

Specific Instance to Korean National Contact Point of Korea

Complainants

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Jayapura City, Papua, Indonesia

Respondents

POSCO International

165, Convensia-daero, Yeonsu-gu,

Incheon, Republic of Korea

National Pension Service

170, Gilji-ro, Deokjin-gu, Jeonju-si,

Jeollabuk-do, Republic of Korea

The Export-Import Bank of Korea

38 Eunhaeng-ro, Yeongdeungpo-gu,

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Before the Korean National Contact Point

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Table of Contents

I. Summary	4
II. Parties to the Complaint.....	8
<i>1. Complainants</i>	<i>8</i>
A. KTNC Watch.....	8
B. PUSAKA	8
C. Keuskupan Agung Merauke/Sekretariat Keadilan dan Perdamaian (SKP- KAME), the Office For Justice & Peace of The Catholic Diocese of Merauke, Papua, Indonesia.....	8
D. WALHI Papua	9
<i>2. Respondents</i>	<i>9</i>
A. POSCO INTERNATIONAL.....	9
B. National Pension Service.....	9
C. The Export-Import Bank of Korea	10
III. Breaches of the OECD Guidelines by POSCO International	11
<i>1. Adverse Impacts caused by POSCO International</i>	<i>11</i>
A. Deforestation and loss of biodiversity.....	11
B. Lack of FPIC	14
C. Infringement of the right to water	22
<i>2. Failure to provide the remedies and to carry out human rights due diligence to address the adverse impacts</i>	<i>25</i>
A. Deforestation and loss of diversity.....	27
B. Lack of FPIC	29
C. Infringement of the right to water	30
IV. Breaches of the OECD Guidelines by National Pension Service.....	32
<i>1. Adverse impacts directly linked to National Pension Service</i>	<i>32</i>
<i>2. Failure to carry out human rights due diligence to address adverse impacts.....</i>	<i>33</i>
V. Breaches of the OECD Guidelines by the Export-Import Bank of Korea	36
<i>1. Adverse impacts directly linked to the Export-Import Bank of Korea.....</i>	<i>36</i>
<i>2. Failure to carry out human rights due diligence to address adverse impacts.....</i>	<i>37</i>
VI. Requests.....	39

<i>1. Requests to Korean NCP</i>	<i>39</i>
<i>2. Requests to POSCO International</i>	<i>40</i>
<i>3. Requests to National Pension Service</i>	<i>40</i>
<i>4. Requests to the Export-Import Bank of Korea</i>	<i>41</i>
<i>5. Requests to the Korean Government</i>	<i>41</i>
VII. Conclusion.....	42
List of the Appendices:	44

I. Summary

This specific instance is to demonstrate the violation of the Guidelines by POSCO International as well as two public financial institutions of Korea by KTNC Watch, PUSAKA, SKP-KAME and WALHI Papua. POSCO International by the activities of its subsidiary, PT. Bio Inti Agrindo (PT. BIA) in Papua, Indonesia, has been producing palm oil and selling it in the global market. Through the operation of oil palm plantation, it caused the adverse impacts such as deforestation and infringing the rights of indigenous people, but failed to take remediation or preventive measures to address the adverse impacts. Meanwhile, public institutions are also directly linked to PT. BIA's palm oil business through their financial services. The Export-Import Bank of Korea (KEXIM) has provided loans for PT. BIA's operations and the National Pension Service (NPS) holds more than five percent share in POSCO International. KEXIM and NPS are directly linked to the adverse impacts by financial services provided to POSCO International, but did not carry out human rights due diligence.

Adverse impacts caused by POSCO International's operation of the palm oil plantation through PT. BIA

POSCO International acquired the palm oil plantation company, PT. BIA in 2011 and became the controlling owner of PT. BIA. With 34,195 hectares of concession area and a CPO mill, in addition to another CPO mill in construction, PT. BIA's operations have caused adverse impacts on forest, river and the indigenous people for whom the forest and river are a part of their livelihood.

1. Deforestation and loss of biodiversity

According to maps from the Indonesian Ministry of Forestry, before PT. BIA developed the palm oil planation, 19,800 hectares of the land were primary forest and 15,900 hectares were secondary forest.¹ From 2011 to 2017, PT. BIA deforested 27,000 hectares in developing the palm oil plantation.² Furthermore, there have been strong indicators that fire was used to clear the concession area, which is against the law in Indonesia.³ The concession area lies in a particularly important ecological region with an exceptionally rich and unique biodiversity.⁴ Deforestation destroyed the habitat of the flora and fauna - including many endangered and threatened species - in the concession area, and has resulted in the loss of biodiversity.

2. Lack of Free, Prior and Informed Consent (FPIC)

The indigenous people in Papua rely heavily on the forest for their livelihood. The forest is also a place for social, cultural and spiritual activities.⁵ The indigenous people are therefore entitled to

¹ Aidenvironment, "Burning Paradise" (2016.8), p.36

² Mighty Earth, "New satellite mapping reveals POSCO Daewoo continues to clear Indonesian rainforest at rapid pace in second half of 2017" (2017. 9. 27), <http://www.mightyearth.org/new-satellite-mapping-reveals-posco-daewoo-continues-clear-indonesian-rainforest-rapid-pace-second-half-2017/>

³ The Council on Ethics for the Government Pension Fund Global, "Recommendation to exclude Daewoo International Corporation and POSCO from the Government Pension Fund Global" (2015), p.5; Aidenvironment, supra note1, p.35

⁴ The Council on Ethics for the Government Pension Fund Global, supra note 3, p.5

⁵ See the explanation on Marind people, one of the tribes affected by PT. BIA's operation, in general at https://awasmiffee.potager.org/?page_id=43; impacts on deforestation on Papuan culture https://www.papuaerfgoed.org/en/Deforestation_threatens_Papua_Culture; Sophie Chao, an anthropologist who has spent a year, living with and studying the Marind-Anim people of Merauke, well documented the impacts of agribusiness on the Marind peoples and environments in several articles. See http://anthronow.com/feature-preview/there-are-no-straight-lines-in-nature?source=post_page-----;

give or withhold consent to a project that may affect them or their territories by FPIC. Throughout PT. BIA's development of the plantation, FPIC was not implemented. For example, for the acquisition of right to use in district A, PT. BIA failed to identify the concerned people. It has been alleged that the compensation was paid to the wrong party who did not have customary ownership of the land in question.⁶ Consent was neither given collectively by the communities in accordance with their customs and traditions, which is against the FPIC. It was also reported that the indigenous people did not fully understand the implication of the transfer of the land use rights for the concession area, which shows that it was not "informed" consent.⁷ It is thus clear that PT. BIA did not implement FPIC for the land acquisition during the development of the plantation.

3. Infringement of the right to water

The quality of the Bian River water is closely linked to the right to water, a fundamental human right. The right to water should be ensured by availability, quality and accessibility including information accessibility. Before the development of the plantation, the Bian River provided a reliable source of drinking water and water for daily use for the local communities. Following the development of the PT BIA plantations, local residents can no longer drink the water or use it for daily use. It has also been reported that the river has become murky, and deformed and dead fish have been found.⁸ It is likely that the activities of the plantation, such as the use of extensive chemicals to maintain the palm trees and the waste from the CPO mill, have contributed to the deterioration of the water quality of the Bian River. In addition, local residents have not been provided any information regarding water issues from the company. In this sense, the degradation of the Bian River water quality and the failure to communicate information to the affected people about the water impacts amount to a violation of the right to water.

POSCO International's failure to provide the remedies as well as to implement human rights due diligence

Under the OECD Guidelines POSCO International has the obligation to carry out human rights due diligence to identify, prevent, and mitigate the adverse impacts of the activities of PT. BIA. Human rights due diligence is a dynamic process with multiple stages: (1) embed Responsible Business Conduct (RBC) into the enterprise's policies and management systems; (2) identify actual or potential adverse impacts on RBC issues, (3) cease, prevent or mitigate them, (4) track implementation and results, and (5) communicate how impacts are addressed; and (6) to enable remediation when appropriate.⁹

PT. BIA has provided the information on its policy on the environmental and social issues as well as measures they have taken in order to address the potential risks that they had identified. However, the policies and the measures were not enough to remedy the actual harms to the forest and the indigenous people who already suffer from severe damages. It also fails to establish due diligence measures to prevent further adverse impacts.

<https://thegeckoproject.org/how-land-grabbers-weaponise-indigenous-ritual-against-papuans-an-interview-with-anthropologist-7ebf8ee34385>

⁶ Hankyoreh21, "Korean Palm Farm in the Stolen Land" (2018. 12. 28), http://h21.hani.co.kr/arti/world/world_general/46390.html [In Korean]

⁷ INDIGENOUS PEOPLES ORGANIZATION OF BIAN ENIM, "The Impact of MIFEE presence at Bian River and Maro River, West Papua" (2012. 12. 21), <https://rightsandresources.org/en/blog/press-release-from-indigenous-peoples-organization-of-bian-enim-the-impact-of-miffee-presence-at-bian-river-and-maroriver-west-papua/#.XeC5QpMzboA>

⁸ Hankyoreh21, supra note 6 (2018. 12. 28)

⁹ OECD, OECD Due Diligence Guidance for Responsible Business Conduct (2018), p.21

PT. BIA emphasizes that their measures for environmental and social policies are focused on receiving certificates from ISPO and RSPO. However, their effectiveness is limited since they are voluntary mechanisms with weak enforcement of the standards and they do not remedy the significant clearance that has already taken place. In addition, PT. BIA's claim to manage High Conservation Value (HCV) areas is baseless given that it has already destroyed tens of thousands of hectares of HCV land. Neither measure provides remedy the significant clearance that has already taken place. Therefore, the measures taken by PT. BIA cannot be the remedies for the deforestation and the loss of diversity or be the due diligence procedures to prevent the potential adverse impacts according to the standards in the Guidelines.

Contrary to the reports from the local residents, PT. BIA failed to identify lack of FPIC as the adverse impacts they have caused. Instead PT. BIA alleges that they have concluded FPIC to protect the rights of indigenous residents prior to farm developments. However, it was reported that the stakeholders were not properly identified and the indigenous people failed to understand the implication of the consent they had been asked to give. The public hearings held by PT. BIA are also insufficient for 'informed consent' as they are not held in a manner that the stakeholders actively engage in the procedure. Thus, PT. BIA has neither provided the remedies nor implemented the due diligence procedure under the Guidelines.

Though PT. BIA identified the protection of the right to water in the Code of Conduct, it failed to implement any measures to address the infringement of the right to water; instead, all the measures related to the water quality focused on the waste water management. PT. BIA disclosed the result of the water quality test conducted in the rivers in its operation site with BOD and COD levels.¹⁰ However, these are insufficient to ensure the quality of water to be safe for daily use as well as drinking. Despite the concerns raised, the local residents have not been able to access to such information regarding the water from PT. BIA. Therefore, the right to water of the local residents living near the Bian River has been severely violated without remediation or due diligence measure.

NPS' failure to implement human rights due diligence

The Guidelines require institutional investors to implement human rights due diligence in relation to adverse impacts directly linked to their investments.¹¹ The NPS has been the largest institutional investor in POSCO International since 2010. NPS is directly linked to the adverse impacts caused by POSCO International as a result of its ownership in POSCO International.¹²

NPS may perform shareholder engagement when investee companies damage shareholder value. NPS has clarified that it is aware of the environmental destruction issue in POSCO International's Indonesian operation and stated that it is monitoring the issue in a letter to KTNC Watch in 2017. In POSCO International's 2019 Investment Prospectus, "environmental issues" was listed as one of the risks. Despite its awareness of the deforestation, social conflicts over land, and degradation of water quality, NPS has not used its leverage to influence POSCO International to cease the impact any measures. NPS has thus failed to implement human rights due diligence in relation to the adverse impacts directly linked to its investment in POSCO International and has thus violated the Guidelines.

KEXIM's failure to implement human rights due diligence

¹⁰ PT. BIA, Environmental and Social Report (2017), p.25; POSCO International, Corporation Sustainability Report 2018 (2019), p.104

¹¹ OECD, "Responsible Business Conduct for Institutional Investors," p. 13, available at <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

¹² POSCO INTERNATIONAL, 2018 Shareholders <http://www.poscointl.com/kor/shareholder.do>

Under the Guidelines, any financial services including lending services can be directly linked to adverse impacts.¹³ The UN Guiding Principles on Business and Human Rights also require that export agencies, as public agencies, as well as corporations receiving support from export credit agencies to adopt human rights due diligence. KEXIM provided a loan to PT. BIA under the overseas business loan scheme from 2012 to 2018. By lending 115,125,000 USD,¹⁴ KEXIM is directly linked to the adverse impacts caused by PT. BIA.

Environmental and social conflicts such as deforestation, social conflicts due to lack of FPIC, and the infringement of the right to water are typical issues in the palm oil industry, and POSCO International's business is no exception. The Government Pension Fund of Norway raised the issue of deforestation and loss of biodiversity and divested from POSCO International in 2015, and ABP, a Dutch pension fund also divested from POSCO International for deforestation in 2018. In 2017 and 2018, Korean media covered the relevant issues including land conflicts and allegations regarding degradation of water quality in PT. BIA's operation. Investment in the palm oil sector thus poses a reasonably foreseeable risk of environmental and social damage. KEXIM lacked policies or management to identify adverse impacts when providing loans to overseas businesses and failed to identify reasonably foreseeable risks. This resulted in non-implementation of the due diligence required by the Guidelines, thus violating the Guidelines.

Requests to the Korean NCP, POSCO International, NPS, and KEXIM

The complainants request that the Korean NCP offer its good offices and facilitate dialogue with the respondents to discuss these specific impacts. We seek through mediated conversation to encourage POSCO International to acknowledge the deforestation they have caused and provide the remediation. We also urge POSCO International to adopt and publish a comprehensive group-wide cross-commodity No Deforestation, No Peat, and No Exploitation (NDPE) policy. As a part of NDPE policy, POSCO International should publicly declare a group-wide moratorium on land clearing and peatland development. We request POSCO International to duly implement FPIC in their operations and ensure the right to water of the local communities relying on the Bian River in line with the due diligence required by the Guidelines.

NPS is requested to exercise their leverage to engage with POSCO International in regard to the adverse impacts directly linked to them. NPS should also duly consider deforestation and infringement of the rights of indigenous in developing its socially responsible investment policies. It is suggested that KEXIM refrain from providing further loans to support PT. BIA's operations that are causing adverse impacts. KEXIM should also adopt policies for reviewing environmental and social risks in financing development of natural resources overseas. It is also suggested that Korean government to adopt the policies to review the actual and potential harms to the environmental and human rights when the financial services are provided to the corporations considering the importance of public financial sector.

¹³ Netherlands National Contact Point, Final Statement in Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie v. Rabobank, 15 January 2016, p. 2.

¹⁴ POSCO INTERNATIONAL, Investment Prospectus (2019. 7), pp.98-99

II. Parties to the Complaint

1. Complainants

A. KTNC Watch

KTNC WATCH (Korean Transnational Corporations WATCH) is a coalition of Korean NGOs that advocate for human rights and the protection of the environment and local communities against corporate malfeasance. KTNC Watch works on cases of extraterritorial corporate malfeasance to ensure the human rights to be respected everywhere Korean companies have operations. KTNC Watch actively investigates, reports, seeks remedies for individual cases, and researches and advocates for the systematic reforms. Furthermore, KTNC Watch stands with the affected people by Korean corporations in solidarity.

In 2016, KTNC Watch visited Indonesia and released the report on human rights violations in oil palm plantations by Korean investors in Indonesia; in 2019, Korea Federation for Environmental Movement (KFEM) and Advocates for Public Interest Law (APIL), member organizations of KTNC Watch, published the report, “Does Spring Come to Stolen Forests,” focusing on the environmental and human rights impacts in palm oil industry in Indonesia and the situation of Korean companies operating oil palm plantations in Indonesia.

B. PUSAKA

PUSAKA is a non-profit organization that focus on doing advocacy research, documenting and promoting the rights of indigenous peoples, capacity development, education and empowerment related to the themes of indigenous peoples' rights, land rights, economic, social and cultural rights, and strengthening community organizations.

PUSAKA has been actively engaged in addressing issues of indigenous people especially in Papua. Foreign investment on the oil palm plantation in Papua has brought the threats to the environment and the lives of the indigenous people instead of the prosperity promised. PUSAKA has actively engaged with the community members to build their capacity to defend their rights and demand the government and the corporations to respect the human rights of the indigenous people of Papua.

C. Keuskupan Agung Merauke/Sekretariat Keadilan dan Perdamaian (SKP- KAME), the Office For Justice & Peace of The Catholic Diocese of Merauke, Papua, Indonesia

SKP-KAME is an internal institution of the Catholic Church established in 2001. SKP-KAME established as cooperation between the Archdiocese of Merauke and MSC congregation in Papua Region. It works on contextual situations of local/regional, national and international. The core issues and scope of works are human rights, natural harmony, freedom, gender equality, justice and peace.

D. WALHI Papua

WALHI is the largest forum of non-governmental and community-based organizations in Indonesia. It stands for social transformation, peoples' sovereignty, and sustainability of life and livelihoods. WALHI works to defend Indonesia's natural world and local communities from injustice carried out in the name of economic development.

NGOs that support the complaint are: WALHI Kalimantan Tengah (Friends of the Earth Indonesia), Milieudefensie (Friends of Earth Netherlands), Friends of Earth Melbourne, Friends of Earth U.S.

2. Respondents

A. POSCO INTERNATIONAL

POSCO INTERNATIONAL is a multinational corporation based in Republic of Korea, with business in international trade, development and management of infrastructure, resource development. Starting off as Daewoo Corporation in 1967, Daewoo Corporation changed its name to Daewoo Co., Ltd. in 1982 and became to handle the trade business exclusively. In 2000, Daewoo International Co., Ltd. was separated as an independent corporation with the current areas of business. In 2010, the company was incorporated into POSCO Group and changed its name to POSCO Daewoo and changed the name again to 'POSCO INTERNATIONAL' in 2019.

In September 2011, POSCO INTERNATIONAL acquired 85% shares of PT. Bio Inti Agrindo (BIA) and took the control of the management. PT. BIA's initial task was focused on acquiring the right to use the land ("HGU – Hak Guna Usaha") of the district A and planted the palm trees for the first time in September 2012. PT. BIA also completed to acquire the right to use land in 2013 for the district B and started to construct the first CPO (Crude Palm Oil) mill in 2014. In 2017, the first CPO mill was constructed and started to export the CPO since December 2018. In addition to the CPO mill already constructed, POSCO INTERNATIONAL is planning to construct two more CPO mills, and it is expected to produce 170,000 tons of CPO by 2020.¹⁵

B. National Pension Service

The National Pension Service (NPS) is the public pension fund for Korean citizens. NPS was founded in 1987 to enhance social stability and welfare of Korea, and it provides pension payments in regards to old ages, disabilities and deaths. As of September 2019, the amount of fund reached KRW 714 trillion, which makes NPS the third largest pension services in the world. In addition to headquarter in Republic of Korea, NPS has offices in London, New York and Singapore.

¹⁵ See PT. BIA, 2016 PT. BIA Environmental and Social Report (2017), p.4, POSCO INTERNATIONAL, "Corporation Sustainability Report 2018" (2019), p.98 and website of POSCO INTERNATIONAL on introducing agro-resources <http://www.poscointl.com/eng/foodResource.do>

NPS consists approximately 37 percent of GDP and holds massive influence over the domestic stock market. The NPS is a major shareholder that owns more than five percent of most of Korea's 10 largest companies. It owns more than five percent of more than 290 companies, of which the NPS holds 10 % of shares in 90 companies.

C. The Export-Import Bank of Korea

The Export-Import Bank of Korea is an ECA (Export Credit Agency) based in Republic of Korea. Established in 1976 under the Ministry of Finance, it has also played role as an executor of EDCF (Economic Development Cooperation Fund) and IKCF (Inter-Korean Cooperation Fund). As an ECA, KEXIM provides export credits to promote the export of goods or credits to support overseas investment, overseas projects, and natural resource development projects.

In 2017, Korea KEXIM provided financial services ranging from project financing for large-scale projects to export credit for SMEs as well as various programs to assist Korean companies. KEXIM disbursed a total credit of KRW 60.8 trillion (KRW 51.4 trillion in loans and KRW 9.4 trillion in guarantees) in 2017, equivalent to USD 53.8 billion. KEXIM has representative offices in 23 countries and has subsidiaries in the UK, Indonesia, Vietnam and Hong Kong.

III. Breaches of the OECD Guidelines by POSCO International

1. Adverse Impacts caused by POSCO International

A. Deforestation and loss of biodiversity

According to FAO, deforestation is defined as “the long-term or permanent conversion of forest to other land uses, such as agriculture, pasture, water reservoirs, infrastructure and urban areas.”¹⁶ It is also defined by the long-term reduction of tree canopy cover below minimum 10 percent threshold.¹⁷

Deforestation is one of the most serious environmental problem and it is closely linked to loss of biodiversity and climate changes. When forests are destroyed, the plants and animals including endemic species lose their habitats which results in the loss of biodiversity. By destroying the forests, huge amount of carbon dioxide stored in trees is released, which attributes to the climate changes.

PT. BIA has in total 34,195 hectares of palm plantation and facilities in the Ulilin district, Merauke regency, Papua province. According to EIA (environmental impact assessments) conducted by PT. BIA, the majority of the concession area (66 percent or 26,438 hectares) was covered by bushes.¹⁸ Official data from the Indonesian government shows that the most of the concession area of PT. BIA was either primary or secondary forest. The maps from the Indonesian Ministry of Forests in 2011 suggest that among the concession area, 19,800 hectares was primary forest and 15,900 hectares was secondary forest.¹⁹



Figure 1. POSCO International’s concession area is divided into two blocks, the western(left-hand) block is Block A and eastern(right-hand) block is Block B, separated by a wildlife sanctuary. In 2013, the company had already cleared large parts of the Block A.²⁰

¹⁶ FAO, Reducing Deforestation, <http://www.fao.org/sustainable-forest-management/toolbox/modules/reducing-deforestation/basic-knowledge/en/>

¹⁷ FAO, Forests and Climate Change Working Paper 5, <http://www.fao.org/3/i9345e/i9345e07.htm>

¹⁸ PT. BIO INTI AGRINDO (BIA), ANALYSIS ON THE IMPACT TO LIVING ENVIRONMENT (ANDAL) OF THE CONSTRUCTION OF PLANTATION AND OIL PALM PROCESSING PLANT OF PT BIO INTI AGRINDO In Merauke Regency Papua Province (2009.4), pp.218-219.

¹⁹ Aidenvironment, supra note 1, p.36

²⁰ The Council on Ethics for the Government Pension Fund Global, supra note 3, p.5

However, as of October 2017, PT. BIA deforested more than 27,000 hectares since 2012.²¹ Furthermore, it was suggested that the area was cleared by burning, which is illegal in Indonesia. According to the observations from the Council on Ethics for the Government Pension Fund Global, from 1 January 2011 to 15 August 2014, about 260 fire spots were found in and close to the concession area.²² Aidenvironment also indicated that the fire was systematically used for land clearing of PT. BIA's western block during 2012 to 2014.²³

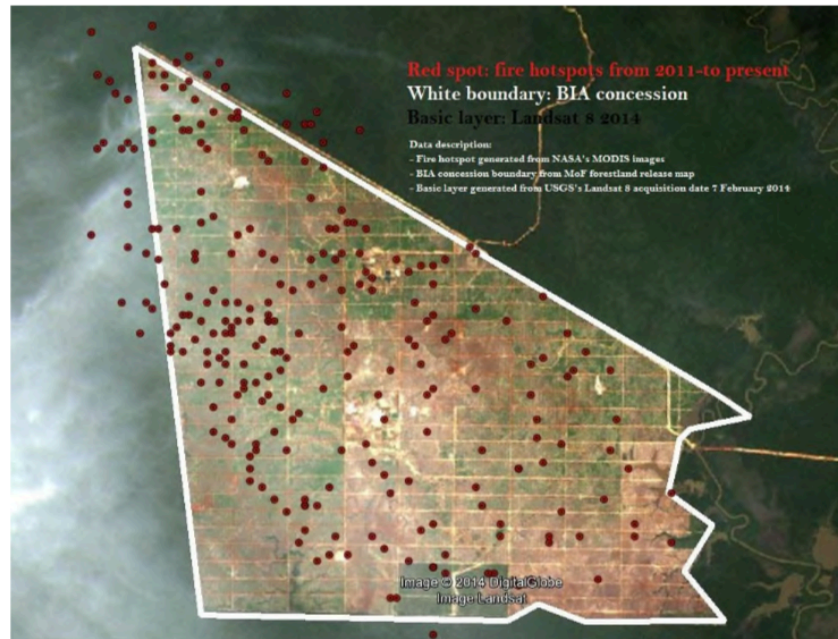


Figure 2. The use of fire in PT. BIA's concession area (white lines) between 1 January 2011 to 15 August 2014.²⁴



Source: AwasMiffee, Merauke burns, but were the plantations to blame?, 20 November 2015, <http://bit.ly/28LFIFf>.

Figure 3. Deforestation and fires in the western block of PT BIA in 2012, 2013 and 2014²⁵

After clearing all the area in western block, it was also observed that 158 hotspots in the eastern block of PT. BIA's concession area between September and October 2015 alone.

²¹ Mighty Earth, *supra* note 2.

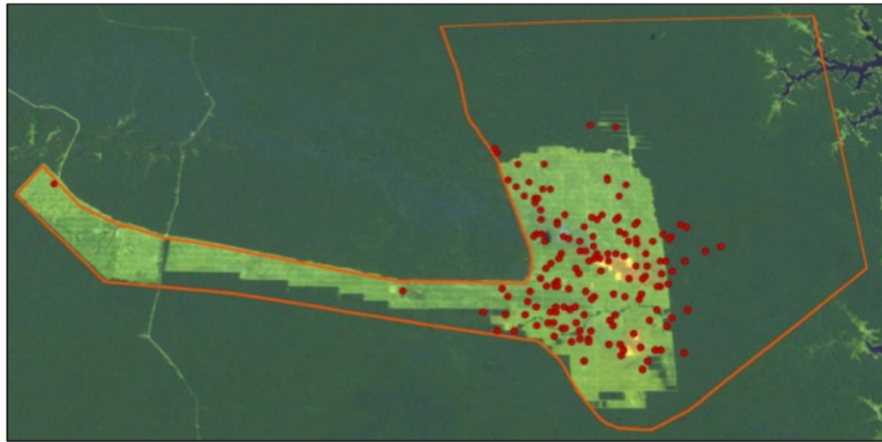
²² The Council on Ethics for the Government Pension Fund Global, *supra* note 3, p.5

²³ Aidenvironment, *supra* note 1, p.35

²⁴ The Council on Ethics for the Government Pension Fund Global, *supra* note 3, p.6

²⁵ Aidenvironment, *supra* note 1, p.36

Based on their research, the Council on Ethics for the Government Pension Fund Global concluded that PT. BIA's use of fire for clearing its concession area.²⁶



Sources: Landsat 8 imagery 22 to 30 September 2015. FIRMS, <http://go.nasa.gov/27awNFg>.

Figure 4: Hotspots in the PT. BIA concession area in September and October 2015

Deforestation in the eastern block continued and during September 2015 and April 2017, 9,900 hectares of forest were cleared continuously.²⁷

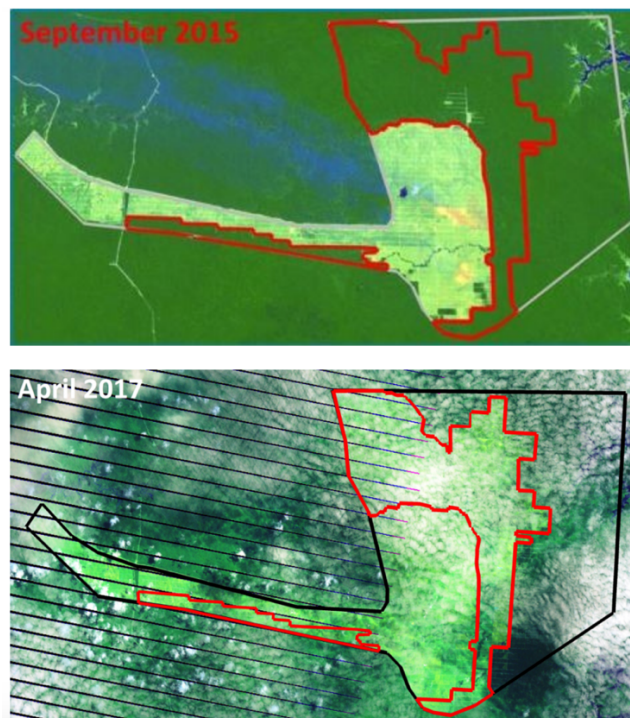


Figure 5: The area outlined in red is the forest cleared during September 2015 and April 2017.

Along with the systematic use of fire, PT. BIA's destruction of forest led to the loss of biodiversity. Papua is considered to be ecologically important area due to tremendously

²⁶ The Council on Ethics for the Government Pension Fund Global, *supra* note 3, p.10

²⁷ Mighty Earth, "Buyers Beware: POSCO Daewoo's Deforestation Palm Oil is Ready for International Markets — But Global Buyers are Rejecting it " (2018)

abundant biodiversity, which has not been properly documented yet.²⁸ As a part of Papua, the concession area of PT. BIA is also rich in biodiversity; the concession area is listed as one of the Global Eco-regions as well as the South Papuan Lowlands Endemic Bird Area.²⁹

It is unavoidable for the flora and fauna in the concession area to lose their place of habitats thus to be endangered of extinction once the forest is destroyed. Though PT. BIA insisted that they would establish the 200-meter-wide buffer zones as well as erect the signs prohibiting logging and hunting, it was considered to be insufficient to preserve the flora and fauna in the concession area.³⁰ Therefore, it is clear that deforestation of the tropical rainforests in the concession area of PT. BIA leads to the loss of diversity.

Chapter II. A. 11 of the Guidelines obliges enterprises to avoid causing the adverse impacts through their own activities and address such impacts when they occur. Under the Guidelines, it is clear that deforestation as well as loss of biodiversity are the adverse impacts related to the environment.³¹ As discussed above, POSCO International cleared 27,000 hectares of primary and secondary forest in PT. BIA's concession area from 2011 to 2017. Though it is not clear the scale of the damages to flora and fauna, it is unavoidable for the diverse animals and plants in the concession area of PT. BIA to lose their habitats as well as their lives due to the deforestation during this time. Therefore, POSCO International caused deforestation as well as loss of biodiversity by land clearing during 2011 to 2017, which is a violation of Chapter II. A. 11 of the Guidelines.

B. Lack of FPIC

'Papua is not empty land.'³² It is estimated that indigenous Papuans have lived in Papua for more than 4,000 years. Though West Papua became a part of Indonesia since 1969 as a result of so called 'Act of Free Choice,' which violated the right to self-determination of the Papuan people, the indigenous peoples in Papua have maintained their ways of life as nomadic hunter-gatherers, heavily reliant on the forest. In fact, for the indigenous peoples in Papua, the forest is not mere source of livelihood but rather "kind of a living history book, animated by these spirits and by their animal and plant manifestations." Papuans consider the forest as a part of their community with the spirits of their ancestors; they are inseparable from the forest, the Mother.³³

²⁸ The Council on Ethics for the Government Pension Fund Global, *supra* note 3, p.7

²⁹ The Council on Ethics for the Government Pension Fund Global, *supra* note 3, p.4

³⁰ The Council on Ethics for the Government Pension Fund Global, *supra* note 3, pp.7-8

³¹ OECD, *supra* note 9, p.39

³² CSO Joint Statement, "Papua is not empty land: Respect the rights of West Papuan peoples" (2018. 11. 11), <https://www.tapol.org/news/papua-not-empty-land-respect-rights-west-papuan-peoples-cso-joint-statement>

³³ The Marind, one of the tribes affected by PT. BIA's operation, are still heavily dependent on the forest not only for the livelihood but for the relationships with them. See the explanation on Marind people in general at https://awasmiffee.potager.org/?page_id=43; impacts on deforestation on Papuan culture https://www.papuaerfgoed.org/en/Deforestation_threatens_Papua_Culture; Sophie Chao, an anthropologist who has spent a year, living with and studying the Marind-Anim people of Merauke, well documented the impacts of agribusiness on the Marind peoples and environments in several articles. See

In this sense, the indigenous peoples should be able to exercise the right to self-determination if the projects would have impacts on their forest and be part of decision-making processes for these projects. This right has been ensured by Free, Prior and Informed Consent (FPIC). It is a right for the indigenous peoples to give or withhold consent to a project that may affect them or their territories. The indigenous peoples can also negotiate the conditions of the project throughout the procedures, and even withdraw the consent at any stage of the project.³⁴

Key elements in FPIC are defined as follows:³⁵

- (a) **Free** refers to a consent given voluntarily and without coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed. More specifically:
 - Rights-holders determine the process, timeline and decision-making structure;
 - Information is offered transparently and objectively at the request of the rights-holders;
 - The process is free from coercion, bias, conditions, bribery or rewards;
 - Meetings and decisions take place at locations and times and in languages and formats determined by the rights-holders; and
 - All community members are free to participate regardless of gender, age or standing.
- (b) **Prior** means that consent is sought sufficiently in advance of any authorization or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community. It should be noted that:
 - Prior implies that time is provided to understand, access, and analyze information on the proposed activity. The amount of time required will depend on the decision-making processes of the rights-holders;
 - Information must be provided before activities can be initiated, at the beginning or initiation of an activity, process or phase of implementation, including conceptualization, design, proposal, information, execution, and following evaluation; and
 - The decision-making timeline established by the rights-holders must be respected, as it reflects the time needed to understand, analyze, and evaluate the activities under consideration in accordance with their own customs.
- (c) **Informed** refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process. Information should be:
 - Accessible, clear, consistent, accurate, and transparent;
 - Delivered in the local language and in a culturally appropriate format (including radio, traditional/local media, video, graphics, documentaries, photos, oral presentations, or new media);
 - Objective, covering both the positive and negative potential of the proposed activities and consequences of giving or withholding consent;
 - Complete, including a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits;

http://anthronow.com/feature-preview/there-are-no-straight-lines-in-nature?source=post_page-----
<https://thegeckoproject.org/how-land-grabbers-weaponise-indigenous-ritual-against-papuans-an-interview-with-anthropologist-7ebf8ee34385>

³⁴ FAO, "Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities" (2016), p.13

³⁵ FAO, *supra* note 34, pp.15-16

- Complete, including the nature, size, pace, duration, reversibility and scope of any proposed project, its purpose and the location of areas that will be affected;
- Delivered by culturally appropriate personnel, in culturally appropriate locations, and include capacity building of indigenous or local trainers;
- Delivered with sufficient time to be understood and verified;
- Accessible to the most remote, rural communities, including youth, women, the elderly and persons with disabilities, who are sometimes neglected; and
- Provided in an ongoing and continuous basis throughout the FPIC process, with a view to enhancing local communication and decision making processes.

(d) **Consent** refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous Peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives, while ensuring the participation of youth, women, the elderly and persons with disabilities as much as possible. In particular consent is:

- A freely given decision that may be a “Yes”, a “No”, or a “Yes with conditions”, including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges;
- A collective decision (e.g. through consensus or majority) determined by the affected peoples in accordance with their own customs and traditions;
- The expression of rights (to self-determination, lands, resources and territories, culture); and
- Given or withheld in phases, over specific periods of time for distinct stages or phases of the project activities. It is not a one-off process.

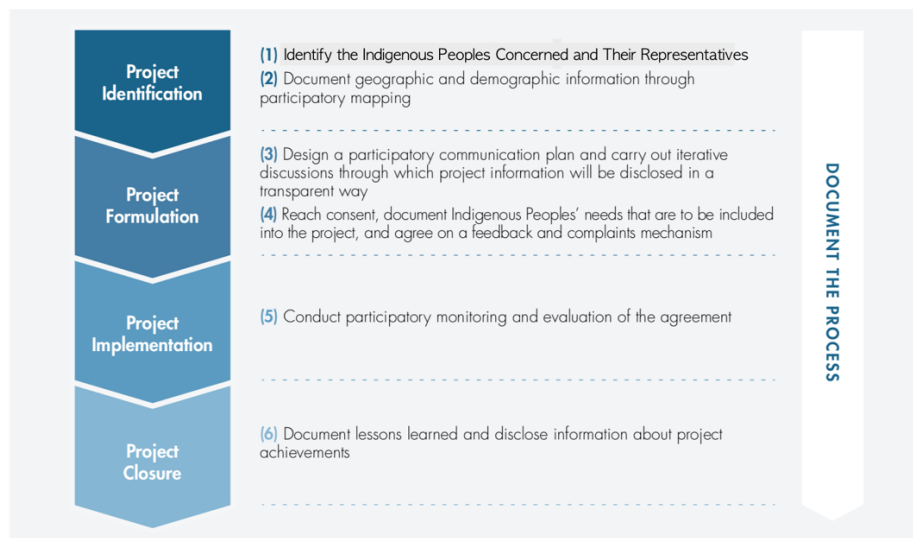


Figure 6. Implementing procedure of FPIC³⁶

PT. BIA insists that their farm is based on FPIC and “concluded FPIC to protect rights of indigenous residents prior to farm developments.”³⁷ In its environmental and social report, PT. BIA listed the major public hearings held from 2007 to 2016.

³⁶ FAO, supra note 34, p.19

³⁷ PT. BIA, “2016 PT. BIA Environmental and Social Report” (2017) p.42



[Public Hearing]

■ Major Public Hearings History

- **2007.01** PT. BIA acquired local permit for farm development
- **2007.01** Public hearing with the local community for land compensation
- **2007.07** Public hearing with the local community for land compensation (District B)
- **2007.07** Public hearing with the local community for environmental and social impact assessment
- **2007.07** 1st public hearing with the local community regarding environmental and social impact assessment
- **2009.03** 2nd public hearing with the local community regarding environmental and social impact assessment
- **2010.12** Public hearing with the local community for land compensation (District A)
- **2011.03** Public hearing for land compensation in port areas
- **2013.04** 1st public hearing with the local community for A-B district road construction
- **2013.07** 2nd public hearing with the local community for A-B district road construction
- **2014.04** Public hearing with the local community to agree on land compensations for alternative access road
- **2014.08** Public hearing for local census
- **2014.09** Public hearing with the local community for road compensation
- **2015.12** Plasma union member head counts
- **2016.03** Plasma program orientation
- **2016.09** Public hearing on Plasma construction

Figure 7. Excerpts from PT. BIA's Environmental and Social Report³⁸

PT. BIA has disclosed that they held the public hearings during 2007 to 2016 regarding at least seven issues: 1) land compensation for district B; 2) environmental and social impact assessment; 3) land compensation for district A; 4) land compensation for port areas; 5) A-B district road construction; 6) land compensations for alternative access road; and 7) plasma. FPIC involves various parties with complex procedure and holding a meeting one time cannot ensure FPIC. In this sense, it is difficult to conclude that these hearings were sufficient to implement FPIC for each issue.

No FPIC for District A

For example, for the land compensation for district A, the allegations have been made that the contract releasing the right to use district A to PT. BIA was signed not by the clans with the customary ownership, but by other clans. On 21 December 2010, Stephanos from Mahuze clan and Damianus Yaone from Basik-Basik clan, both from the Marind tribe³⁹ signed on the document surrendering the right over 6669.1 hectares, the district A, to PT. BIA. PT. BIA paid 50,000 IDR (about 5.53 USD) for 1 hectare and paid 41,681,875 IDR⁴⁰, 25% of the entire compensation, to Stephanos and Damianus

³⁸ Ibid., p.43.

³⁹ Tribe consists of clans: Mahuze and Basik-Basik clans belong to the Marind tribe. there are more clans in the Marind tribe.

⁴⁰ Around 4,610.3 USD based on exchange rate in 21 December 2010. Exchange rate at <http://www.exchangerateusd.com/historicalexchangerate/2010-12-21#.XTX0h5MzboA>

Yaone each when they signed the contract (see appendix 1). On 16 July 2011, both of them were again paid 125,045,625 IDR⁴¹, the rest of the compensation (see appendix 2).

The Mandobo tribe learned about these deals only after 2012 when the forest in the district A was being cleared.⁴² The Mandobos insist that they are the legitimate owners of the customary rights over the forest in block A, thus, the contract signed by the representatives from Mahuze and Basik-Basik was invalid. The Mandobos raised this issue to PT. BIA several times, and conflicts between the Mandobo tribe and two clans from the Marind have arose as well.

Identifying concerned peoples is the very first procedure to implement the FPIC. Without identifying the right groups, FPIC will not be duly implemented. According to EIA for PT. BIA, there are 4,736 people from 11 villages that would be affected by PT. BIA's operation. However, it is clear that PT. BIA did not ask the Mandobos for 'prior' consent to use the block A.

No.	Kampung	Luas (km ²)	Penduduk (Jlwa)	Kepadatan (Jlwa/km ²)
1	Selil	140	127	0,91
2	Kindiki	146	360	2,47
3	Kumaaf	123	724	5,89
4	Nggayu	151	429	2,84
5	Kafyamke	135	761	5,64
6	Mandekman	163	582	3,57
7	Rawahayu	157	515	3,28
8	Belbelan	129	437	3,39
9	Kiraky	143	195	1,36
10	Kandrakay	152	375	2,47
11	Baidub	134	231	1,72
Total		1.573	4.736	3,01

Sumber : Hasil Survei Lapangan Studi AMDAL Perkebunan Kelapa Sawit PT. Bio Inti Agrindo di Distrik Uluin, 2008

Figure 8. The territory area and population density of kampongs in the district around the study area of PT Bio Inti Agrindo⁴³

In order to be 'informed' consent under FPIC, the information should be complete, including general information of the project as well as a preliminary assessment of the potential impacts both positive and negative. However, it was also reported that Stephanos Mahuze, one of the representatives signed the contract, confessed that he had signed the document and received the money without understanding the implication of his actions.⁴⁴ This indicates that PT. BIA did not provide enough information on the projects, and Stephanos and Damianus Yaone were not properly 'informed' to give FPIC.

⁴¹ Around 14,647.5 USD based on exchange rate in 15 July 2011. Exchange rate at <http://www.exchangerateusd.com/historicalexchange/2011-07-15#.XTX1QZMzboA>

⁴² Hankyoreh21 21, supra note 6

⁴³ PT. BIA, supra note 18, p.III-22

⁴⁴ Hankyoreh21 21, supra note 6

Furthermore, the consent should be ‘collective decision determined by the rights-holders and reached through the customary decision-making process of the affected communities.’ Though it is not easy to comprehend precisely all the details in the decision-making procedure of the indigenous peoples in Papua, it is known that the decisions for the land acquisition must be made collectively. A research also shows that for the Marind and Mandobo, at least 11 stages should be sought under the customary decision-making procedure on land transfer.⁴⁵

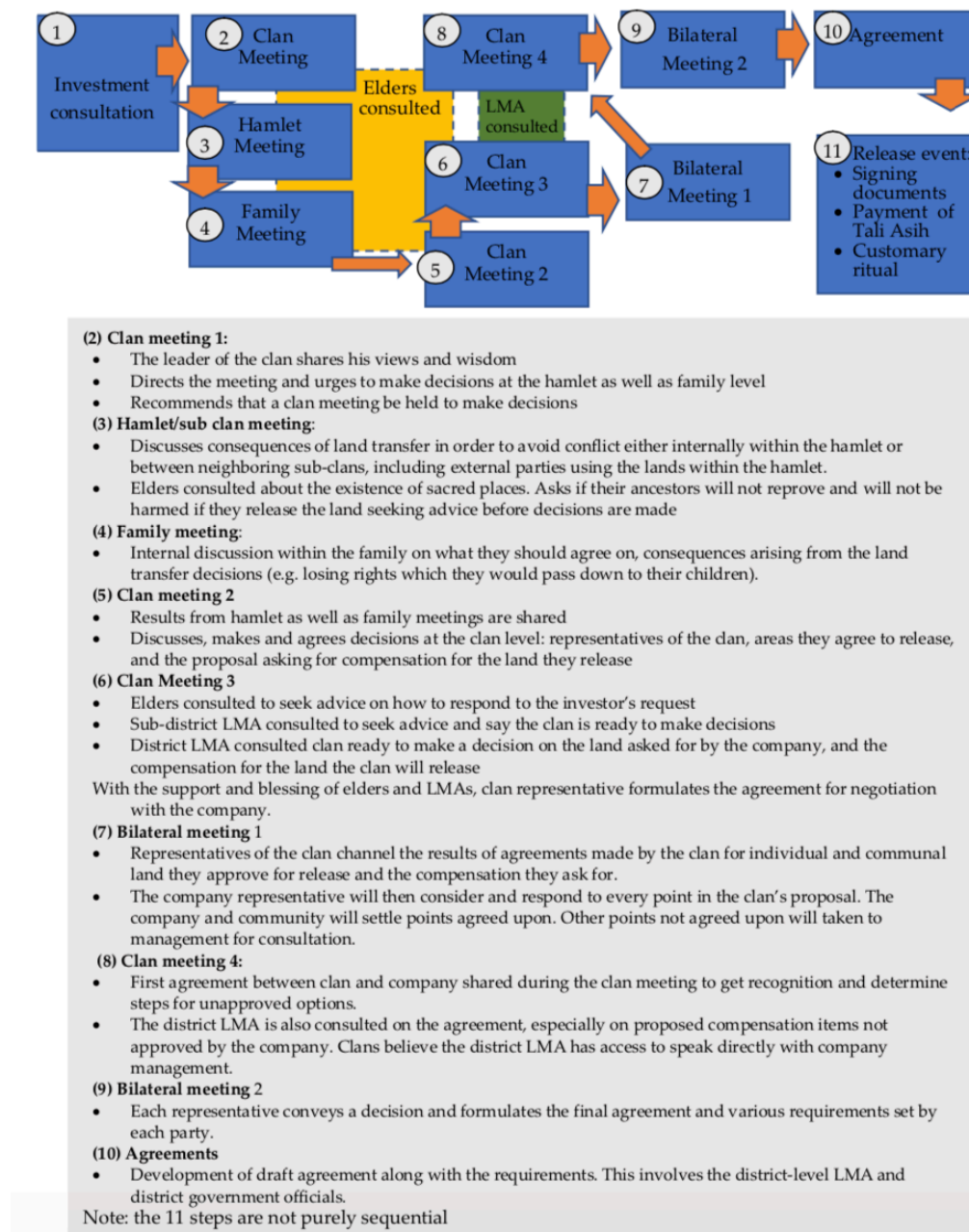


Figure 9. Stages of land transfer from customary land rights to cultivation business rights (HGU-Hak Guna Usaha) from customary communities to investors⁴⁶

⁴⁵ Agus Andrianto et al, "Expansion of Oil Palm Plantations in Indonesia's Frontier: Problems of Externatilities and the Future of Local and Indigenous Communities" (2019), p.7, Land 2019, 8, 56

⁴⁶ Ibid., p. 8

However, there was no decision-making procedure by members either in Mahuze or Basik-Basik clans to hand over the right to use the forest in block A of PT. BIA before 21 December 2010, when two representatives from each clan signed on the document surrendering the right to use the forest. Thus, it is clear that the consent made by Stephanos Mahuze and Damianus Yaone Basik-Basik on 21 December 2010 cannot be sufficient 'consent' to be legitimate FPIC.

In this regard, members in the relevant clans should have been able to participate in decision making procedures for other issues such as land compensation for district B, environmental and social impact assessment, land compensation for port areas, A-B district road construction, land compensations for alternative access road and plasma. However, from the report provided by PT. BIA, it is difficult to see such participatory procedures to be carried out in order to discuss all the issues, hence lacking FPIC throughout their operations.

No 'Informed' Consent in General

In addition to the specific case of district A, indigenous people usually feel that they were not properly informed of the consequences of having plantation in their territory. Testimonies are also found that the indigenous people felt to be deceived to realize that land use rights for the concession areas for PT. BIA would not be returned to them after 35 years. In December 2012, the leaders of villages around the Bian River and Maro River published the press release to request the government to cancel the land use rights as well as to ask the company to provide the remedies the communities alongside the Bian River. In the document, the leaders expressed that the companies did not provide enough information on the implication of the transfer of land use rights and they were deceived intentionally, thus the approval on the transfer of land use rights should be annulled.

*"When the companies came to our land, they and the government mentioned that the land was only borrowed or contracted for 35 years and afterward the land will be returned to the customary land owners, and we believe that we will get our land back. Nowadays, we got information that one of the palm oil companies, PT Bio Inti Agroindo (BIA) who conducting operation on ou land and customary area has got their Land Use Rights / HGU. We realize that the end of land use rights would refer to the land be returned to the state, after 35 years been used by the companies. For us, this situation means that the companies has failed to protect our indigenous rights as the real land owners. This also means that the company has intentionally committed fraud, negligence and removal of our indigenous rights without our approval on the concession. For that matter, we urge that if the company wish to continue using our customary land, thus the company is obliged to seek for our approval as land owners and we also have make sure that the land will be returned to us, the clan owners, after the usage."*⁴⁷

⁴⁷ INDIGENOUS PEOPLES ORGANIZATION OF BIAN ENIM, supra note 7.

Another testimony by the head of the Marind Bian Customary People's Association (LMA) also supports the failure of FPIC during the procedure of getting land rights use from the indigenous people. He reported that large companies including PT. BIA did not provide the communities people enough information to understand the implication of their consent. It was also emphasized that the companies invited the clan chiefs and community leaders, and even including district government officials but did not discuss with the villagers. These clearly show that the consent given to PT. BIA if any did not amount to FPIC.

*"Companies come to the village but never give us full, clear and true information. The company also doesn't involve indigenous people and landowners from the outset. Similarly, information about regulations and permits is not given openly, clearly and in detail, including information about the potential impacts to our customary land that could arise from those company permits"*⁴⁸

There is a recent example showing failure to implement FPIC by PT. BIA. It was reported by the local media that PT. BIA started to construct the CPO mill in the district B without notifying to the indigenous people and the Mahuze clan opposed to the construction of the CPO mill by traditional ritual on 30 August 2018.⁴⁹



Proses Pemalangan PT.BIA dengan Ritual Sasi Adat dari marga Mahuze Milafo, disaksikan MRP (foto : co. JERAT Papua)

Figure 10. Mahuze clan protesting against PT. BIA⁵⁰

⁴⁸ Awas MIFEE, "Customary People's Association wants big companies out of Merauke" (2013. 1. 17) <https://awasmiffee.potager.org/?p=304>

⁴⁹ Jerat Papua, "Pabrik Kelapa Sawit PT.BIA Merauke, Dipalang Pemilik Hal Ulayat" (2018. 9. 1) <https://www.jeratpapua.org/2018/09/01/pabrik-kelapa-sawit-pt-bia-merauke-dipalang-pemilik-hal-ulayat/>; Tabloid Jubi, "Legislator Merauke: PT BIA Inti Agrindo jangan bodohi pemilik ulayat" (2018. 8. 30) <https://tabloidjubi.com/artikel-19058-legislator-merauke-pt-bia-inti-agrindo-jangan-bodohi-pemilik-ulayat.html>

⁵⁰ Jerat Papua, "Pabrik Kelapa Sawit PT.BIA Merauke, Dipalang Pemilik Hal Ulayat" (2018. 9. 1) <https://www.jeratpapua.org/2018/09/01/pabrik-kelapa-sawit-pt-bia-merauke-dipalang-pemilik-hal-ulayat/>

Chapter II. A. 11 of the Guidelines requires enterprises to avoid causing the adverse impacts through their own activities and address such impacts when they occur. Chapter IV. 1, 2 of the Guidelines also highlights the importance of respecting human rights and avoiding infringing on human rights. The companies should also engage in adequate and timely communication and consultation with the communities directly affected by the environmental policies of the enterprises under Chapter VI. 2. b).

As seen above, contrary to PT. BIA's assertion that it is a "FPIC based farm," it is impossible to conclude that FPIC have been carried out throughout PT. BIA's operations. Furthermore, it was obvious that the land acquisition procedure for the district A failed to implement FPIC as PT. BIA had not invited the indigenous communities concerned, had not provided enough information, and had failed to guarantee the members of the affected communities to participate in the decision-making procedure. In addition, the indigenous people were not fully informed of the implication of the oil palm planation in their territory and raised the issue on absence of notification regarding the construction of CPO mill, which also shows lack of FPIC during the construction procedure. Therefore, POSCO International violated Chapter II. A. 11, Chapter IV. 1, 2 and Chapter VI. 2. b) by failing to implement FPIC in its operations.

C. Infringement of the right to water

PT. BIA is located between the Bian river and Fly river and most of the natural drainages in the concession area drains to the Bian river.⁵¹ Local communities who live along the Bian river, especially the Marind, have relied on the river for their daily use such as shower, washing, waste disposal and even for defecation. It has been a source for food by providing fish, shrimp, crabs as well as a place to conduct the traditional ceremony.⁵²

Thus, it is clear that the quality of water is closely linked to the right to water, which is one of the fundamental rights to realize right to an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as right to life and human dignity under the International Bill of Human Rights.⁵³ According to the ICESCR, the right to water should be ensured by assessing the adequacy of the following elements⁵⁴:

(a) Availability. The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines. Some individuals and groups may also require additional water due to health, climate, and work conditions;

⁵¹ PT. BIA, *supra* note 18, p.110

⁵² Irba Djaja et al, Evaluation Of Water Quality At River Bian In Merauke Papua, E3S Web of Conferences 31, 08006 (2018), p.1

⁵³ E/C.12/2002/11, para 3.

⁵⁴ E/C.12/2002/11, para 12.

(b) *Quality*. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

(c) *Accessibility*. Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

(i) *Physical accessibility*: water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace. All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;

(ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;

(iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and

(iv) *Information accessibility*: accessibility includes the right to seek, receive and impart information concerning water issues.

Activities conducted in the plantation usually affect the quality of water in the area. In order to grow oil palm trees in the vast area of the farm, extensive amount of chemicals including pesticide, herbicide and fertilizer are used and these chemicals negatively affect the quality of the water. The waste water from the CPO mill also degrade the water quality. In addition, the increase of the population in the concession area due to the migration of the workers from other islands, can lead to the deterioration of water quality in the area.

The degradation of water quality of Bian river and Fly river was already identified in its Environmental Impact Analysis Report (EIA Report) as “the significant and important impacts estimated to occur and need to conduct a management on the presence of said activity plan.”⁵⁵ The EIA Report clearly sets out that “the liquid waste from oil palm treatment process would degrade water quality” which in turn would “cause an interference to the life of aquatic biota” and “community’s restlessness.”⁵⁶ Furthermore, it is also emphasized that the pollution of the Bian and Fly rivers would also cause the

⁵⁵ In the EIA Report, the most important five issues with regard to impacts estimated due to the operation of PT. BIA were identified as 1) the degradation of River’s water quality (Bian river and Fly river); 2) the increase of soil erosion rate; 3) the disturbance of protected Flora and Fauna; 4) social restlessness / community’s perception; 5) community’s health. See PT. BIA, *supra* note 18, p. 214.

⁵⁶ PT. BIA, *supra* note 18, p.40.

deterioration of the community's health. the concern was addressed that the activities in the plantation as well as waste thrown to Bian and Fly rivers would trigger the diseases such as malaria, ISPA (acute respiratory tract infection), and diarrhea.⁵⁷

Despite the concerns raised even before the operation, it has been reported that the water quality degradation of Bian river since the PT. BIA's operation and the local residents have been suffering. The residents around Bian river reported that the river had become murky since the plantation was established and fish were deformed and dead. The community have neither drunk nor used the water from Bian river for laundry or washing since the pollution became evident.⁵⁸ The deterioration of the quality of the water in the Bian river has caused the local community not to use the water from the river, which constitutes the infringement on the right to water.

In addition, the right to water was also infringed due to the inaccessibility to the information regarding the water quality. According to its Environmental and Sustainability Report, PT. BIA has taken several measures to manage the waste water in their operation site.⁵⁹ Apart from the effectiveness of those measures taken, local residents who have been severely affected by the deterioration of the water quality in the Bian river do not have a chance to access to the relevant information. For example, PT. BIA disclosed the result of the water quality test on the sustainability report, which was released only in English and Korean online. Considering the language barrier and difficulties to access to the internet, it is impossible for the local residents to understand the information posted online in English or in Korean. This inaccessibility to the information on water quality amounts to the infringement of the right to water.

Under Chapter II. A. 11 and Chapter IV. 1. 2 of the Guidelines, companies are required to avoid causing the adverse impacts through their own activities and address such impacts when they occur. Chapter VI. 2. B) of the Guidelines also requires the companies to engage in adequate and timely communication and consultation with communities when the communities are directly affected by the company's activities related to the environment.

As shown above, it is clear that the operation of PT. BIA has resulted in the degradation of the water quality in the Bian river. Furthermore, PT. BIA failed to communicate the important information regarding the water quality of the Bian river with the members of the communities affected by the water quality degradation. Thus, degradation of the water quality and inaccessibility to the information amount to infringement of the right to water, and violation of Chapter II. A. 11 and Chapter IV. 1. 2, and Chapter VI. 2. B) of the Guidelines.

⁵⁷ PT. BIA, *supra* note 18, p.225.

⁵⁸ Hankyoreh21, *supra* note 6.

⁵⁹ PT. BIA, *supra* note 37, p26.

2. Failure to provide the remedies and to carry out human rights due diligence to address the adverse impacts

Chapter IV. 5 of the Guidelines require companies to carry out human rights due diligence during their operation in order to cease or prevent adverse impacts caused by their operations. It is also stipulated that due diligence is an on-going process starting with identifying impacts, and “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.”⁶⁰

OECD Due Diligence Guidance for Responsible Business Conduct provides the due diligence procedure as following six stages: (1) to embed RBC into the enterprise’s policies and management systems; to undertake due diligence by (2) identifying actual or potential adverse impacts on RBC issues, (3) ceasing, preventing or mitigating them, (4) tracking implementation and results, (5) communicating how impacts are addressed; and (6) to enable remediation when appropriate.⁶¹

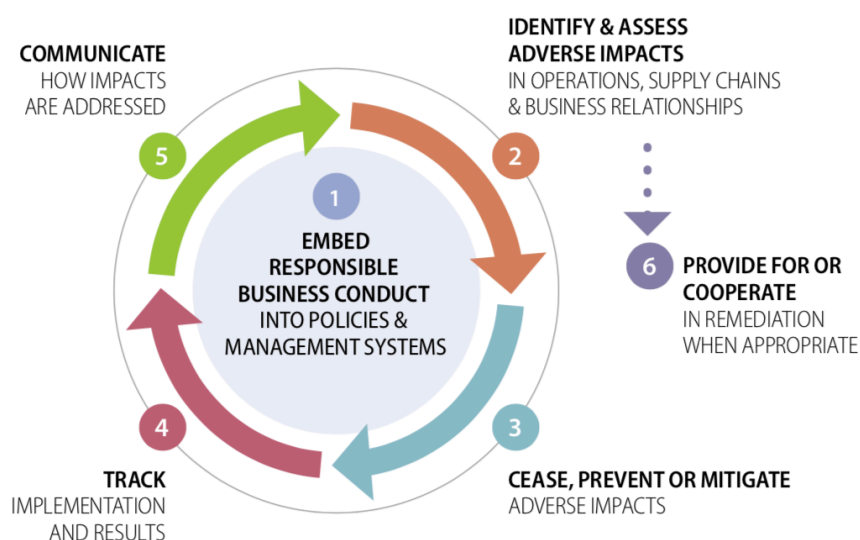


Figure 11. Due diligence process & supporting measures⁶²

Note that the purpose of due diligence is to avoid causing or contributing to adverse impacts on people, the environment and society, and to seek to prevent adverse impacts directly linked to operations through business relationships. In this sense, the independent procedure is required to address the adverse impacts which have already occurred during the business activities.

It should be noted that the communication to the stakeholders regarding the relevant information on due diligence policies, processes, activities conducted to identify and

⁶⁰ OECD Guidelines Commentary 45, see also commentary 40.

⁶¹ OECD, *supra* note 9, p.21

⁶² *Ibid.*, p.21

address adverse impacts is an important “part of the due diligence process itself.”⁶³ When the company caused or contributed to the adverse impacts to human rights, the relevant information should be communicated with the affected people in a timely, culturally sensitive and accessible manner.⁶⁴

The Chapter IV. 6 of the Guidelines stipulates that it is necessary to address adverse impacts caused by providing for or cooperating in the enterprises’ remediation when they identify that it has caused or contributed to the actual adverse impacts. It is suggested that the remediation should be proportionate to the significance and scale of the adverse impact and the procedures for the remediation to be consulted and engaged with the rightsholders.⁶⁵

PT. BIA has adopted policies on environmental and social by enacting ‘Environmental and Social Commitment and its associated Code of Conduct’ in 2016. It was first disclosed in the ‘Environmental and Social Report’ released in 2017 and was also displayed in the website of PT. BIA.

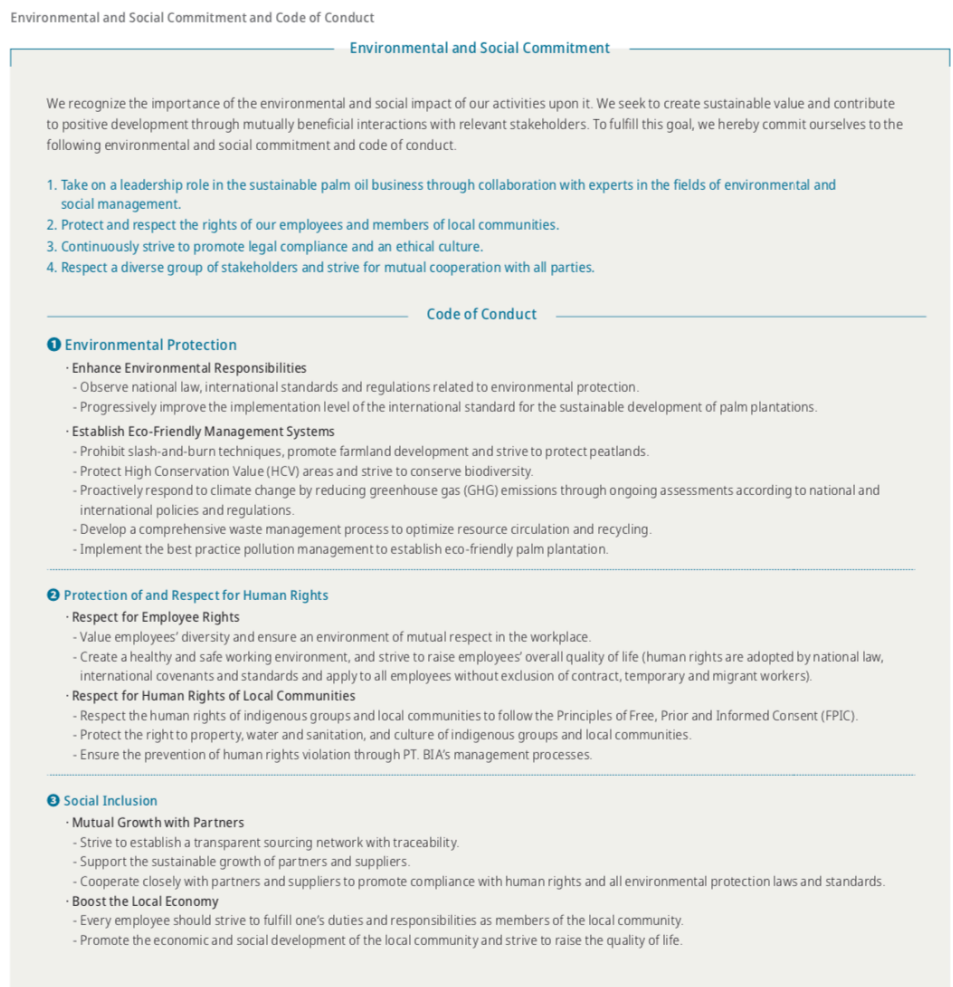


Figure 12. Environmental and Social Commitment and Code of Conduct

⁶³ Ibid., p.19

⁶⁴ Ibid., p. 33

⁶⁵ Ibid., p. 34

After adoption of the ‘Environmental and Social Commitment and its associated Code of Conduct,’ PT. BIA reports its progress on the implementation of environmental and social commitment through POSCO International’s sustainability reports each year from 2017. In the sustainability reports, PT. BIA has addressed the measures taken to address the adverse impacts caused. However, the measures taken are not sufficient to be the implementation of the due diligence under the Guidelines as shown below.



Figure 13. POSCO International’s sustainability reports

Though they have adopted the Environmental and Social Commitment and its associated Code of Conduct and taken several measures to address environmental and social risks, the measures taken were neither sufficient for remedies or due diligence under the Guidelines for the following reasons.

A. Deforestation and loss of diversity

Deforestation

The Guidelines require that companies to provide for remediation for adverse impacts where they identify that they have caused these impacts.⁶⁶ However, PT. BIA has failed to identify deforestation of 27,000 hectares as the adverse impacts they have caused thus failed to provide the remediation to address deforestation. In fact, it is the position of PT. BIA that the concession areas had been cleared were not primary forest and they “have excluded forest and animal preservation areas during the operating site acquisition.”⁶⁷

However, as shown above, there are plenty of evidences that PT. BIA’s concession areas were covered by tropical rainforest and investors leading socially responsible investment such as the Norwegian pension fund and the Dutch national pension fund ABP have already divested from POSCO International for significant scale of deforestation based

⁶⁶ OECD Guidelines, IV. Human Rights, 6.

⁶⁷ PT. BIA, *supra* note 37, p. 22.

on their research.⁶⁸ Despite the clear evidences, PT. BIA refuses to identify the deforestation as the adverse impacts they have caused, thus PT. BIA has failed to provide the appropriate remedies for the deforestation.

Instead, most of the PT. BIA's measures for environmental and social policies are focused on receiving certificates from the voluntary certification mechanisms such as ISPO and RSPO and management of HCV. However, these measures cannot be the remedies for the deforestation or be the due diligence procedures to prevent the potential adverse impacts.

ISPO is considered to be the weakest certification schemes, and failed to protect even HCV areas.⁶⁹ RSPO, on the other hand, does not prohibit the conversion of secondary forest but allows the clearance of any forest not identified as primary or HCV. However, the secondary or degraded forests still count to protect the biodiversity as well as to prevent the climate changes.⁷⁰ Most of all, it has been found that companies certified under ISPO or RSPO are still violating the standards of these certification schemes due to the lack of proper monitoring system as well as the absence of implementing sanctions on the members even when the violations are found.⁷¹ Therefore, neither ISPO nor RSPO can serve as the effective due diligence measures.

In order to HCV areas to be sufficient to serve as the preventive measures to the deforestation, the assessment for the HCV areas should have been conducted before the clearing of the concession areas. However, PT. BIA has conducted HCV assessment in 2015 only after the vast area of primary forests were already cleared.⁷² In addition, it is not even clear which areas PT. BIA have designated as HCV areas and how they have managed the areas except placing signs.

Loss of biodiversity

Since HCV was designated only after the vast area of forest had been destroyed, it is inevitable that precious flora and fauna in the concession area had been lost their place of habitats and their lives. Thus, it is clear that PT. BIA has caused the loss of diversity while their concession area was being developed.

PT. BIA, on the other hand, listed the conservation of biodiversity as one of the main agendas for environmental and social commitment. In its Code of Conduct, it is stipulated that it would "protect HCV areas and strive to conserve biodiversity." According to its Environmental and Social Report, PT. BIA has had identified the endangered and rare species in its concession area in 2015, and prohibited "capturing of

⁶⁸ Mighty Earth, "ABP, World's Fifth Largest Pension Fund, Divests from Forest Destroyer, But Retains Stake in Parent Company" (2018. 6. 25) <http://www.mightyearth.org/abp-worlds-fifth-largest-pension-fund-divests-from-forest-destroyer-but-retains-stake-in-parent-company/>

⁶⁹ Retno Kusumaningtyas, "External Concern on the ISPO and RSPO Certification Schemes," (2017 December) p.3

⁷⁰ Ibid., p.2.

⁷¹ Ibid., p.1

⁷² PT. BIA, supra 37, p.5

these species during farm work” by distributing the list of these species. However, it is not clear whether this policy has contributed to conservation of biodiversity lacking the result of the monitoring on this specific measure. The Council on Ethics for the Government Pension Fund Global (GPF)G’s recommendation resonates with this position. The Council on Ethics for the GPF)G concluded that setting up signs for prohibition of hunting and establishing the buffer zone along waterways were not enough to preserve protected species and biodiversity,^{73 74} and recommended the GPF)G to exclude POSCO International along with its parent company POSCO.

Failing identification of deforestation of 27,000 hectares of the tropical rainforest which must have resulted in mass destruction of flora and fauna, POSCO International has not taken any remedies to address the deforestation as well as the loss of biodiversity that they have caused, which in violation of Chapter IV. 6 of the Guidelines. Furthermore, it is also difficult to conclude that the measures to preserve the HCV and biodiversity are sufficient to be the due diligence under the Guidelines, and violated Chapter IV. 5 of the Guidelines.

B. Lack of FPIC

PT. BIA alleges that they have ‘concluded FPIC to protect rights of indigenous residents prior to farm developments. We listen to their opinions with multiple public hearings since 2007’⁷⁵ and disclosed the list of ‘public hearings’ held from 2007 to 2016. However, as shown above, the mere fact that the public hearings were held does not guarantee the completion of FPIC. It has been reported that PT. BIA has failed to implement FPIC during developing district A and constructing the second CPO Mill. PT. BIA, thus, has failed to identify these incidents as adverse impacts caused by their activities, thus, failing to provide proper remedy.

Without proper remediation on previous adverse impacts caused due to failure to implement FPIC, PT. BIA alleges that they would ‘respect the human rights of indigenous groups and local communities to follow FPIC’ under their Code of Conduct. PT. BIA has provided the list of the public hearings held in their Environmental and Social Report released in 2017; in the following years, PT. BIA has highlighted that they are in “full compliance with the Free, Prior, and Informed Consent (FPIC) principle to prohibit any business development that was neither intended nor agreed by local communities.”⁷⁶ It was also stated that PT. BIA hosts public hearing to discuss major issues including Plasma, land compensation and road construction.

⁷³ The Council on Ethics for the Government Pension Fund Global, *supra* note 3, pp. 7-8

⁷⁴ In fact, it is not even clear whether “the buffer zone” PT. BIA claims to maintain exist as all the documents presents different information regarding this buffer zone. In the report published by the Council of Ethics for the Government Pension Fund Global in 2015, it was stated that POSCO International would establish the 200 meter-wide buffer zone along waterways (The Council on Ethics for the Government Pension Fund Global, *supra* note 3, p.7); but in the English sustainability report released in 2019, the buffer zone was suggested as 20km (p.104) whereas the buffer zone was indicated as 20 meters in the Korean sustainability report in released 2019 (p.104).

⁷⁵ PT. BIA, *supra* note 37, p.42

⁷⁶ POSCO international, Corporation Sustainability Report 2017 (2018), p.89; Corporation Sustainability Report

As shown above, the implementation of FPIC involves very complicated and time-consuming procedures from identifying the relevant stakeholders to design and implement participatory communication to reach genuine informed consent. One of the important aspects of FPIC is that rights-holders are not forced to engage in the process in passive manners but actively engage and lead the procedures. In this sense, it is recommended that the rights-holders to determine the process, timeline and decision-making structure rather than company to lead the whole procedure. However, it is difficult to conclude that ‘the public hearings’ held by PT. BIA have been operated in this manner.

One of the major concerns of the local residents is the pollution of the adjacent rivers and the infringement of the right to water. It was, in fact, one of the reasons that the local residents opposed the construction of the second CPO Mill. The fact that Mahuze clan held demonstration to show their objection to the construction instead of ‘discussion,’ shows that there was no communication channel that the residents could access, which is contrary to PT. BIA’s allegation.

Failing to identify lack of FPIC in their development procedure, PT. BIA has failed to provide the remedy but has continued to fail to implement the FPIC procedure in their operation. This is against Chapter IV. 5 and 6 of the Guidelines, thus PT. BIA has violated the Guidelines.

C. Infringement of the right to water

PT. BIA has not identified the infringement of the right to water as the adverse impacts they have caused. PT. BIA, as a result, has not provided the remedies for the damages that the local residents suffered from infringement of the right to water. PT. BIA, however, stipulates that they are committed to protect the right to water under the Code of Conduct for the Environmental and Social Commitment adopted in 2016. In the Environmental and Social Report 2016, PT. BIA listed the activities to manage the water quality as below.

Water Resources Management

Water Quality

Because PT. BIA acknowledges that high water quality prevents environmental pollution from our business, and is also the key to stabilize life of our employees and local residents, we are committed to protecting water quality. We collect samples from rivers (Bian and Cucumit) located within PT. BIA operating sites to conduct quality testing twice a year. Additionally, quality testing on underground water is also conducted semiannually. Water quality testing on 33 samples are analyzed by SUCOFINDO, a test center approved by the Indonesian government. The water quality is managed based on standards as set by Indonesian Environment Law. In 2017, we will add a sampling area to be used for water quality testing and we plan to expand areas collect more samples.



[PT. BIA Operating Site Sampling]



[Water Sampling at
Bian River]



[Sample Water Quality
Analysis]

River	Index	2015.06	2015.12	2016.04	Legal Standard
Bian	BOD(mg/L)	3.69	4.52	3.87	100
	COD(mg/L)	8.20	11.30	9.70	350
Cucumit	BOD(mg/L)	5.53	11.00	3.23	100
	COD(mg/L)	6.57	27.4	6.5	350

Underground Water Quality Testing Result	Waste Water Quality Testing Result

CPO MILL Water Management

When CPO Mill launches operation in 2017, PT. BIA plans to establish a water resource management system that is environmentally reliable by monitoring and managing the volume of water intake and waste water quality emitted from CPO Mill. Water quality testing will be conducted on a quarterly basis by requesting inspection agencies to analyze samples collected on-site.

Figure 14. Water Resource Management by PT. BIA⁷⁷

PT. BIA emphasized that the result of the water quality tests had met the local legal standards. They also disclosed the plan to reuse the wastewater from CPO Mill as a fertilizer instead of discharging the wastewater to the rivers. In the report published in 2019, PT. BIA reiterated their water management policies which is to analyze the water quality of the nearby stream twice a year and the reuse the wastewater from CPO Mill. It was also highlighted that level of BOD (Biological Oxygen Demand) in the planation lower than the local standards, which is less than 5,000mg/L.⁷⁸

However, regardless of the result of the water quality tests which did meet the Indonesian legal standards, the local residents alongside the Bian river has been suffering due to the degradation of the water quality of the Bian river. The local residents have witnessed how the Bian River has been changed. The changes of the river forced the local residents to change the ways of their lives.

⁷⁷ PT. BIA, supra note 37, p. 25

⁷⁸ POSCO International, Corporation Sustainability Report 2018 (2019), p.104

Local residents who live along with the Bian River used to drink and use the water from the Bian river for daily activities. However, the deterioration of the water quality forced the local residents to buy the drinking water, which put huge financial burden on them. The local residents are avoiding from eating the fish caught from the river anymore which was one of the major sources for their food. Furthermore, it was observed that fish died en masse in the Bian river and one of the villagers fell down after drinking the water from the river in 2015.⁷⁹

It is important to note that in order to ensure the right to water, the quality of the water which needs to be discussed is the standard for drinking water rather than standard for wastewater. In addition, mere information regarding BOD and COD is not enough to review the degree of the water pollution considering the possibility on the contamination from the chemicals. In fact, the local residents suspected that the chemicals in the pesticides used in the plantation had contributed to the pollution of the river, which resulted in the villagers to fall down.⁸⁰

The water quality to ensure the right to water stipulated in the ICESCR confirms the position of the community by requiring the safe water to be “free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.”⁸¹ Thus, it is necessary to review not only the level of BOD or COD but also the impacts of the chemicals and micro-organisms. It is also required under the ICESCR that the information regarding water issues should be accessible to ensure the right to water. However, it is impossible for the local residents to access to the information regarding the water from PT. BIA.

PT. BIA has not provided the remedy for the infringement of the right to water failing to identify the violation of the right to water as the adverse impacts they have caused. Though PT. BIA has identified the issue of right to water in their Code of Conduct for environmental and social commitment, they neither ensured the quality of the water nor provided the relevant information on the water issue to the local communities. Thus, PT. BIA failed to cease the violation of the right to water against the local residents and failed to implement the due diligence under the Guidelines. POSCO International is in violation of Chapter IV. 5 and 6 of the Guidelines.

IV. Breaches of the OECD Guidelines by National Pension Service

1. Adverse impacts directly linked to National Pension Service

According to the Guidelines, institutional shareholders with minority shares can be directly linked to the adverse impacts through a business relationship.

⁷⁹ Sisain, “Indigenous people suffering due to Korean company” (2017. 8. 24), <https://www.sisain.co.kr/news/articleView.html?idxno=29853> [in Korean]

⁸⁰ Ibid.

⁸¹ E/C.12/2002/11, para 12.

“investors, even those with minority shareholdings, may be directly linked to adverse impacts caused or contributed to by investee companies as a result of their ownership in, or management of, shares in the company causing or contributing to certain social or environmental impacts. In other words, the existence of RBC risks (potential impacts) or actual RBC impacts in an investor’s own portfolio means, in the vast majority of cases there is a ‘direct linkage’ to its operations, products or services through this “business relationship” with the investee company.”⁸²

NPS has been one of the minority institutional investors of POSCO International since 2010, when POSCO acquired the Daewoo International. In 2010, NPS held 3.9% of shares but increased the shares up to 9.29% in 2013. However, NPS later decreased its shares and in 2017, the percentage was 4.1%. In 2018 NPS held 5.6% of POSCO International’s share.⁸³ As a result, except the mother company, POSCO owning 62.9% of its share, NPS remains as the largest institutional shareholder.

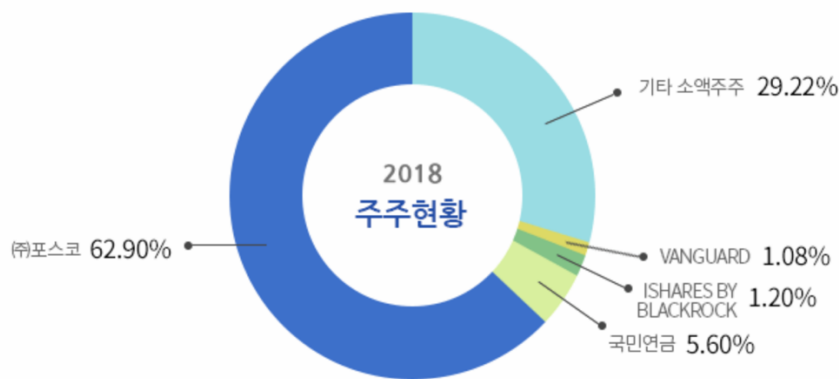


Figure 15. Shareholders of POSCO International in 2018

POSCO International has started its oil palm business since 2011 and NPS has been the largest institutional investor since then. While NPS has been holding the shares of POSCO International, POSCO International has caused adverse impacts through its operation of oil palm plantation in Indonesian subsidiary PT. BIA. Thus, NPS has been directly linked to the deforestation, lack of FPIC and water pollution issues at PT. BIA’s operation through its investment, the business relationship with POSCO International.

2. Failure to carry out human rights due diligence to address adverse impacts

The Guidelines require institutional investors to implement the human rights due diligence for the adverse impacts directly linked to their investment by a business relationship. The due diligence especially involves the communicating externally relevant information with regard to the due diligence policies, processes, and activities.⁸⁴

⁸² OECD, supra note 11, p. 13.

⁸³ POSCO INTERNATIONAL, 2018 Shareholders <http://www.poscointl.com/kor/shareholder.do>; Investment Prospectus (2019. 7. 4), p.337

⁸⁴ OECD, supra note 11, p. 33.

According to the article 17 of the fund management guidelines for NPS, NPS can consider ESG in order to generate stable return in the long term when it manages or operate by trading or loan. In 2017, NPS had disclosed its ESG evaluation index online⁸⁵ and applied to the virtual SRI fund launched in August 2014. ESG evaluation index listed the specific issues for evaluation such as management on carbon emission for climate changes, waste management for clean production, human rights for human resource management and other issues.

On November 17, 2017, KTNC Watch, one of the complainants with KFEM and Mighty Earth, have sent the letter to NPS regarding PT. BIA's adverse impacts to the environment and the local community (see appendix 4). In the letter, it was noted that owning 4.95% of POSCO Daewoo's shares was contrary to NPS' SRI initiatives since PT. BIA, an Indonesian subsidiary of POSCO Daewoo in Papua, actively engaged in deforestation of the primary rainforest, social conflict and water pollution. It was also highlighted that POSCO Daewoo had rejected to adopt 'No Deforestation' policy and would be at risk of being excluded from the global supply chains. The senders finally requested the meeting to discuss the concerns as well as the potential steps measures for the responsible investment.

On December 13, 2017, NPS replied that they were aware of the environmental destruction issue in POSCO Daewoo's Indonesian operation and had been monitoring the issue. However, they rejected the request to meet for the reason that they were working on developing the SRI policies but they would sincerely apply the new SRI standard once established (appendix see appendix 5).

On July 30, 2018, NPS adopted the stewardship code which allows NPS to engage with investee companies regarding issues including ESG. Following adoption of the stewardship code, NPS announced its draft plan on boosting SRI on July 5, 2019. The draft plan includes agendas for creating a future responsible investment plan as well as future action plans for revising guidelines including the principles for responsible investment, improving conditions for corporate ESG disclosure, and strengthening responsible investment by fiduciary management.

NPS has been preparing a set of guidelines for promoting socially responsible investment as well as the exercise of Shareholders' rights with the purpose of management engagement, and it held a public hearing on the working draft of the guidelines in November 2019. According to the draft, NPS stated that it would expand its scope of socially responsible investment and build a foundation for promoting socially responsible investment practice. In addition, NPS also stated that, as a part of follow-up measures to the stewardship code, it would be exercising its shareholder rights for the purpose of participating in management if companies that are "suspected of violating laws or continuously oppose NPS suggestions."⁸⁶

⁸⁵ NPS, the status on responsible investment

https://fund.nps.or.kr/jsppage/fund/prs/policy09_02.jsp?seq=2743&cPage=1&cat=YEA&fld=offi&cat=YEA

⁸⁶ Press release, Public Hearing Held for the draft of the Guidelines for Promoting its Socially Responsible Investment and the Exercise of Shareholders' Rights with the Purpose of Management Engagement (2019. 11. 13), http://www.mohw.go.kr/react/al/sal0301vw.jsp?PAR_MENU_ID=04&MENU_ID=0403&page=1&CONT_SEQ=351505 [In Korean]

However even before the adoption of the such guideline, NPS has engaged with the investee companies which have caused damages to the shareholder value by sending the open letter, conducting the interview, or exercising voting rights. For example, in June 2018, having 12.45% of shares, NPS sent the open letter to Korean Air to raise issue on inspection of Korean Air's executives as well as to request the interview.

NPS' awareness of the adverse impacts directly linked to their investment

It is clear that NPS has been aware of adverse impacts caused by POSCO International at since December 2017 when they replied to the letter from NGOs. 'Environmental pollution issue' of POSCO International has become more public since POSCO International has listed information regarding deforestation in palm oil plantation in Indonesia as one of the risk factors for the company in their Investment Prospectus released in March 2019 (see appendix 11). Investment Prospectus released in July 2019 also listed the deforestation in palm oil plantation in Indonesia as the risk factor of the company related to the environmental pollution. Thus, NPS has been or should have been aware of adverse impacts directly linked to their investment to POSCO International since December 2017.

However, despite its awareness on 'environmental issues,' NPS has not used its leverage over POSCO International to cease or mitigate these adverse impacts. As shown above, NPS could have sent the open letter to POSCO International or requested the interview with them, but they have not. Thus, NPS has failed to carry out the due diligence to address deforestation, lack of FPIC and the infringement on the right to water directly linked to its investment to POSCO International.

Even if they have taken any measures, it would not amount to the implementation of the due diligence as it failed to communicate the relevant information with the stakeholders, which is an important part of the due diligence. The Guidelines require the information shared by the companies during the process of the implementation of the due diligence to "be accessible to its intended audiences (e.g. stakeholders, investors, consumers, etc.) and be sufficient to demonstrate the adequacy of an enterprise's response to impacts."⁸⁷

NPS insists that "they had been monitoring the issue (of the environmental destruction issue in POSCO Daewoo's Indonesian operation)" in December 2017 when they replied to the letter from NGOs. However, no information has been shared by NPS regarding any 'monitoring' activities that NPS might have done; the information was neither accessible to the stakeholders nor sufficient to review the adequacy of the activities conducted. Thus, NPS failed to carry out the due diligence due to the lack of communication. Thus, NPS' failure to implement due diligence including proper communication with the stakeholders amounts to violation of Chapter II. A. 10, 12 and Chapter IV. 3, 5, and Chapter VI. 2. B) of the Guidelines.

⁸⁷ OECD, *supra* note 11, p. 19

V. Breaches of the OECD Guidelines by the Export-Import Bank of Korea

1. Adverse impacts directly linked to the Export-Import Bank of Korea

The Export-Import Bank of Korea (KEXIM) has various loan products to support overseas business. Four types of loans are provided under the KEXIM's overseas business-related loan scheme: overseas investment, overseas project loan, overseas business loan and overseas business facilitation loan. KEXIM provides financing to Korean companies for the investment or projects, to foreign subsidiaries of Korean companies or to entities that contribute to the overseas business activities of Korean companies. PT. BIA, as a subsidiary of POSCO International, received the under the overseas business loan, which is provided for capital investment, working capital, investment or loan to subsidiary of Korean companies. Under this scheme, KEXIM has provided total 115,125,000 USD from 2012 to 2018 to PT. BIA, guaranteed by POSCO International.⁸⁸

Dec. 2018	➤ Delivered the 1 st overseas CPO shipment (India)
Jul. 2018	➤ Became an RSPO member
May 2018	➤ Initiated the construction of the 2 nd CPO mill
Dec. 2017	➤ Applied for the RSPO membership
Mar. 2017	➤ Published the 1 st PT. BIA Environmental and Social Report
Jan. 2017	➤ Conducted ISPO farm assessments on the production stage
Jan. 2017	➤ Developed PT. BIA's environmental and social policy
Dec. 2016	➤ Completed the construction of the 1 st CPO mill
Feb. 2016	➤ Conducted 2 nd ISPO farm assessments on the development stage
May 2015	➤ Initiated the harvest of fresh fruit bunches (FFB)
Dec. 2014	➤ Commenced the construction of the 1 st CPO mill
Sep. 2014	➤ Conducted the 1 st ISPO farm assessments on the development stage
Sep. 2012	➤ Initiated the plantation of palm trees
Sep. 2011	➤ Launched business by PT. BIA's equity acquisition

Year	Amount of loan (USD)
2012	1,500,000
2013	4,125,000
2014	26,000,000
2015	5,000,000
2016	22,000,000
2017	10,000,000
2018	46,500,000
Total	115,125,000

Table 1. Loans provided to PT. BIA from KEXIM

Figure 16. Key milestone of PT. BIA

PT. BIA actively destroyed the forest since 2011 after POSCO International has become the parent company by acquiring 85% of PT. BIA's share. Starting from planting first palm trees in 2012, the construction of the first CPO mill was completed in 2016 and it has started the construction of the second CPO mill in 2018. During its operation since 2011, PT. BIA has constantly caused the adverse impacts such as deforestation and loss of diversity, social conflicts due to the lack of FPIC and the infringement on the right to water due to the water pollution but KEXIM has been providing the loans to PT. BIA continuously.

The Guidelines apply to all sectors including the financial sector and require the financial institution to 'seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.' The Netherland NCP clearly indicated that "the reference to services means that paragraph 12 (in Chapter II, General Policies) of the

⁸⁸ POSCO INTERNATIONAL, Investment Prospectus (2019. 7), pp.98-99

Guidelines is applicable to any financial service, including **lending**. It follows that services of this kind are part of a business relationship.”⁸⁹

KEXIM provided loans of 115,125,000 USD from 2012 to 2018 in order to support various business activities of PT. BIA. However, the business activities made possible by the loans from KEXIM have caused adverse impacts such as deforestation and loss of diversity, social conflicts and infringement of the right to water. Thus, it is inevitable that KEXIM directly linked to adverse impacts by providing the loans to PT. BIA, a subsidiary of POSCO International, from 2012 to 2018.

2. Failure to carry out human rights due diligence to address adverse impacts

Applicability of the Guidelines

Though the Guidelines do not precisely define what ‘multinational enterprises’ under the Guidelines, it stipulates that companies or entities from all sectors of the economy operated in more than one country regardless of the forms of the ownership.⁹⁰ Therefore, ECAs that provides commercial services internationally can be multinational enterprises for the purpose of the Guidelines and have obligation to implement the recommendations under the Guidelines. For example, the Dutch NCP required its export credit agency, Atradius DSB (ADSB) to use its leverage over the business relationships in the context of its financing of a dredging project in north-eastern Brazil which had resulted in severe human rights and environmental impacts.⁹¹

KEXIM provides various types of financial services to the Korean companies to promote the export, import and overseas business. In this case, PT. BIA, as a subsidiary of a Korean company, was able to receive the loan to operate the overseas business from KEXIM for seven years. In this sense, KEXIM should be considered as a multinational enterprise which should comply with the Guidelines. Under the Guidelines, KEXIM is directly linked to the adverse impacts by lending to PT. BIA, KEXIM should seek to prevent or mitigate adverse impacts under the Guidelines.

It is important to note that the due diligence required by the Guidelines is different from ‘Environment and Social Due Diligence’ conducted pursuant to ‘OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (OECD Common Approaches).’ OECD Common Approaches only requires to conduct the environmental and social due diligence only to the projects with repayment terms of two years or longer and above SDR 10 million (USD 15 million) of share or projects related to nuclear sector and environmentally sensitive areas.⁹²

⁸⁹ Netherlands National Contact Point, supra note 13, p. 2. (bolding added)

⁹⁰ OECD, OECD Guidelines for Multinational Enterprises, Chapter I. para 4.

⁹¹ Netherlands National Contact Point, Final Statement Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business, November 2016, p.7

⁹² KEXIM, Export Credit and Environmental Review,
<https://www.koreaexim.go.kr/site/homepage/menu/viewMenu?menuid=002002004002>

However, the scope of the due diligence required by the Guidelines is broader; here, the standard is neither the amount of money nor terms of the repayment, but is whether the financial service provided by the institution in question is directly linked to the adverse impacts caused by its business relationships.

KEXIM's human rights due diligence obligation as a public financial institution

In addition, considering unique nature of KEXIM as public financial institution, it is necessary to also review the standards under the UNGP. It is the position of UNGP that without considering the actual and potential adverse impacts on human rights of beneficiary enterprises, export credit agencies 'put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.'⁹³

UNGP also makes it clear that the scope of requiring human rights due diligence is not limited to 'projects receiving their (export credit agencies in this case) support' but also includes 'those business enterprises receiving their support.' UNGP further suggests that the human rights due diligence should be required when the nature of business operations or operating contexts pose significant risk to human rights.⁹⁴ In this sense, it is necessary for KEXIM to take additional measures such as human rights due diligence as well as to **require the companies that receive financial services from KEXIM** to adopt the human rights due diligence.

As shown above, operation of PT. BIA has caused deforestation, social conflict and the infringement of the right to water and posed significant risk to the local community as well as environment in the area. Thus, KEXIM, as a public financial institution, should implement the human rights due diligence by themselves as well as require the human rights due diligence to PT. BIA as the receiving company of KEXIM.

Foreseeable risk of palm oil industry

Palm oil industry due to its contribution to the deforestation as well as human rights violations against the local residents and workers has become a subject of controversy in recent years. It is not difficult to find any articles regarding harms caused by the palm oil industry: in Korea, SisaIn in 2017 and Hankyoreh²¹ in 2018 have reported that deforestation, water pollution and land conflicts were caused by palm oil business of POSCO International.

Based on extensive researches and dialogue with POSCO International, the investors concluded that the operation of palm plantation would poses risk to the company. For example, the Norwegian Pension Fund, the largest sovereign wealth fund, announced that it would exclude POSCO Daewoo and POSCO, its mother company, due to "unacceptable risk of severe environmental damage" in August 2015.⁹⁵ In 2018, the Netherland national

⁹³ UNGP, para 4 and its commentary

⁹⁴ Ibid.

⁹⁵ The Council on Ethics for the Government Pension Fund Global, supra note 3, p.11.

pension fund also divested from POSCO Daewoo for deforestation.⁹⁶ In addition, private bankers such as HSBC and BNP Paribas have also adopted the financing policy preventing deforestation on palm oil sector.⁹⁷ In this sense, the investment in the palm oil sector would pose reasonably foreseeable risk of environmental and social damages.

While reviewing PT. BIA's activities, which are mainly production of palm oil in Papua, KEXIM, at least, should have identified the environmental damages due to deforestation as they are reasonably foreseeable risk. If KEXIM had researched the typical risks posed by the palm oil industry, they could also have noticed that the business could cause the land conflict and water pollution, other foreseeable risk factors in the palm oil industry. However, KEXIM merely assessed the credit of the mother company in order to provide the overseas business loan and did not review whether the nature of business operations or operating contexts could pose significant risk to human rights.

Lacking review procedure to check reasonably foreseeable risks in providing loans to PT. BIA, KEXIM has failed to identify the adverse impacts directly linked to their financial services. Rather they continued to provide the substantial amount of loans to PT. BIA for seven years. As a result, KEXIM has failed to prevent or mitigate the adverse impacts directly linked to its financial services. In other words, KEXIM's failure to identify the foreseeable risk of environmental and social damages in PT. BIA's operation and following omissions in carrying out the due diligence amounts to violation of Chapter II. A. 10, 12 and Chapter IV. 3, 5, and Chapter VI. 2. B) of the Guidelines.

VI. Requests

1. Requests to Korean NCP

We request that the Korean NCP offer its good offices to facilitate mediation between ourselves and POSCO International, NPS and KEXIM to resolve the OECD Guidelines breaches discussed in this specific instance. Despite the evidence of deforestation from various sources, POSCO International has not recognized that they have destroyed the tropical rainforest; instead they have focused on the other measures such as ISPO and RSPO proven to be ineffective to ensure no deforestation. In addition, indigenous communities have raised the issue of land conflicts and infringement of the right to water due to the operation of the oil palm company. Despite the discussion held between the NGOs and POSCO International, it was not possible to achieve meaningful change in POSCO

⁹⁶ Mighty Earth, "ABP, World's Fifth Largest Pension Fund, Divests from Forest Destroyer, But Retains Stake in Parent Company" (2018. 6. 25) <http://www.mightyearth.org/abp-worlds-fifth-largest-pension-fund-divests-from-forest-destroyer-but-retains-stake-in-parent-company/>

⁹⁷ HSBC announced the No Deforestation financing policy and was requested to act on PT. BIA to test its new commitment. BNP Paribas also adopted a new responsible palm oil financing policy and was requested to review a commercial relationship with POSCO Daewoo. See Mighty Earth, "Buyers Beware: POSCO Daewoo's Deforestation Palm Oil is Ready for International Markets — But Global Buyers are Rejecting it" (2018), <http://www.mightyearth.org/buyers-beware-posco-daewoos-deforestation-palm-oil-is-ready-for-international-markets/>

International's policies and practices. Therefore, we ask for the Korean NCP's help in creating space for dialogue to achieve a more tangible outcome.

Should mediation fail, we expect that the NCP will examine the facts and make a determination as to whether or not POSCO International, NPS and KEXIM have breached the Guidelines. We request the NCP to provide recommendations on what steps POSCO International should take to address the harms to which it has caused and on how POSCO International should provide the remedies and also improve its due diligence in order to avoid causing further adverse impacts in operating its palm oil plantation subsidiary.

We request NCP to provide recommendations to NPS and KEXIM on further measures they should take to prevent or mitigate adverse impacts directly linked to by their financial services. We ask the NCP to discuss and put forward their arguments on what the Korean government should do to prevent further financing of adverse impacts by Korean companies especially in their oversea business, including which elements should be included in binding regulation for the public financial sector.

2. Requests to POSCO International

The complainants request that the Korean NCP offer its good offices and facilitate dialogue with the respondents to discuss these specific impacts. We seek through mediated conversation to encourage POSCO International:

- To acknowledge that the vast majority of the PT. BIA's concession area was covered by tropical rainforest and to provide the remediation, for example, by financing the restoration of an area of land at least equivalent to the area of the forest that was cleared in PT. BIA.
- To adopt and publish a comprehensive group-wide cross-commodity No Deforestation, No Peat, and No Exploitation (NDPE) policy and publicly declare a group-wide moratorium on land clearing and peatland development.
- To review the concerns raised by the local communities such as the right to use in district A and the construction of the second CPO mill and discuss the proper remediation with the stakeholders.
- To establish the communication channels which the local residents can access and raise issues in culturally sensitive and accessible manner for the issues arising out of the operation of the plantation.
- To provide the means to access to the clean water to the local residents.
- To monitor the quality of the water of the Bian River and disclose the result of the monitoring to the local residents in a timely, culturally sensitive and accessible manner.

3. Requests to National Pension Service

It is clear that POSCO International has caused issues damaging shareholder value such as deforestation and loss of biodiversity, lack of FPIC and the infringement on the right to water. Under their stewardship code, NPS can engage with the investee companies regarding ESG issues. We believe that the adverse impacts listed constitute enough ground for triggering the engagement with POSCO International. NPS may send the open letter as they

have done to Korean Air or conduct the interview the relevant employees in POSCO International or even exercise voting rights when there is no change in their practice to address the adverse impacts.

Furthermore, we request NPS to adopt the ESG policy to consider the adverse impacts directly linked to its investment. Cases of adverse impacts caused in this case such as deforestation and loss of diversity, social conflicts due to lack of FPIC, and the right to water should be all considered in order to implement the ESG policy for socially responsible investment which has been in preparation. It is especially important to review whether business activities conducted overseas to cause the harms to the environment or human rights.

4. Requests to the Export-Import Bank of Korea

KEXIM is directly linked to adverse impacts caused by PT. BIA by providing substantial amount of loans to PT. BIA for the past seven years. KEXIM should not provide any more loans to PT. BIA which has been causing harms to the environment and human rights of the local residents in Papua.

As a public financial institution, KEXIM is required to take human rights due diligence as well as to oblige the corporations that receive financial services from KEXIM to adopt the human rights due diligence. Thus, KEXIM should adopt the due diligence to identify the reasonably foreseeable risk in the business it is to provide the loans. KEXIM can also encourage the borrowing companies to adopt the human rights due diligence policies and to implement those measures.

5. Requests to the Korean Government

Considering that POSCO International was also provided the loans through the government agencies such as Ministry of Agriculture, Food, and Rural Affairs and the Korea Forestry Service despite of the harms they have caused, it is also suggested that the government of Korea to establish comprehensive policies to promote the human rights due diligence in the public financial institutions.

The Korean Government operates a system under the Overseas Agricultural and Forest Resources Development and Co-operation Act to finance the development of agricultural products abroad.⁹⁸ However, there does not seem to be any procedure during the loan review

⁹⁸ Overseas Agricultural and Forest Resources Development and Cooperation Act, Act No. 15077, November 28, 2017, https://elaw.klri.re.kr/kor_service/lawView.do?hseq=46212&lang=ENG. Article 25 (Financial Instruments) 1 of the Overseas Agricultural and Forest Resources Development Co-operation Act ① The Government may provide loans for any of the following funds to the operators of overseas agricultural resources development projects, overseas agricultural resources development investment companies and investment companies specialized in development of overseas agricultural resources under Article 11, and overseas forest resources development investment companies and investment companies specialized in development of overseas forest resources under Article 22-2 to facilitate promoting the development of overseas agricultural or forest resources: <Amended by Act No. 13032, Jan. 20, 2015> 1. Funds necessary for acquiring a business permit necessary to develop overseas agricultural or forest resources and for agricultural or afforestation projects;

process for checking whether adverse impacts to the environment or human rights have taken place or would occur during the overseas resource development process.

In the case of loans for the development of agricultural and food products overseas, it appears there is no process for checking the impact of the project on the environment and human rights in the course of the loan review. In total 41.5 billion KRW was provided as loans to support the palm oil business in Indonesia, and POSCO International did receive 30.5 billion KRW in loans by 2018.⁹⁹ In the case of overseas forest resource development projects conducted by the Korea Forest Service, loans for oil palm trees should be given only if the company proved that it is not responsible for forest conversion.¹⁰⁰ However, POSCO International received 4,972 million KRW of loans in 2018 from the Korea Forest Service despite the deforestation they have caused, which shows the ineffectiveness of the existing review system.¹⁰¹

In this sense, we request the government of Korea to adopt the policies to review the actual and potential harms to the environmental and human rights when they provide the loans to the corporations. We hope that the government to put in place the human rights due diligence requirements in the binding regulations for the public financial sector.

VII. Conclusion

The development of massive-scale oil palm plantation left scars in the land of Papua as well as the lives of Papuans. However, any of the measures taken by the company does not amount to heal the scars of the land or people of Papua – the forest has not been restored or the lives of the Papuan people have become more difficult. Taking this into consideration, this specific instance has established how POSCO International has breached provisions of the OECD Guidelines by causing adverse environmental and human rights impacts through its operation of oil palm plantation in Papua, Indonesia. Despite the adoption of the environmental and social policies and measures to address ‘environmental and human rights issues’ identified by themselves, POSCO International failed to provide remedies or

2. Funds for installing and operating facilities necessary to develop overseas agricultural or forest resources;
3. Funds for leasing or purchasing land necessary to develop overseas agricultural or forest development;
4. Other funds prescribed by Presidential Decree, which are necessary to facilitate developing overseas agricultural or forest resources.

② Matters necessary for financing under paragraph (1) shall be prescribed by Presidential Decree.

③ Where it is impossible for the operator of an overseas agricultural resources development project or the operator of an overseas forest resources development project financed under paragraph (1) 1 to repay a loan following a failure of the said project, he/she may be fully or partially exempted from the principal and interest thereof by the Government, as prescribed by Presidential Decree. <Amended by Act No. 13032, Jan. 20, 2015>

⁹⁹ Information provided by the office of National Assembly Congressman, Jun-ho Yoon.

¹⁰⁰ Korea Forest Service, Foreign Forest Resources Development Policy Fund Loan Guidance, http://www.forest.go.kr/newkfsweb/html/HtmlPage.do?pg=/resource/resource_050202.html&mn=KFS_02_01_06_02_02. [In Korean] Companies eligible for loans can receive from 60 to 100 percent of the total cost of the project with low interest rate. One point five percent interest is charged annually. Loan repayments are deferred for from two to 25 years, but when repayments begin the loan must be repaid in equal payments within three years.

¹⁰¹ Information obtained by the information disclosure from the Korea Forestry Service

establish the preventive measures for the harms caused. This specific instance therefore seeks remedy for the harms POSCO International caused and reform by POSCO International to improve its environmental and social impact moving forward.

The specific instance also has shown that the adverse impacts caused by POSCO International are directly linked to NPS, an institutional investor, and to KEXIM, a lender for the oil palm business. NPS and KEXIM failed to implement the due diligence to mitigate the harms either. It is requested that NPS and KEXIM to engage with POSCO International and to adopt the policies to consider environmental and social risk in investment and financial services.

List of the Appendices:

1. Receipt by Stephanos and Damianus Yaone in 2010 for the compensation for district A
2. Receipt by Stephanos and Damianus Yaone in 2011 for the compensation for district A
3. NPS ESG Evaluation index
4. Letter to NPS from NGOs in November 2017
5. NPS letter to KTNC Watch in December 2017
6. PT. BIA, ANALYSIS ON THE IMPACT TO LIVING ENVIRONMENT (ANDAL) OF THE CONSTRUCTION OF PLANTATION AND OIL PALM PROCESSING PLANT OF PT BIO INTI AGRINDO In Merauke Regency Papua Province (2009.4)
7. PT. BIA, Environmental and Social Report (2017)
8. POSCO DAEWOO, "Corporation Sustainability Report 2016" (2017)
9. POSCO DAEWOO, "Corporation Sustainability Report 2017" (2018)
10. POSCO INTERNATIONAL, "Corporation Sustainability Report 2018" (2019)
11. POSCO INTERNATIONAL, Investment Prospectus (2019. 3)
12. Aidenvironment, "Burning Paradise" (2016.8)
13. The Council on Ethics for the Government Pension Fund Global, "Recommendation to exclude Daewoo International Corporation and POSCO from the Government Pension Fund Global" (2015)
14. Retno Kusumaningtyas, "External Concern on the ISPO and RSPO Certification Schemes," (2017 December)
15. Hankyoreh21, "Korean Palm Farm in the Stolen Land" (2018. 12. 28)
16. Sisaln, "Indigenous people suffering due to Korean company" (2017. 8. 24)
17. Netherlands National Contact Point, Final Statement in Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie v. Rabobank, 15 January 2016
18. Netherlands National Contact Point, Final Statement Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business, November 2016