BANKTRACK

“We are unable to comment on specific customers...”

Challenging banks on client confidentiality

BankTrack Briefing, March 2019

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Client confidentiality: banks in their own words[1]

Exhibit A: the shutters come down

"Due to legal and potential confidentiality reasons we cannot comment on our involvement or non-involvement in specific projects." – Letter from a Swiss bank, March 2014

"As you would appreciate, we cannot breach our customer confidentiality obligations by discussing the specifics of any existing or prospective customer relationships; however, we have provided information below regarding our approach to lending in this sector." – Letter from an Australian bank, January 2015

"First of all, we would like to highlight that, as required by the law, we cannot release any comments on individual clients and specific transactions." – Letter from a French bank, April 2015

"As a general rule, Wells Fargo does not disclose details regarding specific relationships." Letter from Wells Fargo, May 2016

"We are unable to comment on possible customer relationships for confidentiality reasons, but I can confirm your report has been received and noted by the relevant people here at [Bank]." – Letter from Lloyds Banking Group. May 2017.

"To respect the privacy and confidentiality that all clients and prospective clients expect, we will keep our comments general in nature." – Letter from a Canadian bank, June 2017

"Due to client confidentiality rules, I cannot disclose to you if [Bank] has a banking relation with the companies mentioned in your letter." – Email from a Dutch bank, September 2017

"We cannot comment on an individual client due to our confidentiality policy. However, we have shared your concerns with relevant departments/ offices." – Response from Mizuho Bank, January 2018

Exhibit B: it doesn't have to be this way

"Let me indicate you (sic) *that the Bank does not have any commercial relation to the project you mention."* – Email from a Spanish bank, March 2014

"Thank you for ... bringing to our attention concerns over some unresolved social conflicts involving [Company A], who is a supplier to [Company B]. We have been in regular contact with [Company B] ..." – A US Bank, March 2015

"BNP Paribas further reviewed the company against the criteria of its Mining sector policy in 2014 [...] Following this, BNP Paribas' Due Diligence flagged the company for ongoing ESG (including human rights) controversies and decided not to provide financial services to the company until further notice." – BNP Paribas, May 2016

"We regularly engage with our corporate clients, including Trafigura and Vitol, to discuss environmental, social and human rights impacts. […] The following points have been part of our dialogue." – ING, May 2017

1. Introduction – the trouble with client confidentiality

Banks routinely respond to enquiries about specific transactions, especially about the damaging impacts of companies or projects they finance, by saying they are "unable to comment on specific clients". They often cite "client confidentiality" as the reason, and individual banks often use the same generic, cut and paste text to respond to every query.

This refusal to comment on specific clients is a problem. It is impossible for affected communities to effectively hold banks accountable for financing projects that impact them if they don't know who these banks are in the first place. Likewise it is impossible for civil society organisations (CSOs) to hold a meaningful dialogue with a bank about the environmental or human rights impacts of a company or project that it finances, without confirmation from the bank that a financial relationship exists. Transparency regarding these financial relationships is also fundamental for the proper functioning of standards like the Equator Principles that purport to safeguard community interests by giving stakeholders a seat at the consultation table.

Yet, there are also times when banks have no problem disclosing their involvement with specific customers. For example, most large banks include examples of finance for specific customers in their annual Sustainability or CSR Reports, typically to highlight their finance for a project with a positive environmental or social impact. Banks also routinely report their involvement in large syndicated loans for inclusion in league tables for marketing purposes. Then there are examples of smaller, ethically-oriented banks that proudly release details of all their corporate clients. Some mainstream banks also have a better record of responding constructively to CSO enquiries than others.

> **When banks say they cannot comment on specific customers, we know this is not the whole story, because there are enough examples provided by banks themselves that show that they can and often do.**

So, when banks say they cannot comment on specific customers, we know this is not the whole story, because there are enough examples provided by banks themselves that show that they can and often do.

This briefing paper:

- looks into the **scale of the problem** of bank refusal to comment on specific clients, principally through the lens of BankTrack's database of correspondence with banks (section 2);
- sets out the **contradictions** of client confidentiality (section 3);
- details what we know so far from research and interviews with banks about approaches to client confidentiality, in terms of **legal requirements** (section 4);
- looks at the positive **case for disclosure** in banking (section 5);
- explores **current good practice examples and solution**s (section 6); and
- provides **recommendations** to the banking sector (section 7).

A comprehensive overview of legal and contractual requirements concerning banking and client confidentiality is outside of this briefing paper's scope. But our research indicates that differences in disclosure practices between banks cannot be explained by differences in national regulatory environments. Rather the question of whether banks can comment on specific clients appears to come down to client consent, and – crucially – the bank's willingness to obtain it. Some banks go to significant effort to secure client consent to make disclosures, while others simply don't ask.

Current market practice is to use standard lending contracts such as those drawn up by the Loan Markets Association (LMA), which include far-reaching client confidentiality clauses. But banks can change these contracts, and can also use contracts to reserve the right to disclose key details of the relationship in certain circumstances.

"Transparency and accountability" is one of the six principles of the new draft "Principles for Responsible Banking", endorsed by 49 banks around the world.[2] The Principles in their current version do not require disclosure of corporate lending relationships – yet transparency regarding these relationships is crucial if real corporate accountability is to be achieved in the banking sector.

Greater transparency will also benefit banks by enhancing trust and allowing for stronger environmental and human rights due diligence practices, including better communication with affected people and better reporting of steps taken to manage impacts. Making such transparency the norm rather than the exception is possible within the legal frameworks of all countries we have investigated. Only commitment from banks, or compulsion from regulators, is needed to get us there.

2. The scale of the problem

To build an understanding of current banking practices regarding client confidentiality, BankTrack compiled and analysed a database of our correspondence with banks between 2012 and 2017. This included details of formal letters sent by BankTrack, usually in partnership with several other CSOs, to a group of the world's largest banks, and all responses we recorded receiving from banks, whether by letter or email.

Reviewing the responses to letters sent gives a corpus of 150 letters or emails received from 31 different large international banks regarding specific companies or projects.[3] This corpus excludes any responses which were not considered substantive, such as responses which simply confirmed receipt of a letter. The database included both letters for which BankTrack was the only or lead writer, as well as letters signed by BankTrack but led by other organisations. We analysed these responses to identify how often banks confirmed involvement or non-involvement with the client or project raised in the correspondence, and how often they did not confirm their involvement.

In practice, CSOs and communities are interested in much more than receiving confirmation of whether banks are involved with a particular client or project – for example they may be interested in the bank's engagement with the client, their due diligence approach or in advocating for the bank to stop financing the company. Although it is not an end in itself, whether a bank is prepared to confirm its relationship with a client is an important indicator of its transparency, as it is often the first step to further dialogue or to an effort to hold the bank accountable for its actions.

Findings from analysing correspondence with banks

Through our research into our correspondence with banks over the past five years, we identified:

- 70 out of 150 responses (47% of the total) stated that the bank could not comment on whether it had a relationship with a customer or project.
    - In 37 of these 70 responses, client confidentiality concerns were cited as the primary reason for non-disclosure.
    - In the remaining 33 responses, no reason was given.

- In the remaining 80 responses, the bank confirmed either its involvement or non-involvement with a specific company or project.
    - In 45 of these 80 responses, the bank confirmed *non-involvement* with a company or project.
    - In the remaining 35 responses, the bank confirmed *involvement* with the company or project.

In cases where the bank confirmed involvement in a company or project, its financial involvement ranged from provision of project finance to general corporate loans and ownership of equity / shares, or a mixture of these, with project finance the most common exposure type.

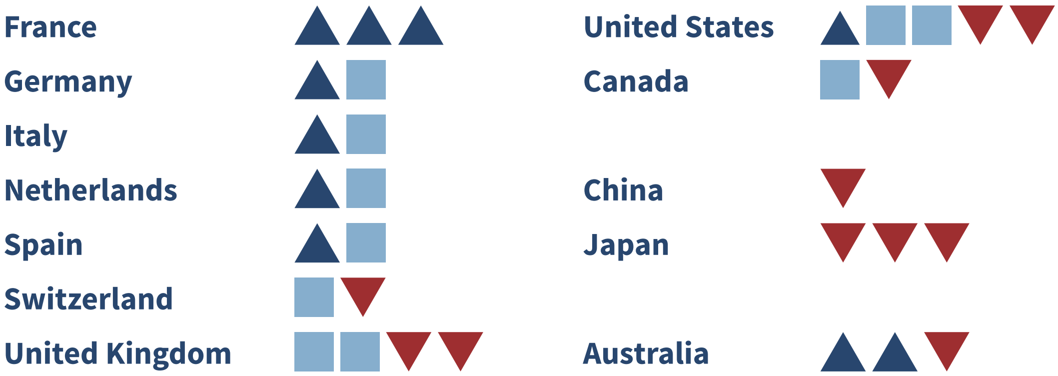
Response type	Items of correspondence
No disclosure given due to client confidentiality	37
No disclosure for other reason, or with no reason given.	33
No disclosure given: total	**70**
Confirming involvement	35
Confirming non-involvement	45
Confirming involvement or non-involvement: total	**80**
Grand total	**150**

Due to the incompleteness of our data, we have not named the banks which were most likely or least likely to comment on the existence of a relationship (see 'Limitations of this exercise', below). However, it is possible to see some regional variations.

- Of the 31 banks for which responses were received, 11 banks *never or almost never* confirmed whether they financed a specific company or project (▼ in the chart below). These least transparent banks are based in Australia, Canada, China, Japan, Switzerland, the United States and the United Kingdom.
- 10 banks *sometimes* confirmed whether they financed a specific company or project, and sometimes did not (■ in the chart below). These banks came from Canada, Germany, Italy, the Netherlands, Spain, Switzerland, the United States and the United Kingdom.
- 10 banks *always or almost always* did confirm whether they financed a specific company or project (▲ in the chart below). These most transparent banks are based in Australia, France, Germany, Italy, the Netherlands, Spain and the United States.

This presents a mixed picture, in which more transparency is typically found in mainland European countries, while less transparency is likely to be found in the UK, Asian countries and Canada. Banks in the United States and Australia occurred in both the least transparent and most transparent groups, showing a range of practices among US banks.

Bank disclosure by country of HQ



Legend: ▼ *represent banks that never or almost never disclosed whether they financed a specific company or project (i.e. in 20% or less of correspondence reviewed);* ■ *represent banks that sometimes disclosed; and* ▲ *represent banks that always or almost always disclosed (i.e. in 80% or more of correspondence reviewed).*

While it is possible that banks respond very differently to BankTrack than to other CSOs, given the extent of civil society collaboration in these letters, we consider that it is unlikely that other organisations experience significantly greater levels of transparency from banks. To give one example of the experience of another CSO, Germany-based Facing Finance has analysed bank responses to its Dirty Profits reports in 2016 and 2017 and has found that 67% of banks which responded declined to comment on the specific company or project mentioned due to client confidentiality reasons – an even lower level of transparency than BankTrack has experienced.[4]

This analysis shows that, in BankTrack's experience, banks refuse to comment on specific clients in around half of all correspondence – often enough for this to present a significant problem in our efforts to hold banks accountable for the impacts of their finance. It also shows that 'client confidentiality' is not an absolute rule – indeed many banks are able to comment on specific clients, and some do so consistently. So, when banks claim they are *unable* to comment on specific clients they are clearly not presenting the full picture. The remainder of this paper investigates this apparent inconsistency in more detail and suggests how it can be overcome.

Limitations of this exercise

The 150 bank responses we reviewed for this research represent all those we were able to identify from our own archives, from contributions from partner NGOs and, in some cases, from banks that forwarded us letters which were missing from our records. As part of our research process, we contacted banks included in our database to present them with individual records of their correspondence, to check this against their own correspondence records. We also contacted other CSOs where they were the lead author of correspondence signed by BankTrack. This helped us to expand our database, and also made clear that gaps remain in our own records, and that some banks respond to enquiries in ways that are not always captured or recorded (phone calls, for example). While we are confident this sample of 150 responses represents a strong basis on which to draw conclusions about general bank behaviour, its incompleteness means it is would not be appropriate to name or rank banks based on their responsiveness as part of this exercise.

Box: Discussions with banks on client confidentiality

As part of the research process for writing this briefing, BankTrack held phone interviews with representatives from a small number of large global banks. These involved staff from the banks' sustainability/CSR teams or Environmental and Social Risk Management teams as well as from their legal teams. In total, we conducted interviews with seven banks from five countries – Canada, the US, France, the Netherlands and the UK – between August and October of 2017.

Banks we spoke to took very different approaches. For some, standard practice is to not disclose any information regarding their involvement or non-involvement with a company or project, even if the information is already publicly available. Others are more willing to push for client consent to disclose information in response to credible enquiries, and/or to confirm information that is publicly available. Still others preferred to put as little in writing as possible, and preferred to respond to CSO enquiries with a phone call, although they would typically not confirm the existence of a client relationship in those calls.

One bank representative commented that the bank would always confirm the existence of a customer relationship to CSOs if it had been published elsewhere, such as on Bloomberg or Thomson, and that this approach is written in an internal policy. The bank regularly sought consent from clients to disclose details of its engagements.

During our conversations, we sought information about the contractual and legal restraints governing confidentiality and the disclosure of client relationships. Although many banks were able to respond helpfully by pointing to specific legislation, a common theme was that banks are subject to a complex and overlapping legal landscape which was not always fully understood even by banks themselves – leading to a precautionary approach to disclosure. Banks implied that some jurisdictions demanded greater secrecy than others, and some expressed the need for these requirements to be better mapped out. While a comprehensive mapping is outside of the scope of this briefing, we have in the course of our research not yet been able to identify any jurisdiction which would prevent banks from disclosing the existence of a client relationship with client consent (see section 4).

3. The contradictions of client confidentiality

The narrative that banks are unable to comment on specific clients is advanced frequently by a wide range of banks, as the analysis above shows – but it holds a number of contradictions. Firstly, different banks' approaches are inconsistent even in discussions involving the same clients and banks in the same jurisdictions. Secondly, even the most secretive banks are often able to discuss specific clients in their own reporting, when it suits them. And thirdly, banks make disclosures about their – often supposedly confidential – client relationships routinely to various databases, which are widely accessed within the banking sector. Banks are able to find ways to be transparent about their client relationships in a wide range of circumstances, but often resist this transparency when it comes to efforts by communities and civil society to hold them accountable for the impacts of their finance.

Bank practice is inconsistent, even within the same jurisdiction

As the analysis of correspondence above illustrates, many of the largest banks routinely refuse to comment to CSOs regarding specific corporate customers or projects they finance. Letters from these banks often present 'confidentiality requirements' as a blanket requirement stopping them from commenting on any client or project they might finance (see bank quotes on page 2). However other banks, sometimes operating in the same jurisdictions, are apparently unhindered by such requirements and *are* able to make such disclosures.

For example, for a 2016 briefing paper, BankTrack contacted seven large banks found to be financing the US coal company Drummond.[5] Of the seven, four banks (Mizuho, Wells Fargo, HSBC, Bank of America) responded that they would not comment on whether they in fact had financial links to Drummond. In all cases, this was presented as part of a general policy not to comment on specific corporate customers. In contrast, three banks (BNP Paribas, Citi and BBVA) confirmed that Drummond was, or had previously been, a customer.

Similarly, in a 2017 briefing paper focussed on Trafigura and Vitol, for which we contacted 26 banks, banks including Lloyds, Standard Chartered and Commonwealth Bank cited customer confidentiality as a reason for not providing information about whether these companies were clients, while others including Crédit Agricole, HSBC, Mizuho, RBS, UBS stated simply that they do not comment on specific clients or companies. However, it was clear from other bank responses that Trafigura and Vitol gave their consent to at least one other bank to disclose its relationship and certain details of its engagement with the companies.[6]

Banks are not normally able to make disclosures about their relationship with a client without the client's specific consent, at least under current standard loan contracts (as explored further in section 5). But in cases where some banks have secured consent from their client for such disclosures, it seems likely that other banks that have not disclosed the relationship could have done so, had they gone to greater lengths to secure consent. Indeed, they may have simply not asked for client consent at all.

Even the more secretive banks disclose client names when it suits them

When we look at the sustainability or CSR reports of the banks that say they do not comment on specific customers as a general matter of policy, we find this general policy is not evenly applied. To give one example, the Japanese bank Mizuho claimed in 2016 and 2017 letters to BankTrack that it “cannot refer to individual transactions”, but comments in its 2017 Sustainability Report on its financial support for a named client involved in post-earthquake reconstruction (see image below).

To give another example, at the time of our 2016 briefing paper on Drummond, the UK-based bank HSBC – which did not confirm a link with Drummond and routinely cites client confidentiality concerns when responding to enquiries – published details in its most recent Sustainability Report regarding its finance for an offshore wind farm in the UK and for a highway construction project “designed to protect the biodiversity of the local area” in Mexico, naming the clients in both cases.[7] This appears to contradict the bank’s claim that it “cannot discuss individual customers”. It must be said that the bank has changed the way it communicates regarding client confidentiality since this time, and has developed a policy on palm oil which represents a possible model for others – see section 6.

From our discussions with banks, it seems securing client consent is common practice when compiling sustainability reports and when banks want to talk about the positive impact of (some of) their lending – but when civil society wants to talk about negative impacts, for many banks, the shutters come down. Yet businesses should be focusing their reporting and disclosure on precisely the areas where their business activities and relationships pose the greatest risk of severe negative impacts.[8]

Case Example

Supporting Recovery in Disaster Areas of the Great East Japan Earthquake – Syndicated Loan to Miraiships

Architectural rendering of the new shipyard

The shipbuilding industry in Kesennuma-shi, Miyagi Prefecture suffered catastrophic damage during the March 2011 earthquake disaster, with facilities destroyed by the tsunami, and ground subsidence in shipyard sites. The recovery of Kesennuma, one of the main marine products cities in Japan, is essential to the revitalization of the shipbuilding industry. Miraiships, comprising mainly four shipbuilding companies damaged in the disaster, was established to strengthen the business foundation for the shipbuilding industry in Kesennuma, and construct a shipyard with cutting-edge facilities at a new site.

The capital to construct the new shipyard was provided by subsidies from the Ministry of Land, Infrastructure, Transport and Tourism, along with a syndicated loan formed by MHBK together with local financial institutions.

Mizuho will continue to support revitalization efforts in the area.

Image: Mizuho describes a syndicated loan to Miraships as an example of its support for post-disaster recovery in its 2017 Integrated Report. In a 2016 letter to BankTrack, Mizuho stated that “as per our policies, we cannot refer to any specific transaction”.[9]

The information is out there for those that can pay for it

CSOs identify links between banks and projects or clients they finance in a range of ways. Sometimes loans are reported in the media, typically after a press release is issued by the recipient of the loan. Transactions may also be reported to a regulator such as the US Securities and Exchange Commission (SEC). Sometimes they are reported on registries of secured transactions and collateral (see below). One of the most common ways CSOs identify such links is by searching on subscription databases operated by Bloomberg and Thomson.

The data available to subscribers to these databases include details of banks' ownership and issuance of bonds and equities (shares), their involvement in syndicated loans (i.e. loans in which more than one bank participates) and their project finance loans. The data elements available on loans includes the deal structure, loan amount, currency, maturity, pricing, bookrunners, agents, lenders, pricing, interest and fee information, use of proceeds, guarantors etc. Banks are a key target market for these databases, and use them routinely to monitor financial markets, conduct research and raise their own profile.

Such databases are outside the reach of most CSOs, let alone communities who may be affected by bank finance – creating a significant imbalance of access to information. But some CSOs interested in financial data and able to afford it pay significant sums to either subscribe to the databases or pay other research organisations to provide it for them.

A 2014 report by Oxfam Australia, 'Banking on Shaky Ground', noted that the widespread availability of this data to those with sufficient funds "seems to fly in the face of assertions of client confidentiality' from banks.[10] Investigating where these data come from, they reported:

> *"We were told the information was obtained through, "direct deal submissions from global dealmakers." When we sought further clarification, staff informed us that "global dealmakers" meant in situations of a project finance or syndicated loan transaction, "the bankers themselves provide us information through submission forms." Investigating further, it appears that this is normal practice. Banks frequently disclose this seemingly highly confidential information, essentially for marketing purposes, seeking to be considered for awards and league tables about who closes the biggest deals, or who has the biggest lending portfolio. This was startling news."*

Some of the information carried by these databases is provided by banks with the consent of their clients, for example through asking clients to sign a standard 'league table agreement' as part of the paperwork at the start of a financial relationship. The league table agreement allows the bank to provide information about the financing to specific market databases.[11]

Banks are not the only source for information in Thomson and Bloomberg databases – the information comes from a variety of sources including regulatory filings, law firm submissions and press releases, alongside information from banks.[12] Bank representatives have also told us that the information on these databases is not always correct, and that as such, CSOs that rely on this information may be publishing flawed data. This is, of course, a problem the banks themselves are often in a position to correct. Nevertheless, these databases are often the best information sources available – at least for researchers who can afford to pay.

Information may also be available on registries of secured transactions

The banking industry generally supports the development of so-called 'secured transaction registries'. These registries collect information about the property of a company that is used to secure loans (its collateral). The registries differ from jurisdiction to jurisdiction, but they often include the name of the institution that was lending the money (the counterparty to the collateral agreement) and so allow anyone that has access to the registry to identify to whom the bank was lending money. Since in the case of project finance the entity that receives a loan is the so-called 'Special Project Vehicle' established for the project, the registry makes it possible to connect particular financial institutions to projects financed.

Sometimes these registries are placed under a paywall, but sometimes they are accessible even without registration.[13] There has been quite some effort to standardise secured transactions internationally, for example the UN Convention on the Assignment of Receivables in International Trade – a good example of concerted action to increase transparency in business transactions. NGOs have been using registries to discover problematic financing, for instance with funding for small hydropower plants in the Balkans.[14] But registries remain less useful for the interested public to learn about loans to larger companies, which have greater access to unsecured loans.

The natural question then is why it is acceptable for banks to disclose their role in financing specific projects or companies in these registries, while in direct communication with civil society stakeholders they often reject such possibilities? One potential response is that banks see a clear business justification in the existence of these registries, as they can help inform banks' credit decisions, reduce credit risk and allow banks to check whether pledges of movable assets are already pledged elsewhere (as noted by Moody's).[15] Also, by making an entry in the collateral registry, the client can be seen as providing consent to publish data about the transaction. This points the way towards increased disclosure being seen as a risk-reducing tactic and a tool in increasing the effectiveness of financial markets, instead of as a liability.

4. Features of legal frameworks in selected countries

Our analysis of correspondence with banks shows that concerns regarding client consent are not localised to specific countries, but are raised by banks around the world. In interviews, banks expressed the view that legislation on customer confidentiality differs greatly from one country to another, and that this overlapping landscape of regulation is difficult for banks themselves to understand. Some banks that were among the most adverse to disclosing information about clients said they were prevented from doing so by legal requirements in some counties in which they operate, citing Switzerland and Singapore as examples of the most restrictive jurisdictions.

An extensive study of client confidentiality legislation across the world is outside of our scope and expertise – although we see a clear need for such a study. However, our research into legal frameworks in several jurisdictions where large global banks are based shows that, while banks may be unable to publicly disclose information about clients *without* their consent in many countries, disclosure *with* client consent is possible in even the most secretive jurisdictions.

Client confidentiality requirements are rather principally governed by contractual requirements in banks' relationships with customers, and as we explore in more detail below, banks have considerable leeway to change current market practice to allow for greater transparency in their contracts with clients.

United Kingdom

The UK's Financial Ombudsman Service sets out that the banker's duty of confidentiality to the customer is an implied term of the contract between customers and their banks. It cites the 1924 case of Tournier v National Provincial and Union Bank of England as the principal item of case law setting out the four areas in which a bank can legally disclose information about its customer. These are:

- where the bank is compelled by law to disclose the information;
- if the bank has a public duty to disclose the information;
- if the bank's own interests require disclosure; and
- where the customer has agreed to the information being disclosed.[16]

The 'Tournier Principle' has relevance beyond the UK – it has been described as the "classic exposition" of a bank's duty of secrecy in common law countries and has been formally recognised in other jurisdictions such as Australia.[17]

The 'public duty' exception has been explained as meaning that, "In times of war, for example, a bank would have a public duty to disclose information relating to a particular customer to the authorities if it has knowledge of that customer trading with the enemy."[18] It is interesting to consider whether a bank might be able to argue for disclosure of client details on the grounds of, for example, its public duty to address human rights violations, or its public duty to combat climate change – a threat which has been recognised as requiring a level of mobilization on a level normally associated with wartime.

The Netherlands

The parties to the Dutch Banking Sector Agreement on human rights – a multi-stakeholder agreement to which the major Dutch banks adhere – contracted the law firm NautaDutilh in 2017 to produce a report considering the specific question of the extent to which banks are legally able to provide CSOs or the public with "individual client information regarding the outcome of a human rights due diligence investigation and any measures taken pursuant thereto within the framework of the Agreement."[19]

The resulting report is limited in scope to applicable laws in the Netherlands (including EU Regulations directly applicable in the Netherlands and Dutch law implementation of EU Directives). It also assumes the Adhering Bank and its client are both located in the Netherlands and acting through a Dutch office.

It considered the responsibilities arising from the Dutch Act on Financial Supervision ('*wet op het financieel toezicht*' or WFT), the Dutch Act on the Prevention of Money Laundering and the Financing of Terrorism ('*wet ter voorkoming van witwassen en financieren van terrorisme*', or WWFT) and the EU's Market Abuse Regulation (MAR). It concludes that:

- individual client information can be made public or shared with CSOs "with client consent or pursuant to a statutory obligation", except under specific circumstances relating to 'inside information' or unusual transaction reports;
- individual information in anonymous form can be shared or made public;
- aggregated anonymous information can be made available; and
- individual client information cannot be made public or shared with CSOs without client consent.

The report also notes – as we have confirmed in interviews with banks elsewhere – that it is 'market practice' for banks to use template contracts drawn up by the Loan Markets Association (LMA), a London-based membership organisation formed with the aim of standardising documentation to assist in the development of a secondary market for loans. Although banks do have the freedom to change these contracts, they set a "far-reaching confidentiality obligation" as part of the default template contract.

Germany

German bank secrecy principles are not codified in law but are predominantly based around customary law ("Gewohnheitsrecht") and mandatory data protection regulations. Banking secrecy (confidentiality) in Germany is applied using the contracts between banks and their customers. Specifically, banking secrecy is provided for in the bank's general business conditions, which are standardised general terms and conditions used by most German banks.[20] There are three pillars of banking in Germany (Association of Private Banks, Association of Public Banks and the Association of Cooperative Banks) and each is governed by their relevant association. The member banks of each Association typically draft their own specific conditions.[21] An example of the similarity of these conditions is those given by Deutsche Bank in its General Business Conditions. This text is exactly replicated in the equivalent document by Commerzbank.[22]

> *"The Bank has the duty to maintain secrecy on any customer-related facts and evaluations of which it may have knowledge (banking secrecy). The Bank may only disclose information concerning the customer if it is legally required to do so, the customer has consented thereto, or if the Bank is authorised to disclose banking affairs."*

According to Global Investigations Review, "In general, the scope of bank secrecy depends on the client's wishes. The general rule is, therefore, that bank secrecy can only be lifted if the client consents or other justification is given. It is accepted that bank secrecy shall not limit the functioning of the credit institution and, for example, not prohibit internal audits and investigations related to internal processes and matters as this would also not be in the interests of the client."[23]

Singapore and Switzerland

Singapore and Switzerland are two examples of countries where a duty of bank secrecy is imposed by criminal law. In Switzerland, the requirement is found in article 47 of the Swiss Banking act, while in Singapore it is coincidentally found in section 47 of the Singapore Banking act.[24]

Unsurprisingly, Switzerland was cited by several banks as one of the countries with the most restrictive legislation surrounding banking secrecy. In our review of bank correspondence, we did not find any examples from the two large Swiss banks (UBS and Credit Suisse) in which they confirmed involvement or non-involvement with a lending client. One of these banks even declined to participate in an interview, saying that the bank is "bound by applicable confidentiality requirements and [is] not in a position to discuss these."

However, in both countries, clear exceptions are in place if clients consent to disclosure. In the case of Switzerland, the Banking Regulation Review states that, although "as a general rule, any disclosure of client data to a third party, including the parent company, its supervisory authority or an affiliated entity, is prohibited", there are exceptions to this rule, and one of these is "if a client has consented to a disclosure."[25] The Alternative Bank Schweiz is therefore able to publish a list of all loans granted, including client name, amount and use of the loan, in its annual report.[26]

Similarly, the Singapore Banking act "lists a total of more than twenty specific situations where disclosure of customer information is allowed, subject to the conditions set out in the schedule … The exceptions deal with a wide range of situations, including the commonly occurring exceptions mentioned earlier, namely where the written consent of the customer has been obtained."[27]

United States

While a detailed exploration of banking regulation in the US is beyond the scope of this briefing[28], the US interestingly allows for a greater measure of transparency for lending transactions than other jurisdictions through disclosures to the federal government's Securities and Exchange Commission (SEC). Publicly listed companies are required to file "form 8-K" reports with the SEC regarding material corporate events including loans, bond and share issues, typically within four days of the event. These forms and other SEC filings are searchable on the SEC database, EDGAR (Electronic Data Gathering, Analysis and Retrieval). Filings available on EDGAR can also include credit agreements. The amount of information available regarding corporate lending varies but can include the name of each bank and often commitment amounts for each bank.

SCHEDULE A
LENDERS AND COMMITMENTS

Lender	Commitment
Barclays Bank PLC	U.S.$ 150,000,000
Citibank Canada	U.S.$ 150,000,000
Bank of Tokyo-Mitsubishi UFJ (Canada)	U.S.$ 120,000,000
Mizuho Bank, Ltd.	U.S.$ 100,000,000
Bank of Montreal	U.S.$ 85,000,000
Export Development Canada	U.S.$ 82,500,000
U.S. Bank National Association	U.S.$ 75,000,000
Royal Bank of Canada	U.S.$ 60,000,000
Canadian Imperial Bank of Commerce	U.S.$ 50,000,000
Credit Suisse AG, Toronto Branch	U.S.$ 50,000,000
DNB Capital LLC	U.S.$ 100,000,000
Morgan Stanley Bank, N.A.	U.S.$ 50,000,000
The Toronto-Dominion Bank	U.S.$ 50,000,000
Wells Fargo Bank, N.A.	U.S.$ 50,000,000
Bank of America, N.A., Canada Branch	U.S.$ 40,000,000
The Bank of Nova Scotia	U.S.$ 37,500,000
HSBC Bank Canada	U.S.$ 25,000,000
National Bank of Canada	U.S.$ 25,000,000
Total:	**U.S.$1,300,000,000**

Image: example of SEC disclosure: Enbridge renews its credit facility agreement for general corporate purposes, August 2016.[29]

Japan

The big three Japanese banks are among the least likely to disclose information to CSOs regarding the clients and projects they finance. However Japanese banking legislation does not appear to be any tougher than legislation anywhere else. Indeed, the Banking Regulation Review notes that "Japanese banking laws do not provide such comprehensive and strict banking confidentiality frameworks as those adopted in some jurisdictions".

A study by the Japanese Bankers Association "suggests that information may be disclosed when (1) the explicit or implicit consent of the customer has been obtained; (2) the information is public information; or (3) the disclosure may be deemed legitimate, taking its necessity into account (leading to the conclusion that a rather wider range of disclosure to other companies within the same group for the purpose of, for instance, marketing activities, is permissible without the customer's consent)."[30]

5. The banking case for disclosure

Disclosure of the corporate clients or projects a bank is financing has obvious benefits for communities affected by bank finance. BankTrack has been documenting cases in which banks finance companies and projects causing or contributing to severe human rights and environmental impacts for over 15 years, resulting in its database of "dodgy deals". Usually these profiles are created as part of a campaign waged in support of, and often in cooperation with, the people directly affected by these impacts, and in situations where the affected people did not have access to information about the project, its financiers and the policies or governance frameworks they may be applying.

There is an urgent need for communities to be able to freely access this information, particularly for projects in high risk sectors like infrastructure, power generation, mining, oil and gas exploration and production and agricultural commodities, so they can exercise their rights to provide or withhold consent to projects in their territory.

There is also a positive case for banks to pursue increased transparency regarding their exposure to companies and projects, creating benefits in at least four areas: clarity and trust, improved due diligence, improved reporting and facilitation of accountability.

Clarity and trust

Improved transparency by banks around their lending relationships can contribute to improving the trust and confidence of civil society observers. For example, it can provide assurance that bank policies and exclusion criteria are being properly implemented, and save banks responding to misplaced advocacy efforts – such as correspondence regarding projects in which a bank is not involved. This is alongside the role that improved transparency can play in helping to build trust in the banking sector in the wake of the financial crisis, alongside improved regulation and democratic control.

Improved stakeholder engagement and due diligence

Banks report being hampered in their human rights or environmental due diligence by being unable to disclose that they are financing or considering financing specific clients or projects in several ways. Client confidentiality considerations can present an obstacle to banks being able to ask questions of external stakeholders, including affected communities, their representatives or other organisations with relevant expertise.[31] Similarly, client confidentiality can present obstacles to banks collaborating together or with other institutions to increase their leverage over clients to address human rights issues, as they are unable to confirm to each other that they finance the same client (even though they may know in practice from their database subscriptions). These obstacles can be overcome through seeking client consent in a systematic manner.

Improved reporting

As discussed above, banks often use case studies to present examples of their finance to environmentally or socially positive projects like renewable energy projects. Yet stakeholders are increasingly aware that how banks manage the negative impacts associated with companies and projects they finance is at least as important, if not more important, than how many positive examples they can showcase.

For example, under the UN Guiding Principles banks have a responsibility to "know and show" that they respect human rights, including accounting for how they address adverse impacts.[32] Banks can report more clearly and effectively on their efforts to address, prevent or mitigate specific human rights abuses they have identified, or which have been raised by others, when they are able to disclose specific details of their finance and steps taken to address the impact (including engagement with clients, agreed action plans etc). This in turn would generate confidence and trust that the bank is fulfilling its policy promises and its human rights and environmental responsibilities in practice.

Accountability

Transparency of lending relationships is also vital for accountability and the effective functioning of grievance mechanisms. Oxfam Australia has talked of transparency as part of a mutually reinforcing 'responsibility triangle', alongside commitments and accountability, with accountability as central to good governance.[33] Banks, like all businesses, have a responsibility set out in the UN Guiding Principles on Business and Human Rights to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted" by their operations.[34] As we have pointed out in a briefing paper written with Oxfam Australia, it is difficult to imagine how a grievance mechanism for people impacted by bank-financed activity can operate effectively without information on corporate loans and project finance being available to those impacted.[35]

The accountability triangle; adapted from Oxfam.[36]

Increased transparency, then, can support every stage of a banks' environmental and human rights due diligence process, from assessing impacts to reporting and ensuring accountability. As Shift, a non-profit centre for business and human rights practice, has put it, "while the tendency within many companies is to seek greater control over and protection of information as risks increase, in reality, enhanced transparency is critical for success."[37]

Increased transparency can support every stage of a banks' environmental and human rights due diligence process

6. Current good practice examples and solutions

Section 4 shows that, in all jurisdictions we have examined, banks *can* disclose details of their lending activities and engagements with clients with client consent, while section 5 sets out some of the reasons why improving disclosure can benefit banks as well as communities and rights-holders. As we have seen, the willingness of banks to seek such consent differs widely. This section sets out some of the emerging examples of good practice, in which banks are seeking client consent for disclosing loan details more systematically.

Project name reporting by Equator banks

The Equator Principles (EPs) are a framework drawn up by banks for assessing and managing environmental and social risk when financing large infrastructure projects, adopted by 94 financial institutions (EPFIs) in 37 countries. At its most recent update in 2013 the EPs introduced new requirements for signatories to report on projects financed under the EPs, subject to various conditions including client consent being secured.

The reporting requirements of the Equator Principles suffer from several flaws: they do not apply to project-related corporate lending carried out 'under Equator' but only project finance lending; reporting is done per bank so that a search for all Equator financiers of a particular project is not possible; reporting of project names and sectors is inconsistent.[38] However, this reporting requirement has led to banks reporting on the projects they finance on a significant scale for the first time, with banks reporting 638 project names in total from the latest available year of reporting.[39] This amounts to 73% of project finance transactions financed 'under Equator', and 56% when all types of finance under the scope of the Equator Principles are considered.

While this is a positive development, making reporting subject to obtaining client consent and several other caveats (including local laws and regulations, and to "no additional liability for the EPFI as a result of reporting in certain identified jurisdictions") allows for a range of practice among Equator banks – including allowing some banks to evade their reporting requirements entirely. Out of 68 EPFIs that reported at least one project finance transaction in the latest reporting year, 37 reported project names for all transactions, while 14 reported names for less than half of the transactions they financed – and of these, ten reported no project names at all. One bank, Banco Mercantil del Norte of Mexico, financed 32 projects 'under Equator' in the latest reporting period, but reported no project names.

The Equator Principles claim that "adoption of and adherence to the EPs offers significant benefits to us, our clients, and local stakeholders through our clients' engagement with locally Affected Communities". Yet at the same time communities often cannot access loan information that is critical for them to have the necessary information to be able to engage with EP clients and EP processes. The Equator Principles are once again up for revision, with a revision process underway that must lead to the launch of EP4 in the summer of 2019. This presents a crucial opportunity for Equator banks to rectify these problems and ensure that all Equator lending is conditional upon the project sponsor agreeing to public disclosure of the transaction on the website of the EP association.[40]

Full disclosure of corporate lending by ethical banks

A number of smaller 'ethical banks' with a focus on lending to support sustainable or socially beneficial activities have pursued an approach of publishing full lists of their corporate customers. Many of these are members of the Global Alliance for Banking on Values, an organisation with a collective goal to change the banking system so that it is more transparent, as well as more sustainable.[41] They include Switzerland's Alternative Bank Schweiz, which, as noted above, publishes a list of all loans granted, including client name, amount and use of the loan.

Similarly, the Netherlands-based Triodos Bank has a section on its website listing all the companies it finances. It is able to do this because it has made granting permission for publication of business details a condition for obtaining a loan, appearing in all loan agreements, since January 2009.[42] Also in the Netherlands, ASN Bank publishes the names of companies, governments and other organisations and institutions the bank finances[43], while the Italian Banca Etica not only publishes information on its loans (name lender, term of the loan, amount), but also on potential transactions that are pending at an external Ethics Committee.[44]

Banks that have taken a progressive approach to transparency have used this as a virtue in their marketing, including through steps such as offering their customers discounts with social enterprises they finance, and through publishing a map of projects they finance, allowing customers to find like-minded businesses in their area. Above all, these examples prove the concept that there are no technical or legal reasons, at least in the jurisdictions where these banks operate, why banks cannot operate with full transparency and reap benefits from this approach.

Above all, these examples prove the concept that there are no technical or legal reasons, at least in the jurisdictions where these banks operate, why banks cannot operate with full transparency and reap benefits from this approach.

Box: development finance institutions can and should drive transparency in the private sector

Development finance institutions including the World Bank's private lending arm, the International Finance Corporation (IFC), the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) invest significantly in private sector banks, through equity and debt financing including corporate and project loans. The private sector bank recipients of this finance are termed 'financial intermediaries', as the finance they receive is intended for onward lending to support development. By default, such investments should be publicly reported. Indeed, some public banks are taking measures for disclosure to be enabled, notwithstanding commercial confidentiality rules.

Around half of the lending portfolio of the IFC is in other financial institutions. However, this lending operates outside of the IFC's environmental and social policy framework, and there is growing evidence and concern that the IFC has little control over how a great deal of this money is spent.[45] The IFC discloses all high-risk projects funded via private equity funds and has launched a pilot voluntary initiative a voluntary initiative to promote disclosure of high-risk projects financed via banks. BIC Europe and SOMO commented that this "is a step in the right direction but simply does not go far or fast enough."[46] The IFC also committed in 2018 to "seek to put disclosure on the agenda of the Sustainable Banking Network", a network of banking regulators and associations.

The EIB states that it "normally delegates the verification of … environmental and social documents … to the intermediary or fund manager and does not publish such documents on its own website but requires the intermediary or fund manager to do so."[47] Sharing these studies in principle would also reveal the final beneficiaries of the projects, but research by CEE Bankwatch Network finds this does not happen in practice, including due to imprecise clauses in contracts. [48] Some partners of the EIB do follow this example - for example, the Republic of Srpska Investment-Development Bank (IRBRS), the public bank of the smaller Bosnia-Herzegovina entity, publishes all of it loans, including the ones originating from EIB credit lines.[49]

The EBRD does not require its financial intermediaries to disclose final beneficiaries, and disclosure is only encouraged "where possible" for Category A projects.[50] Still in some instances and after increased pressure from civil society the EBRD has published data about final beneficiaries, for example via the website of the Western Balkans Sustainable Financing Facility (WeBSEFF).[51]

As public institutions with a development mandate, development finance institutions are well-positioned to drive improvements in disclosure standards in the wider finance sector, particularly through setting standards for financial intermediary banks to follow. Such disclosure is beginning to happen at different levels, but much progress is needed. A recent report from Oxfam International calls on development banks to take decisive steps forward on transparency, and sets out a framework for "open books for high risk financing" for them to do so.[52]

HSBC's Agricultural Commodities Policy – disclosure goes mainstream?

In February 2017, after years of sustained criticism for its finance for palm oil companies causing deforestation, HSBC released a new Agricultural Commodities Policy which requires all new clients in palm oil industry to consent to the bank being able to publicly disclose the relationship.[53]

The policy states: "New customers are required to consent, before financial services are provided, to HSBC being able to disclose publicly whether the customer is or was a customer of the bank. This requirement recognises both the public concern over the role of financial institutions in this sector and the legal constraints on HSBC relating to customer confidentiality."

We should not overplay the importance of this policy move – HSBC has not yet disclosed details of any palm oil customers it has taken on as a result of this policy. But the policy again proves the concept that banks can demand consent from clients to disclose its lending, and further, does so in the context of a bank that is present in 66 countries across five continents. If HSBC can do this for palm oil, we see no reason why it cannot become standard practice, at least beginning with finance for high risk industries.

7. Conclusion and recommendations for banks

When banks claim, as they often do when challenged on their finance for damaging projects and companies, that they are "unable to comment on specific clients", they close down options for constructive discussion about these impacts and seek to evade accountability for the consequences of their financing. Yet there are several contradictions to this claim. Banks can and frequently do comment on specific clients in their annual reports, to registries and financial databases, typically with the consent of the client.

Poor disclosure practices are neither universal nor inevitable. Our research has shown that bank practice in disclosing the projects and companies they finance is inconsistent, with some banks prepared to be much more open than others. Furthermore it has shown that these variations in banks' disclosure practices cannot be explained by differences in legislation. Although more research is needed into the contractual, legal and regulatory frameworks governing client confidentiality around the world, we have not found evidence of any major banking centre where banks would be unable to disclose client information with their client's consent.

Banks can choose to secure consent to disclose relationships and engagements with specific clients and projects on a systematic rather than an ad-hoc basis. Widespread adoption of this approach would have clear benefits for communities and civil society organisations seeking to hold banks accountable for the impacts of their finance, and would also benefit banks, for example by allowing them to significantly improve their environmental and social due diligence, reporting and accountability mechanisms. And there are already positive examples of this more systematic approach working in practice.

When banks say they 'cannot comment on specific customers', they are making a choice for confidentiality over disclosure – a choice which is no longer acceptable.

We recommend that banks:

- Develop a policy on disclosure, and include disclosure considerations in their overarching environmental and social risk frameworks as a fundamental component of corporate social responsibility and good governance,
- Make new corporate lending and project finance contingent on clients consenting to the disclosure of key details, including client or projects names, names of project sponsors where applicable, sector, use of proceeds, amount and duration of the financial commitment, host country and the country in which the proceeds are used,
- Include clauses securing consent from clients to make such disclosures as part of their standard loan contracts, and deny finance to clients that are unprepared to accept such disclosures, and engage with the Loan Markets Association to make such disclosure clauses standard practice,
- Where they are genuinely unable to make disclosures, avoid making misleading statements that they "cannot comment" on specific clients as a general rule, and instead explain specifically why they are prevented from making disclosures with reference to specific regulations or contractual requirements where relevant,
- Consider information they have provided to subscription databases by providers like Bloomberg and Thomson as 'publicly available', and be prepared to confirm it to CSOs,
- Publish a regularly updated database of project and corporate loans, including client and project names, beginning with loans to high risk sectors including infrastructure, energy, mining, oil and gas, forestry and agribusiness, once client consent is factored into standard loan agreements,
- Once client consent is factored into standard loan agreements, publish a regularly updated database of project and corporate loans, including client and project names, beginning with loans to high risk sectors including infrastructure, energy, mining, oil and gas and agribusiness,
- Take steps to improve their environmental and social due diligence, including their stakeholder engagement, operation and participation of grievance mechanisms, and reporting on how adverse impacts arising from client activities are addressed, with the aid of the above disclosure improvements, and
- Ensure the forthcoming new version of the Equator Principles includes improvements in transparency consistent with these recommendations, including ensuring all financing 'under Equator' is conditional upon the project sponsor(s) agreeing to the loans being publicly reported.

Notes

1 Quotes have been attributed to specific banks only where previously published. BNP Paribas and Wells Fargo: quoted in our May 2016 briefing. ING and Lloyds: quoted in our May 2017 briefing. Mizuho: quoted in a January 2018 response to the Business and Human Rights Resource Centre.

2 UNEP-FI, "Principles for Responsible Banking", accessed March 2019.

3 We reviewed letters sent to a list of 45 banks considered "in scope" for this exercise. These are the banks listed in BankTrack, "Banking with Principles?", June 2016. Of the 45 banks in scope, we identified letters sent by BankTrack and allies to 37 different banks during the time period under consideration. We received responses from 31 of these banks.

4 Analysis by Facing Finance, provided to BankTrack October 2018

5 BankTrack, Human Rights Impact Briefing #2: Drummond and paramilitary violence in Colombia, 2016

6 BankTrack, Human Rights Impact Briefing #3: Banks and Dirty Diesel, 2017 (e.g. see ING's response)

7 HSBC, Sustainability Report, 2013

8 For example see the UN Guiding Principles Reporting Framework.

9 Mizuho Financial Group, Integrated Report, 2017, p106

10 Oxfam Australia, "Banking on Shaky Ground", 2014

11 Oxfam International, "Open Books", 2018 (p21)

12 Information provided by Thomson Reuters Eikon to Facing Finance, 2018

13 For an overview of different registries see World Bank, IFC, Making Security Interests Public: Registration Mechanisms in 35 Jurisdictions, 2012

14 CEE Bankwatch Network, Financing for Hydropower in Protected Areas of Southeast Europe: Update, March 2018

15 Egypt Today, 'Egypt's collateral registry benefits banks: Moody's', March 15, 2018

16 Financial-ombudsman.org.uk, accessed October 2018 (emphasis added)

17 Clayton UTZ, The duty of confidentiality and non-bank financial institutions, 2004 (accessed October 2018)

18 International Law Office, "Bank Confidentiality: Duty and Exceptions", 2007

19 NautaDutilh, "Legal Report on the Possibilities for Increased Transparency in light of the Adhering Banks' Client Confidentiality Obligations", 2017

20 The Law Review, "The Banking Regulation Review", June 2018

21 Booysen and Neo, "Can Banks Still Keep a Secret? Bank Secrecy in Financial Centres around the World", Cambridge University Press, May 2017

22 Deutsche Bank, "General Business Conditions", October 2018, and Commerzbank, "General Business Conditions", July 2014

23 Global Investigations Review, "Data Privacy & Transfer in Investigations", February 2019

24 Booysen and Neo (ibid), p19

25 The Law Review, "The Banking Regulation Review", June 2018

26 See Global Alliance for Banking on Values, accessed February 2019

27 Booysen and Neo (ibid), p23-24

28 See The Law Review, "The Banking Regulation Review", June 2018 for one such overview

29 SEC EDGAR database,

30 The Law Review, "The Banking Regulation Review", June 2018

31 Bank interviews, 2017

32 UN Guiding Principles, 2011, Principle 21

33 Oxfam Australia, "No excuses", 2015

34 UN Guiding Principles, 2011: Principle 29

35 BankTrack and Oxfam Australia, "Developing effective grievance mechanisms in the banking sector", 2018 (e.g. p23).

36 Oxfam Australia, "No excuses", 2015

37 Shift, Human Rights Due Diligence in High Risk Circumstances: Practical Strategies for Businesses, 2015

38 For a more detailed explanation of the limits of Equator Principles reporting, see BankTrack, The seven biggest problems with current reporting under the Equator Principles, October 2018

39 This does not account for duplicates, e.g. where more than one Equator bank reported financing the same project, as it is not feasible to analyse the data in this way. The number of duplicates will be large.

40 See Letter, Civil Society Expectations Regarding the Equator Principles Revision Process, 11th October 2018
41 See gabv.org/about-us
42 Triodos.com
43 ASN Bank, Report 2017 (see “ASN Bank’s loans and investments in 2017”, p.33).
44 Profundo, Case study Fair Bank Guide: Transparency and Accountability on the Loan Portfolio of Dutch Banks, December 2017
45 Inclusive Development International, “Financial intermediary Lending”, accessed February 2019
46 BIC Europe and SOMO, “Coming out of the Dark”, November 2018
47 EIB Environmental and Social Handbook Version 9.0 of 02/12/2013, paragraph 340, page 160
48 CEE Bankwatch Network, Outsourcing accountability? The EIB’s failure to enforce environmental information disclosure in its intermediated loans, January 2017.
49 IRBRS, Database of Proposed Loans
50 CEE Bankwatch Network, “To the best of our knowledge”: How to improve the transparency and accountability of intermediated EBRD investments in three steps, May 2017
51 WeBSEFF, Project Map, accessed February 2019
52 Oxfam International, “Open Books”, October 2018
53 For the policy, see HSBC Statement on Revised Agricultural Commodities Policy: Palm Oil, 2017. For the sustained criticism, see for example: Global Witness, “In the future, there will be no forests left”, 2012; EIA, “Banking on Extinction”, 2013; Greenpeace, “Dirty Bankers”, 2017.