

Special Rapporteur on the Right to Development: Consultation on Good Practices, Challenges and Areas for Improvement on the Implementation of the Right to Development (RTD) in the area of Financing for Development (FFD)

Submission by researchers on the New Frontiers in International Development Finance (NeF DeF) project.

The NeF DeF project brings together research and policy thinking on how the shifting landscape of international development finance impacts on law, regulation and governance. Our focus is to map, assess and critique this evolving architecture and what this means for international development cooperation and global economic governance. Our work seeks to engage in an interdisciplinary examination of these changes in international development finance policy and practice, drawing from insights from a range of disciplines including law, politics, economics and finance, sociology and geography.

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1. Introduction

This submission builds on the Guidelines and Recommendations Report on the Practical Implementation of the Right to Development (A/HRC/42/38) (hereinafter Guidelines Report) and takes as its starting point the two main principles of the Right to Development (RTD) that underpin the Guidelines Report: (1) that individuals and communities must drive the processes for their own development through meaningful participation and (2) that there should be fair distribution of the benefits resulting from development policies. Since the report to which this submission contributes examines financing for development (FFD) in the context of the coherent and integrated implementation of the 2030 Agenda for Sustainable Development, the Sendai Framework for Disaster Risk Reduction, the Addis Ababa Action Agenda and the Paris Agreement on climate change, this submission refers to these frameworks where relevant.

It is undisputed that mobilisation of financial resources at national and international level remains key to the realisation of the RTD, as acknowledged in the frameworks mentioned above. The terms under which these resources are mobilised and disbursed, however, will determine the success of policies and programmes aimed at realising the RTD, which in turn, ‘creates an enabling environment for the realization of all human rights’ (UNCTAD, 2019: 1). This submission therefore focuses on the significant changes that are taking place within the international architecture for FFD and their impact on the realization of the RTD. A key plank of the new FFD framework is the engagement of the private sector in the mobilisation and delivery of development finance, including the use of public finance, such as official development assistance (ODA)¹, to leverage private investment for development (UN, 2015a & b; World Bank et al, 2015). As further explained below, the increasing shift away from official sector financing for development projects and programmes towards blended and private financing for development creates particular challenges for the implementation of the RTD at local, national and international levels.

Our research indicates that current policy and operational changes taking place in the aid and other official development finance arenas will have significant impacts on the capacity of states, as primary duty bearers, to create the necessary national and international conditions for the implementation of the RTD. More specifically, these changes risk undermining the commitments enshrined in the 1986 UN Declaration on the Right to Development (hereinafter UN Declaration) and in the aforementioned international instruments for development cooperation.

We submit that, without adequate safeguards, the rapid movement towards private financing for development will: (1) fail to mobilise the resources necessary to meet the Sustainable Development Goals (SDGs) and address other global challenges, such as humanitarian crises, disaster risks and the climate emergency, and (2) undermine existing domestic and international efforts to engender a just and equitable international economic order that is facilitative of the RTD (see Article 3(3) UN Declaration). We focus specifically on two aspects of the questions raised by the Call for Submissions: (1) Participation and Access to Information and (2) Resource Mobilization.

2. Participation and Access to Information

¹ ODA is defined as official sector flows to developing countries that meet the concessionality criteria, purpose and geographical distribution established by the OECD’s Development Assistance Committee (DAC): <http://www.oecd.org/development/financing-sustainable-development/development-finance-standards/officialdevelopmentassistance/definitionandcoverage.htm>

Over the past three decades, multilateral development banks (MDBs) and multilateral development finance institutions (DFIs)² have created a range of instruments (known as environmental and social safeguards) that provide, *inter alia*, for consultation with affected populations, requirements to seek free, prior and informed consent (FPIC)³ of indigenous peoples, and access to information (Bhatt, 2020; Jokubauskaite and Rossati, 2020; Mbengue and de Moerloose, 2017; Tan, 2019). The International Finance Corporation (IFC) (part of the World Bank Group)'s Performance Standards are a good example. These normative frameworks establish a set of increasingly standardised benchmarks that most official sector financiers adhere to in their operations, including a set of standards for due diligence, environmental and social impact assessments and meaningful consultation with affected populations (Park and Strand 2016). At the same time, many official DFIs have also established institutional grievance mechanisms (known as independent accountability mechanisms) to establish platforms for individuals and communities seeking redress for breach of these standards, including the lack of consultation and access to information.

The move towards blended and private financing for development may compromise the limited recourse available to communities under these independent accountability mechanisms. First, there is evidence to suggest that compliance with environmental and social safeguards by private sector entities financed by major DFIs remains questionable. Evidence demonstrates that despite a host state signing international legal guarantees for consultation, project agreements can still circumvent the ability of communities to participate in and gain access to project information. For instance, the presence of Performance Standards of the IFC (Standard 7, Indigenous People) that are meant to guarantee the inclusion of Free, Prior and Informed Consent (FPIC) into the loan agreements, do not necessarily ensure sustainable inclusion (Bhatt, 2020). This is because these standards are only instrumentally inserted within a covenant in a larger loan agreement and the specific terms thereof permit financiers to threaten loan default, negotiate with the company and waive the breach of a performance standard that requires consultation. The effect is to displace these performance standards through the mechanisms within standardised loan documentation (Bhatt, 2020). Additionally, where covenants providing consultation guarantees are implemented, they frequently become operative too late in the project design (eg after land disturbance commences) to have any meaningful participatory impact for individuals (Bhatt, 2020).

Second, while private sector investments routed through major DFIs will have to comply with increasingly common institutional standards, such as the IFC's Performance Standards, the development finance disbursed through other platforms such as multi-stakeholder partnerships (MSPs)⁴ or through public-private partnerships (PPPs), would be reliant on more dispersed project-level accountability frameworks (Tan, 2019). This means that accountability for development operations under these partnerships could not be traced back to general rules accepted by the member states of the DFIs, but would instead be created ad-hoc for a given project, and would therefore be less predictable in terms of ensuring protection for the affected communities. Given their private and contractual nature, these project-level accountability standards and grievance mechanisms tend to: (1) have limited operational independence from their project sponsor and lack independent verification (Tan, 2019 & 2018) and (2) are undertaken in a regulatory black box in which there is a general disengagement of the state in private sector led

² MDBs are international financial institutions which lend mostly to sovereign states at market or concessional rates while multilateral and bilateral DFIs are government-supported institutions that lend or invest in the private sector of developing countries (see CSIS and ODI, 2016).

³ It is important to note that FPIC provisions in these instruments tend to redefine the content of FPIC in a more restrictive manner and, crucially, do not reflect the standards enshrined in the 2007 UN Declaration on the Rights of Indigenous People.

⁴ For example, the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), and the Private Infrastructure Development Group (PIDG).

participatory processes with very little recourse for enforcement of remedies or avenues for appeal (UN Accountability and Remedy Project III Report Feb 2020).

Further, there is currently no harmonised framework for ensuring that these private investments meet common standards of environmental and social safeguards, including those contained in international legal instruments and non-binding standards, including the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Corporations and the Principles for Responsible Investing. The widespread use of financial intermediaries in the disbursement of private finance for development also distances official financiers from the intended beneficiaries of the development projects, making it difficult to ensure safeguard policies and standards are upheld throughout the financing chain (OECD, 2018).

Third, there is greater opacity surrounding private sector projects in development compared to those undertaken by the public sector through an official sector grant or loan (eg through an MDB as opposed to a DFI). DFIs, MSPs and PPPs that lend to private entities as opposed to national or sub-national governments tend to have weaker transparency and information disclosure policies than their public counterparts on grounds of commercial sensitivity or client confidentiality (Vervynckt, 2018). Additionally, where development projects are structured through a PPP between the state and a private investor, it becomes apparent that the fragmented legal structure of PPP projects presents unique challenges for community participation and access to information, both at the pre-project consent stage and at the later grievance/complaint stage. At the pre-project consent stage, PPP structured projects and their debt and project contracts will contain multiple entry points through which the RTD is sidelined through contractual mechanisms and commercial behaviours that exclude the participation of rights-holders in project decision making. Special purpose vehicle (SPV) structures that form the operational framework for project funding and implementation create a veil through which it becomes challenging for communities to gain access to information about project beneficial ownership, excluding them from obtaining details about crucial design issues that affect their individual and collective RTD (Bhatt, 2020; Leader & Ong, 2011).

However, there is evidence of practices in PPP and its project contract and loan agreements that demonstrate an attempt to include individual and community rights holders (including vulnerable ones) within the planning and pre-construction stages of a PPP project; to provide rights holders access to information on all aspects of FFD; and to ensure that civil society participates throughout FFD processes. One example would be to incorporate DFI performance standards within loan covenants that require the PPP project company to obtain the FPIC of indigenous communities before altering land use and access and also to set up a project level grievance mechanism and to share information about grievances with other FFD financiers⁵. Other examples of good practice include ensuring terms of agreements/ memoranda of understanding (MoUs) between communities and companies contain the following provisions: a) clear principles for consultation and an initial moratorium before land clearances; b) explicitly recognition of customary land ownership as the starting point for consent and benefit sharing; c) consultation practices that reflect local customary decision making practices rather than imposing western corporate models (Bhatt, 2020; Bhatt, forthcoming). Agreements could also contain provisions which stipulate that

⁵ Although, as noted above, evidence demonstrates that these are frequently ousted by loan agreement terms (see Bhatt, 2020, specifically case studies on the Oyu Tolgoi project in Mongolia, Barro Blanco Project in Panama and Sakhalin Project in Russia (Bhatt, 2020); also UN Accountability and Remedy Project III Report 2020). More generally, for energy PPP projects, independent review of the power purchase concession agreement's impact on poverty reduction prior to its signature (Bujagali, Uganda). This provided civil society with an important advocacy tool to evidence how financial terms will have severe impacts for the RTD of individuals, communities and future generations (Bhatt 2020).

a project will not go forward without consent or will be re-routed in order to preserve access to specific areas of land and water within a PPP project site (see Pilbara and Oyu Tolgoi agreements in Bhatt, 2020). Private investors and PPPs could also provide independent legal counsel, local anthropologists and 'local' mediators to assist individuals with consent processes although conflicts of interest can arise regarding payment of these interlocutors and consideration must be given to creation of a blind trust mechanism to remedy this (Bhatt, 2020).

Overall, our research highlights that the turn to new modes of financing through mechanisms such as PPPs, MSPs and blended finance poses serious challenges to the implementation of the first principle underpinning the Guidelines Report, notably that individuals and communities should drive the processes for their own development. Hence, while these practices have a potential to expand the pool of FFD, they also dilute the opportunities that exist for the communities to exercise their RTD.

b) Resource Mobilisation

The complexity of the new architecture for private financing for development is also likely to impact on mobilisation of resources to realise the RTD in terms of coherence, sustainability and accountability. Under UN SDG 17, states have committed to 'strengthen(ing) the means of implementation and revitaliz(ing) the global partnership for sustainable development' which includes enhancing policy coordination and coherence and respecting 'each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development' (UN SDG 17, targets 17.13, 17.14 and 17.15). Our research demonstrates that the shift towards private financing for sustainable development without adequate regulatory and governance frameworks risks undermining these targets and other international commitments to harmonise aid practices, enhance development cooperation and coordinate economic policymaking under international agreements such as the aforementioned 2030 Agenda for Sustainable Development, the Sendai Framework for Disaster Risk Reduction, the Addis Ababa Action Agenda and the Paris Declaration on Aid Effectiveness 2005.

First, the proliferation of financing platforms expands the class of actors and the range of mechanisms used in the FFD agenda, making it difficult to 'map, track and account for global financial flows for development', including transparency in decision-making and procurement processes and oversight over the implementation of development projects and programmes (Tan, 2019). This makes it much more difficult for individual states and the international community to measure the amount of resources mobilised to meet the SDGs and other global public goods, and to ensure that such resources are deployed to meet the RTD. Although there has been some movement towards standardising reporting mechanisms for private sector development investments, such as through the IFI Harmonised Indicators for Private Sector Operations, there are significant shortcomings with the current tools available to measure, monitor and evaluate private sector financing for development (Tan, 2019; UNCTAD, 2019).

Second, the multiplicity of financing platforms for private investments increases fragmentation of policymaking, which can lead to greater incoherence in the design and delivery of development initiatives. It can also undermine country ownership and oversight over social and economic policymaking, and hamper national and international coordination of economic and social programmes aimed at realising the right to development (UNCTAD, 2019). The fragmentation at the policymaking, and development policy design and delivery levels, combined with unclear expectations from partner countries undermines donor alignment with country priorities and the principle of mutual accountability, as it is unclear what venues exist to ensure that private sector investors can be rendered accountable to developing countries and their citizens. Policy guidance

on how to harmonise private financing for development and establish common benchmarks for monitoring and evaluating blended and private financial flows for sustainable development, such as the OECD DAC Blended Finance Principles, remain in their infancy and do not address systemic issues of policy coordination and coherence (Tan, 2019, UNCTAD, 2019).

At the country level, the proliferation of new instruments and mechanisms for disbursing development finance beyond traditional donors and official financiers creates additional administrative burdens on developing countries and makes it difficult for countries to plan and budget for sustainable development expenditure to realise the RTD (see Tan, 2019). The focus on incentivising private sector investments through regulatory reforms and catalytic capital from official sources can displace national priorities and processes for facilitating local and nationally driven plans for economic and social development and climate change adaptation and mitigation (Eurodad, 2018). It can undermine aforementioned aid effectiveness agenda that seeks to put developing countries in the front and centre of the development agenda and to ensure that donors (whether public or private) play a role in assisting domestically-driven development strategies and policies without creating additional burdens or impediments to realising the RTD⁶ (Erdem Türkelli, forthcoming).

The ‘private turn’ in development finance also inserts private actors and their priorities into the core of decision-making processes on critical issues relating to international development, including the setting of funding priorities, programme focus and substantive decisions on the allocation of financial resources (Tan, 2019; UNCTAD, 2019). UNCTAD recently reported that developing countries, especially ODA recipients, were not parties to the decision-making processes that led to a reform of ODA policy and that managing donor self-interest, especially where public resources is channelled to private entities, will be a major challenge for many countries (UNCTAD, 2019). There is a great deal of evidence, especially from experience in health and agricultural sectors, to suggest that the presence of private sector actors in financing platforms can often route financing away from national or inter-governmental priorities towards donor and private sector interests (Mert and Chan, 2012). The involvement of commercial interests can create conflicts between the pursuit of private interests versus the public objectives of international development finance (Tan, 2019).

Increased reliance on financial intermediaries, as indicated above, has a further destabilising effect, in that commercial banks do not fully acknowledge their potential role in causing or contributing to human rights adverse impacts (Wästerlund, 2020; Bohoslavsky, 2017). While the debate on the relevance of the UN Guiding Principles on Business and Human Rights to commercial banks, IFIs and DFIs is still in its infancy, the shift towards private financing is underway, without the necessary safeguards in place to ensure an effective remedy when adverse impacts occur. The commercial bank JP Morgan Chase, for instance, has recently launched its own ‘development finance institution’ as part of its Corporate and Investment Bank. Experts have expressed concerns because of a possible dilution of the SDG and climate change objectives, since JP Morgan’s statement regarding its new institution risks prioritising shareholders’ profits, whilst at the same time not fully monitoring and assessing the development impact of the projects it funds (Bradlow, 2020).

⁶ There are five principles that constitute the backbone of the aid effectiveness agenda: (1) country ownership over development policies and strategies, (2) donor alignment with developing country objectives and priorities through the use of local systems, (3) donor harmonisation through coordination and simplified procedures, (4) results-focused development interventions, and (5) mutual accountability of donors and partners (High-Level Forum on Aid Effectiveness, 2005).

And finally, a turn to private finance in FFD introduces new forms of conditionalities, through both public and private modes of governance, that can and do conflict with states' existing commitments under international law, including international investment law (Tan and Cotula, 2018), indigenous peoples' rights (Bhatt, 2020), international human rights law and standards of international protection (La Chimia and Davitti, 2015). A major component of the new FFD framework is the restructuring of legal and regulatory structures to create enabling domestic environments for private investments (World Bank, 2015) and these regulatory reforms may expose countries inadvertently or otherwise, to liabilities under international trade and investment law and/ or create new nodes of transmission for financial instability and the build-up of sovereign debt in developing countries (Tan, 2019).

The financial conditionalities attached to private sector instruments using highly complex financial set-ups such as so-called innovative financing mechanisms may entail very high transaction costs for developing countries and will often by-pass the use of local financial accounting and regulatory systems, again undermining donor alignment with developing country systems. For instance, even proponents of social impact bonds recognise that high overall transaction costs may be incurred particularly due to complex financial and legal arrangements that involve intermediaries. (Mulgan et al, 2011; Hughes and Scherer, 2014). Innovative finance mechanisms promoted through private finance in FFD may result in a 'double conditionality burden' combining *ex-ante* and *ex-post* conditionality, which means that the funds are earmarked *ex-ante* for the specific purposes as required by the donors (for instance, only in certain sectors) and their continued delivery is subject to the achievement of donor-specified results or objectives, *ex-post* (Hurley, 2012). In some cases, access to private financing from private donors may also impose budget conditionalities, such as requirements for allocating a fixed amount of financing to a specific sector in return for financing⁷. This may constrict the policy space developing countries have in following their own development processes, including through budget allocation.

Thus, even when conditionalities attached to finance instruments may seem aimed at implementing SDG objectives or climate resilience and adaptation, they often result in policies that further increase reliance on external financing (aid or loans) rather than in establishing an enabling environment for structural transformation (UNCTAD, 2015 and 2019). They also create contingent liabilities and debt, catapult states into broader global financial markets without necessary safeguards, and introduce exposure to legal liability towards foreign investors because of international protections in international investment agreements or contracts that can be internationalised by virtue of specific dispute settlement clauses (Tan and Cotula, 2018). This has direct relevance to the fulfilment of the RTD, because it expands financial and legal liabilities of the state towards external actors in the financial markets, which in turn precludes the redistribution of development income and benefits directly to the local population. Concession contracts for the private provision of public services have also been found to contain contractual terms that do not align with international and national legal obligations, for instance on resettlement (Bhatt, 2020) and human rights provisions more generally (Erdem Türkelli, 2020). It is apparent, therefore, that financial returns and development objectives remain difficult to reconcile.

3. Conclusion and Recommendation:

Evidence from our research on the shift towards private financing for development demonstrates that there are serious reasons to believe that a shift to private finance in FFD risks undermining

⁷ For instance, the 'results-based funding model' implemented by the Global Partnership for Education (GPE) requires partner countries to allocate adequate and sustained financing to the education sector for the disbursement of the first 70 percent of their implementation funds. Likewise, partner countries are required to progressively commit 20 percent of their budget to education expenditures (GPE, 2018).

individual states and the international community's efforts to realise the right to development. The transition towards private financing for development without requisite regulatory and governance safeguards will impact on the oversight of and accountability of development financing and will risk disenfranchising communities from decision-making processes that affect their rights. New modalities for financing for development that combine official sector financing with private financing will create new administrative and regulatory challenges for both donor and recipient governments and have the potential for undermining policy coherence that forms a basis of the RTD and international agreements to mobilise and disburse financing to realise this right.

We are of the view that while private finance for development can play a role in realising the RTD and meet the SDGs, these forms of financing must not displace official sector financing, especially where such financing remain the most appropriate form of meeting the needs of communities. We believe that there needs to be greater safeguards at national and international levels to ensure that international development finance continues to serve the public interest of meeting the ambitious SDGs and realising the RTD.

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