



“INVESTORS, ESG AND HUMAN RIGHTS”

BANKTRACK SUBMISSION TO UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS CALL FOR INPUT

13TH OCTOBER 2023

Note: Responses to selected questions only. Numbering may differ from that used in the Call for Input. We have answered all questions in the context of the performance of commercial banks, as a subset of investors, as per our mission and expertise.

Corporate responsibility to respect human rights

1. To what extent are investors aware of their responsibility to respect human rights? Are some types of investors more likely than others to align their practices with the UNGPs? Does it depend on the type of investor?

Since 2014, BankTrack has released four Global Human Rights Benchmark reports that assess the extent to which 50 of the largest international commercial banks are meeting the UNGPs.¹ It has also published Regional Benchmarks for Africa² and Asia³. The reports primarily look at four main categories: 1) Policy commitment, 2) Due diligence process, 3) Reporting, and 4) Remedy, and award banks scores up to a potential 14 available points. Since the criteria are closely based on the wording of the UNGPs, a score of 14 represents a “floor” of acceptable practice and not a ceiling of excellence. Some of the benchmarks’ main findings include:

- In the 2022 Global Benchmark, banks achieved an average score of 5 out of 14, an increase from the 2019 Benchmark’s average of 4 out of 14.
- Of the 50 banks covered in the latest Global Benchmark, 38 achieved a score of less than 7 out of 14, indicating that they are implementing less than half of the requirements of the Guiding Principles.
- The three highest-scoring banks received 9 out of 14, meaning that even the ‘front runners’ have work to do to fully align their policies and processes with their international responsibilities.

¹ [BankTrack Global Human Rights Benchmark 2022](#); [BankTrack Global Human Rights Benchmark 2019](#), [Banking With Principles](#) (2nd edn, 2016); and [Banking with Principles](#) (1st edn, 2014).

² [The BankTrack Human Rights Benchmark Africa](#) (2021).

³ [The BankTrack Human Rights Benchmark Asia](#) (2022).

- The Regional Benchmarks demonstrate even lower scores, with most African banks lacking basic human rights policies⁴ and Asian banks performing below the global average⁵.
- Most banks score higher on their policy commitments than on their due diligence process, reporting, or remedy, indicating that they are adopting the most basic elements of human rights governance.

The extent to which commercial banks are aware of their responsibility to respect human rights and align their policies with the UNGPs can vary widely based on numerous factors, including their size, location, regulatory environment, and stakeholder pressures. Since 2014, commercial banks' awareness and alignment with the UNGPs have improved, albeit not significantly.

2. How effective are international instruments, institutions and guidance that promotes HRDD, such as by the UN Global Compact, Equator Principles, Principles of Responsible Investment, Investor Alliance for Human Rights, Business for Social Responsibility and other entities, effective in increasing awareness of human rights impacts among investors and other businesses? Please provide examples of participation, integration, or adherence of investors in these instruments and bodies.

In response to this question, we wish to emphasise a specific problem of the Equator Principles (EPs), which we are concerned is failing in its own responsibility to enable accountability and support remedy with regard to projects that are financed by EPs signatories.⁶

There is a clear responsibility under the UNGPs for industry initiatives, like the EPs, to ensure effective grievance mechanisms are available, so that rights-holders can hold the initiative and its members accountable if the principles they commit to are not met.

Civil society groups, including ours, and other experts have long called on the Equator Principles Association (EPA), the Principles' governing body, to develop an accountability mechanism to address alleged breaches of the EPs, and provide for effective remedies to communities who suffer harm. The EPA finally committed to consider developing its own when it released the latest version of the Principles in late 2019. However, it has since announced that its considerations resulted in a decision not to proceed with the development of such a mechanism.

While we agree that projects financed under the EPs should establish their own effective complaints processes, our research suggests a majority of Equator projects lack any such grievance mechanism.⁷ Moreover, complaints mechanisms established by project developers—the very companies that cause the harms in the first place—are frequently ineffective at resolving community complaints, especially those involving complex and widespread harms. We know from our experience representing communities that mechanisms that are independent of the project developer are often more effective at resolving these types of complaints.

In response to concerns that it would be hard for the EPA to have all its 140 members agree to participate in a grievance mechanism, it could start by piloting a mechanism with members who are prepared to join.

The EPs could also provide for enforceability by requiring that signatories include clauses in all financing agreements that give both the lenders and affected communities rights to pursue remedy through arbitration

⁴ BankTrack, '[African Banks Responsive on Human Rights but Most Lack Basic Policies, Finds New Benchmark](#)' (2021).

⁵ BankTrack, '[Asian Banks Falling Behind in Implementation of UN Human Rights Principles, New BankTrack Benchmark Shows](#)' (2022).

⁶ This response draws on a blog article published by BankTrack, Accountability Counsel, and Inclusive Development International on the BankTrack website 17th October 2022, available here: <https://www.banktrack.org/blog/the-equator-principles-have-two-big-problems-a-fossilfuel-problem-and-an-accountability-problem>.

⁷ BankTrack, '["Trust Us, We're Equator Banks" Part I: The Presence or Absence of Grievance Mechanisms and Stakeholder Engagement Processes Under the Equator Principles](#)' (August 2020).

against project developers. The Hague Rules on Business and Human Rights provide model clauses and procedures for the arbitration of the type of disputes that are common with respect to EPs projects.

3. How should investors integrate human rights considerations throughout the investment process, including when constructing, underwriting, and/or investing in an ESG product or service? How do these steps vary for different asset classes?

Recent issuances of “ESG-linked” loans by commercial banks shed light on the risks connected to this class of loan. One example is Barclays’ financing of the oil and gas company Shell with an ESG-linked loan.⁸ Another is the funding of Nordgold by six European and Japanese banks with loans labelled as “ESG-linked”, despite impacts including on the residents of Carrefour, a small village in Guinea, who have been impacted by the operations of Nordgold’s Lefa gold mine for years.⁹

These examples highlight a need for increasing transparency and accountability in the provision of such loans, for which new regulation may be needed.

In light of these examples, we consider banks should include the following measures, inter alia, within the ESG-loan process in order to ensure not only that the project meets its ESG targets but also accountability in the event of harm:

- Ensure human rights due diligence extends fully to ESG-linked loans, and engage to ensure the rights of local communities impacted by recipients of such loans are fully respected.
- Exercise leverage to ensure that clients obtain Free, Prior and Informed Consent (FPIC) from affected Indigenous Peoples throughout the duration of a project, and from other affected local communities, particularly where required by local and regional regulations (for example, the 2019 ECOWAS mining sector directive.)¹⁰
- Commit to play a role in providing, supporting or enabling remediation of harms and provide supporting measures to address adverse impacts of their ESG lending clients, such as ensuring a safe resettlement process and adequately compensating community members.

4. What does appropriate investor action entail in the event that a client or portfolio company causes or contributes to a potential or actual adverse human rights impact?

Some key actions that commercial banks should take when a client causes or contributes to a potential or actual adverse human rights impact include:

- *Initial assessment:* The bank should conduct an initial assessment to determine the extent and seriousness of the human rights risks or violations associated with the client. This may involve reviewing available information, such as media reports, government findings, or third-party assessments. Where this is not adequate, the bank should, where possible, consult and engage with potentially affected rights-holders and stakeholders directly.
- *Engagement:* Banks should initiate a dialogue with the company's management to express concerns about the human rights impact and seek information on their plans to address it. This is where it is important for commercial banks to exercise their leverage by negotiating with and advocating for their clients to mitigate any potential or actual harm that they have caused or contributed to.

⁸ See Byline Times, [‘Campaign Groups Call for Increased Regulation After Barclays Classifies Loans to Shell as “Sustainable Finance”](#) (August 2023).

⁹ See BankTrack, [‘Banks Raised “Green” Finance for NordGold and then Left Communities Affected by its Guinean Goldmine Stranded’](#) (August 2023).

¹⁰ See UNEP, [‘Directive C/DIR 3/05/09 Dated 27 May 2009 on the Harmonization of Guiding Principles and Policies in the Mining Sector’](#).

- *Collaboration:* Banks can collaborate with other stakeholders, such as other investors, NGOs, and industry initiatives, to address human rights issues collectively. Joint efforts can amplify the impact of engagement.
- *Support with Remediation:* While their responsibility to provide remediation will vary based on the nature of their relationship to the harm (caused, contributed to, or directly linked to), banks should use their capacity and leverage to support their clients in ensuring that adequate and effective remediation occurs.
- *Monitor Effectiveness of Remediation:* Banks should continue consultations with affected peoples, communities, and stakeholders to ensure that the provided remediation is adequate and effective.
- *Long-term Engagement:* Banks should commit to long-term engagement with the company to monitor progress and ensure sustained improvements in human rights practices.
- *Divestment:* In cases where a company's actions pose severe and ongoing human rights risks, banks should divest or exclude the company from their portfolios.

It is important to note that the specific actions taken by commercial banks will depend on the severity of the human rights impact, the willingness of the company to co-operate, the bank's own responsible investment policies, and regulatory requirements in the relevant jurisdiction. However, our findings indicate that examples of banks providing or contributing to adequate remedy for affected people remain extremely rare.¹¹

5. What leverage do investors have to address human rights and climate change issues, and how does it differ based on asset classes and investment types? How does investor leverage differ based on asset classes, stocks and bonds, and lending?

Some of the ways that banks can exercise their leverage when lending include:

- *Refusing loans:* Banks can refuse to provide loans to companies or projects that have either demonstrated a history of disrespect for human rights and the environment or are in a sector that has high human rights and climate change risks (such as mining, fossil fuels, oil, and gas, etc.).
- *Setting conditions:* If a bank identifies risks or violations and still wants to lend, they can use their positions of power to impose strong conditions on the financing. These conditions, aimed at promoting and protecting ESG, can either be set as a precondition to financing (such as FPIC) or as an ongoing set of standards that must be met through the entirety of the loan (such as robust and ongoing HRDD).
- *Negotiation and engagement:* Banks, after providing any lending, should also be regularly reassessing their loans to ensure that any ESG, human rights, or climate change risks/impacts are being identified and mitigated through consultations and negotiations with clients.

Some of the ways that banks can exercise their leverage in relation to investment and asset management include:

- *Refusing to invest:* Banks can refuse to buy shares or bonds from certain companies that fail to meet international human rights and environmental standards and principles. They can choose to only underwrite securities for firms with strong ESG profiles and encourage ESG disclosure as part of the offering process.
- *Adopting and integrating strong human rights and climate change criteria:* Banks should also take active initiative to integrate ESG criteria into their investment decision-making processes and their

¹¹ See BankTrack, '[Actions Speak Louder: Assessing Bank Responses to Human Rights Violations](#)' (2021).

underwriting criteria when constructing portfolios or assisting companies with issuing shares or bonds.

- *Collaborating and joining sector initiatives:* Banks can further exercise their leverage by engaging and collaborating with clients, other financial institutions, and organizations to support collective initiatives aimed at addressing human rights and climate change (such as PRI, NZBA, NZAOA, the IAHR, etc.). This includes joining industry-led sustainability initiatives, disclosing climate-related risks and opportunities, and advocating for policy changes that promote sustainability.

6. What provisions can be included in contracts or investment agreements to encourage respect for human rights? Can technological devices like Blockchain assist in this regard?

Investment contracts should include clauses that secure consent from clients to make disclosure of key lending details, including client or project names, names of project's sponsors, where applicable, sector, use of proceeds, amount and duration of the financial commitment, host country and the country in which the proceeds are used.

A 2019 report from BankTrack,¹² examined some of the problems concerning banks' inability to comment on whether they had a relationship with a particular customer or project when questioned, often citing "client confidentiality" as the reason.

Although the paper did not constitute an exhaustive legal review, we found that the differences in bank behaviour could not be attributed to national legislation. Furthermore, we identified no obstacles preventing banks from disclosing information about their clients, provided they obtain their consent, nor any obstacles to banks including the right to disclose within loan agreements, a practice already adopted by some banks.

Hence, there are no technical or legal impediments preventing banks from operating with full transparency. It is a matter of their choice to obtain consent from clients for such disclosures.

The adoption of this approach would have clear benefits for local communities and civil society organisations seeking to hold banks accountable for the adverse impacts of their financing. But it would also benefit banks by allowing them to improve their environmental and social due diligence, reporting and accountability mechanisms.

Access to remedy: Non-State based mechanisms

1. What remediation responsibilities should investors have? Should these responsibilities vary depending on the nature of the responsibility e.g. cause, contribute to, or be directly linked to the adverse human rights impact? Should it vary depending on the sector invested or the type of investment activity?

Under international guidance and standards,¹³ commercial banks have distinct remediation responsibilities depending on their involvement in causing, contributing to, or being directly linked to adverse human rights impacts.

¹² BankTrack, '[We are Unable to Comment on Specific Customers: Challenging Banks on Client Confidentiality](#)' (2019).

¹³ UN Working Group on Business and Human Rights, <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>, page 6.

However, findings from the 2022 Global Benchmark¹⁴ and a 2021 BankTrack report,¹⁵ show that most banks are falling short of these responsibilities and are failing to demonstrate that they are providing or contributing to adequate remedy:

- The majority of banks (36 out of 50, or 72%) in the 2022 Global Benchmark are still reluctant to address the topic of remediation and fail to show that they are willing to play a role in remediating adverse human rights impacts that they are directly linked to.
- 14 out of 50 banks (28%) have made a clear commitment to remediation, but do not describe the banks' processes or provide any examples of where they previously provided or supported remediation.
- The 2021 BankTrack report analysed 90 instances in which banks were contacted regarding specific allegations of human rights violations. The analysis found only six cases in which banks set out any specific action taken to address their like to the impact or resolve it.

We consider that banks should clearly set out a commitment to provide for or co-operate in the provision of remedy in situations where the bank may have caused or contributed to an adverse impact, and to use its leverage to urge and support remediation whenever possible, including in cases where the bank is directly linked to harms. Further, banks must meet the responsibility to operate or participate in a grievance mechanism, particularly for those whose rights are impacted by the bank's provision of finance. The most direct way to do so will be for the bank to develop its own grievance mechanism at the bank level.

2. What measures and mechanisms, including grievance mechanisms, should be provided at the investment-level that enable individuals or communities affected by the business in which the investor has invested (e.g. the portfolio company) to report adverse human rights impacts to the investor and seek effective remedy for human rights and environmental abuses? How effective are these in providing remedies to the victims? Please provide examples of business or industry association actions in this area.

In addition to the above, the Equator Principles require banks to ensure that high-risk projects they finance have stakeholder engagement processes and project-level grievance mechanisms in place.

In a 2020 briefing paper, BankTrack reviewed a selection of 37 projects financed 'under Equator', focusing on high-impact projects financed in the most recent available reporting year.¹⁶ Of the 37 projects that were researched, it was found that:

- Less than half of the projects (17 out of 37, or 46%) had evidence of a project-level grievance mechanism.
- Only 7 projects (19%) had publicly reported on numbers, types, and outcomes of grievances.

This means either these processes or mechanisms are not in place at all, or if they are, then they cannot be found through online research and banks financing the projects are unable or unwilling to signpost them.

Further, BankTrack found that in many cases, project-level grievance mechanisms are not actually being used by affected stakeholders.¹⁷ We found reports of local communities not knowing about mechanisms, and of

¹⁴ BankTrack, [Global Human Rights Benchmark 2022](#).

¹⁵ BankTrack, ['Actions Speak Louder: Assessing Bank Responses to Human Rights Violations'](#) (2021)

¹⁶ BankTrack, ["Trust Us, We're Equator Banks" Part I: The Presence or Absence of Grievance Mechanisms and Stakeholder Engagement Processes Under the Equator Principles'](#) (August 2020).

¹⁷ BankTrack, ["Trust Us, We're Equator Banks" Part II: The Adequacy and Effectiveness of Grievance Mechanisms and Stakeholder Engagement Under the Equator Principles'](#) (November 2020).

projects where distrust in the project sponsor results in communities not trusting the mechanism to bring about effective resolutions.¹⁸ We know from our experience representing communities that mechanisms that are independent of the project developer are more effective at resolving complaints.

Good practices

- 1. Please provide examples of any good practices, tools, guidance, policies, etc., regarding the integration of the responsibility to respect human rights by investors, including examples of investors actively preventing or mitigating (including by using leverage or undertaking a responsible exit) any adverse human rights and environment impacts of the businesses in which they invest.**

We would like to signpost the following examples of good practices in commercial banking and of civil society toolkits:

- The example of ANZ’s provision of remedy to people adversely impacted by the bank’s finance for Phnom Penh Sugar is an important good practice example.¹⁹
 - For an examples of commercial banks and insurers taking action to avoid being linked to adverse human rights and environmental impacts through their project finance, see:
 - the list of banks and insurers that have made publicly known that they will not be financing the East African Crude Oil Pipeline.²⁰
 - The 2019 public commitment by seven predominantly US-based banks to no longer provide any new financing to the private prison industry.²¹
 - An April 2023 Toolkit developed by Amazon Watch and others, “Respecting Indigenous Rights: An Actionable Toolkit for Institutional Investors”.²²
 - A 2019 briefing paper from Oxfam: Consent is Everybody’s Business: Why banks need to act on free, prior, and informed consent.²³
- 2. Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would assist in ensuring that investors act compatibly with the UNGPs?**

BankTrack’s 2022 Human Rights Benchmark provides the following summary recommendations to commercial banks:

- Enhance meaningful and safe rights-holder engagement
- Improve disclosures on how adverse impacts are managed and remedied

¹⁸ Ibid, see pages 11-12.

¹⁹ See Natalie Bugalski and David Pred, [‘Lessons from the ANZ-Phnom Penh Sugar Case for the OECD National Contact Point System of Corporate Accountability’](#) (June 2023).

²⁰ See StopEACOP, [‘Don’t Bank on EACOP: Who’s Backing the Pipeline and Who’s Ruled it Out?’](#) (June 2023). Note that many of the commercial banks that have declared they will not finance the pipeline directly remain linked to the project via general corporate finance to TotalEnergies.

²¹ See Popular Democracy et al., [“2019 Impact Brief: As Wall Street Banks Sever Ties, Private Prison Companies Stand to Lose Over \\$1.9B in Future Financing”](#)

²² See Amazon Watch, [‘New Toolkit Guides Investors on Indigenous Rights Respect’](#) (April 2023).

²³ See Oxfam, [‘Consent is Everybody’s Business: Why Banks Need to Act on Free, Prior and Informed Consent’](#) (August 2019).

- Enable access to remedy and develop grievance mechanisms, also at the level of industry initiatives such as the Equator Principles
- Respond constructively when genuine human rights concerns are raised
- Support effective legislation that's good for business, people, and the planet

Please see the Benchmark report (pages 60-63) for these recommendations in full.