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SOMO



Making financing for development more accountable?

Proposals for strengthening corporate
accountability in the Financing for Development
'outcome document'

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Acronyms

COA	Compliance Advisor Ombudsman
COP21	2015 Paris Climate Conference
DFI	Development Finance Institution
DRC	Democratic Republic of Congo
EITI	Extractive Industry Transparency Initiative
ESG	Environmental, social and governance
FfD	Financing for Development
FfD3	Third Conference on Financing for Development
FI	Financial Intermediary
IFC	International Finance Corporation
ILO	International Labour Organization
ISDS	Investor State Dispute Settlement
MDB	Multilateral Development Bank
MDGs	Millennium Development Goals
NCP	National Contact Point
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OWG	Open Working Group
SDG	Sustainable Development Goals
SME	Small- and medium-sized enterprise
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights

1. Introduction

1.1. Background

In July, the United Nations (UN) will convene the Third Conference on Financing for Development (FfD3) in Addis Ababa, Ethiopia. The outcome of that conference, which will be negotiated and agreed upon by Member States, should significantly contribute to and support the implementation of the post-2015 development agenda.¹ In particular, the outcome of FfD3 will influence two subsequent inter-governmental negotiations:

- the Post-2015 Summit, which will define the sustainable development agenda; and
- COP21 of the UN Framework Convention on Climate Change (UNFCCC), which will hopefully result in a new agreement to address climate change.

The private sector is being assigned an increasingly prominent role in all these processes on the basis of the recognition that private sector investments contribute to sustainable development. However, it is also widely documented that business activities can have adverse impacts on the full spectrum of human rights,² from labour rights abuses to environmental destruction that threatens the right to health (see Box 1). These impacts undermine development outcomes.

To ensure that domestic and international investments respect human rights and support sustainable development, states must adopt a regulatory framework that offers effective means of legal protection against business-related human rights abuses and provides remedy for those harmed. This policy paper, prepared for the FfD negotiating session in New York from 13-17 April 2015, makes recommendations that must be included in the FfD3 Outcome Document in order to ensure that the private sector's contribution to development is carried out in a manner that respects human rights and the environment.

Box 1 | What are human rights?

"Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Human rights identify the minimum conditions for living with dignity. Under international human rights law, states have a three-part obligation to respect, protect and fulfill human rights."³

The obligation to protect is an obligation to take measures to prevent, regulate, investigate and prosecute actions by private actors, including business entities that violate the rights of individuals subject to that state's jurisdiction.⁴ In the human rights field, international law obligations may be assigned to non-state actors too.⁵ The extent to which human rights obligations already apply directly to companies has been the subject of a good deal of discussion in recent years.⁶ The UN Guiding Principles on Business and Human Rights (UNGPs), explained in Box 2, reaffirm the state duty to protect and identify the responsibility of all business enterprises to respect human rights.

In this briefing paper, human rights refer to the whole spectrum of civil, political, economic, social and cultural rights. As recently identified by the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, human rights law includes both procedural and substantive obligations relating to the environment.⁷

The report is structured in three parts. After this introduction, part one discusses the general principles regarding corporate accountability and the need to integrate it into the FfD3 Outcome Document; and the second part deals with the relevant subsections of the zero draft of the Outcome Document, while the third section draws some conclusions.

1.2. Corporate accountability in Financing for Development

Since its inception, the Financing for Development (FfD) process has largely failed to integrate adequate measures to ensure that reliance on the private sector to deliver development outcomes does not come at the expense of human rights. The 2002 Monterrey Consensus primarily emphasises the positive development impacts of the private sector and prioritises the promotion and protection of foreign investments, without any accompanying commitments to prevent any adverse impacts from private sector activity. Despite calls from civil society for appropriate regulatory frameworks to ensure corporate accountability,⁸ the 2008 Doha Declaration again reflects very weak language regarding the responsibilities of private actors, “welcoming” efforts to promote corporate social responsibility and good corporate governance.⁹

Since 2008, states, international institutions and development finance institutions (DFIs) have only increased their reliance on the private sector to achieve development outcomes. And just as importantly, the business and human rights agenda has significantly advanced with the unanimous adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) by the Human Rights Council in 2011 (see Box 2). The UNGPs reiterate the obligation of states to protect against business-related human rights abuses, to respect human rights in their own business activities, and to provide access to effective remedy when abuses occur. The UNGPs also establish the responsibility of business enterprises to respect human rights. At the same time, the OECD Guidelines for Multinational Enterprises (“the Guidelines”) were revised to mirror the UNGPs in its chapter on human rights.

While the “zero draft” of the FfD3 Outcome Document has a more advanced approach to corporate accountability than its predecessors,¹⁰ it fails to explicitly integrate the developments in international policy on business and human rights that have occurred since the Doha Declaration. The Elements Paper, prepared for the first Drafting Session in January, did include the UNGPs as it proposed to “implement the UN’s Guiding Principles on Businesses and Human Rights (UNGPs) core labor standards of the ILO, and relevant environmental standards, with enforcement and accountability mechanisms.”¹¹ However, in the zero draft, this has been deleted. The current draft thus fails to refer to the single most important and widely-recognised normative framework in the field of business and human rights, the UNGPs. The zero draft does not call for the adoption of measures to fulfil states’ obligations to protect against human rights abuses of the private sector when undertaking development activities, nor does it make any commitments to provide access to remedy for those harmed by corporate abuse. The zero draft also lacks reference to the new process within the UN Human Rights Council to negotiate an international treaty on business and human rights. The omission of the UNGPs in the zero draft is in spite of the commitment “to pursue policy coherence for sustainable development at all levels and by all actors”.

This failure to effectively include an overall human rights approach in FfD3, particularly with regard to the private sector, bears some resemblance to the negotiations around the UN Sustainable Development Goals (SDGs) (see Box 3), where co-chairs of an inter-governmental Open Working Group (OWG) admitted that they deliberately avoided explicit human rights language in the SDG draft for fear that this would be considered too “controversial”.¹² As the role of the private sector in development increases, its adherence to human rights standards becomes ever more critical. In order to promote international policy coherence and ensure that the private sector does not exacerbate poverty and inequality by undermining human rights, FfD3 must integrate a commitment by states to adopt measures to protect against business-related human rights abuses and access to remedy when harm occurs.

Box 2 | International corporate accountability standards

UN Guiding Principles on Business and Human Rights and due diligence

On 16 June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights for implementing the UN 'Protect, Respect and Remedy' Framework.¹³ This policy framework comprises three core principles or pillars:

- the *state duty to protect* against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
- the *corporate responsibility to respect* human rights, which means to act with due diligence to avoid infringing on the rights of others; and
- the need for greater access by victims to *effective remedies*, judicial and non-judicial.

The Guiding Principles do not create new international law obligations. Rather, they analyse the implications of existing standards and practices for states and businesses, integrate them within a single, logically coherent and comprehensive template, and identify where the current regime falls short and how it should be improved. An Interpretive Guide was published in 2012 to provide specific guidance with regard to UNGPs' second pillar.¹⁴ The concept of human rights 'due diligence', as a principle in the corporate responsibility to respect, has gained increasing importance as a potential tool for improving businesses' human rights conduct, as well as providing access to justice for victims of corporate human rights abuses. Again, human rights experts point out that due diligence is not a replacement for states providing victims with effective redress mechanisms. Rather: "*human rights 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*".¹⁵ The obligation of states to take measures to prevent, regulate, investigate and prosecute actions by business entities that violate the rights of individuals subject to that state's jurisdiction¹⁶ means there is thus a clear role of the state in ensuring that the private sector complies with due diligence to prevent human rights.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are government-backed recommendations to companies regarding responsible business conduct in their worldwide operations. They were adopted in 1976 as part of a package that consisted of the Declaration on International Investment and Multinational Enterprises, for the facilitation of direct investment among OECD member countries, together with four instruments related to the Declaration. The Guidelines cover a range of topics, including human rights, employment, environment, disclosure, corruption and taxation. In 2011, adhering governments¹⁷ updated the Guidelines, introducing substantial new provisions in areas such as human rights, due diligence and supply chain responsibility, and were aligned with the UNGPs. While the OECD Guidelines are not legally binding on companies, adhering governments are required to ensure that these guidelines are implemented and observed.

What distinguishes the OECD Guidelines from other corporate responsibility instruments and mechanisms is that they have a dispute resolution mechanism for resolving conflicts regarding alleged corporate misconduct. Governments that adhere to the Guidelines must establish a National Contact Point (NCP) to promote these Guidelines and to handle complaints against companies that have allegedly failed to adhere to the Guidelines' standards. Although not binding, a complaint can lead to mediated dialogue between the complainants and companies in question. This process can result in clarification of facts, changes in corporate policies and practices, compensation or other forms of remedy for the victims of the abuse, and recommendations for improved implementation of the Guidelines.

Box 3: Post-2015 Sustainable Development Goals (SDGs) & corporate accountability

One of the main outcomes of the Rio+20 Conference in 2012 was the agreement by Member States to launch a process to develop a set of SDGs, which will build upon the Millennium Development Goals (MDGs) and converge with the post-2015 development agenda. The outcomes of these inter-governmental debates will determine the model of development advanced in global policy forums over the next 15 years, influencing national government priorities, policies and financing decisions in areas from education to ecology, housing to health, climate change to care work.¹⁸

From a human rights perspective, the draft SDGs are an improvement compared to MDGs. The goals are intended to be universally applicable and many of the draft goals and targets are likewise more aligned with human rights obligations. Unfortunately, however, the draft SDGs fail to effectively commit to improving corporate accountability. The OWG makes no commitments that clarify the human rights responsibility of the private sector. While the private sector is recognised as an important actor in the global partnership for sustainable development, its responsibilities and accountability are not clearly integrated. A clear reference to the UNGPs is also absent.¹⁹

There are several cross-cutting issues related to the UN Business and Human Rights framework that pose fundamental questions for the FfD3 negotiations. However, this policy paper is unable to address these due to its limited scope. Table 1 below clarifies these limitations.

Table 1: Limitations in scope of the present policy paper

Cross-cutting issues
<p>'Do no harm' versus 'doing good'</p> <p>The corporate responsibility to respect, as laid down in the UNGPs, tends to focus exclusively on the obligation to avoid doing harm. In the context of private sector development and FFD3, the question about whether this approach is sufficient and whether companies should not also have positive human rights obligations both become more urgent. However, this paper does not address this important discussion on potential obligations of corporations to protect and fulfil human rights. Instead, it is limited to the negative human rights obligations of companies.</p>
<p>Binding or voluntary rules</p> <p>There is currently no globally binding instrument for corporate accountability for human rights violations. Most soft law instruments, such as the UNGPs, suffer from significant implementation gaps with virtually no effective enforcement mechanisms and weak incentives for compliance, for governments as well as for the private sector. However, the distinction between binding and non-binding human rights obligations for businesses is somewhat blurred as, for example, several governments have begun to impose human rights requirements for companies receiving state aid. Corporate accountability initiatives should therefore not necessarily be seen as purely voluntary – and certainly not without consequences for non-compliance. Such initiatives should be understood as a piece of the overall regulatory context and framework that defines them.</p>
<p>Domestic or extraterritorial regulation</p> <p>This paper does not discuss whether or to what extent states have an active obligation to regulate the extra-territorial activities of businesses domiciled in their territory and/or jurisdiction.²⁰ Rather, it takes a pragmatic approach in assuming that states are not prohibited from doing so (provided there is a jurisdictional basis). There are numerous uncontroversial and accepted measures that states can (and sometimes do) take that would benefit the human rights conduct of domestically incorporated companies operating abroad.</p>
<p>Policy coherence and space</p> <p>OHCHR has noted, <i>"Policy coherence, particularly human rights policy coherence, will be critical for the successful implementation of the post-2015 development agenda. This will entail taking measures to ensure coherence between current international legal regimes for trade, finance, and investment on the one hand and norms and standards for labour, the environment, human rights, equality and sustainability on the other hand."</i>²¹ The current paper does not address this issue in detail, but the authors note that, in the context of international economic relations, the link between taxes, trade and investment treaties and human rights focuses on international trade and investment agreements potentially hampering the policy space of signatory states to ensure that the human rights of their citizens are protected, respected and fulfilled. Countries should maintain – under all circumstances – the freedom to regulate in the public interest (e.g. respect, protect and fulfil human rights).</p>

2. Comments on zero draft of the FfD3 Outcome Document

This section provides comments and specific recommendations on the FfD3 zero draft. The comments focus only on those sections that are most relevant for corporate accountability, namely:

- 1 the preamble;
- 2 domestic public finance;
- 3 domestic and international private business and finance;
- 4 trade; and
- 5 systematic issues.

2.1. Preamble

The current preamble states that policy framework and incentives must ensure that private investment is aligned with sustainable development, norms and standards. As the UN OHCHR states:

“In working together, States and businesses should incorporate social, environmental, labour, human rights and gender equality considerations into their activities and subject public private partnerships to human rights safeguards and rigorous due diligence, including human rights impact assessments. Businesses can thereby identify, prevent and mitigate any risk of adverse human rights impacts.”²²

The current text should be amended to make clear that regulatory frameworks should be put in place to ensure corporate respect for human rights. At the very least, this should involve making explicit reference to the UNGPs. Measures should be developed at the national and international level to align business activities with observance of human rights, in particular regarding the state duty to protect human rights, the corporate responsibility to respect human rights, and the need for access to effective remedies for victims.

Preamble	
Paragraph	Proposed text change
1	We commit to ensure gender equality and promote and respect , protect and fulfill all human rights, including the right to development, in a world where all people are able to raise their standards of living through decent work and productive livelihoods, while preserving the planet for our children and future generations.
14	Public policies must provide the enabling environment, as well as the policy framework and incentives to ensure that private investment is aligned with sustainable development, norms and standards, <u>including the UN Guiding Principles on Business and Human Rights.</u>

2.2. Domestic public finance

Domestic tax revenues are an important financial resource for states in relation to their duty to protect and fulfil human rights. Tax revenues are essential in providing health care, education, infrastructure and other public interest goods. The extent to which countries are able to raise sufficient tax revenues is therefore of major importance. The ability of countries to mobilise these domestic financial resources can be affected by the tax policies of other countries or regions. States, therefore, have a responsibility to ensure that their tax policies do not adversely impact the tax base of other states and their ability to raise sufficient financial resources for development:

“States should take measures to ensure that business enterprises that the State is in a position to regulate, including legal, accounting and other specialized firms that assist in tax abuse, do not participate in or facilitate tax abuse or illicit financial flows, given that they have a detrimental impact on the realization of economic, social and cultural rights.”²³

Multinational corporations exploit differences in states’ tax policies and treaties in order to shift their profits and thereby avoid paying taxes. These practices of tax avoidance and evasion, account for a major proportion of illicit outflows from developing countries.²⁴ It could be argued that tax avoidance and evasion are robbing countries of their financial resources to fulfil and protect human rights for their people. According to the OECD Guidelines, corporations should not only comply with the letter of tax laws, but also with the spirit of such laws.²⁵

Tax avoidance and evasion are facilitated to a great extent by an environment of secrecy. Corporate information on structure and ownership can be easily hidden in many jurisdictions around the world. Reporting and disclosure of tax payments, disaggregated by each country in which a company is incorporated, is not mandatory for all companies. Enhancing fiscal transparency would enable a fair assessment by all stakeholders of governments’ and corporations’ practices regarding taxation.

It is positive that the domestic public finance chapter of the zero draft states that *sustainable development* should be incorporated as an objective in all tax and revenue policies and that countries should work together to strengthen transparency (by making certain crucial information public, including *public* country-by-country reporting by multinational enterprises and *public* beneficial ownership registries) and to end harmful tax competition. However, several crucial elements are not yet included, most importantly that states should not breach international human rights obligations with their fiscal policies, incentives or tax treaties. They should not undermine sustainable development and human rights commitments by harming the domestic resource mobilisation of other countries.

Domestic public finance	
Paragraph	Proposed text change
18	We also agree to incorporate sustainable development, human rights and promote equity, including gender equality, as an objective in all tax and revenue policies, including incentives we give to domestic and foreign investors, and tax treaties and agreements. At a minimum, this requires that such policies do not affect the ability of other States to raise sufficient domestic resources to fulfil their human rights obligations.
23	We agree to implement the Extractive Industries Transparency Initiative (EITI) and adopt laws requiring contract and revenue disclosure to ensure full public disclosure of natural resource revenues of all types.
25	We recognize that there are limits to how much governments can individually increase revenues in our interconnected world. In order to ensure our tax policies do not adversely impact the tax base of other States, we will undertake impact assessments of such policies and treaties. Since tax base erosion is also caused by the practices of the private sector, we will oblige multinational enterprises to refrain from participating or facilitating tax abuse. We thus commit to a global campaign to substantially reduce international tax evasion through more concerted international cooperation. We agree to work together to strengthen transparency and adopt pending policy innovations, including: publicly disclosed country-by-country reporting by multinational enterprises, to include, at a minimum, staff numbers, turnover, profit and loss before tax, tax expenses, cash taxes paid, and public subsidies received in every country of operation and incorporation; public registries of beneficial owners of companies, trust, funds and similar legal structures; and multilateral, automatic exchange of tax information, with assistance to developing countries, especially the poorest, as needed to upgrade their capacity to participate. We agree to work through relevant fora to end harmful tax competition. We call on competing countries to engage in voluntary discussions on tax incentives in regional and international fora, which can also stimulate cooperation to stem illicit financial flows. We agree that all tax incentives granted to foreign investors should be transparent and open to judicial oversight, so as to ensure the accountability of such fiscal policies.

2.3. Domestic and international private business and finance

Private business activity and investment can contribute to development. However, it is also broadly recognised that business activity can result in human rights abuses, leaving people worse off and exacerbating poverty and inequality.²⁶ As described earlier, the UNGPs reiterate the obligation of states to: protect people from human rights abuses committed by third parties, including business enterprises; establish the responsibility of business enterprises to respect human rights; and require that those harmed have access to remedy. Creating the right enabling conditions for private sector investment, then, requires that states and development finance institutions adopt binding standards for business enterprises that ensure respect for human rights and provision of remedy to those harmed, if and when abuse occurs. Most legal and policy frameworks are deficient in both aspects, which led, in part, to the support for a resolution adopted at the UN Human Rights Council last June to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.²⁷

Given the significance of the developments in this field since the adoption of the Doha Declaration, references to the UNGPs and the OECD Guidelines are conspicuously absent in this section of the zero draft. It is necessary – but not sufficient – for states to commit solely to protecting the labour standards of the International Labour Organization (ILO) and key Multilateral Environmental Agreements, as currently reflected in the draft. States should also adopt measures to ensure that business enterprises respect the International Bill of Human Rights and, where the activities could result in impacts on specific groups or populations, other UN instruments that protect the rights of indigenous peoples, women, children, minorities and migrant workers, among others.

Of particular importance for this section is the recognition that the UNGPs and OECD Guidelines apply to the financial sector. The OHCHR, the UN Working Group on Business and Human Rights, and the OECD have confirmed that financial institutions can cause, contribute and be directly linked to human rights abuses.²⁸ To fulfil their human rights responsibilities, financial institutions must undertake human rights due diligence on their investments. This includes accounting for and reporting on (potential) impacts caused by or directly linked to their investments. Along these lines, states are advised to commit to implementing mandatory, standardised reporting standards for companies listed or incorporated in their territory or jurisdiction. There is a clear trend in this direction. Building on existing reporting requirements in countries like Denmark, France, Spain, Sweden and the UK, a new European Union directive²⁹ adopted in September 2014 now requires all large European companies to provide mandatory environmental, social and governance (ESG) disclosure. In the US, the Dodd-Frank Act requires ESG and due diligence disclosure for all companies with conflict minerals from the Democratic Republic of Congo (DRC) in their supply chain. The FfD3 Outcome Document should embrace and build on these trends.

Even development finance that intends to support small- and medium-sized enterprises (SMEs) through financial intermediaries can result in human rights impacts. The International Finance Corporation (IFC), which channels a significant percentage of its lending through financial intermediaries (FIs)³⁰ – purportedly to support SMEs – has come under significant criticism for its failure to ensure that lending by its FIs does not result in harm.³¹ An audit undertaken by the IFC's independent accountability mechanism, the Compliance Advisor Ombudsman (CAO), found that, *"IFC knows very little about potential environmental or social impacts of its [financial market] lending."*³² If IFC cannot be relied upon to prevent harm in its FI lending, states should not encourage channelling development finance through the financial sector in the absence of a robust regulatory framework that requires transparency and compliance with environmental and human rights standards.

Domestic and international private business and finance

Paragraph Proposed text change

38 At the same time, we acknowledge the responsibility of governments to develop regulatory systems to align business incentives with sustainable development and protect against business-related human rights abuses and environmental harm.

39 We support the many initiatives to formulate and adopt principles for socially and environmentally responsible investment and business activities, including the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises and invite actively encourage businesses to sign on to and apply these principles. Such principles should also address business' role in preventing and fighting corruption. We welcome the work by the United Nations Conference on Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP), CFS, the Global Compact, amongst others in this regard. We also recognize that each industry faces its own opportunities and challenges in contributing most constructively to sustainable development. We therefore undertake to work with industry groups, national regulators and international accounting standard-setting bodies to identify industry-level metrics that could frame generally accepted sustainable development accounting principles, consistent with international goals and targets for sustainable development. We will work towards commit to unifying and strengthening the various initiatives on responsible financing, identifying gaps, and strengthening the mechanisms and incentives for compliance and provision of remedy.

40 These initiatives should be complemented by appropriate national regulations, in line with national strategies. We agree to create strong regulatory frameworks on ESG practices, and commit to effectively implement including mandatory integrated country-by-country ESG reporting for large companies all publicly listed companies and asset managers, to be adopted by 20xx. To better align business practices with sustainable development, we will adopt regulatory frameworks that foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with internationally agreed norms, including the labour standards of the International Labour Organization and key Multilateral Environmental Agreements. We commit to effective implementation of the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the core labour standards of the ILO, and key Multilateral Environmental Agreements, and the establishment of effective mechanisms for providing remedy for those harmed by corporate activities. We will adopt policies to internalize externalities, such as the "polluter pays principle", through a combination of taxation, regulation and other measures, in line with national strategies.

41 We acknowledge the importance of robust regulatory frameworks that encompass all financial intermediation, from microfinance to international banking. We will work to ensure that our policy and regulatory environment supports financial market stability, while promoting access to finance, in a balanced manner that ensures respect for human rights. We will also work to design capital markets regulation that promotes incentives along the investment chain that are fully aligned with long-term performance and sustainability indicators.

2.4. International trade for sustainable development

"Trade should be about exchange, with ecologically and culturally distinct regions equitably sharing their products, skills and creativity. But in recent decades, trade has become less about exchange of goods and more about eliminating social and environmental safeguards in pursuit of corporate profit."³³ Trade and investment agreements can harm the ability of states to adopt policies in the interest of human rights, development and the environment. The zero draft commits to "carry out negotiation and implementation of trade and investment agreements in a transparent manner to ensure that trade and investment treaties do not constrain domestic policies to reduce inequality, protect the environment or ensure adequate tax revenues."³⁴ While this is a step forward compared to current practices, there is an urgent need to ensure that all trade and investment agreements are

guided by mandatory ex-ante and ex-post human rights impact assessments, as proposed by the previous Special Rapporteur on the right to food, Olivier De Schutter.³⁵ There is also a need to make sure it is in line with the Elements Paper that proposed to “commit to human rights impact assessments of all trade and investment agreements” and to “elaborate and implement binding environmental, social and human rights standards”.

It is positive that the zero draft also commits to “strengthen safeguards in investment treaties, especially by proper review of investor-state-dispute-settlement (ISDS) clauses, to ensure the right to regulate is retained in areas critical for sustainable development.”³⁶ However, this language does not go far enough. It does not extend to investment protection chapters of trade agreements, which often include ISDS. Regardless, ISDS is a high-risk, parallel legal system and should be abandoned altogether, especially as alternative options (insurance and state-to-state dispute settlement) are available. UNCTAD is currently in the process of assisting Member States to review investment agreements to bring them in line with human rights and sustainable development objectives. The FfD3 conference should reinforce UNCTAD’s initiative in advance of UNCTAD XIV in 2016.³⁷

International trade for sustainable development	
Paragraph	Proposed text change
81	We will carry out negotiation and implementation of trade and investment agreements in a transparent manner to ensure that trade and investment treaties do not constrain domestic policies to reduce inequality, protect the environment or ensure adequate tax revenues. We commit to undertake international sustainable and human rights impact assessments of all multilateral, plurilateral and bilateral trade and investments agreements, and to elaborate and implement international binding environmental, social and human rights standards in all trade and investment agreements. We will strengthen safeguards in investment treaties, especially by proper review of investor-state-dispute-settlement (ISDS) clauses, to ensure the right to regulate is retained in areas critical for sustainable development and human rights , including health, the environment, employment, infrastructure (including electricity and transport), public safety, macro prudential regulations and financial stability. We ask UNCTAD to continue organising consultations with Member States to review investment agreements and ways to bring them in line with sustainable development objectives.

2.5. Systemic issues

States support the private sector through export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. States maintain their human rights obligations when participating in those institutions and should require that those institutions and the business enterprises they support undertake human rights due diligence.³⁸ Those institutions should refuse to finance any activity that would have impacts that are inconsistent with human rights standards. Currently, if they require anything, these institutions usually require that private sector clients comply with the IFC’s Performance Standards on Environmental and Social Sustainability. However, notably, those standards do not require assessment of impacts to human rights. Although most multilateral development banks (MDBs) and few national development finance institutions (DFIs) have created grievance mechanisms to receive complaints from those harmed by the projects they finance, those mechanisms lack the authority to ensure that the victims receive remedy, relying instead on the political will of the management or governing board to respond to findings of non-compliance. Experience has demonstrated that this will is lacking.

Systemic issues

Paragraph Proposed text change

98	We encourage all international and national development finance institutions to align their business practices with sustainable development objectives and the UNGPs , including through assessments of their impact on the enjoyment of human rights, including indigenous peoples' rights, progress toward gender equality, and ESG targets that they have adopted. We call on all international and national development finance institutions to establish grievance mechanisms empowered to provide remedy to anyone harmed by the activities they finance.
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3. Conclusion

Under international law, states are the primary duty bearers for protecting, respecting, and fulfilling human rights. Given the disproportionate impact businesses have on virtually all human rights, the extent to which states are willing to adopt regulatory frameworks at the national and international levels that protect against business-related human rights abuses and provide remedy for those harmed can make or break sustainable development objectives. In the last few years, the business and human rights agenda has evolved significantly with the 2011 adoption of the UNGPs. The absence of any explicit reference in the zero draft of the FfD3 Outcome Document to the UNGPs or any binding standards for business enterprises that ensure respect for human rights and provision of remedy to those harmed, is unacceptable and should be corrected.

This policy paper proposes specific changes to the text that must be adopted in the FfD3 Outcome Document to ensure that the private sector contribution to development respects human rights and the environment. Our recommendations focus on: (1) the state duty to ensure that fiscal policies, incentives or tax treaties do not undermine human rights and sustainable development; (2) operationalisation and implementation of the UNGPs, including mandatory reporting and access to remedies; (3) making trade and investment agreements consistent with human rights by assessing their impact on people and the environment; and finally (4) the state duty to ensure that human rights due diligence is undertaken when financing the operations of the private sector through a DFI or otherwise.

Ensuring that framework for development finance is consistent with existing human rights and corporate accountability standards should be one of the key efforts in the run up to FfD3 in Addis Ababa.

Endnotes

1. Third International Conference on Financing for Development, official UN website, <<http://www.un.org/esa/ffd/overview/third-conference-ffd.html>>
2. See for company cases on human rights, The Business and Human Rights Resource Centre, <<http://business-humanrights.org/en/about-us>> and Principle 12 (Commentary) of the UN Guiding Principles on Business and Human Rights affirm that “business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights”. See UN Office of the High Commissioner on Human Rights (UN OHCHR), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
3. United Nation website, What are Human Rights, <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>
4. A Clapham, *Revisiting Human Rights in the Private Sphere: Using the ECHR to Protect the Right of Access to the Civil Court*, in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001).
5. International law obligations have long been addressed directly to individuals in relation to crimes such as piracy and slavery. And the international criminal responsibility of individuals for war crimes, crimes against humanity and genocide has been recognised in a series of international treaties and judicial statements. See Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006), pp. 75-76. Human rights obligations also extend to armed opposition groups, private security companies and international organisations. See Clapham, ‘Human Rights Obligations of Non-State Actors in Conflicts Situations’, September 2006, *International Review of the Red Cross*, Vol. 88, No. 863. See, more generally, Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press, 2005).
6. For an explanation of the background to the UN Special Representative’s mandate and to access key documentation arising from that mandate, see <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.
7. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-53_en.doc (“Human rights law includes obligations relating to the environment. Those obligations include procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies. The obligation to facilitate public participation includes obligations to safeguard the rights of freedom of expression and association against threats, harassment and violence. The human rights obligations relating to the environment also include substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors.”).
8. Outcome of the Civil Society Forum Doha, Qatar, November 2008, Civil Society Declaration, http://www.un-ngls.org/IMG/doc/a_FINAL_DECLARATION.doc
9. Doha Declaration on Financing for Development: the final text of agreements and commitments adopted at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus Doha, Qatar, 29 November to 2 December 2008, <http://www.un.org/esa/ffd/doha/documents/Doha_Declaration_FFD.pdf>
10. The co-facilitators prepared the zero draft, building on the work of the preparatory process, which included the substantive informal sessions in November and December; the elements considered at the First Drafting Session in January and the wide range of inputs submitted by Member States and other stakeholders. It also takes into full account the Report of the Open Working Group on Sustainable Development Goals; Report of the Intergovernmental Committee of Experts on Sustainable Development Financing (ICESDF), and the Synthesis Report of the Secretary General.
11. FfD3 Elements Paper, January 2015, http://www.un.org/esa/ffd/wp-content/uploads/2015/01/FfD3_Elements-paper_drafting-session.pdf
12. R Balakrishnan and I. Saiz, *Transforming the development agenda requires more, not less, attention to human rights*, September 2014, <<https://www.opendemocracy.net/openglobalrights-blog/radhika-balakrishnan-and-ignacio-saiz/transforming-development-agenda-requires>>
13. United Nations OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, HR/PUB/11/04, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
14. United Nations OHCHR, *The corporate responsibility to respect human rights. An interpretive guide*, HR/PUB/12/02, 2012, http://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf
15. De Schutter et al., *Human Rights Due Diligence: The Role of States*, published by ICAR, ECCJ and CNCA, December 2012, <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>
16. See for example, Clapham, ‘Revisiting Human Rights in the Private Sphere: Using the ECHR to Protect the Right of Access to the Civil Court’ in C Scott (ed), in *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford, Hart Publishing, 2001), p. 513. Commenting on the state’s obligations under the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Council states in its General Comment No. 31 that “There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”, cited in Ineta Ziemele, *Human Rights Violations by Private Persons and Entities: the Case-Law of International Human Rights Courts and Monitoring Bodies*, European University Institute Working Paper, AEL/2009/8, <http://cadmus.eui.eu/handle/1814/11409>

17. For a list of the 34 OECD countries and 12 non-OECD adhering countries, see OECD Watch, <http://oecdwatch.org/oecd-guidelines/oecd>
18. Sustainable Development Goals website, <<https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals>>
19. R Balakrishnan and I Saiz, see fn 18.
20. Several UN Treaty Bodies, for instance, encourage home states to take steps to prevent abuse abroad by businesses incorporated within their jurisdiction: UN Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 Of The Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, USA, UN doc CERD/C/USA/CO/6, 2008, para. 30, available at <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>; UN Committee on Economic, Social and Cultural Rights General Comment No. 19. The right to social security, (art. 9), UN doc E/C.12/GC/19, 2007, para. 54, available at <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>.
21. OHCHR, Key messages on Human Rights and Financing for Development, 2015 (not yet made public).
22. OHCHR, Key messages on Human Rights and Financing for Development, 2015 (not public yet).
23. HRC, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, p.2.
24. See for example: 'Multinationals Account For 60% Of Illicit Financial Outflows In Africa – Mbeki', 8 May 2014, available at <http://leadership.ng/news/369960/multinationals-account-60-illicit-financial-outflows-africa-mbeki>
25. OECD Guidelines for Multinational Enterprises, 2011 Edition, Chapter XI Taxation.
26. See, for example, Yamin, M. and Sinkovics, R. R., 'Infrastructure or foreign direct investment? An examination of the implications of MNE Strategy for economic development', *Journal of World Business* 44(2): 144-157 (2008).
27. http://www.business-humanrights.org/media/documents/ecuador_&_so._africa_resolution_ec_sa_24_06_14.doc
28. <http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-3.pdf>; <http://www.ohchr.org/Documents/Issues/Business/LetterResponseToOECD.pdf>
29. European Union, Directive 2014/95/EU on disclosure of non-financial and diversity information, <http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2047%202014%20INIT>
30. The IFC defines financial intermediaries as a "variety of financial institutions such as universal banks, investment banks, private equity funds, venture capital funds, microfinance institutions, and leasing and insurance companies, among others." IFC Interpretation note on Financial Intermediaries, http://www.ifc.org/wps/wcm/connect/38d1a68049ddf966af3cbfda80c2ddf3/InterpretationNote_Fls_2012.pdf?MOD=AJPERES
31. <http://www.brettonwoodsproject.org/2013/03/art-572178/>
32. http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf; a monitoring report released late last year found that important findings from the audit remained unaddressed: http://www.cao-ombudsman.org/newsroom/archive/documents/CAOFIAuditMonitoringReport_October102014.pdf
33. Alternative Trade Mandate, 2013, <<http://www.alternativetrademandate.org/wp-content/uploads/2012/06/ATM-Vision-Paper.pdf>>. The Alternative Trade Mandate Alliance is an alliance of currently almost 50 organisations, developing an alternative vision of European trade policy that puts people and planet before big business.
34. Para 81.
35. Report of the Special Rapporteur on the right to food, Olivier De Schutter Addendum Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5, 19 December 2011.
36. Para 81.
37. Regions Refocus 2015, Third World Network (TWN) and Development Alternatives with Women for a New Era (DAWN), A Geopolitical Analysis of Financing for Development (FfD3), 2015, <http://www.socialwatch.org/sites/default/files/Geopolitical-Analysis-FfD3-Regions%20Refocus-TWN-DAWN.pdf>
38. UNGPs, Principle 4, commentary ("A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State. Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.")

Colophon

Making financing for development more accountable?

Proposals for strengthening corporate accountability in the Financing for Development 'outcome document'

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