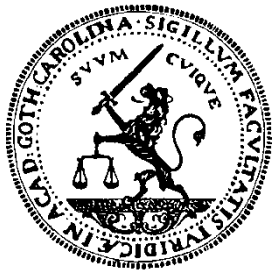

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Bankrolling Adverse Human Rights Impact in Development Projects

A study of the role and responsibilities of international financial institutions with respect to human rights in the development finance context and the implications of using intermediary commercial banks

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Contents

Summary

The increased allocation of capital that is being directed towards sustainable development through the unlocking of private investments with the use of public funds into private sector-led development projects might, at first, seem as a successful outcome of the necessary mobilization of funds for the achievement of the 2030 Agenda, including the SDGs.

The invitation of the private sector into solving public matters with public funds has however had evident consequences on the heightened risk for adverse human rights impact, and has accentuated an accountability gap, as private institutions operate under different operational and legal regimes than public international ones. By applying a doctrinal research method this thesis examines the human rights responsibility of the international financial institutions that operate in the context of development finance, where an increase in the use of commercial banks as financial intermediaries for their lending to private actors operating development projects has been noted.

The study finds that as a result of the inclusion of commercial banks, the prevention of adverse human rights impact associated with development projects, is made dependent on the banking sector's understanding of how human rights pertain to its financing activities and client relationships. The current misconception of commercial banks in respect to this, as highlighted in this thesis, thus counteracts preventative measures for the protection of human rights and increases the need for effective accountability.

Whilst individuals seek to obtain reparations and remedies for the adverse impact that development projects have inflicted upon them or their communities, they are generally hindered by the claim of immunity of international organizations when seeking this redress from the international financial institution, that through its financing, has enabled the private actor to carry out the project. In the absence of regional judicial bodies or international human rights mechanisms available to hold international organizations accountable, this is a conflict that is left to domestic courts to address and solve. The most recent developments in domestic courts in the US, indicate towards a wider amenability to sue international financial institutions. However, doubts remain as to whether domestic courts are a suitable venue for project-affected individuals and communities to seek remedy.

We are still a long way from an appropriate protection of human rights within the BHR regime as businesses are still deliberately staying away from terminology that acknowledges “human rights” and entails actual and legally enforceable obligations. Thus, the focus on BHR and “softer” forms of responsibilities, arising out of private governance, that in turn may lead to “harder” outcomes, remains relevant, if not crucial, when it comes to seeking ways to redress for project-affected individuals and communities, as it emphasizes a different way of thinking in terms of risk to people and not business.

Sammanfattning

Den ökade andelen kapital som riktas mot hållbar utveckling genom att med offentliga medel frigöra privata investeringar i utvecklingsprojekt genomförda av privata aktörer kan, vid en första anblick, verka som ett framgångsrikt resultat av mobiliseringen av nödvändiga finansiella medel för att uppnå Agenda 2030 och de globala hållbarhetsmålen.

Inkluderingen av den privata sektorn att bidra till, och lösa, samhällsutvecklingsfrågor med offentliga medel har emellertid haft uppenbara konsekvenser i form av en ökad risk för skadlig inverkan på mänskliga rättigheter, och har tydliggjort ett hålrum i möjligheterna till ansvarsutkrävande, eftersom privata institutioner är verksamma inom andra operativa och rättsliga system än offentliga internationella institutioner. Genom att använda den rättsdogmatiska metoden, undersöker uppsatsen internationella finansinstitutioners ansvar för mänskliga rättigheter, där en ökad användning av privata affärsbanker som mellanhänder för deras utlåning till privata aktörer som bedriver utvecklingsprojekten, har noterats.

Studien finner att förebyggandet av skadlig inverkan på mänskliga rättigheter som sker i samband med utvecklingsprojekt, till följd av inkluderingen av affärsbanker, görs beroende av banksektorns förståelse för hur ett ansvar för mänskliga rättigheter förhåller sig till deras finansieringsverksamheter och kundrelationer. Den rådande missuppfattningen hos affärsbanker avseende detta ansvar motverkar följaktligen förebyggande åtgärder till skydd för mänskliga rättigheter och ökar behovet av möjligheterna till ansvarsutkrävande.

Individer som strävar efter vedergällning för projektrelaterade människorättskränkningar som påförts dem eller deras samhällen till följd av utvecklingsprojekt, hindras vanligtvis av den immunitet som internationella organisationer besitter under internationell rätt, när ansvar utkrävs från den internationella finansinstitution som genom sin finansiering har möjliggjort den privata aktörens genomförande av projektet. I avsaknad av tillgängliga regionala rättsliga instanser eller internationella domstolar där ansvar för människorättskränkningar av internationella organisationer kan utkrävas, är det upp till nationella domstolar att ta itu med och lösa denna rådande konflikt. Den senaste utvecklingen i nationella domstolar i USA, tyder på en ökad möjlighet att stämma internationella finansinstitut. Likväl kvarstår ändock tvivel om nationella domstolar är en lämplig plats för projektberörda personer att söka vedergällning.

Mycket återstår till ett tillfredsställande skydd av mänskliga rättigheter inom företagande, eftersom företag alltjämt avsiktligt håller sig borta från en terminologi som erkänner "mänskliga rättigheter" och som innebär faktiska och juridiskt bindande skyldigheter. Ett ihållande fokus på företagande och mänskliga rättigheter och ”mjukare” ansvarsformer, härrörande från privata och bolagsstyrda initiativ (*private and corporate governance initiatives*) som i sin tur kan leda till ”hårdare” resultat, förblir alltså relevant, om inte avgörande, när det gäller att söka vägar till vedergällning för projektberörda individer och samhällen, eftersom det framhäver ett tankesätt avseende risker i förhållande till människor och inte företag.

Preface

First and foremost, I want to express my most sincere gratitude to Daria Davitti, my supervisor, who undertook not only to read the countless drafts of this thesis, but also allowed me to profit from her sharp inputs and comments. Your help, words of encouragement and contagious cheerful spirit about this study, and about life in general, has been invaluable in this writing process.

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Mama, táta, although you've never asked anything of me, this is for you. Thank you for your unconditional love. Uwe, thank you for your continuous pep and support since the day you came into my life. Your achievements have always inspired me.

Henna, turns out that the blind *can* lead the blind after all, right? We made it. Gracias amiga, por todo.

Thank you, Vanessa, for allowing me to escape to you and your mountains, and for giving me a second home here in times when I've needed it the most - including now, completing this thesis.

Wengen, February 2020

Paulina Wästerlund

Acronyms and Abbreviations

Addis Ababa Action Agenda	United Nations General Assembly Res. 69/313 "Addis Ababa Action Agenda of the Third International Conference on Financing for Development"
ASR	The Articles on State Responsibility
BHR	Business and Human Rights
Brundtland Report	United Nations General Assembly "Report of the World Commission on Environment and Development: Our Common Future"
CAO	Office of the Compliance Advisor Ombudsman
CLU Guidance	OECD's Due Diligence for Responsible Corporate Lending and Securities Underwriting
CPISA	Convention on the Privileges and Immunities of the Specialized Agencies of the UN (1947)
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
DAC	OECD Development Assistance Committee
DARIO	The Draft Articles on the Responsibility of International Organisations
DFIs	Developmental Financial Institutions
ESG	Environmental, Social and Corporate Governance
Framework	United Nations "Protect, Respect and Remedy" Framework
FSIA	Foreign Sovereign Immunities Act: 28 U.S.C. §§ 1602-1611 (1976)
Guidance Notes	International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability
HRDD	Human Rights Due Diligence
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IFIs	International Financial Institutions
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IOIA	International Organizations Immunities Act: 22 U.S.C. § 288-288f (1994)
ODA	Official Development Assistance

OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner on Human Rights
MDBs	Multilateral Development Banks
MNE Guidelines	OECD's Guidelines for Multinational Enterprises
MIGA	Multilateral Investment Guarantee Agency
NCPs	National Contact Points
NGOs	Non-Governmental Organizations
PSs	International Finance Corporation's Performance Standards on Social and Environmental Sustainability
Roadmap	United Nations Secretary-General's Roadmap for Financing the 2030 Agenda for Sustainable Development (2019–2021)
SDGs	Sustainable Development Goals
SRSG	Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNGPs	United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework
UNEP-FI	United Nations Environment Programme Finance Initiative
UNHRC	United Nations Human Rights Council
UN PRI	United Nations Principles on Responsible Investment
WBG	World Bank Group
WCED	World Commission on Environment and Development
2018 Finance Strategy	United Nations Secretary-General's Strategy for Financing the 2030 Agenda for Sustainable Development (2018-2021)
2030 Agenda	United Nations 2030 Agenda for Sustainable Development

1 Introduction

1.1 Background

This thesis examines the responsibilities of international financial institutions ("IFIs") in the context of development finance, where an increase in the use of commercial banks as financial intermediaries for their lending to private actors pursuing development projects has been noted. As a result of the inclusion of intermediary commercial banks, the prevention of adverse human rights impact associated with the development projects, is made dependent on banking sector's understanding of how human rights pertain to its financing activities and client relationships. If misinterpreted, it might counteract preventative measures or affect the accountability of the IFI providing the original funds. The practise is analysed out of a rights-holders'[1] perspective in the broader context of the business and human rights ("BHR") regime. In order to understand the topic of the thesis, one thus needs to be familiar with the context in which the present discussion is being held as well as the concepts of *sustainable development*, *development finance* and the general functions of financial institutions herein. Of particular importance are hence the roles and functions of IFIs and commercial banks. This chapter intends to be on the one part *contextual*, and on the other part *definitional*, and is therefore split into two sub-sections. The first sub-section will lay out the problem at hand and present a factual scenario that aims to contextualize the topic of the thesis and provide an introduction of all relevant actors. The second sub-section will provide the necessary definitions of each relevant concept and clarify the role of each relevant actor.

1.1.1 Statement of the problem

Behind every large-scale development project is a web of actors that make it feasible. These actors include financial institutions, such as banks, that

[1] In order to understand what the term *rights-holder* implies, one first needs to be familiar with the definition of a *stakeholder*. *Stakeholders* are "persons or groups who are or could be directly or indirectly affected by a project or activity." All stakeholders that are individuals have human rights. *Rights-holders* are thus those individuals that are stakeholders and whose human rights are put at risk or impacted by a business project or activity, see Organisation for Economic Cooperation and Development ("OECD"), OECD 'Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector', (OECD 2015) 19-20.

provide the necessary funding. As gatekeepers of capital, financial institutions are thus enablers of large-scale development projects that tend to constitute high risk for business-related *adverse human rights impact,*[2] given the complex operational context surrounding the business activities. This leaves the financial institutions with certain responsibilities in their deployment of funds.

From a rights-holders perspective, a broad web of actors has proven to challenge the possibilities for victims of adverse human rights impact to obtain an effective and meaningful remedy, otherwise referred to as "the accountability gap."[3] Pin-pointing accountability to an actor in the large chain of enablers is an issue growing abreast with globalization; the growing number of transnational companies with complex global supply chains involving innumerable subsidiaries and suppliers has enlarged the accountability gap[4] in a legal field which is already challenged by its indispensable reliance on self-regulations and corporate voluntarism rather than hard law. However, in light of the accountability gap, a "zero draft" of a first legally binding instrument to regulate the activities of transnational

[2] In the BHR context, *adverse human rights impact* is a key concept that occurs when "an action removes or reduces the ability of an individual to enjoy his or her human rights." Incorporated in the concept is both *actual* and *potential* impact, meaning that it includes impact that has already occurred or is occurring, as well as impact that may occur but has not yet done so, see United Nations Office of the High Commissioner of Human Rights ("OHCHR"), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) UN Doc. HR/PUB/12/02 (hereinafter "Interpretive Guide") 5-7.

[3] When speaking of "bridging the accountability gap", the definition provided by Bernaz should be kept in mind, according to which it should be understood as "both setting standards and attempting to change corporate behaviors so that they become respectful of human rights, and holding corporations and businesspeople to account if violations occur"; Nadia Bernaz, *Business and Human Rights. History, law and policy – Bridging the accountability gap* (Routledge, 2017) 8.

[4] The accountability gap can be explained due to mainly three factors. First, is the complicated situation where a transnational company and its subsidiary is involved in human rights violations as accomplices of a host state in which they operate. As it is the host state that is the perpetrator of the human rights violations, the likelihood of the courts in the host state of providing genuine remedies is low. And even so the host state is not involved in the human rights violations, the situation can occur in developing countries with too weak judicial and enforcement systems to satisfy the remedy. Second, is the difficulty for victims to get access to remedies in the country where the parent company is registered, as the traditional view is that States only exercise jurisdiction over acts committed within their own territories and avoid claiming jurisdiction over acts committed in another sovereign State's territory. This can be circumvented, by "piercing the corporate veil", which is a legal principle that can be summarized as establishing a liability for the parent company for the acts of their foreign subsidiaries. Third, is the lack of an international mechanism by which corporations could be held accountable for their violations of human rights; Bernaz (n 3) 9, 263, 265.

corporations and other business enterprises in international human rights law is currently under revision.[5]

The human rights responsibility of financial actors is a current issue under the notion of globalization and is considered a key challenge for all actors in the global economy.[6] The complexity of the problem will be illustrated by the Siguiri gold mine case in the following section and demonstrates the need to better understand the relationship between human rights and the global economy.[7]

The paradigm shift concerning accountability for human rights abuse has moreover left financial actors subjected to higher expectations to incorporate human rights protection into their decisions through risk management methods,[8] and a growing focus on their responsibilities as enablers of projects where risks for adverse human rights impact are significant.[9]

Without a proper understanding of the accountability mechanisms and effective remedies that are available to rights-holders, and a similar lack of clarity as to *who* should provide such remedies, a large number of individuals and communities are risking being left adversely affected by corporate activities without appropriate remediation. Based on the premise that the inclusion of the financial sector is indispensable for the achievement of

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[5] United Nations Human Rights Council ("UNHRC"), 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2014) UN Doc. A/HRC/26/L.22/Rev.1.

[6] David Kinley, *Civilising Globalisation: Human Rights and the Global Economy*, (Cambridge University Press, 2009) 13.

[7] On this topic, Kinley holds an interesting discussion that is worth noting. By pointing out that States are often the epicenter of both economic and human rights abuses. He argues that state actions on human rights are affected indirectly through the economy, and leans on Howard's "full-belly" thesis (see Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa* (Human Rights Quarterly Vol. 5, No. 4, 1983, 467-490). According to her thesis, a state is only willing and able to secure human rights when its "belly is full", that is when the economic prosperity has been secured. Moreover, the fact that public functions are increasingly are placed into private hands and that the State hence is "shrinking" means, as argued by Kinley, that responsibility shifts from the government to the market. Under the notion of the "shrinking state", the supervisory and regulatory responsibilities of the states are greatly enlarged as the scope for the direct impact on the fulfilment of human rights by the state is reduced. Alongside the expanded regulatory role vested upon such "shrinking states" however, a states' overall concern for the protection of human rights should at least be maintained, if not increased, and Kinley concludes "the role of governments in the global economy is not just to facilitate the conditions for productive, prosperous and prudent commercial enterprise, but also to ensure that, in the process, they do not renege on their social responsibilities […] as represented, in part, by their international human rights obligations"; Kinley (n 6) 20-22.

[8] Radu Mares, *Securing Human Rights Through Risk-Management Methods: Breakthrough or Misalignment?* (Leiden Journal of International Law 32.3, 2019) 518.

[9] Kinley (n 6) 13.

sustainable development,[10] the uncertainty surrounding the reach and implications of the human rights responsibility of financial actors might counteract that very purpose, making the topic of this thesis relevant from both a theoretical and practical perspective.

1.1.2 The Siguiri Gold Mine Case

The case of the AngloGold Ashanti gold mine (hereinafter the "Siguiri gold mine") concerns the activities of a gold mining company in Kintinian, Prefecture of Siguiri in Guinea, Africa, that has led to the forced eviction and displacement of approximately 380 households from their land.[11] The case has been selected for this study because it is useful to emblematically illustrate the financial links between IFIs, which use commercial banks as financial intermediaries, and development projects that cause adverse human rights impact. The case further shows the recent shift in focus concerning the accountability of financial actors and the effects that such actors have on project-affected people's access to remedies.

The Parent Company AngloGold Ashanti

The publicly listed South African company AngloGold Ashanti Limited (hereinafter the "Parent Company") is the third-largest gold mining company in the world, with operations on four continents and a revenue amounting to USD 3.9 billion in 2018.[12] Its largest shareholder is the United States-based asset manager BlackRock Inc. ("BlackRock"), which in turn is one of the world's largest asset managers with USD 6.84 trillion in assets under management as of June 2019.[13] Other shareholders include South African, North American, European and Asian pension funds, with the most significant share being held by the Norwegian Government Pension Fund Global. The company has also been further financed by some of the world's largest commercial banks through general-purpose loans.[14]

The Subsidiary's mining activities in the Siguiri region

[10] See the accompanying text to notes 119-121 in Section 1.7.4.
[11] Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine', <https://www.inclusivedevelopment.net/campaign/guinea-anglogold-ashanti-mine-forced-evictions/> (accessed on 23 November 2019).
[12] AngloGold Ashanti Limited, 'Annual Integrated Report 2018' 2, 51
[13] BlackRock Inc., 'Introduction' <https://www.blackrock.com/sg/en/introduction-to-blackrock> (accessed on 23 November 2019).
[14] As opposed to specific-purpose loans, general-purpose loans enable the user of the loan, typically a company, to use the funds freely and as it sees fit, meaning it can be used in funding of the company's operations; Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine' (n 11).

In 2013, the local subsidiary of the parent company in Guinea, Société AngloGold Ashanti de Guinée S.A. (hereinafter the "Subsidiary") which is responsible for operating the Siguiri gold mine, announced that it wanted to expand its operations into an area referred to as "Area One", populated by families of artisanal gold miners, merchants and smallholder farmers.[15] At the time, the Parent Company held an 85 % interest in the Siguiri gold mine through the Subsidiary, and the remaining 15 % interest were held by the Guinean government.[16] When in 2015 the affected families of Area One continued to refuse the resettlement terms offered by the Subsidiary, the company turned to the Guinean government, asking it to make the area available for operations, or else the Subsidiary would cease its operations entirely in the Siguiri region of Guinea.[17] The Guinean government, based on previous withdrawals of two major mining companies, took the Subsidiary's threat seriously, and promptly acted upon the company's request.[18]

Forced evictions by Guinean state security forces

The Subsidiary's threat to halt its operations and the breakdown of negotiations between the villagers of Area One and the subsidiary, prompted the Guinean government's decision to force relocation by sending in state military and security forces, including the Bérets Rouges ("Red Berets"), notoriously known for their prior involvement in gross human rights abuses.[19] During the forced eviction, the villagers of Area One suffered a wide range of abuses such as theft, violence, intimidation and arrests committed by Guinean state and military security forces. This intervention forced hundreds of people to flee the area into the surrounding woods.[20] Instances where representatives of the Subsidiary, accompanied by armed soldiers, had entered private homes forcing signatures for the inventories of their lands were reported. The villagers had also been excluded from information by the lack of previous consultation from the Subsidiary and most had not understood the content of the inventory documents they were forced to sign

[15] CAO, CAO Cases, 'Guinea / Nedbank-01/Kintinian' <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=1259> (accessed 23 November 2019); Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine' (n 11).
[16] Letter of Complaint concerning IFC loan to NedBank Group Ltd (Project no. 26014) from Inclusive Development International, CECIDE, MDT (27 April 2017) <https://www.inclusivedevelopment.net/wp-content/uploads/2017/05/Letter-of-Complaint-to-CAO_Siguiri_-Guinea_EN-FINAL.pdf> (accessed 23 November 2019) para 9.
[17] Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine' (n 11).
[18] Communities First, Press Release: 'Violence, Intimidation, Exclusion – NGOs report on resettlement at AngloGold Ashanti's mine in Guinea', (31 January 2017) <https://communitiesfirst.net/2017/01/31/kintinian-report/> (accessed 23 November 2019).
[19] Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine' (n 11).
[20] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) para 18.

due to language barriers. Similarly, they had not been given the opportunity to inform themselves of their rights.[21]

The intensity and rate of evictions increased in 2016 with the arrival of bulldozers that started demolishing houses in the area, forcing families to leave and find temporary shelter as the resettlement site had not yet been prepared. Although the resettlement site was still unfinished and conditions remained inadequate in March 2017, some families were moved to this area. The site lacked fundamental basic services and infrastructure such as water, electricity and roads, and there was no access to health care, education or livelihood opportunities.[22] The air on site was also polluted by a nearby mine, causing respiratory problems for the people.[23]

The financial links between IFC, the Commercial Bank and the Parent Company

The International Finance Corporation ("IFC") is the private sector lending arm of the World Bank Group ("WBG"). In 2007, it provided the South African banking group Nedbank Group Ltd ("the Commercial Bank") with a USD 140.73 million loan[24] to be used by the bank to increase its lending to underserved markets for "capital intensive projects that support sustainable economic growth" in the Sub-Saharan region, such as "resource-extraction projects", among other objectives.[25]

The IFC's Sustainability Framework includes, inter alia, a set of Performance Standards on Social and Environmental Sustainability ("PSs"), which clients of the IFC are intended to respect when being provided with a loan. The 2007 transaction from the IFC to the Commercial Bank therefore contained certain contractual requirements concerning social and environmental issues. One of these requirements was for the Commercial Bank to require the recipients of its corporate loans to comply with national laws and apply the IFC's PSs where the corporate activities could pose social or environmental risks. The IFC also required the Commercial Bank to establish a "Social and Environmental Management System" to ensure that its investments would meet the IFC's requirements. The social and environmental performance of the Commercial Bank was going to be monitored by the IFC.[26]

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[21] Communities First, 'Press Release' (n 18).
[22] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) para 18.
[23] Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine' (n 11).
[24] The total loan to Nedbank was co-provided by the IFC and the African Development Bank and amounted to a total of USD 280 million; IFC, 'Press Release' (2 July 2007) <https://ifcextapps.ifc.org/ifcext/pressroom/ifcpressroom.nsf/0/AB073109EA552BDE8525730C006C3AFA?OpenDocument> (accessed on 23 November 2019).
[25] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) para 8.
[26] ibid para 10.

A month prior to the loan, the Commercial Bank had won the "Emerging Markets Sustainable Bank of the Year in the Middle East and Africa" award at the Sustainable Banking Awards, and it was, at the time, the only bank in Africa that had adopted the Equator Principles, that is to say a voluntary set of guidelines for managing environmental and social issues in project-finance lending, based on the PSs.[27]

In July 2015, while still being a client of the IFC, and in the midst of the escalating events surrounding the Parent Company's mining operations in Siguiri, the Commercial Bank co-provided two-thirds of the total USD 105 million general-purpose loan to the Parent Company.[28] The financing agreement between the Commercial Bank and the Parent Company did not contain any clause regarding the application of the PSs to the mining operations in Guinea although the social and environmental risks of the mining operation were well known.[29]

Complaint concerning the IFC loan to the Commercial Bank

In April 2017, two non-governmental organizations ("NGOs")[30] and one international human rights organization[31], submitted a complaint on behalf of the displaced families of Kintinian to the Office of the Compliance Advisor Ombudsman ("CAO"), the IFC's independent grievance and redress mechanism.[32] The complaint describes breaches of relevant international human rights standards[33] and of the PSs. The complaint was directed at IFC for its role in financially supporting the parent company and its non-compliance with its own policies and procedures in relation to its loan to the Commercial Bank.[34] The complainants, on behalf of the victims, argued that

[27] IFC, 'Press Release' (2 July 2007) (n 24); 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16).
[28] Agreement for Revolving Credit Facility for AngloGold Ashanti Ltd with Nedbank Ltd and ABSA Bank Ltd (7 July 2015) <https://www.sec.gov/Archives/edgar/data/1067428/000095015716001802/ex10-1.htm> (accessed 23 November 2019); 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16).
[29] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) para 12.
[30] The Centre de Commerce International pour le Developpement and Le Memes Droits Pour Tous.
[31] Inclusive Development International.
[32] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) para 1.
[33] On the issue of the forced eviction and the right to adequate housing, the complaint refers to, inter alia, the General comment No. 7 of the UN Committee on Economic, Social and Cultural Rights <https://www.refworld.org/docid/47a70799d.html> (accessed 23 November 2019).
[34] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) paras 15-18.

the IFC was exposed to the project through its financial intermediary client[35] and failed in its due diligence in relation to its investment in the Commercial Bank, thus contributing to the harm caused.[36] The complainants sought redress for these harm and losses, and to derive the appropriate development benefits from the project, in line with the provisions and measures set out in the PSs[37] and Guinean Law. The CAO was requested to facilitate a mediation process with the Parent Company, the Commercial Bank and the IFC to address the grievances of the complainants.[38]

Case status

As of May 2019, the dispute resolution process was still ongoing. At the time of writing, the complainants and the Subsidiary have last met in February 2019, where agreements were reached and signed on two of the issues under mediation concerning water and schooling.[39] In accordance with the agreement, a water system has been installed in the Area One resettlement site and the Subsidiary has agreed to facilitate access to schooling for the children on site by providing transportation to and improving the overall conditions at the public school, until the school at the resettlement site is operational.[40] The Commercial Bank has stated that it will support any dispute resolution process that the parties may wish to engage in, and the IFC has expressed its support for the CAO.[41]

The scenario described above clearly shows the contextual complexity of cases, in which not only IFIs, but also intermediary commercial banks, may be involved in adverse human rights impact through their funding of extractive projects or other large-scale development projects. The length and complexity of the complaint mechanism, as discussed in this thesis, also indicates the difficulty to hold IFIs and commercial banks accountable for the harms in practice.

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[35] ibid para 1.
[36] Inclusive Development International, 'Guinea: AngloGold Ashanti Gold Mine' (n 11).
[37] IFC, Performance Standards on Environmental and Social Sustainability (2012) (hereinafter "PSs"), see e.g. PS 1 para 12.
[38] 'Letter of Complaint concerning IFC loan to NedBank Group Ltd' (n 16) para 51.
[39] CAO, 'Guinea / Nedbank-01/Kintinian' (n 15).
[40] CAO, 'Joint statement' (25 February 2019) <http://www.cao-ombudsman.org/cases/document-links/documents/JointStatement_GuineaNedbank-May12019.pdf> (accessed 24 November 2019).
[41] Letter from IFC to CAO, 'Response to the CAO Assessment Report on Nedbank (#26014) in Kintinian, Guinea (4 January 2018) <http://www.cao-ombudsman.org/cases/document-links/documents/IFCResponsetoCAOAssessmentReportforNedbankinKintinian.pdf> (accessed 24 November 2019).

1.2 Research focus

This thesis examines the role of IFIs in development finance by examining the interrelationship between human rights and the responsibilities of international organizations in international law, to then understand to what extent international organizations are bound by international human rights law and what the consequences are for the effective access to remedy for victims of business-related adverse human rights impact. This is done in light of the shift in the lending practices of the IFC[42] towards an increased use of commercial banks as financial intermediaries for loans, intended for development projects and carried out by private actors. This increase is a direct result of the United Nations ("UN") 2030 Agenda for Sustainable Development (hereinafter the "2030 Agenda")[43] that has increased the pressure placed upon Member States to finance development through IFIs as well as scale up private investments to reach its objectives. The inclusion of the banking industry in this equation has highlighted the confusion regarding their human rights responsibility and what a human rights-based approach to risk management means in their respect.[44] This leads the thesis to also examine the reach of the corporate responsibility to respect human rights[45] in a corporate and investment banking context, and to seek to address these misunderstandings, in order to contribute to some clarity on the matter and thus avoid the risk of negative effects on the prevention of business-related adverse human rights impact.

Being entities with different legal personalities, IFIs and commercial banks are subjects of and governed by international and domestic legal regimes respectively. Although the thesis primarily discusses the legal responsibilities of IFIs due to its focus on the IFC, it will inevitably provide, to some extent, a distinction between the human rights responsibility of both financial institutions. It thus also intends to contribute to a deeper understanding of how their roles and responsibilities vary pertaining to the different instruments and practices governing the operations of each financial

[42] The IFC is used as an example throughout the thesis. The choice of IFC as the IFI under scrutiny should be seen against a backdrop of their role in the Siguiri gold mine case and that they are an IFI with an extensive framework on operational policies and an independent accountability mechanism. The shift of the lending practices of the IFC has moreover led to an increased scrutiny of the risk management methods that are used by the IFC and commercial banks respectively, as well as the available accountability mechanisms for victims to seek reparation, that are of relevance to the discussion held in this thesis.
[43] UNGA Resolution (Res) 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1 (hereinafter the "2030 Agenda").
[44] The Thun Group Debate is outlined in Section 2.2 and illustrates the banking sector's misconception on the UNGPs applicability to their operations and client relationships.
[45] See Section 1.4 where the UNGPs are introduced more adequately together with the UN "Protect, Respect and Remedy" Framework.

institution. In doing so, it further aims to show that the BHR regime transcends their differences and applies to both institutions, albeit differently.

The purpose of this thesis is thus to further the understanding of how human rights responsibilities pertain to IFIs and address the accountability gap that is a consequence of the complex interrelationship between human rights and the responsibilities of international organizations in international law.

In order to reach the purpose of the thesis, one main research question and various sub-questions will be posed:

1. How can IFIs be held accountable for the conduct of their borrowers?

    a. What responsibility, under international law, does an IFI have for the adverse human rights impact that a private client (e.g. a company) of their borrower (e.g. an intermediary commercial bank) may cause or contribute to?

        i. How does the banking sector understand its role and responsibility in the context of adverse human rights impact?

        ii. What is the relevance of the UNGPs in the Thun Group Debate?

        iii. What role do private governance initiatives,[46] play in relation to defining the human rights responsibility of the banking sector?

    b. If such responsibility exists, what are the challenges to ensuring effective remedies for the individuals or communities who have been adversely affected?

Ultimately, this thesis seeks to fill the existing gap in the study of the relationship between international law and IFIs and their operations, by raising awareness on the complexity of the topic and, in doing so, stimulate thought, further debate and ultimately action from a regulatory as well as a corporate perspective.

[46] Private governance initiatives refer to the voluntary development of guidelines and frameworks from within corporations and organizations, in order to better address and account for a protection and compliance with human rights responsibility as enshrined by the UNGPs. Private governance initiatives as such thus form part of the soft legal framework around the corporate responsibility of human rights.

1.3 Current state of research

The study of the relationship of BHR has been a rapidly evolving field over the past ten years. Despite the vast amount of research on the area in general,[47] less can be found on the relationship of human rights with the financial sector more specifically.[48] Scholars of BHR and academia now point at the change in the notion of the financial sector as a neutral and nearly invisible actor within the regime, and to the increased scrutiny of the activities of banks.[49] The deficiency in the study refers to both international legal issues relating to the operations of IFIs[50] and private financial institutions. As a result, initiatives such as the Thun Group of Banks' discussion paper have been launched that address the human rights responsibility of the commercial banking sector.[51] Notwithstanding such industry-initiatives, aiming to further the industry's understanding in order to advance the practical application of BHR standards, the demand for further research on the relationship between financial institutions and human rights,[52] and the applicability of the UNGPs to the activities of the financial sector, is evident and necessary.[53]

Various other gaps have been identified in the BHR scholarship that are of relevance. First, a more "rightsholders-centric" research has been requested, where the focus on "human rights", entailing actual and legally enforceable duties against businesses for the true protection of human rights and not "[…] merely a symbolic tick box exercise for companies to get projects approved […]".[54] Sarah Joseph refers to this as an "'actual crystallisation of hard law obligations' in both domestic and international law" where those, whose rights have been adversely affected by business activities, remain at the core of the scholarly concerns.[55]

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[47] The practical workings of the UNGPs and their limits are especially two such themes; Surya Deva, Anita Ramasastry, Florian Wettstein and Michael Santoro (Editors-in-Chief), Editorial, *Business and Human Rights Scholarship: Past Trends and Future Directions*, Business and Human Rights Journal 4, 2019) 202.

[48] The developmental work of international organizations has received less attention from international legal scholars than the powers of the UN to deal with peace and security for instance. Bradlow and Hunter argue that "it is striking how little attention has been paid to the international legal issues relating to the operations of IFIs collectively"; Daniel D. Bradlow, David B. Hunter (eds.), *International financial institutions and international law*, (Kluwer Law International, Austin, 2010), xxviii-xxix.

[49] Deva and others (n 47) 207.

[50] ibid 202.

[51] The Thun Group of Banks, Statement by the Thun Group of Banks (2 October 2013) <https://www.menschenrechte.uzh.ch/dam/jcr:00000000-3175-0061-0000-000030306b7b/thun_group_statement_final_2_oct_2013.pdf> (accessed 27 October 2019).

[52] Deva and others (n 47) 207-208.

[53] The Thun Group Debate which will be discussed further on in the thesis is one example.

[54] Deva and others (n 47) 205.

[55] ibid 205.

Secondly, the 2030 Agenda including the Sustainable Development Goals ("SDGs"), that intend to embed human rights at their core, and the intersection between the SDGs and the UNGPs, are mentioned as new thematic directions where scholarly contributions are needed. Here, the invitation of business to contribute to sustainable development through SDG 17,[56] that requires enhanced partnerships between governments and the private sector, is particularly noted.[57] The research that has been undertaken so far on the contribution of businesses to the 2030 Agenda, has argued that perhaps the best contribution to its achievement would be to eliminate the adverse impacts and abuses that the businesses cause or contribute to.[58]

Lastly, but perhaps most importantly for the purpose of this thesis, the roles and responsibilities of "banks and other financial gatekeepers" is a legal territory that is mentioned as largely uncharted. Here, the study of how financial actors can use their leverage to influence corporate behaviour in accordance with existing global standards on the respect for human rights, as well as further research on the responsibility of financial institutions, alongside businesses, for respecting human rights in relation to their client and business relationships, is requested. In this respect Jonathan Kaufman notes: "it would really help to advance the practical application of this field to get more rigorous research and analysis on the legal underpinnings of financier liability and the theories that could push it beyond its traditional limitations".[59] This thesis aims to be a contribution to the satisfaction of that demand.

1.4 Methodology and materials

In order to achieve the purpose of the thesis, the doctrinal research method has been applied. Conducting a study by means of such method aims to seek the solution to a specific legal problem through the study and interpretation of recognized legal sources in a systematic order. This form of study typically encompasses interpretation of regulations, precedents, cases, principles and

[56] United Nations, 'Sustainable Development Goals and Agenda 2030, "Goal 17: Revitalize the global partnership for sustainable development"'<https://www.un.org/sustainabledevelopment/globalpartnerships/> (accessed 15 January 2020).
[57] Deva and others (n 47) 205.
[58] The research has been conducted by, inter alia, the national human rights institution Danish Institute for Human Rights and the organizations Shift and Oxfam; Deva and others (n 47) 206.
[59] Deva and others (n 47) 207.

policies as well as legal doctrine, from which conclusions can be derived that determine the current legal order.[60]

In respect to the materials that have been used for the purpose of this thesis, the novelty and recent developments of the notion of the responsibility of international organizations must be noted, as well as the novelty of the BHR regime in general, and the lack of hard laws governing its sphere. Here, the deficiency of legal study on the responsibilities of financial actors specifically within this regime must be reiterated,[61] as it affects the availability of materials on the matter. Most of the material written on the subject exists in the form of academic journals or articles. Hence the material that will be used ranges from literature, academic journals and legal commentaries to reports.

The aforementioned has naturally also affected the relevant case law available on this topic, as the area of interest is relatively unexplored and cases within the topic are not very common. The ruling of the United States Supreme Court in the Budha Ismail Jam et al. v. International Finance Corporation (hereinafter the "*Jam* case")[62] however sparked enormous discussion in the international development finance community[63] that is of great relevance to this thesis. The *Jam* case has of course been incorporated in the study to illustrate and keep abreast of the most recent developments on the accountability of IFIs for the conduct of their borrowers. Other case law that is referenced in the study stems from the International Court of Justice ("ICJ") as it relates to the discussion on the international legal personality and responsibility of international organizations under international law in Chapter Three.

The norms governing the field of BHR are mainly to be found in soft law instruments such as principles, agreements or guidelines. Here, the distinction between "soft" and "hard" law is important to note. Whereas hard law regulations are defined as legally binding obligations that are legally enforceable before a court, soft law instruments are not legally binding.[64]

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[60] Fredric Korling and Mauro Zamboni, *Juridisk Metodlära* (Studentlitteratur AB, 2013) 21.
[61] See text by note 60 in Section 1.3.
[62] Jam et al v International Finance Corporation, 586 U. S. ____ (2019); see Section 3.2.2.5.1.
[63] Business & Human Rights Centre, 'What does the US Supreme Court's decision on IFC impunity mean for Indian fisherfolk?' (5 March 2019) <https://www.business-humanrights.org/en/what-does-the-us-supreme-courts-decision-on-ifc-impunity-mean-for-indian-fisherfolk> (accessed 7 February 2020).
[64] European Center for Constitutional and Human Rights (ECCHR), 'Glossary "Hard Law/Soft Law"' <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (accessed 17 January 2020).

Instead, soft law is considered to derive "its normative force through recognition of social expectations by states and other key actors".[65]

The UN "Protect, Respect and Remedy" Framework ("the Framework") and the UN Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework (hereinafter the "UNGPs") were developed by Professor John Ruggie under his mandate as the Special Representative of the Secretary General ("SRSG") on the issue of human rights and transnational corporations and other business enterprises. The two instruments are intrinsically linked and are documents of key importance as they are recognized as the global standard on the corporate responsibility for human rights. The Framework builds upon recognized international human rights standards set forth in the International Bill of Human Rights and is addressed in Chapter Three.[66]

The study will, apart from the principles set forth in public international law, rely upon documents that in essence originate from various sector-specific and corporate voluntary initiatives. In this regard, the UN, International Labour Organization ("ILO") and the Organization for Economic Co-operation and Development ("OECD") are undoubtedly some of the most influential actors that have advanced the development of the international regulatory framework on BHR.[67] Moreover, the revised and updated operational policies of the WBG and its institutions for a better alignment with the UNGPs,[68] points to "a convergence on human rights in in the economic area not witnessed before, even if merely a matter of international soft law."[69]

Lastly, the discussion in Chapter Two on the Thun Group Debate relies on reports and materials published in relation to the Thun Group's discussion paper published in 2017.[70] Most of the critical perspectives on the views

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[65] UNHRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', UN Doc A/HRC/4/035 (9 Feb 2007), para 45.
[66] The International Bill of Rights: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) ("UDHR"); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ("ICCPR"); International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ("ICESCR"). The International Bill of Rights is legally binding if ratified and endorsed, see Section 3.2. 1.1.
[67] Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *International human rights law*, (Third Edition, Oxford University Press, 2017) 568.
[68] See text by note 333.
[69] Mares, "Securing Human Rights Through Risk-Management Methods" (n 8) 518.
[70] Thun Group of Banks, *Discussion paper on the Implications of UN Guiding Principles 13 and 17 in a Corporate and Investment Banking Context* (Thun Group of Banks, December 2017) ("2017 Paper")

presented in the discussion paper will thus be provided from replies in academic journals and articles, as the views of scholars and academia on the subject can mainly be found there. Here, reports and clarifying contributions of larger international organizations such as UN entities have also been of importance.

1.5 Delimitations

The topic that this thesis concerns is one that is full of complexity and controversial legal debates due to its many dimensions. The study is however limited to the role and responsibilities of IFIs with respect to human rights in the development finance context and the implications of using intermediary commercial banks herein, to allow for fruitful comparisons and discussions on its findings. Including more controversies in the scope of the study would potentially compromise the quality of the discussion. Therefore, the thesis does not consider other aspects that nonetheless relate to the financial sector in this context, such as foreign debt and human rights. A discussion on this would in any case be held in relation to Pillar I of the UNGPs, that albeit relevant in a broader discussion on the responsibility of international organizations, serves better in a discussion on state's responsibility for human rights.

The entire World Bank system has a very prominent role within the context of development finance. Nevertheless, only the IFC will serve as an example throughout the thesis. The choice should be seen against a backdrop of the IFC's focus on the strengthening of the private sector in developing countries and the present concerns on their lending practices due to the increased use of intermediary commercial banks, as illustrated by the Siguiri gold mine case in Section 1.1.2. Moreover, they are an IFI with an extensive framework on operational policies (the PSs) that has become the base in the development of other private governance initiatives that are discussed in Section 3.3.2, and whose relevance and possible contributions within the context are also addressed. Additionally, the IFC offers an independent accountability mechanism (the CAO) that serves as a suitable example to illustrate the length and complexity of internal complaint mechanisms that indicates the difficulty to hold IFIs and commercial banks accountable for the harms in practice.

The choice of commercial banks as the private financial actor that has been considered in this study is due to their relevance within the context that is discussed and the use of the Thun Group Debate herein, that exemplifies the current understanding of the human rights responsibility of the banking sector and its applicability to their financial activities and financial relationships. The study therefore does not consider other private financial institutions, such

as private equity funds, that may well be involved in investments related to development finance.

Since this thesis is concerned with IFIs, that are international organizations operating on an international level, no regional or domestic frameworks will be examined directly. The thesis only considers international responsibility, not responsibility under domestic laws. Albeit US legislation is addressed in Section 3.2.2.5 where the Jam case is discussed, it has a more general relevance to the discussion held, as it might serve to set a precedent for the accountability of IFIs in general.

When referring to human rights and international human rights instruments, the thesis only focuses on the modern era of the development of human rights, that is to say after the establishment of the UN in 1945. It does not consider earlier, albeit iconic, human rights proclaiming instruments. Finally, it is limited to the human rights aspects of the challenges and impacts of sustainable development and development projects. Aspects and challenges in relation to sustainability, therefore, are not within the scope of this thesis.

1.6 Structure

The thesis proceeds as follows. The first chapter is of an introductory and definitional character and aims to explain the scope of the thesis and the purpose it intends to meet. The chapter thus provides necessary definitions of some key concepts of the context. Chapter Two, further conceptualizes the topic of the study by introducing the relevant UNGPs that underpin the issues of the Thun Group Debate, which is addressed in the same chapter. The debate is used in the thesis to illustrate the current misconception of the banking sector on their human rights responsibility. Lastly, Chapter Two also provides an introduction of the IFC, which is used as an example-IFI in the study. Chapter Three then proceeds to define the responsibilities of international organizations under international law, and specifically focuses on their applicability to IFIs. The chapter also presents some of the human rights responsibilities that have emerged within the BHR regime in instruments of private governance, and that are of relevance to the issues that are being discussed. The final chapter, Chapter Four, is dedicated to the concluding discussion. By using the previous chapters as matrix, it holds a discussion that is divided into two sections and intends to answer the main research question of the thesis and the pertaining sub-questions. In doing so, the challenges highlighted in Chapter Two by the Thun Group Debate will be discussed in relation to the responsibilities of international organizations set out in Chapter

Three. The chapter will then conclude by considering the implications of the above for the accountability of IFIs.

1.7 Definitions

The definitional sub-section aims to explain the current state of the notion of development finance by providing definitions of key concepts and actors included in the notion. The section begins with an introduction of the role and operational function of the financial actors involved in development finance that are of particular relevance to the thesis. This definitional clarification is crucial in order to provide a context for a later discussion on the responsibility vested upon such actors. It will then proceed to provide a definition of the concept of sustainable development. This is followed by an outline of the developments on the notion of development finance, including the emerging approach of blended finance, and the challenges as well as the possible opportunities it has spurred. The outline will show that currently, there are concerns relating to the concepts and instances where development finance might be considered to counteract the very same objective that it is intended to aid. The topic that this thesis concerns is evidently sprung out of this paradoxical consequence.

1.7.1 International financial institutions

IFIs are organizations that by virtue of presenting two common features are denoted as such. First, they are *international* or *intergovernmental* in that they, as a rule, are established by an international agreement or treaty and are governed by, and operate to the benefit of, more than one state, on the basis of a corporate structure.[71] They are organized on the basis of capital subscription, where the voting powers of each Member State are determined by the number of shares they hold in the organization.[72] Second, they are *financial*, whether for monetary or developmental purposes, by virtue of their mandate to engage in financial transactions.[73] Notwithstanding the common features of IFIs in general, the purposes and functions, the focus of their activities, as well as the financing and membership, tend to vary between them. The variety is expressed in the provisions set forth in the respective

[71] Maurizio Ragazzi, "Financial Institutions, International" (Oxford Public International Law, Max Planck Encyclopedia of Public International Law Online, last updated October 2017) para 1; Bradlow and Hunter (n 48) 1.
[72] Bradlow and Hunter (n 48) 64.
[73] Ragazzi (n 71) para 1.

constituent instrument of the IFI in question.[74] IFIs with developmental purposes are of particular interest to this thesis and are typically referred to as developmental financial institutions ("DFIs"). DFIs provide a platform for disbursement of funds from developed donor countries to borrowing developing countries.[75] Multilateral development banks ("MDBs"), such as the WBG,[76] are a form of DFIs.[77]

The financial transactions of IFIs are despite their public purpose similar to market-based financial transactions. The financial transactions are thus legally similar to the private sector's financial contracts, such as within commercial banking. However, since the financial transactions of IFIs involve agreements between international organizations and states, they become subject to international legal principles applicable to international agreements, as opposed to the private sector which is bound to national rules.[78]

The services provided by IFIs are in general designed to serve a public purpose, related to either macro-economic policy or general goals of development or poverty alleviation.[79] Nevertheless, the functions and operational focus have shown to be further influenced by factors such as the width of the concept of development, which often appears in the definition of many DFI's purpose. The functions of DFIs can therefore span from the promotion of investments or stimulation of the development of capital markets, to the coordination of development policies. Consequently, the financial products used to achieve or implement those functions vary from loans, grants, equity participations, to technical assistance or advisory services. Moreover, the scope of IFIs' operations in general has evolved and now permeates various areas of society such as infrastructure, social development, governance and legal reforms.[80] The significant role of IFIs in the globalizing economy of the world, and the effects of their activities, can therefore not be overstated.[81]

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[74] ibid paras 1 and 6.
[75] Vinay Bhargava, *The Role of International Financial Institutions in Addressing Global Issues* in Vinay Bhargava (ed.) *Global Issues for Global Citizens*: *An Introduction to Key Development Changes* (The World Bank, Washington D.C., 2006), 393-394.
[76] The functions and activities of the World Bank Group will be discussed in more detail in Chapter Two, Section 2.3.
[77] The other four MDBs are the African Developments Bank, the Asian Development Bank, the Inter-American Development Bank and the European Bank for Reconstruction and Development; Bhargava (n 75) 395.
[78] Due to this chapter's definitional character, the legal responsibilities that are applicable to IFIs will be better addressed in Chapter Three; Bradlow and Hunter (n 48) .
[79] Bradlow and Hunter (n 48) 3
[80] Ragazzi (n 71) paras 6 and 7.
[81] ibid para 31.

1.7.2 Commercial banking

Commercial banks are a form of private financial institutions.[82] They are defined as acting in a classical intermediary role by accepting deposits from savers and extending credit to borrowers.[83] The type of loans can vary but are in general granted for a short and fixed period of time against a specific rate of interest. In addition, the loans are conditioned by certain requirements so that the *principal*[84] can be recovered in case of default; such as an indicated guarantor to sanction and security of assets. In this way, commercial banks earn their income by charging higher rates of interest to the borrower compared to the rates that are paid to the depositors, in order to cover costs of their lending services, administrative expenses and returns to shareholders.[85]

As part of their intermediary role, commercial banks also perform a range of ancillary business activities that bring them additional income such as insurance brokerage, investment banking, risk management and capital market activities. Hence, they are for-profit establishments like any other company. The intermediary role of commercial banks provides that they have a vitally important economic function, and their services and products are essential for the proper functioning of the movement of funds and transactions in general, including for project financing.[86]

As a result of commercial banks' central position in the financing system, the banking sector is a prime target for government regulation.[87] Since the majority of commercial banking activities are covered by banking regulations, the conduct and behaviour of banks in their business dealings is strongly influenced by their regulatory obligations. Severe restrictions may be imposed on commercial banks through these regulations, such as restrictions concerning transactions with particular counterparties or operations in certain jurisdictions. This form of country or industry specific sanctions are particularly relevant in relation to the extractive sector,

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[82] Allen N. Berger, Christa H.S. Bouwman, *Bank Liquidity Creation and Financial Crises*, (Academic Press, 2016), ch 1, 4.
[83] Robert Clews, *Syndicated Banks and Lending*, in *Project Finance for the International Petroleum Industry* (Academic Press, 2016), ch 4, para 4.2.1, 64.
[84] The financial definition of "principal" reads: "[…] principal refers to the face amount of a debt instrument or an amount of money borrowed" according to the *Merriam-Webster Dictionary,* "principal" <www.merriam-webster.com/dictionary/principal>. In other words, *principle* is the original amount borrowed, that the borrower then owes the lender, excluding the interest of the loan.
[85] Clews (n 83) 64-65.
[86] Clews (n 83) 64-65.
[87] ibid 64.

including the oil and gas industry. Regulation can therefore be a significant factor in determining the structure and terms of financing loans.[88]

Another feature of commercial banking that is of particular relevance to the topic of this thesis is the notion of due diligence practices of commercial banks. The *Merriam-Webster Dictionary* defines "due diligence" as "the care that a reasonable person exercises to avoid harm to other persons or their property".[89] The OECD is a group, currently representing 36 member countries, that develops economic and social policies.[90] In its Guidelines for Multinational Enterprises (hereinafter the "MNE Guidelines"), the OECD has defined "due diligence" as a process carried out by companies to identify, prevent, mitigate and account for actual and potential adverse impacts by their own business operations or any business relationships, including partners and entities in their supply chain.[91] Important to note here is that the MNE Guidelines constitute principles and standards for responsible business conduct and refer to a *human rights focused due diligence*.[92] The main difference between the concept of human rights due diligence ("HRDD") and the more traditional concept of due diligence in the business context, is that the HRDD process focuses on the risks to rights-holders affected by business activities, whereas the due diligence traditionally undertaken by businesses focuses mainly on the risks to the business itself.[93]

In the banking context, the general perception of "due diligence" is the identification and assessment of reputational, legal and financial risks to the bank that, as such, should be conducted prior to providing financing or other services to a client. Based on this perception, the due diligence processes of commercial banks do not generally take into consideration such impacts that their client's operations might have on the environment, workers and communities, nor their prevention or mitigation.[94] A growing number of

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[88] ibid 66.
[89] *Merriam-Webster Dictionary*, "due diligence" <www.merriam-webster.com/dictionary/due%20diligence > (accessed 25 January 2020).
[90] OECD, 'About' "Our global reach"' <http://www.oecd.org/about/members-and-partners/> (accessed 12 December 2019).
[91] OECD, 'OECD Guidelines for Multinational Enterprises' (OECD, 2011) ("MNE Guidelines") 23.
[92] The content and concepts referred to in the MNE Guidelines draw upon the "Protect, Respect and Remedy" Framework and are aligned with the UNGPs. They will be addressed more in-depth in Chapter Two, Section 3.3.2.3; MNE Guidelines (n 91) 31.
[93] UNHRC, Report of the Special Representative of the Secretary-General (SRSG) John Ruggie on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 (21 March 2011) ("A/HRC/17/31") Annex II.B.17 Commentary.
[94] OECD, 'Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises' (OECD, 2019) ("CLU Guidance") 14.

banks have however started to adopt policies to conduct so-called social and environmental risk assessments of projects that they are involved in.[95] This is best noted through their endorsement of guidelines for managing such risks, as for instance the Equator Principles.[96] Information on the due diligence processes of banks are however still scarce, as banks tend to be rather reluctant on sharing information concerning their clients due to commercial confidentiality[97] and the lack of disclosure policies.[98]

1.7.3 Sustainable development

The definition of sustainable development was coined by the UN established Brundtland Commission, formerly known as the World Commission on Environment and Development ("WCED") in 1987.[99] The term was described in the commission's report (hereinafter the "Brundtland Report") as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[100] The idea of promoting economic advancement while maintaining environmental sustainability expressed in the Brundtland Report later inspired subsequent Earth Summits,[101] and the concept now tops the agendas of the UN as well as the functions of MDBs.[102]

The latest political commitment spurred by this concept is the 2030 Agenda including its 17 SDGs, that were adopted by all UN Member States in 2015. The 2030 Agenda has a range of economic, social and environmental objectives, and promises more inclusive and peaceful societies when

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[95] Sheldon Leader, David Ong, *Global Project Finance, Human Rights and Sustainable Development*, (Cambridge University Press, 2011) 451.
[96] The Equator Principles are a voluntary set of guidelines for managing environmental and social issues in project financing that are based on the IFC's PSs. For more on the Equator Principles, see Section 3.3.2.1.
[97] The duty of client confidentiality is generally regulated in domestic laws and does not only consider financial information of the client but can extend to other sorts of information shared during the course of the client relationship. It can even require the bank to keep the existence of the client relationship itself confidential; CLU Guidance (n 94) 21.
[98] Leader and Ong (n 95) 451.
[99] United Nations General Assembly (UNGA), 'Report of the World Commission on Environment and Development: Our Common Future', A/42/427 (4 August 1987) (hereinafter the "Brundtland Report").
[100] Brundtland Report (n 99) annex, ch 2, para 1; World Commission on Environment and Development ("WCED"), 'Our common future' (Oxford University Press, Oxford, 1987) 41.
[101] The UN Conference on Environment and Development in 1992 in Rio de Janeiro, Brazil, the World Summit on Sustainable Development in 2002 in Johannesburg, Africa and the UN Conference on Sustainable Development in 2012 in Rio de Janeiro, Brazil.
[102] Herman E. Daly, *Toward some operational principles of sustainable development* in Stefan Baumgärtner, Richard B. Howarth (eds.) *Ecological economics* (Vol 2, issue 1, 1990) 1-6; Bhargava (n 75) 381.

achieved, with the ultimate end of eradicating poverty and achieving universal and sustainable development by 2030.[103] Poverty is recognized as the greatest global challenge for the achievement of sustainable development and its eradication is therefore considered as an indispensable requirement.[104]

The 2030 Agenda also aligns domestic and international resource flows, policies and international agreements with economic, social and environmental priorities.[105] It sets out a 15-year plan, from the time of its adoption, for the Member States to stimulate action in areas of critical importance for humanity and the planet, as reflected in the Goals and identified as: people, planet, peace, prosperity and partnership.[106] The SDGs therefore intend to provide clear and practical measures for the Member States to realise the 2030 Agenda, and the respective Goals recognize actions in the aforementioned areas that span from ending poverty and other deprivations, to improving health and education, preserving oceans and forests and spur economic growth; all while tackling climate change.[107] As the most recent global call for action motivating strategies for sustainable development, the 2030 Agenda and its SDGs are meant to be implemented in the national policies of the Member States and mainstreamed throughout all decisions and governance.[108] Yet, the concern that the concept of sustainable development is bypassing some of the most vulnerable groups to the extent that the SDGs might not be achievable by 2030 is reiterated by one of the latest reports by the UN Development Programme ("UNDP").[109] Despite an improvement in living standards resulting from sustainable development in the 21st century, the UNDP report points at the growing inequalities in the globalized world and particularly highlights the increasing inequalities in enhanced capabilities,[110] affecting people's abilities to function in a

[103] 2030 Agenda (n 43) Preamble para 4.
[104] UN, 'Transforming out world: the 2030 Agenda for Sustainable Development' <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed 10 December 2019).
[105] 2030 Agenda (n 43); UN, 'Transforming out world: the 2030 Agenda for Sustainable Development' (n 104).
[106] 2030 Agenda (n 43) Preamble, para 4.
[107] ibid Preamble; UN, 'What is financing for development' <https://www.un.org/sustainabledevelopment/financing-for-development/> (accessed 6 December 2019).
[108] UN, 'Sustainable Development Goals' <https://sustainabledevelopment.un.org/sdgs> (accessed 24 November 2019) para 21.
[109] United Nations Development Programme ("UNDP"), 'Human Development Report 2019 - Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (UNDP, 2019) (hereinafter "Human Development Report 2019").
[110] Despite an improvement and convergence in basic capabilities, linked to the most extreme deprivations of hunger, disease and poverty, such as early childhood survival, primary education, access to entry-level technology and resilience to environmental shocks, a divergence across the enhanced capabilities such as access to quality health and high-quality education at all levels, effective access to present-day technology and resilience to unknown environmental shocks, is creating a new generation of inequalities both between

knowledge-based economy and cope with the effects of climate change, thus creating a new generation of inequalities both between and within countries. These inequalities are considered a roadblock to the achievement of the 2030 Agenda and the SDGs.[111]

A prominent feature of the 2030 Agenda and its SDGs is that it is intended to be universal in that "no one [country] is left behind."[112] The 2030 Agenda therefore stresses a strong international cooperation in order to ensure that all Member States have the means to achieve the SDGs. Based on this premise, SDG 17 is of particular importance, as it targets enhanced partnerships between governments, the private sector and civil society in order to mobilize, redirect and unlock private resources to deliver on SDG-related objectives and ultimately achieve the 2030 Agenda.[113] SDG 17 and its pertaining targets are thus of particular relevance to this thesis, as they underpin the notion of development finance as explained in the following section.

1.7.4 Development finance

The UN Conference on Trade and Development ("UNCTAD") estimates that it will take between USD 5 to USD 7 trillion to achieve the SDGs.[114] The financing gap for their achievement is estimated to be USD 2.5-3 trillion per year in developing countries.[115] Whilst the global gross financial assets exceed this figure a hundredfold, and governments are estimated to hold a share of 50–80% of the resources needed, the finance available is not channelled appropriately towards sustainable development.[116] A surge in

and within countries, affecting peoples abilities to function in a knowledge-based economy and cope with the effects of climate change.

[111] Human Development Report 2019 (n 109) 1.

[112] UN, 'SDG 17 – Partnerships: Why they matter' <https://www.un.org/sustainabledevelopment/wp-content/uploads/2018/09/17.pdf> (accessed 10 December 2019).

[113] UN, 'Goal 17: Revitalize the global partnership for sustainable development' <https://www.un.org/sustainabledevelopment/globalpartnerships/> (accessed 10 December 2019) and SDG 17.3.

[114] Celine Tan, 'The Risks of Using Blended Finance in Development', (University of Warwick, Globe Centre Policy Brief Series, Policy Brief nr 4, October 2018).

[115] United Nations Conference on Trade and Development (UNCTAD), '2014 World Investment Report' (UN, 2014) 6 para 2; UN Secretary-General's Roadmap for Financing the 2030 Agenda for Sustainable Development 2019–2021 (UN, 2019) (hereinafter the "Roadmap for Financing the 2030 Agenda") 1.

[116] Roadmap for Financing the 2030 Agenda (n 115) 1; UNDP, 'What kind of blender do we need to finance the SDGs: Impact investment to close the SDG funding gap' <https://www.undp.org/content/undp/en/home/blog/2017/7/13/What-kind-of-blender-do-we-need-to-finance-the-SDGs-.html> (accessed 6 December 2019).

financing and participation of the private sector in SDG-related investment is therefore considered to be of significant importance.[117]

As a result of the financing gap, the UN Secretary-General adopted the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (hereinafter the "Addis Ababa Action Agenda") as a strategy for the financing of the 2030 Agenda, including the SDGs.[118] The Addis Ababa Action Agenda reiterates the three parallel dimensions of the concept of sustainable development: economic growth, environmental protection and social inclusion, and addresses the challenges by presenting a global framework for its financing.[119]

In order to better cater to the successful implementation of the Addis Ababa Action Agenda and accelerate its pace, the UN Secretary-General released a complementary financing strategy in 2018 (hereinafter the "2018 Finance Strategy").[120] The 2018 Finance Strategy sets out to further mobilize investments and financial support for the 2030 Agenda.[121] It includes a three-year roadmap (hereinafter the "Roadmap") that provides a pathway for its implementation by reflecting actions and initiatives to achieve its aim to transform financial systems to provide development finance more efficiently.[122] The three explicit objectives are to align global economic policies and financial systems with the 2030 Agenda, enhance sustainable financing and investment strategies on regional and national levels and make use of the potential of financial innovations, new technology and digitalization, in order to improve equitable access to finance.[123] The Roadmap underscores the UN system's critical role in this acceleration and specifically addresses the barriers constraining the appropriate channelling of finance towards sustainable development.[124]

In order to achieve the objectives of the 2018 Finance Strategy, the Roadmap suggests specific actions across six areas.[125] A strengthened partnership with

[117] 2014 World Investment Report (n 115) 6 para 2; Roadmap for Financing the 2030 Agenda (n 115) 6.
[118] UN General Assembly ("UNGA"), 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development' (17 August 2015) A/RES/69/313.
[119] United Nations Department of Economic and Social Affairs, 'Addis Ababa action agenda of the Third International Conference on Financing for Development' (United Nations, New York, 2015) (hereinafter the "Addis Ababa Action Agenda") 1 para 1.
[120] UN Secretary-General's Strategy for Financing the 2030 Agenda for Sustainable Development 2018-2021 (UN, September 2018) (hereinafter the "2018 Finance Strategy").
[121] 2018 Finance Strategy (n 120) 1.
[122] Roadmap for Financing the 2030 Agenda (n 115).
[123] 2018 Finance Strategy (n 120) 3.
[124] Roadmap for Financing the 2030 Agenda (n 115) 1-3.
[125] 2018 Finance Strategy (n 120) 5.

IFIs, and MDBs in particular, is set out as one out of the six areas of action.[126] IFIs are encouraged to, among other things, catalyse private finance, and in collaboration with the UN system, work to "identify and formulate a pipeline of bankable SDG projects."[127] Moreover, measures such as responsible and transparent lending and borrowing practices, and the possibility for borrowing countries to negotiate more sustainable, responsible and transparent terms and conditions are mentioned as some of the measures to be supported by the UN in partnership with IFIs.[128] Private financial institutions are similarly mentioned as actors of importance in this context.[129] Their role in fostering sustainability-oriented business models by requiring companies in which they invest to disclose their impact on sustainability, and their efforts to integrate sustainability considerations into their business decisions, is seen as an effort contributing to the shift of business investments and capital allocation decisions into alignment with the SDGs.[130]

Paradoxically, financing for development as means to address the financing gap has created challenges to the realization of the 2030 Agenda and a risk for the further deterioration of sustainable development. Civil society organizations ("CSOs") and NGOs have identified new practices, such as the use of private financial institutions as financial intermediaries for the investments of public funds provided by IFIs, which aid and increase the risks of adverse effects on human rights.[131] The reports of funds with an aim of realizing the 2030 Agenda being funnelled through unmonitored investments into destructive development projects and resulting in negative human rights impact, are numerous.[132] The lending practices of the IFC as the biggest driver in this change have been under particular scrutiny in this regard, and sub-

[126] Roadmap for Financing the 2030 Agenda (n 115) 5.
[127] ibid 7.
[128] ibid 33.
[129] 2018 Finance Strategy (n 120) 4 para 1.6.
[130] ibid 2-3.
[131] Inclusive Development International, 'Outsourcing Development: "Lifting the Veil on the World Bank Group's Lending Through Financial Intermediaries"' <https://www.inclusivedevelopment.net/what-we-do/campaigns/outsourcing-development/> (accessed 6 December 2019); Inclusive Development International, 'Financial Intermediary Lending' <https://www.inclusivedevelopment.net/campaign/campaign-to-reform-development-lending-through-financial-intermediaries/> (accessed 6 December 2019).
[132] See for e.g. Inclusive Development International, Report: 'Unjust Enrichment: How the IFC Profits from Land Grabbing in Africa' <https://www.inclusivedevelopment.net/wp-content/uploads/2017/04/Outsourcing-Development-India.pdf>; Inclusive Development International, Report: '"Disaster for Us and the Planet": How the IFC is Quietly Funding a Coal Boom' <https://www.inclusivedevelopment.net/wp-content/uploads/2016/09/Outsourcing-Development-Climate.pdf> (accessed 6 December 2019).

investments of the organization have been summarized in an extensive database that discloses their involvement in harmful projects.[133]

The response to the financing gap has therefore come to counteract the very same concept of sustainable development that it was intended to benefit.[134] This paradox is exacerbated by the current discourse on the effects of blended finance, that echoes the same concerns of sustainable development being undermined and is addressed in the following section.[135]

1.7.5 Blended finance

Whilst there is no common official definition of the concept of blended finance, there are two main definitions that have gained traction in the development finance discourse.[136] The OECD has broadly defined "blended finance" as "the strategic use of development finance for the mobilisation of additional finance towards sustainable development in developing countries." In comparison, the definition adopted by the UN in the Addis Ababa Action Agenda is narrower and more specific, where "blended finance" has been defined as financing that "combines concessional public finance with non-concessional private finance and expertise from the public and private sector."[137] A third description helpful to evince the scope of the concept merges the three common attributes drawn from the various existing definitions and defines it as being:

- "the use of concessional development finance
- the intent to mobilise additional finance, primarily private commercial finance
- some form of development impact associated with the investment."[138]

In the development context, the mobilisation of additional finance is described as a "[u]se of development finance and philanthropic funds to

[133] Airtable, 'Harmful IFC Intermediary Sub-Projects' <https://airtable.com/shrAA2T8L2SRtgX5M/tbli4INbNgq79GsAL/viw42dnWqRhYFIAGb?blocks=hide> (accessed 11 December 2019).
[134] Inclusive Development International, 'Outsourcing Development (n 131); Inclusive Development International, 'Financial Intermediary Lending' (n 131).
[135] Tan (n 114); Samantha Attridge, Lars Engen, 'Report: "Blended Finance in the poorest countries – The need for a better approach"' (Overseas Development Institute [ODI], April 2019).
[136] An official OECD definition of "blended finance" is however, at the time of writing, still expected to be approved in the coming months; Javier Pereira, 'Research Report: Blended Finance: What it is, how it works and how it is used' (Oxfam International, Eurodad, February 2017) 10; Attridge and Engen (n 135) 17-18.
[137] Addis Ababa Action Agenda (n 119) 24; Attridge and Engen (n 135) 18.
[138] Attridge and Engen (n 135) 17.

attract private capital into deals".[139] In a simplified way, it means that public money is used to attract funds from the private sector, by being channelled to support investment rather than to build infrastructures or provide public services.[140]

Based on the essential idea behind the concept, where grant or grant-like contribution can remove barriers to private investments,[141] blended concessional finance is used by DFIs to support private sector projects in developing countries, increasingly through so-called concessional loans.[142] Concessional loans are loans that are extended on significantly more generous terms than market loans.[143] The possibility to report a loan as concessional depends on the fulfilment of several criteria set out in the definition of official development assistance ("ODA").[144] ODA is defined by the OECD Development Assistance Committee ("DAC"), an expert reference group on external financing for development, as "government aid that promotes and specifically targets the economic development and welfare of developing countries".[145] It refers to grants or concessional loans from OECD member countries to any developing countries listed as an official recipient.[146] In addition to this, the loan, in order to be considered concessional, must have development as its main purpose and fulfil two specific financial conditions: it must include a grant element of at least 25 % and be "concessional in

[139] OECD and World Economic Forum ("WEF"), 'Blended Finance Vol. 1: "A Primer for Development Finance and Philanthropic Funders - An overview of the strategic use of development finance and philanthropic funds to mobilize private capital for development"' (WEF, July 2015, Ref 160715) 8.
[140] One of the key issues that has been highlighted as problematic with the concept of blended finance is the focus of the mobilized investments towards in middle-income countries instead of towards support for pro-poor directed activities. The issue is discussed further down in this section.
[141] Pereira (n 136) 11.
[142] Arthur Karlin, Kruskaia Sierra-Escalante, 'Blended Concessional Finance: The Rise of Returnable Capital Contributions' (International Finance Corporation, Washington D.C., EMCompass No. 72, 2019) < https://openknowledge.worldbank.org/handle/10986/32653 > (accessed 26 December 2019) 1.
[143] International Monetary Fund ("IMF"), 'External Debt Statistics: Guide for Compilers and Users', Appendix III, Glossary (IMF, Washington D.C., 2003) ("IMF Appendix III Glossary") 249–250.
[144] OECD DAC, 'DAC Statistical Reporting Directives' DCD/DAC (2007) 34 (OECD DAC, 2007) <http://www.oecd.org/dac/stats/1948102.pdf> (accessed 26 December 2019).
[145] OECD, 'What is ODA?' (OECD, April 2019) <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/What-is-ODA.pdf> (accessed 11 December 2019); OECD, 'Development Assistance Committee (DAC)' <http://www.oecd.org/dac/development-assistance-committee/> (accessed 11 December 2019).
[146] Stéphanie Colin, 'Report: "A matter of high interest Assessing how loans are reported as development aid"' (Eurodad, January 2014) 9; OECD, 'Understanding Development Finance', < https://www.oecd.org/development/understanding-development-finance.html> (accessed: 26 December 2019).

character" meaning that it should have an interest rate that is lower than the prevailing market rate.[147]

In order to soften the financial terms of concessional loans and thus make them more preferential, the loans are usually extended over long so-called *grace periods*.[148] This period is the time between the extension of the loan, during which the borrower only pays interest to the lender, and the first repayment of the amount borrowed, also referred to as the loan principal.[149] The interest charged by the lender during the grace period is intended to cover lending costs. Like this, the budgetary effort for the donor government is avoided, unlike with grants.[150] As donor governments are on tighter budgetary constraints, they are incentivized to find methods to increase their ODA without budgetary implications.[151] Even so a concessional loan may only have a grant element of the minimum 25 % required, the full sum of the loan is counted as 100 % ODA under the current DAC reporting system.[152] This has been highlighted as problematic as it risks "development finance inflation" due to an overstatement of the actual aid volumes by donors and their developmental benefits.[153] Moreover, donor governments profiting from development aid through interest payments from lending developing countries is considered to increase debt distress in poor countries and risks destabilizing their economies.[154]

As of 2018, there has been a shift concerning the financing model of concessional public finance.[155] Until recently, the funds were usually provided to DFIs by government grants or long-term contributions. The new model of "returnable capital" however, requires DFIs to engage in an up-front agreement where the loan principal plus interest and other fees are to be returned to the original provider on a regular basis.[156] In comparison, the grant or long-term contribution model does not provide the same *reflow*[157] to the original fund donor, as the funds usually reflow to the private sector actor in

[147] Colin (n 146) 9.
[148] ibid 11.
[149] IMF Appendix III Glossary (n 143) 257; Colin (n 146) 9.
[150] Colin (n 146) 11, 19.
[151] ibid 7-8.
[152] ibid 12.
[153] ibid 16; Pereira (n 136) 5.
[154] Colin (n 146) 5; The Guardian, 'European donors "profiting from aid budgets" with high-interest loans' <https://www.theguardian.com/global-development/2014/jan/16/european-donors-aid-budget-loans> (accessed 26 December 2019).
[155] Karlin and Sierra-Escalante (n 142) 1.
[156] ibid 2-3.
[157] *Reflows* are payments of principal, interest, fees and dividends, that result from loans or other financial products other than grants, to the original provider; Karlin and Sierra-Escalante (n 142) 1.

charge of the project. The rationale behind the "returnable capital" model is that it reduces the impact on donor government budgets so that more government funds can become available for collaboration with the private sector. However, it is argued that the regular reflow of funds of the "returnable capital" model affects the DFI's willingness to invest in development projects or services that do not have clear investment returns or generate direct reflows in themselves, such as advisory services, social programs or disaster recovery programs.[158]

The push for blended finance is a result of the crucial role that the private sector is considered to have in the financing of the SDGs, as recognized by the Addis Ababa Action Agenda.[159] Nevertheless, it is also the main contributing factor behind the recent trends pointing at a decline in ODA to developing countries.[160] Only 6 % of the private capital mobilized through ODA between 2012 and 2017 actually benefitted developing countries, whereas 70 % went to middle-income countries.[161] Private sector investments are continuously concentrated to resource-rich middle-income countries or sectors such as the extractive sector.[162] This is a consequence of the overall caution of private investors to invest in developing markets due to factors that might curtail such investments, such as: a poor investment climate; lack of investment-ready opportunities; high risks or the perceptions of high risk and weak enabling or regulatory frameworks that could incentivize long-term investments aligned with the SDGs.[163] Research on concessional loans confirms that these loans as well tend to be skewed towards middle-income countries and productive sectors with economic returns instead of social

[158] Karlin and Sierra-Escalante (n 142) 3-4.
[159] Attridge and Engen (n 135) 26-27.
[160] OECD, United Nations Capital Development Fund, 'Blended Finance in the Least Developed Countries 2019', (OECD Publishing, Paris, 2019) (hereinafter "Blended Finance the Least Developed Countries 2019") 13.
[161] Blended Finance the Least Developed Countries 2019 (n 160) 19.
[162] Achim Steiner, 'Remarks at the launch of the Blended Finance the Least Developed Countries 2019' <https://www.undp.org/content/undp/en/home/news-centre/speeches/2018/blended-finance-in-the-least-developed-countries.html> (accessed 12 December 2019); Eurodad, 'Time to put the poorest first: Why the OECD DAC must reform rules on concessional lending' (16 January 2014) <https://eurodad.org/Entries/view/1546133/2014/01/16/Time-to-put-the-poorest-first-Why-the-OECD-DAC-must-reform-rules-on-concessional-lending> (accessed 17 December 2019).
[163] Attridge and Engen (n 135) 11; UNDP, 'Blended finance in the LDCs' (5 november 2018) <https://www.undp.org/content/undp/en/home/news-centre/speeches/2018/blended-finance-in-the-least-developed-countries.html> (accessed 12 December 2019); Blended Finance the Least Developed Countries 2019 (n 160) 10-12; UNDP, "What kind of blender do we need to finance the SDGs" (n 116).

sectors,[164] since the financial value of actions in the social sector are abstract and harder to calculate despite their potential social return in the long term.[165]

As an approach within the concept of development finance, blended finance seeks to unlock additional private investments in the SDGs by using public sector development finance for subsidies in order to lower the risk of the investments and adjust the rate of return on investment in line with the market.[166] Due to its character of a merge between private and public sector funding, where private actors are used to finance public goods with public funds, a range of challenges and concerns have been identified.[167] Some of the key issues that have been highlighted as problematic concerning the concept of blended finance include the abovementioned worry that the investments it seeks to mobilise tend to focus on middle-income countries, and that the concept therefore does not necessarily incentivize support for pro-poor activities such as the construction of infrastructure or the enhancement public services.[168] In line with the aforementioned, are thus the fears concerning the effects that the increased investments of ODA into blended finance might have on its core agenda of eradicating poverty and increasing welfare in developing countries defined by OECD DAC. The fear concerns the potential distraction of ODA, since the push for blended finance has provided increased investments of ODA into economic sectors in middle-income countries, rather than social sectors whose development is necessary in order to eradicate poverty.[169] Another concern that dents the public trust in the blended finance approach, is that it reinforces accountability gaps as it does not provide as well-developed accountability and redress mechanisms as other official development agencies tend to have. It suffices to compare, for instance, the projects governed by the IFC's own regulatory framework, the PSs, as a result of IFC's funding and the project-affected communities' subsequent access to the IFC's own accountability and redress mechanism CAO for dispute resolution, as exemplified by the Siguiri gold mine case in this chapter's first sub-section. The lack of a common official framework also means that blended finance projects are most likely to fall under the scrutiny of domestic corporate accountability frameworks, which might result in transparency and operational disclosures suffering in countries that are under-resourced or governed by unstable regimes.[170]

[164] Social sectors are for example health, education or the social protection sector; Attridge and Engen (n 135) 12.
[165] Colin (n 146) 16.
[166] Attridge and Engen (n 135) 26.
[167] Tan (n 114); Attridge and Engen (n 135).
[168] Pereira (n 136) 5.
[169] Attridge and Engen (n 135) 12, 59.
[170] Tan (n 114) 2-4; Attridge and Engen (n 135) 12, key finding 5.

2 Conceptualizing the human rights concerns of using commercial banks as financial intermediaries

The objective of this chapter is to conceptualize the core issues and the relevant actors in the current debate on the responsibility of commercial banks to respect human rights. In doing so, the chapter analyses the ongoing debate between the Thun Group of Banks, an informal group of bank representatives from some of the world's leading international banks, and scholars of BHR.[171] The debate (hereinafter the "Thun Group Debate") centres around the implications of the regulatory framework on the corporate responsibilities of human rights called the UN Guiding Principles on Business and Human Rights (hereinafter the "UNGPs") for the banking sector and its operations. The Thun Group's initiative to discuss this topic was the first of its kind within the banking sector. Due to its pioneering aspect and the weight of the names in the Thun Group of Banks, the debate will likely influence the actors within its sector which impels the need for a clarifying contribution on the matter. It is further of great importance to understand the issues of the broader debate concerning the responsibility to respect human rights and the banking sector, in order to understand the implications and key issues of the changed lending practices of IFIs that underpin the research question of this thesis. Before addressing the Thun Group Debate, its main arguments and critical perspectives, a familiarity with the relevant principles of the UNGPs is however necessary. The chapter will therefore begin with a brief introduction of this regulatory framework.

2.1 Relevant principles on the corporate responsibility to respect human rights

In 2005, Professor John Ruggie was appointed as the SRSG on the issue of human rights and transnational corporations and other business enterprises to

[171] The name derives from the town where the first meeting was held in Switzerland in 2011. To date, the group consists of the following banks: Barclays, BBVA, BNP Paribas, Credit Suisse AG, Deutsche Bank, ING, RBS, Standard Chartered, UBS Group AG, UniCredit and J.P. Morgan. A more profound introduction of the Thun Group of Banks is given in Section 2.1.1.

"identify and clarify existing standards and practices" in the field.[172] Although the issue of the relationship between BHR was already part of the global policy agenda and initiatives, both private and public, had already started to emerge, the SRSG argued that it had not yet reached sufficient scale and coherence to have an effect on markets' behaviour.[173] Observing the lack of an authoritative focal point where actions and expectations of relevant stakeholders could converge, the SRSG suggested that the UN Human Rights Council ("UNHRC") should welcome the "Protect, Respect and Remedy" Framework (hereinafter the "Framework") he had developed through a resolution, where the human rights responsibilities of states and businesses were clarified.[174]

2.1.1 The UN "Protect, Respect and Remedy" Framework

The Framework comprises three core principles, divided into three pillars:

1. the state duty to protect against human rights abuses, including business, through appropriate policies, regulations and adjudication;
2. the corporate responsibility to respect human rights; and
3. the need for a more effective access to remedies for victims, both judicial and non-judicial.[175]

Apart from welcoming the Framework, the UNHRC sought an "operationalization" of the Framework, resulting in a further extension of the SRSG's mandate.[176] The culmination of the idea that a corporate responsibility to respect human rights exists was thus reached in 2011, when the UNHRC adopted the UNGPs unanimously.[177] The UNGPs are a set of operational principles that provide concrete and practical recommendations for the effective implementation of the Framework.[178] Although the instrument is technically non-binding, the UN Office of the High Commissioner for Human Rights ("OHCHR") has concluded in their report that the "provisions include restatements of existing international law

[172] A/HRC/17/31 (n 93) Introduction, para 5.
[173] ibid paras 1 and 5.
[174] ibid para 6.
[175] ibid para 6.
[176] ibid para 9.
[177] UNHRC, Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/17/4 (6 July 2011), para 6 (a); see also Dorothée Baumann-Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 33.
[178] A/HRC/17/31 (n 93) Introduction, para 9.

obligations" and that "[a]t the very least, they are evidence of an emerging consensus concerning the steps that States should now be taking, and the areas that need to be prioritised for action, in order to meet their responsibilities towards victims in cases where businesses are implicated or involved in gross human rights abuses."[179]

2.1.2 The UN Guiding Principles on Business and Human Rights

The UNGPs build on the three pillars of the Framework. By their nature, the principles in the three pillars set out differentiated responsibilities respectively. Nevertheless, the pillars are interrelated and intend to be a dynamic system of preventative and remedial measures.[180] The first pillar reflects the state duty to protect the human rights of individuals within their territory and jurisdiction[181] originating from its obligations under international human rights law.[182] The duty includes protection from abuse by third parties, including business enterprises.[183] The second pillar expresses the global standard of the expected conduct of businesses to respect human rights. As part of this responsibility, it requires that all businesses act with due diligence to avoid, mitigate, identify and account for such adverse human rights impact in which they are involved.[184] The scale and complexity of the due diligence process through which businesses can meet this responsibility may however differ according to a number of factors, such as the size of the company and the sector in which conducts its activities, the operational context in general, ownership and structure.[185] The third pillar emphasises the

[179] Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (OHCHR, 2013) 62; Daria Davitti, *Beyond the Governance Gap: Accountability in Privatized Migration Control,* in Cathryn Costello, Itamar Mann (eds.) German Law Journal (forthcoming in 2020 in the special issue on A*ccountability for Human Rights Violations in Migration Control: New Frontiers of Individual and Organisational Responsibility*) 12.
[180] A/HRC/17/31 (n 93) Introduction, para 6.
[181] One of the key issues regarding the state duty to protect human rights concerns states' potential to protect human rights outside of their territory. The extraterritorial application of this duty, that includes protection from abuse of human rights by third parties, including business enterprises, is complicated by companies operating overseas and creates state enforcement issues linked to jurisdictional matters, see Baumann-Pauly and Nolan (n 177) 43.
[182] The internationally recognized human rights standards, as those expressed in international human rights law, are of a foundational nature to the rights referred to in the Framework and set a form of *minimum* standard in this regard. The relevant international human rights law obligations are introduced in Chapter Three; A/HRC/17/31 (n 93) Annex II.A.12.
[183] A/HRC/17/31 (n 93) Annex I.A.1.
[184] ibid Annex II.A.11-13.
[185] ibid Annex II.A.14.

importance of effective access to remedy for victims of business-related human rights abuse and is motivated since "even the most concerted efforts [of states and business enterprises in meeting their responsibilities] cannot prevent all abuse".[186] The principle reiterates the state duty to ensure that a remedy is available, not least because it would otherwise undermine the meaning of the principle expressed in Pillar I.[187] Worth noting in this regard, is the difference between the options that states and businesses have when eliminating human rights abuse from their jurisdiction or operations in order to achieve the respect for human rights that is in accordance with the UNGPs. While businesses have the option of either separating themselves from rights-holders, by cutting their links to abusive third parties, or increasing their efforts to protect rights-holders, states are naturally and solely left with the latter option.[188] Although the state is considered the primary duty-bearer for the protection of human rights, the principle expressed in the third pillar is not limited to exclusively consider state-based judicial and grievance mechanisms. For the purpose of the Framework, the term "grievance mechanism" is used to: "indicate any routinized, state-based or non-state-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought."[189] Incorporated in the state duty is therefore facilitation of non-state-based grievance mechanisms as well.[190] One category of such non-state-based grievance mechanisms are those operational-level grievance mechanisms that businesses should provide as part of the principle of corporate responsibility to respect human rights expressed in Pillar II.[191]

Before addressing the issues concerning the banking sector's interpretation of the corporate responsibility to respect human rights, demonstrated by the Thun Group Debate, a more detailed description of the specific principles that the discussion concerns is in place.

2.1.2.1 The Corporate Responsibility to Respect Human Rights in GP 13

Regarding the corporate responsibility to respect human rights, the UNGPs set out the requirement that business enterprises:

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[186] ibid Introduction, para 6.
[187] ibid Annex III.A.25.
[188] Radu Mares, *Human Rights Due Diligence and the Root Causes of Harm in Business Operations: A Textual and Contextual Analysis of the Guiding Principles on Business and Human Rights* (Northeastern University Law Review, Vol. 10 No. 1, 2018) 13.
[189] A/HRC/17/31 (n 93) Annex III.A.25.
[190] ibid Annex III.B.28.
[191] ibid Annex II.B.22.

> "(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their *business relationships*, even if they have not contributed to those impacts."[192]

As a foundational principle elaborating on the scope and meaning of the corporate responsibility to respect human rights, Principle 13 establishes that, embedded in this responsibility, business enterprises bear a responsibility on account of their business relationships as well. For the purpose of the UNGPs, this should be understood as including "relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services."[193]

2.1.2.2 The Parameters of Human Rights Due Diligence in GP 17

The UNGPs require that all business enterprises undertake a due diligence process "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts". Principle 17 refers to this process as "human rights due diligence" and defines the parameters for the process that should be undertaken:

> "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;

[192] ibid Annex II.A.13 [emphasis added].
[193] ibid Annex II.A.13 Commentary.

(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."[194]

The very purpose of conducting HRDD "is to understand the specific impacts on specific people, given a specific context of operations".[195] Bearing in mind the parameters of the due diligence process generally undertaken by commercial banks,[196] a HRDD process goes beyond merely identifying and managing material risks to the business, to include risks to rights-holders.[197] Here the debate that the two concepts invoke two different meanings to business people and human rights lawyers respectively, should be noted.[198] Legal scholars on one side of the debate have argued that the concept of due diligence to human rights lawyers is a standard of conduct required to discharge an obligation, as opposed to being purely a process to identify and manage business risks, and that the UNGPs invoke both understandings of the concept without clarifying how they relate to each other. This, they argue, in turn leads to confusion as to *when* and *whether* businesses should be obliged to provide remedy in cases of human rights infringements.[199] They then reach the conclusion that businesses are strictly responsible for remedying their own human rights infringements, but that the responsibility for infringements of third parties requires that the business can be considered to have failed to satisfy its HRDD.[200] Legal scholars on the opposing side of the debate however, Ruggie included, claim that their opponents have created a problem that does not exist.[201] They have answered by clarifying that the HRDD process should not be seen as a discharge of a responsibility, but rather a necessity, for without it "companies can neither know nor show that they

[194] ibid Annex II.B.17.
[195] ibid Annex II.B.18 Commentary; John Ruggie, John Sherman III, *The Concept of 'Due Diligence' in the e UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale* (The European Journal of International Law Vol. 28 No. 3, 2017) 924.
[196] See Section 1.7.2.
[197] A/HRC/17/31 (n 93) Annex II.B.17 Commentary.
[198] Jonathan Bonnitcha, Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights* (The European Journal of International Law Vol. 28 No. 3, 2017); Ruggie and Sherman III (n 195); Jonathan Bonnitcha, Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman III* (The European Journal of International Law Vol. 28 No. 3, 2017).
[199] Bonnitcha and McCorquodale, The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights (n 198) 900.
[200] ibid 919.
[201] Ruggie and Sherman III (n 195) 925.

respect human rights, and, therefore, cannot credibly claim that they do".[202] They further clarify that the nature of a company's responsibility resulting from their involvement in adverse human rights impact will depend on *how* the company is involved.[203] They conclude by stating that it is factually incorrect to claim that the responsibility to remediate or participate in remediation is contingent upon whether or not a company conducted a proper HRDD.[204]

The scale and complexity of HRDD processes varies, as previously established, according to size, operational context, sector, ownership and structure of the business.[205] In situations where the business enterprise is involved in complex value chains it may be unreasonable for it to conduct due diligence across all entities. Thus, the UNGPs establish that the business enterprise should prioritize and direct its HRDD at those entities where the most significant risks for adverse human rights impact have been identified, taking account of, among other things, certain clients' operating context. Principle 17 affirms that undertaking HRDD does not limit or free a business from liability for causing or contributing to human rights abuse, but a properly conducted process might minimize its risks of involvement in such abuses and thus the risk of legal claims of complicity.[206] As explained in the next section, the way in which the banking sector has conceptualized and implemented due diligence, however, does not fully reflect the standards enshrined in the UNGP, which is of course highly problematic when it comes to ensuring remedies and accountability for human rights harm.

2.2 The Thun Group Debate

The understanding of the UNGPs and their application to the banking sector has proved to be ambiguous and thus created uncertainty around the legal implications reflected in practice. The debate concerning the Thun Group of Banks (hereinafter the "Thun Group") clearly illustrates the diverging views between scholars of BHR and the banking industry. An examination of the Thun Group Debate, of course, is directly relevant to this thesis, as it ultimately pertains to the way in which the banking sector ensures its human rights responsibility, in full compliance with international law and therefore in line with the UNGP.

[202] ibid 924.
[203] ibid 926–927.
[204] ibid 928.
[205] See Section 2.1.2.
[206] A/HRC/17/31 (n 93) Annex II.B.17 Commentary.

2.2.1 The Thun Group of Banks

The Thun Group[207] is an informal group of banks with representatives from some of the world's leading international banks.[208] Recognizing that the UNGPs do not, nor intend to, provide specific guidance on their implementation in specific sectors or industries, the group was formed in 2011 to elaborate on the implications of the UNGPs for the banking sector and its operations.[209] In doing so, the group set out to produce "a practical application guide setting out the challenges and best practice examples of operationalizing the 'Guiding Principles' in universal banks."[210] As a result of the Thun Group's initiative to provide an industry perspective on the process of carrying out HRDD and to support the debate on the UNGPs implications for the banking sector, the group published two discussion papers.[211]

Although the first paper, published in 2013, marked an important first step of the UNGPs being addressed from a banking perspective, the emphasis here is placed on the second paper, published in 2017. The Thun Group's initiative was the first of its kind within the banking sector. The foundational aspect of the 2017 paper, combined with the weight of the names of the member-banks involved in the Thun Group, makes its accuracy of particular importance, not only because of its likely influence on public and private financial institutions as well as business enterprises in other sectors, but also because it provides guidance for financial institutions on how to conduct HRDD in *all* their activities.[212] Thus, unlike the PSs and the Equator Principles, it does not merely focus on one specific type of activity such as project finance.[213]

The Thun Group's reasoning in their discussion papers concerning the UNGPs' implications for commercial bank's operations has prompted a

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[207] The name derives from the town where the first meeting was held in Switzerland in 2011. To date, the group consists of the following banks: Barclays, BBVA, BNP Paribas, Credit Suisse AG, Deutsche Bank, ING, RBS, Standard Chartered, UBS Group AG, UniCredit and J.P. Morgan.
[208] Damiano de Felice, *Banks and Human Rights Due Diligence: A critical analysis of the Thun Group's discussion paper on the UN Guiding Principles on Business and Human Rights* (The International Journal of Human Rights, Vol. 19, No.3, 2015); Thun Group of Banks, *UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16-21* (Thun Group of Banks, October 2013) ("2013 Paper") <https://www.business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf> (accessed 18 October 2019) 1.
[209] de Felice (n 213); 2013 Paper (n 2018) 25.
[210] Thun Group of Banks, *Statement by the Thun Group of Banks on the Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework" on Human Rights* (Thun Group of Banks, 19 October 2011).
[211] 2013 Paper (n 208); 2017 Paper (n 70).
[212] de Felice (n 213) 319, 321.
[213] ibid 321.

debate and brought to light the interpretive challenges hampering the successful operationalization of the UNGPs in the banking industry. Bearing in mind the aforementioned Principles[214], an outline of the main arguments of the paper published in 2017 and the subsequent debate concerning the misconception between its authors, CSOs and scholars of BHR, is presented in the next section.

2.2.2 The main arguments of the Thun Group

The Thun Group's discussion paper entitled *Discussion paper on the implications of UN Guiding Principles 13 and 17 in a corporate and investment banking context* (hereinafter the "2017 Paper") intends to be a conceptual framework that provides banks with guidance on the meaning and reach of the UNGPs.[215] It considers commercial banks' involvement in adverse human rights impact through their operations and seeks to provide insights as to what due diligence approach the corporate responsibility to respect human rights entails before entering into new client relationships or providing financial services.[216]

Observing the above cited Principle 13, the Thun Group argues that the prerequisites "cause" or "contribution" do not apply to banks, as adverse human rights impact, arising from clients' operations, is not occurring as part of a bank's *own activities*. To that end, the 2017 Paper exclusively considers subparagraph (b) of Principle 13 arguing that it is "the appropriate focus for banks if their clients (in the context of a corporate and/or investment banking relationship) cause or contribute to adverse human rights impacts."[217] The 2017 Paper argues that the provision of financial products and other financial services may nonetheless make a bank *directly linked* to adverse human rights impact arising from its clients' operations.[218] Observing Principle 13 (b), businesses with an established direct linkage to adverse human rights impact are required to seek, prevent or mitigate this impact.[219] However, the 2017 Paper rephrases the requirement to a somewhat weaker commanding that: "banks *should* seek to prevent or mitigate human rights impacts that are directly linked to their operations […]".[220]

[214] Explained in the above Sections 2.1.2.1 and 2.1.2.2 respectively.
[215] 2017 Paper (n 70) 3.
[216] ibid 5.
[217] ibid 5.
[218] ibid 6.
[219] A/HRC/17/31 (n 93) Annex II.A.13(b).
[220] 2017 Paper (n 70) 5.

The 2017 Paper proceeds to introduce a concept of "proximity" that, on the one hand, is said to serve as an upfront indicator of the "degree of directness" of the linkage of a bank to an impact caused or contributed to by its client's activities.[221] The degree of this proximity is in turn dependent on the type of product or service offered.[222] High proximity and direct linkage is in the 2017 Paper exemplified to occur when "the adverse impact is occurring within a specific entity of a client and the bank's financial products or services are *dedicated* to this entity (i.e. asset financing) […] for instance, in cases involving project finance advisory or project financing, project-related corporate loans and other asset financing products or services".[223] The form of financing is in the 2017 Paper considered to invoke a different degree of "proximity" and "directness". [224] Thus, the form of financing will affect the degree of actions that are required as part of the corporate responsibility to respect human rights, such as an appropriate HRDD process.

Continuing this line of argument, the authors of the 2017 Paper establish that the concept of "proximity" to the potential adverse impact, on the other hand, serves to determine the banks' *ability* to assess and manage human rights risks in their business relationships through a HRDD process. The appropriate scope and parameters of the process, and the mitigation measures that should be undertaken, are thus dependent on firstly, the "proximity", and secondly, on informative factors such as the sector and operating context, the regulatory environment and the track record of the client. In addition, the 2017 Paper introduces yet another concept: the concept of a "unit of analysis." Together with the aforementioned concept of "proximity", this concept aims to clarify the implications of being directly linked to adverse human rights impact by defining the entity that should be subject to a bank's HRDD process.[225] Through various figures and fictitious cases presented in the 2017 Paper, an argument is made that the "unit of analysis", being the entity subject to the scrutiny of the HRDD, will vary depending on the type of product or service offered and the duration of the business relationship.[226] The three different forms of financing that the Paper considers for this purpose are asset-specific finance, general corporate loan finance and project finance.[227]

2.2.3 The opposing arguments on the 2017

[221] ibid 7.
[222] ibid 5.
[223] ibid 9 [emphasis added].
[224] ibid 5.
[225] ibid 7.
[226] ibid 7-10, see Figure 2 on the difference between asset-specific financing and general corporate purpose loans.
[227] 2017 Paper (n 70) 8, see Figure 2 again.

Paper's shortcomings

Notwithstanding the initial positive reactions to the Thun Group's initiative to operationalize the UNGPs and clarify their implications for the banking sector, the publication of the 2017 Paper triggered many critical reactions from scholars of BHR and CSOs regarding its shortcomings.[228] It is hereby argued that, based on the various commentaries to the debate, the Paper suffers from three general shortcomings.

2.2.3.1 The first shortcoming

At the core of the criticism of the 2017 Paper in the debate lies the fact the Paper rests on a wrongful premise that banks cannot cause or contribute to human rights impact through their financing operations.[229] This has negative implications for victims' access to remedy, as Principle 22 connects the responsibility to provide remediation for adverse human rights impact to a prior categorization of the business' involvement as *cause* or *contribution*, stating that: "[w]here business enterprises identify that they have caused or contributed to adverse impact, they should provide for or cooperate in their remediation through legitimate processes."[230] Nevertheless, although the responsibility to respect human rights does not require that the business itself provide for remediation in situations where the business, or its activities, are directly linked to the adverse human rights impact, the responsibility is not entirely offset. Principle 22, in fact, encourages that: "it [the enterprise] may take a role in doing so".[231] Providing remediation is considered *good practice* rather than a responsibility in this regard.[232] To this, Principle 29 adds that "business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."[233] The latter mechanism is seen as a general responsibility, independent from a categorization of involvement, as part of the HRDD process that business enterprises should undertake as part of their

[228] Business & Human Rights Resource Centre, 'Thun Group of Banks Releases New Paper on Implications of UN Guiding Principles for Corporate & Investment Banking' <https://www.business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks/?dateorder=datedesc&page=0&componenttype=all> (accessed 19 October 2019).
[229] See e.g. Open letter from BankTrack and others to the Thun Group of Banks, *Significant Concerns Regarding Thun Group Discussion Paper* (14 February 2017); Letter from the UN Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises to the Thun Group of Banks (23 February 2017).
[230] A/HRC/17/31 (n 93) Annex II.B.22; de Felice (n 213) 321.
[231] A/HRC/17/31 (n 93) Annex II.B.22 Commentary.
[232] BankTrack, "Open letter to the Thun Group" (n 229) 2; UN Working Group, "Letter to the Thun Group" (n 229) 4.
[233] A/HRC/17/31 (n 93) Annex III.B.29.

corporate responsibility to respect human rights.[234] Although the argumentation held in the first paper published in 2013 is not addressed, it is worth noting that the Thun Group previously received criticism concerning the very same shortcoming in response to their first paper.[235] The assumption that cause and contribution can only arise out of a bank's own activities, and that banks thus can only be involved through a direct linkage to impact caused or contributed to by their client's operations, has received criticism on mainly three grounds.

2.2.3.1.1 The grounds for its inaccuracy

First, because the idea set out in the Paper misconstrues the central Principle 13 regarding the corporate responsibility to respect human rights.[236] In a letter written by Ruggie in 2017, he countered the Thun Group's reasoning behind the exclusive consideration of Principle 13 (b) that banks can only contribute to human rights harms through their own activities. He clarified that this interpretation is factually incorrect and inconsistent with the UNGPs,[237] and that the correct interpretation of Principle 13 is that a company's involvement in adverse human rights impact can occur in the following ways:

1. through own activities; or
2. as a result of their business relationships; which comes in two forms:
    a. the company *contributes* to a harm by a third party; or
    b. the company's operations, products or services are *directly linked* through its business relationships to the harm.[238]

The central assumption that banks can only contribute to human rights impact through their own activities, and that their responsibility therefore cannot be engaged by their financing services, is not only considered to set the subsequent analysis in the Paper off-track, but it also sets aside the continuum between contribution and direct linkage. According to this continuum, a particular action of a company can be determined as either contribution or direct linkage, depending on a variety of factors such as the extent to which a company has enabled or encouraged the human rights harms by another, their

[234] ibid Annex III.B.29 Commentary.
[235] de Felice (n 213) 327-328.
[236] John Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context* (Harvard Kennedy School of Government, 21 February 2017).
[237] Letter from John Ruggie to Christian Leitz (Head of Corporate Responsibility, UBS, 28 February 2017).
[238] Ruggie (n 236).

potential knowledge of the harm and the quality of their mitigation efforts to avoid the harm.[239]

Second, the assumption contradicts the advice provided by several considerable organisations on the three categories of business involvement in human rights harm in the finance sector context, such as the OHCHR,[240] the UN Environment Programme Finance Initiative ("UNEP-FI")[241] and the UN's Interpretive Guide to the Corporate Responsibility to Respect Human Rights[242] (hereinafter the "Interpretive Guide").[243] The advisory outcomes of the aforementioned organisations, as well as relevant CSOs, point at ways in which financial institutions can be considered to contribute to adverse human rights impact. For instance, the Interpretive Guide classifies a company's lending of vehicles to security forces, that in turn use these as means of transportation to the area where they later commit human rights abuses, as contribution.[244] BankTrack[245] supported by some thirty other CSOs such as Greenpeace[246], OECD Watch[247] and Oxfam[248], compare the lending of vehicles to lending of finance, and claims no conceptual difference between the two actions, as they both are in direct support of human rights abuses.[249] In addition to this, UNEP-FI's report states that: "[a] bank could contribute to an adverse human rights impact by assisting, facilitating, or incentivizing the conduct of another entity that leads to an adverse impact. The bank does not have to be the immediate cause of the impact to be considered to contribute to it."[250]

Third, the transactional approach of the Thun Group is criticized to imply that the human rights responsibility of banks is limited to, and determined by "the extent to which a bank has some significant, direct transactional links with

[239] Ruggie (n 236).
[240] Expert letters and statements on the application of the MNE Guidelines and UNGPs in the context of the financial sector (OECD Global Forum on Responsible Business Conduct 26-27 June 2014), letter from OHCHR, *Subject: Request from the Chair of the OECD Working Party on Responsible Business Conduct*, para 19.
[241] United Nations Environmental Programme Finance Initiative (UNEP-FI), Foley Hoag LLP, 'Banks and Human Rights: A Legal Analysis' (UNEP-FI and Foley Hoag LLP, December 2015).
[242] Interpretive Guide (n 2) 16, see chart.
[243] BankTrack, "Open letter to the Thun Group" (n 229) 2.
[244] Interpretative Guide (n 2) 41, question 39.
[245] BankTrack is a CSO focused on the activities of the financial sector, for more info visit: <https://www.banktrack.org/page/about_banktrack> (accessed 17 December 2019).
[246] Greenpeace, 'Who we are' <https://www.greenpeace.org/international/explore/about/> (accessed 17 December 2019).
[247] OECD Watch, 'About us' <https://www.oecdwatch.org/about-us/> (accessed 17 December 2019)
[248] Oxfam, 'What we do' <https://www.oxfam.org/en/what-we-do/about> (accessed 17 December 2019).
[249] BankTrack, "Open letter to the Thun Group" (n 229) 2.
[250] UNEP-FI and Foley Hoag LLP (n 241) 14.

clients, whose actions in turn adversely affect human rights."[251] If direct linkage, triggering a certain level of human rights responsibility, requires direct transactional links as mentioned above, then no such linkage, and therefore no responsibility, is invoked in situations where the bank is in a business relationship with another entity of the client's corporate family, according to the Thun Group's approach. The approach is considered odd because of the evident proximity to the operations of the entity causing or contributing to harm, that in turn might make the bank implicated by association.[252] The implications of the transactional approach and their effect on the HRDD is of relevance to the second shortcoming of the Paper, where the problematic elements of the approach are further expressed.

2.2.3.2 The second shortcoming

The second shortcoming concerns the view that the Paper sets out regarding the scope and parameters of the HRDD process as established in Guiding Principle 17 by introducing of the concepts of "proximity" and "unit of analysis". As explained above, these concepts imply that a greater proximity to the potential impact requires a greater HRDD. The Thun Group's reasoning in this respect is that an insufficient due diligence might result in an "ill-informed decision" but that it does not change the bank's proximity to the human rights harm.[253] Consequently, loans such as asset or project specific loans would require a deeper due diligence process than the provision of a general corporate loan.[254] The logic behind this is however considered problematic among the Thun Group's critics. Ruggie highlights that the scope and parameters of the HRDD process should depend on the nature of the risk and the bank's involvement in this risk according to the aforementioned categories, not on the type of loan on a *a priori* basis.[255] The UN Working Group on the issue of human rights and transnational corporations and other business enterprises, reiterates this view by expressing that a decision to lend could be considered as contributing to adverse human rights impact in the absence of a sufficient due diligence process or conditionalities tied to the loan that could have otherwise mitigated or prevented the harm.[256] Ruggie further exemplifies this opinion by stating that a general corporate loan to a private prison company, allegedly committing human rights abuses, naturally ought to require a more careful due diligence approach, combined with certain conditionalities, in order for it to not be considered as contribution, if a bank

[251] David Kinley, *Artful Dodgers: Banks and their Human Rights Responsibilities* (Sydney Law School Research Paper No. 17/17, 1 March 2017) 1.
[252] Kinley (n 251) 1-2.
[253] 2017 Paper (n 70) 13.
[254] Ruggie (n 236).
[255] ibid
[256] UN Working Group, "Letter to the Thun Group" (n 229) 3.

was to proceed with such a loan.[257] The risk of using the concept of "unit of analysis" to define the HRDD process in accordance with the Thun Group's interpretation, which would not require a particularly deep due diligence in the case of providing a general corporate loan, is that which is exemplified above of the involvement being seen as contribution and not mere direct linkage, invoking different responsibilities for the bank. Additionally, Ruggie highlights the risk of not dedicating more efforts to the HRDD process by stating that the real challenge for banks lies in financing companies that are not evidently high-risk from a human rights perspective.[258]

Although not directly related to the Thun Group Debate, albeit worth noting in this regard, is the classification of business operations in the migration context as high-risk operations for the purposes of the UNGPs from which analogies can be drawn. In accordance with the UNGPs, such high-risk operations require business enterprises to carry out the HRDD process with more rigour and a higher degree of engagement.[259] Whilst Principle 23 (c) of the UNGPs makes explicit reference to the term "gross human rights abuses" and mentions conflict-affected areas as an example in this regard, there is no uniform definition of the term in international law.[260] The Interpretative Guide to the UNGPs for instance, has thus enlisted other exemplifying and identified practices, that based on their gravity, could be considered as gross human rights violations. Included here are examples of grave and systematic violations of economic, cultural and social rights, for instance targeting a certain population of people or that take place on a large scale. Where these abuses are grave, affect a large number of people, both immediately and in the future, and the situation is irremediable, at a minimum, *status quo ante*, the degree of the impact of business activities is deemed as severe and the business operation thus classified as one of high risk of involvement in gross human rights abuses.[261] The grossness of the abuse is moreover coupled with an increased likelihood of occurrence.[262] In view of this, and in order for banks to undertake a HRDD process that is better aligned with the UNGPs, the scope and parameters of the process should not be based on concepts such as "proximity" and "unit of analysis", highly dependent on the financial service provided, but be determined in light of the *operational context* in which the business activities of their clients are carried out and the risk for severe and gross human rights abuses.

[257] Ruggie (n 236).
[258] ibid
[259] Davitti (n 179) 2.
[260] Davitti (n 179) 8–9.
[261] Davitti (n 179) 9.
[262] Radu Mares, *Corporate and State Responsibilities in Conflict-Affected Areas* (Nordic Journal of International Law Vol. 83 No. 3, 2014), 293, 311; Davitti (n 179) 11.

2.2.3.3 The third shortcoming

The third and final shortcoming of the 2017 Paper emphasized in this thesis is its lack of genuine engagement with relevant stakeholders.[263] Reiterating the criticism given in regards to the first shortcoming, concerning the exclusion and therefore lack of authoritative guidance from the aforementioned organizations such as the OHCHR, essentially mandated by the UN to provide guidance on the interpretation of the UNGPs, the Paper is considered a mere unilateral pronouncement of the banking sector's own responsibilities, unhelpful to its objective.[264] In support of this view, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises question its value as a practice tool, because of its lack of review by other stakeholders, in order to ensure its "accuracy, robustness and legitimacy."[265] It is considered critical to engage with CSOs and experts on human rights and finance when developing robust tools in this field.[266]

2.2.4 Summary

On the first shortcoming, the critics in the debate all agree that the Paper builds on an incorrect premise that Principle 13 (a) does not apply to commercial bank's activities other than in respect to their employment practices or own supply chain. Sub-paragraph (a) of Principle 13 is never considered in the Paper and thus, the Thun Group concludes that the responsibility to provide remediation does not apply to commercial banks when providing finance to a client which might cause or contribute to human rights harms. The criticism towards this wrongful premise is extensive and has above been divided into to three main grounds and explained. The most significant risks posed by the first shortcoming are three. First, the Paper misconstrues the object and purpose of Guiding Principle 13 and should be understood in accordance with the abovementioned clarification provided by Ruggie. In line with Ruggie's interpretation, the OHCHR has established that a business enterprise that provides financing for a project that will entail forced evictions is an example of involvement that is considered as contribution to an adverse human rights impact.[267] Second, it disregards that the situation becomes more complex for business enterprises that may be

[263] UN Working Group, "Letter to the Thun Group" (n 229).
[264] BankTrack, "Open letter to the Thun Group" (n 229).
[265] UN Working Group, "Letter to the Thun Group" (n 229).
[266] ibid
[267] OHCHR, 'Frequently Asked Questions about the Guiding Principles on Business and Human Rights', UN Doc HR/PUB/14/3 (United Nations, 2014) Annex I "Key Concepts in the Guiding Principles" 31.

directly linked to adverse human rights impact through their business operations. The commentaries to the UNGPs clarify that the appropriate action in such situations will depend on several factors such as the enterprise's leverage over the harmful entity, the dependence of their business relationship and most importantly, the severity of the abuse.[268] Third, it ignores that providing for remediation in cases of direct involvement in the harm caused is, at a minimum, considered to reflect *good practice* and a general responsibility that is independent from a categorization of involvement, as part of the HRDD process that business enterprises should undertake as part of their corporate responsibility to respect human rights.[269] Seen jointly with the foundational aspect of the 2017 Paper, these risks cannot remain unclarified nor ignored.

On the second shortcoming, the introduction of the two concepts of "proximity" and "unit of analysis" is criticized for its unfavourable effects on the victim's access to remedy and the scope and parameters of the HRDD process. The concepts are presented as fundamentally dependent on the type of financial product or service that is being provided. Thus, the HRDD process becomes a mechanism serving only within the limits of the chosen financial product or service that is being provided by the bank. The critics maintain that this should depend on the nature of the risk and the bank's connection to that risk by looking at the categories of involvement. Moreover, the concepts have been criticized for creating confusion as these concepts are not mentioned nor consistent with the UNGPs.

On the third shortcoming, the lack of consultation and review by relevant stakeholders in the drafting of the Paper undermines its strength as a practice tool, and the aim to interpret the meaning of the UNGPs, as it is seen as nothing but a unilateral pronouncement by the banking sector.

In addition to what has been said in the summary of the shortcomings, it is seen as odd that representatives of the banking sector seek to restrict their human rights responsibility by believing that they are exempt from responsibility for human rights abuses by the nature of their services. This is particularly inappropriate at a time where other sectors, such as the retail sector, are increasing their efforts in identifying and addressing abusive practices.[270] During an annual meeting in June 2017, the Thun Group itself noted a shift in the notion of legal liability of banks due to their special

[268] OHCHR, 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc HR/PUB/11/04 (United Nations, 2011) ("UNGPs") 21-22.
[269] See text by note 232.
[270] Kinley (n 251) 2.

position of being judged by society, while at the same time judging their client's behaviours.[271] The trend has also been acknowledged within the scholarship on BHR, pointing to the normative developments underway where the Thun Group's initiative is also mentioned in this regard.[272]

Before entering the sphere of legal liabilities and the human rights responsibility of IFIs, an introduction of the IFI which is used as an example in this thesis is necessary. The positioning of the WBG, and the IFC in particular, in the issue that this thesis is concerned with follows from the accounted for case of the Siguiri gold mine. The outline of the functions of the IFC and its lending practices that will follow, will allow for a better understanding of the relevance of the Thun Group Debate in this matter.

2.3 The World Bank Group

The WBG is one of the largest IFIs in the world. The institution provides funding assistance for development to governments and the private sector in developing countries through financial products such as long-term low interest *leveraged loans*[273], credits and grants. In doing so, it aims to meet its objectives to reduce global poverty and improve living standards in the developing world. In contrast to the other MDBs, that by their explicit regional focus could be referred to as *regional development banks*, the WBG is global in its scope and includes projects worldwide.[274] In fiscal year 2019 its investments commitments reached nearly USD 60 billion.[275]

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[271] Centre for Human Rights Studies, 'Conference Report of the Thun Group of Banks Annual Meeting On 19 June 2017' (University of Zürich) <https://bit.ly/3c1pK9A> (accessed 17 December 2019).

[272] Deva and others (n 47) 207.

[273] *Leveraged loan* means "a loan provided to a company that already has a considerable degree of indebtedness". Usually, leveraged loans allow borrowers that already have high debt or a poor credit history to borrow money, though at higher interest rates than usual. In the development finance context however, this type of loan is provided long-term at a low interest instead. A characteristic that applies to leveraged loans in general is that they are *syndicated*, which means that they are provided by several lenders in a so-called *syndicate*, which briefly explained lowers the risk of the lender providing such loan to a typically high-risk borrower; Official Journal of the European Union, 'Guideline of the European Central Bank of 2 August 2012 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9', (ECB/2012/18, 2012/476/EU, 2 August 2012), article 3.6.6.

[274] Bhargava (n 75) 394–396; World Bank, 'What we do' <https://www.worldbank.org/en/about/what-we-do> (accessed 16 October 2019); World Bank, 'Who we are' <https://www.worldbank.org/en/who-we-are> (accessed 16 October 2019).

[275] The World Bank Group, 'Annual Report 2019' (published 2 October 2019) <http://hdl.handle.net/10986/32333> (accessed 16 October 2019).

The WBG consists of five separate institutions. These institutions are separate legal entities whose purposes and objectives are set out in their respective Articles of Agreement. All five institutions all play an important role in the meeting of the WBG's objectives, that seen separately all have different yet significant and wide-reaching aims.[276] Pursuant to their statutory purposes, The International Bank for Reconstruction and Development ("IBRD") and the International Development Association ("IDA") form what is collectively known as the "World Bank" and focus on stabilizing the public sector in developing countries.[277] The IBRD directs its lending to creditworthy low-income countries and middle-income countries. The capital that the IBRD uses for lending is generally taken out of reserves of money paid to the WBG from its shareholders. The institution earns a small margin on their lending, which is later used for the operating expenses of the WBG or for debt relief. The IDA provides interest-free loans and grants to the governments of the poorest countries and its lending services generally account for about 40 percent of the total lending from the WBG.[278] This capital is in turn taken from its about 40 donor country members that replenish the funds of the IDA every 3 years. The remaining three institutions, the International Financial Corporation ("IFC"), the Multilateral Investment Guarantee Agency ("MIGA") and the International Centre for Settlement of Investment Disputes ("ICSID"), focus primarily on the strengthening of the private sector in developing countries.[279] More specifically, the IFC focuses on financing projects that are undertaken and carried out by the private sector. In addition to providing loans, the IFC may also take an *equity stake*[280] in these projects. MIGA provides insurance against political or non-commercial risks in developing countries and thus mobilizes private foreign direct investments in those countries. In cases of disputes between investors and host states, the ICSID provides a forum for investor-state arbitration. ICSID also serves an advisory role to governments in developing countries in their efforts to attract investments.[281]

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[276] Bhargava (n 75) 396.
[277] Bhargava (n 75) 397.
[278] Bhargava (n 75) 397.
[279] World Bank, 'The World Bank Group and The Private Sector' <https://www.worldbank.org/en/about/partners/the-world-bank-group-and-private-sector> (accessed 17 October 2019); World Bank, 'Who we are'<https://www.worldbank.org/en/who-we-are> (accessed 16 October 2019).
[280] An *equity stake* is a part of a company that is owned by a person or an organization and is typically represented by the number of *shares* in the company they have. *Shares* refer to equal parts that the ownership of a company can be split into and sold to members of the public; see *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/equity-stake> and <https://dictionary.cambridge.org/dictionary/english/share> (accessed 18 October 2019).
[281] Bhargava (n 75) 397.

By virtue of their treaty-based relationship with the UN, the WBG[282] is one of the specialized agencies that are included in the UN system.[283] Apart from the UN organs, the extended UN system encompasses various programs, funds, agencies and other bodies, including specialized agencies such as the WBG and the IMF.[284] The specialized agencies coordinate their work with the UN system but are governed independently of it.[285] Instead, each institution within the WBG is owned and governed by its shareholding countries. The ultimate decision-making power on matters such as policy, finance and membership within the institutions is thus subject to the discretion of the member countries.[286] A membership in all five institutions is not required, however, a membership of the World Bank is conditional on a membership in the International Monetary Fund ("IMF"). Similarly, a membership in the IDA, MIGA or the IFC is conditional on a membership in the IBRD.[287]

To date, the members of the WBG amount to a total of 189 countries.[288] All member countries, or shareholders, have direct representation in the Board of Governors that consists of one Governor appointed by each country member, typically the country's minister of finance. The Board of Governors is the senior decision-making body of the WBG according to the Articles of Agreement of each institution, and is thus, the ultimate policymaker of the WBG.[289] The Board of Governors oversees the Executive Board of Directors,

[282] ICSID and MIGA are not specialized agencies in accordance with Articles 57 and 63 of the UN, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, but the institutions are part of the WBG.
[283] UN, '"Funds, Programmes, Specialized Agencies and Others' <https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/> (accessed 20 January 2020).
[284] Bhargava (n 75) 16.
[285] Important to remember in this regard is however the supremacy of the obligations under the UN Charter, as established by Article 103 of the UN Charter, which will affect obligations under any other international agreement, including the Relationship Agreement that the specialized agencies have with the UN; Bradlow and Hunter (n 48) 72; Bhargava (n 75) 394.
[286] World Bank, 'About "Leadership"' <https://www.worldbank.org/en/about/leadership> (accessed 16 October 2019); World Bank, 'About "Members"'<https://www.worldbank.org/en/about/leadership/members> (accessed 16 October 2019).
[287] IBRD Articles of Agreements, Article II Section 1a <https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement> (accessed 16 October 2019).
[288] World Bank, 'About "Leadership"' <https://www.worldbank.org/en/about/leadership> (accessed 16 October 2019); World Bank, 'About "Members"'<https://www.worldbank.org/en/about/leadership/members> (accessed 16 October 2019).
[289] World Bank, 'About "Leadership"' <https://www.worldbank.org/en/about/leadership> (accessed 16 October 2019); World Bank, 'About "Governors"' <https://www.worldbank.org/en/about/leadership/governors> (accessed 24 January 2020).

consisting of a total of 25 Executive Directors working on-site of the WBG.[290] The governance structure of the WBG is based on a weighted system, where the votes and representation of each Member State equate roughly to the economic size or position of each country in the world economy.[291] Consequently, the five largest shareholders appoint one Executive Director each, whereas the remaining Executive Directors are elected and represent country constituencies.[292] Given that the membership in the different institutions varies, and that countries relative shareholding is therefore not the same, the voting powers of the Executive Board of Directors will depend on which institution the vote is cast for.[293] The key tasks for the Executive Board of Directors include deliberating and decision-making on proposals from the agenda set by the Board's President regarding the activities and operations of the various institutions, such as IFC investments for instance.[294] Although it is formally within the powers of the Executive Board of Directors to appoint a President, he or she is appointed by the US. In practice the role of the Board of Directors is therefore limited to merely approving the elected candidate.[295]

2.3.1 The International Finance Corporation

The IFC is the WBG's private sector lending division currently governed by 185 member countries.[296] The IFC is dedicated to the development of private enterprise in developing countries. It is the largest global development institution and financier of development projects, with investment commitments that reached a total of USD 19.1 billion in the fiscal year 2019

[290] ibid
[291] Karl Orfeo Fioretos (ed.), *International Politics and Institutions in Time* (Oxford University Press, First edition, Oxford, 2017) 277.
[292] World Bank, 'About "Leadership"' <https://www.worldbank.org/en/about/leadership> (accessed 16 October 2019); World Bank, 'About "Governors"' <https://www.worldbank.org/en/about/leadership/governors> (accessed 24 January 2020).
[293] Here the criticism regarding the imbalance between the voting powers of industrial and developing countries in the decision-making process of the WBG should be noted, after which the WBG undertook a voice reform process starting in 2008, with the aim of enhancing the voice and participation of developing and transition countries through an increase of their voting powers. In 2010, the Governors agreed on a set of reforms and realigned shareholding in line with economic weight and development contributions. The work is still on-going. For more information see the WBG 'Development Committee's Report to Governors on Shareholding at the Spring Meetings 2018' <http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23776699/DC2018-0003_PShareholding420.pdf> (24 January 2020); Jakob Vestergaard, *Voice Reform in the World Bank* (Danish Institute of International Studies, 2011) 5.
[294] Vestergaard (n 293) 9.
[295] Vestergaard (n 293) 11.
[296] World Bank, 'About "Leadership"' <https://www.worldbank.org/en/about/leadership> (accessed 16 October 2019).

into 269 development projects in 65 developing countries.[297] The functions and purpose of the IFC are set out in its Articles of Agreement.[298] Pursuant to Article 1, the IFC aims to:

> "further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of the International Bank for Reconstruction and Development […] In carrying out this purpose, the Corporation shall:
>
> (i) in association with private investors, assist in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries by making investments, without guarantee of repayment by the member government concerned, in cases where sufficient private capital is not available on reasonable terms;
>
> (ii) seek to bring together investment opportunities, domestic and foreign private capital, and experienced management; and
>
> (iii) seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries."[299]

In addition to investing own funds into private sector projects in developing countries, the IFC mobilizes private capital for private sector investments.[300] It does this by catalysing funds from private investors and lenders into IFC projects in developing countries or through the issuance of *bonds*.[301] The IFC

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[297] IFC, 'Investing for Impact "Annual Report 2019"' <https://www.ifc.org/wps/wcm/connect/4ffd985d-c160-4b5b-8fbe-3ad2d642bbad/IFC-AR19-Full-Report.pdf?MOD=AJPERES&CVID=mThcuRn> (accessed 17 October 2019) 26.
[298] IFC, Articles of Agreement <https://bit.ly/37IPq7r> (accessed 17 October 2019).
[299] ibid Article I.
[300] IFC, 'About IFC – Overview' <https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/About+IFC_New/> (accessed 16 October 2019); IFC, 'Mobilization' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/products+and+services/mobilization-proserv> (accessed 17 October 2019).
[301] The bonds that the IFC issues are, inter alia, green and social bonds; IFC, 'Our Funding' <https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/About+IFC_New/Investor+Relations/Funding/> Green and social bonds are defined as

only undertakes projects in its client countries, being those developing countries that are members of the IFC.[302] The clients are usually companies or financial intermediaries, such as commercial banks.[303] Whilst the IFC does not lend directly to small and medium sized businesses or individual entrepreneurs, it provides funding to financial intermediaries that on-lend to own clients, who are typically such small and medium sized businesses.[304] In addition to the functions of investing and mobilizing private capital, the IFC serves in an advisory capacity to governments, companies and other financial institutions. It provides advice on social responsibility issues ranging from environmental, social and governance ("ESG") standards to improved labour standards in industry-specific supply chains, such as the manufacturing industry.[305] By virtue of its Articles of Agreement, the IFC is required to operate on commercial terms and for-profit.[306]

2.3.1.1 Governance and decision-making of the IFC

The IFC's Board of Directors consists of representatives of all Member States.[307] The Board of Directors is responsible for the daily operations of the

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"any type of bond instrument where the proceeds will be exclusively applied to eligible environmental and social projects or a combination of both" by the International Capital Market Association, 'Frequently Asked Questions, "Is there a definition of Green, Social and Sustainability Bonds?"' <https://www.icmagroup.org/green-social-and-sustainability-bonds/questions-and-answers/#FAQ1.1> (accessed 29 January 2020). Note that the IFC does not issue stocks as it is owned by its members.

[302] IFC, 'About IFC, "Frequently Asked Questions" [What is an IFC Project?]' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/faqs> (accessed 28 January 2020).

[303] The IFC's PSs, which are addressed in Section 2.3.1.3, refer to the term "client" as "the party responsible for implementing and operating the project that is being financed, or the recipient of the financing, depending on the project structure and type of financing."; IFC, 'About IFC, "Frequently Asked Questions" [What is an IFC client?]' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/faqs> (accessed 28 January 2020).

[304] IFC, 'About IFC, "Frequently Asked Questions" <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/faqs> (accessed 28 January 2020).

[305] IFC, 'Advice' <https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/Solutions/Products+and+Services/Advisory> 'Overview' <https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/Solutions/> 'SME and Value Chain Solutions' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/products+and+services/advisory/farmer+and+sme+training> (all accessed 27 October 2019).

[306] IFC, 'About IFC, "Frequently Asked Questions" <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/faqs> (accessed 28 January 2020).

[307] IFC, 'About IFC, "Frequently Asked Questions" [What is the Board's role in an IFC project?] <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/faqs> (accessed 28 January 2020).

IFC and is composed ex officio of the representatives that are Executive Directors in the WBG.[308] The Board of Director meets regularly to review and decide on all investment projects and no investment or disbursement of funds can be made without Board approval.[309]

2.3.1.2 The financing model of the IFC

To begin with it is worth noting that the IFC financing model is much like the lending practices of commercial banks, where the creditworthiness of the borrower and the purpose of the loan is evaluated.[310] In a similar way, and due to its dealings with the private sector, the loan agreements of the IFC may thus be subject to domestic law.[311]

In order to be considered eligible for IFC financing, the project must:

- "be located in a developing country that is a member of IFC;
- be in the private sector;
- be technically sound;
- have good prospects of being profitable;
- benefit the local economy; and
- be environmentally and socially sound, satisfying our environmental and social standards as well as those of the host country."[312]

If the applying project is compliant with the above criteria, a twelve-step investment cycle follows before the project becomes a so-called "IFC-financed project."[313] The applicant's possibility, ability and willingness to comply with the PSs is assessed, and the terms and conditions of the IFC's participation in the project are negotiated previous to the signing of the legal agreement between the IFC and the client, where the latter undertakes to comply with the PSs. During the duration of the investment cycle, the IFC monitors the client to ensure compliance with the conditions of the loan

[308] IFC, Articles of Agreement (n 298) Article IV 'Organization and Management' Section 4(a), 4(b).
[309] IFC, 'About IFC, "Frequently Asked Questions" [What is the Board's role in an IFC project?]<https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/faqs> (accessed 28 January 2020).
[310] See Section 1.7.2.
[311] Ibrahim F.I. Shihata, *The World Bank Inspection Panel: in practice,* (The World Bank, Washington D.C., Oxford University Press, First Printing 2000, Second Edition) 160.
[312] IFC, 'How To Apply For Financing' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/how-to-apply-for-financing> (accessed 27 October 2019).
[313] For a more detailed description of the IFC's Project Cycle see the information on their website: IFC, 'Project Cycle' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/ifc-project-cycle> (accessed 27 October 2020).

agreement and the IFC's Sustainability Framework,[314] including the PSs.[315] The monitoring is made possible by the client's submission of required reports on financial, social and environmental performance.[316]

2.3.1.3 Performance Standards on Environmental and Social Sustainability

Since 2006, the IFC Sustainability Framework, that incapsulates eight PSs,[317] and a corresponding set of Guidance Notes,[318] articulates the IFC's commitment to sustainable development and applies to all of the IFC's investment and advisory client's projects.[319] The PSs and its Guidance Notes were first implemented in 2006, and later revised and aligned with the ideas of the UNGPs in 2012.[320] Similarly to the UNGPs, the PSs thus promote the idea that businesses should respect human rights and that this should be mainstreamed through economic activities and development.[321] The eight PSs[322] establish a minimum standard of requirements that are to be met by IFC's clients throughout the investment cycle.[323] However, the IFC is not hindered from financing investment activities of clients that do not yet meet the requirements of the PSs as long as they are "expected to meet the requirements of the Performance Standards within a reasonable period of time."[324] Moreover, the PSs ask borrowers of the IFC to hold a preventative

[314] IFC, 'Sustainability Framework' <http://www.ifc.org/sustainabilityframework> (accessed 27 October 2019).
[315] PSs (n 37); IFC, 'Sustainability Framework' <http://www.ifc.org/sustainabilityframework> (accessed 27 October 2019).
[316] IFC, 'Project Cycle' <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/ifc-project-cycle> (accessed 27 October 2020).
[317] PSs (n 37).
[318] IFC, 'Guidance Notes: Performance Standards on Environmental and Social Sustainability' (2012) <https://bit.ly/2HFPNVU> (accessed 27 October 2019) (hereinafter "Guidance Notes").
[319] IFC, 'Sustainability Framework' <http://www.ifc.org/sustainabilityframework> (accessed 27 October 2019).
[320] PSs (n 37) PS 1, para 3; Mares, "Securing Human Rights Through Risk-Management Methods" (n 8) 518.
[321] Mares, "Securing Human Rights Through Risk-Management Methods" (n 8) 517.
[322] The PSs refer to the following eight standards: PS 1: Assessment and Management of Environmental and Social Risks and Impacts; PS 2 Labour and Working Conditions; PS 3: Resource Efficiency and Pollution Prevention; PS 4: Community Health, Safety and Security; PS 5: Land Acquisition and Involuntary Resettlement; PS 6: Biodiversity Conservation and Sustainable Management Of Living Natural Resources; PS 7: Indigenous Peoples; PS 8: Cultural Heritage.
[323] I.e. during the period of time where the client receives financing from the IFC; IFC, 'PSs "Overview of Performance Standards on Environmental and Social Sustainability' para 2.
[324] IFC, 'Policy on Environmental and Social Sustainability'(2012) <https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrw0g> (accessed 29 January 2020) (hereinafter "Policy on Environmental and Social Sustainability") para 22.

approach and consider implementation of risk avoidance measures "whenever technically and financially feasible."[325] Delays in meeting these requirements may result in a loss of financing from the IFC.[326] Before their review, the PSs received criticism from NGOs for the lack of proper due diligence and the over reliance on self-monitoring.[327] The PSs would require the client to ensure a broad community support for a project and to conduct the necessary consultations, whilst the IFC were to assess whether this had happened. However, the IFC would not publish their findings.[328]

The most significant changes in the revised and updated version of the PSs thus concerned the strengthening of the due diligence requirement for financial intermediary-clients and their risk categorization process, as well as the addition of another objective of achieving positive development outcomes in investments and lending to financial intermediary-clients, in addition to the previously established objective of "do no harm".[329] Juxtaposing the requirement of a HRDD process in the UNGPs,[330] the PSs ask the IFC to apply its own due diligence process to its investment activities when granting loans.[331] The due diligence process of IFC is however referred to as an "environmental and social due diligence" that is part of the IFC's "overall due diligence" when considering a business activity and the financial and reputational risks.[332] In cases of targeted direct investments from the IFC, but where the form of financing is not yet fully defined, the "environmental and social due diligence" process may be extended to cover other business activities of the potential client. If significant environmental or social impact resulting from the business activity is identified, the IFC undertakes to cooperate with the client to determine possible remediation measures, including in cases of "past or present adverse impact caused by others".[333] In cases of indirect investments, where the IFC's client is a third party, typically a commercial bank acting as a financial intermediary funding, inter alia, development projects,[334] the IFC undertakes to review the existing investment

[325] PSs (n 37), PS 1, para 14.
[326] Policy on Environmental and Social Sustainability (n 324) para 22.
[327] Adrienne Margolis, *Equator Principles*, (The In-House Perspective 13 Vol. 6 No. 2, 2010) <www.westlawinternational.com> (accessed 3 February 2020) 2.
[328] Margolis (n 327) 2.
[329] CAO, 'Monitoring of IFC's Response to: CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries' (2014) <http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf> (accessed 31 January 2020) 17.
[330] UNGPs (n 268) Principle 17.
[331] IFC, Policy on Environmental and Social Sustainability (2012), para 20, retreived from: https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrw0g accessed 29 January 2020.
[332] Policy on Environmental and Social Sustainability (n 324) paras 21, 28.
[333] Policy on Environmental and Social Sustainability (n 324) para 26.
[334] Policy on Environmental and Social Sustainability (n 324) para 32.

portfolio and business activities of the financial intermediary client in question, in addition to the requirement placed on the client to present a risk management plan.[335] Where the IFC in these cases of indirect investments provides a general-purpose loan to the financial intermediary, the PSs apply to the entire portfolio, as opposed to earmarked IFC investments, where the requirements in the PSs will apply to the specific end use only.[336]

The financing model of the IFC has however undergone a change in the last years with the increased use of financial intermediaries, such as commercial banks, for investment of its funds as opposed to direct investments into targeted private sector projects according to their old practices.[337] The IFC has claimed to be moving away from general-purpose financing and that about 80 percent of their financing is now targeted, as a response to the issues arising out of the lack of transparency in the activities of their financial intermediary clients whose projects in turn might leave the IFC exposed to projects that conflict with the PSs when providing loans for general purposes.[338] Nevertheless, the trend of indirect investments by using financial intermediaries, is alarming in itself, as it accentuates the accountability gap by inviting more actors to the web of enablers and further complicates the possibility of tracing the financing provided by the IFC. The new lending practices of the IFC have raised concerns among CSOs in relation to the assistance of individuals and communities adversely affected by projects, as discussed in the following section.

2.3.1.4 Shift towards financial intermediary lending

A large and growing portion of IFC funding is now being provided to private sector development projects in developing countries by third parties such as commercial banks.[339] Under the current model, the IFC still requires its clients to adhere to the PSs. However, the IFC does not ensure that the same standards are met by the sub-client, that is the actor undertaking the development project that the IFC-client on-lends to.[340] The practice has thus raised concerns about the weakening audit and supervision of IFC's investments and their impact. Several regional development institutions, such

[335] The risk management plan is referred to in PS 1 para 5 as an "Environmental and Social Assessment and Management System".
[336] Policy on Environmental and Social Sustainability (n 324) paras 33, 36-37.
[337] Inclusive Development International, 'Financial Intermediary Lending' (n 131).
[338] Michael Igoe, 'Facing pressure for coal connections, IFC aims for greater transparency about "financial intermediaries"' (Devex, 20 April 2018) <https://www.devex.com/news/facing-pressure-for-coal-connections-ifc-aims-for-greater-transparency-about-financial-intermediaries-92586> (accessed 28 January 2020).
[339] CAO, "Monitoring of IFC's Response" (n 329) 8.
[340] Oxfam, 'Report: "The Suffering of Others, The Human Cost of the International Finance Corporation's Lending Through Financial Intermediaries"' (Oxfam, 2015) 2.

as the European Investment Bank and the Asian Development Bank, have followed IFC's lead and adopted the new model of financial sector lending. Critics are mainly concerned with the lack of transparency in the projects implemented by the commercial banks working with IFC and the inability of tracing IFC's funding due to banks' non-disclosure of project information.[341] The concerns have also been raised from within the institution itself, through its own independent accountability mechanism.[342] A solution to the traceability problem that has been voiced is that the IFC should require their high-risk financial intermediaries[343] to at least publicly disclose information on every high-risk investment of the sub-client's portfolio.[344]

2.3.1.5 The Office of the Compliance Advisor Ombudsman

The CAO is an independent accountability mechanism reporting directly to the President of the WBG,[345] that is supported by and scrutinizes the two private sector lending arms of the WBG, the IFC and MIGA.[346] CAO aims to assist in addressing complaints from people that have been adversely affected by IFC or MIGA-financed projects in order to foster a greater public accountability of both institutions.[347] Whilst the compliance review of the CAO focuses mainly on the IFC's performance in relation to their PSs,[348] the

[341] Inclusive Development International, 'Financial Intermediary Lending' (n 131); Medium, 'A year after promising to improve, what has the IFC done to clean up their financial intermediary lending?' (Oxfam International Office, Washington DC, 31 May 2018) <https://medium.com/@OxfamIFIs/a-year-after-promising-to-improve-what-has-the-ifc-done-to-clean-up-their-financial-intermediary-a8c88f09bf81> (accessed 27 October 2019).
[342] For more on the CAO, see the following section 2.3.1.5; CAO, "Monitoring of IFC's Response" (n 329) 26.
[343] That would be the financial intermediaries that are known to be involved in certain high-risk sectors or operational contexts.
[344] Medium, 'A year after promising to improve, what has the IFC done to clean up their financial intermediary lending?' (Oxfam International Office, Washington DC, 31 May 2018) <https://medium.com/@OxfamIFIs/a-year-after-promising-to-improve-what-has-the-ifc-done-to-clean-up-their-financial-intermediary-a8c88f09bf81> (accessed 27 October 2019).
[345] Leader and Ong (n 95) 205.
[346] See Section 2.3 and text by notes 276-281.
[347] CAO, 'About' <http://www.cao-ombudsman.org/about/> (accessed 29 January 2020); IFC, 'Frequently Asked Questions' [What is the Compliance Advisor Ombudsman (CAO)?] <https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/south+asia/countries/frequently+asked+questions> (accessed 29 January 2020).
[348] ibid; IFC, 'Frequently Asked Questions' [Frequently Asked Questions: Coastal Gujarat Power Limited Mundra] <https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/south+asia/countries/frequently+asked+questions> (accessed 29 January 2020).

functions of CAO also involve mediating in grievances and disputes and considering claims that are based on violations of international law.[349]

The three main functions of the CAO are: serving as an ombudsman and receiving complaints from adversely affected individuals by IFC-projects; advisory on social and environmental matters to IFC's management and the President of the World Bank; and audit in order to ensure IFC's compliance with internal policies such as the PSs.[350] Adversely affected individuals or groups can pursuant to the ombudsman function thus bring complaints to the CAO, that then independently determines whether a complaint is admissible or not.[351] If the case proceeds, the general outcome is suggestions of action to the complainant where facilitation of a dialogue, mediation or negotiation between the relevant parties is proposed, as in the case of the Siguiri gold mine.[352] A case is closed when the CAO considers that there has been a satisfactory settlement agreement concluded between the parties or when further investigation is not useful or productive.[353] CAO also conducts monitoring and follow-up on the settlement agreements to a certain extent to ensure their enforceability.[354]

As a result of a planned upscale in private investments in challenging environments by the IFC and MIGA, the institutions launched a review to ensure the role and effectiveness of CAO and their own accountability for adverse environmental and social impact in October 2019.[355] Although the review of the IFC's and MIGA's independent accountability mechanism is not expected to be completed until May 2020,[356] it has received criticism for being undertaken "in secret"[357] and for lacking a proper consultation process and public disclosure of relevant documents to adversely affected individuals

[349] Leader and Ong (n 95) 181.
[350] CAO, 'Operational Guidelines' (2013) <http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf> (accessed 29 January 2020) ("Operational Guidelines 2013") 4-5; Linda C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, (Martinus Nijhoff Publishers, 2004) 351.
[351] Reif (n 350) 351.
[352] See Section 1.1.2 and text by notes 39-41; Reif (n 350) 351-352.
[353] Reif (n 350) 352.
[354] Operational Guidelines 2013 (n 350) sections 3.2.3 and 4.4.6.
[355] World Bank, 'Review Team Conducting the External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness' (8 October 2019) <https://www.worldbank.org/en/about/leadership/brief/review-team> (accessed 28 January 2020).
[356] ibid
[357] Bretton Woods Project, 'Reviews of World Bank Group's accountability mechanisms too important to be done in secret' (12 December 2019) <https://www.brettonwoodsproject.org/2019/12/review-of-world-bank-groups-accountability-mechanism-too-important-to-be-done-in-secret/> (accessed 31 January 2020).

and communities as well as CSOs.[358] In a letter to the Review Team and Board of Directors of the WBG, several CSOs complained about the review not being transparent, meaningful nor inclusive enough by not accommodating for stakeholder participation. The review does not provide the possibility for communities to participate in their own languages as an unreasonable burden to translate their inputs is placed on them. Moreover, it does not disclose information regarding the terms of reference and relevant timelines of the review process. This, the critics continue, undermines the credibility of the WBG[359] and hinders an ability to understand IFC or MIGA-affected community perspectives which results in an incomplete review that is a disservice to the adversely affected.[360]

Having developed a standard-setting framework governing financial institution's lending practices, the PSs has had a catalysing role for a shift in convergence of standards in the financial sector. An example of this is the development of the broadly accepted Equator Principles[361] among financial institutions, that are based on the PSs as a point of reference.[362] The standing of the IFC in the context of social responsibilities within the BHR regime can therefore not be overstated. Using the above mentioned as matrix, the thesis will now proceed to Chapter Three where the regulatory framework on the human rights responsibility that is applicable to IFIs will be addressed.

[358] Letter on IFC and MIGA Accountability Framework Review Process to the Board of Directors of the World Bank Group from the 23 October 2019 "Re: Lack of Transparency and Adequate External Stakeholder Participation in the IFC/MIGA Accountability Framework Review Process" <https://www.inclusivedevelopment.net/wp-content/uploads/2019/10/10.23.19-Letter-on-IFC-MIGA-Accountability-Framework-Review-Process.pdf> (accessed 28 January 2020) ("Letter on IFC and MIGA 23 October 2019").

[359] Bretton Woods Project, 'Reviews of World Bank Group's accountability mechanisms too important to be done in secret' (12 December 2019) <https://www.brettonwoodsproject.org/2019/12/review-of-world-bank-groups-accountability-mechanism-too-important-to-be-done-in-secret/> (accessed 31 January 2020).

[360] Letter on IFC and MIGA 23 October 2019 (n 358).

[361] The Equator Principles are addressed in Chapter Three, see Section 3.3.2.1.

[362] IFC, 'Equator Principles Financial Institutions' <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions> (accessed 27 October 2019).

3 The human rights responsibility of IFIs

This Chapter is mainly to be descriptive in nature as it examines the applicable law as it stands (*de lege lata*) by spanning the breadth of regulatory[363] measures on the BHR field. It will thus provide an overview of the framework that is applicable to the financial actors relevant for this thesis. To date, there is no public international financial law that addresses the public purpose of the financial operations of IFIs and the commercial nature of their transactions.[364] Similarly, there is no provision addressing the human rights responsibility of financial actors. There is however a regulatory framework on the social responsibilities of financial actors that is comprised of both international legal standards on human rights and so-called soft law instruments on corporate responsibilities, such as the aforementioned UNGPs, sector-specific initiatives and other corporate voluntary initiatives. Here, the aforementioned distinction between "soft" and "hard" law is important to note.[365] Whilst soft law instruments thus do not impose obligations on states, their standards may reflect elements that already impose such obligations under customary international law, making them legally binding independently of the soft law instrument itself.[366]

Any discussion on the responsibilities of financial institutions must however begin with addressing the international law applicable to all international organizations. In order to do so, the legal status of international organizations will first be explained. The chapter will then proceed to consider the regulatory framework on the responsibility of international organisations for internationally wrongful acts and the international human rights standards applicable to international organizations. Lastly, the chapter completes the outline of the matrix of BHR responsibilities that apply to international financial institutions and commercial banks in their capacity as financial intermediaries by addressing some frameworks that have yet not been mentioned in this thesis, which despite being instruments of soft law, are of

[363] Note that the term "regulatory" is used here in a broad sense and refers not only to formal legal rules, but incorporates also informal and non-legal mechanisms, used to influence corporate conduct with respect to human rights; Baumann-Pauly and Nolan (n 177) 31.
[364] Bradlow and Hunter (n 48) 2.
[365] See Section 1.4 and text by note 64.
[366] UNHRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', UN Doc A/HRC/4/035 (UNHRC, 9 Feb 2007), para 45.

particular importance to both behavioural and responsibility-related developments in the BHR regime.

3.1 Legal personality of international organizations

3.1.1 The Reparations Case

Before the era of decolonialization, international law was mainly concerned with the delimitation of jurisdiction of states. Its principal purpose was to maintain a peaceful coexistence between states and its functions were directed at restraining and restricting actions that could infringe on the sovereignty of states.[367] Naturally, the exclusive subjects of international law were states and most matters were of a bilateral nature. However, the establishment of the UN changed the scope and content of international law and the decolonialization process spurred a growth in the number of states as many territories attained independent statehood. The growth of the international society created an interdependency of states and called for an increased interstate collaboration and out of this need international organizations were born. International law itself became more concerned with the promotion of human welfare, such as matters of human rights and the environment, than the prevention of national warfare.[368]

The objective international legal personality of international organizations was established in the "Reparations for Injuries Suffered in the Service of the United Nations" Advisory Opinion by the ICJ in 1949 (hereinafter the "*Reparations* case").[369] In a question whether the UN had the capacity to bring an international claim against the state responsible for the assassination of their mediator in Palestine, Count Folke Bernadotte, and obtain reparation for damages caused to the organization and to the victim, the ICJ answered in the affirmative. The court held that the UN, as an international organization, is a "subject of international law capable of possessing international rights and duties, and that it has the capability to maintain its rights by bringing

[367] Parappillil Ramakrishnan Menon, *The Legal Personality of International Organizations*, (Sri Lanka Journal of International Law Vol. 4, 1992) 79.
[368] Menon (n 367) 79.
[369] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion by the I.C.J. Reports 1949 (hereinafter "*Reparations* case") 174. Note here that the objective legal personality of an international organization differs from a subjective legal personality, which would be the recognition of its legal personality only by its Member States, non-members excluded, this is discussed further in Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns,* (Virginia Journal of International Law, Vol 36:56, 1995) 67-68.

international claims".[370] The court's conclusion was based on the rationale that the attribution of international personality to the organization is indispensable for the performance of its functions and for the achievement of its purpose and that "the Organization [the UN] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of a possession of a large measure of international personality and the capacity to operate upon an international plane".[371] Declaring that the nature of legal subjects and the extent of their rights is dependent on the needs of the community expressed in the organization's founding instrument, the ICJ concluded that "it [the UN] could not carry out the intentions of its founders if it was devoid of international personality".[372] Moreover, it follows from the principle of reciprocity and mutuality of obligations that the legal personality of international organizations entails that they should have responsibility for their conduct.[373]

IFIs are, as previously established, a form of international organizations established by states and tasked to mobilize economic cooperation and oversee the financial system.[374] By virtue of their legal personality they are therefore capable of exercising rights and being subjects to certain duties, as well as entering contractual relations and transactions on their own account as distinct entities, similarly to individual human beings and limited or public companies that are granted a legal personality separate from their creators.[375] Since both entities are set up for specific purposes and given limited powers, the position of international organizations in international law is thus rather similar to the position of corporations in domestic law.[376] Noteworthy here is the capitalization of IFIs, that is similar to that of corporations, as Member States subscribe to the shares of the total capital of the IFI in question, much like an investor does in a corporation.[377]

3.1.1.1 The principle of implied powers

Included in the legal personality of international organizations is the *principle of implied powers*.[378] In addition to answering the question related to the legal status of international organizations, the *Reparations* case reiterated the *principle of implied powers* that had first been applied by the Permanent Court

[370] *Reparations* case (n 369) 180.
[371] ibid 178f.
[372] ibid 178.
[373] Bradlow and Hunter (n 48) 64.
[374] See Section 1.7.1.
[375] Menon (n 367) 80.
[376] Menon (n 367) 80.
[377] Bradlow and Hunter (n 48) 76.
[378] Some refer to the same principle by using the *principle of speciality,* see e.g. *Nuclear Weapons* case by notes 381-382.

of International Justice[379] to the International Labour Association in their Advisory Opinion in 1926.[380] The principle adds whatever additional powers that may be essential for the effective performance of the organization's functions and duties, to the already existing powers and responsibilities that are explicitly provided in the organization's constituent treaty.[381] The principle was once again restated, and further developed, by the ICJ in their Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict (hereinafter the "*Nuclear Weapons* case") in 1996.[382] After the *Nuclear Weapons* case, the view is that international organizations do not possess a general competence, since they only have those rights and duties that are ascribed to them by their Member States in their respective constituent instruments, internal rules or rules developed in practice, in accordance with the *principle of implied powers*.[383] They are thus not equal *inter se*.[384] The position of international organizations before the law cannot therefore easily be compared to the one of states, as the conduct of states is, inter alia, governed on the basis of their sovereign equality.[385]

The fact that international organizations are governed by their Member States, thus ultimately a matter of interstate organization, does however create questions on the responsibility for the acts and decisions of the international organization.[386] The view that states bear the responsibility for the actions and decisions of the international organizations that they are members of has been supported by the International Law Association ("ILA")[387] and scholars.[388] The ILA has stated in this regard that "States cannot evade their obligations under customary law and general principles of law by creating an IO [international organization] that would not be bound by the legal limits

[379] The Permanent Court of Justice is the ICJ's predecessor.
[380] Competence of the ILO to Regulate Incidentally the Personal Work of the Employer, Advisory Opinion No. 13 by the P.C.I.J. of July 23rd, 1926 12; Bradlow and Hunter (n 48) xxvi.
[381] Bradlow and Hunter (n 48) xxvi.
[382] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. (8 July) (hereinafter "*Nuclear Weapons* case") 66, 79, para 25; Bradlow and Hunter (n 48) 67.
[383] *Nuclear Weapons* case (n 382) 66, 79, para 25
[384] Bradlow and Hunter (n 48) 67.
[385] Bradlow and Hunter (n 48) 67.
[386] Bradlow and Hunter (n 48) xxvi; Menon (n 367) 81.
[387] ILA, 'Accountability of International Organizations Final Conference Report' (Berlin, 2004) <https://www.ila-hq.org/index.php/committees> (access to clicking on link to Final Conference Report Berlin 2004) (accessed 12 January 2020) (hereinafter "ILA Final Conference Report Berlin 2004") 6, 22-23.
[388] Bradlow and Hunter (n 48) 47-48, in particular footnotes 71-73. Ian Brownlie, *State Responsibility: The Problem of Delegation*, in Ginther K and others (ed.), *Völkerrecht zwishen normativen Anspruch und politischer Realität* (Duncker & Humblot, Berlin 1994) 300-301; James Crawford, *Holding International Organizations and Their Members to Account* (presented at the Fifth Steinkraus-Cohen International Law Lecture, London, March 2007) 7.

imposed upon its Member States" and that "regional human rights bodies lend support to the view that a State's human rights obligations continue to apply."[389]

3.2 Responsibilities of international organizations in international law

3.2.1 Draft Articles on the Responsibility of International Organizations

The Draft Articles on the Responsibility of International Organisations ("DARIO") were adopted by the International Law Commission ("ILC") in 2011.[390] The ILC is a body that was established by the UN in 1947 to undertake the General Assembly's mandate to develop and codify international law under Article 13 (1) (*a*) of the UN Charter.[391] Based on the status of international organizations as subjects of international law following the *Reparations* case, and the view that "the principle that IO-s [international organizations] may be held internationally responsible for their acts is nowadays part of customary international law",[392] the drafting of the DARIO was a necessary means to establish that, in principle, international organizations should be subject to the same rules when breaching their international obligations, just as in the case of states.[393]

As an instrument resulting from a codification of a body mandated by the UN General Assembly, the DARIO has no legally binding force.[394] Its adoption is rather considered to indicate contours of a future law of responsibility of international organizations,[395] and the success of the Articles on State Responsibility ("ASR") adopted by the ILC in 2001, might indicate an equally positive future for DARIO.[396] Despite the many similarities between the two instruments, the DARIO is intended to represent an autonomous

[389] ILA Final Conference Report Berlin 2004 (n 387) 22-23.
[390] Report of the ILC, GAOR 66th Sess., Suppl, 10, Doc A/66/10, 54 ff ("DARIO").
[391] International Law Commission <https://legal.un.org/ilc/> (accessed 4 January 2020).
[392] ILA Final Conference Report Berlin 2004 (n 387) 26.
[393] Mirka Möldner, *Responsibility of International Organizations: Introducting the ILC's DARIO*, in A von. Bogdandy and R. Wolfrum, (eds.) Max Planck Yearbook of United Nations Law (Volume 16, Koninklijke Brill N.V., 2012) 288.
[394] Decisions of the General Assembly are considered to be "recommendations" under Articles 10 and 14 of the UN Charter (n 282).
[395] Bradlow and Hunter (n 48) 53.
[396] The ASR were used as a model in the drafting of the DARIO, which was intended to be "a sequel" (to the ASR), see Giorgio Gaja, 'First Report on Responsibility of International Organizations', UN Doc. A/CN.4/532 (26 March 2003), para 20; Möldner (n 393) 284.

text.[397] So, whilst many of the provisions in the ASR can be regarded as a codification, the same cannot be presumed about the corresponding provisions in the DARIO. This is partly due to the limited available practice on the responsibility of international organizations in general and its relatively recent developments.[398] As most instruments of the ILC however, the provisions in DARIO to some extent reflect, to say the least, an expression of opinio juris and therefore contribute to the formation of international customary law. Although not always legally binding, they represent authoritative means of interpretation.[399]

The DARIO concerns itself with "the international responsibility of international organizations for an internationally wrongful act" according to Article 1 (1).[400] It is stipulated under Article 3 that international organizations bear the responsibility for their internationally wrongful acts,[401] whereas Article 4 expands on the definition of an internationally wrongful act as an "act or omission" that is "attributable to that organization under international law" and "constitutes a breach of an international obligation of that organization."[402] According to Article 10, an international obligation can arise "regardless of the origin". By analogy of the interpretation of the corresponding provision under the ASR, this is to say that an international obligation "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order."[403] Moreover, the obligation may according to the General Commentary to Articles 10 and 33 be owed to "the international community as a whole, one or several states, whether members or nonmembers, another international organization or other international organizations and any other subject of international law."[404] In the General Commentary to the ASR, the scope of the obligations is stated more explicitly by the ILC: "[t]hey [the ASR] apply to the whole field of the international obligations of states,

[397] Report of the ILC, UN Doc A/66/10 54ff (hereinafter the "General Commentary to the DARIO"), para 4.
[398] General Commentary to the DARIO (n 397) para 5; Rekha Oleschak-Pillai, *Accountability of International Organisations: An Analysis of the World Bank's Inspection Panel*, in Jan Wouters and others (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 404.
[399] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ("VCLT") Article 32.
[400] DARIO (n 390), Article 1 (1).
[401] ibid Article 3.
[402] ibid Article 4.
[403] Yearbook of the International Law Commission Volume II Part Two A/CN.4/SER.A/2001/Add.1 (Part 2), Document A/56/10: Report of the International Law Commission on the work of its fifty-third session 55 ("Yearbook of the International Law Commission Volume II Part Two ") Commentary to Article 12 para 3; General Commentary to the DARIO (n 397) Commentary to Article 10, para 2.
[404] ibid Commentary to Article 10, para 3, Commentary to Article 33, para 4.

whether the obligation is owed to one or several states, to an individual or group, or to the international community as a whole."[405]

What the international obligations of international organizations are, was established in the case of "Interpretation of the Agreement of 25 March 1951 between the WHO [World Health Organization] and Egypt" (hereinafter the "*WHO* case"), where the ICJ stated that international organizations are bound "by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[406]

International organizations are however rarely parties to international treaties in which international obligations arise.[407] Nevertheless, international organizations might be bound by human rights law pursuant to provisions in their constituent treaties.[408] Thus, the law governing the conduct of international organizations is limited to customary international law, their constituent treaties and internal laws.[409] However, in the aforementioned *Nuclear Weapons* case, the ICJ established that conventions "constitute intransgressible principles of international customary law."[410] They then clarified, in their Advisory Opinion on Military and Paramilitary Activities (hereinafter the "*Nicaragua* case"), that "customary international law continues to exists and to apply, separately from international treaty law, even where the two categories of law have identical content."[411] This indicates that international organizations, despite not being parties to international human rights instruments,[412] nevertheless are bound to observe those rules in the

[405] Yearbook of the International Law Commission Volume II Part Two (n 403) General Commentary para 5; Möldner (n 393) 296.
[406] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, 89–90 (hereinafter "*WHO* case") para 37; Bradlow and Hunter (n 48) 43-44.
[407] Bradlow and Hunter (n 48) 66.
[408] Matteo Tondini, "The 'Italian Job': How to make international organisations compliant with human rights and accountable for their violation by targeting Member States", in Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 191.
[409] Bradlow and Hunter (n 48) 66.
[410] *Nuclear Weapons* case (n 382) para 79; Bradlow and Hunter (n 48) 70.
[411] Military and Paramilitary Activities in and Against Nicaragua 27 June 1986 (Nicar. v. U.S.), Advisory Opinion, I.C.J. Reports 14–181 ("*Nicaragua* case") para 179; Bradlow and Hunter (n 48) 70.
[412] Juxtaposing international human rights obligations with other international law obligations, their difference in character should still be noted. Whilst international human rights treaties are, typically, agreements between states, their beneficiaries are third parties, being persons within the committing State's territory and jurisdiction. This special relationship between the duty-bearer and the rights-holder, contributes to the fact that international human rights treaties are not relying on the idea of reciprocity and therefore do not lapse when one party does not comply with their obligations. It is thus up to the State that ratifies the treaty to implement the human rights the treaty sets out through

respective treaties that amount to customary international law[413] and to observe and comply with basic international human rights obligations.[414] These international human rights standards will be addressed in the following section.

By virtue of the *WHO* case, and insofar that the constitutive instruments of the international organization in question stipulate actual human rights obligations, they could be considered as a source of human rights obligations for the international organization.[415] However, the legal nature of the internal rules as well as rules arising out of international organizations, and to what extent they can be considered to set out international obligations under international law, is a matter subject to controversy.[416] Whether breaches of such rules can be considered to fall under the scope of the DARIO as breaches of international law, is therefore unclear. The ILC has in this respect stated: "to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article [Article 10] apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law."[417]

In this context and for the purpose of the present discussion on the responsibilities of IFIs, and the IFC in particular, it may be useful to recall that the IFC, by its nature as a specialized agency of the UN, forms part of the UN system which is based on the UN Charter. As such, it is thus additionally bound to respect the UN Charter and the overall purposes of the UN system, of which human rights are at the very core.[418]

International human rights law, as discussed in the next section, is also directly relevant to our discussion on the responsibilities of IFIs, since it sets out international standards that to a great extent reflect principles of

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national laws in order to fulfil its obligations vis-á-vis persons within its jurisdiction; Moeckli and others (n 67) 86-89. In this regard it is however important to note that human rights are not limited by territory but by jurisdiction. In international law there is a presumption of extraterritorial applicability of human rights treaties, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford Monographs in International Law, 2011) 10, 56.

[413] Bradlow and Hunter (n 48) 70.

[414] ILA Final Conference Report Berlin 2004 (n 387) 22; *WHO* case (n 406) para 37; Bradlow and Hunter (n 48) 43-44.

[415] Ciprian Radavoi, *Indirect Responsibility in Development Lending: Do Multilateral Banks Have an Obligation to Monitor Project Loans* (Texas International Law Journal, Vol. 53, No. 1, 2018) 3, 6.

[416] General Commentary to the DARIO (n 397) Commentary to Article 10, para 5.

[417] ibid Commentary to Article 10, para 7.

[418] Bradlow and Hunter (n 48) 43-44.

customary international law.[419] In order to fully grasp the responsibility of international organizations under the DARIO, the fundamental human rights instruments in international law must therefore be addressed.

3.2.1.1 International Human Rights Standards

The International Bill of Human Rights is one of the earliest international human rights instruments and is comprised of three parts that are made up of the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[420] As a measure adopted by the UN General Assembly, the UDHR is a non-binding instrument through which states have expressed their commitment to the fulfilment of human rights for all people.[421] The general principles of human rights set forth in the UDHR were given legal status through the binding commitments in the two Covenants, subject to the signing of states and ratification.[422] The rights enshrined in the UDHR are however accepted as declaratory of international customary law, thus binding upon international organizations.[423]

The UNGPs make explicit reference to the International Bill of Human Rights in Principle 12.[424] The principle establishes that the respect for human rights under the UNGPs includes, at a minimum but not exclusively, those internationally recognized human rights standards that are expressed in the aforementioned instruments and that these are to be respected and applied to all business operations.[425] References to the internationally recognized human rights standards can moreover be found in other fundamental soft law instruments that are relevant in the BHR context such as the ILO Declaration on Fundamental Principles and Rights at Work,[426] the various instruments

[419] Moeckli and others (n 67) 87.
[420] See Section 1.4 note 66; Moeckli and others (n 67) 66.
[421] UN Charter (n 282) Articles 10 and 14.
[422] Ratification is an international act that creates international obligations for states as they indicate their consent to be bound by a treaty through such an act, see VCLT (n 399) Arts 2 (1) (b), 14 (1) and 16; Moeckli and others (n 67) 66-67.
[423] Bradlow and Hunter (n 48) 66; Michael Reisman, *Comment: Sovereignty and Human Rights in Contemporary International Law,* (The American Journal of International Law, Vol. 84, 1990) 867; Radavoi (n 415) 4.
[424] A/HRC/17/31 (n 93) Annex II.A12.
[425] ibid Annex II.A12 Commentary.
[426] ILO, 'Declaration on Fundamental Principles and Rights at Work' (adopted 18 June 1998 86th session); the Declaration includes the eight ILO Conventions with principles and rights in four different categories; freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation. The rights are considered universal and fundamental and the Declaration commits all Member States of the ILO to respect them regardless of ratification status. ILO,

reflecting international labour standards[427] and the OECD's Guidelines,[428] all part of the bedrock from which the regulatory framework of BHR has continued to develop.[429]

3.2.1.2 Attributability of conduct to the IFI

Under the DARIO, the attributability of a wrongful act or omission to the international organization is addressed in Articles 6 to 9. As previously mentioned, the DARIO concerns itself with the responsibility of both international organizations and, to a certain extent, states. An act of an international organization can thus become the responsibility of a state through attribution. In the same way, an act of a state can become the responsibility of the international organization. The attributability of a conduct to an international organization does however not rule out the attribution of the same conduct to a state. Dual or multiple attributability can thus occur in practice.[430] The aforementioned is addressed in Articles 14 to 17 and 58 to 61 DARIO respectively, and seeks to prevent a situation where the wrongful conduct of one entity, state or international organization, is dismissed because of a lack of a legal link to the entity it acts through, for instance situations where a state could act through an international organization for which there is no legal obligation to be breached. Thus, international responsibility for that conduct would be circumvented. As pointed out, Article 1 (2) refers to this gap that was deliberately left in the ASR and intended to be filled by the provisions of the DARIO.[431]

The ILA has highlighted the risks associated with states using international organizations that they are members of to circumvent obligations under international law that are binding upon them and not the organization.[432] The issue is explicitly addressed in Article 61 DARIO: "[a] State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence to the subject matter of one of the State's international obligation, it circumvents that

Declaration, <https://www.ilo.org/declaration/lang--en/index.htm> (accessed on 28 January 2020).

[427] International legal standards are legal instruments setting out basic work rights. The instruments constitute either conventions that must be ratified in order to become legally binding, or recommendations, which generally but not always complement the convention and serve as non-binding guidelines for the convention's application. ILO, 'Conventions and Recommendations' <http://www.ilo.org/global/standards/introduction-to-international-labour- standards/conventions-and-recommendations/lang--en/index.htm> (accessed on 28 January 2020).

[428] MNE Guidelines (n 91).

[429] Moeckli and others (n 67) 568.

[430] General Commentary to the DARIO (n 397) para 4.

[431] ibid para 1.

[432] ILA Final Conference Report Berlin 2004 (n 387) 26 para 6.

obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation."[433] It is worth noting here that Article 17 addresses the same issue and applies in the same way to international organizations in situations where a decision that binds a Member State to commit an act that would be considered an internationally wrongful act for the international organization is adopted.[434]

3.2.1.3 Reparation for internationally wrongful acts

The legal consequences that might arise from an internationally wrongful act include the cessation of the on-going conduct or an assertion or guarantee of non-repetition, according to Article 30. Under Article 31, the international organization has a duty to make reparation for the injury caused by the internationally wrongful act. Article 34 specifically addresses the various forms of reparation and reads: "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter." The forms are separately addressed in the subsequent Articles 35-37, where compensation[435] is the most frequent form of reparation made by international organizations.[436] The ability of international organizations to provide reparations should be seen against its means for making the required reparations. The ability to provide reparations is closely linked to the financial resources of the international organizations, that are generally not available for meeting this type of expense.[437] This circumstance does not, however, free an international organization that is responsible for a breach from the legal consequences of the breach in accordance with its responsibilities under DARIO.[438]

When a responsible international organization is unable, for financial reasons or otherwise, to provide for reparations to an injured party, the question of whether the party can take recourse to the Member States of that organization can be raised.[439] This is however addressed in Article 40 (1) that reads that: "[t]he responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it

[433] DARIO (n 390) Article 61.
[434] General Commentary to the DARIO (n 397) Commentary to Article 61 para 1.
[435] DARIO (n 390) Article 36 reads: "1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."
[436] General Commentary to the DARIO (n 397) Commentary to Article 36 para 1.
[437] ibid Commentary to Article 31 para 4.
[438] ibid Commentary to Article 31 para 4.
[439] Möldner (n 393) 307.

with the means for effectively fulfilling its obligations". Where the international organization cannot fulfill this, the responsibility of the Member States in this regard is instead highlighted as Article 40 (2) reads: [t]he members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations." However, the provision, subject to controversy during its drafting,[440] should not be understood as envisaging "any further instance in which States […] would be held internationally responsible for the act of the organization of which they are members" than according to the conditions set out in Articles 17, 61 and 62.[441] Moreover, the ILC clarify in their General Commentary to the DARIO that "no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation" and that this view is confirmed by practice.[442]

3.2.1.4 Lack of individual focus

An important aspect to consider for the purpose of the present discussion is the fact that the obligations under the DARIO reflect the traditional view of the international legal system in that it focuses on obligations owed to states and, since relatively recently, international organizations, and not individuals or other entities.[443] Despite the mentioning of individuals in relation to Articles 10 and 33,[444] the General Commentary to Article 33 declares a limitation of the DARIO towards consequences of breaches with regard to individuals, where international obligations concerning employment and breaches committed by peacekeeping operations affecting individuals are given as examples.[445] A conclusion on what this delimitation might mean for the operations of IFIs and their adverse effects on third parties is thus not easy to draw. However, it seems that Article 33 (2) that reads: "[t]his Part [on the obligations of the responsible international organization] is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization", refers to the consequences of breaches towards individuals directly.[446] The General Commentary to ASR clarifies what is meant by this by declaring that an individual can invoke the

[440] ibid 307.
[441] General Commentary to the DARIO (n 397) Commentary to Article 40 para 1.
[442] ibid Commentary to Article 40 para 2.
[443] Möldner (n 393) 308.
[444] See text by note 403-404.
[445] General Commentary to the DARIO (n 397) Commentary to Article 33 para 5.
[446] Möldner (n 393) 309.

responsibility of an international organization on its own account for example under human rights treaties that provide this right to affected individuals.[447]

3.2.1.5 Possible impediments to the effective implementation of DARIO

There are two fundamental issues that are considered to impede the effective implementation of a legal framework on the responsibility of international organizations.[448] First, is the abovementioned fact that international organizations differ widely in their powers, functions and purposes. The scope of their mandate can cover anything from ensuring health to securing international peace and security, and their membership can range from being regional to universal, thus complicating their standing before the law as they cannot be treated uniformly.[449] As previously established, this thesis is concerned with the form of international organizations that are IFIs, and more specifically, the IFC, whose objective to "further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas" may be useful to recall in this context.[450] Second, is the immunity of international organizations before domestic courts that has been considered a structural problem affecting the responsibility-framework's implementation.[451] The primary reason for this view is that there is no doctrine comparable to the *doctrine of restrictive state immunity*,[452] that applies to international organizations.[453] Such a doctrine is however in any case only applicable to state-acts of a commercial nature and for a public purpose, such as the purchase of goods and products for government-owned services.[454]

The growing number of powerful international organizations in the international arena, and the expanding scope of their areas of activity in varying contexts, has led to a natural increase in situations where international organizations might be involved in breaches of human rights. Whereas the approach of dealing with the immunity of international organizations differs compared to its dealing in respect to states, it has been argued that the manner in which they become involved in human rights breaches is hardly

[447] Yearbook of the International Law Commission Volume II Part Two (n 403) 95 Commentary to Article 33 para 4.
[448] Bradlow and Hunter (n 48) 52, 66.
[449] Bradlow and Hunter (n 48) 67.
[450] See Section 2.3.1 and text by note 299.
[451] Bradlow and Hunter (n 48) 67.
[452] According to the doctrine of restrictive state immunity, states are denied protection from suit for acts of a commercial nature since it t would raise issues of unfair advantage in the competitive context otherwise; Singer (n 382) 113.
[453] Bradlow and Hunter (n 48), 52-53, 68.
[454] ibid 52-53, 69; Singer (n 382) 138-139.

distinguishable.[455] International organizations should thus be seemingly amenable to comparable solutions concerning the limitations of their immunity as for states.[456]

Still, this has not proven to be the case in practice. The ability for adversely affected rights-holders to hold international organizations accountable is typically constrained because of the *doctrine of functional necessity* granting international organizations immunity from legal process in their Member States.[457] Moreover, international organizations cannot be sued before regional judicial or international supervisory mechanisms of human rights[458] as opposed to Member States. The latter may also be sued before their own domestic courts.[459]

This thesis is concerned with yet another dimension to this problem as it involves commercial banks acting as the financial intermediaries in the already large web of actors, as illustrated by the case study in Chapter One.[460] The issues associated with bringing claims towards international organizations before domestic courts might however be on their way to an end by virtue of the recent decision of the US Supreme Court in a case concerning the jurisdictional immunity of the IFC.

3.2.2 International immunity of international organizations

Included in the legal personality of IFIs, as international organizations, is naturally the capability of IFIs of acting as parties in court proceedings. This is necessary for their effective operation since the promises of IFIs would else amount to nothing on the capital market if partners could not bring claims

[455] Riccardo Pavoni, *Human Rights and the Immunities of Foreign States and International Organizations*, in Erica de Wet, Jure Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights,* (Oxford University Press, 2012) 71.
[456] Moreover, due to the fact that international organizations today have become powerful and influential actors at the international level, and the functions they carry out can be equaled to those that have been carried out by States in the past, the logic behind holding them equally responsible as States for their conduct, and thus, not fall under a different legal regime dealing with the legal consequences of their breaches (of their international obligations) has been argued, see Möldner (n 393) 323; Pavoni (n 455) 71.
[457] Bradlow and Hunter (n 48) Introduction xxviii.
[458] For e.g. the Human Rights Committee of the UN, the European Court of Human Rights and the Inter-American Court and Commission of Human Rights.
[459] Tondini (n 408) 171.
[460] See Section 1.1.2.

against them and thus hinder their core activities.[461] Nevertheless, the ability of bringing claims towards IFIs in domestic courts has been problematic in practice because of the fact that IFIs are international organizations and therefore enjoy certain privileges and immunities.[462] The base of the spectrum of the privileges and immunities of international organizations is the *doctrine of functional necessity*, which will be addressed first in the following section. As this thesis concerns itself with an IFI that is a specialized agency of the UN, it will show that the issue of suit is further complicated by the fact that the IFC enjoys further privileges and immunities established in a separate international legal framework, namely the 1947 Convention on the Privileges and Immunities of the Specialized Agencies of the UN (hereinafter the "CPISA").

3.2.2.1 The doctrine of functional necessity

The doctrine of functional necessity has evolved alongside the creation of the major international organizations, such as the UN.[463] It grants international organizations the jurisdictional immunities necessary for the autonomous and effective performance of their functions and purposes, free from the interventions of states.[464] The assertion of the jurisdictional immunity of the international organization is generally made in the terms of its constituent instrument,[465] but may also be implied by virtue of the doctrine of functional necessity.[466]

How far-reaching the jurisdictional immunities of international organizations should be in order to ensure their survival is however controversial. The scope of the doctrine has been debated frequently among scholars over the years, yet there is still no clear consensus on the question.[467] The main rationale behind granting international organizations international immunity is their

[461] Clemens Treichl and August Reinisch, *Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals*, (International Organizations Law Review Vol. 16, Issue 1, 2019) 114.
[462] Treichl and Reinisch (n 461) 115.
[463] Singer (n 382) 65.
[464] Treichl and Reinisch (n 461) 118.
[465] A provision that exemplifies the doctrine is Article 105 (1) of the UN Charter that reads: "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Similar provisions are common in the constitutive instruments of many other international organizations, see for e.g. Article VI of the IFC's Articles of Agreement "[t]o enable the Corporation to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Corporation in the territories of each member.".
[466] Singer (n 382) 81 and footnote 113.
[467] Singer (n 382) 66-67.

effective functioning and independence.[468] However, the prevailing view is that international organisations should not be entitled to more than "what is *strictly necessary* for exercise of its functions in the fulfilment of their purposes."[469] Although it has been argued that it might be difficult for a development bank to function without a high degree of autonomy in their decisions on the loans they make,[470] courts and scholars have agreed that international organizations performing financial activities as their core activities should be liable to suit as "their creditworthiness appears indispensable to enable them to exercise their functions. For such organizations, but for them only, we would accept external control, i.e. control by domestic courts of the member states of their acts of commercial nature, which will practically include all acts of such organizations. We thus would apply only to them the same criteria as in the case of granting immunity to states."[471] The doctrine of functional necessity in respect to IFIs can therefore be said to have a reverse effect as it operates to limit the scope of the jurisdictional immunities of IFIs. If an IFI cannot exercise its functions and fulfil its purposes without being liable to suit, then the doctrine of functional necessity denies it jurisdictional immunity as this is not needed for the IFI to fulfil its purposes.[472]

The development of case law on the issue shows that the arguments around the application of the doctrine of restrictive state immunity applies in a similar way to international organization.[473] As a result of this, the commercial activities of international organizations, such as the lease of their offices or purchase of supplies, although carried out in order to perform their functions and fulfil their purposes, are not exempt to suit since it would raise the same issues concerning unfair advantages and thus not be subject to the immunity of the organization.[474]

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[468] Peter Bekker, T.M.C. Asser Instituut, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, (Legal aspects of International Organization, Vol. 17, Martinus Nijhoff Publ., 1994) 98.
[469] Bekker and T.M.C. Asser Instituut (n 468) 39; Singer (n 382) 101, 116 [emphasis added].
[470] Singer (n 382) 144.
[471] Ignaz Seidl-Hohenveldern, *Failure of controls in the Sixth International Tin Agreement* in Blokker N, Muller S (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* (Martinus Nijhoff, Vol 1, Dordrecht, 1994) 271–73; Singer (n 382) 136.
[472] Singer (n 382) 136.
[473] See for e.g. *Mendaro* v. World Bank, 717 F.2d 610, 618 (D.C. Cir. 1983); Singer (n 382) 141.
[474] Singer (n 382) 141.

3.2.2.2 Waivers of immunity

Waivers of immunity are rare.[475] The international organization may however waive its jurisdictional immunity explicitly, as a voluntary act, or in a constitutive manner.[476] The act of waiver ought to be done by the international organization when this will serve the organization's functional needs. Important to note, is that an international organization derives its competence from the functions and purposes set out in its constituent instrument by its creators.[477] The *Reparations* case, when establishing the abovementioned doctrine of implied powers, affirmed this direct relationship between the functions and the competence of the organization by stating that "its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged."[478] The international organization is therefore limited to so-called intra vires acts that will benefit and further the organization's purposes.[479] Any acts of the international organization outside of the scope of powers it has been granted are considered ultra vires acts.[480] Thus, an act of waiver must always be considered to benefit the purposes of the organization in order to be rightfully made within its scope of competence.[481]

However, the question of what degree the immunity of an international organization should have, and whether a waiver of an organization's immunity will benefit the organization, will rarely become an issue for a domestic court as the question is a matter that is left to the founding states of the organization to determine, leaving little room for a domestic court of one of the states to replace its views on the matter.[482] Moreover, the consideration of the doctrine of functional necessity will be secondary to a court in the question of the international organization's jurisdictional immunity in claims concerning human rights issues. This follows from the priority that human rights should be given.[483] The effect of a state granting an international organization jurisdictional immunity in such cases, is that it refuses to respect its international human rights obligations and the protection from their

[475] Singer (n 382) 136.
[476] A constitutive waiver refers to a provision in the organization's constituent instrument which allows for suits against the international organization in a domestic court; Singer (n 382) 73, 80.
[477] Singer (n 382) 110.
[478] *Reparations* case (n 369) 179; Bekker and T.M.C. Asser Instituut (n 468) 75-76.
[479] Singer (n 382) 110.
[480] Singer (n 382) 110.
[481] Singer (n 382) 80.
[482] Chanaka Wickremasinge, *International Organizations or Institutions, Immunities before National Courts* (Oxford Public International Law, Max Planck Encyclopedia of Public International Law Online, July 2009) 22.
[483] Singer (n 382) 147-148.

violation within its territory and jurisdiction. Human rights, and especially those that can be derived from the UDHR or the UN Charter, thus override the state duty to respect the doctrine and grant the international organization jurisdictional immunity.[484] It has further been argued that upholding the immunity of an international organization in cases of alleged violations of human rights, adds to the uncertainty around the outer limits of the conduct that an international organization can claim immunity for.[485] In respect to this, it has been argued that the severity of grave human rights violations, so-called *jus cogens rules*,[486] should be used as a yardstick when deciding whether to afford the international organization immunity or not, and that a distinction between domestic and international proceedings should be made in such cases.[487]

3.2.2.3 Jurisdictional immunity in domestic courts

As established, the privileges and immunities are generally stipulated in the constituent instruments of the respective IFI.[488] In the case of the IFC, its Articles of Agreement establish that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members."[489]

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[484] Singer (n 382) 147-148.
[485] Pavoni (n 455) 82.
[486] Jus cogens rules are peremptory norms of general international law that are recognized by the international community to be given priority as they are "seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values" see the General Commentary to Article 40 in Yearbook of the International Law Commission Volume II Part Two (n 403). It is noteworthy that Article 41 DARIO refers to the such peremptory norms of general international law. In accordance with Article 42 DARIO, States and international organizations should cooperate to bring the breach to an end. Previous to the drafting of the DARIO, the Organization for the Prohibition of Chemical Weapons expressed, on request by the ILC, that States in particular should be under an obligation to cooperate to bring breaches of that sort to an end, pointing at the similarities between international organizations and States. Moreover, they continued: "[w]hile the legal personality of States is in principle not limited, the legal personality of international organizations is limited by its mandate, its powers, and its rules as set out in its constituent instrument. Thus, it can be argued that the extent of the obligation of any international organization to bring a breach of jus cogens to an end, unlike that of States, should also be limited by the same, i.e., it must always act within its mandate and in accordance with its rules" see ILC, 'Responsibility of International Organisations, Comments and observations received from international organizations' A/CN.4/582, sect. II.U.2 28.
[487] Pavoni (n 455) 82.
[488] See text by notes 465-466.
[489] IFC, Articles of Agreement (n 298) Article VI Section 3.

The provision supports the view that IFIs' compliance frameworks generally do not establish a right for individuals to gain reparation or compensation from the IFI or its client company.[490] Accountability mechanisms of international organizations *vis-á-vis* non-state actors, such as the CAO, are a new development.[491] The form of accountability that is established by these mechanisms, has been referred to as a "judicial-style accountability" by the UNDP in that it functions in a judicial style, where the process of petition and investigation is more or less similar to the conventional adjudicative method. Although the example-mechanism used by Oleschak-Pillai is the World Bank's Inspection Panel, her reasoning on the mechanisms can be applied analogously to the IFC's CAO. However, their differences should be noted in this context. First, the CAO has considerably more independence of action, as it does not require the Board of Director's permission prior to conducting its investigations and reports to the President, unlike the Inspection Panel.[492] Second, in its dealing with private sector operations, the CAO is required to respect the confidentiality of sensitive business information, and the findings of the mechanisms are thus not made public. Moreover, the CAO will only report its recommendations to the President to the extent that is possible with respect to the confidentiality.[493] As a result, Oleschak-Pillai argues that the Inspection Panel as a form of accountability mechanism does not constitute an effective accountability mechanism[494] by stating that "[t]he World Bank needs to wake up to the fact that merely the existence of the Inspection Panel does not alone create accountability" and that the mechanism is not absolutely independent, as investigations require prior permission, nor are its findings enforceable or binding on the World Bank.[495]

Her rationale further strengthens the reasons why project-affected individuals tend to see mechanisms such as the CAO as pointless. Another shortcoming that has been identified in respect to dispute mechanisms offered by IFIs is that they often depend on the voluntary submissions of information of the IFI or its client.[496] CSOs have seen this as especially problematic since the accountability mechanisms lack a process that ensures an actual redress for the adversely affected, even so it has been established that harm has been caused as a result of non-compliance with operational policies such as the PSs. Those whose rights have been violated, are thus left with a dependence

[490] Treichl and Reinisch (n 461) 114.
[491] Oleschak-Pillai (n 398) 403; see also Inclusive Development International, 'Advancing the Right to Remedy' <https://www.inclusivedevelopment.net/campaign/advancing-the-right-to-effective-remedy-for-development-harms/> (accessed 24 January 2020).
[492] Shihata (n 311) 160.
[493] ibid 160.
[494] Oleschak-Pillai (n 398) 405, 428-429.
[495] ibid 403.
[496] Treichl and Reinisch (n 461) 114.

on the goodwill of the management or board of the IFI in question to take appropriate remedial action, which is not always forthcoming.[497] In this way, and of the reasons set out above, the UNDP's statement that "[j]udicial-style accountability does not correct bad decisions. But it can publicize wrong-doing and encourage organizations to reconsider decisions"[498] might be fully appropriate to caption their contribution in practice. As a result of the abovementioned, victims of project-related adverse impacts are now turning to domestic courts to seek remedies, which raises the issues concerning the present discussion on the jurisdictional immunities of IFIs.[499]

Lastly, for the purpose of the discussion in this thesis, it is of relevance that the IFC is considered a specialized agency of the UN.[500] The jurisdictional immunity of the IFC must therefore be considered in conjunction with the relevant provisions in the CPISA.[501]

3.2.2.4 Convention on the Privileges and Immunities of the Specialized Agencies of the UN

The IFC falls under the scope of the CPISA according to its Article 1 (j) by virtue of their agreement with the UN,[502] thus fulfilling the prerequisite in the present article of being an "agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter."[503] The immunities of the specialized agencies are set out in Article 3 of the present convention where it is established that the agency in question and its assets and property are immune from legal process,[504] and that the premises and archives of the agency are inviolable.[505]

It is worth noting that the IFC has rephrased the immunity provision in their respect pursuant to an annex to the CPISA.[506] The provision in its Articles of

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[497] Inclusive Development International, 'Advancing the Right to Remedy' (n 491).
[498] UNDP, 'Human Development Report 2002' <http://hdr.undp.org/sites/default/files/reports/263/hdr_2002_en_complete.pdf> (accessed 26 January 2020) 116; Oleschak-Pillai (n 398) 403.
[499] See below Section 3.2.2.5 and Treichl and Reinisch (n 461) 114.
[500] Bradlow and Hunter (n 48) 70.
[501] Bradlow and Hunter (n 48) 79.
[502] For the agreement between the UN and the WBG (on behalf of the IFC) that establishes the relationship between the UN and the IFC as a specialized agency since 1957 see 265 UNTS 312 (1961).
[503] Convention on the Privileges and Immunities of the Specialized Agencies signed 21 November 1947, 33 UNTS 262 (entered into force 2 December 1948) (hereinafter "CPISA") Article 1 (j). However, it is important to note that States become parties to the CPISA not through their membership in the specialized agency, but pursuant to their ratification of the convention.
[504] CPISA (n 503) Article 3 section 4.
[505] ibid Article 3 sections 5 and 6.
[506] ibid Annex 13 for the IFC.

Agreement thus prevails and overrides the Article 3 in CPISA.[507] This means that the immunity clause in IFC's Articles of Agreement is to be applied even in states that have ratified the CPISA. In the case of litigation against the IFC, the US is the forum-state pursuant to their immunity clause, as it is the host-state of the WBG's principal offices. However, as the US has not ratified the CPISA, the provisions in the convention would in any case be irrelevant.[508]

Claims concerning the abuse of the privilege or immunity granted under the CPISA can be brought by any state party to the CPISA in accordance with Article 7.[509] Under that provision, consultations should first be initiated between the claimant state and the specialized agency, and if this fails, the question of abuse should be submitted to the ICJ in accordance with Article 9.[510] The article further states that any disputes between the specialized agency and its members should be submitted to the ICJ as requests for an advisory opinion from the court.[511] All articles in the CPISA must be interpreted in light of the varying functions as established in the constitutional instruments of the different specialized agencies that the convention applies to in accordance with Article 10.[512]

Whereas the existence of the CAO as a dispute mechanism is not required by the Articles of Agreement of the IFC,[513] the CPISA requires each specialized agency to "make provision for appropriate modes of settlement of", inter alia, "[d]isputes arising out of contracts or other disputes of private character to which the specialized agency is a party" in Article 9.[514] In this way, it appears that the CPISA avoids contributing to a remedial vacuum by granting immunity when modes of dispute settlements are lacking, since domestic courts rarely take this into consideration before granting immunity.[515] The requirement under the CPISA entails, according to its wording, the condition to provide for appropriate modes of settlement for disputes arising out of a contract or "other disputes of private character." According to documentation available from the drafting of the CPISA, this was intended to encompass only matters "incidental to the performance of the [specialized] Agency under

[507] The applicable provision to the IFC thus reads: "[a]ctions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member of the Bank in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members."; See text accompanying notes 489 for the identical wording in the IFC's Articles of Agreement.
[508] Treichl and Reinisch (n 461) 118.
[509] CPISA (n 503) Article 7 section 24.
[510] ibid Article 9 section 32.
[511] ibid Article 9 section 32.
[512] ibid Article 10 section 34.
[513] Treichl and Reinisch (n 461) 112.
[514] CPISA (n 503) Article 9 section 31.
[515] Treichl and Reinisch (n 461) 112.

its functions" […] "and not to the actual performance of its constitutional functions."[516] The matters serving as examples in the documentation are of the same kind that would be considered as matters of a commercial character in respect to the aforementioned doctrine of restrictive state immunity.[517] The specialized agencies are thus, under the CPISA, not required to establish such dispute mechanisms that would encompass non-constitutional matters of a "incidental" character. This matters to the discussion held in this thesis, as it raises questions on the classification and character of the tort claims brought by injured third parties.[518] The lending activities of IFIs are undoubtedly within the scope of a constitutional matter. The case is however not as clear concerning the consequences caused by the lending.[519]

The requirement to establish a dispute mechanism for a certain type of disputes will also depend on the meaning of the word "appropriate" that is used in the present provision. In this respect it has been argued to imply that the dispute settlement upholds a certain standard of impartiality. Where this is true, the IFC's CAO would not satisfy the requirement of the CPISA as it is an internal claims mechanism.[520]

3.2.2.5 Jam et al. v. International Finance Corporation

The US Supreme Court's decision in the *Jam* case was the first ever decision on a matter concerning the jurisdictional immunity of an international organization.[521] Although the case is primarily concerned with the scope of the International Organizations Immunities Act ("IOIA"),[522] a US legislation, it has a more general relevance to the discussion held in this thesis as it sets a precedent for the accountability of IFIs in general.[523] Moreover, US legislation is of particular importance when considering litigation against any

[516] William E Beckett, 'Final Report of Sub-Committee I of the Sixth Committee, Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN Doc A/C.6/191 (15 November 1947) 12-13 para 32; Treichl and Reinisch (n 461) 113.
[517] See text by note 452.
[518] Treichl and Reinisch (n 461) 113.
[519] Note that it is only the activity of lending in itself that is considered as part of their constitutional function; Treichl and Reinisch (n 461) 113.
[520] Treichl and Reinisch (n 461) 113.
[521] Jam et al v International Finance Corporation, 586 U. S. ____ (2019).
[522] 22 U.S.C. § 288-288f (1994).
[523] The US enacted its principal instrument on the immunity of international organizations, the IOIA, in 1945, parallel to the establishment of the UN. The IOIA provides that: "[i]nternational organizations […] shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract according to § 288a (b)."

of the agencies of the WBG, as it is the forum-state pursuant to their Articles of Agreement.[524]

Until recently, cases brought against international organizations in domestic courts have been unsuccessful from the claimant's perspective, as the immunity of international organizations in the majority of the cases has prevailed the alleged conduct of the organization.[525] The landmark decision in the *Jam* case however, established that the IFC does not enjoy an "absolute immunity" under the IOIA, that grants international organizations the "same immunity" as is "enjoyed by foreign governments" under the Foreign Sovereign Immunities Act ("FSIA"),[526] and is thus not immune from suit in the US. The ruling adds a new perspective on the immunity of international organizations.[527]

The case was brought by a group of farmers and fishermen in India, with the assistance from the NGO EarthRights, in November 2015. The claimants argued that the IFC should be held liable for the environmental damage that had been caused from the Tata Mundra plant in India, a coal-fired power plant that the IFC had financed.[528] Worth noting, is that before, and parallel, to the case being brought before a US court, two complaints had been submitted to the CAO, in 2011[529] and 2016 respectively.[530] The first complaint raised issues related to the project's social and environmental impact on the fishing communities, and that these had not been sufficiently identified, mitigated nor assessed. The second complaint concerned an outfall channel connected to the power plant and its impact on the surrounding environment and the fishing

[524] See for e.g. IFC, Articles of Agreement (n 298) Article 6 Section 3, IBRD (Article 7 Section 3), IDA (Article 8 Section 3).
[525] See for e.g. the outcomes of the claims for reparations cases against the WBG in the Supreme Court of Canada (*World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207) and against the UN in the United States Second Circuit Court of Appeals (*Georges v. United Nations*, No. 15–455-cv [2d Cir. Aug. 18, 2016]), where the courts upheld the immunity of the organizations in both cases. However, the referred to cases did not relate to the UN or the WBG acting in a commercial manner, making the immunity issue much clearer. In the *Jam* case, the issues are more complex since the IFC provides commercial financing for foreign investment in developing nations; see Alan Franklin, 'New perspectives on the immunity of international organisations' (Diplo Blog, 17 August 2018) <https://www.diplomacy.edu/blog/new-perspectives-immunity-of-ios> (accessed 06 February 2020).
[526] 28 U.S.C. §§ 1602–1611 (1976).
[527] Jam et al v International Finance Corporation, 586 U. S. ____ (2019) 15.
[528] Business & Human Rights Centre, 'Intl. Finance Corp. lawsuit (re financing of a coal-fired plan in India', <https://bit.ly/2SLm0zW> (accessed 6 February 2020).
[529] CAO, CAO Cases, 'India/Tata Ultra Mega-01/Mundra and Anjar' (CGPL-01) <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=171> (accessed 06 February 2020).
[530] CAO, CAO Cases, 'India / Tata Ultra Mega-02/Tragadi Village' (CGPL-02) <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=245> (accessed 06 February 2020).

communities in particular.[531] The two cases were merged due to raising substantially similar compliance issues, and its current status is that the implementation of the Action Plan that the IFC provided as a result of the CAO's audit is being monitored by the CAO.[532]

After the case in its legal proceedings was dismissed by the first two judicial bodies, that had ruled in accordance with the IFC's claim that it enjoyed "absolute immunity" and thus could not be sued by individuals allegedly harmed by IFC-projects, the US Supreme Court agreed to hear the case in early 2018 and review the "absolute immunity" doctrine.[533] In 2019, the US Supreme Court ruled 7-1 judges in favour of the claimants appeal by stating that the IFC is not immune from legal proceedings in US courts and can in fact be sued when the organization is acting as a private player on the market.[534] The case has now returned to the District Court in Washington DC where the remaining question about whether development finance constitutes "commercial activities" under the FSIA,[535] will be tested.[536]

3.2.2.5.1 The effects of the Jam case for the jurisdictional immunity of IFIs

The issue is important since it relates to the abovementioned doctrine of functional necessity.[537] As previously established, the immunity of international organizations is intended to serve one purpose: to allow international organizations to operate without legal interference from the courts of the member countries. Hence, the international organizations worry for an abundance of suits from foreign plaintiffs related to their activities. For

[531] IFC, 'Frequently Asked Questions: Coastal Gujarat Power Limited, Mundra' [What is the CGPL Mundra CAO Complaint about?] <https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/south+asia/countries/frequently+asked+questions> (accessed 6 February 2020).
[532] IFC, 'Frequently Asked Questions: Coastal Gujarat Power Limited, Mundra'[What is the status of the CAO Complaints?] <https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/south+asia/countries/frequently+asked+questions> (accessed 6 February 2020).
[533] Business & Human Rights Centre, 'Intl. Finance Corp. lawsuit (re financing of a coal-fired plan in India' (n 544).
[534] Amy Howe, 'Opinion analysis: Justices hold that international organizations do not have near-complete immunity', (SCOTUSblog, 27 February 2019) <https://www.scotusblog.com/2019/02/opinion-analysis-justices-hold-that-international-organizations-do-not-have-near-complete-immunity/> (accessed 7 February 2020); Business & Human Rights Centre, 'Intl. Finance Corp. lawsuit (re financing of a coal-fired plan in India' (n 544).
[535] FSIA, 28 USC § 1605(a)(2).
[536] Bretton Woods Project, 'US Supreme Court rules against World Bank's claim of absolute immunity' (4 April 2019) <https://www.brettonwoodsproject.org/2019/04/us-supreme-court-rules-against-world-banks-claim-of-absolute-immunity/> (accessed 4 February 2020).
[537] See above Section 3.2.2.1.

that to be the case for suits in the US based on lending activities however, they would, for the FSIA exception to apply as stated above, have to qualify as "commercial activities."[538] Here, the Supreme Court's reasoning that was raised in their ruling in the *Jam* case in respect to this issue, although considered within the meaning of US legislation, is interesting to note:

> "As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered "commercial," an activity must be "the type" of activity "by which a private party engages in" trade or commerce. […] As the Government suggested at oral argument, the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as "commercial" under the FSIA. […] And even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. […] For another, a lawsuit must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity. […] Thus, if the "gravamen" of a lawsuit is tortious activity abroad, the suit is not "based upon" commercial activity within the meaning of the FSIA's commercial activity exception."[539]

The commercial nature of an activity should, for the purpose of the FSIA, be inferred from its nature rather than its purpose.[540] In this way, the IFC could be left without any immunity under the FSIA, following an overall classification of their lending activities as commercial to their nature. However, it will be up to the US courts to determine this issue. Based on the approach taken in the drafting of the CPISA, where incidental matters were separated from constitutional matters in accordance with the acts typically referred to as commercial under the doctrine of restrictive state immunity, this could save the IFC from losing its immunity entirely under US legislation.[541]

Up until now, the US Supreme Court's decision in the *Jam* case has had implications for another similar case against the IFC, the Juana Doe et al v IFC (hereinafter the "*Juana Doe* case").[542] The court in the *Juana Doe* case

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[538] Howe (n 534).
[539] Jam et al v International Finance Corporation, 586 U. S. ____ (2019) 14.
[540] See *FSIA*, 28 USC § 1603(d); Treichl and Reinisch (n 461) 128.
[541] Treichl and Reinisch (n 461) 128.
[542] Juana Doe et al v IFC Asset Management Company, No 17-1494-VAC-SRF 2018, WL 2971352 (District of Delaware, 16 February 2018). The case concerns IFC's loan to a Honduran palm oil business, Dinant, despite widespread allegations that Dinant campaigned for terror and dispossession of Honduran farmers. The claimants argue that the

stayed the proceedings during the time that the *Jam* case was pending before the US Supreme Court.[543] The *Juana Doe* case is however now, pursuant to the outcome on the immunity question of the *Jam* case, expected to proceed in a US federal court.[544] On a larger scale, the case might have implications for all international organizations that engage in commercial activities with their operations in the US, excluding those organizations that do not have a separate source of immunity than the IOIA.[545] Pursuant to this, the lending activities[546] of the IFC are now at a greater risk of becoming subject to suits.[547]

Given the topic that this thesis concerns, the argument that US jurisprudence on the immunity of international organizations is widely disassociated with any reasoning based on human rights law is interesting to note.[548] US jurisprudence has established that provisions containing a right to judicial proceedings in international human rights instruments[549] cannot be directly applied in US courts,[550] meaning that plaintiffs cannot seek to apply such international human rights instrument as a basis for their claim that a dismissal of their case due to immunity established in a US legislation would

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funding from the IFC's has been used to finance their campaign, and supported the extreme violence by private and public security forces against Honduran farmers, of which a 100 farmers have been killed, for more information on the case, see EarthRights International, 'Juana Doe et al. v. IFC: Honduran Farmers Sue World Bank Group for Complicity in Human Rights Violations' <https://earthrights.org/case/juana-doe-et-al-v-ifc/#documentsff69-1a905f26-f4b6> (accessed 7 February 2020).

[543] Treichl and Reinisch (n 461) 123.

[544] Business & Human Rights Centre, 'What does the US Supreme Court's decision on IFC impunity mean for Indian fisherfolk?' (n 61).

[545] Marco Simons, 'Jam v. IFC – some questions and answers after the Supreme Court's ruling'(*EarthRights International*, 4 March 2019) <https://earthrights.org/blog/which-international-organizations-will-be-affected-most-by-the-supreme-courts-ruling/> (accessed 7 February 2020).

[546] Another factor worth mentioning in this regard is the requirement that the tortious act, subject for suit, must be conducted on the territory of the US pursuant to the FSIA. In respect to IFC in the *Jam* case, it has been argued that decision-making and lending happens from its offices in Washington DC. This is however part of the question which will now be tested in the District Court, see above text by note 536.

[547] Simons (n 545).

[548] See for e.g. Charles H. Brower II, 'United States' in August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013) 327; Treichl and Reinisch (n 461) 129.

[549] See for e.g. the UDHR, Article 10 that reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." and the ICCPR, Article 14 (1) that reads: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. […]".

[550] This is often referred to as "non-self-executing", meaning it needs legislative implementation into domestic law before it can be applied by the courts; for more see the *Encyclopedia Britannica* on "non-self-executing treaty" <https://www.britannica.com/> (accessed 7 February 2020).

be a violation of their rights under the covenant in question.[551] To this, Brower concludes that "it seems clear that US courts have shown no predisposition to act as norm internalizers who seek to restrict the scope of international immunities as a means of enhancing the effectiveness of human rights norms."[552]

Despite the outcome in the *Jam* case and its likely impact on future suits against WBG institutions or other IFIs with similar immunity provisions, doubts remain as to whether domestic courts are a suitable venue for project-affected people to seek remedy. Wherever domestic courts will consider immunity to prevail pursuant to the doctrine of functional necessity, alternative means of redress should be strengthened. However, a wider amenability to sue might halt IFIs' incentive to establish more effective means of dispute settlement instead of benefit its positive development out of a right-holders' perspective.[553]

The above discussion is one of the reasons why a focus on BHR and "softer" forms of responsibilities, that in turn may lead to "harder" outcomes, remains relevant, if not crucial, when it comes to seeking redress for project-affected individuals or communities.

3.3 Corporate human rights responsibilities in soft law

3.3.1 Background and development of private governance

As the global BHR agenda has evolved, the regulatory authority has become shared and almost entirely transferred from states to non-state actors. Private governance has in this way become a central means in filling the governance gaps with emerging voluntary initiatives establishing standards for corporate conduct and compliance mechanisms for the monitoring of their implementation.[554] Large international organizations such as the UN, ILO and the OECD are undoubtedly some of the most influential actors that have advanced the development of the regulatory framework in this regard.[555] The field of BHR is thus unique from a regulatory perspective, as the body of rules

[551] Brower (n 548) 310; Treichl and Reinisch (n 461) 129-130.
[552] Brower (n 548) 327.
[553] Treichl and Reinisch (n 461) 129, 135-136.
[554] Baumann-Pauly and Nolan (n 177) 32-33.
[555] Moeckli and others (n 67) 568.

and norms governing corporate conduct, as seen in this thesis, stretches from hard laws, both international and domestic, to soft laws, including sector-specific standards and other corporate voluntary initiatives.[556]

3.3.2 Sector-specific standards

This section addresses three sector-specific standards that are of relevance to the discussion, in addition to the previously presented UNGPs[557] and the PSs.[558] The Equator Principles and the UN Principles for Responsible Investments (hereinafter the "UN PRI") are two instruments that were developed by the financial sector to be used by, and applied to, the operations of financial actors. Although their relationship to the UNGPs is not free of shortcomings,[559] the instruments make reference to the UNGPs and are essentially sprung out of the same idea of a corporate respect for human rights. The OECD's Due Diligence for Responsible Corporate Lending and Securities Underwriting (hereinafter the "CLU Guidance") is a guidance paper on responsible business conduct in the financial sector and encourages responsible lending. The instruments provide relevant examples and highlight the quick pace that soft legal instruments can keep in comparison to hard law, and thus spur a fast development of the international framework on more responsible practices within corporations and specific industries. Inevitably though, they suffer the same enforceability flaws as other soft law instruments.

3.3.2.1 The Equator Principles

Since 2003, the Equator Principles serve as a benchmark for financial institutions for determining, assessing and managing social and environmental risks in project finance.[560] The large wave of voluntary endorsement among financial institutions[561] confirms that the Equator Principles promote a convergence around common social and environmental standards in the industry.[562] Whilst the Equator Principles establish that environmental and human rights concerns ought to be factored into

[556] Baumann-Pauly and Nolan (n 177) 31.
[557] See Section 2.1.2.
[558] See Section 2.3.1.3.
[559] E.g. the aforementioned noted differences between the required HRDD processes.
[560] Margolis (n 327) 1.
[561] To date, 101 financial institutions in 38 countries have voluntarily adopted the framework; CAO, 'Audit Report' <http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf> (accessed 31 January 2020) 36.
[562] Equator Principles, 'Equator Principles' http://www.equator-principles.com/about (accessed 03 February 2020).

investment decisions at an early stage by providing a minimum standard for due diligence and monitoring in primarily project-related lending decisions, many financial institutions have extended their reach and are applying the standards on lending to other areas as well.[563] The provisions in the Equator Principles are mainly based on the IFC's PSs.[564] Similarly to the PSs, the Equator Principles require clients of their endorsing financial institutions to commit to a compliance with the relevant parts of the framework, before a financial relationship between the two is initiated.[565]

Although the preamble makes explicit reference to the HRDD of the UNGPs, the Equator Principles have received criticism of providing a weaker HRDD requirement than that of the UNGPs. During the latest update of the framework, that was intended to better align the Equator Principles with the UNGPs, some gaps concerning the weaker HRDD requirement in the Equator Principles were identified through an external review of the draft.[566] The gaps were said to be mainly owed to the misalignment between the UNGPs and the PSs[567] on which the Equator Principles draw substantially. Resulting in a weaker requirement, the HRDD of the Equator Principles thus received criticism of not including an assessment of contextual risks as part of the HRDD process, lacking reference to the leverage that financial institutions should use to seek to address risks that they might be connected to through third parties, and of not using international human rights standards as a minimum benchmark in the management of impact.[568] Another gap that was noted through the external review was the limited scope of application of the Equator Principles. The need of a broadened scope, including a lowered threshold for project-related transactions, was addressed in the updated

[563] Margolis (n 327) 1.
[564] CAO, Audit Report, 'CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries' (10 October 2012) <http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf> (accessed 31 January 2020) 17.
[565] Equator Principles, 'The Equator Principles 4 July 2020' (as of July 2020) <https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf> (accessed 31 January 2020) 3-4.
[566] See e.g. Shift's Report "Enhancing the Alignment of the Equator Principles with the UN Guiding Principles on Business and Human Rights: A Public Summary of Shift's Advice to the EPA" <https://equator-principles.com/wp-content/uploads/2019/01/Shift_Advice_to_SRWG_of_EPA_Public-Version_Final.pdf> (accessed 03 February 2020) (hereinafter "Shift Report on the EPs")
[567] For more on the differences between the risk-management methods of the PSs and the UNGPs, see Mares, "Securing Human Rights Through Risk-Management Methods" (n 8).
[568] Shift Report on the EPs (n 566).

framework whose scope is now extended[569] and will be effective as of July 2020.[570]

The Equator Principles have been considered to open a window for civil society to scrutinize the procedures of commercial banks, that unlike the IFC do not have as generous disclosure policies. The risk of potential scrutiny from civil society might thus serve as a bank's first screening before backing a project, since a reputation of non-compliance with the Equator Principles is not desired. Moreover, projects that the IFC chooses not to finance should naturally be excluded, due to the Equator Principles' basis on the PSs and the questions regarding their due diligence that would arise otherwise.[571] On the other hand however, the Equator Principles lack an independent grievance mechanism such as the IFC's CAO, where claims of non-compliance with the framework can be brought.[572] Whilst principle 6 of the Equator Principles establishes a grievance mechanism, it only allows for claims to be brought against the borrower,[573] and not the financial institution that has endorsed the framework.[574] Moreover, the Equator Principles should point commercial banks to adopt some type of disclosure policy to address the issue of transparency.[575] This has been highlighted by CSOs that have expressed their disappointment in that the Equator Principle's review process did not consider the issue of a strengthened accountability for project financiers enough. Further they have asked the Equator Principles Association to initiate the development of an independent accountability mechanism of their own, which would bring the framework in closer alignment with the UNGPs.[576]

3.3.2.2 The UN Principles for Responsible Investments

Another manifestation of the evolving BHR standards in the financial industry are the UN PRI that reflect an investment strategy that aims to incorporate environmental, social and governance[577] factors into investment decisions and active ownership.[578] Convened by the UN, an international group of institutional investors launched its initiative in 2005 to develop this

[569] For example, the threshold for project-related corporate loans has been reduced and as a consequence, the Equator Principles 4 will now be applicable to loans that amount to at least USD 50 million compared to the earlier USD 100 million.
[570] The Equator Principles 4 (n 585).
[571] Leader and Ong (n 95) 457-458.
[572] ibid 459-460.
[573] That is the client of the financial institution that has endorsed the Equator Principles.
[574] Equator Principles (n 562) Principle 6.
[575] Leader and Ong (n 95) 459-460.
[576] Inclusive Development International, 'Advancing the Right to Remedy' (n 491).
[577] Commonly referred to by the acronym "ESG".
[578] UN Principles for Responsible Investment <https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment> (UN PRI) (accessed 03 February 2020).

set of voluntary investment principles in order to help investors achieve long-term returns and encourage a more sustainable financial system.[579] The UN PRI framework consists of six principles that intend to reflect the fiduciary duty of investors[580] to act in the best long-term interests of their beneficiaries and thus align investment decisions with the broader objectives of society by including environmental, social and governance issues in their investment practices.[581]

3.3.2.3 OECD Due Diligence for Responsible Corporate Lending and Securities Underwriting

The CLU Guidance was launched in October 2019 and is a guidance that is based on the MNE Guidelines. The CLU Guidance sets out to provide banks with a standard of "responsible conduct" for their transactions that is in accordance with the standard set out by the MNE Guidelines, and to provide guidance on due diligence approaches for banks in the context of their corporate lending and underwriting activities.[582] However, it does not consider the due diligence approaches in the context of project- based finance. Nevertheless, it is still of relevance to the discussion held in this thesis, as it focuses on clarifying the due diligence standard recommended under the MNE Guidelines, since it is "not limited to specific types of transactions" but applies to all transactions, according to the CLU Guidance.[583]

The aforementioned MNE Guidelines, are framed by the UNGPs, and are a set of standards for responsible business conduct.[584] Albeit being a non-binding instrument, the MNE Guidelines establish the requirement of providing a unique non-judicial grievance mechanism called National Contact Points ("NCPs") in each of the, at present, 48 adhering states.[585] The NCPs should promote awareness of the content of the MNE Guidelines by assisting corporations in their implementation, and care for complaints that are submitted by individuals or organizations, including CSOs and NGOs, with a legitimate interest regarding corporations', banks included, non-

[579] UN PRI (n 578).
[580] For more on the debate around the updated conception of fiduciary duty see e.g. UN PRI, 'Report: Fiduciary Duty in the 21st Century' (2015) <https://www.unpri.org/download?ac=1378> or <https://www.fiduciaryduty21.org/> (accessed 03 February 2020).
[581] UN PRI (n 578).
[582] CLU Guidance (n 94) 3.
[583] ibid 8.
[584] MNE Guidelines (n 91) 3.
[585] OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises 2018' (2019) <http://mneguidelines.oecd.org/2018-Annual-Report-MNE-Guidelines-EN.pdf> (accessed 29 January 2020) 7.

compliance with the MNE Guidelines.[586] Complaints against a corporation should be brought to the NCP in the country where it has its headquarters and request that the NCP, by referring to the MNE Guidelines, provides recommendations to the corporation in question. The outcome of the procedure is made publicly available, within the limits of "sensitive business and other stakeholder information."[587]

The CLU Guidance provides guidance and recommendations on seven key areas.[588] For example, it recognizes that banks, through their client relationships, can contribute to adverse human rights impact through acts and omissions.[589] The CLU Guidance increases the focus on the due diligence conducted by banks and explains that it has importance for determining whether the bank contributed to the impact caused by its client.[590] In addition, it clarifies that the responsibility of remediating the impact, even so a contribution by the bank cannot be established,[591] includes that the bank "seek[s] to prevent or mitigate the impact, using its leverage, which may involve efforts to influence the client to provide remediation."[592] In this respect, the guidance also emphasizes the role of exclusion policies and blacklists for companies in highly damaging industries or with a history of irresponsible behaviour,[593] and that disengagement or divestment from a client in response to adverse human rights impacts is not a remedy to the impact on its own even so it might be the first response in cases where impact is severe.[594] Moreover, the transparency issues arising in the context of due diligence because of the duty of confidentiality that is owed by the bank to the client is addressed. Despite being a duty that is generally regulated in domestic legal frameworks, the guidance explains that banks generally can establish exceptions to this duty within its scope and promote greater transparency.[595]

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[586] MNE Guidelines (n 91) 71-72.
[587] MNE Guidelines (n 91) 73.
[588] The seven key areas are: relationship of banks to adverse impacts and remedy; bank-level grievance mechanisms; transparency and client confidentiality; sustainability responsibilities; public policy advocacy; engagement with rightsholders; disengagement and divestment; summarized by the CSOs BankTrack and OECD Watch in: OECD Watch and BankTrack, 'The OECD Due Diligence for Responsible Corporate Lending and Securities Underwriting: An analysis and briefing for civil society organisations on the strongest elements for use in advocacy' (November 2019) <https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/11/OECD-Watch-BankTrack-briefing-PDF.pdf> (accessed 2 February 2020) ("OECD Watch and BankTrack Report").
[589] OECD Watch and BankTrack Report (n 588) 3.
[590] ibid 4.
[591] I.e. where the bank is directly linked to adverse human rights impact through a client.
[592] CLU Guidance (n 94) 19.
[593] ibid 51.
[594] ibid 52.
[595] ibid 21.

4 Concluding discussion

The following chapter will attempt to answer the main question of the thesis, namely how IFIs can be held accountable for the conduct of their borrowers. In order to provide a structured answer, a number of sub-questions have been posed that will naturally be addressed. The chapter can be seen as split into two dimensions. The first dimension includes a discussion on the responsibility, under international law, that an IFI has for the adverse human rights impact that a private client (e.g. a company) of their borrower (e.g. an intermediary commercial bank) may cause or contribute to. It is thus intended to be considered a *preventative* dimension, where measures and practices that prevent adverse human rights impact from occurring in the first place are addressed. The second dimension includes a discussion on the effects, if such responsibility exists, and the current challenges to ensuring effective remedies for the individuals or communities who have been adversely affected. It is thus intended to be considered a *remedial* dimension, in which the obstacles that presently hinder access to an effective remedy are identified.

The issues concerning the responsibility and accountability for business-related human rights abuses that are discussed in this thesis are from a BHR perspective not much different from the typical and more traditional supply chain-issues that originally spurred the notion of BHR. Supply chains have been a topic within the BHR context since its beginning, but they have only until recently involved the financial sector. The applicability of these issues to a new sector, that so far has not fully accepted that it bears a responsibility as an enabling actor in a supply chain-context, nevertheless indicates a growth of the BHR regime. The issue is however further complicated by the addition of IFIs to the problem that creates another layer of complexity to the accountability problem as it involves international organizations that cannot be brought before the same judicial mechanisms as states or companies. The discussions held around this added layer are however very interesting also from a purely international legal perspective.

In the following section where the responsibilities under international law will be discussed, the Thun Group Debate and its shortcomings are considered in light of the section's preventative dimension. It is argued that the banking sector could, potentially, pose as an extra preventative layer, contributing to a prevention of adverse human rights impact, but instead, under the banking sector's current understanding of their human rights responsibilities, might contribute to the opposite. Here, the role of the regulatory frameworks of the

BHR regime, including instruments of private governance, and their relevance in respect to the present issues, is discussed.

4.1 The preventative dimension

The recent developments on the notion of development finance have increased the pressure that is placed upon states to mobilize more funds for the operations of IFIs with developmental purposes, in order to satisfy the objectives of the 2030 Agenda, including the SDGs. The subsequent increased participation of the private sector, through the unlocking of private investments with the use of public funds into private sector-led development projects, has led to an increased allocation of capital being directed towards development, that at first sight might seem as a successful outcome of the financing strategy set out in the Addis Ababa Action Agenda.[596] The invitation of the private sector in solving public matters with public funds has however evidently had consequences on the heightened risk for adverse impact on human rights and created issues concerning accountability, as private institutions operate under different operational and legal regimes than public international ones.

In its current state, development finance seems to counteract the very same objective that it is intended to aid. The paradox of intending to direct more funds towards the achievement of the objectives of the 2030 Agenda, while at the same time enabling development projects to be carried out by private actors who do not understand or respect their responsibilities while doing so, thus undermines the idea of sustainable development and an adequate protection of human rights. The use of commercial banks as financial intermediaries only adds to the problem since the banking sector evidently does not understand its enabling role which, inevitably, in accordance with current global standards on the corporate responsibility to respect human rights provided in the UNGPs and subsequent sector-specific guidelines, must be understood as potentially causing, or at least contributing to, adverse human rights impact that may occur as a result of their lending.[597] In light of this, this thesis has discussed the banking sector's understanding of their human rights responsibility and will now consider its implications on the responsibility of IFIs under international law and the effects on victim's access to remedy.

[596] See Section 1.7.4.
[597] This for e.g. clarified in the CLU Guidance in Section 3.3.2.3.

As a result of the Thun Group's initiative to support the debate on the UNGPs implications for the banking sector in general, and to provide an industry perspective on the process of carrying out HRDD, the group published two discussion papers, where the latter has been of interest to this thesis.

The Thun Group Debate has demonstrated that the commercial banking sector does not yet fully understand its role in the BHR regime. From a preventative perspective, where the protection of human rights by the non-occurrence of adverse human rights impact is central, this is crucial to address and clarify, as commercial banks are now all the more involved in project lending that inevitably affects individuals and surrounding communities.[598] Because commercial banks, together with the project-financing IFI, are put at the forefront of adverse human rights impact in development projects, it leaves both financial institutions with certain responsibilities in their deployment of funds. The outlined debate however clearly illustrates the current misconceptions in the banking sector concerning the applicability of the corporate responsibility to respect human rights to their operations as enshrined in the UNGPs, including the standard of HRDD, through which the essence of this responsibility is implemented, and that should be applied to their client relationships. This ultimately pertains to the way in which the banking sector ensures its human rights responsibility within the context discussed in this thesis.

Although the applicability of the relevant principles[599] that are enshrined in the UNGPs appears fairly uncontroversial as commercial banks are private actors and operate for-profit like any other business, it is less so in respect to *how* these principles should be applied to banking operations. The expressed limitations of the principles as demonstrated in the Thun Group Debate,[600] however, understandably lead one to draw the conclusion of an unwillingness to acknowledge responsibility for human rights. The implication of the Thun Group's limitation to Principle 13 (b) is that banks cannot be responsible for the remediation of any adverse human rights impact connected to their activities, only for the prevention or mitigation of such impact, which is a less onerous responsibility.

The internationally recognized human rights standards, as expressed in international human rights law, are foundational to the rights referred to in the UNGPs and set out a *minimum* standard in this regard. Although

[598] See Summary in Section 2.2.4.
[599] Pillars II and III of the UNGPs.
[600] Here the author refers to the central assumption of the Thun Group that banks can only contribute to human rights impact through their own activities, and that their responsibility therefore cannot be engaged by their financing services, i.e. the limitation of their discussion to solely consider UNGP 13 (b), see Section 2.2.2 and 2.2.3.1.1.

international human rights standards impose duties on states with respect to their subject matter, and the UNGPs constitute a non-binding framework, the instruments are not deprived of their value towards non-state actors.[601] The instruments operate to provide normative baselines for general conduct that can be applied directly to states, but indirectly towards non-state actors such as businesses, banks included. So, although the UNGPs do not create new human rights protections in themselves, they are a normative instrument that serves to interpret and reflect international human rights standards into the BHR regimes of states and businesses.[602] Logically thus, where the UNGPs are adhered to, there should be less risks for adverse human rights impact.[603] Moreover, the more successful approaches in the international arena today in respect to BHR are soft law efforts.[604] In order to thus satisfy the standards enshrined in the UNGPs, the banking sector must rethink their interpretation of their responsibility for human rights.

It may well be so, as it was argued by Leader and Ong, that the use of commercial banks then could, in fact, serve as second screening of risks in development projects, where sufficient HRDD was carried out. Not only because a HRDD process as enshrined by the UNGPs goes beyond merely identifying and managing material risks to the business, to include risks to rights-holders and thus further than the parameters of the due diligence process generally undertaken by commercial banks. Also, because projects dismissed by the IFC would similarly be excluded from funding from the commercial banks, as the bank's due diligence practices would otherwise be critically questioned.[605]

As explained, the way in which the banking sector has conceptualized and implemented due diligence,[606] does not fully reflect the standards enshrined in the UNGP. The logic behind the Thun Groups conceptualization of HRDD is problematic and inconsistent with the considerable arguments that the scope and parameters of the HRDD process should depend on the nature of the risk and the bank's involvement in this risk and not on the type of loan on

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[601] Larry Catá Backer, *The Corporate Social Responsibilities of Financial Institutions for the Conduct of Their Borrowers: The View from International Law and Standards*, (Lewis & Clark Law Review, Vol 21, No. 4, 2017), 896.
[602] Catá Backer (n 601) 898.
[603] Although the UNGPs in Principle 17 affirm that undertaking HRDD does not limit or free a business from liability for causing or contributing to adverse human rights impact, a properly conducted process might minimize its risks of involvement in such adverse impact and thus the risk of legal claims of complicity; A/HRC/17/31 (n 93) Annex II.B.17 Commentary.
[604] Catá Backer (n 601) 889.
[605] Leader and Ong (n 95) 457-458.
[606] According to the Thun Group's interpretation, loans such as asset or project specific loans would require a deeper due diligence process than the provision of a general corporate loan, see Section 2.2.2 and text by notes 221-227.

an a priori basis.[607] In view of this, and in order for banks to undertake a HRDD process that is better aligned with the UNGPs, the scope and parameters of the process should be determined in light of the operational context in which the business activities of their clients are carried out and the risk for severe and gross human rights abuses.

In order to comply with the UNGPs, banks will have to realize their pivotal position and leverage and make use of it. This is especially important from a preventative point of view. The banking sector's current misconceptions are, if unresolved, hampering the successful operationalization of the UNGPs in the banking industry, which is of course highly problematic when it comes to preventing adverse human rights impacts.

The growing number of sector-specific standards and corporate voluntary initiatives,[608] in a certain way point towards an evolving consensus around the responsibility that lending financial institutions have for the conduct of the borrowers that they finance. Just as the UNGPs, these instruments promote the idea that businesses should respect human rights, which should be mainstreamed throughout their business activities, and create a normative baseline for general business conduct. In this way, the standards then "harden" into law by being incorporated into the contracts that the financial institutions enter with their clients. This is what is often referred to as the privatization of law, as the law is not provided by the government but by the private actors themselves.

Yet, this places a large responsibility and reliance on private actors (banks) to actually incorporate these standards into their practices. The criticism that these instruments have received[609] indicates that these standards are not yet in full alignment with the standards enshrined in the UNGPs, and thus not capable of adequately preventing adverse human rights impact.[610] However,

[607] Ruggie (n 236); See Section 2.2.3.2 and text to notes 255-258.
[608] E.g. Equator Principles, UN Principles for Responsible Investment and the CLU Guidelines.
[609] E.g. that the IFC is not hindered from financing investment activities of clients that do not yet meet the requirements of the PSs as long as they are "expected to meet the requirements of the Performance Standards within a reasonable period of time" and had are still to a certain extent lacking proper due diligence and instead, suffer an over reliance on self-monitoring. Moreover, and of great importance to the topic that is being discussed, is the fact that the IFC does not ensure that the same standards are met by the sub-client, that is the actor undertaking the development project that the IFC-client on-lends to. The practice has thus raised concerns about the weakening audit and supervision of IFC's investments and their impact, see Section 2.3.1.
[610] Banks commitment to the Equator Principles show their commitment to the same social and environmental standards and assessments as enshrined in the PSs. The standard that the PSs, and thus the Equator Principles, sets out are however too low in terms of adequate protection as it for they do not consider different types of industries and operational contexts, and the timing of the "due diligence process" established in the PSs (and thus the

the most recent instrument of private governance, the CLU Guidance and the areas of focus that are explicitly addressed, such as transparency and client confidentiality, point towards an awareness of the factors that are currently contributing to or hindering the effective prevention and accountability of adverse human rights impacts in this context.

So far, the push for responsibility is thus noted more in theory than in practice. Consequently, the persistent focus of businesses on themselves rather than rights-holders is evident. This is owed to the consistent approach and referral to "social responsibilities" or "social risks"[611] rather than "human rights", and is, perhaps, the biggest indicator of the long way that waits ahead. The fact that the terminology that is used by the WBG and the IFC in their operational policies disregards the use of terms such as "rights", is one of the main signs of its unwillingness to move forward and acknowledge more responsibility. This highly problematic fact is noted by, inter alia, Oleschak-Pillai who exemplifies this problem by stating that the eviction of a person from their home as a result of a development project will under these operational policies not constitute a violation of the right to housing, but rather be a technical step in a process of involuntary resettlement. The term "involuntary resettlement" on the other hand, would thus assume that evictions always result in resettlement.[612] Even the most recent developments of the international framework on BHR, such as the CLU Guidance from 2019, remain at a level of environmental and social risks instead of full engagement with human rights. Even so the framework shows some progress in the way it deals with the existing problems in the context of development finance that this thesis has discussed, by an increase in the pressure that is placed on the corporate client of the commercial bank to avoid and address these issues in their activities. Yet, it still does not account for a satisfying protection of human rights.

4.2 The remedial dimension

The thesis has also discussed the applicable international legal framework to IFIs as international organizations. The following discussion highlights the

Equator Principles) cannot be preventative on social and environmental impacts of a development project, as the project can begin before the due diligence process is completed; Leader and Ong (n 95) 458.

[611] The PSs ask the IFC to apply its own due diligence process to its investment activities when granting loans and refer to this as "environmental and social due diligence" forming part of the IFC's "overall due diligence" when considering the financial and reputational risks with entering into a new relationship with a client, see Section 2.3.1.3 where this is discussed.

[612] Oleschak-Pillai (n 398) 429.

challenges that remain to ensuring effective remedy for the individuals or communities who have been adversely affected.

International organizations today are acting as independent actors[613] with a widening span in the reach of their activities. Their independency and powers are however contingent upon their accountability, since only when there are adequate accountability mechanisms in place, providing the necessary confidence and trust, will their member states enable them to function independently in accordance with the doctrine of functional necessity.[614]

Accountability mechanisms of international organizations *vis-á-vis* non-state actors, such as the accounted for CAO of the IFC, are a relatively new development.[615] However, the study has shown that internal accountability mechanisms offered by IFIs as a form of redress mechanism currently do not constitute an effective mechanism and that they lack the processes that ensure an actual redress for adversely affected individuals or communities seeking remedy. This is mainly due to their lack of independency,[616] and enforceability[617], even though it has been established that harm has been caused as a result of non-compliance with the operational policies of the IFI in question. Moreover, in its dealing with private sector operations, the mechanisms are required to respect the confidentiality of sensitive business information, and the findings of the mechanisms are thus not made public.[618] As a result, project-affected individuals tend to see these mechanisms as pointless,[619] and instead turn to domestic courts to seek remedies since international organizations cannot be sued before regional judicial or international supervisory mechanisms of human rights as opposed to states.

Nevertheless, the ability of bringing claims towards IFIs in domestic courts is problematic in practice because of the immunity of international

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[613] This view is supported by several contributions in the Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010), see for e.g. Olivier de Schutter "Human Rights and the Rise of International Organisations: The logic of Sliding Scales in the Law of International Responsibility" 51-129, and Niels M. Blokker "International Organisations as Independent Actors: Sweet Memory or Functionally Necessary?" 37-51.
[614] See Section 3.2.2.1.
[615] Oleschak-Pillai (n 398) 403; Inclusive Development International, 'Advancing the Right to Remedy' (n 491).
[616] Some investigations require prior permission and those whose rights have been violated are thus left with a dependence on the goodwill of the management or board of the IFI in question to take appropriate remedial action, which is not always forthcoming (although not in the case of the CAO); Oleschak-Pillai (n 398) 403. Moreover, dispute mechanisms offered by IFIs often depend on the voluntary submissions of information of the IFI or its client; Treichl and Reinisch (n 461) 114.
[617] Oleschak-Pillai (n 398) 405, 428-429.
[618] Margolis (n 327) 2.
[619] Treichl and Reinisch (n 461) 114.

organizations before domestic courts by virtue of the doctrine of functional necessity that impedes a victim's access to remedy in domestic courts.[620]

CPISA, in some way, appears to be contributing to curb a remedial vacuum by granting immunity when modes of dispute settlements are lacking, by requiring that specialized agencies establish "appropriate modes of settlement" for disputes arising out of contract or "other disputes of private character", i.e. not constitutional matters. This might have implications for the development and establishment of dispute mechanisms provided by IFIs. However, what is considered "appropriate" in this respect remains contested. It has however been suggested to imply that the dispute settlement upholds a certain standard of impartiality. Where this is true, the IFC's CAO would not satisfy the requirement of the CPISA as it is an internal claims mechanism.[621] The CPISA is relevant to consider as the example that has been used in the thesis, the IFC, is a specialized agency to which the CPISA applies. Yet, in respect to litigation against the IFC, the immunity established by the CPISA is less relevant. The US is the forum-state pursuant to the immunity clause, but it has not ratified the CPISA. Thus, this does not affect the amenability to sue the IFC.

Interestingly, the role of human rights in the question of immunity concerning international organizations is weak in the US, as US jurisprudence has established that provisions containing a right to judicial proceedings in international human rights instruments cannot be directly applied in US courts, meaning that plaintiffs cannot seek to apply such claims against a possible dismissal of their case. Here, the significant role of states as policymakers in the context of international organization's accountability is very noticeable.

Albeit there is no doctrine comparable to the *doctrine of restrictive state immunity* applicable to an international organization's acts of a commercial nature,[622] such a doctrine might however be developing in US case law. The

[620] The main rationale behind granting international organizations international immunity is their effective functioning and independence. Although it has been argued that development banks could not function without a high degree of autonomy in their decisions on the loans they make, courts and scholars seem to agree that international organizations performing financial activities as their core activities should be liable to suit as "their creditworthiness appears indispensable to enable them to exercise their functions. The doctrine of functional necessity in respect to IFIs can therefore be said to have a reverse effect as it operates to limit the scope of the jurisdictional immunities of IFIs. If an IFI cannot exercise its functions and fulfil its purposes without being liable to suit, then the doctrine of functional necessity denies it jurisdictional immunity as this is not needed for the IFI to fulfil its purposes, see this discussion in Section 3.2.2.1 and text by notes 468-469.
[621] Treichl and Reinisch (n 461) 113.
[622] Bradlow and Hunter (n 48), 52-53, 68.

Jam case has established that the IFC is not immune from legal proceedings in US courts and can in fact be sued when the organization is acting as a private player on the market. Whether development finance constitutes "commercial activities" under the FSIA, is currently being considered in a district court.

IFIs as part of the public governance movement do have the possibility and leverage to make mandatory conditionalities in their loan agreements with heightened obligations to monitor, report and remedy established for their borrowers. This is especially relevant for IFIs operating in the context that this thesis concerns, as their lending suffers from a lack of transparency in the projects intermediated by commercial banks, that contributes to the inability of tracing the funding due to banks' non-disclosure of project information. The IFC should, in light of this, and in order to curb the problem and require its financial intermediaries (especially those involved in certain high-risk sectors or operational contexts) to at least publicly disclose information on every high-risk investment of their sub-client's portfolio. Not least because their amenability to sue would be reduced as the current misconception of the banking sector evidently does not satisfy the standards enshrined by the UNGPs.

4.3 Final conclusion

The discussion held in this thesis has accounted for why corporate responsibility and liability is not yet accommodated in the international human rights law regime to a satisfactory extent. We are still a long way from an appropriate protection of human rights within the context of business in general, and businesses are still more focused on themselves than on rights-holders. Moreover, the regulatory framework on BHR incorporating human rights into economic activities, as highlighted in this thesis, remains contentious and unresolved. Yet, the focus on BHR and "softer" forms of responsibilities, arising out of private governance, that in turn may lead to "harder" outcomes, remains relevant, if not crucial, when it comes to seeking redress for project-affected individuals or communities, as it emphasizes a different way of thinking in terms of risk to people and not business.

The fact that terminology most often used in the soft legal instruments is one including words such as "social responsibilities" and "risk management" instead of referring to the problems at hand as "human rights" issues, leads one to conclude that it is a matter of a pretty obvious and conscious avoidance, because human rights bear legal responsibility. There is an evident lack of recognition of human rights responsibility of IFIs and banks that is

mainstreamed through their conduct and has an evident effect on the available accountability mechanisms. The current approach to social responsibilities is insufficient and it further undermines the evolution of BHR. To go back to such a basic understanding of the regime would represent a waste of ten years in the theory and practice of BHR.

In conclusion, the main question concerning the possibility of holding IFIs accountable for the conduct of their borrowers, remains to be resolved. A possible answer might be provided by the ruling of the domestic court currently revising the scope of "commercial activities", that might create a similar doctrine to the one of restrictive state immunity. Nonetheless, doubts remain as to whether domestic courts are a suitable venue for project-affected people to seek remedy. The outcome of the *Jam* case in the US Supreme Court indicates that immunity might no longer clearly prevail in claims brought against IFIs. This might decrease the need for alternative means of redress to be strengthened. On the other hand, wider amenability to sue might halt the positive developments of operational policies and other crucial private governance incentives to establish more effective means of dispute settlement and remedy. That being said, it is evident that a number of issues remain unanswered and that the implications of the most recent developments on victims' access to remedy are not yet known. Through the questions posed, this thesis has nonetheless taken the opportunity to examine some of the concerns, which remain up for deliberation.

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