

Article

FINANCIAL INSTITUTIONS AND THE INTERNATIONAL FRAMEWORKS ON BUSINESS AND HUMAN RIGHTS: CHALLENGES IN IMPLEMENTATION PROCEDURES

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ABSTRACT

This paper introduces the debate surrounding financial institutions and human rights, with special focus on the challenges in translating related international frameworks to this specific industry. The paper outlines the main responsibilities and concerns of the financial sector regarding these instruments, nonetheless presenting practical contribution for their effective implementation by the banking sector.

Introduction

The flourishing of initiatives this last decade regarding business and human rights, seems to have established for the private sector that the respect for human rights is integral part of business responsibilities, and that commitment goes beyond respecting national labour laws, for instance. These initiatives demand respect for a body of internationally recognized human rights laws, including throughout the service of the enterprise.

This paper will focus on a selected international, voluntary, and non-legally binding initiatives directed to standardise the private sector behaviour and processes; regarding specifically the respect of internationally recognised human rights principles. Those are: the 2000 United Nations Global Compact (GC), the 2011 Organisation for Economic Co-operation and Development Guidelines for Multinational Companies (OECD

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Guidelines), and the 2011 United Nations Guiding Principles on Business and Human Rights (UNGP).²

Despite the numerous efforts in literature to assist the private sector in the practical implementation of such frameworks, they all share the same feature: they are generic. There is currently a lack of practical and industry driven literature aimed to settle uncertainties surrounding specific activities. As a corollary, this paper outlines the urgent need for further and prompt clarification of some key terms in their texts.

Thus, by providing new insights and key instructions; this paper aims to the practical implementation of the above mentioned frameworks by financial institutions.

This industry was chosen due the particular challenge involving the sector, namely, most of the human rights violations surrounding its activities are perpetuated by its business relationships operating locally.

This paper is structured as follows. The first part will briefly outline the most relevant challenges and hesitations these frameworks arise to this industry, by illustrating the central responsibilities rising from the three already mentioned frameworks (the GC, OECD Guidelines and the UNGP), and lodge some complementarity and differences they feature.

The second part will introduce the human rights due diligence process (HRDD), the central contribution for business & human rights subject. Aiming the efficient employment of this process, substantial interpretation of crucial elements are combined with available recommendations extracted from cases involving the FIs, including the OECD Guidelines mechanism, namely, the National Contact Point statements.

Finally; the third part outlines the debate surrounding FI's leverage exercise over business relationships committing human rights abuses, a basic element within the HRDD process; detailing the particulars involving the financial sector.

I. Corporate Social Responsibility and International Human Rights Frameworks

Before analysing and discussing the Financial Institutions (FIs) and Human Rights (HR), it is important to comprehend the most prominent developments taking place in the field of human rights business accountability, which, in practice, are translated through international guidelines and frameworks. The central goal of such frameworks is to standardise the private sector behavior wherever it operates across the globe regardless of the industry.

² Other initiatives in place directed towards FIs and human rights are worth mentioning, such as the United Nations Environment Programme - Finance Initiative (UNEP-FI), an institution which has addressed corporate social responsibility management specifically for financial-institutions since 1992. It was launched due to financial industry's role in Environmental, Social and Governance challenges and the great impact they can play in a more sustainable world; the International Finance Corporation (IFC), its sustainability framework includes several guidelines to be taken into consideration for investment; the Equator Principles for investment Services as well as the Natural Capital Declaration, based on a formal commitment from banks, insurance firms and investors to consider sustainability in its business. Because this paper focuses specifically on FI's and Human Rights and these initiatives discuss FI's behaviour on several themes, or are directed for one type of financial product, they will not be dealt in detail.

Companies have always been requested to respect local laws, which might include human rights *ad hoc* legislation, but the claim that they should respect *internationally* recognized human rights principles, is recent. Therefore for the purposes of this article, only transnational instruments will be considered.

Currently, corporations possess significant possibilities regarding enforcement mechanisms for investor-state dispute settlement, i.e. the access to the International Centre for Settlement of Investment Disputes (ICSID). Basically, states have agreed on ICSID as a forum for investor-state dispute settlement, and have been included as the appropriate forum for such disputes in significant international investment treaties, investment laws and contracts.³ However, such legal possibility was not followed, for instance, by an international agreement regulating their obligation to respect internationally recognized human rights. This is particularly serious in countries where local laws are weak or the enforcement mechanisms are broken.

It is also true that some industries chose to auto-regulate their activity, as the so called collective initiatives, such as the Kimberley Initiative on diamonds industry, Round Table for Sustainable Palm Oil,⁴ or even through the endorsement of international and cross-industries initiatives, like the 2000 United Nations Global Compact (GC), the 2011 Organisation for Economic Co-operation and Development Guidelines for Multinational Companies (OECD Guidelines) and the 2011 United Nations Guiding Principles on Business and Human Rights (UNGP); which form the basis for this discussion. However, these forms of regulation are voluntary and non-legally binding, meaning that a company might chose to adhere or not, and in the case it doesn't comply with some of the responsibilities taken, no legal implications will follow.

The current paper will focus on those initiatives directed to standardise the private sector behaviour and process regarding the respect of international human rights law, namely, the UN Global Compact, the pioneer initiative in putting business community to discuss its role in respecting internationally recognised human rights principles, later embraced by both the UNGP and the OECD Guidelines. Second, the UNGP ground breaking innovation on establishing the 'human rights due diligence' process, fundamental on current discussions on the subject matter and which was included within the 'Human Rights chapter' of the 2011 version of the OECD Guidelines.⁵ Third, the potential regarding companies' accountability for human rights abuses around the globe established on the OECD Guidelines' National Contact Points (NCPs) mechanisms.

In this section I will extract the main responsibilities these instruments expect from companies of all kinds of industries, including financial institutions.

A. The 2000 United Nations Global Compact (GC)

The GC was the first United Nations (UN) initiative to establish a joint effort of the business community regarding the implementation of the universal human rights

³ "ICSID [International Centre for Settlement of Investment Disputes] is the world's leading institution devoted to international investment dispute settlement [...] states have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts."

⁴ For more information regarding the goals and participants of these initiatives, see Websites: 'Kimberley Initiative on diamonds industry' available at: <http://www.kimberleyprocess.com>; 'Round Table for Sustainable Palm Oil' available at: <http://www.rspo.org/certification>; 'Global Round Table for Sustainable Beef' available at: <http://www.grsbeef.org> (accessed on 25 May 2016).

⁵ J. Harrison, 'An Evaluation of the Institutionalisation of Corporate Human Rights Due Diligence', *Legal Studies Research Paper* 2012-18, p. 3.

principles.⁶ The GC materialized after a call advanced from the UN Secretary-General Kofi Annan in 1999 at the World Economic Forum in Davos.⁷ Thereby, the GC is a business voluntary initiative with two main operational objectives; the first is to make principles part of business strategy and daily operations and second, to offer an effective platform for multi-stakeholder solution finding.⁸

The GC sets ten general principles for corporate responsibility conduct. The most relevant for this article are Principles 1 and 2 which address human rights directly:

“Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights;

Principle 2: Business should make sure that they are not complicit in human rights abuses.”⁹

The initiative also requires companies to issue an annual ‘Communication on Progress’ report detailing the progress made in implementing the ten principles and in supporting the broader UN development goals.¹⁰

B. The United Nations Guiding Principles on Business and Human Rights (UNGP)

The UNGP are directed towards businesses and aim to ensure that they implement the 2011 United Nations ‘Protect, Respect and Remedy Framework’.¹¹ The Principles are the result of a research conducted by Professor John Ruggie during his mandate -from 2005 until 2011- to address business and human rights, as Special Representative of the Secretary-General of the United Nations.

The Framework was unanimously endorsed on 16th June 2011 by the United Nations Human Rights Council.¹² However, this Framework was not the first UN attempt to address this specific subject under states approval. John Ruggie's mandate was established immediately after the UN Sub-Commission on the Promotion and Protection of Human Rights failed to approve the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (The Norms), in August 2003.¹³

⁶ K. D. Jesse & E. V. Koppe, ‘Business Enterprises and the Environment: Corporate Environmental Responsibility’, *The Dovenshimidt Quaterly* 2013-4, pp. 176 - 189.

⁷ Annan, K., ‘Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in address to World Economic Forum in Davos’ at: <http://www.un.org/News/Press/docs/1999/19990201.sgs6881.html>, (accessed on 23 March 2016).

⁸ C. Fussler & A. Cramer & S. van der Vegt, *Raising the Bar: Creating Value with the United Nations Global Compact*, Sheffield: Greenleaf Publishing 2004, p. 07.

⁹ The other Principles are the Labour (Principles 3 - 6); Environment (Principles 7 - 9) and Corruption (Principle 10). Available at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>, (accessed on 25 May 2016).

¹⁰ For more information on the ‘Communication on Progress’ procedure, visit: <http://www.unglobalcompact.org/COP/index.html>, (accessed on 23 March 2016).

¹¹ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework”* (hereafter ‘UNGP’), New York and Geneva: United Nations 2011.

¹² G. J. Ruggie, *Just Business: Multinational Corporations and Human Rights*, New York and London: W.W. Norton & Company 2013, p. xx.

¹³ 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereafter ‘Norms’) UNDoc./CN.4/Sub.2/2003/12/Rev.

The Norms attempted to extend to corporations the same duties that states always owed to individuals on international human rights law, yet reaffirmed that the primary obligation to ensure respect for human rights was still owed by the later.¹⁴ The Norms were not endorsed by the already extinct Human Rights Commission – replaced by the Human Rights Council in 2005.¹⁵ Due to its strong language, the Norms were perceived by states as a threat to their sovereignty and by companies as harmful for their business.¹⁶ Indeed, these were not unfounded, since the document did have strong language i.e. ‘[...] each transnational corporation or other business enterprise *shall* apply and incorporate these Norms in their contracts or other arrangements and dealings [...]’.¹⁷

Ruggie stated that “it is impossible to demand that companies respect human rights in the same way that the states do simply because corporations are different entities and do not possess the same structure and capacity as states”, adding that “the Norms would cause confusion about the boundaries of responsibilities, which would lead to a fight over who should do what and to what extent.”¹⁸

Ruggie’s final document reflected this logic. Already on the first lines, the UNGP elucidate its non-binding nature: “nothing in these Guiding Principles should be read as creating new international law obligations”.¹⁹ As detailed bellow, the UNGP is built over three pillars:

1. The state Duty to Protect Human Rights: the explanatory commentary reads that a state’s “international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and or jurisdiction.”²⁰ A specific set of international human rights treaties, namely, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights and the 1948 United Nations Universal Declaration on Human Rights, also known as the ‘Bill of Rights’; as well as the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, form the UNGP’s human rights legal foundation.²¹

2. The Corporate Responsibility to Respect Human Rights: this pillar is the most relevant for this article because it states that it is expected from companies to fulfil their own human rights obligations, independently of the states’ abilities or willingness to do the same.²² Furthermore, such responsibility extends to avoid causing or contributing to such abuses and “seeks to prevent or mitigate adverse human rights impacts that are directly

¹⁴ M. T. Kamminga, ‘Corporate Obligations under International Law’, *71st Conference of the International Law Association* 2004, p. 05.

¹⁵ The Human Rights Commission was therefore replaced by the Human Rights Council after the UN Secretary General Kofi Annan suggested its replacement due the various doubts regarding the member’s independence from their sending governments See Tomuschat C., *Human Rights between Idealism and Realism*, London: Oxford University Press Second Edition 2008, pp. 134 - 137.

¹⁶ M. T. Kamminga, ‘Corporate Obligations under International Law’, *71st Conference of the International Law Association* 2004, pp. 02; 05 - 06.

¹⁷ The Norms, paras. 15 - 16 (emphasis added).

¹⁸ ‘Ethical Corp interview with John Ruggie’, at: <http://www.ethicalcorp.com/business-strategy/podcasts/next-steps-business-and-human-rights-exclusive-podcast-john-ruggie>, (accessed on 23 March 2016).

¹⁹ UNGP, p. 01.

²⁰ Ibid.

²¹ UNGP, Guiding Principle 12, p. 13.

²² Idem, Commentary on Guiding Principle 11, p. 13 (emphasis added).

linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts.”²³

The major milestone of Ruggie’s work, was the introduction of the concept of ‘human rights due diligence’ (HRDD) as part of the prevention and mitigation process. Principle 17 explains that the process consists of a) assessing actual and potential human rights impacts b) integrating and acting upon the findings c) tracking responses and d) communicating how impacts are addressed.²⁴ Furthermore, “human rights due diligence means to go beyond simply identifying and managing material risks to the company itself, but to include risks to right-holders.”²⁵ This is an important observation, since the company itself will be its own ‘self-regulatory’ mechanism for the human rights due diligence process.²⁶

Finally, if companies identified that “they have caused or contributed to adverse human rights impacts”, they should provide for a remediation process.²⁷

3. Access to Remedy: In short, the third pillar of the Framework makes clear that states should ensure (through judicial or non-judicial, administrative, legislative or other appropriate means) that when such abuses occur within their territory and or jurisdiction, the affected persons must have access to effective remedy.²⁸

C. The 2011 Organization for Economic Co-operation and Development Guidelines for Multinational Companies (OECD Guidelines)

The most relevant changes in the 2011 version of the OECD Guidelines²⁹ have been the strengthening of the National Contact Points (NCPs) mechanism, the inclusion of Chapter IV dedicated exclusively to human rights which basically reproduces the aforementioned UNGP principles, and a more complete approach for due diligence and responsible supply chain management.³⁰

The Guidelines are not *per se* binding on companies, meaning that there is no legal consequence if a company breaches its principles; however, participating governments are bound by the commitment to disseminate and promote the Guidelines for companies operating nationally and overseas, and to establish the NCP in their territory.³¹

What greatly differentiates the OECD Guidelines from the other already mentioned instruments is the complaint mechanism before the NCPs named ‘specific instance’, for alleged breaches of the Guidelines by a company based within an adhering country.

²³ UNGP, Guiding Principle 13 para. b, p. 14.

²⁴ Idem, Guiding Principle 17, pp. 18 - 19.

²⁵ Idem, Commentary on Guiding Principle 17, p. 18.

²⁶ J. Harrison, ‘An Evaluation of the Institutionalisation of Corporate Human Rights Due Diligence’, *Legal Studies Research Paper* 2012-18, p. 05.

²⁷ Idem, Guiding Principle 22, p. 24.

²⁸ Idem, Guiding Principle 25 - 29, pp. 22 - 35.

²⁹ The Guidelines are revised periodically since their first issuance in 1976, the previous version dates from 2000. 12 non-OECD countries also subscribed the 2011 version, full list available at: OECD, ‘About’ at <http://mneguidelines.oecd.org/about>, (accessed on 27 May 2016).

³⁰ For a more detailed information regarding the main changes between the 2000 and the 2011 versions of the OECD Guidelines and specifically regarding the strengthening of the NCPs, see OECD, *Update of the OECD Guidelines for Multinational Enterprises Comparative: Table of Changes made to the 2000 text*, Paris: OECD 2012, pp. 81 - 94. Available at: <http://www.oecd.org/daf/inv/mne/49744860.pdf> (accessed on 27 May 2016).

³¹ OECD, *Guidelines for Multinational Companies*, Paris: OECD 2011 (hereafter ‘OECD Guidelines’), Procedural Guidance 1 - 1 A, pp. 71 - 75. Available at: <http://www.oecd.org/corporate/mne/48004323.pdf> (accessed on 27 May 2016).

Furthermore, abuses committed abroad by a company from an adhering country (national), are included within the NCP's mandate. The NCP offers a forum for discussion, which comprises good offices and mediation between the parties and since 2011, when the parties do not reach an agreement through mediation; the NCP is *obliged* to publicly publish a statement describing the issues raised, reasons for further examination and where applicable, make recommendations on the issue.³²

The public statements of NCPs even though not legally binding, have in some occasions caused great reputational damage, as was the case involving the airline company Das Air in 2008. The British NCP stated that during its controversial activities in Democratic Republic of Congo, the company lacked enough due diligence of its suppliers and breached several international treaties on civil aviation.³³ The content of such statement led to a public investigation by several British authorities and the European Commission, which resulted in a five months ban to fly over the European airspace.³⁴

This provides an example that the NCPs do have potential to offer an effective mechanism for stakeholders to directly engage against company related issues, at least on a high level plane. However, critics argue that because several terms of the Guidelines are not yet clearly defined, it gives space for different interpretations by the NCPs, which compromise a consistent and homogeneous implementation of the Guidelines around the globe.³⁵

II. The Overlap and Complementarity

It is important to underline that even though different, the above mentioned instruments namely the GC, UNGP and the OECD Guidelines, present some overlaps and complementarities regarding the expected conduct by business. For example, the following table provides an insight into the differences and similarities between the GC and the UNGP:

³² For detailed information's regarding the NCPs' process, see OECD Guidelines, Implementation in Specific Instance, paras. C - C.5.

³³ United Kingdom National Contact Point, 'Raid vs. Das Air 21 July 2008' at: http://www.oecdwatch.org/cases/Case_41, (accessed on 27 May 2016).

³⁴ The ban was established on October 2006 and terminated in March 2007, however, the company only reassumed its activities in September that same year. See OECD, *Consumer Empowerment - 2009 Annual Report on the OECD Guidelines for Multinational Enterprises*, Paris: OECD 2010, pp. 33 – 54; European Commission, 'Consumer Report - press release', at: http://europa.eu/rapid/press-release_IP-07-278_en.htm?locale=en#fn1, (accessed on 27 May 2016).

³⁵ Department for Business Innovation & Skills; Institute for Human Rights and Business, 'Update on the role of OECD National Contact Points with regard to the extractive sectors,' at: http://www.ihrb.org/pdf/IHRB-NNCP-OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf, p. 10; OECD Watch, 'Assessment of NCP Performance in the 2013-2014 Implementation Cycle', pp. 09 – 10, at: http://www.oecdwatch.org/publications-en/Publication_4090 (both accessed on 27 May 2016).

Ruggie and Global Compact: Complementary Frameworks

	Protect, Respect and Remedy Framework	Global Compact
Core Terminology	Respect human rights	Respect and support human rights (ie. Ruggie+)
Applies to	All companies, everywhere	GC signatories
Nature of Expectation	Baseline	Baseline + beyond minimum (aspirational)
Scope	1. Country context 2. Own activities 3. Relationships	Sphere of influence
Wording	Companies have a responsibility to respect human rights, which means to avoid infringing on the rights of others; Companies can avoid complicity by employing human rights due diligence.	1. Businesses should support and respect the protection of internationally proclaimed human rights; and 2. Make sure that they are not complicit in human rights abuses.
Expected Actions	Human rights due diligence, consisting off: a. Statement of policy; b. Assessing impacts; c. Integration; d. Tracking and reporting performance; Companies should also have in place an effective grievance mechanism.	Embrace, support and enact (within their sphere of influence) the GC Principles by: 1. Making them an integral part of business; 2. Incorporating them in decision-making; 3. Contributing through partnerships; 4. "Communication on Progress;" 5. Advocacy and active outreach.

Figure 1 Ruggie Framework and Global Compact: Complementary Frameworks.³⁶

For instance, according to United Nations Office of the High Commissioner for Human Rights (OHCHR), "a company's operations, products or services are either 'directly linked' to an adverse impact through a business relationship – or are not linked at all."³⁷ Therefore, in hypothetical case whereas a financial institution is not directly linked to the human rights violation but is connected to a business relation; i.e. a client or supplier, the UNGP and the OECD Guidelines expects no further action from the bank (see the above column 'scope').

That position was further confirmed by the Chair of the negotiations during the 2011 revision of the OECD Guidelines. Regarding its wording: "we continuously used the

³⁶ Business & Human Rights Initiative, *How to do business with respect for human rights: a Guidance Tool for Companies*, The Hague: Global Compact Netherlands 2010, p. 138.

³⁷ OECD, 'Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector', *2014 Global Forum on Responsible Business*, p. 02. Available at: <https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-3.pdf> (accessed on 27 May 2016).

same/equivalent language and examples regarding the terminology on ‘directly linked’ as those that were used in the context of the UNGP [...].”³⁸

However, on GC this linkage is irrelevant. If a company has leverage over the entity causing the abuse, it should exercise it as an attempt to stop the illegality, regardless the connection with the harm itself. Therefore, the key element is the possibility of action (leverage), not the business relationship status.

Therefore, despite the fact that the UNGP and OECD Guidelines outlines a human rights due diligence procedure to be followed by companies, the GC presumes a corporate conduct in a broader sense (advocacy and active outreach), as some form of ethic and expected behaviour from responsible entities.

It is common knowledge that these instruments are still very broad, there are several uncertainties regarding the meaning of some terms and put several doubts on how to implement them; as the next subchapter details in relation to financial institutions.

III. Are these Instruments Applicable to Financial Institutions?

Both the UNGP and the OECD Guidelines expect companies to avoid causing or contributing to adverse impacts “through their own activities, address such impacts when they occur” and “seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless *directly linked* to their operations, products or services by a *business relationship*.”³⁹

Considering that the negative impact is usually perpetuated by FI’s business relationships, a great confusion arose amongst industry’s experts. According to a research conducted in 2013 by the OECD, closely to a consensus, the FIs consulted supposed the term ‘business relationship’ on both UNGP and OECD Guidelines did not embraced the type of engagement characterized between FIs and their clients; hence, not applicable to the industry.⁴⁰

As an attempt to clarify once for all that both instruments are equally applicable to FIs as for any other industry, organizers of the 2014 Global Forum on Responsible Business compiled several opinions written by experts, including Professor John Ruggie, the UN High Commissioner for Human Rights and the 2011 OECD Guidelines Chair. All experts steadily confirmed that according to the texts’ wording and negotiations processes, both instruments were intended to be equally applicable to the entire financial sector, therefore, comprehending the variety of products and services they engage with clients. Notably, experts unanimously agreed that practical guidance for the sector is urgently needed as they face a particular challenge on this task.⁴¹

³⁸ OECD, ‘Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector’, *2014 Global Forum on Responsible Business*, p. 01.

³⁹ UNGP, Guiding Principle 13, p. 15 (emphasis added).

⁴⁰ OECD Sustainable Finance Advisory, *Environmental and Social Risk Due Diligence in the Financial Sector*, Paris: OECD 2013, p. 52.

⁴¹ OECD, ‘Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector’, *2014 Global Forum on Responsible Business*, p. 02; 19.

A. FIs and Human Rights Due Diligence

Several of the doubts mentioned above were raised in practical terms in 2013, a few months before the 2014 Global Forum on Responsible Business. A specific instance was set against POSCO, a huge South Korean steel company.

POSCO allegedly “[failed] to seek to prevent human rights abuses and carry out comprehensive human rights and environmental studies for its proposed iron mine, steel plant and associated infrastructure in the State of Odisha, in India.”⁴² However, the violations were carried out by its joint venture in India together with its investors, namely, the Dutch pension fund ABP, its Pension Administrator APG, and the Norwegian Bank Investment Management (NBIM). Because of the different nationalities of the involved companies, the North Korean, the Dutch, and the Norwegian NCP’s received a notification of this specific instance.

Already in March 2013, the Dutch NCP affirmed that there were no doubts regarding the applicability of the Guidelines for the financial sector or minority shareholders, but the issue was how to execute them.⁴³ Additionally, the Norwegian NCP in its final statement holding NBIM in breach of the Guidelines; issued some strong recommendations, taking the opportunity to clarify the implementation of the OECD Guidelines into practical terms for FI’s in general.⁴⁴

Experts reasonably recognised several practical challenges. For instance, it would be unreasonable to expect companies with extensive client’s portfolio to assess in advance, every potential impact for each client. Nevertheless, they are “encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers for due diligence.”⁴⁵

The recommendations also highlighted that the HRDD process must be carried out accordingly to the company’s size, nature and severity of the risks in a particular operation.⁴⁶ Furthermore, the achievement of any relevant result on HRDD is highly dependent in the company’s capacity of fully integrating it to its core business processes.⁴⁷

While most of these recommendations are useful, the concept of human rights due diligence by FIs is still burgeoning. The biggest danger of reversing this corporate management risk concept (due diligence) to a model that shall bear human beings, is that

⁴² POSCO allegedly “ [failed] to seek to prevent human rights abuses and carry out comprehensive human rights and environmental studies for its proposed iron mine, steel plant and associated infrastructure in the State of Odisha, India.” OECD Watch, ‘Lok Shakti Abhiyan et. al. vs ABP’ at: http://oecdwatch.org/cases/Case_261 (accessed on 27 May 2016).

⁴³ Dutch National Contact Point, ‘Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development’, p. 05, at: http://www.oecdwatch.org/cases/Case_261 (accessed on 27 May 2016).

⁴⁴ The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, ‘Final Statement Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs. POSCO (South Korea), ABP/APG, Norwegian Bank Investment Management (NBIM) of the Government Pension Fund Global’ (hereafter ‘POSCO case’), at: https://www.regjeringen.no/contentassets/8d118fcbacdb41918795434c4838f848/nbim_final.pdf (accessed on 27 May 2016).

⁴⁵ *Idem*, p. 30.

⁴⁶ *Idem*, p. 29.

⁴⁷ *Idem*, p. 35.

to become a ‘tick the box’ exercise and not actually consider humans, their rights and the impacts they might suffer.⁴⁸

IV. FIs and the Leverage Exercise

Within the context of the UNGP and the OECD Guidelines, leverage is “an advantage that gives power to influence”, meaning the ability of a business enterprise “to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.”⁴⁹

Both these instruments recognise that companies might be directly linked (through a business relationship), but might not cause or contribute to an adverse impact on human rights.⁵⁰ Therefore, companies have to use their leverage to influence the linked entity causing the adverse impact to prevent or mitigate it. This includes acting alone or in cooperation with other actors for that end.⁵¹ Terminating the relationship in case of inertia is also a recommended possibility.⁵²

The leverage capacity, however, can vary immensely according to the service provided or the nature of the relationship between FIs, its clients and commercial relations. It would be unreasonable to demand a shift of the “responsibility from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship”,⁵³ however, “when a company has leverage capacity, it should exercise it.”⁵⁴ The degree of leverage will depend on several factors, such as the importance of the service or products assumed (financially speaking) or the nature of the relation (punctual, longstanding etc). For this reason, “enterprises should use the full range of options for exercising leverage at their disposal, rather than simply assuming they can take no action.”⁵⁵

Without a doubt, FIs can and should use their influence and power as money providers to drive clients to act responsibly on human rights. And that’s because banking is one, if not the most relevant sector of the global economy. The services and products that banks provide, guarantee much of the world’s economic activity to take place.⁵⁶

However, it is not possible to expect that FIs act *on behalf* of their clients. If it is not the bank causing the violation, then it is the client’s primary responsibility to ensure proper HRDD in order to comply with human rights.⁵⁷ Nevertheless, all three frameworks

⁴⁸ Author’s interview with Prof. Dr. Menno Kamminga international lawyer at Maastricht University, October 2013.

⁴⁹ United Nations High Commissioner for Human Rights, *The corporate responsibility to respect human rights. An interpretative Guide*, New York: United Nations 2012, p.07.

⁵⁰ “Contributing to an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.” OECD Guidelines, General Policies, Commentary 14, p. 22.

⁵¹ OECD Guidelines, Commentary on Human Rights para. 43, p. 33.

⁵² UNGP, p. 50.

⁵³ OECD Guidelines, General Policies para. 12, p. 19.

⁵⁴ UNGP, Commentary on Guiding Principle 19, p. 18.

⁵⁵ POSCO case, p. 35.

⁵⁶ For further discussion see Facing Finance, *Dirty Profits I-IV*, Berlin: 2012.

⁵⁷ K. Verhoef & J. de Wilde, *Praktijkonderzoek: Delfstofwinnende bedrijven en mensenrechten: Methodologie voor een aanstaand onderzoeksrapport voor de Eerlijke Bankwijzer en de Eerlijke Verzekeringwijzer*, Amsterdam: Profundo 2013, p. 17.

mentioned above expect companies to avoid being complicit or directly linked to such abuses through their own activities or business relationships;⁵⁸ where:

“Complicity, includes an act or omission (failure to act) by a company, or individual representing a company, that “helps” (facilitates, legitimizes, assists, encourages, etc.) another [entity] in some way, to carry out a human rights abuse” and/or “the knowledge by the company that its act or omission, could provide such help.”⁵⁹

Another manner to exercise its leverage over a client is to include contractual clauses regarding human rights compliance. It is not a guarantee that the clause would *per se* be effective, since it might have limited legal effect in some countries. Nevertheless, it is an additional effort and might serve - at least in some jurisdictions - as a legal protection for the bank and, facing extreme cases, provide the possibility to discontinue the dealing without breaching the contract.⁶⁰ An alternative option to avoid subjective interpretations is to standardise the clause for all clients active in specific sensitive sectors and or areas. Furthermore, regardless of the legal effect, similar clauses do have strong moral obligations, similarly to the adoption of institutional human rights or environmental policies, like the UNGP and OECD Guidelines suggest in their texts.⁶¹

The Thun Group of Banks, an initiative formed by several financial institutions, issued in 2013 the report ‘UN Guiding Principles on Business and Human Rights - Discussion Paper for Banks on Implications of Principles 16-21.’⁶² So far, this was the greatest manifest of the sector regarding the operational commitments laid on both the UNGP and OECD Guidelines. According to the Group, exercise leverage is usually what is left for banks to do when the harm is caused by its business relationships.⁶³

The Thun Group of banks made an effort to map different actions and leverage exercises according to the different types of financial service:

⁵⁸ GC, Principle 2; UNGP, Guiding Principle 13, p. 14; OECD Guidelines, Chapter IV paras. 02 – 03, p. 31.

⁵⁹ Global Compact, ‘Principle Two: Human Rights’ at: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>, (accessed on 27 May 2016).

⁶⁰ S. R. F. Arduini, *Rabobank International and Human Rights: time to act! A report tailored for Rabobank International on External Expectations, International Developments and Rabobank’s Practices*, Utrecht: Rabobank Group 2014, p. 55 (confidential report).

⁶¹ UNGP, Guiding Principle 16, p. 15; OECD Guidelines, Chapter IV para. 04, p. 31.

⁶² The Thun Group, ‘UN Guiding Principles on Business and Human Rights-Discussion Paper for Banks on Implications of Principles 16 - 21’ at: <http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf> (accessed on 27 May 2016). The discussion was supported by University of Zurich Competence for Human Rights, Barclays, BBVA, Credit Suisse, ING, RBS, UBS.

⁶³ *Idem*, p. 20.



Figure 2: The Thun Group, ‘UN Guiding Principles on Business and Human Rights - Discussion Paper for Banks on Implications of Principles 16-21’, p. 11.

Another relevant effort was detailed in an OECD report, as the following diagram illustrates. Several factors influence the degree of leverage over a client and by giving them a score from 1 to 5, the diagram exemplifies the level of leverage a company has over a specific client, in this example, in corporate lending:⁶⁴

⁶⁴ OECD, *Report Environmental and Social Risk due diligence in the Financial Sector*, Paris: OECD 2013, pp. 53 - 74.

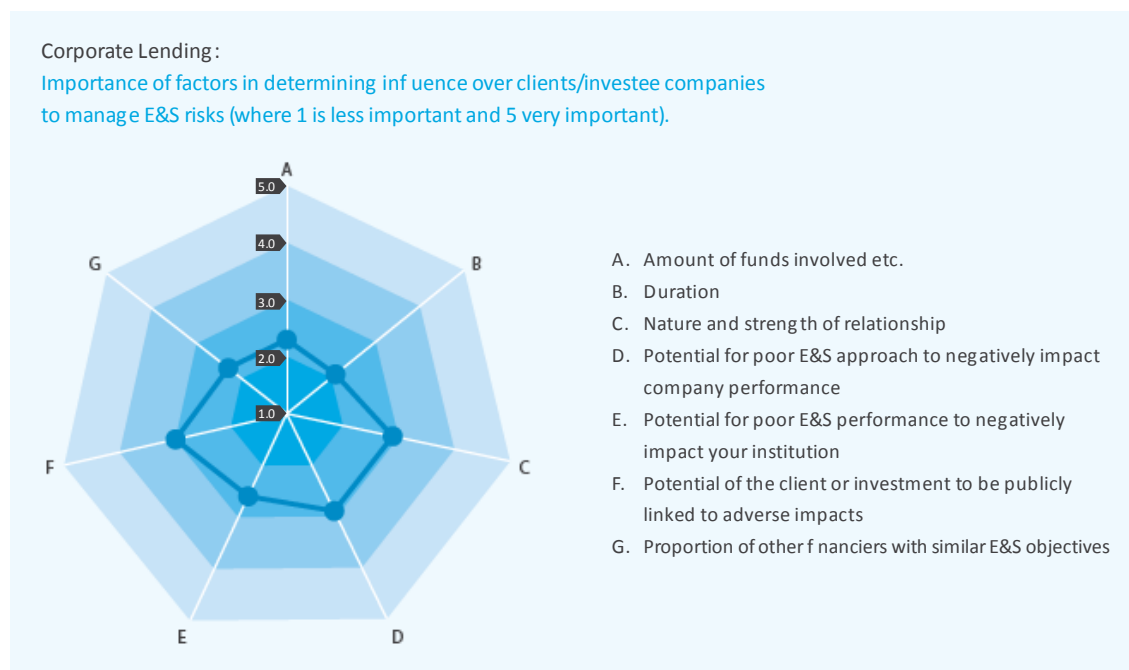


Figure 3: OECD, *Report Environmental and Social Risk due diligence in the Financial Sector*, p. 40.

The report also presents the same mapping exercise for other types of financial services, i.e. capital markets, investment, etc., as an exercise to better comprehend the degree of leverage the institution possess over the business relationship, which depends primarily on the type of service being provided.

Despite the complexity in leverage exercise by FIs towards its clients, this is a very strong if not *the* strongest instrument for banks when it comes to ensure human rights respect from its business relationships. Because the industry is distinguished from others due to their liquidity-generation function, which is essential for financing the economy, bank's leverage is significantly higher than the leverage of generic firms. This is obvious because money is the key factor of production in banking.⁶⁵ That argument is placed in the epicentre of civil society increasing demands for banks to take a stronger position in the subject.

V. Conclusion

The wording of these frameworks is not always clear, neither in their scope nor application, which causes quite some confusion amongst businesses as to their proper implementation. More doubts will come as the implementation procedure develops. This is why it is of utmost importance that regular studies and updates are conducted to establish a harmonized implementation procedure and interpretation of these instruments. A faster development of the frameworks is of absolute importance to avoid going round in circles.

Financial institutions specifically currently struggle to figure out *how* to perform human rights due diligence and to what extent they are accountable for negative impacts committed by their clients. Particularly due to the current practices which seems to

⁶⁵ E. M. Dorenbos & A. M. Paccas, 'Corporate Governance of Banks', *The Dovenshimidit Quaterly* 2013-2, p. 50.

impede the solid establishment between the services provided and the harm itself. Furthermore, it is also relevant to acknowledge that different banking services require different approaches to perform human rights due diligence and leverage exercise.

Due to the financial institutions' powerful position in the global market, civil society expects them to adopt high standards for its business relationships regarding human rights performance. However, it is not possible to expect that financial institutions to act *on behalf of* the entities causing the abuse. As discussed in this article, the full traceability of the services and products provided by financial institutions is currently a grey zone. However, this shall not be used as a pretext to financial institutions – or any other industry-, to remain passive however benefiting from such violations. Changes must be implemented in order to excel these, and if necessary, regular normative acts demanding it.

It seems critical to reopen the discussion regarding the constant failure to uphold multinationals companies legally liable in their home countries for human rights abuses committed abroad and the necessity of the international community to develop stronger mechanisms to this end.

Despite the fact that these frameworks present several implementations challenges, it is highly appreciated that to some extent they attempt to fill the gap of the lack of transnational legal duties over multinational corporations; and call corporations, governments and civil society for action.

To be effectively implemented, these frameworks still have many hurdles to overcome. Hereby what I consider the crucial ones:

- These frameworks are voluntary and not binding, so their breach leads to none or limited consequences;
- The UNGP and the OECD Guidelines expect companies to act only when they cause, contribute or when its services, products or operations are *directly linked* to a harm by a business relationship. However, the lack of enforceable obligations over FIs' to demonstrate its services and products' full traceability, makes the connection to the harm itself extremely challenging. Nonetheless, this cannot be use as an excuse not to perform accordingly to the commitments taken under these voluntary instruments. FIs must implement the necessary management and operational abilities to overcome related challenges;
- From the UNGP and OECD Guidelines wording, it is expected that companies use their leverage over business relationships committing a human rights abuse, *only* when the direct link to the harm has already been established. This can be unproductive in situations where a company has great leverage over a business relationship, regardless if it is not connected to the harm itself.