

Increasing leverage working group

Progress report phase I



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The Social and Economic Council in the Netherlands

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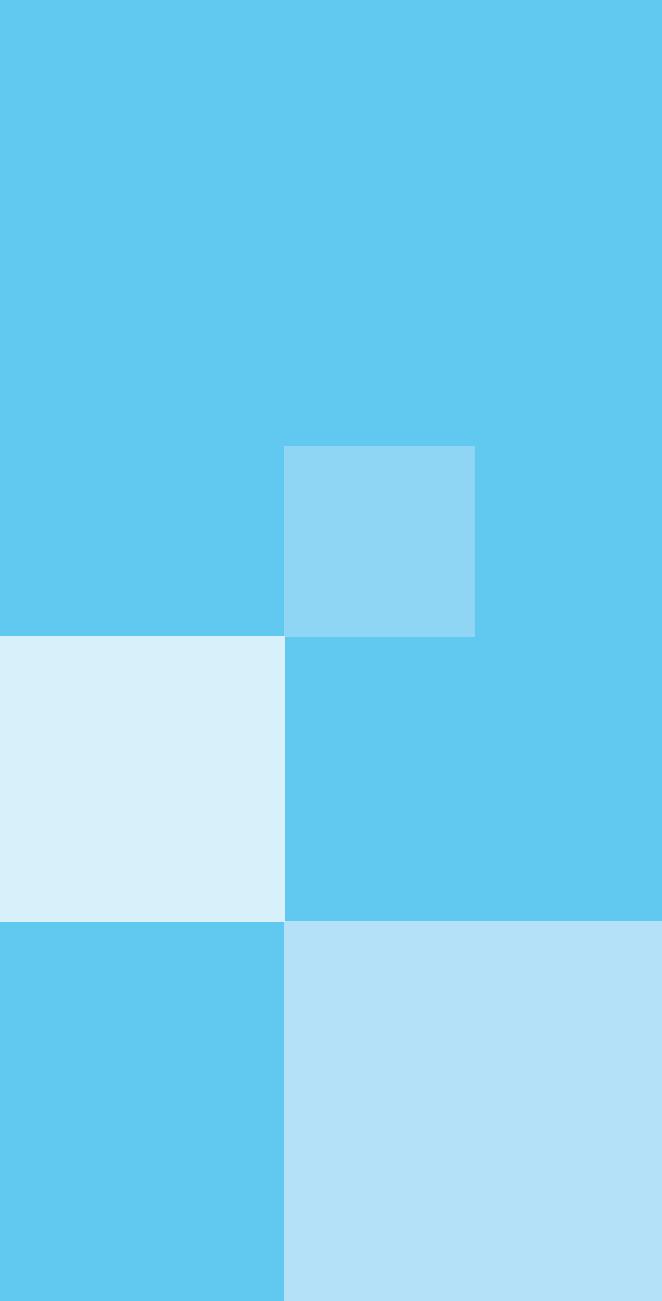
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Dutch
Banking Sector
Agreement

1

Introduction

In the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights (hereafter: DBA or the agreement), the Dutch Banking Association, government, trade unions and civil society organisations (CSOs) (further referred to as the ‘parties’) and adhering banks have joined forces to:

achieve a material positive impact for people (potentially) facing adverse human rights impact (related to the activities of clients of the Dutch banking sector) and to search for solutions to address problems that an adhering bank cannot solve by itself.¹

Among other things, the adhering banks have committed to bring their human rights policies and due diligence processes in line with the OECD Guidelines and UNGPs with the support of the parties. There are no blue prints on how to do this in practice. Therefore, within the DBA, parties and adhering banks jointly develop an understanding of what relevant concepts described in the OECD-guidelines and UNGPs mean in the context of project finance and corporate lending².

One of the goals of the DBA is for the parties and adhering banks to ‘increase leverage’. The DBA states (in article 9.1) that:

Agreements on international responsible business conduct offer companies the opportunity to work jointly at the sector level in conjunction with the government and other parties to address specific complex problems in a structured and solution-oriented manner and thus to increase their leverage.

Therefore, the parties and the adhering banks agree to work together and commit themselves to conducting and publishing a study on good practices of how to increase leverage when supporting companies to improve responsible business conduct regarding human rights for the different types of financial services, including corporate lending and project finance by the end of 2017.

This report on increasing leverage provides an overview of the work carried out in 2017 by the working group that was set up for this purpose (hereafter Working Group). The report presents established definitions of leverage and shares related concepts discussed as part of the 2017 work. It then focusses on the role that the DBA parties and adhering banks can either individually or jointly play to increase leverage in order to “achieve material positive impact for people (potentially) facing adverse human rights impacts”. This is done from a broad perspective, beyond the traditional commercial leverage. Therefore, the report includes a broad range of

¹ SER (2016) Dutch Banking Sector Agreement, p. 7.

² This is the defined scope of the DBA

topics related to leverage, and also considers the role of other actors besides banks and their clients.

The report is drafted by the Working Group. It is based on engagement with and content developed by a group of expert advisers from SILA Consulting (hereafter: the SILA team), commissioned by the Working Group³. The report also builds on work previously carried out by Shift. By way of this report, parties aim to contribute to the explorative work being done and to contribute to setting standards in the area of increasing leverage. By no means should this report be seen as an end note: it is intended as an exploration of potential next steps to achieve positive impact, through exercising leverage by adhering banks, parties and by joint multi-stakeholder initiatives. In chapter 5 the report provides a first start of what kind of steps one can think of. To build the argument, this report sets out to explore the following questions:

1. What does increasing leverage mean? A theoretical overview is provided to ensure that all parties share the same understanding of the concept.
2. How do banks apply leverage to date? A concise and high level overview.
3. Increasing leverage in the context of the DBA:
 - a. What is the role of the adhering banks and other parties when increasing leverage?
 - b. How can collaboration increase leverage?

For all parties and adhering banks, the DBA provides a new way of working together. Notwithstanding the individual obligation of banks to take their responsibility to respect human rights, all DBA parties and adhering banks believe that under particular circumstances by joining forces, collective leverage may exceed the leverage of the individual organisations. Simultaneously, it is also realised that it takes time to find out exactly how the biggest impact can be attained.

Therefore, with the present report, parties not only wish to share the outcomes of this process, but also the insights they have collected along the way.

³ The group of experts is comprised of: Andrea Saldarriaga, director of SILA Consulting and advisor on business and human rights and visiting fellow at the London School of Economics and Political Science; Mark Hodge, independent advisor; Andrea Shemberg, advisor on business and human rights and dr. Simon Bailey, Industrial Fellow at Alliance Manchester Business School; and Kinanya Pijl, PhD Researcher in Law at the European University Institute. SILA has conducted its work during the second half of 2017 and it delivered an internal report (hereafter the SILA 2017 Report) that included: i) a summary note of key findings and proposed areas for action for the DBA parties; ii) a visual presentation of key concepts and normative expectations set out in the UNGPs regarding leverage; iii) a series of 'topic cards' presenting the 'topics' that impact on the exercise of leverage and the ability of the DBA parties to collaborate to increase leverage and providing a catalogue of practices of exercising leverage by bank and other parties and ideas for moving forward (these ideas for action are included in this document as Annex 1); and iv) a framework to understand 'leverage in practice' (included in this report as Annex 2). The work of the SILA team consisted of desk research and a dialogue-based process that included interviews with various Dutch and international CSO and banks, as well as a series of workshops with DBA parties.

Firstly, the theoretical framework on the core concepts around leverage, the roles of the organisations involved and also the potential opportunities for cooperation are presented.

2

What does increasing leverage mean?

A theoretical overview provided to ensure that all parties share the same understanding of the subject

Both human rights due diligence and the concept of leverage are part of a relatively new and evolving field.¹ It is important to develop a common language and shared understanding of what (increasing) leverage means. To be able to collaborate effectively, the parties explored the definition and key concepts of leverage. The SILA team supported them in the process by providing information on relevant concepts and by collecting input on how the parties in this agreement and other relevant stakeholders view and apply leverage.

The concepts described below are intended to serve as the basis for the ‘Next steps to be considered’ by the working group in the context of increasing leverage, which are further described in chapter 5 of this report.

2.1

Defining leverage

Leverage is an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact – The Corporate Responsibility to Respect: UN Interpretive Guide.

The UNGPs expect companies, as part of their baseline responsibility to respect human rights, to build and apply leverage in a variety of circumstances. Under the DBA, parties and adhering banks studied potential means to increase leverage as an individual and/or joint effort of government, banks, trade unions and CSOs in the context of a bank’s corporate lending and project finance activities.

The UN guidance goes on to illustrate what the above definition can mean in practice:

‘Leverage’ over an entity (business, governmental or non-governmental) in this context may reflect one or more factors, such as:

- a. Whether there is a degree of direct control by the enterprise over the entity;
- b. The terms of contract between the enterprise and the entity;
- c. The proportion of business the enterprise represents for the entity;

¹ Leverage is part of human rights due diligence. For more information on human rights due diligence, see the UN Guiding Principles or <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence>.

- d. The ability of the enterprise to incentivize the entity to improve human rights performance in terms of future business, reputational advantage, capacity-building assistance, etc.;
- e. The benefits of working with the enterprise to the entity's reputation and the harm to its reputation if that relationship is withdrawn;
- f. The ability of the enterprise to incentivize other enterprises or organisations to improve their own human rights performance, including through business associations and multi-stakeholder initiatives;
- g. The ability of the enterprise to engage local or central government in requiring improved human rights performance by the entity through the implementation of regulations, monitoring, sanctions, etc.

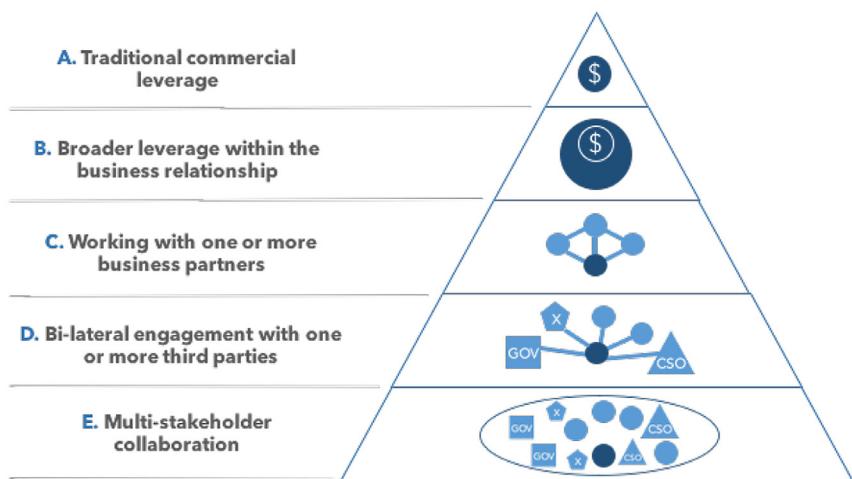
The UNGPs apply to all States and to all business enterprises. Being one step removed from the company, this study takes it that factors related to corporate leverage equally apply to banks. The ultimate goal of increasing leverage as described in the UNGPs and in the context of the DBA, is achieving a positive impact for people (potentially) facing adverse human rights impact. Therefore, it is worth exploring the concept of risk to people as well, when considering leverage. Risk to people or 'human rights risk' is distinct from business risk and from traditional understandings of materiality. Translating this concept to banking, the focal point is not the harm that may result to a bank's bottom line, access to markets or reputation. Rather, it is on the harm that is done or might occur to workers, communities, consumers and human rights defenders in relation to activities financed by banks when providing corporate lending or project finance services. Although business risk and risk to people are distinct concepts, there is a relation between the two. Companies experience value erosion and opportunity costs when they are involved in adverse human rights impacts. The 'North star' for a company's human rights due diligence and engagement should always be about risks and impacts to people. For parties and adhering banks the objective of leverage should be risks and impact to people. As this focus of risk to people differs from traditional understandings of business risk and materiality, it asks for non-traditional responses. These responses in many cases require interaction with other actors, often non-business actors.

2.2

Various modes of building and applying leverage

There are different ways to build, increase and use leverage that banks should be exploring as part of their responsibility to respect. They range from traditional commercial leverage to multi-stakeholder collaborations:

Figure 2.1 Modes of building and applying leverage



Source: the SILA 2017 Report. Adapted by M. Hodge from diagram in Shift, "Using Leverage in Business Relationships to Reduce Human Rights Risks". New York, 2013; Figure One, Page 6.

Diagram notes

A version of the diagram was first developed and published by Shift in 2013 in a report titled Using leverage in business relationships to reduce human rights risks². It includes five categories for how a company can apply leverage:

- **Traditional commercial leverage:** leverage that sits within the activities the company routinely undertakes in commercial relationships, such as contracts.
- **Broader business leverage:** leverage that a company can exercise on its own, but through activities that are no routine nor typical to commercial relationships, such as capacity-building.
- **Leverage together with business partners:** leverage created through collective action with other companies in or beyond the same industry.
- **Leverage through bilateral engagement:** leverage generated through engaging bi-laterally and separately with one or more other actors, such as government, business peers, an international organisation, or a civil society organisation.
- **Leverage through multi-stakeholder collaboration:** leverage generated through collaborative action – collectively with business peers, governments, international organisations and/or civil society organisations.

² Shift (2013) Using Leverage in Business Relationships to Reduce Human Rights Risks, p. 6.

This diagram does not represent the universe of a company's necessary stakeholder engagement efforts, nor is it intended to suggest a sequence or hierarchy of approaches. It does, however, provide an overview of the types of leverage that can be exerted. Under the DBA, based on the theory set out above, the working group studied current and potential practices to increase leverage by banks and parties, both individually and jointly, and in collaboration with other stakeholders, in the context of a bank's corporate lending and project finance activities. The next chapters will reflect on this potential for increased leverage by banks and DBA parties. Chapter 3 provides an overview of how banks apply leverage today, while chapter 4 specifically addresses multi-stakeholder collaboration.

3

Banks and increasing leverage

3.1

How do banks apply leverage to date?

This chapter gives a concise and high level overview of how banks apply leverage to date, and describes some relevant factors to take into account when thinking about how banks apply leverage (such as the type of financial product, organisational aspects and the commercial context, and internal leverage).

Financial products and services within the scope of the DBA are corporate lending and project finance. It is not necessary to have an in-depth understanding of all complexities of these types of financing in order to discuss the potential for leverage. At the same time, some basic knowledge about how commercial deals work in practice does provide a helpful basis to explore increasing leverage. It can help avoid either inflating or under-representing how much leverage any given bank or group of banks has in a given situation. Furthermore, it is worth bearing in mind that every financial institution in the world is different in terms of product range, services and lending portfolio, and thus its ability to affect change.

Some simple definitions:

- **Corporate lending** involves setting up debt-based funding arrangements between a financial institution and a business. The proceeds of loans may be used to fund large capital expenditures and/or operations. There are several different forms of corporate lending, including working capital, acquisition finance or financing to bridge a cash flow gap.
- **Project finance loans** are provided as bank loans to a distinct legal entity – a Special Purpose Vehicle (SPV) – that has been formed to build and operate a project. An SPV is created by a corporation or number of corporations. A significant feature of a project finance loan is that loan returns are tied to cash flows and fortunes of the respective project and not secured against the parent company's or parent companies' assets.

In the context of banking, the traditional interpretations of leverage focusses on the commercial relationship between a bank and its client. This relationship may entail legal and financial incentives that encourage the client to address human rights risks in its operations. Examples are contractual clauses or, more recently, economically rewarding the client for improvements in its human rights performance.

Without being conclusive, some of the basics that are relevant when thinking about human rights due diligence and leverage in this respect include that:

- characteristics of certain financial products may make it more challenging for a bank to conduct in depth due diligence and affect the nature of a bank's leverage. Most banks in the DBA offer corporate lending and project finance products and services, and many more, in different degree per bank. While project finance may be part of the core business of one bank, another may only occasionally conduct this and focus on other activities. The bank's products profile defines the relationship between bank and client, and also how the bank can most effectively leverage this relationship;
- an example of the above is the difference in levels of due diligence conducted for different services provided. Due diligence for corporate lending does not reflect on each and every business operation of the corporate. By nature, high level due diligence screening provides general insights only. In project finance, where the bank has won the role of a Mandated Lead Arranger, in-depth due diligence screening is conducted providing in depth knowledge and arguably better ability to conduct leverage;
- in some other transactions, the ability to leverage will in part be defined by other actors involved in financing part of the operations, being either the operator(s) of the project, equity investors, or other bank(s) assigned the role of Mandated Lead Arranger in a syndicate;
- syndicates can have a large number of banks within them, with different roles, takes and sometimes with different levels of commitment to social and environmental performance, decreasing options for standard setting or joint leverage;
- some bank-client relationships are long-standing over multiple years allowing options for engagement at senior management level, while others can begin and end within a very short time frame.

It is important to emphasise that neither the complexity nor the number of actors in a deal, nor the purpose of a loan are relevant factors when determining whether a given bank *should* attempt to build and use leverage and conduct a sufficient due diligence. Under the UNGPs, all banks should do so if they are somehow involved in (potential) harm to people. Depending on the client relationship and thus its ability to effect change, these banks should explore how they can exert and, if necessary, increase their leverage most effectively. If a bank contributed to an adverse human rights impact, the bank also has a responsibility to contribute to remedy for the impact.

3.2

Possible aspects (or fields) to increase leverage

3.2.1 Organisational aspects

A bank's internal organisation is a relevant aspect with regard to leverage. While some banks have separate policies, procedures and dedicated employees for human rights, others have embedded human rights in broader social and environmental risk management procedures. This is reflected by the different ways they perform human rights due diligence. Although there is not one way that suits all, there is potential for peer learning on these organisational aspects.

Another way of mutual support to achieve optimised internal conditions for exercising leverage effectively, is raising awareness and commitment levels among internal stakeholders. This is part of building internal leverage. It can be achieved by developing the skills and knowledge of relevant staff on human rights by organising joint trainings among peers and all parties. Government, CSOs and trade unions can contribute their specific knowledge to this process.

There is also potential for collaborating on human rights policies. There are some important differences in the way the adhering banks have designed their human rights policy commitments. Some have integrated human rights elements in sector-specific Environmental, Social and Governance risk policies, while others have stand-alone policies. Also, the way in which banks operationalise these policies throughout their entire organisations differs significantly.

As these policies do not concern specific client cases nor commercially sensitive information, DBA parties and adhering banks are not hindered by legal or regulatory constraints on cooperation. Policies can play an important role in applying leverage: they set the norm for banks to adhere to, which cascades to their clients. Additionally, international policy coherence can contribute to a level playing field and sends a message to stakeholders about what banks deem expect from their clients regarding responsible business conduct (RBC).

3.2.2 Commercial context and clients

Exercising leverage in the commercial context might benefit from multi-stakeholder cooperation. Joint efforts might increase the client's awareness of possible human rights risks involved in a business case and might also support his capabilities to manage these risks. Efforts can also be geared towards other banks and financiers to level the playing field. Other parts of the client's value chain can be explored, in order to detect parties that are better positioned to exert leverage on the client. This could be the case when a client would have key customers that are in turn clients of the Dutch banks. Alternatively, one of the DBA CSO parties

could have local operations in the home countries of the specific client, also possibly enabling exerting leverage.

Other relevant actors to level the playing field in the banking industry are regulators, industry bodies and international organisations. A good way to address client capability issues in general would be to focus on industry associations and standards, so that the DBA partners and others raise the bar of social and environmental standards and practices in key industries, such as the cocoa value chain. It would be interesting to explore the possibility for the DBA partners to collaborate with other sector-specific agreements, such as those on gold, insurance, sustainable forestry or the food industry.

As to the clients' capabilities on social and environmental issues – and human rights in particular – banks note how their clients have very different levels of awareness about these issues. They also point out how this leads to differing understandings of the reputational, financial and legal risks that these issues can pose to companies. The same goes for the other side of the coin, the potential opportunities emerging from adequate management of these issues. Banks have indicated that client performance (and willingness to act) on managing social and environmental issues and human rights, apart from awareness, also depends on the sector, market pressure, company size, financial capacity and other factors. Therefore, the client's knowledge, commitment and performance on human rights are important factors for banks to take into account when applying leverage.

3.2.3 Internal leverage

There is also an important internal dimension to leverage. Creating the right conditions for an individual company to build and exert leverage requires one or more individuals to wield their power and influence inside the organisation. This use of 'internal leverage' will be taken into account in the DBA.

There are several conditions or ingredients that organisations typically need to have in place in order to effectively apply internal leverage. These include leadership commitment, policies and processes, internal coherence, management capabilities, resource commitments and some level of external pressure or incentive. All companies need to constantly address these areas in order to be optimally prepared to build and apply leverage in a given situation. The objective and spirit of the UNGPs is that all companies are prepared, nimble and dynamic when they need to exert leverage. In practice, activating a large organisation to act can take time.

4

Increasing leverage in the context of the DBA

4.1

What is the role of the adhering banks and other parties when increasing leverage?

Leverage might be established and applied to the client by the bank. But it may also be expedient to increase and apply leverage with others. These others can be other banks in a syndicate, local or national government or other enterprises in the client's value chain. In the context of the DBA, this means that all DBA parties and adhering banks have an individual role, but also have a joint role to play when it comes to increasing leverage. Below you will find an analysis of the roles that each of the parties to the DBA play and can play.¹

4.1.1 Banks

As the bulk of this report describes how leverage can be exercised in the banking domain, in particular regarding project finance and corporate lending, banks are considered the lead player throughout the document. They can increase leverage on their clients, possibly by using internal stakeholders optimally and by cooperating with peers and other stakeholders. They can set or raise the bar and can help creating a level playing field in specific cases, in the Netherlands or internationally. How they can do this and where they can find their best entry points for exerting leverage depends on their size, client base, products, locations and internal organisation. Please see chapter 3 and 5 for more information on the role of the banks.

4.1.2 Civil Society Organisations

CSOs carry out a broad range of activities to pursue their organisational mission. These include, among other things, advocacy through campaigning as well as collaborative work with banks, companies and other organisations. Other important aspects of their work are the research they perform, the contacts they maintain 'on the ground', close to impacted communities. They thus gather information they could provide to banks.

It is important to recognise that each CSO has its own focal areas and way of working. Some CSOs have a main focus on campaigning, while others may focus

¹ Source: the SILA 2017 Report and subsequent reflections of the working group.

more on research or dialogue. Some choose to do all three. CSOs may choose to adopt one of these roles according to circumstances. However, within all these roles, CSOs can exert leverage and can contribute to the leverage of other parties in the DBA.

On the basis of their knowledge and research, CSOs can provide input for the human rights policies and practices of banks. They often have information on specific topics or regions that may be used to conduct human rights risk analyses or can be used for client engagement. There may also be possibilities for CSOs to play a role in creating internal awareness and mobilise leverage in banks. If CSOs and banks coordinate their efforts to effect change in a certain region or on a specific human rights topic, public advocacy by CSOs could be a powerful addition to banks engaging individual clients. Another example of CSOs' contribution to building knowledge and awareness is their participation in round tables and other forms of multi-stakeholder initiatives. Examples are the Roundtable on Sustainable Palm Oil (RSPO) and the Land Governance Multi-Stakeholder Dialogue.

4.1.3 Trade Unions

The roles of trade unions in the context of increasing leverage are similar to those of CSOs. They too can help build internal awareness and leverage within banks and may have access to information or people through their local networks. Just like CSOs, trade unions have roles in both campaigning and dialogue, depending on the organisation, the issue and the context.

Trade unions focus on specific topics. Their natural role lies within the context of labour rights, such as wages, freedom of association, health and safety, and other core International Labour Organisation standards.

4.1.4 Government

The UNGPs set out a number of roles for government regarding its duty to protect human rights. For examples, the state should exercise effective oversight, communicate expectations, ensure policy coherence and provide guidance to companies. Within the DBA, the Dutch government can use a number of these roles to contribute to the leverage of the banks.

In this specific context of banking and human rights, the Dutch government fulfils different roles, including that of regulator, insurer (through Atradius Dutch State Business) and also as shareholder in various banks (such as FMO). Various ministries and agencies (such as the Netherlands Enterprise Agency RVO) deal with aspects relevant to banking and human rights, including financial regulation, client confidentiality, disclosure requirements, the definition of responsible business conduct standards and the promotion of trade and investment. There is potential

for the government to work on internal leverage by educating and supporting different parts of government that shape banking practices on human rights. These include parts responsible for banking law, anti-trust regulations, investment, trade and labour.

In addition, the Dutch government is an equal partner in multi-stakeholder initiatives. This implies a role beyond that of regulator or facilitator. A good example is the number of Agreements on Responsible Business Conduct, such as the DBA. The Dutch government is uniquely positioned to identify and promote opportunities for collaboration among the different agreements to increase potential for leverage by all relevant stakeholders, including banks, CSOs, and companies.

The Dutch government procures around sixty billion euros worth of services and supplies annually. These consist of expenditures on for instance roads, bridges, home care, and school books. Procurement can be a vital tool for ensuring respect for human rights.

The government has access to a lot of information and stakeholders. Through its embassies, trade missions, development activities and financial support to local CSOs, the Dutch government is present in the geographies where the banks' clients operate. This presence allows it to access local information and actors, including local CSOs, parties in the client's value chain and local government. This can be useful for Dutch banks and CSOs when they explore opportunities for using and increasing their leverage.

The combination of these different roles gives the government the potential to increase leverage.

4.2 How can collaboration increase leverage in banking? An ecosystem perspective

The incentives associated with traditional forms of leverage remain important to exert leverage and can be further reinforced. However, the issues that are being addressed may involve aspects that cannot be solved by an individual bank. This goes for instance for regulation or creating a level playing field. Therefore, addressing impacts on people usually requires awareness of, and engagement in, a variety of actors. These include non-business actors. This broad approach to leverage is called the ecosystem perspective².

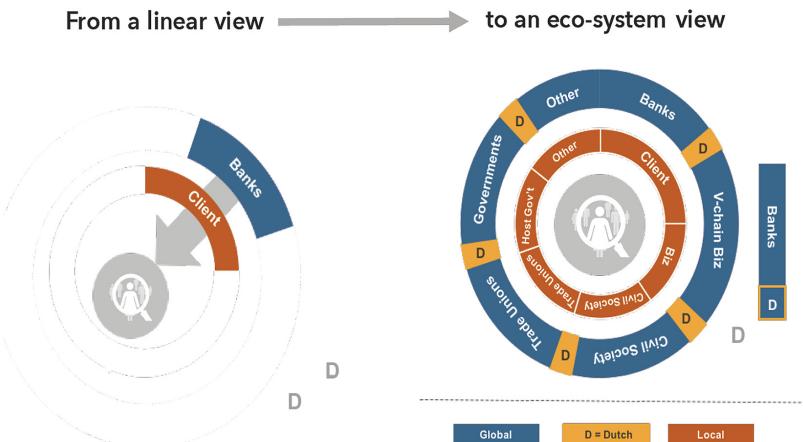
To give an example of some other potentially positive or negative drivers to human rights protection for workers, communities and consumers:

² Source: the SILA 2017 Report.

- local and national government in a country where an adverse impact did or might occur;
- international and local trade unions. These may be well-positioned to empower workers through collective bargaining;
- domestic and international businesses as customers of the bank's client. These may, and often should, also be exerting leverage;
- local human rights defenders, civil society groups and their international counterparts supporting them.

This perspective, which is inspired by Shift's earlier thinking of different types of leverage, takes a very holistic view of how diverse stakeholders (not just business) can play a role to effect change. This approach should not result in any stakeholder to paralysis nor should it diminish or replace individual leverage of a bank stemming from the client relationship. In fact, traditional commercial leverage in action is part of the eco-system.

Figure 4.1 Applying leverage from a human rights ecosystem view



Source: the SILA 2017 Report.

Diagram notes

- The diagram offers a simplified schematic of an ecosystem with the types of actors that might be significant for impacts on people.
- A simplification in the diagram is the split between actors who are physically 'close to impact' and those who are not – and are therefore categorised as 'global'. The intent is to illustrate important local and national dynamics such as the presence or lack of meaningful civic space and courts of law.

- Every segment of the ecosystem has the potential to advance or hamper efforts to address harm to people. Leverage might therefore be applied anywhere in the system.
- The diagram does carry the risk of suggesting that all actors have equal power to bring about change. This will in reality rarely be the case.
- Dutch banks, CSOs, trade unions and the Dutch government normally represent only part of an ecosystem. This is reflected by the orange D in the figure.

This ecosystem approach will be the basis for cooperation in the DBA. It is assumed that leverage will be established and applied to the client by the bank. It may be expedient to increase and apply leverage together with other actors. These might be other banks in a syndicate, the local or national government or other enterprises in the client's value chain, trade unions or CSOs.

With regard to 'internal leverage', so far only the banks were mentioned. But the same arguably also applies to the other parties involved in the DBA. As this is a new way of collaborating, internal stakeholders of parties and adhering banks may need to be convinced first, before collective action can be taken. Certain opportunities to increase and apply leverage may be easy to commit to, whereas other potential inroads may require substantial effort to inform and persuade colleagues before action becomes a possibility.

5 Next steps to be considered

5.1 Domain and objectives of intervention

In this working group, current practices have been shared by the parties and suggestions for increasing leverage have been made by the SILA team. Mapping the field, the objective was not to be conclusive. The working group has not discussed let alone tested, each and every option suggested by the parties or the SILA team¹. As such, parties in the DBA would not be able to advise on the most appropriate and effective means of leverage under which circumstances. Even so, what did become clear, is that in the context of corporate lending and project finance, the ecosystem approach offers a range of opportunities for (joint) intervention at different levels. Governments, CSOs, trade unions and banks may individually or jointly consider to focus on increasing leverage:

- according to the fact set of a specific case, client or transaction;
- in relation to a particular human rights issue (e.g. land rights, health and safety, or discrimination);
- in relation to the general commitment and capability of the business community to meet their responsibility to respect human rights around the world;
- in relation to the general commitment and capability of the banking sector to meet their responsibility to respect human rights around the world; and/or
- for States to meet their human rights obligations and remedy to be delivered to victims.

Leverage can be exercised:

- in response to actual adverse impacts that have occurred which can be understood as a responsive effort; and
- in response to the risk of adverse impacts which may happen in the future which one can understand as a pro-active effort (which includes being prepared to use leverage in a specific case if needed in the future).

Based on these insights, the Working Group identified a number of opportunities. In the first phase of this working group, the DBA parties and adhering banks explored the most important elements of the relevant organisations and their individual roles which allowed for the identification of some opportunities based

¹ All ideas for action identified by the SILA team are included in Annex 1.

on the eco-system approach. These opportunities cover three different areas of leverage: organisational aspects, access to and sharing of information, and the commercial context.

5.2

Organisational aspects

Banks can engage in sharing experiences and collective reflections via peer learning sessions on specific issues such as the improvement of human rights due diligence. It would provide an opportunity to share best practices, look at individual case studies (considering confidentiality limitations) on important themes (environmental, social), and discuss the incorporation of tools and incentives for better internal performance. From these discussions and learnings, training can be developed to improve internal leverage. It would also be beneficial to exchange positive stories where client support and engagement has yielded positive results and critically assess better approaches to assessing human rights risks.

Banks can also enhance their engagement of local stakeholders and continue to improve upon their human rights policies. Further, they could work to ensure coherent application of the bank's policies throughout the corporate group, subsidiaries and business relationships and encourage collective and individual responsibility.

5.3

Improve access to information and increase information sharing

The availability of reliable, current and relevant human rights information is a general challenge for banks. The access to this information is necessary to inform banks during their due diligence on the issues at hand and how best to apply leverage to address the potential impacts. There may be an opportunity of enhancing data collection by working more closely with embassies (including Dutch embassies), government representatives, parties engaged in trade missions and local stakeholders. Increased information sharing by CSOs and trade unions could also inform bank policies and lending practices.

The continued discussion and exchange of information by all parties on salient issues such as land rights and human rights defenders is also needed to ensure that solutions are taking multi-stakeholder views into account. The concept of exploring early stage cooperation where several parties are involved in certain international projects may also help to apply leverage effectively. Including industry experts from

the different organisations provides an opportunity for a more in-depth analysis of sector-specific issues. The continuing involvement in roundtable discussions is also key.

Finally, the continued engagement by the government, particularly as it relates to building capacity in the local communities would also improve leverage capacity and may help identify innovative projects and other relevant opportunities.

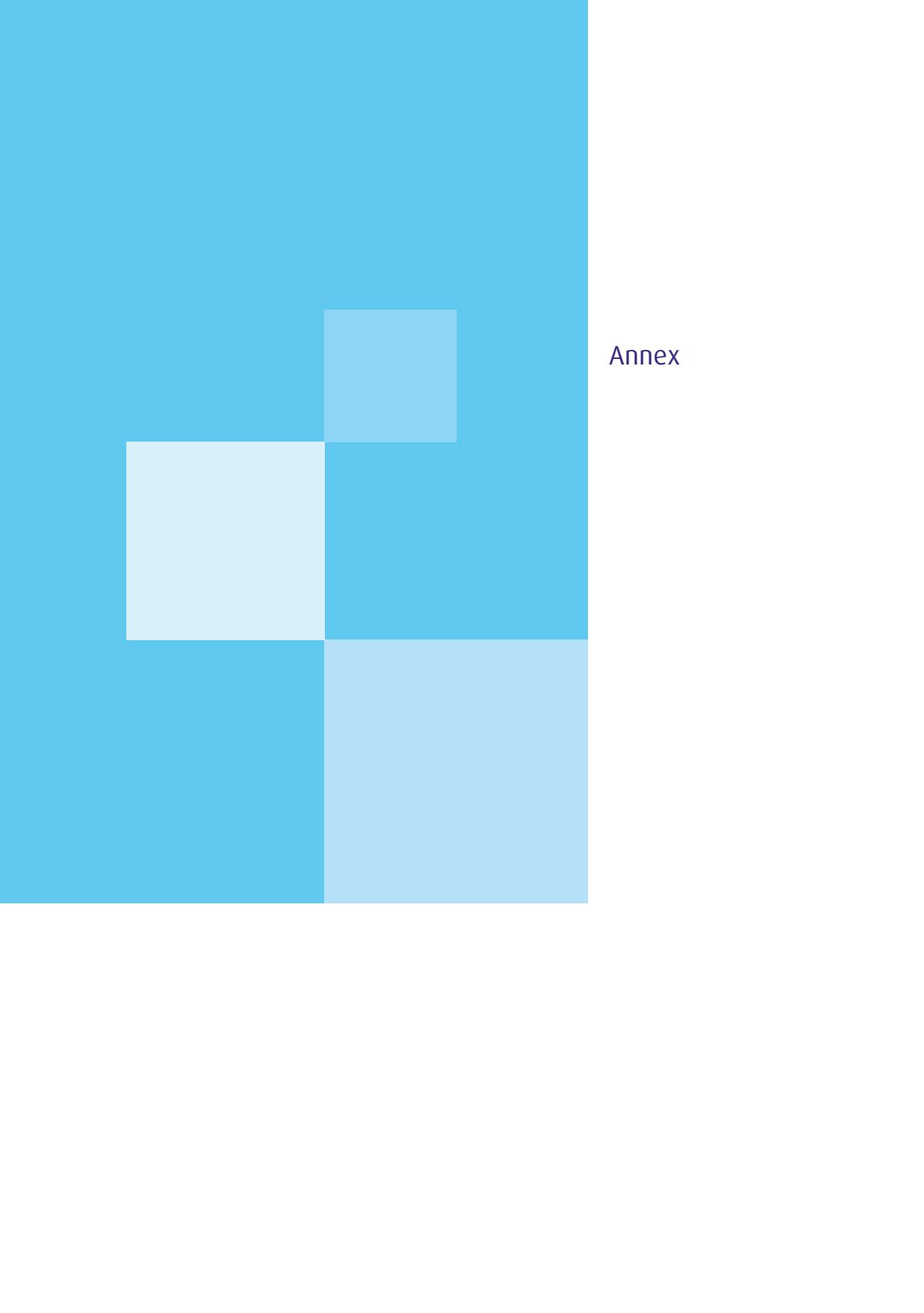
5.4 The commercial context

Banks can use both financial and legal incentives to encourage their client to identify, manage and address HR impacts and more generally make improvements in their social and environmental practices. These incentives are arguably some of the most important tools to influence clients to adapt their conduct to avoid or at least mitigate adverse human rights impacts through engagement and remediation. It is therefore an area to explore opportunities for innovation and collaboration, within the ambit for competition law. In this regard, peer learning is an opportunity whereby banks can discuss experiences with supporting clients, working in syndicates, and general purpose loans which pose unique constraints. The development of common tools, metrics, and training may also assist, particularly as it relates to challenging sectors or geographies. NGOs and the government can collaborate to also inform and further refine these incentives. A better understanding of the clients' knowledge and performance on social and environmental, and human rights issues might offer a measurable improvement on the ability to effectively apply leverage.

6 Conclusion

This report is an important step for the DBA: it offers parties the theoretical background and practical information to discuss and take the next steps to increase leverage. Parties believe that the ecosystem approach can be a valuable addition to the individual roles and activities regarding leverage.

By publishing this report, the parties share their vision. They hope the insights will help others to increase their own leverage.



Annex

Ideas for action identified by the SILA team

As mentioned in chapter 5, the SILA team has identified many different potential areas for organisations to increase leverage. The DBA parties have not decided which will be further explored and also emphasize that these recommendations have not been tested in practice. In this Annex, these ideas for action are included using the SILA 2017 Report's phrasing. They range from concrete ideas to broad concepts that require further research.

The SILA team developed these ideas for action to respond to the specific challenges and opportunities that the team identified in their work and engagement with the DBA parties. Ideas for action are therefore context specific and are organised according to the key 18 topics that the SILA team identified as impacting on the exercise of leverage and the ability of the DBA parties to collaborate to increase leverage. The ideas for action were a section in the "topic cards" that the SILA team prepared for each topic and were accompanied by contextual information such as current practises in exercising leverage and explanations on the timing and relevance of the ideas for action. The parties feel that also without this contextual information the ideas for action may serve as inspiration for organisations outside the DBA and therefore these potential opportunities are included.

1. The bank's policy commitment on human rights
 - Developing a common policy concerning human rights defenders that goes beyond considering them as impacted stakeholders and acknowledges the value of creating a safe space for civil society.
 - Learning about the outcomes of the different approaches to policy commitment by banks, in particular: (i) exploring the advantages/disadvantages of having the policy commitment as the main reference point for setting expectations on HR behaviour to the exclusion of contractual provisions; and (ii) exploring the advantages/disadvantages of standalone policies vs sectorial policies, including the challenges of aligning sectorial policies to the UNGPs.
 - Ensuring the coherent application of the bank's policies throughout the corporate group, subsidiaries and business relationships while allowing every part of the group (in particular local subsidiaries, branches, and joint ventures) to feel responsibility and ownership over local operations.
 - Exploring how to improve the integration of a human rights risk approach in policy commitments.

- Furthering understanding of how CSOs' strategies with regard to banks can support or hinder their progress on human rights.
 - Sharing good practices in producing and updating human rights policy commitments
2. Organisational aspects and internal governance of human rights
 - Developing the skills and knowledge of bank personnel (including board members, relationship managers, risks teams, commercial teams...) on human rights by organising joint trainings among the banks and consider taking recourse of CSOs' expertise on substantive issues.
 - Peer learning among social and environmental teams from banks to discuss and learn about their practices, including for example practices to ensure internal coherence and strengthen social and environmental teams.
 - Developing tools and incentives that integrate performance on social and environmental, and human rights including bank-wide KPIs. Although some banks have integrated human rights and social and environmental in their KPIs, this practice could be expanded – applied to all employees – and refined.
 3. Human rights due diligence practices
 - While human rights due diligence practices are the exclusive remit of banks, there are some areas where banks could benefit from sharing experiences and collective reflection with peers. In addition, in some other areas there can be opportunities for innovation and collaboration with other DBA members. A major point is to discuss and define a way for the DBA to learn collectively from individual cases and better understand the effectiveness of tools and approaches to engage clients on human rights issues.
 - While parties seem to be focused on cases where adverse impacts had arisen, parties know very little about the small positive stories of client support and engagement. Sharing these stories could offer learning opportunities for others and provide a broader view of banks' efforts on leverage.
 - As the topic of information is being considered by another working group within the DBA, it is proposed that the ILWG liaises with the Database working group to share the practices and views provided in this card and coordinate future work in this area. The projects now being considered in the Database group, like creating an app for gathering relevant information from local actors, can also offer interesting opportunities for involving impacted individuals early enough in the human rights due diligence process.

- Clarifying – by means of sharing more detailed examples and case studies – when environmental and social assessments include a focus on human rights, how this done and to what effect in terms of banks actions (especially the use of leverage).
 - Enhancing opportunities for early engagement of local stakeholders, such as impacted peoples and human rights defenders.
 - Clarifying expectations around transparency and disclosure such as understanding what “sufficient disclosure” looks like within the limits of what is legally permissible.
 - Exploring practices concerning assessment of the corporate group and complex corporate structures during human rights due diligence.
4. Use of incentives
- The use of financial incentives is an interesting area for the DBA to explore opportunities for innovation and collaboration. A factor that can help parties move forward in this area is the need to understand and potentially improve the metrics used for social and environmental performance that can be tied to interest rates and other financial incentives.
 - With respect to legal incentives, it is increasingly important to strategically integrate the bank’s lawyers in the work of the DBA. This may require some initial work of sensitisation and capacity building on the intent, content, and scope of the corporate responsibility to respect human rights and the relevant standards, such as the UNGPs and the OECD Guidelines. The participation of lawyers will help and strengthen the discussion about the use of contractual clauses.
 - There is an opportunity to carry out peer learning exercises to discuss and learn from the use of financial incentives and contractual clauses.
5. Remediation, grievance mechanisms and leverage
- The DBA can also benefit from the experience of development banks. Peer learning sessions can be organised to explore questions such as:
- How do grievance mechanisms impact the bank-client relationship?
 - How can grievance mechanism reinforce human rights due diligences processes? How can they contribute to obtaining information about the situation on the ground that is difficult for banks to obtain today?
 - How can the filing of the complaint against the client in the mechanism constitute a tool for influencing the client?
 - How are confidentiality issues managed?

- How are grievance mechanisms sources of continuous learning for the banks on the effectiveness of their social and environmental policies and practices?
6. Awareness and use of government in-country presence and networks
 - Mapping the in-country presence and networks of the Dutch government.
 - Exploring the possibility for Dutch embassies to become a hub for identifying innovative projects, start-ups and local initiatives on social and environmental/human rights that can be helpful for Dutch banks, companies and CSOs to avoid, mitigate and remediate human rights adverse impacts (e.g. small start-ups on land issues).
 - Exploring how Dutch banks and CSOs can support the government to build the capacity of their embassies on social and environmental and human rights issues and to fulfil their commitments under MOUs with local governments.
 7. Policy coherence
 - Educate and support different parts of government that shape banking practices on human rights, including those responsible for banking law, anti-trust, investment, trade and labour.
 - As a party to all sector-specific agreements to promote International Responsible Business Conduct, the Dutch Government is uniquely positioned to identify and promote opportunities for collaboration among the different agreements to increase leverage for all relevant stakeholders, including banks, CSOs, and companies.
 8. CSOs' approaches to advocacy and collaboration
 - An important starting point is building a better understanding of each other's organisations, activities, and external and internal pressures. The DBA parties have expressed interest in "mutual master classes" in which banks, CSOs, trade unions and government learn more about each other's activities, operational and contextual realities in a meaningful way. Moreover, it appears that for organisations in a journey to integrate human rights, including banks, progress happens at diverse levels (policies, management or governance changes, operational practices) and might be perceived in a different way by external parties. This can create tensions between what the banks feel have been achieved and what others perceive as achievements. It is therefore important to also consider this aspect when exchanging views and knowledge about each other's views and practices.

- In addition, it might be interesting to consider some of the internal dynamics within the CSOs and among the different CSOs participating in the DBA. CSOs have different sets of skills and approaches to pursue change. Even if CSOs within the DBA seek to coordinate their views and approaches, this coordination might not be seen or perceived as such by external parties. The DBA parties could seek to explore ways to better understand the diversity between CSOs to maximise the gains that this diversity can bring and for all parties to fully understand the extent to which CSOs seek to coordinate among one another and with other CSOs outside the DBA context.

9. Trade unions' expertise and networks

- It is important for trade unions to actively take part in any initiative that parties decide to put in place to learn more about each other's activities, drivers, barriers and contextual realities.
- An improved mutual understanding between the trade unions and other parties of the DBA can provide a basis to reflect on the contribution that trade unions can bring to increasing leverage, including the efficient use of global trade unions networks.

10. Client commercial context and capabilities on human rights

Among the practices identified, there are three that offer opportunities for innovation and collaboration among DBA members:

- (i) Banks interviewed have taken a crucial step to work proactively in increasing leverage by supporting clients to improve their performance on social and environmental and human rights before an incident occurs. Practices in this respect offer interesting reflections for banks beyond the DBA that do not believe they have role to engage at that level with clients. They also provide opportunities for collaboration among DBA members and in particular:
 - Peer learning about the bank's experiences in supporting clients through technical assistance, including exploring the type of assistance programmes, the financing, the level of client's understanding of social and environmental requirements, the client's receptiveness and improvement, etc.
 - A further step can be for banks to develop common tools and trainings that can be used by DBA members and beyond to help clients learn and improve their practices. This can be particularly interesting in challenging sectors or geographies. NGOs and the Government can also

contribute to the creation of tools and trainings and help to distribute it (for example through embassies).

- (ii) Better understanding the clients' knowledge and performance on social and environmental and human rights issues can offer a space for collaboration and innovation:
 - Share database on good practices: following the example of the bank that systematises the assessment of the client practices on social and environmental, banks could consider making public or at least sharing among them the catalogue of good practices in a manner that becomes a source of learning for clients.
 - Create further incentives among clients for social and environmental performance: classification of clients according to their social and environmental performance can offer an important source of information for incentivising clients to increase social and environmental performance. In the example provided of clients being categorised as leaders and laggards, one could think of encouraging clients to improve performance by offering financial advantages if they move up the social and environmental ladder.
- (iii) Work collaboratively to provide evidence and develop metrics that help banks making the business case for social and environmental to clients.

11. Banking sector capabilities and practices on human rights

- Learning from each other about experience when it comes to collaborating in syndicates on social and environmental matters. This learning exercise could be complemented by a pilot collaboration on social and environmental due diligence among members of the DBA when they are part of a syndicated loan.
- Develop a better understanding of anti-trust and confidentiality legal requirements and operational practices when it comes to collaborating on social and environmental in syndicates.
- Further explore risks and practices concerning general purpose loans. This could be combined with examining the scope of human rights due diligence in case of general purpose loans and the manner in which the client as a corporate group is assessed.
- Collaborate to help level the playing field in the banking industry. This includes opportunities for capacity building, peer learning, sharing of good practices with other banks outside the DBA, regulators, industry bodies and international organisations. This can also include sectorial initiatives like promoting changes to the Equator Principles or the support for contractual

model clauses on social and environmental, human rights and limiting confidentiality at the Loan Market Association.

12. Value chain

- A good way to address client capability issues discussed in topic 10 would be to focus on industry associations and standards, so that (without necessarily focusing on one client) the DBA and others raise the bar of social and environmental standards and practices in key industries, such as cocoa. It would be interesting to explore the possibility for the DBA to collaborate with other sector-specific agreements, such as those on gold, insurance, sustainable forestry or the food industry.
- A good way to address banking sector norms and approaches as discussed in topic 11 would be to convene industry/sector specific teams from within banks (e.g., infrastructure; power; or agriculture) to align on policies, risks, and client expectations. CSOs, trade unions and the government often have teams that focus on specific industries or value chains. Bringing together the industry experts from these different organisations provides an opportunity for a more in-depth analysis of sector-specific complexities and for the development of sector-specific ways of exercising (collective) leverage.

13. Specific human rights issues

- Create a roundtable or discussion group to exchange knowledge and experiences on land rights. The discussion can include issues such as clarifying expectations on leverage in the context of land rights, learning from other sectors or specific cases of good practice, aligning views on the scope and requirements of FPIC and other land issues.
- Catalogue ongoing initiatives on land rights and assess whether there is added value for the DBA as a group or for individual members to join these initiatives. The DBA can also explore possible avenues for collaboration with some of these initiatives.
- DBA members are invited to identify areas of common interest beyond land issues.

14. Local socio-political context

- Exploring how Dutch banks and CSOs can support the Dutch government to help build the capacity of their embassies on human rights issues and to help them fulfil their commitments under MOUs with local governments.

- Learning about local challenges and dynamics through the participation of the DBA or its members in thematic roundtables and the work of other working groups, in particular the Value Chain Working Group.

15. Human rights defenders

- Developing a common policy concerning human rights defenders that goes beyond considering them as impacted stakeholders and acknowledges the value of creating a safe space for civil society.

16. Alignment on leverage and key concepts

- Building a common understanding of the notion of leverage, including in particular, the scope of leverage, the expectations around outcomes of exercising leverage and what constitutes success. A possibility to advance on this front may be the establishment of a discussion group that looks constructively at cases in which leverage was exercised by one or more banks (and eventually other DBA members). The discussion group could also include reflections on other themes such as (i) the debate around materiality and human rights risks; and (ii) the use of the notion of human rights within banks and beyond in challenging geographies.
- Producing a tool that provides the conceptual foundations necessary to advance the work of the DBA. This tool can build upon Part I of this report. Such a tool can be very helpful for the ILWG to allow participants in the group share a basic common understanding of key topics. The tool can also serve to lay a basis for discussion with stakeholders outside the DBA that are not familiar with the notion of leverage.

17. The legal context and operational practices

- Further explore other drivers that can be influencing the banks' position on confidentiality. Are there commercial reasons that discourage disclosure and transparency? Do these commercial reasons also apply to development banks? What are the differences in practice between development banks and commercial banks? What legal, commercial or operational reasons underlie this distinction?
- Further explore how internal bank policies and practices address transparency and collaboration while not contravening legal requirements regarding confidentiality and anti-trust.
- Pursue initiatives at the global or regional banking sector level to push for increased disclosure and to level the playing field.

- Explore if regulatory changes in confidentiality and anti-trust law are needed for banks to increase their ability to exercise leverage and fulfil their responsibility to respect human rights. This exploration calls not only to understand the current requirements under confidentiality and anti-trust law (for which the legal report can offer the bases), but also to adopt a forward-looking vision on what is needed to meet the banks' responsibility to respect human rights and how the current legal framework can be hindering this responsibility.
- Explore other areas of law that can pose obstacles for further collaboration among the parties and for DBA stakeholders to exercise leverage. For example, corporate laws on disclosure and reporting can play a role in how banks identify and account for the issues to disclose/report. Most laws use the notion of materiality as a fundamental tenet of disclosure requirements. Corporate law does not acknowledge the focus on impacts to people even when there is growing awareness that these impacts can have material consequences for companies and subsequently to banks.

18. Building knowledge about each other

- DBA parties can consider the use of real-life cases, role play or other innovative learning approaches.
- In addition, banks could consider developing a basic learning tool (e.g., a webinar, a game, a didactic manual) where they explain the products, services and dynamics that are relevant to understand corporate lending and project finance.

Understanding elements of leverage in practice

A resource/framework to support inquiry into specific examples and cases

This resource has been developed by the SILA team to offer a way of inquiring into, and talking about, the granular realities of practices and examples when leverage is applied by banks, and to a degree by other actors. The SILA team's primary purpose of this framework/document is to support reflection, discussion and learning among DBA parties in order to inform ideas and practices about leverage in the future. As other parties outside the DBA may also benefit from this framework, it has been added as an Annex to this report.

There are a range of *possible* other uses of this framework moving forward including:

- a road-map for conversations among two or more DBA signatories about specific cases (assuming client confidentiality can be managed/waived)
- a road-map for research and analysis into specific examples and cases
- an internal management tool for banks to record and analyze cases
- the basis for a searchable database of practices/cases (anonymized or otherwise)
- the basis for banks to communicate with stakeholders about past examples.

The framework was originally developed to guide the SILA team as they researched and organised content of around (approximately 40) practices, examples or cases of leverage by banks. During the interviews and research that took place during the second half of 2017, the SILA team realised that for each case or examples shared (or identified from public material) there are a common set of important questions or aspects that need to be understood/considered to make sense of "leverage in practice". The framework breaks down two over-arching categories into a total of 9 sub-issues and for each sub-issue the SILA team provided a commentary on how to apply/understand the issue. An overview of the framework is provided in this Annex.

Framework for understanding elements of leverage in practice

A. CHARACTERISTICS OF THE ISSUE

This first set of questions is concerned with understanding some of the basic facts of a situation. The five questions and answers prompt inquiry into a sensible list of aspects that should probably be considered in most, if not all, cases. At the same time, the list of questions is not exhaustive i.e. some important pieces of information may be hard to fit into the questions and possible answers. Finally, note that one question may have more than one appropriate answer.

<p>1. What is the type of financing / loan?</p> <ul style="list-style-type: none">a. Project financeb. Corporate lending (general purpose)c. Corporate lending (specific purpose)d. Syndicated or non-syndicatede. Public finance involvedf. Other points of relevance	<p>2. What was or is the position of the bank or banks that are, or should, be seeking to build and use leverage in the deal?</p> <ul style="list-style-type: none">a. Lead bank/arrangerb. Advisorc. Relative commercial weightd. Voice on ESG
<p>3. In what phase(s) of the business relationship: i) did or might an impact occur? ii) did the bank become aware of the actual or potential issue? iii) was leverage established? iv) was or might leverage be used?</p> <ul style="list-style-type: none">a. Selecting and starting the relationshipb. Formalising the relationshipc. Managing the relationshipd. Ending or renewing the relationshipe. Other	<p>4. How was or is the client involved in the actual or potential impact(s)?</p> <ul style="list-style-type: none">a. Causing or contributingb. Directly linkedc. Exposure (but no linkage)
<p>5. Who are the potentially or actually affected individuals or groups?</p> <ul style="list-style-type: none">a. Client employeesb. Other workers (e.g. client contractors)c. Communitiesd. Consumerse. Human rights defendersf. Others	

B. THE NATURE OF ACTION TAKEN

This second set of issues and questions is concerned with the nature of the action that was taken in relation to a specific case, whether an actual impact, potential impact of client. In the context of this project and research, the focus is on actions that were identified as efforts to build and apply leverage. The four questions prompt inquiry into different but complimentary dimensions of the action taken. By exploring these, it should be possible to gain a relatively holistic understanding of practical steps taken by various actors. While the approach/issues may be most relevant to inquire into actions initiated by banks, it is also possible to use this path of thinking when exploring actions initiated by others (such as NGOs). Finally, note that one question may have more than one appropriate answer.

<p>6. What 'leverage strategy' was or is being used?</p> <ul style="list-style-type: none"> a. Traditional commercial leverage b. Broader internal leverage c. Leverage together with business partners d. Bilateral engagement with one or more actors e. Multi-stakeholder collaboration 	<p>7. What are the various tactics that were tried or are being tried?</p> <ul style="list-style-type: none"> a. Raising issues with client in context of 'day to day'/regular interactions b. Making business case for responsible behavior c. Commercial incentives / disincentives in deal d. Using/Enforcing existing policies and/or international standards (e.g. Equator Principles) e. Using agreements/contracts f. Capacity building of client (incl. via 'placements' of experts) g. Capacity building of client suppliers/contractors or other relevant third part enterprises h. Ending relationships (or threat of ending relationships) i. Addressing host government SDP implementation j. Capacity and protection of local civil society k. Engaging in remediation l. Technical assistance m. Addressing host government SDP implementation n. Seeking remedy o. Campaigns p. Investigative reports
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<p>8. What outcomes have occurred?</p> <ul style="list-style-type: none"> a. Change in client policy b. Change in client practice on specific issue c. Change in client human rights policy and practices (policy, due diligence, reporting, remediation) d. Other e. Likelihood of adverse impact reduced f. Impact mitigated g. Past impact remedied h. Governance, policy or regulatory gap filled i. Other j. Bank no longer contributing to adverse impact k. Bank no longer directly linked to adverse impact l. Unsure/Other 	<p>9. Are the leverage efforts standard practice, good practice or unique/innovative?</p> <ul style="list-style-type: none"> a. Standard practice (in banking industry) b. Standard practice (among Dutch banks) c. Not standard but certainly wide-spread in banks with clear commitments to operate responsibly and with respect for human rights d. 'Leading Practice' i.e. innovative and being done by a few leaders e. Unclear
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