

Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises

REFERENCE: SPB/SHD/UH/ff

23 February 2017

Dear Members of the Thun Group of Banks,

I am writing to you on behalf of the United Nations Working Group on Business and Human Rights (“the Working Group”),¹ which is mandated by the United Nations Human Rights Council to promote the effective and comprehensive dissemination and implementation of the *Guiding Principles on Business and Human Rights* (UNGPs). Part of our mandate is to “identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon”.

At its 16th session (13-17 February 2017), the Working Group had the opportunity to review the Thun Group’s “Discussion Paper on the implications of the UN Guiding Principles 13 & 17 in a corporate and investment banking context”² (“Discussion Paper”). The Working Group welcomes the efforts to gain further understanding of how the UNGPs should be applied in the banking sector and note that the Discussion Paper aims to generate constructive dialogue among banks and other stakeholders interested in the areas covered. This letter is intended as a response to this invitation for dialogue.

The Working Group finds that the Discussion Paper provides some useful practical considerations for banks in certain situations where they may be directly linked to human rights impacts through the financial products or services they provide to third parties which themselves may be contributing to or causing a human rights abuse.³

However, the Working Group would like to express our concern about some elements of the Discussion Paper that do not accurately reflect some key elements of the UNGPs. The Working Group believes that if left unaddressed, this can cause unnecessary confusion about the UNGPs, which may undermine attempts by banks and others to implement their responsibility to respect human rights.

¹ Full title: Working Group on the issue of human rights and transnational corporations and other business enterprises. See

<http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>

² <http://www.menschenrechte.uzh.ch/en/publikationen/thun-group-of-banks.html>

³ The Discussion Paper rightly notes that “In accordance with UNGP 13b, banks should ‘seek to prevent or mitigate 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’”. Further, the Discussion Paper also recognizes that under UNGP 17 human rights due diligence should not only cover human rights impacts that the business enterprise (in the context of the Discussion Paper: banks) may cause or contribute to through activities, but also impacts which may be directly linked to its operations, products or services by its business relationships.

The Working Group has two specific concerns about aspects covered in the Discussion Paper:

- a) The question whether banks can contribute to adverse human rights impacts beyond its own employment practices.
- b) The extent to which the third pillar of the UNGPs – the need to ensure access to remedy for those affected by human rights abuse – is relevant for banks.

Additionally, the Working Group would also like to make some observations about the process of developing these kinds of tools that seek to unpack key concepts of the UNGPs in a sector-specific context.

1. Can banks cause or contribute to human rights abuse beyond their own employment practices?

The Discussion Paper states: “Under UNGP 13, a bank would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients’ operations because the impact is not occurring as part of the bank’s own activities (...). The provision of certain financial products and services may, however, be directly linked to adverse human rights impacts under UNGP 13b.”⁴

This statement does not provide an accurate understanding of UNGP13. While there may be good reasons for the Discussion Paper to focus on situations of direct linkage, the Discussion Paper may give the impression that banks cannot cause or contribute to human rights impacts beyond its employment practices. However, there may well be situations where a bank through its own activities can contribute to human rights impact committed by a client.

In particular, the Discussion Paper may cause confusion about the way in which insufficient due diligence might contribute to human rights impacts. It states: “Insufficiency of due diligence may result in a bank reaching an ill-informed decision but does not change the proximity of the bank to an impact caused, or contributed to, by a client (...). In some cases, insufficient due diligence may result in the bank’s failure to respect human rights. The consequence of this for the bank may be reputational risk and/or potential financial impacts. The primary concern for the bank remains, however, the avoidance or mitigation of the human rights impact.”⁵

In response to this, the Working Group notes that insufficient due diligence by a bank could potentially contribute to human rights impacts. For example, this could arise where a bank provides a loan for an infrastructure project that leads to widespread displacement of local communities, but for which no safeguards or mitigations were in place. If a bank proceeds with financing, absent rigorous due diligence and safeguards, then its decision to lend may contribute to adverse human rights impacts, since it could have mitigated or prevented harm through its due diligence processes and the terms of its loan.

⁴ Discussion Paper, page 6.

⁵ Discussion Paper, page 13.

In addition, the concept of ‘proximity’ to the impact is not one that is found in the UNGPs, and it risks creating confusion rather than clarification. In brief, as set out in the UNGPs, the scope of due diligence and appropriate response depend on the nature of the risks to human rights and how the bank is involved (either causing, contributing or directly linked), but should not depend on the type of financial service provided.

2. Application of access to remedy to the banking sector

The Working Group finds that the following statement does not accurately reflect the UNGPs in relation to access to remedy: “a bank may, in certain circumstances, be *directly linked* to an impact caused or contributed to by a client. **In this context, access to remedy, as considered by the UNGPs, does not apply. This requirement will generally apply to banks only in the context of adverse human rights impacts caused or contributed to via their own activities, notably through actions or omissions affecting their employment practices** [emphasis in bold added].”⁶

The commentary to UNGP22 states that “Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.”

In order to avoid any doubts, the Discussion Paper should clarify two aspects in relation to access to remedy. First, that remediation and access to remedy provisions *do* apply in situations where banks have caused or contributed to human rights impacts. Second, that bank *may* play a role in remediation in situations of direct linkage. A bank’s decisions on whether to play a role in remedying situations where it is directly linked to human rights abuse through its financial products and services to a third party that has caused or contributed to the abuse, would be subject to considerations set out in UNGP19’s commentary: “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 Working Group also encourages the Thun Group to look to the recent “Dutch Banking Sector Agreement on international responsible business conduct regarding human rights”⁷, which provides an understanding of banks’ role in enabling remediation (chapter 7 of the Agreement) that is much more consistent with the UNGPs:

“7.3. The adhering banks will use their leverage to encourage clients to take their responsibility. Within two years of signing the declaration of adherence the adhering banks will implement the following: a. With regard to project finance, the banks will require clients to establish or participate in a grievance mechanism through which grievances concerning the client’s human rights performance can be

⁶ Discussion Paper, page 15.

⁷ https://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx

raised by affected communities, in line with the UNGPs (Principle 31) and international standards such as the IFC PS or the Equator Principles (Principle 6);
b. With regard to corporate loans the banks will, in the case of severe human rights violations known to the banks, actively promote their clients to establish, participate in or enable access to a grievance mechanism in line with the UNGPs (Principle 31) and international standards such as the IFC PS or the Equator Principles (Principle 6);”

In fact, the Discussion Paper seems to implicitly recognize that banks can play a role in enabling remediation. It states in case study # 1 discussed in Annex to the Paper: “Among the various measures included in the Action Plan, the bank ensures that the company provides grievance mechanism to rights holders.” The Dutch Banking Sector Agreement approach is consistent with good practice and the UNGPs, whereas the statement in the Discussion Paper that remediation generally “does not apply” for banks beyond its employment practices is inconsistent with the Guiding Principles.

In view of above observations, it is, therefore, desirable for the Thun Group to revise its Discussion Paper in order to align it with the UNGPs.

3. Process of developing tools

The Thun Group’s efforts to explore practical implications of the UNGPs are welcome, and the Working Group appreciates that such exploration is informed by banks’ own practical experiences in order to develop tools that will be relevant and practice-oriented for the banking sector. However, such practice tools which seek to interpret the meaning of the UNGPs in a sector-specific context should be subject to a process of consultation and review by other stakeholders in order to ensure accuracy, robustness and legitimacy.

Genuine and sustained engagement with civil society organizations and experts on human rights and finance is critical to the development of robust tools in this area. The Working Group would be pleased to support and facilitate such consultation processes. The Thun Group and its Discussion Paper would benefit from engagement with stakeholders and revision that reflected comments from these parties. The Working Group therefore welcomes the commitment in your statement that accompanied the launch of the Discussion Paper, where the Thun Group banks noted that you “aim to generate constructive dialogue among banks and other stakeholders interested in the areas covered within it.”⁸

The Working Group would encourage you to take our comments into consideration.⁹ Please also refer to the comments made by the author of the UNGPs, the former Special Representative of the Secretary-General Prof. John Ruggie, about the Discussion Paper. The Working Group remains available for any further comments or queries that you may have.

⁸ <http://www.menschenrechte.uzh.ch/en/publikationen/thun-group-of-banks.html>

⁹ In order to contribute to the public exchange, we are making our letter public via posting on the OHCHR and the Business & Human Rights Resource Centre web pages.

The Working Group appreciates opportunities to engage with banks and the financial sector in dialogue on challenges and emerging practice in the business and human rights arena. The Working Group has sought to do so, for example, by organizing panel discussions at the UN Forum on Business and Human Rights. In that regard the Working Group was encouraged by the participation by Thun Group members and other financial institutions at the 2016 Forum and hopes to see such participation at the 2017 Forum.

Banks have a tremendous opportunity to be a force for good by implementing their corporate responsibility to respect human rights and using their leverage in line with the UNGPs. The Working Group would be pleased to continue to engage with the Thun Group and other members of the banking sector to explore methods for scaling up the UNGPs' potential for a transformative positive impact.

Yours sincerely,

Michael K. Addo
Chairperson
Working Group on the issue of human rights and
transnational corporations and other business enterprises