

HUMAN RIGHTS BRIEFING PAPER: HOW BANKS CONTRIBUTE TO HUMAN RIGHTS VIOLATIONS

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A flotilla of activists stop construction at the Kinder Morgan tanker terminal in Vancouver, Canada, October 2017

Image: 350.org/Zack Embree

INTRODUCTION

In this briefing paper, BankTrack considers instances in which private sector banks may have *contributed* to adverse human rights impacts through their provision of finance. It sets out eight cases of human rights abuses linked to bank finance, and examines the relationship of the bank to each impact. The cases selected are those where there is, in BankTrack's view, a compelling argument that banks were not only *directly linked* to the impact through their finance, but may have contributed to it. With this paper, we hope to help encourage banks to acknowledge that they may contribute to human rights impacts through their finance and must act accordingly.

The responsibility to respect human rights

The responsibility to respect human rights, as defined by the UN Guiding Principles on Business and Human Rights ("the Guiding Principles"), requires that business enterprises: (a) avoid *causing or contributing* to adverse human rights impacts through their own activities, and address such impacts when they occur; and (b) seek to prevent or mitigate adverse 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.¹

This responsibility sets out a different, higher level of responsibility for businesses when they *cause or contribute* to a human rights impact, compared to when they are *directly linked* to the impact through a business relationship, but do not contribute. In a case of contribution, the business should take the necessary steps to cease its contribution and use its leverage to mitigate any remaining impact as far as possible. It should also provide for or cooperate in the remediation of the impact. In a case of direct linkage, the business still has an important role to play to seek to prevent or mitigate the impact, but is not required to provide for remediation, although it may play a role in doing so.²

The most severe actual and potential human rights impacts of private sector banks are typically related to their core activity - the provision of finance. As businesses *cause* human rights impacts if their actions and decisions *on their own result* in the abuse, without contribution from clients or other entities, human rights impacts connected with bank finance will in almost all cases involve either *contribution to or direct linkage with* the human rights impact.

The controversy over bank contribution to human rights abuses through finance

While it is clear and widely accepted that the UN Guiding Principles apply to all enterprises regardless of sector, and that they therefore apply to private sector banks, the extent to which banks can *contribute* to human rights violations via their finance is still debated. For example, a January 2017 Discussion Paper by the Thun Group of banks provoked strong criticism when it took as its starting point the assumption that a bank “would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients' operations”, and discussed only circumstances in which banks were, in the paper’s analysis, *directly linked* to human rights impacts, through business relationships with clients.³ This ran counter to earlier advice from the UN agencies responsible for interpreting the Guiding Principles - the UN Working Group on business and human rights (UNWG) and the UN Office of the High Commissioner for Human Rights (OHCHR).⁴ As such it was widely challenged by civil society organisations including BankTrack, as well as by the UNWG and Professor John Ruggie, the architect of the Guiding Principles, who was “deeply troubled” by the paper.⁵

A report of the subsequent meeting hosted by the Thun Group in June 2017 indicated that the banks had moderated this position slightly, stating that “the bank representatives acknowledged the possibility of contribution to human rights harm through own activities ... though they considered these as rare when providing financial products & services.” The Thun Group agreed at the meeting “to clarify some of the statements” in the 2017 Discussion Paper, and a revised version of the paper is expected soon.⁶

We consider that, on the contrary, banks can and unfortunately do contribute to human rights violations when providing financial products and services, and that while such occasions may not represent a high proportion of a bank’s transactions, in absolute number they are rather common, and their impact is significant.

Purpose and scope of this paper

This paper aims to continue and build on the dialogue that has followed the Thun Group’s January 2017 paper and its June 2017 meeting, by presenting examples of actual cases in which banks are likely to have contributed to human rights abuses through their finance in our analysis.

In each case we set out, as far as possible given the information publicly available about the actions of banks and their clients:

- the adverse human rights impact that occurred,
- the nature of private sector bank involvement, and
- a discussion of the relationship between the banks involved and the impact.

For the purposes of generating discussion and advancing our own understanding, we present both cases that we consider clear-cut instances of bank contribution to human rights abuses, as well as more borderline cases in which there is a discussion to be had about whether banks have contributed to a human rights impact, or situations where banks may move from being directly linked to an impact towards contributing to it, e.g. through failure to act. We have aimed to present a diverse range of impacts, beginning with those resulting from specific projects, and then considering sector- and country-level impacts. Given the limited resources of civil society to follow controversial companies and projects financed by banks, there will inevitably be many more cases.

In this paper, we do not seek to unilaterally determine whether banks contributed to human rights abuses in these cases, but to put our opinion and arguments on the extent to which these cases represent contribution, based on our interpretation of UN advice. We hope that in so doing we can build on the ongoing debate on this topic by bringing real examples to bear on a discussion which is often dominated by theoretical or anonymized cases, and thereby help to bring about a situation in which thorough and ongoing due diligence by banks results in fewer instances of human rights abuses by bank clients, and more cases in which banks play a role in preventing abuses caused by their clients from occurring and addressing and remediating them where they do occur.

Evaluating examples of bank links to human rights impacts

In evaluating the extent to which banks contributed, or may have contributed, to the human rights impacts outlined in the eight cases below, we principally reference the June 2017 guidance from the OHCHR.⁷ This constitutes the most detailed UN guidance available on the application of the Guiding Principles to the banking sector. The OHCHR guidance notes the following factors that may be used to determine whether a bank is causing or contributing to, or has a direct link to an adverse impact, while noting that this is not an exhaustive *ex-ante* checklist:

- *Whether the bank's actions and decisions on their own* were sufficient to result in an adverse human rights impact, without the contribution of clients or other entities. If so, the bank is 'causing' an adverse impact.
- *Whether the bank was incentivising harm*, i.e. whether the bank's actions or omissions (failure to act) make it more likely that someone else will cause the harm. Such instances are necessarily instances of contribution.
- *Whether the bank was facilitating the harm*, i.e. where the bank adds to conditions that make it possible for someone else to cause harm. A bank may facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks.
- *The quality of a bank's human rights systems and its human rights due diligence processes*, i.e. its processes to identify, prevent and mitigate harm, is an important factor. Where a bank has not undertaken appropriate human rights due diligence, it may miss risks and omit to take the steps necessary to prevent or mitigate these risks.

The OHCHR guidance also notes that there is, in practice, a continuum between *contributing* to and having a *direct link* to an adverse human rights impact, and that a bank's involvement with an impact may shift over time (in either direction), depending on its own actions and omissions. For example, a bank may move from being directly linked to an impact to contributing, if it fails over time to take reasonable steps to seek to prevent or mitigate an impact of which it is made aware. The guidance provides further context and explanation for each of the above points.

CASES OF POSSIBLE CONTRIBUTION BY BANKS TO HUMAN RIGHTS ABUSES

Case 1: Dakota Access Pipeline, United States

Background and human rights impact: The Dakota Access Pipeline (DAPL) is a 1,772-mile oil pipeline connecting the Bakken and Three Forks production areas in North Dakota to a storage hub at Patoka, Illinois.⁸ The pipeline travels underneath the Missouri River, the primary drinking water source for the Standing Rock Sioux, meaning leaks or oil spills could contaminate this water source.⁹ An earlier planned route crossed the Missouri river close to the North Dakota capital, Bismarck, but it was rerouted to move the water crossing closer to the Standing Rock reservation.¹⁰ The pipeline passes within about 500 feet (150 m) of the border with the Sioux reservation, crosses disputed and unceded Sioux territory, and impacts burial grounds and sacred sites.¹¹ Pipeline construction crews are also alleged to have bulldozed a site that was identified by the Standing Rock Sioux Tribe as sacred tribal burial ground.¹²

The project has been widely described as breaching the human rights of Indigenous peoples. The Institute for Human Rights and Business (IHRB) has noted that it “conflicts with the international standard of Free, Prior and Informed Consent”, and Amnesty USA stated that the resumption of pipeline construction “violates rights of Indigenous Peoples”.¹³ Also, during resistance to the project, Native Americans and other protesters have been subjected to excessive force, unlawful arrests and mistreatment in jail, at the hands of North Dakota National Guard, law enforcement officials, and private security - treatment denounced by UN officials.¹⁴

Involvement of banks: In August 2016, 17 banks provided a US\$2.5 billion loan to Dakota Access, LLC and Energy Transfer Crude Oil Company for construction of the Dakota Access Pipeline and the Energy Transfer Crude Oil Pipeline. Citi, Mizuho, Bank of Tokyo Mitsubishi UFJ and TD Bank were the lead arrangers. A number of other banks provided general corporate finance to the company constructing the pipeline, Energy Transfer Partners (ETP), although this finance was not directly provided for the purposes of this project.¹⁵

Relationship of banks to the impact: Following the OHCHR’s advice, a bank may be *contributing* to harm by facilitating it if it “knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks.” As the final route of the pipeline was reportedly known as early as September 2014, the 17 banks financing the project should have known of the human rights risks associated with the project well before financial close.¹⁶ However there is no evidence that these banks took action to require, encourage or support the client to prevent these risks, e.g. through requiring the pipeline consider alternative routes. In BankTrack’s view, these 17 banks are therefore *contributing* to the adverse human rights impacts caused by the pipeline project, by adding to conditions that make it possible for someone else (i.e. the pipeline project consortium) to cause harm. This means the banks are responsible for seeking to address the human rights impacts to which they have contributed by providing for or cooperating in remediation of the impacts, commensurate with their own contributions.

Banks that provided general corporate finance to ETP are also at least *directly linked* to the human rights impacts of the pipeline, through their business relationship with the company. As such, they remain responsible for seeking to prevent or mitigate these impacts, and following the UN Guiding Principles, may take a role in providing for remediation (although they are not required to do so).¹⁷ Furthermore, failure to take reasonable action to prevent or mitigate these impacts over time could cause these banks to move towards contribution.

Case 2: Trans Mountain Pipeline Expansion Project, Canada

Background and human rights impact: The Trans Mountain Pipeline Expansion Project is a planned pipeline which will run roughly parallel to the original Trans Mountain Pipeline, along a 1,150km route from Alberta to the west coast of British Columbia. It is designed to facilitate an increase in exports of oil from Canada's tar sands. The project is being developed by the US energy infrastructure company Kinder Morgan.

Like the Dakota Access Pipeline, the Trans Mountain project is opposed by many affected Indigenous tribes. Outstanding legal challenges have been filed by the Coast Salish, Sto:lo, Nlaka'pamux, and Secwepemc Nations, whose territories cover more than half the length of the pipeline, and the Tsleil-Waututh, Squamish, Musqueam, and Sto:lo First Nations, whose territories cover most of Metro Vancouver Area, impacted by the route and the port terminal.

In addition, spills from the pipeline would endanger local sources of drinking water, including in some communities the only available water source. Much of the massively destructive tar sands extraction process that would feed this pipeline also occurs on First Nations traditional territories and treaty lands, and is opposed by tribes including the Lubicon Cree and Beaver Lake First Nations.¹⁸ The pipeline is awaiting approval from the Trudeau government, which is expected before the end of the year.¹⁹

Involvement of banks: Kinder Morgan is financing the CAD 7.4 billion Trans Mountain Expansion Project primarily through an IPO for its Canadian subsidiary, which raised CAD 1.75 billion in April 2017, and a CAD 5.5 billion credit facility raised in June 2017, of which CAD 5 billion is specifically for the project. TD Bank and RBC were the main underwriters of the credit facility, and via their investment banking arms also the joint bookrunners of the IPO, and 26 other banks also participated in either the credit facility or IPO. These banks' finance is directly supporting the construction of the pipeline.²⁰

Relationship of banks to the impact: This pipeline has not yet been constructed, yet it currently does not have the Free, Prior and Informed Consent (FPIC) of many Indigenous peoples affected. The 28 banks participating in the credit facilities and IPO have been informed of this²¹, and if the project proceeds without FPIC and these banks fail to take reasonable steps to prevent this risk, they may be said to be facilitating the human rights impact. This is likely to result in contribution to a breach of Indigenous rights, in a similar way to the Dakota Access Pipeline case.

These banks could have either decided not to proceed with providing this finance, or made the finance conditional on FPIC being in place, and other impacts mitigated. The banks have now missed this opportunity. In theory, they could now use their leverage to ensure FPIC is sought and achieved, however in practice, given the extent of the opposition of many Indigenous peoples to the pipeline proceeding at all, this may not be possible. These banks should now carefully consider and communicate how they can avoid contributing to an abuse of human rights in this case.

Case 3: Agua Zarca hydroelectric project, Honduras

Background and human rights impact: The Agua Zarca dam is a 22-megawatt run-of-the-river hydroelectric project under construction on the river Gualcarque in Honduras. The Honduran company Desarrollos Energéticos S.A. (DESA) was created in 2008 to develop the project, although objections to the project from the local Indigenous Lenca population and from the Honduran federation of Indigenous groups COPINH began in 2006 when the first studies for the dam took place. The river Gualcarque is an important resource for drinking water, swimming, washing and fishing, with important cultural and spiritual value for these impacted communities.²²

The human rights impacts of the project itself include the violation of Indigenous and traditional peoples' right to Free, Prior and Informed Consent (FPIC)²³, infringement of Indigenous land and resource rights and infringements of cultural rights, and impacts on the rights to food and water, as detailed for example in a dossier presented to the turbine manufacturer Voith by civil society groups in 2015.²⁴

They also include repression by state security forces of the Lenca people resisting the project, which took place over a number of years and culminated in the murder of Berta Cáceres, the COPINH leader, in March 2016, and of COPINH member Nelson Garcia a few days later. These were part of a series of killings and attempted killings associated with the project, stretching back to the murder of COPINH member Tomas García and the close-range shooting of his 17-year-old son by the Honduran military during a peaceful demonstration at the dam site in July 2013.²⁵

Involvement of banks: The Dutch development bank FMO, together with Finnish government-owned Finnfund and the Central American Bank for Economic Integration (CABEI), were the main financiers of DESA's construction of the Agua Zarca dam. FMO was the lead arranger, committing US\$15 million of the US\$64 million total project costs. FMO made its investment in 2014, and announced in March 2016 following the murder of Berta Cáceres that it would seek to exit the project.

Relationship of banks to the impact: COPINH repeatedly contacted FMO and other project financiers from 2013 onwards insisting that they should not fund the Agua Zarca project, as the project sponsor had not obtained FPIC from the Lenca people, and because land titles had not been properly obtained. In addition, the project financiers knew at the time of their investment in 2014 that the project had the potential to result in conflict and violence, given the murder of Tomas García the year before and the numerous warnings from COPINH of threats made against them.

FMO, as the lead arranger and the financier identified by NGOs as possessing the most leverage over DESA, was made aware of the serious risks facing human rights defenders in Honduras and the failure of the government to protect the rights of Indigenous peoples. NGOs warned that this made it impossible for FMO's environmental and social policies to be implemented adequately.²⁶ Correspondence from the bank shows that it assessed these risks but believed that FPIC had been obtained and other risks were sufficiently manageable for the bank to continue.²⁷ On the basis of this flawed analysis, it did not take action to require the client to prevent or mitigate these risks (or did not disclose such action), indicating its due diligence was not adequate in this case.

As such, the case represents in BankTrack's opinion an example of FMO *contributing* to severe human rights violations, following the OHCHR's description of facilitating the harm. The other financiers, Finnfund and CABEI, are also likely to have contributed to the harm, as the leverage of a business does not in itself affect its relationship to the impact. However, FMO's level of foreknowledge of the risks is clearer.

BankTrack has welcomed the decision of FMO and Finnfund to exit the project, and steps since taken by FMO to review its human rights policies and processes. While this may go some way towards addressing the banks' contribution to the impacts, or at least ceasing further contribution, we consider that these financiers remain responsible for cooperating in providing remediation for those affected.

Case 4: Phnom Penh Sugar, Cambodia

Background and human rights impact: In 2010–2011 hundreds of families were forcibly removed from their homes in over 20 villages in Kampong Speu province, Cambodia to make way for a sugar plantation. Families were evicted without compensation, or with figures as low as US\$40 for land that once provided them with food and a livelihood. There have been food shortages because resettlement sites were located on infertile land and community forests and crops were destroyed. Further human rights impacts, including child labour and deaths of plantation workers due to dangerous working conditions, have been documented.²⁸

Involvement of banks: From 2011–2014, Australia’s ANZ part-financed a Phnom Penh Sugar (PPS) mill, built on, and sourcing from the contested land. While ANZ has not disclosed the amount it loaned PPS since 2011, it is believed to be tens of millions of dollars through its Cambodian subsidiary, ANZ Royal Bank.

In 2014 it was reported that the loan had been repaid and the relationship had been brought to an end, due to the company’s inadequate response to a detailed project plan developed by ANZ designed to address these issues.²⁹ Villagers and NGOs expressed disappointment, insisting that the bank still has a responsibility toward the affected communities.³⁰

In October 2014, a complaint was lodged against ANZ to the Australian National Contact Point (NCP) on the bank breaching the OECD guidelines for multinational enterprises. At the time of writing the case remains pending.

Relationship of the banks to the human rights impact: The OECD complaint makes the case that ANZ *contributed* to human rights abuses in this instance, on the basis that it failed to undertake reasonable due diligence prior to engaging with PPS, and because it failed to follow the findings of the social and environmental reports that the bank commissioned prior to issuing the loan. While the case remains pending, these allegations are consistent in our view with the bank contributing to the human rights violations, following the OHCHR’s description of facilitating the harm and its apparent due diligence failings.

It is also relevant to consider whether the bank’s reaction since the impacts occurred has been sufficient to address or affect its relationship to the impacts. Media reports indicate that the bank sought to address the impacts by presenting a detailed action plan to PPS, but the company chose to pay out its loan and cease its relationship with the bank rather than implement the plan.³¹ ANZ has since developed a new position statement on Land Acquisition, and has stated that it has been assisting the Australian NCP’s investigation.³² However, while these steps are welcome, the bank’s response has not yet had any appreciable positive impact on the rights-holders forced from their land in this case. Even if these steps may begin to move the bank along the continuum towards a situation of *direct linkage*, they do not remove the bank’s responsibility to contribute to addressing the impacts given its earlier contribution.

Case 5: Drummond and paramilitary violence, Colombia

Background and human rights impact: The US coal company Drummond produces most of its coal in the Cesar mining region of Colombia, an area in which paramilitary violence has had profound impacts for the local population. Conservative estimates suggest paramilitaries drove over 55,000 farmers from their land and killed at least 3,100 people in the period from 1996 to 2006, with the intention of defending the interests and properties of the local economic elite against guerrilla activities.

The Dutch peace movement PAX has investigated reports of links between this violence and mining companies operating in the area, including Drummond. Extensive legal testimonies examined by PAX indicate that Drummond and other mining companies supported the paramilitaries in several ways, including requesting their establishment and financing them. Drummond strongly denies these allegations, and the matter is currently under criminal investigation in Colombia.³³

Drummond has also benefited from the human rights abuses committed by the paramilitaries in various ways: the company has purchased land which was forcibly cleared by paramilitaries, and the violence and threats by the paramilitaries against trade union leaders and civil society organisations has weakened and curtailed the activities of these groups. PAX has called on the company to take an active, cooperative role in ensuring access to effective remedy for victims and their families for the gross human rights violations they have suffered, through dialogue with these victims and their communities; however the company has to date resisted any involvement in such remediation.

Involvement of banks: Research for BankTrack in 2016 identified seven large private sector banks that provided loans to Drummond since 2010: Bank of America, BNP Paribas, BBVA, Citigroup, HSBC, Mizuho Financial and Wells Fargo. The finance was provided through two revolving credit facilities of US\$550 million and US\$750 million in 2010 and 2012 respectively.³⁴ Such general-purpose loans to Drummond can be said to directly support the company's operations in Cesar, as 95% of Drummond's coal output is generated from these operations. No information about previous bank finance for Drummond is publicly available.

Relationship of the banks to the human rights impact: Finance by banks for Drummond does *not* represent a straightforward case of contribution by banks to a human rights impact, as the finance identified occurred years after the alleged human rights abuses occurred. However, the OHCHR Guidance notes that a bank's relationship to an impact "may shift over time, depending on its own actions and omissions. For example, if a bank identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a client relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact ... it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of 'contributing'."

Banks may argue they are only responsible for human rights impacts occurring during or after their financing. However, it is important not to confuse the action which results in an adverse human rights impact, with the impact itself, which may be ongoing. For example, the right to a remedy is itself a human right that only ends with the provision of remedy or the demise of the victim. For as long as individuals have a reduced ability to enjoy their human rights, the adverse impacts remain, as does the responsibility to remedy them.³⁵

Given the seriousness of the allegations in this case, and the ongoing efforts of the victims to seek remedy, banks that fail to take reasonable steps to exercise leverage over Drummond to provide remedy risk moving into a position of *contributing* to this impact. This is particularly the case for any banks that continue to extend finance to the company.

Case 6: Finance for cluster munitions, International

Background and human rights impact: Cluster munitions are indiscriminate weapons which scatter submunitions or bomblets over a wide area, causing severe threats to civilian lives not only during conflicts, but also post-conflict, as many submunitions fail to explode upon impact.³⁶ An international convention on cluster munitions categorically bans their use, production, stockpiling and transfer. Yet a handful of companies continue to manufacture cluster bombs, and continue to receive finance from private sector commercial banks.

The Dutch peace organization PAX identified China Aerospace Science and Industry (China), Hanwha (South Korea), Norinco (China), Orbital ATK (US), Poongsan (South Korea) and Textron (US) as the companies producing cluster munitions, with discernible links to the finance sector. Textron has announced it will cease production, but will make deliveries until at least the end of 2017.³⁷

The UNGPs make clear that business human rights due diligence should assess *potential* as well as actual human rights impacts. All manufacture of cluster munitions creates such a potential adverse human rights impact. This is likely to become an actual human rights impact when the munitions are used. In one example of recent use of cluster munitions in conflict, Human Rights Watch has accused Saudi Arabia of dropping US-supplied cluster bombs manufactured by Textron in Yemen. Orbital ATK manufactures key components of the type of cluster munition used.

Involvement of banks: PAX found 166 financial institutions invested US\$31 billion in the cluster munitions producers listed. Together they provided loans of at least US\$7.0 billion, provided investment banking services worth at least US\$9.3 billion, and owned or managed shares and bonds worth at least US\$14.5 billion. On the other hand, the number of institutions with policies excluding investments in cluster bomb producers grew to 88 in 2017.

The largest banks in China, Japan and the US are well represented on this list, with Bank of America, Bank of China, BPCE Group, Citigroup, Goldman Sachs, JPMorgan Chase, Mitsubishi UFJ, Morgan Stanley, Sumitomo Mitsui Financial Group and Wells Fargo all listed as providing loan facilities and/or bond issuances for Textron, and in most cases Orbital ATK as well.

Relationship of the banks to the human rights impact: Given the small number of companies manufacturing cluster munitions commercially, the international convention banning their production, and the regular investigations into finance for these manufacturers conducted by PAX and FairFin since 2009, banks should be well aware of the actual and potential human rights risks associated with companies manufacturing cluster munitions. As such, any bank finance for cluster munitions manufacturers is likely to facilitate the harm, following the OHCHR's guidance, and therefore may be *contributing* to the human rights impacts, unless the bank takes significant action to require, encourage or support clients in this sector to cease cluster munition manufacture. Given the reputational risks of cluster munition manufacture and the fact that these products do not represent the core business of the manufacturers identified, this may well be possible in theory. However, no such efforts by banks financing cluster munitions manufacturers have been disclosed.

While efforts to engage with cluster munitions manufactures may be argued to move their financiers into the territory of *direct linkage* - particularly if successful within a short time frame - BankTrack supports the view of PAX and others that banks should develop policies that exclude *all* financial links with companies involved in cluster munitions production, with no exceptions. Banks that have contributed to human rights violations by financing cluster munitions manufacturers should take steps to cease this contribution, and to provide for or cooperate in the remediation of the impacts that have taken place as a result.

Case 7: Bank support for illegal settlements, Palestinian territories

Background and human rights impact: Israeli settlements on occupied Palestinian land are widely recognised as illegal under international humanitarian law, and successive UN and other reports have documented human rights violations linked to these settlements. These include violations related to the confiscation of Palestinian land, water, and other natural resources for the benefit of settlements and residents of Israel, and to Israel’s discriminatory policies against Palestinians, which Human Rights Watch describe as governing virtually every aspect of life in the area of the West Bank under Israel’s exclusive control, and which forcibly displace Palestinians while encouraging the growth of the settlements.

Involvement of banks: The involvement of banks in Israeli settlement enterprise in the occupied West Bank has been documented in detail. As the research centre Who Profits has shown, Israeli banks provide the financial infrastructure for all the activities of companies, governmental agencies and individuals linked to the continuing occupation of Palestinian land. Its February 2017 report found that that all Israeli banks without exception provide loans and financial services to local and regional councils of Israeli settlements in the West Bank, and that all except Dexia Israel had provided project-related loans to construction and infrastructure projects in settlements in the West Bank and East Jerusalem. This represents direct financing for the councils which administer the settlements and for the act of illegal settlement construction and expansion itself. Furthermore, most Israeli banks have several branch offices and ATMs in Israeli settlements in the West Bank and East Jerusalem.

Human Rights Watch argued that “by providing services to and in settlements, and partnering with developers in new construction projects, Israeli banks are making existing settlements more sustainable, enabling the expansion of their built-up area and the take-over of Palestinian land, and furthering the de facto annexation of the territory. All of this contributes to serious human rights and IHL [international humanitarian law] abuses.”

Relationship of banks to the impact: Israeli banks can be assumed to know of the human rights and international humanitarian law impacts of the settlements; however, we know of no evidence of steps taken by these banks to require, encourage or support their clients to prevent or mitigate these risks. Therefore, the majority of bank finance for construction or infrastructure projects which establish or expand these settlements is consistent with *contribution* to human rights violations, following the OHCHR guidance relating to facilitating the harm by not taking steps to require clients to prevent or mitigate clearly present risks. In this way, the banks financing activities in the illegal settlements may be said to create a “facilitating environment” where the clients may be more likely to take actions that result in abuses.

Note that it is also possible that bank activities in settlements, such as construction and operation of branches, may *cause* adverse human rights impacts directly, as they do not require the contribution of clients or other entities. Meanwhile, international banks with shareholdings or other exposure to Israeli banks may be *directly linked* to human rights impacts caused by Israeli banks though their business relationships with them. However, our focus in this paper is on bank *contribution* to human rights impacts via the provision of financial services, and as such these questions are outside the scope of this paper.

Human Rights Watch has recommended that international investors engage with Israeli banks, as well as noting that the UNGPs recommend that enterprises should consider ending the relationship where they lack the leverage to prevent or mitigate adverse impacts. Other advocates of boycott, divestment and sanctions (BDS) have argued that this does not go far enough, and investors should disengage with Israeli banks due to their complicity in war crimes rather than engaging without a deadline.

Case 8: Secret loans scandal, Mozambique

Background and human rights impact: Mozambique suffered an economic crisis in 2016, triggered in large part by the disclosure of the government's enormous debt to state-owned companies. The debt originated in 2013 when the government was loaned US\$2 billion (one eighth of the country's GDP at the time) for the purchase of a tuna fishing fleet and maritime security boats and operations. The loans were kept secret from the IMF, international donors and even the country's parliament, until 2016 when the country's inability to pay became apparent. When they were disclosed, donors, which provided about a quarter of the government's budget, suspended aid and the government defaulted on the loans.

Any economic crisis has human rights impacts, including causing the loss of access to work, affordable food, housing, water and other necessities. Often the rights of women, children, and vulnerable and marginalized persons are disproportionately impacted. The economic crisis in Mozambique has imposed austerity on an already impoverished country, and Human Rights Watch noted that its impact "makes it harder for people to enjoy basic economic and social rights". Much of the proceeds of both loans is reported to have been diverted towards military spending, while at least US\$500 million remains unaccounted for.

Involvement of banks: The loans were organised in the London offices of Switzerland's Credit Suisse and Russia's VTB bank. The banks arranged for the Mozambique government to borrow US\$850 million from international speculators via the issue of "tuna bonds", and together lent a further US\$1.1 billion to two state owned companies, Proindicus and Mozambique Asset Management. The loans received a government guarantee, although local watchdogs such as the Mozambique Budget Monitoring Forum say they were illegal because parliament did not approve the loans.

An independent audit report found that Credit Suisse initially imposed a number of conditions on the loan, including that it was to be reported to the IMF, but these were later dropped. The audit report also found that the assets purchased with the loans - mainly boats - were overpriced and never became operational.

Relationship of the banks to the human rights impact: The loans provided in this case represented such a large proportion of Mozambique's GDP that the potential for economic disruption, and the attendant human rights impacts of this, should have been factored into the banks' due diligence. According to Eurodad, even if the money had been spent properly, the country "would have faced significant repayment challenges". In this case, the actions of the bank in providing the loans in secret, and not reporting them to the IMF, appear to have incentivised the harm by making it more likely to occur, following the OHCHR guidance.

There is also a case to say that the banks facilitated the harm in this case, through omitting to take sufficient due diligence to reveal the risks inherent in the deal. The fishing boats purchased from the loan are unused and are reported to be "rusting in the harbour", while the independent audit report found a difference of \$713 million between the shipbuilder's invoices and the market price for the boats, which it has been unable to explain. This has shed doubt on the extent of bank due diligence - e.g. the UN's Independent Expert on foreign debt noted in a letter to the Thun Group banks that "one wonders how it was possible that private financial institutions did not consider the risks of facilitating the placement of bonds on international financial markets for state-linked business corporations lacking sound business plans and a minimum of transparency." In BankTrack's opinion, this adds up to a strong argument that the banks *contributed* to Mozambique's deep economic crisis and its human rights impacts. Campaigners from the Jubilee Debt Campaign are calling on Credit Suisse and VTB to drop the debt, as well as to fully comply with an external audit, and change their policies and procedures to ensure they do not in the future agree loans which have not been approved by a country's parliament, or which break the law in that country.

RECOMMENDATIONS FOR BANKS

Recognise the principle: This briefing paper has profiled cases involving adverse human rights impacts which are in the majority of cases ongoing, and where remediation is required. We have not focussed here on what form that remediation should take, or what role banks should play in remediating these impacts. The appropriate action will vary in each case, and in many cases would benefit from further multi-stakeholder discussion. But for this discussion to take place, banks must first recognise the principle that they *can* contribute to human rights abuses through their finance. As the OHCHR has made clear, this does not shift the burden of responsibility from the client causing the impact onto the bank, and the bank's client retains its own responsibilities under the Guiding Principles.

It is the lack of recognition of this principle by many banks, and in particular by the Thun Group banks, that has made this paper necessary. Banks should now make clear in their human rights policies that they accept this possibility, and commit to put in place processes to enable remediation of impacts where appropriate, including grievance mechanisms which meet the effectiveness criteria set out in the Guiding Principles. This should at a minimum extend to remediation of impacts which banks recognise they have caused or contributed to, while recognising that banks may also play a role in providing for remediation of impacts they have not caused or contributed to.

Ensure there is remedy: Having recognised the principle, banks should take action wherever possible to participate in the remediation of impacts where they identify that they *may have* caused or contributed to them. We do not expect the debate over when exactly a bank may contribute to a human rights impact through its finance to be definitively settled any time soon. The point is not to develop elaborate criteria to determine whether contribution has occurred, but to protect rights-holders. This goal is most likely to be achieved by banks participating in good faith in efforts to secure remediation wherever they may have contributed, or see that they can play a constructive role in remediation, at the same time as constructively engaging in multi-stakeholder discussions to resolve outstanding questions on their responsibilities.

Improve due diligence, and be prepared to walk away: In the majority of cases above, we have argued that banks are likely to have contributed to a human rights abuse through facilitating the harm that occurred - that is, financing an activity under circumstances where the bank knew or should have known of a significant human rights risk, but omitting to take reasonable steps to require, encourage or support the client to prevent or mitigate this risk. This indicates banks can avoid contribution through improving their due diligence, being more prepared to insist on measures to avoid adverse impacts as a condition of finance, and being prepared to forego business where this is not possible. Banks can also avoid moving into a position of contributing to a human rights impact over time by showing how they prioritise such impacts for human rights due diligence and how they have acted to prevent or mitigate impacts to which they are directly linked.

Engage constructively and seek guidance: As noted earlier, the January 2017 paper by the Thun Group of banks ran counter to earlier advice from the UN OHCHR and Working Group. This highlights a need for banks to engage widely and constructively, including with these UN bodies, in the event of further questions or disagreements on the interpretation of the Guiding Principles. We also urge the Thun Group to make good on its June 2014 commitment to define a stakeholder engagement strategy, in a way which includes consultation with recognised experts, potentially affected groups and other relevant stakeholders as part of the process of developing future guidance for the banking sector.

We welcome responses from banks and others on the cases covered in this briefing and the analysis of the relationship of the bank to the impact in each case, as well as on the appropriate role for banks in providing remediation. We also welcome positive examples from banks of their efforts to participate in remediation of adverse human rights impacts linked to their finance.

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