

Complaint
Milieudefensie v. ING Bank

Complainants

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1. EXECUTIVE SUMMARY

This specific instance establishes how ING Group (ING), a Dutch multinational banking and financial services corporation, has breached several provisions of the OECD Guidelines by contributing to specific adverse environmental, human rights, and labour rights impacts caused by subsidiaries of ING's clients Noble Group Ltd., Bolloré Group/Socfin Group S.A., and Wilmar International Ltd. The complaint argues that ING was initially only directly linked to these specific impacts through the business relationship between ING and these three clients. However, due to the high degree of foreseeability of the harmful impacts caused by its clients and the failure of ING to take any action that actually mitigated or decreased the risk of impacts, an omission that made it easier for these clients to cause harm, ING – through its continued provision and renewal of loans of a substantial total amount to these clients – has come to be in a position of contributing substantially to the harmful impacts. The repeated loans by ING totaled a substantial amount, and given the general nature of corporate loans, it is likely that at least a portion of the proceeds would go to the activities that were known to be causing adverse impacts. Although the impacts were highly foreseeable, there are no indications ING made any efforts to prevent proceeds from being used to support the activity in question. The complaint asserts that, as a contributor to the impacts, ING now has a heightened responsibility to cease its contribution and contribute to remedying the impacts.

Section 2 of this specific instance identifies the parties. Milieudefensie, the lead complainant, is a Dutch NGO that has engaged in research and advocacy for twenty years to raise attention, including among investors, to harms rife within the industrial palm oil industry. Milieudefensie's advocacy focuses both on exposing harmful practices of palm oil companies themselves, and shining light on the support major financial institutions give to these environmental and human rights harms through the financial institutions' extensive – and seemingly unconditional – financing of palm oil companies. ING is, amongst European banks, one of the top ten biggest creditors of selected palm oil companies. ING has financed Noble Group Ltd., Bolloré Group (Socfin Group S.A.), and Wilmar International Ltd. for many years. In addition to providing various types of credit, ING offers various investment funds that include shares of these and other palm oil companies. In April 2018, the market value of the shares in palm oil companies in all these funds amounted to over 1.8 billion euros. ING's support for the companies named in this complaint can only be considered structural and substantial.

Section 3 of this specific instance explains the jurisdiction of the Netherlands National Contact Point (NCP) over this case, and also shows how the case meets the OECD Guidelines' admissibility criteria found in paragraph 25 of the OECD Guidelines' Procedural Guidance.

Section 4 lays out in general terms relevant provisions of the OECD Guidelines and other supporting guidances that explore the conditions for a multinational enterprise to be directly linked to an impact, and how its relationship to the impact may deepen to one of contribution based on the enterprise's notice of the harms and failures to take adequate and effective responsive action. This section seeks to help guide the NCP in understanding how ING has, in respect of the impacts identified in the three specific case examples in section 5, come to contribute to the specific impacts to which it was initially directly linked. Section 4 also includes general guiding provisions on how enterprises should conduct due diligence, because failures of due diligence are an important factor in deepening an enterprise's relationship from direct linkage to contribution to a harm.

Section 5 lays out the three case examples. Milieudefensie published in 2017 a report identifying over 100 scandals in the palm oil sector with which ING and or other Dutch banks are associated.¹ This specific instance focuses on harmful impacts in three specific cases linked to ING.

- A. The first case example explores specific environmental impacts (focusing on destruction of high conservation value zones) caused by two plantation companies owned and controlled by Noble Group in Papua, Indonesia. This subsection identifies ING's relation of direct linkage to the impacts through its business relationship with Noble. The section then explores ING's failures of due diligence, both in its general practices and specifically in relation to the environmental harms on the two plantations. The subsection shows that by long notice of the harms, including through divestment decisions from peer financial institutions, and failure to take action to address them, ING has come to contribute to the harms.
- B. The second case explores specific human rights harms (in respect of land rights and rights to security and privacy) occurring on Socfin's subsidiaries' plantations in Cameroon and Sierra Leone. After identifying the harms, the complaint shows ING's direct linkage to them through its investments in Bolloré Group, a leading financier and board member of Socfin and its subsidiaries. The complaint then identifies what ING should have done and failed to do in its due diligence regarding these impacts. Coupled with ING's notice of the harms – not least through the prior specific instance against Socfin and Bolloré handled by the French and Belgian NCPs from 2010-17 – ING's failures to address these identified harms have caused it to contribute them.
- C. Finally, the third case example focusses on labour rights violations (child labour and wage-related infractions) of two plantation companies owned and controlled by Wilmar in Indonesia as well as several labour harms on a Liberian oil palm plantation partially funded by Wilmar. ING had invested in a Wilmar conglomerate before the harms occurred, and has invested in Wilmar after the harms have been exposed. Here we argue that ING's notice of the harms as well as of the inadequacy of Wilmar's response to them, and ING's failures to address the harms or encourage more meaningful action by Wilmar on the root causes of the labour abuses, places ING in a position of contributing to the harms.

Section 6 identifies the obligations that ING would have, under the Guidelines, as a contributor to the identified impacts. ING's obligation is to cease its contribution to the harms, provide or participate in remediation, and use its leverage to mitigate any remaining impacts to the greatest extent possible.

Section 7 then seeks the help of the NCP to encourage ING to begin to fulfill those obligations. We have communicated with ING about our concerns regarding its support of the palm oil industry for years, but we believe ING's actions and financial decisions continue to be in conflict with the OECD Guidelines. We request that the Netherlands NCP offer its good offices and facilitate a dialogue with ING to discuss these specific impacts and ING's inadequate responses. With respect to these particular impacts, we believe ING's clearest recourse to cease its contribution to the harms is to divest from the industrial palmoil sector and specifically these named companies. We also seek through mediated conversation to encourage ING to improve its due diligence processes moving forward, so that in future, ING

¹ Milieudefensie, *Draw the Line: a black book about the shady investments of Dutch banks into palm oil*, July 2018, available at <https://milieudefensie.nl/actueel/draw-the-line-english.pdf>.

- Avoids investment in industries whose very structure is harmful to people and the environment;
- Takes effective steps to mitigate or prevent harms to which is linked once it has already invested in a company; and
- If those steps do not achieve mitigation or prevention of the harms, increases its leverage to achieve change or takes steps towards responsible divestment.

These steps will help ensure that ING is in compliance with the OECD Guidelines regarding these particular and any other future cases and other negative impacts.

2. IDENTIFICATION OF THE PARTIES

A. Complainants and their interest in this specific instance

Milieudefensie is the Dutch member of Friends of the Earth, one of the largest environmental justice networks in the world. Milieudefensie has been engaged in international and Dutch campaigns on palm oil and the financial sector since the late 1990s.² Milieudefensie has a long-standing interest in reducing consumption of palm oil commodities and financing of the palm oil industry. The palm oil industry is a leading driver of land grabbing, deforestation, climate change, and loss of biodiversity as well as violation of the human and labour rights of impacted communities and workers. Together with the Friends of the Earth network, Milieudefensie works in palm oil producing countries, like Liberia, Cameroon, and Indonesia, as well as in countries such as the Netherlands that represent a leading share of palm oil import, consumption, financing, or manufacturing. Because Dutch actors – including the government, financial institutions, and other companies – play a key role in supporting the palm oil industry, Milieudefensie has targeted these actors to seek policy changes to reduce Dutch demand for palm oil commodities and reduce financial support for expansion of this industry. Milieudefensie's engagement has included report-writing, letter campaigns, direct outreach to palm oil companies and their financial investors, and other research and advocacy. For almost two decades, Milieudefensie has conducted research on palm oil plantations linked to ING, and has engaged ING through direct communication as well as broad-based public campaigning to reform or end its support for the palm oil industry.

WALHI is Friends of the Earth Indonesia and has been supporting communities that are impacted by the expansion of palm oil plantations on their lands over the past decades. Indonesia is one of the hardest hit countries by the palm oil expansion. WALHI has successfully advocated for a moratorium on the expansion of palm oil plantations. And joins the national and international advocacy on regulating financiers. WALHI has done extensive research and supported communities impacted by Wilmar plantations, that is included in this specific instance.

Sustainable Development Institute (SDI) is Friends of the Earth Liberia and has been supporting communities that are impacted by the expansion of palm oil plantations ever since the large scale industrial palm oil sector set foot in the country. Almost 20 percent of the country's land is taken by foreign investment of which a mayor part is for agro-commodities and rubber. SDI has succesfully lobbied for the Land Rights Act where for the first time communities have legal ownership over their customary land. And joins the international advocacy for rules for companies and rights for people, including regulating the financial sector. SDI, together with the Liberian Palm Oil Working Group is involved in supporting communities and workers impacted by the Wilmar (MOPP) oil palm plantation in Liberia, that is included in this specific instance.

² Milieudefensie, People, Planet, Palmoil: A review of oil palm and forest policies adopted by Dutch Banks, 2006, available at <https://milieudefensie.nl/actueel/publicaties>.

In 2018, both WALHI and SDI representatives have met with Dutch financial institutions on their controversial financing of palm oil companies.

NGOs in Europe that support the complaint are: ReAct, Fian Belgium, Brot für alle, FERN and CNCD-11.11.11. These groups are actively supporting civil society organisations and communities in countries where Socfin operates oil palm plantations.

B. Respondents

ING is a Dutch multinational banking and financial services corporation based in Amsterdam with business in retail banking, commercial banking, investment banking, asset management, and insurance services. ING invests in an unknown number of palm oil companies, including major palm oil corporations Noble Group Ltd. and Wilmar International Ltd., as well as Socfin Group S.A. and the Bolloré Group, a major funder of Socfin Group S.A. which is very active in the palm oil industry. Among European banks, ING belongs to the group of the biggest creditors to selected palm oil companies including the three identified in this complaint. In addition to providing various types of credit, ING invests in palm oil companies and offers various investment funds that include shares of different palm oil companies. In April 2018, the market value of the shares in palm oil companies in all these funds amounted to over 1.8 billion euros.

ING has provided funding to Noble, Bolloré/Socfin, and Wilmar for decades. We provide here data on financing since 2010. The financial information we are able to provide below most likely is not complete, because ING does not make such information publicly available.³ As far as we know, this funding is just the tip of the iceberg in terms of funding that ING gives to these three companies.

- **Noble Group Ltd.:** ING has provided credit to Noble every year since at least 2010.⁴ In 2010, ING contributed a total of \$91 million to four revolving credit facilities for Noble Group with overall worth of billions of dollars. In 2011, ING's share of three revolving credit facilities was \$76 million. In 2012, ING gave \$68 million through four revolving credit facilities. In 2013, ING gave \$100.5 million through four revolving credit facilities. That year ING also provided \$54 million to a corporate loan worth \$650 million overall, and underwrote \$80 million in a bond issuance worth \$400 million. In 2014, ING contributed \$50 million to Noble Group through a revolving credit facility valued at \$2 billion. In 2015, ING supported Noble with a \$96 million contribution to three revolving credit facilities. In 2016, ING gave Noble financing of \$97 million through a revolving credit facility. In 2017, ING financed a bond issuance for Noble, providing an amount assessed to have a palm oil value of \$1.6 million.⁵ And in 2018, ING gave a corporate loan to Noble with palm oil value assessed to be \$2 million.
- **Socfin Group S.A./Bolloré Group:** ING has provided credit to Socfin and Bolloré every year since at least 2011. ING has a long-standing financial relationship with Socfin.⁶ According to 2016

³ Ward Warmerdam, Dataset: Financing of companies engaged in the palm oil sector, A study prepared for Milieudéfensie, May 2018, available at https://milieudéfensie.nl/actueel/dataset_zwartboek/view; and Forestandfinance.org (Last update: July 2018) Database, available at <http://forestsandfinance.org/>, last accessed Accessed: 16 January 2019.

⁴ Ward Warmerdam, Dataset: Financing of companies engaged in the palm oil sector, A study prepared for Milieudéfensie, May 2018, available at https://milieudéfensie.nl/actueel/dataset_zwartboek/view; and Forestandfinance.org (Last update: July 2018) Database, available at <http://forestsandfinance.org/>, last accessed Accessed: 16 January 2019.

⁵ Some of our financial data derives from the Forest and Finance database, which includes information only on the value of the portion of a larger financing that went toward an agrocommodity (such as palm oil, called the "palm oil palm oil value" of the larger financing).

⁶ Socfin, "ING continues its collaboration with Socfin Group," 21 March 2019, available at <https://www.farmlandgrab.org/post/view/28827-ing-poursuit-sa-collaboration-avec-le-groupe-socfin>.

research, ING helped facilitate Socfin's first public debt offering, in which Socfin "raised €80 million in senior unsecured 4 percent 5-year debt to finance land-use expansion for its vertically integrated palm oil and rubber production in Africa and Asia."⁷ These €80 million in funds were not ring-fenced and it is likely that at least a portion of the proceeds was or will be used to finance Socfin's palm oil subsidiaries in Sierra Leone and Cameroon (see below for Socfin's ownership links to palm oil operators). ING Belgium informed NGOs that it would soon provide a new loan to Socfin, but ING Belgium has not confirmed this.⁸ There are indications that in 2017, a 15 Million sustainability loan for Socfin was provided by ING Belgium, but this has not been confirmed.⁹

ING has long invested in the Bolloré Group, which says it is a major shareholder in the Socfin Group through its interests in Socfin (39.4%), Socfinasia (22.3%) and Socfinaf (8.6%)¹⁰. There are multiple other relations between Bolloré Group and Socfin, including Vincent Bolloré's positions as director and permanent representative in Socfin and subsidiaries (including those described in this complaint).¹¹ Evidence of ING's financing of Bolloré's palm oil investments is abundant.¹² In 2011, ING underwrote a bond issuance for Bolloré with a palm oil value assessed at \$1.59 million. In 2012, ING's support of a larger revolving credit facility for Bolloré was assessed to have a palm oil value of \$0.66 million. In 2014, ING's support of a larger revolving credit facility for Bolloré was assessed to have a palm oil value of \$0.6 million. In 2015, ING underwrote a bond issuance for Bolloré with a palm oil value calculated to be \$0.5 million. In 2016, ING provided a corporate loan to Bolloré whose palm oil value was \$0.27 million. In 2017, ING underwrote a bond issuance for Bolloré with a palm oil value assessed at \$0.36 million. And in 2018, ING's support for a revolving credit facility for Bolloré had a palm oil value of \$0.21 million, while a corporate loan from ING to Bolloré had a palm oil value of \$0.27 million.

- **Wilmar International Ltd.:** From information we are able to locate publicly, ING has financed Wilmar Group or Wilmar International in 2010 and 2017.¹³ In 2010, ING provided \$100 million of a \$400 million revolving credit facility for the Wilmar Group (Wii Ltd.). In 2017, ING provided a \$150 million revolving credit facility to Wilmar International.¹⁴ This 2017 financing is a so-called

⁷ Chain Reaction Research, "the Chain: Indonesia Strengthens Peatlands Moratorium; ING Places €80 Million in Debt for SocFin's Palm Oil and Rubber Expansion," 7 December 2016, available at <https://chainreactionresearch.com/the-chain-indonesia-strengthens-peatlands-moratorium-ing-places-e80-million-in-debt-for-socfins-palm-oil-and-rubber-expansion/>.

⁸ FIAN, "La banque ING continue de financer des plantations d'huile de palme controversées," 23 October 2018, available at <https://www.fian.be/La-banque-ING-continue-de-financer-des-plantations-d-huile-de-palme?lang=fr.%20accessed%205%20December%202018>.

⁹ <https://www.environmental-finance.com/content/analysis/the-green-and-sustainability-loan-market-ready-for-take-off.html>, last accessed 21th June 2019

¹⁰ Bolloré business report 2018, https://www.bollore.com/bollo-content/uploads/2019/06/boll_1902299_ra_gb_bag_16-05-19.pdf, last accessed: 21 June 2019

¹¹ https://www.bollore.com/bollo-content/uploads/2019/05/4.1.bollore_ddr_2018_gb_mel_16-05-19.pdf, accessed 21 June 2019

¹² Ward Warmerdam, Dataset: Financing of companies engaged in the palm oil sector, A study prepared for Milieudéfensie, May 2018, available at https://milieudéfensie.nl/actueel/dataset_zwartboek/view; and Forestandfinance.org (Last update: July 2018) Database, available at <http://forestsandfinance.org/>, last accessed Accessed: 16 January 2019.

¹³ Ward Warmerdam, Dataset: Financing of companies engaged in the palm oil sector, A study prepared for Milieudéfensie, May 2018, available at https://milieudéfensie.nl/actueel/dataset_zwartboek/view; and Forestandfinance.org (Last update: July 2018) Database, available at <http://forestsandfinance.org/>, last accessed Accessed: 16 January 2019.

¹⁴ Wilmar and ING, "Wilmar and ING collaborate on sustainable loan in Asia," 27 November 2017, available at <https://www.wilmar-international.com/sustainability/wp-content/uploads/2017/11/Joint-Press-Release-Wilmar-and-ING-collaborate-on-sustainable-loan-in-Asia.pdf>.

“sustainability performance loan,” where Wilmar’s interest rate is adjusted downwards if the company makes progress on undisclosed sustainability criteria.

ING is on notice, in general, of the negative impacts that result from the very structure of the palm oil business. Indeed, knowing of the harms in the industry, ING has developed a webpage asserting a short Stance on Palm Oil.¹⁵ ING also references palm oil a few times in its ESR Framework, which establishes the bulk of its due diligence procedures.¹⁶ ING asserts that it does not finance actual palm oil plantations themselves, but rather gives general finance or trade finance to certain palm oil companies. ING asserts it finances fewer than ten clients that earn 10% or more from palm-oil-plantation-related activities.¹⁷ As this complaint shows, ING has specifically had constructive or actual notice of the harms identified in the three case examples we provide. Despite its awareness of risks in the palm oil sector and apparent desire to disclaim close relations with palm oil companies and plantations, among European banks, ING is a leading supporter of the palm oil sector, providing companies in the sector with hundreds of millions of dollars in financing in recent years.

3. JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

This complaint identifies how ING has breached the OECD Guidelines through certain investments in three palm oil companies. Under paragraph 23 of the OECD Guidelines’ Procedural Guidance, “issues will be dealt with by the NCP of the country in which the issues have arisen.” The adverse impacts to the environment, human rights, and labour rights we discuss in this complaint are caused by ING’s clients’ activities in Indonesia, Cameroon, Sierra Leone, and Liberia. However, this complaint seeks to address the responsibility of ING, a key financier of the three companies, with regard to the identified adverse impacts. The primary focus is therefore on ING’s response to the harms, including the due diligence policies and investment-related decisions ING should be taking to meet its responsibilities under the OECD Guidelines. Activities regarding due diligence and investment decisions are made at the headquarters level of an organization. ING Group is headquartered in the Netherlands. For these geographic and substantive reasons, we file this complaint to the Dutch NCP.

The OECD Guidelines apply to financial institutions. Under Provision 1 of OECD Guidelines Chapter on Concepts and Principles, “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy.” This includes the financial sector.

B. Admissibility

Paragraph 25 of the OECD Guidelines Procedural Guidance sets out six criteria complaints must satisfy to be deemed admissible by an NCP.¹⁸ We believe these criteria are all met in this case:

1. Section 3 above outlines the identities of the parties and their interest in resolving the case. The complainant(s) and supporters are environmental rights organizations with a clear focus on

¹⁵ ING, Our Stance on Palm Oil, available at <https://www.ing.com/Sustainability/Our-Stance/Palm-oil.htm>.

¹⁶ ING, Environmental and Social Risk Policies, <https://www.ing.com/Sustainability/Sustainable-business/Environmental-and-social-risk-policies.htm>.

¹⁷ ING, Our Stance on Palm Oil, available at <https://www.ing.com/Sustainability/Our-Stance/Palm-oil.htm>.

¹⁸ OECD Guidelines for Multinational Enterprises 2011 Edition, Paragraph 25, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, pg. 82-83.

palm oil – either because the country from which they work is a leading importer and financier of palm oil, or because people or the environment in their country are directly impacted by palm oil production. All of the complainants and supporters have a strong and long-standing interest in seeking responsible business in the palm oil sector. The respondent is ING Bank, a Netherlands-based multinational banking and financial services corporation that is one of Europe’s largest investors in the palm oil sector.

2. The issues raised in this complaint are material to the OECD Guidelines, as they entail breaches by ING of provisions in Chapter II (General Policies) and Chapter IV (Human Rights). The adverse impacts caused by ING’s clients also pertain to topics covered in the Human Rights, Employment and Industrial Relations, and Environment chapters of the OECD Guidelines. However, our ultimate focus is not on proving breaches of these chapters by ING’s clients, but in exploring ING’s own breaches of the OECD Guidelines through being directly linked and contributing to these harms.
3. Section 5 of this complaint demonstrates clear link between the respondent ING and the issues discussed. ING has, by its own direct action and decisions with respect to these clients, violated several provisions of the OECD Guidelines.
4. In this complaint, we raise where applicable examples of domestic or international laws that are relevant to the impacts discussed, which help define or demonstrate the harmful activity ING has knowingly supported.
5. We are not aware of any parallel proceedings that should prevent the NCP from considering all of this complaint.

To our knowledge, there are no ongoing judicial proceedings with which the Dutch NCP’s consideration of this specific instance could interfere. (See just below discussion of a case recently filed in France against Bolloré Group).

We also believe the Dutch NCP’s consideration of this specific instance will not interfere with the ongoing consideration by the Roundtable on Sustainable Palm Oil (RSPO) of a complaint against Noble Group (one of ING’s clients discussed in this complaint),¹⁹ as that complaint is narrowly focused on Noble’s compliance with RSPO standards, rather than the ING’s (as a financial service provider) compliance with the OECD Guidelines in respect of Noble’s palm oil production activities. We are not aware of any RSPO complaints against Wilmar or Socfin in relation to the plantations we discuss in this specific instance.

We delayed the filing of this case to ensure that the Dutch NCP’s consideration of this complaint would not in any way interfere with the NCP’s simultaneous consideration of another complaint against ING by four NGOs (Bank Track, Oxfam Novib, Greenpeace, and Milieudefensie). Because that complaint concerned ING’s failure to disclose its indirect greenhouse gas emissions, its investments in fossil energy, and its weak coal policy, we felt the risk of conflict between this and that case was slight; but we delayed so as not to risk any potential disruption to all the parties in that case.

¹⁹ Complaint details available here: <https://askrspo.force.com/Complaint/s/case/50090000028ErzaAAC/detail> <https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PXtl/6tzFErGW3CeXbQjhGRGFdVRvWE2fUE0qrAmt4wCQftl>, last accessed 28 February 2018.

As regards past proceedings, we wish to draw the Netherlands NCP's attention to a few past specific instances that may be of relevance to this case.

First, in 2016 the Netherlands NCP concluded a case brought by Milieudefensie against Rabobank concerning its funding of the palm oil industry. Our current specific instance differs from that one, not only because it focuses on ING and different case studies, but also because it raises the argument that ING has become a contributor to the impacts of its clients particularly because its notice of the harms and inadequate due diligence and response to those harms. We envision a dialogue focusing on these distinctions, and on the heightened responsibility a contributor has to cease its contribution to the harms.

Second, section 5.B of this complaint focuses on palm oil sector impacts in Cameroon that were previously the subject of an OECD complaint against Bolloré, Socfin and two related companies filed to the NCPs of Belgium, France and Luxemburg in 2010. In that specific instance, both the French and Belgian NCPs established Socfin's non-compliance with numerous OECD Guidelines provisions and recommended responsive actions that have not yet been undertaken. During that specific instance, the Belgian NCP urged financiers to be mindful of supporting Socfin's activities in respect of these plantations in Cameroon, given its lack of effort to resolve – and the lack of outcomes in resolving – the harms identified in the specific instance. Through that specific instance, Bolloré Group and Socfin at various times agreed, but failed to implement, an action plan to remedy harms identified by the NCPs. Because that action plan has not been implemented, the NGOs that filed that specific instance have recently (May 2019) filed a court case against Bolloré calling for the judge to enforce Bolloré's commitment to the plan as a contract. We do not believe that the Dutch NCP's consideration of this complaint against ING will interfere with that court case against Bolloré. However, we highlight the same impacts in Cameroon, to which ING has been directly linked through its relation with Bolloré Group/Socfin. ING has had long notice of these particular impacts of Socfin – not least through the previous NCP case. We believe the Dutch NCP could give support and credence to the efforts of its peer NCPs by taking their findings of harm on these plantations in Cameroon into account and affirming the appropriateness of heightened due diligence by financiers, such as ING, who continue to fund these activities while under full notice of the Belgian and French NCPs' negative findings and recommendations.

Third, in October 2014, Inclusive Development International and Equitable Cambodia filed a case against Australian and New Zealand Banking Group (ANZ), which was linked through its investments to a sugar company with production in Cambodia. The complainants in that case argued the bank contributed to the various harms of the sugar company, including forced evictions and arbitrary arrests and intimidation of villagers. The Australian NCP accepted the case and, in its final statement, agreed with the complainants that ANZ could have known about the risks associated with investing in the company that owned the plantation and found that the bank did not have adequate policies and procedures in place to prevent the harms from occurring.²⁰ While the facts and ownership structures in this case are not identical to those of the instant case, we believe the Australian NCP's analysis of ANZ's responsibilities in light of the notice it had of the harms occurring may be useful to the Dutch NCP in considering how notice

²⁰ IDI and EC v. ANZ, OECD Watch case database, https://www.oecdwatch.org/cases/Case_343.

to ING has deepened its relationship to the harm and its resulting responsibilities to impacted communities.

6. Finally, consideration of this specific issue would contribute to the purposes and effectiveness of the Guidelines by promoting positive contributions by financial institutions to economic, environmental and social progress, one of the key purposes of the Guidelines.²¹ The Dutch NCP's consideration of the complaint would encourage ING to align its policies and practices with the OECD Guidelines. Additionally, the Dutch NCP's handling of the case could help clarify the responsibilities of all investors regarding human rights impacts caused by their clients. In particular, consideration of the case could help clarify how a financial institution's failures to make (and disclose) *effective* efforts to mitigate or prevent an adverse impact directly linked to it through its business operations can, with time and notice of the harms, bring the financial institution into a position of contributing to the underlying harms. Clarifying when investors may contribute to underlying harms caused by clients would help investors better align their investment strategies and policies to comply with the OECD Guidelines. It would better enable the victims of harmful investments to know their rights and act upon them. And it would better enable national and regional financial regulators to clarify in regulations the due diligence responsibilities financial institutions must take to ensure effective due diligence.

4. GENERAL DISCUSSION OF DIRECT LINKAGE AND CAUSATION FOR FINANCIAL INSTITUTIONS

This section lays out in general terms the expectations that governments – through the OECD Guidelines – have of companies for responding to harms to which they are directly linked, and also how a company's relationship to a negative impact may evolve through a combination of factors. An understanding of these issues is relevant for discussion of ING's responsibilities in each case study in section 5.

The OECD Guidelines and the UN Guiding Principles, establish different tiers of responsibility for companies for human rights harms based on whether the impacts are directly linked to the enterprise through a business relationship, or whether the enterprise itself is causing or contributing to the harm.

Direct linkage

The OECD Guidelines expect companies to prevent or mitigate adverse impacts directly linked to their operations through a business relationship:

- ***General Policies II.A.12: [Enterprises should] Seek to prevent or mitigate an adverse impact ... when the impact is nevertheless directly linked to their operations, products or services by a business relationship; and***
- ***Human Rights II.3: [Enterprises should] Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship.***

The OECD Guidelines define the term *business relationship* to include “relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services.”²² An OECD document on due diligence in the financial sector

²¹ OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. P. 15
<http://dx.doi.org/10.1787/9789264115415-en>

²² OECD Guidelines, Commentary 14.

explains this applies to business relationships “even beyond their supply chain.”²³ Further, “direct linkages are not limited to first-tier or immediate business relationships.” As the Netherlands NCP itself concluded in the recent case *Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie v. Rabobank*, “The reference to services means that paragraph 12 (in Chapter II, General Policies) of the Guidelines is applicable to any financial service, including lending. It follows that services of this kind are part of a business relationship.”²⁴

Regarding the nature of *direct linkage* of impacts through a business relationship, an OECD guidance document on “Responsible Business Conduct for Institutional Investors” helpfully explains that “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.”²⁵ The OECD has given examples of business relationships through which harms may be directly linked to a financial institution. Some of these examples may be useful in the instant case against ING. For example, a bank may be directly linked to harms of a mining company when the bank holds minority shares in that company, and the company mines or trades in minerals from conflict areas without appropriate due diligence systems in place. A bank may also be directly linked to harms where a bank is part of syndicated financing for an infrastructure project that displaces local communities without meaningful stakeholder engagement.²⁶

Due diligence to identify, prevent and mitigate adverse impacts

Whether a multinational is causing, contributing to, or directly linked to an adverse impact, under the OECD Guidelines, an essential action that multinational must undertake to meet its responsibilities is due diligence. As commentary 14 says, “Due diligence can help enterprises avoid the risk of... adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship.”²⁷ The recommendations are as follows:

- ***General Policies A10: Enterprises should... Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts.***
- ***Human Rights 5: Enterprises should... Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.***

Commentary 14 elaborates: “For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address

²³ OECD, “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationships,” Reference material for session on Responsible Business Conduct in the financial Sector of the 2014 Global Forum on Responsible Business Conduct, 26-27 June 2014, p. 4, available at <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf>.

²⁴ 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.

²⁵ OECD, “Responsible Business Conduct for Institutional Investors,” p. 13, available at <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.

²⁶ OECD, “Due diligence in the financial sector” Reference material, at 4.

²⁷ OECD Guidelines, Commentary 14.

their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.”²⁸

Critically, *identifying* harms is only the first step of the due diligence needed to prevent or mitigate harms. Commentary 45 notes that enterprises should, in an ongoing fashion responsive to evolving circumstances, *not only* be identifying impacts, but also “**assessing** actual and potential human rights impacts, **integrating** and **acting upon the findings, tracking responses** as well as **communicating how impacts are addressed**.”²⁹ There are several key terms here. Assessment must be taken of identified risks – meaning some analysis of the nature and potential of the risks. Enterprises must integrate their due diligence into their actions and then actually act upon what due diligence they complete. Enterprises must track responses resulting from their actions – which suggests both that tracking should occur, and that enterprises’ actions must generate tangible outcomes that can be tracked. And enterprises must communicate how the impacts are, actually, being addressed. The OECD Due Diligence Guidance, published in May 2018, explains that “[t]he due diligence process is not static, but ongoing, responsive and changing. It includes feedback loops so that the enterprise can learn from what worked and what did not work. Enterprises should aim to progressively improve their systems and processes to avoid and address adverse impacts.”³⁰

Communication to stakeholders about how identified impacts are addressed is also a vital element of due diligence. The OECD Due Diligence Guidance makes clear that sharing information about due diligence – including the processes, findings and plans – “is part of the due diligence process itself.”³¹ How much information should be disclosed? Information “sufficient to demonstrate the adequacy of an enterprise’s response to the impacts.”³² This is an important point, underscoring that the enterprise must show publicly that its actions have been adequate to prevent or mitigate the harm. To whom should enterprises communicate? To their stakeholders, which includes any “persons or groups whose interests could be affected by an enterprise’s activities – to include civil society organisations.”³³ Thus enterprises must communicate to civil society, among others, enough to show that their due diligence has led to an adequate response to the impacts – the response being to secure actual prevention or mitigation of the impacts, whether by the bank or the client itself. If all risks and impacts cannot be addressed at once, companies can prioritize the order in which they address impacts (starting with the most severe and most likely to occur), but they are expected to eventually address all impacts.

The nature of a bank’s financial relationship with the client (e.g. support of general performance through corporate loans, support of particular projects, etc.) can influence the scope of activities expected of the bank. A high bar is set for general performance support: “In the case that the financial operation, product or service is primarily concerned with the general performance of the client, then the financial institution is likely expected to respond to all adverse impacts associated with any of the activities of the client.”³⁴ At the same time, the OECD Guidelines enable enterprises to undertake due-

²⁸ OECD Guidelines, Commentary 14.

²⁹ OECD Guidelines Commentary 45, *see also* commentary 40 (bolding added).

³⁰ OECD, OECD Due Diligence Guidance, p. 17, available at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

³¹ OECD, OECD Due Diligence Guidance, p. 19, at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

³² OECD, OECD Due Diligence Guidance, p. 19, at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

³³ OECD, OECD Due Diligence Guidance, p. 18, at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

³⁴ OECD, “Due diligence in the financial sector” Reference material, at 8-9.

diligence in a manner that prioritizes focus on business relationships with the highest risk according to the *scale* (gravity) of the risk, the *scope* of the risk (number of individuals/extent of environmental damage), and the *irremediable character* of the harm.³⁵

Contribution

Beyond relationship to harms through direct linkage, the OECD Guidelines set out stronger responsibilities where a company is itself contributing to or causing an adverse impact. Multinational enterprises should:

- **General Policies A11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.**
- **Human Rights 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.**
- **Human Rights 6: Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.**

Commentary 42 of the OECD Guidelines explains that an enterprise's activities that could cause or contribute to adverse human rights impacts "include both actions and omissions."³⁶ Importantly, the OECD Due Diligence Guidance explains that "Contribution can occur in the context of activity related to an enterprise's own operations or *through a business relationship*."³⁷ Authoritative opinions from the UN OHCHR³⁸ and Harvard professor John Ruggie³⁹ have confirmed that financial institutions may be found to contribute to harms caused by their clients. The OHCHR has offered, for example, that "a bank that provides financing to a client for an infrastructure project that entails clear risks of forced displacements may be considered to have facilitated—and thus contributed to—any displacements that occur, if the bank knew or should have known that risks of displacement were present, yet it took no steps to seek to get its client to prevent or mitigate them."⁴⁰

Transition from direct-linkage to contribution to adverse impacts

Critically, the OECD Due Diligence Guidance helps explain that "[a]n enterprise's relationship to an adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring."⁴¹ This means that "an enterprise's ongoing failure to seek to identify and prevent its suppliers' harmful impacts could move the enterprise from being "directly linked" to a negative impact, to "contributing to" all or some part of that impact. Companies in these situations have a heightened responsibility for respecting human rights, including for remedying the harm."⁴² Indeed, as an OECD reference document states, "if the financial institution is found to be contributing to such

³⁵ OECD, RBC Guidance for Institutional Investors, p. 18, <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.

³⁶ OECD Guidelines Commentary 42.

³⁷ OECD Due Diligence Guidance, May 2018, Q29 (emphasis added).

³⁸ Cite to <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

³⁹ John G. Ruggie, Letter to Prof. Dr. Roel Nieuwenkamp.

⁴⁰ OHCHR, OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, 12 June 2017, p. 6, available at <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

⁴¹ OECD Due Diligence Guidance, May 2018, Q29.

⁴² OECD Watch and Amnesty International, *The OECD Due Diligence guidance for Responsible Business Conduct: A briefing for civil society organisations on the strongest elements for use in advocacy*, June 2018, p. 13, available at [file:///Users/marianingrams/Downloads/The%20OECD%20Due%20Diligence%20Guidance%20for%20Responsible%20Business%20Conduct%20\(1\).pdf](file:///Users/marianingrams/Downloads/The%20OECD%20Due%20Diligence%20Guidance%20for%20Responsible%20Business%20Conduct%20(1).pdf).

adverse impacts, then it should also be accountable and help to remedy the impacts in concert with the other entities causing or contributing to the harm.”⁴³

Commentary 14 to the OECD Guidelines clarifies that “For the purposes of this recommendation, ‘contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions.”

The OECD Due Diligence Guidance helps clarify a non-exhaustive list of factors that can be taken into account to assess whether an entity has substantially contributed to – or in other words, caused, facilitated, or incentivized – another entity to cause an adverse impact. No particular factor is essential, but rather they may all be helpful in shedding light on the issue:

1. “The extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.
2. The extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.
3. The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of the impact occurring.”⁴⁴

In addressing the same issue, the OHCHR talks about facilitation. Facilitation is closely related to factors 1 and 2 above. The OHCHR has explained that “[A] bank may facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks. The bank’s failure to act upon information that was or should have been available to it may create a facilitating environment for a client to more easily take actions that result in abuses.”

The OHCHR also lists “the quality of a bank’s human rights systems and its human rights due diligence process” as an important factor that can influence whether a bank contributes to human rights harms. “Carrying out due diligence appropriate to the scope and complexity of a bank’s portfolio and risk picture should help it effectively identify risks and prevent them from occurring. However, where a bank has not undertaken appropriate human rights due diligence, it may miss risks and omit to take the steps necessary to prevent or mitigate that risk. If a bank has in place appropriate policies or processes, but these are ignored or side-lined in practice, it may similarly take actions that ignores [sic] human rights risks.”⁴⁵

It is also important to note the phrasing in factor three above: “The degree to which any of the enterprise’s activities *actually mitigated* the adverse impact or *decreased the risk* of the impact occurring.”⁴⁶ This language focuses on the actual effectiveness of the due diligence. If the financier’s due diligence was not actually effective, yet the financier remains invested, knowing of the risks and continuing to achieve no effect by its due diligence actions, then the financier risks becoming a contributor to the impacts.

The case studies in section 5 below argue that ING has transitioned from being directly linked to adverse impacts of its clients Noble Group Ltd., Bolloré Group, a major funder of Socfin Group S.A., and Wilmar

⁴³ OECD, “Due diligence in the financial sector” Reference material, at 9.

⁴⁴ OECD Due Diligence Guidance, May 2018, Q29.

⁴⁵ OHCHR, p. 9. <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

⁴⁶ OECD Due Diligence Guidance, May 2018, Q29.

International Ltd., to being a contributor to those impacts.

5. ING'S BREACHES OF THE GUIDELINES: THREE PALM OIL CASE EXAMPLES

ING has been linked to dozens of controversial palm oil plantations, but for this specific instance, we focus on three particular palm oil sector case examples exploring environmental harms to which ING is linked through its client, Noble Group; human rights harms to which ING is linked through its clients, Bolloré Group and Socfin; and labour rights harms to which ING is linked through its client, Wilmar International Ltd.. These cases do not represent the totality of ING's linkage to palm oil sector abuses, nor do we intend to suggest that, in general, each company only causes certain types of harms. Instead, these are just three examples representative of the vast array of adverse impacts occurring regularly in the palm oil sector, by these and other companies, through financing of ING and other banks.

In each case, we make the argument below that ING, through its financing of its client(s), was initially directly linked to the adverse impacts identified below in these cases. We then explain that, over time, due to the long notice of the impacts, the repeated provision of financial services likely being at least partly used for the activities causing the impacts, and the failure of due diligence to actually prevent or mitigate of the impacts, ING has come to be in the position of contributing to these harms. Each case below is organized as follows:

- i. Identification of the adverse impacts of ING's clients;
- ii. Identification of ING's initial relationship of direct linkage to the impacts;
- iii. Identification of ING's failures of due diligence; and
- iv. Exploration of ING's transition from direct linkage to contribution, according to the types of factors outlined in section 4 above.

A. ING's violations of Guidelines provisions in relation to adverse environment impacts by subsidiaries of its client, Noble Group Ltd.

In 2010 and 2011, Noble Plantations Pte Ltd, a wholly-owned subsidiary of the Noble Group, began operating plantations in Indonesia when it acquired controlling stakes of 51 percent in the company PT Henrison Inti Persada (PT HIP) and 90 percent in the company PT Pusaka Agro Lestari (PT PAL). Both of Noble's concessions are located on the western (Indonesian) side of the island of New Guinea, which represents just one percent of the world's land mass while hosting five per cent of the world's animal species, two-thirds of which are found nowhere else on Earth.⁴⁷ The first sub-section below identifies adverse impacts caused to the environment by Noble subsidiaries, PT HIP and PT PAL.

i. *Adverse impacts caused by PT HIP and PT PAL.*

Serious environmental impacts related to deforestation, including of high conservation value areas (HCVs), have been reported extensively at Noble's plantations on PT HIP and PT PAL. In 2009-12, a study undertaken by the Environmental Investigation Agency and Telepak (EIA/Telepak)⁴⁸ showed with satellite imagery that deforestation had commenced illegally on PT HIP in 2003, a year before the company had received its permit to clear the land and two years before the government released the land.⁴⁹ Satellite imagery also showed that the company had cleared 12,500 hectares more land than was permitted under the law in place at that time, with the timber illicitly harvested during the time before

⁴⁷ http://wwf.panda.org/knowledge_hub/where_we_work/new_guinea_forests/area_forests_new_guinea/.

⁴⁸ EIA and Telepak, Clear-cut exploitation. How International Investors and REDD+ Donors profit from deforestation in West - Papua, available at <https://eia-international.org/wp-content/uploads/EIA-Clear-Cut-Exploitation-FINAL-v2.pdf>.

⁴⁹ EIA and Telepak, *Clear-Cut Exploitation*, at 3.

the proper license was received.⁵⁰ EIA/Telepak researchers also reported that forest had been cleared right to the end of the Klamono river, far beyond the 100 meter buffer zone mandated by law to protect the river water and the health of people and animals that rely upon it.⁵¹ The report identified ongoing risk to the land from Noble's intended expansion for palm oil production. The deforestation reported and envisaged in the EIA/Telepak report included areas with HCVs.

The Norwegian Council of Ethics was the next to complete an investigation of the situation at both PT HIP and PT PAL. After undertaking its own 2012-13 analysis of PT HIP and PT PAL, the Council recommended the exclusion of Noble from the Norwegian Government Pension Fund Global (GPF), the biggest state fund in the world recognized as a standard setter on sustainable financing.⁵² The Council recommended divestment due to an "unacceptable risk that [Noble] is responsible for severe environmental damage as a result of its conversion of tropical forest into oil palm plantations."⁵³ The Council observed that both the PT HIP and PT PAL concessions are located on "biologically and ecologically important regions known for their unusually extensive and unique biodiversity."⁵⁴ Critically, the Council found that Noble's commissioned assessments of HCVs in both PT HIP and PT PAL were severely lacking in rigor. According to the Council, the HCV assessments had "concentrated exclusively on the areas set aside for protection," thus ironically neglecting analysis of the risks and HCVs in the areas actually slated for conversion. The assessments had also overlooked entire ecosystem types (e.g. lowland forest) and species (e.g. insects), all signifying to the Council the likely omission – and therefore destruction – of several HCVs.

Further evidence of the destruction of HCVs – along with several other environmental harms and rights violations not emphasized in this specific instance – was provided by a 2016 Greenpeace report.⁵⁵ The Greenpeace report contained Indonesian Ministry of Forestry maps showing that, despite the concerns raised in 2012 and 2013 about HCV destruction, Noble kept pace with its extensive deforestation at both PT HIP and PT PAL in 2012, 13, 14, 15 and 2016.

ii. ING's initial relation of direct linkage to adverse impacts caused by PT HIP and PT PAL

ING has a long-standing business relationship with Noble Group and was listed as a principal banker of Noble on Noble's 2016 Annual Report.⁵⁶ Critically, ING served as an institutional investor to Noble, providing a variety of loans, throughout the entire period of Noble's ownership of PT HIP and PT PAL. In 2010, ING contributed a total of \$91 million to four revolving credit facilities for Noble Group with overall worth of billions of dollars. In 2011, ING's share of three revolving credit facilities was \$76 million. In 2012, ING gave \$68 million through four revolving credit facilities. In 2013, ING gave \$100.5 million through four revolving credit facilities. That year ING also provided \$54 million to a corporate loan worth \$650 million overall, and underwrote \$80 million in a bond issuance worth \$400 million. In 2014, ING contributed \$50 million to Noble Group through a revolving credit facility valued at \$2 billion. In 2015, ING supported Noble with a \$96 million contribution to three revolving credit facilities. In 2016, ING gave Noble financing of \$97 million through a revolving credit facility. In 2017, ING financed a bond

⁵⁰ EIA and Telepak, *Clear-Cut Exploitation*, at 3-4.

⁵¹ EIA and Telepak, *Clear-Cut Exploitation*, at 6.

⁵² <https://www.nbim.no/en/>

⁵³ Norwegian Council on Ethics, Recommendation on the exclusion of Noble Group Limited, at page 15.

⁵⁴ Council on Ethics, Recommendation on the exclusion of Noble Group Limited from the Government Pension Fund Global's Investment Universe, pg. 1, available at <https://etikkradet.no/files/2017/02/Recommendation-Noble-260613.pdf>.

⁵⁵ Milieudefensie (2018) Draw the Line, A black book about the shady investments of Dutch Banks into palm oil. See also Greenpeace. 2017. Dirty Bankers. How HSBC is financing forest destruction for palm oil.

⁵⁶ <http://www.thisisnoble.com/images/investors/financialInformation/annualReport/ar2016.pdf>

issuance for Noble, providing an amount assessed to have a palm oil value of \$1.6 million.⁵⁷ And in 2018, ING gave a corporate loan to Noble with palm oil value assessed to be \$2 million.

These adverse impacts at PT HIP and PT PAL are directly linked to ING because of ING's business relationship with Noble, the owner and controller of the plantation companies.

iii. ING's failures of due diligence regarding PT HIP and PT PAL

Because the adverse impacts of PT HIP and PT PAL were initially directly linked to ING, ING had a responsibility to conduct due diligence and seek to prevent or mitigate these impacts. Recalling section 4 above, we quoted OECD Guidelines Commentary 45 which explains that to undertake due diligence properly, enterprises should, in an ongoing fashion responsive to evolving circumstances, *not only* be identifying actual and potential human rights impacts risks, but also "assessing," and "integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed."⁵⁸

ING has a due diligence procedure that is mostly, though apparently not entirely, explained in ING's Environmental and Social Risk (ESR) Framework. ING states that "The ESR Framework describes our proactive approach to assessing risks, and is not the full extent of our due diligence."⁵⁹ Since other features of ING's general due diligence are, counter to the OECD Guidelines, not otherwise publicly accessible, we can assess only the ESR Framework and the acts ING has publicly revealed.

ING's ESR Framework makes plain how risks will be identified. The Framework establishes procedures for assessment of clients (with consideration of each client's human rights policy, certifications achieved, and NGO or other public reports on the client's social performance), and of specific transactions (for example with focus on the country of operation, the sector, the nature of the activity, and again any NGO or other reports on the transaction).⁶⁰

If ING had followed such due diligence steps, it could and should have identified the risks on these two plantations. At a minimum, the years of campaigning toward ING by Milieudefensie and many other NGOs specifically about the palm oil industry should have alerted ING to undertake additional due diligence regarding risks in the sector. In addition, the public report of EIA/Telepak should have raised ING's concerns specifically on these two plantations. Even if this report did not reach ING's attention, ING should have been able to identify the risks from the numerous actions taken by other financial institutions. The Norwegian Council's recommendation in 2013 to exclude Noble from the GPFG the actual divestment by the Norwegian Bank Investment Management were clear indications, as was the 2015 divestment from Noble Group by KLP and the KLP Funds, Norway's largest pension fund, based on the same violations at concessions PT HIP and PT PAL.⁶¹ KLP actually pointed out to Noble that in 2015 the RSPO had strengthened its requirements for HCV assessments in response to criticism that the

⁵⁷ Some of our financial data derives from the Forest and Finance database, which includes information only on the value of the portion of a larger financing that went toward an agro commodity (such as palm oil, called the "palm oil palm oil value" of the larger financing).

⁵⁸ OECD Guidelines Commentary 45, *see also* commentary 40.

⁵⁹ ING, Human Rights Report 2018, p. 17, available at <https://www.ing.com/Newsroom/All-news/ING-publishes-Human-Rights-report.htm>.

⁶⁰ ING, Environmental and Social Risk Framework, available at [file:///Users/marianingrams/Downloads/09072018%20ING%20%20ESR%20Framework%20%20\(3\).pdf](file:///Users/marianingrams/Downloads/09072018%20ING%20%20ESR%20Framework%20%20(3).pdf).

⁶¹ KLP, Decision to exclude, p. 7, http://english.klp.no/polopoly_fs/1.31196.1434009821!/menu/standard/file/Noble%20Group%20Ltd%20%20beslutning%20om%20Uttrekk%201062015%20ENG.pdf, <https://redd-monitor.org/2013/03/13/norways-sovereign-wealth-fund-divests-from-23-palm-oil-companies/> accessed 7 December 2018

earlier method followed by Noble was inadequate.⁶² Yet again Noble declined to update its assessments under new criteria.⁶³ In May 2017, EIA filed the first-ever complaint to the HCV Resource Network against the assessor who had led Noble Group's flawed assessment.⁶⁴ In July 2017, after receiving along with ING and other banks a letter from Greenpeace and EIA,⁶⁵ HSBC called on the RSPO to investigate Noble Group's palm oil concessions in Indonesia,⁶⁶ which prompted the RSPO to place a stop work order on Noble at these plantations.⁶⁷ And on 1 March 2019 Robeco Institutional Asset Management announced that Noble Group is on their exclusion list because of its palm oil practices.⁶⁸ All of these actions have been in the public sphere and should have alerted ING to the harms at these plantations.

Though ING should have been identifying risks in the palm oil sector for about two decades, and at the very least since the introduction of the UNGPs and updated OECD Guidelines in 2011, ING's first-ever 2018 human rights report confirms that, apparently for the first time in 2018, ING "[ma]pped human rights risks in the gold, palm oil and cocoa Value Chains."⁶⁹ The Dutch Banking Covenant initiative prompted this activity. This suggests ING had never comprehensively mapped its palm oil risks in the past, despite long awareness of the harms. This also supports our own experience that ING's due diligence steps are passive and re-active. In any case, if had actually followed its own ESR Framework, ING should have identified the risks at PT HIP and PT PAL, but there is no evidence that this occurred.

Beyond identification, ING's ESR Framework and practice on due diligence show very little about how adverse impacts such as the ones occurring at PT HIP and PT PAL shall be "assessed," "integrated" and "acted upon," "tracked" and "communicated" as required under the OECD Guidelines.

First, ING says little about how identified risks are assessed. Assessment could include a listing of requirements clients must meet, indicators of harm levels that would prompt ING to engage with a client about perceived risks, and thresholds past which ING will not invest in harm-linked clients or a harm-linked industry. But without such indicators, it is not clear how ING can "account for how [it] address[es] [its] actual and potential adverse impacts as an integral part of business decision-making and risk management systems." With respect to palm oil, ING's Framework does require clients to "demonstrate to the satisfaction of ING: ...(iii) Compliance with RSPO certification for companies that own, operate or manage palm oil plantations."⁷⁰ But as of the time of drafting of this specific instance, neither Noble nor any of its plantations are certified by the RSPO. We would also note that compliance with RSPO certification is not a guarantee for respect for human rights. Thus ING's inclusion of this requirement in its ESR Framework does not, anyway, absolve it of its independent responsibility to conduct due diligence of its clients and use its leverage to prevent or mitigate harms to stakeholders.

⁶² RSPO, "RSPO new planting procedure documents". URL: <http://www.rspo.org/resources/keydocuments/certification/rspo-new-planting-procedure> (last visited 1 June 2015).

⁶³ KLP, Decision to exclude, p. 7.

⁶⁴ Environmental Investigation Agency, "EIA still watching the RSPO's palm oil audit watchmen," 19 May 2017, available at <https://eia-international.org/eia-still-watching-the-rspos-palm-oil-audit-watchmen/>.

⁶⁵ Greenpeace and EIA, Letter calling for stop of work at PT HIP and PT PAL, 20 June 2017, available at <https://ap8.salesforce.com/sfc/p/#90000000Yoji/a/90000000PXtl/6tzFErGW3CeXbQjhGRGFdVRvWE2fUE0qrAmt4wCQftl>.

⁶⁶ Eniko Terazono and Martin Arnold, Financial Times, "HSBC triggers probe of Noble's palm oil unit," 9 July 2017, available at <https://www.ft.com/content/0dd9e2f6-632f-11e7-91a7-5027fee26895>.

⁶⁷ Available at <https://askrspo.force.com/Complaint/s/case/50090000028ErzaAAC/detail>. See also <https://chainreactionresearch.com/the-chain-noble-group-crisis-may-understate-palm-oil-liabilities-and-pose-risks-to-forests/>, accessed 11 December 2018

⁶⁸ <https://www.robeco.com/docm/docu-exclusion-policy-and-list.pdf>

⁶⁹ ING, 2018 Human Rights Report, p.

⁷⁰ ING, ESR Framework, p. 23

Second, ING does not explain how it “integrates” or “acts upon” the findings of its due diligence. With respect to Noble, there is no public evidence that ING engaged with Noble about PT HIP and PT PAL until 2017. In 2017, a *Financial Times* article on HSBC’s push for an investigation into PT HIP and PT PAL quoted a representative of ING who continued to deny that ING finances Noble plantations, but noted that ING had referred the matter to the RSPO.⁷¹ ING’s act of referral cannot be seen as a meaningful or effective step in a credible due diligence process. ING should have been aware of the harms even before 2012, but certainly after 2012, ING could not credibly claim a lack of knowledge. What action did ING take, then, in 2012, 2013, 2014, 2015 and 2016, as it provided repeated loans to Noble? As far as we can see in the public sphere, none at all. Moreover, by the time ING referred the matter to the RSPO in 2017, information on the case had already been shared with the RSPO board of governors.⁷² Therefore ING’s actions were too little and too late. ING may assert that because it was less heavily invested in Noble than HSBC or other banks, it had less responsibility to act. We would reply that the gravity and the irremediable character of destruction to the HCVs at PT HIP and PT PAL should have caused ING to prioritise action on these plantations sooner.

There is also no public evidence that ING ever “tracked responses” by Noble Group to ING’s remedial actions. This is only to be expected, because ING seems not to have taken any remediable action that could generate trackable responses. ING has, for the time in 2018 in its first-ever Human Rights Report, included a table of human rights-related dialogues ING has undertaken with clients. However, this is a hand-selected (rather than comprehensive) and anonymized list of engagements that does not disclose information on the companies engaged, over which countries or regions, the specific sector, or the measures or actions taken, and is thereby useless as a tool for external parties to use to assess ING’s tracking of its due diligence measures.⁷³ While ING’s peer bank HSBC has begun requiring new clients in the palm oil sector to consent to the bank’s disclosure of its relationship with the client, to enable HSBC’s more complete communication to civil society stakeholders about the nature of its investments, ING has taken no such step.⁷⁴

Finally, throughout the time of Noble’s subsidiaries’ destruction of HCVs between 2012 and 2017, ING does not appear to have communicated to stakeholders about how ING was seeking to prevent or mitigate the impacts. ING does not even disclose its identification of harms, let alone its own or the clients’ actions mitigating harms. Though ING acknowledges risks in the palm oil sector generally, ING does not meet the OECD Guidelines’ requirement to disclose “material” information on “foreseeable risks” – for ING discloses nothing on risks it foresees in relation to clients or transactions, information that is undoubtedly “material.” With respect to Noble, there is no evidence that ING has disclosed the foreseeable risks at PT HIP and PT PAL of deforestation potentially in violation of local law and on untouchable HCVs. ING also has not communicated what independent analysis it has taken or direct engagement it has sought with Noble Group to seek to prevent or mitigate the impacts that have been so thoroughly documented.

iv. ING’s transition from direct linkage to contribution

⁷¹ <https://www.theguardian.com/sustainable-business/2017/jul/17/hsbc-investigation-palm-oil-company-deforestation-allegations-noble-plantations>

⁷² RSPO case tracker, <https://askrspo.force.com/Complaint/s/case/50090000028ErzaAAC/detail> accessed 9 February

⁷³ See ING Group, *Human Rights Report 2018* at 73

⁷⁴ See HSBC, Revised Agricultural Commodities Policy, Palm Oil, available at www.hsbc.com/%7E/media/hsbc-com/newsroomassets/2017/pdfs/170220-new-statement-on-revised-agricultural-commodities-policy.pdf.

This final sub-section explains why ING should now be considered to be in a position of contributing substantially to the impacts of PT HIP and PT PAL. As we outlined in section 4 above, there are several factors and considerations that can help determine whether an enterprise such as a bank is transitioning towards contributing to an adverse impact to which it is linked. These include:

1. The extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.
2. The extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.

Again, the OHCHR's language on facilitation helps elucidate these factors on motivation and notice or foreseeability. The OHCHR writes that "[A] bank may facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks [thereby creating] a facilitating environment for a client to more easily take actions that result in abuses." It is important to understand that a bank's *failure* to require, encourage, or support a client's prevention or mitigation of impacts that are knowable to the bank may lead the bank to create a facilitating environment for the client to cause harm. And thirdly,

3. The degree to which any of the enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring."⁷⁵

Again, the emphasis here is on *actual* mitigation or decreased risk of adverse impacts. The OHCHR's language on due diligence may also be helpful in understanding factor 3: if a bank had inadequate due diligence procedures, or had appropriate policies in place but ignored or side-lined them in practice, the bank may be found to have contributed to the harms. This is particularly relevant in cases where a bank continues to provide additional finance to a client causing sustained or recurring abuses – as is the case here with ING and Noble. Provision of additional finance despite clear impacts is an indication of poor due diligence and an important factor in determining whether a bank contributed to the impacts.

Analysis

These factors are not meant to be exhaustive and they address interrelated concepts, so we evaluate them together.

One chief consideration on ING's transition from direct linkage to contribution is that ING has had extensive notice of the harms caused by Noble for nearly the entire duration of its financing of the company. The harms are knowable and should have been known to ING. ING's own ESR Framework, if implemented properly, should have enabled it to identify the harms at PT HIP and PT PAL as early as 2012. Even beyond notice through its ESR Framework, ING could not but have been aware of the ample and detailed discussion on the harms at these two plantations by the Norwegian Council on Ethics and actors in the financial sector including the NBIM, KLP, and HSBC. Both the Norwegian Council and KBL approached Noble (in 2012-13 and in 2015) to seek explanation for its actions, and both published that Noble Group stuck by its assessments, arguing that these complied with requirements of the RSPO.⁷⁶ These shortcomings in Noble's processes were publicized, yet ING did not take action.

⁷⁵ OECD Due Diligence Guidance, May 2018, Q29.

⁷⁶ Norwegian Council exclusion recommendation.

Another important consideration is ING's substantial and repeated funding of Noble throughout the period of serious environmental harms at PT HIP and PT PAL. Given the general nature of the financing (general corporate loans), which can be used by client companies for any and all activities, it is likely that at least a portion of the proceeds of those repeated, substantial loans were to be for Noble's high-risk activities. There is no evidence that ING requested that its funds not be used for Noble's high-risk activities. Even if Noble only used a small portion of the proceeds for the operations at PT HIP and PT PAL, the large amount of the successive loans and their repeated nature over many years means that ING's contribution can only be considered to have been substantial.

Once the risks had been identified, proper implementation of a due diligence policy should have required ING to take action to assess the risks, implement a plan to mitigate or prevent the risks, track outcomes, communicate to stakeholders what responsive actions were underway, and integrate improved procedures into its handling of investments. Critically, such action should have resulted in *actual* improved practices by Noble Group. Instead, the weak step ING did take in referring the situation to the RSPO in 2017 did not prevent nor meaningfully mitigate the ongoing harms.

It is possible ING took actions that it did not communicate to stakeholders. But from the information we have been able to locate, ING continued providing financing to Noble even as EIA/Telepak's research indicated that Noble's plantation deforestation had violated zoning law to protect riverways.⁷⁷ We cannot see evidence that ING sought to mitigate or reverse such damage, or propose improved environmental protection procedures for Noble. We are not aware that ING called Noble to task for apparently not complying with the Guidelines for Identification of High Conservation Values in Indonesia, as identified by the Council on Ethics' study.⁷⁸ There is also no public evidence that ING asked Noble to redo its HCV assessments according to updated RSPO requirements. In other words, from public records we see that ING has failed to require, encourage, or support Noble to address the harms at PT HIP and PT PAL. ING's due diligence in this case can only be considered to be inadequate.

Because ING consistently funded Noble Group through the period of the harms, while knowing of the illegal deforestation and destruction of vulnerable environmental zones occurring at PT HIP and PT PAL, and yet while failing to implement a due diligence policy that actually mitigated the destruction or decreased risk of future destruction, ING has come to contribute to those harms. ING's repeated funding, while knowing of the impacts, meets the factors showing that it gave substantial contribution to harms caused by PT HIP and PT PAL.

B. ING's violations of Guidelines provisions in relation to adverse human right impacts of Socapalm and SAC

The Bolloré Group, a client of ING managed by French billionaire Vincent Bolloré until May 2019 when Cyrille Bolloré became CEO⁷⁹, is the beneficial owner of no less than 39.4% of the shares of the Société Financière des Caoutchouc (Socfin). Socfin, through its controlling (59%) ownership of Socfinaf, is one of the world's largest owners of palm oil plantations across Africa. In Cameroon, Socfinaf owns 67% of Socapalm, which in turn owns a number of palm oil concessions in the country. In Sierra Leone, Socfin's subsidiary is Socfin Agricultural Company Sierra Leone (SAC), which is owned for 93% by Socfinaf and in turn owns a number of concessions across that country. Figure 1 below provides an overview of the

⁷⁷ EIA and Telepak, *Clear-Cut Exploitation*, at 6.

⁷⁸ Council on Ethics, Recommendation on the exclusion of Noble Group Limited, at 5, The Guidelines for Identification of High Conservation Values in Indonesia <http://www.daemeter.org/downloads/guidelines/>.

⁷⁹ <https://www.bollore.com/en/le-groupe/governance/>, accessed 21 June 2019

ownership relationships between Bolloré, Socfin, Socfinaf, Socapalm, and SAC. For over a decade, Socapalm and SAC have been involved in a range of serious abuses on its concessions across several African and Asian countries. In this complaint, we particularly focus on negative human rights impacts in respect of land rights violations and rights to security, privacy and freedom of movement that have been caused by Socapalm and SAC.

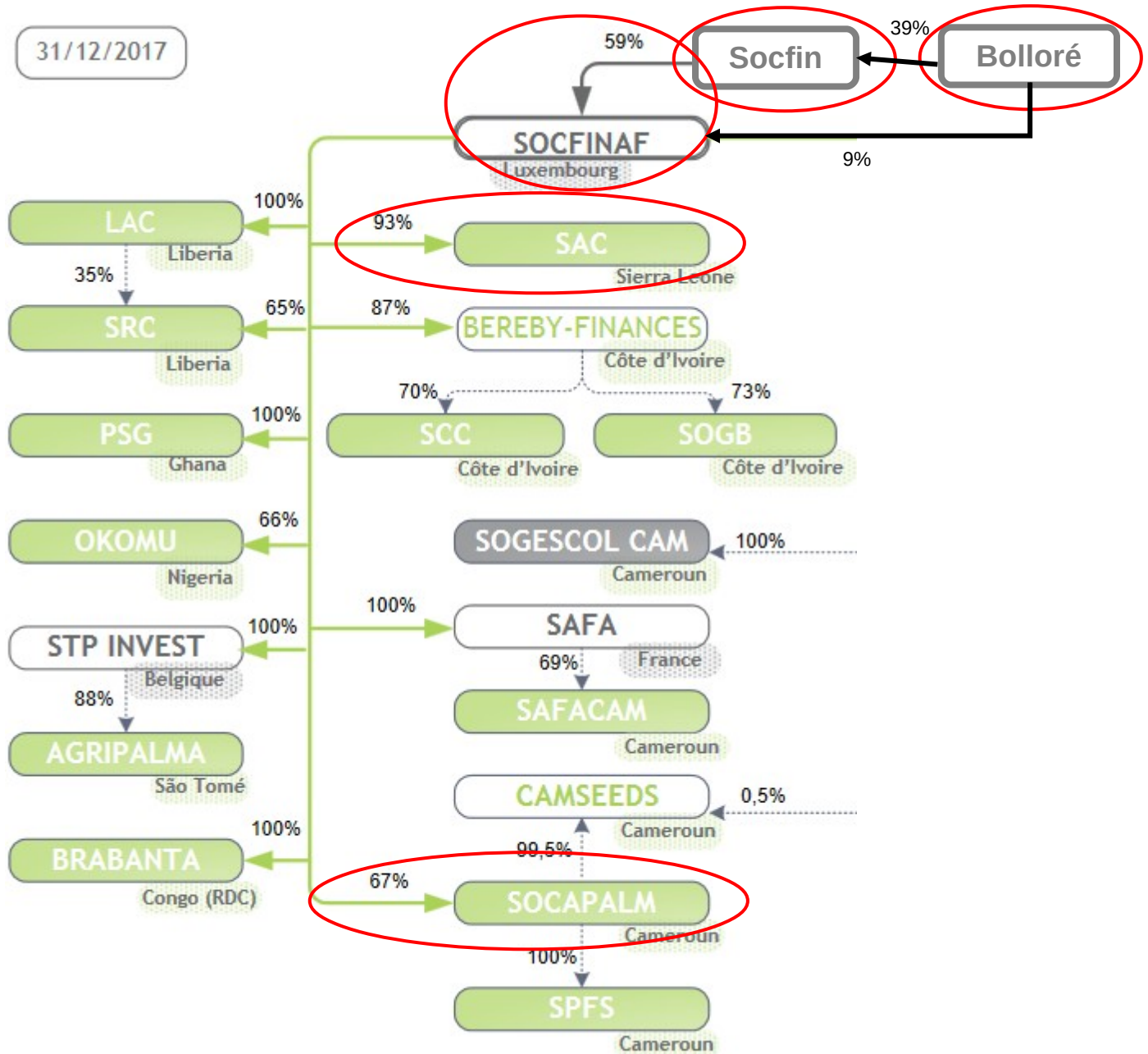


Figure 1: Ownership relations between Bolloré, Socfin, Socfinaf, SAC, and Socapalm, as of 31 December 2017

Source: Socfin⁸⁰, with SOMO additions in black and red

⁸⁰ Socfin, https://www.socfin.com/sites/default/files/2018-12/2017%2012%2031%20Organigramme%20Socfin_2.pdf

i. Adverse impacts caused by Socapalm and SAC

Land rights

ING's business relations, Socapalm and SAC, have engaged in a range of land rights abuses on its palm oil plantations. We highlight harms occurring in both Sierra Leone and Cameroon. Before discussing the case examples, we provide here an explanation of international standards regarding development-based evictions:

The UN Basic Principles and Guidelines on Development-based Evictions and Displacement (the "Eviction Guidelines") define forced evictions as "acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon."⁸¹ The UN Human Rights Commission has confirmed in two resolutions (1993/77 and 2004/28) that the practice of forced evictions represents "a gross violation of a range of human rights" such as the rights to adequate housing, adequate food, access to healthcare and education, and others.⁸² Evictions may be lawful so long as they are permitted only in narrow circumstances and carried out according to set procedures. The UN Committee on Economic, Social and Cultural Rights established that eviction procedural protections must include, among other things, "(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction."⁸³

SAC's land rights abuses in Sierra Leone were extensively documented in 2011 and 2012 by the Oakland Institute and Green Scenery.^{84,85} In 2011, SAC leased from the Sierra Leonean government 6,500 hectares (ha) of good quality farmland for rubber and oil palm plantations in the Malen chiefdom in Pujehun district. The land covered about 30 villages. Approximately 120 land-owning families claimed the land as their own and had no interest in giving up their land. SAC, upon signing the lease in March 2011, agreed to compensate families slated to lose their land, and also improve public services through building a hospital, roads, schools, and housing facilities.⁸⁶ But by October 2011, protests against the lease were in full swing. Oakland's analysis of the situation found that SAC had undertaken a range of activities that failed to meet the requirements set by the UN Eviction Guidelines above, and which therefore breached community members' land rights. According to the Oakland Institute:

- Many community members submitted grievances asserting lack of proper consultation before the lease deal was signed, particularly failure to involve councilors, parliamentarians and women land owners;
- SAC was not transparent in offering its deal to landowners: the contract was not even presented to those who would sign it, and was instead described deceptively to confuse landowners about the true nature of the lands to be leased;

⁸¹ Miloon Kothari, "Basic Principles and Guidelines on Development-based Evictions and Displacement (UN Eviction Guidelines)," Report of the Special Rapporteur on the right to adequate housing, Miloon Kothari, A/HRC/4/18, February 2007, para 4.

⁸² The UN Human Rights Commission, resolutions 1993/77 and 2004/28.

⁸³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions, para. 15, available at <https://www.refworld.org/docid/47a70799d.html>.

⁸⁴ Oakland Institute, *Understanding Land Investment Deals in Africa: Socfin Land Investment in Sierra Leone*, April 2012, available at https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_socfin_agricultural_company.pdf.

⁸⁵ https://www.fian.be/IMG/pdf/201105_socfin_missing_out_on_best_practices.pdf

⁸⁶ Oakland Institute and Green Scenery, *Understanding Land Investment Deals* at 4.

- SAC and its representatives put pressure on landowners to sign the documents or risk receiving no compensation at all for their lands;
- The lease agreement did not include information or commitments about compensation or resettlement; and the amount offered per acre was so low that many thought it was meant to be offered annually;
- Fewer than half of the nine Malen sections implicated by the deal signed it; and
- The land deal was only translated and read to local inhabitants a full two months *after* its signing.⁸⁷

In light of these various violations, the Malen landowners protested the legality of the contract and the circumstances of its signing, asserting the land was grabbed from them illegally. Unfortunately, land grabbing by SAC continues to be reported in Sierra Leone. The NGO FIAN has produced a database on landgrabbing by SAC in the Malen Chiefdom from 2011 until today that includes dozens of links to reports and news messages as well as six community grievances and complaints related to rights violations.⁸⁸ Through investigative reporting in 2012, 16, and 18, FIAN has documented how SOCFIN has progressively gained control of 18,473 hectares of the Malen Chiefdom's 27,000 hectares of land, impacting more than 32,000 people living in 52 villages in the concession area. According to FIAN's data, so far over 12,000 hectares have been converted into industrial palm oil plantations. The grabbing of land has resulted in a range of other serious human rights violations for community members, ranging from violations of right to food and housing, to right to education. FIAN's reporting suggests that proposed solutions to the conflicts between residents and SAC have failed due do a lack of political will.⁸⁹ Regardless of the reason, it is clear that the land rights violations have persisted and worsened between 2011 and today.

In Cameroon, ING is linked to land violations caused by Socapalm. Socapalm was created by the Cameroonian government in 1968, but privatized and acquired by the Socfin group in 2000. Before its privatization, Socapalm only used one-third of the concessions it was granted by the government.⁹⁰ In the intervening half century after 1968, the unused land was used productively by numerous smallholder farmers. Under typical national law on adverse possession, Socapalm would long have lost title to land it had left unused and openly cultivated by others for 40 years. But in 2008, the NGO World Rainforest Movement reported allegations of land grabbing that was disrupting the livelihoods and food security of local and indigenous people.⁹¹ By 2011, the *Guardian* had reported that Socapalm was expanding development of its concessions across the whole of the land originally leased to Socapalm.⁹² Beginning in 2014, the social movement Synaparcam began staging active protests, seeking proper dialogue with Socapalm over the land rights violations.⁹³

⁸⁷ The Oakland Institute, *Understanding Land Investment Deals in Africa: Socfin Land Investment in Sierra Leone*, April 2012, p. 4-5, available at https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_brief_socfin_agricultural_company.pdf.

⁸⁸ FIAN, *Land Grabbing for Palm Oil in Sierra Leone: Analysis of the SOCFIN Case from a Human Rights Perspective*, February 2019, p. 8-9, available at https://www.fian.be/IMG/pdf/fian_b_report_landgrab_in_sl_malen_2019_full.pdf, see also <https://www.fian.be/Landgrabbing-by-SOCFIN-in-Sierra-Leone-documentation?lang=fr>.

⁸⁹ FIAN, *Land Grabbing for Palm Oil in Sierra Leone: Analysis of the SOCFIN Case from a Human Rights Perspective*, February 2019, p. 9, available at https://www.fian.be/IMG/pdf/fian_b_report_landgrab_in_sl_malen_2019_full.pdf.

⁹⁰ Victoria Schneider, THE GUARDIAN, "The palm oil company at the centre of a bitter land rights struggle in Cameroon," 27 July 2015, available at <https://www.theguardian.com/sustainable-business/2015/jul/27/palm-oil-boom-cameroon-land-ownership-protest>.

⁹¹ World Rainforest Movement, *Résistances contre deux géants industriels en forêt tropicale*, 2008.

⁹² Schneider, THE GUARDIAN, "The palm oil company at the centre of a bitter land rights struggle in Cameroon."

⁹³ Re-Act, "Le Combat des sans terre," available at <https://www.projet-react.org/fr/bollore-presentation>.

Villagers have reportedly been facing land threats in a few ways. First, Socapalm is taking villagers' lands outright. As reported by the Guardian in 2015, villagers in the Dibombari region protested the expansion onto land they claim as their own, staging blockades to prevent construction workers from crossing on their lands.⁹⁴ A more recent 2018 report by Cameroonian journalist Madeleine Ngeunga and Fern documents reports of numerous villagers whose lands have already been confiscated by Socapalm, preventing villagers from benefiting from their own rightfully-owned palm fruits. One man interviewed by Fern said, "They [Socapalm] say that our concession is on Socapalm land. Yet this land belongs to my grandfather. All I did was renovate the house. The proof? Here are the graves of my ancestors, built here well before my birth."⁹⁵ The NGO ReAct reports that there is no longer enough forest left for food gathering or hunting, or collection of medicines or construction materials.⁹⁶ ReAct is supporting local groups to mobilise, seek cessation of the land grabbing and the restoration of lands to individual owners.

Second, Fern reports that villagers have also been prevented from accessing land they own when access would require crossing through Socapalm plantations. Many villagers have grown their own oil palm on land outside the perimeter of Socapalm's plantations. After Socapalm was privatized, however, villagers report that security forces of Socapalm, who believe villagers are stealing oil palm fruits, are preventing villagers from passing through plantation lands to access their farms.

Right to security

Socapalm and SAC have also negatively impacted the rights to security of the person, freedom of movement, and privacy. These rights are enshrined in articles 9, 12, and 17 of the International Covenant on Civil and Political Rights.⁹⁷ These violations are most easily identified in Cameroon, occurring at the hands of security forces Socapalm has hired to protect its plantations.

In 2010, French NGO Sherpa along with other NGOs filed a specific instance at the French, Belgian, and Luxembourg NCPs against Bolloré Group and Socfin for their support of Socapalm in Cameroon. Among other issues, the NGOs reported physical abuse of community members by guards of Africa Security, the firm employed by Socapalm to protect its plantations. Community members filed court complaints against the company, and indeed during the process of the specific instance at the end of 2012, security guards of Africa Security were found guilty of violence toward local community members, including especially for acts of violence against a female member of the community.

The French NCP already assessed some of these harms in relation to Socapalm, and its assessment "enabled the NCP to establish that Socapalm's activities were non-compliant with the OECD's Guidelines of 27 June 2000 on several counts."⁹⁸ Specifically in relation to security threats, the French NCP welcomed the decision of the Cameroonian court, finding this "an important decision given the local situation."

⁹⁴ Schneider, THE GUARDIAN, "The palm oil company at the centre of a bitter land rights struggle in Cameroon."

⁹⁵ Fern, *Speaking truth to power: The village women taking on the palm oil giant*, September 2018, p. 8, available at <https://fern.org/takingonthepalmoilgiant>

⁹⁶ Re-Act, "Le Combat des sans terre," available at <https://www.projet-react.org/fr/bolloré-presentation>.

⁹⁷ ICCPR Art. 9, 12, 17.

⁹⁸ Report of the French National Contact Point for the OECD Guidelines for Multinational Enterprises, SOCAPALM, 3 June 2013, available at <https://www.tresor.economie.gouv.fr/Ressources/File/397319>.

After much effort, the French NCP was able to convince the Bolloré Group to agree to mediation and develop a remediation plan for Socfin to implement. But Socfin blocked implementation of that plan, causing the French NCP to seek assistance from the Belgian NCP in 2015.

The Belgian NCP was at first unable even to encourage Socfin to join mediations. At this stage, the Belgian NCP issued a statement deploring Socfin's unwillingness to negotiate, and calling upon national and international authorities to take notice of the non-compliance of Socfin and its business relations with the OECD Guidelines, and to exercise "thorough due diligence" over Socfin.⁹⁹

Socfin finally joined mediations, and although Socfin did publicly commit to adopt several changes to its responsibility and transparency policies, the Belgian NCP found that Socfin's plans did not prioritize a resolution of the actual issues, including abuses by security forces, identified in Cameroon. The Belgian NCP also found that Socfin's proposed responsible management policy did not mitigate the consistent problems on plantations such as Socpalm's, evidenced in numerous reports from NGOs and workers' groups. The Belgian NCP asked Socfin to accelerate plans to implement the agreed action plan into its responsibility management plan. Unfortunately, in 2017, the Belgian NCP dismissed the case on grounds that specific commitments in Cameroon only partially corresponded to the action plan developed through the specific instance proceeding, and that no progress had been made in implementing the action plan.¹⁰⁰ The Belgian NCP also forwarded its final statement in the case to the Belgian export credit agency, encouraging it to consider Socfin's poor behaviour and approach to the specific instance process when considering awarding trade-promotion benefits to the company.¹⁰¹

Proof that Socfin has not addressed the security harms by Socapalm in Cameroon, as asked by the French and Belgian NCPs, is shown through recent investigation by the World Rainforest Movement. Reporting in 2018, the World Rainforest Movement observes that the intimidation and even violence against community members by direction of Socapalm has continued, now increasingly at the hands of military personnel. According to the World Rainforest Movement, "[s]ecurity companies initially were tasked with policing the plantations. However, the local population has increasingly witnessed the presence of soldiers, whose interventions have been compared to those observed in war zones."¹⁰² World Rainforest Movement documented commentary of women in the Southwest region of Cameroon protesting the increasing presence of soldiers in their towns and the plantations surrounding them. According to women such as those in village Mbonjo 1, security forces have been beating women, beating young people, threatening to take their oilpalm nuts, and loitering inside people's kitchens. As recently as spring 2019, community members in the Dibombari area sent a letter to Socapalm that outlined serious harms against, women including abuses such as land grabbing, damage to property, violation of peace and privacy, as well as sexual offenses.¹⁰³

⁹⁹ Belgian National Contact Point, Press release, on the specific circumstance SOCAPALM / SOCFIN / SOCFINAF - Center for Development - Cameroon (CED Cameroon), the Foundation Cameroonian Rationalized Actions and Training on the Environment (FOCARFE), the association SHERPA (France) and the NGO MISEREOR (Germany), 5 October 2015, available at [file:///Users/marianingrams/Downloads/Belgian%20NCP%205.10.15%20\(1\).pdf](file:///Users/marianingrams/Downloads/Belgian%20NCP%205.10.15%20(1).pdf).

¹⁰⁰ Belgium National Contact Point, Final Statement, file:///Users/marianingrams/Downloads/Communique-pcn-belge-Socapalm-Socfin-Socfinaf-Groupe-Bolloré-fr-20170615%20(1).pdf

¹⁰¹ OECD Watch email exchange with the Belgian NCP.

¹⁰² World Rainforest Movement, "Cameroon: Local women besieged by the military, guardians of the palm oil plantations of SOCAPALM," 7 March 2018, available at <https://wrm.org.uy/articles-from-the-wrm-bulletin/section1/cameroon-local-women-besieged-by-the-military-guardians-of-the-palm-oil-plantations-of-socapalm/>.

¹⁰³ Community letter, "Nous avons aussi droit à la vie," to the Director General of Socopalm, Doula, Spring 2019.

A 2018 report by the NGO Fern about the Dibombari region documented the same abuses by military personnel. According to the villagers interviewed by a leader of a women's group, the soldiers accuse villagers of stealing oilpalm nuts, and if villagers deny theft, the soldiers threaten them, steal their own nuts and sometimes destroy their stoves.¹⁰⁴ Security forces have apparently never shown warrants to search people's houses, break down doors, or attack local people.¹⁰⁵ The leader of the women's group was quoted as saying "When we're asleep at night, the soldiers enter our homes. Are there palm trees in our houses? The palm groves are on the hillsides, not inside our homes....The soldiers are everywhere, everywhere....Women have become prisoners in their own village, where they constantly feel afraid. [Socapalm] grabbed our lands to exploit them. Socapalm needs to respect our privacy in our homes. We're tired of all this abuse by the security forces, affecting both ourselves and our families." Women assert that the soldiers feel no fear to act without legal authorization, because they will be transferred soon to another location, and in the meantime they "have the full support of the company."¹⁰⁶

World Rainforest Movement further reports that the leader of the women's group explains, "[w]omen recognize the power of the company because court rulings in favor of abused women have never been implemented. An infamous example is that of a woman who lost her baby when she suffered a miscarriage after Socapalm guards beat her. That happened six years ago. In the court of Mbanga, a favorable ruling was handed down to the woman, but Socapalm appealed and the case continues in a court in Douala, the economic capital of Cameroon. The next hearing is on 23 March 2018."¹⁰⁷ Court documents from Cameroon are difficult to obtain, so we are not able to locate filings on this court complaint.

Because the harms in Cameroon persist without implementation of the action plan devised as a result of the 2010-13 OECD complaint, in May 2019 the NGO Sherpa, together with European and Cameroonian organisations, filed a lawsuit against Bolloré Group. In the suit, the NGOs ask the judge to consider that action plan, agreed to by Bolloré, as a contract that Bolloré has breached. The suit asks the French judge to force execution of the action plan.¹⁰⁸

ii. ING's initial relation of direct linkage to Socapalm and SAC's adverse impacts

ING has a long-standing financial relationship with Socfin, as reported by Socfin.¹⁰⁹ Information on ING's financial relationship with Socfin is not easily traceable online, but according to a 2016 update from Chain Reaction Research, ING helped facilitate Socfin's first public debt offering, in which Socfin "raised €80 million in senior unsecured 4 percent 5-year debt to finance land-use expansion for its vertically integrated palm oil and rubber production in Africa and Asia."¹¹⁰ These €80 million in funds are not ring-fenced and it is likely that at least a portion of the proceeds was or will be used to finance Socfin's expansion in Sierra Leone and elsewhere. ING Belgium informed NGOs that it would soon provide a new

¹⁰⁴ Fern report, p. 9.

¹⁰⁵ World Rainforest Movement, "Cameroon: Local women besieged by the military."

¹⁰⁶ World Rainforest Movement, "Cameroon: Local women besieged by the military."

¹⁰⁷ World Rainforest Movement, "Cameroon: Local women besieged by the military."

¹⁰⁸ Sherpa et al., "Bolloré group sued by NGOs in an unprecedented legal action," 27 May 2019, available at <https://www.grain.org/en/article/6238-bollore-group-sued-by-ngos-in-an-unprecedented-legal-action>.

¹⁰⁹ Socfin, "ING continues its collaboration with Socfin Group," 21 March 2019, available at <https://www.farmlandgrab.org/post/view/28827-ing-poursuit-sa-collaboration-avec-le-groupe-socfin>.

¹¹⁰ Chain Reaction Research, "the Chain: Indonesia Strengthens Peatlands Moratorium; ING Places €80 Million in Debt for SocFin's Palm Oil and Rubber Expansion," 7 December 2016, available at <https://chainreactionresearch.com/the-chain-indonesia-strengthens-peatlands-moratorium-ing-places-e80-million-in-debt-for-socfins-palm-oil-and-rubber-expansion/>.

loan to Socfin, but ING Belgium has not confirmed this.¹¹¹ There are indications that in 2017, a 15 Million sustainability loan for Socfin was provided by ING Belgium, but this has not been confirmed.¹¹²

ING also has long invested in the Bolloré Group, and because of Bolloré's partial ownership of Socfin and its subsidiaries and governance relations between the Groups, ING was initially directly linked through Bolloré and Socfin to the impacts caused by Socapalm and SAC on oil palm plantations in Cameroon and Sierra Leone. First, ING's general corporate loans to Bolloré establish a business relationship between ING and Bolloré. Documentation of ING's financing of Bolloré is more readily accessible from public sources. In 2011, ING underwrote a bond issuance for Bolloré with a palm oil value assessed at \$1.59 million. In 2012, ING's support of a larger revolving credit facility for Bolloré was assessed to have a palm oil value of \$0.66 million. In 2014, ING's support of a larger revolving credit facility for Bolloré was assessed to have a palm oil value of \$0.6 million. In 2015, ING underwrote a bond issuance for Bolloré with a palm oil value calculated to be \$0.5 million. In 2016, ING provided a corporate loan to Bolloré whose palm oil value was \$0.27 million. In 2017, ING underwrote a bond issuance for Bolloré with a palm oil value assessed at \$0.36 million. And in 2018, ING's support for a revolving credit facility for Bolloré had a palm oil value of \$0.21 million, while a corporate loan from ING to Bolloré had a palm oil value of \$0.27 million.

Second, it is important to understand the close links between Bolloré and Socfin/Socapalm. Bolloré's holdings in Socfin constitute a "complex web of companies and interests, including cross holdings and companies based in tax havens such as Lichtenstein or Luxembourg." In addition to being the primary shareholder of Socfin, Bolloré also holds a significant portion of the shares of other subsidiaries such as Socfinasia and Socapalm. The Oakland Institute also notes that "Vincent Bolloré, as the CEO of the Group, sits on the boards of Socfin and other subsidiaries. This would suggest that Bolloré exercises significant operational and financial control over the joint venture."

In 2013, the French NCP considered some of the same claims against Socapalm that are described above. In that specific instance, the French NCP deliberated carefully over the relationship between Bolloré and Socapalm and decided in its final statement that Bolloré Group is a business partner of Socapalm.¹¹³ The NCP's reasoning was founded on two primary factors. First, Bolloré was a minority shareholder in Socapalm itself (holding a stake of 9.35%) and also a minority shareholder (with a 37.8% stake¹¹⁴) in Socfinaf, itself the majority shareholder holding 63.72% of Socapalm's share capital. Secondly, Bolloré Group held a seat on Socapalm's board of directors, while in turn the director of the group that held the remaining share capital in Socapalm itself had a director on the board of Bolloré Group. Together, Bolloré's share of ownership of Socfin subsidiaries, and placement of Vincent Bolloré on the board of Socapalm, were sufficient evidence for the NCP to conclude that Bolloré Group had a "business relationship" meeting the requirements of the May 2011 Guidelines.¹¹⁵

In this case, the general nature of the financing from ING to Bolloré and Socfin, and the ownership relation between Bolloré, Socfin, Socfinaf, Socapalm, and SAC means that ING's loans and financial

¹¹¹ FIAN, "La banque ING continue de financer des plantations d'huile de palme controversées," 23 October 2018, available at <https://www.fian.be/La-banque-ING-continue-de-financer-des-plantations-d-huile-de-palme?lang=fr,%20accessed%205%20December%202018>.

¹¹² <https://www.environmental-finance.com/content/analysis/the-green-and-sustainability-loan-market-ready-for-take-off.html>, last accessed 21th June 2019

¹¹³ Report of the French National Contact Point for the OECD Guidelines for Multinational Enterprises, SOCAPALM, 3 June 2013, available at <https://www.tresor.economie.gouv.fr/Ressources/File/397319>.

¹¹⁴ Bolloré may now hold 9% in Socfinaf: see Socfinaf, at <https://www.socfin.com/fr/socfinaf>.

¹¹⁵ Report of the French National Contact Point, SOCAPALM, at 7.

services to Bolloré and Socfin were initially directly linked to the adverse impacts caused by Socapalm and SAC.

iii. ING's failures of due diligence regarding Socfin/Bolloré Group

Because the adverse impacts caused by Socapalm and SAC are directly linked to ING, ING has a responsibility to seek to prevent or mitigate these impacts. Once again we recall the explanation in section 4 on due diligence as the first step in preventing or mitigating adverse impacts to which an enterprise is directly linked, contributing, or causing. As directed by Commentary 45, our inquiry is whether ING has, in an ongoing fashion responsive to evolving circumstances, “identified” the risks of actual and potential human rights impacts, “assessed” these risks, “integrated” and “acted upon” the findings, “tracked responses,” and “communicated” to stakeholders what ING is doing to mitigate and prevent the harms and what outcomes it is having.¹¹⁶

First of all, again ING's own ESR Framework, if implemented correctly, should have led ING to identify these specific impacts of Socapalm and SAC, as they have been widely reported since at least 2010 at the filing of the specific instance to the French, Belgian, and Luxembourgian NCPs by French and other NGOs, and through the subsequent news outlet and NGO reporting discussed above. ING has also been approached directly by NGOs about the general harms related to Socfin's palm oil investments in 2018.^{117,118} There is no evidence that ING took any action on the land grabbing and security situations we cite in this complaint.

Assuming, nevertheless, that ING has (as it should have) identified the risks, ING should have assessed them in order to discern how best to fulfill its responsibility to prevent or mitigate them. As described with Noble Group, assessment should normally evolve indicators, recommendations, thresholds measuring the risks or actual impacts and indicating the point at which ING would engage with the client. As mentioned in section 5.A above, ING's ESR Framework requires clients to “demonstrate to the satisfaction of ING: ...(iii) Compliance with RSPO certification for companies that own, operate or manage oilpalm plantations.”¹¹⁹ But again as with Noble, ING is not enforcing its own requirement: only Socfin Indonesia is an RSPO member, and the rest of Socfin's subsidiaries, including SAC and Socapalm, are not RSPO members and are not RSPO certified.

Other entities have assessed Socfin's actions and found them harmful. Again as stated, the French NCP found Socapalm's actions in violation of the OECD Guidelines. We also know that other financial institutions appeared either to have heeded the Belgian NCP's warning against Socfin, or to have undertaken their own due diligence leading them to the same conclusion. For example, in 2016 the World Bank reportedly held back on giving a loan of one hundred and fifty million Euros to Socfin, referencing its failure to comply with international standards.¹²⁰

¹¹⁶ OECD Guidelines Commentary 45, see also commentary 40.

¹¹⁷ Fian et al., “ING finances controversial palm companies in spite of sustainability policy,” 23 October 2018, available at https://www.grain.org/bulletin_board/entries/6049-ing-finances-controversial-palm-oil-companies-in-spite-of-sustainability-policy.

¹¹⁸ Greenwash-ing, “ING past haar eigen duurzaamheidsbeleid niet toe en blij controversiële palmolie financieren,” available at <http://greenwash-ing.be/nl/> (“Al meer dan twee jaar is er een dialoog gaande tussen de NGO's en ING over de financiering van het palmoliebedrijf SOCFIN”).

¹¹⁹ ING, ESR Framework, p. 23

¹²⁰ Fian et al., “ING finances controversial palm companies in spite of sustainability policy,” 23 October 2018, available at https://www.grain.org/bulletin_board/entries/6049-ing-finances-controversial-palm-oil-companies-in-spite-of-sustainability-policy.

But ING did not take such an approach. ING's assessment of Socfin seems to have led it to an opposite finding: as reported by FIAN in October 2018, "ING communicated to civil society that its sustainability policy has been applied to SOCFIN and the company had 'answered satisfactorily' to all the questions. ING is in the process of deciding on a new loan of fifteen million euro to SOCFIN."¹²¹ In early March 2019, reports surfaced that ING Belgium was ceasing its relationship with Socfin because not all of its palm plantations are RSPO certified, and ING informed journalists and NGOs during meetings and interviews about a halt in new financing for Socfin.¹²² However, it appears ING retraced these step, for it later wrote to NGOs that "[i]n the framework of their commercial relationship ING and Socfin evaluate on a regular basis their cooperation."¹²³ For its part, Socfin released a statement on 21 March 2019 rejecting reports of discontinued financing, and confirming that ING's relationship with Socfin is still strong.¹²⁴ While ING's communication to NGOs appears to show some evidence of response to risks and engagement with Socfin, these steps do not constitute meaningful integration of the risks into ING's relationship with Socfin, or meaningful action by ING to respond. We believe this because ING has remained committed to its relationships with Socfin and Bolloré for years, providing repeated loans and financial services in 2012, 2014, 2015, 2016, 2017, 2018, and 2019 even while ING has been aware of the harms on these plantations. By our assessment, the evidence we have presented in this section about land grabs and security violations by Socfin's subsidiaries should discourage ING from continued investment in the company, and because ING is still deeply invested, we hold that ING's due diligence is failing as regards these subsidiaries.

iv. ING's transition from direct linkage to contribution

Once again we assert here that ING's knowledge of the land grabbing and security harms to which it is linked through its business relations, coupled with its failures to take steps that actually mitigated or prevented the harms, has put the bank in a position of contributing to those harms. We recall again the sample factors proposed by the OECD Due Diligence Guidance to assess whether a company, initially directly linked to a harm, can come to provide substantial contribution:

- Did ING know or could it have known about the existence or potential for the impacts caused by its business relations, Socapalm and SAC?
- To what extent has ING motivated, encouraged, facilitated, or increased the risk of these harms?
- To what degree did ING's activities – such as through its due diligence practices – bring about actual mitigation or prevention of the impacts occurring?

The analysis here mirrors that of the previous case, and is as follows. ING has had extensive notice of the harms occurring on these plantations, and also notice – provided at a minimum by the lengthy Belgian and French NCP case – of the failure by Bolloré or Socfin to ameliorate the harms. All the while that ING has known or should have known of the harms and the inadequacies of Socfin's responses, ING has continued to provide repeated and substantial loans and financial services to Bolloré and Socfin. Given the general nature of the financial business relationship (general corporate loans and financial services, as well as share ownership), which can be used by client companies for any and all activities, it likely that at least a portion of the proceeds of those repeated, substantial loans and financing were to be for

¹²¹ FIAN, "ING finances controversial palm oil companies in spite of sustainability policy," 23 October 2018, available at <https://www.grain.org/fr/article/6049-ing-finances-controversial-palm-oil-companies-in-spite-of-sustainability-policy>.

¹²² <https://trends.knack.be/economie/bedrijven/ing-schort-samenwerking-met-omstreden-palmoliebedrijf-socfin-tijdelijk-op/article-news-1437755.html> based on articles in the French magazine Médor

¹²³ Email from ING Belgium to Fian Belgium, 25 March 2019

¹²⁴ Socfin, "ING continues its collaboration with Socfin Group," 21 March 2019, available at <https://www.farmlandgrab.org/post/view/28827-ing-poursuit-sa-collaboration-avec-le-groupe-socfin>.

Socapalm's and SAC's high-risk activities. There is no evidence that ING requested that its funds not be used for Socapalm's and SAC's high-risk activities. Even only a small portion of the proceeds of the financing ING provided to Bolloré and Socfin was used – through those companies' ownership – by Socapalm and SAC for the plantations in questions, the large amount of the successive provision of financing and its repeated nature over many years means that ING's contribution can only be considered to have been substantial.

Once the risks had been identified, proper implementation of a due diligence policy should have required ING to take action to assess the risks, implement a plan to mitigate or prevent the risks, track outcomes, communicate to stakeholders what responsive actions were underway, and integrate improved procedures into its handling of investments. Critically, such action should have resulted in actual improved practices by Socapalm and SAC. Instead, whatever steps ING did take – if any – did not actually prevent or mitigate the ongoing harms.

Because ING consistently funded Bolloré and Socfin through the period of the harms by Socapalm and SAC, while knowing of them, and yet while failing to implement due diligence measure that actually mitigated the impacts, ING has come to contribute to those harms.

C. ING's violations of Guidelines provisions in relation to adverse labour rights impacts caused by subsidiaries of ING's business relation, Wilmar International Ltd.

Wilmar International Limited is one of the largest companies in the palm oil sector and one of Asia's leading agribusiness groups. Wilmar has 239,935 hectares of land planted with oil palms, of which 68% are located in Indonesia.¹²⁵ As of 2013, Wilmar has had in place a "no deforestation, no peat, no exploitation policy" that applies to all plantations Wilmar owns, manages or invests in, regardless of Wilmar's stake in the plantation.¹²⁶ Unfortunately, over the past decade, Wilmar's plantations around the world have been cited for causing a range of harms to the environment as well as communities near Wilmar's plantations.¹²⁷

i. Adverse impacts caused by Wilmar subsidiaries, PT Milano and PT Daya, and MOPP

In this complaint, we focus on impacts on labour rights on three plantations. Two of Wilmar's Indonesian oil palm plantations are PT Perkebunan Milano (PT Milano) and PT Daya Labuhan Indah (PT Daya). Wilmar has very strong ownership and control over these two subsidiaries: PT Milano is a wholly-owned Wilmar subsidiary.¹²⁸ Wilmar owns 95% of PT Daya.¹²⁹ PT Milano is an RSPO certified grower of oil palm and miller of palm oil that owns four oil palm plantations and also a mill in North Sumatra. PT Daya, also certified by the RSPO, is also a grower of oil palm and miller of palm oil. PT Daya also has a mill and two oil palm plantations in North Sumatra. A 2016 report by Amnesty International documented serious labour rights abuses on PT Milano and PT Daya, as well as on the plantations of some of Wilmar's suppliers. The Amnesty reveals that the labour abuses so common on oil palm plantations (as well as on other types of agricultural plantations) are structural, effectively *necessitated* by the payment and picking target system upon which the palm oil industry depends. Although Amnesty's report was

¹²⁵ Milieudfensie, *Draw the line*, p. 80.

¹²⁶ Wilmar, No deforestation, No peat, No exploitation policy, 2013. <https://www.wilmar-international.com/wp-content/uploads/2012/11/No-Deforestation-No-Peat-No-Exploitation-Policy.pdf>, accessed February 10, 2019

¹²⁷ See, e.g., Milieudfensie, *Draw the Line*, p. 80.

¹²⁸ Amnesty report, fn 6.

¹²⁹ Amnesty report, fn 7 and 8.

released in 2016, the labour harms it discusses have long been recognized in the palm oil industry, and remain rife today. We focus on wage-related violations and child labour.

We also highlight a range of labour-related harms on a Liberian oil palm plantation in which Wilmar has a minority stake. As of 2018, Wilmar became sole owner of Nauvu Joint Venture Company, which in 2017 owned 27% of the shares in SIFCA, an agribusiness in the Ivory Coast that controls the Maryland Oil Palm Plantation (MOPP).^{130 131} One of the complainants in this case, Sustainable Development Institute (SDI), supports communities that are directly impacted by these violations, which range from wage violations, to non-hiring of local staff, to unsafe or discriminatory working conditions.

Wage-related violations at PT Milano and PT Daya: unpaid labour and non-payment of minimum wage and overtime

Indonesia has several laws in place to ensure workers are paid an adequate amount to satisfy the basic needs of themselves and their families. First and foremost, Article 90 of Indonesia's Manpower Act prohibits employers from paying wages less than the minimum wage.¹³² The Indonesian Manpower Act also requires in Article 78 that employers pay overtime according to certain criteria, including that workers do just three hours of overtime per day or 14 hours of overtime work per week, that a higher level of pay be given for overtime hours, and that workers agree to all overtime work in writing.¹³³ Regarding work on Sunday in particular, the Minister of Transmigration's Decree on Overtime clarifies that if workers labour on Sundays, they should get two times their hourly pay for their first seven hours and three to four times their hourly pay for the eighth and ninth hour of labour.¹³⁴ In addition to these national laws, Indonesia is also a party to ILO conventions that concern the minimum wage, such as the Minimum Wage-Fixing Machinery Convention, 1986 (No. 26), and the Minimum Wage Fixing Convention, 1970 (No. 131).

Despite these laws, Amnesty International found extensive evidence that on both PT Milano and PT Daya, Wilmar regularly fails to pay workers minimum wage if they do not meet targets for oil palm fruit picking. The payment structure used at Wilmar's plantations (as used at many other oil palm plantations) effectively forces workers to do work for less than minimum wage, work overtime just to receive minimum wage, or do unpaid additional work to cover their basic living expenses.

On oil palm plantations, typically female workers in plant maintenance units are given targets for the number of sacks of fertilizer they should spread, tanks of chemicals they should spray, or plant rows they should weed.¹³⁵ Typically male harvesting workers have targets for the weight of fruit they harvest: each day they must return from the oil palm rows with a certain weight of oil palm fruit collected. Under normal conditions, harvesters can also receive a bonus payment for any loose fruit they collect from the ground. Based on its research, Amnesty concluded that "targets appear to be set arbitrarily to meet companies' needs rather than based on a realistic calculation of how much workers can reasonably do in

¹³⁰ Friends of the Earth Europe, Continuing to Exploit and Deforest. Wilmar's ongoing abuses, 2014,

https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/wpallimport/files/archive/FOEE_wilmar_factsheets_eng_US_letter_lr.pdf, accessed 18 January 2019

¹³¹ SIFCA. Annual report 2011, http://www.groupesifca.com/pdf/rapports_annuels/ra_sifca_2011.pdf, accessed 10 February 2019

¹³² Manpower Act, Art. 90.

¹³³ Amnesty report, p. 8.

¹³⁴ Article 11, Minister of Manpower and Transmigration Decree No. 102/2004 Concerning Overtime Work and Overtime Pay, (Keputusan Menteri Tenaga Kerja dan Transmigrasi Nomor Kep.102/MEN/VI/2004 Tentang Waktu Kerja Lembur dan Upah Kerja Lembur).

¹³⁵ Amnesty report p. 24.

their working hours.”¹³⁶ Yet because minimum wages are often so low (and for various reasons not consistently paid, as described below), families rely strongly on bonuses to meet their basic needs.¹³⁷

Although national and international law requires Wilmar to ensure workers are paid minimum wage, in practice workers’ ability to meet their targets, not the minimum level set by law, is what actually determines the wage they take home. At PT Daya, maintenance workers may not receive minimum wage if they fail to meet their targets, regardless of whether they work the requisite number of hours.¹³⁸ To ensure full payment for one day’s worth of targets, the worker can “carry over the work to the next day, but if it takes the worker two days to meet the target, she will only be paid for one day’s work.”¹³⁹ In PT Milano, if a maintenance worker cannot meet her target in one day, she will still receive the daily wage. But on the following day she will have to meet that day’s target and also make up the work not completed from the previous day’s target – without a compensation for the overtime she has worked.¹⁴⁰

Meanwhile, on PT Milano, if harvesting workers do not meet their targets, the bonus payment they are supposed to receive for collecting loose fruit is instead not paid, as the loose fruit is counted towards workers’ targets. If targets still are not met, workers may take home less than minimum wage at the end of the day.¹⁴¹

To avoid missing their targets and also avoid losing out on potential bonus pay, workers often work overtime. Worker testimony reported by Amnesty shows that workers at PT Milano and PT Daya regularly work beyond 14 hours of overtime per work, have never agreed to work overtime in writing, and are almost never paid the requisite higher wage for their overtime hours. In addition to unpaid overtime done to meet targets, unpaid overtime also results from the palm oil companies’ improper recording of workers’ hours: although workers are required to attend a daily morning assembly starting at 5:30 or 6am, companies count their hours starting from 7am when workers reach the groves.¹⁴² This means that workers are simply not paid for those early morning work hours, nor are those hours counted toward overtime. As one PT Milano worker is reported as saying, “I work from 6.15am for seven working hours but it depends on the target, sometimes I work till 4pm as we are forced to get 60 ffb [fresh fruit bunches] per day. If we cannot fulfil the target, our loose fruit [the loose fruit workers are required to collect] will be used to count the target. ...Management doesn’t consider this to be overtime.”¹⁴³ The same worker quoted here also reported earning far less than minimum wage on Sunday, let alone the increased amount he should be earning under the Minister of Transmigration’s Decree on Overtime.

Another tactic harvesters on PT Milano and PT Daya use to meet their targets and get the needed bonuses from collecting loose fruit is to bring their wives or children to help them collect.¹⁴⁴ Wives who help collect fruit with their husbands are not paid for the work they do beside their husband: instead, their work affects the pay or bonus the husband receives, and helps protect the husband for facing penalties for not meeting fruit collection targets.¹⁴⁵ Wives, who are maintenance workers, often join

¹³⁶ Amnesty report p. 26.

¹³⁷ Amnesty report p. 25.

¹³⁸ Amnesty report p. 26.

¹³⁹ Amnesty report p. 26.

¹⁴⁰ Amnesty report p. 6.

¹⁴¹ Amnesty report p. 26.

¹⁴² Amnesty report, p. 48.

¹⁴³ Amnesty report p. 49.

¹⁴⁴ Amnesty report p. 31-32.

¹⁴⁵ Amnesty report p. 31.

their husbands in the afternoon after their own work day is over. Thus wives often work well-beyond a standard work day, and are not even provided a wage for the extra work they do, let alone the overtime that they deserve.¹⁴⁶

Workers also go unpaid if rain falls relatively early in the workers' shifts, because the rain is considered to have washed away or deleted chemical sprayed on the plants. As Amnesty notes, workers are effectively penalized for the rain's impact on their work: workers are treated as though they have not "met their targets or ...done the work at all."¹⁴⁷ On PT Milano, a worker noted that if rains come at or before 9am, workers are not paid for any work they did before the rains fell, are dismissed for the day, and are also not paid for that day of work, although it is not by their own choice that they stay home.¹⁴⁸

Child labour

Indonesia is party to the ILO Convention on Worst Forms of Child Labour, 1999 (No. 182), which mandates that governments take immediate, effective measures to prohibit and eliminate the worst forms of child labour.¹⁴⁹ Indonesian law defines a child as under 18 and, reflecting ILO standards, prohibits employers from hiring children to do the worst forms of child labour, which are defined by the Manpower Act to include jobs using certain types of tools or machinery; taking place in a dusty environment; involving extreme temperatures or harmful chemical substances; and including manual lifting or carrying heavy loads (10-12 kgs depending on the child's sex).¹⁵⁰ Indonesia's National Action Plan for the Elimination of the Worst Forms of Child Labour lists work on plantations as included in the definition of worst forms of child labour.¹⁵¹ Article 68 of the Manpower Act prohibits employment of children (below age 18) except children aged between 13 and 15 for "light work" for fewer than three hours a day that does not interrupt the children's education.¹⁵²

Again despite these rules in place, Amnesty International documented extensive evidence of child labour, including work meeting the standards for the worst forms of child labour, on both PT Milano and PT Daya.¹⁵³ Amnesty spoke with children who had begun working from the age of eight, and found that some children missed school temporarily, while others dropped out entirely, to help their parents. Testimony showed that child workers do not get paid themselves, but help their parents meet targets that are simply too high for a parent to meet alone. Amnesty also showed that on Wilmar's plantations, children are not equipped with protective gear including gloves, frequently carry loads exceeding 10-12 kgs, are exposed to hazardous chemicals such as weedicides and fertilizers, and are provided no training to use potentially harmful equipment. Testimony collected by Amnesty also revealed that foremen across the plantations were well aware of the presence of children doing work, but failed to stop the children from working, even instead advising them occasionally on work topics such as where to deposit their fruit.

When alerted by Amnesty to the presence of child labour in its workforce, Wilmar responded by asserting that child labour is not tolerated, but may result from lack of childcare or educational services

¹⁴⁶ Amnesty report p. 31-32.

¹⁴⁷ Amnesty report pg. 43.

¹⁴⁸ Amnesty report pg. 43.

¹⁴⁹ Footnote to ILO convention, Indonesia member.

¹⁵⁰ Article 74 (2) (d) and (3), Manpower Act.

¹⁵¹ Footnote to the National Action Plan for the Elimination of the Worst Forms of Child Labour, Presidential Decree No. 59 of 2002.

¹⁵² Article 3, Minister of Manpower and Transmigration Decree No. 235/2003.

¹⁵³ Amnesty article p. 33-39.

for children. Wilmar wrote that “Where presence of children is detected, specifically during the school holidays when some workers may bring their children to the plantations because there is no one to look after them at home, stern warnings are given to the workers not to bring children to their workplace. Disciplinary action is taken against repeat offenders.”¹⁵⁴ Wilmar blames parents for the child labour on its plantations, totally ignoring the pay structures and target quotas that force parents to need extra help from their children just to earn a basic living.

Labour violations by MOPP in Liberia

In 2011, the Liberian government signed a 25-year concession agreement with MOPP for the plantation to cultivate 15,200 hectares of land in Maryland and Grand Kru counties in Liberia. Attention was attracted to the plantation in 2013, when workers protested the non-payment of wages and employment malpractice, among other issues.¹⁵⁵

Investigation in 2015 by the Forest Peoples Programme and Social Entrepreneurs for Sustainable Development (SESDev) revealed several claims of bad working conditions, and also failure to hire local employees to conduct the work. One resident of Gbowein in the area of the plantation reported that “When MOPP arrived they announced that the new company is here and they are looking for people who can operate tractor, be security etc., but they deceived us. They made us to register and they said they will take the people for training and after that they will come back to work. Whilst we were still waiting to go for the training surprisingly we saw people from different areas, Ivory Coast and other places starting to work. When we asked why, MOPP told us that the men from this town did not pass the test.” Another youth from Gbolulu noted that, “out of 1,961 people in both the mission and big town, only 47 people are working for MOPP”¹⁵⁶

Liberian NGOs from the Palm Oil Working Group have undertaken several focus group discussions in 2018 and 2019 with women employed by MOPP or its subcontractors. Many of the labour violations echo those reported at PT Milano and PT Daya. For example, the women have said that they only get a day’s pay when the day job is finished, no matter how long it takes. Especially when fertilizing this can mean working days of over 12 hours. Other labour abuses have also been reported, such as insecurity of payment and sexual harassment. The women acknowledge a general fear by workers to speak out, or risk losing their jobs. The women also report occurrence of several injuries or even deaths related to work with tractors and other transport, and they report that workers must work despite having injuries or sickness. The women explain that they are allotted 10 hospital visits per year and if they take their child to hospital they are marked absent and not paid.¹⁵⁷

The poor conditions have been noted by local press: in May 2018, journalists from Front Page Africa found several malpractices in labour conditions, such as appalling conditions of housing for workers, inadequate access to health care, latrines, and safe drinking water.¹⁵⁸ The conditions have also been noted by the Netherlands Development Finance Company (FMO): the FMO observed in an analysis of

¹⁵⁴ Wilmar International letter to Amnesty International, dated 17 October 2016.

¹⁵⁵ The informer, Crisis Engulfs Maryland Again - Several Protesters Arrested, February 2013

¹⁵⁶ Forest Peoples Program & SESDEV, Respecting Rights? Assessing Oil Palm Companies’ Compliance with FPIC obligations. Case Study Maryland Oil Palm Plantation, December 2015, <https://www.forestpeoples.org/sites/fpp/files/publication/2016/02/reportmopp.pdf>

¹⁵⁷ SESDEV, notes from focus groups discussions with women in communities with the MOPP plantations in December 2018

¹⁵⁸ Front page Africa, Workers of Cavalla Rubber Corporation Living Under Appalling Conditions, May 2018, <https://allafrica.com/stories/201805110812.html> accessed 10 February 2019

SIFCA that “safe work and labor conditions” are some of the key Environmental and Social risks with SIFCA, especially in its Liberia plantations.¹⁵⁹

ii. ING’s initial relation of direct linkage to impacts caused by Wilmar subsidiaries

ING has had a long-standing business relationship with Wilmar enduring through the time-period in which we have documented Wilmar’s labour-related harms. In 2010, Wilmar provided \$100 million of a \$400 million revolving credit facility for the Wilmar Group (Wii Ltd.).¹⁶⁰ In 2017, ING provided a \$150 million revolving credit facility to Wilmar International.¹⁶¹ This 2017 financing is a so-called “sustainability performance loan,” where Wilmar’s interest rate is adjusted downwards if the company makes progress on undisclosed sustainability criteria. Meanwhile, as stated above, PT Milano is a wholly-owned subsidiary of Wilmar, while Wilmar owns 95% of PT Daya. MOPP is owned by SIFCA in which Wilmar holds around 27% of the shares through Nauvu. From what we can see publicly available, ING’s financing to Wilmar is general corporate financing, creating a direct link between ING and PT Milano, PT Daya, and MOPP. Relevant for establishing and determining the strength of the relationship is Wilmar’s high degree of control over the two Indonesian plantations and ING’s strong business relationship with SIFCA¹⁶².

iii. ING’s failures of due diligence regarding adverse impacts by PT Milano, PT Daya and MOPP

Because the adverse impacts caused by PT Milano, PT Daya and MOPP were initially directly linked to ING, ING had a responsibility to seek to prevent or mitigate these impacts. Once again under Commentary 45, we seek to learn whether ING has, in an ongoing fashion responsive to evolving circumstances, “identified” the risks of actual and potential human rights impacts, “assessed” these risks, “integrated” and “acted upon” the findings, “tracked responses,” and “communicated” to stakeholders what ING is doing in a manner that is effective at actually mitigating and preventing the harms.

On one level, our findings on ING’s due diligence with respect to Wilmar are the same as those for Noble and Bolloré/Socfin, and we so give a briefer analysis here: we do not see information shared by ING about its identification of specific risks related to the impacts of Wilmar’s subsidiaries’ operations, certainly not to the level of labour abuses at MOPP, PT Milano and PT Daya. ING does not disclose how it assessed the risks at these three plantations, nor how ING has integrated and acted upon the findings such as through engagement with Wilmar about these plantations. We cannot see that ING has tracked any response by Wilmar to ING’s demand for action at these three plantations. Because ING has not communicated with stakeholders the risks it has identified, nor explained any subsequent efforts to encourage Wilmar to ameliorate the labour harms on its plantations, we cannot tell if ING has taken any meaningful steps to prevent or mitigate the harms.

We do know, however, that ING has provided a new kind of financing to Wilmar in 2017: a sustainability performance loan, much hailed in ING and Wilmar’s press releases as an innovative new financing model that could set a new example for the palm oil industry or other industries.¹⁶³ From what we can see in

¹⁵⁹FMO, project detail SIFCA, <https://www.fmo.nl/project-detail/54763>, accessed 10 February 2019

¹⁶⁰ Ward Warmerdam, Dataset: Financing of companies engaged in the palm oil sector, A study prepared for Milieudefensie, May 2018, available at https://milieudefensie.nl/actueel/dataset_zwartboek/view; and Forestandfinance.org (Last update: July 2018) Database, available at <http://forestsandfinance.org/>, last accessed Accessed: 16 January 2019.

¹⁶¹ Wilmar and ING, “Wilmar and ING collaborate on sustainable loan in Asia,” 27 November 2017, available at <https://www.wilmar-international.com/sustainability/wp-content/uploads/2017/11/Joint-Press-Release-Wilmar-and-ING-collaborate-on-sustainable-loan-in-Asia.pdf>.

¹⁶² SIFCA, annual report 2011, mentions support from Wilmar for the new mill amongst others.

¹⁶³ Wilmar and ING, “Wilmar and ING collaborate on sustainable loan in Asia,” 27 November 2017, available at <https://www.wilmar-international.com/sustainability/wp-content/uploads/2017/11/Joint-Press-Release-Wilmar-and-ING->

public material, the loan works as follows: during the loan, Wilmar's performance against sustainability measures in environmental, social, and governance issues will be assessed by the sustainability evaluator company Sustainalytics, and if Sustainalytics vouches for an improvement in Wilmar's sustainability performance, Wilmar will receive a lowered interest rate from ING. Further details on the loan are not available: we are not sure what improvements must be implemented. For example, we do not know if labour rights are covered, and we do not know what "base-level" of performance will be set by the loan's terms or Sustainalytics. We also do not know what the loan rates are either before or after any improvement in Wilmar's business conduct.

While ING's offer of a sustainability performance loan to Wilmar could seem like a positive step to encourage better conduct by Wilmar, there are several reasons why we believe the loan will not be effective in practice and merely enables ING and Wilmar to appear to promote sustainability. After being contacted by Amnesty about labour harms identified at PT Milano and PT Daya, Wilmar opened an inquiry into general wage practices, and published an action plan to address labour concerns at PT Milano and PT Daya.¹⁶⁴ Amnesty's analysis of the action plan shows the plan fails completely to address the structural causes of labour abuses such as child labour on its plantations. In a detailed and annexed letter to Wilmar, Amnesty showed how the Plan failed to address issues such as targeting and unduly high quotas for workers, coupled with unreasonably low salaries, that force workers to rely on child help, unpaid help or unfunded overtime.¹⁶⁵

An article by Eco-Business quoted a representative from Amnesty asserting that "[w]ithout reforming the working policies and practices on plantations, and changing the wage and quota system, this policy could actually make working conditions harder for parents. It's really about attacking the root causes."¹⁶⁶ Eco-Business also quoted a representative from Wilmar who responded to Amnesty by admitting, "it's a fair point, and yes, the root cause of some of these issues is about wage structure....But we are not saying that the policy is going to fix everything. We cannot yet say we have successfully solved the wage issue."

By its own admission then, Wilmar's Action Plan on labour violations at PT Milano and PT Daya will not work. Further, the Action Plan is only designed to address labour concerns on plantations in North Sumatra, thus ignoring completely the fact that these labour harms are endemic to the palm oil industry and visible on other plantations such as MOPP.

Our concern with ING's "sustainability" financing of Wilmar is that the financing rewards Wilmar with a financial and publicity boon, without tending towards achieving mitigation or prevention of harms. If the criteria for reduction of Wilmar's loan interest rate will hinge on Wilmar's remediation of the structural wage and quota problems across all its plantations that led to labour abuses, then that would be a meaningful step. But from what we can see, the sustainability performance loan does not and would not in future penalize Wilmar for continuing with its poor practices. The loan terms are not public, but the description of the loan in press releases and new articles suggests that the initial rate likely matches that of other loans. This means the financing only offers carrots: rewards to Wilmar if it does better, but no

[collaborate-on-sustainable-loan-in-Asia.pdf](#).

¹⁶⁴ Wilmar, "Wilmar's Action Plan to Address Labour Concerns in North Sumatra," 5 April 2017, available at <https://www.wilmar-international.com/sustainability/wp-content/uploads/2017/04/Wilmar%E2%80%99s-Action-Plan-To-Address-Labour-Concerns-In-North-Sumatra.pdf>.

¹⁶⁵ Amnesty International, "Amnesty International Response to Wilmar Action Plan," 21 July 2019, available at <https://www.amnesty.org/download/Documents/ASA2171912017ENGLISH.PDF>.

¹⁶⁶ Vaidehi Shah, ECO-BUSINESS, "Wilmar launches landmark sustainable finance deal, child protection policy," 1 December 2017, available at <https://www.eco-business.com/news/wilmar-launches-landmark-sustainable-finance-deal-child-protection-policy/>.

sticks/penalties if it fails to improve. Rewarding a client for better conduct does not meet the OECD Guidelines requirements to take action to mitigate or prevent harms.

If ING's due diligence has led it here, we would again argue that ING's due diligence procedure is ineffective and inadequate: not only for missing out on the requirement to assess, track, integrate, and communicate responses to actual known and anticipated risks, but for failing to take meaningful steps to actually prevent or mitigate the harms identified.

iv. ING's transition from direct linkage to contribution

Again we believe that ING's repeated provision of financial services to Wilmar and failures in due diligence in light of the ongoing and highly-foreseeable harms occurring on MOPP, PT Milano and PT Daya, have placed ING in a position of contributing to those harms. We recall again the sample factors proposed by the OECD Due Diligence Guidance to assess whether a company, initially directly linked to a harm, can come to provide substantial contribution:

- Did ING know or could it have known about the existence or potential for the impacts caused by its business relations, MOPP, PT Milano and PT Daya?
- To what extent has ING motivated, encouraged, facilitated, or increased the risk of these harms?
- To what degree did ING's activities – such as through its due diligence practices – bring about actual mitigation or prevention of the impacts occurring?

The analysis here mirrors that of the previous cases. ING has had extensive notice of the harms occurring on Wilmar plantations like PT Milano, PT Daya, and MOPP. Regarding harms on the plantations discussed in this complaint, at the latest, ING had notice of these situations from the years 2013 through 2016 via the reports and articles cited in this complaint. Moreover, Milieudedefensie has engaged with ING since at least 2004 about harms at Wilmar plantations much like PT Milano, PT Daya, and MOPP. In 2013, for example, Milieudedefensie and Friends of the Earth Europe attended the Annual General Meeting of ING to raise concerns about Wilmar's destructive social and environmental practices. ING's response to us was to forward our letter on these concerns to Wilmar. That year Milieudedefensie raised the issue of the Wilmar plantations and suppliers on several occasions, including in an Earth Alarm writing action on harms at Wilmar and Sime Darby plantations in Uganda and Liberia. But ING responded that it had no responsibilities because it was not investing directly into the plantations where the issues occurred.¹⁶⁷ In 2015, in response to a report on Wilmar plantations in Nigeria by Friends of the Earth, ING suggested that Friends of the Earth simply contact Wilmar directly about its concerns.¹⁶⁸ It is clear to us that this approach of attempting to disclaim responsibility by disclaiming direct connection to the plantations is inadequate, as it does not prevent Wilmar from financing abuses in the palm industry.

Meanwhile, all the while that ING has known or should have known of the harms and the inadequacies of Wilmar's responses at these plantations, ING has continued to provide repeated (in 2010 and again in 2017) and substantial loans totaling at least \$250 million to Wilmar. Given the general nature of the financial business relationship (general corporate loans), which can be used by client companies for any and all activities, it is likely that at least a portion of the proceeds of those repeated, substantial loans

¹⁶⁷ Gert Jan Rohmsen, De Trouw, "Illegale kap Indonesië stopt niet," 21 November 2013, available at <https://www.trouw.nl/home/-illegale-kap-indonesie-stopt-niet--aff132da/>.

¹⁶⁸ Email from ING to Milieudedefensie, December 2015, in response to report *Exploitation and Empty Promises: Wilmar's Nigerian land grab*, July 2015, available at https://www.foeeurope.org/sites/default/files/corporate_accountability/2015/foe_exploitationandempty_lowres_rev.pdf.

were used for to be for the high-risk activities of MOPP, PT Milano and PT Daya. There is no evidence that ING requested that its funds not be used for the high-risk activities being carried out by MOPP, PT Milano and PT Daya. Even only a small portion of the proceeds of the loans ING provided to Wilmar was used by MOPP, PT Milano and PT Daya for the plantations in questions, the large amount of the loans and their repetition means that ING's contribution can only be considered to have been substantial.

Once the risks had been identified, proper implementation of a due diligence policy should have required ING to take action to assess the risks, implement a plan to mitigate or prevent the risks, track outcomes, communicate to stakeholders what responsive actions were underway, and integrate improved procedures into its handling of investments. Critically, such action should have resulted in actual improved practices by MOPP, PT Milano and PT Daya. Instead, whatever steps ING did take did not actually prevent or mitigate the ongoing harms. ING's sustainability performance loan to Wilmar, following the damning report by Amnesty and Wilmar's development of a responsive Action Plan, seems intended to support and encourage Wilmar's efforts to reform its practices. However, because Wilmar's Action Plan will not prevent all of the harms from occurring in future (but indeed risks worsening conditions for families), and because the Plan makes no attempt to remedy the harms caused in the past, the Plan still largely perpetuates business as usual at PT Milano and PT Daya, while making no changes at other plantations. That means that ING's financing perpetuates, facilitates, encourages business as usual – and ING knows this, given the public discussion of the Plan's shortcomings.

Because ING repeatedly funded Wilmar through the period of the harms by MOPP, PT Milano and PT Daya, while knowing of them, and yet while failing to implement due diligence measure that actually mitigated the impacts, ING has come to contribute to those harms.

6. ING'S RESPONSIBILITIES AS A CONTRIBUTOR TO THESE IDENTIFIED HARMES

As described in section 4 above, as a contributor to the harms to which it was linked through its clients Noble, Bolloré/Socfin, and Wilmar, ING has a responsibility to address these harms:

- ***General Policies A11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.***
- ***Human Rights 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.***
- ***Human Rights 6: Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.***

Commentary 19 explains that “If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible.” As for remediation, commentary 4 notes that “addressing actual and potential adverse human rights impacts consists of... remediation of actual impacts, and accounting for how the adverse human rights impacts are addressed.” Regarding leverage, Commentary 19, 20, and 42 explain that “Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.” An enterprise can act alone or in cooperation with other entities to encourage the company causing the adverse impact to prevent or mitigate it.”

There are thus three steps for ING to follow here: ING must address the impacts to which it is contributes by 1) ceasing its contribution, which may require divestment, 2) providing or participating in remediation, and 3) using its leverage to mitigate any remaining impacts to the greatest extent possible.

The OECD's guidance on Responsible Business Conduct for Institutional Investors sets out the logical, step-by-step considerations for an investor in deciding when to end a business relationship.¹⁶⁹ The analysis is based on whether the relationship is crucial or not to the financier, and whether the financier has leverage or not over the client. The general guidance is that financiers must mitigate the risk that abuse occurs, and if unsuccessful in mitigating the risk, seek to increase leverage to mitigate the risk of the abuse, and if that is deemed unsuccessful or impossible, to consider ending the relationship with the client in a responsible manner with consideration of the human rights impacts of termination.

ING is now no longer only directly linked to the negative impacts caused by the business relationships detailed above, but is itself contributing to the negative impacts. The Guidelines and the OECD's guidance for institutional investors both suggest that ING must immediately its contribution by either immediately ensuring that the impacts stop or, if that fails, ending the financing that comprises business relationships responsibly. Moving forward, we call on ING to take these three steps of ceasing its contribution, participating in remediation, and increasing leverage to mitigate remaining impacts in order to begin meeting its responsibility regarding impacts to which it is contributing.

7. REQUESTS AND STATEMENT OF GOOD FAITH

A. Requests of the Dutch NCP

We respectfully request that the Netherlands NCP offer its good offices to facilitate mediation between ourselves and ING to resolve the OECD Guidelines breaches discussed in this specific instance. We have communicated with ING for two decades regarding the adverse impacts ING supports in the industrial palm oil sector, but we have been unable to achieve meaningful change in ING's policies and practices. Therefore, we ask for the Netherlands 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 ING has breached the Guidelines. We request the NCP to provide recommendations on what steps ING should take to address the harms to which it has contributed and on how ING can improve its due diligence in order to avoid contributing to further adverse impacts in the palm oil sector in the future. It would be useful if the NCP could elaborate on whether statements from (other) NCPs on the non-compliance of the OECD guideline of investees should lead to divestment or other actions by their financiers.

We ask the NCP to discuss and put forward their arguments on what the government of the Netherlands should do to prevent further financing of abuses in the palm oil sector, including which elements should be included in binding regulation for the financial sector, such as but not limited to those forthcoming from the European Commission action plan on sustainable finance.

¹⁶⁹ OECD, *Responsible Business Conduct for Institutional Investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, 2017, pg. 40-41, available at <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.

Such an outcome could prompt meaningful changes in the investment policies and practices of ING as well as other multinational financial institutions. Such an outcome could also help the communities impacted by ING's clients by preventing harms from occurring or achieve remedy for harms they have already incurred.

B. Requests of ING

We hope that facilitated dialogue between the parties would result in the following:

- ING's immediate halting of its contribution to the ongoing harms mentioned in this complaint by responsibly divesting from the clients named in this complaint and – because the industrial palm oil sector and specifically;
- ING's inclusion of improved sustainability criteria in its financing contracts, and also of a clause requiring clients to consent to ING's disclosure of its relations with them to facilitate full communication of ING's due diligence activities.
- ING's public disclosure of its engagement with all of its clients regarding their environmental, social, and human rights-related risks and impacts, including the nature of ING's engagement and outcomes and timeframes demanded of clients by ING.
- ING's development and publication of a new ESG risk-averse investment model. For the agro-commodities sector, the model should prohibit investments in high risk industries and support financing of a transition from industrial agricultural production to agro-ecology and community-based land and forest management.
- ING's development and publication of due diligence methods that guarantee credible and timely information, including through use of local information sources and supply chain responsibility. In our understanding, financiers too often rely on commercial data providers to assess their portfolio and/or specific companies. Data is mainly based on annual reports, questionnaires, and a media scan. As a result, local and "real-time" information is absent, and risks in complex supply chains are not meaningfully analyzed. analysis. We call on ING to develop improved data collection procedures that improve its awareness of harms linked to its clients.
- ING's development and publication of clear criteria and procedures on when and how it will divest responsibly from clients linked to harms, when ING's engagement and leverage efforts have failed to resolve adverse impacts. Such procedures should lay out the trigger points and timelines that will guide ING's systematic efforts to increase leverage, mitigate harms, and ultimately divest from harmful investments.
- ING's participation, independently or with its clients and peer financial institutions, to contribute to redress and remediation for communities and workers impacted in case examples 5.B and 5.C. And to ensure restoration of HCV and other environmental values in case example 5.A

C. Statement of good faith

We attest here our desire to engage in the Netherlands NCP procedure in good faith, with respect towards all parties, with the goal of bringing ING's practices into alignment with the OECD Guidelines,

for the improvement of the lives of people implicated by the harms identified in this complaint. We will respect the confidentiality of any mediation proceedings that may result from this complaint; however, we intend to keep the public informed about the nature of the complaint, our demands, and the overall progress of the complaint as it moves through the stages of the NCP's review process.

8. CONCLUSION

This specific instance has established how ING has breached provisions of the OECD Guidelines by contributing to adverse environmental, human rights, and labour rights impacts through its investments in major palm oil companies Noble Group Ltd., Bolloré/Socfin Group S.A., and Wilmar International Ltd. ING's structural support of the palm oil industry has contributed to the systematizing and embedding of serious adverse impacts within the palm oil sector. ING has had ample actual and constructive notice of the harms of its clients in the palm oil industry, yet its due diligence practices have not led it to take meaningful action to prevent, mitigate, or cease support of these harms. It is ING's notice of the harms to which it is directly linked, coupled with its failures to motivate reform by the clients and achieve mitigation through its own due diligence, that has made ING a substantial contributor to many of those underlying harms. This specific instance seeks remedy for the harms ING contributed to and reform by ING to improve its environmental and social impact moving forward.