

UN Guiding Principles on Business and Human Rights

Discussion Paper for Banks on Implications of Principles 16–21

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Introduction

This document

- i) is based on the UN Guiding Principles on Business and Human rights as an overarching global standard
- ii) is the result of discussions among a group of banks interested in sharing their experiences and ideas regarding implementation of the Guiding Principles
- iii) is intended as a discussion paper, providing thoughts on what the topic of human rights might mean for banks in practice and initial guidance to banks keen to address human rights issues in their core business activities – both to minimise potential adverse impacts to rights holders and related risks to banks, and to identify opportunities to promote good practice
- iv) focuses on Guiding Principles 16–21 (relating to the corporate responsibility to respect human rights), which were considered the most relevant to participating banks’ specific issues
- v) focuses on the human rights implications arising from banks’ business relationships with clients, and not on the broader impacts of the banking industry on society
- vi) suggests an approach to the assessment of risks and the scope and depth of due diligence which may be undertaken
- vii) does not address issues that are non-specific to the banking sector (e.g., supply chain screening, employment practices) where there is already detailed precedent and guidance, but refers to practices of banks’ clients where these may be relevant for human rights
- viii) supports existing frameworks and guidelines and reflects relevant parts therein
- ix) is intended to further reflection among banks interested in taking the issues and debate forward
- x) recognises that many banks already incorporate human rights considerations as part of their normal operating processes.

The Thun Group – background and drivers

The Thun Group of Banks is an informal group of bank representatives that have been discussing the meaning of the UN’s “Protect, Respect and Remedy” Framework” and the Guiding Principles for the activities of banks. The name derives from the location where the group met for two workshops in May 2011 and March 2012, respectively, but does not constitute a formal entity of any kind. The Group consists of banks which have a genuine interest in gaining a better understanding of the “Framework” and the “Guiding Principles” and in looking for ways in which they can be applied in the banking business. The discussions of the Thun Group banks were assisted by expert input from the [University of Zurich Competence Centre for Human Rights](#), a member of the [Swiss Centre of Expertise in Human Rights](#).

The work of the Thun Group is motivated by the following drivers:

1. Acting responsibly: Respecting human rights as “the right thing to do” and an integral part of responsible business conduct.
All of the participating banks are committed to respect human rights in their business activities. The motivation for this commitment is twofold: it reflects responsible business practice by minimising related risks and underlines the banks’ desire to manage their impacts on society responsibly.
2. Acting instead of waiting for legal requirements.
While the Guiding Principles are non-binding, they have nevertheless prompted legal developments which are relevant for banks. The European Union, the United States and other countries have introduced binding rules impacting on business responsibility for human rights. It is therefore advisable for banks to proactively engage in the ongoing debate around the Guiding Principles and their implementation.
3. Acting jointly.
The participating banks agree that the Guiding Principles need to be implemented in a manner appropriate for each institution if they are to become operationally effective. At the same time the banks see an opportunity in shared thinking on how to tackle this process. This document is aimed at supporting banks in mapping and analysing their potential adverse impacts on human rights and related risks for their own operations, including reputational, legal, operational and financial risks. The banks hope that this document, which is based on shared expertise and experience, will support the integration of the Guiding Principles into the policies and practices of banking institutions.

Business and human rights – external developments and drivers

With the unanimous adoption of the “Protect, Respect and Remedy” Framework by the UN Human Rights Council in 2008 and the Guiding Principles on Business and Human Rights in 2011, a new overarching single point of reference for business and human rights has been established. It does not create new human rights obligations but provides a framework for implementing human rights in a business context by combining existing legal rules with market incentives.

The Guiding Principles have been strongly influenced by the work of Professor John Ruggie. Appointed the UN Secretary General’s Special Representative for Business and Human Rights in 2005, Professor Ruggie and his team worked persistently to fulfil his mandate of identifying and clarifying the human rights responsibilities of governments and corporations. **The particular strength of the Guiding Principles lies in the fact that they are the result of six years of robust multi-stakeholder consultations, engaging an unprecedented variety of actors from the business community, as well as civil society organizations, employers and workers organizations, UN member states and international organizations.**

Now the key focus is on their implementation. A working group has been appointed by the UN to maintain oversight of progress in this area.

The Guiding Principles demonstrate three key objectives: they clarify the roles of states and corporations; address conflicts between society and corporations; and set a clear, minimum standard for companies in conducting their core business.

Although the Guiding Principles are not binding in law, they are more than simple voluntary guidelines. They are a good example of “hardening” soft law in the sense that they act as a catalyst to spark new policy requirements or binding regulation and are being multiplied by other international organisations and national legislators. Three recent developments are particularly relevant for banks and illustrate the nature of the Guiding Principles as “law in the making”:

1. The recently revised OECD Guidelines for Multinational Enterprises contain a human rights chapter with clear reference to the Guiding Principles. The OECD Guidelines also contain an obligation for adhering member states to establish a National Contact Point which can receive complaints against companies for not complying with the Guidelines, including the responsibility to respect human rights. Similarly, the human rights aspect of the International Finance Corporation’s recently revised and updated Sustainability Framework has also been strengthened in the light of the Guiding Principles.
2. The European Commission published its new EU Strategy on Corporate Social Responsibility 2011–2014 in October 2011. It marks a departure from the earlier concept of CSR as a voluntary corporate initiative and defines CSR as business’ responsibility for its impact on society. The new strategy refers to the Guiding Principles as the minimum standard expected from all European companies. In addition, states are required to develop action plans on how to implement the Guiding Principles. These action plans are likely to include binding regulations at least in some countries. Of particular relevance for banks are the sections on public procurement and investment. Apart from strengthening existing rules on socially sustainable procurement, the Commission is considering introducing specific requirements for investment funds to report on their performance with regard to their standards for responsible investments. Several stock exchanges have already introduced disclosure rules (e.g., Hong Kong, India, Malaysia, and Norway).
3. A third important development is the acceptance of seven shared principles on investment by the European Union and the United States in April 2012. The principles refer to the OECD Guidelines for Multinational Enterprises and state explicitly that “governments should urge that multinational enterprises operate in a socially responsible manner” (principle no. 6). Furthermore, the European Union and the United States intend to support the implementation of the OECD Guidelines and to promote adherence of other countries to the Guidelines.

The Guiding Principles in brief

Against the backdrop of increasing awareness by multinational corporations of the need to demonstrate their social utility, the UN “Protect, Respect and Remedy” Framework and the associated Guiding Principles offer the first clear and overarching benchmark defining the respective human rights responsibilities of governments and business. The Framework focuses on the State duty to protect against human rights abuses, the corporate responsibility to respect human rights, and the need for access by victims to effective remedy. **The Guiding Principles provide a helpful blueprint for companies interested in identifying their human rights risks and impacts and reducing the risk of contributing to human rights violations.**

They offer a high-level indication of the kind of policy statement, due diligence, monitoring and reporting that is required from businesses wishing to apply best practice in the area of human rights. Further interpretation is, however, necessary to scope out and understand how they may be implemented within specific industries.

Banks and human rights – context

The financial services industry operates a host of complex processes with a highly diverse range of products and services. These are offered to a broad range of individual, institutional and corporate clients and cover all industry sectors. Implementation of the Guiding Principles across all aspects of banking business will require a comprehensive approach to identify and manage potential adverse human rights impacts and related risks to the bank.

The provision of products and services may expose financial institutions to the human rights issues of the operations of their clients. Exposure to human rights issues arising from client operations may entail risks to the bank's own operations, such as reputational, legal, operational and financial risks.

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. In practice, the degree of leverage is often a great deal less than popularly believed – and the degree to which it is feasible for banks to exert influence on their clients' behaviour is a matter of complexity. Governments are, as the Guiding Principles reiterate, the primary duty bearers of human rights. Commercial organizations, including banks, cannot be expected to become human rights "regulators" as a surrogate for government. However, banks may find themselves linked to human rights violations committed by their clients, and do therefore have an interest and a responsibility to ensure, so far as practically possible, that their actions and decisions do not harm human rights and add value to the communities in which they operate.

A bank may apply international human rights standards wherever possible but if doing so means that its employees in a particular jurisdiction are acting in breach of local law and may be subject to legal retribution, then it may decide to comply with local law and seek alternative means of compliance with accepted standards. **Avoiding operations in all countries which do not apply international standards would not necessarily be helpful to the advancement of human rights, as engagement and example by companies seeking to apply best practice can encourage change.**

The issue of leverage is an important aspect in the consideration of human rights impacts. 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. For example, in a competitive mass market, the provision of many products and services offers limited opportunity to exert influence on non-financial issues. The decision of the bank may be limited simply to whether or not it should conduct the business. The potential and capacity to pro-actively address potential adverse impacts on human rights through client relationships varies, and depends on a number of factors.

Therefore banks need to examine how the Guiding Principles can best be applied across all types of products and services provided to clients and what the scope and depth of the human rights responsibilities and due diligence requirements should be, including what can reasonably be achieved in terms of leverage. Banks should consider assessing the human rights impacts inherent in a business opportunity and to what extent it is possible to eliminate or minimise adverse effects.

Consideration should be given to:

- Development of a risk management model that goes beyond traditional parameters, to address (identify, manage and mitigate) human rights risks to external stakeholders, i.e., which identifies and assesses potential adverse impacts on rights holders as well as risks to the bank itself.
- Ensuring awareness of human rights issues and responsibilities within the bank at all levels and across all disciplines.

This guidance focuses on the implications for banks of Guiding Principles 16–21. These Principles cover the areas of policy development and commitment, due diligence in terms of scope, accountability and implementation, as well as tracking and reporting. These Principles are those which are most relevant to banks' potential adverse impacts on human rights and which tend to be most challenging to implement.

Guiding Principle 16

Guiding Principles on Business and Human Rights

Policy commitment

16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) Is approved at the most senior level of the business enterprise;**
- (b) Is informed by relevant internal and/or external expertise;**
- (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;**
- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;**
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.**

Policy development – what needs to be done?

A statement of policy and governance framework should be developed which aims to:

- i) Express the bank's public commitment to respect human rights
- ii) Generate awareness and understanding throughout the organisation of the importance and relevance of human rights issues to business decisions, including the focus on "doing no harm" and the impact of getting it wrong
- iii) Apply to all parts of the business, including client and other business relationships, transactions, projects, products, operational decisions, strategy and planning
- iv) Assist identification of human rights impacts (e.g., by classification of risk level using factors including transaction type, geographical considerations, sector, social context, etc.)
- v) Signpost tools and guidance to assist personnel in dealing with issues in their part of the bank. These should assist in identifying and assessing human rights-relevant aspects, and include links to any existing policies which already have a human rights dimension (e.g., codes of conduct, employment practices, supply chain screening, social risk management, reputational risk management, financial crime prevention, financial inclusion).
- vi) Be embedded in already established procedures and proactively communicated in dialogue with employees, clients, business partners, investors, suppliers and other external stakeholders
- vii) Establish clear accountabilities and allocation of responsibility, monitoring and reporting requirements and an escalation procedure for evaluating risks or dilemmas as they arise
- viii) Be subject to regular review, audit and consultation, and sign-off via a high level governance process.

What does this mean for a bank?

As a first step it may be helpful to identify relevant internal stakeholders and understand the external relationships the bank maintains which may provide sector specific helpful information and precedent on human rights. These may include the Equator Principles Association, UNEP Finance Initiative, International Finance Corporation, OECD Guidelines, independent consultants, and industry trade associations such as the International Council for Mining and Metals. Other sources may be peer banks, development banks, Export Credit Associations, legal advisors and clients who may be familiar with dealing with human rights issues.

Secondly, from an internal engagement perspective, it may be useful to identify and build relationships with departments and management who may contribute usefully to the management of human rights issues. These may include teams with responsibility for credit risk policy, transaction level risk assessment, project finance, investment banking client relationship teams, compliance, legal, public policy, corporate responsibility, internal and external communications, among others.

Key steps and challenges

Management approval

It is critical to seek senior management buy-in at the outset. **“Tone from the top” is important in gaining buy-in from other parts of the organisation, especially when making explicit reference to human rights in a range of policies and integrating a human rights “perspective” on decisions and processes.**

Colleagues may lack confidence in interpreting the policy and guidance and need to know they are supported in considering the issues.

Comprehensive and inclusive implementation

Human rights, similar to ethics or business conduct, is a theme which is relevant to all business activities. It is not sufficient to ring-fence a policy in one part of the organisation. To be robust there should be a human rights dimension to decision-making so that ownership and responsibility is broadly spread and awareness is maintained across the business. Thinking about the issues then becomes integrated into the culture of the company. The challenge is to establish this consistency of awareness and build knowledge, experience and confidence among managers to implement the policy effectively. Training, workshops and other internal communication is helpful, but practical experience and sharing of precedent reinforces the learning. It is helpful also if there is a climate which allows employees to raise issues of concern without censure. Ongoing communication on human rights issues is important and will help generate feedback.

Consistency

Most banks will already be assessing some potential adverse impacts on human rights and related risks of their business relationships and transactions, without necessarily using human rights language. While it is important to enhance familiarity with the language of human rights, this does not mean that every human rights-related activity must be reformulated in human rights terms. Health and safety, community relations, consultation with local communities and other issues are all relevant to human rights and are often an established part of existing assessments. Another challenge from a policy perspective is to ensure employees are comfortable talking about human rights and can make the necessary linkages to ensure they have an accurate overview of the impacts and related risks.

Guiding Principles 17 - 21

Guiding Principles on Business and Human Rights

Human rights due diligence

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
- (a) Should cover adverse human rights impacts that the business enterprise 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;
 - (b) 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;
 - (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.
18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
- (a) Draw on internal and/or independent external human rights expertise;
 - (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.
19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.
- (a) Effective integration requires that:
 - (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
 - (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
 - (b) Appropriate action will vary according to:
 - (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
 - (ii) The extent of its leverage in addressing the adverse impact.
20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
- (a) Be based on appropriate qualitative and quantitative indicators;
 - (b) Draw on feedback from both internal and external sources, including affected stakeholders.
21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:
- (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
 - (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
 - (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Due Diligence – what needs to be done?

All banks conduct due diligence and risk assessments on client relationships, transactions and operational decisions and will have processes in place to ensure compliance with the law (including human rights laws), international sanctions, financial crime prevention measures and other internal and external requirements.

The due diligence outlined in the Guiding Principles has additional parameters covering potential adverse impacts and related risks that may occur in the context of the bank's own activities or through the provision of financial products and services to clients. This due diligence is an ongoing process, not something to be completed once and not revisited.

A “one-size fits all” approach to due diligence will not be feasible across the many relationships, transactions and activities of a multi-national bank. The approach should be determined by the human rights impacts and risks involved, to rights holders and to the bank. Enhanced due diligence should be conducted whenever significant potential impacts are identified, e.g., when considering financing a project in a conflict zone, when providing financial services to a sector with strong human rights sensitivities, when developing financial products associated with vulnerable client segments.

What does this mean for a bank?

A review should be undertaken of how the bank's existing due diligence procedures measure against the Guiding Principles. All banks will have different governance systems and it will be helpful to identify where the Guiding Principles fit best from a due diligence oversight and cultural perspective. This may be in client-facing, product development, risk, compliance or sustainability functions, or a combination thereof. The key element is that these considerations become part of “business as usual” operations.

The review should map and evaluate existing policy, procedures, committees and governance structures and whether or not they could be amended to incorporate human rights elements consistent with the Guiding Principles. Based on the results of the mapping exercise, a gap analysis will provide a steer on any changes required if the bank is to implement the Guiding Principles fully. **There should be no need to duplicate existing systems, it is likely to be most effective if they are adapted to include the human rights due diligence.**

There are established tools and training resources available through existing initiatives (e.g., Equator Principles, UNEP FI, UN Global Compact), which offer helpful suggestions on what constitutes good human rights due diligence, and how to deal with conflicting human rights or issues where the right way forward is not clear.

Development of an internal centre of expertise, which some banks already have on environmental and social risks, will assist in advising the different parts of the business and foster a consistent approach across the company. This may also act as a hub for training, sharing precedent and best practice, and monitoring performance.

Access to external expertise will also be important. In some instances banks rely on input from specialist consultants to inform their risk assessment and this is an integral part of the due diligence conducted. Obtaining the “right” information is essential. Advisors should not be taken on simply to prove compliance with the Guiding Principles, but to support the bank in identifying and prioritising relevant human rights impacts and risks and suggest possible mitigants.

Scope of due diligence

All human rights are relevant. However, it may be that some are particularly relevant for certain types of client groups, transactions, regions or products. It is not practical to undertake a full human rights assessment of every business arrangement. An initial assessment should identify whether there is a potential for low, medium or high risk of human rights impacts, and further due diligence should be tailored to mitigate those risks.

The due diligence outlined by the Guiding Principles requires that businesses, including banks, take a broader view of their potential impacts rather than focusing solely on their own commercial or reputational risks. This means viewing transactions, relationships, products and operational decisions through a different lens to ensure potential adverse human rights effects on third party stakeholders, which may not necessarily have been reviewed previously, are evaluated. This evaluation should be approached from a practical and sensible perspective, taking into account the significance of the impact and the degree of linkage to the business activity. It will not be possible to evaluate every impact of every business decision regardless of proximity.

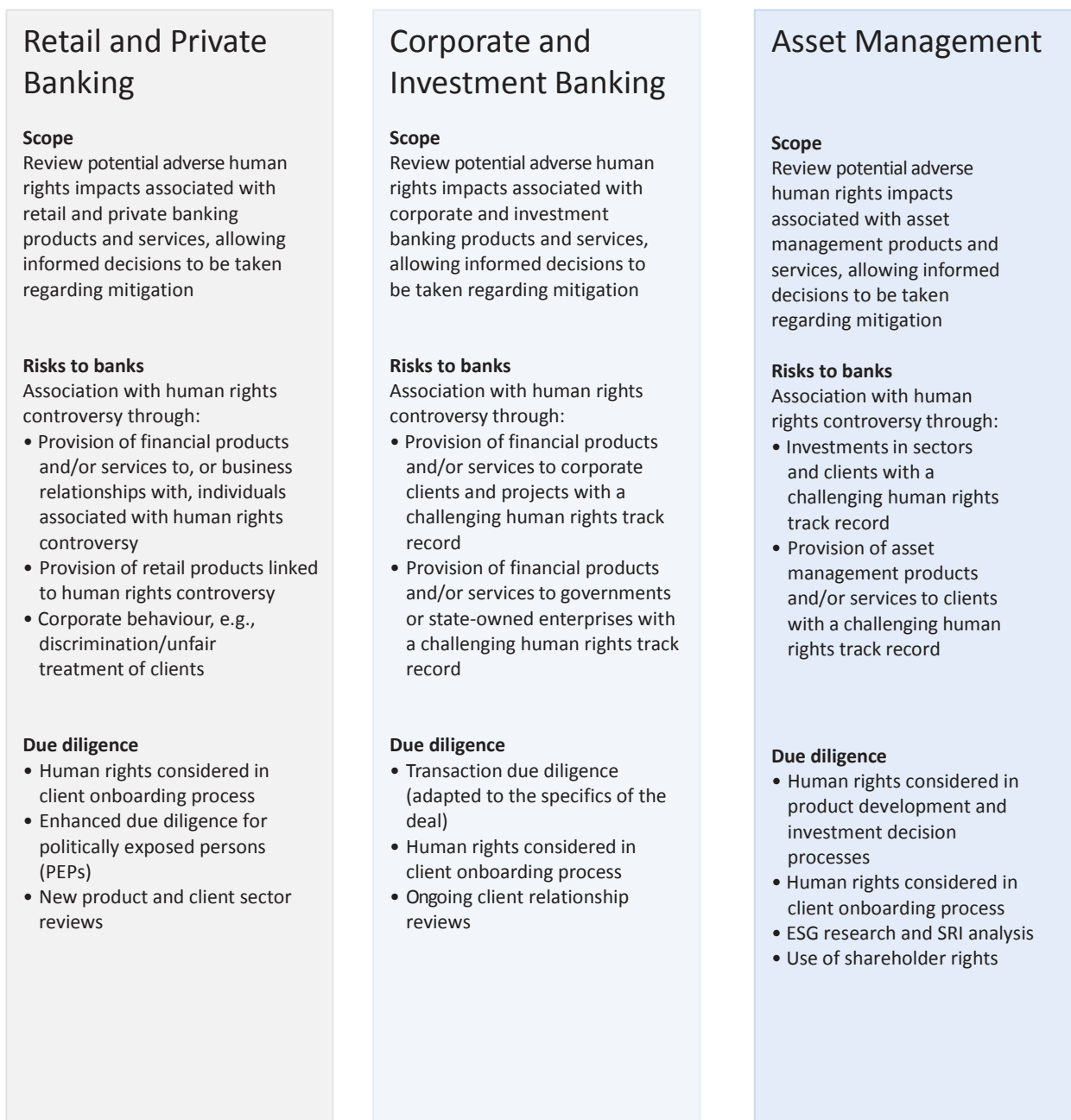
Banks do business with many types of clients: from individuals via retail and private banking, to commercial businesses via corporate and investment banking, to investors via asset management activities, combined with a variety of products and services offered to clients. Each type of client and product range has its own risk profile and requires tailored risk management approaches. **Human rights due diligence undertaken should be commensurate with the human rights impacts and risks present and should be part of the overall due diligence performed on clients and/or products.**

The ability of any given State and the laws and judicial processes it has in place to ensure the protection of human rights within its jurisdiction will have a strong bearing on the likelihood and severity of human rights risks, and thus on the level of due diligence required. States that have a robust legal and judiciary system and strong enforcement are likely to have a lower human rights risk profile. The need for a heightened level of due diligence will increase in the presence of international sanctions, high levels of corruption, political instability, violent repression of minority groups or dissidents, armed conflict, undemocratic government, poverty, discrimination, or weak governance.

Different transaction types and client relationships result in different amounts of information being shared with the bank. Generally, where the bank has access to high levels of information from the client, it will be possible to conduct deeper and more comprehensive due diligence. These transactions and relationships tend to be those where there is most leverage and engagement with the client. Where the transaction type requires little information to be shared with the bank, there is less scope for leverage. Where a transaction entails little leverage and no ongoing relationship, the capacity for engagement with the client is likely to be very limited. In such cases, it may be that an in principle decision to approve or decline the relationship is taken as there is little or no opportunity to address any impacts and risks identified. **Leverage is therefore a material factor in considering the potential for human rights impact and risk mitigation.**

Banks can prioritize the assessment of their potential adverse impacts on human rights and related risks by using two criteria: First, the impact on the rights holders themselves (severity and number of affected people) and second, the bank's connection to these adverse impacts. Heightened attention needs to be paid to groups who are particularly vulnerable to human rights violations in a specific context, even though the bank's connection to these violations may be remote. Depending on the context, discrimination, disenfranchisement from political decision-making, illnesses or poverty may result in people being more exposed to human rights abuses. Since decisions need to be taken in real time, a risk-based and prioritized approach to due diligence is essential to ensure that banks can exert sufficient leverage prior to deal approval. Within these limitations, banks will need to ensure that any human rights due diligence conducted is effective, efficient and appropriate to the business in scope.

Fig. 1 Integrating human rights due diligence into existing practice – a snapshot



Retail and Private Banking

Definition and scope

Retail banking encompasses consumer credit, leasing and mortgage products for individuals and cash management and commercial banking services for small businesses and corporate clients. Private banking offers high net worth individuals a range of advisory and investment products and services.¹

Retail and private banking may entail potential adverse impacts on human rights and related risks to the bank in various ways. These can arise from a business relationship with a client who is associated with human rights violations or controversies due to a political or governmental function he or she may hold or may have held, or due to a directorship in a company associated with human rights controversies. These impacts may vary in significance depending on i) the diversity of countries in which retail branches and private banking offices are operated and the quality of their governance infrastructure and ii) the range of customer segments served.

In addition, it should be remembered that **policies and practices in certain areas, notably financial inclusion and microfinance, have potential to contribute positively to the realization of human rights, in addition to mitigating risk.**

Potential human rights risks

In a retail and private banking business, serving individual clients from basic bank account holders to high net worth individuals, human rights aspects may cover a range of issues:

- i) Association with politically sensitive clients associated with human rights controversy
- ii) Association with clients who are the owners of companies involved in human rights controversies, or who hold influential directorships in such companies
- iii) Association with products and/or services which may be associated with human rights controversy (mis-selling, discriminatory, exploitative)
- iv) Bank's conduct which may have an impact on the human rights of clients (e.g., discrimination/exclusion/inappropriate marketing, treatment of vulnerable clients)
- v) Country-specific risk (operating retail networks in countries where national laws/practices conflict with internationally accepted standards and specific bank policies).

Human rights impacts from serving mass-market personal customers are likely to be less associated with individual client relationships and more relevant to banks' conduct in dealing with client groups and the products and services provided. Local legislation and the human rights environment may vary from region to region and make consistent practice difficult (this is not limited to retail banking). The focus of due diligence from a human rights perspective may therefore be best placed on these areas.

Human rights due diligence

Existing policies and practices may already address human rights risks or be adapted to include a human rights component, e.g., most multinational banks will have:

- i) Anti-Money Laundering (AML) policies and procedures to establish the identity of clients and beneficial owners prior to engaging in business relationships with such persons
- ii) Politically Exposed Persons (PEP) policies requiring enhanced due diligence in relevant circumstances
- iii) Anti-discrimination policies (diversity and inclusion policies relating to clients, suppliers and employees)
- iv) New product approval processes (which may be extended to cover human rights implications)
- v) Financial inclusion policies and activity (basic bank account service/partnerships with service providers who may reach excluded groups/microfinance)
- vi) Country risk policies and procedures (which may be extended to cover human rights issues)
- vii) Strategy and planning policies (which may be extended to cover human rights issues)

In retail and private banking, human rights due diligence should be based on existing policies and practices covering AML and PEP. If the client has been identified as a PEP, a thorough assessment is required into any involvement of the individual in human rights violations conducted by the political entity for which the client holds or held office. This could range from civil unrest and armed conflict to forced displacement of communities and discrimination against ethnic groups.

The investigation into the source of a client's wealth during the client onboarding process ("know your client", KYC) will indicate whether

¹ Refer to asset management section for human rights impacts and risks associated with investment products and services.

the client's current or former business activities carry any human rights risk. This would depend on the industry, the types of services and products, and the countries in which or with which the client is doing business. Essentially, the analysis of an individual retail or private banking client would become an assessment of the client's business activities, guidance to which is provided in the following section, Corporate and Investment Banking.

Corporate and Investment Banking

Definition and scope

Corporate and investment banking offers a wide range of products and services to clients. In this business, banks would typically provide corporate loans, provide advice to either side of a merger or acquisition (M&A), or raise equity or debt capital among investors or through the stock exchange.

Different products and services carry different levels of risk, offer various degrees of leverage, and come with a varying levels of information available to banks. There are, however, certain risk indicators which may assist in assessing the level of human rights risk associated with a transaction and help determine the appropriate level of due diligence to be undertaken.

Potential human rights risks and management

A corporate and investment bank may encounter human rights issues in a number of ways:

- i) Providing financial products and services to companies with a challenging human rights track record or involved in countries with a challenging human rights situation
- ii) Providing financial products and services to governments or State-owned enterprises with a challenging human rights situation
- iii) Providing financial products and services to projects in sensitive industries or in sensitive locations.

Based on these scenarios, and on the type of businesses and operations of the corporate and investment bank, a mapping of the potential adverse impacts on human rights would need to be undertaken to identify these risks.

Human rights risk mapping:

- i) Identify the human rights which are at stake, and which of these are the most significant
- ii) Identify where human rights risks are the most likely to occur, i.e., in which countries of operations or for what type of clients or association with which financial products and services
- iii) Identify the significance of these risks, i.e., scope and severity
- iv) Identify the degree of leverage associated with each of the human rights risks/ financial products to facilitate evaluation of potential mitigation measures and remediation processes.

Reviewing existing policies and procedures:

- i) Based on the results of the human rights risks mapping, banks would review existing procedures and policies and identify potential gaps in addressing the flagged human rights risks.
- ii) Based on identified gaps banks will endeavour to define appropriate measures to close such gaps.

The mitigation measures that a bank can put in place will depend on the type of financial products or services as well as on the nature of the business relationship with the client.

Risk indicators

With regard to country risk, the level of due diligence required could be influenced by the following factors:

- i) Location of assets/operations being financed
- ii) Location of client's operations
- iii) Conflicts (past/present, internal/external) in country of client's operations
- iv) Human rights track record of the client and relevant jurisdiction
- v) Other (including location of the client's headquarters, stock market listing).

The country risk will be determined by the nature of the respective government (democratic/undemocratic, stable/unstable), the presence of conflict or oppression, the level of government control over state security forces, as well as by levels of poverty and development prevalence of bribery and corruption. Weak governance and lack of a fully functioning judicial system are also negative indicators.

With regard to sector risk, the level of due diligence could be influenced by the following factors:

- i) Human rights risk inherent in particular industries or products
- ii) Standards and practices prevalent in particular industry sectors
- iii) Application of best practice standards and voluntary codes.

The sector risk will be determined by the potential for bank products or services to be linked to human rights abuses, the prevailing working conditions in the industry, as well as the potential for client operations to impact on the health, safety, livelihoods or cultural heritage sites of affected communities.

Client commitment and capacity to manage risks

The experience and ability of a client, and any relevant contractors, to manage risk is a crucial factor in the risk assessment process.

As a starting point, it will be helpful to confirm if the client can demonstrate conformity with the Guiding Principles, evidenced by the publication of a human rights policy (or equivalent), the establishment of a due diligence process that covers potential adverse impacts on human rights, the provision of operational level grievance mechanisms, as well as reporting on human rights. Positive indicators of client commitment to manage human rights risks include adherence to relevant national and international voluntary standards (e.g., Voluntary Principles on Security and Human Rights, Kimberley Process, Roundtable on Responsible Palm Oil, Extractive Industry Transparency Initiative). Adoption of such voluntary standards is not a guarantee of good practice but together with a related disclosure/reporting policy can be an indication that the client takes its corporate responsibilities seriously.

Positive indicators of client capacity to manage human rights risks include the presence of established policies and governance processes, experience in operating in the sector and a solid performance track record.

Human rights due diligence

When financing or advising corporate clients it is important to determine the use of proceeds of a financial product or service, i.e., whether the funds are intended for general corporate purposes or whether they will be used for a specific investment or project. If the client intends to use the funds non-specifically for general corporate purposes (such as strengthening the working capital or refinancing an existing general corporate purpose loan or bond), the bank should look for management systems and structures on the client's side that demonstrate the company's ability to identify, manage and respond adequately to general human rights issues across all assets and operations in the various countries the client may be active. Such issues would include, for example, more general aspects such as working conditions of staff and contractors or the protection of health and safety of workers, contractors and local communities, as well as aspects that may be specific to certain locations or operations, such as impacts on the traditional livelihoods of indigenous people, or consultation and engagement with communities that have to be relocated. Particular attention should be paid to the company's process for identifying and consulting with stakeholders potentially affected by its operations, including grievance mechanisms.

If the client intends to use the funds for a defined purpose, e.g., to acquire another company active in the same industry, or to develop a specific project such as a new coal mine or a hydropower dam, the potential impact of these specific investments on the human rights of affected rights-holders should be assessed in addition to the company's general management of human rights. With reference to specific projects, banks may, where available, take into account the standards and the due diligence performed by multilateral finance institutions (e.g., International Finance Corporation, European Bank for Reconstruction and Development, European Investment Bank, etc.) or by an official agency (e.g., Export Credit Agency, etc.).

The scope and depth of a bank's human rights due diligence may further depend on the type of countries where the client operations are situated, as well as the industry sector in which the client is active. Client operations in countries with a challenging human rights record may likely require a higher level of scrutiny than those in lower risk countries, in the same way as clients from certain industry sectors are more prone to having significant human rights impacts. Country risk assessments within banks are increasingly informed by non-financial factors such as civil liberties and political rights or the presence of corruption, on which specialized organizations provide ratings and rankings.

In order to assess the effectiveness of the client's systems and procedures to manage human rights, banks may base their analysis both on public disclosures made and on evidence provided by the client, and on a review of the external perceptions of the company held by stakeholders such as regulators, ESG rating agencies, specialized data providers, media, local communities, NGOs or trade unions. Stakeholder opinion may help the bank identify areas where their client has been facing difficulties in managing human rights issues. This provides a starting point for the bank to address specific questions to the company as part of the client due diligence process.

In order to manage human rights risk adequately, the bank should include reference to human rights impacts in its policies and processes governing risk assessment for related financial products.

When considering project finance (see Appendix) and advisory roles, policies on social risk, covering human rights aspects, may already be in place – especially if the bank has adopted the Equator Principles, or works in line with these Principles in its due diligence. If the bank's due diligence identifies significant human rights risks, actions should be agreed with the client and implemented to manage and mitigate their impact, within the limitations of the client relationship and the leverage and influence the specific product or service entails. In certain circumstances where the risk is significant and cannot, in the bank's judgement, be mitigated sufficiently, the bank may opt not to pursue the business opportunity.

Unforeseen events

During the life of a project or loan, unexpected developments may occur, which may change the human rights risk profile of the relationship. Such unforeseen events may be entirely outside of the control of the client, such as a regime change in one of its countries of operations, they may be partly controllable by the client, such as a deterioration of the human rights situation related to one of its projects, or they may be directly associated with the client, such as a takeover by or a merger with another company with a different human rights record and a different approach to managing human rights risks. The bank should be in a position to monitor these developments and maintain an understanding of the events and the management approach the client is taking to address the situation. It is important to understand the position of the client, and to put into context the perceptions and public comments of political, civil society and media stakeholders. Unforeseen events may require a rapid update in impact assessments and action planning, and actions may have to be taken on a case-by-case basis.

Timing of due diligence

Due diligence should be carried out at the stage of client onboarding as well as on a transactional basis. The periodical review of corporate client relationships, projects or loans provides an opportunity to review any human rights issues and associations that may change the risk profile of the relationship.

Asset Management

Definition and scope

Asset management includes all business activities related to the creation and management of investment funds, property or credit portfolios, investments managed on behalf of clients as well as other assets held on a financial institution's own account. Ownership rights for these funds lie with the asset management clients who often specify strict investment guidelines; however, investment decisions may be taken for them by the asset management business within specific client instructions or general portfolio management constraints.

Potential human rights risks and management

Asset management businesses may be confronted with human rights issues in several ways:

- i) Investing in companies (shares, bonds) with a challenging human rights track record or investing in countries (bonds) with a challenging human rights situation, on behalf of individual clients or institutional investors
- ii) Establishing and managing funds of companies or countries with a challenging human rights track record or a challenging human rights situation
- iii) Establishing and managing funds around a topic that could be viewed critically from a human rights perspective (e.g., defence industry fund, fund focusing on the topic of security).

As part of their investments review and due diligence processes, asset managers should consider including appropriate structures, policies and processes to mitigate against the potential human rights risks associated with relevant clients or products. However, opportunities to exert influence may be constrained by the type of investment (e.g., passive investment²) and by client or mandate restrictions.

Still, there are potentially situations where a bank may decide not to engage in an investment activity nor invest in certain assets due to an assessment of perceived legal or environmental, social and governance (ESG) risks.

Accountability

Policies and ownership practices that address ESG issues in general may already be in place, especially if the financial institution (or its asset management business) is a signatory of the UN Principles for Responsible Investment (UNPRI). Nevertheless, financial institutions should review their policies and ownership practices, including:

- i) Capacity to identify human rights risks in existing due diligence procedures through prudent management of ESG issues both in product development and investment decision processes
- ii) Consideration of human rights among other ESG issues when exercising ownership rights like proxy voting and actively engaging with management of investee or potential investee entities.

Human rights due diligence

In order to avoid or mitigate association with potential human rights violations, due diligence in asset management processes should include "know your customer" (KYC), country, industry and company/asset aspects. The level of due diligence depends on the applicable circumstances. In some business settings a bank may consider it appropriate to include the client characteristics, such as controversial government/authority, in the due diligence process.

To foster implementation of the Guiding Principles in its due diligence, an asset management business should, where relevant:

- i) Include, as part of overall investment review and due diligence processes, consideration of ESG research including human rights aspects
- ii) Set up specialised teams (internal or external) dedicated to the analysis of ESG issues
- iii) Integrate ESG research in both sustainable and socially responsible (SRI) and mainstream investment processes
- iv) Provide guidance on how to actively engage with companies/assets and on proxy voting
- v) Provide guidance for the (potential) exclusion of assets (from investment vehicles)

² Investing into a mutual fund or other investment portfolio by relying on automatic adjustments such as tracking an index, instead of individually selecting shares in the pursuit of a specific investment objective.

- vi) Draw, within the scope of its fiduciary duty, the client's attention to potentially material human rights impacts if and when it is asked about investing in companies known for a challenging human rights track record
- vii) Integrate considerations on human rights into the KYC process before starting a business relationship with a client.

Ongoing due diligence

During the life of an investment or a client relationship the human rights profile or related issues may change. Banks should develop efficient ways of monitoring such changes and maintain an understanding of the events together with actions required to address such changes. Investments need to be assessed in their entirety including, amongst other factors, human rights considerations. Both expected and unexpected events may require an update in impact assessments and action planning.

Challenges in due diligence

The due diligence processes described in this document are far from simple or standard. Each customer, transaction, project or asset holding is unique and the assessment and mitigation must be tailored appropriately. There are also a number of additional challenges that should be noted:

- i) Unfamiliarity with human rights issues may result in some risks or impacts being overlooked
- ii) Time constraints, i.e., transactions adhere to demanding timetables and there may be challenges in identifying and evaluating human rights risks to meet deadlines, particularly where the relationship or deal is complex and where there are competitive issues
- iii) Difficulty in achieving a consistent approach across an international organisation spanning many different cultures and jurisdictions and including many different businesses and subsidiaries
- iv) Ongoing due diligence is often challenging as the leverage and access to documentation can be limited
- v) Managing external expectations that the scope of due diligence conducted by banks will be greater than is possible or appropriate
- vi) Managing external expectations around transparency where the data and information concerned belongs to the client and cannot be disclosed by the bank
- vii) Managing situations where national law conflicts with internationally accepted standards, with bank policy, or where national laws of different countries conflict with each other
- viii) Have access to and use valid, external and standardised ESG data.

Reporting

A bank should aim to institute a sensible level of transparency on the human rights policies, processes and procedures it has implemented. The most obvious regular and formal option for human rights reporting is the bank's annual report, its sustainability report or its website. These ensure wide dissemination among the bank's stakeholders of its key human rights commitments and activities.

In reporting on human rights the bank may find use of established reporting channels helpful (e.g., the Global Reporting Initiative or the UN Global Compact's Communication on Progress). These provide companies with a recognized framework for reporting significant human rights aspects and support comparability of information. Using such frameworks also helps to ensure that human rights data and information are communicated in a clear, structured manner.

A particular focus of a bank's human rights reporting should be on its own actions and processes for considering impacts and risks associated with provision of services to clients. This is undoubtedly a challenge, not least as it is difficult to inform on outcomes when considering the impacts of third party activities. Also, client related data belongs to the client and is subject to the usual rules around confidentiality. A bank could therefore choose to encourage clients (or suppliers) to disclose their relevant human rights-related aspects and issues (e.g., within their annual financial or sustainability reports).

Banks may wish to report on the following factors in their sustainability reporting or other communications:

- Voluntary human rights standards that the bank is signatory to
- Policies and procedures to identify and mitigate human rights risks
- Approach to human rights issues specific for sectors in which bank's clients operate
- Governance process for dealing with human rights
- Staff training on human rights.

In addition to its annual sustainability reporting a bank should also make use of other communications channels to ensure a flow of relevant human rights-related information to its stakeholders. In contrast to reporting, which is usually „one-way“ communication, conducting a dialogue with stakeholder groups on the topic of human rights will allow the bank to draw directly upon their feedback on relevant issues. Reporting to, and dialogue with, the bank's own employees is also important to maintain awareness and commitment to applying consistent standards of human rights due diligence.

Conclusion

The Guiding Principles provide guidance for businesses on what corporate respect for human rights entails. This is a complex issue for banks as **most of their human rights impacts arise via the actions of their clients and are addressed through influence, leverage and dialogue rather than through direct action from the banks themselves.**

Banks wishing to implement the Guiding Principles 16 to 21, the focus of this document, should aim to:

- i) Develop a knowledge and awareness of human rights and relevant international laws and standards. Risk assessment in this area is not a tick box exercise but a qualitative review of the issues at stake which requires understanding and capacity to make subjective judgements
- ii) Integrate human rights into existing risk management, decision making and governance procedures with senior management accountability
- iii) Extend the scope of existing due diligence to cover human rights issues, including understanding what types of rights may be affected
- iv) Monitor the risks throughout the client relationship or loan term, e.g., through inclusion of human rights considerations in client onboarding and annual review processes
- v) Identify and engage with human rights specialist advisors on issues where in-house knowledge is lacking
- vi) Identify external standards that may assist in benchmarking client performance. Other sector-specific guidance is being produced that will aid risk assessment for banks
- vii) Be transparent about the policies and processes established to manage human rights risk in the different parts of the business and, where possible, report on performance. This may be published in the annual report, sustainability report or equivalent
- viii) Engage with clients, peer group companies, human rights specialists and other interested groups to share good practice, address common challenges and keep up to date with developments.

Appendix 1

Timeline for development and implementation of the UN Guiding Principles

- 1970s–2000** Several attempts within the UN to draft binding human rights obligations for transnational corporations failed to gain endorsement.
- 2003 –** UN Draft Norms on business and human rights initiated international controversy and were eventually dropped.
- 2005 –** UN General Secretary Kofi Annan appoints Harvard Professor John Ruggie as Special Representative for Business and Human Rights with a mandate to identify and clarify the human rights responsibilities of Governments and corporations.
- 2008 –** Professor Ruggie presents the “Protect, Respect and Remedy” Framework to the UN Human Rights Council following extensive and global consultation and research including dialogue with governments, businesses, lawyers and civil society. The Framework focuses on the State duty to protect against human rights abuses, the corporate responsibility to respect human rights, and the need for access by victims to effective remedy. It is endorsed by the Council.
- 2011 –** In the final phase of his mandate, Professor Ruggie proposes a set of Guiding Principles on Business and Human Rights offering high level guidance on implementing the Framework. These are endorsed by the Human Rights Council and receive widespread support from governments, business and civil society. A Working Group on the issue of human rights and transnational corporations and other business enterprises is appointed by the UN to maintain oversight of the implementation of the Principles, comprising five independent experts from different geographies for a three-year term. They will oversee an annual two-day forum on business and human rights.
- 2012 –** The Working Group holds its first session in January to determine: key priorities; a programme of activities; and review proposals/suggestions submitted by interested parties. In December, the Working Group holds its first Annual Forum on Business and Human Rights where stakeholders discuss progress and challenges in the implementation of the Guiding Principles.

Link to Business and Human Rights Resource Centre portal on the work of the UN Special Representative:
<http://www.business-humanrights.org/SpecialRepPortal/Home>

Appendix 2

Project Finance

Although project finance comprises a relatively small proportion of the commercial lending book of most banks, it is supported by well-developed policies, practices and governance in terms of assessing non-financial risk such as human rights. Therefore it is worth focusing on these in this document as a guide to what due diligence may be possible to apply to other products and services, depending on the nature of the client relationship and financial services being provided.

Human rights due diligence in project finance

Initial review and ESIA assessment

Each lending transaction is subject to a risk assessment which should contain an initial overview of any relevant human rights issues. The nature of the transaction or project, e.g., the host country, industry sector and client commitment and capacity will provide indicators for the level of assessment recommended.

For project transactions where substantial human rights impacts are identified it may be appropriate to integrate a more explicit human rights component within the transaction social risk assessment. A social risk assessment would typically cover risks related to project labour (including contractors and sub-contractors) and local and affected communities. The Equator Principles and IFC Performance Standards provide full guidance on these assessment processes.

References to human rights risk and social risk may cause confusion so it is important to ensure that all relevant issues are included and any issues around definitions are resolved.

Stakeholder engagement

The risk assessment should include a review of any stakeholder engagement process undertaken by the client relevant to the transaction or project being financed. Stakeholder engagement can make an important contribution to the successful management of adverse impacts. It is an ongoing process that can involve stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, provision of grievance mechanisms, and ongoing reporting to the communities concerned. The Equator Principles and IFC Performance Standards provide full guidance on bank requirements in terms of stakeholder engagement.

In addition, FPIC („Free Prior and Informed Consent“) should also be taken into account. FPIC constitutes the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. FPIC is now a key principle in international law and jurisprudence related to indigenous peoples.

It is important to note that the stakeholders are those of the client and of the project, rather than those of the bank. Stakeholder management is the responsibility of the client and their advisors. Commercial banks have neither the expertise nor legitimacy to engage with clients' stakeholders.

High risk scenarios

If a project is assessed as very high risk from a human rights perspective and the bank remains keen to lend, there may be the option to engage with the client with a view to conducting a standalone human rights impact assessment (HRIA). This is likely to be a rare occurrence as assessments will generally be integrated into existing risk management procedures. There are tools available to assist with HRIA. The IFC, UN Global Compact and International Business Leaders' Forum (IBLF) collaborated to design the Guide to Human Rights Impact Assessment and Management. In this instance it is recommended that specialist human rights experts are commissioned to undertake the assessment.

Use of external advisors

In transactions where there are substantial human rights risks, banks may use the services of external specialists and consultants to assist in the risk assessment process. When using external expertise it is important that robust, fit-for-purpose terms of reference are used. The terms of reference should clearly document the scope of assessment, standards to be used, and reporting format. It is important to confirm that the consultants have relevant expertise in the client's industry, the geography of the project, the standards being used, the human rights scenario and in providing guidance to financial institutions. The bank may require the client to commission such an impact assessment, or commission the work directly to review existing impact assessment reports.

Risk mitigation – action plans

Following the assessment and identification of human rights risks, actions should be agreed and implemented to manage and mitigate their impact. In project finance transactions, this is commonly documented in an action plan for implementation by the client. An action plan should include; detail of the risk, the action to take to manage the risk, the team responsible for undertaking the action, the timetable for action and resolution. Action plans may relate to labour issues, local community issues, including re-settlement, and health and safety.

Public disclosure

It is accepted practice in project finance transactions for impact assessments and action plans to be disclosed publicly by the client to affected and interested parties. The information should be made easily available in the relevant local language and in a culturally appropriate way. Data and information relevant to the provision of financial services to specific clients is a matter of commercial confidentiality and cannot be disclosed by the bank.

Grievance mechanisms

Grievance mechanisms should also be put in place by the client. A grievance mechanism is a communications tool to receive and facilitate resolution of concerns and grievances of affected communities regarding client activities. The grievance mechanism should be scaled to the risks and adverse impacts of the project and have affected communities as its primary user. It should seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate and readily accessible at no cost and without retribution to the party that originates the concern. The mechanism should not impede access to judicial or administrative remedies.

Covenants, monitoring, reporting

When action plans are in place, it is important that the bank has certainty that the client will implement the plans as agreed. This can be achieved by the client committing to implement the action plans, monitoring progress of implementation and providing regular progress reports to the bank. These measures can be stated in the loan documents governing the transaction. Failure to report progress or to implement the plans will then constitute an event of default. Guidance on this process and suggested wording to address general environmental and social matters for loan documentation is provided by the Equator Principles Association.

Events of default

Calling an event of default part way through a project is not a desirable scenario and very much a last resort. The client and bank will first discuss the issue of concern to try to agree a way forward. This may lead to a redesign of the action plan. However, if all attempts to remedy the situation fail and the client does not show sufficient commitment to managing the situation, an event of default may be called.

Appendix 3

Resources on business and human rights

The following list provides an overview of key resources, tools and centres of expertise on business and human rights. The reasonableness, accuracy or completeness of such information and tools has not been verified by the banks. The overview does not cover specific national regulations or guidelines, is strictly indicative and makes no claim to be complete. Banks accept no liability whatsoever in connection with any such information or tools that have been or will be provided by third parties.

Foundational documents

- [Universal Declaration of Human Rights](#)
- [International Labour Organization \(ILO\) Conventions](#)
- ["Protect, Respect and Remedy" Framework](#)
- [UN Guiding Principles on Business and Human Rights](#)

International norms, standards and guidelines

- [OECD Guidelines for Multinational Enterprises UN Global Compact](#)
- [ISO 26000 – Social Responsibility](#)
- [European Union \(EU\) strategy 2011–2014 for Corporate Social Responsibility](#)

Financial sector-related standards and guidance

- [International Finance Corporation \(IFC\) Performance Standards on Environmental and Social Sustainability](#)
- [Equator Principles](#)
- [IFC/IBLF Guide to Human Rights Impact Assessment and Management](#)
- [UNEP FI Human Rights Guidance Tool for the Financial Sector](#)
- [UN Global Compact Business and Human Rights Learning Tool](#)
- [UN PRI \(Principles for Responsible Investment\)](#)

Human rights-related due diligence tools

- [RepRisk](#)
- [Maplecroft](#)
- [SigWatch](#)

Centres of expertise on business and human rights

- [Institute for Human Rights and Business](#)
- [Business and Human Rights Resource Centre](#)
- [The Danish Institute for Human Rights](#)
- [Global Business Initiative on Human Rights](#)
- [Amnesty International](#)
- [Human Rights Watch](#)
- [University of Zurich Competence Centre for Human Rights](#)
- [Swiss Centre of Expertise in Human Rights](#)

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