

FMO Sustainability Policy and Position Statement on Human Rights

Comments of the Office of the United Nations High Commissioner for Human Rights

18 November 2016

Introduction

The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes the opportunity to comment upon FMO's draft Sustainability Policy ("draft Policy") and Position Statement on Human Rights ("Position Statement"). OHCHR is concerned at recent pressures to weaken social and environmental safeguard policies of multilateral development banks and the very mixed implementation record of these policies in practice, for both public and private sector financing institutions. OHCHR welcomes FMO's strong commitment to sustainability and human rights and urges FMO to continue to play a leadership role in these fields.

OHCHR notes a great many positive features in the draft Policy and Position Statement. These draft documents clearly aim to set a high bar for FMO's social and environmental responsibilities and are anchored a range of important international standards governing responsible investment, good governance and business and human rights, including the UN Guiding Principles on Business and Human Rights. OHCHR recognizes that the draft Policy and Position Statement are intended to be statements of principle and policy, and that more detailed operational guidance will follow thereafter.

OHCHR's comments below are focused on areas where further strengthening may be warranted. A number of general comments are offered first, followed by specific recommendations separately in relation to the draft Policy and Position Statement.

General comments

2030 Sustainable Development Agenda and human rights

OHCHR notes the reference in the draft Sustainability Policy to the Sustainable Development Goals. The 2030 Agenda underscores the centrality of human rights for sustainable development and the need to implement the Agenda consistently with existing international law (paras. 10, 18 and 19). Moreover the Addis Ababa Action Agenda (para. 75) calls upon "all development banks to establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women's empowerment, that are transparent, effective, efficient and time-

sensitive.” Both agreements explicitly reference the UN Guiding Principles on Business and Human Rights (UNGPs), which frames due diligence in the draft Policy. OHCHR suggests that these provisions of the 2030 Agenda and Addis Ababa Agenda for Action be explicitly referenced in the draft Policy and Position Statement.

FMO as a duty-bearer

OHCHR recommends that FMO explicitly recognize that, as a national development bank, it has obligations under international law to respect human rights, at a minimum, and in certain circumstances also to protect against human rights violations perpetrated by others. This is different from the legal nature of the responsibilities of businesses under the UNGPs and other relevant guidelines, although the practical implications for the FMO’s and clients’ due diligence processes may be similar. OHCHR welcomes FMO’s commitment to human rights and the (factual) statement that “FMO itself respects human rights,” however OHCHR would suggest a more explicit undertaking in the following terms in both the draft Policy and Position Statement: *“FMO will respect internationally recognized human rights standards and take all necessary measures to avoid supporting projects that may cause or contribute to human rights violations.”*

Reprisal risks and shrinking civil society space

OHCHR is concerned at the shrinking of civil society space in all regions of the world in recent years. Reprisals against human rights and environmental defenders, including complainants to independent accountability mechanisms of multilateral development banks (MDBs), appear to be increasing. OHCHR notes that a number of MDBs have developed policies and procedures to govern their response to reprisals, and welcomes the leading role of the government of the Netherlands in acknowledging and addressing these threats.

OHCHR recommends that the issue of reprisals be addressed in both the draft Policy (under “FMO Complaints Procedure”) as well as the Position Statement. Recourse could be had to the MDB reprisals policies as well as those of the various mechanisms of the UN human rights system (treaty bodies, Special Procedures, and the UN Human Rights Council). FMO’s policy should spell out its own responsibilities in anticipating and responding to reprisals in the context of FMO-supported investments, and identify other potentially useful partners, response strategies and mechanisms.

Protection mechanisms for those exposed to risk in relation to FMO-supported investments include UN and regional human rights mechanisms (especially those in Europe and Latin America), temporary refuge or asylum through foreign embassies, the EU “Protect Defenders” programme (<https://www.protectdefenders.eu/en/supporting-defenders.html#emergency-support>), “Shelter Cities” in the Netherlands (<https://www.sheltercity.nl/en/about-us/>), Freedom House’s emergency assistance programme (<https://freedomhouse.org/program/emergency-assistance-programs>).

Potential NGO partners include Frontline Defenders (whose services include protection grants, risk analysis/protection training, digital protection and advocacy, including for environmental defenders), International Federation for Human Rights, and the International Service for Human Rights.

The UN mechanisms include the Special Rapporteur on the right to freedom of opinion and expression, the Special Rapporteur on the freedoms of peaceful assembly and association, and the Working Group on arbitrary detention. The Inter-American Commission on Human Rights (IACHR) also has a system of Special Rapporteurs on a range of potentially relevant topics, including human rights defenders, and may grant orders called “precautionary measures” which have had life-saving impacts in numerous cases (though not, regrettably, in the case of Berta Cáceres and other human rights and environmental defenders in relation to the FMO-supported Agua Zarca dam project in Honduras).

Sustainability Policy

Scope

(32-33): The question of leverage is vital in practice, if sustainability objectives are to be achieved. However lenders and business enterprises sometimes take an unduly defeatist approach to this question. Guiding Principle 19 of the UNGPs encourages enterprises to seek to increase leverage where it is presently lacking, “for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.” OHCHR would suggest that the leverage of both FMO and its clients be discussed in this forward-looking, results-oriented manner.

How we do work

(60-81): OHCHR suggests that the word “wants to” in line 73 be replaced by “will”, and that “applicable law” be defined by reference to both national and international law, whichever sets the higher standard on a given risk or issue pertinent to an FMO-supported investment.

Principles

(83-85): National laws of themselves rarely if ever provide an adequate framework for social and environmental risk management. UN human rights mechanisms can be consulted to identify the major gaps in the social areas, for particular countries, population groups and themes. OHCHR recommends that line 83 be amended: “FMO requires, at a minimum, that all clients comply with applicable environmental, social and human rights laws in their home and host countries” (with the term “applicable law” having been defined, as recommended above, to include both national and international

law, whichever sets the higher standard on a given risk or issue pertinent to an FMO-supported investment).

(86-94): OHCHR suggests that the 9 core UN human rights treaties be referenced (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>). All UN member States have ratified several of these, and the UN Convention on the Rights of the Child has been ratified by all States but one. A further reference directly relevant for FMO's purposes are the *UN Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations* (http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf), which contains guidance on issues including due diligence, physical security, community engagement, grievance mechanisms and transparency/disclosure.

(102-105): OHCHR notes FMO's referencing of the IFC's Performance Standards (IFC PS), and recognizes that the latter standards set an important benchmark for social and environmental risk management in many important respects. However if FMO is serious about its human rights policy commitment, the IFC PS appear to be deficient in three important respects:

Firstly, the IFC PS only recognize the need for human rights due diligence in "limited high risk circumstances" (IFC PS 1, fn 12). This is not sufficient in practice, as Agua Zarca (a relatively small dam) reminds us. FMO has been praised for its principled and measured mitigation response in the latter case (including from the UN High Commissioner for Human Rights: <https://www.theguardian.com/commentisfree/2016/mar/20/development-banks-human-rights-crisis-honduras-agua-zarca>), but mitigation is no substitute for prevention.

Secondly, the IFC PS do not contain an explicit requirement that the client comply with the highest applicable legal standard governing a given risk or issue. IFC PS 1, para. 6 and PS 7, para. 2 merely require compliance with "applicable [national] laws and regulations ... including those laws implementing host country obligations under international law." In other words, where national laws are weak, silent, or do not adequately implement international obligations, there may be potentially serious gaps in social risk assessment and policy. The Equator Principles (June 2013, Exhibit II) recognise the equal importance of national and international laws, providing that assessment documentation "may include, where applicable, requirements under host country laws and regulations, applicable international treaties and agreements." However, strangely, the Equator Principles are silent on potential inconsistencies between national and international laws, and do not call for the higher standard to be respected.

Finally, the IFC PS fail to recognize the human rights obligations of the lender (the IFC, as with FMO, has an obligation to respect human rights, at a minimum, under international law), in addition to the responsibilities of the client.

Operational implementation

(139): OHCHR welcomes the inclusion of forced and child labour in the exclusion list but suggests that the category O2 (including “any activity illegal under host country laws or international conventions or agreements”) be illustrated by reference to other potentially serious violations of human rights agreements that have affected FMO-supported investments to date, for instance: (a) serious human rights violations by security forces; (b) suppression of freedoms of expression, assembly and association to the point where meaningful consultation and participation in relation to FMO-supported investments is unachievable; (c) serious patterns of discrimination against indigenous peoples, women, or other population groups; and (d) forced evictions. It should be specified that FMO should not be expected to make its own determinations of compliance with international agreements on child labour or any other such matter, but that the opinions of specialized UN bodies would be sought in this regard.

(140-150): OHCHR notes the serious shortcomings in social and environmental risk management that have been brought to light in the IFC’s Financial Intermediary portfolio (CAO audit report, C-I-R9-Y10-F135, Oct. 10, 2012). OHCHR notes the systemic implications of the CAO’s findings and urges FMO, to the extent that it intends to engage in this particularly risky mode of financing, to provide further details in the draft Policy (not only the guidance notes) as to how the Policy’s human rights and sustainability objectives will be safeguarded, what a safe upper limit may be for this type of financing in the context of the FMO’s overall portfolio, and how it will ensure adequate appraisal, disclosure, and monitoring of all higher-risk sub-investments of FI clients. In OHCHR’s view the term “best efforts” should be clarified, if it is retained in the final Policy.

(176-188): OHCHR recommends that further details be given in the draft Policy, not only in guidance notes, on information disclosure, the preparation and disclosure of environmental, social and human rights assessments, and monitoring (including triggers for independent third party monitoring, third party experts and panels). If assessments are not prepared and disclosed publicly at an early stage prior to the approval of a project, the true costs and likely need, scale and feasibility of mitigation actions will not be known until it is too late. Early and comprehensive information disclosure is especially vital: OHCHR recommends that FMO integrate the guidance in the UN Principles for Responsible Contracts (http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf) in this regard, principle 10 of which balances transparency and effective risk management with client confidentiality.

Disclosure

(205-212): The disclosure of “selected relevant information” about investments appears unduly constrictive. OHCHR suggests that the draft Policy outline what kinds of

exceptions to the general rule of full disclosure may be acceptable, guided by the UN Principles for Responsible Contracts (principle 10). Compelling justifications, for example concerning business proprietary information regarding a concurrent or imminent negotiation, should be individually made, objectively warranted, publicly disclosed and time-bound.

Position Statement on Human Rights

(2-4): OHCHR suggests that this opening sentence be aligned more closely with the objectives stated in lines 60-61 of the draft Policy, stating that FMO prizes not only entrepreneurial ambition, but also the willingness of its clients to work with FMO on improving their environmental, social and human rights impacts.

(11-14): OHCHR welcomes FMO's commitment to ethics and integrity as reflected in the human rights Position Statement, and suggests that this statement of commitment could also include FMO's drive for particular results, e.g. "They reflect our objective to apply the highest standard of ethics and integrity to our business activities, and our drive for equitable and sustained impacts." In OHCHR's view these contextual remarks could also include reference to shrinking civil society space and increasing inequalities within (and between) countries, and the impacts that these phenomena will increasingly have on FMO-supported investments.

(16-21): OHCHR recommends footnoting the core 9 UN human rights treaties (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>), and not only the UDHR and two Covenants. Granted, the latter three instruments are often cited as the International Bill of Rights, however privileging these three can have the unintended consequence of diminishing the importance of the others, some of which (such as the UN Convention on the Rights of the Child) enjoy near-universal ratification, and many of which may have direct relevance for FMO-supported investments at country level. OHCHR would also recommend citing the 2007 UN Declaration on the Rights of Indigenous Peoples, which contains important guidance on the "Free, Prior and Informed Consent" norm and other rights of importance to many FMO-supported investments.

(33-36): See comments earlier on the nature of FMO's obligations as distinct from those of its clients.

(37-43): See comments above on the 9 core UN human rights treaties, UN Principles on Responsible Contracts, and the apparent shortcomings in the IFC PS from the standpoint of human rights due diligence.

(44-47): OHCHR welcomes FMO's commitment to non-discrimination and equality in its hiring and employment practices, and suggests that this commitment explicitly be reflected in its project due diligence and clients' risk management responsibilities. The

World Bank's recent Directive on Non-Discrimination, accompanying its new Environmental and Social Framework, lists a number of population groups warranting explicit attention in the context of social and environmental due diligence and risk management.

(52-56): OHCHR recommends that FMO spell out more clearly the elements of its own due diligence, including risk categorization, contextual human rights analysis, guidance on human rights due diligence, review of adequacy of client environmental, social and human rights assessments, review of adequacy of client's analysis of and compliance with applicable laws (national and international, taking the higher standard as the benchmark), reviewing adequacy of documentation disclosure and stakeholder engagement, supervision of the client's risk management obligations throughout the project cycle, inclusion of third party expertise and independent monitoring and expert panels as needed, and circumstances under which contractual remedies would be exercised. OHCHR also recommends that FMO include here brief mention of leverage in the context of UNGP 19, outlining illustratively how FMO will exercise and seek to increase its leverage as needs require.

(57-65): OHCHR recommends that FMO specifically include the requirement that clients have a human rights policy in place (UNGP, principle 16). All other relevant UNGP's appear to be listed, however – as demonstrated by FMO itself – a human rights policy approved at the most senior level of the business enterprise is the starting point for embedding human rights within business practices.

Concluding remarks

OHCHR congratulates FMO on the important strides it has undertaken to strengthen its human rights due diligence, not only in connection with its draft Sustainability Policy and Human Rights Position Paper, but also in light of the hard lessons of experience in relation to projects like Agua Zarca, Honduras. OHCHR hopes that the above comments will be useful to FMO and is available for clarifications and further discussion as needed.