

BANKTRACK

ON THE THUN GROUP PAPER ON BANKS AND HUMAN RIGHTS

DECEMBER 2013

THE THUN GROUP – THE STORY SO FAR

The Thun Group was formed when a group of banks came together in May 2011 in Thun, Switzerland, to discuss what the UN Guiding Principles on Business and Human Rights¹ (“Guiding Principles”) may mean for the banking sector.

In an initial statement, released in October 2011 and signed by four banks - Barclays, Credit Suisse, UBS and Unicredit - the group welcomed the Guiding Principles and identified a need for further interpretation to understand how they should be implemented within the banking sector². The group then committed to produce “a practical application guide” setting out the challenges and best practice examples of operationalizing the “Guiding Principles” in universal banks.

In December 2012, the Thun Group released a second statement in response to questions posed at the United Nations Forum on Business and Human Rights by BankTrack and the Berne Declaration³. This statement emphasised that the Thun Group “does not constitute a formal entity of any kind”, and noted that the Group was completing work on a “discussion document” focusing on Guiding Principles 16 - 21 (relating to the corporate responsibility to respect human rights).

In October 2013 the Thun Group’s Discussion Paper was finally released, with a covering statement signed by seven banks⁴. These included the original four, with the addition of BBVA, ING Group and RBS Group.

¹ [UN-OHCHR, 2011, “Guiding Principles on Business and Human Rights”](#)

² [Thun Group, 2011, “Statement by the Thun Group of banks on the “Guiding principles for the implementation of the United Nations ‘protect, respect and remedy’ framework” on human rights”](#)

³ [Thun Group, 2012, “Thun Group of Banks Response to a question at the UN Forum on Business and Human Rights, December 2012”](#),

⁴ [Thun Group, 2013, “UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21”](#), And: [Thun Group, 2013, “Statement by the Thun Group of Banks”](#)

BANKTRACK REACTION

Although this two-year process seemed to constitute a “managing down” of expectations (from ‘practical application guide’ to ‘discussion document’, from the Guiding Principles as a whole to just Principles 16 – 21, etc.), the Thun Group’s paper made an important contribution as a guide to the banking sector for operationalizing the UN Principles, elaborating on policy and governance frameworks for banks, and providing guidance on the scope and content of due diligence procedures for different financial services.

The paper recognized, in a first for the banking sector, that the UN Guiding Principles apply to all parts of a bank's business, including asset management and personal banking as well as corporate and investment banking. It was accordingly given a cautious welcome by BankTrack. Some important gaps, however, remain to be filled.

KEY CRITICISMS OF THE THUN GROUP PAPER

1. Lack of engagement with civil society and other key stakeholders.

The UN Guiding Principles call for consultation with recognised experts, potentially affected groups and other relevant stakeholders in the formation of policy commitments and in the process of human rights due diligence.

While the Thun Group sent an advance document to a small group of as-yet unnamed experts, apparently no NGO or Civil Society consultation has taken place on the draft document. Neither BankTrack, nor any of its network of 40 civil society organisations working on banks, was consulted, despite assurances from UBS and Credit Suisse that this would take place.

BankTrack calls on the Thun Group to engage Civil Society groups in any next step it may undertake.

2. Weak context section underplays banks’ influence

The context section of the Thun Group paper begins with a series of caveats that seek to play down the banking sector’s influence and its leverage over clients. It states for example that “the degree of leverage is often a great deal less than popularly believed” and that “the decision of the bank may be limited simply to whether or not it should conduct the business” (page 5).

Leverage is defined in the UN Guiding Principles as “the ability to effect change in the wrongful practices of an entity that causes a harm” (commentary to Principle 19). By providing essential financing, banks have a higher leverage than for example a buyer in a supply chain. Banks also have the possibility to increase leverage, for example by the use of specific covenants outlining non-financial obligations of the client, as is standard practice with transactions that fall under the Equator Principles.

The paper further recognised that banks “have an interest and a responsibility to ensure, so far as practically possible, that their actions and decisions do not harm human rights and add value to the communities in which they operate” (page 5), but only because they “*may find themselves linked* to human rights violations committed by their clients”.

Banks find themselves linked to human rights violations when they are involved in financing human rights violations. Recognition that banks’ human rights responsibility results from their role in facilitating projects and other economic activities with real impacts, rather than from passively ‘finding themselves linked’ to such violations, would have been welcome. This focus on reputational and other risk to the bank is a step back from the Guiding Principles, which start from the basis that “the responsibility to respect is a global standard of expected conduct for all business enterprises” (Principle 11) and not only a risk minimizing exercise.

In addition, the content section also includes an unnecessary relativisation of the universality of human rights: “A bank may apply international human rights standards wherever possible but if doing so means that its employees in a particular jurisdiction are acting in breach of local law and may be subject to legal retribution, then it may decide to comply with local law and seek alternative means of compliance with accepted standards” (page 5).

The Guiding Principles themselves discuss the possibility that the domestic context renders it impossible to honour the principles of internationally recognized human rights fully. In such situations “business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard” (Commentary to Principle 23).

The guidance of the Guiding Principles for situations of conflict between local law and universal standards is therefore much stronger than what is set out in the Thun Group paper. Furthermore, given the fact that banks do not usually cause adverse human right impacts directly but contribute to them through their “relationships with business partners, [and] entities in the value chain... directly linked to [their] business operations... or services” (commentary to Principle 13), it is important to note that banks usually do have the option to terminate a business relationship. As bank employees are not forced by governments to maintain a specific activity or client relationship, legal retribution in the event that they terminate a business relationship because of human rights concerns is unlikely. To prioritise local law over universal standards and disguise this as protection of employees is an unnecessary weakening of, and diversion from, the Guiding Principles.

In implementing the Guiding Principles banks should address the possibilities open to them to increase leverage. They should acknowledge the relevance of universal human rights standards and further assess their exit options where this is necessary.

3. Partial coverage of the UN Guiding Principles

The Thun Group discussion paper limits its scope to Principles 16-21 of the UN Guiding Principles, stating:

“These Principles cover the areas of policy development and commitment, due diligence in terms of scope, accountability and implementation, as well as tracking and reporting. These Principles are those which are most relevant to banks’ potential adverse impacts on human rights and which tend to be most challenging to implement” (page 5).

While it is understandable that banks do not comment on the State Duty to Protect Pillar (Principles 1 – 10) there are other principles which are also relevant to banks’ adverse impacts. In the first place, the Thun Group paper only discusses the Operational Principles but not the Foundational Principles of the Corporate Responsibility to Respect Human Rights (Principles 11 – 15). As some of the strongest statements about the responsibility of enterprises regarding human rights, such as the one in Principle 11 cited above, are discussed there, this sense of urgency is lost by not covering Principles 11-15.

Furthermore the Paper stops short of addressing Principle 22, which falls under the heading of Remediation:

“Principle 22: Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”

The commentary to Principle 22 determines that even in the case where “a business enterprise has not caused or contributed” to adverse human rights impacts “which are directly linked to its business operations, products or services by a business relationship,” the enterprise “may take a role” in enabling remediation.

BankTrack calls on the Thun Group to also explicitly address the Principles it has overlooked.

4. Thun group does not address bank responsibility to ensure Access to Remedy

The third pillar on Access to Remedy is clearly directed both at governments and businesses. Therefore there are also principles in that section of the Guiding Principles that are relevant for banks, in particular Principle 29:

“To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”

While it is clearly the case that the company which is directly responsible for a grievance is best placed to provide access to remedy, banks can play a valuable role in (a) ensuring that a grievance mechanism is established by the bank's client in the first place, and (b) establishing their own mechanisms that allow rights holders affected by activities financed by a bank access to remedy. This is especially important when a client that is violating human rights is unwilling to address the issue of effective remedy.

BankTrack calls on the banking sector to ensure grievance mechanisms are established for projects which present human rights risks, and to establish their own mechanisms that allow rights holders affected by bank financed projects and activities access to remedy.

5. Human Rights due diligence in corporate and investment banking

The discussion paper elaborates on human rights due diligence processes in the different areas of activities of universal banks. In corporate and investment banking, where many high risk transactions occur, the paper proposes a different approach depending on whether the funds are used for general corporate purposes or for a specific investment or purpose.

When providing funds for general corporate purposes, the paper advises that the due diligence process focuses on "management systems and structures (...) that demonstrate the company's ability to identify, manage and respond adequately to general human rights issues" and "the company's process for identifying and consulting with stakeholders potentially affected by its operations, including grievance mechanisms" (page 15). This means the bank is basing its due diligence process almost exclusively on information provided by the client itself, such as a description of the different processes in place.

Only "if the client intends to use the funds for a defined purpose" should the potential impacts "on the rights of affected rights-holders ... be assessed" (page 5). The focus on rights-holders is therefore lost in the due diligence process for general corporate purposes. Victims of corporate human rights abuse and NGOs that support them usually raise their voices against specific investments rather than commenting on the processes of the company involved, with the result that their voices remain unheard in the due diligence process. This is even more serious as there is plenty of evidence that banks routinely provide general corporate financing for many companies that are involved in serious human rights conflicts.

BankTrack is convinced that a company's performance 'on the ground' in delivering actual projects says much more about the company's degree of responsibility than just its processes. BankTrack therefore urges banks to include the views of rights-holders and their supporters in due diligence processes when providing funds for general corporate purposes, by analysing the client's on-the-ground performance.

WHAT HAPPENS NEXT?

Although billed as a ‘discussion paper’, the release of the Thun Group’s document was not accompanied by a launch event, press release or press conference, and accordingly, there has been minimal public discussion on its contents and implications. We would welcome further efforts by the Thun Group or others in the banking sector to promote such discussion of its proposals.

Now that the paper has been released, we expect banks to work quickly towards implementing the UN Guiding Principles across their operations. There has been disappointingly little in the way of progress towards this goal - in fact we know of no bank which has yet taken steps – publicly – to integrate the UN Guiding Principles into its business practices. The Thun Group discussion paper has laid out the ambition and clearly stated what is now necessary: The “development of a risk management model that goes beyond traditional parameters, to address (identify, manage and mitigate) human rights to external stakeholders, i.e., which identifies and assesses potential adverse impacts on rights holders” (page 5).

It goes without saying that a credible implementation of the UN Guiding Principles in the financial sector is only possible in combination with much more transparency. Only if policies are publicly available are stakeholders able to assess whether the Principles have been implemented in a meaningful way.



JOINTLY PREPARED WITH THE BERNE DECLARATION

ABOUT BANKTRACK

BankTrack is the global network of civil society organisations and individuals tracking the operations of the private financial sector and its effect on people and the planet.

ABOUT THE BERNE DECLARATION

The Berne Declaration is a Swiss non-governmental organization with over 25,000 members. Through research, public education and advocacy work, it has promoted more equitable, sustainable and democratic North-South relations since 1968.

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