PROVIDING ACCESS TO EFFECTIVE REMEDY IN THE FINANCIAL SECTOR: PANEL DISCUSSION

OPENING REMARKS[1]

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Good afternoon, and thank you to the organisers for inviting us to participate in today's panel.

BankTrack is a civil society organisation focussed on private sector banks internationally, and the environmental and social impacts of their financial activities.

This is the fourth UN Forum we have attended as an organisation, and I thought that outlining our engagement in these four Forums would be useful way to give an overview of the debate on the human rights responsibilities of private sector banks. I will then go on to talk about the barriers that banks see to the establishment of grievance mechanisms.

At the first Forum, in 2012, BankTrack was in the audience, eager to hear about the banking sector's response to the then-new UN Guiding Principles. A representative of the banking sector told the Forum about the formation of the Thun Group, a group of then four banks - Barclays, UBS, Credit Suisse, Unicredit, and its plans to produce a "practical application guide" for banks on the implementation of the Guiding Principles.

At the second Forum, in 2013, the Thun Group, augmented to a group of seven banks, had released its paper.[2] BankTrack participated in a panel discussion, giving the paper a cautious welcome but lamenting, in particular, the fact that the paper only considered UN Guiding Principles 16 to 21, stopping just short of GP 22, on "remediation".[3]

At the third Forum, last year, there was no panel planned on the responsibilities of the private finance sector in the main Forum agenda, and so BankTrack organised a parallel session. We used this to launch a benchmarking report, "Banking with Principles?"[4], motivated by a sense that the time had come for banks to move beyond producing discussion papers, valuable as these may be, and to focus on implementation of the Principles.

The report took the form of a benchmarking and ranking exercise, rating 32 large global banks on their progress towards implementing the Principles. The report aimed to be as objective as possible, using criteria based on the Guiding Principles directly, and receiving an independent review from an academic expert.

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[1] NOTE: While this document forms the basis of the opening remarks given, it is not intended as a verbatim transcript.
[2] Thun Group, 2013, "UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21"
[3] BankTrack, 2013, "On the Thun Group Paper on Banks and Human Rights
[4] BankTrack, 2014, "Banking with Principles?"

The study showed that banks are at an early stage in their implementation of the Principles. On our twelve-point scale, banks scored on average just three. But there was also a wide range of performance, with the top scoring bank (the Dutch Rabobank) scoring 8/12, while a group of nine banks received scores of 1 or less. The most advanced banks had well developed human rights policies and clearly described due diligence processes. However all fell short on reporting, and we found that none of the banks had a grievance mechanism in place.

This brings us to the current Forum and the topic of today's debate.

Since producing the benchmarking report a year ago, we've had conversations with several large global banks about access to remedy, the establishment of grievance mechanisms, and what the banks feel are the barriers to fulfilling their responsibilities in this area. Since there are no bank representatives on the panel today, I will take the opportunity to present their views, based on these conversations but also on their public statements – and of course our reactions to them.

Banks have presented three main arguments for not having made more progress.

Firstly, they have said that there is a need for greater clarity on their responsibilities to provide access to remedy.

For example, the Thun Group banks stated in response to our report that it was "premature" for us to benchmark banks "on a topic that continues to be subject to much debate and has not been conclusively interpreted yet".

We agree that greater clarity on bank responsibilities would be helpful, and have written to the Office of the High Commissioner, requesting that it elaborate in particular on the differentiated responsibilities of banks and their clients to provide remedy, where the bank has contributed to the impact, and to provide grievance mechanisms.

However we believe that enough is known now for banks to make good progress in meeting their responsibilities to provide access to remedy.

For example, of course, banks ask for greater clarity on when a bank can "contribute to" a human rights impact, as their responsibility to provide remedy is limited to activities to which they have caused or contributed.

The OECD and OHCHR have both asserted that banks can contribute to such impacts, and have provided similar examples, relating to providing finance for specific activities which result in displacement of people, without stakeholder engagement or without safeguards in place.[5]

It also resonates with our common sense to say that banks can contribute to human rights impacts through their financing, particularly under project finance, where the project would not proceed without the bank's finance.

But beyond these arguments over definitions, let's remember that businesses which are "directly linked" to a human rights impact "*may also take a role*" in providing remedy[6]. This is good practice, and we would like to see banks striving towards such good practice, instead of awaiting "conclusive interpretation".

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[5] See OECD, 2014, "Due diligence in the financial sector" (page 4) and OECD, 2014, "Expert letters…". (Second letter, Paragraph 19).

[6] UN Guiding Principles, GP22, Commentary.

Secondly, banks have argued that most of the time, when a bank is linked to a human rights issue, it's caused by the client rather than by the bank, and therefore client is "in a better position" to provide remedy.[7]

We agree that this is often the case, but banks have their own responsibilities as well, and with good reason. For rights-holders, the ability to seek remedy from the financiers of a project or company as well as the project sponsors directly will only be to their benefit. Indeed the company directly responsible may prove unwilling or unable to remedy the impact.

And of course banks, like any other business, can also cause human rights violations directly. For example in the wake of the financial crisis, some banks were accused of racial discrimination in mortgage provision. This adds to the need to provide access to remedy.

It is important to distinguish here between the *responsibility to remediate human rights impacts* on the one hand (in the second pillar), and the *responsibility to provide access to remedy, through a grievance mechanism* on the other (in the third pillar). All businesses have a responsibility to establish or participate in operational level grievance mechanisms. These mechanisms are there to enable remediation, but also to ensure grievances are addressed early; to enable rights holders to "engage the business enterprise directly in assessing issues" - and to "support the identification of adverse impacts as part of an enterprise's ongoing human rights due diligence"[8].

Therefore the responsibility to establish or participate in a grievance mechanism is not limited to impacts to which the bank causes or contributes. It does not require that a complaint amounts to an alleged human rights abuse before it can be raised. It aims to identify legitimate concerns of those adversely impacted. As such it is a universal responsibility.

And, as the Principles make clear, a grievance mechanism can have important benefits to the bank as a source of information and as a means of remedying impacts before they spiral and become more costly.

Thirdly and finally, banks have argued that they meet the responsibility to provide access to remedy through their participation in external initiatives.

For example, by co-operating with the OECD NCP, should a case be brought before them (as one bank said in its response to our study), or through involvement in the Equator Principles.

Hopefully it is clear that relying on OECD National Contact Points is not sufficient for any business to meet its responsibilities to provide access to remedy.

Under the Equator Principles, banks must make sure the projects they finance include grievance mechanisms. This is positive. However this is not sufficient to meet the bank's own responsibilities under the UNGPs, to "establish or participate in" an effective grievance mechanisms.

Simply instructing a client to operate a grievance mechanism, and then stepping back, cannot be considered "participating". Participating would involve the bank being a party to the complaint, and working together with the client towards its resolution.

[7] See for example "Are big banks short-selling their leverage over human rights?", A. Meyerstein, The Guardian, 2013
[8] UN Guiding Principles, GP29, commentary

It must also be noted that the Equator Principles themselves do not operate a complaints mechanism. The Guiding Principles are strongly worded when it comes to the responsibilities of collaborative initiatives, stating that those which are "based on respect for human rights-related standards should ensure that effective grievance mechanisms are available" and that "the legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms".[9]

BankTrack has been calling since 2003 for the Equator Principles to establish a grievance mechanism, and its failure to comply with the UN Guiding Principles on this point does indeed threaten its legitimacy.

To briefly conclude, the banking sector can fulfil its responsibilities to provide rights holders with access to remedy in a number of ways. Full participation in client grievance mechanisms may be part of this. Participation in multi-stakeholder grievance mechanisms such as the (urgently needed but still non-existent) Equator Principles grievance mechanism may also contribute. However neither would take the place of a grievance mechanism which applies to the whole of a bank's operations and is accessible to all rights holders potentially affected by them.

We are not prescriptive about exactly how such mechanisms should be established: on an individual bank basis, or operated by a number of banks on a country, regional or international basis. We would like to see banks trial different models of grievance mechanism and see what works best, learning by doing. I look forward to discussing how such grievance mechanisms may look in practice further in the panel.

[9] UN Guiding Principles, GP30, Commentary