EerlijkeBankwijzer®

Assessing the response of Dutch banks to severe human rights abuses in the extractive industry

Fair Bank Guide

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The Fair Bank Guide is a coalition of the following organizations:

Amnesty International, FNV, Milieudefensie, Oxfam Novib, PAX and World Animal Protection

Research by:

This report was researched and written by Amnesty International Netherlands and PAX, on behalf of the Fair Bank Guide (FBG), with contributions from Profundo (financial research) and the Special Chair on International Business and Human Rights of the Rotterdam School of Management of the Erasmus University Rotterdam (Indicators).

Not all coalition members of the FBG work on all themes and/or sectors on which the research of the FBG focuses. Reports on specific themes therefore do not necessarily reflect the opinion of all coalition members of the FBG.

Disclaimer: the figures on extended loans were put together with care and based on high quality databases, but have not been verified by the banks.

Front page cover photograph by Afandi Ahmad Syaikhu taken on 18 November 2015.

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Samenvatting

De delfstofwinnende sector is een sector met een relatief hoog risico op mensenrechtenschendingen. Bedrijven die in deze sector actief zijn moeten voortdurend en in verhoogde mate 'due diligence' processen uitvoeren om mensenrechtenschendingen te voorkomen, de impact ervan te beperken en te zorgen voor genoegdoening voor slachtoffers als een schending heeft plaatsgevonden. Deze stappen zijn kernelementen van internationale standaarden zoals de *United Nations Guiding Principles on Business and Human Rights* (UNGPs). Een van de kernprincipes van de UNGPs is dat bedrijven mensenrechten moeten respecteren. Deze verantwoordelijkheid geldt voor financiële instellingen zoals voor bedrijven in andere sectoren.

Financiële instellingen, zoals banken, moeten standaard goede 'due diligence' processen hebben, in aanvulling op het uitvoeren van 'due diligence' in reactie op specifieke incidenten. De opzet van dit praktijkonderzoek had tot doel om de reactie van de banken te beoordelen op een aantal ernstige schendingen waarmee zij zijn verbonden door het lenen van geld aan betrokken bedrijven: hoe wenden de banken hun invloed op de klant aan om de schade van de schending te beperken, en aan te dringen op genoegdoening voor de slachtoffers?

Voor de Eerlijke Bankwijzer was met name het recht op genoegdoening ('remedy') belangrijk, omdat dit recht vaak wordt verwaarloosd of slecht wordt begrepen. Het recht op genoegdoening maakt wel expliciet onderdeel uit van de verantwoordelijkheid van bedrijven om mensenrechten te respecteren. Als onderdeel van de studie werd een aantal indicatoren ontwikkeld om aan de hand daarvan de reactie van banken te beoordelen. Die beoordeling kon echter niet worden gedaan, omdat de banken geen enkele informatie deelden over de eventuele gesprekken die ze voerden met de geselecteerde bedrijven.

Dit rapport geeft aan welke banken leningen hebben verstrekt aan vijf bedrijven die ernstige mensenrechtenschendingen veroorzaken of daartoe bijdragen. De geselecteerde bedrijven/cases laten een gebrek aan vooruitgang zien wat betreft het beperken van de schade en het bieden van genoegdoening aan slachtoffers. De vijf bedrijven en de schendingen waar zij betrokken bij zijn of waren, zijn de volgende:

- Freeport-McMoran: vanwege betrokkenheid bij mensenrechtenschendingen rond de Grasberg mijn in West Papua (Indonesie). Freeport-McMoran's activiteiten in het gebied hebben de rivieren daar ernstig vervuild, en daarnaast wordt Freeport-McMoran er van beschuldigd Indonesische overheidstroepen te hebben betaald. Die troepen zijn verantwoordelijk voor allerlei gewelddadigheden in het gebied rond de mijn.
- Glencore: dit bedrijf begon mijnbouw activiteiten in de César regio, in Colombia, tijdens een burgeroorlog. In het mijnbouwgebied waren paramilitairen verantwoordelijk voor gedwongen verhuizingen, moord en andere misdaden.
- Lundin: vanwege betrokkenheid bij mensenrechtenschendingen in Soedan (nu Zuid-Soedan), rond olievelden. Het bedrijf ging door met activiteiten, waaronder de aanleg van infrastructuur, in een gebied waar op dat moment duizenden mensen op de vlucht werden gejaagd tijdens gevechten om controle over olievelden.
- Shell: vanwege betrokkenheid bij mensenrechtenschendingen als gevolg van decennia van olievervuiling in de Nigerdelta. Lokale gemeenschappen lijden onder de schadelijke gevolgen van de vervuiling op landbouwgrond, visvijvers en drinkwater.
- Trafigura: vanwege twee incidenten:
    - Betrokkenheid bij ernstige vervuiling en impact op de gezondheid in Ivoorkust, als gevolg van het dumpen van giftig afval door een bedrijf dat door Trafigura was ingehuurd.
    - Export en verkoop van diesel en benzine met hoge zwavelwaarden naar en in landen in vooral West Afrika. De kwaliteitstandaarden voor brandstof zijn daar lager. De hoge zwavelwaarden hebben een negatief effect op de gezondheid.

In totaal leenden drie banken 12.5 miljard dollar uit aan de geselecteerde bedrijven ING investeerde in alle vijf bedrijven, ABN Amro in vier, en Rabobank in twee bedrijven. Rabobank leende bijna 4.2 miljard USD uit, ABN Amro iets meer dan 2.8 miljard USD en ING leende meer dan 5.6 miljard USD uit aan de geselecteerde bedrijven. Tabel 1 biedt een overzicht van de verstrekte leningen. De data hebben betrekking op leningen tussen 1 januari 2013 tot 31 oktober 2016. Van ASN Bank en SNS Bank (de Volksbank), NIBC, Triodos Bank en Van Lanschot werden geen leningen aan de geselecteerde bedrijven gevonden.

Table 1 Leningen verstrekt door de geselecteerde banken aan de geselecteerde bedrijven tussen 2013 en 2016 (in USD, miljoenen)

Companies	ABN AMRO	ING	Rabobank
Freeport-McMoRan	-	81.81	-
Glencore	1,570.11	2,498.18	2,190.18
Lundin	331.67	499.11	-
Royal Dutch Shell	333.33	435.33	-
Trafigura	609.12	2,018.12	1,989.49
Total	**2,844.23**	**5,532,55**	**4,179.66**

Source: Bloomberg, "Loans", viewed in November 2016; Thomson Reuters Eikon, "Corporate events – deals", viewed in December 2016.

Het rapport concludeert het volgende:

- De drie banken verstrekten leningen aan de geselecteerde bedrijven, ondanks hun betrokkenheid bij voortdurende, ernstige mensenrechtenschendingen sinds lange tijd.
- De publieke verantwoording is zwaar onvoldoende, veroorzaakt door op geen enkele manier publiekelijk aan te geven welke acties de banken (mogelijk) hebben ondernomen richting deze bedrijven. Dit heeft ook negatieve gevolgen voor de informatie positie van slachtoffers in hun zoektocht naar genoegdoening.
- De drie banken die de focus waren van deze studie hebben geen beleid waarin staat dat er per definitie om toestemming van de klant gevraagd moet worden om informatie over engagement met derden te kunnen delen, als de bank geconfronteerd wordt met serieuze aantijgingen van mensenrechtenschendingen waar de klant bij betrokken is.

De Eerlijke Bankwijzer doet de volgende aanbevelingen:

1. Als banken bedrijven 'screenen' voordat zij een relatie aangaan (zoals bijvoorbeeld gebeurt door geld uit te lenen), moet daarbij expliciet worden gekeken naar genoegdoening ('remedy'). Als het bedrijf betrokken was bij mensenrechtenschendingen, mag dit niet als afgehandeld worden beschouwd zolang de slachtoffers geen genoegdoening hebben ontvangen.
2. Als banken een zakelijke relatie hebben met bedrijven die betrokken zijn of waren bij mensenrechtenschendingen, moeten banken (het recht op) genoegdoening in hun gesprekken met deze bedrijven uitdrukkelijk aan de orde laten komen. Banken zouden er bij de klant op aan moeten dringen voor genoegdoening van slachtoffers te zorgen. Dit moet bij alle stappen die dit rapport (in hoofdstuk 2) beschrijft: zowel bij het beoordelen van de schade, als ook bij het stellen van doelen voor het bedrijf, en bij het monitoren van vooruitgang.
3. Banken zouden een effectief klachtenmechanisme moeten instellen, individueel of als sector, in lijn met de effectiviteitcriteria uit *United Nations Guiding Principle* 31.

4. Inspanningen zijn nodig om bij te dragen aan een (juridische) context waarin banken makkelijker verantwoording kunnen afleggen over hoe zij mensenrechtenschendingen adresseren in hun waardeketen. Banken zouden niet langer afhankelijk moeten zijn van de toestemming van hun klanten om te kunnen voldoen aan wat onder internationale standaarden rond mensenrechten wordt verwacht qua rapportage (bijvoorbeeld, aanpassen Gedragsregels NVB, aanpassen van contracten met klanten en verbeteren/versterken van eigen transparantiebeleid).

Summary

Operations of the extractive industry are often characterised by severe human rights risks and abuses/violations. Companies operating in the extractive sector should have ongoing, enhanced due diligence processes in place to prevent, mitigate, and remediate human rights abuses. These due diligence steps are the core elements of international standards such as the United Nations Guiding Principles on Business and Human Rights (UNGPs). One of the foundational principles of the UNGPs is that business enterprises should respect human rights. The responsibility to respect human rights is applicable by the financial sector in a similar way as it is to companies in other sectors.

Financial institutions, including banks, should have in place due diligence systems, in addition to carrying out due diligence in response to particular incidents. This design of this case study aimed to assess how the banks responded to a number of severe human rights abuses to which they are linked via corporate clients: how did they use their leverage over the client to mitigate the adverse impact and enable remedy for the victims?

The FBG considered the focus on remedy of key importance as this right is too often neglected and/or not well understood, while the corporate responsibility to respect human rights includes respecting the victims' right to remedy. A set of Indicators for an adequate response of banks to severe human rights abuses caused or contributed to by a client, has been developed as part of this study. This part of the study could however not be completed, as the banks did not provide any information on possible engagement they had with the selected companies.

This report lists which banks have extended loans to five companies that caused or contributed to severe human rights abuses. The selected cases show a lack of progress in mitigating the negative impact and in providing remedy to the victims. As long as no remedy has been provided, the FBG will consider these cases as ongoing cases. The five companies and the abuses they were/are involved in are the following:

- Freeport-McMoran; for its involvement in human rights violations around the Grasberg mine in West-Papua (Indonesia). Freeport-McMoran's operations severely polluted the rivers in the area, and there are reports that Freeport-McMoran has paid Indonesian government security forces, who have been responsible for violence in the area.
- Glencore: this company started mining operations in the César regio, in Colombia during a civil war. Paramilitary groups were responsible for forced displacements, murder and other crimes in the mining region.
- Lundin: for its involvement in human rights violations in Sudan (now South-Sudan), around oil fields. The company continued its work (including the establishment of infrastructure) in an area where thousands were being displaced in fights over the oil fields Lundin was exploring.
- Shell: for its involvement in human rights abuses that result from decades of oil pollution in the Niger Delta. Local communities are suffering from the harmful impact of the pollution on agricultural land, fishing ponds and drinking water.
- Trafigura, in relation to two incidents:
    - Involvement in the severe pollution and health impacts in Ivory Coast as result of the dumping of toxic waste by a company contracted by Trafigura.
    - Exporting and sale of high sulphur diesel and gasoline to countries in mostly West-Africa, which have lower fuel quality standards. The high sulphur fuels lead to health damage.

In total, three banks lend 12.5 billion USD to the selected companies. ING was invested in all five companies, ABN Amro in four of the companies, Rabobank in two companies. Rabobank invested almost 4.2 billion, ABN Amro a bit over 2.8 billion. ING invested over 5.6 billion USD in the selected companies. Table 1 presents the overview of extended loans, data spans the period from 1 January 2013 until the 31st of October 2016. For ASN Bank and SNS Bank (de Volksbank), NIBC, Triodos Bank and Van Lanschot no loans to the selected companies were found.

Table 2 Loans provided by the selected banks to the selected companies between 2013 and 2016 (in USD, millions)

Companies	ABN AMRO	ING	Rabobank
Freeport-McMoRan	-	81.81	-
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The report concludes that:

- The three banks extended loans to the selected companies, despite their involvement in ongoing severe human rights abuses for many years.
- There are serious public accountability gaps, caused by the lack of transparency on the part of the banks on which actions were taken towards these companies. These also have an adverse impact on the information position of victims in their search for remedy.
- There is, with the three banks at the focus of this study, no policy that declares asking for consent to share basic information about engagement and dialogue as a logical first step when a bank is confronted with serious allegations of human rights abuses in which a client is involved.

The Fair Bank Guide recommends that:

1. When screening companies before entering into relationship, human rights screening should include remedy issues: human rights abuses cannot be considered resolved if the harm done has not been adequately remediated.
2. When in a financial relationship with companies which are or have been involved in human rights abuses, banks should include case based remedy requests of the victims in their engagement process towards these companies and push the client to provide remedy to victims. This should be addressed in all steps outlined in Chapter 2 of this report: the assessment of the harm done, setting goals for and starting engagement, as well as monitoring progress of the company.
3. Banks should establish their own effective grievance mechanisms, individually or as a sector, in line with UN Guiding Principle 31.
4. Efforts are needed to contribute to a (legal) context in which banks can more easily account for how they address human rights impacts in their value chains and do no longer depend on client consent to live up to the reporting requirements under the international human rights standards (for example, adjusting Conduct Rules of the Dutch Banking Association, adjusting contract clauses with clients and improving/strengthening own transparency policies.

Introduction

This case study was commissioned by the Fair Bank Guide (FBG) to Profundo in December 2016, at the initiative of Amnesty International Netherlands and PAX, two coalition partners of the FBG. The study aimed to investigate and assess the (effectiveness of the) response of Dutch banks to six incidents of severe human rights abuses (involving five companies) that have taken or are taking place in the context of the extractive industry in conflict-affected and high-risk areas, and to which banks are linked via their clients. Victims of the abuses still find themselves in a situation that no remedy has been provided. An important objective of this study was therefor to find out whether remedy for victims is part of the engagement agenda of the selected banks with the clients that caused or contributed to the abuses.

To investigate and assess the response of the selected banks, the study relied on a degree of collaboration and transparency on the side of these banks. However, the banks were not willing to collaborate and to look for possibilities to publicly account for how they deal with these severe human rights incidents. During a process of more than one and a half year, the FBG has come forward with proposals to agree on a process to execute this study with valuable input from the banks (see 2.5), but the banks obstructed the process time and again.

The study contains a number of severe human rights incidents in which victims are (still) not remedied for the harm suffered, and which deserve more public awareness and action. Banks should put these cases high on the engagement agenda with the clients involved and account for how they use their leverage to address the issues on the ground. Second, the study presents a new set of Indicators for an adequate response of banks to severe human rights abuses caused or contributed to by a client. Bringing these Indicators into the public domain, they can feed into standard setting discussions on effective engagement processes in the banking sector.

The outline of the report is as follows: Chapter 1 includes the objective of the case study and the financial links between the selected banks and the companies involved in the cases. It briefly describes the cases and process of selection. Chapter 2 presents the new set of Indicators, which represent the expectations the FBG has from banks in case they need to respond to severe human rights abuses in which clients are involved. Chapter 3 provides insight into the steps that were taken to set up this study and to involve the banks with the aim to present a well-informed report to the public. Finally, Chapter 4 draws conclusions and makes recommendations to the banks. A Dutch and English summary are provided in the first pages of the report. Appendix 1 presents the full case descriptions and Appendix 2 contains the extensive Assessment Guidance for each indicator.

Chapter 1 Objective, incidents and financial links

This chapter explains why the FBG set out to do this study, which banks and human rights incidents have been selected and the existing financial relationships between the banks and companies involved in the incidents.

1.1 Rationale and objective of the case study

Operations of the extractive industry are often characterised by severe human rights risks and abuses. The selected incidents (see 1.3) are all examples of severe human rights abuses in the extractive sector, which show a lack of progress in mitigating the negative impact and in providing remedy to the victims. The incidents all have taken place in conflict-affected and high-risk areas,[1] which would require enhanced human rights due diligence to address the adverse impacts.

There is a clear international consensus that companies should - at a minimum - respect all human rights wherever they operate in the world. Their responsibility is laid out in the UN Guiding Principles on Business and Human Rights (UNGPs), which have also been integrated in the OECD Guidelines for Multinational Enterprises (OECD Guidelines).

The responsibility to conduct human rights due diligence to seek to prevent or mitigate adverse impacts is applicable by the financial sector in a similar way as it is to companies in other sectors. As financial institutions may have hundreds to thousands of clients, the OECD Guidelines do not expect extensive due diligence on all of them, but do expect banks to identify general areas where the risk of adverse impacts is most significant and to prioritise due diligence on their clients accordingly, through screening and monitoring clients when the risk is high, and/or when a risk is brought to the attention of the enterprise (e.g. by an external stakeholder).

As such, financial institutions should have in place due diligence systems, in addition to carrying out due diligence in response to particular incidents.[2]

This case study doesn't focus on due diligence systems, but on how the banks responded to the particular incidents: how did they use their leverage over the client to mitigate the adverse impact and enable remedy for the victims.

The corporate responsibility to respect all human rights includes respecting the right to remedy. This right is often neglected and/or not well understood. In order to fully implement the corporate responsibility to respect, it is important to understand its meaning.

All victims of human rights violations have a right to an effective remedy. This right lies at the very core of international human rights law. It encompasses the victim's right to: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Central to the right to effective remedy is the requirement of reparations or measures to repair the harm caused to victims of human rights violations/abuses. This can take many forms as the actual reparation that should be provided in a case will depend on the nature of the right violated, the harm suffered and the wishes of those affected. There are five recognized forms of reparation: restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition.

In all the incidents selected, the banks have not been causing or contributing to the abuses but are 'directly linked' to the abuse through the involvement of their clients. As a result, the banks would not be expected under the UNGPs and OECD Guidelines to provide remedy to the victims themselves. However, they should take action to encourage the client to provide remedy as a component of their responsibility to seek to prevent and mitigate the negative impacts.[3]

The objective of the case study was to assess whether and how the banks selected in this study have responded to the six incidents of severe human rights abuses to which they are linked via their clients. Special attention would go out to whether remedy for the victims is/has been part of the engagement process with the clients and to what effect.

To this end, a set of 15 indicators has been formulated (see Chapter 2). These indicators assume that financial institutions (FIs) have a structured, formalized and documented process in place to undertake action in situations where negative human rights impact is directly linked to their operations, products or services.

The conclusions of the assessment would have provided practical recommendations regarding what banks can do to effectively respond to severe human rights abuses to which they are linked via their clients.

1.2 The selected bank groups

The Dutch Fair Bank Guide selected eight banking groups assessed in the FBG which are active in the extractive industry for assessment in this study. These are the following:

- ABN AMRO;
- ASN Bank;
- ING BANK;
- NIBC;
- Rabobank;
- SNS Bank;
- Triodos Bank; and
- Van Lanschot.

Since the start of the study, ASN Bank and SNS Bank have started operating under the same banking licence, bringing the number of banks assessed down to seven, effectively.

1.3 The selected incidents

We selected the incidents based on the following criteria:

- The case is a known to the bank, either by the FBG, one of its member organizations or via significant media coverage;
- The case must be ongoing (as in: not resolved / remediated): resolved or remediated cases would not warrant a response from the bank
- Cases in which companies are involved with more ties to the selected banks are selected over cases for which this is not or to a lesser extent the case
- A maximum of 10 cases is selected.

A description for each of the cases is provided in Appendix 1. Some of these cases are central to campaigns of FBG member organizations, some are not. The case descriptions should be read as summaries of the human rights violations/abuses, not as exhaustive reports of all facts. Similarly, the list of 'recommendations' to the company should not be read as to represent the complete list of demands from all stakeholders, but rather as the direction in which the FBG believes the solution should be found.

The selected incidents involved the following companies:

- Freeport-McMoran; for its involvement in human rights violations around the Grasberg mine in West-Papua (Indonesia). Freeport-McMoran's operations severely polluted the rivers in the area, and there are reports that Freeport-McMoran has paid Indonesian government security forces, who have been responsible for violence in the area.
- Glencore: this company started mining operations in the César region, in Colombia during a civil war. Paramilitary groups were responsible for forced displacements, murder and other crimes in the mining region.

- Lundin: for its involvement in human rights violations in Sudan (now South-Sudan), around oil fields. The company continued its work (including the establishment of infrastructure) in an area where thousands were being displaced in fights over the oil fields Lundin was exploring.
- Shell: for involvement in human rights abuses that result from decades of oil pollution in the Niger Delta. Local communities are suffering from the harmful impact of the pollution on agricultural land, fishing ponds and drinking water.
- Trafigura, in relation to two incidents:
    - Involvement in the severe pollution and health impacts in Ivory Coast as a result of the dumping of toxic waste by a company contracted by Trafigura.
    - Exporting and sale of high sulphur diesel and gasoline to countries in mostly West-Africa, which have lower fuel quality standards. The high sulphur fuels lead to health damage.

The reason that unresolved cases were selected is that the study aimed to focus on the right to remedy of affected communities and individuals. By definition, this required cases with some degree of history: for each case, it needed to be clear that effective remedy was actually lacking. It is important to note that we never intended to investigate actions by banks at the time of the incident. Financial research indicated there were ongoing, current, financial links. The absence of effective remedy should be reason for the bank to have undertaken action towards the company in question, to engage on remedy.

1.4 Financial links

Profundo conducted financial research to determine the financial links between the selected banks and the companies. We focused on one specific activity that is unique for banks: corporate lending, including project finance. Profundo collected data regarding corporate lending, from 1 January 2013 until the 31 October 2016.

Table 1 shows that three banks have provided financing through loans to the selected companies of the period of 1 January 2013 until the 31 October 2016. These are:

- ABN Amro;
- ING; and
- Rabobank.

Table 3 Loans provided by the selected banks to the selected companies between 2013 and 2016 (in USD, millions)

Companies	ABN AMRO	ING	Rabobank
Freeport-McMoRan	-	81.81	-
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In total, the three banks lend 12.5 billion USD to the selected companies. ING was invested in all five companies, ABN Amro in four of the companies, Rabobank in two companies. Rabobank invested almost 4.2 billion, ABN Amro a bit over 2.8 billion. ING invested over 5.6 billion USD in the selected companies.

For ASN Bank and SNS Bank (de Volksbank), NIBC, Triodos Bank and Van Lanschot no loans to the selected companies were found.

It is important to note that the data presented here were gathered in December 2016. Some of the loans provided may have matured (ended) or renewed in the meantime. Other loans found in the selected research period, running from January 2013 until October 2016, were to mature later than the date of publication of this report, but it cannot be stated with full certainty that these loans are ongoing. It may also be possible that banks have provided new loans to these companies in 2017 or 2018.

The banks are in the best position to inform the public about the current state of affairs regarding loans provided to these companies. If they ended the relationship an explanation as to why this decision has been made and how it has taken the position of the victims into consideration in the decision would be very welcome.

Chapter 2 Indicators for Adequate Response to Human Rights Abuses

Commissioned by Amnesty International Netherlands and PAX, representing the FBG, the Special Chair on International Business and Human Rights of the Rotterdam School of Management (Erasmus University) has developed a set of 15 indicators for an adequate response of banks to severe human rights abuses (allegedly) caused or contributed to by a corporate client.

The indicators follow directly from international (business and human rights) standards, are a concretization of general standards or fill lacunae from the perspective of the NGO's and the Special Chair on Business and Human Rights. The indicators assume that banks have a structured, formalised and documented process in place to undertake action in situations where negative human rights impact is directly linked to their operations, products or services. The present indicators are in the process of development and need validation.

Amnesty and PAX provided feedback to the Indicators and have developed extensive Assessment Guidance for using the indicators in the context of this FBG case study. The Assessment Guidance includes the rationale behind the indicator, the specific focus points required by the bank and references to relevant international standards/guidance. It can be found in Appendix 2.

The Indicators presented below represent the expectation the FBG has from banks in case they need to respond to severe human rights violations/abuses in which their corporate clients have been or are involved.

The Indicators apply to the following processes:

- Investigation of alleged human rights abuses;
- Engagement with clients that have been causing or contributing to human rights abuses; and
- Enable victims of human rights abuses to receive remedy.

The Indicators are structured in four section sections: A – Qualification of Issue and Risk, B – Engagement of Financial Institution (FI) with company, C – Monitoring progress, and D – Transparency. It uses the terms Financial Institution (FI) and Company as these Indicators are not only relevant for banks and their clients, but also for (institutional) investors and their investee companies.

The framework provides a clear direction. It is possible that a bank employs other ways than those described in these Indicators to reach the same goal. Banks have been invited to describe possible alternative actions taken towards the company with respect to a number of indicators highlighted with a footnote.

2.1 Investigation of facts and their human rights qualification

Section A - Issue and Risk: Qualification
A1 – The FI investigates facts and their human rights qualifications
As soon as the FI receives information on the (alleged) human rights abuse(s) and the (alleged) involvement of the company, the FI starts investigating these allegations. Findings of this inquiry are laid down in a report. This report contains at least: • a list of the persons and/or groups of persons adversely impacted by the abuse(s); • the facts of the incident; • a qualification of the severity (i.e. scale, scope and irremediable character) of the human rights abuse(s); • a qualification of how the company is involved in the abuse(s) (cause, contribute to, directly linked to, indirectly linked to); • a qualification of how the FI is involved in the abuse(s) (contribute to, directly linked to, indirectly linked to); • in case of non-agreement about the (assessment of) the facts and qualifications of the incident amongst the parties involved: the points of view of (a) the FI; (b) the company; and (c) the persons adversely impacted; • in case of non-agreement about the (assessment of) the facts and qualifications of the incident amongst the parties involved: independent expert advice on the findings and qualifications in the inquiry findings report; and • when applicable, information on the judicial or non-judicial procedure against the company.
A2 – The FI engages in multi-stakeholder approach re facts and qualifications
The FI carries out the inquiry (A1) by taking into consideration views of other stakeholders, including representatives of the persons adversely impacted and relevant Civil Society Organisations (CSOs).
A3 – The FI takes formal decision on engagement
After the inquiry findings report has been finalized, it is readily submitted to and discussed by the FI's appropriate level of management. The FI takes an informed and reasoned decision whether to engage with the company. The FI shares its decision and the reasons for it with: • the company.

2.2 Goals and strategy for engagement

B – Engagement of the FI with the company
B1 - The FI formulates goals and strategy for engagement with the company
If the FI has decided to engage on this specific incident with the company, the FI: • formulates specific goals to be achieved by its engagement; and • designs an engagement strategy.
B2 –The FI formally notifies the company of its engagement

The FI:

- sends the inquiry findings report to the company's appropriate level of management;
- informs the company's appropriate level of management of initiating its engagement with the company; and
- asks for a formal reaction.

B3 – The FI enters into dialogue with the company

After having notified the company, the FI undertakes prompt action to start a dialogue with the company's appropriate level of management with respect to the inquiry findings report.

B4 – The FI ensures that the company has adequate knowledge on the right to an effective remedy

The FI ensures that the company has adequate knowledge on the right to an effective remedy for those who have been adversely impacted.

B5 –The FI requires an Action Plan from the company*

The FI requires an Action Plan from the company in due time, aiming at (i) terminating any ongoing human rights abuse; (ii) mitigating the negative impact of human rights abuse by providing an effective remedy for those adversely impacted; and (iii) preventing new human rights abuses.

The company's Action Plan contains at least:

- specific goals tailored to the situation at hand, including one or more types of remedy, and – if there is none - the establishment of an operational-level grievance mechanism by the company in accordance with the UNGP 31;
- specific actions tailored to the situation at hand to meet the set goals;
- a reasonable timeline for the goals to be met; and
- a Community-Engagement Plan (addressing local communities or work force communities).

B6 – The FI requires a multi-stakeholder approach from the company

The FI requires that:

- before finalising its Action Plan, the company has discussed the Plan with (representatives of) the persons adversely impacted and the relevant CSOs;
- the company has provided the persons adversely affected by the human rights abuse(s) with adequate information on their rights to an effective remedy, such as through the operational-level grievance mechanism; and

* For this indicator, banks have been invited to describe possible alternative actions aiming at the same result.

- during the implementation of the Action Plan, the company engages with (representatives of) those adversely impacted and the relevant CSOs.

2.3 Monitoring of engagement process

C – Monitoring of the engagement progress by the FI

C1 – The FI monitors the engagement progress including execution of the company's Action Plan*

The FI actively monitors the engagement progress, including execution of the company's Action Plan by:

- reviewing the company's progress reports and asking the company for internal documents to validate this report;
- cross checking the claims through media releases, NGOs, etc.; and
- having in place a procedure for receiving information from (the representatives of) those adversely impacted or CSOs on the execution of the company's Action Plan.

C2 – The FI provides intermediate assessments on the execution of the company's Action Plan*

The FI regularly provides intermediate assessments on the engagement progress, including the execution of the company's Action Plan and shares these with the company.

An intermediate assessment of the engagement progress would logically contain one of the following conclusions:

1. The goals as formulated in the company's Action Plan have been achieved; on the basis of this conclusion the engagement will be terminated.
2. The goals as formulated in the company's Action Plan have not been achieved; however, the company has taken sufficient adequate steps towards obtaining the goals; on the basis of this conclusion, the engagement will be continued in order to achieve the goals as formulated in the company's Action Plan.
3. The goals as formulated in the company's Action Plan have not been achieved; the company has not taken sufficient adequate steps towards obtaining the goals; on the basis of this conclusion the FI will take follow up actions; this may include requiring the company to review and, if needed, update its Action Plan. Follow up actions may include as well: mobilising other lenders in case of syndicated loans to increase leverage.
4. The goals as formulated in the company's Action Plan have not been achieved; the company has not taken sufficient adequate steps towards obtaining the goals and it has become clear that the company has failed to carry out its Action Plan. On the basis of this conclusion the FI may terminate the engagement and the FI may take follow up actions like divesting, not agreeing on new investments and/or terminating the relationship.

C3 – The FI engages in multi-stakeholder approach to assess the execution of the Action Plan

* For this indicator, banks have been invited to describe possible alternative actions aiming at the same result.

* For this indicator, banks have been invited to describe possible alternative actions aiming at the same result..

When intermediately assessing the execution of the company's Action Plan, the FI takes into consideration views of stakeholders, including representatives of the persons adversely impacted and relevant Civil Society Organisations (CSOs).

The FI collects stakeholder views on at least the following questions:

- Have the human rights abuses been terminated?
- Have the action(s) taken by the company prevented similar new human rights abuses from taking place?
- Has the company provided victims with an adequate remedy?

C4 – The FI takes a formal decision on concluding or continuing the engagement and follow up actions

After each intermediate assessment of the execution of the company's Action Plan, the FI's appropriate level of management takes an informed and reasoned decision whether to:

- conclude the engagement on the basis that the goals as formulated in the company's Action Plan have been achieved (C2-i);
- continue the engagement (C2-ii);
- continue the engagement including follow up actions (C2-iii); or
- terminate the engagement on the basis that the company has failed to carry out its Action Plan and take follow up actions like divesting, not agreeing on new investments and terminating the relationship (C2-iv).

The FI shares its decision and the reasons for it with:

- the company.

C5 – The FI has a Grievance Mechanism in place for complaints by stakeholders

The FI has a Grievance Mechanism in place, in accordance with UNGP 31, allowing stakeholders to lodge a complaint and, for those adversely impacted, to obtain remedy from the FI in case of lack of other reasonable options to obtain remedy.

2.4 Transparency

D – Transparency by the FI

D1 – The FI publishes relevant documents and procedures on its website

The FI publishes the following procedures on its website:

- The standard procedure to undertake action in situations where negative human rights impact is directly linked to the FI's operations, products or services
- The FI's procedure for receiving information from (the representatives of) those adversely impacted or CSOs; and
- The FI's grievance mechanism (C5).

The FI publishes the following information regarding its practice of engagement on its website:

1. Client specific (in case client consent is given):

- The results of the engagement with the Company on a specific case, including the issues discussed, goals and deadlines.

2. Client specific (in case client consent is not given):
    - The FI's own goal(s) of the engagement with a Company on a specific case (if the business relation is in the public domain)
3. General information:
    - How many times the FI has been confronted with (alleged) involvement of Companies with human rights abuse(s), in what sectors/regarding what type of product
    - How many times has the FI started engagement with a Company on the (alleged) involvement with human rights abuse(s)
    - How many times has this resulted in an Action Plan to be carried out by the Company
    - How many engagement trajectories have come to an end, after how much time, with what result

2.5 Research process

The FBG started the case study in October 2016. The overview below shows which steps were taken at which time. Below the overview, we draw a couple of conclusions on the unwillingness of the three banks to provide a degree of transparency on their response to the selected cases.

January 2017	With the criteria developed, the cases selected and the financial research showing involvement of ABN Amro, ING and Rabobank, a meeting is set up with these three banks to discuss the methodology and planning of the study, including the selected cases. All questions and objections by the banks are addressed in a written document, composed after the meeting.
March 2017	The study starts by the researchers of Profundo sending the questionnaire (based on the criteria) and the financial data to the banks. Their question is to fill out the questionnaire and plan a meeting to discuss answers afterwards. The banks indicate they will not fill out the questionnaire. There are concerns about how the banks can protect 'client confidentiality', if they answer the questions asked by the researchers.
March 2017	The banks and the FBG agree to study the possibilities for transparency, while taking into account client confidentiality. The study is to be carried out within the framework of the banking covenant, signed in December 2016.
June 2017	Legal experts from NautaDutilh deliver a report on transparency / client confidentiality.[4] The report indicates that a degree of transparency is possible. It is also clear that the research as proposed could, from a legal viewpoint, raise concerns about client confidentiality.
August 2017	The set-up of the study is adjusted by the FBG. Criteria around transparency are adjusted, and various options are developed for banks to be transparent in the context of the study while addressing concerns around maintaining client confidentiality.
August 2017	The banks indicate that they are not willing to take up any of the proposals done by the FBG to continue the study. This includes setting a first step by asking the clients involved for permission to share information on (if applicable) conversations about involvement in the human rights abuse.

November 2017	The FBG and banks agree to a different approach: the study will be postponed. The banks and the FBG will first discuss the Indicators in a limited number of sessions. These sessions are to take place under supervision of Prof. dr. Cees van Dam, who is Professor of International Business and Human Rights at the Rotterdam School of Management (Erasmus University)
February 2018	After planning the first meetings for the agreed upon discussions, the banks notify Professor Van Dam that they see no basis for the meetings unless the process will lead to an academic blueprint of FBG research. As that was not the case/not intended, the banks indicated that they wanted to discuss the Indicators in the context of the Dutch banking sector Agreement. The FBG is never notified.
July 2018	After bringing up the stagnation in the materialization of the agreement made in November 2017, the FBG indicates to the Dutch Banking Association that it will publish the study on investments of banks in companies involved in human rights abuses.
September 2018	A number of the banks in the FBG indicate they will no longer collaborate with or provide feedback to studies under preparation by the FBG. ABN Amro, ING and Rabobank are among those banks.

Box 1: Client confidentiality concerns

The selected banks provided us with various arguments why they were not willing to collaborate in the research. Amongst others, they stated that it was not possible to share information on the specific incidents as these were related to specific clients and client confidentiality rules would stand in the way of sharing information. It was agreed to look further into the issue of client confidentiality. In the Dutch Banking Sector Agreement (DBA) on human rights it was also foreseen to explore options for greater transparency, including discussions on how client confidentiality relate to the increased expectations that enterprise show how they put their responsibility to respect human rights into practice. We put the case study on hold and awaited the legal exploration undertaken in the context of the DBA, which resulted in the following report from NautaDutilh: 'Legal report on the Possibilities for Increased Transparency in light of the Adhering Banks' Client Confidentiality Obligations'.

In brief, the report concluded that (1) individual client information can be made public or shared with CSOs with client consent or pursuant to a statutory obligation; (2) individual information in anonymous form can be shared or made public; (3) aggregated anonymous information can be made available; (4) individual client information cannot be made public or shared with CSOs without client consent. This is the current state of affairs and possibilities to change this rather restrictive situation has also been presented. Based on the legal analysis, the FBG adjusted the indicators related to transparency so that we would not require the banks to break the law.

The broader issue here is how the ask for transparency weighs against the underlying values that materialize into client confidentiality. The FBG accepts that a degree of confidentiality between a bank and a client is productive for commercial reasons. In other instances, privacy concerns may play a role. Transparency is a value in itself, which is often linked to equal access to information. In the context of human rights abuses, this is an important factor, as it links to the possibility to seek justice for harm done.

These two factors have to be weighed against each other. In this case, we believe the banks are mistaken in valuing client confidentiality over the opportunities for negatively affected communities to seek remedy for their damages.

For the NautaDutilh report, see: In https://www.imvoconvenanten.nl/banking/news/2018/5/human-rights-policy?sc_lang=en

Chapter 3 Conclusions and recommendations

This report lays out three key issues.

- Three large Dutch banks, ABN Amro, Rabobank and ING, have (during the period of January 2013 until October 2016) lent significant amounts of money to companies that had been or still were involved in severe human rights abuses. The human rights cases included in the report show that the victims of the abuses have till today not received effective remedy for the damage caused by or contributed to by the clients of the banks. Information about the cases has been in the public domain for a long time and it is highly unlikely that the banks were not aware of the human rights abuses and remaining remedy issues. Apparently, this did not withhold the banks from entering into or maintaining a business relationship with these companies by providing them corporate loans.
- The three banks adhere to the UN Guiding Principles for Business and Human Rights and the OECD Guidelines for Multinational Enterprises and as such should address severe human rights violations/abuses in their value chain and account for the steps they have taken in that respect. It is unclear whether the banks took any steps in response to the human rights abuses and unaddressed remedy issues in each case. Did the banks investigate and qualify the allegations of human rights abuses involving relevant stakeholders, start an engagement procedure including objectives and timelines, put remedy on the engagement agenda to urge clients to provide remedy to victims? These and many more questions remain unanswered. In general, banks provide information about their overall Environmental, Social and Governance screening and engagement procedures but are silent about the steps they do/do not take in response to severe human rights abuses. This amounts to serious public accountability gaps, which also have an adverse impact on the information position of victims in their search for remedy.
- Client confidentiality at present does form an obstacle to being transparent about (engagement with) a particular client. However, banks could ask for client consent to share this type of information. There is no bank policy that declares this as a logical first step when a bank is confronted with serious allegations of human rights abuses in which a client is involved. Without consent, a bank can look for ways to share information about addressing abuses in an anonymous or aggregated form. Moreover, as a matter of policy it should require clients concerned to publicize information regarding the severe human rights impact(s) in which it is involved and the steps it takes to address the impact(s). In the balance between transparency and confidentiality however, it is important to question which rights are protected, and at what expense. Bank clients have a right to privacy, but if involved in unresolved human rights abuses, this right needs to be weighed against the rights of victims to know what is being done to support them in their struggle for justice, also by banks.

The Fair Bank Guide recommends that:

1. When screening companies before entering into relationship, human rights screening should include remedy issues: human rights abuses cannot be considered resolved if the harm done has not been adequately remediated.
2. When in a financial relationship with companies which are or have been involved in human rights abuses, banks should include case based remedy requests of the victims in their engagement process towards these companies and push the client to provide remedy to victims. This should be addressed in all steps outlined in Chapter 2 of this report: the assessment of the harm done, setting goals for and starting engagement, as well as monitoring progress of the company.
3. Banks should establish their own effective grievance mechanisms, individually or as a sector, in line with UN Guiding Principle 31.

4. Efforts are needed to contribute to a (legal) context in which banks can more easily account for how they address human rights impacts in their value chains and do no longer depend on client consent to live up to the reporting requirements under the international human rights standards (for example, adjusting Conduct Rules of the Dutch Banking Association, adjusting contract clauses with clients and improving/strengthening own transparency policies.

Appendix 1 Case descriptions

Freeport-McMoran, Indonesia

Short case description

Freeport-McMoran Copper & Gold (Freeport-McMoRan) is an American mining company. The activities of the company mainly focus on copper mining in Chile and Indonesia, but the company is also active in North America and the Democratic Republic Congo.

The Freeport-McMoran Grasberg copper and gold mine in the Indonesian province of West Papua (Indonesia) has caused significant environmental damage. Freeport-McMoRan dumped waste in the Otomina and Ajkwa Rivers. The dumping of toxic mining waste into rivers is extremely harmful to the river and surrounding ecosystems. In both valleys in the area the rivers are seriously polluted, which resulted in violations of various socio-economic rights: the right to an adequate standard of living, the right to food and the right to clean drinking water.

Freeport Mc Moran has tried to limit the spread of residues using dikes, but this has only reduced the problem in part. Complete recovery of the rivers after this kind of waste disposal, is not possible in most cases. Indonesia is one of the few countries in the world, along with Papua New Guinea, where there are no restrictions on the dumping of waste into the river.

Next to this, violations of civil and political rights are caused by security forces who are employed by the Indonesian government but paid by Freeport-McMoran. Their behaviour often leads to violent and sometimes deadly confrontations with residents, employees and rights groups. With respect to its relations with public security personnel the company does not succeed in securing adequate respect for the security and fundamental freedoms of workers and the local population.

The New Zealand's Public Pension Superfund decided, in September 2012, to continue to exclude Freeport-McMoran from their investment "Because the human rights policy of Freeport-McMoran does not provide sufficient guarantees." The Norwegian Pension Fund has decided to withdraw its investments in the company, based on its Ethical Council's recommendations.

Main human rights violations/abuses

- Violations of the right to an adequate standard of living, including the right to food;
- Violations of the right to access to secure and clean water;
- Right to life and prohibition of arbitrary use of force;
- Right to demonstration and peaceful assembly;
- Right to collective action;
- Failure to ensure access to effective remedy for people whose human rights have been violated;

Recommendations to the company

- Stop the internationally unacceptable negative impact on the environment;
- Contribute to the restauration of the impacted areas;
- To use its influence to address the human rights violations of the security forces that secure its operations

More information

- SOMO, July 2013, “Private Gain – Public Loss: Mailbox Companies, Tax Avoidance and Human Rights”, p. 81-84.
- Earthworks and MiningWatch Canada, February 2012, “Troubled Waters: How mine Waste dumping is Poisoning our Oceans, Rivers, and Lakes
- Singapore Management University, June 2012: “Submission on Oil & Gas sector discussion paper”

- Norwegian Ministry of Finance, February 2006: "The recommendation from the Council on Ethics (Freeport)"
- Schulman, S. (2016) The $100bn gold mine and the West Papuans who say they are counting the cost. Online: https://www.theguardian.com/global-development/2016/nov/02/100-bn-dollar-gold-mine-west-papuans-say-they-are-counting-the-cost-indonesia

Glencore, Colombia

Short case description

In the early 1990's mining companies Prodeco/Glencore and Drummond started to operate in Cesar, Colombia, which was effectively a war zone. Between 1996 and 2006 paramilitaries waged systematic terror in this region, killing more than 3,100 people and displacing over 55,000 from their villages. The bodies of 240 persons are still missing. Community organizations and labour unions have been severely repressed.

The paramilitary group responsible for these atrocities arrived roughly at the same time that mining multinationals started their operations in the area. However, mining companies have so far failed to address the human rights impact in the mining zone, while at the same time they have benefited from the abuses, for example by obtaining land in zones where communities had previously been forcefully displaced. While victims have been waiting for recognition, truth and reparations for a long time, threats and assaults by paramilitary successor groups have recently increased again.

The victims of violence in the mining region suffer to date. They still do not know the truth behind what happened to their beloved ones, the land has not been restored back to displaced families, and the leaders continue to be targeted by unknown groups when they try to claim their rights.

Main human rights violations/abuses

- Murder;
- Assault;
- Rape;
- Forced displacement.

Recommendations to the company

- Take an active, cooperative role in ensuring access to effective remedy for the victims of gross human rights violations committed by the paramilitaries in Cesar between 1996 and 2006 such as entering into reconciliation dialogue with victim organizations.
- Agree to an action plan to improve actual human rights conduct.
- Cooperate fully in non-judicial truth-finding efforts relating to the events described above.
- Take adequate measures for the prevention of human rights violations against employees, members of communities, and other vulnerable stakeholders in the Cesar mining region. These violations include in particular recent threats against trade union leaders, members of the victims' movement, human rights lawyers, and participants in the land restitution movement.
- Do not profit, or seem to be profiting, from human rights violations by others. This relates particularly, but not exclusively, to the acquisition or use of lands that have been illegally or forcibly taken from the original owners (or holders).
- Promptly and without reservation comply with the spirit and letter of all court orders and decisions of legal authorities (e.g. the Attorney-General's Office) relating to issues listed above, including land restitution orders.

More information

- PAX online file: https://www.paxforpeace.nl/stay-informed/in-depth/stop-blood-coal

- Banktrack (2016) Human Rights Impact Briefing #2: Drummond and paramilitary violence in Colombia Online: www.banktrack.org/download/drummond_human_rights_impact_briefing_160525_pdf_pdf/160525_drummond_case_study_final.pdf

Lundin, (South) Sudan

Short case description

The alleged abuses stem from the period between 1997 and 2003, when Lundin, along with three other companies, began oil exploration in what is now South Sudan. The oil exploration set off a spiral of violence as the Sudanese government and forces loyal to them set out to secure and take control of the oil fields.

Atrocities included killings, rape, child abduction, torture, the destruction of schools, markets and clinics and the burning of food, huts and animal shelters. Thousands died, and almost 200,000 people were violently displaced.

Lundin, an ECOS (the European Coalition on Oil in Sudan) report from 2010 says, 'should have been aware of the abuses committed by the armed groups that partly provided for their security needs. However, they continued to work with the Sudanese government, its agencies and its army'.

Currently, the Swedish government is conducting an investigation to determine whether or not to bring charges against the oil company. The CEO and Chairman of the board have been named as suspects by the prosecutor. They are suspected of aiding and abetting war crimes in Sudan between 1997 and 2003, but there is no indictment yet. Victims of the oil war hope that the court case in Sweden may help them get their right to effective remedy.

However, in the event of an indictment only about 40 to 50 individuals will be named by the court as victims. These people will have access to some sort of compensation if Lundin will be found guilty, but in reality there were thousands of people affected. Lundin should not be waiting to be convicted in a criminal court in order to remedy the victims but do this in a pro-active manner.

Main human rights violations/abuses

- Murder
- Assault
- Rape
- Displacing individuals/communities

Recommendations to the company

- Acknowledge that Lundin has contributed to the harms suffered by the victims
- Contribute to effective remedy for the victims, including by putting aside money in a fund for the victims.

More information

- Pax for Peace online file: https://www.paxforpeace.nl/stay-informed/in-depth/unpaid-debt
- ECOS (2014) Unpaid Debt.

Testimony by Chief Thomas Malual Kap: "The first attack on Koch by Government of Sudan forces was in 1998 when they attacked with gunships, tanks and ground troops. We were chased away by the attack to Ngony. (...) Again, when it seemed safe, we went back to Koch, but there was another Government attack. This time we were displaced to Pultutni. From there we were displaced to Mirmir and from there we were displaced to Bieh. In each of these locations I built a shelter in which to live. Each time I was forced to leave by Government forces, these shelters were either destroyed or abandoned. (...) In 2001 I was in Ngony when it was attacked by Government of Sudan ground forces and helicopter gunships. I was shot in the foot by a Sudanese soldier. I still suffer the effects of this wound. All these places were near an all-weather road that was being built from Rubkona to Ler for the use of the oil companies."

Source: European Coalition on Oil in Sudan (2010), *Unpaid Debt: The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan 1997-2003,* p. 52.

Shell, Nigeria

Short case description

The oil industry in the Niger Delta started commercial production in 1958 following the discovery of crude oil by Shell British Petroleum (now Royal Dutch Shell), in 1956. Today, the oil industry is highly visible in the Niger Delta and has control over a large amount of land. The oil industry comprises both the government of Nigeria and subsidiaries of multinational companies such as Shell, Eni, Chevron, Total and ExxonMobil, as well as some Nigerian companies. Oil exploration and production is undertaken in "joint ventures", involving the state-owned Nigerian National Petroleum Corporation (NNPC) and one or more oil companies or within production sharing contracts. NNPC is the majority stakeholder in all joint ventures. One of the non-state companies is usually the operator, which means it is responsible for activity on the ground.

Shell Petroleum Development Company (SPDC), a subsidiary of Royal Dutch Shell, is the main operator on land. The SPDC joint venture involves NNPC, which holds 55 per cent, Shell 30 per cent, Elf Petroleum Nigeria Ltd., 10 per cent and Agip, 5 per cent. SPDC alone operates over 31,000 square kilometres. The area is crisscrossed by thousands of kilometres of pipeline, punctuated by wells and flow stations. Much of the oil infrastructure is located close to the homes, farms and water sources of communities. The people of the Niger Delta are suffering from the harmful impact of decades of oil pollution. There are hundreds of oil spills every year.

Main human rights violations/abuses

- Violations/abuses of the right to an adequate standard of living, including the right to food – as a consequence of damage on agriculture and fisheries;
- Violations/abuses of the right to water – oil spills pollute water used for drinking and other domestic purposes;
- Violations/abuses of the right to health – which arise from failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws to protect the environment and prevent pollution;
- Failure to ensure access to effective remedy for people whose human rights have been violated;
- Failure to provide affected communities with information relating to oil spills and clean-up.

The government of Nigeria is failing to fulfil its duty to protect the human rights of people living in the Niger Delta, including by ensuring that they enjoy their human right to a remedy and proper clean-up. However, the fact of government failure to protect rights does not absolve the non-state actor from responsibility for their actions and the impact of them on human rights. Shell has a responsibility to ensure that its actions do not cause or contribute to human rights violations. People also have a right to know what kinds of pollutants they are exposed to.

In Nigeria, the company that operates the pipeline or well from which the oil is spilled is responsible, under the law, to start the clean-up within 24 hours, whatever the cause. It must rehabilitate and restore the affected area as much as possible to its original state, a process known as remediation. SPDC fails in implementing this responsibility. There are serious delays in the response to reports of spills. The information published about the cause and severity of the spills is misleading, which may result in communities not receiving compensation.[5]

In 2015, Amnesty and the Centre for Environment, Human Rights and Democracy (CEHRD) examined four locations that were included in the 2011 environmental assessment of Ogoniland of the United Nations Environmental Programme (UNEP).[6] Shell has publically said that, since 2011, it has addressed the pollution documented by UNEP. The evidence gathered contradicts these claims. The main observations at the four sites were as follows:

- 45 years after a fire and spill at Shell's Bomu Well 11 at Boobanabe, researchers saw waterlogged areas with an oily sheen, and soil was black and encrusted with oil. Shell said it had cleaned-up and remediated the site in 1975 and in 2012. According to Nigerian government regulations, there should be no oil in water 60 days after a spill;
- Outside the perimeter of the Bomu Manifold at KegbaraDere (K. Dere) which Shell said it had cleaned in 2012, researchers saw soil soaked with crude oil. The pollution dates back at least to 2009 when a large fire and spill occurred at the Bomu Manifold, an area where several Shell pipelines meet;
- The Barabeedom swamp, south of the Bomu Manifold, is visibly contaminated with crude oil a year after the government regulator certified it as clean;
- At Okuluebu, Ogale, researchers saw patches of oil-blackened soil at several locations. The government regulator certified the area as clean in 2012.

Recommendations to the company

- As a matter of urgency, carry out effective clean-up and remediation operations at oil spill sites, including Bomu Manifold, Barabeedom swamp, Okuluebu, and Boobanabe, in consultation with the local communities;
- Ensure that all communities affected by failed or delayed clean-up of oil spills receive adequate compensation for their losses;
- Overhaul Shell's remediation methodology in line with the recommendations of UNEP and publish details of how it has changed.[7]

Specific issues to take into consideration

UNEP found that Shell's main technique for tackling land-based oil pollution, which Shell calls remediation by enhanced natural attenuation (RENA), or bio-remediation by land-farming, "has not proven effective" and should be overhauled. In response to these criticisms, Shell stated online that it had revised bio-remediation, but it has not explained what these revisions have been. It has said that this technique remains its main method for addressing oil pollution in the Niger Delta.

UNEP also raised concerns about the local contractor companies that Shell uses to do most of the clean-up and remediation work. Shell responded by re-training its contractors. However, evidence from the field demonstrates that contractors are still failing to adequately clean up oil pollution.

In responding to (public) criticism of its record in the Niger Delta, Shell frequently refers to the impact of illegal activity. Oil theft and illegal refining are genuine challenges but should not divert attention away from the company's failures to deal with old and leaking pipelines and failure to carry out proper clean-up and remediation. Moreover, illegal activity does not explain poorly executed clean-up. All oil companies are obliged to clean up oil spills, no matter what the cause.

More information

- Petroleum, Pollution and Poverty in the Niger Delta (2009), Amnesty International, https://www.amnesty.org/en/documents/AFR44/017/2009/en/

- The True Tragedy: Delays and Failures in Tackling Oil Spills in the Niger Delta (2011), Amnesty International and CEHRD, www. amnesty.org/en/documents/AFR44/018/2011/en/
- Environmental assessment of Ogoniland (2011), United Nations Environmental Programme, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=2649&ArticleID=8827&l=en&t=long
- Negligence in the Niger Delta (2018), Amnesty International, https://www.amnesty.org/en/latest/news/2018/03/nigeria-amnesty-activists-uncover-serious-negligence-by-oil-giants-shell-and-eni/

Regina Porobari, 40, used to trade in fish. Her husband used to be a fisherman. they have six children. After the August 2008 oil spill, all the fish in the creek died, moved away or were too polluted to eat. Regina became a petty trader and her husband now tries to find work in the building sector. neither of them is able to make as much money as they used to. they used to grow vegetables and cassava on their plot of land. After the spill, their harvest is much smaller than before. Meanwhile, local food prices have increased substantially. "The price of fish has increased a lot in Bodo," Regina said. "Before the spill you could buy a fish for 50 naira (us$0.35). Now you have to pay 300 to 500 naira (us$1.95 to us$3.25) for a fish." Many families can't afford to buy food with enough nutrients, she explained. "Everybody is struggling." Regina and her husband have not complained to anyone about the impact of the spill. "I think that for someone with a low voice as myself it is difficult to make a claim," she said. Her main wish for changing the current situation was for the pollution to be cleaned up so she could sell fish once again.

Source: Amnesty International (2011), *The True 'Tragedy: Delays and Failures in Tackling Oil Spills in the Niger Delta*, p. 11.

Trafigura, Ivory Coast

Short case description

In August 2006, the cargo ship the Probo Koala reached the end of a four-month journey that resulted in toxic waste being dumped illegally in Côte d'Ivoire. Multinational oil trading company Trafigura produced the toxic waste on board the ship as a result of refining a dirty petroleum product called coker naphtha to mix with gasoline and sell it on as petrol. Trafigura knew the waste was hazardous but hadn't figured out how to dispose of it safely.

Trafigura tried and failed to get rid of the waste in five countries: Malta, Italy, Gibraltar, The Netherlands and Nigeria. Its attempt to dispose of the waste in Amsterdam sparked an environmental incident when residents complained of the overwhelming smell and experienced nausea, dizziness and headaches after some of the waste was unloaded. Trafigura rejected an offer from a disposal company to deal with the waste safely in The Netherlands for the equivalent of US$620,000.

Instead, the toxic waste was finally dumped illegally in Côte d'Ivoire by a local company that Trafigura hired to dispose of it for just US$17,000 – a fraction of the price quoted in the Netherlands. Lorries dumped the toxic waste in at least 18 locations in and around the main city of Abidjan. On 20 August 2006, the people of Abidjan woke up to the appalling effects of the dumping. Tens of thousands of people experienced a range of similar health problems, including headaches, skin irritations and breathing problems. Over 100,000 people sought medical assistance and extensive clean-up and decontamination was required. Côte d'Ivoire authorities also recorded about 15 deaths.

More than twelve years on, victims of the dumping and other residents in Abidjan remain in the dark about the ongoing dangers to their health. They still do not even know what was in the toxic waste.. Many victims have not received an adequate remedy for the harms caused by the incident and report that they are have not been able to afford medical treatment notably after October 2006 when the relevant free medical treatment finished.

The dumping had a devastating impact on the health and environment of the people of Abidjan, violating their right to health and exposing them to health risks that have never been fully understood or addressed. Twelve years on from the disaster, people in Abidjan still live in fear of the impacts of the dumping on their health and the health of their children.

The failure to monitor the health of victims, and to fully identify and address any long-term health risks, has denied people a meaningful and vital aspect of their right to an effective remedy. The people of Abidjan have a right to know if exposure to the chemicals in the waste could cause long-term health issues and, if so, what they are and how they can be treated. On 30 January 2018, the United Nations Environment Programme (UNEP) published their report on the Environmental Audit of the sites affected by the dumping of toxic wastes from the "Probo Koala". UNEP's found that pollution levels did not exceed national or international standards requiring further clean-up at any of the toxic waste dumpsites. This is an important first step in helping to address people's fears about ongoing contamination at the dumpsites. UNEP makes a point of noting, however, that this does not "preclude that health impacts from their original exposure to the wastes in 2006 are still affecting communities".

Trafigura has never been properly held to account for its role in the actual dumping of the waste. Moreover, many of those affected are still waiting for an adequate remedy and justice.[8] In 2016, victims launched a new and as yet unresolved compensation claim against Trafigura in the Netherlands.

Main human rights violations/abuses

The exposure to hazardous wastes has impact on a range of human rights including the rights to food, water, health and work. This can be due to direct contact with hazardous material or when soil, water, air, or the food chain are contaminated. Exposure to hazardous wastes can lead to a violation of the right to life. In this case, the authorities reported 15 deaths. The right to effective remedy of the victims has also seriously been violated/abused.

Jérôme Agoua, president of the toxic waste victims' association of the Abobo-Plaque 1 area: "In August 2006, everyone was contaminated, my family, my neighbours. I never want us to have a catastrophe like this one again… The waste was dumped around 8pm. We had breathing problems. First the smell suffocated us and then we couldn't breathe… I had very bad headaches, colds and when I blew my nose, there were blood clots coming out. I had to stop working on 2 September. I was bed-bound for a whole week and did not go back to work until 11 September. My children had very red eyes, they had a fever, they also had a cold and one of them had diarrhoea. They had a fever for at least two weeks. My family and I suffered from the toxic waste. I told my wife, who was pregnant, to leave the neighbourhood. She had diarrhoea, bloating, palpitations. She left with the children for Yopougon for at least one month.

The whole neighbourhood fell ill. The most common symptoms were headaches, colds, coughing, chest pains, respiratory problems, itching sensations, pimples, eye problems, vomiting and digestive problems. When you go to a place and you are responsible for a disaster, the least you can do is to visit the victims. No one from Trafigura ever approached me."

Source: Amnesty International and Greenpeace Netherlands (2012), *The Toxic Truth: About a Company called Trafigura, a Ship called the Probo Koala, and the Dumping of Toxic Waste in Côte d'Ivoire*, p. 23.

Recommendations to the company

Support the steps taken by the Government of Côte d'Ivoire to address the long-term health and environmental impacts of the incident, by disclosing all the information about the contents and nature of the waste dumped, and its likely ongoing health and environmental consequences.

- Contribute to the discovery of the full truth by cooperating fully in any judicial procedures or studies into the events described above.

Specific issues to take into consideration:

While Trafigura claims that it has disclosed the contents of the waste in UK court proceedings, this was based on tests conducted by a government agency in Amsterdam six weeks before the waste was dumped and not been made public.

Trafigura is rebranding itself as a leader in corporate responsibility in the commodities trading sector. Its move to join the Extractive Industry Transparency Initiative in 2014 reflected according to the organization's CEO its "commitment to transparency and accountability". This is in stark contrast with its decision not to disclose all the information about the toxic waste dumped in Abidjan and its possible impacts on the people who live there. It continues to hamper medical treatment for people in Abidjan.

More information

- The toxic truth: About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire (2012), Amnesty International and Greenpeace Netherlands, https://www.amnesty.org/en/documents/afr31/002/2012/en/
- Ten years after toxic waste dumping, victims in the dark (2016), Amnesty International, https://www.amnesty.org/en/latest/news/2016/08/Ten-years-after-dumping-victims-in-the-dark/http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384&LangID=E
- Ten years on, the survivors of illegal toxic waste dumping in Côte d'Ivoire remain in the dark (2016) UN Special Procedures, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384&LangID=E
- Recent report (2018): https://www.amnesty.org/download/Documents/AFR3175942018ENGLISH.PDF

Trafigura, West Africa (a.o.)

Short case description

Swiss commodity trading companies have been accused of taking advantage of weak fuel standards in Africa to produce, deliver and sell high sulphur diesel and gasoline, which is damaging to people's health. In West Africa especially, Vitol, Trafigura and Addax & Oryx exploit the weak regulatory standards. Researchers of the Swiss NGO Public Eye drew fuel at local pumps in eight countries - Angola, Benin, the Republic of the Congo, Ghana, Côte d'Ivoire, Mali, Senegal and Zambia - with a shocking result: the diesel samples contained up to 378 times more sulfur than is permitted in Europe. Furthermore, other toxic substances, such as benzene and polycyclical aromatic hydrocarbons, were also found in concentrations that are also banned in Europe.

Trafigura does not only ship this diesel and gasoline — and in some areas even sell it at their own pumps — but also produces both fuels itself. On land or at sea, it mixes up a petrochemical cocktail from refinery products and other components known in the industry as "African Quality". These toxic fuels are mainly mixed in the ARA-Zone (Amsterdam-Rotterdam-Antwerp) where Swiss trading firms have their own refineries and storage facilities. Many West African countries that export high grade crude oil to Europe receive toxic low-quality fuel in return.

When the fuel is burned, the sulphur is released into the atmosphere as sulphur dioxide and other compounds that are major contributors to respiratory diseases such as bronchitis and asthma. According to the UN, the populations in the continent's major urban centers suffer from the most rapidly increasing levels of air pollution in the world. The International Council on Clean Transportation estimates that by 2030 Africa will have three times as many deaths from traffic-related particle dust than Europe, Japan, and the US combined. Respiratory illnesses are already a major health issue and diesel fumes can cause cancer.

Human rights violations/abuses

The production and sale of this diesel and gasoline lead to a violation of the right to health

Recommendation to the company

- Stop abusing Africa's low fuel quality standards
- Recognize that if left unchanged this practice will jeopardize the health of millions of people
- Immediately start producing and selling to African countries only fuels that would meet Europe's high fuel quality standards.

More information:

- Dirty Diesel, How Swiss traders flood Africa with Toxic Fuel (2016), Public Eye, https://www.publiceye.ch/fileadmin/files/documents/Rohstoffe/DirtyDiesel/PublicEye2016_DirtyDiesel_A-Public-Eye-Investigation.pdf
- Trafigura, Vitol and BP exporting dirty diesel to Africa, says Swiss NGO (2016), The Guardian, https://www.theguardian.com/world/2016/sep/15/trafigura-vitol-bp-dump-dirty-diesel-africa-swiss-ngo-public-eye
- United Nations Environmental Programme, Urban Air Pollution website, http://www.unep.org/urban_environment/Issues/urban_air.asp
- The International Council on Clean Transportation, http://www.theicct.org/

Appendix 2 Assessment Guidance

The Assessment Guidance explains for each of the 15 Indicators presented in Chapter 2 the rationale behind the Indicator and the specific focus points required of a financial institution. Finally, it provides references to international standards and guidance that have been used to develop the Indicators. The Assessment Guidance has been developed by Amnesty and PAX.

Section A - Issue and Risk: Qualification:

This section highlights a series of actions that a FI should pursue in the event of alleged human rights violations/abuses concerning the qualification of the event(s).

A centrepiece of section A is that for an accurate assessment of the human rights impacts, FIs should seek to understand the concerns of (potentially) adversely impacted individuals and communities by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is considered not possible, FIs should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.

Table 4 Assessment Guidance for indicator A1

A1: The FI investigates facts and their human rights qualifications
Rationale behind the issue to be assessed:
This indicator sets up an expectation for FIs to conduct an investigation in order to understand the specific impacts on specific people, given the specific context of operations to which it is linked. While the investigation does not aim to draw final conclusions or to assign responsibility right away, it is very important that it includes a qualification of the human rights abuses, as well as the type of involvement (cause, contribute, directly linked) of both the company and the FI. In particular, the investigation needs to assess the severity of the abuse, as the more severe the abuse, the more quickly the FI will need to see action from the company. For determining the severity, the FI needs to look at the 'scale, scope and irremediable character'. Both the gravity of the impact and the number of individuals that are affected (for instance, from the delayed effects of environmental harm) are relevant considerations. Irremediability means any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the impact. It is often the case that the greater the scale or the scope of an impact, the less it can be remedied. All these elements are crucial to determine the subsequent steps in the due diligence process, particularly in relation to remedy (see Assessment Guidance B4). It is important that the FI investigates independently from the company or local communities, either by own staff or by recruiting an independent consultant. The more complex the situation and its implications for human rights is - which will be the case when facts are disputed between the parties involved -the more urgent is the need to draw on independent expert advice. Naturally, any investigator will be dependent on the parties to cooperate to some extent. However, this dependence should not stretch further then the ability to reflect the parties' own viewpoint in the report. If any hindrance occurs during the investigation, this should be noted in the report. From the viewpoint of transparency and to be able to start an informed engagement process, the outcome of this investigation should be laid out in a report. The specifics of this report are listed below under "specific focus points".

As part of the investigation phase, FIs should research the existence of any (local) judicial or non-judicial procedures against the company. The corporate responsibility to respect human rights includes respecting the right to remedy (see also B4), which implies that Companies should not obstruct or corrupt judicial or non-judicial mechanisms. If during the investigation, it turns out that the company for example blocks legitimate routes to remedy, this should become part of the engagement agenda from the FI with the company.

It is important to realise that the most common corporate response to allegations of abuse and demands for remedy is defensive. This response itself frequently leads to further abuse; as Companies seek to manage and contain the risks to themselves they - whether intentionally or not – can block legitimate routes to remedy. Amongst the ways that companies do this are: deals with governments, denying victims access to vital information and using vastly greater financial means to delay and frustrate attempts to bring cases to court.

Specific focus points required of the FI:

The FIs' investigation should lead to a report, in which at least the following specific items are present:

- a list of the individuals and communities adversely impacted by the abuse(s);
- the facts of the incident;
- a qualification of the character, severity and scale of the human rights abuse(s);
- a qualification of how the company is involved in the abuse(s) (cause, contribute to, directly linked to, indirectly linked to);
- a qualification of how the FI is involved in the abuse(s) (contribute to, directly linked to, indirectly linked to);
- in case of non-agreement about the (assessment of) the facts and qualifications of the incident amongst the parties involved: the points of view of (a) the FI; (b) the company; and (c) the persons adversely impacted;
- in case of non-agreement about the (assessment of) the facts and qualifications of the incident amongst the parties involved: independent expert advice on the findings and qualifications in the inquiry findings report; and
- when applicable, information on the judicial or non-judicial procedure against the company.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 14, 18, 19,22,29, commentariesto14, 19,22,26.

Inspiration has been drawn from the following documents:

- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, p. 34-35;
- Dutch Banking Sector Agreement on international responsible business conduct regarding human rights para. 4.3 (a).

Table 5 Assessment Guidance for indicator A2

Indicator A2: The FI engages in a multi-stakeholder approach concerning the facts and qualifications
Rationale behind the issue to be assessed:

Stakeholder engagement is a growing expectation of responsible business conduct, but also foundational to the effective implementation of human rights due diligence.

In practice, many human rights impacts can be linked back to challenges related to stakeholder engagement. It appears that more effective stakeholder engagement often could have prevented or mitigated them. The values and priorities of impacted stakeholders are vital considerations in evaluating impacts and identifying appropriate avoidance or mitigation steps.

While companies may also choose to engage with issue expert stakeholders (independently or being internal or external to the FI, see indicator A1), who can provide insights into the qualification stage, this should not replace engagement with adversely impacted individuals or communities. For an accurate assessment of the human rights impacts, FIs should seek to understand the concerns of (potentially) adversely impacted individuals and communities.

Specific focus points required of the FI:

Multi-stakeholder engagement should include FI's clients, individuals and/or communities adversely impacted by the abuses. The extent of an FI's engagement with those most impacted by the behaviour of a client will depend on how human rights violations/abuses are prioritised. FIs are encouraged to engage with these stakeholders.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 18.

Inspiration has been drawn from the following document:
- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, para 1.4.

Table 6 Assessment Guidance for indicator A3

Indicator A3: The FI takes a formal decision on engagement

Rationale behind the issue to be assessed:

The formal decision on how to proceed is important from two points of view:

First, for the FI to be effective in its engagement, a formal decision to act upon the findings of a report strengthens its position.

Second, from the viewpoint of transparency, a formal decision helps both the company and the adversely impacted individuals and communities, as well as other stakeholders to understand the FI's position.

It is important to note that a decision *not* to engage with a company is a decision as well.

It is also important that the formal decision is reasoned. This means that it is supported by arguments derived from the investigative report, the FI's assessment of its leverage, and other relevant items. Taking this decision, the FI's assessment of its leverage is especially important in order to be able to exercise it for prevention or mitigation of the adverse impact.

Specific focus points required of the FI:

The formal decision on engagement should be based on the following criteria:

- The FI is able to show in records that a formal decision was taken.
- The decision is taken by the FI's appropriate level of management. That means that the staff meets the criteria of knowledgeability and authorization.
    - Knowledgeability: There is sufficient knowledge available of the human rights situation the company needs to address. This is operationalized as follows: there is either in depth knowledge of the incident based on geographical affiliation (the staff involved is in the same country/region) or there is in depth knowledge of the incident based on content affiliation (the staff involved is specialized in human rights / CSR), or both.
    - Authorization: The level participating in the conversation is the level that can independently take or authorize action to address the human rights situation.
- The FI shows that the decision was taken based on the findings of the enquiry report.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 19 and commentary to 19.

Inspiration has been drawn from the following document:

- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, para. 2.3.

Section B - Engagement of the FI with the company:

This section elaborates how the FI should interact with the company during the process of engagement. At its core, engagement is a process of dialogue with the company aiming to persuade it to end and remediate human rights abuses. A key element under this section is the company's action plan.

Table 7 Assessment Guidance for indicator B1

Indicator B1: The FI formulates goals and a strategy for engagement with the company
Rationale behind the issue to be assessed: This indicator is applicable in those instances in which the FI has decided to start engagement with the company. The indicator requires that the FI formulates specific goals to be achieved and that set up a strategy to achieve them. The formulation of specific goals is key as without specific and written goals, the engagement process runs a risk to become unguided, unrealistic, not measurable and unbound in time. Among the factors that will determine the appropriate strategy, are the FI's leverage over the entity concerned, how crucial the relationship is to the FI, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights impact. **Specific focus points required of the FI:** The written goals of the FI should meet four criteria: (1) specific; (2) measurable; (3) realistic and (4) time-bound. These are four of the five items of the 'SMART' (specific, measurable, acceptable, realistic and time-bound) requirement of goals in general. Three notes are important: • The aspect 'acceptable' is missing from this list. Some goals set by the FI might be unacceptable to the company, in which case the FI is driven to further action (the use of its leverage or exclusion). • The aspect 'realistic' is also missing from this list: this aspect is important, but is not suitable to be measured in the scope of this research. The FI is incentivized to set realistic goals, as well as in the best position to weigh leverage, facts and positions to determine what is realistic. • It is up to the FI to assess what would be a reasonable timeline. It is required of the FI however, that in assessing what is reasonable, the interests of the adversely impacted individuals and communities are weighed as well. The more severe the abuse, the more quickly the FI will need to see change. If any (local) judicial or non-judicial procedures against the company exist, or will start, the FI should require the company to cooperate with the mechanisms. **References to international standards and guidance:** • United Nations Guiding Principles on Business and Human Rights, Guiding Principles 22,29, commentaries to 22,26.

Table 8 Assessment Guidance for indicator B2

Indicator B2: The FI formally notifies the company of its engagement
Rationale behind the issue to be assessed:

The second indicator for the engagement phase follows the decision to engage, plus the formulation of goals and a strategy for the engagement process.

Notifying the company is an obvious next step, but it requires attention nonetheless. If the notification is not sent properly, or if the company is not aware of the FI's aims, the process might start on wrong assumptions.

Specific focus points required of the FI:

- The company should be notified that the dialogue the FI is starting is part of an engagement procedure. For the company, the goals and the strategy of the FI should be clear. This should include the interest of the FI to end and/or remediate an (alleged) human rights violation or abuse; Along with the notification, the inquiry report should be sent to the company.
- The notification should be sent to the appropriate level of management in the company to ensure the process is picked up with sufficient urgency. Two factors determine the appropriateness of the level of management:
    - Knowledge ability: There is sufficient knowledge available of the human rights situation the company needs to address. This is operationalized as follows: there is either in depth knowledge of the incident based on geographical affiliation (the staff involved is in the same country/region) or there is in depth knowledge of the incident based on content affiliation (the staff involved is specialized in human rights / CSR), or both.
    - Authorization: The level participating in the conversation is the level that can independently take or authorize action to address the human rights situation.
- The FI should ask for a formal reaction; this serves to ensure that the FI's message is understood and marks the start of the formal engagement process.

References to international standards and guidance:

Inspiration has been drawn from the following document:

- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, p 32-34.

Table 9 Assessment Guidance for indicator B3

Indicator B3: The FI enters into adequate dialogue with the company
Rationale behind the issue to be assessed:
This indicator sets a standard for the dialogue opened by the FI with the company. For this dialogue to be effective, FIs should pay attention to the quality of their actions. Two factors are important for measuring the adequateness: the level of the conversation and the content of the dialogue.
Specific focus points required of the FI:
• Level of the conversation: the dialogue should be opened at the appropriate level of management within the company. Two aspects determine the appropriateness of the level of management:

    - Knowledgeability: There is sufficient knowledge available of the human rights situation the company needs to address. This is operationalized as follows: there is either in depth knowledge of the incident based on geographical affiliation (the staff involved is in the same country/region) or there is in depth knowledge of the incident based on content affiliation (the staff involved is specialized in human rights / CSR), or both.
    - Authorization: The level participating in the conversation is the level that can independently take or authorize action to address the human rights situation.
- Content of the dialogue: the dialogue should focus on findings of the inquiry report. This does not mean that no other topics can be on the agenda for the meeting, but the inquiry findings report needs to have an independent slot on the agenda.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principles 19, commentary to 19.

Inspiration has been drawn from the following document:
- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, p. 32-34.

Table 10 Assessment Guidance for indicator B4

Indicator B4: The FI ensures that the company has adequate knowledge on the right to an effective remedy

Rationale behind the issue to be assessed:

In order to address human rights violations/abuses effectively, the meaning of the right to remedy should be well understood. Only then, the company can formulate and integrate the appropriate remedy steps in an Action Plan, in close consultation with (representatives of) those adversely impacted (see B6).

The following paragraphs present key information on the right to remedy:

All victims of human rights violations/abuses have a right to an effective remedy. The core elements of right to remedy encompasses the victim's right to:

- equal and effective access to justice;
- adequate, effective and prompt reparation for harm suffered; and
- access to relevant information concerning violations and reparation mechanisms.

Central to the right to remedy is the requirement of providing reparation. The actual reparation that should be provided in a case will depend on the nature of the right violated, the harm suffered and the wishes of those adversely impacted.

There are five recognized forms of reparation:

Restitution: This is intended to restore the victim to the original situation that they were in before the abuse took place and includes, as appropriate, "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".*

* UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 19.

Compensation: When the damage can be economically assessed, monetary compensation should be provided. The harm that can be compensated includes: "(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services."*

* UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 20.

Rehabilitation: This includes any medical and psychological care needed by the victim as well as support from legal and social services.

Satisfaction: This covers a broad range of measures which will be applicable as appropriate to the circumstances and includes: measures aimed at the cessation of the violations; verification of the facts and full and public disclosure of the truth; a public apology, including acknowledgement of the facts and acceptance of responsibility; and judicial and administrative sanctions against those responsible for the violations.

Guarantees of non-repetition: The prevention of further abuses can be achieved through a number of measures, any or all of which will contribute to non-repetition in the future. For example, changes in laws to prevent discrimination or ensuring that proper oversight mechanisms are put in place may be necessary to guarantee non-repetition.

While International Human Rights Law places an obligation on States to ensure that the right to remedy is fully realized, international law has yet to adequately address non-State actors that may be substantially more powerful than the State. The State is expected not only to guarantee the right to remedy but to protect this right from undue interference by private parties. States must protect individuals and communities from the harmful activities of corporate actors through effective policies, legislation, regulation, and adjudication. Amongst the ways that companies, which could be clients of financial institutions, unduly interfere are deals with governments, denying victims access to vital information and using vastly greater financial means to delay and frustrate attempts to bring cases to court.

The corporate responsibility to respect all human rights includes respecting the right to remedy. In this context, the UN Special Representative of the Secretary-General on business and human rights affirmed that "companies that obstruct or corrupt judicial mechanisms act at variance with their responsibility to respect". The Special Representative further emphasized the importance of both States and companies acting in a manner that is supportive of judicial integrity and independence, and of courts being able to act independently from any political or economic pressures from either the State or corporations.

The UN Guiding Principles on Business and Human Rights state in Guiding Principle 29: 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. Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (Guiding Principle 31): legitimate, accessible, predictable, equitable, transparent, rights-compatible, source of continuous learning and based on engagement and dialogue (consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances). These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.

Specific focus points required of the FI:

- The FI ensures it understands the full meaning of the right to remedy and discusses this right in the dialogue with the company.
- The FI emphasizes the core elements of the right to remedy with the company, including the victim's right to:
    - equal and effective access to justice;
    - adequate, effective and prompt reparation for harm suffered; and
    - access to relevant information concerning violations and reparation mechanisms.

References to international standards and guidance:

The international standards mentioned here serve the purpose of informing the FI about the content of the right to effective remedy. A full understanding of this rights is conditional for setting the right engagement agenda with the Company.

- International Covenant on Economic, Social and Cultural Rights, Article 2; Committee on Economic, Social and Cultural Rights, General Comments 9, 14 (Article 12);
- International Convention on the Elimination of all Forms of Racial Discrimination, Article 6;
- Convention on the Elimination of All Forms of Discrimination against Women, Article 2;
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14;
- International Convention for the Protection of All Persons from Enforced Disappearance Articles 3–8;
- Convention on the Rights of the Child, Articles 12, 19(2), 37 and 39; Committee on the Rights of the Child, General Comment 5.
- Convention on the Rights of Persons with Disabilities, Article 13; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 83;
- European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 13;
- American Convention on Human Rights, Article 25;
- African Charter on Human and Peoples' Rights, Article 7(1)(a);
- Charter of Fundamental Rights of the European Union, Article 47;
- Arab Charter on Human Rights, Articles 12 and 23.
- Human Rights Committee, General Comment 31, para. 16;
- United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principles2(b), 2(c), 3(c), 3(d), 11(a), 11(b),12, 15-23;
- Human Rights Council, Business and Human Rights: Further steps towards the operationalization of the "Protect, Respect and Remedy" Framework, para. 26;
- United Nations Guiding Principles on Business and Human Rights, Guiding Principles 29, 31 and commentaries to 29,31.

Table 11 Assessment Guidance for indicator B5

Indicator B5: The FI requires an Action Plan from the company

Rationale behind the issue to be assessed:

FIs are expected to build and exert their leverage to the extent possible in order to influence their clients to take action to prevent and mitigate adverse impacts. A concrete Action Plan of the company to address human rights violations/abuses will enable the FI to assess whether the goals the FI has set for the engagement process will actually be achieved. The company should be able to demonstrate to the FI that it is able to respond adequately and timely to the abuses, provide remediation and learn from mistakes.

When a company has caused or contributed to adverse impacts, it should provide for or cooperate in their remediation through legitimate processes. On the basis of the international business and human rights standards, the company should establish or participate in effective operational-level grievance mechanisms for individuals and communities adversely impacted to make it possible for grievances to be addressed early and remediated directly. In order to ensure their effectiveness, non-judicial grievance mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, source of continuous learning and based on engagement a dialogue (consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances).

The values and priorities of impacted stakeholders are vital considerations in evaluating impacts and identifying appropriate avoidance or mitigation steps.

Specific focus points required of the FI:

The FI requires that the Action Plan of the company contains at least:

- Specific goals tailored to the situation at hand, including one or more types of remedy, and – if there is none – the establishment of an operational-level grievance mechanism by the company in accordance with UNGP 31;
- Specific actions tailored to the situation at hand to meet the see goals;
- A time-bound frame for the goals to be met; and
- A community engagement plan (addressing local communities or work force communities), (see B6 for an elaborate description on content).

References to international standards and guidance:

- PRI Human rights and the Extractive Industry – investigating the company's response to incidents or allegations, p. 9;
- United Nations Guiding Principles on Business and Human Rights, Guiding Principles 22,29.

Inspiration has been drawn from the following documents:

- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, p. 35-36;
- Dutch Banking Sector Agreement on international responsible business conduct regarding human rights para. 4.3 (b), 7.3.

Table 12 Assessment Guidance for indicator B6

Indicator B6: The FI requires the company to follow a multi-stakeholder approach
Rationale behind the issue to be assessed: The FI requires an action plan from the company that aims at (i) terminating any ongoing human rights abuse; (ii) mitigating the negative impact of human rights abuse by providing an effective remedy for those adversely impacted; and (iii) preventing new human rights abuses. As such, the values and priorities of adversely stakeholders are vital considerations for drafting an effective action plan. In order to respect the right to remedy of victims, and decide upon the right steps towards ensuring remedy for the victims, the meaning of the right to remedy should be well understood by all parties, including the victims. The company needs to provide adequate information to the victims on this right. See B4. For the verification whether adverse human rights impacts are addressed, the effectiveness of the response, as formulated in the action plan, should be tracked. Tracking should draw on feedback from both internal and external sources, including adversely impacted individuals or communities. Engagement needs to happen as a continuing, two-way process and be moulded by local context. In particular, embedding grievance mechanisms in community engagement will help build relationships of trust with local stakeholders in the mechanism. **Specific focus points required of the FI:** The FI should ensure that a company undertakes a multi-stakeholder consultation, which includes (representatives of) those adversely impacted. The FI should ensure that this consultation: • takes place before finalising the action plan; • includes adequate information sharing on the right to remedy, at a minimum the three core elements of a victim's right to remedy: 1) equal and effective access to justice; 2) adequate, effective and prompt reparation for harm suffered; 3) access to relevant information concerning violations and reparation mechanisms; and • continues during the implementation phase of the action plan. **References to international standards and guidance:** • PRI Human rights and the Extractive Industry – Probe the company's due diligence processes p.10; • United Nations Guiding Principles on Business and Human Rights, Guiding Principles 19,20,29.

Section C - Monitoring engagement progress by the FI:

With the Action Plan in hand – where the expectations have been set –, the next phase of the engagement process focuses on the FI's monitoring of progress. This is the third and final phase of the engagement process, but also the most extensive phase. The FI continues to play a role in the implementation of the Action Plan by the company. Key element of this section is in the indicators C2, C3 and C4, which constitute a cycle of intermediate assessment of progress, checking progress in the multi-stakeholder dialogue, and then taking a formal decision on next steps based on both elements.

Table 13 Assessment Guidance for indicator C1

Indicator C1: The FI monitors the engagement progress including execution of the company's action plan

Rationale behind the issue to be assessed:

In the first indicator of the implementation phase, the FI's role as monitor of the company's action plan is central. Monitoring the ongoing processes signals to the parties involved in the incident that the FI is committed to its resolution.

Monitoring the activities taking place in the framework of the action plan will help also the FI to manage the expectations set up in the Action Plan. When other stakeholders communicate about the incident, it is important that the FI is aware of the current status to be able to communicate in ways that restore trust.

Specific focus points required of the FI:

In monitoring the engagement progress, including the execution of the company's action plan the FI should focus on the following points:

- reviewing the company's progress reports and asking the company for internal documents to validate this report;
- cross checking the claims through media releases, sources with CSOs, other stakeholders, etc.; and
- setting up a procedure for receiving information from (the representatives of) those adversely impacted or CSOs on the execution of the company's action plan.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 20.

Table 14 Assessment Guidance for indicator C2

Indicator C2: The FI provides intermediate assessments on the execution of the company's action plan

Rationale behind the issue to be assessed:

The monitoring of the execution of the action plan should eventually lead to a final decision by the FI. This means that during the monitoring, the FI needs to build in assessments. These assessments should lead to a number of possible decisions, listed under 'specific points'.

The indicators C2, C3 and C4 are closely linked: they describe the cycle of assessment, decision, then possibly re-assessment and decision again, until a final decision is reached.

Specific focus points required of the FI:

The FI regularly provides intermediate assessments on the engagement progress, including the execution of the company's action plan and shares these with the company. An intermediate assessment of the engagement progress contains one of the following conclusions:

1. The goals as formulated in the company's action plan have been achieved; on the basis of this conclusion the engagement will be terminated.

2. The goals as formulated in the company's action plan have not been achieved; however, the company has taken sufficient adequate steps towards obtaining the goals; on the basis of this conclusion, the engagement will be continued in order to achieve the goals as formulated in the company's action plan.
3. The goals as formulated in the company's action plan have not been achieved; the company has not taken sufficient adequate steps towards obtaining the goals; on the basis of this conclusion, the FI will take follow up actions; this may include requiring the company to review and, if needed, update its action plan. Follow up actions may include as well: mobilising other lenders in case of syndicated loans to increase leverage
4. The goals as formulated in the company's action plan have not been achieved; the company has not taken sufficient adequate steps towards obtaining the goals and it has become clear that the company has failed to carry out its action plan. On the basis of this conclusion, the FI may terminate the engagement and the FI may take follow up actions like divesting, not agreeing on new investments and/or terminating the relationship.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 19 and commentary to 19;
- OECD Guidelines for Multinational Enterprises, Chapter II, para. 22.

Inspiration has been drawn from the following document:
- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, p. 36, 39-41.

Table 15 Assessment Guidance for indicator C3

Indicator C3: The FI engages in multi-stakeholder approach concerning the assessment of execution of the Action Plan

Rationale behind the issue to be assessed:

In indicator B6, the importance of a multi-stakeholder approach was indicated. During the monitoring of the execution of the action plan, this is of equal importance.

During the implementation of the action plan, the FI is in a decision-making process on how to proceed with both the engagement process and with the investment in the company (see indicator C2). This process requires information feeds. One such information feed is the progress reporting taking place from the company. The FI should ensure it also possesses information from other stakeholder groups, including those adversely impacted by the incident, on the progress that has been made.

Specific focus points required of the FI:

The FI is required to collect information from stakeholders independent from the company involved. The information from the stakeholders focuses on these questions:

1. Have the human rights abuses been terminated? For example:
    - No more reports of new abuses occur for a reasonable amount of time; or

- The ongoing multi-stakeholder consultations lead to the conclusion that the abuses have been terminated.

2. Have the action(s) taken by the company prevented similar new human rights abuses from taking place? The company is able to show it has either:
    - a written lesson learned report;
    - changed its standard operating procedures;
    - replaced staff;
    - terminated relations with other companies involved in the abuse;
    - incorporated the adversely impacted communities or individual(s) in its decision-making procedure in some way; or
    - or a combination of the above.
3. Has the company provided victims with an adequate remedy? For example:
    - The ongoing multi-stakeholder consultations lead to the conclusion that adequate remedy has been provided

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 20.

Table 16 Assessment Guidance for indicator C4

Indicator C4: The FI takes a formal decision on concluding or continuing the engagement and follow up actions

Rationale behind the issue to be assessed:

Where C2 stipulates the importance of conducting an intermediate assessment, this indicator stipulates the importance of a distinct formal decision based on the intermediate assessment. A formal decision on how to proceed is important from two points of view.

First, a formal decision on concluding or continuing the engagement and/or on follow up actions will strengthen the position of the FI.

The involvement of the appropriate level of management in the process will ensure the political will to implement whatever decision is made. It will help integrate the decision across relevant internal functions and processes (assign responsibility to appropriate level, internal decision making, budget allocations and oversight processes). The following points of departure, derived from international standards, need to be taken into consideration by the appropriate level of management:

- If the FI remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial, or legal – of the continuing connection.
- When there is a lack of leverage, the FI could find ways to increase it by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors. If the situation is such that the FI lacks the leverage to mitigate adverse impacts and is unable to increase its leverage, the FI should consider ending the relationship, considering credible assessments of potential adverse human rights impacts of doing so. Generally, the more severe the adverse impact, the more quickly the FI will need to see change before it takes a decision on whether it should end the relationship.

Second, from the viewpoint of transparency, a formal decision helps both the company and the adversely impacted individuals and communities, as well as other stakeholders to understand the FI's position. Continuing to invest in a company which has been identified as causing or contributing to adverse impacts may pose reputational risks or potential financial risks to FIs. Thus, it should be also in the FI's interest to publicly explain its decision to stay invested, how this decision aligns with their Responsible Business Conduct policy and priorities, what actions are being taken to attempt to apply leverage to mitigate the impacts, and how the investment will continue to be monitored in the future.

It is important that the decision is informed and reasoned: informed means that it is based on sufficient understanding of the report, reasoned means that it is supported by arguments derived from the investigative report, the FI's assessment of its leverage, and other relevant items.

Specific focus points required of the FI:

The formal decision of the FI should meet the following criteria (cf. A3):

- The FI is able to show in records that a formal decision was taken.
- The decision is taken by the appropriate level of management within the FI. Two factors determine the appropriateness of the level of management:
    - Knowledgeability: There is sufficient knowledge available of the human rights situation the company needs to address. This is operationalized as follows: there is either in depth knowledge of the incident based on geographical affiliation (the staff involved is in the same country/region) or there is in depth knowledge of the incident based on content affiliation (the staff involved is specialized in human rights / CSR), or both.
    - Authorization: The level participating in the conversation is the level that can independently take or authorize action to address the human rights situation.
- The FI shows that the decision was taken based on the findings of the assessment report.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 19 and commentary to 19;
- OECD Guidelines for Multinational Entreprises, Chapter II, para. 22.

Inspiration has been drawn from the following document:

- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, para. 95,101,103,107.

Table 17 Assessment Guidance for indicator C5

Indicator C5: The FI has a Grievance Mechanism in place for complaints by stakeholders
Rationale behind the issue to be assessed:

Remediation is an expectation where a FI causes or contributes to adverse impacts. Where adverse impacts are only directly linked to its operations, products or services by a business relationship, the FI is not expected to provide for or cooperate in their remediation. However, regardless of the category of relationship to the abuses, there is a general rationale for having an operational-level grievance mechanism. There are two major reasons for this:

- First, operational-level grievance mechanisms support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence;
- Second, operational-level grievance mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly, thereby preventing harms from compounding and grievances from escalating.

The second situation is especially relevant when the company is not providing remedy to the victims, or when victims are very apprehensive in approaching the company due to a hostile approach of the company towards those adversely impacted. In this situation, FI's grievance mechanisms, as a fall-back option, also in situations of being directly linked, can help prevent the escalation of the grievances into major abuses or even conflicts. This is particularly relevant regarding investments in Companies that operate in conflict-affected and high-risk areas. Furthermore, by having such a mechanism, the FI can show its overall commitment towards solving human rights abuses effectively, including enabling remedy for victims.

Specific focus points required of the FI:

When setting up a grievance mechanism the FI should include effectiveness criteria in accordance with the criteria from UNGP 31: legitimate, accessible, predictable, equitable, transparent, rights-compatible, source of continuous learning and based on engagement a dialogue (consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances). For example, whether the FI has an operational-level grievance mechanism should be clear from public information provided by the FI, amongst other things on its website. The people it is intended to serve should know about it, trust it and be able to use it.

References to international standards and guidance:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 22,29,31, commentary to 29,31.

Section D - Transparency

Transparency is the final section of this assessment guide. It focuses on a cross cutting theme rather than a phase of the engagement process.

Indicator D1: FI publishes relevant documents and procedures on its website, and requests the company to do the same

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Rationale behind the issue to be assessed:

Transparency is important for several reasons. It makes public accountability for how human rights impacts are addressed possible for relevant stakeholders. This will help adversely impacted individuals and communities to follow the actions of the FI and the company in relation to their case. Moreover, it makes it possible for investors and consumers of the FI (and the company) to follow its action towards a specific incident. As such, it is important that the FI publishes both its general procedures and as much relevant information regarding specific cases as possible.

The UNGPs require business enterprises to be prepared to communicate externally how they address their human rights impacts, particularly when concerns are raised by or on behalf of affected stakeholders. In case operations or operating contexts pose risks of severe human rights impacts, formal reporting on how business enterprises address them is expected and should (a) be of a form and frequency that reflects the enterprise's impacts and be accessible to its intended audience, (b) provide sufficient information to evaluate the adequacy of the response to a particular impact and (c) not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality. These expectations apply to the FIs and the company.

In the Dutch context some regulatory laws related to the banking sector constrain public disclosure regarding specific incidents, due to client confidentiality rules. There is a regulation governing the disclosure of what may constitute 'inside information', in case of listed companies. Also, the banker's oath requires bankers to keep secret what has been shared with them in confidence. The Rules of Conduct of the Dutch Banking Association contains a stipulation that confidential information regarding clients may not be provided to third parties unless client consent has been obtained or disclosure is legally required. Lastly, contracts between a lender and lending company often contain confidentiality clauses.

Despite these obstacles, individual client information can be made public with client consent or in anonymous form or aggregated anonymous form. To act in the spirit of the UNGPs and work towards more transparency, banks should on the short-term do what is possible within the legal context to maximise transparency. This implies first of all that they require the client involved to publicize information regarding the severe human rights impact(s) in which it is involved and the steps it takes to address the impact(s). Additionally, the bank should do its utmost to obtain client consent in order to be able to publish individual client information. If consent is not provided, it should at least share its own goal(s) and procedure(s) regarding the engagement process with the client when the business relationship is in the public domain. If the relationship is not publicly known, the bank should find ways to report on their engagement efforts, including results, in an anonymous form.

In the longer term, efforts are needed to contribute to a legal context in which banks can more easily account for how they address human rights impacts in their value chains and do no longer depend on client consent to live up to the reporting requirements under the international human rights standards (for example, adjusting Conduct Rules, contract clauses and improve/strengthen transparency policies.

Specific focus points required of the FI:

The FI publishes the following procedures on its website:

- The standard procedure to undertake action in situations where negative human rights impact is directly linked to the FI's operations, products or services
- The FI's procedure for receiving information from (the representatives of) those adversely impacted or CSOs; and
- The FI's grievance mechanism (C5).

The FI publishes the following information regarding its practice of engagement on its website:

Client specific (in case client consent is given):

- The results of the engagement with the Company on a specific case, including the issues discussed, goals and deadlines.

Client specific (in case client consent is not given):

- The FI's own goal(s) of the engagement with a Company on a specific case (if the business relation is in the public domain)

General information:

- How many times the FI has been confronted with (alleged) involvement of Companies with human rights abuse(s), in what sectors/regarding what type of product
- How many times has the FI started engagement with a Company on the (alleged) involvement with human rights abuse(s)
- How many times has this resulted in an Action Plan to be carried out by the Company
- How many engagement trajectories have come to an end, after how much time, with what result

Most relevant international standards and guidance documents:

- United Nations Guiding Principles on Business and Human Rights, Guiding Principle 21 and commentary to 21.
- Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, para 2.4.
- NautaDutilh, Legal Report on the Possibilities for Increased Transparency in light of the Adhering Banks' Client Confidentiality Obligations (2017).

References

1 Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterized by widespread human rights abuses and violations of national or international law. Source: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk areas p.13

2 OECD Global Forum on Responsible Business Conduct. Due Diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship, 2014, page 7.

3 OECD, Responsible Business Conduct for Institutional Investors. Key considerations for institutional investors in implementing the recommendations of the OECD Guidelines for Multinational Enterprises, 2017, https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf

4 Dutch Banking Sector Agreement on international responsible business conduct regarding human rights. Legal Report on the Possibilities for Increased Transparency in light of the Adhering Banks' Client Confidentiality Obligations, 2017, https://www.imvoconvenanten.nl/banking/news/2018/5/human-rights-policy?sc_lang=en

5 Amnesty International, Negligence in the Niger Delta, 2018, https://www.amnesty.org/en/latest/news/2018/03/nigeria-amnesty-activists-uncover-serious-negligence-by-oil-giants-shell-and-eni/

6 In 2011 UNEP published the most comprehensive study to date of the impact that oil pollution has had on the communities living in the Niger Delta. Focusing on just one region, Ogoniland, UNEP exposed an appalling level of pollution, including the contamination of agricultural land and fisheries, the contamination of drinking water, and the exposure of hundreds of thousands of people to serious health risks. See: http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=2649&ArticleID=8827&l=en&t=long

7 UNEP found that Shell's main technique for tackling land-based oil pollution, which Shell calls remediation by enhanced natural attenuation (RENA), or bio-remediation by land-farming, "has not proven effective" and should be overhauled.

8 In 2007, Trafigura reached a settlement with the government of Côte d'Ivoire granting Trafigura immunity from prosecution. In a civil claim in the UK, brought on behalf of some of the victims, Trafigura reached another out-of-court settlement. A Dutch court found the company guilty of illegally exporting the waste from the Netherlands but authorities decided not to prosecute Trafigura for the dumping. When Greenpeace brought a legal complaint against this decision, the Dutch court stated that it would not be feasible or expedient to investigate the alleged acts in Côte d'Ivoire. UK authorities refused to investigate the case based purely on the likely costs and benefits of undertaking that investigation. It is estimated that only 63% of registered victims received compensation under the 2007 settlement agreement between Trafigura and the Ivorian Government. Although another 30,000 victims were due to receive compensation following the 2009 settlement in the UK, funds destined for over 6,000 of those victims were reportedly misappropriated by a fraudulent group who claimed to represent the victims in Côte d'Ivoire.

The Fair Bank Guide is a coalition of organisations that consists of Amnesty International, FNV, Milieudefensie, Oxfam Novib, PAX and World Animal Protection.