responsibilities under its internal institutional law—specifically, the Sustainability Policy. It describes the (1) IFC’s ex ante due diligence responsibilities during the project assessment phase, (2) the IFC’s ex post due diligence responsibilities upon signing of the legal agreement, (3) the responsibilities delegated to the client, and the (4) role of the Compliance Advisor/Ombudsman (CAO) in keeping the IFC accountable.

### **B.1 The IFC’s Ex Ante Due Diligence Responsibilities**

The level of the IFC’s engagement is determined by the nature and scope of the proposed activity. During the concept review and early review stages before the project is approved for appraisal, the IFC ensures that the project is not part of the Exclusion List and considers the risks and impacts of the proposed investment provided by the client, especially third party risks, to determine whether such risks are manageable.<sup>376</sup>

The IFC decides on a provisional risk categorization of the project during the pre-investment review phase that is commensurate to the amount of environmental and social risk identified.<sup>377</sup> Category A describing business activities with potential significant adverse environmental and social risks, Category B for potentially limited adverse

[wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/solutions/investment-proposals](http://wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/investment-proposals).

<sup>372</sup> See IFC Project Cycle, *supra* note 261.

<sup>373</sup> IFC, Sustainability Policy, para. 22 (2012).

<sup>374</sup> See discussion in Part I, Section 3.3.4, herein, on Voluntary Human Rights Due Diligence.

<sup>375</sup> See generally ESRP Manual, *supra* note 193.

<sup>376</sup> IFC, Sustainability Policy, paras. 19, 23 (2012).

risk and Category C for minimal or no adverse risk.<sup>378</sup> Category C projects do not have disclosure requirements and do not require a robust environmental and social risk assessment. The outcome of the environmental and social risk assessment is relevant for determining the scope of the conditions of IFC financing and investment disbursements.<sup>379</sup> During the Appraisal stage the risk categorization is finalized.<sup>380</sup>

The IFC discloses its environmental and social review summary, along with relevant sponsor documentation, on the IFC website consistent with its Access to Information Policy.<sup>381</sup> The IFC is also committed to notifying countries potentially affected by the transboundary effects of proposed business activities to consider possible adverse effects.<sup>382</sup>

The client has to engage and consult with Affected Communities to ensure their awareness of the project, providing the foundation for an ongoing constructive relationship. For projects with potential significant adverse impacts on Affected Communities and projects involving Indigenous Peoples, the IFC will make a determination of the level of Broad, Community Support (BCS) for the project. Otherwise, it only verifies that engagement between the client and Affected Communities occurred.<sup>383</sup>

### **B.1.1 Direct Investments**

In the context of direct investments, the IFC's due diligence generally includes the following: (1) reviewing all available information regarding environmental and social risks and impacts, (2) conducting site inspections and interviews, (3) analyzing the business activity's environmental and social performance in relation to the requirements of the PSs and other guidelines, and (4) identifying gaps and supplemental actions, which are made part of the Environmental and Social Action Plan, constituting the necessary conditions for investment.<sup>384</sup>

Furthermore, the Sustainability Policy frequently invokes the idea of proportionality and scaling due diligence based on the potential riskiness of business activity. In the context of direct investments, the IFC notes that its due diligence is "commensurate with the nature, scale, and stage of the business activity, and with the level of environmental and social risks and impacts."<sup>385</sup> This allows for projects with significant environmental or social impacts to receive more attention from the IFC.

There are two situations where the Sustainability Policy is more specific about the due diligence obligations of the IFC: in relation to third party risks and indigenous peoples. The Sustainability Policy requires the IFC to review the clients' identification of third party risks and decides whether such risks are manageable. The Sustainability Policy further states that "[c]ertain risks may require the IFC to refrain from supporting the proposed business activity."<sup>386</sup> In addition, where a proposed business activity triggers PS7's requirement of Free, Prior, and Informed Consent of Indigenous Peoples, the IFC has committed itself to conducting an in-depth review of the process conducted by the client as part of its environmental and social due diligence.<sup>387</sup>

<sup>377</sup> ESRP Manual, *supra* note 193, at 21.

<sup>378</sup> IFC, Sustainability Policy, para. 40 (2012).

<sup>379</sup> IFC, Sustainability Policy, para. 21 (2012).

<sup>380</sup> ESRP Manual, *supra* note 193, at 27.

<sup>381</sup> IFC, Sustainability Policy, para. 14 (2012). See generally IFC, Access to Information Policy (2012).

<sup>382</sup> IFC, Sustainability Policy, para. 18 (2012).

<sup>383</sup> ESRP Manual, *supra* note 193, at 31.

<sup>384</sup> IFC, Sustainability Policy, para. 28 (2012).

<sup>385</sup> IFC, Sustainability Policy, para. 26 (2012).

<sup>386</sup> IFC, Sustainability Policy, para. 23 (2012).

### **B.1.2 Financial Intermediaries**

As per the requirements of the Sustainability Policy, at the appraisal stage, the IFC reviews the existing portfolio and prospective business activities of its FI clients to identify activities where the FIs and the IFC could be exposed to risks as a result of their investments.<sup>388</sup> In addition, the IFC reviews the implementation capacity of FIs and their Environmental and Social Management System (ESMS) used to deal with environmental and social risks. The capacity of this management system should be “commensurate with the level of environmental and social risks in its portfolio, and prospective business activities.”<sup>389</sup>

Upon review and depending on the investment type, use of IFC financing and level of expected environmental and social risk in the FI’s portfolio, the IFC provides a risk categorization for the investment, and determines the environmental and social requirements the FI client will be expected to implement.<sup>390</sup> Where an FI’s portfolio or prospective business activities present moderate to high environmental and social risk, the IFC requires the client “to apply relevant requirements of the Performance Standards.”<sup>391</sup>

Prior to approval, the IFC discloses a Summary of Investment Information (SII) for FI investments. Through this disclosure, the IFC outlines its rationale for its determination of the environmental and social risk categorization, a description of the main risks and impacts associated with the investment, a summary of the FI’s management system that deals with environmental and social risks, and key measures identified to strengthen the client’s management system as included in an Action Plan with the FI.<sup>392</sup>

## **B.2 The IFC’s Ex Post Supervision and Monitoring Responsibilities**

For both direct investment and FI clients, the IFC implements a regular program of supervision for business activities with environmental and social risks in accordance with the requirements of the IFC’s Environmental and Social Review Procedures.

### **B.2.1 Direct Investments**

The Sustainability Policy specifies that the IFC should monitor the project’s compliance with the PSs and terms in the investment agreement by reviewing periodic reports submitted by the client and conducting site visits.<sup>393</sup> The client is required to submit annual reports on financial as well as social and environmental performance, and information on factors that might materially affect the enterprise. This report provides information on the client’s progress in meeting the environmental and social terms of the investment agreement. The IFC is then supposed to disclose the client’s progress as laid out in the action plan. The IFC also has to track the project’s contribution to development against key indicators identified at the start of the investment cycle. Ongoing dialogue during supervision allows the IFC to support clients, both in terms of solving issues and identifying new opportunities for project enhancement.

The Sustainability Policy also requires the IFC to monitor the client’s community engagement process, which must be ongoing, as part of its portfolio supervision.<sup>394</sup> In the event the client fails to comply with its social or environmental commitments, the Sustainability Policy requires the IFC to “work with the client to bring it back

<sup>387</sup> IFC, Sustainability Policy, para. 31 (2012).

<sup>388</sup> IFC, Sustainability Policy, para. 34 (2012).

<sup>389</sup> IFC, Sustainability Policy, para. 34–35 (2012).

<sup>390</sup> IFC, Sustainability Policy, para. 35, 40 (2012).

<sup>391</sup> IFC, Sustainability Policy, para. 40 (2012) (where IFC provides an FI with an E&S risk categorization of FI-1 “when an FI’s existing or proposed portfolio includes, or is expected to include, substantial financial exposure to business activities with potential significant adverse environmental or social risks or impacts that are diverse, irreversible, or unprecedented”).

<sup>392</sup> IFC, Access to Information Policy, para. 31(b) (2012).

<sup>393</sup> IFC, Sustainability Policy, para. 7 (2012).

into compliance to the extent feasible, and if the client fails to reestablish compliance, exercise remedies when appropriate.”<sup>395</sup> The IFC notes that “the Performance Standards . . . and other applicable environmental and social obligations of the client are covenanted in loan agreements,”<sup>396</sup> making them legally enforceable.

### **B.2.2 Financial Intermediaries**

The IFC undertakes to periodically review the FI’s ESMS process and the results of the E&S due diligence that the FI is required to conduct for its investments.<sup>397</sup> Moreover, the IFC must periodically review FI investments—sometimes during site visits to FI funding recipients engaged in high-risk subprojects.<sup>398</sup> The IFC works with FIs to help them address any shortcomings in their ESMS.

### **B.3 Delegation of Responsibilities to the Client**

Managing environmental and social risks and impacts in a manner consistent with the PSs is the responsibility of the client, although the IFC declares that it endeavors to collaborate with clients to accomplish its mission and achieve its commitments.<sup>399</sup> In the loan agreement, the client agrees to comply with the applicable Performance Standards, to report material changes, to provide regular monitoring reports, and to cooperate with IFC supervision visits.<sup>400</sup>

Direct investment clients also agree to ongoing stakeholder engagement. In cases where the business activity to be financed is likely to generate potential significant adverse impacts on communities (i.e. Affected Communities) or is likely to generate potential adverse impacts on Indigenous Peoples, the IFC expects clients to engage in a process of Informed Consultation and Participation (ICP).<sup>401</sup> The client discloses the project’s environmental and social assessment information locally.<sup>402</sup>

FI clients are required to develop and operate a management system that deals with environmental and social risks commensurate to the level of risks in its current portfolio and prospective activities, taking into account the principles in PS1.<sup>403</sup> For portfolios or prospective business activities that present moderate to high risk, the FI must apply the relevant Performance Standard requirements to those higher risk business activities.<sup>404</sup> FI clients are also required to apply relevant aspects of PS2 to their workers, the IFC Exclusion list, and follow respective national laws.<sup>405</sup>

The IFC requires clients to set up and administer appropriate mechanisms and/or procedures to address related grievances and complaints from Affected Communities.<sup>406</sup> These mechanisms are distinct from the CAO accountability mechanism.

### **B.4 The Role of the Compliance Advisor/Ombudsman**

The IFC’s Compliance Advisor/Ombudsman (CAO) is an independent office that impartially responds to environmental and social concerns of Affected Communities and aims to enhance IFC accountability and outcomes.

<sup>394</sup> IFC, Sustainability Policy, para. 30 (2012).

<sup>395</sup> IFC, Sustainability Policy, paras. 24, 45 (2012).

<sup>396</sup> See Letter from Rachel Kyte, *supra* note 245.

<sup>397</sup> IFC, Sustainability Policy, para. 45 (2012).

<sup>398</sup> *Id.* Also, the frequency and focus of supervision visits is commensurate with the identified risks.

<sup>399</sup> IFC, Sustainability Policy, para. 30 (2012).

<sup>400</sup> IFC, Sustainability Policy, paras. 24-25. (2012).

<sup>401</sup> IFC, Sustainability Policy, para. 30 (2012).

<sup>402</sup> IFC, Sustainability Policy, paras. 9, 30 (2012).

<sup>403</sup> IFC, Sustainability Policy, para. 35 (2012).

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*



The CAO is independent of IFC management and reports directly to the President of the World Bank Group. The CAO receives and addresses complaints in line with the criteria set out in its Operational Guidelines. There are different phases for CAO involvement, including: eligibility review, assessment of proper role (dispute resolution or compliance), investigation/audit, and monitoring.<sup>407</sup>

The CAO has three roles: Dispute Resolution, Compliance, and Advisory.<sup>408</sup> Dispute resolution is between the complainant and IFC client; Compliance is an IFC/MIGA audit; and Advisory is for the President of World Bank Group. The CAO works to resolve complaints using a flexible problem-solving approach through the CAO's dispute resolution arm. Complaints may relate to any aspect of IFC-supported business activities that is within the mandate of the CAO.<sup>409</sup> Through its compliance arm, the CAO oversees project-level audits of the IFC's environmental and social performance in accordance with the CAO's operational guidelines.<sup>410</sup>

As an accountability mechanism, the CAO is not designed to provide legal accountability. Although as a mechanism it undoubtedly has improved the accountability of the IFC to the people who are adversely affected by its projects, it is not (nor was it intended to be) an equivalent alternative to the legal process. Firstly, the CAO generally lacks authority to determine whether the IFC has violated international or domestic law.<sup>411</sup> Exercising its compliance function, it may only assess whether the IFC has complied with its internal operational policies and procedures.<sup>412</sup> Secondly, the CAO lacks power to "impose any of the remedies that are available under customary international law."

<sup>406</sup> IFC, Sustainability Policy, para. 54 (2012).

<sup>407</sup> Compliance Advisor Ombudsman [CAO], Operational Guidelines (2013), [http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines\\_2013.pdf](http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf).

<sup>408</sup> *Id.*

<sup>409</sup> IFC, Sustainability Policy, para. 57 (2012).

<sup>410</sup> IFC, Sustainability Policy, para. 56 (2012).

<sup>411</sup> There is a limited exception. The CAO's Operational Guidelines preclude it from supporting negotiated agreements that violate international law, and thus authorize it to consider violations of international law as part of its dispute resolution function. See CAO, Operational Guidelines, *supra* note 408, at 15.

<sup>412</sup> Steven Herz, Rethinking International Financial Institution Immunity, in *INTERNATIONAL FINANCIAL INSTITUTIONS & INTERNATIONAL LAW* 137, 153 (Bradlow & Hunter eds,

## Annex C – Country-Specific Human Rights Risk Information for IFC’s Dinant-Honduras Project

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## Annex D – Sector-Specific Human Rights Risk Information for IFC’s Dinant-Honduras Project

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