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Towards a socially responsible green transition: The role of investors in closing governance gaps affecting the respect for human rights around raw-materials for a non-carbon economy*

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Abstract

Certain corporate practices have long been recognized to cause risks for human rights. Many of these arise as results of governance gaps connected to inadequate rule of law at the national level. Human rights problems related to the production of oil, gas and coal in such countries have been well documented. With recent years' global political commitment to a transition to fossil-free energy it is important to be mindful of the harmful impacts or risks to human rights that may result from the production of the raw-materials required for 'green' energy. The green transition creates a market for products required for renewable energy, in particular bio-fuel crops and certain minerals, some of which are associated with human right abuse. Social harm can reduce societal buy-in for the green transition. Taking point of departure in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, this chapter argues that institutional investors have an important potential in addressing governance gaps causing human rights risks. It explains that bringing this potential to fruition will benefit from three inter-related activities: investors performing risk-based due diligence to identify and understand adverse impacts from the perspective of affected stakeholders (rights-holders), which requires meaningful stakeholder engagement designed to take account of that bottom-up perspective; internalizing the findings into investors' organizations to inform their decision-making to appropriately take account of human rights impacts; and exercising leverage (using their influence) in a manner that not only targets invested companies but also helps those companies and others in the investment value chain to build capacity to identify and appropriately manage adverse human rights impacts. It concludes that to enhance such active engagement by institutional investors in addressing governance gaps there is a need for methods to be developed, informed by public participation as a human right.

1. Introduction

Governance gaps are a major cause for business-related human rights abuse.¹ At the national level, inadequate implementation of international obligations cause human rights infringements affecting core elements of states' commitment to the rule of law. Whether or not states have formal commitments to the rule of law at the national level, the near-universal membership of the United Nations (UN) among the worlds' countries speaks to the discord. The preamble of the Universal Declaration of Human Rights (UDHR)² refers to the importance of human rights being protected by the rule of law. While the preamble's call on 'every organs of society' to commit to the Declaration as a common standard of achievement was not originally intended to include companies,³ the globalization of international trade and investment has added to the urgency of protecting human rights against business-related human rights infringements. Yet international law's conventional

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¹ John Ruggie, *Just Business* (Norton 2013); John G Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights', (2014) 20 *Global Governance* 5.

² *Universal Declaration of Human Rights*, 1948, U.N. Doc A/810.

³ Louis Henkin, 'The Universal Declaration at 50 and the challenge of global markets', (1999) 25 *Brooklyn Journal of International Law* 17.

hesitation to adopt obligations for companies to match the rights that they have been granted through international economic law has so far left businesses with little accountability, victims with little protection, and the vision of the UDHR far from realization with regard to business-related human rights impacts.

The discourse on corporate social responsibility (CSR) evolved in response to the lack of accountability for economic actors for their adverse impacts on society, essentially corresponding to the effects of inadequate transnational rule of law for the harm that business may cause in the context of trade or investments. The CSR discourse has undergone significant change over the past two decades. An uneasy relationship between CSR and law, marked by formal recognition that CSR implies basic compliance with law⁴ along with an insistence that CSR is voluntary action beyond the requirements of the law⁵ has given way to explicit recognition that CSR and law are related in many ways. Many CSR instruments draw directly on international labour law or international law on human rights as normative sources.⁶ The UN Special Representative on Business and Human Rights has recognised social expectations as important elements in generating demands on business to respect human rights.⁷ Consumers, buyers, media or politicians expect business organisations to respect international or sometimes even help fulfil international human rights law (for example, by not employing child labour or by contributing to the development of educational or health service infrastructure). Theories on the Social License to Operate (SLO) and CSR as well as analyses conducted in the context of business & human rights indicate that adverse societal impacts caused by companies can result in economic losses and reduction of corporate legitimacy. In turn, such events may cause backlashes to the implementation of the transition to a non-carbon economy, potentially delaying innovation, implementation and reducing the societal buy-in on which the transition depends. It is therefore important to get the green transition socially right from the start.

In parallel with societal concern with business-related adverse impacts on society and CSR theories, a transnationalization of law has been occurring, largely spurred by the fact that markets have internationalized while governments remain bound by their borders. Transnational law merges elements of conventional public (international, regional, and sometimes even national) law and conventional private law as well as new forms of law- and rule-making.⁸ It may appear to be private but is fundamentally public in character, represented by such fields as human rights, labour, environmental and public health law.⁹ Yet transnational regulation does not hold a strong formal place in the current legal order in terms of hard regulation with broad applicability to businesses operating in diverse national contexts, within and outside their home state. Some regulatory initiatives launched by public international organisations seek to address these governance gaps. Major regulatory initiatives adopted to this effect during the past decade include the UN ‘Protect, Respect and

⁴ AB Carroll, ‘A three-dimensional conceptual model of corporate performance’, (1979) 4 *The Academy of Management Review* 497.

⁵ See for example the EU’s definition of CSR 2001-2011 in the communications Corporate Social Responsibility: A business contribution to sustainable development, COM(2002)347; Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on CSR, COM (2006)136.final. The definition was changed only in 2011 with the communication A renewed EU Strategy 2011-2014 for Corporate Social Responsibility, COM(2011)681, (see 3.1.).

⁶ Karin Buhmann, ‘Corporate Social Responsibility – what role for law? Some Legal Aspects of CSR’, (2006) 6 *Corporate Governance – The International Journal of Business in Society* 188.

⁷ Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, (UN Doc. E/CN.4/2006/97, 2007), para. 74.

⁸ Peer Zumbansen, ‘Transnational law, Evolving’ in J. Smits (ed.) *Elgar Encyclopedia of Comparative Law*, 2nd ed. Edward Elgar 2012) 898; HK Koh, ‘Why do nations obey international law? (Review essay),’ (1997) 106 *The Yale Law Journal* 2599, 2626–7.

⁹ HK Koh, ‘Opening remarks: Transnational legal process illuminated’ in M Likosky (ed) *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths 2002) 327, 331.

Remedy' Framework,¹⁰ the UN Guiding Principles on Business and Human Rights (UNGPs),¹¹ and the 2011 revision of the OECD Guidelines for Multinational Enterprises (OECD Guidelines).¹² While not hard law for businesses, along the lines of 'informal' law¹³ these initiatives are not without legal relevance since they respond to governance gaps and inadequate transnational rule of law. The noted initiatives were all motivated by the need for normative guidance for responsible business conduct on the backdrop of the limits of national law for regulating business conduct extraterritorially. The noted instruments all apply risk-based due diligence as a key element for the corporate responsibility to respect human rights. Due diligence includes sub-elements like ongoing impact assessment, leverage and meaningful stakeholder engagement that should include affected stakeholders (victims).

Recent years' global political commitment to a transition to fossil-free energy has exacerbated the urgency of better human rights practices in the investment value chain. In the late 20th and early 21st centuries attention has been drawn to human rights infringements related to the production of fossil-based energy - oil, gas and coal. However, low-carbon energy is not exempt from risks to human rights, for example in regard to the production of bio-fuel crops in countries with low levels of rule of law. The green transition creates a market for products required for renewable energy, in particular bio-fuel crops and certain minerals. Innovation, development and production of technologies requires capital, and therefore investments. The production and storage of 'green' energy depends on raw materials – ranging from wind or water to agri-fuel and minerals - whose production can cause human rights risks. Solar power panels, batteries for storing wind-based power, and batteries for electric cars all require minerals, including some that like cobalt can be sourced from conflict-areas or produced by mines under labour conditions that do not conform to international human rights standards,¹⁴ or rare earth minerals whose production poses environmental or health risks.¹⁵ The placement of windpower farms, for example in the Nordic Arctic, is being challenged as infringing upon the rights of indigenous peoples.¹⁶ The rise in political and economic interest in bio-fuel, such as maize and palm oil, has contributed to a growth in agri-businesses, plantations and investments, especially in Global-South-based emerging economies.¹⁷ While agri-industry may create benefits for local stakeholders (such as new employment opportunities), it often causes affected small-scale farmers and communities to experience infringements on land rights, cultural traditions, or rights to participate in decision-making.¹⁸ Institutional investors potentially have a role in addressing the adverse effects of governance gaps by careful assessment of

¹⁰ Protect, respect and remedy: A framework for business and human rights (UN Doc A/HRC/8/5, 2008) (hereinafter UN Framework), para. 2, 16, 47 and 84.

¹¹ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (UN Doc. A/HRC/17/31, 2011) (hereinafter UNGP).

¹² Guidelines for Multinational Enterprises. OECD 2011) (hereinafter OECD Guidelines), <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> (accessed 10 December 2018)

¹³ Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'An introduction to information international law-making' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds) *Informal international law-making* (OUP 2012) 1.

¹⁴ Amnesty International, 'Time to recharge? Corporate action and inaction to tackle abuses in the cobalt supply chain' (Amnesty International, 2018) <<https://www.amnestyusa.org/wp-content/uploads/2017/11/Time-to-recharge-online-1411.pdf>> accessed 5 November 2018.

¹⁵ Mark Z. Jacobson and Mark A. Delucci, 'A path to Sustainable Energy by 2030' (2009) 301 *Scientific American* 58; see also Todd Woody, 'Were your Solar Panels made with Conflict Minerals?' (*Take Part*, 2014) <<http://www.takepart.com/article/2014/11/11/does-your-solar-panel-contain-conflict-minerals/>> accessed 10 December 2018; Liu Hongqiao, 'The Dark side of Renewable Energy' (*Earth Journalism*, 2014), <<https://earthjournalism.net/stories/the-dark-side-of-renewable-energy>> accessed 10 December 2018.

¹⁶ Dorothee Cambou, 'Renewable energy in the Arctic and the human rights of indigenous peoples: Past, present and future experiences of the Sámi People' In G Xue and L He. (eds) *Law and Governance: Emerging Issues of the Polar Regions* (China University of Political Science and Law Press, Shanghai 2018) 291.

¹⁷ Lorenzo Cotula and Thierry Berger, *Trends in global land use investment: implications for legal empowerment* (International Institute for Environment and Development, 2017), <<http://pubs.iied.org/12606IIED/>> accessed 2 September 2018; EA Zoomers and K Otsuki, 'Addressing the impacts of large-scale land investments: Re-engaging with livelihood research' (2017) 83 *Geoforum* 164.

¹⁸ Lorenzo and Berger, n 17.

the impacts of their investments and relevant follow-up. Studies of responses to adverse social impact in some natural resource sectors indicate high culture-sensitivity and suggest that impact assessment must be informed by knowledge of local culture, values, etc.¹⁹ Yet other studies argue that impact assessment processes tend to be dominated by the values and organizational approaches of the organizations that are driving the process rather than the communities that are affected.²⁰

This chapter considers the role of institutional investors in supporting socially responsible transitions to non-carbon energy and the potential for them to help build higher human-rights capacity beyond the first tier of an invested company itself. The chapter takes the expectations expressed by the UNGP and the OECD Guidelines as the normative point of departure. Observing that investors has a major potential to fill governance gaps by exercising leverage to improve processes through the chain of invested companies in regard to the corporate respect for human rights, the chapter argues that bringing that potential to fruition requires meaningful stakeholder engagement designed to determine actual and potential adverse impacts from the perspective of affected stakeholders. Further, it argues the need for development of a method to connect this level of stakeholder engagement with institutional investors' internal decision-making and their engagement with invested companies in terms of leverage. To provide a specific context the chapter draws on the palm-oil industry in Indonesia, while also referencing some examples and studies from other countries.

The chapter proceeds as follows: Section 2 elaborates on the connection between green transitions, human rights and institutional investors. Section 3 introduces the OECD Guidelines as normative sources for responsible investment with respect for human rights. Section 4 provides key facts on the oil palm industry and its human rights impacts. Section 5 discusses impact assessment and meaningful stakeholder engagement as aspects of the risk-based due diligence process according the UNGP and OECD's Guidelines. Section 6 proceeds to a discussion of how institutional investors may deploy leverage to enhance responsible economic activity in the investment chain. Section 7 develops broader implications and research perspectives, arguing a need for development of methods for stakeholder engagement. Section 8 concludes.

2. The context: Sustainable transitions, human rights guidance, and institutional investors

In 2015 two major international instruments related to a non-carbon transition of the global economy were adopted: the UN Sustainable Development Goals (SDG) and the Paris Climate Change Accord. The Paris Accord meant a preliminary end to long-winded negotiations on a global agreement to reduce the advance of climate change. Under the catch-phrase of sustainable transitions, decreasing reliance on fossil-based energy is a major issue in this regard. It is also an issue covered by the SDGs, which encompass 17 overall goals. Calling on companies to work with states to implement the goals, the SDGs connect with the CSR discourse on companies creating value for society. While the SDGs between them target a range of public policy topics,²¹

¹⁹ E.g Yousuf Aftab, *Pillar III on the Ground: an independent assessment of the Porgera Remedy Framework* (Enoro Rights 2016); Deanna Kemp and Frank Vanclay, 'Community relations in mining: Core to business but not "core business"', (2013) 38 Resources Policy 523.

²⁰ Frank Vanclay and AM Esteves, *New Directions in Social Impact Assessment* (Edward Elgar 2011); Zoomers and Otsuki 2017 (n 17).

²¹ In some contexts, the SDGs as defined in the report 'Transforming our world: the 2030 Agenda for Sustainable Development', (UN Doc. A/Res/70/1, 2015) (hereinafter SDG report) have come to be presented very much as an initiative for companies. However, of the 17 SDGs, nos. 1-16 essentially address obligations or public policy objectives of states. SDG 17 on global partnerships invites companies and civil society to contribute to the implementation of SDG 1-16. Para. 1 of the SDG resolution (A/RES/70/1) states, 'We, the Heads of State and Government and High Representatives, meeting at United Nations Headquarters in New York from 25 to 27 September 2015 as the Organization celebrates its seventieth anniversary, have decided today on new global Sustainable Development Goals.' Throughout the SDG resolution, 'we' therefore refers to these Heads of State (governments). This applies to all commitments in paras. 2-58, and therefore to SDG 1-17. SDG 17 (on states' commitment to develop Global Partnerships, and activities through which these can contribute) refers to 'partnerships', including multi-stakeholder partnerships involving the private sector,

SDG 7 on access to affordable, reliable, sustainable and modern energy addresses a topic closely related to climate change. This goal aims, *i.a.*, to substantially increase the share of renewable energy in the global energy mix by 2030. The objective of advancing a sustainable transition of the global economy in regard to energy has led to a surge in research and production of sources of non-carbon energy, in particular wind power, solar power, and bio-fuels. Important minerals for the technology and bio-fuel crops such as maize and palm-oil are produced in the Global South in countries that sport relatively weak rule of law and national institutional systems for protecting human rights against business-related infringements, such as Indonesia, Malaysia, and countries in Latin America and Africa.²²

International investments by the private sector, including institutional investors, are a powerful vehicle for integration among economies.²³ To balance their economic rights with their societal impact through invested companies, both the UN and the OECD have recognized a need for enhanced governance, including guidance, for investors.²⁴ This is based on the UN Framework, UNGPs and the OECD Guidelines.

Developed through a three-year multistakeholder process and adopted by the UN Human Rights Council in 2008, the UN Framework sets out a fundamental theory of business responsibilities for human rights, explicitly recognizing the connection between the rule of law, governance gaps, and the role of businesses to fulfill their societal potential without causing human rights abuse. As part of this, the Framework introduced the concept of human rights due diligence as process for companies to identify, prevent, mitigate and account for their actual and potential harmful impacts on human rights. The UNGP, adopted by the Human Rights Council in 2011, elaborate the UN Framework into operational steps for businesses as well as states. The UNGP provide guidance for governments and companies to align governance systems across international economic and socio-economic legislation and policy, and to decrease governance gaps between international and national law and corporate governance.²⁵ As part of this, the UNGP provide detailed steps for the due diligence process, detailing how impact assessment can be performed, how it should engage stakeholders, the importance of meaningful communication with potential or actual victims, and what ‘leverage’ entails. A 2011 revision of the OECD Guidelines for Multinational Enterprises adopted the human rights due diligence approach under the name of risk-based due diligence, expanding the application beyond human rights to apply to most issue areas covered by the Guidelines, including industrial relations and labour, environment, and anti-corruption. Complaints with the ‘National Contact Point’ (NCP) remedy institutions established at national level under the OECD Guidelines have drawn attention to the pertinence of risk-based due diligence for institutional investors to exercise leverage with invested companies to avoid harmful impacts.²⁶

Business-related infringements of human rights in the implementation of SDG 7 contrasts with an explicit reference under SDG 17 for businesses to respect human rights in the process of SDG implementation. The SDG Declaration para. 67 observes that the fostering a dynamic and well-functioning business sector also means protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard. As normative sources for

civil society etc. The means of implementation set out in paras. 60-62 refer to the role of the private sector etc. as part of the Global Partnership for implementing the other SDGs (that is, SDGs 1-16).

²² World Justice Project, ‘Rule of Law Index 2017-2018’ (*World Justice Project*, 2018), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf accessed 10 December 2018.

²³ Karl Sauvant, *The evolving international investment law and policy regime: Ways forward* (E15 Task Force on Investment Policy – Policy Options Paper, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016).

²⁴ Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises (OECD 2017).

²⁵ Ruggie 2014 (n 1).

²⁶ Karin Buhmann, ‘Analysing OECD National Contact Point statements for guidance on human rights due diligence: method, findings and outlook’, (forthcoming) *Nordic Journal of Human Rights*.

such responsible conduct, the Declaration references the UNGP, the labour standards of the International Labour Organization (ILO), the Convention on the Rights of the Child and “key multilateral environmental agreements”.²⁷

Despite critique, the UN Framework and UNGP are considered to be ‘state of the art’ in regard to corporate responsibilities for human rights.²⁸ The risk-based due-diligence approach has emerged as a core process in this context. By contrast to conventional legal or financial liability due diligence exercised by companies to protect themselves against harm, the risk-based due diligence approach is directed by an objective of preventing harm *to society* from occurring (complemented by remedy when it does occur). This is informed by the overall rationale of the UN Framework and UNGP that economic actors should do no harm. As part of their due diligence economic actors such as investors should 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.²⁹ Meaningful stakeholder engagement, which includes communication with affected stakeholders to understand risks from their perspective, is a key element in the process.³⁰ The OECD Guidelines have adopted this approach in full, applying it to institutional investors, including minority investors as explained in the following.

3. The OECD Guidelines as normative sources for responsible investment with respect for human rights

OECD’s Guidelines are recommendations from adhering states to economic actors operating in or out of those states. Adherence is optional for non-OECD states. Non-OECD members account for around one fifth of the currently 48 states adhering states. The Guidelines are an Annex to an investment agreement that is legally binding for participating states, thus creating obligations on those states to promote observance of the Guidelines with firms that operate in or from those states. While the Guidelines are non-binding for private economic actors, their observance is monitored by NCPs, state-based complaints and remedy institutions that adhering states must set up. NCPs are non-judicial remedy institutions but have powers to issue statements on conduct assessed not to be in accordance with the Guidelines. As they can include critique and recommendations, NCP statements can contribute to shaping future conduct by companies. Like courts’ judgments that can help indicate ways of operating that are deemed to be better in accordance with the Guidelines than other alternatives. NCP statements expressing critique may cause reputational damage for an economic actor as companies are affected not just by legal sanctions but also by stakeholder reactions affecting their ‘social license to operate’.³¹ NCPs have extraterritorial powers in that an NCP may handle a complaint or issue occurring in a country without an NCP, if the economic entity in question has its home state in an OECD country or another country that adheres to the Guidelines.³² In principle, this reinforces the formal reach of the Guidelines as well, beyond the home state, further supported by the attention paid by the Guidelines to the responsibility of economic actors for impacts to which they are directly linked through their business relations. As a result, economic actors like investors who are often involved with business relations in other countries

²⁷ SDG Report (n. 21), para 67.

²⁸ Florian Wettstein, ‘Human Rights as a critique of instrumental CSR: Corporate responsibility beyond the business case’, (2012) 116 *Notizie de POLITEIA* 18.

²⁹ UNGP 13(b) and 17.

³⁰ UNGP 18 with commentary; see also Karin Buhmann, ‘Neglecting the proactive aspect of human rights due diligence? A critical appraisal of the EU’s Non-Financial Reporting Directive as a Pillar One avenue for promoting Pillar Two action’, (2018) 3(1) *Business and Human Rights Journal* 23.

³¹ Jason Prno and D. Scott Slocombe, ‘Exploring the origins of “social license to operate” in the mining sector: Perspectives from governance and sustainability theories’, (2012) 37 *Resources Policy* 346.

³² See further, Karin Buhmann, ‘Defying territorial limitations: Regulating business conduct extraterritorially through establishing obligations in EU law and national law’ in Jernej Letnar Cernic and Tara Van Ho (eds) *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers 2012) 179.

need to pay attention to impacts of their own activities or those of their business relations not only in the home country, but also the country where impacts occur.

Building on the UNGP, the OECD Guidelines distinguish between three different ways in which the company may be involved in human rights abuse: it may *cause* the impact or *contribute* to it, or the company may be involved only due to impact being directly linked to its operations, products or services by a business relationship.³³ The character of the involvement determines how the company should act, and the extent of its responsibility, and therefore has implications for its due diligence. Compared to impacts that the company has caused or contributed to, addressing the harmful impact in situations of direct linkage can be more complex from the perspective of the economic actors because the impacts are outside its direct control. Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. These are the expectations that one would have of a company such as an oil-palm plantation owner (whose establishment of the plantation may, for example, cause adverse impacts on the tenure or land rights of local farmers), a producer of palm oil (whose production facilities may cause employees to suffer occupational health or safety accidents), or a buyer of palm oil who places orders with a supplier. For economic actors that are directly linked to adverse impacts through operations, products or services by a business relationship, exercising leverage is recognized to be a key step to seek to prevent or mitigate harm.

Leverage refers to influence that a business enterprise may have with one or more entities involved in a human rights abuse, such as a government or a company down-stream in the investment chain.³⁴ Leverage can take various forms, for example meetings, capacity building, or collaborating with other actors.³⁵

The OECD Guidelines apply not just to trading companies, but also to investors regardless of whether they are minority or majority investors. This was an issue in a complaint handled by Norway's NCP. The complaint alleged that the Norwegian Bank Investment Management (NBIM) had failed to take appropriate steps to prevent or mitigate negative human rights and environmental impacts in connection with its investment in POSCO, a Korea-based steel-producing company.³⁶ Supported by confirmation from the UN Office of the High Commissioner on Human Rights that institutional investors are indeed covered by the UNGP,³⁷ the NCP's concluding statement in the case has contributed to establishing that the OECD Guidelines apply to institutional investors, including minority investors.

As investors are directly linked to adverse human rights impacts through the operations, products or services by a business relationship, exercising leverage is a key element of their risk-based due diligence. Indeed, the OECD Guidelines advise companies involved in such relations to use their influence to change the practices that cause adverse impacts.³⁸

³³ UNGP 19 with commentary.

³⁴ UNGP 19 with commentary; OECD Guidelines, Chapter II, Commentary on General Principles, para. 19.

³⁵ UNGP 19 with commentary.

³⁶ *Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance, and Forum for Environment and Development vs. POSCO/South Korea, ABP/APG (Netherlands) and NBIM (Norway)*, Statement by the NCP of Norway (27 May 2013).

³⁷ OECD, *Scope and application of 'Business Relationships' in the financial sector under OECD's Guidelines for Multinational Enterprises* (Global Forum on Responsible Business Conduct, 2014), <https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-2.pdf> accessed 3 December 2018.

³⁸ OECD Guidelines, commentary 20 and 43; Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, (OECD, 2017) 13.

Also in line with the UNGP,³⁹ the OECD Guidelines highlight that meaningful stakeholder engagement is a core element in the impact assessment process⁴⁰ which forms part of risk-based due diligence. The rationale is that extensive consultations with stakeholders helps a company understand about potential and actual impact or risks of impact, and identify culturally appropriate ways to manage adverse impact.

Because of the novelty of risk-based due diligence as a theoretical concept and management process, guidance is evolving based on practice and theory on impact assessment in three more established areas: environmental, social, and human rights impact assessment.⁴¹ Stakeholder involvement and consultation are highlighted in guidance documents and theory on risk-based due diligence.⁴²

Besides the OECD Guidelines, several other transnational business governance instruments also recommend that economic actors apply risk-based due diligence to identify and manage their adverse impacts (e.g., the UN Global Compact and the ISO 26000 Social Responsibility Guidance Standard). Hard law, such as the French ‘loi vigilance’ and the EU’s Non-Financial Reporting Directive which requires reporting on due diligence in accordance with the UNGP, also apply the concept. Guidelines on responsible minerals supply chains mining investment issued by the Chinese industry organization for the sector in collaboration with OECD and the NGO Global Witness apply risk-based due diligence with explicit reference to the UNGP.⁴³ The uniform adoption of risk-based due diligence across such instruments highlights the pertinence of institutional investors understanding risks of harmful impacts in which they are involved through their investments, and therefore of obtaining relevant knowledge to understand the impact from the perspective of those affected so that responses may be appropriate. Yet, detailed application of the approach is still work in progress. The UN Framework and UNGP are both brief documents (for formal reasons related to page limits for reports to the UN Human Rights Council), and the guidance they provide has therefore called for additional details to be provided by other sources organizations. The OHCHR in 2012 developed a general guidance text⁴⁴ for economic actors but still, risk-based due diligence has been in need for detailed elaboration taking into account the challenges of specific sectors. The OECD has taken a lead in this regard, in some cases jointly with expert organizations, leading to both sector-specific⁴⁵ and a general guidance on due diligence.⁴⁶

Investors and their investees may also consider localized or sector-specific initiatives. For the oil-palm sector the Roundtable on Sustainable Palm Oil (RSPO) principles state, *i.a.*, that no primary forests or other high conservation value areas should be cleared for new oil palm plantations. However, while the RSPO principles are well-known in the sector, implementation has been lacking and enforcement weak. In this regard, global

³⁹ UNGP 18 with commentary.

⁴⁰ OECD Guidelines, Chapter II, para. 14.

⁴¹ Vanclay and Esteves 2011 (n 20); James Harrison, ‘Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment’, (2013) 31(2) Impact assessment and Project Appraisal 107

⁴² Michelle Greenwood, ‘Stakeholder engagement: beyond the myth of Corporate Social Responsibility’, (2007) 74 Journal of Business Ethics 315.

⁴³ Guidelines for Social Responsibility in Outbound Mining Investment (China Chamber of Commerce of Metals, Minerals & Chemicals, 2014, <https://www.globalwitness.org/sites/default/files/library/CCCMC%20Guidelines%20for%20Social%20Responsibility%20in%20Outbound%20Mining%20Investments%20Oct%202014%20CH-EN_1.pdf> accessed 24 November 2018; Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, (China Chamber of Commerce of Metals, Minerals & Chemicals, 2015) <<https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm>> accessed 24 November 2018; Karin Buhmann, ‘Chinese Human Rights Guidance on Minerals Sourcing: Building Soft Power’. (2017) 46(2) Journal of Current Chinese Affairs 135.

⁴⁴ The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (Office of the High Commissioner for Human Rights, 2012);

⁴⁵ E.g., OECD-FAO guidance for responsible agricultural supply chains (OECD and FAO, 2016); Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises (OECD, 2017).

⁴⁶ OECD Due Diligence Guidance for Responsible Business Conduct, OECD Doc. DAF/INV(2018)17 (OECD 2018)

principles associated with international organisations (like the UNGP) and/or with monitoring institutions (like the OECD Guidelines) may carry stronger weight than a private initiative.

4. Oil palm as an industry and its human rights impacts

In recent decades palm oil from the oil-palm (*Elaeis guianensis*) has become one of the most important vegetable oils globally assessed on produced quantity.⁴⁷ Among bio-fuel crops, palm oil, which is also an important commodity for the food and cosmetics industries, has top economic productivity due to the high crop yield and a low production cost.⁴⁸ The area covered by oil plant plantations has increased more than 2000 per cent since 1980s.⁴⁹ Most of this expansion has occurred in South-East Asia.

Despite the economic contributions and potential of the sector in countries where oil-palm forms a considerable or emergent agri-industry and source of income,⁵⁰ the sector is also facing challenges as to livelihood impacts across the value chain, and in particular with regard to small-holders. These impacts are largely related to issues concerning land rights, distribution and access to information, and to broader social and environmental impacts of the expansion of oil-palm plantations that have already caused concern for some years. Environmental problems include soil degradation (oil palm is a very ‘greedy’ crop which grows fast, yields much but for a limited number of years, and also depletes the soils making it difficult to maintain the production long-term and to shift to other crops subsequently); air pollution (due to the practice of burning forest timber or peat to clear land for oil palm plantations, and burning surplus products from the oil production); habitat conversion and threats to endangered species due to the expansion of plantations into areas that were formerly natural forest; and use of pesticides and fertilizers. Some of these environmental impacts by themselves carry social impacts of which several have a human rights aspect. For example, soil depletion may affect the ability of neighbouring land to yield, thereby affecting the right to food and in general an adequate standard of living for each person and his/her family;⁵¹ and air pollution and pesticides may lead to health problems (not just locally: smoke from Indonesia or Malaysia has repeatedly been reported to cause severe air problems in South-East Asian cities), thereby affecting the right of everyone to the highest attainable standard of health.⁵² As importantly, the economic drive to expand the area for oil-palm farming leads to overwhelming changes in the lives and practices of many small-scale farmers. To some, selling land to plantations may mean a welcome income or employment opportunities as a salaried worker, thereby enhancing access to a range of social goods that come at a cost, and to access to work.⁵³ To others, however, it may mean pressure to sell, and perceived disregard for personal, family or community concerns and preferences, thereby leading to de facto violations of access to social or economic rights, as well as rights related to informed participation in decision-making relating to one’s life.

A right to participate in decision-making at the community level was recognised in the Vienna Declaration and Programme of Action⁵⁴ adopted after the 1993 World Conference on Human Rights. It is, moreover, in line with a general tendency towards recognising a human right to public participation in decision-making at the

⁴⁷ US Department of Agriculture, ‘Oil seeds: World Markets and Trade’ (2018)

<<https://apps.fas.usda.gov/psdonline/circulars/oilseeds.pdf>> accessed 1 September 2018.

⁴⁸ Joni Jupesta, ‘Modeling technological changes in the biofuel production system in Indonesia’, (2012) 90(1) *Applied Energy* 211.

⁴⁹ V Vijay, , SL Pimm, CN Jenkins, Sharon J Smith, ‘The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss’, (2016) 11(7) PLoS ONE: e0159668. doi:10.1371/journal.pone.0159668.

⁵⁰ Jupesta (2012) n. 48.

⁵¹ Universal Declaration of Human Rights, (hereinafter UDHR) art. 25(1); International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), art. 11(1).

⁵² UDRH, art. 25(1); ICESCR, art. 12(1).

⁵³ UDHR art. 23; ICESCR art. 6.

⁵⁴ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights, 25 June 1993, Endorsed by the UN General Assembly Resolution (UN Doc 48/121, 1993), para. 25.

local level for individuals and communities, including those affected by the activities of the private sector.⁵⁵ This procedural right can be crucial for rights-holders to protect a range of substantive human rights, such as land, culture including traditional forms of resource use and religious sites, adequate standard of living, etc. For indigenous people, the right to free, prior and informed consent for certain types of activities or decisions is established in hard⁵⁶ as well as soft law.⁵⁷ Studies also report that expansion in agri-industry, including based on investments in the sector, may cause conflicts in the local community due to disagreement between those who wish to sell and those who prefer to retain the conventional way of agri- or silviculture.⁵⁸ Moreover, in some cases the immediate benefit of income and employment yield to loss of a stable income through tenured land, and therefore the ability to provide for oneself and one's family. Studies also indicate that small-scale farmers receive inadequate information to allow them to make informed decisions on the longer-term implications of selling their land, or of shifting their own production to oil palm.⁵⁹ These studies further indicate inadequate processes of consultation and provision of information on the part of actors downstream or new plantation owners. They suggest that a failure to understand and consider the concerns of small-scale farmers from their own perspective is a major source of the problems.

To appreciate the dilemmas encountered by the oil-palm sector, consider the case of Indonesia. Along with Malaysia, Indonesia is one of the world's major producers of palm oil based on locally sourced palm fruit. Indonesia has embarked on an ambitious plan for sustainable transitions, aiming to advance economic growth and development while avoiding unsustainable use of natural resources. Providing jobs for least three million Indonesians, the palm-oil sector is a source of income for many more in related professions. The industry itself estimates that the sector benefits around six million people, many of whom have been lifted out of poverty through income generated.⁶⁰ On the other hand, the Indonesian land agency reported 3500 palm-oil related land conflicts between companies and communities around 2010.⁶¹ A 2017 study warns that due to land constraints, a planned expansion of oil-palm from currently around 4 million to 18 million hectares of land would lead to deforestation with consequent conflicts in society over water and land, as well as biodiversity loss and ecosystem changes.⁶² Communities resist large extractive projects on the basis of the threats such project represent to their livelihoods, ecology and economy.⁶³ Studies also indicate that while local communities in Indonesia favour oil-palm as a crop because of the economic income it creates, they wish for the cultivation to be undertaken in a manner that causes as few adverse social and ecological impacts as possible.⁶⁴ Research moreover suggests that current impact assessments and stakeholder consultation with

⁵⁵ George (Rock) Pring and Susan Y. Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in Donald M Zillman, Alastair Lucas and George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public participation in the Sustainable Development of Mining and Energy Resources* (Oxford Scholarship Online 2002) DOI:10.1093/acprof:oso/9780199253784.003.0002; Barry Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Donald M Zillman, Alastair Lucas and George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public participation in the Sustainable Development of Mining and Energy Resources* (Oxford Scholarship Online 2002) DOI:10.1093/acprof:oso/9780199253784.003.0003.

⁵⁶ Indigenous and Tribal Peoples Convention, ILO convention 169 (26 June 1989).

⁵⁷ UN Declaration on the Rights of Indigenous Peoples (UN Doc A/RES/61/295, 2007).

⁵⁸ B Haalboom, 'The intersection of corporate social responsibility guidelines and indigenous rights: examining neoliberal governance of a proposed mining project in Suriname'. (2012) 43(5) *Geoforum* 969; S Mingorría, G Gamboa, B Martín-López and E Corbera, 'The oil palm boom: socio-economic implications for Q'eqchi' households in the Polochic valley, Guatemala' (2014) 16(4) *Environment, development and sustainability* 841.

⁵⁹ Cotula and Berger 2017 (n 17).

⁶⁰ P Gillespie, 'Participation and power in Indonesian oil palm plantations' (2012) 53(3) *Asia Pacific Viewpoint* 254.

⁶¹ M Colchester, *Oil palm expansion in South East Asia: trends and implications for local communities and indigenous peoples* (Forest Peoples Programme, 2011)

⁶² Jupesta (2017) n 48.

⁶³ A Escobar, *Difference and Conflict in the Struggle Over Natural Resources: A political ecology framework* (2006) 49(3) *Development* 6.

⁶⁴ J Sayer, J. Ghazoul, P. Nelson and AK Boedhihartono, 'Oil palm expansion transforms tropical landscapes and livelihoods', (2012) 1(2) *Global Food Security* 114.

communities in Indonesia tend to be implemented in a manner that disregards the historical, social and political context, thereby making them inadequate for understanding complex social issues and interactions.⁶⁵

For institutional investors working out of OECD countries or the several other states that have acceded to the OECD Guidelines, the actual or potential adverse impacts listed above translate into expectations or requirements to consider what leverage they have or may exert on invested companies. As this is an element in risk-based due diligence on the part of investors, their exercise of meaningful stakeholder engagement to help expose the concerns and needs of affected individuals and communities may offer part of the solution, as explained in the following sections.

5. Impact assessment and meaningful stakeholder engagement

According to the UN Framework, the corporate responsibility to respect human rights applies to all businesses regardless of legal form and requires a series of interconnected practical steps: a policy commitment to human rights; undertaking human rights due diligence; and ensuring remedy. Elaborating these steps the UNGP emphasize communication as an element in both identifying risks or actual impacts, and providing transparency and accountability for how companies address those risks or impacts by taking action in response to findings based on their due diligence. The UNGP note that such communication can take a variety of forms, such as in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports.⁶⁶ Thus, communication as part of due diligence entails a variety of actions along a continuum of identifying, preventing and mitigating harm through informal feedback to stakeholders or formal reports, such as non-financial reports that are increasingly becoming mandatory.⁶⁷ For effectiveness of the forms of stakeholder engagement that aim at identifying risks of harm before harm occurs and preventing it from occurring, the UNGP emphasize the importance of meaningful stakeholder engagement, in particular with affected stakeholders. In many cases these are rights-holders.

The UNGP establish the International Bill of Rights and ILO's core labour standards as the minimum baseline for the corporate responsibility to respect.⁶⁸ As the UNGP are soft law in regard to companies, they define minimum standards of aspiration. On the other hand, they do not set an upper limit: an economic actor can set higher standards for itself, for example in regard to the extent of its leverage, or the way in which a directly linked company engages in impact assessment through meaningful stakeholder consultation. It can also decide to be inspired by the standards beyond the International Bill of Rights and the ILO core labour standards. For example, it may wish to observe the principle of free, prior and informed consent in its decisions, thus seeking inspiration from ILO Convention 169 and the Declaration of the Rights of Indigenous Peoples.

Further expanding on communication as part of due diligence, the UNGP refer to "knowing and showing".⁶⁹ Communication is not simply to disclose information ('showing' and providing accountability), but as importantly obtaining relevant information for avoiding adverse human rights impact ('knowing'). This is supported by the description of due diligence steps like consultation, impact assessments and tracking performance. "[M]eaningful consultation with potentially affected groups and other relevant stakeholders" should be conducted to gauge human rights risks before they occur. Tracking performance "is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement".⁷⁰ In

⁶⁵ Ibid.; JF McCarthy, 'Certifying in Contested Spaces: Private regulation in Indonesian forestry and palm oil', (2012) 33(10) Third World Quarterly 1871.

⁶⁶ UNGP 17, 21 with commentary.

⁶⁷ Compare Buhmann (2018) n 30.

⁶⁸ UNGP 12.

⁶⁹ UNGP 21 with commentary.

⁷⁰ UNGP 20 with commentary.

assessing human rights risks to prevent and mitigate adverse human rights impacts, firms should look for both actual and potential adverse impacts.⁷¹

Accordingly, to deliver on the ‘do no harm’ objective of the UN Framework and UNGP, the due diligence process must be undertaken with a view to understanding stakeholder perceptions of impacts both before they occur, as well as after the firm has sought to address them.

In line with the UNGP’s approach to risk-based due diligence, economic actors subject to the OECD Guidelines are expected to exercise risk-based due diligence that involves stakeholder consultation in a very broad sense. When risks are present of adversely affecting individuals or communities up-stream, they should be involved through meaningful stakeholder engagement. In the production chain for agri-products, such as palm oil, this includes small-holders as well as industrial small or medium sized enterprises (such as those involved in palm oil processing or transport of nuts or oil).

As noted earlier, the literature underscores the relevance of meaningful stakeholder engagement with affected stakeholders, but current theory and practice remains top-down focused. The discussion here has made the case for shifting the focus of the process towards the needs and perceptions of affected stakeholders, from their perspective. The subsequent section elaborates how this may be done by investors and why it should be done.

6. Using leverage to enhance responsible economic activity in the investment chain

Recent studies underscore that for investors to avoid infringing on the rights of local communities, they need to have access to detailed and relevant information on the views of these communities.⁷² Other analyses indicate that the existence, quality and application of risk-based due diligence policies varies considerably among institutional investors, even those with a commitment to responsible investment.⁷³ Partly in response to the human rights complexity of the sector, many such companies that have general sustainability policies appear to avoid investment in the palm oil sector because of the social risks associated with the activity. Some studies argue that in cases of risks of adverse impacts, responsible companies should pull out (divest).⁷⁴

Decisions by investors with responsibility commitments and due diligence policies to stay away from complex sectors or divest can translate into investment gaps that in turn are filled by investors lacking similar commitments and policies. The need for capital for the shift towards green energy underscores the importance of institutional investors applying impact assessment processes that identify and address the needs and concerns of affected stakeholders from that bottom-up perspective, so that they may address them through exercising leverage, for example to build human rights capacity in the investment chain. If responsible investors stay away or divest, other investors are likely to be willing to fill the investment gaps, but not necessarily the governance gaps.

Whether an investor is covered by the OECD Guidelines or not, the UNGP apply. In exercising risk-based due diligence, all institutional investors should take steps to conduct impact assessments, integrate findings from the assessments, and respond by taking appropriate actions.⁷⁵ What constitutes ‘appropriate action’ may

⁷¹ UNGP 18-20 with commentary.

⁷² Zoomers and Otsuki (2017) n 17; Business and Human Rights Clinic, *Pension Funds and Human Rights: a study of human rights considerations of pension funds* (Columbia University, 2018) <http://humanrightscolumbia.org/sites/default/files/pdf/bhr_pension_funds_2018.pdf> accessed 30 August 2018.

⁷³ Danwatch, *Pensionskassers investeringer i palmeolie* (Danwatchc, 2015) <<https://www.danwatch.dk/undersogelseskapitel/pensionskassers-investeringer-i-palmeolie-bidraget-til-afskovning-og-jordtyveri/>> accessed 18 November 2018

⁷⁴ M Van Huijstee, L de Leeuw, and J Wilde-Ramsing, *Should I stay or should I go: Exploring the role of disengagement in human rights due diligence* (SOMO/Centre for Research on Multinational Corporations, 2016).

⁷⁵ UNGP 19.

depend on the circumstances, not least the company's ability to use its leverage over the invested company, how crucial the relationship is to the investor, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.⁷⁶ Leverage can be exercised through the investor's economic investment-muscle (the threat of disinvesting), and before that but at least as importantly, through active participation in shareholder meetings, and perhaps even more importantly, through active 'engagement' with invested companies. In the investment sector, 'engagement' entails an effort to work with the invested company or other business relations to manage a risk and improve a situation long-term.⁷⁷ Institutional investors are increasingly looking to 'engagement' as an alternative to divestment or non-investment.

An investor may play important roles to address the reasons for adverse human rights impacts in the investment chain by exercising leverage not just influence the invested company itself, but by using leverage in a manner that goes beyond that company. This could include capacity building of the invested company to assist it in developing its own due diligence process, and to help that company engage with its suppliers to ensure that human rights are respected in the supply chain. As the capacity to exercise solid risk-based due diligence and identify and manage human rights risks filters down the chain of companies from the immediate invested company to the farmer or other company at the top of the supply chain, the investor de facto may exercise leverage through that chain to reduce adverse impacts.

In line with the UNGP's emphasis on meaningful stakeholder engagement and the reported findings of the need for bottom-up approaches to identifying impact, the value of the process may be further enhanced by directing emphasis to identifying impacts to capture the perspective of those affected rather than those directing the due diligence process. A bottom-up perspective can help the investor understand and respond to impacts caused through the investment chain in a manner that is relevant and culturally adequate to affected stakeholders. As importantly, it can help the investor understand what constitutes salient adverse impacts from the perspective of affected stakeholders, and integrate this knowledge into their own investment decision and management processes. With the knowledge on impacts perceived by affected stakeholders, the investor will be better equipped to use their leverage to exert changes with invested companies and the business relations of those companies throughout the investment chain. This can benefit small-scale farmers or communities growing oil-palm, or under pressure to sell their land to plantations.

Active engagement aiming at strengthening bottom-up impact assessment may be a valid alternative to a decision not to invest.⁷⁸ Even the UNGP and OECD Guidelines treat divestment as a last option, to be applied when the company lacks leverage or is unable to increase its leverage as adequately, and only after taking into account 'credible assessments of potential adverse human rights impacts' of divesting.⁷⁹ Investors with solid knowledge of social impact and sustainable transitions may share their knowledge with investees. By implication, risk-based due diligence also allows economic actors to understand from the outset how investments may contribute to benefits for society, and to design investment strategies and specific investment accordingly.⁸⁰

7. Outlook: a need for development of methods for stakeholder engagement

⁷⁶ UNGP 19, commentary.

⁷⁷ Arleta Majoch, Andreas GF Hoepner and Tessa Hebb, 'Sources of Stakeholder Salience in the Responsible Investment Movement: Why do investors sign the Principles for Responsible Investment?' (2017) 140(4) *Journal of Business Ethics* 723.

⁷⁸ Ibid.; see also Principles for Responsible Investment, *Engagement as a mechanism to change investee ESG practices* (PRI, no year) <<http://www.unpri.org/prian-events/engagement-as-a-mechanism-to-change-investee-esg-practices/>> accessed 28 November 2018.

⁷⁹ UNGP 19 with commentary.

⁸⁰ International Finance Corporation, *Stakeholder Engagement: A good practice handbook for companies doing business in emerging markets* (IFC 2017)

Like other companies, institutional investors are expected to conduct risk-based due diligence to identify and manage harmful human rights impacts or risks of such impacts resulting from activities in which they invest. As part of the discharge of due diligence to respect human rights, institutional investors are expected to exercise leverage with their business relations to influence or assist those in preventing, mitigating, and if relevant remedying harm. According to the UNGPs and the OECD Guidelines, leverage extends at least to immediate business relations. In the case of an institutional investor this is typically an invested company, or an investment screening company. However, in view of their economic muscle, institutional investors may have important potential to exert influence on companies in the investment chain so that those, too, understand when and how they should adapt activities or processes to respect human rights. This can be done directly, when appropriate or relevant, or through collaboration with the invested company or other actors in the investment chain.

The chains between the invested company (*e.g.* a power-company in an industrialized country) and the community whose lands have been changed into a plantation for bio-fuel can be long and complex. For investors to engage adequately along the investment chain and make use of their leverage potential as well as to assess whether divestment is a better strategy, contextual information is needed. In particular, institutional investors need contextual information on investment-related impacts at the far end of the investment chain. Without such information, the process of assessing harmful impacts or risks of such impacts as an element in risk-based due diligence will likely be inadequate to understand and address the problem at hand as perceived from those who are affected.

Large-scale exploration and exploitation of natural resources have a legacy of causing human rights abuse. This applies from large-scale to non-renewable resources, as is well-known from coal mines like the Cerrejon mine in Colombia,⁸¹ gold mines like the Yanacocha mine in the Cajamarca region in Peru,⁸² or ‘conflict-minerals’ which take their nick-name from the rebel-led conflicts that their trade helps fuel, known to also cause human rights atrocities.⁸³ As noted above, it may also apply to renewable resources, such as agri-industry or forest industry that main encroach on land or tenure rights of individuals or communities, or their cultural practices and livelihoods. With relevant adaptation to a specific sector and social and cultural context, solid theory-based methods development may form the back-bone of impact assessment processes in various sectors to connect the ideals of meaningful stakeholder engagement inherent in the UNGP and the OECD Guidelines with the potential of institutional investors to fill governance gaps.

The analysis above indicates that bringing the potential of institutional investors to fruition for that purpose will benefit from three inter-related activities, namely for institutional investors to (1) perform risk-based due diligence to identify and understand adverse impacts from the perspective of affected stakeholders (rights-holders), which in turn requires meaningful stakeholder engagement processes designed to take account of that bottom-up perspective; (2) internalize the findings into investors’ organizations to inform their decision-making to appropriately take account of human rights impacts; and (3) exercise leverage in a manner that not only targets invested companies but also helps build capacity through the investment chain to identify and appropriately manage adverse human rights impacts.

As also observed, theory as well as practice for impact assessment are currently dominated by top-down approaches. There is a general need for theory-based methods for impact assessment from the perspective of

⁸¹ E.g., Danwatch, *The curse of coal* (Danwatch, 2012)

⁸² Ruggie (2013) n 1.

⁸³ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1; Due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas (OECD, 3rd edition, 2016).

affected stakeholders, and for transmitting this information to companies to inform their decision-making. This need applies to institutional investors too, and translates into a knowledge gap to be filled by research, methods development, testing, and refining.

Research can help advance the potential of institutional investors in promoting the respect for human rights of communities and individuals along their chains of investment. The benefits are, at least, three: First, connecting an appreciation of impacts at the level of affected stakeholders with the logics and decisions of institutional investors can help institutional investors with CSR commitments deliver on these commitments in a manner that carries substantive effects, rather than just statements in CSR reports and on websites. Second, through active engagement supported by the capacity and experience of institutional investors and their economic muscle, these investors can contribute to enhancing the capacity to respect human rights in many companies that are suppliers or business relations to invested companies. Third, and most importantly in the current context, institutional investors can thereby help fill governance gaps related to inadequate rule of law. Depending on the portfolio, reach, policies and economic size, this may affect governance gaps at the international, transnational, national, or even local level.

Methods for institutional investors to fulfil that potential need to combine both aspects of stakeholder engagement noted above. These are both indicated by the UNGP and the OECD Guidelines, but without a clear designation of the differences: On one end of the spectrum is meaningful stakeholder engagement with affected stakeholders (rights-holders/potential or actual victims) to help them voice their concerns and perceptions of an activity. On the other end is the relationship between the investor and the invested company, that is, the economic actor with which an investor may ‘engage’ by exercising their leverage to promote changes of actions and activities. While combinations of engagement at these two levels and from these two perspectives may be relevant to some other types of companies as well, it is particularly strong in the investment context.

The development of methods for this purpose should be informed by relevant academic theory on impact assessment. But it will need to go beyond the limitations of current theory in order to adequately inform the design and implementation of impact assessment processes to take account of perceived or lived human rights impacts by actual or potential victims at the top of the investment chain. When in place, the application will contribute towards the implementation of the human right to public participation for community-level decisions affecting individuals and communities. The methods development should be informed by theory and studies on the implementation of international human rights at the level of individuals, along with studies on public participation in decision-making as a procedural human rights for protecting substantive rights linked to land, culture, religion, work, etc. It may also be useful to involve various academic approaches to human rights and the transformation of normative ideals into practice, *e.g.* in addition to international human rights law for example anthropology and legal and general sociology.

Due to the variety of investments as well as cultural, value-oriented and other differences of rights-holders, the methods may need to embody some flexibility. At the same time, the methods offered may ideally possess certain uniform elements in order to allow for comparisons, effect-tracking and learning across diverse interventions. For this purpose, a particular sector (*e.g.*, palm oil) may serve as an initial systemic case for the development of methods for meaningful stakeholder engagement in impacts assessment. Findings on best practice can be applied to other sectors to test and potentially expand their deployment, complemented by analysis to theorize on these aspects of risk-based due diligence.

8. Conclusion

The production of several bio-fuel crops and mineral products currently used for the green transitions are related to adverse human rights impacts. The example of the Indonesian oil palm sector shows that despite the

impressive contributions of bio-fuel crops to green economic growth, the sector is facing challenges as to human rights impacts across the palm oil value chain, and in particular with regard to small-holders. Key problems relate to land rights, distribution and access to information, and informed involvement in decision-making. When this occurs in value chains with invested companies, the problems become issues of inadequate respect for human rights for institutional investors. The UNGP apply to all companies, including institutional investors all over the world. Institutional investors working out of OECD countries or several other states that have acceded to OECD's Guidelines are also expected to abide by the Guidelines. OECD countries are hosts to many of the world's large institutional investors, as well as multinational enterprises.

It follows from the UNGP and the OECD Guidelines that institutional investors linked to adverse impacts through their business relations should exercise leverage to the extent possible. This chapter has argued that institutional investors should use leverage to not only influence invested companies to change practices that cause or contribute to harmful impacts, but also work actively through the investment chain to help companies in that chain build capacity to prevent and manage adverse impacts. The chapter expands on investors' due diligence from the responsibility to do no harm with a narrow focus on their own business and immediate business relations.

There is a need for developing methods for institutional investors to design and implement a process for assessing impacts in a bottom-up perspective and connect with the rationality of the invested company to trigger the desired changes with this company and its own engagement with its business relations.

Informed by theory on impact assessment, such methods may benefit investors, their engagement with business relations along the investment value chain, and finally affected stakeholders beyond the specific sector or sectors. Combined with aims to exercise leverage and general knowledge for minimizing adverse impacts and maximizing positive impacts, methods development and its testing, refinement and implementation can help deflect adverse impacts that may be unintended side-effects of efforts to speed up sustainable transitions in line with the Paris Accord and SDG 7. This will help ensuring respect for the UNGP in line with SDG 17 and particularly the SDG's somewhat overlooked call on companies to respect human rights, even in the urgent transition to a non-carbon economy.