



Comments on FMO's Proposed Sustainability Policy and Human Rights Position Statement

November 15, 2016

The Coalition for Human Rights in Development is a global coalition of over 65 social movements, civil society organizations and community groups working to ensure that all development finance institutions respect, protect, and fulfill human rights¹. We welcome this opportunity to comment on the Dutch Development Bank (FMO)'s draft Sustainability Policy and Human Rights Position Statement. Our members include both Dutch organizations active in FMO reforms as well as groups impacted directly by FMO investments around the world.

We welcome FMO's adoption of the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights², which sets out important benchmarks for the financial sector in the areas of human rights and human rights due diligence. As a coalition we have been developing human rights due diligence methodologies for the development finance context and are eager to work with FMO to strengthen policy and practice in this critical area.

Our comments are focused on the Sustainability Policy ("Policy") and the Human Rights Position Statement ("Position Statement").

1. Strengthen the Commitment to Human Rights

FMO's commitment to human rights is stated as follows – "FMO respects human rights and acknowledges the responsibility of its clients to do the same. This means to avoid infringing on the human rights of others and to address adverse impacts business may cause or contribute to" (Position Statement 33-36). We suggest revising and enhancing this provision to instead read: "FMO respects human rights and acknowledges the responsibility of its clients to do the same. FMO and its clients will not support or undertake any activities that will cause, contribute to, or exacerbate human rights violations. In order to achieve this, FMO and its clients will undertake human rights due diligence to identify and avoid potential adverse human rights impacts. Should adverse impacts still occur, FMO and its clients will promptly and effectively remedy them."

2. Adopt a commitment to Non-Discrimination

While the Policy states that FMO actively seeks to achieve inclusive development, this ambition is not operationalized within the Policy. The Policy should include a commitment to substantive equality and to avoid prejudice or discrimination (whether formal or informal, direct or indirect), particularly toward

¹ More information at www.rightsindevelopment.org.

² Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, 2016, http://www.ser.nl/%7E/media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx.

disadvantaged or marginalized groups, within FMO-financed activities, including in the distribution of adverse impacts or in access to development resources and project benefits.

3. Incorporate the Full Body of Human Rights Standards

The draft Sustainability Policy states that FMO requires, as a minimum, that all clients meet national environmental, social and human rights legislation in their home and host countries (Policy 83-84). Additionally, the Position Statement states that FMO upholds several international standards, identified in a list of nine standards, and that these standards will be utilized to identify and agree on mitigants for human rights impacts that may go beyond the International Finance Corporation (IFC) Performance Standards (Policy 84-108).

The Policy should further require that FMO and its clients comply with applicable international human rights law. When identifying applicable law, FMO clients and staff should consider not only the International Bill of Human Rights identified in the draft Policy, but additionally the nine core international human rights treaties, applicable regional treaties, and other key human rights instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).³ While some of these instruments may be of more relevance than others to the conduct of business, none can be categorically excluded as irrelevant.

4. Establish a Clear Benchmark and Process for Human Rights Due Diligence

Neither the Sustainability Policy nor the Human Rights Position Statement establish a clear benchmark or process for human rights due diligence. The Policy states that “The IFC Performance Standards guide FMO’s human rights due diligence with respect to clients” (Policy 102), while the Position Statement provides that “FMO’s human rights due diligence with respect to clients is guided by the IFC Performance Standards and other applicable international standards such as the UN Guiding Principles for Business and Human Rights” (Position Statement 52-54).

Effective human rights due diligence requires measures beyond the IFC’s Performance Standards. The IFC Performance Standards set out requirements for environmental and social assessment and management, not human rights due diligence. While the Performance Standards note that in certain high risk situations, human rights due diligence may be required, they do not actually identify what human rights due diligence entails.⁴ The Dutch Banking Sector Agreement acknowledges this when calling for

³ The nine core international human rights conventions are: International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Convention for the Protection of All Persons from Enforced Disappearance, and Convention on the Rights of Persons with Disabilities. Applicable regional treaties will include, for example, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.

⁴ For one idea for what human rights due diligence in this context could look like, see Shift Project, “Human Rights Due Diligence in High Risk Circumstances” March 2015, <http://www.shiftproject.org/resources/publications/human-rights-due-diligence-high-risk-circumstances/>

the establishment of a human rights due diligence procedure in addition to application of the IFC Performance Standards.

The UK's development finance institution, CDC Group plc, recently adopted new Human Rights Guidance identifying several main challenges with the Performance Standards⁵:

1. Due diligence processes, and the expertise deployed in their implementation, are often more developed in assessing and addressing environmental issues than social issues.
2. Traditional environmental and social due diligence may not use international human rights standards as a reference point, and therefore may not correctly identify the severity of an impact nor what is required as a remedy under international human rights standards.
3. Social due diligence often focuses on the specific impacts highlighted in Performance Standards 2 through 7, and may therefore miss other potential human rights impacts that are not explicitly mentioned.

Overlooked human rights impacts may include gender impacts, impacts on persons with disabilities, impacts related to privacy or freedom of assembly, impacts related to conflict and reprisals, and many more.

Finally, while the Performance Standards rely heavily on the existence of a client's social and environmental management system, they do not adequately address the following critical elements: 1) the client's active due diligence throughout the project cycle, 2) contextual and third-party risk, 3) the bank's active due diligence to screen project risks, monitor implementation, and supervise the project and plans to mitigate risks, and 4) accountability for impacts and results.

As compared to the IFC Performance Standards, the Organisation for Economic Cooperation and Development Guidelines on Multinational Enterprises (OECD Guidelines) and UN Guiding Principles on Business and Human Rights (UNGPs) provide more in-depth guidance on human rights due diligence for companies, and therefore these resources should be given greater weight.

5. Clarify FMO's Due Diligence Obligations

In addition to the due diligence obligations of its clients, FMO as a national development bank has its own human rights obligations and due diligence responsibilities well established in human rights law. These are echoed in the UNGPs, which stress that both State agencies and the business enterprises and projects they support, should be required to undertake human rights due diligence.⁶

In FMO's Human Rights Position Statement, while the client's due diligence requirements are discussed, FMO's due diligence obligations are reduced to "undertak[ing] due diligence of the risk and impact assessment process carried out by (prospective) clients" (Position Statement 57-65). FMO's due

⁵ See CDC Group, ESG Toolkit for Fund Managers, "Human Rights Briefing Note," <http://toolkit.cdcgroup.com/e-and-s-briefing-notes/human-rights>.

⁶ See Commentary to UNGP Principle 4, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

diligence role should be made more explicit in the Policy, and this role must be understood to extend beyond risk and impact assessment to include screening, monitoring, supervision and remedy.

Norway's export credit agency, GIEK, offers in their policy a useful outline of due diligence obligations⁷:

GIEK's due diligence process is based on (1) identifying actual or potential environmental and human rights impacts, (2) assessing actual or potential negative impacts, (3) acting to seek to prevent, mitigate and remediate those impacts through the appropriate exercise of leverage, (4) accounting for how those impacts are addressed through follow-up and monitoring, and (5) communicating with and disclosure to relevant stakeholders on the management of impacts.

FMO should include in its Policy, as that is the binding instrument, a clear outline of its due diligence process. The Dutch Banking Sector Agreement provides a useful discussion of due diligence elements. We additionally highlight the following critical elements:

- Screening projects to ensure that they do not present an unacceptable level of risk. Reviewing and verifying the information provided by the client relating to the project's risks and impacts, in consultation with affected communities, and requesting additional and relevant information or conducting additional research where necessary for FMO to complete its human rights due diligence;
- Reviewing the applicable national and international legal framework, and the implementation practices, track record and the commitment and capacity of the client;
- Providing guidance to assist the client in developing appropriate measures to address environmental and social risks and impacts in accordance with the Policy and in compliance with applicable law with input from affected communities.
- Requiring and verifying meaningful consultation for all projects and free, prior, and informed consent (FPIC) where required;
- Performing necessary site visits and employing relevant specialists to monitor project implementation, mitigation and social impacts, including through use of participatory and third-party monitoring;
- In situations of significant human rights risk, enacting loan covenant provisions to ensure that human rights abuses are prevented, such as covenants on the use of force by security personnel, enhanced monitoring and supervision measures, and response protocols to deal with risks, including third party risks, should they materialize.

For due diligence to be effective, FMO must be able to support its clients with necessary and relevant expertise on social, environmental and human rights issues. FMO's engagement of dedicated Environmental Social and Governance (ESG) specialists should therefore not be limited to projects categorized as B+ and A, but should be extended to category B projects, as these projects are defined to entail potential adverse risks or impacts that are beyond the site boundaries and largely irreversible. FMO additionally should develop more detailed human rights due diligence procedures, as required in

⁷ See GIEK, Environmental and Human Rights Policy, August 2013, http://www.giek.no/resources/pdf/diverse_engelsk-1/Environmental_and_Human_Rights_Policy.pdf

the recent Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, as well as risk assessment and management tools to support staff and clients.⁸

6. Ensure Proper Risk Categorization

As due diligence is triggered according to a project's risk categorization, the categorization process is critical for preventing adverse human rights impacts. Low risk (Category C) investments should not be exempt from the ESG standards, rather the level of due diligence should be adjusted commensurate with the level of risk/severity of the impacts (Policy 148-150). Similarly, the proposed due diligence exemptions for financial intermediary projects are unwarranted. It does not make sense to hold FI Category B+ projects to merely the client's "best effort" and to exempt FI Category B projects entirely (Policy 151-154). Recent investigations into IFC's own financial intermediary portfolio have revealed shocking levels of exposure to risk.⁹

7. Strengthen Transparency and Community Engagement

It should be stressed that the accurate identification of human rights risks and potential impacts requires rigorous consultation and meaningful engagement with potentially affected communities. Some of the greatest human rights challenges and conflicts derive from projects imposed on local communities without their input or consent. It is not sufficient to consult communities merely on the risks, impacts, and mitigation measures of a pre-determined activity (Policy 61, 62). If FMO is committed to human rights and to sustainable, inclusive development, local communities need to have a role in determining development priorities and inputting into project design. Similarly, assessment and monitoring processes should be participatory. Additionally, Line 79 of the Sustainability Policy should be changed to read "affected communities and civil society organizations" not only "civil society organizations."

8. Utilize Leverage to Prevent Harm

Where human rights risks materialize within the context of an FMO operation, FMO should act strategically and decisively first to ensure that its financing is not causing, contributing to, or exacerbating human rights abuses, and secondly to prevent and remedy harm. This is the case even if risks come from outside the immediate project area and area of influence – be that the country or sector context or business relationships with third parties. FMO should develop a toolbox of potential options utilizing a range of compliance remedies, technical expertise, relationships with various stakeholders, financial leverage, and diplomatic and business relationships, which can be drawn upon in a situation where human rights are at immediate risk or have been violated, in order to address risk and prevent future harm. In particular, FMO should develop protocols for identifying and addressing risks to human rights and environmental defenders, including intimidation, threats and violent reprisals against those

⁸ See for instance Danish Institute for Human Rights Impact Assessment and Guidance at <http://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox>; Coalition for Human Rights in Development Social Risk Analysis Tool (forthcoming at www.rightsindevelopment.org/HRDD).

⁹ See "Outsourcing Development: Lifting the Veil on the IFC's Harmful Private-Sector Lending," Inclusive Development International et al, 2016, www.inclusivedevelopment.net/wp-content/uploads/2016/09/Outsourcing-Development-Introduction.pdf.

who seek to participate in or speak out about development projects. For specific recommendations regarding human rights defenders, we wish to highlight the joint civil society statement on that topic.¹⁰

9. Ensure Accountability for Outcomes

According to the Policy, FMO states a commitment to sustainable development and commissions evaluations to assess the development impact of its investments. However, it is not a given that investments lead to sustainable development outcomes. In fact, investments can often have the opposite effect, especially where human rights are not respected. FMO should therefore screen projects based on anticipated development impact, and work with affected communities to track, evaluate, report, and hold itself and its clients accountable for development outcomes. In this effort, human rights norms provide useful metrics.

We recognize the FMO's requirement to have clients set up the appropriate mechanisms and procedures to address grievances and complaints at project level. We would highlight that at a minimum, these grievance mechanisms should also be built on the "effectiveness criteria" set forth in the UN Guiding Principles on Business and Human Rights. Finally, the Independent Complaints Mechanism cannot provide accountability or remedy if communities do not know it is available. It is therefore critical that FMO require project proponents to inform potentially affected communities of the existence of the ICM and how it can be accessed.

¹⁰ See civil society sign-on letter, "FMO Should Protect Human Rights Defenders," November 2016, <http://rightsindevelopment.org/wp-content/uploads/2016/07/CSO-statement-to-FMO-on-HRDs-Nov-2016.pdf>.