

Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises

REFERENCE: SPB/SHD/GF/JG/ff

5 March 2020

Dear Mr. Woicke,

We have the pleasure of writing to you in your capacity as Chair of the Review Team conducting the external review of IFC and MIGA's environmental and social (E&S) accountability, including the Compliance Advisor/Ombudsman's (CAO's) role and effectiveness. We write to you in our role as members of the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises ("[United Nations Working Group on Business and Human Rights](#)"; hereafter Working Group).¹

The Working Group is a group of five independent experts appointed and mandated by the United Nations Human Rights Council (resolutions 17/4, 26/22 and 35/7) to promote dissemination and implementation of the [Guiding Principles on Business and Human Rights for implementing the United Nations "Protect, Respect and Remedy" Framework \(Guiding Principles\)](#), which provide the globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address business-related human rights impacts. Part of this mandate is to "identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon." Previously, the Working Group has issued interpretive guidance for sectoral application of the Guiding Principles, for example, concerning the bank sector.²

The Working Group has had the pleasure of engaging with IFC/MIGA (including the CAO) in our work, in particular at the annual UN Forum on Business and Human Rights in Geneva, which is chaired and guided by the Working Group. The Working Group recognizes that IFC/MIGA plays a vital role in supporting sustainable development in the countries in which it operates, including increasingly in settings characterized by fragility, conflict, and violence (FCV).

¹ <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>

² https://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf

Mr. Peter Woicke
Chair of the Review Team
International Finance Corporation
2121 Pennsylvania Avenue, NW
Washington, DC 20433
USA

We also note the importance of IFC/MIGA's accountability mechanism, the CAO. The CAO, at present, is one of the more robust and effective independent accountability mechanisms (IAMs) among existing development finance institutions (DFIs). The CAO serves a critical function, helping to enable access to remedy for affected stakeholders, which is a prerequisite for sustainable development. While the CAO is a crucial accountability mechanism, the Working Group would like to offer some suggestions as to how its role can be further strengthened. Our comments also address how IFC/MIGA can strengthen its practices for preventing adverse impacts as well as ensuring accountability and access to remedy for those affected by development projects that it finances and supports.

The Working Group notes that DFI accountability mechanisms face pressure from stakeholders to become more effective. We also recognize that there are particular challenges with accountability and access to remedy in FCV settings.³ One key issue that requires further clarity is the question of which parties involved in a development project are responsible for harms connected to the project. The Working Group would like to suggest that clarifying the different roles and responsibilities of various actors within a development project concerning investment-related harms should be a central aspect to consider in the IFC/MIGA's accountability review.

Human rights due diligence under the Guiding Principles: critical to the prevention of harm in development finance

The Guiding Principles are of central relevance to the IFC's mandate and functions. Guiding Principle 11 sets out the corporate responsibility to respect human rights, which requires business enterprises "to avoid infringing on the human rights of others" and to "address adverse human rights impacts with which they are involved". Guiding Principle 13 states that this responsibility applies to adverse impacts caused or contributed to through the enterprise's own activities as well as impacts "that are *directly linked* to their operations, products or services by their business relationships, even if they have not contributed to those impacts". Guiding Principle 14 further clarifies that "[T]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure".

In the context of the financial sector, this means that the responsibility to respect human rights applies to both financial institutions (both public and private) and their clients and the companies they invest in as well as other business partners and entities in the value chain. Guiding Principle 15 further explains that "to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances", including, human rights due diligence and processes to enable remediation of adverse impacts.

The corporate responsibility to respect set out in the Guiding Principles has been integrated in other standards for responsible business conduct, such as the OECD Guidelines for Multinational Enterprises and increasingly in environmental and social due diligence approaches of both public and private financial sector entities. Notably, the IFC Performance

³ The Working Group is currently identifying and clarifying policies and practices for States and businesses, including public and private investors, across the full "conflict cycle" and the three "Protect, Respect and Remedy" pillars of the Guiding Principles. The recommendations will be presented in a report to the General Assembly in October 2020. <https://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx>

Standards reference international human rights standards and instruments in several key areas, and IFC Performance Standard (PS) 1 states that all business enterprises are expected to respect human rights. The Guidance Note to PS 1 states that PS 1 reflects the “Protect, Respect, and Remedy” pillars of the Guiding Principles.

The prevention of adverse impacts on people is the primary purpose of human rights due diligence. The Working Group has elaborated further on the characteristics and implications of human rights due diligence in its report to the UN General Assembly in 2018.⁴ In this report, the Working Group noted that human rights due diligence is an essential tool for all business enterprises, including financial institutions, to address negative human rights impacts in their business operations and linked to them via their business relationships. Human rights due diligence is a fundamental way of informing what any business enterprise should do to meet its responsibility to respect human rights, going well beyond the idea of doing no harm, requiring proactive steps to prevent and address harmful impacts.⁵

The Working Group has observed that an increasing number of investors rightly acknowledge that they have their own responsibility to respect human rights. Like any other enterprise, financial institutions and investors may cause or contribute to adverse impacts and may be directly linked to adverse human rights impacts through their investments in companies across industries or sectors and regions. As part of their own human rights due diligence, they should, therefore, identify and assess risks and use their leverage to seek to prevent and mitigate potential and actual adverse impacts, covering not only the project level narrowly, but also consider how a project may affect contextual dynamics that increase the severity or likelihood of potential human rights impacts.

The Working Group recommends that IFC/MIGA policies and processes align much more closely with the human rights due diligence standard of the Guiding Principles. For example, the Guiding Principles provide that human rights due diligence should be an ongoing process to identify and mitigate adverse human rights impacts in all situations, not merely in projects that involve “high risk circumstances” as noted in PS 1, Footnote 12. Furthermore, human rights due diligence should be a process in which the IFC engages at the outset of its engagement with a project or client, even before it determines that a project entails “high risk circumstances”. For projects in FCV settings, both financial institutions and their clients should undertake **enhanced** due diligence, as FCV situations typically entail heightened risk of becoming involved in severe human rights abuse.

Assessments of differences between the Guiding Principles and the IFC Performance Standards as well as emerging good practices among financial institutions could provide useful reference when considering how to strengthen alignment.⁶

⁴ UN Document A/73/163, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163. Executive summary available at: <https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryA73163.pdf>

⁵ UN Document A/73/163. The Working Group also notes that the OECD Due Diligence Guidance for Responsible Business Conduct provides a comprehensive practical tool for supporting the implementation of human rights due diligence and is fully aligned with the UN Guiding Principles. See: UN Document A/73/163 and companion document 1 on <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf>.

⁶ See “Evaluation views: Exploring the relationship between human rights due diligence and broader environmental and social due diligence”, <https://norad.no/en/front/evaluation/news/2018/exploring-the-relationship-between-human-rights-due-diligence-and-broader-environmental-and-social-due-diligence/>.

Explicitly adopting the “cause, contribute and directly linked” framework of the Guiding Principles would provide a helpful and practical way for IFC/MIGA to understand its involvement with human rights risks and negative impacts and calibrate appropriate action. The commentary to Guiding Principle 19 elaborates on this aspect, noting that if the enterprise is causing the impact, it should take steps to cease or prevent the impact. Alternatively, if it is contributing to the impact, it should take steps to cease or prevent the contribution and use leverage to mitigate any remaining impact by other involved parties. Finally, if the impact is directly linked to its operations, products, or services through its business relationships, it should take steps to gain and use leverage to prevent and mitigate the impact.

In situations of direct linkage, the commentary to Guiding Principle 19 further states “the factors that will enter into the determination of an appropriate action (...) are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.” The Guiding Principles clarify that if an enterprise possesses leverage to prevent or mitigate the adverse impact, it should exercise such leverage.⁷ If leverage is limited, an enterprise should seek to increase it through the building of a partner’s capacity, the provision of incentives that foster respect for human rights, and collective action with other actors.

The Guiding Principles note that where it may not be possible to enhance leverage to prevent or mitigate adverse impacts, divestment or ending a business relationship may be considered. However, as clarified in Guiding Principle 19, such a step requires “taking into account credible assessments of potential adverse human rights impacts of doing so.” The process of responsible disengagement itself requires adequate due diligence and assessment of human rights impacts. Potentially affected rights-holders and other stakeholders should be meaningfully involved in the decision-making process around how to disengage responsibly. It would not be consistent with the Guiding Principles’ requirement that leverage is exercised when adverse impacts are identified, for a business to divest at the first sign of potential or actual concerns. By extension, ending a business relationship alone may not automatically absolve an entity of its responsibility.

In a situation where specific human rights impacts are caused or contributed to by a client or partner, but where IFC/MIGA is directly linked through funding or its advisory services or through a financial intermediary, the Guiding Principles would suggest that IFC/MIGA exercise leverage to seek to mitigate impacts as a critical step in addressing harms to rights-holders. IFC’s current practice of working through intermediaries adds a layer of complexity in preventing and addressing impacts, including the use of leverage in situations where adverse impacts are identified. We therefore believe it is important to explicitly require intermediaries to carry out human rights due diligence and recognize that the responsibility of IFC/MIGA to respect human rights still applies, including concerning use of leverage to address actual impacts.

⁷ OHCHR's Interpretive Guide on the Corporate Responsibility to Respect elaborates on the actions that need to be considered. It provides a decision matrix for considerations related to questions of ending a business relationship based on the degree of leverage the business partner and how "crucial" the business relationship is.

In brief, effective human rights due diligence is of critical importance. It is at the heart of strengthening prevention and a vital tool for responsible business that supports sustainable development. The Working Group has noted that if human rights are not respected in business activities, the positive contributions that businesses may otherwise make towards sustainable development are undermined. We have emphasized that the most significant contribution most business enterprises can make towards sustainable development is to prevent and address adverse impacts on human rights through effective human rights due diligence.⁸ Human rights due diligence also adds value in terms of helping mitigate reputation and legal liability risks, as stressed by the UN High Commissioner for Human Rights (see e.g., UN Document A/HRC/38/20/Add.2).

Differentiating the role of development finance institutions in accountability and effective remedy

The Working Group would like to recommend that IFC/MIGA adopt a more proactive approach to the question of remedy for several reasons.

In the context of sustainable development, as highlighted in the UN-World Bank *Pathways to Peace* report, unaddressed grievances are a common cause of social conflict and fragility. Enabling remedy for negative impacts is also an integral part of meeting the responsibility to respect human rights.

As the Guiding Principles indicate, the extent to which a business entity needs to provide affected rights-holders with an effective remedy, relates to whether the entity has caused or contributed to the human rights abuse in question, or is directly linked to the impact through a business relationship.

Concerning responsibility toward remediation of adverse impacts, Guiding Principle 22 clarifies that “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” It notes further that “[w]here adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that an enterprise itself provides remediation, though it may take a role in doing so.”

The Office of the UN High Commissioner for Human Rights (OHCHR) has elaborated on the differentiated responsibilities of a financial institution and the company or vehicle leading a project, to provide for or cooperate in remediation, when the funding has contributed to the impact.⁹ It provides useful guidance on the differentiated share of remediation when multiple stakeholders are involved. The OHCHR guidance notes that “all companies that have contributed should provide for or cooperate in remediation through legitimate processes. This also carries an expectation that a bank contributing to human rights

⁸ <https://www.ohchr.org/EN/Issues/Business/Pages/SustainableDevelopmentGoals.aspx>

⁹ OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. The Working Group has also commented on the role of banks in potentially contributing to human rights impacts and the applicability of the expectation to provide for or cooperate in remediation, https://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf.

abuse through a client relationship should provide for remediation appropriate to its share in the responsibility for the harm.”

Thus, IFC/MIGA should always ensure it has a robust and effective remedy mechanism available for the situations where its own actions are causing or contributing to an adverse impact (e.g., because its own actions are the catalyst for specific harms, or because its own due diligence fell short of requirements). In this regard, it is worth noting that IFC/MIGA’s responsibilities with regard to human rights due diligence and remediation are ongoing and do not cease by virtue of divestment or discontinuance of financing or advisory services.

In a situation where specific human rights impacts are caused or contributed to by a client or partner to which IFC/MIGA is directly linked through funding, advisory services, or a financial intermediary, IFC/MIGA is not required to provide remediation. We would note, however, that in “linkage situations”, the Guiding Principles do underline that the enterprises in question may take a role in enabling accountability and remedy for rights-holders. In fact, IFC/MIGA and the CAO are uniquely placed to play a positive enabling role in helping address project-level impacts, leading to better outcomes for affected people and in turn helping prevent future adverse impacts. In this regard, the Working Group considers that the role that the CAO already plays could be part of what IFC/MIGA could consider as a more holistic approach to enabling remedy.

For example, IFC/MIGA can exercise leverage to ensure that its clients have effective operational-level grievance mechanisms for projects it finances, in accordance with Guiding Principle 31, which sets forth effectiveness criteria for grievance mechanisms. Beyond operational-level grievance mechanisms, of which there are currently few good practice examples, IFC/MIGA can exercise leverage for example through direct engagement with the client, through multi-stakeholder initiatives, or by working with the World Bank Group as a whole to encourage remediation through State-based mechanisms.

Taking such a role would constitute a significant potential contribution to sustainable development, as using leverage to push partners to provide remedy for adverse impacts and strengthen grievance processes going forward can be one of the most effective ways of trying to prevent future harms from occurring.

Key recommendations

To better align IFC/MIGA policies and processes with the Guiding Principles and in turn take advantage of the opportunities this can create to help prevent and address impacts on the ground, the Working Group would recommend that IFC/MIGA:

- a) align their sustainability frameworks and Performance Standards more closely with the Guiding Principles, including on the substantive requirements for conducting human rights due diligence and for providing or enabling remediation for adverse impacts to which its own activities have caused or contributed;
- b) commit to building and exercising leverage to address situations where IFC/MIGA is directly linked to human rights impacts caused or contributed to by clients or partners, and commit to playing a positive role in enabling remediation of identified harms in such situations;

- c) align IFC/MIGA's specific policies and processes for FCV environments, given that the risk of severe human rights impacts is heightened in such contexts, with the human rights due diligence approach of the Guiding Principles, including a requirement that its clients carry out enhanced human rights due diligence when engaging in investments in FCV environments;
- d) adopt gender-responsive standards and frameworks concerning human rights due diligence and remediation, as women and girls are not only impacted differently and often disproportionately (including in FCV settings), but they also face additional barriers in seeking access to remedy;¹⁰
- e) acknowledge that, under the Guiding Principles, IFC/MIGA's responsibilities with human rights due diligence and remediation are ongoing and do not cease by virtue of divestment or discontinuance of financing or advisory services;
- f) establish a remedy fund to ensure that resources are available to enable IFC/MIGA to contribute to remediation where appropriate and necessary; and
- g) commit to best practice in responding to CAO compliance findings. In this regard, the EBRD IPAM Policy represents an excellent example in the Working Group's view, as it requires the development of a management action plan that includes project-specific and systems-level actions and provides an opportunity for complainants to provide input into this process.

Considering the leading role of IFC among DFIs and the critical importance of convergence around agreed international standards for responsible business and common approaches that support sustainable development, the Working Group strongly encourages the IFC/MIGA E&S Accountability Review to consider these comments and strengthen alignment with the Guiding Principles.

IFC/MIGA is tremendously well placed to support progress on sustainable development based on enhanced prevention of adverse impacts on people and the planet and a more robust and coherent accountability architecture. The Working Group would be pleased to continue to engage with IFC/MIGA and the CAO as well as other DFIs to advance alignment with the Guiding Principles to scale up positive impact.

Yours sincerely,



Githu Muigai
Chairperson



Anita Ramasastry
Vice-Chair

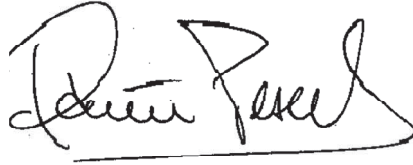
¹⁰ The UN Working Group in its 2019 report to Human Rights Council (A/HRC/41/43) developed a gender framework for the UN Guiding Principles and proposed gender guidance specific to each of the 31 Guiding Principles: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/43



Surya Deva
Member



Elzbieta Karska
Member



Dante Pesce
Member

Working Group on Business and Human Rights

cc: P. le Houérou, N. Jahmad, CAO