16

The Emerging Human Rights and Environmental Due Diligence Responsibility of Financial Institutions

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16.1	**One of the Last Bastions of Corporate Social Responsibility**	16.01	**16.4**	**The Controversy Regarding the Scope of the Due Diligence Responsibility of Financial Institutions**	16.30
16.2	**The Distinction between the Obligations of Public and of Private Financial Institutions**	16.10	**16.5**	**Conclusion**	16.55
16.3	**Corporate Due Diligence as a Responsibility Proxy**	16.18			

16.1 One of the Last Bastions of Corporate Social Responsibility

16.01 It is a truism to say that the issue of corporate social responsibility (CSR) has gained momentum over the last two decades. CSR is no longer circumscribed to a handful of soft law instruments long criticized for their lack of effectiveness. New initiatives have widened the scope of CSR disciplines and further developed their implementation and compliance mechanisms. While most of the attention has been focused on the regulation of global value chains and on economic sectors in which human rights, social and/or environmental concerns are prevalent (extractive industries, garment industries, agriculture, etc), the financial sector has not escaped the CSR wave.

16.02 Private financial institutions have indeed been subject to a growing body of norms, standards, and codes aimed at promoting their CSR policies and specifying the implementation of general norms for the financial sector. In the wake of the earlier practice of international financial institutions, initiatives to promote sustainable finance plummeted in the years after the launch of the 'Equator Principles' in 2003—a set of voluntary guidelines to ensure that large-scale development or construction projects that financial institutions 'finance and advise on are developed in a manner that is socially responsible and reflect sound environmental management practices'.[1] At the UN level—and more specifically under

[1] The author would like to thank Mr Dong Hun Han for insightful discussions on the matter and Mr Ho Lam for his research assistance in the early stages of this project. All errors remain my own. All websites accessed 1 September 2022. The cut-off date is 31 May 2022.

Equator Principles, Preamble, <https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf>. See S Lazarus, 'The Equator Principles at Ten Years' (2014) 5 Transnational Legal Theory

Régis Bismuth, The Emerging Human Rights and Environmental Due Diligence Responsibility of Financial Institutions In: International Monetary and Banking Law post COVID-19. Edited by: William Blair, Chiara Zilioli and Christos V. Gortsos, Oxford University Press. © the many contributors 2023. DOI: 10.1093/law/9780192869753.003.0016

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the auspices of the United Nations Environment Programme Finance Initiative (UNEP FI)—a partnership between UNEP and the global financial sector—the 'Principles for Responsible Investment' (PRI) were adopted in 2006. This initiative aimed at promoting and incorporating environmental, social, and governance (ESG) issues into investment decision-making processes and now has more than 4,000 signatories.[2] The 'Principles for Sustainable Insurance' followed in 2012, and the 'Principles for Responsible Banking', which were adopted in 2019, were endorsed by more than 240 banks, representing a third of the global banking sector.[3] More recently, in 2021, more than 50 banks, accounting for a fourth of the global banking sector, have joined the UNEP FI Net-Zero Banking Alliance and have committed to aligning their lending and investment portfolios with net-zero emissions by 2050.[4] At the EU level, within the framework of the ambitious Action Plan on Financing Sustainable Growth,[5] a new regulation on sustainability-related disclosures in the financial services sector was adopted in 2019.[6] It imposes on financial institutions specific transparency obligations concerning both the integration of sustainability risks in the investment decision-making process and adverse impacts on sustainability matters at entity and financial products levels. As part of the Action Plan, EU institutions are also currently envisaging a European green bond standard[7] as well as integrating sustainability risks into prudential regulatory requirements.[8]

16.03 This brief overview shows that major initiatives aimed at promoting CSR and sustainable development goals in the financial sector intend mainly to reorient capital flows towards what is labelled 'sustainable investment', integrate sustainability issues (especially climate change) into risk management, and foster transparency of financial institutions on these matters. The thrust of such initiatives is to generate a market-driven system of incentivization toward sustainability. Such a system relies mainly on disclosure and institutional communication, the management of financial and reputation risks and, as leverage, highlights the behaviour of institutional clients, consumers, non-governmental organizations (NGOs), and other stakeholders to signal financial institutions that have not taken the sustainability turn.

16.04 Such important advances must not, however, overshadow the more sensitive issue of the responsibility—in the sense of liability—of financial institutions. Promoting investments in

417; CA Williams, 'Regulating the Impacts of International Project Financing: The Equator Principles' (2013) 107 American Society of International Law Proceedings 303.

[2] <https://www.unpri.org>.

[3] <https://www.unepfi.org>.

[4] See <https://www.unepfi.org/net-zero-banking/commitment>. See also UNEP FI, 'Guidelines for Climate Target Setting for Banks' (April 2021) <https://www.unepfi.org/net-zero-banking/commitment>.

[5] EU Commission, 'Action Plan: Financing Sustainable Growth' COM(2018) 97 final (8 March 2018). See also EU High-Level Expert Group on Sustainable Finance, 'Financing a Sustainable European Economy, Final Report' (2018) <https://ec.europa.eu/info/sites/default/files/180131-sustainable-finance-final-report_en.pdf>.

[6] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1.

[7] EU Technical Expert Group on Sustainable Finance, 'Proposal for an EU Green Bond Standard' (June 2019) <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190618-sustainable-finance-teg-report-green-bond-standard_en.pdf>.

[8] See E Kivisaari, 'Sustainable Finance and Prudential Regulation of Financial Institutions' in PG Fisher (ed), *Making the Financial System Sustainable* (CUP 2020) 75. See also N De Arriba-Sellier, 'Turning Gold into Green: Green Finance in the Mandate of European Financial Supervision' (2021) 58(4) Common Market Law Review 1097.

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renewable energy is one thing. Determining what responsibilities stem from financing fossil fuels or businesses whose activities have adverse impacts on the environment or on human rights is another. Of course, financial institutions, just like any other corporations, may breach labour standards and engage in discriminatory or corrupt practices. It is unlikely that they, their subsidiaries, or main suppliers (software and IT services, legal services, consulting firms, etc) structurally engage in activities significantly harming the environment or breaching the most fundamental human rights[9] (eg prohibition of child labour, slavery, human trafficking, crimes against humanity, etc). But this may, nonetheless, be the case for their corporate clients or the businesses they advise or in which they have a financial stake. In such situations, may banks be held liable on the basis of the financial services or products they provide and/or on the basis of a financial lien such as a minority equity stake?

16.05 While the issue of corporate responsibility in global value chains for environmental harm or human rights abuses has been at the centre of discussions over the last many years,[10] the responsibility of financial institutions in the global value chain of money appears to be one of the new frontiers—and is probably one of the last bastions—of corporate accountability. So far, financial institutions, and mostly banks, have been mainly sanctioned for offshore tax evasion (UBS, Credit Suisse, Bank Hapoalim, Swedbank, Commerzbank, etc), violation of economic sanctions programmes (BNP Paribas, HSBC, ING, Barclays, etc), money laundering and/or terrorist financing (HSBC, Westpac, Rabobank, etc) as well as transnational corruption (Goldman Sachs, Deutsche Bank, Société Générale, etc).[11] Leaving aside unilateral economic sanctions (primarily US ones), the aforementioned criminal offences are part of the CSR regime.[12] However, such sanctions are usually the result of specific and aggressive prosecution techniques with an extraterritorial reach that rely on efficient instruments of negotiated justice. This is particularly the case in the emerging transnational anti-corruption regime.[13]

16.06 Victims of human rights abuses and environmental degradation by companies cannot benefit from such refined corporate accountability mechanisms, which are firmly administered by public authorities and rely on increasingly effective international judicial cooperation and corporate compliance regimes. Most of the time, such victims also need to overcome many procedural and substantive hurdles (such as jurisdictional issues, the principle of separate legal personality, and lifting the corporate veil) when they intend, for instance, to target a parent entity or a lead company for the activities, respectively, of their subsidiary or their supplier in the value chain.

[9] We are referring here to activities which have adverse environmental and human rights impacts stemming directly from the goods and services purchased from external suppliers. Of course, an external supplier of a financial institution may be involved in such activities outside this commercial relationship (eg an IT company providing services to a foreign government for unlawfully spying and tracking political dissidents).

[10] See L Enneking and others (eds), *Accountability, International Business Operations, and the Law—Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge 2020).

[11] For an overview, see P-H Verdier, *Global Banks on Trial—U.S. Prosecutions and the Remaking of International Finance* (OUP 2020).

[12] See, eg, 'OECD Guidelines for Multinational Enterprises' (2011), s VII (Combating Bribery, Bribe Solicitation and Extortion) and s XI (Taxation).

[13] For an overview, see R Bismuth and others (eds), *The Transnationalization of Anti-Corruption Law* (Routledge 2021).

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16.07 Victims of human rights abuses have already instituted legal actions against financial institutions. For instance, in *Kashef v BNP Paribas S.A.*, victims of the Sudanese genocide filed in 2016 a class action (still pending) in the Southern District of New York against BNP Paribas and several of its branches and subsidiaries, as well as against individual defendants working for the bank. The claims are based on primary liability (negligence, etc) and secondary liability allegations (conspiracy or aiding and abetting of battery, assault, wrongful death, etc) in the broader context of the assistance and financing BNP Paribas provided to the Sudanese government, while designing schemes to help Sudanese entities evade US sanctions. These were acts for which the bank had to pay a nine billion dollar fine to US authorities in 2014.[14] In *Jesner v Arab Bank*, victims of terrorist attacks in Israel, West Bank, and Gaza filed suits under the Alien Tort Statute (ATS) in US courts against the Arab Bank, a major Jordanian financial institution, for maintaining accounts for terrorists and for allowing funds transfers to terrorist groups. Eventually, the US Supreme Court considered that ATS liability cannot extend to foreign corporations and the claims were unsuccessful on jurisdictional grounds.[15]

16.08 Beyond claims in which human rights abuses are linked to violations of economic sanctions, money laundering, or terrorist financing,[16] financial institutions have been under increasing pressure from civil society and NGOs. As an example of a recent high-profile complaint in which both human rights and environmental consideration were at stake, in 2016, more than 25 NGOs wrote an open letter to the Chair of the Equator Principles Association expressing their 'deep concern about the involvement'[17] of 14 financial institutions (most of which adhered to the Equator Principles) in the financing of the Dakota Access Pipeline.[18] The letter pointed out the adverse environmental impact of the project and the fact that financing fossil fuel infrastructures like this project is incompatible with the Equator Principles and climate change commitments. It also pointed out that the project affects Native Americans, infringes the indigenous rights commitments of the Equator Principles Financial Institutions (EPFIs) and constitutes a 'gross violation of Native land titles'.[19] This initiative was taken very seriously by the financial institutions targeted—most of which replied with very general statements about their CSR commitments[20]—as well as by the developers of the project, which sued some of the NGOs involved. They argued

[14] See case note *Kashef v BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019) in (2021) 133 Harvard Law Review 1103. See also, *Kashef v BNP Paribas S.A.*, 16 Civ. 3228 (AKH) (SDNY 3 May 2022) (dismissing the motion for *forum non conveniens*).

[15] *Jesner v Arab Bank*, 138 S. Ct. 1386 (2018). See case notes in (2018) 112 American Journal of International Law 720; (2018) 132 Harvard Law Review 397.

[16] See also about the *Rabobank* case, M Cupido and others, 'Holding Businessmen Criminally Liable for International Crimes Lessons from the Netherlands on How to Address Remote Involvement' in L Enneking and others (eds), *Accountability, International Business Operations, and the Law—Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge 2020) 170, 178.

[17] BankTrack and others, 'An Open Letter to the Equator Principles Association' (7 November 2016), <https://www.banktrack.org/article/an_open_letter_to_the_equator_principles_association>. See also 'Environmentalists Target Bankers Behind Pipeline', *New York Times* (7 November 2016).

[18] The financial institutions mentioned in the letter are BBVA, BNP Paribas, Bank of Tokyo Mitsubishi UFJ, Citigroup, Crédit Agricole, ING Group, Intesa Sanpaolo, Mizuho, Natixis, Société Générale, Sumitomo Mitsui, TD Bank Financial Group, and Wells Fargo.

[19] BankTrack and others (n 17).

[20] Replies are accessible at the following link: <https://old.business-humanrights.org/en/usa-human-rights-concerns-regarding-dakota-access-pipeline/>.

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that by publicly targeting banks financing the pipeline, NGOs were involved in a criminal racketeering enterprise under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. The lawsuit was eventually dismissed by a US federal judge.[21] This case clearly shows that such NGOs complaints are no longer limited to a mere reputational risk but may also herald future legal actions and liability claims against financial institutions.

16.09 It is therefore relevant to explore the different legal channels through which the responsibility of financial institutions may be incurred when their activities are linked to or generate adverse environmental and human rights impacts. It is not possible to study the legal framework applicable in every relevant jurisdiction nor every type of adverse human rights or environmental impact. Our ambition is rather to understand, in a more prospective manner, what major trends are currently shaping how the issue of the responsibility of financial institutions in such cases is likely to be addressed. In that regard, it is necessary (i) to clarify the distinction between the respective obligations of public and of private financial institutions, (ii) to explore the growing importance of the due diligence paradigm for corporations in international law and to what extent it constitutes the 'antechamber' of litigation for financial institutions, (iii) to consider what this due diligence paradigm entails or could entail for financial institutions, and to consider the divergent interpretations it has so far received (from the financial sector, international organizations, and NGOs) with regard to its implementation in practice.

16.2 The Distinction between the Obligations of Public and of Private Financial Institutions

16.10 It is, first, important to clarify the distinction between the obligations of states—and possibly *per extensionem* of some public financial institutions—and those of private financial institutions, as both types of obligations are not necessarily based on the same rules and principles. In this light, this section first discusses the specificity of the obligations of public financial institutions.

16.11 States are parties to several human rights and environmental agreements, and they are also subject to obligations in these fields under international customary law. Under the rules of state responsibility as codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts,[22] the conduct of a state organ—even acting *jure gestionis* (Article 4)—or of an entity exercising elements of governmental authority (Article 5) is attributable to the state—regardless of whether the organ or entity exceeds its authority or contravenes instructions (Article 7). Also, the conduct of a private entity acting on the instructions of, or under the direction or control of, the state would eventually be attributable to it (Article 8). Although central banks, development banks or programmes, sovereign wealth funds, or export credit agencies may operate under different legal frameworks in domestic law from public or private bodies, the conduct of such entities

[21] *Energy Transfer Equity, L.P. et al. v Greenpeace International, et al.*, Case 1:17-cv-00173-BRW-CSM (DND 2018).

[22] See J Crawford and S Olleson, 'The Character and Forms of International Responsibility' in MD Evans (ed), *International Law* (5th edn, OUP 2018) 415.

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is likely to be attributable to their state of origin. In addition to their obligations as a corporate entity, which will be explored below, they are therefore also indirectly bound by the international environmental or human rights obligations of their home state.

16.12 One of the public financial institutions that has been highly proactive with respect to the international legal implications of its activities is the Norwegian sovereign wealth fund. Its 'Council on Ethics' started as early as 2004 assessing the compatibility of its investments with the international legal obligations of the Norwegian state.[23] Although it has operated under a broader mandate that also has the objective to blacklist companies producing tobacco or involved in 'serious violations of fundamental ethical norms',[24] the Guidelines governing the work of the Council of Ethics specify that the fund shall not invest in companies which themselves or through entities they control 'produce weapons that violate fundamental humanitarian principles'.[25] Private companies also invoke, albeit superficially, similar considerations but they resonate differently for this sovereign wealth fund in light of Norway's international obligations. For instance, in one of its decisions, the Council on Ethics considered that the obligation under the 1997 Convention on the Prohibition of Anti-Personnel Mines[26] not to 'develop, produce … directly or indirectly, anti-personnel mines' and not to 'assist, encourage or induce, in any way, anyone to engage in an activity prohibited to a State party'[27] implied that even a modest investment of Norway (and *per extensionem* of the Norwegian sovereign wealth fund) in a company involved in the production of anti-personnel mines would constitute a breach of this treaty.[28]

16.13 Determining what the precise environmental and human rights obligations of public financial institutions are requires careful analysis.[29] Interestingly, some international norms are particularly relevant to the financial activities of public bodies. As an example, Article 2 of the 2015 Paris Agreement provides that, in enhancing the implementation of the 1992 United Nations Framework Convention on Climate Change, it aims 'to strengthen the global response to the threat of climate change, including by … (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'.[30] But more general obligations could suffice to call into question the legality of the conduct of public financial institutions. Claims have targeted, for instance, central banks on the basis of very broad treaty obligations. In April 2021, the NGO ClientEarth filed a suit against the

[23] See S Chesterman, 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of the Norway's Sovereign Wealth Fund' (2009) 23 American University International Law Review 577; R Bismuth, 'Les fonds souverains face au droit international—Panorama des problèmes juridiques posés par des investisseurs peu ordinaires' (2010) 56 Annuaire Français de Droit International 567.

[24] 'Guidelines for Observation and Exclusion from the Government Pension Fund Global' (Unofficial English version) (last updated 2 September 2019) s 2(1)(b) and s 3(f) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2019/12/guidelines-for-observation-and-exclusion-from-the-gpfg-01.09.2019.pdf>.

[25] ibid s 2(1)(a).

[26] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (18 September 1997) 2056 UNTS 211.

[27] Art 1(b) and 1(c) of the 1997 Convention on the Prohibition of Anti-Personnel Mines (n 26).

[28] 'Tilrådning 2002 om utelukkelse av selskapet Singapore Technologies Engineering' Notat til Finansdepartementet (22 March 2012) <https://etikkradet.no/singapore-technologies-engineering-3>.

[29] For a study exploring the international legal obligations of export credit agencies, see K Cook and JE Viñuales, 'Legal Opinion—International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities' (24 March 2021) <https://priceofoil.org/2021/05/04/eca-legal-opinion>.

[30] For more details regarding the obligations stemming from this provision, see Cook and Viñuales (n 29) paras 50ff.

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Belgian National Bank in Brussels for failing to meet environmental, climate, and human rights requirements when purchasing bonds from fossil fuel and other greenhouse gas- intensive companies in the context of the European Central Bank's Corporate Sector Purchase Program (CSPP).[31] The claim is based on Article 11 of the Treaty on the Functioning of the European Union (TFEU) and Article 37 of the EU Charter of Fundamental Rights which both require, as EU Member States obligations, the integration of environmental protection into EU policies in accordance with the principle of sustainable development.[32]

16.14 Leaving aside the international obligations of states potentially applicable, directly or indirectly, to public financial institutions, corporate entities, either public or private (and including, therefore, private financial institutions) are also subject to an emerging body of international environmental and human rights obligations.

16.15 Although most major CSR instruments are still of a soft law nature (*inter alia*, the OECD Guidelines for Multinational Enterprises,[33] the UN Guiding Principles on Business and Human Rights,[34] and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy),[35] they have progressively shaped the applicability of international legal obligations to multinational corporations.[36] The arbitral tribunal in *Urbaser v Argentina* recognized that 'international law accepts corporate social responsibility as a standard of crucial importance'[37] and that 'it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law'.[38] Although it considered that there is no general principle of international law automatically transferring all states' human rights obligations to corporations, it nonetheless pointed out, relying on the UN Guiding Principles on Business and Human Rights (UNGPs), that corporations have an obligation to act in accordance with international human rights.[39] In another investment arbitration case, the tribunal stated that it is also the case 'when it comes to rights and obligations that are the concern of all states, as it happens in the protection of the environment.'[40]

16.16 In order to get a better sense of the responsibility of private financial institutions, it would be pointless to draw up a catalogue of multinational corporations' substantive duties listed in the aforementioned CSR instruments, given that they cover a wide array of obligations.[41]

[31] See 'ClientEarth sues over climate impact of ECB policy' Press Release (13 April 2021) <https://www.clientearth.org/latest/press-office/press/clientearth-sues-over-climate-impact-of-ecb-policy>.

[32] See also 'Letter from ClientEarth to Christine Lagarde, President of the European Central Bank' (13 April 2021) <https://www.clientearth.org/media/jtxnhiba/2021-04-12-letter-from-clientearth-to-christine-lagarde.pdf>.

[33] OECD Guidelines for Multinational Enterprises, Annex I to the Declaration on International Investment and Multinational Enterprise' (25 May 2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> (hereafter OECD Guidelines for Multinational Enterprises).

[34] 'Guiding Principles on Business and Human Rights—Implementing the United Nations 'Protect, Respect and Remedy' Framework' Human Rights Council resolution 17/4 (16 June 2011) (hereafter UNGPs).

[35] 'ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (March 2017).

[36] For an overview, see LC Curzi, *General Principles for Business and Human Rights in International Law* (Brill Nijhoff 2020) 23ff.

[37] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para 1195.

[38] ibid.

[39] ibid.

[40] *David Aven et al v Republic of Costa Rica*, Case No. UNCT/15/3, Award (18 September 2018), para 738.

[41] R Bismuth, 'Deciphering and Revisiting the (Guiding) Principles on Business and Human Rights' in M Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019) 311.

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For instance, the OECD Guidelines for Multinational Enterprises include rules on human rights, labour standards, the protection of the environment, anti-corruption, the protection of consumers, anti-competitive practices, and tax compliance. Its chapter on human rights alone refers to other international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, and to the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.[42]

16.17 Obviously, it would be complicated to catalogue in an exhaustive way the application of such obligations to the financial sector. Rather, in light of current developments, it is more directly relevant to explore the emerging structural duty of corporations to address risks relating to human rights abuses and environmental protection. In that regard, the UNGPs deserve special attention, particularly their provisions on corporate due diligence which constitute the conceptual cornerstone on which are built emerging disciplines relating to the responsibility of financial institutions and which also form the main antechamber of future litigation.

16.3 Corporate Due Diligence as a Responsibility Proxy

16.18 The UNGPs were developed by the late John Ruggie as the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. As an implementation of the UN Business and Human Rights framework 'Protect, Respect and Remedy', the UNGPs revolve around three pillars: first, the state duty to protect human rights; second, corporate responsibility to respect human rights; and third, the joint responsibility of states and businesses to provide access to an effective remedy for those affected. At the heart of the second pillar (corporate responsibility to respect human rights) lies the duty of businesses to conduct 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[43]

16.19 It is useful to clarify the complementarity between the various duties stemming from the UNGPs in order to better understand the importance of the due diligence requirement in practice and its potential in a litigation context.

16.3.1 The relevance of due diligence as the 'antechamber' of corporate liability

16.20 Under the first pillar, states have an obligation 'to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises'.[44] To that

[42] OECD Guidelines for Multinational Enterprises (n 33) 32, para 39.

[43] UNGPs (n 34) Principle 15(b). See also J Bonnitcha and R McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) European Journal of International Law 900 (pointing out the 'centrality of the concept' of due diligence in the UNGPs).

[44] UNGPs (n 34), Principle 1.

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extent, the UNGPs do not, in general, advocate for an obligation to exercise extraterritorial jurisdiction over human rights abuses committed abroad, a position which sparked some criticism.[45] However, the UNGPs emphasize that enterprises under their jurisdiction should 'respect human rights throughout their operations'[46] and that within this framework, corporations 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[47] In order to meet this responsibility, enterprises should have in place policies and processes including, *inter alia*, 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[48] According to Guiding Principle 17 (GP 17), this due diligence should cover adverse human rights impacts that a corporation 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'[49]—and it should therefore cover human rights impacts in all affected jurisdictions.

16.21 This due diligence requirement has also had an influence on the development of other major CSR instruments. It is notable that, in the wake of the adoption of the UNGPs, the Organisation for Economic Co-operation and Development (OECD) undertook a major update of its Guidelines for Multinational Enterprises, which included a new chapter on human rights, incorporating human rights due diligence inspired by the UNGPs[50] and, in the words of John Ruggie, 'drawn virtually verbatim from the Guiding Principles'.[51] While not explicitly mentioning corporate due diligence, other parts of the OECD guidelines also prescribe a due diligence approach. This is, for instance, the case of the chapter on environmental protection which states that enterprises should 'assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them'.[52] Interestingly, as the Dutch National Contact Point pointed out in a complaint against ING for failing to set targets under the 2015 Paris Agreement to reduce the emission of greenhouse gases stemming from its financial products and companies that it financed,[53] under the OECD Guidelines, 'companies are expected to conduct a due diligence process in respect of their environmental impact, including climate impact'.[54]

[45] On this, see Bismuth (n 41) 314–15.
[46] UNGPs (n 34) Principle 2.
[47] UNGPs (n 34) Principle 11.
[48] UNGPs (n 34) Principle 15(b).
[49] UNGPs (n 34) Principle 17(a).
[50] OECD Guidelines for Multinational Enterprises (n 33) 31, 34.
[51] JG Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 Global Governance 5, 11.
[52] OECD Guidelines for Multinational Enterprises (n 33) 43.
[53] 'Klacht tegen ING vanwege schending van de OESO-richtlijnen op het gebied van klimaat' (8 May 2017) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170508_11365_complaint.pdf>.
[54] Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises, 'Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING' Final Statement (19 April 2019) p 3, <https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing>. An agreement was reached between the bank and the NGOs after a mediation process but interestingly, the Dutch NCP affirmed (ibid 5) that 'the OECD Guidelines demand that ING, and other commercial banks, put effort into defining, where appropriate, concrete targets to manage its impact towards alignment with relevant national policies and international environmental commitments' and noted that 'regarding

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16.22 In addition, while originally a soft law instrument, the UNGPs have played a seminal role in the development of CSR policies and corporate due diligence may have some relevance in a litigation context at the domestic level. First, it may play a role in the context of a civil liability claim to characterize the existence of a duty of care of the parent or lead company which had or should have had some knowledge of potential human rights abuses in its supply chain. It is also important to point out that, given the growing recognition of the UNGPs and due diligence obligations in other CSR instruments such as the OECD Guidelines for Multinational Enterprises, the standard of care and expected reasonableness of corporations applicable in negligence law is evolving. Indeed, CSR tools and soft law guidance

> can slip into civil liability through the reasonable person standard and raise the legal threshold of what a company should know and do. The fact that soft law pronouncements are not legally binding does not mean they have no legal effects, even though such effects are subtle and incremental.[55]

16.23 Also, relying on the philosophy of Ruggie's framework, some states have implemented due diligence obligations in domestic law. This is, for instance, the case in both the United Kingdom and Australia. The 'Modern Slavery Act' in both countries, adopted respectively in 2015[56] and 2018,[57] imposes a requirement on some corporations to report on the risks of modern slavery and labour abuses in their operations and supply chains.[58] France went even further with its 2017 statute on the *devoir de vigilance*.[59] It imposes on certain French companies an obligation to draft and implement a 'vigilance plan' aimed at identifying and preventing risks of serious breaches of human rights and adverse impacts on: (i) people's health and safety; and (ii) the environment stemming from the activities of the company and its subsidiaries as well as those of its suppliers with which it has an established commercial relationship.

16.24 Going beyond the British and Australian statutes, the law on the *devoir de vigilance* explicitly provides that companies not complying with this due diligence requirement have an obligation, under general rules of extracontractual responsibility, to repair the harm suffered that the fulfilment of the due diligence would have allowed them to avoid.[60] While there is still some uncertainty as to the applicable standard of proof and the causal link

climate change, the Paris Agreement is currently the most relevant international agreement'. Interestingly also, the Dutch NCP also noted that it 'is sensitive to the argument that financed emissions are indirect and thus more difficult to measure and control. The NCP considers that impact measurement of financed emissions is a new field of expertise, and recognizes the fact that ING, and banks like ING, face considerable challenges in developing an appropriate methodology.'

[55] R Mares, 'Business and Human Rights Symposium: Evolution of the Duty of Care Doctrine in Cases of Business-Related Human Rights Abuses' (22 June 2021) <http://opiniojuris.org/2021/06/22/business-and-human-rights-symposium-evolution-of-the-duty-of-care-doctrine-in-cases-of-business-related-human-rights-abuses>.

[56] UK Modern Slavery Act 2015 (Chapter 30).

[57] Modern Slavery Act 2018, No 153, 2018.

[58] For an overview, see S Rao, *Modern Slavery Legislation—Drafting History and Comparisons between Australia, UK and the USA* (Routledge 2020).

[59] Loi No 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (27 March 2017).

[60] Code de commerce, Art L225-102-5.

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between the failure to comply and the harm suffered,[61] the French Statute clearly illustrates this emerging due diligence/liability nexus. Interestingly, it also covers environmental adverse impacts and therefore, while relying on the UNGPs framework, extends it beyond human rights matters. It should also be noted that, drawing on the French model, the EU is also considering enacting a due diligence obligation at the Union level. In February 2022, the European Commission published a proposal for a directive on corporate sustainability due diligence which would apply to large EU companies and non-EU companies generating turnover in the EU exceeding certain thresholds.[62]

16.3.2 What due diligence entails

16.25 Imposing a due diligence obligation is one thing. Identifying what this obligation implies for corporations—and what it specifically entails for financial institutions—is another. The UNGPs—and the same could be said about the OECD Guidelines—provide only very broad indications as to what human rights due diligence should consist of and there is something of an asymmetry between the centrality of the concept of due diligence in this instrument and the uncertainty as to its precise content.[63] Just to offer a glimpse of how abstract the UNGPs could be in that regard: the commentary of GP17 points out the relevance of risk assessment 'where business enterprises have large numbers of entities in their value chains'; GP18 indicates that the due diligence process should 'draw on internal and/or independent external human rights expertise' and 'involve meaningful consultation with potentially affected groups and other relevant stakeholders'; GP19 advocates for the horizontal integration of human rights due diligence across all relevant business functions and also emphasizes that it should use its leverage to prevent or mitigate adverse human rights impacts; and GP20 indicates that enterprises 'should track the effectiveness of their response'.

16.26 To improve identification of what corporate due diligence could entail in practice for financial institutions, it is useful to recall the three ways in which, according to the UNGPs, a business enterprise can become involved in an adverse human rights impact. In that regard, GP13 states that business enterprises should 'avoid causing or contributing to adverse human rights impacts through their own activities' (GP13(a)) and 'seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products and services by their business relationships, even if they have not contributed to those impacts' (GP13(b)). GP17 specifies that corporate due diligence shall cover all these dimensions. The OECD Guidelines follow similar principles.[64]

[61] Curzi (n 36) 253.

[62] See, European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM(2022) 71 final (23 February 2022).

European Parliament, 'Corporate Due Diligence and Corporate Accountability' Resolution P9 TA(2021)0073 (10 March 2021).

[63] R McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 Business and Human Rights Journal 195, 198.

[64] OECD Guidelines for Multinational Enterprises (n 33) 31.

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Situations falling under the scope of GP13 deserve special attention when it comes to financial institutions, but it is important to make fine distinctions between situations of 'causation', 'contribution', and 'direct linkage'. 16.27

Of course, financial institutions may cause adverse human rights impacts through their own activities. This would be the case, for instance, if they were to discriminate racially against their own employees or if they were unlawfully to disclose confidential information about their clients to public authorities. However, the situations of 'contribution' and 'direct linkage' raise more structural and concrete difficulties for financial institutions. Indeed, it would be complicated to identify across the wide range of activities and services offered by financial institutions those activities and services which are 'contributing to adverse human rights impacts through their own activities' and/or the adverse human rights impacts 'that are directly linked to their operations, products and services by their business relationships, even if they have not contributed to those impacts' and which have to be prevented or mitigated. If banks are vested with a due diligence responsibility, what exactly does this entail in the context, for instance, of a client–bank relationship, a syndicated loan, securities underwriting, financial advice, or a minority equity stake? 16.28

In that regard, an analysis of the respective positions of the financial sector on the one hand and of international organizations and NGOs on the other hand highlights significant divergences as to the interpretation of the notions of 'contribution' and 'direct linkage' in the context of the UNGPs, and eventually as to the scope of the due diligence responsibility of financial institutions. 16.29

16.4 The Controversy Regarding the Scope of the Due Diligence Responsibility of Financial Institutions

The scope of the due diligence responsibility of financial institutions has been subject to various interpretations. Financial institutions, and more particularly banks, have advocated for a minimalist reading of corporate due diligence while international institutions and NGOs have adopted a more proactive stance and have attempted to unleash the full potential of the UNGPs when it comes to the financial sector. These divergent interpretations were possible in the first place because the UNGPs, along with their commentary, do not say a word about the implementation of the 'Business and Human Rights' framework to financial institutions. 16.30

16.4.1 Financial institutions left in a blind spot

The UNGPs only briefly mention 'development finance institutions' as one of the agencies that are potentially 'linked formally or informally to the State',[65] 'export finance institutions' in the context of conflict-affected areas,[66] and international financial institutions when the 16.31

[65] UNGPs (n 34) 7 (Principle 4, Commentary).
[66] UNGPs (n 34) 9 (Principle 7, Commentary).

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state is acting as a member of an international organization.[67] No reference is explicitly made to purely private financial institutions.

16.32 In the wake of the adoption of the UNGPs, the Office of the United Nations High Commissioner for Human Rights (OHCHR) published Frequently Asked Questions (FAQs)[68] as well as an Interpretative Guide focusing more specifically on the second pillar (the corporate responsibility to respect human rights).[69] They are not particularly helpful and are even somewhat contradictory with respect to the distinction between contribution and direct linkage. The Interpretative Guide only briefly mentions, as an example of an 'adverse impact that is directly linked to an enterprise's operations, products or services by its business relationships, but where the enterprise itself may not have contributed to it',[70] the case of 'financial loans to [another] enterprise for business activities that, in breach of agreed standards, result in the eviction of communities'.[71] The FAQs express a different stance when pointing out that 'a company may contribute to an adverse impact if it provides financing to a construction project that will entail forced evictions'.[72]

16.33 The UNGPs and subsequent guidance instruments have been developed mainly with those human rights abuses in mind that occur within a single business enterprise, in a corporate group, or through a global value chain. It is thus not a surprise that most of the envisaged scenarios cover the duties of parent and lead corporations relating to their subsidiaries and suppliers or subcontractors. Thus, in comparison with conventional industrial enterprises, the specificities of financial services have remained in something of a blind spot and have also constituted an opportunity for those willing to adopt a narrow interpretation of the due diligence responsibility. After all, leaving aside the specific field of project finance, financial institutions do not necessarily have technical or strategic knowledge of the activities of their (many) clients and suppliers in multiple segments and industries in the same way conventional enterprises would do with subsidiaries they control and suppliers or subcontractors. This is all the more so when the latter are under the former's economic dominance.

16.34 The absence in the UNGPs, their commentary, the Interpretative Guide, or FAQs of specific guidance as to what due diligence entails for financial institutions has meant, at least for a certain time, the absence of objective interpretative authority and has thus left room for the financial sector to develop its own agenda. However, the OHCHR, the OECD Working Party on Responsible Business Conduct (WPRBC), some NGOs, and John Ruggie himself have attempted, on their own or in response to the positions held by the financial sector, to provide a different interpretation of due diligence during this critical transitional period from soft law to hard law.

16.35 The analysis below will focus mainly on the (debated) interpretation of the notion of direct linkage under the UNGPs, which constitutes a structural issue with regard to the scope

[67] UNGPs (n 34) 11 (Principle 9, Commentary).
[68] OHCHR, 'Frequently Asked Questions about the Guiding Principles on Business and Human Rights' HR/PUB/14/3 (2014).
[69] OHCHR, 'The Corporate Responsibility to Respect Human Rights—An Interpretative Guide' HR/PUB/12/02 (2012)
[70] OHCHR (n 69) 17.
[71] OHCHR (n 69) 17.
[72] OHCHR (n 68) 31.

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of financial institutions' responsibility. This should not of course eclipse other differences of opinions on other issues relating to due diligence, such as the required involvement of stakeholders, the temporal scope of due diligence, and remediation strategies.[73]

16.4.2 Financial institutions' minimalist reading of the due diligence responsibility

16.36 In May 2011, just a few weeks after the adoption of the UNGPs, an informal closed group of bank representatives—named the 'Thun Group of Banks'[74]—gathered in order to discuss 'the meaning of the UN's 'Protect, Respect and Remedy' Framework and the Guiding Principles for the activities of banks'.[75] It published a first discussion paper in October 2013, addressing corporate responsibility to respect human rights, as outlined in GPs 16 to 21.[76] It subsequently published another discussion paper in December 2017, focusing on the interpretation of GP13b on direct linkage and GP17 on due diligence.[77] This latter document is a toned-down version of a paper on the same issue published in January 2017,[78] which generated widespread criticism from the UN Working Group on business and human rights,[79] from more than 30 NGOs[80] and from John Ruggie himself.[81] While there are some differences in language between the two versions, the changes in the amended version are more cosmetic than substantive.

16.37 Surprisingly, although the UNGPs advocate an active engagement with the civil society, experts, and other stakeholders when applying the UNGPs, it is obvious that no consultations have been carried out with these actors within the framework of this work.[82] Noting that the Guiding Principles are part of a process of 'law in the making',[83] and constitute an 'overarching single point of reference for business and human rights',[84] the Thun Group intended to develop its agenda and advance its own vested interests instead of seeking a collaborative

[73] For a general study covering also these aspects, see DH Han, *The Narratives Shaping Banks' Human Rights Due Diligence Obligations* (Masters Thesis, Sciences Po 2021).

[74] The participating banks were Barclays, BBVA, BNP Paribas, Credit Suisse AG, Deutsche Bank, ING, RBS, Standard Chartered, UBS Group AG, and UniCredit, with J.P. Morgan.

[75] Thun Group of Banks, 'UN Guiding Principles on Business and Human Rights—Discussion Paper for Banks on Implications of Principles 16–21' (October 2013) 3 <http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf>.

[76] ibid.

[77] Thun Group of Banks, 'Paper on the Implications of UN Guiding Principles 13b & 17 in a Corporate and Investment Banking Context' (December 2017) <https://www.business-humanrights.org/documents/7638/2017_12_Thun_Group_of_Banks_Paper_UNGPs_13b_and_17.pdf>.

[78] Thun Group of Banks, 'Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context' (January 2017) <https://www.ing.com/MediaEditPage/Thun-Group-discussion-paper.htm>.

[79] The letter (23 February 2017) is available at the following link: <https://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf>.

[80] 'Significant Concerns Regarding Thun Group Discussion Paper' (14 February 2017) <https://corporatejusticecoalition.org/wp-content/uploads/2021/06/Open-letter-to-Thun-Group-170214-1-2.pdf>.

[81] JG 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' (21 February 2017) <https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf>.

[82] 'BankTrack on the Thun Group Paper on Banks and Human Rights' (December 2013) <https://www.banktrack.org/download/banktrack_on_the_thun_group_paper_on_banks_and_human_rights>.

[83] Thun Group of Banks (n 75) 4.

[84] ibid.

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initiative with other international organizations and NGOs. It noted that 'instead of waiting for legal requirements',[85] it was necessary for banks 'to proactively engage in the ongoing debate around the Guiding Principles and their implementation'.[86]

16.38 While welcoming the UNGPs, the Thun Group's position denotes a willingness to stringently narrow the scope of the banks' due diligence responsibility and, to that end, the core of their argument is primarily focused on the—probably exaggerated—specificity of the financial industry compared with conventional economic sectors.

16.39 The Thun Group first attempted to ignore the paradigm shift stemming from the UNGPs implications by suggesting that the due diligence responsibility is just an extension of existing regulatory requirements. It indeed pointed out that 'existing policies and practices may already address human rights risks or be adapted to include a human rights component',[87] mentioning *inter alia* anti-money laundering (AML) policies, Politically Exposed Persons (PEP) policies, anti-discrimination policies, financial inclusion policies, country risk policies and procedures, etc. It is thus not a surprise that it considered that 'in retail and private banking, human rights due diligence should be based on existing policies and practices covering AML and PEP'.[88]

16.40 After recognizing that the provision of financial products and services 'may expose financial institutions to the human rights issues of the operations of their clients',[89] the Thun Group first emphasized the specificity of the bank–client relationship, which has inherent limits as to the influence or leverage that the financial institution could exercise over its client. According to the Thun Group, 'there is a common public perception that banks have strong leverage over their clients' behaviour and can, and should, seek to influence client actions to promote good practice.'[90] I added that 'in practice, the degree of leverage is often a great deal less than popularly believed'.[91] The group noted that 'the degree to which it is feasible for banks to exert influence on their clients' behaviour is a matter of complexity'.[92] Although GP17 considers that human rights due diligence 'will vary in complexity' with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations, the banks have held something of an opposing position, namely, that the complexity of a business sector may limit rather than expand the scope of the due diligence responsibility.

16.41 As to the issue of leverage, the group pointed out that 'given the multitude of stakeholders involved in financial business operations, combined with the multitude of suppliers that may contribute to a business relationship, effectively addressing human rights throughout their business activities is complex for banks'.[93]

16.42 The financial industry 'operates a host of complex processes',[94] and, as 'a competitive mass market, the provision of many products and services offers limited opportunity to exert

[85] Thun Group of Banks (n 75) 3.
[86] ibid 3.
[87] ibid 12.
[88] ibid.
[89] ibid 5.
[90] ibid.
[91] ibid.
[92] ibid.
[93] ibid.
[94] ibid.

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influence on non-financial issues'.[95] In that light, it is surprising to notice that, on the one hand, the Thun Group tended to minimize the influence or leverage they could exercise over their clients while, on the other hand, it considered that human rights due diligence 'is a complex issue for banks as most of their human rights impacts … are addressed through influence, leverage and dialogue rather than through direct action from the banks themselves'.[96]

16.43 Perhaps more importantly, the Thun Group also considered in its second discussion paper that financial institutions are not structurally exposed to the risk of causing or contributing to adverse human rights impacts through their own activities (GP13(a))[97] and that it is only in 'exceptional circumstances' that some form of 'contribution' may be reached.[98] It also stated that financial institutions have only a limited due diligence responsibility when adverse human rights impacts are directly linked to their operations, products and services by their business relationships (GP13(b)). Indeed, instead of relying on how the concept of 'direct linkage' has been construed and interpreted in the context of the UNGPs, the Thun Group introduced a new concept of 'proximity' which does not exist in the UNGPs and its subsequent guidance. According to the Thun Group, 'proximity to an impact' is a suitable criterion for banks to the extent that it indicates 'the degree of directness of linkage between the impact and the product and service offered by the bank'.[99] Under this approach, project-specific loans, unlike general corporate loans, structurally imply a high degree of proximity. The Thun Group therefore assumed that general corporate loans would entail a narrower due diligence responsibility. However, as John Ruggie pointed out, this 'logic is problematic',[100] since the scope of due diligence should depend on the nature of the risk and not on the type of financial services 'on an a priori basis'.[101]

16.4.3 The UN OHCHR and OECD's extensive interpretation of the due diligence responsibility

16.44 The Thun Group's attempt to stringently narrow the scope of the due diligence responsibility for the financial sector eventually did not prevail in the broader transnational debate on the implementation of the UNGPs on financial institutions. Whether as a response to the Thun Group's arguments or as part of their own agenda and activities, various international organizations and NGOs[102] have imposed an extensive understanding of what falls under the scope of 'direct linkage' under GP 13(b).

[95] ibid.
[96] ibid 20.
[97] ibid 3.
[98] ibid.
[99] ibid.
[100] Ruggie (n 81) 2.
[101] ibid. As an illustration, he noted that providing a general loan to a private prison company engaged in severe human rights abuses 'ought to require a very deep dive by the bank, coupled with the imposition of strict conditions if it decides to go ahead with the loan' (ibid).
[102] More specifically the NGO BankTrack which considered that the first Thun Group's discussion paper seeks 'to play down the banking sector's influence and its leverage over clients' and that 'by providing essential financing, banks have a higher leverage than for example a buyer in a supply chain'. The NGO also criticized the Thun Group's lack of engagement with civil society and other key stakeholders as well as the partial coverage of the UNGPs by overlooking the issue of remediation (BankTrack, On the Thun Group Paper on Banks and Human Rights (December 2013) 2–4 <https://www.banktrack.org/download/banktrack_on_the_thun_group_paper_on_banks_and_human_rights>.

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16.45 In November 2013, just a month after the publication of the first Thun Group's discussion paper, the Chair of the OECD WPRBC requested the advice of the OHCHR to clarify the interpretation of the UNGPs when applied to the financial sector. This illustrated once again the special relationship between the UNGPs and the OECD Guidelines for Multinational Enterprises with regard to the scope of the due diligence responsibility. In its subsequent guidance, the OECD has significantly relied on the UNGPs approach as well as on the OHCHR's interpretations. Notably, the OECD relied on this approach in its 2017 report on responsible business conduct for institutional investors[103] as well as in its 2019 report on due diligence for responsible corporate lending and securities underwriting in which it pointed out that its recommendations 'seek to align with the [UNGPs]'.[104]

16.46 In 2013, the OECD WPRBC asked the OHCHR, *inter alia*, 'what is meant by being 'directly linked', both in general and for financial institutions specifically?[105] The OHCHR made it clear that 'the financial sector is covered by the Guiding Principles in the same way as all other sectors',[106] but that there were 'some misconceptions among financial institutions'[107] about the meaning of the UNGPs and, more specifically, about the concept of 'direct linkage', as many financial institutions considered that 'they are indirectly linked to the human rights issues'[108] through the provision of financial services to their clients. The OHCHR pointed out that direct linkage does not mean that 'the enterprise must have some causal relationship to the harm'[109] and that it was necessary to make a distinction between, on the one hand, 'direct links' between the adverse impact and the services a financial institution provides to clients or investee companies and, on the other hand, 'indirect impacts', which would refer to the adverse human rights impacts which their clients cause.[110] The latter concept of 'indirect impacts' does not exist in the UNGPs. As an example, the OHCHR considered that financing a mine involved in a widespread displacement of local communities could contribute (GP13(a)) to adverse human rights impacts if the financing is provided without safeguards in place and that such impacts could be directly linked (GP13(b)) to the products and services of the financial institution when they occur, despite safeguards and risk mitigation strategies implemented by the financial institution.[111]

16.47 The OHCHR clarified its position on these issues in a subsequent paper published in June 2017 in response to a request from the NGO BankTrack seeking advice regarding the application of certain aspects of the UNGPs.[112] BankTrack asked *inter alia* to specify the factors

[103] OECD, 'Responsible Business Conduct for Institutional Investors—Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises' (March 2017) <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.

[104] OECD, 'Due Diligence for Responsible Corporate Lending and Securities Underwriting—Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises' (October 2019) 13 <http://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf>.

[105] OHCHR, 'Request from the Chair of the OECD Working Party on Responsible Business Conduct' (27 November 2013) <https://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf>.

[106] ibid 5.

[107] ibid.

[108] ibid.

[109] ibid 3.

[110] ibid 5.

[111] ibid 6.

[112] OHCHR, 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (12 June 2017) <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

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to be taken into account to determine whether a bank is in a situation of causation, contribution or direct linkage. This is a key issue when putting in place due diligence processes.

16.48 In order to explain the distinction between contribution and direct linkage, the OHCHR has introduced two concepts of 'incentivising harm' and 'facilitating the harm', both of which are related to situations of contribution. According to the OHCHR, 'contribution implies an element of "causality" ' to the extent that the bank's actions or decisions have made more likely the adverse human rights impact directly caused by the client.[113] 'Facilitating the harm' relates to the situation where the financial service provided by the bank makes it possible for the client to cause an adverse impact (eg an infrastructure project which presents clear risks of human rights violations) about which the bank knew or should have known.[114] 'Incentivizing the harm' relates to the situation where the bank's actions increase or facilitate the risks of adverse human rights impacts. This would be the case if, for instance, the bank were to advise a client, in the context of a large infrastructure project, to significantly reduce costs, thereby making the risk of environmental degradation for local communities more likely.[115] Leaving aside cases of 'incentivizing' and 'facilitating,' the other adverse impacts associated with the financial institution's products and services 'may fall into the "direct linkage" category'.[116] This category is, therefore, significantly broader than envisaged by the Thun Group—and the scope of the due diligence responsibility of financial institutions is thereby expanded further.

16.49 The OHCHR also pointed out that there is a continuum between the notions of contribution and direct linkage, since a bank's involvement and impact may shift over time depending on its own actions or omissions. For instance, if a bank eventually finds during a due diligence review that adverse human rights impacts are linked to its operations, products, or services, and fails to take appropriate steps to prevent or mitigate the impacts (under GP13(b)), it could eventually be seen 'to be facilitating the continuance of the situation'[117] and then be characterized as a situation of contribution (under GP13(a)). To some extent, the OHCHR's approach incentivizes financial institutions to adopt a maximalist conception of due diligence for situations of 'direct linkage' to prevent them from being subsequently characterised as contribution—a change which could have significant practical implications in terms of compliance cost but also in the context of a tort claim or a criminal complaint.

16.50 The OHCHR has also further elaborated on the application of the UNGPs to the financial sector in more specific cases.[118] When a request was made as to whether financial institutions acting as minority shareholders are covered by the UNGPs, it considered that the percentage of shares held 'is not a factor in determining whether there is a business relationship for the purposes of [GP13(b)]'[119] and that even a 1 per cent share in a company involved in

[113] ibid 5.
[114] ibid 6.
[115] ibid 8.
[116] ibid 6.
[117] ibid 7.
[118] On that matter, see also OHCHR, 'The Application of the Guiding Principles on Business and Human Rights to Minority Shareholdings of Institutional Investors' (26 April 2013) <https://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf>.
[119] OHCHR (n 105) 6.

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human rights violations constitutes a situation of direct linkage.[120] The OECD WPRBC follows a similar approach[121].

16.51 The OHCHR's doctrine on the due diligence responsibility for the financial sector, which has been endorsed by the OECD WPRBC's recommendations,[122] clearly contradicts the Thun Group's attempt 'to promote a minimalist interpretation of their responsibilities'.[123] It is worth noting that, when targeted by NGOs, some financial institutions still embrace the Thun Group's stance on 'proximity', tending to adjust the scope of the due diligence according to the nature of the financial product or service provided. This is, for instance, the case of Société Générale and Macquarie Capital, which have been appointed as financial advisors for the debt and equity financing for the construction of its Rio Grande LNG and Rio Bravo Pipeline projects, which have been targeted by several NGOs for their adverse environmental and human rights impacts. In a reply to the NGOs' accusation, Société Générale stressed that 'as an advisor bank, [its] role is to provide financial services to its client to support them with the best possible development of their project' and that, contrary to the NGOs' claim, it 'does not provide any financing'[124]—thereby suggesting that acting as a mere financial advisor does not entail in substance the same responsibility as that stemming from financing the project.

16.52 The OHCHR's doctrine has also been followed by OCED National Contact Points (NCPs), government-supported offices whose core duty is to advance the effectiveness of the OECD Guidelines for Multinational Enterprises. More specifically, NCPs have to promote the OECD Guidelines and, as a non-judicial grievance mechanism, have the responsibility for 'contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances'.[125]

16.53 For instance, in 2016, the French NCP received a referral from the North American trade union targeting the French bank Natixis and its then asset management entity Natixis Global Asset Management for the activities of their US subsidiary, AEW Capital Management, in relation to a hotel property in California owned by one of its US clients, a pension fund called Utah Retirement System. After a dispute arose at the hotel when the employees wanted to unionize, the trade union took action in the United States against the hotel's operator and owner but also, before the French NCP, against Natixis and its asset management subsidiary. The French NCP offered its good offices and the dispute was eventually ended. It is worth noting that the French NCP considered that the OECD Guidelines applied to the Natixis Group. It noted that, while the hotel's operator 'had very likely caused the alleged adverse impact',[126] Natixis and its French subsidiary Natixis Global Asset Management 'had not taken due diligence measures in compliance with the OECD Guidelines vis-à-vis their

[120] ibid 6–7.
[121] OECD (n 103) 13.
[122] See (n 103) and (n 104).
[123] BankTrack, 'Banks and Human Rights: The Thun Group Must Step Up' (27 March 2018) <https://www.banktrack.org/blog/banks_and_human_rights_the_thun_group_must_step_up>.
[124] Société Générale, 'Societe Generale's Position Following Several NGO Actions' (14 September 2018) <https://www.societegenerale.com/en/responsability/csr-ambition/dialogue-and-transparency-archives>.
[125] OECD Guidelines for Multinational Enterprises (n 33) 68.
[126] 'Natixis and NGAM in the United States of America—Specific Instance, Report from the French National Contact Point' (5 December 2017) 3, <https://www.tresor.economie.gouv.fr/Articles/2017/12/14/5-decembre-2017-rapport-du-pcn-francais-dans-la-circonstance-specifique-natixis-ngam-aux-etats-unis>.

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American subsidiary AEW Capital Management'. It also further pointed out that in the context of the advice provided to the hotel's owner, the American subsidiary AEW Capital Management 'did know that American enterprises were causing, contributing to, or that their activities were directly linked to, the adverse impact alleged [by the trade union]'[127] and that 'AEW's activities were potentially linked or contributed to the adverse impact alleged by Unite Here since it did not act to remedy the situation'.[128] Interestingly, the French NCP considered that due diligence requirements have to apply even in the context of the financial advice provided to the hotel's owner and thus was not limited to a situation of equity participation, even with a minority equity stake. In this light, the French NCP followed the OHCHR's doctrine and its maximalist conception of due diligence.

16.54 The OHCHR has also been requested to provide additional guidance in order to correct what NGOs have considered to be wrongful interpretations of 'direct linkage' by OECD NCPs. The Swiss NCP received a submission from an NGO concerning UBS's alleged business relationship with the Chinese corporation Hikvision which, according to the NGO, manufactures technology used for surveillance of Uighurs and other minorities in the Xinjiang. In its initial assessment of the submission, the Swiss NCP decided to hear only one part of the complaint against UBS, since it considered that 'in relation to UBS's role as custodian for Hikvision shares on behalf of clients … no business relationship between UBS and Hikvision exists'.[129] The NGOs BankTrack and OECD Watch considered the Swiss NCP's decision as 'deeply problematic'[130] as more banks might offer these services 'essentially as a way to screen out linkage and avoid taking any responsibility despite their crucial role in the value chain'.[131] It is within this framework that they asked the OHCHR to clarify the interpretation of the UNGPs on this matter. In August 2021, the OHCHR considered that there would be a 'business relationship' under the UNGPs between a financial institution and a company in which it holds shares on behalf of a client, as a custodian or nominee shareholder to the extent that 'there is a direct link between its service and the investee company'.[132] This business relationship should therefore be covered in the due diligence process under GP13(b). In this kind of situation, financial institutions are not equipped with the usual tools available to beneficial owners, but the OHCHR notes—perhaps too optimistically—that 'they have multiple avenues to exercise leverage'[133] (participating in collaborative efforts through stakeholder engagement platforms to put pressure on investee companies, etc). If it eventually happens that the financial institution lacks the leverage to

[127] ibid.
[128] ibid.
[129] National Contact Point of Switzerland, 'Initial Assessment—Specific Instance Regarding UBS Group AG submitted by the Society for Threatened Peoples Switzerland' (20 January 2021) <https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_F%C3%A4lle/ubs_2021/initial_assessment_ubs_stp_2021.pdf.download.pdf/Swiss%20NCP__Initial%20Assessment_UBS_STP_forpublication.pdf>.
[130] BankTrack, 'Swiss NCP Misses the Mark on UBS Links to Mass Surveillance of Uighurs' (3 March 2021) <https://www.banktrack.org/article/swiss_ncp_misses_the_mark_on_nominee_shareholdings_in_ubs_case>.
[131] ibid.
[132] OHCHR, 'OHCHR Response to Request from BankTrack and OECD Watch for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights Where Private Sector Banks Act as Nominee Shareholders' (30 August 2021) 3 <https://www.ohchr.org/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf>.
[133] ibid 6.

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prevent or mitigate the adverse impacts under the UNGPS, 'it should consider ending the relationship'.[134] In its final statement, the Swiss NCP did not reconsider its position in light of the UNCHR's clarifications.[135] However, given the influence the OHCHR's doctrine on 'direct linkage' has had over the OECD WPRBC's recommendations, it would be complicated for other NCPs blatantly to ignore these latest developments.

16.5 Conclusion

16.55 In the last decade, the issue of the corporate social responsibility of financial institutions has entered a new era. While ESG disciplines and indicators have captured most of the attention, these developments should not overshadow the sensitive and emerging responsibility of financial institutions for human rights abuses and environmental degradation related to their activities and, more specifically, the products and services they provide. In this regard, the development of corporate due diligence obligations, through soft law instruments in the first place, has proven to be a powerful responsibility proxy likely to facilitate future liability claims. Corporate due diligence is based on the idea that a business enterprise should not evade its responsibility to respect human rights when abuses, primarily attributable to third parties, have been committed within the framework of its activities or business relationships. In this light, under the UNGPs, corporate due diligence should cover adverse human rights impacts that a corporation 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'. The OECD Guidelines for Multinational Enterprises, which in addition cover environmental protection, have followed a similar approach.

16.56 The UNGPs have been developed primarily with human rights abuses occurring in corporate groups or through global value chains in mind. Due diligence obligations have thus been shaped mainly for parent and lead corporations in relation to the respective activities of their subsidiaries and suppliers or subcontractors. When the issue of the application of the UNGPs to financial institutions came to the fore, the focus was no longer on subsidiaries, suppliers, and contractors of conventional enterprises but rather on the many clients of financial institutions as well as business enterprises in which they have a minority equity stake. Unsurprisingly, different interpretations of the scope of due diligence obligations in the global value chain of money have been put forward by, on the one hand, financial institutions and, on the other hand, the UN OHCHR, the OECD, and NGOs. More specifically, what constitutes 'direct linkage' has been a major point of contention during this transitional period from soft law to hard law. Unlike financial institutions which have advocated a minimalist understanding of the concept, the OHCHR has embraced a broad interpretation of 'direct linkage' so that there are potentially no operations, products, or services that

[134] ibid.

[135] National Contact Point of Switzerland, 'Final Statement—Specific Instance regarding UBS Group AG submitted by the Society for Threatened Peoples Switzerland' (20 December 2021) <https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_F%C3%A4lle/ubs_2021/abschlusserklaerung_ubs.pdf.download.pdf/SwissNCP_Final%20Statement_UBS_STP_forPublication.pdf>.

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would not fall within the scope of the due diligence responsibility under the UNGPs—a view the OECD subsequently endorsed. Following this approach, the breadth of due diligence depends on the likelihood and gravity of adverse human rights impacts and not on the type of financial product or service provided to the client or on the proximity or leverage the financial institution has towards or over the client (eg likely to be greater in the context of project finance than in general corporate loans).

16.57 This is an issue of the utmost importance for financial institutions since the due diligence process aims to identify, prevent, mitigate, and account for how they address their impacts on human rights and *per extensionem* on the environment—and where this is not possible, as an ultimate option to end the relationship with the client. It will be interesting to see how due diligence obligations will be implemented in domestic statutes or applied by domestic courts with regard to the financial sector. The European Commission's proposal for a directive on corporate sustainability due diligence tends at this stage to follow a minimalist interpretation of the due diligence responsibility of financial institutions and it remains to be seen whether it will be kept in the final version.[136] It appears, nonetheless, that for financial institutions, maintaining operations, products, or services linked to such adverse impacts may have significant consequences in terms of civil or criminal liability in the future.

[136] The current directive proposal (n 62) provides that when financial institutions 'provide credit, loan or other financial services, identification of actual and potential adverse human rights impacts and adverse environmental impacts shall be carried out only before providing that service' (Art 6(3)). It also provides that 'as regards potential adverse … that could not be prevented or adequately mitigated … the company shall be required to refrain from entering into new or extending existing relations' (Art 5(5) but that 'by way of derogation … [financial institutions] shall not be required to terminate the credit, loan or other financial service contract when this can be reasonably expected to cause substantial prejudice to the entity to whom that service is being provided' (Art 5(6)). The European Commission pointed out in its Explanatory Memorandum that 'despite the fact that OECD guidance covers the financial sector, it is not included in the high-impact sectors due to its specificities'.

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