

To:

THE THUN GROUP OF BANKS (BARCLAYS, BBVA, BNP PARIBAS, CREDIT SUISSE AG, DEUTSCHE BANK, ING, RBS, STANDARD CHARTERED, UBS GROUP AG, UNICREDIT), WITH J.P. MORGAN, C/O CHRISTIAN LEITZ, HEAD, CORPORATE RESPONSIBILITY MANAGEMENT, UBS SWITZERLAND AG

CC:

THE OECD WORKING PARTY ON RESPONSIBLE BUSINESS CONDUCT IN THE FINANCE SECTOR

SUBJECT: SIGNIFICANT CONCERNS REGARDING THUN GROUP DISCUSSION PAPER

February 14, 2017

We, the undersigned organisations and individuals are writing to raise significant concerns regarding the discussion paper by the Thun Group of Banks, “on the implications of UN Guiding Principles 13 and 17 in a corporate and investment banking context”, published in January.¹

We consider that the premises on which the paper is based are fundamentally flawed, and regret that it has either intentionally or unintentionally omitted to take into account authoritative guidance, including by the UN Office of the High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme – Finance Initiative (UNEP-FI) and other relevant organisations. As such it represents an unhelpful intervention in view of the multi-stakeholder discussions being coordinated by the OECD Working Party on Responsible Business Conduct, in which the Thun Group of banks are engaged alongside signatories to this letter.

We ask the Thun Group to withdraw and reconsider this paper, and to prioritise engagement with a range of stakeholders, including civil society organisations, affected communities and other subject experts, prior to future publications. We ask the OECD Working Party to ensure that its forthcoming work on the finance sector builds on the advice of the OHCHR and to recognise that the Thun Group paper is not an appropriate starting point.

The flawed assertions underpinning the paper

The Thun Group paper seeks to develop a conceptual framework for considering Principle 13 of the UN Guiding Principles on Business and Human Rights (UNGPs) for banks in a corporate and investment banking context. However, it begins with the flawed assertion that only half of Principle 13 applies in the case of human rights impacts linked to bank finance. The paper states in its Introduction:

¹ Thun Group of Banks releases new Discussion Paper on implications of UN Guiding Principles for corporate & investment banking, [Business & Human Rights Resource Centre](#), 25 January 2017

“In accordance with UNGP 13b, banks should “*seek to prevent or mitigate 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*”. This paper proceeds on the basis that this is the appropriate focus for banks if their clients (in the context of a corporate and/or investment banking relationship) cause or contribute to adverse human rights impacts. [...] The paper also explores why, when it is a client’s conduct which causes or contributes to a human rights impact, a bank’s role is properly focused on influencing the actions of the client rather than remediation for rights holders.” (*Emphasis from the original*).

The paper goes on to state that UNGP 13a would generally not apply: “Under UNGP 13, a bank would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients' operations because the impact is not occurring as part of the bank’s own activities.” The substance of the remainder of the paper, from its mapping of proximity to the case studies it presents, builds on this central assumption: banks do not generally *contribute* to human rights impacts through their finance, and are therefore not responsible for remediation of these impacts.

This is stated as if it were a settled fact – however it directly contradicts advice provided by the UN OHCHR to the OECD Working Party in a published letter from November 2013, of which we must assume the Thun Group banks are aware.² The letter, provided in response to a request for advice from the OECD Working Party on what is meant by “directly linked” in the context of the finance sector, gives examples of circumstances where financial institution may contribute, be directly linked or have no link to a human rights impact via their finance. It advises that financing can contribute to a human rights impact, “such as if financing is provided for a project that will result in widespread displacement of communities, without safeguards in place”. Banks would then have a responsibility to remedy such a human rights impact.

This advice is consistent with the UN’s Interpretive Guide to the Corporate Responsibility to Respect Human Rights, which clarifies that a business may contribute to human rights impacts via a third party.³ The Interpretive Guide uses an example of a business that “lends vehicles to security forces that use them to travel to local villages and commit atrocities.” We see no conceptual difference between lending vehicles and lending finance, where the action directly supports human rights abuses.

Moreover, a report by UNEP-FI also supports the conclusion that a financial institution may contribute to adverse human rights impacts which result from other entities: “A bank could contribute to an adverse human rights impact by assisting, facilitating, or incentivizing the conduct of another entity that leads to an adverse impact. The bank does not have to be the immediate cause of the impact to be considered to contribute to it.”⁴

² Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector, [OECD](#), 2014. The example quoted appears in paragraph 19 of the OHCHR letter.

³ The Corporate Responsibility to Respect Human Rights, An Interpretive Guide, [United Nations](#), 2010: chart (p16) and question 39 (p41).

⁴ Banks and Human Rights: A Legal Analysis, [Foley Hoag LLP and UNEPFI](#), December 2015, page 14.

While there is room for further discussion on the interpretation of such terms, it is within the mandate of the OHCHR, together with the UN Working Group on business and human rights, to provide guidance on the interpretation of the Guiding Principles, and this advice must be viewed as a starting point for such further discussion.⁵ It is not for banks to unilaterally “clarify” their own human rights responsibilities, as this Discussion Paper seeks to do.

Misunderstandings on Access to Remedy

Building on this flawed starting point, the paper misrepresents the rights of people who may be affected by business activities to access to remedy, and goes on to omit the responsibility of banks to respect the (human) right to remedy - part of the responsibility to respect all human rights - and provide complaints channels for affected people.⁶

The paper states in its Executive Summary and Conclusion that, when a bank is directly linked to a human rights impact caused or contributed to by a client, “*access to remedy*, as considered by the UNGPs, does not apply”. However, the right of affected people to an effective remedy, through judicial or non-judicial means, continues to apply in all circumstances. The paper appears to confuse the *right of individuals to seek remedy* with the *responsibility of business to provide remedy* where it identifies that it has caused or contributed to a human rights impact. This misunderstanding may be at the root of the Thun Group’s ongoing failure to acknowledge banks’ responsibility to provide for complaints mechanisms for affected communities.

The paper sets out the view that, in the event of a human rights impact linked to the bank’s finance, it is the responsibility of the bank’s client to “provide Access to Remedy” - although banks may seek to ensure that their clients establish a grievance mechanism where appropriate. Notwithstanding the UN advice that banks may also contribute to human rights abuses through their finance, the paper misses two important aspects of the UN Guiding Principles.

The first is that, even in cases where a business has not itself caused or contributed to an adverse human rights adverse impact, but is directly linked to the impact, the Guiding Principles state that the business “may take a role” in enabling remediation (Commentary to UNGP22). Taking such a role, while not a strict responsibility under the UNGPs, should be considered good practice, which we would hope to see the Thun Group advocate.

The second is that the UNGPs set out a general responsibility for businesses (including banks) to “establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted” (UNPG 29). It does not limit this responsibility to human rights impacts the business causes or contributes to. Indeed, the function of such a mechanism is to support the early identification of human rights impacts – with obvious benefits for banks which may find themselves linked to such impacts – as well as to allow these grievances to be addressed and remediated as early as possible. As the Protect, Respect and Remedy framework states, “an effective grievance mechanism is part of the corporate responsibility to respect” human rights.⁷

⁵ On the OHCHR’s remit, see <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>

⁶ Core elements of the human right to remedy include the victim’s right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

⁷ Protect, Respect and Remedy: a Framework for Business and Human Rights, [Human Rights Council](#), 2008: paragraph 93

While bank participation in such mechanisms could take different forms, the Thun Group has to date failed to acknowledge this responsibility, including in this paper – an omission which is damaging for rights-holders’ opportunities to seek remedy for abuses they have suffered.

Concluding remarks

Although there are further comments to be made on this paper, given these unreliable foundations, we consider the conceptual framework and case studies it presents as unsound. These flaws could have been avoided had this “discussion paper” in fact been based on meaningful discussion with external stakeholders. However, although the Thun Group committed in 2014 to elaborate a stakeholder engagement strategy, it has not done so.⁸

There is a place for informal discussions among banks to discuss human rights issues. However, it is unhelpful for the banking sector to make unilateral pronouncement on its own responsibilities. Furthermore, to do so while appearing to sideline the advice of UN agencies is deeply problematic, and to take this approach at the start of multi-stakeholder discussions relating to these responsibilities risks undermining the good faith required for these discussions to reach consensus.

We ask the Thun Group, as a party to the OECD’s multi-stakeholder project on Responsible Business Conduct in the finance sector, to show that it is prepared to engage in this process in good faith by retracting this paper, making clear that it recognises and respects the advice provided by the UN OHCHR, and working with other stakeholders to build consensus in a consultative and constructive manner.

We request a response from the Thun Group on this letter as soon as possible, and before 24th February. Please respond to BankTrack’s Director, Johan Frijns (johan@banktrack.org).

Sincerely,

Organisations:

GREENPEACE, International - Daniel Mittler, Head of Political and Business Unit
OECD Watch, International - Ame Trandem, coordinator
Oxfam, International - Steve Price-Thomas, Advocacy and Campaigns Director
FUNDEPS (Foundation for the Development of Sustainable Policies), Argentina - Juan Carballo, Executive Director
Markets for Change, Australia - Peg Putt, CEO
Mineral Policy Institute, Australia - Charles Roche, Executive Director
Conectas Human Rights, Brazil - Caio Borges, Attorney
Equitable Cambodia, Cambodia - Eang Vuthy, Executive Director
Les Amis de la Terre France, France - Lucie Pinson, Private finance campaigner
Fair Finance France, France - Alexandre Naulot, Policy advisor
Facing Finance, Germany - Thomas Küchenmeister, Managing Director
TuK Indonesia, Indonesia - Rahmawati Retno Winarni, Program Director
Jamaa Resource Initiatives, Kenya - Maurice Ouma Odhiambo, Executive Director

⁸Thun Group of Banks re critical analysis of Thun Group discussion paper on UN Guiding Principles, [Thun Group](#), 20 August 2014

Project on Organizing, Development, Education, and Research (PODER), Mexico - Fernanda Hopenhaym, Deputy Director

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BankTrack, Netherlands – Johan Frijns, Director

PAX, Netherlands - Michel Uiterwaal, Advisor on Extractives, Human Rights and Conflict

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Friends of the Siberian Forests, Russia - Andrey Laletin, Chairman

Alliance Sud, Switzerland - Jürg Staudenmann, Responsible International Climate and Environment Policy

Klimaallianz Schweiz, Switzerland - Christian Lüthi, Director

Public Eye, Switzerland - Andreas Missbach, Joint Managing Director

Society for Threatened Peoples Switzerland, Switzerland - Julia Büsser, Campaign Manager Business and Indigenous People's Rights

CORE Coalition, United Kingdom - Marilyn Croser, Director

London Mining Network, United Kingdom - Andy Whitmore, Project Coordinator

Accountability Counsel, United States - Kindra Mohr, Policy Director

Friends of the Earth US, United States - Katharine Lu, Sustainable Finance Coordinator

Inclusive Development International, United States - David Pred, Managing Director

International Corporate Accountability Roundtable, United States – Amol Meghra, Executive Director

Rainforest Action Network, United States - Tom Picken, Campaign Director

Individuals:

Cees van Dam, Professor of International Business and Human Rights, Rotterdam School of Management, The Netherlands

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Sara Seck, Associate Professor, Faculty of Law, Western University, Canada