

BANKTRACK

BANKTRACK SUBMISSION TO THE CALL FOR INPUTS ON “BUSINESS AND HUMAN RIGHTS: TOWARDS A DECADE OF GLOBAL IMPLEMENTATION” – UNGPs 10+

1. Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organizations, civil society organizations, etc.) that can be built on?

Note we are focused in our human rights work on advocating for private sector banks to fully implement the UNGPs, and our comments in this questionnaire will focus on the role of these banks.

We have produced three benchmarks (in 2014, 2016 and 2019) analysing the performance of up to 50 of the largest banks.¹ We have seen the majority of these large banks develop policies to respect human rights, however most have not gone further than this.

A handful of banks have progressed with reporting in line with the UNGPs Reporting Framework; however even these reports typically do not attempt to show how the banks have addressed or worked to manage specific adverse impacts to which they are linked or have contributed.

One positive development in this space was specific guidance for the sector provided by UN OHCHR in a letter to BankTrack.² This proved influential in setting expectations of the sector and informing multi-stakeholder processes.

Other promising practices in the sector include one bank, Australia’s ANZ, agreeing to compensate communities displaced by a Cambodian sugar company it financed.³ The move, following years of campaigning, media pressure and a complaint to the Australian National Contact Point, stands as a (so far) unique example of a private sector bank participating in remedy.

In addition, there are initiatives under way at two private sector banks (ANZ in Australia and ABN AMRO in the Netherlands) to develop the first bank-level grievance mechanisms. Also promising but at an early stage is an initiative at the Equator Principles (the voluntary guidelines followed by over 100 financial sector institutions to manage environmental and social risk in lending to large infrastructure projects) to consider such a mechanism.

2. Where do gaps and challenges remain? What has not worked to date?

Assessing relationship to impact: In our most recent benchmark, we found only four banks gave any indication that they assess whether they caused or contributed to an adverse human rights impact in their policies, with no banks describing a process for making such an assessment. Putting such processes in place is a first step towards ensuring that banks play a role in remedying adverse human rights impacts where appropriate.

¹ <https://www.banktrack.org/hrbenchmark>

² <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

³ <https://www.inclusivedevelopment.net/anz-agrees-to-landmark-settlement-with-cambodian-farmers-displaced-by-sugar-company-it-financed/>



Access to remedy: Whilst banks sometimes ask or require certain clients or project companies to establish grievance mechanisms, they are failing to meet the responsibility to establish or participate in grievance mechanisms themselves. In the 2019 benchmark, 39 out of 50 banks had no channel through which affected people can raise human rights related complaints to the bank, excluding channels that are limited to customers and staff. Of the channels that did exist, almost all were limited to email or telephone contact details; grievance channels backed by a process for managing complaints are vanishingly rare, and no private sector bank yet has a grievance mechanism that it benchmarks against the UN Guiding Principles effectiveness criteria, let alone one which is independently assessed as effective.

Remediation of adverse impacts: There is an almost total absence of evidence that banks are playing any role in remediating adverse human rights impacts in practice. None of the 50 banks in our 2019 benchmark disclosed efforts to cooperate in the remediation of specific impacts in their reporting or elsewhere, or assessed whether their efforts had played a role in ensuring that human rights impacts were remediated. The above mentioned move from ANZ to compensate communities in Cambodia serves as a precedent for banks acting to directly contribute to remediating adverse impacts. Reporting of specific adverse human rights impacts identified by businesses, action taken to address those impacts, and tracking of the effectiveness of the response, needs to become standardised and mainstreamed.

Challenges encountered with selected banking sector initiatives:

a) The **Equator Principles** were revised in 2019, however they still fall short in terms of alignment with the UN Guiding Principles. In practice our research has found that the Equator Principles do not ensure that adequate and effective stakeholder engagement is being undertaken by project sponsors, or that project-level grievance mechanisms are in place and effective. Affected communities lack clear pathways to access remedy for the harms they suffer, despite the Principles requiring these things of project sponsors and signatory banks. See our reports, “Trust Us, We’re Equator Banks” Part I⁴ and Part II⁵, which include specific recommendations for the Equator Principles Association and banks. It is clear that voluntary initiatives, such as these Principles, are not doing enough to ensure proper human rights and environmental due diligence is being undertaken.

b) The **Thun Group of Banks**, an informal group of banks formed to consider the implications of the UNGPs for the banking sector, was criticised by Professor John Ruggie and others in 2017 after misinterpreting the requirements of the UN Guiding Principles in a corporate and investment banking context in a published Discussion Paper.⁶ This experience showed the pitfalls of a unilateral approach by the banking sector to determine its responsibilities without (sufficient) consultation or reference to external expertise.

c) The **Dutch Banking Sector Agreement on Human Rights (DBA)**, signed in October 2016 and concluded at the end of 2019, resulted in some more positive contributions to the debate on the banking sector’s roles and responsibilities, particularly the discussion papers produced in the topics of leverage and encouraging remediation. However, the Agreement’s Independent Monitoring Committee concluded that it could not be determined “whether and if so how, the DBA has led to real change on the ground for individuals and communities”.⁷ The issue of client confidentiality was identified as “pivotal to further transparency and accountability” and “one of the main clashing points” between NGOs and the Dutch banks and NVB. The Committee states that although it urged the National Banking Association (the NVB) and the banks to “push

⁴<https://www.banktrack.org/download/trust-us-were-equator-banks-briefing-paper/201124-part-1-trust-us-were-equator-banks.pdf>

⁵ <https://www.banktrack.org/download/trust-us-were-equator-banks-part-ii>

⁶ The initial paper, several responses and the revised paper can be viewed at: <https://www.business-humanrights.org/en/latest-news/thun-group-of-banks-releases-new-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banking/>

⁷<https://www.banktrack.org/article/ngos-after-evaluation-of-dutch-banking-sector-agreement-legislation-needed-to-ensure-respect-for-human-rights>



this topic and make real progress” in its Year Two report, they failed to provide “convincing evidence that this happened or a clear plan how this will happen.”

3. What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

A key obstacle we can identify is **client confidentiality**. Banks routinely respond to enquiries about specific transactions, especially about the damaging impacts of companies or projects they finance, by saying they are “unable to comment on specific clients”. As a result, there is a **lack of information in the hands of stakeholders about who is financing activities that impact them**.

In March 2019 we published a report on this issue, encouraging banks to include disclosure considerations in their overarching environmental and social risk frameworks.⁸

Client confidentiality concerns, as applied currently by most banks, form an obstacle for the proper implementation of the human rights due diligence in several respects. The OECD Guidance on Due Diligence for Responsible Corporate Lending and Securities Underwriting⁹ states that client confidentiality duties can be a challenge for banks when collaborating with one another in identifying real and potential adverse impacts associated with clients and applying leverage; engaging with stakeholders; communicating on their due diligence activities; and when cooperating in processes to enable remediation. Client confidentiality concerns can also form obstacles to the effective operation of bank-level grievance mechanisms. However, banks could overcome client confidentiality concerns using simple measures such as adjusting lending contracts to include transparency clauses (see below).

4. What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights?

5. In concrete terms, what will be needed in order to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs’ expectations over the coming years?

We have combined our response to the above two questions in one answer:

Client confidentiality: In order to tackle the obstacle of client confidentiality, banks should standardize the process for requesting client consent to disclose certain details, including the fact of the existence of a client relationship. For example, provisions can be included in the standard language of loan agreements, and client relationship managers can secure consent for disclosures with prospective clients as a matter of practice during the client on-boarding process (and then ensuring that any agreement is recorded in writing). Currently, broadly used template covenant agreements, such as that of the Loan Markets Association, do not include such provisions; modifying such template agreements to include client consent to disclose the existence of the client relationship would be very useful to standardising this practice.

Grievance mechanisms: Although, as noted above, there are initiatives in place at two banks to develop bank-level grievance mechanisms, we are a long way from mainstream uptake, and action in the form of intervention in government National Action Plans or other regulatory interventions could be one way to promote mainstream uptake of grievance mechanisms by private sector banks.

Banking sector initiatives: Internationally there is an ongoing absence of a forum for the banking sector to discuss practical challenges in implementing human rights standards and seek advice from qualified and

⁸https://www.banktrack.org/download/we_are_unable_to_comment_on_specific_clients/191105weareunabletocomment.pdf

⁹ <http://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf>



trusted practitioners. Support could be provided to existing sector initiatives that are willing to work towards developing such a forum.

Reporting on adverse impacts: As noted above, reporting by banks and other business entities of specific adverse human rights impacts they identify; action taken to address those impacts; and tracking of the effectiveness of the response, needs to become standardised and mainstreamed. Development of further reporting standards and templates, potentially linked to measures to encourage grievance mechanisms, could assist in this regard.

Need to move beyond voluntary measures: Companies and financial institutions will not fully integrate their responsibility to respect human rights throughout their operations and value chains without legislation being passed to that effect - such as human rights standards like the UNGPs being made into hard law. BankTrack's most recent human rights benchmark shows that the financial sector is making unacceptably slow progress towards the full implementation of the UN Guiding Principles. It is clear to us that regulators need to intervene to ensure that banks are properly respecting human rights and the environment. Similar trends can be found in the 2020 Corporate Human Rights Benchmark¹⁰ and in the European Commission's Study of Due Diligence Requirement Through the Supply Chains.¹¹ There is a disconnect between high-level policy commitments and actual on the ground actions being taken by companies and financial institutions regarding human rights abuses.

National Action Plans should explore options to encourage or require nationally operating banks to respect human rights. The OECD Guidelines and the guidance published by the OECD specifically looking at the financial sector could form a good bases for legislation to be integrated at a national level as part of the NAPs or internationally in provisions within the European legislative proposal on mandatory human rights and environmental due diligence or the ongoing UN Treaty on Business and Human Rights.

We thank the UN Working Group for the opportunity to provide input and welcome the opportunity to discuss further. Please feel free to reach out to either Ryan Brightwell (ryan@banktrack.org) or Hannah Greep (hannah@banktrack.org) for further discussion on these topics.

¹⁰ <https://www.worldbenchmarkingalliance.org/publication/chrp/>

¹¹ <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>

