

Annex II

The Benefits of Integrating Human Rights Risk Information into the World Bank's Due Diligence

I. Introduction

Human rights risks arise frequently in relation to investment projects supported by multilateral development banks (MDBs), including the World Bank, in all countries. The risks can arise in relation to economic, social, cultural rights as well as civil and political rights. Human rights risks have often been serious and irremediable, undermining investment project objectives, blowing out remediation and administrative costs (including costs of investigation by MDBs' independent compliant mechanisms), and causing reputational harm to both the Borrower and the lender.

OHCHR has undertaken a comparative analysis of several MDB-supported investment projects where human rights risks were, or should have been, apparent at an early stage of the preparation of the investment yet did not appear to have been identified or prioritized, or alternatively were taken into account too late. These and other cases bring to mind the counterfactual question: What would have changed had the lender adopted an explicit human rights commitment and provided staff with the tools to implement it?

This Annex seeks to illustrate in practical terms how human rights risk information could be integrated more explicitly and systematically within the investment project cycle. While relevant to MDB-supported investment lending generally, the discussion focuses on entry points specific to the Bank's project cycle and draft Environmental and Social Framework (ESF). While this discussion focuses mainly on the Bank's due diligence responsibilities, it is also relevant to the duties of Borrowers to take human rights risk information into account as part of their social and environmental assessment and risk management responsibilities.¹

II. What is human rights risk information?

The term "human rights risk information" may be taken to mean information generated by duly mandated and independent human rights reporting and monitoring bodies, including those within the UN system as well as other reputable sources, relevant to environmental and social risk assessment and management. Information and recommendations from UN human rights bodies address many issues relevant to the assessment of social and environmental risks and context risks in relation to investment projects.

All World Bank shareholders have ratified at least some (and frequently, several) of the ten "core" UN human rights treaties, and 174 members have ratified five or more.² All are

¹ Environmental and Social Standard – ESS 1: Assessment and Management of Environmental and Social Risks and Impacts (2nd draft, September 2015), para. 24.

² See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>, and Annex I to these submissions.

bound by the 1945 UN Charter and 1948 Universal Declaration on Human Rights.³ Similarly, most World Bank members have ratified the core conventions of the International Labor Organisation (ILO) and all, by virtue of their ILO membership, are bound by the 1998 Declaration on Fundamental Principles and Rights at Work.

Projects financed by Bank may potentially have an impact on a broad range of human rights, including not only economic, social and cultural, but also civil and political. In fact, many of the social issue areas covered by the Bank’s ESF, and some environmental issues, are regulated by international human rights agreements and mechanisms. Thus the information produced by human rights bodies and mechanisms in relation to specific countries is often of direct relevance to identifying and mitigating social and environmental risk. For example a project to improve health services for women should take into account information and recommendations stemming from the monitoring of the UN Convention on the Elimination of Discrimination against Women (CEDAW, article 12 concerning the elimination of discrimination in relation to the right to health) and International Covenant on Economic, Social and Cultural Rights (ICESCR, articles 2 and 12, on the right to health), and projects involving labour should take into account information from the monitoring of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and of the core ILO conventions [see *Table 1*].

National laws within the ambit of the ESSs are not always consistent with States’ corresponding international human rights obligations. Recommendations from international human rights bodies help to clarify the extent to which national laws relating to the subject matter of the ESSs and investment projects are aligned with the borrowing country’s human rights obligations, and whether national laws which appear to be consistent with a country’s human rights obligations are actually implemented in practice. This is crucial not only for environmental and social risk assessment and gap analysis, but also to inform the lender’s assessment of a Borrower’s implementation capacity, commitment and track record.

The broader human rights context is also relevant for specific operations. The draft ESF limits the scope of international conventions or agreements to those that are “directly applicable” to a project (ESS1, para 24). By contrast, national laws are to be taken into account to the extent that they are “applicable” (ESS1, para 24). It is not clear why international law, alone, must be “directly” applicable. OHCHR’s analysis of recent MDB-supported investment projects shows that human rights are relevant to project risk assessment in many ways, including in helping understand context risks concerning issues such as discrimination, social exclusion, conflicts over natural resources, participation and voice, risk of reprisals, access to grievance redress mechanisms and may other factors critical for the success of the project. The relevance of human rights risk information is especially obvious when cumulative impacts are factored in. The consideration of this information could significantly enrich the Bank’s upstream country diagnostics and strategic social and environmental assessments, as well as project-specific context risks.

³ The Universal Declaration is not a legally binding treaty, however it is generally accepted that much (though not all) of its provisions are binding upon UN member States under customary international law, and the Declaration gives expression to the legally binding human rights commitments in the UN Charter.

Figure 1: Illustrative list of human rights issues, international instruments and monitoring mechanisms relevant to the ESSs⁴

ESSs	Issues	Instruments	Monitoring mechanisms
ESS1	Non-discrimination Vulnerable groups	UDHR ICCPR ICESCR ICERD CEDAW CRC CRPD MWC	CEDAW Committee ICERD Committee CRPD Committee CRC Committee SR on racism SR on minorities SR on indigenous peoples SR on disability SR on older persons WG on discrimination against women SR on violence against women
ESS2	Labour rights	ILO Core Conventions (Nos. 29, 87, 98, 100, 11, 105, 138, 182) ICESCR CRC	ILO supervisory bodies CESCR CRC Committee
ESS3	Water use Toxic waste	ICESCR	SR on water and sanitation SR on toxic waste
ESS4	Community health Accessibility Security personnel	ICESCR CRPD Voluntary Principles on Security and Human Rights	CESCR CRPD Committee SR on health SR on disability WG on mercenaries
ESS5	Land rights Forced evictions	ICESCR	CESCR SR on housing
ESS6	Natural resource management	ICESCR	CESCR SR on the environment
ESS7	Rights of indigenous peoples	ICERD UNDRIP ILO Conventions 107 & 169	SR on indigenous peoples ILO Committee of Experts CERD Committee
ESS8	Cultural heritage	UNESCO World Heritage and Intangible Heritage Conventions ICESCR	UNESCO supervisory bodies CESCR SR on cultural rights
ESS10	Participation Consultation Accountability	ICCPR CEDAW CRC CRPD UNDRIP	Human Rights Committee SR on freedom of speech SR on peaceful assembly & association SR on human rights defenders WG on arbitrary detention

⁴ *Acronyms:* UDHR: Universal Declaration of Human Rights; ICCPR: International Covenant on Civil and Political Rights; ICESCR: International Covenant on Economic, Social and Cultural Rights; CEDAW: Convention on the Elimination of All Forms of Discrimination against Women; ICERD: International Convention on the Elimination of all Forms of Racial Discrimination; CESCR: Committee on Economic, Social and Cultural Rights; CRC: Convention on the Rights of the Child; CRPD: Convention on the Rights of Persons with Disabilities; MWC: Migrant Workers' Convention; UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples; SR: Special Rapporteur [Special Procedures of the UN Human Rights Council]; WG: Working Group [Special procedures of the UN Human Rights Council]. The UDHR is relevant to all ESS's.

III. Relevant sources of human rights risk information

Relevant sources of risk information include the following international (UN) human rights mechanisms:

- 1. Universal Periodic Review (UPR):** The UPR is a peer review process voluntarily undertaken by all countries on a 4-5 year cycle in the UN Human Rights Council, a subsidiary inter-governmental body of the UN General Assembly. Official information, UN data and reports, and information from NGOs and other stakeholders are submitted as part of the data base for the review.⁵ Of particular relevance is the so-called UN “compilation report,” submitted for each country’s review, which contains a summary of recommendations issued by all UN human rights bodies for the country concerned.
- 2. Treaty bodies:** Human rights treaty bodies are 18-24 member expert committees which review countries’ implementation of their legal obligations under the international human rights treaties they have ratified. They deal with issues such as the rights of women children, migrant workers, persons with disabilities, racial discrimination (including against indigenous peoples and minorities), civil and political rights (including freedom of association and participation rights), economic and social rights (including labour rights), among others.⁶
- 3. Special Procedures** are independent individuals and/or working groups, appointed by member States in the UN Human Rights Council, mandated to analyse and report on human rights situations in particular countries and/or thematic issues (like the right to food, health, housing, the environment, rights of indigenous peoples, violence against women, freedom of expression, human rights defenders, toxic waste, arbitrary detention, and many others).⁷
- 4. OHCHR, UN field presences and other UN bodies.** As part of annual reporting to UN bodies, or at the direct request of those bodies, OHCHR and other UN entities with presence in the field routinely produce reports on country situations. Such reports are also increasingly prepared by *ad hoc* independent expert bodies commissioned by the UN, such as commissions of inquiry.

The UPR and Special Procedures can produce information and recommendations relevant to social and environmental risk assessment even where the country concerned is not party to the relevant treaty. For example, the Special Rapporteur on the right to water and sanitation may visit a country and make recommendations relevant to investment project risk assessment even where the country has not ratified the ICESCR. More generally, the UPR reviews of the UN Human Rights Council are based, in part, on the Universal Declaration of Human Rights, which covers all rights: civil, social, cultural, economic and

⁵ All documentation regarding the UPR is publicly available and searchable by country at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

⁶ See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

⁷ See <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

political. Information relevant to social and environmental risk assessment may also come from individual complaint procedures under the various UN human rights mechanisms.

Other relevant sources of risk information include the ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, responsible for monitoring the ILO core conventions and other international labour standards.⁸ In addition, regional human rights regimes with monitoring and complaint procedures have been established within the framework of regional organizations. The better established regional human rights systems are those in the African,⁹ American¹⁰ and European regions.¹¹

Last but not least, relevant human rights risk information is available from non-governmental sources, which include both national and international NGOs and civil society organisations. As the case studies below show, NGOs frequently perform a vital role in bringing to light potential human rights risks associated with investment projects and often help affected communities to access grievance redress mechanisms (including project level mechanisms, national grievance redress systems, and the Inspection Panel).¹² National Human Rights Institutions may also make important contributions to monitoring the human rights situations in a given country or region, and could be valuable partners in social and environmental risk assessment and mitigation.

IV. Opportunities for integrating human rights risk information in the World Bank's project cycle

OHCHR has analysed a range of MDB-supported investment projects where human rights risks were, or should have been, apparent at an early stage of the preparation of the investment yet did not appear to have been identified or prioritized, or alternatively were taken into account too late. In each case, context analysis (and social, political economy and human rights analysis) was weak, an unduly low risk rating was given, and remediation measures and supervision were ill-suited to the (unidentified) human rights risks pertaining to the project. In most of these cases, adverse impacts led to investigation and findings of non-compliance by the MDB's independent complaints, adding administrative and reputational costs to the project-related harms to individuals and communities.¹³

There are several clear entry points for integrating human rights risk information within the Bank's project cycle, with specific implications for the Bank's due diligence. These are the following: (1) Strategic Country Diagnostic (upstream project selection criteria); (2) risk screening and categorization; (3) assessing the Borrower's E/S framework; (4) informing the selection of the most appropriate risk assessment tools; (5) Bank appraisal and due diligence; and (6) supervision and reporting.

⁸ See <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

⁹ See <http://www.au.int/en/organs/cj>.

¹⁰ See http://www.oas.org/en/topics/human_rights.asp.

¹¹ See <http://www.echr.coe.int/Pages/home.aspx?p=home&c=>.

¹² An extensive list of international NGOs working in the field of human rights is *available at* <https://www1.umn.edu/humanrts/links/ngolinks.html>.

¹³ Draft case studies on file with OHCHR (internal working document, March 2016).

1. Strategic Country Diagnostic – upstream project selection criteria

At the earliest planning stage before a specific project has been identified, diagnostics of environmental and social risks should take human rights risk information into account. The Bank now consults a range of institutional capacity metrics for determining how to assess country or sector level risks and to better align a country's strategic priorities and capacities, captured within the Strategic Country Diagnostic, which informs the Country Partnership Framework (CPF) as well as the Systematic Operations Risk-Rating Tool (SORT).¹⁴

Key governance and development indicators related to human rights could be identified and utilised at the planning stage, including, for example indicators concerning disadvantages experienced by specific population groups, constraints on public participation and free expression, constraints in accessing health services, abuses by security forces and private security contractors, labour rights violations, and indicators shedding light of problems in specific sectors that have proven risky in the past (e.g. natural resource extraction, land titling or tenure reforms, displacement in the context of rural road projects or hydroelectric dams, privatization of water services without adequate safeguards for the poorest, and so forth). The information gathered through indicators of this kind could help to signal the need for upstream Strategic Environmental and Social Assessments (SESAs), poverty and social impact assessments (PSIAs), or similar assessment instruments for operations in sectors where the CPF diagnostics have anticipated substantial or high social risks.¹⁵ Upstream human rights risk analysis could also help to identify situations where lending activities should be complemented by enhanced technical assistance (TA) and Economic and Sector Work (ESW), in areas that country diagnostics identified as environmentally or socially sensitive.

2. Risk screening and categorization

Risk categorization is a key decision point in the process of determining possible social and environmental impact and determines the degree of attention a proposed operation receives in the risk management process. Under the proposed ESF, the Bank would be required to undertake an initial “screening” of the social and environmental impacts of a proposed project and define criteria for classifying the project in four risk categories. If a project concept fails to demonstrate that relevant social and environmental risks have been considered, the Environmental and Social Safeguards Advisor (previously Regional Safeguards Advisor) may stop project preparation and carry out a further review. The screening for potentially significant social risks could help to ensure an accurate risk classification, and in turn, the allocation of appropriate assessment tools and resources. Even with the dynamic risk rating system proposed in the ESF, the underestimation of project risk due to missed or ignored human rights context analysis could set in motion a series of design decisions that are much more costly to reverse or re-engineer later.

¹⁴ World Bank Interim Guidance Note Systematic Operations Risk-Rating Tool (SORT) (25 June 2014), paras. 2, 8 at http://www.worldbank.org/content/dam/Worldbank/document/SORT_Guidance_Note_11_7_14.pdf.

¹⁵ UNDP (2014) Social and Environmental Standards and Screening Procedure; Bank on Human Rights Coalition – Human Rights Due Diligence, Methodology for Incorporating Human Rights into Social Impact Assessment and Management at Development Finance Institutions Working Draft (22 March 2015)) at <http://www.bankinformationcenter.org/issues/safeguards/environmental-and-social-assessment/>.

3. Assessment of the Borrower's E/S Framework

Another critical decision emphasized in the ESF as part of concept review is the consideration of whether a Borrower's Environmental and Social Framework (BF) is suitable for use, in whole or in part. As part of the preliminary analysis of the Borrower's track record and institutional commitment to manage social risks, human rights risk information could help in assessing whether a full assessment of the framework is merited. In this regard, under the proposed ESF, the Bank may consider "recent studies and assessments...to the extent these are relevant to the proposed project, and the potential environmental and social risks and impacts," including those produced by the "relevant stakeholders" (ESP, para. 24 fn 21). Those studies and assessments should explicitly include relevant information produced by the UN human rights system and other relevant sources, in order to ascertain potential human rights risks and gaps and the extent to which a BF is consistent with the international human rights obligations of the Borrower.

In addition, in circumstances where the use of all or part of a BF has been requested and is considered appropriate, human rights risks identified by a SESA or PSIA should trigger the development and implementation of risk-specific and sector-specific mitigation measures, including prior, complementary TA or ESW, as noted previously. These measures would need to be planned and negotiated during project design and prescribed as mandatory requirements prior to project approval.

4. Choosing the appropriate risk assessment tool

Human rights risk information would also inform when and how to apply certain environmental and social assessment (ESA) methods that are mentioned in ESS1 (i.e. conflict assessment, differentiated measures to assess discrimination, including PSIA, etc). Beyond triggering the most appropriate assessment tool, the careful consideration of credible human rights risk information for country, sector or project area of influence will be essential to apply the ESS1 non-discrimination requirement. The right ESA approach, if adequately informed, would affect the design of stakeholder consultation and other Stakeholder Engagement Plan requirements, the need for a high level advisory panel for independent advice on key assessment topics and process decisions, and a more targeted focus on gaps in baseline analysis and institutional capacity. The measures identified through the ESA process, informed by human rights risk information, would provide the foundation for further measures that become part of a mitigation, remediation, benefits-sharing or commitment plan.

5. Bank appraisal and due diligence

The integration of human rights risk information from an early stage in the project cycle would help the Bank to ensure that the projects it supports do not inadvertently contribute to human rights violations. This does not involve "policing" on the Bank's part or making findings on compliance. Borrowers are responsible for implementing their legal obligations under human rights treaties, and courts and other bodies determine compliance (see **Annex I** to these submissions). Rather, for the Bank, due diligence is principally a standard of expected conduct. The explicit integration of human rights risk information would help to

ensure that all information pertinent to risk assessment is considered by the Bank in a timely way, all potentially useful mitigation options are identified, and that consultation and stakeholder engagement are structured, scaled and timed in a manner that respects human rights and promotes positive social and environmental outcomes.

For any project involving high or substantial human rights risks, the Bank's due diligence should verify the information provided by the borrower concerning the nature of those risks and how they will be avoided or mitigated. Where an analysis of human rights risk information reveals potential constraints concerning freedom of information, expression and/or association, or if there is evidence of reprisals against individuals or communities voicing their concerns publicly, this should trigger a requirement under the ESP for the World Bank to carry out independent consultations.

6. Supervision and reporting

With the shift to adaptive risk management, as the draft ESF proposes, there will be an even greater need for strong supervision and timely, reliable feedback loops. When reporting on environmental and social risk management during implementation, the Bank should ensure that relevant human rights risk information and significant changes in the context are reflected. This could be done by ensuring that relevant human rights indicators become part of the results framework, and that independent third party monitors are put in place where human rights risks are high at the outset or borrower commitment, track record and/or implementation capacity are low.

7. Independent human rights expertise

Consultation with independent human rights experts may be needed in certain circumstances, individually or as part of high level advisory panels, in addition to the timely incorporation of human rights risk information. These two resources should be viewed as complementary, rather than alternatives. Rosters of national actors could be established to provide ongoing feedback on how well social and environmental risks are being managed. These individuals could be invited to join supervision missions or project audits, as needed. Human rights expertise could be built into the criteria for membership of these rosters.

IV. Conclusions

Case studies of MDB-supported investment projects carried out by OHCHR illustrate the seriousness and potentially irremediable nature of human rights risks that may arise in relation to MDB-supported projects in practice, as well as the serious reputational costs and remediation costs that may be borne by both the Borrower and the lender.¹⁶ The more timely and systematic integration of human rights risk information within the Bank's due diligence responsibilities may help to minimise adverse impacts and contribute to the success and sustainability of investment projects.

¹⁶ Draft case studies on file with OHCHR (internal working document, March 2016).

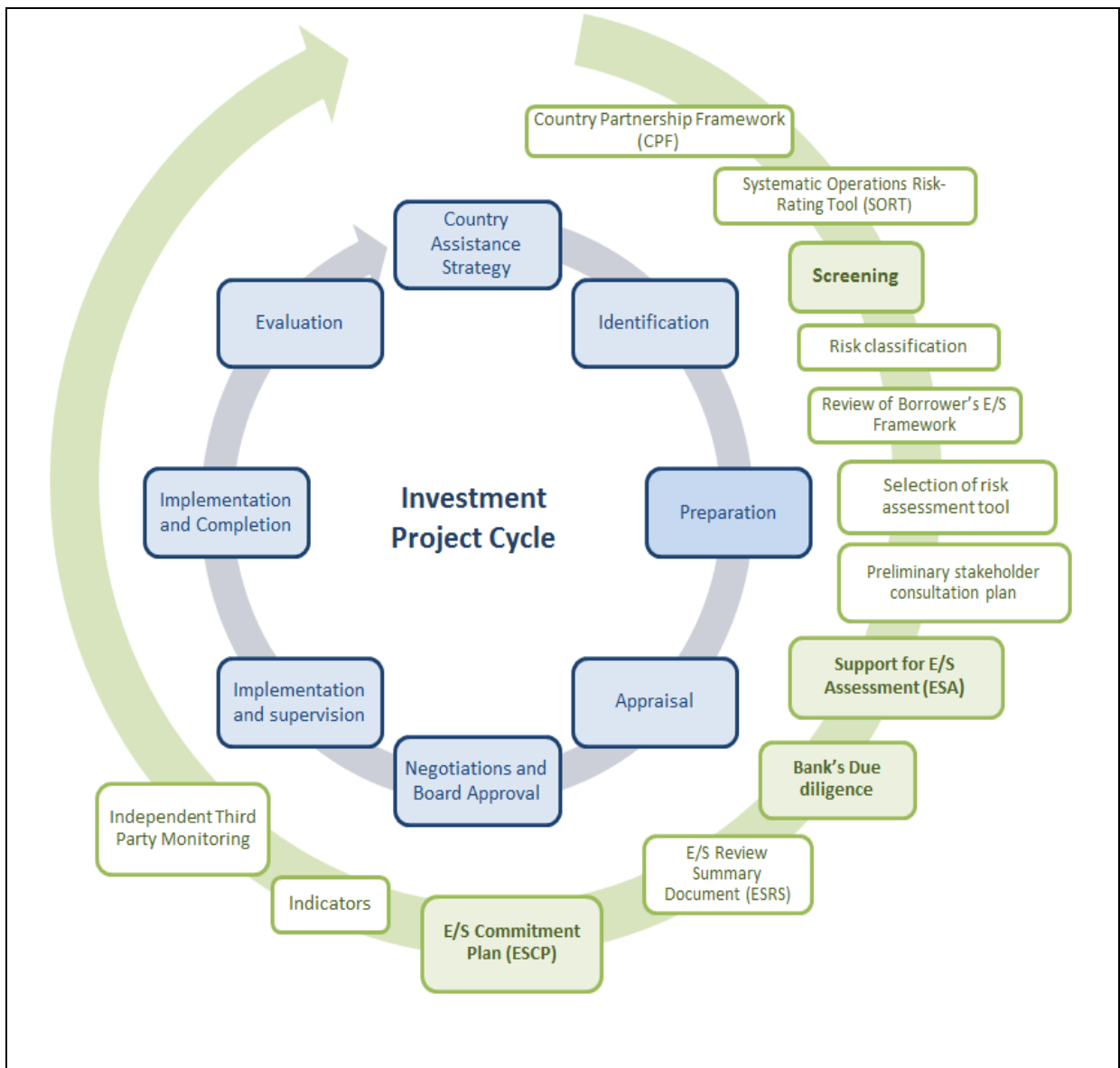


Figure 2: Entry points for integrating human rights risk information/expertise into the World Bank's project cycle