Comments on Thun Group of Banks
Discussion Paper on the Implications of UN Guiding Principles 13 & 17
In a Corporate and Investment Banking Context

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I welcomed the Thun Group of Banks' initiative to elaborate on the application of the UN Guiding Principles on Business and Human Rights (UNGPs) to banking when it first started up some five years ago.[1] A paper published by the Group in 2013 marked an important first step.

I am also keenly aware that, beyond their own walls, corporate and investment banking may face greater challenges resulting from diverse and complex business relationships than, say, a mining company. But banks are not alone in this respect. Other sectors, such as telecoms and social media, encounter comparably complex challenges. I applaud all efforts conducted in good faith to clarify and bring greater granularity to the implications of the UNGPs for different sectoral and operational contexts.

Having said that, I am deeply troubled by the discussion paper the Thun Group has just recently published.[2] It misconstrues *the* central Guiding Principle regarding the corporate responsibility to respect human rights (UNGP 13). This takes the subsequent analysis in the paper off-track and poses the risk of confusing if not undermining what has been the common understanding since the UN Human Rights Council unanimously endorsed the UNGPs in 2011.[3]

Below, I divide my comments into two parts, the first focusing on the analytical discussion in the paper, and the second on the illustrative cases.

Contribution/Linkage

UNGP 13 specifies that business enterprises can be involved with adverse human rights impacts either through their own activities or as a result of their business relationships. In turn, the latter comes in two forms: where the enterprise *contributes* to harm caused by a third party, and where the enterprise neither causes nor contributes but its operations, products or services are *directly linked* through its business relationships to the harm. UNGP 13 then refers to UNGP 19 for the implications of this distinction for action to be taken by a company. That commentary states:

- "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.

- Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.

- Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences."

The recent Thun paper collapses the first two categories—"cause" and "contribute to"—into one for banks because, it claims, causing or contributing to harm "will generally apply to banks only in the context of adverse human rights impacts caused or contributed to via their *own activities*," such as employment practices (p. 3, emphasis in the original).

There is no basis in the UNGPs for such an assertion. The UNGPs stipulate three categories of business involvement in human rights harm. The critical distinction that banks (and other businesses) should be making is not only between "their own activities" versus harms in which they may otherwise be involved. Perhaps even more important in practice, especially for banks, is the distinction between harm they may "contribute to" and harm that may be committed by a third party to which they are "directly linked" through their business relationships even without their having caused or contributed to the harm. This distinction is important because the two situations have very different implications for what banks, or any other businesses, should do about that actual or potential harm (see bullets 2 and 3 above), including in relation to remedy.

There is a continuum between contribution and linkage. A variety of factors can determine where on that continuum a particular instance may sit. They include the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it. Asserting that only a bank's own activities can constitute "contributing to" harm, as the paper does, bypasses these critical questions entirely.

Those problems are compounded by the paper's use of the term "proximity" to harm, which is nowhere to be found in the Guiding Principles. The paper claims that asset or project specific loans are more likely to put a bank in the position of "high proximity" to harms caused by clients while general corporate loans pose low proximity, so that the former requires greater due diligence than the latter. But the logic is problematic.

As it does under the UNGPs, the scope of due diligence should depend on the nature of the risk and the bank's connection to it using the established categories of involvement set out above, not on the type of loan on an *a priori* basis. For example, providing a general corporate loan to a private prison company that is alleged to engage in severe human rights abuses ought to require a very deep dive by the bank, coupled with the imposition of strict conditions if it decides to go ahead with the loan. If the bank does neither and yet proceeds, then it is squarely in "contribution" territory for any adverse impacts, even though the loan is not asset or project specific. Where the real challenge to banks lies is in their need to obtain sufficient information in the case of a company that is not as obviously high-risk from a human rights perspective as in this example. That may well call for more effort to be dedicated to human rights due diligence in some instances. But the concern cannot simply be excluded based on the type of financing involved.

In short, the Thun paper reinterprets core elements of the Guiding Principles in such a way that banks, by definition, do not "contribute to" harm except through their own activities. This is arbitrary and inconsistent with the UNGPs.

Case Studies

The paper includes seven hypothetical cases, intended to illustrate the analytical argument in somewhat more concrete terms. But on my reading the cases are not entirely consistent with the paper's analytical arguments; ironically they seem closer to the actual meaning of the UNGPs.

For example, several of the hypothetical cases could fall into the "contribute to" harm category (cases 1, 2 and 3), depending on additional situational factors. The Thun paper classifies all of them as instances of mere "linkage."

Moreover, the use of "high" or "low" proximity in the case studies does not seem to lead to marked differences in how these hypothetical banks behave. All appear to make reasonable efforts to gather information, exert leverage, or decide not to proceed if they feel unable to manage the human rights risks identified (in one case the bank is even excluded by a client from a deal for asking tough questions). In other words, these hypothetical banks seem to be acting in practice as if they were aware of the prospect that, unless they took appropriate action, they could be deemed to have "contributed to" harm caused by their clients—which the analysis excludes by definition. When banks land in this space it also has consequences for their role in the provision of remedy. But because the paper rules out the very possibility that banks can "contribute to" harm caused by clients, it does not address remedy at all.

Finally, the example in case # 7 is both complex and underspecified, so I don't propose to engage it on the question of whether or not it implies any specific responsibility on the part of the hypothetical bank. But I would make two general points. First, it rests on the premise that for banks "linkage" exists only when money actually flows versus when the bank is in an ongoing contractual relationship with a client. The UNGPs do not support that as a general proposition. Second, even though the example states that there is no "linkage," the hypothetical bank still seems to act as if there may be one. So once again the formal categorization of relationships seems to be largely disconnected from the action taken by the bank.

Conclusion

It is exemplary that a group of major banks is undertaking important work on the application of the UNGPs to its sector. But I fear that the misconstruing of core elements of the UNGPs and their implications in this paper may do serious damage and risks setting back some of the innovative work that we are seeing from individual banks. Therefore, I would urge the Group to reflect on these issues and consider publishing a future paper more in keeping with the core elements of the UNGPs. In doing so, the Group may want to consider authoritative elaborations of these issues.[4] I would also suggest engaging with other stakeholders—governments, businesses, civil society and independent expert groups—who have been building on the UNGPs in a variety of sectors and operating contexts.

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[1] The participating banks are Barclays, BBVA, BNP Paribas, Credit Suisse AG, Deutsche Bank, ING, RBS, Standard Chartered, UBS Group AG, and UniCredit, with J.P. Morgan.

[2] https://business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf.

[3] For the full text of the UNGPs, see *Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy' Framework,* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[4] See, for example, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide,* http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, and *Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises,* http://mneguidelines.oecd.org/global-forum/gfrbc-2014-financial-sector-document-2.pdf.