

#DFIs – [Response to the 2023 Call for Input](#)
of the Working Group on Business and Human Rights
“Development Finance Institutions and Human Rights”

In the context of lack of protection of the rights of #entrepreneurs

3 March 2023

Submitted by: Sharof Azizov, LLM, Secretary of the Board of the Association “[Justice for All International / Justice pour Tous Internationale](#)”.

Development Finance Institutions and lack of protection of the rights of entrepreneurs

According to recent studies, there are [582 million entrepreneurs worldwide](#), including [274 million women entrepreneurs](#). Entrepreneurs are the right-holders, entitled to enjoy a full range of human rights. Also, private business activity, investment, and innovation are major drivers of productivity, inclusive economic growth, and job creation. The role and diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals, are acknowledged in the [Addis Ababa Action Agenda](#), the outcome document from 2015 that provides the global framework for financing sustainable development. Despite the recognized important role of entrepreneurs in achieving SDG's [goals](#), the protection of the rights of entrepreneurs has been eroding for many years now.

Between the pandemic shutdowns, supply issues, post-pandemic inflationary pressures, and military conflict in Ukraine, the past three years have been crushing for entrepreneurs worldwide. In the developing world, the impact was more brutal. In addition, entrepreneurs are targeted by corrupt officials and law enforcement through arbitrary and flawed prosecutions for breaching regulatory frameworks created by the expansion of unilateral sanctions, money laundering, and financing terrorism. This trend is increasing due to international pressure, including by FATF, OFAC, G7, G20, IMF, and World Bank, who promote within the global business community their requirements to operate a business with a risk-based approach (RBA), conduct due diligence (CDD) and compliance with the regulatory framework. All this is done ostensibly to protect the integrity of the global financial system.

Additional pressure is coming from the UN Working Group and its Forum on Business and Human Rights, promoting human rights due diligence, responsible business, corporate accountability and [asset recovery](#). This may lead to rapid changes in domestic laws and regulations, which establish new liabilities and responsibilities for entrepreneurs that do not encompass the unintended consequences of such changes on their enjoyment of human rights. In other words, in countries with a lack of traditions in democratic governance and human rights, in particular, a lack of independence of the judiciary, due process rules, and presumption of innocence, entrepreneurs are vulnerable to a wide range of abuses.

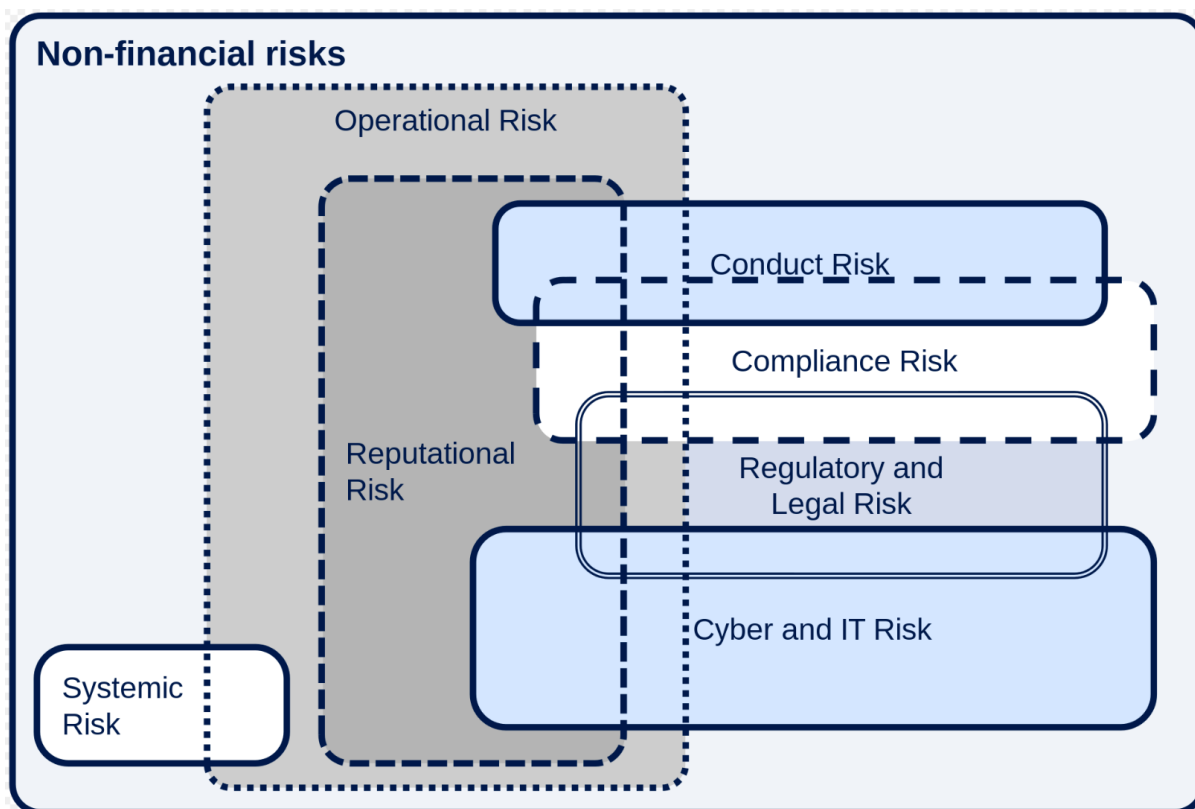
Furthermore, changes in the legal and regulatory landscape promulgated by the expansion of unilateral sanction regimes may lead to human rights violations related to discriminatory and de-risking closure of bank accounts of individual traders and companies engaged in genuine commercial activities and remittances, abusive use of anti-money laundering and terrorism financing regulatory environment; flawed and arbitrary prosecution and conviction in many countries, as the form of de-risking and over-compliance, which may lead to discouraging trade, supply and doing other businesses with countries under unilateral sanctions.

In many countries, the conflation of corruption, arbitrary and flawed prosecution of entrepreneurs with the pressure to enforce sanctions, and civil and criminal penalties often results in over-compliance or due diligence and compliance costs that are too high for many businesses, especially small and medium ones. This forces many entrepreneurs to seek legal protection, which is virtually unavailable at the national and international levels. Thus, they may opt to refrain from registering or exiting their business.

Protection of the Global Financial System in the context of Development Finance Institutions and Human Rights:

Here is a Venn Diagram of various non-financial risks¹, including systematic risks (not to be confused with systemic risks). This is only one possible representation of how the different risk types overlap:

¹ https://en.wikipedia.org/wiki/Non-financial_risk#/media/File:VennDiagramNonFinancialRisk.svg



A simple example: an investor buys shares of many firms from most global industries. This investor is vulnerable to systematic risk, including the risks of non-compliance with sanctions, anti-money laundering regulatory requirements, terrorist financing and the detection of other suspicious transactions, even though he has diversified the impact of specific risks on the value of his portfolio. All his efforts to diversify the investor portfolio are aimed at reducing vulnerability and risk of loss of assets. Further reducing the risk of asset loss requires this investor to purchase *risk-free assets* with lower yields (such as **U.S. Treasury securities**). With high risks of investing in countries under sanctions or countries with high systematic risk, the investor will seek to acquire risk-free assets. It follows that the entire sanctions narrative is designed to ensure that **U.S. Treasury securities are risk-free assets**.

The regulatory framework, which the entrepreneurs are bound to comply with, is designed to protect the integrity of international financial systems by implementing strict rules and practices to combat money laundering and terrorist financing (AML / CFT), is created to ensure that countries identify systematic risks (non-financial risks) with their own hands, create a regulatory framework mandatory for entrepreneurs, and report on these risks and measures to counter them. This is the so-called Risk Based Approach (RBA).

In this regard, it is worth noting in her recent reports to the UN Human Rights Council and General Assembly by [the UN Special Rapporteur on unilateral coercive measures and human rights](#) also speaks about risks and de-risking as the main reason for over-compliance with sanctions. For instance, in her latest report to the General Assembly, the Special Rapporteur notes that the main reasons for over-compliance by the financial sector and businesses are requirements to comply with banking regulations aimed at minimizing financial risks and avoiding involvement in financial crimes, as well as the need on the part of banks to preserve

their reputations and the trust of clients.² It is important to understand that sanctions and other regulations that require due diligence and compliance create non-financial risks, which unlike financial risks are not created by market and competition but are handmade risks and appear to be arbitrarily designed to control the market competition – negatively impacting emerging and developing markets.

Negative consequences resulting from the incorrect implementation of sanctions, AML/CFT regulations and emerging responsible business mandatory directives:

It is well known that RBA compliance can lead to [unintended consequences](#) for entrepreneurs resulting from the incorrect implementation of the AML/CFT Standards and Recommendations, which were developed by the [Financial Action Task Force](#) (FATF). In February 2012, the FATF completed a thorough review of its standards and published the revised [FATF Recommendations](#). This revision was intended to strengthen global safeguards, and further protect the financial system's integrity [emphasis added] by providing governments with more potent tools to take action against financial crime. They have been expanded to deal with new threats, such as the financing of proliferation of weapons of mass destruction, and to be more precise on transparency and tougher on corruption.

The FATF's current standards, developed in 2012, comprise 40 recommendations covering policymaking, prevention, enforcement, confiscation, and international cooperation. Recommendation #3 focuses on the offence of money laundering and calls for countries to apply the crime of money laundering to all serious offences, leaving it to jurisdictions to determine what offences are considered serious.

"Countries should criminalize money laundering based on the 1988 [Vienna Convention](#) and the 2000 [Palermo Convention](#) (the UN Convention Against Transnational Organized Crime, or UNTOC). Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences" - recommendation #3 on the Anti-Money Laundering Offence.

As FATF plays a crucial role, in particular through the promotion of the provisions of its [Interpretive Note to Recommendation 3](#), which do not contain any provisions of human rights protection, including due process and presumption of innocence, it leads in many cases to over-compliance, de-risking, financial exclusion and undue targeting by its financial sector, corrupt law enforcement, and judiciary. This has a ripple effect throughout the commercial banking system, various money or value transfer services (MVTs), including Hawala in the Middle East, private businesses, and Designated non-financial Businesses and Professions (DNFBPs); the negative impact on the enjoyment of fundamental human rights.

There are plenty of examples in many jurisdictions of flawed and arbitrary prosecution and judicial harassment of private businesses due to over-compliance and de-risking, as well as corruption. Based on the narrative for the protection of the global financial system, it is easy

² Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights about Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions, 15 July 2022, A/HRC/51/33 (paras. 32 and 43).

to assert that financial institutions and DNFBPs worldwide are expected to adhere to standards to counter ML/FT set by the FATF.

Countries are expected to take a risk-based approach (RBA) to implement the FATF Recommendations, meaning that national rules should evolve to mitigate risks as they arise. Legitimacy is critical as blacklists, and other coercive measures already result in sanctions on countries for not complying with norms and standards. The international community should ensure that international norms enjoy the highest levels of legitimacy by providing a level-playing field in a negotiation process with universal participation. The UN Convention Against Corruption (UNCAC) is one such instrument. It enjoys broad support, as it was negotiated through a versatile and inclusive body. The international community needs to frame such tools on other aspects of financial integrity through a similarly inclusive process.

Mitigating negative consequences resulting from the incorrect implementation of sanctions, AML/CFT regulations and emerging responsible business mandatory directives:

The UN mechanisms for the protection of human rights could play a significant role in ensuring respect for entrepreneurs' rights, countering the negative consequences of sanctions, corruption and arbitrary and flawed prosecution impacting them. For example, the UN Working Group on Business and Human Rights treats entrepreneurs strictly as duty bearers, not rights holders. The Working Group within the existing system of UN human rights mechanisms could play a crucial role in protecting the rights of entrepreneurs. Unfortunately, entrepreneurs suffer more and more from virally expanded legal frameworks generated by sanctions, AML/CFT regulations, and emerging responsible business mandatory directives, which require financial institutions to develop sophisticated customer due diligence programmes to assess money laundering risks and detect suspicious transactions. This renders the protection of the rights of entrepreneurs outside of the scope of the Working Group on Business and Human Rights mandate.

Currently, the Working Group on Business and Human Rights is engaged in promoting its Guidance on business and human rights that aims to protect the rights of employees, workers, and indigenous people in the countries where various corporations and business entities operate. In this regard, the working group's focus on business human rights is to integrate the promotion of human rights protection into the activities of corporations and business structures, calling for human rights due diligence and responsible operation of the corporations and other business structures. However, the Working Group on Business and Human Rights does not pay attention or put any effort to mitigate negative consequences resulting from the incorrect implementation of sanctions, AML/CFT regulations and emerging responsible business mandatory directives.

In the past, the Working Group offered protection to entrepreneurs (see communications to Somalia [SOM 2/2015](#), Australia [AUS 9/2015](#), United Kingdom [GBR 5/2015](#), and United States [USA 21/2015](#)). However, it subsequently appeared to remove this critical matter from its agenda and focused on protecting [the rights holders](#). The Working Group currently limits its scope of focus on protection by positioning the rights holders and accountability as central elements of the State's duty to protect and the business responsibility to respect human

rights. Since then, it appears that the entrepreneurs have been excluded from this focus as the right holders and treated exclusively as the duty bearers.

During the meeting with NGOs within its 34th Session on 10 February 2023, in response to a direct question about pending for more than half a year an individual complaint concerning the violation of the rights of an entrepreneur by one of the Middle East countries, the Working Group seems failed to recognize the existence of the problem of the lack of protection.

In this context, the Working Group must adjust the focus of its mandate by including the protection of the rights of entrepreneurs in its agenda and the agenda of the annual Forum on Business and Human Rights. And it is also necessary to consider the possibility of introducing provisions on the protection of the rights of entrepreneurs, especially concerning issues of a fair trial, due process, presumption of innocence, and protection of property rights, in the relevant resolutions of the Human Rights Council with the view to mitigating negative consequences resulting from the incorrect implementation of sanctions, AML/CFT regulations and emerging responsible business mandatory directives.

Proposed four action points in the context of DFIs to ensure respect for and protection of the rights of entrepreneurs and mitigate negative consequences of sanctions and corruption impacting them:

- 1) include respect for and protection of the rights of entrepreneurs into the list of priorities of relevant United Nations forums for promoting universal and holistic coherence and international commitments to sustainable development in the context of SDG 16.
- 2) adjust the focus of the mandate of the Working Group and its annual Forum on Business and Human Rights with the view to enhance the accountability of States and strengthen their obligation to respect, protect and fulfil the human rights of entrepreneurs from arbitrary prosecution, judicial harassment and corruption.
- 3) engage in constructive dialogue with FATF to mainstream human rights in all its standards, recommendations, evaluation methodology, and practice.
- 4) strengthen regional, national, and subnational institutions to prevent all forms of human rights violations of entrepreneurs, in accordance with international human rights law.