

## **Input Milieudefensie (Friends of the Earth Netherlands)**

**on**

### **the call for inputs of the Special Rapporteur on the promotion and protection of human rights in the context of climate change**

Milieudefensie very much welcomes the work of the Special Rapporteur on the promotion and protection of human rights in the context of climate change and appreciates the opportunity given to give input on these crucial questions. Milieudefensie applauds the recognition of the crucial role international companies (ought to) play in preventing dangerous climate change and to address this topic within the scope of her authorities. We will address in general terms the questions raised from the perspective of our work with partners in the Global South and our work on climate litigation.

#### **1. The role of states**

When it comes to climate change, human rights and the environment, many states in the Global South do not allow access to information or (actively) provide this. Neither do they provide an enabling environment by establishing laws and regulations that require transparency from corporations on their activities, climate policies or due diligence policies. When it comes to state policies, states often lack capacities and know-how, for example, in systematically calculating carbon emissions. More importantly, local communities, CSOs and NGOs are often met with resistance, suppression and even violence when engaging and inquiring about public policies and political decisions. For example, in Argentina, Bolivia, and Honduras, the government actively cracks down on civil society organisations resisting deforestation and new oil and gas projects. These local organisations do not have access to policy makers and key political figures. This situation is exacerbated by the fact that big oil companies have more power when it comes to influencing and obtaining information from national, regional and local governments. There is no transparency about the lobby activities of these oil companies through publicly available lobby registers.

Milieudefensie works with a range of partner organisations in Asia, Africa and Latin-America. Our partners often do not have access to information about new oil and gas projects, the granting procedure and requirements for permits and social, environmental impact assessment reports (including climate impacts) and the phasing out of fossil fuel projects. In case exploration and exploitation has already started, governments do not (systematically) share information of adverse impacts and measures to prevent, mitigate or remediate these impacts through their ministries or national supervisory bodies.

We request the Special Rapporteur to call on states to

- take sufficient measures for the protection of climate, environmental and human rights defenders and combat policies that lead to the shrinking of civic space;
- to provide access to key policy and decision-makers for affected stakeholders and the organisations representing them;

- To guarantee robust systems of providing access to information to affected stakeholders on (non-exhaustive) climate policies, fossil phaseout and fossil projects, especially vulnerable, marginalized groups of affected stakeholders. These stakeholders should also be involved in the design and execution of these policies.

### **1.1 Export Credit Insurances and Agencies**

Export Credit Agencies (ECAs) still provide finance options for fossil fuel projects. ECAs often do not provide transparency about requirements for granting procedures, which projects it finances, contractual terms and the status of projects. It is not clear to what extent climate, environmental and human rights, including gender-related risks and impacts, are assessed and included in decision-making. Neither are ECAs transparent about what the contractual obligations for companies are to uphold climate, environmental and human rights in line with the OECD Guidelines and what would constitute a breach of contract, resulting in a termination of the contract. This is particularly salient when requests for export credit support are made for projects that have already been associated with human rights abuses or illegal environmental destruction.

Furthermore, ECAs do not publicly report on adverse risks and impacts on climate, environmental and human rights, including gender-related impacts of the projects that are supported by them and what kind of measures they are taking to address these impacts..

We request the Special Rapporteur to call on states and business to

- timely disclose which projects the ECA has under consideration for financial support and disclose which projects it is supporting, especially fossil fuel projects;
- disclose in what way adverse climate, environmental and human rights, including gender-related risks and impacts, are assessed in the granting procedure and upheld in contractual requirements;
- publicly report on adverse risks and impacts on climate, environmental and human rights, including gender-related impacts, and what measures ECAs are taking to address these;
- limit Export Credit Insurance eligibility to projects that have not already been associated with human rights abuses or other breaches of corporate due diligence standards and national laws;
- to ensure ECAs have due diligence clauses in their agreements that allow for the withdrawal of insurance when corporate due diligence standards are not met.

### **1.2 Development Banks**

In 2022, Milieudedefensie filed a request at the Dutch Ministry for Foreign Affairs for access to information to give insight on major land- and human rights violations at palm oil plantation "Plantations et Huileries du Congo S.A (PHC) - Feronia ("PHC-Feronia") in the DRC, a plantation (co-)financed by the Dutch development bank FMO.

Large parts of the request to information was denied. The Ministry argued that FMO is an independent institution and therefore cannot give information based on the request for information. Next to that, the

Ministry argued they can't give more information because of other interests such as 'international relations'. FMO itself has not replied to our request for information.

Those affected are to this day engaged in a complaint procedure with various development banks through which they hope to get justice for both their stolen land and the violence and killings of their families and friends committed by authorities and guards of PHC-Feronia. From the point of view of justice and transparency, it is crucial that the Ministry of Foreign Affairs and/or FMO facilitates access to information.

We request the Special Rapporteur to call on the Dutch government and the Dutch FMO to provide information on the major land- and human rights violations at palm oil plantation "Plantations et Huileries du Congo S.A (PHC) - Feronia ("PHC-Feronia") in the DRC.

### **1.3 Investor-State Dispute Settlement (ISDS) and transparency**

ISDS allows fossil fuel companies to circumvent national judicial systems to counteract specific climate measures, such as the phasing out of fossil fuels, or claim compensation.<sup>1</sup> In its report, the International Institute for Sustainable Development (IISD) highlights that the fossil fuel sector is the most litigious sector, accounting for 20% of the total known ISDS cases. The majority of these cases are decided in favour of investors providing fossil fuel companies with 600 million USD per case on average. Cases are often brought against lower middle and upper middle income countries, while 92% of the claimants come from high income countries, especially American ones.

However, these arbitration cases are often marred by a lack of transparency. In 54% of the fossil fuel cases, it was decided to keep all documentation confidential. This includes claims, case-related documents, awards and decisions. This severely hampers the access to information for rights holders, especially when they are directly impacted by the award of the tribunal.

Furthermore, local communities and NGOs do not have legal standing at these proceedings in case their rights are (potentially) harmed by the outcome of the award. For example, in the case of Ecuador vs. Chevron, it was ruled that Ecuador could not enforce the Ecuadorian court ruling providing 9.6 billion in damages to local communities. However, these local communities and the NGO(s) representing were not in any way part of the proceedings.

We request the Special Rapporteur to call on states and business to:

- provide transparency on ISDS cases, including claims, case-related documents, awards and decisions;
- to ensure that ISDS rulings do not surpass existing international human rights and environmental standards neither circumvent domestic policy space, especially in relation to financing a just transition;

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<sup>1</sup> L. Di Salvatore, [International Institute for Sustainable Development, december 2021 at: < https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf >](https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf)

- to ensure that affected stakeholders have access to arbitration proceedings when (parts of) their rights are subject in the proceedings.

## **2. The role of businesses**

### **2.1 Lack of transparency about climate, human rights and environmental due diligence efforts by companies**

The UN Guiding Principles and OECD Guidelines provide six clear steps which companies should take when conducting due diligence. Engagement with relevant stakeholders, communication about potential and actual adverse impacts and practising due diligence efforts are part of these steps. Such information should be sufficient to evaluate the adequacy of their response to their adverse impacts.

Companies should provide more transparency about the policies they adopt, especially climate related and due diligence policies. Risk analysis, impact assessments (including climate, environmental and human rights) of the company, and on a project-level are often not available. Impact assessments, especially in the oil and gas industry, are an important source of information for local communities, CSOs and NGOs to understand the adverse impacts on their jobs, communities and the environment.

Although companies publicly report on measures they are taking to prevent, address and mitigate adverse impacts (e.g. in its annual sustainability report), these communities often do not have (sufficient) access to information about the specific measures that directly affect and impact them. Furthermore, companies should include these communities and organisations more in the development of these measures. They are affected stakeholders, but it is often not clear to these stakeholders in what step of the process they are consulted, and how their feedback is used in the design of measures.

We welcome the efforts of the European Union to introduce mandatory HREDD and climate plans through the EU Corporate Sustainability Due Diligence Directive (EU CSDDD) and the obligation for companies to disclose relevant information under the EU Corporate Sustainability Reporting Directive (EU CSRD).

It is however important to note that due to intensive corporate lobbying activities the CSDDD falls short with regard to, amongst others, the obligations of financial, legal and consultancy companies. Their downstream due diligence obligations are not included in the CSDDD, which is a major omission. Especially financial institutions have the same responsibility to respect human rights as other companies, and as was rightfully stated in an earlier stage: “creating carveouts or presumptions for the financial sector in the draft Corporate Sustainability Due Diligence Directive would be inconsistent with international standards on business and human rights.”<sup>2</sup> This is in line with earlier statements on the level of involvement of financial institutions in addressing adverse human rights impacts.<sup>3</sup> The recently adopted update to the OECD Guidelines confirm

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<sup>2</sup> OHCHR, Financial Sector and the European Union Corporate Sustainability Due Diligence Directive Statement by the United Nations Working Group on Business and Human Rights, 12 July 2023

<sup>3</sup> OHCHR, Response to Request from BankTrack for Advice Regarding the Application of the UNGP in the

the dynamic nature of the involvement framework<sup>4</sup>, as do recent communications about the financiers of Saudi Aramco.<sup>5</sup>

Milieudedefensie is convinced that financial institutions have due diligence obligations based on national tort law, supported by amongst others soft law. On January the 19th of 2024 Milieudedefensie has sent the Dutch ING-bank a notice of liability. In the notice of liability you can read more about the role of ING and other financial institutions in the climate crisis and their (due diligence) obligations to prevent dangerous climate change.

Despite the omission mentioned above, it is clear that companies within the scope of the CSDDD are now obliged to adopt and put into effect a climate transition plan (article 15) and to practice mandatory due diligence (articles 6-8). Under the CSRD, large corporations are obliged to report on the alignment of their business model to the Paris agreement and to report on specific and absolute targets for emissions reduction and on their most significant adverse climate impacts and progress towards these targets based on scientific targets. Transparency, integrity and access to information for all relevant stakeholders, especially on (downstream) scope 3 emissions, is crucial in order to have an effective implementation of these Directives.

Reporting on climate, human rights and environmental due diligence has been a longer standing practice. However, many gaps in communicating, sharing information and reporting remain. At every of the six due diligence steps, improvements can be made.

We request the Special Rapporteur to call on all businesses

- to communicate, disclose and report on their due diligence efforts, including climate, environmental and human rights policies, risk analysis and impact assessments
- to ensure that affected stakeholders and NGOs are engaged in a meaningful stakeholder dialogue and that they have access to all relevant information about projects that impact them. These stakeholders should be consulted specifically when business are taking measures to prevent, mitigate and remediate adverse impacts that directly impact these stakeholders. Companies should

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Context of the Banking Sector; 2017, p. 8

<sup>4</sup> OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 8 June 2023, Chapter II Commentary 16: “For the purposes of this recommendation, ‘contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. An enterprise’s relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring.”

<sup>5</sup> Letter to Saudi Aramco, p. 7: “A financial business can move from being directly linked to an adverse human rights impact to contributing to that impact if it does not take action to prevent or mitigate the business relationship to which it is directly linked, including by undertaking human rights due diligence. Therefore, the alleged involvement of financial institutions in the financing of Saudi Aramco’s activities could be in violation of

also directly communicate which measures they are taking and in what way the stakeholders will be involved in tracking the impact of these measures;

- to provide public access to information on their scope 1, 2 and especially (downstream) absolute scope 3 emissions
- to disclose their means of putting into effect climate transition plans

## **2.2 Unveil the “client confidentiality” and “business sensitive” veil when it affects human rights**

When it comes to access to information for affected stakeholders, access to information is often banned under the veil of the information being ‘business sensitive’ or ‘commercial’. For example, financial institutions, private as well as public ones, invoke the protection of ‘client confidentiality’ in refusing to give insight in the clients they finance and facilitate. However, ‘client confidentiality’ should be differentiated when it comes to financing, for example, a mortgage, as opposed to financing and facilitating major corporate emitters. The latter have an enormous impact on the climate, human rights and the environment and access to information on their supply chain and downstream scope 3 emissions is crucial to understand their impacts to human rights, climate change and the environment. Therefore, financiers have a duty to be transparent about their relationship with these major corporate emitters and have to make sure affected stakeholders are given access to information on value chain partners and production locations.

We ask the Special Rapporteur to use her position to address this issue by urging financial institutions and their regulators to safeguard, amongst others, openness of information on precautionary measures taken to limit negative impacts, to adopt corporate funding requirements as well as deadlines for meeting those requirements and to implement independent external audits.