

# American University International Law Review

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Volume 34 | Issue 2

Article 3

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2018

## Banks as Human Rights Enforcers? A Comparative Analysis of Soft Law Instruments

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### Recommended Citation

Mota, Rita (2018) "Banks as Human Rights Enforcers? A Comparative Analysis of Soft Law Instruments," *American University International Law Review*. Vol. 34 : Iss. 2 , Article 3.

Available at: <https://digitalcommons.wcl.american.edu/auilr/vol34/iss2/3>

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# **BANKS AS HUMAN RIGHTS ENFORCERS? A COMPARATIVE ANALYSIS OF SOFT LAW INSTRUMENTS**

RITA MOTA \*

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## **I. INTRODUCTION**

Globalization, largely fueled by foreign direct investment, is undeniably associated with a wide range of benefits, particularly in terms of economic growth.<sup>1</sup> However, globalization is also

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1. See Laura Alfaro et al., *Does Foreign Direct Investment Promote Growth? Exploring the Role of Financial Markets on Linkages*, 91 J. DEV. ECON. 242, 243 (2010) (finding that increases in the productivity of foreign firms leads to higher

accompanied by serious dangers, especially with regard to sustainability, which includes environmental and human rights (HR) issues.<sup>2</sup> One of these dangers lies in the discrepancies that exist between the power and reach of large-scale economic forces and the ability of societies to manage the adverse consequences of their activities.<sup>3</sup>

The impact that businesses can have on HR has attracted high levels of attention in the last decade, but the legal framework remains confusing. HR have traditionally been construed vertically as a shield protecting individual citizens from actual or potential harm inflicted by states, rather than corporations or other non-state actors.<sup>4</sup> Corporate HR responsibility is currently governed by a puzzle of soft law instruments of questionable efficacy, and attempts at regulating business conduct under international HR law have invariably failed.<sup>5</sup> The current HR obligations imposed upon businesses by existing legal frameworks are therefore very poorly constructed.<sup>6</sup>

That is not to say that businesses are completely exempted from HR responsibilities and domestic regulation of corporate activities, such as, *inter alia*, criminal law, labor law, and environmental law, which

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growth in developed economies).

2. See, e.g., V.N. Viswanathan, *Human Rights in a Globalized World – The Indian Experience*, 69 INDIAN J. POL. SCI. 49, 55 (2008) (revealing that only 20% of the world's workers have adequate social protection as 3,000 people die a day from work-related incidents).

3. See John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations), *Business and Human Rights: Towards Operationalizing the “Protect, Respect, and Remedy” Framework*, ¶ 7, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (naming these discrepancies “governance gaps”).

4. See Peter Muchlinski, *Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Enterprises*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 431, 436-39 (Doreen McBarnet et al. eds., 2007) (providing an assessment of the conceptual difficulties associated with the extension of HR obligations to corporations).

5. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 194 (2010) (using the International Covenant on Civil and Political Rights, a multilateral human rights agreement, as an example of the overall ineffectiveness of international human rights treaties).

6. See *id.* at 174 (“Obligations are, to a large extent, in the eye of the beholder.”).

undoubtedly affect HR.<sup>7</sup> In addition, several jurisdictions regulate business conduct abroad through rules of extraterritorial application.<sup>8</sup> However, international HR law largely ignores the responsibilities of businesses, thus allowing them to operate with virtual immunity in many circumstances.<sup>9</sup>

Under the traditional, state-centric, construction of international HR law, states, rather than corporations, are held vicariously liable for business actions that have an adverse impact on individuals' HR.<sup>10</sup> In fact, under international law, host states have the primary duty to protect HR against abuse by third parties, including businesses.<sup>11</sup> This duty imposes an affirmative obligation on host states to exercise due diligence in the form of appropriate policies, legislation, regulations, and adjudication to ensure that the activities of private parties do not impinge on the enjoyment of internationally guaranteed HR of individuals and groups within their jurisdiction.<sup>12</sup> In reality, however, host states are often unable or unwilling to control corporate behavior, either because multinational enterprises (MNEs) wield significant power or because host states' regulatory powers are restricted by international treaties, such as international investment agreements.<sup>13</sup>

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7. See Noura Bakarar, Note, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L.J. 591, 603-04 (2016) (outlining the State Department's efforts to promote, and provide a framework for, good corporate human rights practices).

8. See Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies*, 145 J. BUS. ETHICS 545, 547 (2017) (providing a definition for, and reasons for the increasing use of, extraterritorial regulations).

9. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 935 (2004) (asserting that, because of the lack of direct obligations in international human rights law, corporations operate in a legal vacuum).

10. See *id.*

11. See Comm. on Econ., Soc., & Cultural Rights, Rep. on the Forty-Sixth & Forty-Seventh Sessions, ¶ 1, U.N. Doc. E/C.12/2011/3 (2012) (asserting that, while globalization has its benefits, it is ultimately up to States to stifle globalization's negative consequences on human rights).

12. See *id.* ¶¶ 4-5.

13. See, e.g., Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 599-600 (2007); see also Schrempf-Stirling & Wettstein, *supra* note 8, at 547 (providing specific examples of the power balance between strong corporations and weak governments).

Although many recognize the need for a legally binding instrument to impose HR obligations on MNEs, that need is still a long way from being met. Laudable efforts are being made to create such an instrument, for example, the Human Rights Council (HRC) Resolution 26/9 of July 14, 2014, established “an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to [HR].”<sup>14</sup> The working group’s mandate is “to elaborate an international legally binding instrument to regulate, in international [HR] law, the activities of transnational corporations and other business enterprises.”<sup>15</sup> However, the viability of such a legally binding instrument is questionable: the Resolution establishing the working group was adopted by a vote of 20 to 14, with 13 abstentions.<sup>16</sup> The countries that opposed its adoption include the United Kingdom, the United States, and several other western countries;<sup>17</sup> therefore, it is reasonable to question whether this instrument will ever see the light of day.

In light of the previously discussed problems, alternative ways to enforce HR standards should be explored. Specifically, existing tools can be harnessed to influence investor behavior and contribute to the development of a more responsible investment environment. Banks, in particular, can have a powerful effect on the HR of stakeholders in the context of foreign investment. While the projects that banks fund may have positive outcomes, such as economic growth, eradication of poverty, and development, they also have the potential to cause devastating effects on the lives of local communities through environmental damage and HR violations.<sup>18</sup> Banks are uniquely positioned to influence investment projects by incorporating specific HR requirements into finance agreements, in which their relationship

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14. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at 2 (July 14, 2014) (elaborating on international legally binding instruments on transnational corporations and other business enterprises with respect to human rights).

15. *See id.*

16. *See id.* at 3.

17. *See id.* (listing fourteen countries that voted against adoption).

18. *See* THUN GRP. OF BANKS, UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: DISCUSSION PAPER FOR BANKS ON IMPLICATIONS OF PRINCIPLES 16-21 5 (2013), [http://www.csrandthelaw.com/wp-content/uploads/sites/2/2013/10/thun\\_group\\_discussion\\_paper.pdf](http://www.csrandthelaw.com/wp-content/uploads/sites/2/2013/10/thun_group_discussion_paper.pdf) (outlining initiatives banks should consider to apply the Guiding Principles and reduce human rights violations).

with clients could shape foreign investment in a way that improves social and environmental outcomes.<sup>19</sup>

In line with these remarks, activism by civil society organizations (CSOs) and non-governmental organizations (NGOs) has created a climate in which banks are increasingly expected to act on HR issues.<sup>20</sup> Traditionally, banks assessed and managed their legal, reputational, and market risks primarily from the perspective of their shareholders; however, recently, the international community has started to emphasize the risks to which banks expose other stakeholders.<sup>21</sup> Societal expectations of banks' conduct have become impossible to ignore, yet there is still significant uncertainty regarding the role they have in protecting and promoting HR.<sup>22</sup>

In this article, I do not discuss whether or why businesses in general, and financial institutions in particular, should be subject to international HR law. I assume that an appropriate binding international legal regime is necessary if globalization is to be a positive force and if the dangers it poses to people in lesser-developed countries are to be mitigated. A binding regime does not currently exist and is unlikely to emerge in the near future; therefore, I examine alternative, pragmatic solutions to the problems of HR in MNEs. In particular, a variety of soft law instruments apply to banks in the HR context.<sup>23</sup> I map the most relevant intergovernmental, institutional, and private instruments and show through a close examination of their key features that there is significant international consensus as to the HR

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19. See *id.* at 17 (suggesting ways in which asset management businesses may face, and be an enforcer of, human rights issues).

20. See Malcolm Forster et al., *The Equator Principles – Towards Sustainable Banking? Part 1*, 6 J. INT'L BANKING & FIN. L. 217, 220 (2005) (arguing that stakeholders are responsible for the “increasing realization . . . that failure to deal with environmental and social issues . . . may threaten . . . businesses”).

21. See BSR, *THE FUTURE OF STAKEHOLDER ENGAGEMENT: TRANSFORMATIVE ENGAGEMENT FOR INCLUSIVE BUSINESS 5* (2016), [https://www.bsr.org/reports/BSR\\_Future\\_of\\_Stakeholder\\_Engagement\\_Report.pdf](https://www.bsr.org/reports/BSR_Future_of_Stakeholder_Engagement_Report.pdf) (using the launch of the Sustainable Development Goals as an example of the transforming environment in corporate human rights expectations).

22. See *id.* at 3 (insisting that corporations are now facing mounting pressure to prove that their work adds value to communities).

23. See Guzman & Meyer, *supra* note 5, at 188 (2010) (explaining that the Basle Accords seek to improve banking regulatory practice and are also considered soft law).

responsibilities of financial institutions. Moreover, I argue that banks can and should play the role of HR enforcers, and thus, contribute significantly to closing the governance gaps created by globalization, as long as the hardening<sup>24</sup> of the principles contained in these instruments is achieved in a meaningful way.

This article begins by introducing the most important HR soft law mechanisms that have an impact on financial institutions in Section II. I then analyze areas of convergence amongst them, in terms of applicability and scope, policy commitment, due diligence, prioritization, engagement with stakeholders, and remediation in Section III. In Section IV, I conclude and suggest three avenues for improvement.

## II. OVERVIEW OF INSTRUMENTS

The HR responsibilities of businesses have been extensively addressed through soft law instruments adopted at the intergovernmental, institutional, and private levels.<sup>25</sup> These instruments state that businesses, including banks, have a responsibility to respect HR.<sup>26</sup> In this section, I briefly introduce and contextualize the most relevant initiatives in this regard: the United Nations Guiding Principles on Business and Human Rights (UNGPR),

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24. To clarify, for the purposes of this article, the hardening of soft law instruments is deemed to occur in four different ways: first, states and regional institutions (such as the European Union) may adopt binding legislation inspired by, and in line with, the existing soft law instruments; second, financial institutions (in particular, international organizations) can make, apply, and enforce rules linked to sustainability in an increasingly 'law-like' manner; third, international courts and tribunals may apply HR standards to corporate behavior, even if indirectly (e.g., investor-state dispute settlement bodies may justify their decisions with reference to soft law instruments); and, finally, the success of these initiatives can inspire the transition of international HR law to a binding framework that formally expands HR duties to non-state actors.

25. See Kinley & Tadaki, *supra* note 9, at 935 (addressing the widespread, though thinly applied, soft law instruments).

26. See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 23, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*] (listing various soft law instruments that urge corporations to "obey the law, even if it is not enforced").

the Organization of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines), the International Finance Corporation (IFC) Performance Standards (PSs), and the Equator Principles (EP).<sup>27</sup>

#### A. THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The United Nations first attempted to regulate business conduct within a HR law framework in 2003, with the presentation by the Sub-Commission of the then U.N. Commission on Human Rights of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>28</sup> Even though the initiative attracted strong support from NGOs, businesses expressed fierce opposition and it eventually failed.

Subsequently, in 2008, John Ruggie, who was appointed in 2005 by U.N. Secretary-General Kofi Annan for the newly created post of Special Representative on Business and Human Rights, presented the Protect, Respect and Remedy Framework (Framework) to the HRC.<sup>29</sup> The Framework was unanimously welcomed in that year, and was

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27. See generally John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect, and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *UNGP*]; Org. Econ. Co-operation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2011), <http://dx.doi.org/10.1787/9789264115415-en> [hereinafter *OECD Guidelines*]; Int'l Fin. Corp. [IFC], *Performance Standards on Environmental and Social Sustainability* (Jan. 1, 2012), [https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES) [hereinafter *IFC Performance Standards*]; EQUATOR PRINCIPLES ASS'N, GOVERNANCE RULES (Apr. 2017), <http://equator-principles.com/wp-content/uploads/2018/01/governance-rules-april-2017-v2.pdf>.

28. See generally Comm'n on Human Rights, Sub-Comm'n on the Promotion & Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, at 4 (Aug. 26, 2003); see also David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 907 (2003) (bringing attention to several issues that arose during the drafting of the Norms).

29. See generally *UNGP*, supra note 27, ¶ 5.



operationalized in 2011 with the adoption of the UNGP,<sup>30</sup> thus the United Nations finally had an official position on the HR responsibilities of MNEs.<sup>31</sup>

The United Nation's position is based on three pillars: (1) a state's duty to protect against HR abuses by third parties, including business, through appropriate policies, regulation, and adjudication; (2) a corporate responsibility to respect HR, by acting with due diligence to avoid infringing on the rights of others and addressing adverse impacts that occur; and (3) a greater access for victims to both effective judicial and non-judicial remedies.<sup>32</sup> Today, the UNGP are considered the benchmark against which business engagement with HR should be assessed.<sup>33</sup> They establish corporate responsibility for HR that is both complementary and independent from states' HR obligations.<sup>34</sup>

Notwithstanding the limitations of international HR law, the UNGP reflect a significant international consensus for the existence of corporate HR responsibilities and, therefore, made an appreciable contribution to shifting perceptions of businesses' responsibilities.<sup>35</sup> The UNGP were not only unanimously endorsed by the HRC, which is a rare event, but also they were endorsed and taken up by a wide range of stakeholders, from the European Union (which called on its members to adopt National Action Plans to implement the UNGP) to the OECD (which incorporated the UNGP into the OECD Guidelines for Multinational Enterprises). Additionally, the UNGP were endorsed

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30. See Human Rights Council Res. 17.4, U.N. Doc. A/HRC/RES/17/4, ¶ 6 (July 6, 2011) (establishing, and creating a framework for, a Working Group on the issue of human rights and business enterprises).

31. See *UNGP supra* note 27, ¶ 6 (establishing three pillars upon which the Framework rests).

32. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, supra* note 26, ¶ 9.

33. Ursula Wynhoven & Yousuf Aftab, *The Virtue of Voluntarism – Human Rights, Corporate Responsibility, and UN Global Compact*, in *CORPORATE SOCIAL RESPONSIBILITY? HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY* 232, 232 (Charlotte Walker-Said & John D. Kelly eds., 2015).

34. See *UNGP, supra* note 27, ¶¶ 13-14 (claiming that the Guiding Principles are not an end to human rights issues, but rather, a global platform for addressing such issues).

35. See Michael K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights*, 14 *HUM. RTS. L. REV.* 133, 136 (2014) (portraying the Guiding Principles as a "smart mix" of various international legal standards).

by private and multi-stakeholder initiatives (such as the Voluntary Principles on Security and Human Rights, adopted by the International Council on Mining and Metals, and the Thun Group of Banks).<sup>36</sup>

However, the UNGP have some important shortcomings. First, as critics have pointed out, the UNGP stand on weak philosophical foundations because they are justified in terms of a business case and do not have a clear ethical grounding.<sup>37</sup> While this may be the most pragmatic approach, it is harder to justify to a dispassionate moral actor than one founded on companies' moral duties. Second, the UNGP provide general guidance, rather than substantial and measurable rules and standards.<sup>38</sup> In 2011, Human Rights Watch criticized the initiative, arguing that it "endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights," and that it constituted a missed opportunity "to put in place a mechanism to ensure that the basic steps to protect human rights set forth in the Guiding Principles are put into practice. . . ."<sup>39</sup> Finally, there are no provisions for formal monitoring and for holding actors accountable for non-compliance; thus, there is a risk that companies will comply with the UNGP more in form than in substance, and the effectiveness of the due diligence process largely depends on the moral commitment of businesses.<sup>40</sup>

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36. *See id.* at 141.

37. *See* Wesley Cragg, *Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework*, 22 *BUS. ETHICS Q.* 9, 27-29 (2012) (asserting that the voluntary ethical foundation of the UNGP contributes to its lack of clarity).

38. *See id.* at 11 (arguing that principles are of minimal value if they cannot be enforced).

39. *UN Human Rights Council: Weak Stance on Business Standards*, HUM. RTS. WATCH (June 16, 2011, 6:28 PM), <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.

40. *See* Björn Fasterling & Geert Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, 116 *J. BUS. ETHICS* 799, 805-08 (2013) (assessing strengths and weaknesses of due diligence requirements, ultimately concluding that such effectiveness depends on businesses themselves).

## B. THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The OECD Guidelines were first adopted in 1976 and revised five times, most recently in 2011.<sup>41</sup> At the time of writing, they are adhered to by forty-six countries, including several non-OECD countries; the European Union has the status of observer.<sup>42</sup> With the 2011 review, the UNGP were incorporated into the Guidelines and terminological convergence between the two initiatives was achieved.<sup>43</sup>

The OECD Guidelines are government-backed recommendations directly addressed to MNEs operating in and from adhering countries, and have been generally well received by the business sector.<sup>44</sup> They are important because they make up one of the oldest standards addressing the issue of business and HR (introducing, for example, risk-based due diligence in global supply chains), and they are the only multilaterally agreed code of conduct that governments have committed to promoting.<sup>45</sup>

The chapter of the Guidelines that is dedicated to HR<sup>46</sup> states companies should: (1) respect HR; (2) avoid causing or contributing to adverse HR impacts; (3) find ways of preventing or mitigating adverse impacts that are directly linked to their operations, products, or services, even if they did not contribute to those impacts; (4) have a policy commitment to respect HR; (5) carry out HR due diligence; and (6) provide for, or co-operate in, the remediation of adverse HR impacts.<sup>47</sup>

The most noteworthy advance achieved by the Guidelines is the establishment of a grievance mechanism known as the National Contact Points (NCPs), which is unique amongst intergovernmental

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41. See Org. for Econ. Co-operation & Dev. [OECD], Bus. & Indus. Advisory Comm., *Responsible Business Conduct: The OECD Guidelines for Multinational Enterprises*, at 3-4 (June 2015).

42. See *id.* at 7 (listing every country that adheres to the Guidelines).

43. See *id.* at 3.

44. See U.N. ENV'T PROGRAMME FIN. INITIATIVE (UNEP FI) & FOLEY HOAG LLP, *BANKS AND HUMAN RIGHTS: A LEGAL ANALYSIS* 42 (2015), <http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf> [hereinafter UNEP FI & FOLEY HOAG].

45. *OECD Guidelines*, *supra* note 27, at 3.

46. See *id.* at 3-4.

47. See *id.* at 31.

initiatives related to business and HR.<sup>48</sup> Even though the Guidelines are non-binding for MNEs and do not come with formal enforcement mechanisms, adhering countries have an obligation to establish NCPs, “to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. . . .”<sup>49</sup> This non-judicial mechanism serves a tripartite mission of promoting the Guidelines in the country where each NCP is based, handling enquiries, and playing a conciliatory role by contributing to the resolution of issues related to the implementation of the Guidelines.<sup>50</sup> NCPs are open to all interested parties, including the business community, worker organizations, NGOs, and individuals.<sup>51</sup>

While NCPs constitute a major advantage of the Guidelines over the UNGP, they are nevertheless imperfect. In particular, the implementation and effectiveness of NCPs across countries is not uniform, in terms of both procedural rules and interpretation of the Guidelines, which may lead to confusion and differences in the levels of protection.<sup>52</sup> Furthermore, the Guidelines are largely unenforceable, as the NCPs do not have the power to issue decisions or awards, but

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48. See *id.* at 3.

49. See Org. Econ. Co-operation & Dev. [OECD], *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, ¶ 1, OECD/LEGAL/0307 (June 27, 2000) (amended May 25, 2011).

50. See *OECD Guidelines*, *supra* note 27, at 72.

51. See *id.* (stating that the NCP will provide assistance by determining whether the issue raised has merit, offering the appropriate offices to help resolve the issue, and making the results available after the issue has been resolved); U.K. Nat'l Contact Point [U.K. NCP], *Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises*, at 3 (2016), <https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-iuf-against-bat> (describing an international federation of labor unions which made a complaint to the U.K. NCP in 2016, claiming that British American Tobacco is linked, through a business relationship with a U.S. company, to alleged abuses of migrant farmworkers on U.S. tobacco farms).

52. See Scott Robinson, *International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime*, 30 *UTRECHT J. INT'L & EUR. L.* 68, 72 (2014) (“While this lack of a prescribed structure is a clear and perhaps necessary deferral to state sovereignty by the OECD, it no doubt detracts from the organisation, consistency and capabilities of the NCP system as a whole.”).

rather rely on collaboration.<sup>53</sup> Additionally, many NCPs are housed within government departments dedicated to promoting business, trade, and investment, which raises issues of conflicts of interest;<sup>54</sup> and there is a generally inadequate investigation of complaints.<sup>55</sup> Most of these shortcomings are attributable to implementation failures by adhering countries, and commentators have urged the OECD to demand more from those countries.<sup>56</sup>

Despite these limitations, the complaints procedure serves to “name and shame” non-compliant businesses, which are therefore pushed towards compliance by fear of reputational damage.<sup>57</sup> In addition, regardless of the existent inconsistencies, NCPs provide an invaluable clarification of the terms of the OECD Guidelines that is necessary for their practical implementation.<sup>58</sup> Furthermore, the Guidelines have a very wide territorial reach, and they apply whenever a company incorporated in one of the state parties acts in a third country.<sup>59</sup>

### C. THE IFC PERFORMANCE STANDARDS

International financial institutions (IFIs), such as the World Bank Group, have also been subject to growing pressure from NGOs and CSOs to integrate HR policies and standards into their activities.<sup>60</sup>

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53. See Leyla Davarnejad, *In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises*, 2011 J. DISP. RESOL. 351, 364 (2011) (describing collaborative governance as implementing consensual methods instead of adversarial adjudicative methods).

54. See, e.g., Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *supra* note 26, ¶ 98 (discussing that in many different aspects the NCPs usually do not meet the established minimum requirements).

55. See, e.g., Jernej L. Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 4 HANSE L. REV. 71, 95-96 (2008).

56. See Robinson, *supra* note 52, at 79-80 (recommending a required uniform standard and a review mechanism to assure that the standards are being met by all countries).

57. See BSR, *supra* note 21, at 5-6.

58. See Christian Schliemann, *Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises—a Public International Law Perspective*, 13 GERMAN L.J. 51, 53-54 (2012).

59. See Davarnejad, *supra* note 53, at 356-57 (arguing that the broad reach is very important because the major issues take place in developing countries).

60. See VINAY BHARGAVA, GLOBAL ISSUES FOR GLOBAL CITIZENS: AN

However, Multilateral Development Banks (MDBs) face a legal challenge in this regard, in that the mandates of most IFIs explicitly prohibit interference with political matters, and this prohibition is commonly deemed to cover the subject of HR.<sup>61</sup> Despite the so-called political prohibition, MDBs have a number of policies in place that support HR, even if they are not labelled as doing so.<sup>62</sup> For instance, the World Bank adopted policies regarding indigenous peoples, gender equality, and involuntary resettlement, all of which are obviously connected to HR.<sup>63</sup>

The IFC, a member of the World Bank Group, is an excellent case in point. The IFC is the most prominent source of financing to the private sector in developing countries, and, hence, is able to significantly influence its many clients and increasingly set standards for other financial institutions.<sup>64</sup> Like other MDBs, the IFC is highly conscious of the negative social and environmental impacts that may result from the activities it finances, and has developed policies and guidelines aimed at minimizing those possible impacts.<sup>65</sup> The IFC's Policy and Performance Standards on Environmental and Social Sustainability, together with its Access to Information Policy, compose its Sustainability Framework which expresses the IFC's commitment to sustainable development and clarifies its approach to

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INTRODUCTION TO KEY DEVELOPMENT CHALLENGES, WORLD BANK 403-04 (2006), <https://openknowledge.worldbank.org/handle/10986/7194> (arguing that the necessary policies will need to include legitimacy, effectiveness, and financial capacity and sustainability).

61. See World Bank [WB] & Org. Econ. Co-operation & Dev. [OECD], *Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges*, at 149 (2013), <https://openknowledge.worldbank.org/bitstream/handle/10986/12800/9780821396216.pdf>.

62. See *id.* at 149-50.

63. See *id.* (explaining that the Asian Development Bank and the Nordic Investment Bank have also implemented policies for human rights protection in lending practices).

64. See Int'l Fin. Corp. [IFC], *IFC The First Six Decades Leading the Way in Private Sector Development: A History*, at 9 (2016), <https://www.ifc.org/wps/wcm/connect/6285ad53-0f92-48f1-ac6e-0e939952e1f3/IFC-History-Book-Second-Edition.pdf?MOD=AJPERES>.

65. See Adebola Adeyemi, *Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation*, 16 ENVTL. L. REV. 91, 94-95 (2014).

risk management.<sup>66</sup> The Sustainability Framework was adopted in 2006 and was last updated in 2012.<sup>67</sup> This update introduced important HR language, in line with the UNGP, requiring clients to address the respect and remedy pillars in their activities.<sup>68</sup>

The IFC requires its clients to meet eight PSs on Environmental and Social Sustainability.<sup>69</sup> These should be considered together as a whole, as well as cross-referenced, because more than one can apply to the same project, and they deal transversely with issues such as climate change, gender, water, and HR.<sup>70</sup> In addition to requiring clients to apply the PSs, the IFC also highlights the requirement that they comply with both national and international law, as well as with the World Bank Group Environmental, Health, and Safety (EHS) Guidelines.<sup>71</sup> Furthermore, if the host state's regulations establish standards that are different from these EHS Guidelines, the more stringent standard applies.<sup>72</sup>

The IFC, together with the Multilateral Investment Guarantee Agency (MIGA), has an independent inspection and accountability mechanism called the Compliance Advisor/Ombudsman (CAO).<sup>73</sup>

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66. See *IFC Performance Standards*, *supra* note 27, ¶ 1.

67. Int'l Fin. Corp. [IFC], *IFC Sustainability Framework—2006 Edition*, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/ifcsustainabilityframework\\_2006](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/ifcsustainabilityframework_2006) (last visited Nov. 1, 2018) (describing that the 2012 IFC Framework applies to all investment and advisory clients that go through the initial review process).

68. See Elena Amirkhanova & Raimund Vogelsberger, *Challenges and Advantages of IFC Performance Standards: ERM Experience*, in RESPONSIBLE INVESTMENT BANKING: RISK MANAGEMENT FRAMEWORKS, SUSTAINABLE FINANCIAL INNOVATION AND SOFTLAW STANDARDS 59, 61 (Karen Wendt ed., 2015) (stating that this change could be made by implementing a management system and a way to allow the public to express their concerns).

69. See *IFC Performance Standards*, *supra* note 27, ¶¶ 1, 2 (stating that the PSs “are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable manner, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities”).

70. See *id.* ¶ 4.

71. See *id.* ¶¶ 5, 6.

72. See *id.* ¶ 7.

73. See *About the CAO: Who We Are*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, <http://www.cao-ombudsman.org> (last visited Nov. 1, 2018).

The CAO offers redress for negative environmental and social impacts of IFC and MIGA projects, and, therefore, plays an important role in their contribution to sustainable development.<sup>74</sup> Redress is made available to communities and individuals affected at any time during the life of a project by any aspect of the project's planning, implementation, or impact.<sup>75</sup> The role of the CAO is threefold: (1) it provides dispute resolution; (2) it oversees compliance investigations of the environmental and social performance of the IFC and MIGA; and (3) it provides independent advice on environmental and social issues to the President of the World Bank Group and senior management of the IFC and MIGA.<sup>76</sup>

The policies and guidelines developed by the IFC are essential for the promotion of a more sustainable investment environment, not only because they apply to IFC activities, which are very significant, but also because they constitute fundamental benchmarks for the conduct of financial institutions.<sup>77</sup> This fact is evidenced by initiatives such as the Equator Principles, which will be addressed below. Nevertheless, the IFC has been criticized for a number of shortcomings, including its failure to address all relevant HR issues<sup>78</sup> and its lack of transparency.<sup>79</sup> In addition, NGOs and CSOs have recently voiced

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74. See *Terms of Reference*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, at 1, [http://www.cao-ombudsman.org/about/whowear/documents/TOR\\_CAO.pdf](http://www.cao-ombudsman.org/about/whowear/documents/TOR_CAO.pdf) (last visited Nov. 1, 2018) (discussing that it would be fair and objective for the internal organization to be audited by outside parties).

75. See *How We Work: Ombudsman*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, <http://www.cao-ombudsman.org/howwework/ombudsman/> (last visited Nov. 1, 2018) (claiming that the CAO provides an objective role in helping the parties resolve disputes).

76. See *How We Work*, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, <http://www.cao-ombudsman.org/howwework/> (last visited Nov. 1, 2018).

77. See *IFC Performance Standards*, *supra* note 27, ¶ 1.

78. See STEVEN HERZ ET AL., CTR. FOR INT'L ENVTL. L. ET AL., THE INTERNATIONAL FINANCE CORPORATION'S PERFORMANCE STANDARDS AND THE EQUATOR PRINCIPLES: RESPECTING HUMAN RIGHTS AND REMEDYING VIOLATIONS? 1 (2008), [https://www.ciel.org/wp-content/uploads/2015/05/Ruggie\\_Submission.pdf](https://www.ciel.org/wp-content/uploads/2015/05/Ruggie_Submission.pdf) (listing that substantive standards, due diligence procedures, and grievance mechanisms are areas where the shortcomings have occurred).

79. See MATHIEU VERVYNCKT, EUR. NETWORK ON DEBT & DEV., AN ASSESSMENT OF TRANSPARENCY AND ACCOUNTABILITY MECHANISMS AT THE EUROPEAN INVESTMENT BANK AND THE INTERNATIONAL FINANCE CORPORATION 3 (2015), <https://eurodad.org/files/pdf/1546480-an-assessment-of-transparency-and->



concerns that there is a lack of monitoring of financial intermediary lending; for example, as the IFC channels funds through third parties, it arguably loses control of how the money is actually spent.<sup>80</sup> The CAO initiated a compliance audit in 2011 to look into this issue, and in its reports, it identified several problems.<sup>81</sup> It then made recommendations that eventually led to progress on the IFC's approach to risk management.<sup>82</sup> The IFC disagreed with many of the CAO's latest observations, but it nevertheless reaffirmed its commitment to continuously improving its practices.<sup>83</sup> The CAO is the strongest feature of the IFC's sustainability framework, not only because it provides a forum for dispute resolution, but also (and perhaps more importantly) because it allows for constant reevaluation and refinement of the policies and procedures of the IFC.

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accountability-mechanisms-at-the-european-investment-bank-and-the-international-finance-corporation.pdf.

80. See e.g., OXFAM ISSUE BRIEFING, *THE SUFFERING OF OTHERS: THE HUMAN COST OF THE INTERNATIONAL FINANCE CORPORATION'S LENDING THROUGH FINANCIAL INTERMEDIARIES 2* (2015), [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf) (arguing that the IFC loses control of how the money is spent, and the people who are impacted are placed in a difficult situation).

81. See OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN, *CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY INTERMEDIARIES 25-26* (2012), [http://www.cao-ombudsman.org/newsroom/documents/Audit\\_Report\\_C-I-R9-Y10-135.pdf](http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf) (observing that, in some cases, the IFC "did not have the information on the end use of funds available" and "knows very little about potential environmental or social impacts of its FM [financial markets] lending").

82. See OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN, *THIRD MONITORING REPORT OF IFC'S RESPONSE TO: CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY FINANCIAL INTERMEDIARIES 16* (2017), [http://www.cao-ombudsman.org/documents/CAOMonitoringReport\\_FIAudit\\_March2017.pdf](http://www.cao-ombudsman.org/documents/CAOMonitoringReport_FIAudit_March2017.pdf) (noting that "[i]ncreased resources, growth in E&S specialists dedicated to IFIs, revisions in guidelines, and piloting of new ESMS appraisal and supervision tools have resulted in an improved understanding of FI clients' approach to E&S risk management").

83. See INT'L FIN. CORP., *THIRD MONITORING REPORT OF IFC'S RESPONSE TO: CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY FINANCIAL INTERMEDIARIES 20* (2017), <http://www.cao-ombudsman.org/newsroom/documents/documents/IFCResponsetoCAOThirdFIMonitoringMarch2017.pdf>.

## D. THE EQUATOR PRINCIPLES

The EP were born out of both internal and external pressure to incorporate HR responsibility into the activities of commercial banks.<sup>84</sup> In October 2002, ABN AMRO and the IFC called a meeting in London with a small number of banks to discuss the social and environmental impacts of project finance.<sup>85</sup> During the following year, the participants decided to address such impacts through the development of a risk management framework, and began drafting a set of principles and standards.<sup>86</sup> Concomitantly, one hundred and two NGOs drafted, signed, and released the Collevocchio Declaration at the World Economic Forum in Davos in January 2003.<sup>87</sup> The Declaration “demanded that financial institutions formulate clear sustainability objectives, introduce and enforce environmental and social compliance requirements, support debt-relief for highly-indebted developing countries, refrain from financing projects without local community consent, disclose policies and lending portfolios, and lobby in favor of stronger financial regulation.”<sup>88</sup>

In June 2003, the group of banks convened by ABN AMRO and the IFC announced in Washington, D.C. that they were launching the first version of the EP based on World Bank and IFC standards.<sup>89</sup> The EP were subsequently revised in 2006 and again in 2013, in order to bring its provisions in line with the revised standards of the World Bank and the IFC. These revisions also reflected proposals from NGOs and

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84. See RYAN CHRISTOPHER HANSEN, THE IMPACT OF THE EQUATOR PRINCIPLES ON LENDER LIABILITY: RISKS OF RESPONSIBLE LENDING 4 (2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=948228](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=948228).

85. See Malcom Forster et al., *The Equator Principles – Making a Difference? Part 2*, 7 J. INT’L BANKING & FIN. L. 217, 217 (2005).

86. See *id.*; HANSEN, *supra* note 84, at 4.

87. See BANKTRACK, COLLEVECCHIO DECLARATION: THE ROLE AND RESPONSIBILITY OF FINANCIAL INSTITUTIONS 7-10 (2006), [https://www.banktrack.org/download/collevocchio\\_declaration/030401\\_collevocchio\\_declaration\\_with\\_signatories.pdf](https://www.banktrack.org/download/collevocchio_declaration/030401_collevocchio_declaration_with_signatories.pdf) (listing the 102 NGOs who drafted, signed, and released the Collevocchio Declaration); Christopher Wright, *Global Banks, the Environment, and Human Rights: The Impact of the Equator Principles on Lending Policies and Practices*, 12 GLOB. ENVTL. POL. 56, 58-59 (2012).

88. Wright, *supra* note 87, at 59 (stating that commercial banks were not in favor of these new regulations and did not implement most of the listed recommendations).

89. See Press Release, Int’l Fin. Corp., Leading Banks Announce Adoption of Equator Principles (June 4, 2003).

CSOs as to how the EP could be more effective, which resulted in increased control over project activity by the EP financial institutions (EPFIs).<sup>90</sup> Today, ninety-two financial institutions in thirty-seven countries adhere to the EP, and the majority of project finance debt in developed and emerging markets is arranged by EPFIs.<sup>91</sup>

The preamble to the EP summarizes the main pledges made by the EPFIs, which includes a commitment to responsible investment in areas such as climate change and HR.<sup>92</sup> More importantly, the preamble states that the EPFIs will not provide project finance or project-related corporate loans to clients who do not comply with the EP.<sup>93</sup> It also characterizes the EP as a common baseline and framework, that each EPFI should implement through their internal environmental and social policies, procedures, and standards;<sup>94</sup> therefore, EPFIs are afforded considerable latitude in their implementation of the EP.<sup>95</sup>

The EP have been widely criticized for their lack of accountability, monitoring, and enforcement mechanisms and for their failure to provide formal sanctions for non-compliance.<sup>96</sup> In July 2010, a delisting mechanism was introduced into the EP for cases where EPFIs do not pay the annual fee to the Secretariat or fail to comply with reporting requirements; however, this mechanism unfortunately does not apply to implementation failures.<sup>97</sup> Nevertheless, the EP provide valuable practical guidance specifically aimed at financial institutions, which is crucial given the complexity of the financial sector.<sup>98</sup> In addition, even though HR have been an important part of the EP since

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90. See HANSEN, *supra* note 84, at 5.

91. See *The Equator Principles*, EQUATOR PRINCIPLES ASS'N, <http://equator-principles.com/about/#> (last visited Nov. 1, 2018).

92. See EQUATOR PRINCIPLES ASS'N, *THE EQUATOR PRINCIPLES JUNE 2003 2* (2013), [http://equator-principles.com/wp-content/uploads/2017/03/equator\\_principles\\_III.pdf](http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf) [hereinafter EQUATOR PRINCIPLES 2013].

93. See *id.*

94. See Adeyemi, *supra* note 65, at 102.

95. See HANSEN, *supra* note 84, at 5-6.

96. See Manuel Wörsdörfer, *Equator Principles: Bridging the Gap Between Economics and Ethics?*, 120 BUS. & SOC. REV. 205, 226-27 (2015).

97. See Wright, *supra* note 87, at 68.

98. See Zhiyun Liu & Luying Zheng, *Equator Principles as "Norms of Self-Regulation": General Principles and Legitimacy Source*, 8 FRONTIERS L. CHINA 140, 142 (2013).

their inception, the 2013 version refers explicitly to a broader scope of rights and requires EPFIs to conduct due diligence processes in line with the UNGP and IFC PSs, as well as additional HR due diligence in high-risk areas.<sup>99</sup>

### III. THE INSTRUMENTS IN PRACTICE

The instruments assessed converge on a number of important features; this reflects widespread consensus across intergovernmental, institutional and private sector initiatives, although some differences remain. This section briefly outlines selected areas of convergence and divergence in their application to the financial sector.

#### A. APPLICABILITY AND SCOPE

Both the UNGP and the Guidelines apply to all businesses,<sup>100</sup> including banks. However, because they are meant to apply universally and not just to the financial sector, they only provide general guidance rather than establishing detailed instructions as to how each bank should proceed.<sup>101</sup> This reinforces the importance of initiatives that contextualize and develop methodologies that are relevant to certain types of banks, such as the PSs and the EP which apply directly to financial institutions and their clients.<sup>102</sup>

Some recent problems with NCPs in the financial sector suggest that the Guidelines are insufficiently precise in their application to banks.<sup>103</sup> For example, in 2012 a consortium of NGOs brought a complaint to the Norwegian, Netherlands, and Korean NCPs, arguing that a company and two of its investors had breached the HR provisions of the Guidelines.<sup>104</sup> One of the investors submitted an

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99. See UNEP FI & FOLEY HOAG, *supra* note 44, at 49-50.

100. See UNGP, *supra* note 27, Annex, at 14; OECD Guidelines, *supra* note 27, at 13.

101. See *id.* at 6; OECD Guidelines, *supra* note 27, at 13.

102. See UNEP FI & FOLEY HOAG, *supra* note 44, at 47.

103. See Adam McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. J. 127, 165 (2008).

104. See Neth. Nat'l Contact Point for the OECD Guidelines for Multinat'l Enterprises [Neth. NCP], *Final Statement: ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development*, at 2 (2013), <https://www.oecdguidelines.nl/documents/publication/2015/1/6/final->

argument that the Guidelines did not apply to minority shareholdings.<sup>105</sup> The Norwegian NCP responded that the question was not *if* they applied to the financial sector and minority shareholding, but rather *how* they applied.<sup>106</sup> Referring to a letter from the Office of the High Commissioner for Human Rights (OHCHR)<sup>107</sup> that addressed questions related to the financial sector, the Norwegian NCP indicated that “the OECD Chapter on Human Rights is . . . applicable to minority shareholders of institutional investors” and that “there is little basis to argue that the OECD Guidelines as such are not applicable to investors.”<sup>108</sup> All three NCPs agreed on this point.<sup>109</sup> The Working Party on Responsible Business Conduct later confirmed these findings,<sup>110</sup> referring to the Interpretive Guide on the Corporate Responsibility to Respect Human Rights of the OHCHR, which states that “business relationships include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.”<sup>111</sup>

The same case also raised questions as to whether the Guidelines should apply differently to state-owned investors.<sup>112</sup> The Norwegian

statement-abp-apg---somo-bothends.

105. See Nor. Nat'l Contact Point for the OECD Guidelines for Multinat'l Enterprises [Nor. NCP], *Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development v. Posco (South Korea), ABP/APG (Netherlands), and NBIM (Norway)*, at 7 (2013), [http://www.responsiblebusiness.no/files/2013/12/nbim\\_final.pdf](http://www.responsiblebusiness.no/files/2013/12/nbim_final.pdf) [hereinafter Nor. NCP].

106. See *id.*

107. See generally Office of the High Comm'r for Human Rights, Letter dated Apr. 26, 2013 from the Chief of the Development and Economic and Social Issues Branch to the OECD Watch Secretariat for Centre for Research on Multinational Corporations (Apr. 26, 2013).

108. Nor. NCP, *supra* note 105, at 22.

109. *Id.* at 23.

110. See Org. Econ. Co-operation & Dev. [OECD], *Global Forum on Responsible Business Conduct: Scope and Application of 'Business Relationships' in the Financial Sector under the OECD Guidelines for Multinational Enterprises*, at 5 (June 26-27, 2014), <http://mneguidelines.oecd.org/global-forum/gfrbc-2014-financial-sector-document-2.pdf>.

111. Office of the High Comm'r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, at 3, 5, HR/PUB/12/02 (2012), [https://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) [hereinafter *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*].

112. See Nor. NCP, *supra* note 105, at 23.

NCP concluded that “the OECD Guidelines explicitly underscore that state-owned enterprises are not exempt, and, on the contrary, suggests [*sic*] that public expectations are often even higher for state owned enterprises.”<sup>113</sup>

In response to criticism, the 2013 revision process significantly expanded the scope of the EP. Many NGOs expressed concern that projects causing severe adverse social and environmental impacts were being disguised as corporate loans to avoid the application of the EP.<sup>114</sup> Thus, since 2013, the EP apply globally and to all industry sectors, and to the following financial products: (1) *project finance advisory services* where total project capital costs are U.S. \$10 million or more; (2) *project finance* with total project capital costs of U.S. \$10 million or more; (3) *project-related corporate loans*, including export finance in the form of buyer credit, if conditions are met,<sup>115</sup> and (4) *bridge loans* with a tenor of less than two years that are intended to be refinanced by project finance or a project-related corporate loan that is anticipated to meet the four conditions established for number (3).<sup>116</sup> Furthermore, the EP also apply to the expansion or upgrade of existing projects where changes in scale or scope have the potential to create significant adverse risks and impacts, or significantly change the nature or degree of an existing impact.<sup>117</sup>

Under the UNGP and the Guidelines, financial institutions should adequately respond to situations where their activity *causes* an adverse impact on HR; their activity *contributes* to adverse impacts; or their operations, products, or services are *directly linked* to adverse HR impacts through business relationships.<sup>118</sup>

The most common impacts included in the first category relate to

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113. *Id.*

114. See Michael Torrance, *Equator Principles III: New Sustainability Rules Requiring Legal Strategy Rethink*, 8 J. INT’L BANKING & FIN. L. 503, 503 (2013).

115. See EQUATOR PRINCIPLES 2013, *supra* note 92, at 3 (discussing that these conditions are as follows: the majority of the loan relates to a single project over which clients have effective direct or indirect operational control, the total aggregate loan amount is at least U.S. \$100 million, the EPFI’s individual commitment is at least U.S. \$50 million, and the loan tenor is at least two years.).

116. *See id.*

117. *See id.*

118. *See UNGP, supra* note 27, at 14.

the bank's relationship with its employees, such as unequal pay for men and women.<sup>119</sup> The second category refers to situations where the bank contributes to, or is perceived as contributing to, HR violations; contribution is used in the UNGP in a similar sense to complicity, which has both legal and non-legal meanings and implications.<sup>120</sup> The legal standard of complicity is related to both criminal and civil liability at the domestic level, and is understood in international criminal law as aiding and abetting, such as "knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime."<sup>121</sup>

The third category of HR impact occurs in situations where there are adverse HR impacts that are *directly linked* to the bank's operations, services, or products *and* the bank is connected through its business relationships to the entity causing the impact.<sup>122</sup> A report developed under the auspices of the United Nations Environment Programme Finance Initiative (UNEP FI) clarifies that a bank's business relationships include "relationships with borrowers, project partners, retail and commercial banking clients, and other entities, potentially including some more distant in the value chain."<sup>123</sup> It also states that direct linkage should be assessed on a case-by-case basis to establish the degree of proximity, which ranges from clear association

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119. See *id.*; see also Office of the High Comm'r for Human Rights, Letter dated Dec. 3, 2013 from the Members of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to the Chair of the OECD Working Party for Responsible Business Conduct, at 2-3 (Dec. 3, 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf> [hereinafter OHCHR Letter, Dec. 3, 2013].

120. See UNGP, *supra* note 27, at 17.

121. See *id.*; see also Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 342-44 (2000); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 95 (2002); Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 335 (1998); *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, *supra* note 111, at 79-80; Florian Wettstein, *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, 96 J. BUS. ETHICS 33, 34-35 (2010).

122. See UNGP, *supra* note 27, at 16.

123. UNEP FI & FOLEY HOAG, *supra* note 44, at 10.

to extremely remote.<sup>124</sup> The most common accusations of adverse HR impacts levelled against banks relate to situations in which the bank's operations, products, or services are *directly linked* to a HR impact through its business relationships.<sup>125</sup>

With regard to the third category, the concept of leverage is crucial. Banks are considered to have leverage over a company when they are able to affect the activities of the entity causing the HR impact.<sup>126</sup> If such leverage exists, they should exercise it to prevent or mitigate the adverse impact.<sup>127</sup> However, if the banks lack leverage, they should make an effort to increase it to influence the actions of the entity that is causing, or likely to cause, the adverse impact.<sup>128</sup> If it is impossible to increase leverage, banks should consider ending the business relationship.<sup>129</sup>

The amount of leverage that each individual bank possesses can vary considerably depending on which types of products, services, or operations are at stake.<sup>130</sup> In project finance,<sup>131</sup> lenders typically have more influence over the construction and operation of the project, and this leverage is particularly strong before the project starts.<sup>132</sup> Conversely, general corporate loans that are not specific to a project entail much less leverage, though banks have the possibility of increasing it through contractual language and other alternatives, such as threatening to withdraw funding.<sup>133</sup>

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124. *Id.* at 15.

125. *Id.* at 13.

126. *Id.* at 16.

127. *Id.* at 19.

128. *Id.* at 16.

129. *Id.*

130. *Id.* at 17.

131. See SHELDON LEADER & DAVID ONG, *GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT 5* (Cambridge University Press 2011) (analyzing the relationship between project finance, HR and development). In project finance, lenders and investors rely either exclusively or mainly on the cash flow generated by a specific project to repay the loans and earn a return on investments. Conversely, in general corporate loans, lenders rely on the strength of the borrower's balance sheet.

132. See Kendyl Salcito et al., *Assessing Corporate Project Impacts in Changeable Contexts: A Human Rights Perspective*, 47 ENVTL. IMPACT ASSESSMENT REV. 36, 37 (2014).

133. See UNEP FI & FOLEY HOAG, *supra* note 44, at 17.



The application of HR standards to these situations reflects an endorsement of the idea of leverage-based HR responsibilities, in that the notion of leverage gives rise to responsibility even when the bank itself is not causing or contributing to HR impacts.<sup>134</sup>

### B. POLICY COMMITMENT

Both the UNGP and the Guidelines require banks to develop a policy commitment to meet their responsibility of respecting HR.<sup>135</sup> According to the UNGP, this should be expressed through a public statement explaining the bank's responsibilities, commitments, and expectations.<sup>136</sup> The statement should be approved at the most senior level; be based on internal and external expertise; be publicly available and communicated both internally and externally to all personnel, business partners, and other relevant entities, which may include investors and potentially affected stakeholders; and it should be embedded "from the top of the business enterprise through all its functions."<sup>137</sup> Companies are thus expected to *know* and *show* that they respect HR in the course of their activities.<sup>138</sup>

The IFC further requires its clients to establish a project-specific, overarching policy setting out the environmental and social objectives and principles that guide the project,<sup>139</sup> which also applies to EPFIs.<sup>140</sup>

### C. DUE DILIGENCE

The most significant demand each of the four instruments makes of banks is that they conduct due diligence. In addition to risk

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134. See Stepan Wood, *The Case for Leverage-Based Corporate Human Rights Responsibility*, 22 BUS. ETHICS Q. 63, 64-65 (2012) (discussing leverage-based HR responsibility).

135. See UNGP, *supra* note 27, at 15-16; OECD Guidelines, *supra* note 27, at 31, 33-34.

136. UNGP, *supra* note 27, at 15.

137. *Id.* at 16-17.

138. See *id.* at 16 (explaining that the policy statement concerning HR should be integral to the business from top to bottom, so that all functions act with awareness and regard for HR); see also OHCHR Letter, Dec. 3, 2013, *supra* note 119, at 2 (stating that the appropriate course of action required for each business depends on that specific business's HR impact).

139. See IFC Performance Standards, *supra* note 27, at 2-3.

140. See EQUATOR PRINCIPLES 2013, *supra* note 92, at 6, 21.

management mechanisms designed to control risks to shareholders, internationally active bank are required by the UNGP to establish a specific HR impact assessment that covers both actual and potential impacts.<sup>141</sup> This requirement means that banks “should put risks to *rights-holders*<sup>142</sup> first, rather than risks to the business itself.”<sup>143</sup>

It is extremely difficult for banks with multiple business lines to assess the risks involved in each of their business relationships.<sup>144</sup> According to the UNGP, to conduct an initial scoping, banks should identify entities in their value chain that belong to high-risk sectors; pinpoint the products and services with the highest risk of adverse HR impacts; and determine which locations are high-risk, such as states with high levels of corruption or locations where indigenous peoples live.<sup>145</sup> This scoping exercise should be undertaken with recourse to credible and widely available information referring to HR issues in specific countries, businesses, and sectors.<sup>146</sup>

The Guidelines also recommend that companies carry out HR due diligence, assessing actual and potential impacts.<sup>147</sup> This is an ongoing exercise because risks may change as the context and company’s operations evolve.<sup>148</sup> In line with the UNGP, the Norwegian NCP,<sup>149</sup> acknowledged the impossibility of scrutinizing and engaging each company in detail or individually. It also suggested

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141. See *UNGP*, *supra* note 27, at 17-18.

142. See Deanna Kemp & Frank Vanclay, *Human Rights and Impact Assessment: Clarifying the Connections in Practice*, 31 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 86, 90 (2013) (stating that these rights-holders have legitimate interests that deserve respect).

143. BANKTRACK, *BANKING WITH PRINCIPLES? BENCHMARKING BANKS AGAINST THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* 8 (2d ed. 2016), [http://www.banktrack.org/ems\\_files/download/5412388/banking\\_with\\_principles\\_june2016update.pdf](http://www.banktrack.org/ems_files/download/5412388/banking_with_principles_june2016update.pdf) [hereinafter *BANKTRAK BANKING WITH PRINCIPLES*].

144. See *UNGP*, *supra* note 27, at 18 (admitting that the situation is more complex for businesses with operations directly linked to adverse HR impacts, when they have not contributed to those impacts).

145. *Id.*

146. See *UNEP FI & FOLEY HOAG*, *supra* note 44, at 12.

147. See *id.* at 13.

148. *OECD Guidelines*, *supra* note 27, at 34; see *UNGP*, *supra* note 27, at 20 (outlining forms of communication that are important in the changing context of how businesses should address their human rights impact).

149. See *supra*, text accompanying note 62; see generally Nor. NCP, *supra* note 105.

that banks take a risk-based approach, focusing due diligence efforts on situations involving the most likely and severe HR impacts.<sup>150</sup>

The PSs emphasize the importance that IFC clients have an Environmental and Social Management System (ESMS) in place.<sup>151</sup> The ESMS should include due diligence processes that address all relevant environmental and social risks and impacts, including those caused by third parties and the primary supply chain. These due diligence processes should account for the position of disadvantaged and vulnerable individuals or groups that might be directly and differentially or disproportionately affected by the project.<sup>152</sup> However, the PSs only require specific HR due diligence in limited high-risk circumstances,<sup>153</sup> and the EP contain the same imperfect solution.<sup>154</sup>

Under the EP, due diligence processes should address compliance with all relevant host state laws, regulations, and permits regarding environmental and social issues.<sup>155</sup> For that purpose, the EP distinguish between designated countries, which are “deemed to have robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the natural environment[,]”<sup>156</sup> and non-designated countries, which include all others.<sup>157</sup> The assessment process for projects located in designated countries evaluates compliance with host state laws and regulations; for projects located in non-designated countries, it evaluates compliance with the IFC PSs and the World Bank EHS Guidelines. It is important to recognize that the relevant standards constitute a minimum threshold and EPFIs may, at their sole discretion, apply additional requirements.<sup>158</sup>

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150. See Nor. NCP, *supra* note 105, at 29-30.

151. See IFC Performance Standards, *supra* note 27, at 2-3.

152. See *id.* at 3-4.

153. *Id.* at 3 n.12.

154. EQUATOR PRINCIPLES 2013, *supra* note 92, at 5.

155. See *id.* at 6.

156. See *id.* at 15 (providing a complete list of designated countries).

157. See *id.* at 18.

158. *Id.* at 6.

## D. PRIORITIZATION AND CATEGORIZATION

Once scoping is concluded, the UNGP require banks to prioritize action to address any identified risks of HR impacts, taking into account their severity, which “will be judged by their scale, scope and irremediable character.”<sup>159</sup> Here, scale refers to the gravity of the HR impact, while scope refers to the number of individuals potentially or actually affected.<sup>160</sup> An impact should be deemed irremediable if it is impossible fully to restore the position of those affected to its prior level.<sup>161</sup> A situation need not satisfy all three requirements to be classified as severe; though it appears clear that the greater the scale and/or scope of an impact, the less it is likely to be remediable.<sup>162</sup>

Both the UNGP and Guidelines require banks to respond to the risks of HR impacts as soon as they are identified and prioritized.<sup>163</sup> Therefore, banks should cease or prevent any activities that directly cause a HR impact; cease or prevent their contribution to impacts they are not directly causing, using their leverage to mitigate the remaining impacts to the greatest extent possible; and prevent or mitigate any HR impacts to which they are directly related through business relationships.<sup>164</sup>

The IFC classifies projects as A, B, C, or FI,<sup>165</sup> in accordance with the magnitude of environmental and social risks and impacts. If a project is placed in category C, there is no further action required beyond screening.<sup>166</sup> Project categorization as A, B, or FI, determines

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159. *UNGP*, *supra* note 27, at 14.

160. *See id.* (commenting that a business’s responsibility to protect HR is considered in proportion to its size [scale] as well as the severity of that impact [scope]).

161. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, *supra* note 111, at 8.

162. *See id.* at 19.

163. *See UNGP*, *supra* note 27, at 18 (stating that a business enterprise must “take the necessary steps to cease or prevent” impact).

164. *Id.* at 21-22; *OECD Guidelines*, *supra* note 27, at 33.

165. Int’l Fin. Corp. [IFC], *Environmental and Social Review Procedures Manual*, at 2 (2016), [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Policies-Standards/ES-Proc-Manual/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/ES-Proc-Manual/).

166. *Id.*

the level of scrutiny and disclosure of information.<sup>167</sup>

The EP also require EPFIs to categorize projects in line with the IFC process.<sup>168</sup> Categorization is essential since assigning a project to a specific category determines which actions should be taken in respect to that project by the EPFIs and their clients.<sup>169</sup> In general, category A projects require extensive due diligence to be conducted by both the EPFI and the borrower, while categories B and C entail decreasingly stringent obligations.<sup>170</sup> Obviously, the more stringent the due diligence requirements, the more expensive it will be for both the EPFIs and their clients; therefore, NGOs have consistently expressed concerns that EPFIs may seek to reduce their due diligence costs by categorizing as B projects that should be placed in category A, or as C projects that belong to category B.<sup>171</sup>

#### E. ENGAGEMENT WITH STAKEHOLDERS

The UNGP state that to conduct an accurate HR impact assessment, companies should consult stakeholders directly, taking into account language and other factors that can impede effective and meaningful engagement.<sup>172</sup> Whenever this consultation is not possible, companies are required to explore reasonable alternatives, such as engaging credible, independent experts, including HR defenders.<sup>173</sup> Engagement with stakeholders is also recommended as businesses track the effectiveness of their responses to HR impacts,<sup>174</sup> as well as for transparency and accountability purposes: companies are required to know and show that they respect HR, and that entails communication with the relevant stakeholders.<sup>175</sup> Companies are expected to report formally whenever there is a risk of severe HR impacts. In all cases,

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167. *Id.* at 2-3.

168. EQUATOR PRINCIPLES 2013, *supra* note 92, at 5.

169. *Id.*

170. *See id.* (defining the separate categories by their environmental and social risks and/or impacts).

171. *See* HANSEN, *supra* note 84, at 9 (indicating that such practices are ill-advised and can lead to expensive project complications in the future); Forster et al., *supra* note 85, at 254.

172. UNGP, *supra* note 27, at 18.

173. *Id.*

174. *Id.* at 19.

175. *Id.* at 20.

communications should be accessible to their intended audiences.<sup>176</sup>

The Guidelines require companies to: (1) cooperate closely with local communities to encourage local capacity building; (2) promote a relationship of confidence and mutual trust between companies and the societies in which they operate; and (3) provide stakeholders with meaningful opportunities to express their views in relation to activities that may impact local communities.<sup>177</sup> The Guidelines further point out that effective stakeholder engagement depends on two-way communication and good faith.<sup>178</sup>

The IFC requires its clients to ensure stakeholder engagement through an on-going process that aims to build strong, constructive, and responsive relationships.<sup>179</sup> The PSs provide clear procedures for identifying stakeholders and their concerns, communicating with them, gathering their views, and ensuring that appropriate consent is given. These procedures include stakeholder analysis and engagement planning, disclosure and dissemination of information, consultation and participation, grievance mechanisms, and reporting to stakeholders.<sup>180</sup> The EP also outline consultation, participation, and disclosure measures to be implemented by borrowers.<sup>181</sup>

#### F. REMEDIATION

The UNGP state that businesses should provide for, or cooperate in, the remediation of HR impacts that they have caused or to which they have contributed.<sup>182</sup> In cases where adverse impacts are directly linked to a bank's operations, products, or services, by a business relationship, the bank does not have to provide for remediation itself, although it may take a role in it.<sup>183</sup> Businesses are encouraged to establish operational-level grievance mechanisms, which should be directly accessible to those adversely impacted.<sup>184</sup> The UNGP further

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176. *Id.*

177. *OECD Guidelines*, *supra* note 27, at 19-20.

178. *Id.* at 25.

179. *IFC Performance Standards*, *supra* note 27, at 7.

180. *See id.*

181. *EQUATOR PRINCIPLES 2013*, *supra* note 92, at 7.

182. *UNGP*, *supra* note 27, at 20.

183. *Id.* at 20-21.

184. *Id.*

identify eight effectiveness criteria for grievance mechanisms; these should be: (1) legitimate, (2) accessible, (3) predictable, (4) equitable, (5) transparent, (6) rights-compatible, (7) a source of continuous learning, and (8) based on engagement and dialogue.<sup>185</sup> The Guidelines follow the language of the UNGP closely,<sup>186</sup> but have the advantage of providing for the NCPs, a grievance mechanism that does not depend on company implementation.<sup>187</sup>

The IFC requires its clients to implement and maintain grievance mechanisms to address concerns and grievances brought by stakeholders in relation to the project's environmental and social impacts.<sup>188</sup> The latter should consist of an "understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution to the party that originated the issue or concern."<sup>189</sup> In addition, the CAO is available to affected stakeholders, offering a possibility of redress that is independent of company implementation.<sup>190</sup>

Under the EP, EPFIs should require their clients to establish grievance mechanisms for all category A and, as appropriate, category B projects, with the relevant stakeholders as their primary users. They should "seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate, readily accessible, at no cost, and without retribution to the party that originated the issue or concern . . . [and] should not impede access to judicial or administrative remedies."<sup>191</sup>

#### IV. CONCLUSION

In this article, I analyze recent attempts by intergovernmental, institutional, and private bodies to hold banks accountable for the HR impacts of their lending decisions. I highlight a number of problems in the formal legal structures that govern MNEs, and I examine four

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185. *Id.* at 26.

186. *OECD Guidelines*, *supra* note 27, at 34.

187. *Id.*

188. *IFC Performance Standards*, *supra* note 27, at 9.

189. *Id.* at 3-4.

190. *How We Work: Ombudsman*, *supra* note 75.

191. EQUATOR PRINCIPLES 2013, *supra* note 92, at 8.

soft law instruments that attempt to address the resultant governance gap.

My analysis yields several important conclusions. First, all of the instruments assessed in this article recognize that financial institutions have HR responsibilities, including leverage-based responsibility, which is evidence that there is a strong international consensus on this point.<sup>192</sup> Not only are there high expectations from NGOs, CSOs, and the international community in general, but also financial institutions themselves appear to be embracing the notion that they need to act on HR, even when they are not directly causing the adverse impacts.<sup>193</sup> Initiatives such as the Thun Group of Banks<sup>194</sup> and the 2016 Dutch Banking Sector Agreement on Human Rights,<sup>195</sup> confirm the progressively increasing adherence of private institutions to HR standards.<sup>196</sup>

Second, the UNGP are the common thread across initiatives. They establish widely accepted principles, such as the need for companies to make a policy commitment to respecting HR; the requirement that companies conduct effective due diligence; the importance of prioritization; the necessity of meaningful engagement with stakeholders; and the responsibility to provide for, or contribute to, remediation of adverse HR impacts.<sup>197</sup> The Guidelines closely follow the UNGP, but the existence of NCPs allows for a measure of monitoring and accountability that the UNGP simply do not provide.<sup>198</sup> The IFC PSs and the EP take the principles contained in the

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192. EQUATOR PRINCIPLES 2013, *supra* note 92, at 2; *IFC Performance Standards*, *supra* note 27, at 1; *OECD Guidelines*, *supra* note 27, at 19; *UNGP*, *supra* note 27, at 6-7.

193. *The Business Case for Sustainability*, INT'L FIN. CORP., [https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Business-Case/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Business-Case/) (last visited Nov. 1, 2018).

194. See THUN GRP. OF BANKS, *supra* note 18, at 3.

195. See SOC. & ECON. COUNCIL OF THE NETH., DUTCH BANKING SECTOR AGREEMENT ON INTERNATIONAL RESPONSIBLE BUSINESS CONDUCT REGARDING HUMAN RIGHTS 13 (2016), [https://www.ser.nl/~media/files/internet/publicaties/overige/2010\\_2019/2016/dutch-banking-sector-agreement.ashx](https://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx).

196. See *infra* notes 216-26 (overviewing the problematic interpretation of the UNGP made by the Thun Group of Banks).

197. *UNGP*, *supra* note 27, at 10, 13, 18, 20-21.

198. *OECD Guidelines*, *supra* note 27, at 22, 31.



UNGP and apply it to the specific context of financial institutions.<sup>199</sup> The EP are much softer than the IFC PSs, due to the absence of accountability, monitoring, and enforcement mechanisms; conversely, the CAO contributes significantly to the hardening of the PSs.<sup>200</sup>

Third, the instruments assessed in this article, together with other initiatives<sup>201</sup> have an important *expressive* role because they provide financial institutions with valuable practical guidance as to how they should respect HR in their activities and business relationships.<sup>202</sup> The effectiveness of this guidance is, however, undermined by the weak language in which it is expressed.<sup>203</sup> Furthermore, compliance with the relevant standards is still almost completely reliant on corporate goodwill, states' willingness to enact national legislation meant to enforce corporate HR responsibilities, and perhaps more heavily, on the effectiveness of reputational mechanisms.<sup>204</sup> The normative power of the instruments assessed in this article is further undermined by their failure to express clear moral foundations: they essentially rely upon instrumental arguments linked to the business case for HR.<sup>205</sup> Bending this way is dangerous, because, as Wettstein insightfully

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199. See *IFC Performance Standards*, *supra* note 27, at 1 (listing “commitment to transparency and good governance” as the core operational mandates of corporations); see also *EQUATOR PRINCIPLES 2013*, *supra* note 92, at 2 (recognizing the obligations of financiers to promote human rights measures).

200. Wörsdörfer, *supra* note 96, at 226.

201. *E.g.*, *Promoting Integrity and Transparency in the Banking and Financial Sectors*, U.N. GLOB. COMPACT, <https://www.unglobalcompact.org/take-action/events/231-promoting-integrity-and-transparency-in-the-banking-and-financial-sectors> (last visited Nov. 1, 2018); *UNEP FI Human Rights Guidance Tool for the Financial Sector: Home*, U.N. ENVTL. PROGRAMME FIN. INITIATIVE, <http://www.unepfi.org/humanrightstoolkit> (last visited Nov. 1, 2018).

202. *General Information on Human Rights*, U.N. ENVTL. PROGRAMME FIN. INITIATIVE, <http://www.unepfi.org/humanrightstoolkit/resources.php> (last visited Nov. 1, 2018) (outlining the interconnectivity of international human rights in instruments in the business context).

203. Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14 J. HUM. RTS. 162, 165-174 (2015).

204. See, e.g., Christopher Wright & Alexis Rwabizambuga, *Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles*, 111 BUS. & SOC. REV. 89, 94 (2006) (explaining that firms voluntarily conform to “recognized industry practice” to bolster their reputation in the industry).

205. Wettstein, *supra* note 203, at 176.

notes, instrumental logic respects the concerns of the powerful, and, hence, is frequently at variance with the HR of the powerless.<sup>206</sup>

Fourth, in the contexts where convergence is occurring, soft law instruments are beginning to harden in different ways; for example, there are already several examples of states adopting binding legislation on the issue of banks and HR, and, in the European Union, the Commission has urged member states to develop National Action Plans<sup>207</sup> to implement the UNGP.<sup>208</sup> Soft law comes with significant advantages, such as flexibility in implementation, adaptability to uncertainty, and lower contracting and sovereignty costs;<sup>209</sup> however, it is particularly limited in terms of monitoring, accountability, and victims' access to remedies. There is a stark division of opinion as to the desirability of a binding treaty on business and HR,<sup>210</sup> and an endless range of options as to the shape and strength that such treaty could have,<sup>211</sup> if made. I do not have the space to step into that discussion; but I believe that, treaty or no treaty, there is an immediate need for effective solutions that ensure rights-compatible business conduct at the very least. What the above analysis has demonstrated is that financial institutions have the ability to lead the companies they fund towards compliance with HR law. This is extremely important: at least in the context of foreign investment, banks can potentially become HR enforcers.

In practice, however, it is clear that the results of the application of these instruments are not yet ideal. For example, according to

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206. *Id.*

207. See *Commission Staff Working Document on Implementing the U.N. Guiding Principles of Business and Human Rights - State of Play*, at 7, COM (2015) 144 final (July 14, 2015).

208. UNEP FI & FOLEY HOAG, *supra* note 44, at 53.

209. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

210. See, e.g., Larry Catá Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All*, 38 FORDHAM INT'L L.J. 456, 529 (2015); David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUS. & HUM. RTS. J. 1, 3 (2016).

211. See, e.g., Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41, 43 (2015); Douglass Cassell & Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights*, 6 NOTRE DAME J. INT'L & COMP. L. 1, 17 (2016).

BankTrack, an NGO focused on private sector commercial banks, a large percentage of banks still does not commit to properly implementing due diligence processes: only sixteen out of forty-five banks assessed in 2016 fully committed to carrying out HR due diligence processes, while seventeen did not even mention such process at all.<sup>212</sup> Furthermore, none of the assessed banks demonstrated how they guarantee meaningful consultation with potentially affected groups.<sup>213</sup> Finally, it was discovered that only nine out of the forty-five banks specifically allocated responsibility<sup>214</sup> for addressing HR within the company to clearly identified levels and functions.<sup>215</sup>

Moreover, there is evidence that some banks are resisting the correct and full application of the UNGP. The Thun Group of Banks, an informal group launched in 2011 to foster discussion of the meaning and implications of the UNGP, has so far released two Discussion Papers.<sup>216</sup> The first paper, published in 2013,<sup>217</sup> presented some weaknesses<sup>218</sup> but was well received by commentators; the second paper, circulated in 2017,<sup>219</sup> was more controversial and elicited responses from academics, NGOs, CSOs,<sup>220</sup> the U.N. Working

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212. BANKTRAK BANKING WITH PRINCIPLES, *supra* note 143, at 8.

213. UNGP, *supra* note 27, at 16-17.

214. BANKTRAK BANKING WITH PRINCIPLES, *supra* note 143, at 9.

215. *Id.*

216. *Get All the Facts*, UBS, [https://www.ubs.com/global/en/about\\_ubs/ubs-and-society/how-we-do-business/sustainability/thun-group.html](https://www.ubs.com/global/en/about_ubs/ubs-and-society/how-we-do-business/sustainability/thun-group.html) (last visited Nov. 1, 2018).

217. *Statement by the Thun Group of Banks "The Guiding Principles: An Interpretation for Banks"—A Discussion Paper for Banks on Principles 16–21 of the UN Guiding Principles on Business and Human Rights*, THUN GRP. OF BANKS (Oct. 2, 2013), [https://www.business-humanrights.org/sites/default/files/media/documents/thun\\_group\\_statement\\_final\\_2\\_oct\\_2013.pdf](https://www.business-humanrights.org/sites/default/files/media/documents/thun_group_statement_final_2_oct_2013.pdf).

218. BANKTRACK, ON THE THUN GROUP PAPER ON BANKS AND HUMAN RIGHTS 2, 9 (2013), [https://www.banktrack.org/download/banktrack\\_on\\_the\\_thun\\_group\\_paper\\_on\\_banks\\_and\\_human\\_rights/131129\\_thun\\_group\\_paper\\_final.pdf](https://www.banktrack.org/download/banktrack_on_the_thun_group_paper_on_banks_and_human_rights/131129_thun_group_paper_final.pdf).

219. *See generally* THUN GRP. OF BANKS, DISCUSSION PAPER ON THE IMPLICATION OF UN GUIDING PRINCIPLES 13 & 17 IN A CORPORATE AND INVESTMENT BANKING CONTEXT (2017), [https://www.business-humanrights.org/sites/default/files/documents/2017\\_01\\_Thun%20Group%20discussion%20paper.pdf](https://www.business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf).

220. *See* Letter from BankTrack et al. to the Thun Grp. of Banks, at 1 (Feb. 14, 2017), [https://www.business-humanrights.org/sites/default/files/documents/170214\\_Open\\_letter\\_to\\_Thun\\_Group.pdf](https://www.business-humanrights.org/sites/default/files/documents/170214_Open_letter_to_Thun_Group.pdf) [hereinafter Letter from BankTrack et al.].

Group on Business and Human Rights,<sup>221</sup> and even John Ruggie himself, who advised the group to amend their position.<sup>222</sup> Significant misconstructions of the UNGP were found in the document; for example, it conflated the categories of causation and contribution into one, and assumed banks generally only contribute to HR violations through their own activities, such as employment practices.<sup>223</sup> In addition, it contained three case studies which could be seen as contribution to harm, but were classified as “directly linked” instead.<sup>224</sup> Ruling out the possibility that banks can contribute to HR violations and assuming that linkage is the norm has serious implications—most notably, in terms of remedy.<sup>225</sup> In fact, another problematic point was the affirmation that “access to remedy . . . does not apply” in cases of direct linkage.<sup>226</sup>

The Thun Group responded to public criticism by updating the Paper a few months later, but the revisions were less than satisfactory: although some of the most problematic language was removed, the group maintained the idea that “banks . . . are more likely to be directly linked to adverse [HR] impacts” and that only “under exceptional circumstances [does the provision of financial products and services] reach the level of contribution,”<sup>227</sup> it also did not change any of the

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221. See Letter from Michael K. Addo, Chairperson, U.N. Working Group on Business & Human Rights to the Thun Group of Banks, U.N. Doc. SPB/SHD/UH/ff (Feb. 23, 2017), <https://www.business-humanrights.org/sites/default/files/documents/20170223%20WG%20BHR%20letter%20to%20Thun%20Group.pdf> [hereinafter Letter from Addo].

222. JOHN RUGGIE, COMMENTS ON THUN GROUP OF BANKS DISCUSSION PAPER ON THE IMPLICATIONS OF UN GUIDING PRINCIPLES 13 & 17 IN A CORPORATE AND INVESTMENT BANKING CONTEXT 1, 3-4 (2017), [https://www.ihrb.org/uploads/submissions/John\\_Ruggie\\_Comments\\_Thun\\_Banks\\_Feb\\_2017.pdf](https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf) [hereinafter Letter from Ruggie].

223. Letter from Addo, *supra* note 221, at 3; Letter from BankTrack et al., *supra* note 220, at 3; Letter from Ruggie, *supra* note 222, at 2.

224. Letter from Addo, *supra* note 221, at 4; Letter from BankTrack et al., *supra* note 220, at 3; Letter from Ruggie, *supra* note 222, at 3.

225. Letter from Addo, *supra* note 221, at 4-5; Letter from BankTrack et al., *supra* note 220, at 2-3; Letter from Ruggie, *supra* note 222, at 3.

226. Letter from BankTrack et al., *supra* note 220, at 3; Letter from Addo, *supra* note 221, at 4.

227. THUN GRP. OF BANKS, PAPER ON THE IMPLICATION OF UN GUIDING PRINCIPLES 13B & 17 IN A CORPORATE AND INVESTMENT BANKING CONTEXT 3, 6, 18-21 (2017), <https://www.business-humanrights.org/sites/default/files/documents/>

three case studies mentioned above.<sup>228</sup> The updated document predictably caused further disappointment and concern<sup>229</sup> and raised questions as to how far banks are willing to go to enforce HR.

The proposition of this paper, that banks can and should play the role of HR enforcers and thus contribute to closing the governance gaps brought about by globalization, is therefore not immediately verified. If banks are to lead foreign investors towards compliance with HR law, more needs to be done on three fronts. First, banks need to make a serious and rigorous interpretation of the existing soft law HR instruments, promoting the hardening of the principles they contain, and favoring expansive views of their own HR responsibilities. They should do so through meaningful engagement with authoritative sources of interpretation and with the relevant stakeholders. Second, the existing instruments should be strengthened through more effective monitoring and accountability mechanisms. The CAO provides a good example in this regard and should be replicated in the context of the EP and other initiatives within the sector. Third, banks need to embrace an enforcement role, which requires them to align their internal culture with HR goals. Though this is arguably the hardest objective to accomplish, the trend seems to be moving in that direction. While international law does not provide for a firm answer to the problem, banks have the opportunity to be a vital part of the solution.

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2017\_12\_Thun%20Group%20of%20Banks\_Paper\_UNGPs%2013b%20and%2017.pdf.

<sup>228</sup>. See Ryan Brightwell, *Banks and Human Rights: The Thun Group Must Step Up*, BANKTRACK (Mar. 27, 2018), [https://www.banktrack.org/blog/banks\\_and\\_human\\_rights\\_the\\_thun\\_group\\_must\\_step\\_up](https://www.banktrack.org/blog/banks_and_human_rights_the_thun_group_must_step_up).

<sup>229</sup>. See, e.g., Letter from BankTrack et al. to the Thun Group of Banks, at 1 (Mar. 22, 2018), <https://www.business-humanrights.org/sites/default/files/documents/180322%20Thun%20Group%20CSO%20letter.pdf>.