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Dear Messrs. Brightwell and Missbach,

The application of the Guiding Principles on Business and Human Rights to the banking sector, including with respect to responsibility for remediation

As the principal United Nations office mandated to promote and protect human rights for all, Office of the High Commissioner for Human Rights (OHCHR) provides substantive expertise, technical assistance and other advice to relevant stakeholders on international human rights standards and principles and the protection of human rights worldwide.

On behalf of OHCHR, I hereby transmit our response to BankTrack's request of 6 March 2017 for interpretive advice on the interpretation of the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of the banking sector.

The attached advice is intended to provide clarification on aspects of the UNGPs in relation to the particular questions posed by BankTrack. It may also be a resource for other stakeholders in their efforts to implement the UNGPs.

Please do not hesitate to follow up with my Office through Ms. Lene Wendland, Chief, Human Rights and Economic and Social Issues Section (lwendland@ohchr.org), if further clarification or guidance is needed.

Yours sincerely,

Peggy Hicks
Director
Thematic Engagement, Special Procedures and Right to Development Division

cc: Lene Wendland

# OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector

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**Purpose of this note**

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has been approached by the non-governmental organisation BankTrack to provide advice regarding the application of certain aspects of the UN Guiding Principles on Business and Human Rights (UNGPs)[1] in the context of the banking sector. Specifically, BankTrack has requested advice and clarification on the factors that would influence how a bank is involved with an adverse human rights impact; the responsibilities of banks with respect to remediation in situations where a bank has contributed to an adverse human rights impact; and the role of operational-level grievance mechanisms in this context.[2]

The following advice is provided in response to the request from BankTrack, and does not express an opinion on any specific case or the acts of any specific institutions or enterprises.[3] The purpose of this note is to provide advice and clarification of the UNGPs in relation to the particular questions posed.[4] It may also be a resource for stakeholders in the financial sector in their efforts to implement the UNGPs, by clarifying some key points regarding human rights due diligence and remediation. It is not, however, within the scope of this note to provide *operational guidance* on implementation of the UNGPs, which may be best articulated through multi-stakeholder processes involving banks, civil society organizations, experts, and others.[5]

This note builds on, and aligns with, earlier advice prepared by OHCHR in relation to the application of the UNGPs to the financial sector. Earlier advice to the non-

[1] The UN Guiding Principles on Business and Human Rights were endorsed by the United Nations Human Rights Council in 2011 (A/HRC/RES/17/4). They were prepared by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/17/31).The text of the UN Guiding Principles is available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[2] For the full text of the questions posed by BankTrack, see each section heading.

[3] For the purposes of this note, 'banks' refers to corporate and investment banks. While some of the considerations would be applicable to consumer/retail banks in the context of their investments, it is acknowledged that retail banking involves different considerations that are best discussed separately. This note focuses on human rights considerations in the context of a bank's financing activities – i.e. in the context of its client and customer relationships. However, although not the focus of this note, many of the considerations herein would also be applicable to situations involving a bank's suppliers and other business relationships

[4] As the principal United Nations office mandated to promote and protect human rights for all, OHCHR provides substantive expertise, technical assistance and other advice to relevant stakeholders on international human rights standards and principles and the protection of human rights worldwide. See also report by the United Nations Secretary-General: "Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights", A/HRC/21/21, paras. 32-33 and 96.

[5] In this context, see for example the recent OECD guide for institutional investors developed: OECD, 2017, Responsible Business Conduct for Institutional Investors, Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises, http://www.oecd.org/finance/RBC-for-Institutional-Investors.pdf, which contains operational guidance for responsible business conduct, developed through a multi-stakeholder process. OHCHR was a member of the Advisory Group for this process. See also letter of 23 February 2017 from the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf.

governmental organization SOMO clarified the meaning of the term 'business relationships' in the context of institutional investments.[6] Advice to the Chair of the OECD Working Party on Responsible Business Conduct provided further guidance on the application of UNGP 13(b) and the meaning of 'directly linked' in the context of institutional investors' minority shareholdings.[7] This note also aligns with advice relating to the financial sector prepared by the UN Working Group on human rights and the issue of transnational corporations and other business enterprises.[8]

**Question 1: Which factors would influence whether a bank is (a) causing or contributing to an impact and (b) having a direct link to an adverse impact via a business relationship, in the context of the banking sector?**

To address this question, it is helpful to first restate the key elements of the corporate responsibility to respect human rights, as set out in Pillar II of the UNGPs.

The UNGPs apply to all business enterprises, including commercial banks and other entities in the financial sector, regardless of "size, sector, operational context, ownership and structure".[9] Equally, they apply to any company or commercial vehicle from any other sector that may be a client of, or enter into a business relationship with, a bank.[10]

UNGP 13 states that the corporate responsibility to respect human rights requires all business enterprises to:

a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
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." [11]

To meet this responsibility, banks should have in place "policies and processes appropriate to their size and circumstances", including a "human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights."[12]

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[6] See OHCHR response to the non-governmental organisations SOMO and OECD Watch, 26 April 2013, http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf.
[7] See advice to the Chair of the OECD Working Party on Responsible Business Conduct, 27 November 2013, http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.
[8] See letter to the Thun Group of Banks by the Working Group, 27 February 2017, http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf. See also advice to the Chair of the OECD Working Party on Responsible Business Conduct, 3 December 2013: http://www.ohchr.org/Documents/Issues/Business/LetterResponseToOECD.pdf.
[9] Ibid, note 5. See also UNGPs, ibid., note 1, UNGP 14.
[10] See also the OECD's Responsible Business Conduct for Institutional Investors, 2017, ibid., note 5, above, for a discussion of the application of the OECD Guidelines for Multinational Enterprises, which align with the UNGPs with respect to human rights.
[11] Ibid., note 1, UNGP 13.
[12] Ibid., note 1, UNGP 15.

It is through conducting human rights due diligence that a bank is able to identify *whether and how* it is involved with actual or potential adverse human rights impacts. The due diligence process should cover any impacts a bank may cause, those that it may contribute to through its own activities and impacts that may be directly linked to its operations, products or services through its clients or customers (i.e. its 'business relationships').[13] A bank's 'own activities' in this context includes actions and decisions (including omissions) involving third parties, such as providing financial products and services to clients.

The complexity of a bank's human rights due diligence processes depend on the size of the bank, the nature and context of its operations and the severity of the bank's potential adverse human rights impacts.[14] '**Severity'**[15] of potential impacts is the most important factor in determining the scale and complexity of the due diligence process.[16] The number and types of a bank's clients (existing and prospective), its financial products and services, and the countries in which its clients are located and operate in, will all influence the complexity of a bank's risk picture and the severity of the potential human rights risks associated with its activities and client relationships. The more complex a bank's portfolio, the more sophisticated its systems would need to be to make sure that it identifies and addresses relevant risks, and the more detailed its human rights due diligence processes would need to be with respect to particular clients or transactions.

In practice, for banks that have a large and/or complex portfolio of clients, it will likely be difficult to conduct in-depth human rights due diligence across all its activities and business relationships. The UNGPs recognize this situation and the need to prioritize due diligence efforts. To this end, a bank's human rights policies and systems should be developed with an aim to provide a minimum level of screening for all types of activities, with the more detailed analysis prioritized for high-risk clients or transactions. Where possible, a bank would be expected to first develop an understanding of its overall risk picture, including which areas (e.g. activities/sectors, relationships/clients, countries) are likely to pose the most severe risks, and then to prioritize those areas for more detailed analysis. In some cases, however, especially where severe risks are clearly present, it may be necessary to start with obvious high-risk areas without first conducting an overall analysis. The more detailed analysis involves analysing how the bank may be involved with specific risks or impacts (for the purposes of a bank's client relationships, the most relevant categories will be 'contribution' and 'direct linkage'), and identifying appropriate responses to prevent or mitigate them. As the bank addresses its involvement in the most severe risks and impacts, it would be expected to move on to less severe risks.[17]

[13] Id, note 1, UNGP 17. See also OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, HR/PUB/12/02, p.32.
[14] Id., note 1. UNGP 14.
[15] Id, note 1. The commentary to UNGP 14 defines severe human rights impact with reference to its scale, scope and irremediable character.
[16] Interpretive Guide, id., note 13, p. 19.
[17] Id., note 1, commentary to UNGP 17.

Human rights due diligence should not be thought of as a linear process, but rather as an iterative, ongoing process that should be adapted in response to changes in a bank's operational context, emerging human rights risks (including in its clients/business relationships, e.g. new types of clients, changing situations for existing clients), and feedback from internal processes and external stakeholders. In the UNGPs, *addressing* impacts and *accounting* to stakeholders form an integral part of the due diligence process and provide a 'feedback loop' to the bank that should in turn help shape and refine its due diligence processes in the future.[18]

***Causing, contributing and having a direct link to an adverse impact***

While UNGP 13 distinguishes between a bank's responsibility in situations where it is causing or contributing to adverse human rights impacts and in situations where a bank's financial products and services are directly linked to harm through a business relationship, it may be difficult in practice to delineate precisely whether a bank has contributed to an adverse impact or whether there is a situation of 'direct linkage'. However, since a bank's responsibility to respond to an impact (which may include remediation) depends on the nature of its involvement, it is nevertheless an important determination to make. It is worth noting, however, that where a bank has contributed to or has a direct link to an adverse impact through a client relationship, this does not shift the responsibility from the client onto the bank. The client always retains its own responsibilities to respect human rights, including with respect to remediation.

A bank can **cause** an adverse impact where its activities (its actions or omissions)[19] *on their own* 'remove or reduce'[20] a person's (or group of persons') ability to enjoy a human right, i.e. where the bank's activities alone (without those of clients or other stakeholders) are sufficient to result in the adverse impact. In the context of a bank's activities, such situations are most likely to arise in the context of a bank's own employees, for example if a bank discriminates against women or racial minorities in its hiring practices.

A bank can **contribute** to an adverse impact through its own activities (actions or omissions)[21]—either directly *alongside other entities*, or *through some outside entity*, such as a client. [22] Contribution implies an element of 'causality', for example that the bank's actions and decisions influenced the client in such a way as to make the adverse human rights impact more likely.[23] This element of causality may in practice exclude activities that have only a 'trivial or minor'[24] effect on the client, which may thus not

[18] In this regard, the concept of human rights due diligence may differ from how 'due diligence' is normally used in a banking context.
[19] Id., note 1, commentary to UNGP 13.
[20] Interpretive Guide, id., note 13, p. 16.
[21] Id., note 1, commentary to UNGP 13.
[22] Interpretive Guide, id., note 13, p. 15.
[23] Id., note 22.
[24] In the OECD Guidelines for Multinational Companies, which are aligned with the UNGPs in the concept of due diligence, there is an explicit requirement that a contribution should be 'substantial' to be counted as such, i.e. the contribution should not be 'trivial or minor' in order to fall within the scope of the Guidelines. It should be noted that the UNGPs do not include this same requirement that a contribution meet a certain level to be counted as such. However, in practice, for there to be a

be considered as 'contribution'. For example, a bank that provides financing to a client for an infrastructure project that entails clear risks of forced displacements may be considered to have facilitated—and thus contributed to—any displacements that occur, if the bank knew or should have known that risks of displacement were present, yet it took no steps to seek to get its client to prevent or mitigate them.

In practice, many of the impacts associated with a bank's financial products and services may fall into the **'direct linkage'** category. 'Direct linkage' refers to situations where a bank has *not* caused or contributed to an adverse human rights impact, but there is nevertheless a direct link between the operations, products or services of the bank and an adverse human rights impact, through the bank's business relationships. A situation of 'direct linkage' may occur where a bank has provided finance to a client and the client, in the context of using this finance, acts in such a way that it causes (or is at risk of causing) an adverse impact. Providing a financial product or service creates a business relationship between the bank and the client for the purposes of the UNGPs.[25] However, the mere *existence* of such a business relationship does not automatically mean that there is a direct link between an adverse impact and the bank's financial product or service. For UNGP 13(b) to apply, the link needs to be between the financial product or service provided by the bank and the adverse impact itself.

In order to satisfy itself that its financial products and services are not being used in ways that cause adverse human rights impacts, a bank should clearly communicate its expectations to its clients and undertake human rights due diligence appropriate to the proposed transaction, which may include seeking assurances from the client that it has in place adequate policies and processes to itself identify, prevent and mitigate risks associated with its activities. For example, a bank may be one of several financiers to a project where a client, in breach of agreed standards and the client's own policies, violates health and safety regulations in a way that puts workers' health at risk. In this case, the bank has not contributed to the adverse impact. However, once it is made aware of this situation, it should use any leverage it has over the client to seek to mitigate the impact.

It should be noted that a situation of direct linkage can occur beyond the first tier of a client relationship – for example, if the client uses the bank's financial products or services to fund another business or entity that causes adverse impacts.[26]

***Continuum between categories***

In practice, there is a continuum between 'contributing to' and having a 'direct link' to an adverse human rights impact: a bank's involvement with an impact may shift over

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contribution at all requires sufficient effect on the client's actions so as to make the abuse happen or make it more likely to happen. Actions that a bank takes that have only a trivial or minor effect on the client's actions and decisions would thus be excluded. The level of contribution in a particular instance is furthermore of relevance when it comes to the question of remediation, as discussed below in relation to question 2. See OECD, 2011, OECD Guidelines for Multinational Enterprises, OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en, Commentary on General Policies, para. 14.

[25] See also OHCHR's advice to SOMO, id., note 6.

[26] See further OHCHR's advice to the Chair of the OECD Working Party on Responsible Business Conduct on this issue, id., note 7.

time, depending on its own actions and omissions. For example, if 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—such as bringing up the issue with the client's leadership or board, persuading other banks to join in raising the issue with the client, making further financing contingent upon correcting the situation, etc.—it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of 'contributing.'

***The role of leverage***

It is worth noting that a bank may be involved with an adverse impact whether or not it has *leverage* over a client. [27] The absence of leverage does not by itself mean that the bank is not involved and that the impact falls outside the responsibility to respect as set out in the UNGPs, although the extent of leverage will naturally have great bearing on the bank's options to respond to such a situation. In other words, a bank would both need to establish its relationship to the impact (if any) and consider what action it can take in response, for example whether it has leverage to stop or mitigate the abuse.

Similarly, the degree of '*proximity'* between the bank and the client or other entity causing the impact is not by itself a factor in determining the overall scope or 'boundaries' of a bank's human rights responsibilities, as both contribution and linkage can exist beyond the first tier of a client or other business relationship. Proximity can instead be an indicator of the degree of leverage a bank has to seek to prevent or mitigate the impact, and therefore relevant to the options available to a bank in responding.

***Factors influencing the nature of a bank's involvement with an adverse human rights impact***

While it is not possible to provide an exhaustive *ex ante* "check list" of situations that would fall within one category or the other, the following section sets out a non-exhaustive list of factors that may be used to determine whether a bank is causing or contributing to, or has a direct link to an adverse impact. Further deliberations involving banks together and other relevant stakeholders are needed to explore the practical implications of applying such factors in the banking context to understand

[27] As defined in the OHCHR Interpretive Guide (p.7), leverage is an advantage that gives power to influence, such as the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact. A bank may not have sufficient leverage over a client to effectively influence its actions. However, there may be ways to increase its leverage, including by acting together with other banks. If the bank has no leverage, and the adverse impact is severe or ongoing, the bank may need to consider terminating the business relationship if possible, taking into account credible assessments of any human rights impacts of so doing. If the bank chooses to stay in the relationship, it should be prepared to accept the consequences of doing so – whether legal, financial or reputational. See also OHCHR Advice to the Chair of the OECD Working Party on Responsible Business Conduct, id. note 7.

how they would apply to a wide range of financing scenarios.[28]

- ***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 in 'causing' an adverse impact. If the bank's actions, without those of clients or other entities, would not in and of themselves have resulted in the adverse impact, it is likely a situation of either contribution or direct linkage.

- ***Whether the bank was incentivising***[29] 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. Motivating or incentivising harm implies that the bank affected its client in a way that made the client more likely to act in a way that an adverse human rights impact occurred. The mere existence of a business relationship would not normally equate motivating or incentivising harm – there needs to be a specific action or decision by the bank that provides motivation or incentives for the client to act in a way that results in human rights harm. For example, a bank that advises a client on cost-cutting on an infrastructure project, despite such cost-cutting measures making it significantly more likely that livelihoods of nearby communities would be destroyed, may be seen to be contributing to harm caused by the client.

- ***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. The primary activity, i.e. providing a financial product or service, is not inherently problematic—it is in fact an important service to commerce—and as such not the facilitating factor in and of itself because the potential for abuse relates to external factors, i.e. the decisions of the client. However, 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 bank's failure to act upon information that was or should have been available to it may create a facilitating environment for a client to more easily take actions that result in abuses. Conversely, if the bank knows about a human rights risk associated with a particular project and takes reasonable steps to prevent and mitigate these risks, the situation would instead in principle be one of 'linkage'.

[28] See, above, the OECD multi-stakeholder process on Responsible Business Conduct in the financial sector. See also the Dutch Banking Sector Agreement https://www.ser.nl/nl/publicaties/overige/2010-2019/2016/dutch-banking-sector-agreement.aspx

[29] See also the OECD Guidelines for Multinational Enterprises, 2011, ibid., note 24. While the UNGPs do not explicitly mention the concepts of incentivizing or facilitating, these same concepts are indirectly suggested by the OHCHR Interpretive Guide (ibid., note 13), by the examples of 'contributions' to adverse impacts given throughout.

Whether a situation is one of incentivising or of facilitating, contribution to human rights harm is tied to a *bank's actions or omissions*, not the outcome, i.e. the *existence of harm.* If it was defined by the outcome (i.e. *whether harm occurred)* then a bank would be considered to have contributed to *any* harm associated with its financial products or services, regardless of its efforts to identify and mitigate risk. This would not be a reasonable standard and it is not what is expected under the UNGPs.

- ***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. As noted above, whether a bank is contributing to a human rights impact depends on the bank's own actions or omissions. Carrying out due diligence appropriate to the scope and complexity of a bank's portfolio and risk picture should help it effectively identify risks and prevent them from occurring. However, 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 that risk. If a bank has in place appropriate policies or processes, but these are ignored or side-lined in practice, it may similarly take actions that ignores human rights risks. Whether a bank's due diligence efforts have been reasonable and appropriate to a particular situation depends on the context of that specific instance (see above about the factors influencing due diligence processes). Dialogue with stakeholders or, if necessary, through external processes may help in identifying more specific dimensions of what is expected in particular circumstances.

  In line with the UNGPs, banks should have in place a policy statement on human rights, clearly communicate their human rights expectations to clients and other business partners, and a due diligence process to identify and assess impacts (drawing on relevant internal and external expertise, and in consultation with stakeholders), integrate the findings from their impact assessments across relevant functions and departments (including taking appropriate actions), and track and account for how impacts are addressed.[30]

  As already mentioned, due diligence in the UNGPs is a continuous, ongoing, iterative process. Extensive and complex client portfolios, changes in operating contexts, or the decision to prioritize due diligence in certain areas, may mean that some risks or impacts are not immediately identified by the bank itself, but are brought to the attention of the bank through a triggering event or by external stakeholders. In such cases, a bank would need to extend the scope of its due diligence process and determine how, if at all, it is involved with a risk or impact that has been brought to its attention and what would be an appropriate response. Such a situation does not *necessarily* imply that the bank did not meet the expected standard of conduct under the UNGPs in failing to identify or address a risk/impact, if it can demonstrate that it did in fact take reasonable steps to seek to identify, prevent, and mitigate adverse

[30] Id., note 1, UNGPs 14-21.

impacts in the specific situation. However, it may indicate that the bank needs to update its human rights due diligence process, for example by prioritizing risks differently or to change the way in which it monitors client performance.

Disputes about whether a bank's actions place it in a situation of contribution rather than linkage (and thus having a responsibility for remediation) should be settled through stakeholder dialogue or legitimate grievance processes (see question 2, below).

**Question 2: Where a bank has contributed to an adverse impact through its finance, what are the differentiated responsibilities of the bank and the company or vehicle leading the project to provide for or cooperate in remediation under Guiding Principle 22?**

A bank cannot meet its responsibility to respect human rights if it causes or contributes to adverse human rights impact and then fails to enable its remediation.[31] It should be emphasized that attribution of responsibility, and thus responsibility for remediation, in the UNGPs is *distinct from issues of legal liability and enforcement*, which remain defined largely by national law provisions in relevant jurisdictions.[32]

UNGP 22 stipulates:

> "[w]here business enterprises identify that they have **caused or contributed** to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." [emphasis added]

This situation is distinct from situations where a bank did not cause or contribute to the adverse impact, but instead the impact is *'directly linked'* to its operations, products or services by a business relationship.[33] In such cases, the responsibility to respect *does not require that the bank itself provide for remediation, though it may take a role in doing so*.[34] UNGP 19 elaborates on the appropriate action expected in situations where a bank is "directly linked", which may include using any leverage the bank may have over the client to seek to influence it to provide for remediation.[35]

Two main scenarios may occur: where a bank recognizes that it is responsible for an adverse impact, and where it does not. The application of UNGP 22 is limited to situations where *a bank itself recognizes* that it has caused or contributed to an adverse impact. A bank may arrive at such recognition through its own due diligence processes, in consultation with stakeholders, or through an operational-level grievance mechanism.

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[31] Interpretive Guide, id., note 13, p. 63.
[32] Id., note 1, commentary to UNGP 12. For an analysis of legal issues relating to banks and human rights, see joint report from UNEP-Finance Initiative and Foley Hoag LLP http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf
[33] Id., note 1, UNGP 13 (b).
[34] Id., note 1, commentary to UNGP 22.
[35] Id., note 1, UNGP 19 and its commentary. See also the Interpretive Guide, id., note 1, pp. 48-52.

***Situations where a bank does not accept responsibility***

In situations where a bank contests an allegation that it has caused or contributed to an adverse impact*, it is not expected to provide for remediation itself unless and until it is obliged to do so* (for instance, by a court decision or the conclusion of another binding grievance mechanism).[36] However, the corporate responsibility to respect always implies a responsibility to *cooperate in good faith* with legitimate processes designed to settle grievances, either through judicial or non-judicial means, even when the bank contests the allegations made against it.[37]

***Situations where a bank accepts responsibility***

Where a bank accepts that it has contributed to an adverse impact in the context of its client relationships, the bank has a responsibility for providing or cooperating in remediation of that impact. However, as OHCHR has previously noted, while the corporate responsibility to respect human rights extends to a bank's business relationships, *it does not intend to shift the burden of responsibility* for the impact from the client causing the impact onto the bank.[38] This means that where a bank is contributing to an impact, for example through a specific project finance transaction, the client (in this case, the project operator) retains its own responsibilities under the UNGPs, including as it relates to remediation, as discussed below.

The commentary to UNGP 22 makes clear that remediation requires 'active engagement' by the bank, meaning that it should actively seek to ensure that timely and effective remedy is provided. UNGP 22 does not prescribe that the bank must provide the remedy directly through its own mechanisms; in many cases, both the affected stakeholders and the bank may prefer a legitimate external grievance mechanism to hear the case and decide on remedy.[39] 'But 'active engagement' implies that the bank should continue to closely follow the situation even where remediation is not being provided by the bank itself, and take appropriate action where needed to ensure that remedy is indeed being provided.

Where the bank recognises that it has contributed to the impact through its own activities, it is *not only its responsibility for remediation under UNGP 22 that is triggered*. As part of its responsibility to respect human rights, the bank should also take appropriate steps to *cease or prevent its contribution* to the impact and use its leverage[40] to mitigate any remaining impact to the greatest extent possible.[41]

***Remedy in the context of 'contribution' – differentiated share of remediation***

Where more than one company has contributed to an adverse human rights impact, the question arises whether or how to allocate differentiated responsibility to remediate.

[36] Interpretive Guide, Id. note 13, p. 67.
[37] The Interpretive Guide elaborates on what legitimate processes may look like, id., note 13, p. 65.
[38] See advice from OHCHR to the OECD Working Party, id., note 7.
[39] Interpretive Guide, id. note 13, p. 64.
[40] See definition of leverage, id. note 23.
[41] Id., note 1, Commentary to UNGP 19.

The principle remains that all companies that have contributed should provide for or cooperate in remediation through legitimate processes. This carries an expectation that a bank contributing to human rights abuse through a client relationship should provide for remediation appropriate to *its share in the responsibility* for the harm.

As such, there are situations where it would be appropriate that contributing companies provide a differentiated share of the remediation, also to avoid providing perverse incentives to the client and/or other contributing companies not to provide for remedy. It is not, however, possible to stipulate in general terms *pro rata* responsibilities of involved companies in different scenarios. The exact allocation of different companies' 'share' of the harm will depend entirely on the specific situation and should be determined in each instance through the remediation process, which should involve a legitimate grievance mechanism. If the implicated companies cannot reach agreement on their respective share of responsibility for the harm, it may prove necessary either to involve a neutral third party as a mediator or to turn to adjudication.[42]

In situations where a bank has contributed to an adverse human rights impact caused by a client, there may furthermore be several processes through which stakeholders seek remediation. Where a bank recognizes that it has contributed to adverse human rights impact through a client, and that client is either providing remediation and/or is being held to account through a legitimate mechanism, it will typically be appropriate for the bank *to defer* to that process. This is particularly the case where a parallel remediation process could undermine the other legitimate process.[43]

Deferring to other remediation processes does not imply a limitation of the bank's responsibility under UNGP 22. However, for reasons of both accountability and reasonableness, the entity most directly involved with the harm should have the primary responsibility to provide remediation. In many cases involving banks, there may also be multiple stakeholders involved in a process to seek remediation, creating a risk of parallel, potentially conflicting processes. For example, a bank may be only one of many financiers of a project. In such situations, it may be most practical to defer to a single process.

However, in all cases of deferring to other ongoing processes, the bank would nevertheless be expected to be prepared to cooperate in the remediation process, for example by providing relevant information or other measures that are necessary for the process.[44]

In situations where the bank is the only one of the entities involved which is willing or able to provide for remediation, it may be unreasonable to assume that it should necessarily carry the full share of the remediation, particularly if it has only made a limited contribution to the harm compared to its client and/or other entities involved. This could create perverse incentives for other contributors to deny responsibility.

[42] This is similar to the recommendation in cases where there is no agreement with those affected on the appropriate remedy. Interpretive Guide, id. note 13, p. 68.
[43] Id., note 30.
[44] Id., note 31.

If the bank finds that an adverse impact it has contributed to is not remediated by the client, it should exercise its leverage over the client to seek to get it to meet at least its share of the responsibility. Depending on the particular circumstances and contractual arrangements, such leverage might exist in the form of withholding further funding for a project or similar measures. In any case, the bank should still take steps to make its own contribution right; however, this should be done in a way that does not provide perverse incentive for the client to evade its responsibility to remediate. The question of how to avoid creating perverse incentives for clients in practice is, however, one that needs to be discussed further in a multi-stakeholder context including banks, civil society organizations, experts and others.

Remedies can take a variety of forms and it is important to understand what those affected would view as an effective remedy, in addition to the bank's own view. Remedy may include an apology, provisions to ensure the harm cannot recur, compensation (financial or other) for the harm, restitution or rehabilitation, cessation of a particular activity or relationship, or some other form of remedy agreed by the parties.[45] A bank may consider whether it would be appropriate to extend one or more of these forms of remedy for its own contribution to those harmed, even where the harm is being remediated through other legitimate processes. For example, it may be particularly important for the bank to acknowledge the harm suffered and its own involvement in it, and to demonstrate efforts to improve its processes to ensure that similar abuses will not occur again. Further exploration of practical examples in a multi-stakeholder setting would be useful in this context to provide guidance on what may be appropriate forms of remedy in different 'contribution' scenarios.

***Expected actions in situations of 'linkage'***

If a bank has identified adverse human right impacts *directly linked* to its financial products or services through a client it is not responsible for providing remedy. However, there are still actions expected of the bank other than remediation – i.e. to ***seek to*** *prevent or mitigate* the impact. UNGP 19 and its commentary make clear that the appropriate action will vary according to the extent of the leverage that the bank has in addressing the adverse impact. However, the expectation is that it will take steps to seek to do so, using its leverage. If the bank lacks leverage there may be ways to increase it. In situations where the bank lacks the leverage to prevent or mitigate the adverse human rights impact and is unable to increase its leverage, it should consider ending the relationship, taking into account the potential human rights risks of doing so.[46] The UNGPs set out considerations that will factor into the appropriate response by the bank, including how crucial the relationship is to the bank, the severity of the abuse and whether terminating the relationship with the client would itself have adverse

[45] Interpretive Guide, id., note 13, p. 65.

[46] Note that considerations of ending a business relationship may also be subject to contractual terms, and that banks may in some situations be legally prevented from terminating or suspending a client/business relationship based on human rights performance. In such cases, leverage will likely be limited. Ideally, provisions for terminating a relationship based on failure to address human rights risk would be incorporated into contracts with clients and business partners. For further discussion of considerations in terminating a business relationship, see also the guide prepared by SOMO, April 2016, Should I Stay or Should I Go, p. 4, https://www.somo.nl/should-i-stay-or-should-i-go-2/.

human rights consequences. However, the practical implications of these considerations in a banking context, as well as the question of how banks can best exercise or increase their leverage, would be useful to explore and elaborate through multi-stakeholder processes.

**Question 3: How should the responsibilities of banks to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by their operations" under Guiding Principle 29 be interpreted with regard to adverse impacts that a bank may cause or contribute, or those to which the bank may have a direct link through its finance? In particular, in the context of impacts that a bank has not caused through its *own* activities, what would be the differentiated responsibilities of the bank and the company which has directly caused an impact to establish a grievance mechanism, and how should the term "operational level" be interpreted in this regard?**

***Responsibility to establish or participate in effective operational-level grievance mechanisms***

As noted above, a bank cannot meet its responsibility to respect human rights if it fails to provide for or cooperate in remediation of harms which it has caused or contributed to.[47] One of the most systematic ways to provide for remediation of such impacts is through an operational-level grievance mechanism (OLGM).[48]

UNGP 29 provides the following:

> "To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."

An OLGM is a mechanism that is directly accessible to stakeholders who feel they have been adversely impacted.[49] An OLGM serves **two main purposes**: to "support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence", and to "make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly".[50] Thus, remediation of actual adverse impacts is only one of the purposes of such mechanisms.

OLGMs have to date been little discussed with respect to the financial sector, or for banks specifically. Banks may combine physical footprints with extensive and varied client relationships across a large number of geographies. A bank may reasonably expect that most of its potential involvement with human rights harm may relate primarily to its client relationships. These conditions create particular challenges with respect to the forms that a suitable grievance mechanism may take and how it would

[47] Id., note 1, UNGP 22.
[48] Interpretive Guide, id., note 13, p. 68.
[49] Id., note 1, UNGP 29, commentary.
[50] Id., note 1 UNGP 29, commentary.

operate. OLGMs can potentially take a range of forms, which would depend on the type of the bank, the needs of its stakeholders, and the bank's human rights risk picture. However, it is important to note that any OLGM should meet the criteria that are set out in UNGP 31 to ensure its effectiveness.[51]

To identify how OLGMs may be designed and work in the banking sector in practice, further discussion within the sector and with stakeholders is necessary.[52] The following section aims to set out some general principles to inform discussions regarding the responsibility to establish OLGMs and the functions that these mechanisms can play with respect to remediation and beyond.[53]

UNGP 29 stipulates that companies establish or cooperate in grievance mechanisms in order *to make it possible* for business enterprises to address grievances early and directly. In other words, banks are expected to have mechanisms in place (their own or one they participate in) to respond effectively if or when grievances arise. This is *separate* from the substantive responsibility for remediation for identified harm, which is set out in UNGP 22. While OLGMs may be established in response to specific situations of adverse impact, the UNGPs intend for them to be established proactively, in order to provide a venue for stakeholders to raise concerns and resolve them before they escalate into larger-scale grievances.

It should be noted that the UNGPs do not require that every bank have its own OLGM—it can participate in mechanisms that may be established in collaboration with or by other entities, for example through industry-networks, multi-stakeholder initiatives, or sector-based human rights initiatives.[54]

In addition, the UNGPs make clear that OLGMs should form one part of a broader system of effective remedy mechanisms. While OLGMs are one means through which remediation can be provided, some impacts may be best remediated through other legitimate mechanisms, including State-based judicial and non-judicial mechanisms.[55] Banks should respect stakeholder preferences with respect to use of OLGMs or other legitimate processes, and engage with the latter in good faith.

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[51] Ibid., note 1, UNGP 31 and its commentary.

[52] Note that in the context of the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, there is an ongoing discussion to explore the functioning of OLGMs in the banking sector. https://www.ser.nl/~/media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx

[53] For consistency with the UNGPs, this note uses the term "operational-level grievance mechanisms" (OLGMs) throughout. This term should be understood broadly, to cover grievance mechanisms that are set up by a bank, alone or together with other stakeholders, but which may not be "operational-level" in a traditional sense of being "on the ground" where impacts are taking place.

[54] Interpretive Guide, id., note 13, p. 72.

[55] Regarding improvement of judicial mechanisms, see recommendations from OHCHR's Accountability and Remedy Project (phase I), and OHCHR's ongoing project regarding the functioning of State-based non-judicial mechanisms (Accountability and Remedy Project Phase II): http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx and the project portal at the Business and Human Rights Resource Centre: https://business-humanrights.org/en/ohchr-accountability-and-remedy-project.

***Functions of operational-level grievance mechanisms with respect to remedy***

As noted above, an OLGM should "make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly" by the bank. To do this, an OLGM should be able to receive complaints, identify whether human rights harm has occurred and either include a process to settle the bank's responsibility (if any) and, if applicable, agree an appropriate form of remedy through dialogue with the stakeholders;[56] or alternatively, a process to refer the complaint to a mechanism that can provide arbitration, mediation or adjudication of the claim.

To enable grievances to be raised and resolved before they escalate, OLGMs should not be confined to complaints that meet a certain 'threshold' of abuse, but rather allow stakeholders to raise all relevant concerns linked to the bank's operations, products or services, including impacts that may occur through its business relationships. However, OLGMs need not necessarily be designed to be able to *provide remedy* for every type of adverse human rights impact. While an OLGM should be able to *receive* all types of concerns and complaints, a bank's grievance mechanism may be set up so that some categories of complaints are referred to external processes, for example due to their severity.

Where an OLGM process determines that the bank did *not* cause or contribute to an adverse human rights impact (and thus is not responsible for remediation), the OLGM process should not preclude stakeholders from seeking to engage other legitimate grievance mechanisms, including State-based non-judicial and judicial mechanisms where possible. Similarly, where an OLGM is dialogue/mediation-based but fails to reach a settlement between the parties, it should not preclude access to other available legitimate mechanisms. In such cases the bank should cooperate with any other legitimate mechanisms in good faith and respect the outcome of these processes.

***Role of operational-level grievance mechanisms in providing feedback on human rights performance***

As noted above, remediation is only one of the roles that OLGMs are intended to serve. Where a bank is involved with an adverse impact, an OLGM may recommend actions that may be necessary to cease contributing to harm and prevent recurrence, or, in the case of 'directly linked' impacts, ways in which the bank can use or increase its leverage with business partners to seek to prevent or mitigate the impacts. It should also serve as a feedback mechanism for the bank, which will provide guidance on the types of human rights risks that the bank may face, and how to improve due diligence processes to better capture risks and avoid similar impacts in the future. As such, OLGMs play a role in helping banks effectively manage risks and progressively meet their responsibility to respect human rights across their operations.

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OHCHR
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[56] Id., note 1, UNGP 31, commentary (h).